

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 326

Issued by the authority of the Minister for Justice and Customs

Subject: *Australian Federal Police Act 1979*

Australian Federal Police Amendment Regulations 2006 (No. 1)

The *Australian Federal Police Act 1979* (the Act) establishes the Australian Federal Police (AFP) and prescribes the constitution, functions and powers of the AFP.

Section 70 of the Act provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for securing the discipline and good government of the AFP and for otherwise carrying out or giving effect to the Act. Section 40P of the Act provides that regulations may be made for the purposes of sections 40M and 40N of the Act (dealing with drug testing).

The *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* (the LE Act) amends the Act to insert a new Part to modernise the complaints and professional standards regime within the AFP. The new Part implements a contemporary managerial approach to AFP complaints and professional conduct issues. The LE Act also repeals the *Complaints (Australian Federal Police) Act 1981* and amends the *Ombudsman Act 1976*.

Schedules 1 to 3 to the LE Act, which contain the main amendments of that Act, will commence on the commencement of section 3 of the *Law Enforcement Integrity Commissioner Act 2006*, which is expected to be 30 December 2006.

The purpose of the proposed Regulations is to prescribe matters related to the suspension of AFP appointees from their duties and matters related to drug testing. These matters were previously prescribed by the *Australian Federal Police (Discipline) Regulations 2006*, which are to be repealed by the *Australian Federal Police (Discipline) Repeal Regulations 2006*, and which are the subject of a separate Minute.

Details of the proposed Regulations are set out in the Attachment.

The proposed Regulations would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulations would commence on the commencement of sections 3 to 224 of the *Law Enforcement Integrity Commissioner Act 2006*.

Consultations regarding these legislative instruments were held with the AFP. This level of consultation is sufficient given the urgent nature of the amendments arising out of the LE Act.

The Minute recommends that Regulations be made in the form proposed.

Authority: Section 70 of the
Australian Federal Police Act 1979

ATTACHMENT

Details of the proposed *Australian Federal Police Amendment Regulations 2006 (No. 1)*

Regulation 1 – Name of Regulations

This regulation would provide that the title of the Regulations is the *Australian Federal Police Amendment Regulations 2006 (No. 1)*.

Regulation 2 – Commencement

This regulation would provide for the Regulations to commence on the commencement of sections 3 to 224 of the *Law Enforcement Integrity Commissioner Act 2006*.

Regulation 3 – Amendment of *Australian Federal Police Regulations 1979*

This regulation would provide that Schedule 1 to the Regulations would amend the *Australian Federal Police Regulations 1979* (the Principal Regulations).

Schedule 1 – Amendments

Schedule 1 to the Regulations prescribes matters related to the suspension of AFP appointees from their duties and matters related to drug testing.

Item [1]

This item would define the term ‘accredited pathology laboratory’ as having the same meaning as provided in the *Health Insurance Act 1973*.

Item [2]

This item would define the term ‘approved breath analysis instrument’ as an instrument which is approved by the law of the State or Territory in which the breath test is conducted in, or in circumstances where a breath test is conducted in an external Territory or foreign country, the instrument need only be approved by a law of a State or Territory. This definition provides that AFP appointees conducting their duties overseas may still be breath tested with an instrument approved by a State or Territory of the Commonwealth.

Item [3]

This item would define the term ‘medical practitioner’ as having the same meaning as provided in the *Health Insurance Act 1973*.

Item [4]

This item would define the term ‘registered nurse’ as having the same meaning as provided in the *Health Insurance Act 1973*.

Item [5]

This item would omit the note stating that certain terms used in the Principal Regulations have the same meaning as defined in the Act. Paragraph 13(1)(b) of the *Legislative Instruments Act 2003* provides that expressions used in any legislative instrument have the same meaning as in the enabling legislation, therefore the note is not required.

Item [6]

This item would replace the existing regulation 5 with a new regulation 5 to provide for the circumstances in which an AFP appointee may be suspended from duties, and the matters relating to a suspension, including remuneration whilst suspended.

Item [7]

This item would omit the note which refers to the *Australian Federal Police (Discipline) Regulations 1979*, which would be repealed by the proposed *Australian Federal Police (Discipline) Repeal Regulations 2006* and which would commence on the same day as the Regulations.

Item [8]

This would insert proposed Division 2.4A prescribing the conduct of AFP appointees and proposed Division 2.4B relating to drug testing.

Division 2.4A

Proposed regulation 13A would proscribe failure to give prompt attention to duties and being absent from duties without authority.

Proposed regulation 13B would proscribe unauthorised disclosure of certain information.

Proposed regulation 13C would proscribe unauthorised use or access to information that comes into an AFP's knowledge or possession by reason of being an AFP appointee.

Proposed regulation 13D would require an AFP appointee to advise the Commissioner in writing if he or she becomes a bankrupt.

Division 2.4B

Subdivision 2.4B.1

Proposed regulation 13E would provide a definition of 'authorised person' for the purposes of obtaining a sample for a breath test, blood test or prohibited drug test or operating equipment for the purposes of the test.

Proposed regulation 13F would allow the Commissioner to authorise a person by name or the holder of a particular position in writing to direct an AFP appointee to undergo a breath test or provide a body sample for a prohibited drug test, direct an AFP appointee directly involved in an incident while on duty where a person is killed or seriously injured in a motor vehicle or vessel accident, or whilst in police custody,

as a result of the discharge of a firearm or application of force to undergo a breath test or provide a body sample for a prohibited drug test, even where the AFP employee or special employee is admitted to hospital for examination or treatment because of an incident. The person authorised by the Commissioner to give such directions, must obtain a certificate stating that he or she is authorised and must produce the certificate, if requested, to the AFP employee or special member directed to undergo a test.

Proposed regulation 13G would provide that proposed Schedule 1A (see item [9] below) to the Regulations specifies the persons authorised to conduct breath, blood or prohibited drug tests and operate equipment to do so.

Proposed regulation 13H would ensure that tests conducted under the Act must be conducted in a respectful manner, affording privacy to the AFP employee or special member undergoing the test and if practicable, to be conducted by a person of the same sex. Currently there is no Australian Standard or universally adopted international standard for obtaining a hair sample for the purposes of a prohibited drug test, therefore the Regulations observe current best practice as endorsed by the Victorian Forensic Medical Institute for hair sampling and provide that a hair sample may be provided by either cutting a strand of hair or removing the hair by its root.

Proposed regulation 13J would provide that a certificate issued under proposed subregulation 13F(3) from the Commissioner authorising another person to direct an AFP employee or special member to undergo a breath, blood or prohibited drug test, Regulation 13M relating to a breath test, or 13T relating to the analysis of a body sample, is evidence of the matters stated in the certificate.

Proposed regulation 13K would provide for the record keeping requirements relating to breath, blood or prohibited drug test records, including where the records must be kept and the period of time for which the records must be kept and/or destroyed. The proposed regulation would also provide for retaining information for the purposes of compiling a statistical database.

Proposed regulation 13L would provide for the circumstances in which information revealed by a breath, blood or prohibited drug test may be disclosed.

Subdivision 2.4B.2

Proposed regulation 13M would outline the procedures to be followed when conducting a breath test, including the instrument to be used and the information to be contained in the certificate evidencing the result of the breath test.

Proposed regulation 13N would authorise the Commissioner to approve a training course in conducting breath tests.

Subdivision 2.4B.3

Proposed regulation 13P would provide that the subdivision applies to blood tests and prohibited drug tests of body samples, but that the matters set out in this subdivision do not apply to prohibited drug tests of urine samples.

Proposed regulation 13Q would provide a definition of the term ‘analyst’ to be a person performing the quantification on a body sample, and the term ‘unanalysed sample’ to be the sample provided for the purpose of making a sample available for independent testing.

Proposed regulation 13R would prescribe the process involved in taking a body sample including the sealing and labelling of containers and ensuring that the AFP employee or special member understands the procedures applied to him or her.

Proposed regulation 13S would prescribe for the process involved when an analyst analyses the body sample to determine the concentration of alcohol or prohibited drug in the sample. The proposed regulation would require a second analysis of another portion of the sample where the first analysis indicates the presence of alcohol or a prohibited drug.

Proposed regulation 13T would provide that the analyst must give a certificate to the AFP employee or special member detailing information relating to the analysis including, the results of the analysis and any observations made which may have affected the results.

Proposed regulation 13U would provide that if the results of an analysis are disputed, and the second sample is made available for independent testing, the re-testing must only indicate the presence of the drug or alcohol. Due to degradation of the sample over any period of time, the re-testing need only detect the presence of the drug or alcohol and a lower result in the second test cannot call into dispute the original test results. All positive test results are notified to the AFP's Medical Review Officer (MRO). The MRO will then constitute the Medical/Science Review Panel which consists of suitably qualified people whom the MRO considers appropriate to review the circumstances impacting on the person who provided the sample. This review process will consider all confirmed positive results, taking into account information provided by the subject and determine whether a positive result is verified. Test results of secondary samples will also be reviewed by the MRO.

Subdivision 2.4B.4

Proposed regulation 13V would provide that the provision and analysis of urine samples for the purpose of a prohibited drug test, must be conducted in accordance with the Australian/New Zealand Standard.

Proposed regulation 13W would authorise the Commissioner to approve a training course in supervising the provision of urine samples.

Item [9]

This item would insert Schedule 1A to the Principal Regulations to prescribe the persons authorised to take samples for the purposes of drug and alcohol testing.

Item 1 of Schedule 1A

This would provide that an AFP employee who has completed a training course approved by the Commissioner, and a member of a police force or police service of a

State or Territory who is authorised to conduct a breath test using a breath analysis instrument, is an 'authorised person' who may conduct a breath test in accordance with Regulation 13M.

Item 2 of Schedule 1A

This would provide that medical practitioners and registered nurses are 'authorised persons' who may take a body sample for the purposes of a blood test in accordance with Regulation 13R.

Item 3 of Schedule 1A

This would provide that medical practitioners and registered nurses are 'authorised persons' who may take a body sample for the purposes of a prohibited drug test in accordance with Regulation 13R.

Item 4 of Schedule 1A

This would provide that medical practitioners, registered nurses and persons who have completed a training course in supervising the provision of urine samples approved by the Commissioner, are 'authorised persons' who may take a body sample for the purposes of a prohibited drug test in accordance with Regulation 13V.