AUSTRALIAN FEDERAL POLICE ASSOCIATION

A submission to the Senate Legal and Constitutional References and Legislation Committee on the *Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* – A Bill for an Act to amend the *Australian Federal Police Act 1979*, and other related purposes.

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Introduction

The Australian Federal Police Association[1] represents the industrial, social and professional interests of all employees of the Australian Federal Police[2]. Our membership interests span across Commonwealth law enforcement functions through the wide-ranging dispersment of AFP employees across a range of Commonwealth interests. Our activities are predominately within the AFP across the entirety of its functions, the Australian Crime Commission[3], and the Federal Parliamentary Security Service[4].

The AFPA is the Federal Branch of the Police Federation of Australia. We have long worked with the AFP on the application of the *Australian Federal Police Act 1979*[5] and the associated *Australian Federal Police Regulations 1979*[6], *Complaints (Australian Federal Police) Act 1981*[7] and *Australian Federal Police (Discipline) Regulations 1979*[8], and as such are well situated to advance practitioner's perspectives in respect of the Bill and its eventual application post enactment.

We thank the Senate Legal and Constitutional Reference and Legislation Committee[9] for the time to address the possible issues related to the *Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006*[10], and believe this submission will be of valuable assistance to the Committee in their enquiry. The Bill before the Committee today is a direct result of concerns raised by the AFPA before the same Committee in 2000. It is imperative that the current Committee take on board the concerns we now wish to raise in relation to this Bill as they did in 2000.

The AFPA objects to the Bill being passed in its current form. It does not provide adequate external review of the professional standards internal decision-making process to ensure effective accountability and transparency, and does not protect the rights of the AFP employees to natural justice and a fair hearing.

Our concerns, if adequately addressed, we believe will result in amendments to the legislation that will equally protect the Australian public and the AFP employee, from abuse and misuse of police power.

[1] Hereafter referred to as the 'AFPA'.
[2] Hereafter referred to as the 'AFP'.
[3] Hereafter referred to as the 'ACC'.
[4] Hereafter referred to as the 'PSS'.
[5] Hereafter referred to as the 'AFP Act'.
[6] Hereafter referred to as the 'AFP Regs'.
[7] Hereafter referred to as the 'Complaints Act'.
[8] Hereafter referred to as the 'Discipline Regs'.
[9] Hereafter referred to as the 'Committee'.
[10] Hereafter referred to as the 'Bill'.

Background to the Bill

Amendments to the AFP Act on 1 July 2000 led to the distinction between the Commissioner's command powers and his employment powers. The legislators at the time placed safeguards on the Commissioner's command powers and employment powers by ensuring that the Governor-General could make regulations for securing the discipline and good government of the AFP. In particular, the Governor-General could make regulations under s70 of the AFP Act for, *inter alia*:

(k) AFP employment decisions and the values on which such decisions must be based, including:
    (i) Impartiality and professionalism; and
    (ii) Merit; and
    (iii) Freedom from discrimination; and
    (iv) Openness and accountability; and
    (v) Fairness; and
    (vi) Equity in employment; and
    (vii) Effectiveness; and

(l) The review of AFP employment decisions[11]

The then Minister for Justice & Customs, Amanda Vanstone, made undertakings to Parliament that led to Part 3 Division 3.2 of the of the AFP Regs which states:

Regulation 24 Process for Review must exist

(1) The Commissioner must ensure that a process for reviewing AFP employment decisions exists at all times.

(2) The process must be at least as favourable to AFP employees and Special members as the process set out in the Australian Federal Police Certified Agreement 1999-2002, as at 1 July 2000.12

In 2000 the AFPA gave evidence before the Legislative and Constitutional Reference Committee 'Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority'.

In particular, the AFPA raised concerns in relation to the AFP misusing managerial action as punitive action without AFP employees having an avenue of independent review in relation to a finding of fact and/or punishment imposed. The AFP was deliberately avoiding the Disciplinary Regs so as to avoid review by the AFP Disciplinary Tribunal[13].

The Complaints Act provided an unusual distinction between the role of the Tribunal and the position of the Commissioner as the head of the AFP. This was explained in the second reading speech as follows:

[11] AFP Act 1979 Part VI Section 70 Regulations.
[12] AFP Regulations 1979 Part 3 Division 3.2 Miscellaneous Regulation 24
[13] Hereafter referred to as the 'Tribunal'.

> *'Recognizing the need for the Commissioner to be, and to be seen to be, the source of discipline within the force, the Government concluded… that the Tribunal, when constituted by other than a Judge should determine only guilt, the penalty being remitted to the Commissioner for determination. However, when the Tribunal is constituted by a Judge, the Bill provides that it should determine guilt and penalty.'* [14]

As a result of the evidence given, the Legal and Constitutional Reference Committee recommended:

> *' The Committee recommends that the procedures for dealing with complaints and allegations be examined with a view to their being simplified and made more transparent, and to ensuring that employees are not disadvantaged by the use of administrative instead of disciplinary processes.'* [15]

Clearly the Legal and Constitutional Reference Committee concluded that any administrative process must be at least as favourable to AFP employees and Special Members as the process set out in the Complaints Act and the Discipline Regs.

As a result of the above recommendation, a review of Professional Standards in the AFP was undertaken by the Hon. William Kenneth Fisher AO, QC, and a report completed on 12 February 2003.

Justice Fisher questioned the need for the continuation of the Tribunal. He stated:

> *'The recent history of the AFP administration discloses that for the last four years there have been no cases heard within the Tribunal. The preference has been for the AFP administration to pursue other outcomes. This has been possible as a result of the recent amendments to the AFP Act … The available inference is that there may not be any future need for the continuation of the Tribunal…'* [16]

His Honour then went onto make a number of recommendations that in large are incorporated in the Bill before the Committee.

In simplified terms, the elements of the proposed structure set out by Justice Fisher are as follows:

- Minor management matters (including customer service matters) that are not classified as a complaint leading to outcomes that are resolved by local managers with guidance from a central AFP body with the outcomes monitored by the Commonwealth Ombudsman;

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[14] Commonwealth Parliamentary Debates Senate, 26 February 1981 page 170 Senator Durack, Attorney-General

[15] Senate Legal & Constitutional Affairs Committee 'Order in the law- the report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority 2001' page 137

[16] A Review of Professional Standards in the Australian Federal Police February 2003 page 15.

- Complaints leading to ***non-reviewable*** actions that are managerially resolved by local managers with reporting requirements via the AFP professional standards unit to the Commonwealth Ombudsman; and

- Complaints leading to dismissal with reporting requirements via the AFP professional standards unit to the Commonwealth Ombudsman and **reviewable** by the Australian Industrial Relations Commission[17].

There is no internal appeal for non-reviewable matters, contrary to the recommendations of Justice Fisher, and there is no external independent review of matters with punitive outcomes, other than termination of an AFP employee. Even then, this is questionable whether termination is reviewable under the WRA, as once the new section s69B(1)(b) is enacted, action (i.e. termination) in relation to a matter under Part V is excluded.

Executive summary

The Bill represents a significant change in the AFP professional standards structure. The proposed structure set out by the Fisher Review has not been fully incorporated into the Bill, and has glaring omissions that impact quite onerously on the rights of AFP employees.

The AFPA's fundamental concerns with the Bill are fivefold:

1. The drafters have failed to contemporise the recommendations of Justice Fisher;

2. The drafters have included non-reviewable outcomes that do in fact have a punitive action against the employee. As set out above, this was clearly not the intended outcome of the Fisher Review;

3. The legislators have removed the Tribunal and have not clearly articulated that AFP regulation 24 still applies to AFP employment decisions. There are no reviewable actions in the new structure, as envisaged by Justice Fisher;

4. The professional standards rubric can be utilised as an umbrella to incorporate employments related actions to usurp the application of the *Workplaces Relations Act 1996*[18];

5. The new structure needs more refinement and specificity in its powers and application to avoid the possibility of abuse and misuse by those empowered within it.

The submission is set out to incorporate these fundamental concerns in the form of a chronological analysis of the Bill, as the Bill itself is set out. Some points are purely

[17] Hereafter referred to as the 'AIRC'.
[18] Hereafter referred to as the 'WRA'.

commentary; some are recommendatory; while others suggest entire new sections to the AFP Act not envisaged by the drafters of the Bill.

The general points to the Bill are summarised in the submission below as follows:

- The drafters have failed to contemporise the recommendations of Justice Fisher
- The AFP Commissioner should be subject the professional standards of the AFP. One cannot have a standard without it applying to all employees.
- The assignment and duties of members to the professional standards unit could conflict with their rights acquired under the WRA.
- The AFP professional standards system should not apply retrospectively to persons who have ceased to be AFP employees.
- There is room for manipulation of what conduct falls within a particular category.
- All uncategorised conduct defaults to the most severe form of conduct, being category 3.
- Remedial action taken as a result of substantiated conduct could result in the action impacting on an AFP employee's rights acquired under the WRA.
- Some powers afforded to investigators in certain investigations are unspecified and too broad.
- The drafters have included non-reviewable outcomes that do in fact have a punitive action against the employee. As set out above, this was clearly not the intended outcome of the Fisher Review
- The professional standards rubric could be used to pick up employment and industrial matters on the periphery of the investigation so as to exclude the application of review and the WRA. A process for the review of employment decisions should be enshrined in the AFP Act so as to limit this.
- Professional standards investigators should be required to obtain a warrant to search property and premises belonging to AFP if the search is of a personal nature.
- Orders stopping an AFP employee from resigning must be related to contemporaneous conduct and should only be given once.

Chronological analysis, comments and recommendations on the Bill

1. The legislators have failed to contemporise the recommendations of the Fisher Review

The following point is a generic point applicable to the entire Bill. The recommendations of Justice Fisher must be placed in context with the industrial environment at the time. Significant industrial reforms have now changed the role and function of the AIRC. Justice Fisher was clearly relying on the Federal Court and the AIRC to be the review process for reviewable actions instead of the Tribunal.

He stated:

> *'This distinction between the Commissioner's employment and command powers also defines the boundary between employment issues covered by the Workplace Relations Act 1966(Cth) and command issues covered by the AFP Act which are not so reviewable. The Workplace Relations Act 1966 (Cth) applies only to employment decisions but does not apply to the Commissioners command powers or the discipline of the AFP'.*[19]

He recommended, *inter alia*, the following:

> *'If an employee is aggrieved about the result of a non-reviewable resolution there should be a provision for an* ***internal review*** *and removal of the matter to the next level of seniority*[20].
>
> *'The list of outcomes in respect of matters that can be resolved managerially should be expressed by the legislation to be non-reviewable. This means a decision in relation to these complaints is not reviewable by a court or Tribunal save for the role of the Ombudsman to monitor minor managerial matters and non-reviewable action or the Federal Court of Australia to review administrative action*[21].
>
> *'The current provisions of the AFP Act relating to review of employment decisions under section 28 of the AFP Act by the Australian Industrial Relations Commission should be maintained*[22].

To ensure that the safeguards, originally envisaged by the Legal and Constitutional Reference Committee are maintained, there must be a simplified and transparent independent system of review that ensures employees are not disadvantaged, compared to the current, and soon to be repealed, disciplinary process. That being, that it is made clear in the Bill, that Part V is subject to regulation 24, as set out in the AFP Regs.

A stated above, the Legal and Constitutional Affairs Committee recommended in 2000:

> *' The Committee recommends that the procedures for dealing with complaints and allegations be examined with a view to their being simplified and made more transparent, and to* ***ensuring that employees are not disadvantaged by the use of administrative instead of disciplinary processes****.*[23]

Clearly the Legal and Constitutional Affairs Committee concluded that any administrative process must be at least as favourable to AFP employees and Special Members as the process set out in the Complaints Act and the Discipline Regs.

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[19] Fisher Review, page 19.
[20] Fisher Review, recommendation 12.4.
[21] Fisher Review, recommendation 13.1.
[22] Fisher Review, recommendation 20.1.
[23] Senate Legal & Constitutional Affairs Committee 'Order in the law- the report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority 2001' pg 137

2. Schedule 1 - Item 28 - Part V Div 1 Subdiv B s40RC & s40RG
Commissioner may determine professional standards & member or special member in unit may be directed to perform other duties

It should be noted at the outset that there is a general operation throughout the Bill that the Commissioner will not be subject to the professional standards Part V of the new AFP Act. There is nothing that expressly excludes the Commissioner from following the professional standards of the AFP, likewise however, there is nothing to expressly include the Commissioner under the regime. Section 40RC allows the Commissioner to determine the professional standards and as such he may determine who they apply to.

Recommendation:

The AFPA recommends that 40RC include a provision that in determining the standards, they **must apply equally to all AFP employees**, including the Commissioner.

3. Schedule 1 - Item 28 - Part V Div 1 Subdiv C s40RF
Assignment of members, and special members, to unit

This and the following section is quite analogous to the current s40H(2) of the AFP Act. First, it allows the Commissioner to assign the tenure and duties of an AFP employee for a particular position. Second, the sections (and Part V for that matter) will not be subject to the WRA under the new s69B(1)(b) of the AFP Act.

Since the enactment of s40H(2), the AFPA believes the Commissioner has applied the section in an *ultra vires* manner to incorporate all the terms and conditions applying to AFP employees deployed overseas – hence excluding the application of the WRA, any applicable certified agreements and any formal dispute resolution process that would apply had the employees not been assigned overseas. This is despite what the section states; what the Explanatory Memorandum states; what was said in Parliament when the bill was passed and what was expressly stated by the then Minister for Justice and Customs, Senator Amanda Vanstone.

Section 40RF and s40RG (see below), *prima facie*, do not explicitly usurp the certified agreements or Australian Workplace Agreements that currently, or in the future, may apply to AFP employees. However, at the time s40H(2) was being passed, it was also not envisaged that the Commissioner would imply a term into the section that allowed him to assign and determine *all* the terms and conditions of AFP employees deployed on the IDG[24]. It was thought the Commissioner would have only used the section to supplement the terms and conditions applying to AFP employees (that is the applicable certified agreements), as required by s40H(2).

[24] International Deployment Group.

Recommendation:

Incorporate a subsection under s40RF (for example s40RF(8)):

> *To avoid any doubt, assignments made under s40RF to the unit constituted under s40RD are made only to assign the member to the unit. The applicable award, collective agreement or an Australian workplace agreement that the member was under prior to the assignment will also apply to the member in its entirety during his or her assignment to the unit.*

4. Schedule 1 - Item 28 - Part V Div 1 Subdiv C s40RG
Member or special member may be directed to perform other duties

Section 40RG should be amended to consider the possibility of undue interference on the member: It currently states:

> *The Commissioner may direct a member, or special member, of the Australian Federal Police serving in the unit constituted under section 40RD to perform duties that are not related to the unit's functions but only if those duties do not unduly interfere with the performance by the unit of its functions.*

Does this mean the Commissioner can direct duties to be performed that unduly interfere with the member, so long as they do not unduly interfere with the performance of the unit? It must be remembered that this part will not be subject to the WRA. Can the directions unduly interfere with the member's award, a certified agreement or an Australian workplace agreement that are certified under the WRA? The Commissioner has used s40H(2) in this manner to usurp the application of the WRA and applicable certified agreement in the past and to date.

Recommendation:

Amend the final part of the paragraph to take the member's award, certified agreement or an Australian workplace agreement into account.

Incorporate a subsection under s40RG (for example s40RG(2)):

> *An award, a collective agreement or an Australian workplace agreement overrides any direction under subsection (1), to the extent of any inconsistency.*

5. Schedule 1 - Item 28 - Part V Div 1 Subdiv D s40RH
AFP Conduct issues

Subsection (2)(a) makes subsection (1) apply even if the AFP appointee has ceased to be an AFP appointee. This section coupled with the new section 30A (schedule 5 of the Bill – see below) could effectively place an AFP employee under the auspices of the professional standards unit for the entirety of their life, irrespective of whether they are employed with the AFP, are seeking to cease employment or are no loner employed with the AFP.

Subsection (2)(a) effectively applies retrospectively to past AFP employees no longer employed with the AFP through to current employees that may leave in the future. The subsection is considerably onerous on a whole range of people and must be omitted.

Subsection (1) should also state the conduct in question is being done while the AFP appointee is employed with the AFP. While this is implied, and somewhat obvious, it could create ambiguity in the application of the section, particularly in light of subsection (2)(a). Subsection 2(a) is implying that ex AFP employees are labelled as constructive AFP employees for the purpose of a professional standards investigation. Using the same logic, subsection (1) could be interpreted in the same manner. That is, they are not AFP employees, but for the purposes of their conduct and the investigation they are AFP employees.

6. Schedule 1 - Item 28 - Part V Div 1 Subdiv E s40RM

AFP Commissioner and Ombudsman to determine the kinds of conduct that are category 1, category 2 or category 3 conduct.

For the purposes of simplicity, the author will refer to the conduct as CAT1, CAT2 and CAT3.

Subsection (2) states:

> *If there is no determination under subsection (1) that applies to particular conduct, the conduct is to be taken to be category 3 conduct for the purposes of this Act.*

This subsection is onerous on many different levels. First, the Commissioner and Ombudsman have not yet categorised the kinds of conduct under s40RM, and there is no obligation on them to categorise the conduct within a specified time. As at the day of enactment of the Bill, if no forms of conduct have yet to be classified, **all conduct for the purpose of AFP professional standards would default to CAT3**.

Second, CAT3 conduct is treated significantly different to CAT 1 and CAT2. Division 5 of Part V is devoted specifically to CAT3, as opposed to CAT1 and CAT2 investigations under Division 3 Subdivision C.

Third, under the new s30A, as outlined below, AFP employees suspected of or involved in CAT3 conduct could effectively be made 'employee prisoners' to the AFP through infinitely repeated 90 day orders from the Commissioner not to accept the resignation of an employee (remember this is all done without the application of the WRA). The default CAT3 provision places all uncategorised conduct (that is not already categorised as CAT3) in that position.

Fourth, as the author knows only too well, almost all conduct coming before the professional standards team is different and distinct from any other form of conduct. The default CAT3 provision thus allows for considerable manipulation to place a 'less severe' form of conduct, not quite falling within a category, under CAT3. Careful manipulation could allow any investigator, vindictive or not, to place a form of conduct under CAT3. This

is not to say the conduct cannot be generally categorised, however subsection (2) does allow for a considerably large backdoor into the CAT3 process.

If there is going to be a default CAT3 provision, there must be a decision by the Commissioner, or his/her delegate (e.g. Manager Professional Standards (MPRS)), to proceed down that path, thus effectively negating the auto-provision. Likewise, there should also be an obligation to have the 'uncategorised' conduct categorised under 40RM(1).

It is difficult to see how it would take too long to categorise the conduct, as one only needs to look at the lengthier delay in investigating CAT3 to see the balance is far in favour of single person categorisation at first instance, as opposed to multi-person investigation at subsequent instance of what could ultimately turn out to be a CAT1 issue.

Let us not lose sight of the process here; one is investigating, and one is being investigated. Efficacious processes should not overrule the fundamental right of having the correct process available to a person who is at the time of investigation presumed innocent.

Currently as the subsection stands, there is no 'human' decision being made, it is automatic CAT3. There is not even a provision to determine that it is not CAT3, unless the Commissioner and Ombudsman decide the conduct falls within a particular category, at which point the CAT3 default provision would not apply. Likewise, as stated above, there is no obligation to categorise the uncategorised conduct.

Further to what is set out above, the automatic CAT3 provision contradicts not only the object of the graduated system, it also directly contradicts s40RL(3) and s40RP. That is, a category 3 conduct issue is an issue of whether an AFP appointee has engaged in CAT3 conduct[25]. Conduct under the automatic CAT3 provision has nothing to do with engaging in CAT3 conduct, as set out in s40RL(3), because CAT3 conduct can only be conduct as set out in s40RP. That is, the Commissioner and (not or) the Ombudsman may decide the conduct is CAT3 *only if* it is conduct of the kind that is *serious misconduct*, or raises the question of whether *termination* action should be taken in relation to an AFP appointee, or it involves a breach of *criminal law* or *serious neglect* of duty.

Does this sound like the sort of conduct that is likely to come through the auto CAT3 provision? *Ceteris Paribus*, there is only a 33% chance the conduct is CAT3. Certainly there will be some forms of serious conduct that are not categorised, however, the vast majority of conduct will not be serious misconduct, and thus the 33% chance figure of being CAT3 falls even lower. Likewise, taking into account the seriousness of CAT3 conduct, should all uncategorised conduct go though a 'lengthier' system designed for such serious conduct?

Recommendation:

The 'automation' needs to be taken out of s40RM(2). Operationally, grammatically and mathematically the section is flawed and onerous on all AFP employees. There needs to be a decision at the Commissioner or delegated level to proceed down the CAT3 path. There also needs to be an obligation to categorise all uncategorised conduct as it arises.

[25] Item 28 – Part V Div 1 Subdiv E s40RL(3).

7. Schedule 1 - Item 28 - Part V Div 1 Subdiv E s40RQ
Managers of particular categories of AFP conduct issues

Are the managers that are appointed to act as managers for CAT1 and CAT2 conduct issues the decision makers in whether a particular form of conduct is CAT1 and CAT2? This in itself is not such a manipulable power, however, do they also have the ability to decide whether a particular form of conduct is uncategorised and subject to the auto CAT3 provision? In light of what is stated above, and considering many of the managers under s40RQ will also be the direct managers of the investigated employees at an employment level, there is considerable room for the manager to aim the investigation in the direction s/he personally feels is 'best'.

8. Schedule 1 - Item 28 - Part V Div 2 s40SB
Arrangements for persons in custody to give information

The state prisons look after all Commonwealth detainees. Have the states been consulted in the application of s40SB?

9. Schedule 1 - Item 28 - Part V Div 2 s40SB
Commissioner may decide that AFP conduct issue should be dealt with under this Part

Once again, following the general theme of the operation of Part V, can the Commissioner exclude him or herself from conduct issues that are to be dealt with under Part V?

10. Schedule 1 - Item 28 - Part V Div 3 Subdiv A s40TA
Commissioner's orders about how AFP conduct or practice issues are dealt with

The inclusion of s40TA(2) & (3) is commended. It is hoped by the author that the AFP will adhere to these sections and keep the complainants informed of the progress and action taken in relation to the complaint. The author has experienced first hand that this has been a problem in the past.

11. Schedule 1 - Item 28 - Part V Div 3 Subdiv A s40TD
Remedial action

The remedial action taken under s40TD(2)(b), 'structured changes to the AFP appointee's employment', must be made subject to the applicable award, certified agreement or an Australian workplace agreement. Section 40TD(4) looks at s40TD(2)(b) in more detail and suggests options such as change shifts, restricting duties, re-assignment and transfer to another part of the AFP. Section 40TD(4)(d) could effectively allow a manager under s40TJ to transfer an AFP employee anywhere in Australia or overseas, resulting in a detrimental affect on the employee, his or her family and their financial situation. All of this could occur

without any form of internal or external review. Many of these actions override the AFP employee's rights that have been legitimised under the provisions of the WRA.

As outlined above, the new s69B(1)(b) of the AFP Act will exclude the application of the WRA to Part V. Also as stated above, the Commissioner has fully utilised (albeit erroneously) the application of s69B to restrict the fundamental rights that are available to AFP employees under their applicable certified agreements.

Another example; the Commissioner's delegate could transfer an AFP employee to another part of the AFP. A non-professional standards (i.e. management) related transfer would be made taking into account the certified agreement made between AFP and the AFP employee. Generally their salary, composite, and other terms and conditions would not be worse off in the new position. The WRA however has no application to transfers being made under s40TD(4)(d).

The AFPA has seen on occasion in the past what would be considered a management related transfer being effected between the AFP and AFP employee, however, the matter has then been 'professional-standardised' without any real substantiation in the finding to class the transfer as a discipline related transfer. As such, the composite of the employee is for example reduced from 45% down to 25% or even 3%. The reduction goes against everything set out in the certified agreements.

Once again, the issue arises as to the manipulability of the investigation to affect transfers and usurp a formal agreement made between the AFP and the AFP employee. This has occurred in the past and will unfortunately be made easier to do with the new amendments. With the process being made more efficient also comes a break down in the checks and balances of both internal and external scrutineers.

Certainly action needs to be taken against those that have substantiated claims brought against them from the professional standards investigation, however, the applicable certified agreement has been formalised by all parties, and under legislation must apply throughout the tenure of the AFP employee's employment. It should not be wrongly used as a tool to 'punish' AFP employees when many other remedial actions are available to the professional standards unit.

It is somewhat hypocritical to employ someone under a formalised contract, place them in a professional standards bubble, devoid of all application to the WRA, and when bubble is deflated, place them under different terms and conditions. If they are employable as an employee after the investigation, why should their terms and conditions be altered?

Recommendation:

Remedial action taken under s40TD must only be made subject to the applicable award, collective agreement or an Australian workplace agreement.

12. The drafters ignored a process for internal review of non-reviewable outcomes, and the non-reviewable outcomes have a punitive effect action against the employee.

The above point illustrates the possibility of the remedial action being taken having a punitive affect on the AFP employee. Non-reviewable actions in the Fisher Review were actions of a CAT1 nature and could be moved to the next level if an employee is aggrieved about the result.

Justice Fisher stated:

> *'If an employee is aggrieved about the result of a non-reviewable resolution[26] there should be a provision for an internal review and removal of the matter to the next level of seniority[27]'.*

The above recommendation has not been implemented, express or implied, into the Bill.

Justice Fisher conducted some comparative analysis and it should be pointed out that his recommendations are largely based on a conglomerate of the models he examined, all of which differentiated between reviewable matters and non-reviewable matters.

The NSW Police model defines reviewable actions as having a punitive aspect as they may affect the position of the officer in respect to rank, grade, seniority and deferral of a salary increment. Additionally the NSW Commissioner can order any other action (apart from dismissal or the imposition of a fine) that he or she considers appropriate. Dismissal is considered separately in relation to more serious matters and is also externally reviewable.

It should be noted that Justice Fisher acknowledged that:

> *'The New South Wales Police Service has been the subject of perhaps the most extensive judicial examination of any police service in Australia's history. This was conducted by the Honourable Mr. Justice Wood sitting as Royal Commissioner. …Central to the concept of reform, as proposed by the royal Commissioner, has been a shift away from the traditional disciplinary model to a model strongly favouring managerial solutions.[28]*

[26] A non reviewable action is a matter that can be resolved managerially. See recommendation 11 of the Fisher Review.
[27] Fisher Review, recommendation 12.
[28] Fisher Review page 28.

After reviewing all the models available, he goes on to say:

> *'…Essentially, the administrative model in New South Wales exemplifies the modern management systems which provides the tools to create better work environments. It is a leading light in Australia for the application of managerial resolutions in the police work environment…It is a system that recognizes policing is a unique occupation often requiring specific adjudication at close quarters taking into account knowledge of the workplace. However, the model also has adequate safeguards which provides for serious cases of misconduct to be managed appropriately by other means, including punitive measures, dismissal and the criminal law.*[29]

A comparison of the NSW Police Service Model and the current Bill show a glaring discrepancy. This is best demonstrated by the following table.

Our concerns are resolved if the descriptors used in the NSW Police Model are adopted in full in relation to Transfer and Change of Shift and that it is made clear that Part V is subject to regulation 24.

NSW Police Service Model	**Proposed AFP Model**
Class & Kind Agreement matters including:	**Re-educational outcomes** including:
• Coaching;	• Coaching;
• Reminder of duties and responsibilities;	• Personal Development;
• Counselling;	
• Mentoring;	• Mentoring;
• Training & development;	• Retraining & Development;
• Increased professional, administrative, or educational supervision;	• Increased supervision;
Non reviewable matters including:	***Behavioural improvement*** including:
• Counselling;	• Counselling;
• Reprimand;	• Reprimand;
• Warning;	• Warning;
• Retraining;	• retraining;
• Personal development;	• Improvement strategies;

[29] Fisher Review page 57.

• Performance enhancement agreements;	• Performance Agreements;
	Employment-Structured change including:
• Non-disciplinary transfer;	• Transfer;
• Change of shift (but only if the changes result in no financial loss and is imposed for a limited period and is subject to review);	• Change of Shift;
• Restricted duties;	• Restricted duties;
• Recording of adverse findings;	***Recording of Adverse findings;*** including: • A recorded adverse finding (prescribed limited term) • A recorded adverse finding (Permanent).

It should be noted that if this NSW provision was in place in relation to the 'change of shift section' and 'non-disciplinary transfer' in the table above, the example given above under point 11 would not have occurred within the AFP without review. It most likely would not have even occurred because the AFP would have been aware of the possibility of an independent external review.

13. Schedule 1 - Item 28 - Part V Div 3 Subdiv A s40TE
Termination action

If the Commissioner and Deputy Commissioner of the AFP are both appointed under s17 of the AFP Act by the Governor-General, and their respective appointments can be terminated by the Governor-General. Why then is the Commissioner not consider as a terminable AFP appointee in the s40TE Termination action table as the Deputy Commissioner is? What is the special quality possessed by the Commissioner that makes it impossible for him or her to commit a CAT1, CAT2 or even CAT3 conduct issue? And why is it that the Deputy Commissioner could possibly commit the conduct but the Commissioner cannot? The immortal element is unmistakable here.

The word 'standard' in professional standards suggests it is there because the standards are applicable to all AFP employees. Is it grammatically possible to have a standard with exceptions? Finally, one begs to ask the question why the Commissioner is not openly stating s/he is subject to the same professional standards as all other AFP employees, as many other modern government agency heads, politicians and corporation CEO's now do.

Schedule 1 - Item 28 - Part V Div 4
Ministerially directed inquiries – Minister may arrange special enquires

The AFPA commends Division 4 allowing the Minister to arrange an inquiry concerning the conduct of an AFP appointee, or any matter relating to the practices and procedures of the AFP or any other matter relating to the AFP.

Section 40UD(3) of Division 4 should also include that the Minister should give a copy of the report to Parliament. This would serve two purposes, one to create transparency of the inquiry, and two, to create transparency in relation to the impetus and reasoning for conducting the inquiry. That is, limit political motivation.

14. Schedule 1 - Item 28 - Part V Div 5 s40VB
Manner of Conducting investigation or inquiry

Section 40VB(1) states:

> *The investigation or inquiry is to be conducted, subject to this Division, in such manner as the investigator thinks fit.*

The power being afforded to the investigator under this section is incredibly broad. Some would say even broader than the Commissioner's command powers. Apart from the section being subject to Division 5 (not Part V or the AFP Act), the conduct of the inquiry is open-ended.

Subsection (1) is subject to the directions of the head of the unit[30], the Commissioner[31] and the Minister[32], but that is only *if* those people give directions as to the manner in which the investigation is to be conducted. That is, they *may* give such directions. Excluding any directions that may or may not be given, the investigator may still conduct the investigation in such manner as s/he thinks fit.

Recommendation:

The power to investigate should be subject to further checks and balances to increase the integrity of the process. The investigation should be done in such a particular manner, not in such a manner as the investigator thinks fit, subject to the Division and the mere possibility that some directions may be given. That is, there is not so much of a need to limit the power of the investigator; there is more of a need to specify the manner in which the investigator can use the power.

[30] Item 28 – Part V Div 5 s40VB(3).
[31] Item 28 – Part V Div 5 s40VB(5).
[32] Item 28 – Part V Div 5 s40VB(7).

Schedule 1 - Item 28 - Part V Div 5 40VC(1)
Obtaining information and making inquiries

Section 40VC(1) states:

> *For the purposes of investigation or inquiry, the investigator may obtain information from such persons, and make such inquires, as he or she thinks fit.*

As with s40VB the section is subject to the Division only, and as such the power set out in s40VC(1) is only subject to the Division and what may or may not be directed, and in the absence of such the investigator may operate as s/he thinks fit.

Recommendation:

The same recommendation applies to s40VC(1) as does with s40VB. The power to investigate should be more specific.

Likewise, the AFP appointee must be entitled to a defence of reasonable excuse in the event of unreasonable directions or inquiries.

15. Schedule 1 - Item 28 - Part V Div 5 40VF
Entering and searching AFP Premises

Subsection (1)(a) states:

> *For the purposes of investigating or inquiry, the investigator may enter, at any time, premises occupied by the Australian Federal Police.*

By general convention, the AFP will not enter the 'personal premises and property' of AFP employees belonging to the AFP, such as personal rooms at Barton College and AFP salary packaged vehicles, without a warrant. Such a convention should be enshrined in s40VF, in that searching may still be conducted, however when it impacts on the 'personal premises and property' of AFP employees, greater care will be taken in the form of a warrant.

16. Schedule 3 – Item 22 – Paragraph 69B(1)(b)

The AFPA is increasingly worried about the AFP's use of the professional standards process to blur the edges of what is a professional standards action and what is an employment or management related action. Item 22 allows the AFP to limit the operation of the WRA to action taken in relation to a professional standards matter. As mentioned above though, certain actions such as managerial decisions to transfer could become professional standards actions for the purpose of usurping the WRA.

For example, under the current certified agreement, if the AFP direct a transfer of an employee, because management is initiating the transfer, then the composite must remain the same even though the new position is a lesser composite. To get around this, a professional

standards investigation is initiated, low level it may be, and the outcome is nothing major but to transfer the employee based on the findings of the investigation, not on the initial management decision. The transfer is neatly taken outside the parameters of the certified agreement and the application of the WRA.

Simply put, the AFP will 'professional standardise' the employment action by bringing it within the protection of s69B(1)(b) and limit any option for review.

The AFPA recognises that internal investigations are unique and understand the object of s69B. We do not however believe there is a need for limiting the application of the WRA. It is the misuse of s69B that can take away many AFP employees' fundamental rights to the transparent review of what would normally be purely a management lead employment decision decision. Likewise, it can also take away the application of agreements certified under the WRA.

Recommendation:

Section 69B(1)(b) needs to repealed or re-worded to avoid all doubt of its application.

17. Schedule 3 – Item 24 (after)

Keeping inline with chronological review of the Bill, the AFPA believes there should be an Item inserted after Item 24 that brings the review mechanism under s70(l) (review of AFP employment decisions) into the AFP Act. That is, bring regulation 24 of the AFP Regs into the AFP Act.

A section for the **review of employment decisions** should be a new subdivision under 'Part III Division 2 – AFP Employees' of the AFP Act. Placing regulation 24 into the AFP Act would eliminate the possibility for misuse of s69B(1)(b) set out above. One must remember a major theme of the Fisher Review was to bring transparency to the discipline process. Section 69B(1)(b) actually serves to muddy the waters in the area of review of employments decisions – a counter-action to the purpose of the Bill. That is, s69B(1)(b) does actually serve to limit transparency, and thus increases the risk for misuse by allowing for employment decisions to made under the discipline rubric. A subdivision E under Division 2 of Part III of the AFP Act would provide a check and balance on the possibility of misuse of s69B(1)(b).

The ALRC commented on this point in 1996 stating:

> *'The law enforcement agency must have primary responsibility for the imposition of a penalty. This principle is generally agreed upon. However, there must be external review of this internal decision-making process to ensure effective accountability and transparency and to protect the rights of the officers to natural justice and fair hearing.'*[33]

[33] ALRC Report 1996 page 98.

The NSW Model has an external review mechanism for reviewable matters that can consider whether the Commissioner's decision was beyond power, harsh unreasonable, or unjust.[34] In cases of dismissal an appeal lies with the Industrial Relations Commission on the basis that it was harsh, unreasonable or unjust. This is now not the case for AFP employees due to the changes in the WRA.

Recommendation:

Due to the unique nature of policing, it is necessary for the AFP employees to have an independent review process established under a new subdivision E under Division 2 of Part III of the AFP Act which encompasses regulation 24, which can consider whether the Commissioner's decision was beyond power, harsh, unreasonable or unjust. Further, dismissal should also now be considered by the same body on the basis of an appeal that it was harsh, unreasonable or unjust.

18. Schedule 5 – Item 3 - s30A(1)(b)(i)

Resignation in anticipation of termination of employment

This section applies if the AFP employees conduct 'has been' investigated as an AFP conduct issue and either; the investigation has been completed and the Commissioner is considering a s28 termination on the basis of the findings of the investigation or the Commissioner is satisfied that the employees conduct (investigation or not) may amount to serious misconduct within the meaning of s40K.

'Has been' is a considerably onerous term as it does in effect place an AFP employee under s30A for the entire tenure of their employment to the AFP purely because they were the subject of a CAT3 investigation. That is, s30A applies irrespective of when they were under a CAT3 investigation and subsequently found unsubstantiated or currently under a CAT3 investigation and yet to even have a finding. Section 30A is the ultimate 'guilty and never to be proven innocent clause because s30A will always apply' clause.

S30A (and Part V) could apply as follows:

FA/Smith is investigated under Part V of the AFP Act; she has allegedly committed what would normally be recognised as a CAT1 conduct issue but unfortunately the conduct does not fit under a specific form of conduct because the Commissioner or Ombudsman have not yet categorised the conduct under s40RM; her conduct, under the new auto CAT3 provision (s40RM(2)) becomes CAT3 conduct; four months later her matter is found substantiated and she is required to undergo counselling by her manager in filling out a certain particular form that was not categorised. Despite her matter being obvious CAT1, it is pushed on to CAT3. Despite her conduct being unsubstantiated, it is caught up by 30A. FA/Smith now faces the possibility she will never be able to resign – never – from the AFP.

[34] *Police Service Act* 1990 s.174(1).

Recommendation:

Section 30A(1)(b)(i) must not include 'has been'. For the Commissioner to give a s30A 90 day order under s30A(2), the **conduct must be contemporaneous**. If the Commissioner is considering a s28 or s40K, then proceed with a Part V investigation to decide if there is any basis for a s30A order. Simply put, the basis for a s30A order must be contemporaneous conduct, not conduct that may, or may not have occurred 10 years in the past. Section 30A does not even require the 'has been' CAT3 conduct was substantiated.

19. Schedule 5 – Item 3 - s30A(3)

Section 30A(3), (4) and (5) must be omitted. Coupled with the possibilities above; the fact that Part V is not subject to the WRA; and the auto CAT3 provision, the Commissioner must not be able to repeat the s30A orders for a second or further period. The option for infinite s30A notices is draconian.

First, 90 days is an exceptionally long time to keep an unremunerated (suspension may be without remuneration under reg 5 of the AFP Regs) employee in a position of not being able to resign. Second, that position could be indefinitely extended without any investigation. And finally, the Commissioner and AFP professional standards investigators should quite easily be able to complete an investigation and finalise the position of the AFP employee within 90days.

A further point to note; decisions made under s30A(1)(c)(i) and (ii) would be decisions **taken in relation to** Part V and as such the WRA would not apply under s69B(1)(b), and decsions made under s30A(1)(c)(iii) are made under Division 2 to 8 of Part IV of the AFP Act (Commissioners command powers), and as such the WRA also does not apply under s69B(1)(a). Sections 28, 30 and 30A are all subject to the WRA, however in their application in the s30A environment, they may not be subject to the WRA because they are all 'action taken in relation to' matters covered under Divisions 2 to 8 of Part IV and Part V.

The AFP has in the past, and currently is, arguing along these lines. They have used s40H(2) and the WRA exclusion under s69B(1)(a) to exclude the WRA and the AIRC by manipulating the s40H(2) to include 'any action taken under' s40H(2).

The long and the short of this is that the AFP have quite openly in the past used the WRA exclusionary provisions under s69B to exclude the WRA, the AIRC, the certified agreements and the AFPA (and the CPSU) from matters that were purely employment and industrial, by bringing them within the Command powers and professional standards rubrics. The drafting of s30A must take s69B and AFP past practice into account. If it is left unchanged, AFP employees could be denied their fundamental rights set out under the WRA for matters that are not related to the discipline of AFP employees.

Details of the author

The author holds a B.Ec. and LL.B(Hons) from the University of Sydney and is admitted as a legal practitioner in the state of New South Wales and the Australian Capital Territory.

The author interacts first-hand with the AFP, including AFP employees within the professional standards team, and also AFP employees that are investigated by the team. As such, the author has a unique first-hand perspective on how the 'old system' has functioned, and as such where the 'new system' will fit in.

The author is also available to make comment, written or verbal, on any of the issues raised in the submission and associated issues, and can be contacted at the AFPA on +61 (0)2 6285 1677 or on email at ian.phillips@afpa.org.au.