

# Professional Standards – charting the way forward



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Effective supervision and scrutiny of police conduct, and the corresponding accountability regime to ensure appropriate behaviour, is an important issue for all police services.

At the centre of this issue is the need to regulate those who exercise substantial powers over the community, while preserving an appropriate level of discretion to get a difficult job done. As police occupy a special position between the citizen and the State, and exercise far reaching discretions under the law, striking an appropriate balance is important to both community confidence and operational effectiveness.

The purpose of commissioning the review was partly in response to the ALRC and the Senate Committee, but also because of concerns that adversarial processes were seeing significant delay in resolving complaints, were leading to high levels of sustained anxiety in the workplace and efforts could be better focused on prevention and sustainable performance improvement.

The traditional approach to this balance has been a structured complaint and discipline regime, prosecutorial in nature and based on quasi-criminal charges. However, recent developments in Australia and overseas have questioned the wisdom of this approach and raised alternative methods for dealing with poor police behaviour while preserving public confidence that complaints against police are dealt with appropriately.

The Australian Federal Police has embarked on a process to critically examine its traditional complaints and discipline processes with a view to charting a new way forward.

#### The current model

The current AFP model of professional standards is grounded in legislation enacted in 1981, but has its origins in a complaints and discipline regime adopted in most Australian jurisdictions in the 1970s.

Its central characteristics are contained in the *Complaints (Australian Federal Police) Act 1981* and the *Australian Federal Police (Discipline) Regulations 1979*, which are underpinned by Commissioner's Orders. The combination of these provisions provides a structured regime of control of police action, which reflects the prevailing view in the early 1980s that police behaviour was best

controlled by rules of conduct enforced by legalistic charges and determined in certain circumstances by the Federal Police Discipline Tribunal.

However, in 1996 the Australian Law Reform Commission (ALRC) observed that the AFP complaints and discipline process was "... outdated and unsatisfactory."<sup>1</sup> Additionally, in 2001, the Senate Legal and Constitutional Reference Committee into management arrangements and adequacy of funding in the AFP and NCA also recommended that AFP complaints procedures be "simplified and made more transparent."<sup>2</sup>

Clearly, there was a need for the AFP to take a critical look at this area of public administration.

#### The Fisher Review

In May 2002, the Commissioner asked Justice William Fisher AO, QC to undertake a review of AFP professional standards, known as the Fisher Review. The purpose of commissioning the review was partly in response to the ALRC and the Senate Committee, but also because of concerns that adversarial processes were seeing significant delay in resolving complaints, were leading to high levels of sustained anxiety in the workplace and efforts could be better focused on prevention and sustainable performance improvement. Substantial public funds were also being spent on protracted

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investigations which could be more effectively dealt with by a competent manager or supervisor.

The Terms of Reference required Justice Fisher to undertake a wide ranging review of AFP professional standards in collaboration with AFP management, the Australian Federal Police Association and key stakeholders. There was also a requirement to conduct a comparative analysis of systems operating in Australia and overseas.

Justice Fisher met with senior ministers, judicial officials and a range of law enforcement officers across the country and also received a number of confidential submissions. Significant analysis was undertaken into systems operating in Queensland, Victoria, New South Wales and Canada. The Fisher Review was completed and delivered to the Commissioner in 2003.

## The role of discipline

In discussing a way forward for the AFP, Justice Fisher was critical of the inappropriate use of discipline and punishment in police complaints systems. He observed:

“... police services have traditionally tended to focus too much on the aspect of reactive punishment. This has been due to the reliance on military precedence and the notion that good “discipline” is at the heart of the effective operation of policing. Today, what is really needed is appropriate motivational management. This leads, in relation to policing, to a renewed emphasis on personnel management and less interest in the alleged motivations stemming from military-style discipline.”<sup>3</sup>

This criticism recognises that performance failures can be the result of many factors, including inadequate supervision and training. His Honour argues that any system with a punitive regime as its central focus cannot adequately address the causes of poor performance or bring about significant behavioural improvement.

It is important to note that Justice Fisher does not entirely dispense with the idea of discipline in policing, acknowledging that the complex role of policing requires a disciplined approach to achieve the high expectations demanded from Government and the community. The real question is the means by which police administrators can achieve discipline to increase and enhance

performance. To this end, a new model has been proposed for the AFP.

## The recommendations

The Review recommends the AFP adopt a graduated professional standards regime according to the seriousness of the matter and the ability of managers or supervisors to deal with performance issues.

While recognising that the current AFP Professional Standards approach has been to introduce managerial resolutions wherever possible, positioning us as a learning organisation keen to develop our employees, the Review advocates a structural change to extend and develop these ideas and practices.

## Minor management matters

It is proposed that at the lower end of the spectrum the Commissioner and Ombudsman should be able to agree that certain complaints are dealt with as “minor management matters”. These are typically characterised as minor issues of conduct, rudeness or a failure to provide customer service, but can include other matters by agreement.

This category of grievance would not be treated or recorded as a “complaint” in the formal sense and would be resolved by managers or supervisors in the workplace with innovative and motivational management techniques being used to address poor performance. The resolution of these cases would be recorded on a restricted form of PROMIS, the core AFP management IT platform, and monitored centrally by the Ombudsman and Professional Standards to ensure consistency.

Outcomes from this process would include coaching, mentoring, retraining, personal development or increased supervision.<sup>4</sup> The emphasis would be on a quick resolution of the issue in a non-adversarial setting, with appropriate advice back to complainants to ensure continued public confidence.

## Non-reviewable action

The next level of complaints management would be what His Honour termed “non-reviewable action”. This is similar to minor management matters but has a wider application and more prescribed outcomes are available including a



Justice William Fisher

reprimand, performance agreement, reassignment of duties, transfer or a recorded adverse finding. These matters would be dealt with in the workplace and underpinned by the management philosophy advocated by Justice Fisher, with the manager playing a pivotal role.

It is important to note that the outcomes flowing from Minor Management Matters and Non-Reviewable Actions would not be amenable to review by a court or tribunal, save for the role of the Ombudsman to monitor management of the complaint or the Federal Court of Australia to review administrative action.<sup>5</sup> This makes the decisions in these cases more certain and eliminates elaborate review processes that have proven to be costly and fraught with delay.

### More serious matters

While managerial resolutions may be appropriate for some complaints, the Fisher Review proposes that more serious matters would still be investigated on a formal basis by AFP Professional Standards using traditional investigative tools and a more formal approach. These cases would include matters which:

- disclose a serious breach of the criminal law;
- are a serious abuse of power;
- are a serious neglect of duty, or
- give rise to consideration of employment suitability.<sup>6</sup>

It is clear that these cases would not necessarily be amenable to managerial resolution and public confidence requires serious cases to be handled in a more proscribed manner. Results flowing from these cases would include any of the outcomes applicable to minor management matters or non-reviewable action as well as the application of the criminal law and the Commissioner's power to terminate employment.

### The Ombudsman

The Fisher Review envisages a continued role for the Commonwealth Ombudsman, although in a more supervisory role for minor management matters and non-reviewable action.

The Review proposes the Ombudsman have access to Professional Standards PROMIS and be able to monitor progress of cases to examine inconsistencies, poor decision-making, misunderstandings or a failure to perceive the implications of primary decisions or emerging trends.<sup>7</sup>

This more focused role allows for demands on the Ombudsman's services to be redirected to more difficult complaints and to continue to undertake "own motion" investigations into aspects of AFP processes.<sup>8</sup>

### The way forward

The Minister for Justice and Customs, Senator The Hon. Christopher Ellison, tabled the Fisher Review in Federal Parliament in December 2003. The Commissioner has established a Fisher Review Implementation Group which includes representatives from the Ombudsman's Office, the Commonwealth Attorney-General's Department and the Department of Justice and Community Safety (ACT). The Group has been working on ways to implement the Review's recommendations, including proposed amendments to the Complaints Act and Commissioner's Orders as well as appropriate training packages to enable managers and supervisors to undertake the proposed resolutions under the new model.

It is envisaged that the majority of the work of the Implementation Group will be completed in 2004.

### Reference

1. Australian Law Reform Commission, *Integrity: but not by trust alone* – AFP & NCA complaints and disciplinary systems, Report No 82 (1996) 11.
2. Senate, Legal and Constitutional Affairs Committee 'Order in the Law' – The report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority (2001) 137.
3. The Hon. William Kenneth Fisher AO, QC, *A Review of Professional Standards in the Australian Federal Police* (2003) 59.
4. *Ibid*, 65, Recommendation 9.
5. *Ibid*, 67-68.
6. *Ibid*, Recommendation 14.
7. *Ibid*, 73.
8. *Ibid*, 74, Recommendation 16.