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Senate Standing Committee on Legal & Constitutional Affairs

Inquiry into Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

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Submission by the
Australian Federal Police

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Introduction

1. The Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 includes a number of measures that relate to the operations and workforce of the Australian Federal Police (AFP). This submission focuses on the amendments to the *Australian Federal Police Act 1979* (AFP Act), as set out in Schedule 8 of the Bill. The AFP supports each of the amendments in Schedule 8.
2. In particular, this submission addresses some of the concerns raised by the Australian Federal Police Association (AFPA) in relation to clause 20 of Schedule 8, in its submission dated 13 December 2016.
3. The amendments are designed to clarify and improve aspects of the AFP's professional standards regime. This regime subjects the AFP workforce to high levels of accountability and scrutiny (both on-duty and off-duty) under the AFP Act, the AFP Regulations, and a range of internal policy and governance requirements. The AFP's professional standards regime enables the AFP to maintain the integrity and professionalism of its workforce, as well as the confidence and trust of the Australian government, national and international partners, and the Australian community which it serves.
4. Specifically, the amendments ensure the AFP's alcohol and drug testing program and integrity framework is applied efficiently and effectively to the entire workforce. The amendments also clarify and enhance processes for resignation in cases of serious misconduct and corruption. The ability to complete an investigation into potential misconduct prior to the resignation of the person under investigation is critical in terms of the AFP's ability to identify, address and protect against possible issues relating to organisational culture and AFP workforce integrity more broadly.

Drug testing amendments

5. In order to fulfil its functions, the AFP's personnel are routinely called upon to make decisions and judgments, often instantaneous, that can significantly and irrevocably affect the safety, rights and freedoms of other individuals. The AFP's drug and alcohol testing regime contributes to the integrity of the AFP workforce and ensures that decisions made by AFP personnel are free from the effects of drugs and alcohol. The effective operation of this regime and its consistent application across the AFP's workforce is vital to ensuring the public and Government's continued confidence in the AFP.

AFP workforce terminology

6. Part 1 of Schedule 8 of the Bill includes amendments to clarify that the AFP's internal drug and alcohol testing program applies to the full AFP workforce. Currently, these provisions refer to either 'employees and special members' or 'members and special members'. The Bill proposes to amend these references to 'AFP appointees', which covers a broader range of AFP personnel, including independent contractors and consultants as well as employees and special members.
7. Appointees who are not currently covered by sections 40LA, 40M and 40N are generally subject to drug and alcohol testing under contract. As such, the amendments will not involve any practical implications for AFP personnel. Rather, they

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will ensure consistency in the way testing requirements are applied across the range of AFP personnel. The amendments will also ensure that AFP drug testing requirements on contractors and consultants are publically available and enshrined in statute.

8. The main categories of AFP employees are set out below.

Categories of AFP personnel

AFP appointees

An 'AFP appointee' is defined in section 4 of the AFP Act to include Deputy Commissioners, AFP employees,¹ special members, special protective service officers (PSOs), and overseas employees (under section 69A of the Act), as well as consultants, independent contractors and persons engaged by agreement (under sections 35 and 69D of the Act). This is the broadest description of the AFP workforce and encompasses the majority of AFP personnel.

AFP employees

An 'AFP employee' is a person engaged as an employee under section 24 of the Act. For example, this category includes AFP members, AFP protective service officers, and other professionals employed by the AFP.

The term 'AFP employee' does not include special members, special PSOs, contractors or consultants.

AFP members

'AFP members' are AFP employees that have been declared to be a member of the AFP by the AFP Commissioner under section 40B of the Act. AFP members are sworn police officers and must meet specific competency and qualification requirements.

'AFP members' are a subset of 'AFP employee', and thus included in the definition of 'AFP appointee'.

AFP protective service officers (PSOs)

'AFP PSOs' are AFP employees that have been declared to be an AFP PSO by the AFP Commissioner under section 40EA of the Act. AFP PSOs have their own powers and duties under the AFP Act.

'AFP PSOs' are a subset of 'AFP employee', and thus included in the definition of 'AFP appointee'.

¹ The definition of 'AFP employee' includes AFP members and AFP protective service officers – see below.

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Special members and special PSOs

The AFP Commissioner has the power to appoint non-AFP members as 'special members' under section 40E of the Act. Special members have powers and duties as conferred or imposed under the AFP Act or other legislation as well as any powers and duties conferred or imposed in their instrument of appointment. A similar provision for non-AFP protective service officers exists under section 40EC.

Special members and special PSOs are not AFP employees. For this reason, they are explicitly referred to in the definition of 'AFP appointee'.

Contractors and consultants

Persons engaged by the AFP under an independent contract do not generally fall under other categories of AFP personnel. In some instances, contractors have access to AFP systems and information, for example, information communications technology (ICT) staff, records management service providers, and audio transcript service providers. AFP's independent contractors and consultants are generally subject to drug and alcohol testing requirements as a condition of their contract.

Industry standards for drug testing

9. Collection and testing of specimens for the purpose of the AFP's internal drug and alcohol regime is subject to strict procedural requirements. These procedural requirements are dictated by national industry standards, maintained by Standards Australia. For example, the AFP Regulations currently require collection and analysis of urine samples for the purposes of a prohibited drug test to be carried out in accordance with the Australian/New Zealand Standard AS/NZ 4308-2008 – 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine'. This industry standard contains highly detailed, prescriptive procedures for the collection and testing of urine, including technical scientific processes for the purpose of specimen analysis.
10. The drug testing standard is not intended to impact on the rights or obligations of the employee. Rather, it ensures that collection procedures and testing methods are in accordance with industry best practice. There is an expectation from AFP appointees and the public that drug tests will be carried out pursuant to current industry standards. This is because the standards provide chain of custody assurance and ensure the integrity of results.
11. Clause 15 of Schedule 8 contains an amendment to the AFP Act that would enable AFP Regulations to apply the relevant Australian Standard as in force from time to time. As with all industry standards, AS/NZ 4308-2008 is a living document which is periodically reviewed and updated to reflect progress in science, technology and systems. The proposed amendment ensures that the AFP and the company it contracts to conduct drug tests are always following the most up to date scientific procedures. It also ensures there can be no discrepancy between the procedures and testing methods used by the drug testing company, and the standard referenced in the AFP Regulations.
12. This proposed amendment expressly provides that this regulation making power applies despite the principle established in section 14(2) of the *Legislation Act 2003*.

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The principle established in section 14(2) is that legislation should not incorporate external material as in force or existing from time to time unless a contrary intention appears. The AFP notes that, in this instance, a departure from usual practice is warranted given the amendments only affect AFP appointees and all AFP appointees are provided full access to the most up to date drug testing standard. Moreover, there is an expectation from the public and the AFP workforce that workplace drug testing will be carried out in accordance with industry best practice, as reflected by the applicable Australian Standard at any given time.

Resignation in anticipation of termination

13. Part 2 of Schedule 8 of the Bill relates to the AFP Commissioner's power to postpone an employee's resignation date in very limited circumstances (section 30A of the AFP Act). This power has very limited scope; it can only be used in cases where an employee attempts to resign during an investigation into category three misconduct² or corruption, or while the AFP Commissioner is considering terminating the employee's employment for such conduct.
14. It is imperative that the AFP is able to investigate allegations of category three misconduct while the person under investigation remains an AFP employee. Investigations into one person's misconduct have the potential to uncover broader organisational issues, including workplace culture issues and security vulnerabilities. However, once the person under investigation resigns, the AFP's powers to compel evidence are limited.
15. Currently, the maximum time the Commissioner can postpone resignation is 90 days. The AFP's experience is that 90 days can be insufficient time to complete an investigation and ensure fairness to those impacted (including the employee being investigated). The amendment would extend this maximum to 180 days, however, the Commissioner would retain the ability to postpone resignation by less than 180 days.
16. In the past three years, six AFP employees have resigned prior to the conclusion of a category three investigation conducted by AFP Professional Standards (PRS). A further three employees resigned after a PRS investigation had made an established finding of category three conduct, but before their employment could be terminated. Generally, this occurs because the employee is informed of the investigation, attempts to resign to avoid having their employment terminated, and the PRS investigation is unable to be completed within 90 days of the resignation date.

Overview of PRS investigations and section 30A

17. The AFP PRS branch is responsible under Part V of the AFP Act for the oversight of complaints received by the AFP as well as investigation of category three misconduct by AFP appointees.³

² Category three misconduct is defined in the AFP Categories of Conduct Determination 2013 (**Attachment A**). It is the most serious category of misconduct (apart from serious corruption, which is generally investigated by the Australian Commission for Law Enforcement Integrity).

³ Following the 2016 independent review of the AFP in relation to cultural change conducted by Elizabeth Broderick, the PRS branch has moved to the Reform, Culture and Standards Portfolio of the AFP.

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18. Part V of the AFP Act establishes a PRS investigations unit responsible for the investigation of category three misconduct by AFP appointees.⁴ This includes corruption, serious abuse of power, serious dereliction of duty, and other seriously reprehensible conduct in the course of duties.⁵ Serious corruption allegations (category four misconduct), are generally investigated by the Australian Commission for Law Enforcement Integrity (ACLEI), sometimes jointly with PRS. External oversight of the AFP's complaint management is conducted by the Commonwealth Law Enforcement Ombudsman, which must be notified of every category three misconduct issue.
19. Where an employee is found to have engaged in category three or four misconduct, the PRS investigator may recommend the termination of their employment. For AFP employees, this action is carried out by the AFP Commissioner under section 28 of the Act.
20. In some instances, employees under investigation for serious misconduct attempt to resign before their employment can be terminated. Once the subject of an investigation resigns, PRS no longer has the power to compel information from them under Part V of the AFP Act. To overcome this issue, the AFP Commissioner currently has the power (under section 30A) to postpone resignation in limited situations, including where the employee's conduct is being investigated as a category three misconduct or a category four corruption issue. This is a critical power of the AFP Commissioner as it ensures the AFP is able to effectively investigate and address issues of misconduct and corruption, particularly where that conduct may be indicative of broader organisational issues or security risks.

Rationale for the section 30A power

21. Section 30A of the AFP Act ensures that an AFP employee cannot simply resign to avoid participating in a PRS investigation. Once an employee resigns, they can no longer be compelled to provide information to PRS.⁶ This severely limits the ability of PRS to continue an investigation into serious misconduct and creates a risk that broader organisational issues identified as part of an investigation remain unaddressed.
22. Section 30A also ensures that an AFP employee cannot simply resign to avoid their employment being terminated. This is a serious consideration for the AFP. Termination reflects the seriousness of the misconduct and the damaging effect the conduct may have on the professional respect and morale of the AFP workforce as well as the AFP's reputation with the public, the Australian government, and overseas governments and partner agencies. There is also a public expectation that the AFP will deal with serious misconduct, including corruption, with zero tolerance. Where AFP appointees are allowed to resign while a PRS investigation is ongoing, this can lead to a view that the AFP does not take misconduct seriously and may impact on public confidence in the AFP. This is particularly the case in instances where an investigation into one individual's behaviour may be indicative of broader organisational problems or risks.

⁴ Section 40RD, AFP Act.

⁵ Section 40K, AFP Act.

⁶ See, for example, section 40VE of the AFP Act, which only applies to AFP appointees.

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23. It is critical that employees who engage in misconduct, including corruption, are not re-employed by other security agencies where they may continue to pose a security and integrity risk. Many government agencies require job applicants to declare the reason for leaving their previous place of employment. The AFPA submission claims that recording an adverse finding on an employee's record is not the only way of notifying other agencies of national security concerns.⁷ In fact, the secrecy provisions in Part V of the AFP Act severely limit the ability of the AFP to disclose information provided to PRS as a complaint or during an investigation into misconduct. If the person's employment is terminated, the AFP is able to disclose this fact to other security agencies that are considering employing that person.

Time taken to investigate

24. An inherent component of a PRS investigation is engagement with the subject of the investigation (the natural justice component). This is because the AFP Manager of Professional Standards, as well as the individual PRS investigator, is required under the Act to ensure the appointee being investigated has an adequate opportunity to be heard in relation to the issue and is, as far as practicable, involved in the resolution of the issue.⁸
25. At any stage where the appointee is engaged in the investigation, it is possible they may resign in an attempt to avoid termination of employment. On receiving notice of resignation, the AFP Commissioner may (in limited circumstances) use section 30A to postpone the employee's date of resignation. This creates a maximum of only 90 days from the resignation date for PRS to complete the investigation, draft a formal written report for comment, and provide the appointee with a further opportunity to show cause (where the investigator may recommend that termination action may be taken).
26. The natural justice component of the investigation alone can take over 90 days. This includes opportunities to refute allegations. At the conclusion of the investigation, a formal written report is provided to the appointee to allow them to comment on the investigation, provide further information, clarify information, or nominate additional investigations or inquiries, prior to the matter progressing to adjudication. For more serious allegations, it is relatively common for the appointee to seek extensions of up to several months to prepare their response to the written report. Some of the reasons given include obtaining legal representation and ongoing medical or welfare issues. Finally, the adjudication process may take up to a few weeks to review the material properly and make a considered decision.
27. Aside from the natural justice component, the investigation itself may require over 90 days to be conducted properly and with fairness. This is because allegations of serious misconduct that prima facie raise issues of employment suitability necessitate more probative evidence and an elevated standard of proof. In particular, more time may be needed for PRS to determine the extent to which the behaviour under investigation has involved other AFP appointees and may be indicative of broader organisational issues.
28. Each PRS investigation is unique and the time required to properly conduct an investigation into serious misconduct will vary depending on the allegations made and

⁷ Key reason 5, AFPA submission.

⁸ Sections 40TH and 40TQ.

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the individual circumstances of the case. Some of the various avenues of PRS investigation that may take significant time are outlined below.

Investigation options

Each PRS investigation is unique. Depending on the nature of the alleged misconduct, avenues of inquiry can include:

- Internal audits such as phone usage, AFP PROMIS access, internet usage, email usage, computer/hard drive usage, audits of any print/photocopy/ external storage device usage. An audit may include thousands of phone calls, entities accessed in PROMIS or emails.
- Review of relevant employment data such as human resource or pay records, roster information, AFP asset allocation and use, AFP vehicle usage.
- Security related information such as swipe card audits, premises access, information access and dissemination. The investigation may require review of historical data, or thousands of entries/accesses.
- Employment performance or employment management data such as Performance Development Agreement (PDA) or workplace performance reviews, including historical data.
- Drug testing which may include engagement and review of any drug test results by expert specialists in toxicology. The analysis of body samples (hair, urine) may take weeks; further expert testing may take weeks to months; expert opinion (including international consultation if required) may take weeks to months.
- Digital forensic examination of items including mobile phones, iPads/tablets, laptop computers, storage devices, computer servers. Depending on the level of examination required and the amount of property this can take weeks to months.
- Traditional inquiries such as interviews and collection of statements from the subject of the investigation, other AFP appointees, and members of the public.
- Inquiries with external or other law enforcement agencies, particularly if the AFP code of conduct breach stems from adverse actions that have come to the attention of another external agency.

The time frames for these inquiries may be dependent upon external parties, such as consultants, subject matter experts, and witnesses.

As evidenced above, when conducting a PRS investigation into a matter that raises issues of employment suitability there are many requirements to ensure a proper and fair process. Noting the potential variability within the investigation process, and the legislative requirement to involve the subject of the investigation, 90 days can be insufficient time.

Interaction between PRS investigation and criminal investigation

29. The AFPA submission recommends the AFP elect to investigate serious misconduct through criminal investigation.⁹ The AFP confirms that its preference is to conduct criminal investigations into conduct that involves criminality where practicable, with a view to laying criminal charges. However there are a number of limitations to criminal

⁹ Key reason 7, AFPA submission.

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investigation and prosecution which may preclude criminal investigation. In some instances there are also strong reasons to conduct both a criminal and a PRS Part V (administrative) investigation. This is because the two investigation types serve different purposes and may result in different outcomes in relation to the same conduct. Most significantly, a criminal prosecution does not directly result in termination of employment, the importance of which is outlined above at paragraphs 21-23.

30. Firstly, not all category three misconduct amounts to criminal conduct. For example, a serious or deliberate breach of the AFP Commissioner's Order on Security leading to a breach of operational or national security would prima facie amount to category three misconduct, but may not fall within the scope of any particular criminal offence. In that case, a PRS administrative investigation may be the only appropriate course of action.
31. When conducting a PRS administrative investigation, PRS investigators have powers under Part V of the AFP Act, not available in criminal investigations. Most significant of these is the power to compel AFP appointees to produce documents and answer questions (failure to comply with such a direction is a criminal offence).¹⁰ This power cannot be used on an employee after they have resigned, hence the importance of section 30A. If an employee is permitted to resign on their own terms, the AFP's ability to investigate misconduct by that individual, and also broader organisational problems, becomes limited.
32. Where a PRS administrative investigation parallels (or follows after) a criminal investigation, the two investigations are conducted completely separate to each other. Information obtained under compulsion cannot be used as evidence in a criminal prosecution against the AFP appointee.¹¹ It is also an offence for a PRS investigator to disclose information obtained in the course of the administrative investigation, other than for the purposes of the investigation.¹² The AFP uses strict information barriers to prevent PRS information being used in criminal investigations, including storing information and evidence on two separate databases.
33. Criminal investigations and prosecutions generally take far longer than PRS investigations and prosecutions are subject to admissibility of evidence laws and a higher standard of proof.
34. Finally, criminal prosecutions are punitive in nature, whereas PRS administrative investigations are conducted for a myriad of purposes, including maintaining public confidence in the AFP workforce, identifying vulnerabilities in the AFP's professional standards regime, and maintaining the integrity and professionalism of the AFP workforce as a whole. There is limited scope for criminal investigation to be directed towards these purposes.

¹⁰ Sections 40VE, 40VH(1).

¹¹ Section 40VE(4) - limited exceptions apply.

¹² Section 40ZA, AFP Act.

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Suspension from duties

35. The AFPA submission expresses concern that the proposed amendment will force an additional three months of suspension on employees.¹³ While these powers may be exercised in relation to the same PRS investigations, it should not be assumed that a section 30A notice will be followed or predicated by a suspension from duties.
36. As the head of a disciplined force, it is imperative that the AFP Commissioner retains the ability to suspend AFP employees where appropriate. This is particularly important given the powers, responsibilities, and accesses to sensitive and personal information that AFP employees have. For example, an employee may be suspended if the employee has been charged with an offence, and due to the nature of that offence, the Commissioner believes that the employee should not continue to perform his or her duties until the charge has been determined.¹⁴
37. Whether suspension is appropriate depends on the factual circumstances and is assessed on a case by case basis. The AFP takes into account a number of factors when considering whether to suspend an appointee that is under investigation. These include the seriousness of the allegations, the role being performed by the appointee, and whether the appointee can be temporarily redeployed to an appropriate alternate role within the AFP. The AFP takes steps to ensure that employees under investigation are not unfairly disadvantaged as a result of unproven allegations. Employees under investigation for category three and four misconduct are suspended without pay in very limited circumstances.

Conclusion

38. The effective operation of the AFP's professional standards regime is critical to the ongoing success of the AFP. It is a key way in which the AFP upholds its core values, including integrity and accountability, and enables the AFP to maintain the trust and confidence of the community it serves. As such, it is important that drug and alcohol testing provisions apply equally to different categories of the AFP workforce, and are carried out in accordance with the most up to date industry standards.
39. In particular, it is critical that the AFP has the powers it needs to effectively investigate allegations of serious misconduct and identify broader organisational culture or security risks that may be identified as a result of such allegations. This includes ensuring that the consequences of serious misconduct cannot easily be avoided through resignation. These amendments provide the AFP with adequate time to investigate allegations, and identify and address broader organisational culture or security risks where relevant.

¹³ Key reason 2, AFPA submission.

¹⁴ See AFP regulation 5.