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**Witness Protection Schemes- Pitfalls & Best Practice
& Covert Investigations**

[Lima Declaration](#)

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Part A

Witness Protection Schemes

Pitfalls and Best Practice

Successful law enforcement and anti-corruption strategies are largely dependent upon both the willingness and availability of individuals to provide information and/or to give evidence. Traditional witness protection focuses on the safety of the witness, however, experience shows that individuals will not be willing or available unless they have confidence that the State will protect their rights as well as their safety. In this Part of my paper I propose to discuss witness protection in the context of two Australian legislative measures which could help build this confidence. The first legislative measure is concerned with that group of people commonly referred to as whistleblowers and the second is concerned with traditional witness protection. I also propose to discuss some of the pitfalls or difficulties which can arise in spite of the legislation and/or because of it.

Whistleblower Legislation

In the public sector in New South Wales (NSW) ^[1] the Protected Disclosures Act 1994 (PDA), sometimes known as the Whistleblowers Act, provides a legislative scheme to give limited protection to public servants who come forward in good faith with information about corruption, maladministration, or serious and substantial waste in the public sector.

The PDA requires the identity of the person making the disclosure to be kept confidential unless the person otherwise consents or there are overriding operational or public policy considerations. The PDA also makes it an offence for an employer or individual to take detrimental action against a person who has made a disclosure in accordance with the Act, if the action is taken substantially in reprisal for the person making the disclosure. In order for the whistleblower to attract protection under the Act:

- the disclosure must be made through either an established internal reporting mechanism, or directly to the head of the Organisation; or
- directly to an investigating authority which in the PDA includes the Independent Commission Against Corruption (ICAC), the Ombudsman, or the Auditor General.

Disclosures may also be made to a journalist or Member of Parliament, however, such disclosures are only afforded protection if:

- the whistleblower has made substantially the same disclosure to an investigating authority or officer of their own Organisation in accordance with the Act; and
- the claim is substantially true and the investigating body or officer of the public authority to whom the matter was first reported:
 1. has decided not to investigate the matter,
 2. has not completed the investigation within six months of the disclosure,
 3. has investigated but not recommended any action, or
 4. has failed to notify the whistleblower within six months of the disclosure as to whether or not the matter is to be investigated/is being investigated.

Legislation of this type sends a clear message that the Parliament is committed to integrity in the public sector, however, there are a number of pitfalls associated with it, which, if not addressed, could undermine its effectiveness and the integrity of investigations.

Organisational Commitment

The efficacy of the PDA's implementation was at first disappointing. ICAC research revealed that a large number of public sector organisations had failed to take steps to inform their staff about the PDA and how to make disclosures under it.^[2] The research also provided evidence that public servants' concerns about reprisals and doubts about the PDA's effectiveness in providing protection were major inhibitors to public servants making disclosures.

Ninety per cent of respondents supported the concept of legal protection for making disclosures and 75 % stated that they would not make a disclosure without it. However, 71 % did not know or did not believe that their employers had the capacity to provide protection. 70% did not know or did not believe that their employers were serious about providing protection. In total 85 % were unsure about either the willingness or desire of their employers to protect them. Meanwhile 25 % did not believe that the Act had the power to provide protection, while 50% would refuse to make a disclosure for fear of reprisal.

The ICAC's research concludes that there are two fundamental elements which need to be addressed in order to augment the effectiveness of the Act:

- first, there must be a real commitment within the Organisation to acting upon disclosures and protecting those who make them; and
- secondly, an effective internal reporting system must be established and widely publicised in the Organisation.

Fifty-eight per cent of NSW public sector organisations have an internal reporting System in place and there is work currently under way which will see that percentage improve. Instilling commitment within an Organisation is a more difficult task. It requires leaders to demonstrate their commitment and to foster within the Organisation an understanding and appreciation of the benefits to an Organisation of a workforce which is confident it can report wrongdoing.

Provision of appropriate training to management and staff will help to bring about that understanding. I wish to focus next on training in relation to the needs of the whistleblower.

Effective Communication with the Whistleblower

Managers and investigators need training so that they are more able to effectively communicate with the whistleblower who will often be experiencing a high level of stress.

When dealing with the whistleblower, managers and/or investigators must ensure that the details of the allegation are fully explored and understood by them and that the investigative process is explained to the whistleblower. Information concerning the time taken to conduct investigations, why some matters are investigated and others are not, and the possibility that some allegations will result in long-term systems changes rather than spectacular criminal charges or disciplinary actions must also be explained. By making these matters clear from the start, unrealistic expectations may be eliminated reducing the likelihood of outcomes which are unexpected and hence unacceptable to the whistleblower.

Another important factor in minimising anxiety for the whistleblower is to ensure that throughout the investigation the whistleblower is kept informed of the status of the inquiry. This increases in importance as the investigation becomes more protracted, particularly since the whistleblower may incorrectly surmise from the lack of contact with investigators that the matter has faltered. Often the individual involved in making a protected disclosure has dedicated considerable personal time and resources to the matter, thus a lack of communication may contribute to the perception that their allegation is being treated as trivial, or even "covered up". Feedback should help eliminate the whistleblower's concerns about a lack of commitment and will also reduce the need for the whistleblower to pursue management or the investigator for information - a circumstance which can lead to the whistleblower being seen as a problem to deal with.

This approach is supported by whistleblower research done by Morton Bard of the New York City Police. He found that whistleblowers experience similar emotional reactions to that of major crime witnesses. Bard defines this response in three stages; impact, recoil, and reorganisation. Without understanding this process investigators may easily and unwittingly increase the negative emotional and psychological ramifications for the whistleblower. By initially focusing on the needs and concerns of the whistleblower, and completely explaining the investigative and judicial process and timeframe, the investigator will better equip the whistleblower to "last the distance" of a protracted investigation. ^[3]

I now wish to examine a number of problems which can arise with whistleblower- style legislation and also briefly consider the need to maintain objectivity in the investigation process.

Seriousness of Complaints

The first problem is that the conduct covered by the legislation is necessarily broad and potentially includes quite minor misconduct. I say that the type of conduct is necessarily broad because it is likely that, had the legislature attempted to limit or overly define the types of conduct, it would have caused uncertainty and thereby undermined the objectives of the legislation. However, as noted earlier, the legislation enables the whistleblower to go public with the allegation if not satisfied that the matter had been dealt with within a six month period. Given this, it is not surprising that government departments and investigative agencies would give some priority in the allocation of resources to protected disclosure matters. Given the range of seriousness of the matters received only time will tell whether the public interest is served by giving priority to them in the allocation of resources.

Assessment of the Complainant

The second problem, and this is related to the first, is that the protection provisions under the legislation are activated by the disclosure being made in good faith and that it is not frivolous, vexatious or made in an attempt to avoid dismissal or disciplinary action. The problem is that it is often difficult to form a view about any of these things until after the disclosure has been examined in detail. It is not uncommon for the person making the disclosure to have been involved in the course of events which form the subject matter of the disclosure. In addition to this, complex questions such as the person's performance in the work place and/or disciplinary considerations can cloud the issues. In traditional witness protection the witness only receives protection once the authorities have assessed the value of the witness.

Satisfying the Whistleblower

The third problem relates to the investigative process itself. The legislation creates an expectation that the whistleblower will ultimately be satisfied that the disclosure they made was properly investigated. Whilst in simple or less serious matters this may not prove difficult, considerations such as the operational integrity of investigations and the right of others to have their privacy protected may preclude the person who made the disclosure ever being told sufficient detail about the investigation to satisfy them that the matter has been properly investigated. At the ICAC, such level of detail would generally only become public when the matter was examined in public hearing and a report on the investigation is presented to Parliament. In most other circumstances the ICAC keeps the detail of its investigations secret.

Need for Objectivity

It is imperative that investigations be conducted in an objective way. The rights of those who are the subject of complaint cannot be ignored out of concern for the whistleblower. Regard for civil liberties and procedural fairness should be part of the core values of any healthy government department or investigative agency. At a more pragmatic level, disregard for these considerations can undermine public and employee confidence in the investigative process and ultimately compromise future prosecution or disciplinary action.

For investigative agencies such as the ICAC, the issue of independence is also important in this area. For such agencies to retain an objective and independent image it is important for it not be captured by, or appear to be captured by, any particular interest group. Therefore, whilst it is important to foster confidence in those who would provide information, it is imperative that each matter be considered on its merits. It must be remembered that, no matter how sincere the whistleblower, they can be, and experience shows they often are, mistaken in their belief. Occasionally, the whistleblower will prove to be vexatious or acting in bad faith.

Other Considerations

Finally, there are at least two things which such legislation will never be able to do.

The first is that you cannot legislate to make people like each other and want to work together. Therefore it would be wrong to tell a prospective whistleblower that their life at work will go on as before if they make a disclosure and the fact that they made the disclosure becomes known. This is particularly so if the investigation demonstrates that they were wrong.

The second, which is sometimes but not always related to the first, is that you cannot legislate to protect people against their

own lack of judgment or foolishness in relation to the suspicions they hold or the way in which they behave in relation to them. A person's career prospects are likely to be affected if they make a complaint which ultimately demonstrates some gross misjudgment by them of a situation in the workplace.

Conclusion - Protected Disclosures

Legislation alone will never be able to protect the whistleblower. The best protection for a public official who wishes to make a disclosure about wrong doing in the work place is: an organisational culture which encourages such disclosures to be made in accordance with an internal reporting system; and an internal reporting system which accommodates the needs of the person making the disclosure and protects the rights of individuals who are the subject of the disclosure.

Finally, reasonable behaviour by all concerned, including an appreciation of the need for confidentiality by the person making the disclosure as well as those to whom it is made, will decrease the likelihood of adverse consequences to the whistleblower and unintended adverse consequences to others affected by the disclosure.

Traditional Witness Protection

Witness protection usually starts with a risk-based assessment of the direct to the witness and the vulnerability of the witness. We then look at what we can do to reduce the vulnerability. Where the risk is assessed as relatively low there are a wide range of actions that can be taken.

They include:

- involving local police in patrolling the person's home on a regular basis;
- improving the person's home security by upgrading their door locks, security bars for windows and doors, securing the mail box and entry gates, etc.;
- installing an alarm monitored by the law enforcement agency;
- screening phone calls with an answering machine;
- having malicious calls traced through the local telephone authority;
- providing immediate protection at the person's home or safe house.

Where the risk is assessed as very high the person can be entered into the formal witness protection schemes and this can involve the person and/or their family being relocated to another State or overseas and being given new identities.

A substantial amount of witness protection involves counselling the witness and/or their family to allay their fears. Most of the witness protection conducted by the ICAC tends to be in the low risk area as we are generally dealing with less serious forms of conduct involving public officials rather than organised crime where the risks are commonly very high.

Witness Protection Legislation

Witness protection legislation in Australia arose out of an inquiry and report by the Parliamentary Joint Committee on the National Crime Authority. ^[4] As a result of that inquiry and report, national legislation was developed with the intention that it provide a model for complementary legislation by the States and Territories in Australia.

I do not propose to deal with the Australian scheme in detail but rather I will give an overview of it and then focus on some of the problems which can arise with any witness protection scheme.

When introducing the national legislation the Australian Attorney-General noted that it had the following important features:

- it enables the Commissioner of the Australian Federal Police (AFP) to operate a National Witness Protection Program (NWPP) to provide protection and assistance to witnesses and their families;
- it enables the AFP Commissioner to enter into arrangements with approved authorities eg State Police Commissioners, to provide protection and assistance;
- it provides the AFP with statutory procedures to govern the placement on, and removal of, witnesses from the NWPP, including the witness signing a memorandum of understanding (MOU), creating of new identities, and the restoring of former identities;
- it will enable foreign witnesses to be placed on the NWPP. In such a case, the person will not only have to be approved for inclusion on the NWPP by the AFP Commissioner, but also have an entry visa. The foreign law enforcement authority will enter into an arrangement for the costs of such matters as travel and protection. Where all these requirements have been satisfied, final approval for acceptance into the program is reserved for the Minister for Justice;
- it establishes a register of persons who are, or who have been, on the program, which must include certain information, including the old and new identity as well as the criminal record of the person, if any;
- it provides safeguards regarding the processes for issuing new identity documents and mechanisms to ensure that persons on the NWPP do not use the new identity to avoid civil or criminal liability. A special measure has been included to ensure that the financial support statements under the MOU may be the subject of cross-examination;
- it provides for special procedures where a person with a new identity is required to give evidence in criminal proceedings in their new identity;

- to safeguard the integrity of NWPP documents, 12 months after the legislation commences, national agencies will not be able to issue documents for persons on State/Territory witness protection programs unless there is complementary legislation in place and there are arrangements in place with the State/Territory in question;
- the Ombudsman's powers to investigate complaints under the Complaints (Australian Federal Police) Act 1981 are retained. For this purpose it is proposed that the Ombudsman has a right of access to documents and records held by the AFP in relation to the NWPP.
- it creates offences relating to divulging information without lawful authority about the NWPP and persons who have been assessed for the program or who are or have been on the program;
- it provides for the AFP Commissioner and the Ombudsman not to be required to disclose information or produce documents in proceedings relating to performance of functions under the legislation, unless it is essential to the determination of the proceedings;
- where in any court proceedings the issue of the identity of the person on the NWPP arises, the court must, with some exceptions, protect the witness' identity.
- decisions made under the legislation will be exempt from the usual administrative judicial review processes.

The key elements in the current witness protection scheme are:

- officers involved with the assessment and placement of persons on the program are an operationally discrete unit. This means that operational police who deal with a witness are not involved in the decision-making process for placement of the witness on the witness protection program. It also means that operational police can only contact the witness through those running the program;
- the legislation provides that the delegation of key functions, such as the removal and placement onto the program, may not be delegated below certain senior levels;
- protected witnesses may be removed from the program for a number of reasons provided by the Act. For example, they may ask to be taken off a program. Alternatively, successful relocation and integration into a new community may mean that over time the person ceases to be in a high risk category. A breach by the protected witness of the MOU such as taking unnecessary risks or committing offences while on the program can also result in their removal;
- importantly, any removal from the program or refusal to include a witness on the program is subject to external review.

Unfortunately, the review process referred to last did not find its way into the national legislation. However, it was adopted by NSW when it passed its Witness Protection Act in 1996.

I believe that the model outlined above would be close to best practice in this area. Despite this, problems can still arise and I will now outline some of them and suggest at least some solutions.

Pitfalls and Problems

At the coalface of investigations into serious crime and corruption, informants are a vital commodity and ethical issues arise as to the extent to which the investigator sees the informant as an exploitable, and perhaps expendable, commodity. Furthermore, the protection regime's need for secrecy and security produces some unintended consequences.

The following issues are raised for consideration and discussion:

1. Witness protection can only be offered to informants once they have ceased being active informants. Operational police officers in holding out an offer of witness protection will at times value the informant so much that they will push the informant to do "one more job" on the basis that they will then get them witness protection.
2. This protection scheme can be applied to a person who has been an informant who is at risk of injury even though police would never think of using that person as a witness in a court. In such cases, the informant may be a source of intelligence only. Nevertheless, there may be a need ultimately to protect that person. The difficulty with this situation is that there is no compelling need for the operational police to put the person on witness protection as there is in court related matters. Where a person is to be used as a witness in court this to some extent guarantees that consideration will be given to witness protection because once the defendants have been charged, the court timetable takes over and the informant's willingness to give evidence may depend upon them receiving witness protection. However, if the informant is not to be a witness, the operational police may choose to keep the informant in the field for as long as they like.
3. A question arises as to what promises are held out to informants by operational police about the availability of witness protection and the level of witness protection. A real issue arises as to whether the informant can make an informed decision about whether they wish to be given witness protection or whether they should co-operate in order to get it because they will not necessarily have any say in the level of protection offered. The rule by which the scheme operates is that a witness should not be better off financially by entering the program because if they were, the defence would be able to argue that their evidence was tainted.
4. Witnesses have to sign an MOU, however, they are not able to keep a copy of the MOU because that in itself would cause a security problem. Add this to the fact that they will generally be highly stressed at the time they enter the scheme and will have been removed from their normal support structures and it is not surprising that they will often be in an emotionally perilous state. Accordingly the witness may not be in the best position to understand and protect their rights.
5. Witnesses will often have an ongoing need for psychological support. For example, one case involved a female who had been sexually abused by her father and had had given birth to two children as a result of the abuse. The female gave evidence against the father and was put into witness protection. Not surprisingly she had an ongoing need for

psychological counselling and welfare support.

6. The scheme is in its infancy and there are many issues to be resolved. For example, how does a professional person such as a solicitor who has entered the witness protection program get back onto a professional register. For this to occur it would be necessary for the professional body to have some knowledge of what was happening in relation to witness protection and this would offend against the requirement for secrecy in relation to witness protection.
7. A common area of difficulty arises in family law proceedings. For example, a woman is on witness protection and is involved in a custody and access battle with the father in relation to children. The father is the reason why the woman is on witness protection. In such cases the woman cannot tell the court the details of her life and there is an obvious risk that if the father has access to the children he may find out where his wife or ex-wife is. Nevertheless the children and the father have a right to see each other and therefore it can be very difficult for the court to resolve these issues.

I believe the solution to the issues raised in the first three points above is for agencies to adopt accountable informant management plans and investigation management systems. Briefly these should include at least the following key elements:

- registration of informants within the law enforcement agency;
- supervision of the relationship between the informant and the law enforcement officer (known as the case officer) such that all contact is reported to the case officer's supervisor;
- regular review by the supervisor of the informant's activities and the informant's need for protection.

In New South Wales the authorities have recognised that the way of dealing with the remaining issues above, which could be classed as matters related to the witnesses emotional and social well-being, is to form strategic alliances with public authorities including health, community services and the legal system to ensure that the witnesses ongoing emotional and social needs are met to the extent possible and practicable. The New South Wales authorities have recognised that the need for secrecy needs to be balanced with the need to ensure that the witness has the benefit of those organisations which have the skills and funding to attend to their emotional and social needs. There will always be a risk in providing a protected witness with access to necessary services and it will be a question of judgment in any particular case whether the risk is acceptable.

Conclusion - Traditional Witness Protection

Witness protection can involve a wide variety of responses ranging from simply counselling the witness through to changing their identity and where they live.

A professional and accountable witness protection scheme must balance the need of law enforcement with the needs of the witness and this will be more likely to occur in a System which:

- separates those responsible for the investigation from the management of the witness protection scheme;
- has in place professional/informant management and investigation case management plans; and
- has regard for the ongoing social and emotional needs of the witness.

By taking this holistic approach to witness protection the law enforcement agencies will over time maintain the public's confidence in witness protection schemes and thereby ensure that witnesses continue to be available to give evidence and otherwise assist law enforcement agencies in the fight against serious crime and corruption.

Part B Covert Investigations

Introduction

In this Part of my paper I will briefly discuss the nature of covert investigations and then focus on the issue of law enforcement officers or their operatives engaging in criminal activity.

The ICAC

The ICAC has significant powers to enable it to get to the truth of a matter by using public and/or private hearings. At such hearings witnesses can be compelled to give evidence and, subject to a limitation on the further use of such evidence, the individual does not have a right to refuse to answer on the grounds that the evidence might incriminate him or her. Some may consider that this power alone should be sufficient to enable the ICAC to pursue corrupt activity. However, the ICAC's experience is that many people will be prepared to lie on oath about their conduct despite the fact that, if they were successfully prosecuted for doing so, they could suffer a more substantial prison sentence than had they been prosecuted and convicted in relation to the conduct under examination. However, where a witness is confronted with their own words and/or actions being replayed to them in a hearing room, evidence which contradicts their previous denials, they generally become more helpful. This is important not merely because it closes the aspect of the inquiry in relation to their conduct, but because it often leads to the witness "rolling over" such that they then assist the investigation by providing evidence and/or information about others involved in the criminal or corrupt activities. The ability to gather such evidence is a measure of an investigative agency's covert investigative capacity.

Covert Investigations

Covert investigations might include the use of undercover operatives, in short or long term operations, or the use of visual and electronic surveillance of targets. The latter might include listening devices, telephone interception, video surveillance devices, tracking devices and covert on-line access to computer databases. The ICAC has in the last few years significantly increased its use of electronic surveillance recognising that, whilst it is labour intensive and therefore expensive, it often provides the most compelling and incontrovertible evidence that corrupt activity or a criminal offence has occurred. The following case study taken from a recent ICAC investigation is illustrative of this type of investigation.

Case Study

Mr Bloggs, a builder, rang the ICAC at 10.00am on a Monday and said that a local government officer, Mr White, had asked him to pay a \$10,000 bribe in order to get his building development plans issued. After being interviewed by ICAC investigators Mr Bloggs agreed to assist the ICAC by arranging a meeting with Mr White at which he would pay the \$10,000. At 3.00pm that day ICAC officers made application to the Supreme Court for a listening device warrant to allow the ICAC to tape the meeting between Bloggs and White. The warrant was granted. The meeting was scheduled for 1.00pm the following day (Tuesday) in a building owned by Mr Bloggs. This allowed the ICAC to prepare the meeting room with audio and visual recording devices. On Tuesday ICAC surveillance officers and investigators were in Position outside the building in order to record Mr White's arrival and to monitor the subsequent meeting.

The meeting proceeded. Mr White again requested payment of the \$10,000 and Mr Bloggs handed over the money. The conversation and the actions were successfully recorded and Mr White was arrested as he left the meeting.

When interviewed, Mr White initially denied seeking a bribe. When he was confronted with the audio visual evidence he was initially shocked but then sought to explain his behaviour by claiming that he had been conducting his own investigation to find out whether other local government officers were corrupt. Despite this he subsequently pleaded guilty to a bribery charge and received a term of imprisonment.

Proposed Covert Legislation

In Australia there is nothing illegal about conducting investigations in a covert manner. However, sometimes it is necessary for law enforcement officers or their agents to participate in criminal activity in order to gather evidence so that an arrest can be made.

This type of activity has until recently been tolerated by the Australian criminal justice system. However, in *Ridgeway v The Queen*^[5] the High Court of Australia considered the criminality of the conduct of a police informant who had passed heroin to Ridgeway. The heroin had been imported into Australia by the informer and a Malaysian police officer with the knowledge and assistance of the Australian Federal Police (AFP). Because the importation was in breach of the Australian Customs Act the conviction of Ridgeway was quashed on the public policy ground that the AFP had committed a criminal act which was an essential ingredient of the offence charged. The court held that criminality attaches to the actions of the operative irrespective of the motive behind them:

where no law exists authorising law enforcement officers to encourage or participate in the commission of criminal offences... it is likely that the conduct which procures the commission of a criminal offence by another will itself be criminal. ^[6]

The court in *Ridgeway* took their analysis further than just unlawful conduct by investigating officials. Their comments extended to "improperly obtained evidence".

The court defined improper conduct as:

... conduct which is not criminal but which is quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement.

In *Ridgeway* the court recognised the necessity for investigating authorities to engage in subterfuge, deceit, and the intentional creation of opportunities for the commission of a criminal offence, however, they refused to draw the line between such behaviour and behaviour that they considered improper.

Because of this decision, and because of concerns the ICAC had about arrangements for obtaining covert identity papers, it convened a working group of law enforcement agencies in New South Wales for the purpose of promoting legislation which would, in particular, provide legal immunity for authorised officers taking part in approved covert investigations which required them to engage in criminal acts. In the absence of such legislation, an officer might be at risk of prosecution or disciplinary action or at the very least, criticism if the conduct was subsequently the subject of investigation.

An essential part of the proposed legislation would be a requirement for an assessment to be made of the comparative

seriousness of the conduct under investigation and the unlawful conduct which it is proposed to authorise under the legislation.

Some examples of the types of conduct which might be covered by legislation protecting authorised officers participating in approved, controlled investigations would include:

- officers or informants at the direction of law enforcement agencies purchasing a sample of a drug from a supplier in order for the law enforcement agency to assess the type and purity of the drug sold;
- undercover officers or informants involved with a criminal group being asked to engage in the group's criminal activities whilst providing information to the law enforcement agency. This is done in order to protect the officer's or informant's safety. In such cases the law enforcement agency would direct the officer or informant to avoid, as far as possible, being involved in any criminal activity which the agency had not been notified about;
- arrangements for the Provision of covert identities can in certain circumstances involve participants in the commission of an offence.

There has been some debate in Australia about the legal need for such legislation. It has been argued that prosecution or disciplinary action had not in fact been taken against officers who had been involved in such approved controlled investigations. In response to that argument the recent Royal Commission into the New South Wales Police Service ^[7] expressed the concerns of the ICAC and those who had worked on promoting the legislation with the following:

- it is contrary to principle to place any Police officer in a Position where operationally, he or she is expected to commit a criminal offence, and to apply to the Attorney General after the event for an indemnity from prosecution if the relevant conduct is called in question, or to rely on the discretion of the Director of Public Prosecutions not to prosecute, or of the Commissioner of Police not to institute disciplinary proceedings;
- it is undesirable for the courts to be placed in a position where an expectation arises that they will similarly turn a blind eye to this form of conduct or de facto be given a delegated responsibility to 'excuse' criminal conduct; and
- it is equally undesirable that uncertainty should exist in the planning of an operation, or in the presentation of a Crown case, which might ultimately depend on an exercise of discretion.

Conclusion

Covert investigations are a vital tool in the battle against corruption. Given this, and assuming that law enforcement officers act in good faith and in accordance with their instructions, it is important that any ambiguity about the lawfulness of their conduct be removed.

Notes and References

[1] Australia is made up of six States and two Territories. NSW is one of the six States and has the largest population.

[2] "Why people don't report corruption: Barriers to the success of the NSW Protected Disclosures Act" delivered by Lisa Zipparo to the 12th Annual Conference for the Australian and New Zealand Society of Criminology, 8th-11th July 1997, Griffith University, Queensland.

[3] "Government Whistleblowers - Crimes Hidden Victims" FBI Law Enforcement Bulletin July 1994 - Vol 63 No 7 pp 17-71 at 18-19

[4] Witness Protection: Report by the Parliamentary Joint Committee on the National Crime Authority, May 1988

[5] *Ridgeway v The Queen* (1995) 184 CLR 19.

[6] *Ibid* (at p.36, per Mason CJ, Deane and Dawson JJ).

[7] Royal Commission into the New South Wales Police Service Final Report, Volume II, May 1997, at p.445.

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