

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPLAINTS (AUSTRALIAN FEDERAL POLICE) AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,  
the Honourable Duncan Kerr)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE  
SENATE TO THE BILL AS INTRODUCED





# COMPLAINTS (AUSTRALIAN FEDERAL POLICE) AMENDMENT BILL 1994

## OUTLINE

This Bill amends the *Complaints (Australian Federal Police) Act 1981* ('the Complaints Act'), which governs the handling of complaints made, whether by the public or by Australian Federal Police members, against the Australian Federal Police and its members, including disciplinary measures consequent on a complaint and all disciplinary appeals.

The amendments arise out of the report of an inter-Departmental Working Group which was established in mid-1991, comprising representatives of the Attorney-General's Department, the Department of the Prime Minister and Cabinet, the Office of the Commonwealth Ombudsman and the Australian Federal Police. In consultation with the Australian Federal Police Association, the Working Group considered proposals by all interested parties as well as reports of both the Royal Commission into Aboriginal Deaths in Custody and the Senate Standing Committee on Finance and Public Administration's Review of the Ombudsman's Office.

The resulting amendments do not alter the long-standing policy principles of the Complaints Act, but are designed simply to eliminate anomalies and to meet practical concerns arising out of the operation of the Act since its commencement (and in particular following the introduction of the new AFP rank structure).

The major amendments are:

- (a) to extend the Act's coverage to include non-sworn AFP staff (whose exclusion from the Complaints Act regime is no longer justified by differential allocation of duties to members and staff members);
- (b) to create two new offences: making a false complaint or giving false information, and victimisation of a complainant or a person assisting in the investigation of a complaint;
- (c) to provide for investigations by the Ombudsman or Investigation Division, on the Ombudsman's own motion, of action by a member or staff member of the AFP;
- (d) to make evidence obtained by the Ombudsman in the course of an investigation admissible in disciplinary hearings; and
- (e) to abolish the requirement that hearings of complaint-based disciplinary charges be held before the Disciplinary Tribunal where the appointee charged pleads guilty. The option of a Tribunal hearing where the public interest requires it is retained.

Other minor amendments include changes to the rank requirements for conciliators in complaints cases, an extension of the Ombudsman's discretion to determine that a complaint should not be investigated where he or she is

satisfied that it is trivial, adjustments to penalty provisions to bring them into line with current policy and the removal of sexist terminology.

## **FINANCIAL IMPACT STATEMENT**

The amendments will have no financial impact.

## **NOTES ON CLAUSES**

### **Clause 1: Short Title etc.**

Clause 1 is a formal provision specifying the short title of the Bill and identifying the *Complaints (Australian Federal Police) Act 1981* ('the Principal Act') as the Principal Act amended by the Bill. The commencement date is provided for under the *Acts Interpretation Act 1901*.

### **Clause 2: Definitions**

Following the establishment by the *Australian Federal Police Legislation Amendment Act (No. 2) 1989* of a unified police force, the work of sworn and non-sworn Australian Federal Police employees ('members' and 'staff members' respectively) has become increasingly interrelated, so that the duties of staff members are no longer of a consistently different nature from those of members. The continued exclusion of staff members from the full complaints regime is therefore unjustified. The purpose of the amendments in clause 2 is to facilitate the extension of various aspects of the complaints regime to staff members of the Australian Federal Police ('the AFP').

First, clause 2 amends the interpretation section of the Principal Act (section 3) by replacing the terms 'member', 'member of the AFP' and 'staff member' with two new terms. The term 'AFP appointee' creates a broad category which includes employees defined under the *Australian Federal Police Act 1979* as members, staff members and special members, but does not include persons employed on a temporary basis under section 39A or consultants employed under section 39B of that Act. Because consultants are employed on a contractual basis, contractual remedies are the appropriate means of dealing with matters which would otherwise fall within the statutory regime. The other new term, 'Federal police officer', creates a narrower category which is equivalent to, but more specific than, the existing category of 'member'.

Secondly, clause 2 extends the application of subsection 3(3) to all AFP appointees. Subsection 3(3) concerns references to action taken in relation to the employment of members in general as well as the employment of particular members. It also concerns references to the giving of cautions and admonitions and the charging of members in respect of breaches of discipline.

### **Clause 3: Conciliation**

Section 6B of the Principal Act is concerned with the resolution of complaints by conciliation.

Clause 3 amends section 6B in two respects. First, it extends to all AFP appointees protection against the use in any other proceedings of evidence

given by a member in the course of an attempt to resolve a complaint by conciliation.

Secondly, it alters the requirements of rank for a 'senior member' (being a person who may be directed by the Commissioner or officer in charge to attempt a conciliation under subsection 6B(1)), to reflect both the abolition of the rank of senior sergeant and the scarcity of officers above the new merged rank of sergeant following the consolidation of the AFP rank structure.

#### **Clause 4: Action consequential on report**

Section 11 of the Principal Act concerns determinations made by the Commissioner in relation to the charging of AFP members.

Clause 4 amends paragraph 11(1)(b) of the Principal Act so as to require the Commissioner, in determining whether any charge should be laid, to consider (together with any report of the results of a special or additional investigation of a complaint by the Ombudsman) any recommendations received by him or her under the new subsection 26(3A) (inserted by clause 10).

#### **Clause 5: Transfers to Investigation Division**

Section 16 of the Principal Act concerns the number of members being transferred to and from the Investigation Division, and the duties which can be performed by the members of the Division.

Clause 5 amends section 16 by replacing references to a 'member' in subsections 16(1) and (2) with the more specific 'Federal police officer', maintaining the existing distinction between members and staff members in relation to the transfer of employees to the Internal Investigation Division.

The original subsection 16(3) concerned the duties which could be performed by members of the Division, and specified that the investigation of offences alleged to have been committed by persons other than members could not be investigated.

This has been replaced by new subsections (3), (4) and (5). The new subsection (3) allows members of the Investigation Division to perform duties that are not related to the Division's functions if the Commissioner so directs, and provided the performance of those duties does not unduly interfere with the performance by the Division of its functions. The Commissioner cannot, however, direct a member to investigate an offence alleged to have been committed by a person other than an AFP appointee (subsection (4)), unless it is necessary for the full investigation of an AFP appointee (subsection (5)). These provisions apply to investigations of staff members as well as members. They are intended to protect the admissibility of evidence, while maintaining a strong focus on police wrongdoing.

#### **Clause 6: False complaints and providing false information in relation to complaints**

Clause 6 reflects a concern that the making of false complaints has become a means by which some persons charged with a serious criminal offence seek to

'muddy the waters' by casting doubt on the integrity of police. Some allegations may be extremely serious and can be disastrous for the officers involved and their families. In such cases, some protection for innocent appointees is desirable.

The amendment introduces an offence of providing what the offender knows to be materially false information to an AFP appointee in relation to a complaint or action taken by an AFP appointee. The penalty for the new offence is comparable with the penalty for providing misleading or false information to the Ombudsman under subsection 44(2) of the Principal Act (as amended by Schedule 3 of this Bill).

Proposed subsections 19(1) and (2) are intended to be used only in the most serious cases, where the need to protect an appointee outweighs the possibility that fear of prosecution might deter genuine complainants. In order to safeguard against abuse, proposed subsection 19(3) introduces a requirement for the Ombudsman to consent before a charge of making a false complaint or providing false information in relation to complaints may be brought by anyone.

Under proposed subsection 19(3), proceedings will only be able to be commenced after the Ombudsman (or a person authorised by the Ombudsman) consents in writing to the bringing of proceedings. The Ombudsman's role is seen as a safeguard to ensure that the section is not used capriciously against complainants, and to protect the complainant against any possible intimidation.

If the Ombudsman's consent is not forthcoming, the Attorney-General will ultimately decide whether to bring proceedings. This additional control over possible prosecutions under the section will give further protection to complainants. Either the Ombudsman or the person who sought the Ombudsman's consent to proceed will be able to refer the matter to the Attorney-General for resolution. The referral of the matter to the Attorney-General is in keeping with other provisions in the Principal Act. It will, for example, give a similar degree of protection to complainants as members of the AFP receive before being charged with disciplinary offences under section 11 of the Principal Act.

#### **Clause 7: Ombudsman may initiate investigation**

Under the *Ombudsman Act 1976* ('the Ombudsman Act') the Ombudsman can initiate investigations of administrative actions on his or her own motion. The Principal Act, however, does not make equivalent provision for the investigation of action by AFP members. The absence of this important power is an anomaly which clause 7, and related clauses 8, 9, 13, 15, 16 and 21, are intended to rectify.

Clause 7 amends the Principal Act to provide for initiation by the Ombudsman on his or her own motion of an investigation of the actions of an AFP appointee. This power is in addition to the Ombudsman's present power to investigate such action where it is the subject of a complaint.

Under proposed section 21A, the Ombudsman may either initiate his or her own investigation or, with the exception of procedural matters, may refer the matter to the Investigation Division (in the scheme of the Principal Act, matters

procedural in substance - in relation to which section 21A adopts the terminology of the existing subsections 23(1) and (5) - should be handled by the Ombudsman). Whether the Ombudsman chooses to refer the matter to the Investigation Division will depend on its character.

#### **Clause 8: Duties of Ombudsman with respect to complaints**

Subsection 23(4) of the Principal Act provides that where the Ombudsman has of his or her own motion commenced, under paragraph 5(1)(b) of the Ombudsman Act, to investigate action taken by a member, and he or she subsequently receives a complaint or particulars of a complaint concerning that action under section 6 of the Principal Act, the Ombudsman Act investigation is to cease and the matter is instead to be investigated under the Principal Act. The proposed amendment allows for the introduction of an own-motion power under the Principal Act by also excluding paragraph 5(1)(b) investigations where the Ombudsman proposes to deal with the matter under the new section 21A (inserted by clause 7 of this Bill).

Clause 8 is not intended to require the Ombudsman to cease an own-motion investigation being carried out under the new section 21A, should a complaint be received on the same subject-matter. It may be more convenient to continue the Ombudsman-initiated investigation, in the course of which the substance of the complaint will be investigated. Rather, clause 8 is intended to prevent the duplication of effort involved in simultaneous investigations conducted under the two Acts referred to above.

#### **Clause 9: Ombudsman may determine that complaint should not be investigated**

Under section 24 of the Principal Act, the Ombudsman has a discretion to determine that in certain circumstances a complaint should not be investigated, or investigated further, as the case requires.

The grounds for refusing to investigate a complaint set out in subparagraph 24(1)(b)(i) are frivolity, vexatiousness and bad faith. The proposed amendment adds triviality to this list as an independent ground, so that the waste of time and resources involved in the investigation of very minor matters can be avoided.

#### **Clause 10: Special or additional investigations conducted by Ombudsman under this Part**

Section 26 of the Principal Act applies to the investigation of a complaint conducted by the Ombudsman under section 36 (where the Ombudsman is not satisfied with the results of an investigation conducted by the Investigation Division and decides to conduct his or her own investigation), or section 46 (where the Ombudsman and the Commissioner have agreed or the Minister has determined that the Ombudsman should conduct an investigation).

Subsection 26(3) enables the Ombudsman, when reporting to the Commissioner the results of his or her investigation, to recommend that a member be charged with an offence or breach of discipline, or offered a caution or admonition for a breach of discipline. Subclause 10(a) amends subsection 26(3) to provide that,

in addition to recommending disciplinary action, the Ombudsman may request the Minister to cause an inquiry under section 50 to be held, or may notify the Commissioner that an AFP appointee took action which he or she should not have taken. New subsections 26(3A) and (3B) provide that, further, the Ombudsman may make any recommendations he or she thinks fit to the Commissioner, together with a request to be advised within a specific time limit of the action the Commissioner proposes to take in response.

Subclause 10(b) amends subsection 26(5) to extend to all AFP appointees (to whom the rest of section 26 applies by virtue of clause 2 of this Bill) the requirement that the Commissioner furnish particulars and comments regarding an investigation to the member concerned.

Subclause 10(c) incorporates into section 26 provisions equivalent to the existing subsections 36(4) to (6) (the last being amended to refer to completion of an investigation by the Ombudsman rather than receipt of a report from the Investigation Division).

#### **Clause 11: Power to obtain information and documents**

Subsection 27(5) of the Principal Act enables the Ombudsman to obtain evidence under Part III of the Act which would otherwise be protected by other legislation, by public interest considerations or by privilege by removing these grounds for refusal to comply with a request for information or for the production of documents or records.

Such evidence is generally not admissible against a person in proceedings, with the exceptions set out in paragraphs (5)(d) and (e). Clause 11 provides for an additional exception under the new paragraph (f), which makes evidence obtained under Part III admissible against an AFP appointee in proceedings for or in relation to a breach of discipline. The proposed amendment will put the Ombudsman on a level with the Investigation Division in this regard (see section 7 of the Principal Act) by removing a restriction on admissibility of evidence which undermines the position of the Ombudsman as the investigator of last resort.

#### **Clause 12: Persons affected to be informed of results of investigation by Ombudsman**

Section 34 of the Principal Act requires the Ombudsman, on completion of an investigation, to furnish to the Commissioner and the complainant particulars of the results of the investigation. The Ombudsman is also given a discretion to provide progress reports at any time during the course of an investigation.

Clause 12 amends section 34 to allow the Ombudsman to inform affected persons of the results of any investigations, including own-motion investigations which do not arise out of a complaint but are initiated by the Ombudsman under the new section 21A (inserted by clause 7 of this Bill).

#### **Clause 13: Ombudsman to inform complainant of results of investigation**



Section 37 of the Principal Act deals with the manner in which the Ombudsman is required to deal with reports received by him or her from the Investigation Division concerning matters originally the subject of a complaint to the Ombudsman. In particular, the Ombudsman must furnish particulars of the investigation and any proposed recommendations to the complainant.

Subclause 13(a) extends the application of the section to a complaint originally made directly to a member of the AFP.

Subclause 13(b) extends section 37 to cover staff members, against whom complaints or own-motion investigations by the Ombudsman may now be made by virtue of clause 2 of this Bill.

Subclause 13(c) simply corrects an error in subsection 37(2) of the Principal Act.

#### **Clause 14: Progress reports about complaints**

Clause 14 inserts into the Principal Act section 38A, which provides that progress reports may be furnished by the Ombudsman to complainants under the Principal Act at any time. This is a relocation of an existing provision (subsection 34(2), omitted by clause 12 of this Bill).

A progress report given to a complainant under proposed section 38A is not intended to replace any other report. Rather, its purpose is to supply the complainant with additional information. The report need not be in writing or any other particular form and its issue is a matter for the Ombudsman's discretion.

#### **Clause 15: Reports of special inquiries**

Section 52 of the Principal Act provides that where a person is appointed by the Minister to hold an inquiry under section 50, that person is to report to the Minister the results of the inquiry and make such recommendations as he or she thinks fit. If the special inquiry under section 50 was made pursuant to a request from the Ombudsman under paragraph 36(2)(a)(ii), then on receipt of the report the Minister is required to furnish a copy thereof to the Ombudsman.

Such a request can also be made under proposed paragraph 26(3)(b) (inserted by clause 10 of this Bill). Subclause 15(b) amends section 52 to require the Minister to furnish the Ombudsman with a copy of the resulting report.

Subclause 15(c) amends section 52 to allow the Minister to charge not only a member, but any AFP appointee with a breach of discipline, or offer a caution or admonition as a result of an investigation under section 50.

Subclauses 15(a), (d) and (e) amend section 52 to introduce gender-neutral terminology.

#### **Clause 16: New Part VA - Undisputed charges**

At present, where a member is charged in disciplinary proceedings and is found guilty, the determination as to penalty is made either by the Commissioner or by the Disciplinary Tribunal, depending on whether or not the charge arose from a

complaint. Where the charge did not arise from a complaint, the matter is dealt with by the Commissioner. In the remaining cases, a Tribunal hearing must be conducted.

In practice, where a member pleads guilty to a disciplinary charge, a Tribunal hearing becomes a mere formality and tends to prolong the process unnecessarily. The proposed amendments set out in clause 16 abolish the automatic distinction between charges which do and do not arise from a complaint, while retaining the option of a Tribunal hearing where the interests of the public are such that it would serve a real purpose.

Clause 16 inserts a new Part VA in the Principal Act comprising new sections 52A to 52E.

#### **New section 52A - Undisputed charges in respect of breaches of discipline**

Proposed section 52A provides that, where an AFP appointee pleads guilty to a disciplinary charge arising either from a complaint or otherwise, and the Commissioner thinks that the public interest requires the proceedings to be dealt with by the Disciplinary Tribunal, then a Tribunal hearing should be held. If not, and the Ombudsman agrees in writing, then the proceedings should be dealt with by the Commissioner as if they did not arise from a complaint. Where the Ombudsman does not agree, the matter will be decided by the Attorney-General, who in making his or her decision must consider any relevant report, notification or recommendation and the results of any relevant inquiries.

#### **New section 52B - Commissioner may impose penalty**

If after hearing the matter the Commissioner finds the AFP appointee guilty, he or she may, under proposed section 52B, impose a penalty. If the Commissioner considers that the appropriate penalty is one which results in lowering of rank or level or in dismissal, the appointee must be given notice in writing and an opportunity to provide written submissions on the appropriate penalty.

#### **New section 52C - Ombudsman to be notified of penalty**

As soon as possible after imposing a penalty, the Commissioner must notify both the Ombudsman and the appointee upon whom the penalty is imposed.

#### **New section 52D - Ombudsman may inform Attorney-General of penalty**

If the Ombudsman considers the penalty to be inadequate, he or she may report in writing and with comments to the Attorney General.

#### **New section 52E - Appeals**

Upon receipt of notification from the Ombudsman under proposed section 52D, the Attorney-General may appeal against the Commissioner's decision. Similarly, if the appointee on whom the penalty is imposed considers it excessive, he or she may appeal. Appeals will be dealt with by the Disciplinary Tribunal under section 68 of the Principal Act, as if the Tribunal had remitted

proceedings to the Commissioner and the Commissioner's subsequent decision on penalty under subsection 67(6) of that Act had been challenged by the appointee or the Attorney-General under subsection 68(1). Sections 74 (public hearings) and 75 (right to representation) apply to this appeal process.

#### **Clause 17: Charges in respect of breaches of discipline**

Section 67 of the Principal Act specifies how charges for breaches of discipline should be dealt with according to the avenue used by the original complainant to lodge his or her complaint. The authority to which the complaint was originally directed (either Commissioner or Ombudsman) has the responsibility of advising a complainant of the decision of the Tribunal in any disciplinary proceeding arising from the complaints. This procedure has been inconvenient in practice where the complaint was made to the Ombudsman, as the Ombudsman is not directly involved in disciplinary proceedings.

For the above reason, clause 17 inserts new subsections 67(9) and (10), with two effects. First, the old subsection (9) is split into two parts for the sake of clarity. Secondly, the provision is amended to provide for all complainants to be advised of the decision of the Disciplinary Tribunal by the Commissioner rather than the Ombudsman.

Clause 17 also amends subsection 67(1) to account for the Ombudsman's own motion investigations under proposed section 21A and for proposed section 52A regarding undisputed charges.

Section 67 is also amended to extend to charges against all AFP appointees, and introduces gender-neutral language, in accordance with changes made elsewhere in this Bill.

#### **Clause 18: Powers of Tribunal**

Subsection 71(2) of the Principal Act gives power to the Disciplinary Tribunal of its own motion, or at the request of a party to the proceeding, to summon a person to appear before the Tribunal to give evidence and to produce any document referred to in the summons.

At present, a summons issued under subsection 71(2) must be signed by the Registrar or a Deputy Registrar of the Tribunal. Clause 18 amends this to permit the issue of a summons signed by a member of the Tribunal as an alternative to signature by the Registrar or Deputy Registrar. This will avoid unnecessary delays where the Tribunal sits out of normal hours or in a city where there is no registrar or deputy registrar.

#### **Clause 19: Offence of victimisation**

Clause 19 inserts into the Principal Act a new section 88A which creates an offence of causing or threatening to cause detriment to a person ('the victim') on the ground that the victim, or any other person (including a member of the Investigation Division) has made or might make a complaint or has given or might give a document or other information to assist in an investigation under the Principal Act.

This provision is designed to protect complainants and those (including police) who assist in investigations, against the possibility of police victimisation. It is appropriate that this provision and the new section 19 (inserted by clause 6 of this Bill) be introduced simultaneously so that the new offences of giving false information and of victimisation may balance each other and thereby cut down the potential for abuse.

#### **Clause 20: Transitional Provision**

Clause 20 ensures that the secrecy provision of the Principal Act (section 87) continues to apply to those persons it applied to before the commencement of this Act.

#### **Clause 21: Other amendments to extend application of *Complaints (Australian Federal Police) Act 1981* to AFP appointees.**

The amendments proposed in clause 21 are set out in schedule 1 of this Bill. They extend the application of the Principal Act to all employees of the AFP who fall within the definition of 'AFP appointee' in clause 2 of this Bill.

#### **Clause 22: Other amendments to introduce gender-neutral terminology in the *Complaints (Australian Federal Police) Act 1981***

The amendments proposed in clause 22 are set out in schedule 2 of this Bill. They are intended to remove sexist terminology from the Principal Act in accordance with current drafting practice.

#### **Clause 23: Other amendments to penalties**

The penalties set out in the Principal Act are no longer in accordance with criminal law policy. The amendments proposed in clause 23 are designed to rectify this situation and are set out in schedule 3 of this Bill.

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