

CHAPTER 2

OVERVIEW OF THE BILL

Background

Law Enforcement Integrity Commissioner Bill 2006 and Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006

2.2 The Law Enforcement Integrity Commissioner Bill 2006 (LEIC Bill) establishes the office of the Integrity Commissioner who will head up the Australian Commission for Law Enforcement Integrity (ACLEI), an independent body with powers to prevent, detect and investigate corruption within Commonwealth government law enforcement agencies, including the Australian Federal Police (AFP) and the Australian Crime Commission (ACC).¹ In his second reading speech, the Attorney-General, the Hon. Philip Ruddock MP, stated that other Commonwealth agencies may later be brought within ACLEI's jurisdiction by regulation.²

2.3 When he announced that the Commonwealth would establish an independent anti-corruption body, the Minister for Justice and Customs, Senator the Hon. Chris Ellison said:

While no evidence exists of systemic corruption within the Australian Crime Commission (ACC), the Australian Federal Police (AFP) or other Commonwealth law enforcement agencies, the Government has decided there should be a independent body with the powers of a Royal Commission to address corruption at the Federal level should it arise.³

2.4 The LEIC Bill and its companion Bills have had a lengthy development which reflects the experience of several Australian States in investigating serious corruption.

State Bodies

2.5 A number of Australian jurisdictions have established statutory bodies with power to investigate misconduct and corruption in the public sector generally.⁴ In other words, the powers of these State bodies are wider than only investigating corruption or misconduct in law enforcement agencies. For the most part, these bodies are also empowered to investigate organised crime.

1 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 1.

2 *House of Representatives Hansard*, 29 March 2006, p. 9.

3 The Hon. Philip Ruddock MP, Attorney-General and Senator the Hon. Chris Ellison, Minister for Justice and Customs, 'Commonwealth to set up independent national anti-corruption body', Joint media release E73/03, 16 June 2004.

4 Sue Harris Rimmer, *Client Memorandum – Law Enforcement Integrity Commissioner Bills*, 21 April 2006, p. 3.

2.6 **New South Wales** – In 1988, NSW established the Independent Commission Against Corruption (ICAC). ICAC's functions include investigating allegations of corruption including those made against members of the NSW Police. In addition, the Police Integrity Commission (PIC) was established in 1996 upon the recommendation of the Wood Royal Commission. The PIC's functions include preventing, detecting or investigating police corruption and other serious police misconduct and to manage or oversee other agencies doing the same.⁵ The ICAC retained an advisory and support role for the PIC.

2.7 **Queensland** – In 2002, the Criminal Justice Commission and the Queensland Crime Commission merged to form the Crime and Misconduct Commission (CMC). The CMC serves two basic functions. The first relates to the investigation of major and organised crime. The second relates to complaints of misconduct by public sector employees, including those from the police service. The CMC also has a research function and prevention function.

2.8 **Western Australia** – The Corruption and Crime Commission of Western Australia (CCC) investigates allegations of misconduct by Western Australian police officers and public officers. It also conducts education programs with State government departments, agencies, and in the community, to increase the awareness of misconduct and how to counter it. The CCC took over the cases from the Anti-Corruption Commission (that ceased to operate on 26 May 2004) and the Police Royal Commission.⁶

2.9 **Victoria** – Victoria has no analogous body to those noted above. However, in 2004, a Police Ombudsman was established which subsequently became the Office of Police Integrity in November 2004. The Director of Police Integrity is also the Victorian Ombudsman.

The Commonwealth

2.10 Preventing and combating public sector corruption at the Commonwealth level is not a new issue. In 1976, the Commonwealth Ombudsman was established and, since that time, the office has been entrusted with the functions of overall integrity 'watchdog' through its role as office of final resort for complaints about defective administration.⁷ As a separate function, the investigation of corrupt and

5 G.A. Kennedy AO QC, *Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian police officers – Interim Report*, December 2002, pp 57-58.

6 Corruption and Crime Commission of Western Australia, <http://www.ccc.wa.gov.au/> (accessed on 30 April 2006).

7 *Complaints (Australian Federal Police Act) 1981*; Dr A.J. Brown, 'Federal anti-corruption Policy takes a new turn...but which way? Issues and options for a Commonwealth integrity agency', *Public Law Review*, 2005, vol. 16, no. 89, p. 93.

other behaviour involving Commonwealth officials, for the most part, rested with the AFP and later the National Crime Authority (NCA), now the ACC.⁸

2.11 In 1996, the Australian Law Reform Commission (ALRC) proposed a major departure from these arrangements and recommended that:

a new single agency...should be established to investigate or manage/supervise the investigation of complaints against the AFP and the NCA [now ACC].⁹

2.12 The ALRC recommendation (though not accepted) argued for the creation of a dedicated corruption prevention/handling body similar to those established by the States.¹⁰

2.13 The lessons learned from the State bodies, as well as a clearer perspective on the potential for corruption at the Commonwealth level, has given rise to the establishment of an anti-corruption body.

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

2.14 The Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (AFP Professional Standards Bill) provides a new complaints and professional standards framework for the AFP.

2.15 The central characteristics of the current AFP model of professional standards are contained in the *Complaints (Australian Federal Police) Act 1981* (to be repealed by this Bill), the *Australian Federal Police (Discipline) Regulations 1979* and the Commissioner's Orders. These provisions provide a structured regime of control of police action, which reflects the view that police behaviour is best controlled by rules of conduct enforced by legalistic charges and determined in certain circumstances by the Federal Police Discipline Tribunal.¹¹

2.16 In its 1996 review of AFP and (then) NCA complaints and disciplinary systems, the ALRC observed that AFP processes were outdated and unsatisfactory.¹² The ALRC saw as the solution the establishment of a National Integrity and Investigations Commission that would have a dual role for the AFP and NCA – an

8 Dr A.J. Brown, *Submission 8 (Attachment A)*, pp 1-2.

9 Australian Law Reform Commission, *Integrity: but not by trust alone: Australian Federal Police and National Crime Authority complaints and disciplinary systems*, 1996, ALRC Report No. 82, Recommendation 6.

10 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 3.

11 Federal Agent Alan Scott, *Professional Standards – charting the way forward*, Platypus Magazine (Australian Federal Police), No. 82, March 2004, p. 36.

12 Australian Federal Police, *Submission 3*, p. 1.

office dealing with complaints and an office dealing with corruption.¹³ Additionally, in 2001, the Senate Legal and Constitutional References Committee also recommended that the AFP complaints procedures be 'simplified and made more transparent'.¹⁴

2.17 In 2002, Justice William Fisher AO QC undertook a review of AFP professional standards (the Fisher Review) at the request of the AFP Commissioner Mick Keelty. Justice Fisher's recommendations centred around the establishment of a 'managerial model' for professional standards rather than a legalistic and formal approach.¹⁵ The Fisher Review observed:

In complaints and discipline matters police services have traditionally tended to focus too much on the aspect of reactive punishment.¹⁶

2.18 The AFP Professional Standards Bill implements the bulk of the Fisher Review's recommendations.

Law Enforcement Integrity Commissioner Bill 2006

2.19 As stated above, the LEIC Bill establishes ACLEI and the role of the Integrity Commissioner. ACLEI's jurisdiction will initially cover the AFP and the ACC, though other Commonwealth agencies with law enforcement functions may be brought within its jurisdiction by regulation.¹⁷

2.20 The main purpose of the LEIC Bill is to enhance the integrity of Commonwealth law enforcement agencies by providing independent and effective external investigation of possible instances of corruption in the AFP and ACC.¹⁸ The Bill provides ACLEI with the power to conduct a Royal Commission style investigation and many provisions in the Bill mirror those contained in the *Royal*

13 Australian Law Reform Commission, *Integrity: but not by trust alone: Australian Federal Police and National Crime Authority complaints and disciplinary systems*, 1996, ALRC Report No. 82, p. 15.

14 Senate Legal and Constitutional References Committee, *Order in the law – The report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority*, 28 August 2001, p. 137.

15 The Hon. W.K. Fisher AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 97.

16 The Hon. W.K. Fisher AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 59.

17 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 9.

18 Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006, *Explanatory Memorandum*, p. 1.

Commissions Act 1902 and the investigation and hearing powers in the *Australian Crime Commission Act 2002*.¹⁹

2.21 A total of \$9.5 million was allocated in the 2005-06 Federal Budget – of this, \$0.6 million was allocated to the Attorney-General's Department to fund the establishment of ACLEI and \$8.9 million was allocated to ACLEI.²⁰

Part 1 – Preliminary

2.22 Part 1 outlines the commencement dates (clause 2), objects (clause 3) and application (clause 4) of the Bill.

Part 2 – Interpretation

2.23 Definitions are contained in clause 5. At clause 6, the Bill provides that the meaning of 'engages in corrupt conduct' is:

...any act or omission which involves the abuse of office as a staff member of a law enforcement agency, or conduct which perverts, or is for the purpose of perverting the course of justice, or, having regard to the staff member's duties and powers, conduct engaged in for the purpose of corruption of any other kind...²¹

2.24 Clauses 7-9 discuss the meaning of the term 'corruption issue' in the context of ACLEI and law enforcement agencies.

2.25 Clauses 10 and 11 identify persons who are considered to be staff members of law enforcement agencies and ACLEI respectively. The Bill treats staff members of the former NCA as if they were staff members of the ACC (clause 12). 'Secondees' are defined in clause 10(5).²²

Part 3 – The Integrity Commissioner

2.26 Clause 15 provides for the appointment of an Integrity Commissioner as the statutory head of ACLEI and prescribes his or her functions and powers in investigating corrupt conduct and corruption issues. In carrying out his or her functions, priority must be given to matters involving serious or systemic corruption (clause 16).

19 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 6.

20 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 3.

21 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 12.

22 See also Attorney-General's Department, *Submission 10*, Answers to Questions on Notice, Question 2.

Part 4 – Dealing with corruption issues

2.27 Division 1 outlines the ways in which a corruption issue may be brought to ACLEI's attention – that is, by notification or referral by the Minister or by another agency or person.²³ The Bill creates particular obligations for heads of law enforcement agencies in relation to corruption issues that concern their agency and for custodians of prisoners who may wish to raise a corruption issue.

2.28 Division 2 deals with ACLEI's initial decision about whether to directly investigate a corruption issue or whether it should be investigated by a law enforcement agency. Clause 27 provides a list of factors that ACLEI must consider, including the appropriate balance between its responsibility to investigate corruption issues, and the responsibility of law enforcement agencies to manage their agencies.²⁴ Division 2 also provides for ACLEI to advise interested parties of the decision and for the possibility of changing the decision at a later stage if there is reason to do so.²⁵

2.29 ACLEI will have jurisdiction to investigate allegations of corruption made against, or relating to, State and Territory law enforcement officers who are seconded to a Commonwealth agency (clause 29). ACLEI will share the oversight of State and Territory officers with the relevant integrity agency (clause 30).

2.30 ACLEI must deal with corruption issues that were notified (clause 19) or referred (clauses 18 or 23) in one of the ways listed in subclauses 26(1) and 29(6), or decide to take no further action.²⁶ ACLEI may conduct an investigation, either alone or jointly with another government agency or State and Territory integrity agency. It may refer a corruption issue to the AFP or other law enforcement agency for investigation, and may manage or oversee an investigation being conducted by a law enforcement agency. ACLEI has further options where the corruption issue relates to a secondee to a law enforcement agency.

2.31 Subdivision C requires ACLEI to advise particular people (for example, Ministers, persons who refer issues and heads of law enforcement agencies) of the decisions made in relation to the corruption issue raised. ACLEI may also initiate its own investigations (subdivision D) and may at any time reconsider how a corruption issue is to be dealt with (subdivision E).

Part 5 – Information sharing when decision made about how to deal with corruption issue

2.32 This Part provides mechanisms to ensure that the law enforcement agency which is to investigate a corruption issue has access at the outset to all the available

23 Law Enforcement Integrity Commissioner Bill 2006, clauses 18, 19 and 23.

24 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 18.

25 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 18.

26 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, pp 19-20.

information.²⁷ The Bill provides for information sharing between agencies to ensure effective and efficient investigations.

Part 6 – Investigations by Integrity Commissioner

2.33 Part 6 sets out basic principles governing the conduct of investigations of corruption issues by ACLEI. ACLEI has the discretion to choose the most suitable approach to each individual matter (clause 48), subject to the Minister's power to order a public inquiry (clause 71).

2.34 ACLEI is required to inform the Minister, the head of the agency concerned, the complainant and – where appropriate – the subject of the investigation, of the initiation, progress and outcomes of the investigation. It must report all findings at the conclusion of an investigation, subject to provisions contained in the Bill ensuring the confidentiality of protected information (clause 149). ACLEI may also report to the Minister and Parliament if it believes that there is a failure by the head of an agency to take adequate remedial action (clauses 55-57).

Part 7 – Investigations by other Commonwealth agencies

2.35 Part 7 sets out the process and requirements where ACLEI either refers an investigation to a law enforcement agency or is managing (clause 61) or overseeing (clause 62) an investigation by an agency.

2.36 Reporting and notification requirements are set out in Division 3. ACLEI may request progress reports from the agency conducting the investigation (clauses 63 and 64) and must receive a report at its conclusion (clause 66). Upon receipt of the final report, ACLEI may make comments and/or recommendations in writing to the head of the agency concerned (clause 67). ACLEI may request details of actions that the agency plans to take in response to its recommendations and if it is not satisfied with the response of the agency it may refer the matter to the Minister.

Part 8 – Public inquiries into corruption issues

2.37 The Minister may request that ACLEI conduct a public inquiry into a corruption issue, corruption generally in law enforcement agencies and/or the integrity of staff members of law enforcement agencies (clause 71).

2.38 ACLEI must invite submissions on issues that are the subject of a public inquiry (clause 72) and it is required to submit a report to the Minister at the conclusion of an investigation that includes findings, evidence, action taken or proposed to be taken and recommendations (clause 72).

27 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 24.

Part 9 – Integrity Commissioner's powers in conducting investigations and public inquiries

2.39 For the purposes of investigating a corruption issue ACLEI has the power to compel the production of documents and things. It can make requests to staff members of law enforcement agencies or to any other person requiring them to provide information or produce documents or things (clauses 75 and 76). ACLEI is allowed to retain documents or things produced for a period necessary for the purposes of the investigation for which they were requested (clause 77).

2.40 The staff member or other person has grounds for non-disclosure where disclosure would, for instance, prejudice Commonwealth/State relations or reveal a confidential source of information relevant to the enforcement of a criminal offence or a civil penalty provision (clause 78).

2.41 If ACLEI requests a legal practitioner to produce documents, information or things, the legal practitioner can refuse if doing so would disclose privileged communications made by, or to, the legal practitioner (clause 79).

2.42 A staff member or person is not excused from complying with a request made under clauses 75 and 76 on the grounds that the production of information or documents requested could incriminate him or her. The privilege against self-incrimination is abrogated in clause 80, although a 'use immunity' is provided in (subclauses 80(2) and (4)). This immunity operates where a staff member of a law enforcement agency, or other person, prior to producing information or documents or things, claims that doing so may tend to incriminate or expose them to a penalty.²⁸ This means that the information or documents or things will not be admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. The use immunity is not available in five specified circumstances (subclause 80(4)).

2.43 Similarly, a person is not excused on the grounds that answering a question or producing information, documents or things would breach a secrecy provision (except if disclosure would breach a taxation secrecy provision or a law enforcement secrecy provision) (clause 80).

2.44 Clause 80 also provides that a person cannot refuse or fail to comply with a request to answer a question or produce information, documents or things on the grounds that doing so would be contrary to the public interest.

2.45 Division 2 confers powers on ACLEI to hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry. ACLEI has the power to hold the whole, or part of, a hearing in public or private (subclause 82(3)). It may serve a summons on a person to attend a hearing (clause 83) and may take evidence outside Australia (clause 84).

2.46 If a summons has been served on a person, ACLEI has a general discretion (limited by subclauses 91(3)-(5)) to include a notation preventing or limiting disclosure of information about the summons or any official matter connected with the summons (subclause 91(2)). This is designed to prevent a disclosure which could lead to the destruction or alteration of evidence, or intimidation of witnesses.²⁹ According to the Explanatory Memorandum, a specified circumstance allowing disclosure in order to obtain legal advice is likely.³⁰

2.47 ACLEI's powers are supported by criminal offences for conduct in the nature of contempt (clause 94).

2.48 ACLEI staff will provide investigative, intelligence and administrative support. For the purpose of conducting investigations ACLEI 'authorised officers' will have the same powers of arrest (Division 5) as a constable of police and will be able to apply for and execute search warrants (Division 4). A search warrant may be issued if there are reasonable grounds to suspect that there is, or will be within 72 hours, evidential material on the premises or person which may be concealed, lost, mutilated or destroyed (clause 109). Subdivision D sets out general provisions about executing a search warrant and subdivisions E and F contain specific provisions about executing a warrant in relation to premises and persons (respectively).

Part 10 – Dealing with evidence and information obtained in investigation or public inquiry

2.49 ACLEI must provide evidence of an offence or a person's liability to a civil penalty or confiscation proceedings³¹ to the relevant authority or person to enable prosecution or the commencement of civil penalty proceedings in appropriate circumstances (clauses 142 and 143; see also clause 148). Prior to providing a person or authority with this evidence, ACLEI must take reasonable steps to consult the head of a relevant agency, unless it is likely that an investigation or subsequent action would be prejudiced by doing so (clause 144).

Part 11 – Attorney-General certificates about release of information

2.50 The Attorney-General is authorised to prevent the disclosure of information by ACLEI and the Integrity Commissioner on the grounds that it would be contrary to the public or national interest (clause 149).³² The Attorney-General may issue a certificate prohibiting the disclosure of specific information by specific methods. A certificate may also impact on information sharing between agencies, and the mandatory reporting requirements.

29 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 49.

30 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 49.

31 Law Enforcement Integrity Commissioner Bill 2006, clause 143.

32 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 2.

Part 12 – Dealing with ACLEI corruption issues

2.51 The Bill includes a procedure for investigating complaints of corruption issues within ACLEI (including the Integrity Commissioner) and provides that the Minister may authorise a special external investigation (clause 156).

2.52 Clause 174 imposes an obligation on all ACLEI staff members (including the Integrity Commissioner) to report corrupt conduct.

Part 13 – Administrative provisions

2.53 Part 13 covers administrative issues, including the appointment (clause 175), remuneration (clause 178) and termination (clause 183) of the Integrity Commissioner. Division 2 provides for the appointment of an Assistant Integrity Commissioner and other related issues.

2.54 Division 3 establishes ACLEI (clause 195) and prescribes that its function is to assist the Integrity Commissioner in dealing with corruption issues (clause 196). The Integrity Commissioner may engage consultants (clause 198) and secondees (clause 199).

2.55 ACLEI must give a report to the Minister to be presented in Parliament on the performance of the Integrity Commissioner's functions during each financial year (clause 201).

2.56 Division 5 outlines the confidentiality requirements for ACLEI staff. Exceptions to these requirements are at clauses 208 and 209.

Part 14 – Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity

2.57 The Bill creates a Parliamentary Joint Committee (PJC) to oversee the operation of ACLEI and to ensure that it is accountable to Parliament. The PJC must monitor, review and report on any relevant matter that should be directed to the government's attention (clause 215). ACLEI must inform the PJC when requested, of the general conduct of ACLEI operations and provide information related to investigations and inquiries unless the information is clause 149 certified information (clause 216).

2.58 The Bill provides that the PJC must meet in private once each year to receive a brief from the Commonwealth Ombudsman about ACLEI's involvement in controlled operations (clause 218).

Part 15 – Miscellaneous

2.59 Part 15 contains miscellaneous provisions, including the Integrity Commissioner's power of delegation (clause 219) and the provision of immunity from civil proceedings for staff members of ACLEI (clause 222). Clause 224 provides that

the Governor-General may make regulations prescribing matters required or permitted by the Bill, or that are necessary or convenient to be prescribed.

Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006

2.60 The Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 (Consequential Amendments Bill) amends a range of Acts as a consequence of the establishment of ACLEI and the appointment of the Integrity Commissioner.³³

2.61 As a result of the LEIC Bill, it is necessary that ACLEI has investigatory and inquiry powers that will allow it to gather information and evidence to perform its functions.³⁴ It is also necessary that information be passed between ACLEI and other Commonwealth agencies lawfully, particularly where that information relates to a Commonwealth criminal offence.

2.62 This Bill provides for ACLEI investigators to have access to the full range of special investigative powers, including the capacity to use telecommunications interception, surveillance devices, controlled delivery and assumed identities. It also provides ACLEI with access to a range of otherwise confidential information that is accessible to investigators from other key Commonwealth law enforcement agencies. Lastly, the Bill modifies the *Ombudsman Act 1976* to clarify the relationship between the Commonwealth Ombudsman and ACLEI.

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

2.63 The AFP Professional Standards Bill inserts a new part in the *Australian Federal Police Act 1979* (AFP Act) to modernise the complaints and professional standards regime within the AFP. The new part implements a contemporary managerial approach to complaints and professional conduct issues.³⁵ It provides for a graduated system of categories of conduct to allow for minor complaints to be dealt with by managers and for more serious categories to be investigated by the unit established within the AFP to deal with professional standards concerns.

2.64 The Bill also revises the role for the Commonwealth Ombudsman in relation to professional standards. It gives the Ombudsman:

- the ability to jointly determine, with the AFP Commissioner, the kinds of issues that belong to various categories of conduct;

33 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 7.

34 Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006, *Explanatory Memorandum*, p. 1.

35 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1.

- access to the records that are kept in relation to AFP conduct and practices issues; and
- the role of conducting annual and ad hoc reviews of the operation of the new professional standards system.

2.65 There is no financial impact flowing directly from the provisions of this Bill.³⁶

Schedule 1 – Main amendments

2.66 Schedule 1 amends the AFP Act by inserting a number of definitions. In particular, item 2 expands the current definition of 'AFP appointee' (contained in the *Complaints (Australian Federal Police) Act 1981*) to ensure all persons engaged by the AFP Commissioner, including consultants, independent contractors and persons engaged overseas as employees are covered by the new complaints and professional standards system.

Part V – Professional Standards and AFP conduct and practices issues

2.67 This part establishes the procedures for AFP conduct issues, AFP practices issues, and other issues related to the AFP are able to be raised and dealt with under the new system.

Division 1 – Preliminary

2.68 The AFP Commissioner may determine the professional standards to be complied with by AFP appointees (clause 40RC).

2.69 A unit must be constituted within the AFP to undertake investigations of AFP conduct issues and corruption issues that relate to conduct engaged in by AFP appointees (clause 40RD). The head of the unit is responsible directly to the AFP Commissioner (clause 40RE).

2.70 'AFP conduct issue' is defined broadly and relates to whether an AFP appointee has engaged in conduct that breaches the AFP professional standards or is corrupt conduct (clause 40RH). Conduct that was engaged in before the commencement of this section and conduct for which the statute of limitations has passed are included in the definition.

2.71 'AFP practices issue' is also defined broadly and concerns the practices and procedures of the AFP, both within and outside of Australia (clause 40RI).

2.72 There are three categories of conduct that define what behaviour is able to be the subject of a complaint in relation to a professional standards issue for the purposes of the proposed legislation.

36 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1.

- **Category 1 conduct** (least serious) – inappropriate conduct that relates to minor management matters or customer service matters or conduct that reveals a need for improvement by the AFP appointee concerned (clause 40RN).
- **Category 2 conduct** – minor misconduct by an AFP appointee, inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee or repeated instances of category 1 conduct (clause 40RO).
- **Category 3 conduct** – conduct that is serious misconduct by an AFP appointee or that raises the question whether termination action should be taken, or involves a breach of the criminal law or serious neglect of duty by an AFP appointee, and that is not conduct that raises a corruption issue (clause 40RP).
- The highest category of conduct is conduct giving rise to a corruption issue (clause 40RK).

2.73 The AFP Commissioner and the Commonwealth Ombudsman may jointly determine by legislative instrument the kind of conduct that falls within category 1, 2 or 3. If a conduct issue potentially falls into a number of different categories, it will be taken to fall within the highest of those categories.

Division 2 – Raising AFP conduct and practices issues with the AFP for action under Division 3

2.74 Any person may give information that raises an AFP conduct or practices issue either to the AFP Commissioner or any AFP appointee, in writing or orally (clause 40SA). The Bill also provides mechanisms for persons in custody to give information (clause 40SB).

2.75 Information given under clause 40SA must be recorded and dealt with in accordance with subclause 40TA(1). There is an exception for category 1 conduct issues or an AFP practices issues (subclause 40SC(2)).

Division 3 – Dealing with AFP conduct or practices issues

2.76 The AFP Commissioner may issue orders about how AFP conduct or practices issues and information are to be dealt with by AFP appointees (clause 40TA).³⁷ The AFP Commissioner's power to make orders is important because the provisions of the proposed Part V set out only key elements of the new regime.

37 The AFP Commissioner may, by writing, issue orders with respect to the general administration of, and the control of the operations or, the AFP (section 38, *Australian Federal Police Act 1979*).

Most of the remaining administrative details to enable the system to function effectively will be provided by the Commissioner's orders.³⁸

2.77 Division 3 also outlines action that can be taken to improve or address the AFP appointee's performance or behaviour – for example, training and development action (clause 40TC), remedial action (clause 40TD) and termination action (clause 40TE).

2.78 Subdivision C provides that category 1 and 2 conduct issues are to be dealt with by a manager who is allocated such an issue. Subdivision D outlines how category 3 conduct issues and corruption issues (in association with ACLEI) are to be dealt with.

Division 4 – Ministerially directed inquiries

2.79 The Minister has the power to arrange for an inquiry to be held concerning the conduct of an AFP appointee or any matter relating to the AFP (clause 40UA). If the Minister arranges for an inquiry, he or she must inform the Commonwealth Ombudsman, ACLEI and other persons or bodies that the Minister deems appropriate about the details of the inquiry (clause 40UB).

Division 5 – Investigative powers

2.80 Where a person is investigating a category 3 conduct issue, a corruption issue (under Division 3) or a ministerially directed inquiry (under Division 4), Division 5 provides additional powers to the investigator (clause 40VA).

2.81 The investigator may:

- conduct the inquiry and may obtain information in a manner that he or she thinks fit (subject to the Division) (clauses 40VB and 40VC); and
- enter and search AFP premises for the purposes of an investigation or inquiry (clause 40VF).

2.82 The investigator may direct an AFP appointee to provide information, produce a document or thing, answer a question or do anything else reasonably necessary for the purposes of the investigation or inquiry (clause 40VE). The AFP appointee is not excused from complying with the direction on any ground. The production of information or evidence obtained from the AFP appointee is not admissible in evidence against the AFP appointee in civil or criminal proceedings (with some exceptions). Similar powers are given to an investigator conducting a Ministerially directed inquiry (clause 40VG).

38 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 12.

2.83 A number of offences regarding the conduct of AFP appointees with a maximum penalty of six months imprisonment are listed at clause 40VH.

Division 6 – Record keeping

2.84 The AFP Commissioner must keep adequate records. There is an exception for category 1 conduct issues that are resolved without being recorded (clause 40WA). Both ACLEI and the Commonwealth Ombudsman are entitled to have access to the records for the purposes of performing their functions (clause 40WA).

Division 7 – Ombudsman review

2.85 The Commonwealth Ombudsman's role is to review the administration of Part V (clause 40XA). At least every 12 months the Ombudsman must inspect the records of AFP conduct and practices issues that have been, or are being dealt with, under Divisions 3 and 4. The Ombudsman may also conduct ad hoc inspections (clause 40XB).

2.86 The Commonwealth Ombudsman must prepare an annual report for the Parliament that includes information as to the adequacy of the administration of matters under Divisions 3 and 4 (clause 40XD).

Division 8 – Offences

2.87 Division 8 provides that it is an offence:

- to cause, or threaten to cause, detriment to another person on the ground that the person, or another person, gave information for the purposes of Part V (clause 40YA);
- to provide false information about AFP conduct or practices issues (clause 40YB);
- for an AFP appointee to refuse to give the necessary personal details without reasonable excuse, or to give false details, where a person has requested those details for the purpose of making a complaint or raising a conduct issue, and where the AFP appointee was informed of the reason for requesting the details (clause 40YC).

Division 9 – Secrecy

2.88 Clause 40ZA applies where a person inappropriately records or communicates information acquired via the investigation or inquiry.

