SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE LAW ENFORCEMENT INTEGRITY COMMISSIONER BILL 2006; THE LAW ENFORCEMENT INTEGRITY COMMISSIONER (CONSEQUENTIAL AMENDMENTS) BILL2006 AND THE LAW ENFORCEMENT (AFP PROFESSIONAL STANDARDS AND RELATED MEASURES) BILL 2006
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 1

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Definitions (clauses 5-13) – 'serious corruption'

The NSW standard used for the Independent Commission Against Corruption (ICAC) is a more exhaustive standard for corruption where it is defined as either:

- One of a variety of conducts relating to the adverse or dishonest use of their official functions, or misusing information they have gained in the course of their official functions.
- One of a number of specific offences or groups of offences.

- Why was a more rigorous standard like the ICAC standard not used?

- Was this raised at any time in consultation over the Law Enforcement Integrity Commissioner Bill 2006? Give details.

- Shouldn't we be using a more rigorous standard such as the ICAC standard?

Please also see page 33 of the transcript.

The answer to the Committee's question is as follows:

It was decided that substantially the same definition of corruption should be used in the Law Enforcement Integrity Commissioner Bill as in existing Commonwealth legislation dealing with forfeiture of superannuation benefits by people convicted of corruption offences, namely the *Crimes (Superannuation Benefits) Act 1989* and Part VA of the *Australian Federal Police Act 1979* (the AFP Act). As 'downstream' consequences of a conclusion by the Integrity Commissioner that a person had engaged in corrupt conduct would potentially include conviction for a 'corruption offence' and forfeiture of superannuation benefits, it was considered important that the definitions at both stages should be consistent.

The decision was made at an early stage in the development of the proposal. Other interested Commonwealth agencies were made aware of the details of the proposal, including the proposed approach to the definition of corruption, in April 2005. The matter was not raised with the States and Territories before the circulation of the draft Law Enforcement Integrity Commissioner Bill in March 2006.

We do not see any clear advantage in adopting a complex definition of the sort used in the *Independent Commission Against Corruption Act 1988* (NSW) (the ICAC Act). It is not clear that it establishes a more rigorous standard. Despite detailed inclusions and exclusions, the breadth of

the definition largely depends on the four broad categories set out in subsection 8(1) of the ICAC Act.

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ATTORNEY-GENERAL'S DEPARTMENT

Question No. 2

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Definitions (clauses 5-13) – 'AFP staff member'

Per clause 10, the definition of an AFP staff member includes under paragraph 10(1)(h) a person who is a member of a State/Territory police force or employee of a government who is assisting the AFP under section 69D of the *Australian Federal Police Act 1979.*

- For instance, could this potentially include a NSW police officer stationed in Queanbeyan who is assisting the AFP community policing contingent? Or ACT community policing gaining assistance from the NSW police generally?
    - If so:
        - Does this mean that the police will be under the aegis of two separate corruption bodies?
        - Which one would take precedence in a corruption investigation? ACLEI or the local corruption body?
        - Does it also mean that they would be subject to the more expansive definition of corruption set out above than, say, the more specific ICAC definition?
    - If not, why wouldn't it?

- What about police who assist the AFP airport policing contingent, but who are not part of it, with investigations? Would they also count as an AFP staff member for the purposes of ACLEI?

- Exactly how far is the term 'assisting' expected to reach?

Please also see pages 32, 33-34 of the transcript.

The answer to the Committee's question is as follows:

Section 69D of the AFP Act indicates in its heading that it deals with 'secondments of persons to assist the Australian Federal Police'. The text of the section provides that the people concerned perform functions specified in a written agreement with the Commissioner subject to any terms and conditions specified in the agreement. State or Territory police who provide occasional assistance to the AFP (whether in connection with the ACT policing function, the airport policing function or any other function of the AFP) in the course of their normal duties do not fall within this description. The key issue is not the meaning of 'assist' but the contractual context in which assistance is provided. The remaining elements of this question therefore do not arise.

The sorts of issue envisaged by this question may, however, arise where a State or Territory police officer is acting in the capacity of a special member of the AFP. Should a corruption issue arise in this type of situation, both ACLEI and State authorities would have jurisdiction. As discussed in the hearing on 27 March, the way in which the two authorities operated in relation to such a matter would be determined case by case in light of the particular circumstances.

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Question No. 3

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

At page 34 of the transcript.

Senator LUDWIG—In terms of then conducting own motion investigations, the way the legislation is drafted seems to suggest that they are limited by the act and regs, which means that the regs could limit the ability of the commissioner to launch own motion investigations. We obviously have not seen the regs yet, but both the act and the regs limit it. So the potential is there for the own motion investigations to be curtailed by the regulations.

Mr Manning—That is certainly not our intention.

Mr Harris—We will take that on notice. That is certainly not the intention of the bill, so we will take a closer look at that.

Senator LUDWIG—The way it has been worded seems strange, which means it can potentially be a fetter. I understand that the purpose is to allow the commissioner to have a true own motion investigation without fetter.

Mr Harris—Absolutely.

The Integrity Commissioner (clauses 14-16)

- Is it correct that the Integrity Commissioner is not able to conduct an own-motion investigation into corruption outside of those permitted in the bill or regulations?

- Why wasn't the Integrity Commissioner given these functions?

- Was this considered? If so, why was it eventually not decided to proceed with those functions?

- What methods are there for the Integrity Commissioner to conduct investigations into agencies not specifically listed in the regulations?
  - If there are none, why not?
  - Was this considered during the drafting of the Law Enforcement Integrity Commissioner Bill 2006? If so, in what context, and why was it ultimately rejected?

Please also see page 32 of the transcript.

The answer to the Committee's question is as follows:

Under the Bill the Integrity Commissioner is only authorised to conduct an own motion investigation into an issue relating to corruption in the AFP, the ACC, or another agency that has a law enforcement function and is prescribed by the regulations as a law enforcement agency. These are the same agencies for which issues may be referred, or made the subject of complaints, to the Integrity Commissioner for investigation under the Bill.

The Government decided, as a matter of policy, that the jurisdiction of the Integrity Commissioner to investigate issues relating to corruption should be limited to the AFP and the ACC, with the option for the jurisdiction to be extended to other Australian Government agencies with law enforcement functions after due consideration by the Government. For this reason the Bill makes no provision for the Integrity Commissioner to conduct investigations into other agencies, whether on the Integrity Commissioner's own motion or on any other basis.

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Question No. 4

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Dealing with corruption issues (clauses 18-25) – process of referral of corruption issues to the commissioner

- Is it correct that the Integrity Commissioner has the power to conduct an investigation into a secondee even while the secondee is under investigation from, or has been investigated by, a corruption body in their home state, although they have the discretion not to do so?
  - Why is this? Why was it decided to adopt this approach?

- Does this essentially mean that the Integrity Commissioner can conduct a parallel investigation alongside a pre-existing investigation?

- Is this an appropriate arrangement? What circumstances are envisaged in which the Integrity Commissioner would run a parallel investigation alongside a State body?

Please also see pages 10-11 and 32-33 of the transcript.

The answer to the Committee's question is as follows:

A fundamental principle underlying this Bill is that the Integrity Commissioner should, in the last resort, have the power to investigate independently any corruption issue that arises within an agency over which the Integrity Commissioner has jurisdiction. One implication of this principle is that the Integrity Commissioner has the power to conduct an investigation of the conduct of a secondee before, after, or at the same time as, a corruption body in the secondee's home State or Territory. However, in the normal course of ACLEI's operations the Integrity Commissioner would not conduct parallel investigations.

It is envisaged that the Integrity Commissioner would, as far as possible, cooperate and exchange relevant information with other agencies with jurisdiction over a corruption issue, adopting the approach that seemed sensible in the circumstances of each case. To this end, the Integrity Commissioner has the discretion to conduct a joint or cooperative investigation or, in an appropriate case, to leave the investigation to another agency. This arrangement is designed to give the Integrity Commissioner flexibility without attempting to legislate in detail for every possibility in advance.

The question of conducting a parallel investigation might arise, for example, in a case where the other agency was unwilling or unable to provide information on its investigation or the Integrity Commissioner had reason to believe that the other agency would not conduct an adequate investigation.

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Question No. 5

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

How the Integrity Commissioner deals with corruption issues (clauses 26-42)

Regarding clause 27 of the Law Enforcement Integrity Commissioner Bill 2006 – it mentions the 'rights' of agencies in the context of 'rights' of a home agency to investigate corruption allegations.

- Are you able to indicate exactly what is meant by 'rights'? Are these quantifiable in any way?
    - Are these sorts of 'rights' reflected in other legislation? If so, which ones?

- What sorts of circumstances would the Integrity Commissioner take into account when looking at the 'rights' of the agency?

Regarding the provisions in the same clause (clause 27) allowing for the Commissioner to have regard for the resources involved in an investigation:

- At what stage would it become infeasible for an investigation to take place due to resource allocation issues?

- What sorts of investigations are envisaged as falling under this section?

- Doesn't this mean that complex cases requiring an intensive amount of resources could be passed over?

Please also see page 25 of the transcript.

The answer to the Committee's question is as follows:

The term 'rights', as used in paragraphs 27(2)(a) and 29(9)(a), is intended to refer to the powers and functions conferred on an agency by applicable laws that would enable the agency to investigate a matter that raises a corruption issue. The applicable laws would include the laws of a State or Territory establishing the disciplinary, performance management, or internal investigation functions of a police service or conferring investigative powers or functions on an integrity agency in relation to a police service.

When looking at the rights of an agency the Integrity Commissioner would consider whether, under applicable legislation, the agency would have the functions and powers necessary to investigate the facts of a particular corruption issue. This would be a threshold consideration, but other considerations, including those listed in subclauses 27(2) and 29(9) would then need to be taken

into account, for example whether the agency had a discretion not to investigate and the priority it would give to the matter.

The purpose of the reference in paragraphs 27(2)(d) and 29(9)(c) to resources is to make it clear that the Integrity Commissioner is not expected to decide on a course of action without taking account of the likelihood of each agency being able to conduct or participate in an adequate investigation within a reasonable time. Clause 27 applies to all investigations of corruption issues. Subclauses 29(8) and (9) apply to all investigations of corruption issues involving secondees.

It is not possible to define in advance whether an investigation would not be feasible due to resource allocation issues.

The overall range of factors listed should ensure that, within the available resources, the Integrity Commissioner effectively investigates the most significant matters and, so far as possible, refers other matters to an agency which is in a position to investigate them effectively. The Integrity Commissioner is required to give priority to serious and systemic corruption.

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Question No. 6

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Reporting regime

Regarding clause 67 which provides that the Integrity Commissioner, where unsatisfied with the response of the head of the agency, 'may refer material' to the Minister, and where the Integrity Commissioner does this, he or she 'may' also send a copy to the Speaker of the House of Representatives and the President of the Senate for presentation:

- Does the fact that the standard is only 'may refer material' mean that the Commissioner is not required to forward the material?

- Why is the standard only 'may'? Why was it decided not to make it compulsory to refer that material?

- Given the seriousness of an unsatisfactory agency response to a corruption issue, wouldn't it be best to make the referral mandatory?

No transcript reference.

The answer to the Committee's question is as follows:

The provision that the Integrity Commissioner 'may refer' material to a Minister or the Parliament does not require the Integrity Commissioner to take this step. If this course of action were made compulsory it would elevate every disagreement between the Integrity Commissioner and an agency head to the highest level before the parties had an opportunity to discuss their differing views. Premature publication of positions could exacerbate some disputes rather than facilitate their satisfactory resolution. In many cases an unsatisfactory agency response will represent a disagreement about means rather than ends and will not necessarily be so serious as to merit onward referral. It is preferable to give the Integrity Commissioner the option to judge from the circumstances of each particular case how serious the disagreement is and which course of action is likely to bring about the most satisfactory outcome.

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Question No. 7

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Part 13 (clauses 175-211) – Administrative provisions

- Under clause 203, is it correct that a non-public inquiry that does not contain sensitive material is not forwarded to Parliament?
    - Why not? If there is a lack of sensitive material, why shouldn't the outcomes of all public inquiries be forwarded to the Parliament?

- What is the rationale behind the non-reporting of non-public inquiries?
    - Was this investigated at all and, if so, why was it not proceeded with?

Please also see page 36 of the transcript.

The answer to the Committee's question is as follows:

Under clause 203 a report is to be provided to Parliament on all public inquiries and all investigations that involved public hearings. In other words, subject to the excision of sensitive material, outcomes of all public inquiries will be forwarded to Parliament.

If an investigation has been conducted without public hearings, there is no obligation on the Minister to table a report in Parliament, but the Minister may do so. The Bill provides for investigations to be conducted either in public or in private in accordance with judgments as to the balance of public interest, and makes consequential provision about publication of reports, in order to meet two competing objectives. On the one hand, it has been widely observed that public exposure may be an important means of discouraging corruption, particularly where there are systemic problems. On the other hand, there may be valid reasons why a matter should not be made public. For example, effective investigation and prosecution may in some circumstances require that a matter receives minimal publicity until the matter is brought before a court. Part of the function of the Integrity Commissioner and the Minister, at their respective stages of the process, will be to judge which approach is more appropriate in each case.

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Question No. 8

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

Part 14 (clauses 212-218) – Parliamentary Joint Committee on the Australian Commissioner for Law Enforcement Integrity

- Why was it deemed appropriate to set up a new parliamentary joint oversight body for Australian Commissioner for Law Enforcement Integrity (ACLEI)?

- Given that the Parliamentary Joint Committee on the Australian Crime Commission (ACC) already has oversight roles of the ACC, why wouldn't this be extended to ACLEI?
    - Isn't there potential for doubling up oversight powers by doing this (for example, if the ACLEI reports on an ACC matter – which committee is relevant)?

Please also see pages 36-37 of the transcript.

The answer to the Committee's question is as follows:

It was considered appropriate to set up a new Parliamentary Joint Committee to oversee ACLEI because it is consistent with previous practice to establish such a specialised committee to oversee an agency which exercises special coercive powers. It was not considered appropriate to give this task to the existing Parliamentary Joint Committee on the ACC (PJC-ACC) because, while it will have similar powers, ACLEI has a different function from the ACC and will deal with agencies that are not subject to oversight by the PJC-ACC. At the outset the ACC will account for just over 10% of the total number of people within the Integrity Commissioner's jurisdiction.

The fact that some reports produced by the Integrity Commissioner would be of interest to the PJC-ACC does not mean that there would be a significant degree of duplication in the role of the two Committees. Consideration of reports by the Integrity Commissioner about corruption issues arising within the ACC, including such matters as the impact of any corrupt conduct on the performance of the functions of the ACC and the corrective measures adopted by the ACC, would clearly fall within the duties of the Committee under section 55 of the ACC Act. However, this is a separate matter from overseeing the performance by the Integrity Commissioner and ACLEI of their function of investigating possible corruption in the ACC and other law enforcement agencies. The two Committees should not have difficulty in dealing case by case with the limited degree of overlap in roles that will arise from the Integrity Commissioner's jurisdiction over the ACC.

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Question No. 9

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner Bill 2006

- The grounds on which the Attorney-General can issue a certificate not to disclose information under clause 149 are very open ended. Can the Department explain why clause 149 is so broad and does it mean the A-G could stymie a corruption investigation?
    - Should the Attorney-General have to provide more detailed reasons?

No transcript reference.

The answer to the Committee's question is as follows:

The purpose of clause 149 is to enable the Attorney-General, as First Law Officer, to determine whether the disclosure of certain types of matter would be contrary to the public interest and, if so, to issue a certificate prohibiting such disclosure. Similar schemes already exist in other contexts where a statutory investigator has power to require provision of official information and documents, for example, section 70 of the *Privacy Act 1988* and subsection 9(3) of the *Ombudsman Act 1976*. The list of grounds on which the Attorney-General can issue a certificate under the Bill is substantially the same as the list in the Privacy Act, although it is wider than the list in the Ombudsman Act. The inclusion of law enforcement related grounds in clause 149 is appropriate, because these are matters on which the Integrity Commissioner is likely to seek information and there is a significant risk that inappropriate disclosure of such matters could do serious damage to current operations or to Australian Government law enforcement more generally.

Unlike the schemes in the Privacy and Ombudsman Acts, the scheme set out in the Bill is not designed to preclude the Integrity Commissioner from accessing relevant information wherever there is a public interest in the information not being generally disclosed. It would allow for a certificate to declare, for example, that particular information may be given to the Integrity Commissioner but that it would be against the public interest for the Integrity Commissioner to make that information available to the public or to another agency.

It is possible that the issue of a certificate under clause 149 by the Attorney-General could prevent the Integrity Commissioner from effectively investigating a particular corruption issue but the Attorney could only issue the certificate if there was a genuine public interest in not disclosing the information to the Integrity Commissioner.

An obligation for the Attorney to provide more detailed reasons for the issue of a certificate would tend to nullify the utility of the scheme by requiring disclosure of matters which might reveal some of the information the certificate was intended to keep out of the public domain. Neither the Privacy Act nor the Ombudsman Act makes provision for the Attorney to give reasons when issuing a certificate under the equivalent provisions of those Acts.

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Question No. 10

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006

Consequential Amendments – *Ombudsman Act 1976*

As per item 42 that amends the *Ombudsman Act 1976* to allow that, when the Ombudsman becomes aware of a corruption issue, it 'may' refer that issue to ACLEI:

- Why is the standard only 'may'?

- Shouldn't the Ombudsman notify ACLEI as a matter of course if it becomes aware of corruption issues?

- What is the rationale for only allowing that they 'may' do so?

No transcript reference.

The answer to the Committee's question is as follows:

We have sought to maintain a relationship of parity between the Integrity Commissioner and the Ombudsman, so as to ensure the demonstrable independence of the Ombudsman's review and monitoring role in relation to the Integrity Commissioner and ACLEI. Accordingly, so far as possible, we have followed the model already established in section 6 of the Ombudsman Act for referral of matters to other specialised review agencies. That model gives the Ombudsman a discretion to refer matters rather than imposing an obligation.

An obligation for the Ombudsman to notify all corruption issues arising from complaints received would also tend to duplicate the obligation of law enforcement agency heads to notify the Integrity Commissioner of such issues, as it is likely that the Ombudsman would redirect many of these complaints to the law enforcement agency concerned under subsection 6(1A) of the Ombudsman Act.

Under proposed subsection 6(17), matters that raise a significant corruption issue in relation to a law enforcement agency must be referred to the Integrity Commissioner, because it is part of the scheme of the LEIC Bill that the Integrity Commissioner must either investigate such issues or refer them to a law enforcement agency for investigation.

We envisage that, in practice, arrangements would be made by agreement between the Integrity Commissioner, the Ombudsman and law enforcement agencies to ensure the correct identification and appropriate referral of corruption issues.

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Question No. 11

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006

Consequential Amendments – *Australian Federal Police Act 1979*

This consequential amendment may not properly include the Law Enforcement Integrity Commissioner Bill 2006 (LEIC bill) into the *Australian Federal Police Act 1979* (AFP Act).

The amendment replaces subsection 60A(2) of the AFP Act to include an additional rule for those communicating secret information under the LEIC bill. It expands the section so that persons named in subsection 60A(1) of that Act now cannot divulge information except for the purposes under the *Witness Protection Act 1994* and now the LEIC bill.

However, there is a subsequent subsection, 60A(2B) of the AFPA Act, which provides an exception in certain circumstances. The Commissioner may authorise one of the persons to whom that section applies to divulge prescribed information related to the Witness Protection Program if they are of the opinion that it is in the due administration of justice to do so.

However, the consequential amendments do not update subsection 60A(2B) to allow a similar provision for ACLEI.

- Why wasn't that subsection extended to include the LEIC Act?
- If not, why not?

No transcript reference.

The answer to the Committee's question is as follows:

Section 60 A of the AFP Act is a general secrecy provision governing the recording and disclosure of information by AFP staff members. Subsection 60A(2) provides that an AFP staff member must not record or disclose 'prescribed information' except for the purposes of, or for the performance of duties, functions and powers under, specified legislation (namely the AFP Act, the *Witness Protection Act 1994*, the Law Enforcement Integrity Commissioner Bill when enacted, and regulations under any of these). Subsection 60A(3) defines 'prescribed information' as information obtained by an AFP staff member in the course of performing a duty, function or power, or otherwise in the course of the person's employment, under any of that legislation.

There are two special cases in which the AFP Commissioner may authorise disclosure of prescribed information that could not be disclosed under subsection 60A(2). The case here in question (subsection 60A(2B)) concerns disclosure of prescribed information that relates to the National

Witness Protection Program (NWPP). Disclosure of such information may be authorised if it is in the interests of the due administration of justice to do so.

There is a need for this special power to authorise disclosure because the Witness Protection Act imposes special restrictions on the disclosure of information that relates to the NWPP. In general it would be part of the duty of an AFP staff member under the AFP Act to disclose information where it is in the interests of the administration of justice to do so. In the case of information that relates to the NWPP, the special restrictions in the Witness Protection Act override that duty. The purpose of subsection 60A(2B) is to permit the disclosure in the interests of the administration of justice of information that otherwise could not be disclosed because of the special restrictions imposed by the Witness Protection Act. The Explanatory Memorandum for the Witness Protection Act indicated that appropriate examples would be cases where the information was relevant to the investigation by the Ombudsman of a complaint against the AFP or the investigation by a State or Territory police officer of a serious crime such as murder.

There is no need for a corresponding power for the AFP Commissioner to authorise disclosure of information that AFP staff members have acquired under the Law Enforcement Integrity Commissioner (LEIC) legislation. The LEIC Bill does not impose special restrictions of the sort imposed by the Witness Protection Act, so the normal right of an AFP staff member under the AFP Act to disclose information in the interests of the administration of justice would not be overridden by the Bill in the same broad way.

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Question No. 12

The Committee asked the following question on 1 May 2006:

Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006

Consequential Amendments (see item 86) – *Telecommunications (Interception) Act 1979*

- Do these amendments take into account the recent update of the *Telecommunications (Interception) Act 1979* (TI Act)?

- Item 86 adds in new 'class 2' offences, but the notion of 'class 2' offences were repealed under the recent amendments to the TI Act. Does this need to be re-drafted to bring it up to date?

- Is it correct that item 86 adds in a range of new offences that now fall under the operation of the TI Act?

- Is it correct that these new offences apply to all law enforcement agencies and not just ACLEI?

- So, what is the rationale for this major extension of the TI Act, especially given it will apply to all agencies – not just ACLEI?

Please also see pages 30-31 of the transcript.

The answer to the Committee's question is as follows:

The amendments take account of the changes proposed in the Telecommunications (Interception) Amendment Bill 2006 recently passed by Parliament. However, as that Bill has not yet commenced, the LEIC (Consequential Amendments) Bill includes amendments to both the current and the amended versions of the *Telecommunications (Interception) Act 1979*, with commencement provisions to ensure that the amendments to the current version will only come into effect if the LEIC Bills receive Royal Assent and commence before the TI Amendment Bill. Accordingly, item 86 does not need to be redrafted, as it and item 87 are alternatives.

It is correct that items 86 and 87 add a range of Commonwealth corruption offences to the class of offences that fall under the operation of the TI Act. This extension affects all agencies and not just ACLEI, although it will have limited relevance to State law enforcement agencies. The reason for this is that, if the power to use telecommunications interception to investigate serious Commonwealth corruption is to be granted to an external agency, there is no basis for refusing to allow the law enforcement agencies to use the same investigative tool. This extended law enforcement power will also put the AFP in a stronger position to deal with corruption in non law enforcement agencies.

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Question No. 13

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Making a complaint

- How will complaints against AFP local police contingents in external territories be handled? For example: if there are two officers posted to an external territory, what avenues are open for a junior officer to make a complaint against a more senior officer?
    - Are there any special processes or procedures for the junior officer to make a complaint directly to AFP headquarters?

Please also see page 32 of the transcript.

The answer to the Committee's question is as follows:

The AFP Professional Standard framework proposed in the Bill will apply to all AFP sworn members deployed in external territories, as the current framework does.

The AFP is currently re-drafting the internal guidelines on the professional standards framework to accommodate the proposals in the Bill. It is envisaged that the junior AFP appointee in this example has a number of avenues available to make a complaint pursuant to the proposed legislative requirements. Proposed section 40SA articulates how a person may provide information. The AFP appointee may record their own complaint directly via proposed section 40SC or give the information to another AFP appointee to record the complaint. The options available to the junior AFP appointee are proposed to be:

- To give the information to another AFP appointee outside of the work area, which may include giving the information directly to Professional Standards;
- To record the information directly pursuant to proposed section 40SC (The AFP will be implementing an online Web based complaint recording system available to all AFP appointees to record and manage complaints. This includes the ability to self report breaches of professional standards.); and
- To give the information to a member of the AFP's Confidante program, who will act as a support person for the affected AFP appointee and assist throughout resolution of the matter.

The processes which will be implemented by the AFP in these circumstances will generally ensure that the complaint is managed externally to a small or isolated post. Additionally, proposed section 40YA provides protection to an AFP appointee by creating an offence of victimisation. The Bill and AFP process will allow for the complaint to be made in circumstances that will not directly involve making the complaint through the more senior member.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE LAW ENFORCEMENT INTEGRITY COMMISSIONER BILL 2006; THE LAW ENFORCEMENT INTEGRITY COMMISSIONER (CONSEQUENTIAL AMENDMENTS) BILL2006 AND THE LAW ENFORCEMENT (AFP PROFESSIONAL STANDARDS AND RELATED MEASURES) BILL 2006
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 14

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

- How will complaints against AFP officers deployed overseas be handled?

No transcript reference.

The answer to the Committee's question is as follows:

The AFP Professional Standards framework proposed in the Bill will apply to all AFP appointees deployed overseas as the current framework does.

The Bill allows for information to be given pursuant to proposed section 40SA and recorded pursuant to proposed section 40SC. The majority of AFP appointees deployed overseas will have access to AFPNet, which will enable access to the web based Complaints Recording and Management System (CRAMS). The ability of an AFP appointee serving overseas to make a complaint will follow the procedures as outlined in the answer to Question 13. If an AFP appointee serving overseas receives a complaint in relation to another AFP appointee serving in the post, that appointee is required to record the information and should do so via CRAMS.

The AFP proposes to implement 'Complaint Management Teams' (CMT) in each Functional Stream and major regional office. A CMT will be established as part of the International functional stream and will be based in the AFP Headquarters. The international CMT will be comprised of middle managers who will be authorised to act as managers pursuant to proposed section 40RQ for managing category 1 and 2 conduct issues. Category 3 and corrupt conduct issues will be referred (via CRAMS) to the head of Professional Standards who will allocate the issue for investigation pursuant to sections 40TN and 40TP.

As each complaint has differing circumstances and considerations, the Commissioner, pursuant to proposed section 40TA, will issue guidance on how conduct issues under the proposed Part V the AFP Act will be dealt with. Accordingly, it is envisaged that each CMT for category 1 and 2 matters, and the head of the Professional Standards unit for category 3 and corruption matters, will have to consider the circumstances of each complaint to determine how it will be appropriately investigated.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE LAW ENFORCEMENT INTEGRITY COMMISSIONER BILL 2006; THE LAW ENFORCEMENT INTEGRITY COMMISSIONER (CONSEQUENTIAL AMENDMENTS) BILL2006 AND THE LAW ENFORCEMENT (AFP PROFESSIONAL STANDARDS AND RELATED MEASURES) BILL 2006
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 15

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Recommendations of previous reports

- For each recommendation made in the reports listed below, indicate whether the recommendation is met by the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006. If not, why not?
    - ALRC Report No. 82 (1996) – *Integrity: but not by trust alone. AFP and NCA complaints and disciplinary systems*.
    - Harrison Inquiry (1997)
    - Senate Legal and Constitutional References Committee (2001) – *Order in the Law: Report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and National Crime Authority*.
    - Fisher Report (2003) – *A Review of Professional Standards in the Australian Federal Police*

At pages 36-37 of the transcript the recommendations of the Fisher Review were discussed.

Senator LUDWIG—In terms of Fisher, which recommendations did you not adopt?

CHAIR—Sorry, we are now moving to—

Senator LUDWIG—I wanted to stay with ACLEI.

CHAIR—That is fine.

Senator LUDWIG—I was going to put some of these questions on notice.

CHAIR—I understand that we will put some more questions in relation to ACLEI matters on notice. I dealt with most of the questions that I had through the submissions that we received. We do want to talk about the professional standards bill and we will move on to that now. I am not sure to whom you were directing your question.

Senator LUDWIG—I suspect to the Attorney-General's Department. Which recommendations have been adopted and which ones have not been brought forward?

Mr Manning—We have pretty much adopted all of them. I would have to take on notice a detailed answer to that question and we could provide you with some sort of a table illustrating what we have and have not adopted.

Senator LUDWIG—That would be helpful. One that comes to mind is that the police association raised the issue of what happens after a decision is made to terminate. There is no third party, such as the AIRC, to hear a matter even if you have more than 100 employees, so you do not have that ability.

Mr Harris—Again, I will have to take on notice which recommendations were not adopted, and particularly this question—

Senator LUDWIG—I will put it more broadly—

CHAIR—Certainly, take that on notice, but that is quite a specific question. Take the general question on notice, but that specific question is in relation to a mechanism for review after a termination decision has been made, and I would expect that the department—or, in fact, the commissioner or Federal Agent Scott—could make a response to that.

The answer to the Committee's question is as follows:

The Government's decision to implement the Fisher Review did not entail a detailed consideration of the previous reports listed in the question or a decision to implement any of the recommendations of those reports. Accordingly, the following comments in relation to these other reports merely note the extent to which the recommendations are implemented in effect by the Bill, but cannot give reasons why other recommendations are not to be so implenmented.

ALRC Report No 82

This report made 163 recommendations. Of those that specifically relate to the AFP discipline and complaints system, recommendations 80, 82, 96, 99, 100, 104, 105 and 110 appear to be substantially implemented by this Bill. Some of the recommendations have been overtaken by other developments over the past decade, such as changes in AFP employment arrangements.

Many other recommendations are integral to the National Integrity and Investigations Commission (NIIC) proposal which was at the core of the Report's recommendations and they could not be implemented in their proposed form outside of that proposal. Some of these are reflected to a degree in the Law Enforcement Integrity Commissioner Bills but there is no question of those Bills purporting to implement the NIIC proposal, so it would be misleading to suggest that any have been implemented in those Bills.

Harrison Inquiry

For operational and privacy reasons, the Government did not release the report of this inquiry. Instead, the Attorney-General made certain findings public in May 1997. The bulk of these findings concerned the particular allegations of corruption that Mr Harrison had investigated and are therefore not relevant here. The only relevant recommendation was that the external review of allegations of police misconduct or corruption in relation to the AFP remain with the Ombudsman and that the Ombudsman's powers be enhanced.

The Bill implements that recommendation to the extent that it retains the role of the Ombudsman as external reviewer of AFP misconduct other than corruption and that it enhances the power of the Ombudsman by freeing the Ombudsman from the obligation to devote a disproportionate level of resources to formal review of minor matters. The companion bills depart from this recommendation by establishing ACLEI and the Integrity Commissioner as a separate body with enhanced powers to deal with corruption in the AFP and other Commonwealth law enforcement agencies.

Senate Legal & Constitutional Committee Report 'Order in the Law'

The Committee made four broad recommendations. Recommendation 1, the only one relevant to the Bill, was 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'. This recommendation was one factor which led to the Commissioner establishing the review of the AFP's professional

standards framework by Justice Fisher. Through its implementation of the Fisher recommendations the Bill implements this recommendation.

Fisher Report

Details of the implementation of each recommendation are set out at **Attachment A**. The Bill implements recommendations 1, 2, 4, 5, 6, 8, 10, 11, 13, 14, 18, 19, 20, 21 and 22. It implements recommendations 7, 9 and 15 with some variation. (The main variation is that managers dealing with category 1 and 2 matters will not have the full range of investigative powers available for a category 3 matter.) Recommendations 3 and 17 will be implemented by administrative action. Recommendations 12, 16 and 23 will be implemented in part by the Bill and in part by administrative action.

COMPARISON TABLE:

RECOMMENDATIONS OF THE REVIEW OF PROFESSIONAL STANDARDS IN THE AUSTRALIAN FEDERAL POLICE (THE FISHER REVIEW)

AND

THE LAW ENFORCEMENT (AFP PROFESSIONAL STANDARDS AND RELATED MEASURES) BILL 2006

FISHER REVIEW RECOMMENDATIONS	IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?
General Principles Recommendation 1 1.1 The principles of the managerial model or administrative approach to professional standards should be adopted by the AFP. 1.2 Emphasis should be placed on a less legalistic and less formal approach to professional standards in the AFP with increased emphasis on a 'knowledge administration'. There should be greater emphasis on the management of performance and a desire to effect a change in poor behaviour. 1.3 The Review confirms that managerial resolutions are currently available for the majority of professional standards matters in the AFP. However, legislative amendment is required to implement a full managerial model or administrative approach to professional standards in the AFP.	Yes. The Bill provides, at **proposed sections 40TG to 40TK** for category 1 and category 2 conduct issues to be addressed by local managers, involving the relevant AFP appointee in the resolution process as much as possible. Managers are authorised, under **proposed sections 40TI and 40TJ** to use training and development action or remedial action to address performance deficiencies identified. These are non-punitive measures aimed at fostering improved performance. Formal investigative powers are not provided for this level of conduct issue.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Repeal of Current Provisions <u>Recommendation 2</u> 2.1 The AFP Discipline Regulations should be repealed.	Yes. The authority in section 70 for making regulations about disciplinary matters will be replaced with authority to make regulations about compliance with professional standards. The provisions of the Australian Federal Police (Discipline) Regulations that establish disciplinary offences, and the penalties for those offences, will be repealed. Some parts that relate to professional conduct and employee management, including alcohol and drug testing and suspension of employees, will need to be modernised, and any deficiencies addressed. It is proposed that these revised provisions be incorporated in the *Australian Federal Police Regulations 1979* (the AFP Regulations). Any necessary consequential changes to the AFP Regulations would be made at the same time.
<u>Recommendation 3</u> 3.1 Commissioner's Order 5 and 6 should be repealed. 3.2 A new Commissioner's Order should be issued to underpin the proposed new model of complaints management for the AFP.	Not expressly addressed in the Bill, but the focus on conduct issues, rather than complaints, will allow all issues concerning conduct of AFP appointees to be dealt with under the same regime. The repeal and issue of Commissioner's orders is a matter for the Commissioner, but the Commissioner is expected to implement this recommendation when the new legislative framework is in place.
<u>Recommendation 4</u> 4.1 The present Complaints Act should be repealed. It follows that the Federal Police Discipline Tribunal should be abolished.	Yes. 4.1 **Item 1 of Schedule 2 of the Bill** repeals the *Complaints (Australian Federal Police) Act 1981* in its entirety, including the provisions that establish the Federal Police Discipline Tribunal.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
<u>Recommendation 5</u> 5.1 A new Division of the AFP Act should be created which specifically deals with complaints about the conduct of an AFP employee. 5.2 Complaints under the new Division of the AFP Act should be made in the same manner as they are at present; that is either directly to the AFP or the Commonwealth Ombudsman.	Yes. 5.1 **Item 28 of Schedule 1 of the Bill** inserts 'Part V – Professional standards and AFP conduct and practices issues' into the *Australian Federal Police Act 1979.* 5.2 **Proposed section 40SA** provides that a person may give information that raises an AFP conduct or practices issue to the Commissioner or any AFP appointee. Complaints will be able to be made to the Ombudsman 5.2 **Proposed subsection 40SA(5)** makes provision for the Ombudsman to refer information under subsection 6 (21) of the *Ombudsman Act 1976.* The person that gave the information under the Ombudsman Act is then deemed to have given the commissioner information under this section that raises an AFP conduct or practices issue. The person is then able to become a complainant for the purposes of the Bill. The Ombudsman will be able to receive complaints about action taken by the AFP as it can about any other agency under section 7 of the *Ombudsman Act 1976.*

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Recommendation 6 6.1 The 'conduct' to which the new Division of the AFP Act applies should be clearly defined. The new definition should be drawn from what currently appears in section 5 of Commissioner's Order 2; that is the conduct complained of must have a bearing on either: a. Commissioner's Orders; b. AFP National Guidelines; c. the applicable provisions of any law; d. standards of performance which may, from time to time, be set by a supervisor of an AFP employee or special member, with respect to the performance of duties or functions by the AFP employee or special member; and e. any applicable policy of the Commonwealth.	Yes. 6.1 **Proposed section 40RH** defines an AFP conduct issue to be conduct that breaches the AFP professional standards, or corrupt conduct. **Proposed section 40RC** provides that the Commissioner may issue Commissioner's orders under section 38 of the *Australian Federal Police Act 1979* determining the professional standards to be complied with by AFP appointees.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Recommendation 7 7.1 The new Division of the AFP Act should not apply to conduct engaged in by an AFP employee that is lawful and private. 7.2 The new system should protect AFP employees from complaints that are grounded only on the fact of their employment but have no bearing at all on their duties with the AFP. 7.3 A category of 'Lawful and Reasonable, Off-Duty or Private Conduct', similar to that adopted in Queensland, should be introduced for the AFP. 7.4 This definition captures the possibility that lawful off duty or private conduct may be unreasonable which would then attract the application of the complaints regime. In a case such as this the lawful conduct might impact on the integrity of the employee which has an obvious connection with his or her ability to carry out their duties in the AFP.	Yes, qualified. **Proposed section 40RH** provides that conduct that is off-duty or private falls within the definition of conduct, however only if it has a bearing on professional standards. This is to ensure that there is scope for conduct that has an impact on the integrity of the AFP appointee to be addressed, even where the conduct was off-duty or took place before the person became an AFP employee.
Complaints and Allegations Recommendation 8 8.1 The current distinction between 'complaints' and 'allegations' no longer serves a useful purpose and should be dispensed with. 8.2 The 1997 recommendation by the Australian Law Reform Commission that a 'complaint' should be defined to include all situations where a person expressly or by implication seeks review of, or challenges, the validity or appropriateness of the conduct of an AFP employee or of the AFP as an organisation' should be adopted.	Yes. **Proposed section 40SA** provides that a person may give information that raises an AFP conduct or practices issue. The term allegation is not used in the Bill. The inclusion of practices issues ensures that action that is not in breach of AFP professional standards can still be the subject of a complaint.

FISHER REVIEW RECOMMENDATIONS	IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?
Minor Management Matters Recommendation 9 9.1 The new Division of the AFP Act should provide for an agreement between the Commissioner of the AFP and the Commonwealth Ombudsman that certain types of complaints are capable of being resolved using managerial processes. 9.2 This category of complaint should be called 'minor management matters', which reflects the idea that it incorporates customer service matters as well as other minor management issues. 9.3 These managerial resolutions should not be treated as complaints in the true sense as they would fall outside the normal operation of the legislative structure for complaints. They should be an exception to the normal operation of the complaints provisions of the AFP Act. 9.4 There should be no limitation on the types of complaints that can be agreed to be resolved in this manner. 9.5 The outcome of a minor management matter should be limited to the five re-educational outcomes listed in recommendation 11 below in the Proposed Schedule for AFP Non-Reviewable Actions; that is: • Coaching • Mentoring • Retraining and Development • Personal Development • Increased Supervision	9.1 Yes. **Proposed section 40RM** provides that the Commissioner and Ombudsman may jointly determine in writing the kind of conduct that is to be category 1 conduct (generally relating to minor management matters or customer service matters, or conduct revealing a need for improvement in the performance of the AFP appointee concerned). 9.2 No. The categories have simply been numbered. 9.3 No. All professional conduct issues, regardless of their nature and seriousness, are captured within the Bill. However, category 1 and 2 conduct issues are not subject to formal investigation by the professional standards unit or to direct intervention by the Ombudsman. 9.4 No. Although the Ombudsman and AFP Commissioner are able to settle the detail of the types of matters to be resolved in this manner, the Bill provides legislative parameters that limit their joint agreement. 9.5 Yes. **Proposed sections 40TI and 40TJ** provide that action that a manager may take training and development action in relation to category 1 conduct.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
New Complaints Provisions – Non Reviewable Action <u>Recommendation 10</u> 10.1 The new Division of the AFP Act should provide a mechanism for the Commissioner to take action with respect to an AFP employee's 'unsatisfactory performance'. This should be achieved by a clearly worded statute that indicates the Commissioner can initiate a range of non-reviewable actions that flow from the complaints process. 10.2 The Commissioner should delegate to all employees of or above the position of Director (Commander) the power to investigate complaints and determine non-reviewable managerial outcomes. This delegation should include the power to appoint a manager to inquire into the complaint and report to the delegate for a final decision.	Yes. **Item 19 of Schedule 1 of the Bill** defines manager for a category 1 or 2 conduct issues to be a person to whom an issue is allocated in accordance with commissioner's orders for the purposes of proposed subsection 40TA(1).
<u>Recommendation 11</u> 11.1 The following list of outcomes should be used in respect of non-reviewable actions; that is matters that can be resolved managerially: Schedule for Non-Reviewable Actions Re-Educational Outcomes • Coaching • Mentoring • Retraining and Development • Personal Development • Increased Supervision	11.1 Yes. **Proposed section 40TJ** provides that a manager may take either remedial action or training and development action in relation to an AFP appointee who has engaged in category 2 conduct.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Behavioural Improvement • Counselling • Reprimand • Warning • Performance Agreements • Improvement Strategies Employment – Structured Change • Change of Shift • Restricted Duties • Reassignment of Duties • Transfer Recording of Adverse Findings • A Recorded Adverse Finding (Prescribed Limited Term) • A Recorded Adverse Finding (Permanent)	**Proposed section 40TD** of the Bill defines 'remedial action' to include action taken to improve the AFP appointee's behaviour, structured changes to the AFP appointee's employment, the recording of adverse findings against the AFP appointee, counselling, reprimanding, giving the AFP appointee a formal warning or requiring the AFP appointee to adopt particular improvement strategies.
11.2 A combination of these outcomes may be appropriate in certain cases and provision ought to be made in the AFP Act for that to occur.	11.2 Proposed sections 40TJ and 40TR allow for the measures available in respect of conduct falling within lower categories to be taken or recommended where category 2 or 3 conduct, or corrupt conduct, has been established.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Recommendation 12	
12.1 Once a decision is made that a matter can be dealt with on a non-reviewable basis it should be assigned to a responsible line manager. This manager will decide the best method for dealing with the matter.	12.1 & 12.2 Yes. **Proposed Subdivision C** provides that a manager dealing with a category 1 or 2 conduct issue must ensure that the AFP appointee and the complainant must have an adequate opportunity to be heard in relation to the issue and that the AFP appointee is involved, as far as practicable, in the resolution of the issue.
12.2 The manager should note and record the views of the employee, not only to engage in proper managerial practice but also in order to satisfy the requirement that they are fully heard in relation to the matter. There should be ample opportunity for the officer concerned to state his or her version of the events and to put a position in response to the complaint.	
12.3 The outcome of the case should be negotiated between the manager and the employee. The skill being employed is the skill of a manager to identify behavioural and performance issues and address them in the workplace. Employees should be encouraged to recognise their shortcomings and accept the proposed remedial action.	12.3 Yes. **Proposed subsection 40TH (2)** provides that without limiting the ways that a manager may deal with an AFP conduct issue, the manager attempt to resolve the issue by conciliation.
12.4 The line manager will prepare a report of the matter which will be scrutinised by the delegate before the non-reviewable action is implemented.	12.4 Not expressly. The details of the process by which a manager settles the appropriate action to be taken are not set out in the Bill but a process along the lines described would be consistent with the legislation and is planned by the AFP.
12.5 If an employee is aggrieved about the result of a non-reviewable resolution there should be provision for an internal review and removal of the matter to the next level of seniority.	12.5 Not expressly. Internal review arrangements will be established administratively.
12.6 All actions during this phase should be recorded on a central electronic database (with the provision of a case log) to allow scrutiny by AFP Professional Standards and Employee Management and the Commonwealth Ombudsman.	12.6 Not expressly. **Proposed subsection 40WA(1)** provides that adequate records must be kept for the purposes of the new Part V. The Bill does not expressly provide for an electronic database, but it is planned that many of the administrative steps that the new Part would leave to be determined by Commissioner's orders would be carried out by means of such a database. The AFP is well advanced in developing this facility in consultation with the Ombudsman.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
12.7 The new model should contain a clear provision that allows for a matter identified for managerial resolution to be elevated to a higher level of examination if the initial inquiry reveals that need. 12.8 AFP line managers will need to undertake structured programs to give them the skills to undertake managerial resolutions. The availability of a decision-making framework across the AFP will promote and ensure consistency of application within the proposed new structure. The AFP Professional Standards will play a central role in delivering the decision-making framework and ensuring that line managers are adequately trained to perform these new tasks.	12.7 Yes. **Proposed subsection 40RK(7)** provides that the category to which conduct belongs may change as more information is obtained in relation to the conduct. 12.8 Not expressly. This is an administrative measure which is to be implemented by the AFP but does not need to be reflected in the Bill.
<u>Recommendation 13</u> 13.1 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.	13.1 Yes. The Bill does not expressly address this issue but the system it will establish will not leave room for forms of review other than those proposed here.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
More Serious Cases Recommendation 14 14.1 Matters that do not disclose that the managerial option is appropriate should be handled centrally or by one of the AFP Professional Standards offices around the country. These cases should include: (i) matters that disclose a serious breach of the criminal law; (ii) a serious abuse of power; (iii) a serious neglect of duty, and (iv) matters that give rise to a consideration of employment suitability.	Yes. **Proposed section 40TN** provides that the head of the unit constituted under the Act to deal with professional standards issues must allocate the issue to a person who is a member of the unit for investigation. Category 3 conduct is defined by **proposed section 40RP** to be conduct of a kind that is serious misconduct by an AFP appointee, or conduct that raises the question whether termination action should be taken in relation to an AFP appointee, or involves a breach of the criminal law or serious neglect of duty by an AFP appointee.
Powers of Investigation Recommendation 15 15.1 The new Division of the AFP Act should reproduce the current provisions of the Complaints Act in relation to a power to require information, answer a question or to produce a document. This power should be delegated to all employees of or above the position of Director (Commander) including the power to delegate that authority to a line manager undertaking a 'minor management matter' or a non-reviewable action inquiry. Additionally, that power should be delegated to all employees undertaking duties in the Professional Standards and Employee Management area.	15.1 Yes, with some modification. **Proposed sections 40VA to 40VF,** in Division 5 of the proposed new Part V, set out the powers that investigators of category 3 conduct issues and corruption issues will have. With minor modifications these provisions replicate the powers provided by the Complaints Act. It is not considered appropriate to extend these powers to managers dealing with category 1 and 2 issues, especially as AFP management already has significant general power to require self-incriminatory answers under section 40A of the AFP Act.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Recording of Complaints and the Role of the Ombudsman <u>Recommendation 16</u> 16.1 Provision should be made for all complaints to be centrally recorded on an electronic database. This database should be monitored by AFP Professional Standards and Employee Management as well as the Commonwealth Ombudsman. 16.2 Provision should be made for the Ombudsman's office to intervene and call up any matter for further scrutiny or examination to ensure that they are being dealt with appropriately. The Ombudsman should also be able to intervene if there is evidence of: (i) poor decision-making by the primary decision-maker (ii) misunderstandings; or (iii) a failure to perceive the implication of the primary decision or the significance of emerging trends. 16.3 The role of the Ombudsman should be as follows: (i) to monitor 'minor management matters' and non-reviewable action as detailed above; (ii) matters removed by the Ombudsman from the 'minor management matters' and non-reviewable action category ought to be the exception rather than the rule; (iii) exercise an over-riding jurisdiction to examine all cases on a reassurance basis; (iv) to review matters in the same manner that all investigations are currently reviewed under the Complaints Act; and (v) continue to undertake 'own motion' investigations as currently provided by the Complaints Act.	16.1 Not expressly, but this will be done administratively. See comments above on recommendation 12.6. 16.2 & 16.3 Yes. **Proposed sections 40XA and 40 XB** provide for the Ombudsman to conduct annual and ad hoc inspections of AFP records for the purpose of reviewing the administration of the new Part V. The Ombudsman can also make use of the general 'own motion' investigation power under the *Ombudsman Act 1976*.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Professional Standards <u>Recommendation 17</u> 17.1 The functional areas of the AFP currently termed 'Professional Standards' and 'Employment Standards' should be subject to a fundamentally unified administration. 17.2 The area should be renamed 'Professional Standards and Employee Management' which will more accurately reflect its modified function, placing emphasis on the management of employees and the advisory and support function for Directors (Commanders) undertaking the resolution of 'minor management matters' and *non-reviewable* action.	Not expressly. 17.1 & 17.2 **Proposed section 40RD** of the Bill provides only for the establishment of an investigative professional standards unit because of the sensitive nature of this work, but it avoids being prescriptive about administrative structures. The AFP has indicated that these other functions will in practice be closely associated with the investigative function regulated by the Bill.
<u>Recommendation 18</u> 18.1 This Review considers that there remains a need for a team of dedicated investigators to conduct inquiries into the more serious matters which come to the attention of the AFP administration. These are the matters detailed in recommendation 14.1 above. The advantage of this approach is that this team of investigators would be selected by the AFP management for their proven skills in investigative techniques and ability to deal with sensitive issues.	Yes. 18.1 As noted under recommendation 17, **proposed section 40RD** addresses this requirement.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
Recommendation 19 19.1 The new Division of the AFP Act should not use the expression 'Internal Investigation Division' or 'Officer in Charge' which are outdated and do not reflect current practices. 19.2 The AFP Act should require the Commissioner to establish an area within the AFP that deals with complaints that disclose the matters detailed in recommendation 14.1 above.	Yes. 19.1 & 19.2 **Proposed subsection 40 RD(1)** provides for establishment of a professional standards investigative unit. **Proposed subsection 40RD(2)** expressly leaves it to the Commissioner to determine the name of this unit. **Proposed subsection 40RE(1)** simply refers to the 'head' of the unit.
Employment Decisions Recommendation 20 20.1 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.	Yes. 20.1 Section 28 is not amended. **Proposed subsection 40TR(2)** indicates that termination of employment under section 28 is not dependent on a recommendation under proposed subsection 40TR(1). We are reviewing the amendment to section 69B at Item 22 of Schedule 3 to the Bill to ensure it does not change the operation of section 28.
The Requirement for 'Substantiation' Recommendation 21 21.1 This Review considers that the AFP has spent far too much time in the substantiation phase of complaints and allegations. 21.2 It would be at least as reliable, and far more expeditious, if the matters at issue were dealt with by normal probative administrative and managerial tests. 21.3 The test applied should be whether there is any cogent material that the person the subject of the complaint has had an involvement in the matter demonstrated.	Yes. 21.1 – 21.3 **Proposed sections 40TI, 40TJ and 40TR** all operate on a test of satisfaction in reasonable grounds.

FISHER REVIEW RECOMMENDATIONS	**IS THE RECOMMENDATION IMPLEMENTED IN THE BILL?**
External Review Processes Recommendation 22 22.1 There is no need for an Independent Review Process as submitted by AFPA.	Yes. 22.1 No provision for this is included in the Bill
Overseas Liaison Officers Recommendation 23 23.1 The Commissioner's Direction appointing an overseas liaison officer should contain direct injunctive material included in its terms, such as the fact that the appointment is subject al all times to satisfactory behaviour and the continuing approval of the Commissioner. It should also state in clear terms that the member may be withdrawn from the appointment at any time and must accept direction, if given, to return to Australia as promptly as required. 23.2 This Review has found that the existing provisions of the AFP Act are sufficient to effect the transfer of an AFP employee from an overseas posting on the grounds of inadequacy. To make this position clearer, a provision similar to section 40F(2) should be enacted to apply to the Commissioner's 'assignment of duties' power in section 40H providing for the exercise of the power to be amenable to termination at any time.	Not expressly. 23.1 This is an administrative matter for the AFP. 23.2 A provision for this purpose was inadvertently omitted from the Bill. We are considering addressing this by a Government amendment.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE LAW ENFORCEMENT INTEGRITY COMMISSIONER BILL 2006; THE LAW ENFORCEMENT INTEGRITY COMMISSIONER (CONSEQUENTIAL AMENDMENTS) BILL2006 AND THE LAW ENFORCEMENT (AFP PROFESSIONAL STANDARDS AND RELATED MEASURES) BILL 2006
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 16

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Training and development action (clause 40TC)

- Does clause 40TC protect affected AFP employees from pecuniary loss?
    - If so, how?
    - If not, why not, especially given the magnitude of category 1 and category 2 breaches?

Please also see pages 20 and 39-40 of the transcript.

The answer to the Committee's question is as follows:

Proposed subsection 40TC(1) provides for outcomes that may be applied against all categories of conduct issues, including corrupt conduct, where that conduct is established to have occurred. It states that the purpose of training and development action is to improve the appointee's performance through training and development. It is implicit in these provisions that the action taken must be proportional to the conduct to which it is a response and that any impact other than improvement in the appointee's performance must be genuinely coincidental. This does not provide complete protection against pecuniary loss but should ensure that any such loss is minimal and is not used to impose a penalty.

A guarantee that an appointee will suffer no pecuniary loss as a result of training and development action would not be appropriate. The application of such action will be a consequence of the underperformance and/or misconduct of the AFP appointee concerned. It is appropriate for the AFP to have the power to take reasonable measures to effect the necessary changes in the appointee's skills or behaviour so that the appointee can perform as an effective member of the AFP. Potential side-effects such as pecuniary loss ought clearly to be taken into account in making these decisions, but they should not deter a manager from taking action that is clearly required.

The Commissioner undertook during his appearance on 27 April 2006 that the AFP will ensure through its internal guidelines that the application of these outcomes is not used to impose pecuniary penalties. The Professional Standards unit will have an oversight role to ensure that these guidelines are properly and consistently applied by line management throughout the AFP.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
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ATTORNEY-GENERAL'S DEPARTMENT

Question No. 17

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Reporting of Ministerially Directed inquiries (Division 4)

- Does Division 4 provide for the report, either in its entirety or in part, to be made available to the public or tabled before the Parliament?
    - If not, why not?

No transcript reference.

The answer to the Committee's question is as follows:

Division 4 does not require the report of an inquiry directed by the Minister to be made available to the public or tabled in Parliament, nor does it prohibit the Minister from taking such action. In this respect it follows the existing section 52 of the *Complaints (Australian Federal Police) Act 1981*.

This arrangement leaves the Minister free to judge, in light of the contents of each report, to what extent (if any) it is appropriate to make it public. This flexibility is desirable because the report may contain sensitive information about AFP operations or procedures or prejudicial material about individuals which it would not be appropriate to disclose.

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ATTORNEY-GENERAL'S DEPARTMENT

Question No. 18

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Manner of conducting investigation or inquiry (clause 40VB)

- How to subclauses 40VB(3), (5) and (7) interact with one another?
    - Can there be more than one concurrent investigation into a particular matter?
    - Can an investigator be under the direction of multiple people (i.e. more than one of the unit heads constituted under clause 40RD, the Commissioner or the Minister)?
        - If so, how are conflicting directions to be dealt with?
    - Can the direction of a current investigation, established by one person, be assumed by another? If so:
        - Please outline the possible circumstances.
        - Indicate what safeguards are in place to prevent the incoming investigation 'director' from narrowing the terms of reference relative to the directions of the outgoing 'director'.

- How does subclause 40VB(2):
    - Interact with subclauses 40VB(3), (5) and (7)?
    - How does it affect any issues raised above?

The answer to the Committee's question is as follows:

For the reasons set out below, the three possibilities suggested in the first part of this question do not arise, except that an AFP investigation of an issue could lawfully proceed in parallel with an inquiry directed by the Minister into the same conduct and both investigations could be conducted by the same person.

An investigation referred to in proposed subsection 40VB(3) and an investigation referred to in proposed subsection 40VB(5) cannot be conducted concurrently into the same issue. The obligation for the head of the Professional Standards unit to allocate an issue for investigation under proposed section 40TN is subject to the Commissioner's obligation to allocate an issue for investigation under proposed section 40TO. It would be possible for a special inquiry arranged by the Minister to be conducted concurrently with an investigation allocated under proposed section 40TN or 40TO, but proposed section 40UC permits the Commissioner to suspend, and ultimately terminate, such an investigation if the Minister has arranged for a special inquiry into the same conduct or matter.

An investigator could only be under the direction of multiple authorities if both the Minister and either the Commissioner or the head of the Professional Standards unit appointed the same person to conduct an investigation/inquiry under different provisions of the Act into the same conduct. The investigator would in principle be conducting two distinct processes. If the Commissioner did not

suspend the AFP investigation in these circumstances, the Commissioner and the Minister would need to ensure that the investigator did not receive conflicting directions.

There is no provision for direction of an investigation to be transferred from one authority to another, although a substitute or additional investigation could be established in some circumstances.

If it emerged in the course of an investigation of an issue allocated by the head of the unit under proposed section 40TN that there were grounds why the issue should have been allocated by the Commissioner under proposed section 40TO, a new investigation would be established under section 40TO and the original investigation would lapse. As there are different requirements for choice of an investigator, it is unlikely that the issue would be allocated to the same person.

A special inquiry arranged by the Minister under proposed Division 4 will not prevent an investigation under proposed Division 3 from continuing, so no question of transferring direction of an existing investigation arises.

In view of the foregoing answers the issue of safeguards against an incoming investigation 'director' narrowing the terms of reference of the investigation does not arise. However, there are safeguards against the head of the Professional Standards unit or the Commissioner unduly restricting the scope of an investigation. In principle, each category 3 conduct or corruption issue that is identified must be fully investigated and the power to give directions under proposed section 40VB does not diminish this requirement. It will be a part of the review function of the Ombudsman and the Integrity Commissioner to consider whether issues have been too narrowly defined (either by the giving of directions or otherwise) and to institute additional investigations where necessary.

Proposed subsection 40VB(2) interacts with proposed subsections 40VB(3), (5) and (7) by requiring that any directions given under those subsections be consistent with the terms of an arrangement made under proposed subsection 40VB(2). The existence of such an arrangement would not affect the capacity of the Minister to establish a separate special inquiry into the same conduct or matter or to appoint persons who were conducting a joint investigation under proposed section 8D of the *Ombudsman Act 1976* to conduct the special inquiry. However, one potential impact on all joint investigations is that the Ombudsman would be in a position to ensure that the issue under investigation was not too narrowly defined.

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ATTORNEY-GENERAL'S DEPARTMENT

Question No. 19

The Committee asked the following question on 1 May 2006:

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

Schedule 5 – Provisions relating to suspension or resignation from, and termination of, employment

Item 3 inserts a new section 30A which allows the Commissioner to reject or suspend a resignation by up to 90 days. There is no clarity on how often this may be used.

- Are there any limitations on the number of times proposed section 30A may be used in relation to a particular employee and/or investigation?
    - If not, why not?
    - Does this have implications for how long an employee may be kept in suspended termination? If so, please outline.

No transcript reference.

The answer to the Committee's question is as follows:

The proposed subsection 30A(2) will allow the Commissioner, by issue of a written notice, to delay the date of effect of a resignation for a maximum of 90 days from the date of effect specified in the resignation.

The effect of proposed subsections 30A(3) to (5) is that, if the Commissioner's initial notice delayed the date of effect of a resignation by less than 90 days, the Commissioner may issue one or more notices further delaying the date of effect, provided the total delay imposed by all the notices issued is not more than 90 days. Once the 90 day limit is reached (or such earlier date as is set in the most recent notice), the Commissioner, under proposed subsection 30A(6), must either accept the resignation or take termination action under s28 of the AFP Act.

In short, there is no limit to the number of notices that may be issued but the total delay cannot exceed 90 days. This is appropriate because the intent of these provisions is to ensure that the date of effect of a resignation is not delayed for longer than is necessary for the Commissioner to address the issues set out in proposed subsection 30A(1), while ensuring that the date of effect of a resignation cannot be delayed indefinitely.