

EXPLANATORY STATEMENT

Select Legislative Instrument 2007 No. 264

Issued by the authority of the Minister for Justice and Customs

Australian Federal Police Act 1979

Australian Federal Police Amendment Regulations 2007 (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 (which relate to alcohol and drug testing of AFP employees). Section 40N of the Act states that an AFP employee is required to undergo a breath test, or provide a body sample for a prohibited drug test, in certain circumstances – eg where there was a death, injury or hospitalisation involving the AFP employee.

The purpose of the Regulations is to amend the *Australian Federal Police Regulations 1979* (the Principal Regulations) to prescribe the requirements for the retention and destruction of records relating to the testing of AFP employees for the presence of alcohol or prohibited drugs.

The Regulations also amend the Principal Regulations to restrict the ability to retain and later re-test body samples taken from AFP employees which do not show the presence of drugs or alcohol (ie 'clear samples'). The Regulations reduce the maximum retention period of such records from 2 years to 28 days after the test was conducted.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

Consultations regarding these legislative instruments were held with the AFP.

ATTACHMENT

Details of the Australian Federal Police Amendment Regulations 2007 (No. 1)

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Australian Federal Police Amendment Regulations 2007 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered.

Regulation 3 – Amendment of Australian Federal Police Regulations 1979

This regulation provides 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 certain matters including those related to drug testing.

Item [1]

This item replaces the existing subregulation 13K(1) relating to record keeping. The provision addresses the requirements for keeping results of tests conducted on an AFP employee to detect the presence of alcohol or prohibited drugs.

The item substitutes new subregulation 13K(1) and subregulation 13K(1A). The effect is to now ensure that the operation of this provision will only apply to cases where a test result indicates the presence of alcohol or a prohibited drug.

Subregulation 13K(1)

Subregulation 13K(1) states that subregulation 13K(1A) will apply to all records including any body sample, that indicate the presence of alcohol or prohibited drugs when tested.

Subregulation 13K(1A)

Subregulation 13K(1A) prescribes the record keeping requirements relating to all records, including body samples, relevant to a breath test or prohibited drug test conducted in accordance with section 40M or 40N of the Act.

Paragraph 13K(1A)(a) specifies that, in the case of a body sample, it must be kept in a secure location and destroyed no later than 2 years from the day that the test was conducted. The purpose is to ensure that records of this nature are kept in a secure place and disposed of within the required time frame.

This differs from subparagraph 13K(1)(b)(i) which provides that a body sample is destroyed *after the period of 2 years* or in circumstances where the Commissioner and the AFP employee or a special member who provided the body sample both agree to the destruction of the records at an earlier date.

The substituted paragraph changes these requirements by now providing for the destruction of records *at any time within the 2 year* time period. This substituted paragraph changes these requirements by now providing for the destruction of records *at any time within the 2 year* time period. Earlier destruction of these records is in the interests of privacy. The intention is to allow for earlier destruction where samples are no longer required to be retained, for example, where a person is no longer an AFP employee. In addition, removal of the requirement for to obtain permission from the person in order to carry out this earlier destruction of samples will provide for greater flexibility.

Paragraph 13K(1A)(b) specifies that, in the case of any other record, it must be kept in a secure location and destroyed as soon as practicable after the AFP employee or special member to whom the record relates, ceases to be employed with the AFP. This paragraph retains the original intention of subparagraph 13K(1)(b)(ii).

Item [2]

This item inserts new subregulation 13K(3) after subregulation 13K(2).

Subregulation 13K(3) requires that all records that do not indicate the presence of alcohol or prohibited drugs when tested, 'clear samples', must be destroyed no later than 28 days after the day the test was conducted. Paragraph 13K(1)(a) allows clear samples to be retained for up to 2 years.

The intention of this provision is to expressly provide that clear samples must be destroyed and specify the time frame in which this must take place. The purpose is to ensure that these records of clear samples are not retained or made available for later re-testing.

The time frame of 28 days is specified to allow for destruction of samples. This time frame has been carefully set following consultations with the Australian Federal Police (AFP). As AFP has an ongoing alcohol and drug testing program of all its employees, the 28 days would be appropriate to allow for necessary internal processes and any unforeseen delays caused by illness or other communication delays with laboratory results. The intention is to allow sufficient time for the AFP's medical provider to properly evaluate the sample. This time period will ensure that the provider can communicate the 'clear' result to the AFP and for relevant areas of the AFP to review the results, communicate with the individual tested and advise the provider of the completion of these processes so that the sample can be destroyed.

The 28 day time period allowed is not intended to be taken as an opportunity for further testing.