



Commonwealth
Ombudsman

**Investigation into the issue of
substitute medical certificate under the
*Witness Protection Act 1994***

**A Special Investigation pursuant to
sub-Section 46(1)(e) of
the *Complaints (Australian Federal Police) Act 1981***

Canberra
20 October 2003

Executive Summary

This report of a Special Investigation is made to the Commonwealth Ombudsman pursuant to s 48(1)(b) of the *Complaints (Australian Federal Police) Act 1981*. It is a report of an investigation into a practice of the Australian Federal Police (AFP) in their administration of the National Witness Protection Program, under the *Witness Protection Act 1994*.

The specific complaint issues related to the ill health of a key witness in the committal hearing of *R V Barbaro and Ors*. This witness was a key witness for the prosecution and an accepted participant in the National Witness Protection Program. In the weeks before the committal hearing, the witness became ill with symptoms of a cardiac problem. These problems were being investigated by health practitioners in his state/territory of residence, under his assumed name. The witness advised the AFP that he would be unable to travel and attend the committal hearing because of his ill health, and was advised by the AFP that he should obtain a medical certificate to support a request for an adjournment by the prosecution.

The witness obtained a medical certificate shortly before the application for adjournment, and the AFP formed the view that the medical certificate as written would disclose the witness's assumed identity and current location. The AFP made arrangements for another doctor (the issuing doctor) to prepare a substitute medical certificate for the court, in the birth name of the witness, to support a request for adjournment. This certificate was intended to protect the current identity and location of the witness, and was further required because the witness was appearing before the court in his birth name.

In considering the application for adjournment, the Magistrate requested further information about the witness's medical status. The magistrate was advised of the circumstances surrounding the issue of the certificate, and made certain comments.

The Complaints Act provides a Special Investigator with powers to compel documentary and witness evidence from AFP members. Under s 47(3) and using the powers in s 50 of the Complaints Act we interviewed and obtained documents from AFP members.

Our investigation considered two elements:

1. *The circumstances under which the original medical certificate was issued by the treating doctor (medical certificate 1) and whether it was reasonable for the AFP to rely on this document as an indicator of the witness's health and availability for his court appearance; and*
2. *The circumstances under which the second medical certificate was issued by the issuing doctor (medical certificate 2) and the policies and procedures that supported these actions.*

Based on the evidence outlined above we have formed the opinion that medical certificate 1 was issued in accordance with the AMA position statement on medical certificates and normal medical practice. We accept that it was reasonable for the AFP to

accept this certificate as evidence of incapacity on which to make an application for an adjournment.

Based on the written and anecdotal evidence available, we formed the opinion there is no evidence to support the allegation the witness was attempting to avoid giving evidence in court and being subjected to cross examination. In this regard, we are satisfied that it was reasonable for the AFP to have accepted the documents relating to the ill health of the witness as evidence of his health issues, and the medical investigation of a suspected cardiac condition.

We also formed the opinion that medical certificate 2 was issued in good faith and in accordance with a similar accepted practice, but note that it would have been prudent for the doctor to have sighted the medical documents provided by the witness rather than relying only on medical certificate 1 and case notes prepared by AFP members.

We also formed the opinion that the practice of obtaining a medical certificate to replace a previous medical certificate is not in pursuance of any procedure laid out in the Act. Whilst the action was not in violation of any provision of the Act, and was done in good faith, it was nevertheless ill advised. Actions under s 26(3) of the Act or via public interest immunity provide alternatives that are more transparent to the court.

Finally, we formed the opinion that while the AFP did not disclose all information about the creation of medical certificate 2 to the court, the AFP did not mislead the court about the health of the witness.

We made five recommendations as a result of our investigation:

1. That the AFP review the *Witness Protection Act 1994* to gauge whether amendments are needed to support current practices relating to the creation of documents to protect the new identity and location of participants in the National Witness Protection Program.
2. That the AFP review the current draft guidelines on the National Witness Protection Program with a view to endorsement.
3. That the AFP develops guidelines on managing the process of disclosure of information in court relating to documents created to protect participants in the National Witness Protection Program.
4. That, in consultation with court administrative officers and other agencies, the AFP develops guidelines on its interaction with court officials and other prosecuting agencies in relation to the National Witness Protection Program.
5. That the AFP pursues administrative arrangements for medical officers (suitably authorised under the Act) to provide medical certificates for participants in the National Witness Protection Program.