

# COMMONWEALTH OMBUDSMAN

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20 October 2003

Mr Mick Keelty APM  
Commissioner  
Australian Federal Police  
68 Northbourne Avenue  
CANBERRA ACT 2601

Dear Mr Keelty

**Special investigation into the issue of a substitute medical certificate under the  
*Witness Protection Act 1994***

I refer to the letter of 18 September 2003 from Deputy Commissioner J A Davies (performing the duties of the Commissioner) requesting me to arrange for a special investigation of a matter pursuant to s 46(1) of the *Complaints (Australian Federal Police) Act 1981* ("Complaints Act").

As earlier advised, I appointed special investigators to undertake the special investigation. I have now received their report, which is attached.

A report of a special investigator under the Complaints Act is prepared as an independent report by the special investigator. Section 48(3) of the Complaints Act provides that in forwarding this report to you I may make any comments I choose. In this letter I shall briefly state my own views, which have been formed after having read the report and given some consideration to the issues raised in it. It is my intention to make this letter and the Executive Summary in the special investigators' report publicly available.

The thrust of the inquiry undertaken by the special investigators was into whether there had been unlawful or inappropriate action by any AFP officer concerning the issue of a medical certificate for a person who had been accepted into the National Witness Protection Program ("NWPP"). Of particular concern was whether any AFP officer had engaged in deceptive conduct.

The special investigators have concluded that there was no improper conduct by any AFP officer in relation to the medical certificate that was the subject of this inquiry. On the other hand, they concluded that the action taken by the AFP was ill-advised, and recommended that consideration be given to adopting an alternative procedure for the future handling of any similar such cases. The special investigators spell out a few specific recommendations and proposals.

I agree with the conclusions reached by the special investigators, for the following reasons.

In the first place, it is clear I think that the action taken by the AFP officers was taken in good faith and solely in pursuit of the objective of protecting the identity of a witness in the NWPP. Furthermore, the view was taken, evidently for good reason, that to protect the identity of a witness it may be necessary to suppress details that would draw a link between the witness, the AFP, and the issue by a medical practitioner of a certificate for the witness. In this regard the special investigators have drawn attention to relevant provisions of the *Witness Protection Act 1994* (Cth), that make it an offence to compromise the identity or security of a person in the NWPP (s22), and which authorise the Commissioner of the AFP (and his delegates) to take action considered necessary and reasonable for protecting a witness's safety (s13).

The specific allegation of deception relates principally to the medical certificate that was prepared by a doctor to support the application for adjournment of a committal proceeding. The doctor had not examined the witness (who was located elsewhere), and the certificate was prepared upon the basis of documentary material provided to the doctor, including a medical certificate prepared independently by a medical practitioner who had recently examined the patient but who was by that time uncontactable. I note that there is no legal or practice requirement for a doctor to undertake a personal, physical examination of a patient before issuing a medical certificate; indeed, it is not uncommon to my knowledge for a medical practitioner to express a medical opinion on the basis of documentary material. Further, the certificate issued by the doctor in this case did not make any claim that the doctor was not in a position to make. It was, rather, a generalised opinion to the effect that the patient had a medical condition related to a cardiac function that rendered the patient medically unfit pending further tests being undertaken. No statement was made to the effect that the patient had been examined by the person signing the certificate.

It is, of course, possible that a third person reading the certificate prepared to support the request for adjournment would assume that the doctor had examined the patient – that is, to read something into the document. That said, the certificate did not itself make any incorrect or deceptive statement. Moreover, when questions were asked about this certificate in the legal proceedings in which it was tendered, there was no attempt made to represent the certificate as anything different. Rather, the circumstances in which the certificate was prepared, including its shortcomings, were frankly acknowledged.

For those reasons I do not see that there is any basis on which I should suggest that disciplinary or other adverse action should be considered against any AFP officer.

I do, however, endorse the view of the special investigators that the general procedure followed in this case by the AFP was ill-advised. I will point to three aspects that raise that concern.

First, the procedure that was followed was inherently likely to unravel – as indeed it did – as soon as it was placed under the spotlight. The purpose for which the medical certificate was being issued was to seek the adjournment of a committal proceeding of six accused. The reason for the adjournment was that a witness for the prosecution was ill and unable to attend. It was to be expected that the court hearing the adjournment application would look searchingly at the reason for the application and the supporting evidence, such was the potential prejudice to the accused and disruption to the administration of justice. It was similarly to be expected that counsel for the accused might also object to the application and submit that the court should require strict proof of any assertion on which the adjournment application was based.

A medical certificate that stated little more than that a witness was suffering from a medical condition that prevented his attendance at court would be unlikely to satisfy the court. It was therefore to be expected that the court would require further explanation of the statements made by the doctor in the medical certificate and how the doctor reached his or her opinion.

It is enough to observe that this scenario in fact occurred. At that point the coherence of the procedure broke down and there was fertile opportunity for suspicion to breed about the integrity of the medical certificate. The untoward interest then shown in the procedure by the media and others ran the further risk of jeopardising the protected identity of the witness.

The second reason for concluding that the AFP procedure was ill-advised was that inherent in it was the risk of sloppy or defective administration. Pivotal to the integrity of the stance taken by the prosecution in seeking the adjournment of a committal proceeding was that the medical certificate on which the prosecution relied was prepared in a professional manner and did not deceive or attempt to deceive the court. The special investigators concluded, and I have accepted, that the medical certificate prepared in this case met that requirement. Their conclusion was in part based on an interview with the issuing doctor and inspection of the documents seen by the doctor.

There is, nevertheless, an abiding risk that a medical certificate in these circumstances will be prepared in a perfunctory manner. Specifically, there is a risk that a doctor might simply endorse without further consideration or independent thought the view formed by other medical practitioners as relayed in an AFP briefing paper. With this in mind, the special investigators concluded in the present case that it would have been prudent for the doctor to have sighted some additional original medical documents and not to have relied as heavily on case notes prepared within the AFP.

Thirdly, the special investigators draw attention in their report to alternative procedures that might have been adopted in cases such as the present. Three that are mentioned are: first, the setting in place of arrangements by which, for the purposes of the NWPP, a participant can be examined by a medical practitioner at short notice; secondly, an approach to the magistrate in chambers under s 26(3) of the Act; or thirdly, reliance on the doctrine of public interest immunity to disclose the essential medical facts whilst shielding any identifying details. The clarity of those alternatives is admittedly sharper with hindsight, and it may be that each is not without its own practical difficulty. The point can nevertheless be made that there are alternatives that are more satisfactory than the procedure that was followed in the present case.

Lastly, I draw attention to the five recommendations made by the special investigators, which I collectively endorse. I draw attention in particular to the second, third and fourth recommendations, that foresee a need for the AFP to develop guidelines to deal with the preparation and disclosure of medical certificates in circumstances such as these.

Yours sincerely

Prof. John McMillan  
Commonwealth Ombudsman