



New South Wales

Witness Protection Amendment Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Witness Protection Act 1995*:

- (a) to specifically permit the provision to protected witnesses of counselling (such as psychological counselling and drug and alcohol counselling) and vocational training services, and
- (b) to provide for the issue of false death certificates in respect of protected witnesses or their relatives, and
- (c) to make provision for the issue of non-disclosure certificates in court proceedings to protect the identity of protected witnesses when they give evidence in the proceedings, and
- (d) to repeal the provision dealing with the issue and use of false identity documents by Witness Protection Unit personnel, and

- (e) to extend to a person who provides services to or for a protected witness at the request of the Commissioner of Police the protection that prevents a person being required to disclose information as to the identity of a protected witness except by order of the Supreme Court, and
- (f) to allow the memorandum of understanding between the Commissioner and a protected witness to provide for the taking, provision and retention of photographs of the witness, and
- (g) to ensure that the terms required to be contained in the memorandum of understanding concerning the grounds for termination of protection and assistance to the witness fully reflect the provisions of the Act as to the grounds for termination, and
- (h) to permit temporary suspension of a protected witness from the witness protection program if the witness compromises the ability of the Commissioner to provide protection (with requirements for notice to the witness and, if the witness requests it, review of a decision by the Ombudsman), and
- (i) to increase the period within which the Ombudsman is required to determine appeals under the Act from 72 hours to 7 days, and
- (j) to shorten from 28 days to 14 days the period within which a protected witness can request a review of a decision of the Commissioner to terminate protection, and
- (k) to provide for a decision of the Ombudsman confirming a decision of the Commissioner to terminate protection of a protected witness to take effect even if the witness cannot be notified of the decision despite reasonable efforts to do so, and
- (l) to permit authorised persons under complimentary witness protection programs of other Australian jurisdictions to apply directly to the Supreme Court for orders to facilitate new identities for witnesses, and
- (m) to enact savings and transitional provisions.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Witness Protection Act 1995* set out in Schedule 1.

Schedule 1 [1], [18] and [20]–[23] provide for certain designated authorities under complimentary witness protection laws to be able to apply directly to the Supreme Court for the issue of orders to facilitate the acquisition of a new identity by a witness. Currently such orders can only be made on the application of the Commissioner of Police. **Schedule 1 [30]** makes a consequential amendment.

Schedule 1 [2] broadens the range of actions that can be taken under the witness protection program for the protection of protected witnesses to include the provision to protected witnesses of counselling (such as psychological counselling and drug and alcohol counselling) and vocational training services.

Schedule 1 [3] repeals a provision authorising the use of false identities by persons involved in the administration of the witness protection program (on the basis that this is now authorised and regulated under the *Law Enforcement and National Security (Assumed Identities) Act 1998*).

Schedule 1 [4] and [12] extend from 72 hours to 7 days the period within which the Ombudsman is required to determine an appeal against a decision to not include a witness in the witness protection program or to terminate protection and assistance to a witness.

Schedule 1 [5] modifies the provision of the memorandum of understanding required to be entered into with a protected witness dealing with the grounds for termination of protection and assistance so that the provision properly reflects the grounds on which protection and assistance can be terminated.

Schedule 1 [6] extends the matters that the memorandum of understanding between the Commissioner and a protected witness can provide for to include the taking, provision and retention of photographs of the witness.

Schedule 1 [7] inserts a provision that allows the Commissioner to temporarily suspend protection and assistance to a protected witness if the Commissioner is satisfied that the witness has done or intends to do something that limits the ability of the Commissioner to provide adequate protection to the person. **Schedule 1 [8]–[11] and [13]–[17]** make consequential amendments and extend to suspensions existing provisions dealing with notice to witnesses of decisions to terminate protection and review of and appeals against those decisions.

Schedule 1 [10] shortens from 28 days to 14 days the period within which a protected witness can request a review of a decision of the Commissioner to terminate protection, and provides that a protected witness has 2 days within which to request a review of a decision of the Commissioner to suspend protection.

Schedule 1 [17] provides for a decision of the Ombudsman confirming a decision of the Commissioner to terminate protection of a protected witness to take effect even if the witness cannot be notified of the decision despite reasonable efforts to do so. Currently the provision prevents the decision on appeal taking effect until the witness is notified.

Schedule 1 [19] extends existing provisions that deal with the issue of false birth and marriage certificates to protected witnesses to provide for the issue of false death certificates in respect of protected witnesses or their relatives. **Schedule 1 [24]–[29]** make consequential amendments.

Schedule 1 [31] repeals a provision that will be subsumed by the provisions to be inserted by **Schedule 1 [33]**.

Schedule 1 [32] makes a consequential amendment.

Schedule 1 [33] inserts a new Part 3A dealing with the issue of non-disclosure certificates in respect of persons given new identities under the witness protection program who are then required to give evidence in proceedings (either under their former identity or their new identity). A person who is or may be required to give evidence must notify the Commissioner of Police accordingly. The Commissioner must then issue a non-disclosure certificate to the court in which the person will give evidence. The effect of such a certificate is to prevent the disclosure in the proceedings of the person's *protected identity* (which may be their new identity or their former identity, depending on the capacity in which they are giving evidence).

Schedule 1 [34] makes it clear that an order of the Supreme Court authorising a person to be required to give evidence in proceedings operates as an exception to the provision that makes disclosure of certain information an offence.

Schedule 1 [35] and **[36]** amend a provision that prevents participants and former participants in the witness protection program from disclosing certain matters to extend the provision to persons who were refused inclusion in the witness protection program or who were only temporarily included in the program.

Schedule 1 [37] extends a provision that prevents certain persons being required to disclose information to a court about the witness protection program to persons or bodies or their employees who provide services to or for a protected witness. **Schedule 1 [38]** is consequential on this amendment.

Schedule 1 [39] makes it clear that the immunity from legal proceedings conferred by the Act extends to action taken pursuant to an order of the Supreme Court under the Act.

Schedule 1 [40]–[42] enacts savings and transitional provisions.

First print



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New South Wales

Witness Protection Amendment Bill 2002

No. , 2002

A Bill for

An Act to amend the *Witness Protection Act 1995* to make further provision for the services to be provided to protected witnesses, the obligations of protected witnesses, the role of the Ombudsman, offences under the Act and measures for the protection of witnesses; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Witness Protection Amendment Act 2002</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5 6
3 Amendment of Witness Protection Act 1995 No 87	7
The <i>Witness Protection Act 1995</i> is amended as set out in Schedule 1.	8

Schedule 1 Amendments	1
(Section 3)	2
[1] Section 3 Definitions	3
Insert in alphabetical order:	4
<i>designated authority</i> for a complementary witness protection	5
law means the approved authority exercising functions under	6
that law that is declared by the Minister by order published in	7
the Gazette to be the designated authority for that law.	8
[2] Section 5 Witness protection program	9
Insert after section 5 (2) (e):	10
(e1) providing to the witness services in the nature of	11
counselling (such as psychological counselling and drug	12
and alcohol counselling) and vocational training	13
services,	14
[3] Section 5 (2) (f)	15
Omit the paragraph.	16
[4] Section 6 Inclusion in the witness protection program	17
Omit “72 hours” from section 6 (4). Insert instead “7 days”.	18
[5] Section 8 Memorandum of understanding	19
Omit section 8 (1) (b). Insert instead:	20
(b) contain a provision to the effect that protection and	21
assistance under the program may be terminated if the	22
participant deliberately breaches a term of the	23
memorandum of understanding or a requirement or	24
undertaking relating to the witness protection program.	25

[6] Section 8 (2) (c1)	1
Insert after section 8 (2) (c):	2
(c1) the taking, provision and retention of photographs of the participant,	3 4
[7] Section 11A	5
Insert after section 11:	6
11A Suspension of protection and assistance	7
Protection and assistance provided under the witness protection program to a participant may be suspended by the Commissioner of Police for a reasonable period determined by the Commissioner if the Commissioner is satisfied that the participant has done or intends to do something that limits the ability of the Commissioner to provide adequate protection to the person.	8 9 10 11 12 13 14
Note. For example, the participant may have done something that results in him or her being in custody, or may intend to travel to a place despite a warning from the Commissioner not to go there because of the risk of harm to the participant.	15 16 17 18
[8] Section 12 Notice of involuntary termination or suspension and application for review	19 20
Omit “under section 11 (2)” from section 12 (1).	21
Insert instead “under section 11 (2) or 11A”.	22
[9] Section 12 (1)	23
Insert “or suspended” after “terminated”.	24
[10] Section 12 (2)	25
Omit “28 days”.	26
Insert instead “14 days (in the case of termination) or 2 days (in the case of suspension)”.	27 28
[11] Section 12 (4) and (5)	29
Insert “or suspend” after “terminate” wherever occurring.	30

[12] Section 12 (5)	1
Omit “72 hours”. Insert instead “7 days”.	2
[13] Section 13 Date on which involuntary termination or suspension takes effect	3
	4
Omit “under section 11 (2)” from section 13 (1).	5
Insert instead “under section 11 (2) or 11A”.	6
[14] Section 13 (1)	7
Insert “or suspended” after “terminated”.	8
[15] Section 13 (1) (a) and (b)	9
Omit “period of 28 days” wherever occurring.	10
Insert instead “appropriate review period”.	11
[16] Section 13 (2)	12
Insert “or suspended” after “terminated”.	13
[17] Section 13 (3) and (4)	14
Insert after section 13 (2):	15
(3) If the Ombudsman has been unable to notify the participant of the decision despite taking reasonable steps to do so, the decision of the Ombudsman takes effect when the Ombudsman notifies the Commissioner of Police that the Ombudsman has been unable to notify the participant of the decision.	16
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(4) In this section:	21
<i>appropriate review period</i> means:	22
(a) if the decision is to terminate protection and assistance—14 days, or	23
	24
(b) if the decision is to suspend protection and assistance—2 days.	25
	26

[18] Section 15 Application for court order	1
Omit “The Commissioner of Police may apply” from section 15 (1).	2
Insert instead “Application may be made”.	3
[19] Section 15 (1) (a1)	4
Insert after section 15 (1) (a):	5
(a1) to make a new entry in the register of deaths in respect	6
of a witness or a relative (by blood or marriage) of a	7
witness, or	8
[20] Section 15 (1A)	9
Insert after section 15 (1):	10
(1A) Such an application may only be made by:	11
(a) the Commissioner of Police, or	12
(b) the designated authority for a complementary witness	13
protection law.	14
[21] Section 15 (2)	15
Omit “Commissioner of Police”. Insert instead “applicant”.	16
[22] Section 17 Power of Supreme Court to make order	17
Insert “or (in the case of an order applied for by the designated authority for	18
a complementary witness protection law) under that law” after “this Act” in	19
section 17 (a) (ii).	20
[23] Section 17 (c)	21
Omit the paragraph. Insert instead:	22
(c) a memorandum of understanding has been entered into	23
between the witness and the Commissioner of Police in	24
accordance with section 8 or (in the case of an order	25
applied for by the designated authority for a	26
complementary witness protection law) between the	27
witness and that designated authority in accordance with	28
the corresponding provision of that law, and	29

[24] Section 18 Effect of witness protection order	1
Insert “or (a1)” after “section 15 (1) (a)”.	2
[25] Section 18 (a)	3
Omit the paragraph. Insert instead:	4
(a) a person authorised to do so by the order may make any	5
entries in a register of births, deaths or marriages that are	6
necessary to give effect to the order, and	7
[26] Section 18 (c)	8
Omit the paragraph. Insert instead:	9
(c) the Commissioner of Police or (in the case of an order	10
applied for by the designated authority for a	11
complementary witness protection law) that designated	12
authority must maintain records showing details of the	13
original birth, death or marriage of each person in	14
respect of whom an entry is made under paragraph (a).	15
[27] Section 19 Effect of entries made under this Act	16
Omit “the register of births or the register of marriages” from section 19 (1).	17
Insert instead “a register of births, deaths or marriages”.	18
[28] Section 19 (2)	19
Omit the subsection. Insert instead:	20
(2) An entry made under this Act in a register of births, deaths or	21
marriages can only be cancelled by the Registrar of Births,	22
Deaths and Marriages if the Supreme Court, after being	23
satisfied that the witness is no longer included in the relevant	24
witness protection program, has made a court order on the	25
application of the Commissioner of Police or the designated	26
authority for a complementary witness protection law directing	27
that the entry be cancelled.	28

[29] Section 23 Information not to be disclosed	1
Omit “the register of births or the register of marriages” from section 23 (1).	2
Insert instead “a register of births, deaths or marriages”.	3
[30] Section 23 (1) (a)	4
Insert “or a complementary witness protection law” after “this Act”.	5
[31] Section 25 Requirement where participant becomes witness in criminal proceedings	6
Omit the section.	7
[32] Section 26 Identity of participant not to be disclosed in legal proceedings	9
Insert after section 26 (2):	10
(3) This section does not limit the operation of Part 3A (Proceedings involving persons with new identity).	11
[33] Part 3A	12
Insert after section 31:	13
Part 3A Proceedings involving persons with new identity	14
31A Definitions	16
In this Part:	17
<i>court</i> includes tribunal, Royal Commission or other commission of inquiry and the person or body holding or conducting a relevant proceeding.	18
<i>protected identity</i> of a protected person means:	19
(a) in the context of relevant proceedings in which the protected person is or may be required to give evidence under the person’s new identity—the person’s previous identity, or	20
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- (b) in the context of relevant proceedings in which the protected person is or may be required to give evidence under the person's previous identity—the person's new identity. 1
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- protected person*** means a person who, having been provided with a new identity under the witness protection program, retains that identity whether or not he or she remains a participant. 5
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- relevant proceeding*** means each of the following: 9
- (a) a proceeding before a court, 10
- (b) an inquest or inquiry under the *Coroners Act 1980*, 11
- (c) a hearing under the *New South Wales Crime Commission Act 1985*, 12
13
- (d) a hearing under the *Police Integrity Commission Act 1996*. 14
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- 31B Requirement if person given new identity becomes a witness in relevant proceeding** 16
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- (1) If a protected person is or may be required to give evidence in a relevant proceeding before a court, whether under the person's new identity or previous identity, the person must notify the Commissioner of Police that the person is or may be required to give evidence in the proceeding. 18
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- Maximum penalty: 50 penalty units. 23
- (2) The Commissioner of Police must give the court concerned a certificate (a ***non-disclosure certificate***) relating to the protected person. 24
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- (3) If the court considers it appropriate in the relevant proceeding, the court may disclose to each party to the proceeding: 27
28
- (a) that the court has been given a non-disclosure certificate relating to a person who may be required to give evidence in the proceeding, and 29
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31
- (b) what the certificate states. 32
- (4) The court may only disclose what the non-disclosure certificate states in the absence of any jury empanelled for the proceeding and the public. When disclosing the certificate's existence, the court must inform the parties of the effect of the certificate. 33
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31C	What non-disclosure certificate must state	1
(1)	The non-disclosure certificate must state:	2
(a)	that the person is, or has been, included in the witness protection program, and	3 4
(b)	that the person has been given a new identity under this Act, and	5 6
(c)	that the person has not been convicted of any offence other than an offence stated in the certificate.	7 8
(2)	The certificate must not include any information that may enable the protected identity of the person to be revealed.	9 10
31D	Effect of non-disclosure certificate	11
(1)	On the giving of a non-disclosure certificate in respect of a protected person:	12 13
(a)	a question may not be asked in the relevant proceeding that may lead to the disclosure of the protected identity of the protected person or where the protected person lives, and	14 15 16 17
(b)	a witness in the relevant proceeding, including the protected person, cannot be required to answer a question, give any evidence, or provide any information, that may lead to the disclosure of the protected identity of the protected person or where the protected person lives, and	18 19 20 21 22 23
(c)	a person involved in the relevant proceeding must not in the relevant proceeding make a statement that discloses or could disclose the protected identity of the protected person or where the protected person lives.	24 25 26 27
(2)	This section applies despite any other Act but subject to section 31E.	28 29
31E	Court may grant leave to disclose relevant information	30
(1)	The court may, on application made to it, give leave to a party to ask questions of a witness, including the protected person, or make a statement that, if answered or made, may disclose the protected person's protected identity or where the protected person lives.	31 32 33 34 35

- (2) The only parties to whom such leave may be given are as follows:
 - (a) for a criminal proceeding—the prosecutor and each accused person to whom the relevant proceeding relates or the person’s legal representative,
 - (b) for a civil proceeding—each party to the relevant proceeding or the party’s legal representative,
 - (c) for another proceeding—each person who has been given leave to appear in the relevant proceeding or the person’s legal representative,
 - (d) in any proceedings—a legal practitioner assisting the court.
- (3) The court may direct that the application be heard in the absence of any jury empanelled for the proceeding and the public.
- (4) The court must not give leave to a party under this section unless satisfied:
 - (a) there is some evidence that, if believed, would call into question the credibility of the protected person, and
 - (b) it is in the interests of justice for the party to be able to test the credibility of the protected person, and
 - (c) it would be impractical to test properly the credibility of the protected person without knowing the protected identity of the person.
- (5) If the court gives leave, a person may, in accordance with the leave:
 - (a) ask a question that may lead to the disclosure of the protected identity of the protected person or where the protected person lives, or
 - (b) answer a question, give evidence, or provide information that may lead to the disclosure of the protected identity of the protected person or where the protected person lives, or
 - (c) make a statement that discloses or could disclose the protected identity of the protected person or where the protected person lives.

(6) If the court gives leave, the court:	1
(a) must hold the relevant part of the proceeding in the absence of the public, and	2 3
(b) must make an order for the suppression of publication of evidence given before it that it considers will ensure that the protected identity of the protected person and where the protected person lives is not disclosed, and	4 5 6 7
(c) may make any other order the court considers appropriate.	8 9
(7) A person must not contravene an order made under subsection (6).	10 11
Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.	12 13
(8) This section does not does not limit the court’s power to punish for contempt.	14 15
[34] Section 32 Offence—disclosures concerning participants	16
Insert “or in accordance with an order of the Supreme Court under section 34,” before “disclose information”.	17 18
[35] Section 33 Offence—disclosure by participants and others	19
Omit “participant or a former participant” from section 33 (1).	20
Insert instead “person who is or was a participant or a witness considered for inclusion in the witness protection program”.	21 22
[36] Section 33 (3)	23
Insert after section 33 (2):	24
(3) A person is a <i>witness considered for inclusion in the witness protection program</i> if:	25 26
(a) the person is a witness who is the subject of consideration under section 6 for inclusion in the witness protection program (even if the Commissioner subsequently decides not to include the witness), or	27 28 29 30

(b)	the person is a witness included in the witness protection program temporarily under section 10 (even if the witness does not go on to be included in the witness protection program).	1 2 3 4
[37]	Section 34 Certain persons not to be required to disclose information	5
	Insert at the end of section 34 (1) (h):	6
	, or	7
	(i) a person or body (or an employee of a person or body) providing services to or for a participant at the request of the Commissioner of Police.	8 9 10
[38]	Section 34 (2)	11
	Omit “the performance of his or her duties in accordance with this Act”.	12
	Insert instead “the exercise of functions under this Act or the protection of witnesses included in the witness protection program”.	13 14
[39]	Section 40 Immunity from legal proceedings for exercise of functions under Act	15 16
	Omit “by this Act”.	17
	Insert instead “by or under this Act (including an order of the Supreme Court under this Act)”.	18 19
[40]	Schedule 1 Savings, transitional and other provisions	20
	Omit “this Act” from clause 1 (1). Insert instead:	21
	the following Acts:	22
	this Act	23
	<i>Witness Protection Amendment Act 2002</i>	24
[41]	Schedule 1, clause 1 (2)	25
	Omit “this Act”. Insert instead “the Act concerned”.	26

[42] Schedule 1	1
Insert at the end of the Schedule:	2
Part 3 Provisions consequent on Witness Protection Amendment Act 2002	3 4
5 Definition	5
In this Schedule:	6
<i>2002 amending Act</i> means the <i>Witness Protection Amendment Act 2002</i> .	7 8
6 Appeals	9
(1) An amendment made by the 2002 amending Act to section 6 (4) or 12 (5) does not apply in respect of an appeal received before the commencement of the amendment.	10 11 12
(2) An amendment made by the 2002 amending Act to section 12 (2) does not apply in respect of a notification received before the commencement of the amendment.	13 14 15
(3) An amendment made by the 2002 amending Act to section 13 does not apply in respect of a decision made before the commencement of the amendment.	16 17 18
7 Memorandum of understanding	19
The amendment made by the 2002 amending Act to section 8 (1) does not apply to a memorandum of understanding signed before the commencement of the amendment.	20 21 22
8 Suspension of protection and assistance	23
Section 11A extends to apply in respect of a witness who became a participant before the commencement of that section.	24 25
9 Non-disclosure certificates	26
Part 3A extends to persons who became protected persons within the meaning of that Part before the commencement of that Part and also extends to apply in respect of the giving of evidence after the commencement of that Part in proceedings that commenced before the commencement of that Part.	27 28 29 30 31

10 Information disclosure

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An amendment made by the 2002 amending Act to section 34 extends to apply in respect of the provision of services before the commencement of the amendment.

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