

EXPLANATORY STATEMENT

Issued by the authority of Commissioner of the Australian Federal Police and the Commonwealth Ombudsman

Australian Federal Police Act 1979

Determination 2013/ to determine AFP Categories of Conduct

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Background

Complaints about the conduct of Australian Federal Police (AFP) appointees are dealt with in Part V of the *Australian Federal Police Act 1979* (the Act). Section 40RH of the Act stipulates that an AFP conduct issue is an issue of whether an AFP appointee has engaged in conduct that contravenes the professional standards of the AFP, or engaged in corrupt conduct. Professional standards to which all AFP appointees must comply are established by the AFP Commissioner pursuant to section 40RC of the Act. These professional standards are issued as Commissioner's orders under section 38 of the Act.

Section 40RK provides that there are four categories of conduct issues for the purpose of the Act. Under section 40RM the AFP Commissioner and the Ombudsman may jointly determine (by legislative instrument) the kinds of conduct considered to constitute Category 1, 2 or 3 conduct for the purposes of the Act.

The category into which a particular instance of conduct falls determines how it will be dealt with by the AFP, the Ombudsman's office and the Australian Commission for Law Enforcement Integrity (ACLEI). Categorisation is for the purpose of investigation and oversight, and is based on the conduct as characterised when it comes to the attention of the AFP, not on how it was or might be characterised following investigation.

This Determination incorporates specific references to AFP Commissioner's Orders 2, 3 and 9 and to the AFP Code of Conduct. The Determination also makes general reference to AFP National Guidelines and Practical guides but does not incorporate specific AFP guidelines and directions. These documents are incorporated as in force at the time the Determination took effect. The Determination addresses the conduct of AFP appointees including those who have ceased to be AFP appointees. Each of these documents are readily accessible to existing AFP appointees via the AFP intranet.

In addition, the AFP Code of Conduct, Commissioner's Order 2 and a number of the AFP National Guidelines and Practical guides are also publicly available. A small number of these contain redactions. A redacted version of Commissioner's Order 3 is also publicly available. Commissioner's Order 9 and a number of other AFP Governance documents that are not publicly available have been assessed and determined as exempt from publication under the *Freedom of Information Act 1982*.

The Commissioner's Orders specifically incorporated into this Determination are:

- Commissioner's Order 2 on Professional Standards as made by the Commissioner on 9 August 2011
- Commissioner's Order 3 on Operational Safety as made by the Commissioner on 1 June 2012.
- Commissioner's Order 9 on Security as made by the Commissioner on 15 April 2013.

A former AFP Appointee could, in addition to the publically available version of the documents, also request access to relevant information by way of a summons, subpoena or a request under the *Freedom of Information Act 1982*.

The Categories of Conduct in the Determination

Section 40RK of the Act establishes the following four categories of conduct:

- 1) Category 1 conduct which is the least serious class of conduct
- 2) Category 2 which is the next most serious category
- 3) Category 3 which is the next most serious category again; and
- 4) Conduct giving rise to a corruption issue which is the highest and most serious category

Sections 40RK, 40RN, 40RO and 40RP of the Act establish that the four categories of conduct have the following characteristics:

Category 1 conduct

Category 1 conduct covers inappropriate conduct that relates to minor management matters, customer service matters or reveals a need for improvement in the performance of the AFP appointee concerned and does not warrant being treated as Category 2 or Category 3 conduct.

Category 2 conduct

Category 2 conduct is minor misconduct by an AFP appointee, inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee or conduct that would otherwise be Category 1 conduct but warrants treatment as category 2 conduct, due to its repeated nature. Category 2 conduct must also be conduct which does not warrant being treated as category 3 conduct.

Category 3 conduct

Category 3 conduct is serious misconduct by an AFP appointee; or raises the question whether termination action should be taken in relation to an AFP appointee; or involves a breach of criminal law, or serious neglect of duty, by an AFP appointee and in each case is conduct which does not raise a corruption issue.

Corrupt conduct

Conduct captured under this category is defined in s 6 of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) to refer to conduct that involves abuse of office, perverting the course of justice or corruption of any other kind.

Comparison with 2006 determination

This instrument replaces the *Australian Federal Police Categories of Conduct Determination 2006* (2006 Determination). It is intended to provide further clarity about the kinds of conduct that will satisfy category 1, 2 and 3 for the purposes of the Act.

This Determination introduces definitions for Category 1, 2 and 3 conduct modelled on the provisions in ss 40RN, 40RO and 40RP of the Act. The new definitions align the conduct available in each category with the parameters specified in those provisions.

The tables in this Determination largely restate the categories of conduct that were determined by the 2006 Determination with some clarifications, additions and reorganisation.

Some conduct that was specifically described in the 2006 Determination is now included by reference to governance documents such as the Commissioner's Orders and the National Guidelines. The tables continue to provide a selection of the behaviours captured under these governance documents as examples of the conduct in each category.

Additions to Category 2 will enable less serious examples of breaches of the Commissioner's Orders on Safety to be addressed by the appointee's management. Specifically, excessive use of force where the circumstances are unlikely to amount to serious misconduct or serious negligence and unauthorised discharge of a conducted energy weapon are now included in Category 2 conduct.

Specific behaviours are provided as examples in Category 3 to clarify that this Category includes workplace bullying, unapproved methods of use of force and failure to secure a firearm.

Currently, the terms "minor misconduct" used in Category 2 and 3 and "serious misconduct" (as it applies to Category 3 conduct) are not defined. Definitions providing further clarity around the concepts are to be included in Commissioner's Order 2 and are referred to in this Determination.

Human rights implications

The Determination promotes human rights relating to work

Right to work, including safe, just and favourable conditions of work

The right to just and favourable conditions of work including safe and healthy working conditions is recognised in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to protection of health and to safety in working conditions is also recognised in the specific context of women in the workplace in Article 11 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

This Determination promotes these specific human rights by making it clear that workplace harassment (including sexual harassment), bullying of Australian Federal Police appointees or a serious contravention of provisions of anti-discrimination legislation each constitute conduct required to be appropriately addressed under the AFP's professional standards regime. Clarifying that these kinds of behaviours constitute relevant conduct under the Act promotes awareness that this behaviour can be reported and addressed through appropriate remedies including training and development, remedial action, formal investigation or termination.

Conclusion

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the right to work in Article 7 of the ICESCR and the right to protection of health and to safety in working conditions in Article 11 of the CEDAW.

Consultation

Under s40RM(1) of the Act, and having been satisfied in terms of s40RN, s40RO and s40RP of the Act, the Commonwealth Ombudsman and the Commissioner of the Australian Federal Police agree to the categorisation of conduct which breaches the professional standards of the AFP, as set out in this Determination.

The Australian Federal Police Association was consulted during the formulation of this Determination as it relates to the handling of breaches of the professional standards of the AFP. The Community and Public Sector Union was informed of the context, scope and impact of this Determination once formulated. The Commissioner and Commonwealth Ombudsman have sole responsibility for jointly agreeing to the categorisation of conduct which breaches the professional standards of the AFP.