

TASMANIA

WITNESS (IDENTITY PROTECTION) BILL 2006

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WITNESS (IDENTITY PROTECTION) BILL 2006

*(Brought in by the Minister for Justice and Workplace
Relations, the Honourable Steven Kons)*

A BILL FOR

An Act to facilitate, for law enforcement purposes, investigations in relation to criminal activity, including investigations extending beyond this jurisdiction, by providing for the protection of the identity of operatives and facilitating mutual recognition of witness identity protection certificates under corresponding laws

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Witness (Identity Protection) Act 2006*.

2. Commencement

This Act commences on a day to be proclaimed.

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3. Interpretation

(1) In this Act, unless the contrary intention appears –

“**assumed name**”, of an operative, see section 7(1)(a)(i);

“**Australian Crime Commission**” means the Australian Crime Commission established by the *Australian Crime Commission Act 2002* of the Commonwealth;

“**chief officer**” means the person for the time being holding office as –

(a) in relation to the Police Service, the Commissioner of Police; or

(b) in relation to the Australian Crime Commission, the Chief Executive Officer of the Australian Crime Commission;

“**conduct**” includes any act or omission;

“**corresponding law**” means a law of another jurisdiction that corresponds to this Act, and includes a law of another jurisdiction that is declared by the regulations to correspond to this Act;

“**corresponding non-disclosure certificate**” means a certificate given under a provision of a corresponding law that corresponds to section 18(2);

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“corresponding witness identity protection certificate” means a certificate given under a provision of a corresponding law that corresponds to section 6;

“court” includes any tribunal or person authorised by law or consent of parties to receive evidence;

“court name”, for an operative in relation to a proceeding, means a name (other than the operative’s real name) or code used to identify the operative in the proceeding;

“criminal activity” means conduct that involves the commission of an offence by one or more persons;

“investigation” means an investigation in relation to criminal activity, including an investigation extending beyond this jurisdiction;

“jurisdiction” means the Commonwealth or a State or Territory of the Commonwealth;

“law enforcement agency” means –

(a) the Police Service; or

(b) the Australian Crime Commission;

“lawyer” means a legal practitioner within the meaning of the *Legal Profession Act 1993*;

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“non-disclosure certificate” means a certificate given under section 18(2);

“operative” means a person who is or was –

- (a) authorised to acquire and use an assumed identity under the *Police Powers (Assumed Identities) Act 2006*; or
- (b) a participant in a controlled operation under the *Police Powers (Controlled Operations) Act 2006*;

“party”, to a proceeding, means –

- (a) for a criminal proceeding, the prosecutor and each accused person; or
- (b) for a civil proceeding, each person who is a party to the proceeding; or
- (c) for any other proceeding, each person who may appear or give evidence in the proceeding;

“proceeding” means any criminal, civil or other proceeding or inquiry, reference or examination in which by law or consent of parties evidence is or may be given, and includes an arbitration;

“this jurisdiction” means Tasmania;

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“witness identity protection certificate”
means a certificate given under section 6.

- (2) For the purposes of this Act –
- (a) anything permitted to be done by a party to a proceeding may be done by the party’s lawyer; and
 - (b) any requirement to give something to a party to a proceeding is satisfied by giving the thing to, or notifying, the party’s lawyer.

4. Meaning of reckless

- (1) A person is “reckless” in relation to a circumstance if –
- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is “reckless” in relation to a result if –
- (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

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- (3) It is a question of fact as to whether taking a risk is unjustifiable.

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**PART 2 – WITNESS IDENTITY PROTECTION
CERTIFICATES FOR OPERATIVES**

5. Application of Part

- (1) This Part applies to a proceeding in which an operative is, or may be, required to give evidence obtained as an operative.
- (2) To remove any doubt, this Part does not affect the operation of the common law in relation to the protection of the identity of a person who is not an operative who gives or intends to give evidence in a proceeding.

6. Witness identity protection certificate – giving

- (1) The chief officer of a law enforcement agency may give a certificate for an operative of the agency in relation to a proceeding if –
 - (a) the operative is, or may be required, to give evidence in the proceeding; and
 - (b) the chief officer is satisfied on reasonable grounds that the disclosure in the proceeding of the operative’s identity or where the operative lives is likely to –
 - (i) endanger the safety of the operative or someone else; or
 - (ii) prejudice any investigation.

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- (2) The chief officer must make all reasonable enquiries to enable him or her to ascertain the information required to be included in the certificate by section 7.
- (3) A decision to give a witness identity protection certificate –
 - (a) is final; and
 - (b) cannot be impeached for informality or form; and
 - (c) cannot be appealed against, reviewed, called into question, quashed or invalidated in any court.
- (4) Subsection (3) does not prevent a decision to give a witness identity protection certificate being called into question in the course of any proceedings of a disciplinary nature against the person who made the decision.

7. Form of witness identity protection certificate

- (1) A witness identity protection certificate for an operative of a law enforcement agency in relation to a proceeding must state the following:
 - (a) if the operative –
 - (i) is known to a party to the proceeding or a party’s lawyer by a name other than the operative’s real name, that name (the “**assumed name**”); or

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- (ii) is not known to any party to the proceeding or any party's lawyer by a name, the operative's court name for the proceeding;
- (b) the period during which the operative was involved in the investigation to which the proceeding relates;
- (c) the name of the agency;
- (d) the date of the certificate;
- (e) the grounds for giving the certificate;
- (f) whether the operative has been convicted or found guilty of an offence, in this jurisdiction or elsewhere, and, if so, particulars of each offence;
- (g) whether any charges against the operative for an offence are outstanding, in this jurisdiction or elsewhere, and, if so, particulars of each charge;
- (h) if the operative is or was a law enforcement officer –
 - (i) whether the operative has been found guilty of professional misconduct and, if so, particulars of each finding; and
 - (ii) whether any allegations of professional misconduct against the operative are outstanding and,

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if so, particulars of each allegation;

- (i) whether, to the knowledge of the person giving the certificate, a court has made any adverse comment about the operative's credibility and, if so, particulars of the comment;
 - (j) whether, to the knowledge of the person giving the certificate, the operative has made a false representation when the truth was required and, if so, particulars of the representation;
 - (k) if there is anything else known to the person giving the certificate that may be relevant to the operative's credibility, particulars of the thing.
- (2) A witness identity protection certificate for an operative must not contain information that may allow the operative's identity, or where the operative lives, to be revealed.
- (3) For the purposes of this section –
- (a) a charge against a person for an offence is "outstanding" until the charge is finally dealt with in any of the following ways:
 - (i) the charge is withdrawn;
 - (ii) the charge is dismissed by a court;

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- (iii) the person is discharged by a court;
 - (iv) the person is acquitted or found guilty of the offence by a court; and
 - (b) an allegation of professional misconduct against a person is “outstanding” if the allegation has not been finally dealt with in accordance with the *Police Service Act 2003* or the *Australian Crime Commission Act 2002* of the Commonwealth.
- (4) The *Annulled Convictions Act 2003* does not apply to the disclosure of information under subsection (1)(f) or (g).
- (5) In this section –
 - “**false representation**” does not include a representation made under an authority under –
 - (a) the *Police Powers (Assumed Identities) Act 2006*; or
 - (b) the *Police Powers (Controlled Operations) Act 2006*;
 - “**professional misconduct**” means misconduct or a breach of discipline under –
 - (a) the *Police Service Act 2003* or the *Australian Crime Commission*

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Act 2002 of the Commonwealth;
or

- (b) a law of another jurisdiction that corresponds to the *Police Service Act 2003*; or
- (c) a law of a foreign country that corresponds to the *Police Service Act 2003*.

8. Filing and notification

- (1) A witness identity protection certificate for an operative in relation to a proceeding must be filed in the court before the operative gives evidence in the proceeding.
- (2) The person who files the certificate must give a copy of it to each party to the proceeding at least 14 days (or such shorter period as is agreed to by the party) before the day on which the operative is to give evidence.
- (3) The court may order the person filing the certificate to give a copy of it to someone else stated in the order.

9. Effect of witness identity protection certificate

- (1) This section applies if –

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- (a) a witness identity protection certificate for an operative is filed in accordance with section 8(1); and
 - (b) either –
 - (i) a copy of the certificate is given to each party in accordance with section 8(2) and to each person in accordance with an order under section 8(3) (if any); or
 - (ii) the court gives leave for this section to apply despite non-compliance with section 8(2) or (3).
- (2) If this section applies –
- (a) the operative may give evidence in the proceeding under the assumed name, or court name, stated in the certificate; and
 - (b) subject to section 11 –
 - (i) a question must not be asked of a witness, including the operative, that may lead to the disclosure of the operative’s identity or where the operative lives; and
 - (ii) a witness, including the operative, cannot be required to (and must not) answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the

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operative's identity or where the
operative lives; and

(iii) a person involved in the
proceeding must not make a
statement that discloses, or may
lead to the disclosure of, the
operative's identity or where the
operative lives.

(3) For the purposes of this section, a person
involved in a proceeding includes –

- (a) the court; and
- (b) a party to the proceeding; and
- (c) a person given leave to be heard or make
submissions in the proceeding; and
- (d) a lawyer representing a person referred to
in paragraph (b) or (c) or a lawyer
assisting the court in the proceeding; and
- (e) any other officer of the court or person
assisting the court in the proceeding; and
- (f) a person acting in the execution of any
process or the enforcement of any order
in the proceeding.

10. Orders to protect operative's identity, &c.

- (1) The court in which a witness identity protection
certificate is filed may make any order it
considers necessary or desirable to protect the

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identity of the operative for whom the certificate is given or to prevent the disclosure of where the operative lives.

- (2) A person is guilty of an offence if –
- (a) the person knows that, or is reckless as to whether, an order has been made under subsection (1); and
 - (b) the person intentionally, knowingly or recklessly contravenes the order.

Penalty: Imprisonment for a term not exceeding 2 years.

- (3) Subsection (2) does not limit the court's power to punish for contempt.

11. Disclosure of operative's identity, &c., despite certificate

- (1) This section applies if a witness identity protection certificate for an operative in relation to a proceeding is filed in a court.
- (2) A party to the proceeding, or a lawyer assisting the court in the proceeding, may apply to the court –
- (a) for leave –
 - (i) to ask a question of a witness, including the operative, that may lead to the disclosure of the

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operative's identity or where the operative lives; or

(ii) for a person involved in the proceeding to make a statement that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives; or

(b) for an order requiring a witness, including the operative, to answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.

(3) The court may –

(a) give leave for the party or lawyer to do anything mentioned in subsection (2)(a); and

(b) make an order requiring a witness to do anything mentioned in subsection (2)(b).

(4) However, the court must not give leave or make an order unless satisfied about each of the following:

(a) there is evidence that, if accepted, would substantially call into question the operative's credibility;

(b) it would be impracticable to test properly the credibility of the operative without allowing the risk of disclosure of, or

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- disclosing, the operative’s identity or where the operative lives;
- (c) it is in the interests of justice for the operative’s credibility to be able to be tested.
- (5) If there is a jury in the proceeding, the application must be heard in the absence of the jury.
- (6) Unless the court considers that the interests of justice require otherwise, the court must be closed when –
- (a) the application is made; and
- (b) if leave is given or an order is made, the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (7) The court must make an order suppressing the publication of anything said when –
- (a) the application is made; and
- (b) if leave is given or an order is made, the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (8) Nothing in subsection (7) prevents the taking of a transcript of court proceedings, but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.

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- (9) The court may make any other order it considers appropriate to protect the operative’s identity or to prevent the disclosure of where the operative lives.
- (10) A person is guilty of an offence if –
- (a) the person knows that, or is reckless as to whether, an order has been made under subsection (7), (8) or (9); and
 - (b) the person intentionally, knowingly or recklessly contravenes the order.
- Penalty: Imprisonment for a term not exceeding 2 years.
- (11) Subsection (10) does not limit the court’s power to punish for contempt.

12. Directions to jury

- (1) This section applies if –
- (a) a witness identity protection certificate for an operative in relation to a proceeding is filed in a court; and
 - (b) there is a jury in the proceeding; and
 - (c) the operative gives evidence.
- (2) The court must (unless it considers it inappropriate) direct the jury not to give the operative’s evidence any more or less weight, or draw any adverse inferences against the

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defendant or another party to the proceeding,
because –

- (a) there is a witness identity protection certificate for the operative; or
- (b) the court has made an order under section 10 or section 11(7), (8) or (9).

13. Witness identity protection certificate – cancellation

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity protection certificate for an operative of the agency in relation to a proceeding.
- (2) The chief officer must cancel the witness identity protection certificate if the chief officer considers that it is no longer necessary or appropriate to prevent the disclosure of the operative’s identity or where the operative lives.
- (3) If the chief officer cancels the certificate after it has been filed in a court and before the matter has been finalised by the court, the chief officer must immediately give notice to the court and each party to the proceeding, in writing, that the certificate has been cancelled.

14. Permission to give information disclosing operative’s identity, &c.

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity

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protection certificate for an operative of the agency in relation to a proceeding.

- (2) The chief officer may, in writing, permit a person to give information (otherwise than in the proceeding) that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives if the chief officer considers it necessary or appropriate for the information to be given.
- (3) The permission –
 - (a) must name the person who may give the information; and
 - (b) must name the person to whom the information may be given; and
 - (c) must state the information that may be given; and
 - (d) may state how the information may be given.

15. Disclosure offences

- (1) A person commits an offence if –
 - (a) a witness identity protection certificate for an operative in relation to a proceeding has been given; and
 - (b) the person knows that, or is reckless as to whether, the certificate has been given; and

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- (c) the person intentionally, knowingly or recklessly does something (the “**disclosure action**”) that discloses, or is likely to lead to the disclosure of, the operative’s identity or where the operative lives; and
- (d) the person knows that, or is reckless as to whether, the certificate has not been cancelled under section 13 before the person does the disclosure action; and
- (e) the person knows that, or is reckless as to whether, the disclosure action is not –
 - (i) authorised by leave or an order under section 11; or
 - (ii) permitted under section 14.

Penalty: Imprisonment for a term not exceeding 2 years.

- (2) A person is guilty of an offence against this subsection if the person commits an offence against subsection (1) in circumstances in which the person –
 - (a) intends to endanger the health or safety of any person or prejudice the effective conduct of an investigation; or
 - (b) knows that, or is reckless as to whether, the disclosure action –
 - (i) endangers or will endanger the health or safety of any person; or

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- (ii) prejudices or will prejudice the effective conduct of an investigation.

Penalty: Imprisonment for a term not exceeding 10 years.

16. Reports about witness identity protection certificates

- (1) As soon as practicable after the end of each financial year, the chief officer of a law enforcement agency must submit to the Minister and the Minister administering the *Police Service Act 2003* a report about witness identity protection certificates given by the chief officer during that year.
- (2) The report must include the following:
 - (a) the number of witness identity protection certificates given;
 - (b) on what basis the chief officer was satisfied about the matters mentioned in section 6(1)(b) for each certificate;
 - (c) if leave was given or an order made under section 11 in a proceeding in which a witness identity protection certificate for an operative of the agency was filed, details of the proceeding that relate to the leave or order;
 - (d) if a witness identity protection certificate was cancelled under section 13, the

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reasons why the certificate was cancelled;

- (e) if a permission was given under section 14, the reasons why the permission was given;
 - (f) any other information relating to witness identity protection certificates and the administration of this Act that the Minister considers appropriate.
- (3) A report must not include information that discloses, or may lead to the disclosure of, an operative's identity, or where the operative lives, unless the witness identity protection certificate for the operative has been cancelled.
- (4) The Minister is to cause a copy of the report to be laid before each House of Parliament within 15 sitting-days from the day on which the report is received by the Minister.

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Part 3 – Evidence by People in Witness Protection Program

**PART 3 – EVIDENCE BY PEOPLE IN WITNESS
PROTECTION PROGRAM**

17. Interpretation

In this Part –

“protected identity” of a protected person,
means –

- (a) for a proceeding 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
- (b) for a proceeding in which the protected person is or may be required to give evidence under the person’s previous identity, the person’s new identity;

“protected person” means a person who, having been given a new identity under the *Witness Protection Act 2000*, keeps the identity whether or not the person remains a participant in the witness protection program;

“witness protection program” means a witness protection program under the *Witness Protection Act 2000*.

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18. Non-disclosure certificates

- (1) If a protected person is or may be required to give evidence in a proceeding in a court, whether under the person's new identity or previous identity, the person must notify the chief officer of the law enforcement agency responsible for the witness protection program that the person is or may be required to give evidence in the proceeding.
- (2) The chief officer must give a certificate for the protected person in relation to the proceeding, and file a copy with the court.
- (3) A protected person is guilty of an offence if he or she –
 - (a) knows that, or is reckless as to whether, he or she is or may be required to give evidence in a proceeding in a court; and
 - (b) intentionally, knowingly or recklessly fails to notify the chief officer under subsection (1).

Penalty: Fine not exceeding 50 penalty units.

- (4) In this section –

“court” includes a court, within the meaning of this Act, of another jurisdiction.

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19. What non-disclosure certificate must state

- (1) A non-disclosure certificate for a protected person must state –
 - (a) that the person is, or has been, included in the witness protection program; and
 - (b) that the person has been given a new identity under the *Witness Protection Act 2000*; and
 - (c) that the person has not been convicted or found guilty of any offence other than an offence mentioned in the certificate.
- (2) The non-disclosure certificate must not include information that discloses, or may lead to the disclosure of, the person's protected identity or where the person lives.

20. Effect of non-disclosure certificate

- (1) This section applies if a non-disclosure certificate for a protected person in relation to a proceeding is filed in a court in this jurisdiction.
- (2) If this section applies, in the proceeding –
 - (a) a question must not be asked of a witness, including the protected person, that may lead to the disclosure of the protected person's protected identity or where the protected person lives; and

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- (b) a witness, including the protected person, cannot be required to (and must not) answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the protected person's protected identity or where the protected person lives; and
 - (c) a person involved in the proceeding must not make a statement that discloses, or may lead to the disclosure of, the protected person's protected identity or where the protected person lives.
- (3) For the purposes of this section, a person involved in the proceeding includes a person referred to in section 9(3).
- (4) The court may disclose to each party to the proceeding –
 - (a) that the court has been given a non-disclosure certificate for a person who may be required to give evidence in the proceeding; and
 - (b) what the certificate states.
- (5) The court may only disclose what the non-disclosure certificate states in the absence of the jury (if any) and the public.
- (6) If the court makes a disclosure about the non-disclosure certificate under subsection (4), the court must also inform the parties of the effect of the certificate.

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- (7) This section applies despite any other Act, but subject to section 21.

21. Disclosure of protected person's identity despite certificate

- (1) This section applies if a non-disclosure certificate for a protected person in relation to a proceeding is filed in a court in this jurisdiction.
- (2) A party to the proceeding, or a lawyer assisting the court in the proceeding, may apply to the court –
- (a) for leave –
- (i) to ask a question of a witness, including the protected person, that may lead to the disclosure of the protected person's protected identity or where the protected person lives; or
- (ii) for a person involved in the proceeding to make a statement that discloses, or may lead to the disclosure of, the protected person's protected identity or where the protected person lives; or
- (b) for an order requiring a witness, including the protected person, to answer a question, give evidence or provide information that discloses, or may lead to

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the disclosure of, the protected person's protected identity or where the protected person lives.

- (3) The court may –
- (a) give leave for the party or lawyer to do anything mentioned in subsection (2)(a); and
 - (b) make an order requiring a witness to do anything mentioned in subsection (2)(b).
- (4) However, the court must not give leave or make an order unless satisfied about each of the following:
- (a) there is evidence that, if accepted, would substantially call into question the protected person's credibility;
 - (b) it would be impracticable to test properly the credibility of the protected person without allowing the risk of disclosure of, or disclosing, the protected person's protected identity or where the protected person lives;
 - (c) it is in the interests of justice for the protected person's credibility to be able to be tested.
- (5) If there is a jury in the proceeding, the application must be heard in the absence of the jury.

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- (6) Unless the court considers that the interests of justice require otherwise, the court must be closed when –
 - (a) the application is made; and
 - (b) if leave is given or an order is made, the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (7) The court must make an order suppressing the publication of anything said when –
 - (a) the application is made; and
 - (b) if leave is given or an order is made, the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (8) Nothing in subsection (7) prevents the taking of a transcript of court proceedings, but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.
- (9) The court may make any other order it considers appropriate to protect the protected person's protected identity or to prevent the disclosure of where the protected person lives.
- (10) A person is guilty of an offence if –
 - (a) the person knows that, or is reckless as to whether, an order has been made under subsection (7), (8) or (9); and

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(b) the person intentionally, knowingly or recklessly contravenes the order.

Penalty: Imprisonment for a term not exceeding 2 years.

(11) Subsection (10) does not limit the court's power to punish for contempt.

**PART 4 – MUTUAL RECOGNITION UNDER
CORRESPONDING LAWS**

22. Recognition of witness identity protection certificates under corresponding laws

The following provisions apply, with any necessary changes, to a corresponding witness identity protection certificate as if it were a witness identity protection certificate given under section 6:

- (a) section 8 (Filing and notification);
- (b) section 9 (Effect of witness identity protection certificate);
- (c) section 10 (Orders to protect operative's identity, &c.);
- (d) section 11 (Disclosure of operative's identity, &c., despite certificate);
- (e) section 12 (Directions to jury);
- (f) section 15 (Disclosure offences).

23. Recognition of non-disclosure certificates under corresponding laws

The following provisions apply, with any necessary changes, to a corresponding non-disclosure certificate that is filed with a court in this jurisdiction, as if it were a non-disclosure certificate given under section 18(2):

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- (a) section 20 (Effect of non-disclosure certificate);
- (b) section 21 (Disclosure of protected person's identity despite certificate).

PART 5 – GENERAL

24. Delegation

- (1) Except as provided by this section (and despite any other Act or law to the contrary), the functions of a chief officer under this Act may not be delegated to any other person.
- (2) A chief officer may delegate any of the chief officer's functions under this Act (except this power of delegation) to a senior officer of the law enforcement agency.
- (3) In this section –

“senior officer” means a person for the time being holding office as –

- (a) in relation to the Police Service, a police officer of or above the rank of Deputy Commissioner; or
- (b) in relation to the Australian Crime Commission, the Director National Operations of the Australian Crime Commission or another office of the Australian Crime Commission that is prescribed by the regulations.

25. Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) The regulations may be made so as to apply differently according to such factors as are specified in the regulations.
- (3) The regulations may authorise any matter to be from time to time determined, applied or regulated by any person or body specified in the regulations.

26. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Justice and Workplace Relations; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.