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AUSTRALIAN FEDERAL POLICE (AFP)

SUBMISSION

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HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND  
CONSTITUTIONAL AFFAIRS

INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE  
AUSTRALIAN GOVERNMENT PUBLIC SECTOR

## Overview

The AFP welcomes the opportunity to assist the Committee with its inquiry into whistleblowing protections within the Australian Government public sector.

To address the terms of reference from an AFP perspective, this submission will provide the Committee with:

- Background on the role and function of the AFP;
- The AFP's existing professional standards and internal protected disclosure systems; and
- Commentary on each of the terms of reference.

The submission will highlight that, the AFP has:

- a system that performs the function of protected disclosure legislation for AFP employees;
- a role to investigate allegations that are made through protected disclosures within the Australian Public sector; and
- a role to investigate unauthorised disclosures of information.

## Background

### *Role and function of the AFP*

The Australian Federal Police (AFP) is the Commonwealth's primary law enforcement agency. It is Australia's international law enforcement and policing representative and the chief source of advice to the Commonwealth Government on policing issues. The AFP's role is to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas.

The AFP provides a range of investigative, criminal intelligence and other services supporting the Commonwealth's law enforcement objectives. The AFP directs a large proportion of its efforts toward preventing and responding to high impact, high level crime which threatens Australia's national interests. The AFP also provides community policing services to the Australian Capital Territory under contract and to Australia's external territories. The AFP uses skills from both these areas to support the significant offshore commitments to law and order and peace operations delivered by the International Deployment Group. It also provides protective security services through AFP Protective Service officers, Close Personal Protection services to high office-holders and visiting dignitaries and Uniformed Policing at the major airports.

The AFP's strategic direction and its priorities are determined in accordance with the *Australian Federal Police Act 1979* and by Ministerial Directions issued under the Act. Strategic priorities may also result from government policies such as the Commonwealth Fraud Control Guidelines which assign specific responsibilities to the AFP for investigating serious or complex fraud.

## *Australian Federal Police Act 1979*

Section 8 of the *Australian Federal Police Act 1979* specifies that the functions of the AFP include:

- the provision of police services in relation to laws of the Commonwealth, property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth;
- the safeguarding of Commonwealth interests;
- to do anything else that is incidental or conducive to the provision of these services;
- the provision of police services in relation to the Australian Capital Territory (ACT) and Australia's external territories;
- protective and custodial functions as directed by the Minister;
- the provision of police services and police support services for the purposes of assisting, or cooperating with, an Australian or foreign law enforcement agency, intelligence or security agency, or government regulatory agency; and
- the provision of police services and police support services in relation to establishing, developing and monitoring peace, stability, and security in foreign countries.

### *Ministerial Direction*

Under section 37(2) of the *Australian Federal Police Act 1979* (the Act), the Minister may give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of AFP functions. Such Ministerial Directions encompass broad guidance to the AFP on the Government's expectations of the AFP and the principal areas of priority on which it wishes the AFP to focus. The Act provides for the Minister to issue Directions after taking advice from both the Commissioner and the Secretary to the Attorney-General's Department (AGD).

The current Ministerial Direction was issued by the then Minister for Justice and Customs on 12 October 2007. In this, the Government outlined its expectations that in performing its functions and prioritising its activities, the AFP give special emphasis to:

- countering the threat of terrorism to the safety and security of Australians and Australian interests within and outside Australia;
- preventing, deterring, disrupting and investigating criminal activities impacting on the interests of the Australian community;
- safeguarding the economic interests of the nation from criminal activities such as serious fraud, money laundering, corruption, intellectual property crime and technology enabled crime;
- ensuring that specific individuals, establishments and events, identified by the Australian Government as being at risk, are protected;

- contributing effectively to the Government's international law enforcement interests including matters involving cooperation to combat transnational organised crime, responses to emergencies, law and order capacity building missions, and participation in United Nations or other internationally mandated peace operations;
- achieving and maintaining a technological edge over criminals, including sharing knowledge and capacities with strategic partners;
- identifying emerging criminal threats to the national interest and advising on appropriate policy approaches, strategies and treatments to counter such threats; and
- contributing actively to broader government programs or initiatives where their successful implementation requires the engagement of law enforcement capabilities.

#### *AFP structure*

To maximise the AFP's ability to effectively carry out its functions and respond to its Ministerial Direction, the AFP is structured around its functions. The structure, known as the Functional Model, organises the AFP around its major operational activities with services delivered through the AFP headquarters in Canberra and various regional offices around Australia.

There are nine key operational areas. They are:

- Border and International Network;
- Economic and Special Operations;
- Intelligence;
- International Deployment Group;
- Counter Terrorism;
- High Tech Crime Operations;
- Protection;
- Aviation; and
- ACT Policing.

The resulting management structure is a matrix that has combined centralised functional responsibilities with the AFP's geographic locations. The functional departmentalisation of the matrix is managed through National Managers (Assistant Commissioner level) being responsible for a discrete operational area. To assist National Managers in the delivery of their business, geographic management is provided through regional office managers.

The AFP office structure that directly supports Border operations, Economic and Special Operations, Counter-Terrorism operations, and High Tech Crime Operations includes:

- Sydney Office;
- Melbourne Office;
- Brisbane Office;
- Perth Office;
- Adelaide Office;
- Darwin Office;
- Cairns Office; and
- Hobart Office.

The AFP operational structure for Protection includes Protective Service Officer Stations for:

- Critical Infrastructure protection at ANSTO (Lucas Heights Sydney), DFAT Canberra, and Australian high commissions and embassies in Port Moresby, Jakarta and Kuala Lumpur;
- Defence Stations at Exmouth, Geraldton, Pine Gap, and Russell Offices;
- Diplomatic Protection in the ACT, Perth and Sydney; and
- Official establishments' protection in Sydney and Canberra.

The AFP operational structure for Aviation includes:

- Airport uniformed police providing a community policing presence and airport police commanders at eleven major Australian airports including Adelaide, Alice Springs, Brisbane, Cairns, Canberra, Darwin, Gold Coast, Hobart, Melbourne, Perth and Sydney; and
- Joint Aviation Investigation Taskforces at Sydney, Melbourne, Adelaide and Perth airports which are mobile through the CTFR airport network.

### **AFP Professional Standards**

The AFP operates in an increasingly complex and dynamic environment driven predominantly by changes in what comprises national security. To effectively perform in this environment, it is critical that the AFP secures and maintains the confidence of national and international governments, partners and the public. Central to this is the integrity and professionalism of AFP employees on an individual level and the ability of the AFP at an organisational level to prevent and counter internal corruption and misconduct. To meet this obligation, the AFP maintains a rigorous Professional Standards regime.

### *What are Professional Standards?*

The term Professional Standards has two related meanings.

In an operational sense it relates to the expectations the Commissioner has of all AFP appointees with regards to their conduct both on-duty and off-duty. The Professional Standards of the AFP are underpinned by the AFP Core Values and Code of Conduct and apply to all AFP appointees in Australia, its Territories and overseas.

*Commissioner's Order 2* sets out the professional standards expected of AFP appointees in the performance of their duties in conjunction with:

- The *Australian Federal Police Act 1979*;
- The *Australian Federal Police Regulations 1979*;
- Commissioner's Orders;
- The AFP Code of Conduct;
- The AFP Core Values;
- Commander's Orders;
- National Guidelines;
- Practical Guidelines, and
- Australian Federal Police policies.

In a practical sense, 'Professional Standards' is the description given to the functional area of the AFP that deals with professional Standards issues. This includes the internal administrative structures and methodology for investigating and resolving professional standards matters that come to the attention of the AFP administration.

### *The AFP professional standards model*

The AFP has maintained a professional reporting program for breaches of professional standards since 1996. In May 2002, Commissioner Keelty engaged retired NSW Supreme Court Judge, Mr William Fisher, AO QC, to undertake a review of the AFP's professional standards regime. The Fisher review was completed in February 2003 and tabled in Federal Parliament later that year. The Fisher review recommended that the AFP adopt a professional standards regime using managerial resolutions for minor misconduct and underperformance matters. In 2006, the AFP updated its complaints and professional standards regime in line with the Fisher Review recommendations by inserting a new part (Part V) into the *Australian Federal Police Act 1979*.

The AFP's current professional standards model adopts a graduated (tiered) approach according to the seriousness of the breach of Professional Standards.

Matters are allocated to one of four categories.

- Category 1 conduct (least serious) – inappropriate conduct that relates to minor management matters or customer service matters or conduct that reveals a need for improvement by the AFP appointee concerned.<sup>1</sup>
- Category 2 conduct – minor misconduct by an AFP appointee, inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee or repeated instances of category 1 conduct.<sup>2</sup>
- Category 3 conduct – conduct that is serious misconduct by an AFP appointee or that raises the question whether termination action should be taken, or involves a breach of the criminal law or serious neglect of duty by an AFP appointee, and is not conduct that raises a corruption issue.<sup>3</sup>
- Category 4 conduct – corruption matters.<sup>4</sup>

The AFP Commissioner and the Commonwealth Law Enforcement Ombudsman have jointly determined the kind of conduct that falls within Category 1 and Category 2. As Category 1 and Category 2 conduct matters are considered minor, they are dealt with managerially and resolved at a local level wherever possible. The focus is on early intervention and early resolution. Functional stream and AFP office based Complaint Management Teams have the opportunity to manage and resolve minor matters within the workplace and address underperformance or behavioural issues without undue delay or stress for appointees or complainants. Strategies to prevent recurrences can also be developed and enforced at the management level.

While managerial resolution is appropriate for the majority of complaints, public confidence requires serious matters to be handled through investigation by Professional Standards. Category 3 conduct matters, which are determined jointly by the AFP Commissioner and the Law Enforcement Ombudsman, are therefore directed to AFP Professional Standards for investigation.

A Category 4 corruption matter is an issue where a staff member of a law enforcement agency has engaged, is engaged in or may engage in corrupt conduct. A staff member engages in corrupt conduct if they abuse their office, pervert or attempt to pervert the course of justice or engage in corruption of any other kind.<sup>5</sup> The AFP Commissioner is obligated to refer corruption matters as soon as practicable to the Commissioner of the Australian Commission of Law Enforcement Integrity (ACLEI).<sup>6</sup> Any subsequent new information received by the AFP must also be passed by the Commissioner to ACLEI.<sup>7</sup> ACLEI may investigate the matter, return the matter to AFP for investigation or commence a joint investigation with the AFP.<sup>8</sup> If the matter is returned to the AFP, Professional Standards will generally conduct the

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<sup>1</sup> Section 40RN of the AFP Act 1979

<sup>2</sup> Section 40RO of the AFP Act 1979

<sup>3</sup> Section 40RP of the AFP Act 1979

<sup>4</sup> Section 40RK of the AFP Act 1979

<sup>5</sup> Section 6 of the Law Enforcement Integrity Commissioner Act 2006

<sup>6</sup> Section 19 of the Law Enforcement Integrity Commissioner Act 2006

<sup>7</sup> Section 21 of the Law Enforcement Integrity Commissioner Act 2006

<sup>8</sup> Section 26 of the Law Enforcement Integrity Commissioner Act 2006

investigation unless inappropriate in the circumstances.<sup>9</sup> At conclusion of the investigation, the investigator must prepare a written report detailing the results.<sup>10</sup>

The AFP Professional Standards regime is also subject to external review. The Commonwealth Law Enforcement Ombudsman maintains an oversight role in relation to all AFP professional standards matters and has the power to commence an ‘own motion’ investigation into the AFP.

In addition, the office of the ACLEI is a permanent, independent and proactive body established by the Commonwealth to detect and prevent serious or systemic corruption in the AFP and other Commonwealth agencies. ACLEI can invoke Royal Commission powers to compel the provision of evidence. As noted above, all Category 4 corruption matters must be referred to the Commissioner to ACLEI.

The AFP Commissioner may enter into arrangements with the Commonwealth Law Enforcement Ombudsman and the Integrity Commissioner to enable access to the AFP Complaints Recording and Management System (CRAMS) in order to assist their oversight functions.

Furthermore, any person may make a report to ACLEI that raises an allegation, or provide information in relation to a corruption issue.

### *Reporting Obligations*

Commissioners Order 2 places an obligation on AFP appointees to report all breaches of professional standards by themselves or any other appointee of the AFP. Compliance with the professional standards of the AFP is the responsibility of every AFP appointee. This obligation can be satisfied in a number of ways:

- self-reporting or reporting through the Complaint Recording and Management System (CRAMS);
- reporting via another member; or
- reporting via the Confidant Network.

The AFP has primary responsibility for resolution of complaints against AFP employees. The Commonwealth Law Enforcement Ombudsman no longer receives complaints directly from the public and instead refers complainants to the AFP for resolution of complaints matters.

A member of the public may lodge a complaint with the AFP in person, by correspondence, via email, or most commonly, via the telephone. AFP appointees are obliged to receive and record a complaint when made, even in circumstances where the appointee complained about is no longer an AFP appointee or the identity of the particular appointee cannot be established by the complainant.

AFP appointees are obligated to receive complaints from the persons in their custody and, if requested, provide facilities to enable persons in custody to lodge a complaint in writing.

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<sup>9</sup> Sections 40TL, 40TN & 40TO of the AFP Act 1979

<sup>10</sup> Section 40TU of the AFP Act 1979



## CRAMS

The preferred method of reporting a breach of professional standards is via CRAMS. CRAMS is utilised to record all complaints, automatically categorise complaints according to the tiered model and refer complaints to the relevant Case Management Team or Professional Standards for action. The National Guideline on Professional Reporting details the support process available to AFP appointees who have reported, or are considering reporting, the activity or conduct of others which they believe to be contrary to the professional standards of the AFP. All appointees who report any matter in good faith will be supported. When receiving complaints from members of the public, an AFP appointee must record the details of the complaint and deal with it in accordance with the provisions of *Commissioner's Order 2*. This would normally be satisfied by using the CRAMS system.

## AFP Confidant Network

The AFP Confidant Network is a unique feature of the AFP that is available to all current AFP appointees, regardless of their status or geographic location. Essentially, it is a network of trained appointees (Confidants) who are available to provide information, options and support to other appointees (Clients) in dealing with issues of genuine concern. The AFP believes that the combination of its professional standards system and the Confidant Network provides a very high level of protection for 'whistleblowers' within the AFP.

The Network is not part of the Professional Standards portfolio and provides an environment which is conducive to the reporting of breaches of professional standards, including criminal and/or corrupt behaviour. The program is an anti-corruption strategy for the workplace.

The Confidant Network, which operates in effect as the AFP internal witness support program, was established by the AFP in 1996 under the guise of the Professional Reporting Network. The original program title 'Professional Reporting Network' title was adopted as it ensured a more positive connotation than the negatively perceived term 'whistleblower'. The program name was later changed to the 'Confidant Network', with the renaming of the internal investigations and co-related functions to 'Professional Standards'. This change was to reflect a clear distinction between the two reporting areas. The use of positive terminology also aimed to encourage employees to disclose information so that the AFP could address conduct and practice issues that contravened AFP Professional Standards.

The network consists of Confidants located in all AFP workplaces who provide support and options to appointees/clients to enable them to fulfil their obligations regarding the reporting of inappropriate, criminal or corrupt behaviour. Their role includes being used as a conduit of information. Confidants, however, are not a spokesperson for their client.

Confidants have undertaken training in communication and conflict resolution and possess a sound knowledge of the integrity environment, the professional reporting process, Commissioner's Orders and National Guidelines. Confidants are able to provide support and options to resolve matters raised by appointees relating to genuine issues of concern such as work practices, which may not constitute a criminal offence. Confidants will continue to provide support, and where possible, feedback to the appointee until it is no longer required by them.

All matters reported to Confidants are known as 'referrals'. Referrals can relate to a diverse range of issues. There is no scope for what is, or is not, a matter that a Confidant can assist an AFP appointee with. Referrals can arise from matters occurring within the workplace or outside of working hours.

The Confidant Network is governed by the National Guideline on the Confidant Network. An important aspect in the creation of the Confidant Network was the need to afford clients a relative degree of confidentiality and anonymity.

The Confidant Network Coordination Team (CNCT) is responsible for recording and coordinating all Confidant Network referrals. Referral details are entered on a secure stand-alone database which can only be accessed by the CNCT. The CNCT coordinates the approval of Confidants and the provision of regular training and integrity checks to ensure Confidants maintain their skills and knowledge in the role. The CNCT are also responsible for the marketing and awareness of the network throughout the AFP.

During the reporting process anonymity can be offered in relation to a non-criminal matter if the reporting appointee has a genuine concern about being identified. In criminal matters, the confidentiality of the reporting appointee cannot be guaranteed, however, all efforts will be made to protect his or her identity. In cases where reports are referred to Professional Standards for investigation, the identity of the reporting person will not be disclosed without his or her consent, unless required, for example:

- following the lawful direction of a court, tribunal or similar body or person, if argument in support of non-disclosure is unsuccessful;
- during any investigation, prosecution or other proceedings connected with the report where disclosure is necessary; and/or
- otherwise by law.

Not all referrals are required to be forwarded to Professional Standards. Each referral is treated on a case by case basis. Options provided by the Confidant may include:

- the client speaking with their team leader/supervisor;
- for the matter to be recorded by the Network only;
- for the matter to be referred to Management; and/or
- for the client to speak directly with the subject of the referral.

In all referrals, the consideration and wellbeing of the Client is given priority. Where possible, referrals will be resolved at the lowest possible level. This is a principle embraced by the network to enable referrals to be dealt with in a timely and effective way.

Any interference with an employee who makes a report is prohibited by the National Guidelines on Professional Reporting, is viewed as serious by AFP management and may result in prosecution with a maximum penalty of six months imprisonment.

Confidants can, but are not limited to:

- attend meetings with the Client;
- support the client in contacting the relevant people;
- act as an interview friend during a Professional Standards interview; and
- proof read reports.

### *The Confidant Network Organisational Structure*

The Confidant Network is contained within the Human Resources portfolio. It is not a part of the AFP Professional Standards portfolio. The Coordinator, Confidant Network, reports directly to the National Manager (Assistant Commissioner) Human Resources.

There are approximately 230 Confidants located throughout the organisation, including AFP international locations. The role of the Confidant is voluntary and carried out in concert with the employee's usual workplace role. It is not team or geographically based.

The CNCT operate a 24/7 telephone line that enables employees to access information, options and support from a Case Officer if a Confidant is not available. This affords employees working shift work and weekends the opportunity to discuss concerns or to seek guidance and/or support without delay.

The CNCT maintain rapport with the Professional Standards team and Wellbeing Services to ensure support and protection is provided if required.

### *Success of the Network*

There are several contributing factors that enhance the Confidant Network. These include:

- the use of the independent database. Employees have more trust in the confidentiality of the program;
- continued support from the Senior Executive of the AFP, a number of which are Confidants. The Commissioner is a Confidant and regularly refers to the functional capability and purpose of the Confidant network in staff messages;
- the Confidants themselves and their commitment to the role and the independence of the Confidant Network external to the Professional Standards Portfolio; and
- the reporting by the Coordinator of the Confidant Network directly to the National Manager, Human resources.

Marketing the Network is integral to its ongoing existence and approachability. It is essential to have support of the senior executive, maintain a strict application vetting process and to conduct awareness training for new employees to the organisation. The Confidants have to act in accordance with the values of the organisation and maintain confidentiality. They are

usually the ones in the workplace that people tend to trust and feel comfortable in approaching, even before being selected and trained as a Confidant.

#### *Continued Commitment by AFP*

The Confidant Network is unique in law enforcement and was established in support and consultation with the Commonwealth Ombudsman and the Australian Federal Police Association. There have been ongoing reviews and improvements over the years to enhance the quality of the service in encouraging employees to come forward with information knowing they have the support of the AFP.

The AFP is also supportive of sharing the success of the Confidant Network with other agencies both nationally and internationally. This includes, via a previous networking forum, all law enforcement agencies in Australia and New Zealand, with more detailed information provided in recent times to the Australian Taxation Office and law enforcement agencies of Western Australia, Victoria, NSW, Hong Kong and Canada.

#### *Involvement in national research*

The AFP was involved as a case study agency in a national research project initiated by Griffith University to review Australian whistleblowing laws and practices. The project is titled "*Whistling while They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector*". The research aim was to identify and expand 'current best practice' systems for the management of public interest disclosures in the Australian public sector, including effective protection.

The AFP participated in this project because it considered that it would provide valuable insight into our own processes and enable the AFP to better meet the needs of employees who come forward to report wrongdoing. Information was provided on the structure of the organisation, the legislative and governance framework, the reporting and support processes of the AFP and was actively involved in the two workshops facilitated by the research team throughout the survey process. The final report is expected to be released in September 2008.

#### **Investigation of Protected disclosures and unauthorised disclosure of Commonwealth information**

The AFP is responsible for the investigation of sensitive matters and special references from the Australian Government and other agencies. Investigations are undertaken into a diverse range of offences, including matters that under the Committee's terms of reference would be considered protected disclosures such as corruption of public officers, bribery of foreign public officials and other matters that may affect proper governance within the Commonwealth as well as unauthorised disclosures of Commonwealth information.

From 1 July 2005 to 30 June 2008, the AFP has considered 144 referrals of corruption allegations and 45 referrals in relation to unauthorised disclosure allegations. The AFP receives these referrals from a variety of sources.

The AFP does not investigate whistleblowers that provide information of wrong-doing to the appropriate authorities unless criminal or corrupt activity on the part of the whistleblower is identified.

## Terms of Reference

*Term of reference 1 - The categories of people who could make protected disclosures.*

Whistleblower protections should apply only to those within the public sector. Under the *AFP Act 1979*, all AFP appointees are currently required to report any instances of breaches of professional standards or behaviour that is contrary to the AFP core values by other AFP appointees. The term 'appointee' includes:

- a Deputy Commissioner;
- an AFP employee;
- a special member;
- a special protective service officer;
- a person engaged overseas under s. 69A to perform duties overseas as an employee of the AFP;
- a person engaged under s. 35 as a consultant, or independent contractor, to perform services for the AFP;
- a consultant, or independent contractor, determined by the Commissioner under s. 35(2) to be an AFP appointee; or
- a person assisting the AFP to perform its functions under an agreement under s. 69D.

For persons outside the public sector who make disclosures about public sector wrongdoing, the need for whistleblowing protection is less obvious. In particular, the risk of employment related reprisals for making a disclosure about public sector wrongdoing would be minimal or non-existent, though there is potential for reprisals in some cases such as in the award of future contracts.

*Term of reference 2 - the types of disclosures that should be protected*

The AFP believes that protected disclosures should be limited to the types of matters described at term of reference 2(a):

Allegations of illegal activity in the public sector, corruption in the public sector, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, waste of public funds, dangers to public health and safety and dangers to the environment.

This scope of activity is similar to that covered by AFP conduct or practices issues under the AFP's professional standards regime. Under the AFP system a person may give information that raises an AFP conduct or practices issue either orally, in writing or anonymously.

An AFP conduct issue is an issue of whether an AFP appointee has engaged in conduct that contravenes the AFP professional standards, or has engaged in corrupt conduct. The definition is broad and includes:

- conduct by an AFP appointee that occurred before the person was engaged as an AFP appointee;
- conduct that is off duty or private;
- conduct engaged in by an AFP appointee who has since ceased to be an AFP appointee; and
- conduct that occurred within or outside Australia whether the identity of the AFP appointee who engaged in the conduct is known, certain or is disclosed in the information.

AFP Practices issues are issues about the practices or procedures of the AFP (whether those practices or procedures are carried out within or outside Australia) and may include where the practice or procedure is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, inadequate or otherwise wrong or inappropriate.

The AFP Act excludes from the definition of conduct and practices issues employment matters involving no breach of professional standards or corrupt conduct. This includes action taken in relation to an appointee's employment, including their appointment, terms and conditions of employment, termination, promotion, discipline and remuneration matters relating to an appointee.

With regard to the matters raised in terms of reference 2(b), the AFP does not believe that these matters should be included as protected disclosures in model legislation as public sector agencies have a range of mechanisms to address these concerns.

*Term of reference 3 - The conditions that should apply to a person making a disclosure*

The AFP believes that while the merits of applying thresholds needs to be carefully considered, thresholds in terms of the seriousness of the alleged conduct are not essential. The AFP notes that under the current AFP regime, there is no threshold of seriousness applied to a complaint in order for the internal disclosure to be subject to the protections provided in the Act. A person can make any form of disclosure and the matter is then assessed internally as to its seriousness and veracity, including anonymous complaints and those referred via the Confidant Network. For example, the issue to be considered in the reporting of a theft is not necessarily the amount in a theft, but the conduct relating to the integrity of the person in undertaking that action.

The AFP believes that the Committee should consider penalties where the actions of a 'whistleblower' amount to misuse of, or undermine the proposed protected disclosure provisions. The AFP notes that it is an offence under the AFP Act to provide false information about AFP conduct or practices issues. Under Section 40YB an AFP appointee must not provide false information about AFP conduct or practices issues where that person knows that the information is false in a material particular.

With regards to disclosing externally outside of the AFP professional standards regime, unless the disclosure is in pursuant with the provisions of Section 8 by virtue of Section 60A of the Act, employees would be at risk with regard to penalties regarding disclosure. This would not impact on those matters that are raised at external bodies such as Human Rights and Equal Opportunity Commission regarding harassment, discrimination issues. Employees can legally take this course, albeit mechanisms exist internally to facilitate this action.

*Terms of reference 4 - The scope of statutory protection that should be available*

The AFP believes that the protections canvassed by this term of reference all warrant serious consideration. The AFP notes that immunity from criminal liability is an issue that needs to be considered carefully. By way of example, the current AFP system has the following procedural and statutory protections.

Internal AFP mechanisms exists to provide confidentiality and anonymity with regards to the Confidant Network and the provision for protection of the complainant in providing conduct related information under Part V of the AFP Act. Statutory protection against victimisation exists under section 40YA of the AFP Act. It is an offence if a person causes or threatens to cause detriment to another person (the victim) on the ground the victim or any other person has given or may give information relating to a contravention of the professional standards of the AFP. Detriment includes injury, damage or loss, discrimination, disadvantage or injury to a person's employment, and impeachment of reputation. The Act provides that the threat may be expressed or implied, conditional or unconditional.

The only protections with regard to criminal liability for a 'whistleblower' relate to the use of coercive powers. The Act provides investigators with coercive powers that relate to directing an AFP appointee to give information and provide documents. AFP appointees must comply with directions. The information or documentation provided under direction is not admissible in evidence against the appointee in any civil or criminal proceedings except termination action, failure to comply charges, *Safety, Rehabilitation and Compensation Act 1988*, proceedings in tort against the Commonwealth instituted by an appointee.

Outside of the use of coercive powers, under the current AFP system sections 70 and 79 of the *Crimes Act 1914*, which relate to the protection of Commonwealth information, apply. If relief from criminal liability will be afforded in relation whistleblowing protections, the AFP would be concerned about any adverse impact on the ability to prosecute persons for the unauthorised disclosure of Commonwealth information. The AFP believes that an equally important policy principle to be observed in developing model whistleblowing legislation to ensure disclosures about maladministration and corruption are protected should be to enhance the protection of Commonwealth information.

*Terms of reference 5 - Procedures in relation to protected disclosures*

The AFP believes that the development of model whistleblowing legislation should look to complement existing mechanisms in the Australian Public Sector. The AFP believes that the scheme should provide for public servants to be able to make disclosures within their agency and if that is not possible because of the nature of the allegation to an outside agency.

The AFP believes that there are a range of existing agencies that could be considered to be the external body to which public servants can report to, including the Commonwealth Ombudsman, the Privacy Commissioner, the Human Rights Commissioner, the Inspector-General of Intelligence and Security and the Law Enforcement Integrity Commissioner. The fit of a protected disclosure regime with their roles and functions needs to be considered before a proposal for a new agency is considered.

The requirements for agencies to handle disclosures should focus on providing confidentiality and responsiveness to the complainant, objective analysis of the substance of the complaint, assessment of whether the complaint should be investigated, notification of the complainant of that decision and referral to an appropriate investigatory body either inside the agency or to another agency. If the complainant is not satisfied with the outcome of the process they should have the right to make their disclosure to an external public sector body such as the Ombudsman for assessment and investigation.

Monitoring of the system and training and education will be critical to its success. Monitoring requirements if they are to include annual reporting to Ministers and Parliament need to focus on collecting high level information that can identify the utility of the scheme and any problems in its functioning. The monitoring of whistleblowing should not require case specific information that can identify the complainant or the subject of the complaint to be publicly available.

Model legislation should not include the option of disclosure to a party other than the agency or oversight agency.

*The relationship between the Committee's preferred model and existing Commonwealth laws*

No comment.

*Such other matters as the Committee considers appropriate*

No comment.