

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

**Consideration of Legislation Referred
to the Committee**

**Provisions of the Australian Protective Service
Amendment Bill 2002**

June 2002

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ISSN 1326-9364

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Secretariat

Mr Peter Hallahan Acting Secretary

Ms Saxon Patience Senior Research Officer

Mr Anthony Marinac Principal Research Officer

Ms Michelle Lowe Executive Assistant

Committee contacts

Legal & Constitutional Committee

S1.108

Parliament House

CANBERRA ACT 2600

Telephone: (02) 6277 3560

Fax: (02) 6277 5794

E-mail: legcon.sen@aph.gov.au

Internet: www.aph.gov.au/senate_legal

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CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE BILL

Referral of the Bill

1.1 On 15 May 2002, the Senate Selection of Bills Committee recommended,¹ and the Senate subsequently agreed to, the referral of the provisions of the Australian Protective Service Amendment Bill 2002 ('the bill') to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 13 June 2002. Referral was contingent upon the introduction of the bill in the House of Representatives, which occurred on 16 May 2002.²

1.2 The Selection of Bills Committee recommended referral of the bill in order to give consideration to the Government's proposal to make the Australian Protective Service (APS) an operating division of the Australia Federal Police (AFP).³

History of APS Functions

1.3 For many years the functions of the APS were undertaken by the AFP (known until 1979 as the Commonwealth Police Force). Late in 1982, during the leadup to the 1983 Federal Election, the Government announced its intention to create '... an independent organisation, dedicated to the provision of protective security services ...'⁴ The reasons for this policy were described as follows:

Mr Newman said that the establishment of the new organisation recognises that the provision of protective security services is a distinct function separate from the general policing role. The Commonwealth sees value in providing a centralised service to protect its key installations, including those in the defence field, official residences, and certain foreign embassies and consulates. Subject to consultations with the Presiding Officers, the new body may also assume responsibility for protective security at Parliament House.⁵

1.4 This policy was given further impetus by the Hon. Mr. Justice Stewart, who conducted a Royal Commission of Inquiry into Drug Trafficking, which reported in February 1983. Recommendation 9 of the report was that '[t]he Protective Services component should

1 Selection of Bills Committee, *Report No. 3 of 2002*, 15 May 2002

2 House of Representatives *Hansard*, 16 May 2002, p. 2319

3 Selection of Bills Committee, *Report No. 3 of 2002*, 15 May 2002

4 The Hon Kevin Newman, Minister for Administrative Services, *Commonwealth Record*, 31 December 1982. Mr Newman's announcement was made on 23 December 1982

5 The Hon Kevin Newman, Minister for Administrative Services, *Commonwealth Record*, 31 December 1982

be severed from the Australian Federal Police and re-formed into a uniformed gendarmerie.⁶ His reasons were similar to those presented above:

One change [to the AFP's structure] is so obvious and essential that the Commission must suggest it. A significant proportion of the Commonwealth's police are not engaged in investigative duties at all. They are responsible for guarding Commonwealth property and embassies of foreign countries. It is really a misnomer to call these police; their duties are far more what one would expect from military sentries.⁷

1.5 In May 1984, the Government introduced the Australian Federal Police Amendment Bill, which resulted in the creation of a separate protective service organisation, located in the Department of Administrative Services. In the second reading speech, the Minister stated:

The Government has taken this decision on the basis that the quality of service able to be offered by an organisation dedicated to a single task is significantly better than that offered by an organisation responsible for two or more dissimilar functions. There is a clear distinction between the requirements and characteristics of an organisation which is intended to perform the range of duties required of a modern police force and those of an organisation dedicated to performing the more specialised functions of access control and the security of premises.⁸

1.6 The Australian Protective Service was then formed on 20 October 1984, as part of the Department of Local Government and Administrative Services.⁹ Its initial personnel complement was transferred in from the AFP, and funding was redirected from the AFP budget to support the APS.

1.7 Once the APS had begun operating, it emerged that the powers used by APS officers in carrying out their duties were unclear at law, as the Commonwealth laws had been drafted with a general perception that police-like powers (such as arrest powers, and the authority to bear firearms) would only be required by members of a police force. In order to clarify this situation, the Government introduced the Australian Protective Service Bill 1986, which was passed the following year as the *Australian Protective Service Act 1987*. The Minister stated:

... [the unclear legal] situation is administratively inefficient and unfair to both the officers and to members of the public who may have to deal with such officers, so the Bill I am now presenting is intended to do two things: First, to make sure that officers of the Australian Protective Service have all the powers they genuinely need to perform their full range of duties, and, secondly, to ensure that the private citizen is protected against abuse of those powers.¹⁰

6 The Hon. Mr. Justice D.G. Stewart, Royal Commission of Inquiry into Drug Trafficking, *Report*, February 1983, p. 830

7 The Hon. Mr. Justice D.G. Stewart, Royal Commission of Inquiry into Drug Trafficking, *Report*, February 1983, p. 516

8 The Hon. M. Young, Special Minister of State, House of Representatives *Hansard*, 30 May 1984, p. 2482

9 See also, *Transcript of evidence*, Australian Protective Service, p. 2

10 The Hon. T. Uren, Minister for Local Government and Administrative Services, House of Representatives *Hansard*, 16 October 1986, p. 2193

1.8 The National Commission of Audit conducted in 1996 stated that, while there was a core of security work which must be undertaken by a Commonwealth agency, many of the activities of the APS could be undertaken by private security providers¹¹. As a result, the operations of the APS were ‘... divided into core and contestable functions ...’¹² and the APS must now compete with private security providers for work in the latter category.

1.9 Following the terrorist attacks on the United States in September 2001, the Government reviewed Australia’s security and counter-terrorism arrangements. This process included consideration of the Australian Protective Service, which has significant counter-terrorism roles including a counter-terrorist first response role in Australian airports.

1.10 As a result of this review, the Government decided that in the first instance, responsibility for administering the *Australian Protective Service Act 1987* should move from the Secretary of the Attorney-General’s department to the Commissioner of the AFP. The purpose of this move is to ‘...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.’¹³ The bill gives effect to this new alignment of responsibility.

1.11 The new alignment is proposed to take effect from 1 July 2002 and while control of the APS would be transferred to the Commissioner of the AFP, the APS would, at least in the first stage of the process, still be a separate agency to the AFP, employing separate staff.

1.12 The Government, in the Second reading speech in the House of Representatives, stated that ‘the Government will explore steps to further align the Australian Federal Police and the Australian Protective Service following the passage of the Bill, having regard to current competition and efficiency arrangements applying to the Australian Protective Service’.¹⁴ This will be done ‘in full consultation with the employees of the two organisations’.¹⁵

Purpose of the Bill

1.13 The primary purpose of the bill is to create the Australian Protective Service as a statutory authority, with the Commissioner of the Australian Federal Police as the agency head. This would result in the Commissioner being head of both the AFP and the APS, which would remain separate agencies. So, while the second reading speech describes the APS ‘becom[ing] an operating division of the Australian Federal Police,’¹⁶ the new arrangements do not return the APS to the pre-1984 circumstances described above.

11 See Department of Finance, *National Commission of Audit Report*, Chapter 3

12 Attorney-General’s Department, *Annual Report 1996-97*, p. 135

13 House of Representatives’ *Hansard*, Second Reading Speech, Australian Protective Service Amendment Bill 2002, 16 May 2002, p. 2319

14 House of Representatives’ *Hansard*, Second Reading Speech, Australian Protective Service Amendment Bill 2002, 16 May 2002, p. 2319

15 House of Representatives’ *Hansard*, Second Reading Speech, Australian Protective Service Amendment Bill 2002, 16 May 2002, p. 2319

16 House of Representatives’ *Hansard*, Second Reading Speech, Australian Protective Service Amendment Bill 2002, 16 May 2002, p. 2319

1.14 Second, the bill updates the language used in the initial act, in order to make it clear that there are two types of Australian Protective Service employees: ‘protective service officers’ and ‘APS [Australian Public Service] employees in the Protective Service.’ This distinction is relevant because the Act gives protective service officers a range of powers, including arrest powers, search powers, and authority to carry a firearm. These powers are not available to an ‘APS employee in the Protective Service.’ These employees undertake administrative and similar duties, and therefore do not require the powers given to protective service officers.

1.15 Third, the bill broadens some of the Australian Protective Service Director’s delegation powers. Currently, the Act only permits the Director to delegate his or her powers to another protective service officer. The Director cannot currently delegate his or her powers to an ‘APS employee in the protective service.’ The bill contains provisions which would allow the Director to do so. However, this power is restricted to matters of an administrative nature (for instance, the power to issue identity cards may be delegated). Powers which the Act grants to Protective Service Officers (for instance, arrest powers) may not be delegated.

1.16 Fourth, the bill clarifies that the General Orders (which the Director may issue) are subordinate to a range of other laws and instruments. This provision is currently in place, but will be amended to take account of the transition from the *Public Service Act 1922* to the *Public Service Act 1999*.

1.17 Finally, the bill requires the Australian Protective Service, as a statutory authority, to submit an annual report each year, in the same manner as other statutory authorities.

A staged approach

1.18 The passage of the Australian Protective Service Amendment Bill 2002, and the formal transfer of the APS to the leadership of the AFP Commissioner will represent the first step of a staged approach to bring the two organisations together. A number of issues which do not (or may not) require legislative change are still to be dealt with. These include:

- complementary people and professional standards in the AFP and the APS;
- organisational design issues;
- financial and commercial issues;
- communications; and
- operational delivery¹⁷

1.19 A combined APS/AFP/Attorney-General’s Department Portfolio Working Group has been formed to implement the transition stage by stage, in order to make the transition as seamless as possible. This work is co-ordinated by the *Project Merida* team within the AFP. The next stage in the process will be to resolve the issues described above, followed by a

17 *Transcript of Evidence, Australian Federal Police, p.7*

third stage which will follow the transition and review the outcome.¹⁸ The project will complete all stages at the end of 2003 or early in 2004.¹⁹

Conduct of the Inquiry

1.20 On 22 May 2002, the Committee wrote to a number of individuals and organisations drawing their attention to the provisions of the Bill. The Committee received 4 submissions which are listed at Appendix 1.

1.21 On 7 June 2002, the Committee held a public hearing in Canberra. A list of witnesses who appeared at this hearing is at Appendix 2.

Note on References

1.22 References in this Report to submissions, are to individual submissions as received by the Committee, and not to a bound volume.

1.23 References to the *Hansard* transcript are to the Proof *Hansard*. Page numbers vary between the proof and the official *Hansard* transcript.

18 *Submission 2*, Australian Federal Police, p.2, par. 20

19 *Submission 2*, Australian Federal Police, p.2, par. 14

CHAPTER 2

ISSUES

Overview

2.1 This is a relatively simple, though nonetheless significant bill, which initiates the first step of a staged approach to implementing the Government's decision to integrate the APS into the AFP. Its major effect is to transfer control of the APS from the Secretary of the Attorney-General's Department to the Commissioner of the Australian Federal Police.

2.2 The staged approach to change, which is clearly being carefully managed and which has sought to take into account the views of a wide range of stakeholders, together with the minimalist approach in the bill involving a relative lack of disruption to either organisation, resulted in few issues arising directly out of the bill being drawn to the Committee's attention.

2.3 All of the submissions, including those received from the staff associations and unions involved, supported the bill and recommended that it be passed. The Australian Federal Police Association did raise several issues with the Committee and made a range of recommendations in its submission, but in the Committee's view, a number of these issues are more relevant to the subsequent stages of the process rather than the first stage to which this bill is confined.

The need for amalgamation

2.4 In the context of the bill, the Committee considered the need for the amalgamation of the two organisations. As noted in Chapter 1, following the events of September 11 2001, the Government initiated a review of Australia's security and counter-terrorism arrangements in order to 'ensure that Australia can best meet the demands of the new terrorist environment'.¹ This review was conducted by the Secretary of the Attorney-General's Department, Mr Robert Cornall ('the Cornall Review').

2.5 In evidence to the Committee, the APS confirmed that the Cornall Review recommended the amalgamation of the two organisations because '...there was a need for closer coordination between the various counter-terrorist organisations of the Commonwealth'.² The APS also stated that the Cornall Review identified that '...there were some operational synergies to be gained by linking the APS with the AFP'.³

2.6 The Director of the APS, while emphasising the different roles of the two organisations, also pointed to the natural connections between them:

The role of the AFP is clearly different from that of the APS. The AFP role is to enforce Commonwealth criminal law and to protect Commonwealth and national

1 House of Representatives' *Hansard*, Second Reading Speech, Australian Protective Service Amendment Bill 2002, 16 May 2002, p. 2319

2 *Transcript of evidence*, Australian Protective Service, p. 4

3 *Transcript of evidence*, Australian Protective Service, p. 4

interests from crime in Australia and overseas.... The role of the APS, on the other hand, is to provide protective security and custodial services to the Commonwealth...it is also very clear that there are natural connections between the two roles, so very appropriately the APS functions will be included in AFP outcome 1...The APS role very clearly fits into the prevention and the protection parts of that outcome.⁴

2.7 The Commissioner of the AFP supported these comments and stated that:

The amalgamation is to achieve a seamless approach to the provision of security of the Australian government largely at airports and at installations here in Canberra, the seat of government, and at the other installations around the country.⁵

2.8 The Commissioner also identified benefits to the amalgamation of the two organisations in terms of intelligence sharing and the functional similarities between the organisations such as the provision of protection services.⁶ The Commissioner suggested that a cohesive approach amongst counter-terrorist agencies may assist in preventing intelligence sharing breakdowns as has been documented to have occurred in the United States recently.⁷ This view was supported by the Attorney-General's Department:

Having the AFP Commissioner in a position to make assessments about the positioning of both agencies avoids the kind of problems the AFP Commissioner referred to, which we have not had in Australia, which were experienced by the FBI. In the FBI's case, even though there were legal powers for information to flow, that did not happen properly. With the AFP Commissioner in charge of both organisations on an operational level, that flow could be achieved without going down the track of other things that might be done.⁸

Ministerial direction on operational matters

2.9 The Committee sought information about whether the AFP Commissioner, in his role as CEO of the APS, would be subject to ministerial direction in relation to operational matters.

2.10 The Attorney General's Department assured the Committee that there is no power in any legislation to direct the way an operation is carried out, and that the Government had put on record that there would be no interference with operational decision making. The witnesses outlined the nature of the powers to give directions:

There are powers of general direction that apply to both the AFP and the APS under the Australian Federal Police Act, section 37. There is a power on the part of the minister to issue directions with respect to the general policy to be pursued by the Australian Federal Police, and that is used for a prioritisation model. Under the Public Service Act, there is a power for the Prime Minister to issue general directions to agency heads and then a provision stating that that is not apply to specific individuals. So the contrast in the settings is not as dramatic as has been

4 *Transcript of evidence*, Australian Protective Service, p. 2

5 *Transcript of evidence*, Australian Federal Police, p. 11

6 See, *Transcript of evidence*, Australian Federal Police, pp. 9-11

7 *Transcript of evidence*, Australian Federal Police, p. 11

8 *Transcript of evidence*, Attorney-General's Department, p. 24

suggested in some quarters, especially when you take that legal framework, which fits comfortably, and couple that with the commitment that has been made about how it will be used in practice.⁹

Potential inconsistencies with general orders

2.11 The Committee sought information from a number of witnesses about potential inconsistencies or conflicts with general orders resulting from amendments to s12(3) of the *Australian Protective Service Act 1987* contained in the bill.¹⁰ The issue raised was whether there are any current general orders which are inconsistent with:

- (d) a direction issued by the Public Service Commissioner under section 11, 15 or 36 of the *Public Service Act 1999*; or
- (e) a direction issued by the Prime Minister under section 21 of the *Public Service Act 1999*; or
- (f) the Classification Rules made under section 23 of the *Public Service Act 1999*;

and if so, whether the new section 28 (Transitional general orders) overrides the new provisions in section 12(3).

2.12 Attorney General's Department addressed the issue, advising the Committee that the provision would operate in relation to general orders already made:

If a general order already exists, a Prime Minister's direction or a Public Service Commissioner's direction will override that general order to the extent that there is any inconsistency.¹¹

2.13 The Department also addressed the issue of whether there was any problem with a general order requiring rectification, advising that this was unlikely:

The reason for that is that, as a matter of existing government policy and without this legislation, general orders comprised a document that was meant to be framed in accordance with these other classes of document. That is also inherent in the subject matter. The classes of instrument that will prevail over general orders in the event of any inconsistency are directions by the Public Service Commissioner about the APS values and the manner in which they are to be upheld, procedures to be laid down for breaches of the Public Service Code of Conduct and the Prime Minister's general directions to agency heads. On a technical level in respect of the way the legislation works, it does not invalidate the general order or require it to be remade; it just means that in the event that there is an inconsistency-which is something you would always avoid or remove if it was discovered-the other instrument would prevail.¹²

9 *Transcript of evidence*, Attorney-General's Department, p. 24.

10 This issue was drawn to the Committee's attention in *Submission 1*, Community and Public Sector Union, p. 2

11 *Transcript of evidence*, Attorney-General's Department, p. 22.

12 *Transcript of evidence*, Attorney-General's Department, p. 22.

2.14 This evidence was confirmed on notice by the APS and the AFP, both of whom stated that ‘to date, the Portfolio Working Group has not identified any inconsistencies’ but ‘it is currently completing a close scrutiny of the existing general orders’.¹³

Other issues raised beyond the scope of the bill

2.15 A proportion of the evidence received by the Committee focussed on issues that, while related to the integration of the APS as an operating division of the AFP, were nonetheless beyond the scope of the bill. The most significant of these issues were:

- the potential for conflicts of interest between the APS's commercial activities (eg: tendering for management of the immigration detention centres and protection services at Sydney Airport) and the AFP's policing functions;
- cultural differences between the two organisations;
- training differences between staff of the two organisations; and
- differences between integrity and accountability frameworks.

2.16 The Director of the APS also reminded the Committee that while the APS does have commercial aspects to some of its operations, most of its role is non commercial:

The fact is that in some circumstances—I should say that the competitive aspects of our commercial operations are not as widespread as you might think—we compete with other organisations, but the vast majority of what we do is straight service to the Commonwealth.¹⁴

2.17 Evidence provided by the AFP and APS made it clear to the Committee that these and other issues will be addressed by the Portfolio Working Group and Project Merida as the staged approach progresses. For example, the Director of the APS, addressed the issue of the conflicts between the commercial role of the APS and the AFP, describing how the working group "is focussing on maintaining...a firewall between the activities of the AFP and the commercially based activities of the APS" and maintaining "two very separate financial systems".¹⁵

2.18 Similarly, the AFP Commissioner assured the Committee that these issues were under active consideration:

One of the safeguards, as I outlined in my opening statement, is to maintain the APS as a separate operating division of the AFP. I think one of the elements of accountability that will be imposed upon me under the Financial Management Act will be to ensure that I do not cross-subsidise APS out of money that is appropriated to the AFP for other outcomes. It is something that I am alive to and something that I am giving significant consideration to. This reinforces why we are taking a staged approach and why this bill is before us to identify the separate role, albeit under the one head.¹⁶

13 See, *Submission 2A*, Australian Federal Police, p. 1 and *Submission 3A*, Australian Protective Service, p.1

14 *Transcript of evidence*, Australian Protective Service, p. 5

15 *Transcript of evidence*, Consideration of the Budget Estimates 2002-3, p. 453-4

16 *Transcript of evidence*, Australian Federal Police, p. 10

2.19 The Committee is reassured by these statements. The Committee will return to these matters if subsequent legislation is referred.

Recommendation

The Committee recommends that the bill be passed.

Senator Marise Payne

Chair

APPENDIX 1

ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Community and Public Sector Union
2. Australian Federal Police
- 2A. Australian Federal Police
3. Australian Protective Service
- 3A. Australian Protective Service
4. Australian Federal Police Association

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Friday 7 June 2002 (Canberra)

Dr Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

Mr James Ashurst, Manager, APS-AFP Project, Australian Protective Service

Mr Thane Cooper, Legal Officer, Attorney-General's Department

Ms Annie Davis, Director, Legislation Program, Australian Federal Police

Federal Agent Audrey Fagan, General Manager, Australian Federal Police,

Ms Brooke Hartigan, Legal Officer, Attorney-General's Department

Mr Christopher Hayward, Assistant Secretary, Corporate Support, Australian Protective Service

Mr Jonathan Hunt-Sharman, National President, Australian Federal Police Association

Mr Laurence Hutchison, Chief Executive Officer, Australian Federal Police Association

Mr Mick Keelty, Commissioner, Australian Federal Police

Mr Doug Lilly, Acting National Secretary, Community and Public Sector Union

Mr Craig Shannon, Principal Industrial Officer, Australian Federal Police Association

Mr Martin Studdert, Director, Australian Protective Service

