

CHAPTER 4

KEY ISSUES – AFP PROFESSIONAL STANDARDS

Background

4.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry in relation to the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (AFP Professional Standards Bill).

The Fisher Review

4.2 The proposals contained in the Bill are based on the results of a 2003 review of Australian Federal Police (AFP) professional standards undertaken by Justice William Fisher AO, QC (known as the Fisher Review). The Fisher Review focused on the means by which police administrators could achieve real discipline to increase and enhance performance.

4.3 In his second reading speech the Attorney-General, the Hon. Philip Ruddock MP, explained that the Fisher Review¹ found that the AFP's current disciplinary system was inconsistent with modern management practices and the organisational needs of the AFP, and that its focus on punitive outcomes, adversarial structure and formalised processes has caused delay and unnecessary dispute.²

4.4 In identifying the problems with the current AFP system, the Fisher Review noted that contemporary policing in the AFP was based on a model characterised by '... strong notions of rank, subordination, command, control and discipline'.³

4.5 The Review made 23 recommendations. These included general principles, focusing on adopting the principles of the managerial or administrative approach to professional standards.⁴ The Review further recommended repeal of the *Complaints (Australian Federal Police) Act 1981* (Complaints Act) and the related Commissioner's Orders 5 and 6 (with the latter to be replaced by a new Commissioner's order to underpin a new AFP complaints management model).⁵

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

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

3 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 35.

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

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

4.6 Other important recommendations of the Review included:

- Inserting a new division in the *Australian Federal Police Act 1979* (AFP Act) to include a detailed complaints regime with clear definitions of the conduct to which the new division of the Act applied. The new division should not apply to conduct that is lawful and private.
- There should be a statutory definition of 'non-reviewable action', which would apply to complaints such as those of 'unsatisfactory performance'.
- The availability of a range of options for non-reviewable actions ranging from the educational (coaching, mentoring) to behavioural (counselling, reprimand) to structured change (change of duties, transfer) and a recording of temporary or permanent adverse findings.
- Provision for the Commonwealth Ombudsman to intervene and examine any matter to ensure it is dealt with appropriately.

The new complaints and professional standards system

4.7 The AFP Professional Standards Bill aims to modernise the complaints and professional standards system for the AFP. To this end, and consistent with the findings of the Fisher Review, the Bill proposes a more modern managerial approach to replace the hierarchical disciplinary regime currently provided under the Complaints Act, which the Bill repeals.⁶

4.8 The new complaints and professional standards systems provide for a graduated system of categories of conduct, ranging upwards in seriousness from categories 1 to 3 and an additional higher category being conduct giving rise to a corruption issue.⁷ The types of matters that fall into each category are described only in general terms in the AFP Professional Standards Bill.

4.9 The new AFP complaints and professional standards system would differ from the current model by allowing:

- all complaints, including those made by AFP officers, to be categorised by the level of seriousness;
- minor complaints – such as rudeness – to be dealt with by managers quickly and informally (for example, in the context of performance agreements); and
- more serious complaints – including conduct such as assault or persistent low-level misconduct – to be investigated by the unit to be established within the

6 Australian Federal Police, *Submission 3*, p. 3; Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

7 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 9.

AFP to deal with professional standards concerns.⁸ All serious complaints could lead to employment action being taken against the officer.⁹

The complaints process

4.10 In evidence, questions were raised about the how the complaints process would operate in the new professional standards framework, and in particular, on the operation of proposed Division 2, which relates to the mechanisms for raising AFP conduct with the AFP.¹⁰

4.11 The committee was advised that the AFP is currently re-drafting the internal guidelines on the professional standards framework to accommodate the proposals in the Bill. The options proposed for an officer making a complaint would be:

- To give the information to another AFP appointee outside of the work area, which may include giving the information directly to Professional Standards.
- To record the information directly pursuant to proposed section 40SC. (The AFP will be implementing an online web-based complaint recording system available to all AFP appointees to record and manage complaints. This includes the ability to self report breaches of professional standards.)
- To give the information to a member of the AFP's Confidante program, who will act as a support person for the affected AFP appointee and assist throughout resolution of the matter.¹¹

4.12 There are also processes for external and isolated posts. These procedures are designed to ensure that the complaint is managed externally; AFP appointees also are further protected by proposed section 40YA which creates an offence of victimisation.¹²

Ombudsman's role

4.13 The Bill also confers a revised role for the Commonwealth Ombudsman in relation to professional standards. First, it designates the Commonwealth Ombudsman as the Law Enforcement Ombudsman, a role that includes the oversight of complaints handling and conduct issues in the AFP and the investigation of matters.¹³

8 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, clause 40RD.

9 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1; Commonwealth Ombudsman, *Submission 4*, p. 2.

10 *Committee Hansard*, 27 April 2006 p. 32.

11 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 13.

12 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 13.

13 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

4.14 Second, it gives the Ombudsman the ability to jointly determine, with the AFP Commissioner, the kinds of issues that belong to various categories of conduct.¹⁴ On a practical level, the Bill removes the need for the Ombudsman to be involved in all complaints, which it was argued, would allow it to focus on more serious complaints and systemic issues.¹⁵

Reactions to the proposal

4.15 Reactions to the Bill have been essentially positive.

4.16 Commissioner Keelty told the committee that both the AFP appointees¹⁶ and complainants¹⁷ stand to benefit from the new system. These benefits include:

- improved timeliness in resolving minor matters for both AFP appointees and complainants;
- results which aim to improve police conduct, as well as reducing the possibility of the conduct recurring; and
- improvements in performance oversight and management.¹⁸

4.17 The Commonwealth Ombudsman stated that the office had been 'closely involved' in the development of the AFP Professional Standards Bill and that they supported the 'more streamlined approach to handling complaints against the AFP'.¹⁹

4.18 Similarly, it was argued by the Commonwealth Ombudsman that the new complaints and professional standards system would be 'more flexible and efficient' than the present approach which was described as 'a product of the thinking in the 1980s which required that precise rules be set down to cover every possible circumstance'.²⁰

4.19 From the Ombudsman's perspective, the Bill would:

14 The new AFP complaints and disciplinary system allows all complaints to be categorised by level of seriousness. The types of matters that fall within each of the categories are described in very general terms in the Bill, with specific matters within each category to be agreed between the AFP Commissioner and the Commonwealth Ombudsman; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

15 Commonwealth Ombudsman, *Submission 4*, p. 3.

16 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, item 2.

17 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, item 13.

18 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

19 Commonwealth Ombudsman, *Submission 4*, p. 3; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

20 Commonwealth Ombudsman, *Submission 4*, p. 2; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

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- increase efficiency by removing the need to be involved in all complaints – this would allow the Ombudsman to dedicate increased resources to more serious and systemic matters; and
 - allow for improvements in its oversight role because of the new audit function and the new focus on practice and procedure – this would provide the Ombudsman with opportunities to look at broader administrative practices within the AFP.²¹

4.20 The Australian Police Federation of Australia (AFPA) is more critical in its assessment of the Bills. While generally supporting the proposed changes, the Association does not believe that the Bill covers all the required areas adequately and thus, should not be passed in its current form.²²

4.21 In evidence, Mr James Torr, Chief Executive Officer of the AFPA, emphasised the importance of managing the new system effectively. He explained that no other area of management has so much potential to disenfranchise employees if mismanaged: a mishandled complaint or misconduct allegation, can damage the morale of not only the officer concerned, but also engender cynicism and negativity across the whole work team.²³

4.22 The main concern of the AFPA is that the proposed changes in the Bill do not fully implement the recommendations of the Fisher Review and that it had 'glaring omissions that impact quite onerously on the rights of AFP employees'.²⁴ In particular, the AFPA submission argues that:

- the recommendations of Justice Fisher have not been interpreted in the light of the changes in the industrial environment since 2003;
- non-reviewable outcomes have a punitive action against the employee;
- the AFP tribunal has been removed, but there is no clear indication that AFP regulation 24 still applies to AFP employment decisions (regulation 24 provides that a process for review of employment decisions must exist at all times);²⁵
- there are no reviewable actions in the new structure, as envisaged by Justice Fisher;

21 Commonwealth Ombudsman, *Submission 4*, pp 3-4.

22 Australian Federal Police Association, *Submission 6*, p. 2.

23 *Committee Hansard*, 27 April 2006, p. 17.

24 Australian Federal Police Association, *Submission 6*, p. 5.

25 Australian Federal Police Association, *Supplementary Submission 6A*, Answers to Questions on Notice, p. 3; AFPA argued strongly for the inclusion of AFP regulation 24 review mechanisms within the AFP Act.

- professional standards can be used as an umbrella to incorporate employment related actions to usurp the application of the *Workplace Relations Act 1996*; and
- the new structure needs more refinement and specificity in its powers and application to avoid the possibility of abuse and misuse by those empowered within it.²⁶

4.23 In relation to the Ombudsman, the AFPA hoped that the change of focus would mean that the Ombudsman's office would become 'more effective in dealing with complaints at the senior level' of the AFP.²⁷ In evidence, Mr Torr argued:

Many of our members currently see the Ombudsman as their last line of defence of what they might perceive as mismanagement, but it does not translate that way. With all due respect to that office and that role, it has not proven effective in dealing with complaints about senior level police.²⁸

4.24 The exact extent to which the recommendations of the Fisher Review were incorporated into the Bills was unclear. The Attorney General's Department indicated in evidence that 'pretty much all' of the recommendations had been implemented, but the committee sought clarification.²⁹

4.25 The Department took the question on notice and sent the committee a detailed response. In summary, the Department indicates that the Bill implements 15 of the Fisher Review's 23 recommendations. The recommendations which were partially implemented or implemented with some variation, include recommendations 7, 9 and 15. Broadly, these deal with the conduct and complaints investigation process, and the role of the professional standards unit. Notable is the fact the Justice Fisher saw no reason to include 'minor management matters' in the legislation. He said:

9.2 This category of complaint should be called 'minor management matters', which reflects the idea that it incorporates customer service matters as well as other minor management issues.

9.3 These managerial resolutions should not be treated as complaints in the true sense as they would fall outside the normal operation of the legislative structure for complaints. They should be an exception to the normal operation of the complaints provisions of the AFP Act.³⁰

4.26 However, the Attorney General's Department notes that 'all professional conduct issues, are captured within the Bill'. Category 1 and 2 matters will not be

26 Australian Federal Police Association, *Submission 6*, p. 5.

27 Australian Federal Police Association, *Supplementary Submission 6A*, Answers to Questions on Notice, pp 2-3.

28 Mr James Torr, *Committee Hansard*, 27 April 2006, p. 21.

29 Mr Michael Manning, *Committee Hansard*, 27 April 2006, pp 35-36.

30 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 99.

subject to formal investigation by the professional standards unit or to direct intervention by the Ombudsman.³¹

4.27 The Department also advised the committee that two recommendations – 3 and 17 – are to be implemented by administrative action. Fisher recommendation 3 concerns the repeal of the Commissioner's orders, which the Department indicates 'is a matter for the Commissioner, but the Commissioner is expected to implement this recommendation when the new legislative framework is in place.'³² Fisher recommendation 17 concerns the unification of the areas of Professional Standards and Employment Standards.

4.28 The committee was also advised that Fisher 'Recommendations 12, 16 and 23 will be implemented in part by the Bill and in part by administrative action'.³³ Recommendation 12 deals with the non-reviewable matters and the process of assignment for investigation. Recommendation 16 deals with the recording of complaints and the role of the Ombudsman, and recommendation 23 deals with the appointment and function of the Overseas Liaison Officer.

Committee view

4.29 On this matter, the committee makes the observation that there is no obligation *per se* for the government to implement the Fisher recommendations as a whole. Nevertheless, several matters require further consideration, in particular:

- the provisions relating to the categorisation of complaints;
- the provision for review of decisions;
- the resources available to the Commonwealth Ombudsman; and
- the application of professional standards to the Commissioner.

Categorisation of complaints

4.30 A technical matter that arises in the Bill is the potential problem caused by the omission of any specified timeframes for the joint categorisation of complaints by the Commissioner and the Commonwealth Ombudsman.

4.31 As outlined above, the AFP Professional Standards Bill proposes that the complaints system include a graduated scheme for categorising complaints. Minor complaints would be dealt with by managers as performance issues and would attract category 1 classification (clause 40RN). Category 2 conduct includes minor misconduct or repeated instances of category 1 conduct (clause 40RO). The most serious matters would fall into category 3 (clause 40RP). It should be noted that

31 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

32 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

33 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

conduct falling within category 3 does not raise a corruption issue but could give rise to termination (which is dealt with in conjunction with ACLEI and the Integrity Commissioner).

4.32 Clause 40RM provides for the AFP Commissioner and the Commonwealth Ombudsman to determine jointly, by legislative instrument the kind of conduct that falls into categories 1, 2 or 3. The AFPA observed that there is no obligation for the Commissioner and the Ombudsman to categorise conduct under clause 40RM within a specified time.³⁴ The AFPA was particularly concerned that if no determination were in place when (and if) the Bill commenced, all conduct for the purpose of AFP professional standards system would be categorised by default as category 3.³⁵ On this point, the AFPA recommended:

The 'automation' needs to be taken out of s40RM (2)... There needs to be a decision at the Commissioner or delegated level to proceed down the CAT3 [category 3] path. There also needs to be an obligation to categorise all uncategorised conduct as it arises.³⁶

4.33 In evidence, the committee was told by a representative of the Australian Federal Police that it was 'most unlikely' that subclause 40RM(2) would operate as an automatic provision and that 'detailed work' had been undertaken jointly by the AFP and the Commonwealth Ombudsman on the issue.³⁷

4.34 A related concern focused on the potential for misuse of managerial action 'as punitive action' in relation to category 1 conduct.³⁸ AFPA argued, for example, that training and development action³⁹ taken in relation to category 1 conduct could be an arrangement with 'considerable punitive effect' due to loss of remuneration from requiring a person to undertake different daily activities.⁴⁰

4.35 In response, Commissioner Keelty strongly argued that training and development action was not intended to be used as a 'de facto punishment' and that the real issue was about 'applying management strategies to change behaviour'.⁴¹

4.36 Similarly, an Attorney-General's Department representative said that although the framework established by the Bill gives discretion to AFP management regarding

34 Australian Federal Police Association, *Submission 6*, p. 10.

35 Australian Federal Police Association, *Submission 6*, p. 10.

36 Australian Federal Police Association, *Submission 6*, p. 11.

37 Federal Agent Allan Scott, Manager, People Strategies, Australian Federal Police, *Committee Hansard*, 27 April 2006, p. 37.

38 Australian Federal Police Association, *Submission 6*, p. 3; Mr Ian Phillips, Director Legal, Australian Federal Police Association, *Committee Hansard*, 27 April 2006, p. 20.

39 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, clause 40TC.

40 Mr James Torr and Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 20.

41 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 38.

the appropriate corrective avenue for behaviour, he did not accept that there was any risk of this mechanism being used to inappropriately impose a 'significant pecuniary element'.⁴² The Department undertook to provide further information, and this was provided.

4.37 The Department indicated that the proposed subsection 40TC(1) applies to category 1 conduct that has occurred.⁴³ While not providing complete protection against pecuniary loss, the Department considers:

It is implicit in these provisions that the action taken must be proportional to the conduct to which it is a response and that any impact other than improvement in the appointee's performance must be genuinely coincidental.⁴⁴

4.38 It would be inappropriate (according to the Department) to offer any guarantee that an appointee will suffer no pecuniary loss as a result of training and development action, as this would be a result of underperformance or misconduct by the AFP officer concerned. In deciding what is appropriate to effect the necessary changes in behaviour, the AFP should take into account 'potential side-effects such as pecuniary loss... but they should not deter a manager from taking action that is clearly required'.⁴⁵

4.39 The Department notes the Commissioner's undertaking at the hearing on 27 April 2006 'that the AFP will ensure through its internal guidelines that the application of these outcomes is not used to impose pecuniary penalties'.⁴⁶ The Department also advised the committee that the Professional Standards unit will have an oversight role to ensure that these guidelines are properly and consistently applied throughout the AFP.

Committee view

4.40 The committee notes the response to the issue of applying pecuniary penalties, and the assurances by the Commissioner of internal controls on the regime for dealing with professional issues and complaints.⁴⁷ The committee acknowledges that the proposals are designed to manage conduct issues efficiently, and that to over prescribe the rectification of these matters, especially at the lower levels would reinstate the bureaucratic arrangement which this legislation is designed to overcome.

42 Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 38.

43 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

44 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

45 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

46 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

47 *Committee Hansard*, 27 April 2006, pp 38-39.

4.41 In relation to the categorisation of unacceptable conduct, the committee notes the terms of the proposed section state that the AFP Commissioner and the Commonwealth Ombudsman 'may' make a joint determination regarding the categories of conduct. As such, there is no obligation to complete this in a specified time, or indeed any obligation to do it at all.

4.42 While the committee acknowledges that the risk of this occurring is minimal, the fact remains that if, in the absence of a determination by legislative instrument, all matters become category 3 conduct, the purpose of the Bill in simplifying and professionalising the AFP conduct scheme would be defeated.

4.43 As such, it is a matter that should be rectified by amendment.

Recommendation 12

4.44 The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 be amended to provide that a determination on categories of conduct shall be made by the Commonwealth Ombudsman and the Commissioner of the Australian Federal Police within three months of the commencement of the Act.

Review of decisions

4.45 The AFPA is also concerned by the limited extent to which the Bill incorporates the review mechanisms envisaged by the Fisher Review.

4.46 In his review, Justice Fisher recommended that behavioural or performance problems be addressed through what he called 'non-reviewable managerial outcomes'. The process would involve a delegate of the Commissioner appointing a manager to investigate the issue, and report to the delegate for a final decision. An example of this process is set out in the *Police Service Act 1990* (NSW).⁴⁸ Fisher then sets out a hierarchy of appropriate actions to rectify the matter.

4.47 More serious matters (breaches of the criminal law, serious abuse of power or neglect of duty and matters raising employment suitability) would be dealt with by a dedicated professional standards office.

4.48 All complaints (including minor management matters) would be monitored by the Commonwealth Ombudsman who would have power to intervene in certain circumstances.⁴⁹

4.49 The Fisher review also considered that in the more serious professional standards matters, decision making would still be subject to review by the Federal

48 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, pp 66-67.

49 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 68.

Court under either section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review) Act 1977*. He concluded that the jurisdiction of the Australian Industrial Relations Commission (AIRC) to review employment related decisions would not be affected.⁵⁰

Provisions of the Bill

4.50 The Bill has been drafted in a different employment landscape from that which operated when the Fisher Review was completed, which raises issues as to its operation within the revised workplace relations system.

4.51 The Bill does not provide the kind of external review mechanisms anticipated by the Fisher review, but instead attempts to compensate for this by reworking the role of the Ombudsman. However his active participation is limited only to serious matters. The Ombudsman noted in his submission that the current arrangement in which he is required to oversee all matters has resulted in a 'disproportionate amount of resources being dedicated to minor matters...the proposals...would allow the Ombudsman to focus on more serious and systemic matters'.⁵¹

4.52 The Ombudsman notes that while he will be notified of serious complaints he has discretion whether to oversee them. In his submission he observes that the new focus on practice and procedure allows him to examine AFP administrative practice, 'subject to resources'. He indicates that he intends 'to undertake a greater number of own-motion investigations, to improve strategies for identifying systemic issues, for instance through statistical analysis, and to provide greater oversight of investigations into serious allegations'.⁵²

4.53 Effectively though, there are no review mechanisms in the Bill for the less serious category 1 or 2 matters, and it is arguable whether there is any recourse for category 3 matters.

Concerns about absence of review

4.54 The AFPA argued that, by not fully implementing the findings of the Fisher Review, the Bills do not provide proper independent external review of such matters as dismissal decisions or decisions involving financial penalties or punitive outcomes; nor internal appeal avenues for non-reviewable matters.⁵³

50 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 75.

51 Commonwealth Ombudsman, *Submission 4*, p. 3.

52 Commonwealth Ombudsman, *Submission 4*, p. 4.

53 Australian Federal Police Association, *Submission 6*, pp 4-5; Mr James Torr, *Committee Hansard*, 27 April 2006, p. 17.

4.55 In evidence, representatives from AFPA stressed that external review mechanisms were vital for ensuring accountability and transparency within the AFP.

Everyone in the AFP needs to embrace accountability, including the Commissioner.... On that basis, we call for an external review panel, tribunal or court, as envisaged by the Fisher review and as is found in all other Australian police forces bar none.⁵⁴

4.56 In relation to lower level management decisions, Mr Phillips also drew a comparison between the Bill and the disciplinary model that exists in the NSW Police Force that allows for independent review.⁵⁵

4.57 The AFPA also argued that the Bill presents the additional danger that the use of the 'professional standards rubric' could blur the edges of what is considered to be a professional standards issue versus an employment or management issue.

4.58 The proposed change to paragraph 69B (1) (b) of the AFP Act, would limit the operation of the *Workplace Relations Act 1996* (WRA). As a result, the AFPA claims that action in relation to a matter under the new professional standards system would be excluded from the WRA and that the change would be 'considerably onerous' on AFP appointees because of the potential for certain managerial decisions to 'become professional standards actions for the purpose of usurping the WRA'.⁵⁶ The AFPA's submission questioned whether the decision to terminate would then be reviewable under the WRA.

4.59 The Attorney-General's Department rejected this analysis, arguing that the AFP Professional Standards Bill would still allow termination decisions to be taken to the AIRC,⁵⁷ except decisions to terminate employment by reason of serious misconduct.⁵⁸ It was further argued that it remained appropriate for decisions of the AFP Commissioner relating to corruption to have this exemption in order to avoid an 'unproductive review path'.⁵⁹ Commissioner Keelty further noted that, in exercising such powers within the last five years, he exercised the discretion personally and did so carefully and with 'due consideration'.⁶⁰

54 Mr James Torr, *Committee Hansard*, 27 April 2006, p. 17.

55 Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 18, Australian Federal Police Association, *Submission 6*, pp 14-15.

56 Australian Federal Police Association, *Submission 6*, p. 18; Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 21.

57 Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 36.

58 *Australian Federal Police Act 1979*, sections 28 and 40K; Federal Agent Alan Scott, *Committee Hansard*, 27 April 2006, p. 37.

59 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 37.

60 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 37.

Committee view

4.60 The committee notes that the AFP Professional Standards Bill is intended to streamline the disciplinary process within the AFP. It appears that the Fisher Review has provided a basis for this, and the AFP Commissioner is to be commended for personally initiating the Review process.

4.61 The committee also notes the revised role of the Ombudsman, and that there is some scope for him to review all matters relating to professional conduct and complaints.

4.62 However, the committee notes that efficiency of administration should not compromise procedural fairness. Any complaint about an employee whether proved or not, can affect not only the employee, but the workplace as well. At the same time, there is no point in compromising the administration, and adding layers of responsibility which may have no discernable result.

4.63 The committee considers that the lower level disciplinary matters should be subject to internal review while more serious matters should be the subject of external review for example, through the Administrative Appeals Tribunal.

4.64 The issues surrounding a possible conflict with the *Workplace Relations Act 1996* represent a potentially serious problem. Although the Attorney-General's Department indicated that the matter of recourse to the AIRC is being examined, the committee considers that any conflict which may serve to preclude a person who has been dismissed having recourse to the AIRC should be resolved before the Act commences.

Recommendation 13

4.65 The committee recommends that the lower level disciplinary matters (categories 1 and 2) should be subject to internal review while more serious matters (category 3) should be the subject of external review for example, through the Administrative Appeals Tribunal.

Recommendation 14

4.66 The committee also recommends that the possible conflict of the Bill with the *Workplace Relations Act 1996* be resolved, before the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 is enacted.

Commonwealth Ombudsman

4.67 The Commonwealth Ombudsman noted that its resources and funding requirements need to be reviewed in light of its additional responsibilities and change of focus under the Bill.

It is expected that the creation of a new Law Enforcement Ombudsman role, with a new audit function and the development of an enhanced own

motion program, with the requirement to report at least annually, will place additional demands on my office.⁶¹

4.68 Dr Thom from the Office of the Ombudsman added:

I think the concern might be that we focus the resources on the complaints rather than doing own motion investigations. So you can deal reactively with the things that come in, but you do not proactively look at systemic issues, and that would be a concern for us.⁶²

4.69 In commenting on the demands on the operation of the Ombudsman's office, a representative from the Attorney-General's Department said that he had not received any indication that the legislative changes would affect current resources, but undertook to examine the issue.⁶³

Committee view

4.70 The committee notes that AFP Professional Standards Bill and its companion Bills do appear to place additional responsibilities on the Commonwealth Ombudsman.

4.71 The committee considers it essential that the steadily widening jurisdiction of the Ombudsman does not erode the effectiveness of the office's capacity to scrutinise agencies' actions. As such, funding must keep pace with responsibilities. The committee urges the government to review the funding of the Ombudsman during forthcoming budgets to ensure this occurs.

Coverage of professional standards

4.72 The AFP Professional Standards Bill gives the AFP Commissioner the power to determine the professional standards to be complied with by AFP appointees (clause 40RC). However, the AFPA suggested that the Bill, as currently drafted, does not appear to subject the Commissioner to the new professional standards system contained in Part V.

There is nothing that expressly excludes the Commissioner from following the professional standards of the AFP, likewise however, there is nothing to expressly include the Commissioner under the regime.⁶⁴

4.73 The committee considers that there is no doubt that the professional standards regime should – and is intended to – apply to the Commissioner. The provisions should be reviewed to remove any doubt on this point.

61 Commonwealth Ombudsman, *Submission 4*, p. 4.

62 *Committee Hansard*, 27 April 2006, p. 25.

63 Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 32.

64 Australian Federal Police Association, *Submission 6*, p. 8.

Recommendation 15

4.74 The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 clarify that the professional standards regime applies to the Commissioner of the Australian Federal Police.

**Senator Marise Payne
Committee Chair**

