

The Senate

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Legal and Constitutional  
Legislation Committee

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Australian Federal Police and Other  
Legislation Amendment Bill 2003 [2004]

March 2004

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# **RECOMMENDATIONS**

## **Recommendation 1**

**4.27 The Committee recommends that the Bill should be agreed to.**

## **Recommendation 2**

**4.28 The Committee recommends that the Government clarify that there are no legal obstacles to the conferral of jurisdiction on the Board of Reference to settle disputes over the remuneration and conditions of APS transferees.**

## **Recommendation 3**

**4.29 In light of concerns raised about the final stage of the integration of the Australian Protective Service and the Australian Federal Police, particularly in relation to terms and conditions of employment of protective service officers in the future, the Committee recommends that the Australian Federal Police report back to the Committee within twelve months on the progress of the integration, and that the Committee reconvene to examine those matters. That report should include an examination of the commercialisation of the protective service function.**





# ABBREVIATIONS

AFP	Australian Federal Police
AFP Act	<i>Australian Federal Police Act 1979</i>
AFPA	Australian Federal Police Association
AIRC	Australian Industrial Relations Commission
ALRC	Australian Law Reform Commission
APS	Australian Protective Service
APS Act	<i>Australian Protective Service Act 1987</i>
Bills Digest	Department of the Parliamentary Library <i>Australian Federal Police and Other Legislation Amendment Bill 2003</i> Bills Digest No. 78 of 2003-04
CPSU	Community and Public Sector Union



# CHAPTER 1

## INTRODUCTION

1.1 On 11 February 2004, the Senate referred the Australian Federal Police and Other Legislation Amendment Bill 2003 [2004] to the Legal and Constitutional Legislation Committee for inquiry and report by 23 March 2004.

### Key provisions of the Bill

1.2 The Bill proposes to:

- complete the integration of the Australian Protective Service (APS) into the Australian Federal Police (AFP) by amending the *Australian Federal Police Act 1979* and repealing the *Australian Protective Service Act 1987*; and
- amend the *Australian Federal Police Act 1979* and *Crimes Act 1914* to enable the AFP to investigate State offences with a federal aspect.

### Conduct of the inquiry

1.3 The Committee wrote to over 40 individuals and organisations inviting submissions by 27 February 2004. Details of the inquiry, the Bill and associated documents were also placed on the Committee's website.

1.4 The Committee received 6 submissions, including two supplementary submissions, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.5 The Committee held one public hearing in Canberra on 8 March 2004. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the internet at: <http://aph.gov.au/hansard>.

### Acknowledgment

1.6 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

### Notes of references

1.7 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.



# CHAPTER 2

## BACKGROUND TO THE BILL

2.1 This chapter briefly outlines the background and the main provisions of the Bill in relation to:

- the integration of the Australian Protective Service (APS) into the Australian Federal Police (AFP); and
- the proposed provisions to enable the AFP to investigate State offences with a federal aspect.

2.2 A detailed analysis of the Bill is available in Bills Digest No. 78 2003-04.<sup>1</sup>

### Integration of the APS into the AFP

#### *Role of the APS*

2.3 The APS was established by the *Australian Protective Service Act 1987* (the APS Act). The function of the APS, as currently set out in section 6 of the APS Act, is 'to provide such protective and custodial services for or on behalf of the Commonwealth as the Minister ... directs'.<sup>2</sup>

2.4 The APS supplies protective security services at Parliament House, the offices and residences of the Prime Minister and Governor-General, sensitive defence establishments, certain foreign embassies and the Australian Nuclear Science and Technology Organisation. The APS also provides counter terrorism first response at selected designated airports around Australia, including Air Security Officers who fly covertly on domestic and international air routes.<sup>3</sup>

#### *Role of the AFP*

2.5 The AFP enforces Commonwealth criminal law, and protects Commonwealth and national interests from crime in Australia and overseas. The AFP's priorities are set by Ministerial Direction and include enforcing laws relating to terrorism, organised

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1 Department of the Parliamentary Library *Australian Federal Police and Other Legislation Amendment Bill 2003* Bills Digest No. 78 of 2003-04.

2 A more detailed history of the APS can be found in Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Australian Protective Service Amendment Bill 2002*, June 2002; and Bills Digest No. 152 2001-02 on the Australian Protective Service Amendment Bill 2002.

3 AFP, *Submission 3*, p. 1.

and transnational crime, major fraud, illicit drug trafficking and e-crime. The AFP also provides some personal protective services, including to certain Australian Office Holders, internationally protected persons, diplomats and visiting dignitaries.<sup>4</sup>

### *A staged approach*

2.6 Following the terrorist attacks in the United States of America in September 2001, the Commonwealth Government reviewed Australia's security and counter-terrorism arrangements. As a result of this review, the Government determined that the APS should transfer from the Attorney-General's Department and become an operating division of the AFP. The stated reason was that this would:

... allow the closest possible coordination between two of Australia's key counter-terrorist agencies. Better coordination between the [AFP] and [APS] will strengthen both organisations and their ability to fulfil their counter-terrorism responsibilities.<sup>5</sup>

2.7 There has been a staged approach to the integration of the APS into the AFP. The first stage occurred on 1 July 2002, when legal and financial responsibility for the APS was transferred from the Secretary of the Attorney-General's Department to the AFP Commissioner under the *Australian Protective Service Amendment Act 2002*.<sup>6</sup> However, the employment framework of the APS was left intact at that stage.<sup>7</sup>

2.8 In February 2003, a 'Protection Portfolio' was established in the AFP. This portfolio placed the protective security functions of the AFP alongside those of the APS.<sup>8</sup> The AFP provided a number of examples where the AFP and APS have successfully undertaken joint operations or joint deployment since 1 July 2002, including:

- APS involvement as part of Operation Alliance in Bali;
- assistance to ACT Policing during the January 2003 bushfires;

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4     ibid.

5     The Hon. Fran Bailey MP, Parliamentary Secretary to the Minister for Defence, Second Reading Speech, Australian Protective Service Amendment Bill 2001, *House of Representatives Hansard*, 16 May 2002, p. 2319.

6     This legislation was considered by the Committee in 2002 — see Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Australian Protective Service Amendment Bill 2002*, June 2002.

7     Australian Federal Police and Other Legislation Amendment Bill 2003 *Explanatory Memorandum*, p. 1.

8     AFP, *Submission 3*, p. 3.

- AFP/APS deployment for Regional Assistance Mission Solomon Islands; and
- AFP/APS security for the visits of President Bush of the USA and President Hu of China in October 2003.<sup>9</sup>

### ***Current employment arrangements in the APS and AFP***

2.9 The APS and AFP currently operate under separate employment frameworks. At present, all APS employees are public service employees for the purposes of the *Public Service Act 1999*. Protective service officers are covered by an award made under section 170MX of the *Workplace Relations Act 1996*. This award expires in November 2004.<sup>10</sup> Other APS administrative employees are covered by Australian Workplace Agreements (AWAs).<sup>11</sup>

2.10 AFP employees are not employed under the *Public Service Act 1999*. The AFP Act, along with other Commonwealth employment legislation, establishes the employment framework for all AFP employees. Conditions of service specific to all AFP employees (apart from Senior Executives) are set out in the *AFP Certified Agreement 2003-2006*.

### ***Key employment integration provisions in the Bill***

2.11 Schedules 1 and 2 of the Bill represent the final stage of the integration of the APS into the AFP.<sup>12</sup> The Bill will:

- transfer current APS employees into the AFP and create a new category of employee in the AFP ('protective service officer');
- include the protective service function as a function of protective service officers in the AFP; and
- repeal the APS Act and incorporate various provisions from the APS Act into the *Australian Federal Police Act 1979* (the AFP Act), including the functions of the APS and existing powers and duties of protective service officers.

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9     ibid.

10    Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 2.

11    *Explanatory Memorandum*, p. 1.

12    ibid.

### ***Proposed transitional employment arrangements***

2.12 Clause 4 of the Bill provides for the transfer of current APS employees into the AFP. Subclause 4(1) will deem each APS transferee to have been engaged under section 24 of the AFP Act. Subsection 4(1) of the AFP Act will then be amended to create a new category of AFP employee – 'protective service officer'. Part III of the AFP Act covers the terms and conditions of employment of AFP employees.

2.13 According to the Explanatory Memorandum, the transfer of APS employees will be achieved through section 72 of the *Public Service Act 1999*. Section 72 provides that the Public Service Commissioner may determine that Australian Public Service employees cease to be Australian Public Service employees, and become employees of a specified Commonwealth authority. The Explanatory Memorandum states that:

Subsection 72(3) of the PS Act [*Public Service Act 1999*] provides that employees transferred under section 72 are entitled to remuneration and other conditions of employment no less favourable than those which applied under certain types of instruments immediately before the transfer. The nature of some of the industrial instruments existing within the APS workplace means that this obligation will not apply to all employees. However, as a matter of policy the 'no less favourable' test will be implemented in relation to all APS employees transferring to the AFP. To cover the industrial instruments that will not be transferred, the AFP Commissioner will make a determination under subsection 24(1) of the PS Act, prior to the actual date of transfer. This will have the effect of those conditions being recognised under subsection 72(3) of the PS Act.<sup>13</sup>

### ***Other integration provisions in the Bill***

#### ***Charging for protective services***

2.14 Proposed section 69E will allow the AFP Commissioner to charge for certain protective services. The Explanatory Memorandum states that:

This provision is modelled on the existing section 25A of the APS Act and will maintain the status quo for charging for such services.<sup>14</sup>

#### ***Functions, powers and duties of protective service officers***

2.15 Proposed section 8A will allow the Minister to direct that certain protective and custodial functions of the AFP are protective service functions. (The Minister

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13    *ibid* pp. 1-2.

14    *ibid* p. 21.



currently directs the functions of the APS under subsection 6(1) of the APS Act.) The Explanatory Memorandum states that 'proposed section 8A maintains the status quo'.<sup>15</sup>

2.16 Proposed sections 14A-14G deal with the powers and duties of protective services officers. Proposed sections 14H-14N deal with the powers and duties of AFP members, AFP special members and protective service officers.

### **AFP investigation of State offences that have a federal aspect**

2.17 Schedule 3 of the Bill proposes to amend the AFP Act and *Crimes Act 1914* to enable the AFP to investigate State offences with a federal aspect.

2.18 According to the Explanatory Memorandum, this implements the legislative aspect of resolution 16 of the Leaders' Summit on Terrorism and Multi-jurisdictional Crime in April 2002.<sup>16</sup> In resolution 16, the Prime Minister and State and Territory Leaders agreed:

... to legislate and develop administrative arrangements to allow investigation by the Australian Federal Police into State offences incidental to multijurisdictional crime.<sup>17</sup>

2.19 In November 2003, the Australasian Police Ministers' Council accepted a recommendation by the Standing Committee of Attorneys-General/Australasian Police Ministers Council Joint Working Group on National Investigative Powers that Commonwealth legislation be amended:

... to allow the AFP to utilise Commonwealth investigative powers to investigate State offences with a federal aspect.<sup>18</sup>

2.20 Under the proposed amendments in Schedule 3, a State offence will have a 'federal aspect' if the subject matter of the offence is a subject on which the Commonwealth has the constitutional power to legislate, or where the investigation of that State offence is incidental to an investigation of a Commonwealth or Territory offence.

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15 *Explanatory Memorandum*, p. 8.

16 *ibid* p. 24.

17 *ibid*.

18 *ibid*.



## CHAPTER 3

### KEY ISSUES

3.1 This chapter discusses concerns raised in submissions and evidence in relation to the employment arrangements surrounding the integration of the APS into the AFP, including:

- transitional employment arrangements for APS employees; and
- other employment issues, including review of employment decisions, whistleblower protection, the AFP's disciplinary regime, union representation and temporary employment issues.

3.2 The chapter then discusses two other key issues, namely, commercialisation of protective service functions and consultation processes in developing this Bill.

#### **Integration of the APS into the AFP: employment implications**

3.3 The two unions that made submissions to this inquiry generally supported the final stage of integration of the APS into the AFP, but raised concerns about the consequences for the employment arrangements of APS transferees. From the evidence presented to the Committee, there seemed to be considerable uncertainty surrounding the quite complex transitional employment arrangements.

3.4 The two union submissions were divided on the Bill's implications for employment conditions. The Community and Public Sector Union (CPSU) expressed concern that the Bill would extinguish many employment conditions and protections currently available to APS employees.<sup>1</sup> The CPSU was also concerned about the proposed transitional employment arrangements for the period between the proposed transfer and the negotiation of a new industrial agreement.<sup>2</sup> The CPSU presented a petition signed by over 650 protective service officers expressing concern about the impact of the proposed transfer on their employment conditions.<sup>3</sup>

3.5 On the other hand, the Australian Federal Police Association (AFPA) was concerned that the Bill would maintain separate employment conditions for protective service officers, rather than its preference for a single set of uniform employment

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1 *Submission 1*, p. 2.

2 *Committee Hansard*, 8 March 2004, p. 2.

3 Document tabled by the CPSU on 8 March 2004.

entitlements and conditions within the AFP. The AFPA argued that the APS should be fully integrated into the existing AFP employment regime.<sup>4</sup>

3.6 Transitional employment arrangements and other future employment issues are discussed in turn below.

### ***Transitional employment arrangements***

#### *Impact of transfer on current industrial instruments*

3.7 The Committee heard that the current industrial agreement covering most protective service officers, the 170MX Award, would not automatically transfer to bind the AFP Commissioner in relation to APS transferees. A representative of the Australian Government Solicitor explained that there were two reasons for this:

First, there is no change in employer. The Commonwealth remains the employer, and the transmission of business provisions of the Workplace Relations Act operate when there is a change of employment from one employer to another. The Commonwealth remains the employer and the AFP Commissioner remains the person representing the Commonwealth in respect of employment. Secondly, there is no provision in the Workplace Relations Act for transmission of a 170MX award.<sup>5</sup>

3.8 For APS employees under Australian Workplace Agreements (AWAs), the Committee was informed that those AWAs would continue to have effect, as again there would be no change in the employer.<sup>6</sup>

#### *Transfer mechanism*

3.9 As noted in Chapter 2, the main mechanism for the transfer of APS employees is section 72 of the *Public Service Act 1999*.<sup>7</sup> Section 72 provides that the Public Service Commissioner may determine that Australian Public Service employees cease to be public service employees, and become employees of a specified Commonwealth authority. The AFP is a Commonwealth authority for these purposes.<sup>8</sup>

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4 *Submission 2*, p. 5.

5 Ms Margaret Byrne, Australian Government Solicitor, *Committee Hansard*, 8 March 2004, p. 18.

6 *Explanatory Memorandum*, pp.1-2.

7 *ibid.*

8 Ms Margaret Byrne, Australian Government Solicitor, *Committee Hansard*, 8 March 2004, p. 18.

### 3.10 The Explanatory Memorandum states that:

Subsection 72(3) of the [*Public Service Act 1999*] provides that employees transferred under section 72 are entitled to remuneration and other conditions of employment ***no less favourable*** than those which applied under certain types of instruments immediately before the transfer.<sup>9</sup> [*emphasis added*]

#### *What is covered by 'no less favourable'?*

3.11 An officer from the Australian Government Solicitor explained to the Committee that the 'no less favourable' test under subsection 72(3) only applies to certain industrial instruments and determinations. Subsection 72(3) does not cover conditions provided administratively or by legislation (such as those under the *Public Service Act 1999*).<sup>10</sup> This was a matter of particular concern to the CPSU.<sup>11</sup>

3.12 The Committee also heard that section 72 does not cover the 170MX Award.<sup>12</sup> The AFP explained:

The section 72 transfer mechanism safeguards the remuneration and other conditions under an award, certified agreement, Australian Workplace Agreement or a determination under the Public Service Act. The safeguard does not have effect on the *Commonwealth Employment (Protective Service Officers Section 170MX Award)* (MX Award) made under the *Workplace Relations Act 1996*. The Commissioner will make a determination under section 24(1) of the [Public Service] Act to ensure that employees under the MX Award are protected by the subsection 72(3) safeguards.<sup>13</sup>

3.13 The Committee heard that, following transfer and the determination under section 24 of the *Public Service Act 1999*, the AFP Commissioner could then make a determination under section 27 of the AFP Act that:

... would provide the certainty and transparency that is required and which would set out the terms and conditions of employment. That provision of the

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9 *Explanatory Memorandum*, pp.1-2.

10 Ms Margaret Byrne, Australian Government Solicitor, *Committee Hansard*, 8 March 2004, p. 19.

11 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 4. Particular legislative and administrative conditions are discussed in further detail later in this chapter.

12 The 170MX Award is not covered by the definition of 'award' in either the *Public Service Act 1999* or the *Workplace Relations Act 1996*: AFP, *Submission 3*, p. 4 and Ms Margaret Byrne, Australian Government Solicitor, *Committee Hansard*, 8 March 2004, p. 18.

13 *Submission 3*, p. 4.

AFP Act allows the Commissioner to determine terms and conditions for employees.<sup>14</sup>

3.14 The Australian Government Solicitor's representative noted that:

... the no less favourable test continues to apply until a new AWA or certified agreement is made or if there is a variation to a certified agreement.<sup>15</sup>

3.15 The AFP confirmed that the section 72 transfer mechanism will operate:

... to protect the transferred remuneration and other conditions until such time as a new award or certified agreement or new AWAs can be negotiated.<sup>16</sup>

*What will the determination cover?*

3.16 From the submissions and evidence before the Committee, there was a lack of certainty as to the exact content of the determinations to be made under section 24 of the *Public Service Act 1999* and section 27 of the AFP Act. This was compounded by the problem, raised during the Committee's hearing, that parts of the 170MX Award could not be transferred because they would conflict with AFP Act requirements.<sup>17</sup>

3.17 In questions on notice the Committee sought clarification from the AFP as to exactly what matters would be covered by the determinations. The AFP responded that the determinations would 'replicate' the 170MX award, with the exception of:

- clauses or words that do not impact on the provision of remuneration or conditions;
- clauses that conflict with the Commissioner of the AFP's powers under the [AFP Act] or the [*Workplace Relations Act 1996*]; or
- wording or definitions that require changes as a result of the transfer of employment from the [APS] into the [AFP].<sup>18</sup>

3.18 The AFP provided a more detailed list which is reproduced at Appendix 3.

3.19 The AFP noted that clauses or terms that would be amended included the following:

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14 Ms Margaret Byrne, Australian Government Solicitor, *Committee Hansard*, 8 March 2004, p. 19.

15 *ibid* p. 18.

16 Acting Deputy Commissioner John Lawler, *Committee Hansard*, 8 March 2004, p. 23.

17 Federal Agent Mark Ney, AFP, *Committee Hansard*, 8 March 2004, p. 24.

18 *Submission 3A*, p. 4.

- changed terminology and titles due to the differing legislative and governance frameworks of the APS/Public Service and the AFP;
- substituting the APS Performance Management Plan (existing increment arrangements are protected in the proposed Determination) with the AFP's Performance Development Agreement (as modified to fit the APS Information Technology infrastructure;
- a proposal to refer disputes regarding the implementation of the section 27 Determination to the existing AFP Board of Reference; and
- changes which may be needed in employee representation.<sup>19</sup>

### 3.20 Clauses that would be deleted were:

- no longer applicable or redundant, for example, clauses that deal with subject matter such as title, responsency and operative dates of the original award; or
- in conflict with the Commissioner's powers as set out in the AFP Act 1979. These include:
  - o clause 19.1.2(c) - application of the 'excess employee' clauses and subsequent redundancy provisions. These apply where an employee's duties are to be performed at a location where the employee is not already stationed and is not willing to make the geographical move. This clause conflicts with the Commissioner's powers under section 40H of the AFP Act. This provisions gives the Commissioner the power to determine where an employee's duties are to be performed.
  - o Clause 20 – termination and employment. This clause conflicts with the Commissioner's powers under section 28 and related provisions of the AFP Act.<sup>20</sup>

### 3.21 The AFP noted that to ensure that the 'no less favourable' test was met, the determinations:

... will contain a Savings Clause aimed at reinforcing the intent of preserving the remuneration and conditions that PSOs are currently entitled to under the section 170MX award.<sup>21</sup>

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19    ibid p. 4.

20    ibid p. 5.

21    ibid pp. 2-3.

*Alternative transfer mechanisms*

3.22 The CPSU expressed various concerns about the proposed transfer mechanism, particularly because, as outlined above, the 'no less favourable test' section 72 of the *Public Service Act 1999* would not cover all employment conditions. The CPSU suggested specific amendments to cover some key legislative rights (discussed in more detail later in this chapter).<sup>22</sup>

3.23 The CPSU was also concerned that the Commissioner's determination would be a unilateral decision, with little or no opportunity for review of that decision.

... there is nothing to stop the Federal Police Commissioner from changing the determination at any time, so long as it is not less favourable overall.<sup>23</sup>

3.24 The CPSU gave an example to the Committee:

... a major fear might be that ... a regime to replace shift penalties with a composite allowance could be introduced. In this case, the Federal Police Commissioner could decide that, overall, we think they are not less favourable. That might not apply to an individual or an individual's particular roster, but ... protective service officers would have no vote on whether or not they agreed to this new regime ...<sup>24</sup>

3.25 The Committee sought further information from the AFP on review rights of APS transferees in relation to the determinations. The AFP responded:

It is the AFP's intention to call up the AFP Board of Reference in the section 24/section 27 Determinations as provided for under section 131 of the [*Workplace Relations Act*] and to give it the same powers of review over remuneration and conditions as it currently has in relation to AFP employees.<sup>25</sup>

3.26 The Committee notes that the Board of Reference is recognised under the AFP Certified Agreement 2003-2006 and consists of a member of the Australian Industrial Relations Commission (AIRC), a nominee of the Commissioner, a nominee of the AFPA and, by consent, any other party who may assist the Board of Reference to reach a decision. In accordance with section 170LW of the *Workplace Relations Act 1996* the Board of Reference has the power to settle disputes over the application and interpretation of the Certified Agreement and any other matters agreed between the parties.

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22 See the discussion at paras 3.44-3.65.

23 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 6.

24 *ibid* p. 5.

25 *Submission 3A*, p. 7.



3.27 The AFPA drew the Committee's attention<sup>26</sup> to clause 8 of the Certified Agreement, which states:

This Agreement may incorporate employee roles that may be undertaken, at the direction of the Government, after the date of its certification by agreement of the parties and with the approval of the Board of Reference.

3.28 The AFPA also referred<sup>27</sup> to paragraphs (d) and (e) of clause 8 which provide:

d) Workplace disputes not resolved via the Internal Disputes Resolution Procedure can be referred to the [Board of Reference] by either party.

e) In accordance with section 170LW of the *Workplace Relations Act 1996* the [Board of Reference] has the power to settle disputes over the application and interpretation of this Agreement and any other matters agreed between the parties.

3.29 The AFPA stated:

It is certainly our intention to make application in accordance with the provisions of the agreement for the APS functions to be incorporated into the AFP certified agreement, thereby providing a full net of coverage for PSO, SPSO and other roles within the context of the AFP work force.<sup>28</sup>

3.30 One alternative transfer option the CPSU suggested was to make an industrial agreement prior to the transfer.<sup>29</sup> However, the AFP said that this would be problematic:

Under an MX award there is an embargo on the manner in which you can commence a bargaining period, so it is problematic to get into a bargaining period with either the members or the unions prior to the extinguishment of the MX award.<sup>30</sup>

3.31 Another option the CPSU proposed was to include a specific provision in the Bill to ensure that current APS industrial awards and conditions are maintained.<sup>31</sup> Mr Evan Hall from the CPSU argued:

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26 Mr Craig Shannon, AFPA, *Committee Hansard*, 8 March 2004, p. 11.

27 Mr Craig Shannon, AFPA, *Committee Hansard*, 8 March 2004, p. 11.

28 Mr Craig Shannon, AFPA, *Committee Hansard*, 8 March 2004, p. 12.

29 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 8.

30 Federal Agent Ney, AFP, *Committee Hansard*, 8 March 2004, p. 24. See also s 170MZ(7) of the *Workplace Relations Act 1996*.

31 *Submission 1*, p. 3.

Given that no-one intends to change the conditions, we think the appropriate way to handle it is to remove all doubt as to the application of those conditions by including a provision that recognises the fact that those awards will apply for their remaining period.<sup>32</sup>

3.32 Mr Hall also noted that:

It has often been the case in similar transfers of employment out of the Public Service into a Commonwealth agency that provisions are made in the Bill so there is, once again, clarity as to the industrial awards which would cover the transferring employees.<sup>33</sup>

3.33 The CPSU cited the example of the transfer of fisheries officers to employment by the Australian Fisheries Management Authority.<sup>34</sup> In that case, section 10 of the *Fisheries Legislation (Consequential Provisions) Act 1991* specifically provided that industrial awards would continue to apply.<sup>35</sup>

3.34 However, a representative of the AFPA argued:

We substantially need this phase of the process to be resolved—the passing of this legislation—before mechanisms can be put in train to address the concerns raised here this morning.<sup>36</sup>

3.35 In questions on notice the Committee sought further information from the AFP on the CPSU's suggestion that the Bill should be amended to continue the application of current APS industrial awards. The AFP responded:

The [Public Service Act] contains a comprehensive "machinery of government changes" mechanism in section 72 through which Government decisions on administrative arrangements and reorganisations can be implemented. This provision contains protections for entitlements of transferred employees.

Both the Australian Public Service Commission and the Department of Employment and Workplace Relations have advised the AFP that section 72 is the appropriate and preferred mechanism to transfer APS employees into the AFP.<sup>37</sup>

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32 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 2.

33 *ibid.*

34 Note this transfer occurred out of the *Public Service Act 1922*, which has now been repealed and replaced by the *Public Service Act 1999*.

35 CPSU, *Submission 1*, p. 3.

36 Mr Craig Shannon, AFPA, *Committee Hansard*, 8 March 2004, p. 13.

37 *Submission 3A*, p. 6.

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*A new agreement?*

3.36 The Committee heard that the proposed section 72 transfer mechanism would apply until a new industrial agreement could be negotiated. There seemed to be general agreement from all parties that, after APS staff were transferred into the AFP, negotiations should commence in relation to a new award, certified agreement or new AWAs. The AFP told the Committee that:

On 4 March 2004 the Commissioner announced to all AFP and APS staff that the AFP intends to commence such negotiations as soon as practicable after the commencement of this legislation.<sup>38</sup>

3.37 At the hearing stage, it was unclear to the Committee whether the AFP intended to negotiate an entirely new industrial agreement to cover both AFP employees and APS transferees, or whether the current AFP Certified Agreement would be amended to incorporate them. The AFPA expressed support for the incorporation of APS transferees into the AFP Certified Agreement, pointing out that clause 8 of that agreement provides for such action:

There was a very explicit provision put in, in that context, for the APS function to be negotiated and to be incorporated within the context of the AFP certified agreement.<sup>39</sup>

3.38 The Committee sought clarification on the matter from the AFP, which noted that the Commissioner had informed staff 'of his intention to commence negotiations for replacement industrial agreements for transferred APS employees as soon as practicable after integration' and that

Negotiations with the relevant unions and ultimately the AIRC will determine whether there is a separate agreement to cover the protective service function or a consent variation to the current AFP Certified Agreement.<sup>40</sup>

3.39 The Committee also sought information on the implications and dispute resolution mechanisms available if, after transfer, no agreement could be reached to incorporate protective service officers into a new agreement. The AFP responded that the section 27 determination would continue to apply until replaced by an industrial award or other agreement under the *Workplace Relations Act 1996* and that:

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38 Acting Deputy Commissioner John Lawler, AFP, *Committee Hansard*, 8 March 2004, p. 23.

39 *Submission 2*, p. 4.

40 *Submission 3A*, p. 8.

The normal industrial processes as set out in the [*Workplace Relations Act 1996*] will apply to the negotiations for that agreement. Access to the AIRC remains available under these arrangements.<sup>41</sup>

### *Competency and qualification requirements*

3.40 The CPSU also expressed concern that existing APS employees could be made redundant because they will not automatically be deemed to have the mandatory competencies and qualifications (to be required under proposed section 40EB) upon transfer to the AFP.<sup>42</sup> Mr Hall told the Committee that this was a major concern:

... there is no specific element of the legislation that recognises the existing competencies and qualifications of officers ... we think for the sake of clarity—and, frankly, to ease the concerns of officers that they will not [sic] be told, having transferred, that they do not meet the minimum competency standards or qualification requirements—it would be best for this to be spelt out in the legislation.<sup>43</sup>

3.41 Mr Hall explained further:

... they will have lost the opportunity for continuing Public Service employment or redeployment, should that work no longer be suitable.<sup>44</sup>

3.42 The Committee sought clarification from the AFP on this issue. In answers to questions on notice, the AFP stated:

The Bill will deem an APS employee who is a protective services officer (PSO) at the time of transfer to be a PSO after the transfer is effected. This preserves the competency and qualification requirements for PSOs post transfer.

The role of a PSO will not change as a result of integration. The full function of the APS will be integrated into the AFP. There is consequently no consideration being given to redundancies in such circumstances.

This does not effect the proposal to include the existing redundancy provisions under the section 170MX award in the section 24 Determination.<sup>45</sup>

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41    *ibid.*

42    *Submission 1*, p. 3.

43    *Committee Hansard*, 8 March 2004, p. 2.

44    *Committee Hansard*, 8 March 2004, p. 3.

45    *Submission 3A*, p. 5.

3.43 The AFP also stated that because existing APS competencies and qualifications would continue to be recognised 'by necessary implication under the deeming provisions in the Bill', it saw 'no benefit in an express provision in the Bill deeming transferred APS employees ... as competent and qualified post-integration'.<sup>46</sup>

*The Committee's view*

3.44 The Committee believes that for administrative purposes and cohesion within the new integrated agency, all staff should be employed under an integrated employment framework. However, the Committee is concerned about the issues raised by the CPSU in relation to the transitional employment arrangements and the lack of certainty for APS employees transferred into the AFP.

3.45 The Committee is also concerned that these transitional issues did not appear to have been fully considered until after the Bill was introduced into Parliament. The process of integration of the APS into the AFP began in 2002. Yet the AFP gave evidence that they received legal advice on the full implications of the transfer (and proposed transfer mechanisms) for protective service employment conditions only 10 days before the Committee's hearing on 8 March 2004.<sup>47</sup>

3.46 The capacity of the AFP to confer jurisdiction on the Board of Reference to settle disputes over the remuneration and conditions of APS transferees could not be fully explored in the time available to the Committee. The Committee notes the concern expressed by the CPSU that remuneration and conditions might be unilaterally varied by the Commissioner. This concern assumes considerable significance if there is legal doubt about the capacity of the AFP to confer jurisdiction on the Board of Reference in relation to these matters. The Committee notes the stated intention of the AFP in this regard but considers that the ability of APS transferees to access, through their union representatives or otherwise, the Board of Reference should be free of legal doubt. The Committee is concerned to ensure that APS transferees do not face the unacceptable prospect of having their remuneration and conditions unilaterally varied without any access to independent review.

3.47 The Committee considers that it is particularly important that the rights and entitlements of APS officers transferring to the AFP are protected should they be made redundant within a reasonable period. While the Committee notes the AFP's advice that there is no intention to make any officer redundant on transfer and that the redundancy provisions under the 170MX award will continue to apply in the first instance, the Committee is concerned that those rights should be protected when a new agreement is negotiated, particularly if that occurs within 12 months of the transfer.

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46    *ibid.*

47    Federal Agent Tony Negus, AFP, *Committee Hansard*, 8 March 2004, p. 25.

### *Other future employment issues*

3.48 Several other specific employment-related issues were raised with the Committee, including:

- mechanisms for external review of employment decisions;
- whistleblower protection;
- the proposed title of 'protective service officer'; and
- the AFP disciplinary regime and drug and alcohol testing, future union representation for protective service officers and temporary employment issues.

3.49 These issues are discussed in turn below.

### *Mechanisms for external review of employment decisions*

3.50 The CPSU was concerned that APS transferees would lose access to independent external review of employment decisions.<sup>48</sup> One concern was the loss of the right to independent review of promotion, discipline and other employment decisions by the Merit Protection Commissioner under section 33 of the *Public Service Act 1999*.<sup>49</sup>

3.51 Another key concern for the CPSU was the loss of access to the AIRC in relation to disputed employment decisions.<sup>50</sup> Section 69B of the AFP Act excludes some matters from the operation of the *Workplace Relations Act 1996*.<sup>51</sup> The key exclusions in subsection 69B(1) are the provisions which state that the *Workplace Relations Act 1996* (other than Parts VIIIA or XA)<sup>52</sup> does not apply to:

- a matter covered by any of Divisions 2 to 8 of Part IV of the AFP Act or to any action taken under those Divisions; or

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48 *Submission 1.*

49 *ibid* p. 4.

50 *ibid.*

51 This section was added to the AFP Act by the *Australian Federal Police Legislation Amendment Act 1999*.

52 Part VIIIA deals with strike pay. Part XA deals with freedom of association.

- the discipline of AFP employees.<sup>53</sup>

3.52 Subsection 69B(2) also provides that the *Workplace Relations Act 1996* (other than the unfair dismissal provisions) does not apply in relation to the termination of AFP employees.

3.53 The CPSU submitted that:

In short, there is a whole range of employment decisions that are not subject to the jurisdiction of the Industrial Relations Commission. These go from unfair dismissal in cases of alleged but not demonstrated serious misconduct to simply being transferred from one station to another, which could have immense consequences for the earnings and hours of work of an officer.<sup>54</sup>

3.54 The AFP responded:

... there are rights of appeal that are very similar to the current Australian Public Service Act. In fact, the Industrial Relations Commission and the Federal Court are still the No. 1 arbiters of [decisions on termination of employment or continued employment with the organisation].<sup>55</sup>

3.55 The AFPA also noted that aspects of AFP discipline are overseen by the Commonwealth Ombudsman.<sup>56</sup>

3.56 The Committee sought clarification from the AFP in relation to the review rights available to both APS transferees and current AFP employees. The AFP noted that APS transferees would remain Commonwealth public sector employees for the purposes of section 4(1) of the *Workplace Relations Act 1996* and that, because they would not be subject to any probationary period upon transfer, the qualifying period of employment before a review application could be made to the AIRC would not apply.<sup>57</sup> The AFP also noted that it intended to give the AFP Board of Reference:

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53 Subsection 69B(1) of the AFP Act also provides that the same provisions of the *Workplace Relations Act 1996* do not apply to any entitlement of AFP employees to adjustment payments, or any other matter prescribed by the regulations.

54 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 3. These decisions can be made by the AFP Commissioner under section 40H of the AFP Act (assignment of duties) and section 40K (termination of employment for serious misconduct cases).

55 Federal Agent Mark Ney, AFP, *Committee Hansard*, 8 March 2004, p. 24.

56 Mr Jonathan Hunt-Sharman, AFP, *Committee Hansard*, 8 March 2004, p. 15.

57 Section 170CE(5B) prescribes a qualifying period of employment of 3 months before an application can be made to the AIRC.

... the same powers of review over remuneration and conditions as it currently has in relation to AFP employees.<sup>58</sup>

3.57 The Committee repeats its earlier observation that the ability of AFP transferees to access, through their union representatives or otherwise, the Board of Reference should be free of legal doubt. The Committee notes also that the AFP Regulations<sup>59</sup> require the AFP Commissioner to ensure that a process for reviewing AFP employment decisions exists at all times.

#### *Whistleblower protection*

3.58 One issue of particular concern to the CPSU was protection for whistleblowers. The CPSU suggested the Bill be amended to provide specific protection based on section 16 of the *Public Service Act 1999*, a provision which currently applies to APS officers.<sup>60</sup>

3.59 The Committee heard from the AFPA that the AFP had a program in place to protect whistleblowers,<sup>61</sup> and sought further details from the AFP. The AFP's response noted that a Commissioner's Order<sup>62</sup> and a National Guideline on Professional Reporting were in place:

The order and guidelines provide for protection of the identity of the reporter. They also provide protection against direct or indirect harassment, threats, intimidation or any detriment of the reporter. In criminal matters, the Professional Reporting regime cannot guarantee anonymity where matters proceed to a prosecution. However, in conjunction with the Professional Reporting protections the AFP Professional Standards Division have the ability to register persons as informants. This provides greater protection regarding identity, however this too is subject to the discretion of the courts in a criminal proceeding.<sup>63</sup>

3.60 The AFP also told the Committee that about 700 'official referrals' had been received since the inception of the Professional Reporting Network in 1996 (formerly known as the Confidant Network). The AFP also noted that employees could also

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58 *Submission 3A*, p. 7.

59 Regulation 24.

60 CPSU, *Submission 1*, p. 4; Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 3.

61 Mr Jonathan Hunt-Sharman, AFPA, *Committee Hansard*, 8 March 2004, p. 14.

62 Commissioner's Order on Allegations by AFP Employees and Special Members About the Conduct of Other AFP Employees and Special Members (CO6).

63 *Submission 3A*, p. 8.



report directly to AFP Professional Standards, and that both measures were accessible to all employees and had 'ongoing marketing strategies'.<sup>64</sup>

3.61 The Committee notes that the Australian Law Reform Commission (ALRC) is currently conducting an inquiry into protection of classified and security sensitive information in the course of investigations and proceedings and is to report later this year.<sup>65</sup> The ALRC proposes, in its recent Discussion Paper, the introduction of a comprehensive public interest disclosures scheme to cover all Australian Government agencies, including security and intelligence agencies. It proposes the development of special procedures to encourage public interest disclosures, ensure that such disclosures are independently investigated and ensure that those making such disclosures are protected from reprisals.<sup>66</sup>

3.62 A full exploration of such issues is beyond the scope of this inquiry, particularly in light of the very short timeframe and the limited evidence the Committee received on these matters. However, the Committee notes the CPSU's concerns that APS officers may be subject to fewer protections under the new arrangements than they currently enjoy under the *Public Service Act 1999*. The Committee urges the AFP to ensure that the whistleblower protections offered to its staff at least meet the standard of those under that Act, taking into account operational requirements, and that any recommendations of the ALRC be considered closely in due course.

#### *Title of 'protective service officer'*

3.63 While the Bill creates a new category of employee in the AFP, it retains the current name of 'protective service officer'. The AFPA suggested that, upon transfer into the AFP, protective service officers should be renamed 'Police Protective Officer'.<sup>67</sup> They argued this would:

... recognise the increased professionalism of the APS employees and the importance of the roles they perform.<sup>68</sup>

3.64 The CPSU disagreed with the AFPA, suggesting that 'protective service officer' was an accurate name.<sup>69</sup>

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64 *ibid* p. 9.

65 See <http://www.alrc.gov.au>. The ALRC has issued a Background Paper (No. 8) in 2003 and a Discussion Paper (*Protecting classified and security sensitive information*, Discussion Paper No. 67) in January 2004.

66 ALRC, *Protecting classified and security sensitive information*, Discussion Paper No. 67, 2004, Proposal 3-1.

67 *Submission 2*, p. 4.

68 *ibid* p. 3.

3.65 The Committee notes the AFPA's suggestion, but considers that the proposed name change is unnecessary and could cause confusion as to the role and function of protective service officers. The Committee does not recommend any changes to the Bill in relation to the titles of protective service officers.

#### *Other issues*

3.66 Three other issues were raised for consideration during the hearing:

- the AFP disciplinary regime and drug and alcohol testing;
- union representation for APS officers after transfer; and
- temporary employment arrangements.

3.67 APS transferees will be subject to AFP disciplinary measures and drug and alcohol testing. The AFPA was supportive of APS transferees being brought into this AFP 'integrity regime'.<sup>70</sup> The CPSU did not appear to object to this aspect of the Bill, although it did have some concerns associated with external review mechanisms (see earlier discussions on this issue). Consequently the Committee makes no recommendation on those matters.

3.68 The future union representation of protective service officers once transferred into the AFP was also raised during the hearing.<sup>71</sup> However, the Committee heard little evidence on this issue, and notes that it is outside the scope of the Bill.

3.69 The CPSU also suggested an amendment to the Bill to provide specific protection against the 'misuse' of temporary employment in relation to protective service officers, based on provisions in section 22 of the *Public Service Act 1999*.<sup>72</sup> However, the Committee received no evidence to suggest that there are problems with misuse of temporary employment in the AFP, and therefore makes no recommendation on this issue.

### **Integration of the APS into the AFP: other key issues**

3.70 Two other issues relating to the integration of the APS into the AFP were raised:

- commercialisation, or charging for protective service functions; and

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69 Mr Evan Hall, CPSU, *Committee Hansard*, 8 March 2004, p. 2.

70 Mr Craig Shannon, *Committee Hansard*, 8 March 2004, pp. 13-14.

71 *Committee Hansard*, 8 March 2004: Mr Evan Hall, p. 9; Mr Craig Shannon, p. 16; Federal Agent Mark Ney, p. 24.

72 CPSU, *Submission 1*, p. 4.

- consultation processes in developing the Bill.

### ***Commercialisation of protective services***

3.71 The AFPA expressed concern about proposed section 69E, which will allow the AFP Commissioner to continue to charge for certain protective services, and the commercialisation of the APS function. The AFPA argued that:

... any perception that the AFP as an organisation has commercial imperatives that may impact or conflict with the overriding operational obligations and judgements of the Commissioner will erode both public and stakeholder confidence.<sup>73</sup>

3.72 The AFPA argued that this could also lead to conflicts of interest:

It is inappropriate for the Commonwealth law enforcement agency to enter into tendering and commercial activities that may make it subject to the scope of its own investigative responsibilities with regard to fraud against the Commonwealth.<sup>74</sup>

3.73 At the hearing, the AFPA offered to provide documentation to the Committee to indicate:

... the way commercialisation of the protective service function, particularly at the airport fabric, is impacting on the safety of the Australian public.<sup>75</sup>

3.74 The Committee did not pursue the AFPA's offer in relation to this matter for reasons outlined below.

3.75 Finally, the AFPA suggested that:

... the AFP Act not be amended to allow commercial activities and tendering to be conducted by the AFP .... the APS function [should] be either fully budget funded or properly subsidised through more appropriate user pays cost recovery.<sup>76</sup>

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73 *Submission 2*, p. 2.

74 *ibid*; see also Mr Craig Shannon *Committee Hansard*, 8 March 2004, p. 15.

75 Mr Craig Shannon, AFPA, *Committee Hansard*, 8 March 2004, p. 15.

76 *Submission 2*, p. 3.

3.76 The Committee notes that the Explanatory Memorandum states that proposed provision 69E:

... is modelled on the existing section 25A of the APS Act and will maintain the status quo for charging for such services.<sup>77</sup>

3.77 Federal Agent Audrey Fagan from the AFP further responded that:

The current arrangements are approximately 70 per cent commercial and 30 per cent budget funded ... the government direction is to seek to preserve those commercial arrangements, which is what we are doing.<sup>78</sup>

3.78 Acting Deputy Commissioner John Lawler also submitted that:

All AFP financial activity, including services received free of charge, are audited separately by the Australian National Audit Office and are consolidated with the AFP for reporting in the annual financial statements.<sup>79</sup>

3.79 The AFP also stated that APS financial activity will appear as a separate item in the portfolio budget statement and annual report, and that the AFP is subject to the *Financial Management and Accountability Act 1997*.<sup>80</sup>

3.80 The Committee acknowledges the AFPA's concerns but notes that broader policy issues about commercialisation of protective services are outside the scope of this Bill. Further, no new role is being proposed for the APS in the Bill, and the AFP Commissioner has already assumed managerial, financial and administrative responsibility for the APS in July 2002.<sup>81</sup>

3.81 The Committee is satisfied that there are sufficient mechanisms to ensure accountability and to allow public scrutiny in relation to the AFP Commissioner's ability to charge for certain protective services. The Committee recommends no change to these provisions.

### ***Consultation processes in developing the Bill***

3.82 In the Committee's previous inquiries on earlier stages of the integration of the APS into the AFP, concerns were raised about the adequacy of consultation

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77 p. 21.

78 *Committee Hansard*, 8 March 2004, p. 27.

79 *Committee Hansard*, 8 March 2004, p. 27.

80 Federal Agent Audrey Fagan, *Committee Hansard*, 8 March 2004, p. 27.

81 Under the *Australian Protective Service Amendment Act 2002*: Acting Deputy Commissioner John Lawler, AFP, *Committee Hansard*, 8 March 2004, p. 22.

undertaken by the AFP.<sup>82</sup> The Committee stressed the importance of consulting key groups when legislation is being developed, particularly on issues arising from the integration of the APS into the AFP. The AFP assured the Committee during those previous inquiries that consultation processes would be improved in future.<sup>83</sup>

3.83 The Committee was therefore keen to ascertain whether consultation had been adequate in this final stage of the integration. During this inquiry, both the CPSU and AFPA stated that, although there were still issues to be resolved, there had been a valuable and much improved consultation process.<sup>84</sup>

3.84 The Committee acknowledges the efforts made by the AFP and the Attorney-General's Department to ensure that there was an appropriate consultation process in the development of this Bill.

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82 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Australian Protective Service Amendment Bill 2003*, August 2003, para 2.78, pp. 17-18; and *Inquiry into proposed Government amendments to the Australian Protective Service Amendment Bill 2003*, October 2003.

83 *Inquiry into proposed Government amendments to the Australian Protective Service Amendment Bill 2003*, October 2003, p vii.

84 *Committee Hansard*, 8 March 2004, pp. 4 and 12.



## CHAPTER 4

### OTHER ISSUES

4.1 This chapter briefly discusses other issues raised by the Bill:

- AFP investigation of State offences with a federal aspect; and
- minor drafting issues raised in the Bills Digest.

4.2 It then presents the Committee's conclusions and recommendations.

#### **AFP investigation of State offences that have a federal aspect**

4.3 Schedule 3 of the Bill, which proposes to amend the AFP Act and *Crimes Act 1914* to enable the AFP to investigate State offences with a federal aspect, reflects similar provisions in other Commonwealth legislation.<sup>1</sup> The AFP submission stated that the:

... definition of a State offence with a federal aspect, covering a State offence that could have validly been enacted as a federal offence, provides a sound constitutional basis for the amendments.<sup>2</sup>

4.4 The AFPA expressed strong support for the amendments to enable the AFP to investigate State offences with a federal aspect.<sup>3</sup>

4.5 The Committee inquired as to how far the AFP's investigative powers might extend under these provisions.<sup>4</sup> A representative from the Attorney-General's Department explained:

... it is really incidental to a federal investigation. So the idea here—and this is the reason that the state police were convinced that this was a good idea—is to prevent the situation where the AFP have done their controlled operation, done all the investigation and spent months investigating a matter and then they find that there is a state offence which needs to be dealt with. It just saves bringing in a fresh team. The state police obviously see an

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1 See, for example, section 4A of the *Australian Crime Commission Act 2002*.

2 *Submission 3*, p. 5.

3 *Submission 2*, p. 5; *Committee Hansard*, 8 March 2004, p. 17.

4 *Committee Hansard*, 8 March 2004, pp. 27-28.

advantage in it in that it saves them having to be involved in an investigation that has already been dealt with by another police force.<sup>5</sup>

4.6 The AFP also noted that:

These amendments will streamline investigations, avoiding the potential duplication of police resources that arises where the state and AFP services are currently required to investigate different aspects of the same criminal conduct.<sup>6</sup>

***The Committee's view***

4.7 The Committee notes the support for these amendments and the importance of coordination and reduced duplication between state and federal police. Subject to the minor drafting changes discussed below, the Committee recommends no changes to these provisions.

***Issues raised by the Attorney-General's Department***

4.8 The Attorney-General's Department notified the Committee on 16 March 2004 that certain additional amendments to Schedule 3 were required. These included:

- adjustments to sections 8 and 9 of the AFP Act to ensure consistency in powers, duties and functions of the AFP;
- amending the listening device procedures in Division 2 of Part II of the AFP Act 'to better cater for the use of the procedures when investigating State offences with a federal aspect';
- clarifying in the definition of 'State offence that has a federal aspect' that the conduct rather than the elements of the offence determine whether it is such an offence; and
- including a specific reference to the external affairs power in proposed section 4AA(3) of the AFP Act and proposed section 3AA(3) of the *Crimes Act 1914*.

4.9 The Committee notes that advice but, as the proposed amendments are not before it, makes no further comment.

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5 Mr Geoff McDonald, Attorney-General's Department, *Committee Hansard*, 8 March 2004, p. 28.

6 Acting Deputy Commissioner John Lawler, AFP, *Committee Hansard*, 8 March 2004, p. 23.



## Minor drafting issues

4.10 The Bills Digest<sup>7</sup> also identified a number of minor drafting issues in the Bill. The Committee sought clarification from the Attorney-General's Department on each of the issues set out below.<sup>8</sup>

### ***'Commonwealth authority' v 'authority of the Commonwealth'***

4.11 The Bills Digest states that inconsistent terminology is used in relation to the terms 'Commonwealth authority' and/or 'authority of the Commonwealth'. Proposed paragraph 69(1)(e) uses the phrase 'Commonwealth authority'. Subsection 69E(3) then defines the term 'authority of the Commonwealth' rather than 'Commonwealth authority'. 'Commonwealth authority' is defined in subsection 4(1) of the AFP Act, but in slightly different terms to the definition of 'authority of the Commonwealth' in subsection 69E(3). Further, in Schedule 3 of the bill, a definition of 'authority of the Commonwealth', which refers to the definition in the *Crimes Act 1914*, will be included in section 4AA of the AFP Act.<sup>9</sup>

4.12 The Committee asked the Attorney-General's Department to consider this matter. The Department responded that no change was considered necessary for the following reasons:

As noted in the Digest, there is no definition of the phrase “authority of the Commonwealth” in proposed section 3AA of the Crimes Act 1914 (Crimes Act). However, this phrase in proposed section 4AA of the AFP Act is defined to mean whatever it means in section 3AA of the Crimes Act. This is to ensure that ‘State offence that has a federal aspect’ is defined consistently for the purposes of both the Crimes Act and AFP Act amendments in Schedule 3 of the Bill.

The meaning of the phrase “authority of the Commonwealth” in proposed section 3AA of the Crimes Act and proposed section 4AA of the AFP Act is not the same as the meaning of the identical phrase in section 4(1) of the AFP Act. The phrase in section 4(1) draws some of its content from regulations as “authority of the Commonwealth” is defined to include “...any other body declared by the regulations to be an authority of the Commonwealth for the purposes of this Act.”

The fact that “authority of the Commonwealth” is not defined in proposed section 3AA of the Crimes Act does not mean that the phrase is meaningless. The phrase “authority of the Commonwealth” appears a

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7 Department of the Parliamentary Library *Australian Federal Police and Other Legislation Amendment Bill 2003* Bills Digest No. 78 of 2003-04 (Bills Digest).

8 *Committee Hansard*, 8 March 2004, pp. 28-29.

9 Bills Digest, p.6.

number of times in the *Acts Interpretation Act 1901* (Acts Interpretation Act) although not specifically defined by that Act. For this reason, I do not consider it necessary to define “authority of the Commonwealth” specifically for the purposes of the Crimes Act; the phrase has the same meaning as it does in the Acts Interpretation Act.<sup>10</sup>

4.13 The Committee does not recommend any change to those provisions.

#### ***Passenger Movement Charge Collection Act 1978***

4.14 Item 12 of Schedule 2 of the Bill inserts a new paragraph 5(n) into the *Passenger Movement Charge Collection Act 1978*.<sup>11</sup> The Bills Digest notes that it is unclear why the existing subparagraph 5(m) of that Act is not being amended, as it is currently identical to proposed paragraph 5(n), except that it refers to the APS Act rather than the AFP Act.<sup>12</sup>

4.15 The Attorney-General's Department responded that at the time this Bill was being drafted, another bill that inserted paragraph 5(m) with operation from 1 December 2002 was before the Parliament. As it was not known if that bill would be passed, the two amendments were drafted separately.<sup>13</sup> The Department acknowledged that as the other bill has now commenced:

... a parliamentary amendment to replace the amendment at item 12 would avoid an out-of-date reference in the APS Act continuing to appear in the PMCC Act.<sup>14</sup>

4.16 The Committee supports such an amendment.

#### ***Definitions of 'electronic communication'***

4.17 Proposed subsection 4AA(5) in Schedule 3 of the Bill contains a lengthy definition of the term ‘electronic communication’. The Bills Digest notes that this term is defined in simpler language in subsection 476.1(1) of the Criminal Code to mean ‘a communication of information in any form by means of guided or unguided electromagnetic energy’.<sup>15</sup>

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10 *Submission 4*, p. 2.

11 This provision exempts protective service officers who are air security officers from paying the passenger movement charge.

12 Bills Digest, p.8.

13 Customs Legislation Amendment Bill (No. 2) 2002.

14 *Submission 4*, p. 2.

15 Bills Digest, p. 9.

4.18 The Attorney-General's Department responded that it did not consider such an amendment necessary:

Proposed sections 4AA of the AFP Act and 3AA of the Crimes Act adopt the definition of “electronic communication” contained in section 4A of the Australian Crime Commission Act 2002 (ACC Act). Section 4A provided a precedent for defining the concept of a “State offence that has a federal aspect”.

The more concise definition identified in the Digest is the same in substance and I do not consider it is necessary to amend the Bill to include the more concise definition in place of the current definition. I also consider it is desirable to maintain a degree of consistency between the definition of “State offence that has a federal aspect” in the ACC Act, and the definition of “State offence that has a federal aspect” in Schedule 3 of the Bill.<sup>16</sup>

4.19 The Committee notes the Department's response and does not recommend any change to the Bill.

### **The Committee's conclusions and recommendations**

4.20 This Bill represents the final stage of integration of the APS into the AFP and the Committee is pleased to note that consultation with relevant parties appears to have improved during this stage of the process. However, it is apparent that many APS officers still have some concerns about the extent to which their rights and entitlements will be recognised and protected under the new arrangements.

4.21 The Committee notes that the proposed transfer mechanism under section 72 of the *Public Service Act 1999* entitles APS officers to remuneration and other conditions of employment that are no less favourable than those they currently enjoy. A combination of determinations by the Public Service Commissioner under section 24(1) of the *Public Service Act* and by the AFP Commissioner under section 27 of the AFP Act will ensure that employees under the 170MX Award are protected by the section 72 mechanism. The Committee notes also that this arrangement will apply until a new industrial agreement can be negotiated and that, as the AFP has indicated, negotiations with the relevant unions and ultimately the AIRC will determine whether there is a separate agreement or whether the existing AFP Certified Agreement is amended.

4.22 The Committee is mindful of the CPSU's concerns about transitional employment arrangements in the period before a new agreement is reached, particularly in relation to competencies and qualification requirements and the potential for possible future redundancies of protective service officers. During this inquiry the Committee was able to obtain more detailed information on the proposed

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16 Submission 4, p. 2.

arrangements. The Committee notes the AFP's assurance that the full APS function is being integrated into the AFP and that no redundancies are being considered.

4.23 A particular concern of the CPSU is that protection for whistleblowers may be less under the new arrangements than APS officers currently enjoy under the *Public Service Act 1999*. The Committee urges the AFP to ensure that the whistleblower protections offered to its staff at least meet the standard of those under that Act, taking into account operational requirements, and that the ALRC's recommendations later this year are considered.

4.24 After considering the evidence before it, the Committee does not recommend any changes to the Bill, other than those minor matters on which the Attorney-General's Department has advised that amendments may be moved (as discussed earlier in this chapter). However, in light of the concerns that have been expressed during this inquiry about the implications for the terms and conditions of employment of protective service officers both in the period immediately following the integration and in the longer term, the Committee believes that it would be appropriate for the AFP to report on progress on the integration within a reasonable period, such as twelve months, and that the Committee should reconvene to consider those matters. Such a report should include consideration of the implications of commercialisation of the protective service function under the AFP's control.

4.25 As discussed in Chapter 3, the Committee also notes the stated intention of the AFP to confer jurisdiction on the Board of Reference under the AFP Certified Agreement, but considers that the ability of APS transferees to access, through their union representatives or otherwise, the Board of Reference should be free of legal doubt. The Committee is concerned to ensure that APS transferees do not face the unacceptable prospect of having their remuneration and conditions unilaterally varied without any access to independent review.

4.26 Consequently the Committee believes that the Government should clarify that there are no legal obstacles to the conferral of jurisdiction on the Board of Reference to settle disputes over the remuneration and conditions of APS transferees.

### **Recommendation 1**

**4.27 The Committee recommends that the Bill should be agreed to.**

### **Recommendation 2**

**4.28 The Committee recommends that the Government clarify that there are no legal obstacles to the conferral of jurisdiction on the Board of Reference to settle disputes over the remuneration and conditions of APS transferees.**

### **Recommendation 3**

**4.29 In light of concerns raised about the final stage of the integration of the Australian Protective Service and the Australian Federal Police, particularly in relation to terms and conditions of employment of protective service officers in the future, the Committee recommends that the Australian Federal Police report back to the Committee within twelve months on the progress of the integration, and that the Committee reconvene to examine those matters. That report should include an examination of the commercialisation of the protective service function.**

**Senator Marise Payne**

**Chair**



## **Additional comments by the Australian Democrats**

The Australian Democrats generally support the integration of the Australian Protective Service and the Australian Federal Police. We do, however, share the Committee's concerns regarding the terms and conditions of employment for Protective Service Officers following this integration. On the basis of these concerns, we reserve our position on the Bill and any amendments that we may consider necessary.

**Senator Brian Greig**  
**Australian Democrats**





## **APPENDIX 1**

### **ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS**

- 1 Community and Public Sector Union
- 2 Australian Federal Police Association
- 3 Australian Federal Police
- 3A Australian Federal Police
- 3B Australian Federal Police
- 4 Attorney-General's Department



## **APPENDIX 2**

### **WITNESSES WHO APPEARED BEFORE THE COMMITTEE**

**Canberra, Monday 8 March 2004**

**Community and Public Sector Union (CPSU)**

Mr Evan Hall, Division Secretary

Ms Alison Rahill, Organiser

**Australian Federal Police Association (AFPA)**

Mr Jonathan Hunt-Sharman, National President

Mr Craig Shannon, Principal Industrial Officer

**Australian Government Solicitor**

Ms Margaret Byrne, Senior General Counsel

**Australian Federal Police (AFP)**

Federal Agent John Lawler, Acting Deputy Commissioner

Federal Agent Audrey Fagan, Chief of Staff

Federal Agent Tony Negus, National Manager, Protection

Federal Agent Mark Ney, National Manager Human Resources

**Attorney-General's Department**

Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch

Mr Anthony Seebach, Principal Legal Officer, Criminal Law Branch

Ms Sandra Bennett, Legal Officer, Criminal Law Branch



## APPENDIX 3

**Summary of clauses from *Commonwealth Employment (Protective Service Officers) Section 170MX Award 2001* not included in *Protective Service Officers Employment Conditions Determination* made under s24 (1) of the Public Service Act 1999.**

This summary includes:

- Excluded clauses or parts of clauses
- Reasons for non-inclusion
- Details of alternate arrangements
- Amendments

### Excluded clauses or parts of clauses

Cl.	Clause title	Reason for non-inclusion	Alternate arrangement (if any)
1	Award title	New title substituted	
2	Type of award	Not applicable	
3	Arrangement	Doesn't reflect new Arrangement	New Arrangement
4	Vision and Mission Statement	Not applicable to Remuneration/Entitlements	
5	Purpose	No longer applicable	Clause 3 Preamble
6	Award Objectives	Doesn't deal with Remuneration/Entitlements	
7	Continuous Improvement	Doesn't deal with Remuneration/Entitlements	
8	Definitions	Partly redundant	Clause 32 Savings Clause*
9	Commencement Date	Not applicable to current situation	Clause 2 Commencement
10	Parties Bound	Not applicable – no party 'bound'	
11	Application of Award	Not applicable - replaced	Clause 4 Application
12	Relationship with other awards	No longer applicable	Clause 5 Relationships
16	Reference of Disputes to the AIRC	Not applicable - s24 Det can't cede jurisdiction	Clause 9 Board of Reference (AWR Act s131)
19.1.2(c)	Meaning of excess employee	Inconsistent with CoP powers of transfer	AFP Act
20	Termination of Employment	Inconsistent with CoP powers	AFP Act
24	Salary increases	No longer applicable – all complete	
26.5/8	Performance Management/Increments	Amended/Part deleted (new AFP scheme)	Clauses 16.6.1 & 32 pick up existing increment arrangements*
30	Transitional Use of RDOs	Redundant Clause – not applicable	Clause 20 picks up current arrangements
Sch 5	Security Assistant Classification	Not used	

### \* Clause 32 Savings Clause provides that:

“Unless specifically provided for or altered in this Determination, all definitions, remuneration and entitlements provided for in the *Commonwealth Employment (Protective Service Officers) Section 170MX Award 2001* will continue to apply”.

### Other amendments are as follows:

Amended term	Original term
Determination	Award
AFP	APS
AFP Board of Reference established by the AFP Certified Agreement 2003-2006	AIRC
Union or Association with the right to represent AFP employees	CPSU or other employee representative
Performance Development Agreement	Performance Management Scheme
Commissioner	Director

## AFP &amp; APS current and future Industrial Arrangements

AFP/APS classification	Number involved	Current award for W R Act 'no disadvantage' test	Current industrial instrument coverage	Basis of contents of s24 Det	Cover post 1/7	AFP CA applies post 1/7?	Award post 1/7 for W R Act 'no disadvantage' test	Comments
PSO	1000	APS	170MX 'award'  (not an award for s72)	Remuneration & Conditions from 170MX, APS Award	S24>s27 Det	No. AFP CA exclusion clause applies	AFP Award	CA cover excluded because pre-existing AFP 'Function' does not include <b>totality</b> of protective services
ASO (Ongoing)	130	APS	P S Act S24 Det	T & C from s24 Det., APS award	S24>s27 Det	No. AFP CA exclusion clause applies	AFP Award	CA cover excluded because pre-existing AFP 'Function' does not include ASO function
Admin staff (Ongoing)	100	APS	AWA		AWA	Not immediately, maybe later if AWA ceased	AFP Award	AWA unless ceased, then AFP award or AFP CA depending on whether function is AFP or APS function
Admin staff (Ongoing)	29	APS	Contract (awaiting AWA)		AFP CA or AWA	Depends on role – whether AFP or APS	AFP award	If role covered by AFP function, CA over-rides s27 Det
Admin staff (Non-Ongoing)	42	APS	contract		AFP CA or contract	Depends on role – whether AFP or APS	AFP award	If covered by AFP function, CA over-rides s27 Det
All current AFP employees (except SES)	3506	AFP Award	AFP CA	n/a	AFP CA	Yes (except SES)	AFP Award	SES Officers in the AFP are generally covered by CoP determinations

Source: AFP Submission 3A