

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General
the Hon Daryl Williams AM QC MP)



OUTLINE

This Bill amends the *Australian Federal Police Act 1979* (the AFP Act).

The more significant of the proposed amendments deal with the power given to the Commissioner at paragraph 26E(2)(b) to end the appointment of a member or staff member before the day on which the appointment is due to end. This power is a key element of the Government's major reform of the AFP introduced by the *Australian Federal Police Legislation Amendment Act (No. 2) 1989* which, amongst other innovations, abolished tenure and replaced it with fixed term appointments and provided the Commissioner with Chief Executive powers in relation to the composition of the Australian Federal Police and the terms and conditions of members.

The amendments will omit subsection 26E(3) which limits the circumstances related to disciplinary offences and criminal proceedings in which the Commissioner may make a determination under paragraph 26E(2)(b). The Commissioner will have a general power to end the appointment of individual members or staff members. This will allow the Commissioner to act quickly and effectively against corruption and other forms of serious misconduct.

The amendments will also clarify that a person who is retired under paragraph 26E(2)(b) may challenge the termination using the remedies provided to employees by Division 3 of Part VIA of the *Industrial Relations Act 1988* ("the unlawful termination provisions"). Regulation 30BB of the *Industrial Relations Regulations*, which excludes the Australian Federal Police from the operation of those remedies until 1 January 1997, will be repealed following the commencement of this Bill. There will be one exception to the application of these remedies. They will not be available if a person is retired under paragraph 26E(2)(b) because of his or her behaviour and the Commissioner makes a declaration that the appointment was ended for serious misconduct which is likely to have a damaging effect on the professional self-respect or morale of members or staff members or on the public reputation of the Australian Federal Police.

There are two minor amendments to the AFP Act. The first relates to the power of the Governor-General to authorise the Deputy Commissioners of the Australian Federal Police, as well as the Commissioner, to make appointments or promotions by commission. There are also minor amendments dealing with disciplinary obligations during special leave for service with an industrial association which will extend this provision to staff members.

FINANCIAL IMPACT STATEMENT

The cost of the amendments is expected to be insignificant.

NOTES ON CLAUSES

Clause 1: Short Title

Clause 1 is a formal provision specifying the short title of the Bill

Clause 2: Amendments

The *Australian Federal Police Act 1979* (the AFP Act) is amended as set out in the Schedule to the Bill.

Schedule - Amendments of AFP Act

Item 1

This item makes it unambiguous that where a person is acting as Commissioner or as a Deputy Commissioner that person, by reason of the acting, does not have the power to appoint or promote a person to a commissioned rank under new subsection 25(1A). A Deputy Commissioner who is exercising the powers of the Commissioner under subsection 18(1) would retain any authority granted to him or her under subsection 25(1A) as a Deputy Commissioner.

Item 2

This item prevents a person who is exercising the powers of a Commissioner or a Deputy Commissioner under subsection 19(1) from exercising the power to appoint or promote a person to a commissioned rank under subsection 25(1A). A Deputy Commissioner who is exercising the powers of the Commissioner under subsection 19(1) would retain any authority granted to him or her under subsection 25(1A) as a Deputy Commissioner.

Item 3

Item 3 amends subsection 25(1) of the AFP Act by omitting the words allowing the Governor-General to authorise the Commissioner to appoint or promote commissioned officers. New subsection 25(1A) is intended to govern the Governor-General's powers in this regard.

Item 4

This item inserts subsection 25 (1A). The effect is to permit the Commissioner or a Deputy Commissioner to appoint or promote a person to a commissioned rank if authorised to do so by the Governor-General in writing. Previously the Governor-General could authorise only the Commissioner to appoint or promote commissioned officers. Paragraph 25 (1A)(b) allows the Governor-General to limit the Commissioner's or a Deputy Commissioner's power to make appointments or promotions to positions within a specified rank.

Item 5

This item repeals subsection 26E(3). The proposed repeal reflects a concern that subsection 26E(3) of the AFP Act imposes unnecessary limits on the Commissioner's authority over individual appointments thereby affecting the Commissioner's ability to fulfil his or her statutory responsibilities for the AFP's operational efficiency and

internal administration. Subsection 26E(3) prevents the Commissioner from making a determination under paragraph 26E(2)(b) ending an appointment merely because of an act or omission for which a disciplinary charge has or could be laid against the person or because the person has been convicted or found guilty by a court of a criminal offence within the meaning of the Australian Federal Police (Discipline) Regulations.

Consequently the Commissioner is not able under paragraph 26E(2)(b) to terminate the appointment of a person who has been convicted by a court of corruption or other reprehensible behaviour merely because of that conviction. To dismiss that person, it is necessary for the Commissioner to initiate separate disciplinary proceedings. Similarly the Commissioner may not end the appointment of a person who has been charged with serious criminal or disciplinary offences even where the Commissioner believes on reasonable grounds that the person is not suitable to continue as a member or staff member of the AFP.

The repeal of subsection 26E(3) will allow the Commissioner to make a determination under paragraph 26E(2)(b) ending the appointment of a person an appointment ends irrespective of whether the determination is made because of conduct that has been or could be the subject of a criminal or disciplinary charge. Such a determination is separate from decisions of the Commissioner not to re-appoint a person at the end of a term of appointment.

A person whose appointment is ended under paragraph 26E(2)(b) will be able to challenge that determination under the unlawful termination provisions of the *Industrial Relations Act 1988* as well as by judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and the common law function of the Federal Court. However, a person is precluded from challenging the termination of an appointment by way of the *Industrial Relations Act 1988* where a declaration under proposed new section 26F has been made in relation to a AFP member or staff member.

Item 6

Item 6 adds a new section 26F to the AFP Act. The intention is to allow the Commissioner to exercise a broad power to terminate an appointment in cases of corruption, a serious abuse of power or a serious dereliction of duty where continued retention of the individual would be harmful to the integrity, reputation and status of the AFP.

The new section 26F provides for the Commissioner to make a declaration in writing that the Commissioner believes, on reasonable grounds, that the conduct or behaviour of a person who has been retired under paragraph 26E(2)(b) amounts to serious misconduct which is having, or is likely to have, a damaging effect on either the professional self respect or morale of some or all of the members or staff members of the AFP or on the reputation of the AFP with members of the public, or any section of the public, or with an Australian or overseas government. This provision allows the Commissioner to act before or after the serious misconduct becomes generally known. Subsection 26F(2) provides that the declaration must be made as soon as possible, but not later than 24 hours, after the Commissioner makes the determination under paragraph 26E(2)(b) which terminates the person's appointment.

The effect of this item is that where the Commissioner makes a declaration of this kind in relation to a person who is retired under paragraph 26E(2)(b), the person, in respect of that retirement, is excluded from the operation of the Subdivisions B, C, D and E of

Division 3 of Part VIA of the *Industrial Relations Act 1988* which deal with the minimum rights of employees on termination of employment. The intention is that, because of the special powers and duties entrusted on members of the AFP, a person who is the subject of a declaration under subsection 26F(1) will not be able to use the remedies provided for in the specified provisions of the *Industrial Relations Act 1988* in order to challenge the lawfulness of that termination. The lawfulness of the decision to terminate the appointment, and the decision to make the declaration, will remain subject to judicial review in the Federal Court.

Items 7 and 8

Item 7 omits “member” whenever occurring in subsection 34(5) of the AFP Act and substitutes “person”. Item 8 amends subsection 34(5) of the AFP Act to include an association composed of members and/or staff members. The effect is to apply subsection 34(5) to staff members as well as members.

These amendments are necessary as a result of the commencement of the *Complaints (Australian Federal Police) Amendment Act 1994* on 13 January 1995. That 1994 Act extends the application of the *Complaints (Australian Federal Police) Act 1981* to staff members.

Subsection 34(5) provides for the liability or obligation in respect of discipline of a person who is granted leave of absence under subsection 34(1) to enable that person to engage in service with an association of members that is an organisation within the meaning of the *Industrial Relations Act 1988*. The person will not be subject to any disciplinary liability or obligation in respect of an action that is reasonably required for the proper performance of the functions of an officer of that association. However, a member or staff member remain subject to the *Complaints (Australian Federal Police) Act 1981*.

