

EXPLANATORY STATEMENT

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

Australian Federal Police Act 1979

Australian Federal Police (Categories of Conduct) Determination 2023

Subsection 40RM(1) of the *Australian Federal Police Act 1979* (the AFP Act) provides that the Commissioner of the Australian Federal Police (Commissioner) and the Commonwealth Ombudsman may jointly determine, by legislative instrument, the kind of conduct that is to be category 1, 2 or 3 conduct for the purposes of the AFP Act.

Complaints about the conduct of AFP appointees are dealt with in Part V of the AFP Act. Section 40RH of the AFP 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 corrupt conduct. Professional standards, to which all AFP appointees must comply, are established by the Commissioner pursuant to section 40RC of the AFP Act. The professional standards are issued as Commissioner's orders under section 38 of the AFP Act.

Section 40RK of the AFP Act provides that there are 4 categories of conduct issues:

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

Sections 40RN, 40RO and 40RP of the AFP Act set out the kinds of conduct which the Commissioner and the Commonwealth Ombudsman may determine to be category 1, 2 or 3 conduct.

The *Australian Federal Police (Categories of Conduct) Determination 2023* (the Determination) determines:

- the kind of conduct that is to be category 1 conduct, as described in section 40RN of the Act, for the purposes of the Act;
- the kind of conduct that is to be category 2 conduct, as described in section 40RO of the Act, for the purposes of the Act; and
- the kind of conduct that is to be category 3 conduct, as described in section 40RP of the Act, for the purposes of the Act.

The category into which conduct falls determines how it will be dealt with by the AFP and the Office of the Commonwealth Ombudsman. Categorisation is for the purpose of

investigation and oversight. When a complaint is first considered, it is categorised based on its characterisation when it comes to the attention of the AFP. If, during the course of or following an investigation, it becomes apparent that the conduct is of a more (or less) serious nature it can be escalated (or lowered) to the appropriate category as necessary.

The AFP Act specifies the following conditions that need to be satisfied before the power to make the Determination may be exercised:

- The Commissioner and the Commonwealth Ombudsman may determine conduct of a particular kind is to be category 1 conduct if they are satisfied that conduct of that kind is inappropriate conduct that relates to minor management matters or customer service matters; or reveals a need for improvement in the performance of the AFP appointee concerned and the conduct does not warrant being treated as category 2 or category 3, and does not raise a corruption issue.
- The Commissioner and the Commonwealth Ombudsman may determine conduct to be category 2 conduct if they are satisfied the conduct is of the kind that is minor misconduct by an AFP appointee or inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee, or repeated category 1 conduct that warrants, because of its repeated nature, being treated as category 2 conduct and the conduct does not warrant being treated as category 3 conduct, and does not raise a corruption issue.
- The Commissioner and the Commonwealth Ombudsman may determine conduct to be category 3 conduct if the conduct is serious misconduct by an AFP appointee or raises the question of whether termination action should be taken in relation to an AFP appointee, or involves a breach of the criminal law or serious neglect of duty by an AFP appointee, and does not raise a corruption issue.

The instrument was developed through extensive consultation between the AFP and the Office of the Commonwealth Ombudsman. 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. Public consultation was not necessary, as the instrument concerns obligations on AFP appointees.

The Commissioner and Commonwealth Ombudsman have sole responsibility for jointly agreeing to the categorisation of conduct breaching the professional standards of the AFP.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). The Determination is subject to disallowance, and subject to sunseting.

The Determination references the AFP Code of Conduct (the Code) and AFP Core Values (the Values), both of which are publicly accessible through the AFP website. The Determination references these documents, rather than including relevant provisions, as both the Code and the Values are key documents within the AFP's governance framework.

Details of the Determination are set out in [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Office of Impact Analysis has been consulted (ref: OIA23-05289) and agreed the instrument is unlikely to have a more than minor impact and so an Impact Analysis is not required.

Details of the *Australian Federal Police (Categories of Conduct) Determination 2023*

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Australian Federal Police (Categories of Conduct) Determination 2013* (the Determination).

Section 2 – Commencement

The instrument commenced on the day after the instrument was registered on the Federal Register of Legislation.

Section 3 – Authority

The instrument is made under subsection 40RM(1) of the *Australian Federal Police Act 1979* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument are amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Section 5 – Definitions

This section sets out the definitions of terms used within the Determination. Some of these terms are already defined in the Act, but have been included to ensure clarity and for the avoidance of doubt.

Part 2 – Categories of conduct

Section 6 – Conduct of a kind that raises a corruption issue

This section provides that, despite anything in sections 7, 8 or 9, conduct of a kind that raises a corruption issue is not category 1 conduct, category 2 conduct, or category 3 conduct. Conduct giving rise to a corruption issue is the highest, and most serious, category of conduct (see subsections 40RK(5) and 40RP(1)(b) of the Act).

Section 7 – Category 1 conduct

The table in section 7 sets out the kind of conduct jointly determined by the Commissioner and the Commonwealth Ombudsman to be category 1 conduct. Column 1 sets out the kind of conduct that is category 1 conduct and column 2 contains non-exhaustive examples of that conduct.

Item 1 of the table provides that customer service issues are category 1 type conduct. This includes but is not limited to, failure to provide a service or facility in an adequate, professional or appropriate manner; failure to provide appropriate or correct advice; unreasonable delay in dealing with an issue or providing a service; failure to take appropriate

action in relation to an issue where action by the AFP appointee was warranted, and discourteous behaviour including (but not limited to) rudeness and abruptness.

Item 2 of the table provides that minor breaches of AFP governance is category 1 type conduct. AFP governance includes National Guidelines and Better Practice Guides. An example of this is an AFP appointee's failure to respond to a query within a timeframe specified in AFP governance.

Section 8 – Category 2 conduct

AFP appointees must comply with AFP governance requirements.

Under the Commissioner's Order on Professional Standards, an AFP appointee may only depart from this mandatory compliance obligation in circumstances where:

- they have considered the risks of departure from the rule, including legal and work health and safety risks, and security and professional standards requirements;
- the AFP appointee has obtained advice from relevant AFP advisory areas (unless the circumstances are urgent);
- they have consulted with a supervisor prior to the departure where possible; and
- the departure is reasonable and justified in the circumstances.

The table in section 8 sets out the kind of conduct jointly determined by the Commissioner and the Commonwealth Ombudsman to be category 2 conduct. Column 1 sets out the kind of conduct that is category 2 conduct and column 2 contains non-exhaustive examples of that conduct. Category 2 conduct covers a broad range of minor misconduct and inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee.

Item 1 of the table provides that breaches of Commissioner's Orders that do not or could not result in breach of operational or national security, harm to an individual or AFP reputational damage, are category 2 type conduct. This includes but is not limited to failure to apply sound security practices within the AFP appointee's role and duties as required by Commissioner's Orders dealing with security, or breach of Commissioner's Orders dealing with operational safety that does not relate to any physical injury being sustained by an individual.

Item 2 of the table provides that breaches of Commissioner's Orders dealing with operational safety where the breach relates to a weapon, are category 2 type conduct. This may include where an AFP appointee discharges a conducted energy weapon while in the process of loading the AFP appointee's utility belt.

Item 3 of the table provides that unauthorised departure from AFP National Guidelines or Practical Guides that does not, and could not, result in a breach of operational or national security, harm to an individual or reputational damage to the AFP, is category 2 conduct. The 'secondary work' example for Item 2 in Column 2 concerns employment in addition to the AFP appointee's employment with AFP. The obligations around secondary work are set out in the AFP National Guidelines and AFP Practical Guides.

Item 4 of the table provides that failures to comply with the AFP Code of Conduct that do not or could not result in a breach of operational or national security, harm to an individual or AFP reputational damage, are category 2 type conduct. This may include failure to adequately or appropriately supervise another AFP appointee who is within the AFP

appointee's line of responsibility as a supervisor; or repeated category 1 conduct that amounts to a failure to comply with the AFP Code of Conduct because of its repeated nature.

Item 5 of the table provides that failure of due care or diligence that does not or could not result in a breach of operational or national security, harm to an individual or AFP reputational damage, is category 2 conduct. This may include failure to correctly enter or record information in a policing database. Given the duties, functions, and powers of the AFP an appointee's failure to take due care or diligence can have serious consequences. To reflect this, the Determination makes clear that a failure of due care or diligence is category 2 conduct.

Item 6 of the table provides that administrative failures relating to a warrant or an authorisation under the Act are category 2 type conduct. The execution and administration of warrants, and authorisations, is a key component of the AFP's functions. As such, it is essential that AFP appointees abide by the requirements of warrants, legislation, guidelines and standard operating procedures in relation to the execution and maintaining of warrant and authorisation records. Any failure in this regard constitutes category 2 conduct.

Discriminatory conduct, sexual harassment and workplace bullying or harassment, where the alleged victim wants the matter dealt with informally and the conduct does not constitute a breach of the law, is category 2 conduct under the Determination. This is reflective of the AFP's victim-centred approach to this type of conduct and ensures the needs of the alleged victim are addressed. It is important to note that category 2 captures conduct of this kind that is directed towards other AFP appointees and towards members of the public. Item 7 of the table provides that sexual harassment against another AFP appointee or member of the public of this type is category 2 conduct under the Determination. Item 8 of the table provides that discriminatory conduct (that is not sexual harassment) against another AFP appointee or member of the public of this type is category 2 conduct. Item 9 of the table provides that workplace bullying or harassment (that is not sexual harassment) of this type is category 2 conduct.

Item 10 of the table provides that traffic misconduct that would not result in criminal charges is category 2 conduct. Under the AFP Code of Conduct, AFP appointees are expected to maintain the highest level of professional standards both in their official and private capacities. As such, any traffic misconduct that results in a requirement to appear in court as a defendant is considered to be category 3 conduct under the Determination.

Item 11 of the table provides that misconduct relating to the handling and management of property or exhibits held by the AFP is category 2 conduct. Property and exhibits held by the AFP are for the most part the property of others or constitute evidence, as such it is essential, they are appropriately managed and any failures in this regard are appropriately addressed.

Item 12 of the table provides that breaches of AFP governance relating to actual, perceived or potential conflict of interest, and item 13 of the table provides that failure to report an actual, perceived or potential conflict of interest are both category 2 type conduct.

Section 9 – Category 3 conduct

AFP appointees must comply with AFP governance requirements.

An AFP appointee may only depart from a mandatory compliance obligation in circumstances where:

- they have considered the risks of departure from the rule, including legal and work health and safety risks, and security and professional standards requirements;
- the AFP appointee has obtained advice from relevant AFP advisory areas (unless the circumstances are urgent);
- they have consulted with a supervisor prior to the departure where possible; and
- the departure is reasonable and justified in the circumstances.

A breach is considered to be serious where it is reckless or deliberate and/or where the breach may result in a breach of operational or national security, harm to an individual or reputational damage to the AFP.

The table in section 9 sets out the kind of conduct jointly determined by the Commissioner and the Commonwealth Ombudsman to be category 3 conduct. Column 1 sets out the kind of conduct that is category 3 conduct and column 2 contains non-exhaustive examples of that conduct. Category 3 conduct covers a broad range of serious misconduct.

Item 1 of the table provides that a serious breach of the law is category 3 conduct. This may include driving over the prescribed concentration of alcohol, being arrested, summonsed or charged in relation to an alleged criminal offence, victimisation contrary to section 40YA of the Act, giving false information in relation to an AFP conduct or practices issue contrary to section 40YB of the Act or any other breach of the Act.

Item 2 of the table provides that serious breaches of Commissioner's Orders and instructions that results or could result in a breach of operational or national security, harm to an individual or AFP reputational damage, are category 3 type conduct. This may include failure to report misconduct that relates to the AFP appointee or another AFP appointee, serious breach of the Commissioner's Financial Instructions (CFI) or the *Public Governance, Performance and Accountability Act 2013* or unwarranted attention, in the course of, or in connection with, the AFP appointee's duties, towards a person who is not an AFP appointee. An example of unwarranted attention may include parking a marked police car outside an individual's residence or place of business where there is no legitimate policing purpose to do so.

Item 3 of the table provides that serious breaches of Commissioner's Orders concerning use of a weapon are category 3 type conduct. This may include unauthorised discharge of a firearm, use of force where non-approved methods or accoutrements are used to affect the force applied, excessive use of force against a person or animal, threatening to use excessive force against a person, failure to secure ammunition or accoutrements, where the failure poses potential danger to the public or may damage the reputation of the AFP or deliberately preventing the provision of adequate medical attention, or decontamination treatment, following use of chemical munitions.

Item 4 of the table provides that serious breaches of the AFP Code of Conduct or AFP Core Values are category 3 type conduct. This may include multiple failures to comply with the AFP Code of Conduct or failure to comply with the AFP Code of Conduct or the AFP Core Values while deployed overseas that may damage the reputation of Australia or the AFP.

Item 5 of the table provides that serious unauthorised departure from AFP National Guidelines or Practical Guides is category 3 conduct. This may include failure to display red and blue flashing lights or to sound an alarm when priority driving or failure to take

reasonable care, having regard to hazards, as set out in the National Guideline on Priority Driving.

Item 6 of the table provides that serious breaches of AFP governance relating to actual, perceived or potential conflict of interest, are category 3 type conduct. Any conflict of interest, which is not appropriately or adequately managed in line with AFP governance, constitutes serious misconduct and is category 3 conduct. This may include continuing involvement in an investigation regarding a family member or inappropriate relationships with victims of crime or suspects which may involve a power imbalance between the individuals involved or otherwise give rise to an actual or perceived conflict of interest.

Item 7 of the table provides that failure to report an actual, perceived or potential conflict of interest is category 3 type conduct. This may include failure to report a personal interest in a procurement process.

Discriminatory conduct, sexual harassment and workplace bullying or harassment, where the alleged victim wants the matter dealt with formally and the conduct is of such a serious nature as to require formal intervention, is category 3 conduct under the Determination. This is reflective of the AFP's victim-centred approach to this type of conduct and ensures the needs of the alleged victim are addressed, while also indicating the seriousness of this type of conduct. It is important to note that category 3 captures conduct of this kind that is not criminal and that is directed towards other AFP appointees and/or members of the public. Item 8 of the table provides that serious sexual harassment of this type is a category 3 conduct under the Determination. Item 9 of the table provides that serious discriminatory conduct (that is not sexual harassment) against another AFP appointee or member of the public of this type is category 3 conduct. Item 10 of the table provides that serious workplace bullying or harassment (that is not sexual harassment) of this type is category 3 conduct.

Item 11 of the table provides that domestic and family violence are category 3 type conduct. Under the AFP Code of Conduct, AFP appointees are expected to maintain the highest level of professional standards both in their official and private capacities. To reflect this, the Determination makes clear that any allegation of domestic and family violence is a category 3 matter, whether or not there has been a criminal conviction.

Item 12 of the table provides that accessing pornographic images is category 3 type conduct. This may include viewing or disseminating pornographic images at work or while undertaking official duties or storing or accessing pornographic images, on an AFP device, that are not related to official duties.

Item 13 of the table provides that misusing or mishandling prescribed information is category 3 type conduct. Any access, use or disclosure of prescribed information, where it is not accidental or unintentional, is category 3 conduct. This item also encompasses failures to protect prescribed information, denoting the sensitivity of the information held by the AFP.

Items 14 and 15 of the table provides that misconduct relating to intoxication and drug misconduct are both category 3 type conduct. Misconduct relating to intoxication, and drug misconduct, are category 3 matters and encompass misconduct on and off duty. It is important to note that drug misconduct includes where an AFP appointee is assigned duties overseas and engages in drug activities that may be legal overseas, but would constitute a breach of law in Australia. This is in line with the AFP Code of Conduct, which makes clear that an AFP appointee is required to comply with all Australian laws. The National Guideline on prohibited drugs, pharmaceutical products and alcohol sets out what substances are

‘prohibited’ and also makes clear that an AFP appointee is required to comply with all Australian laws while in Australia and when assigned duties overseas.

Item 16 of the table provides that serious traffic misconduct is category 3 conduct. Under the AFP Code of Conduct, AFP appointees are expected to maintain the highest level of professional standards both in their official and private capacities. As such, any serious traffic misconduct that may result in criminal charges, constitutes a serious breach of traffic legislation, or damage to the reputation of the AFP is considered to be category 3 conduct under the Determination.

Part 3 – Application and transitional provisions

Section 10 – Transitional provision—repeal of the *Australian Federal Police Categories of Conduct Determination 2013*

Section 10 provides that, despite the repeal of the *Australian Federal Police Categories of Conduct Determination 2013* (the old determination) by Schedule 1, the old determination as in force before the commencement of this instrument (the commencement time) continues to apply, on and after the commencement time, in relation to conduct engaged in before the commencement time.

Schedule 1 – Repeals

Item 1

This item repeals the *Australian Federal Police Categories of Conduct Determination 2013*.

Statement of Compatibility with Human Rights

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

Australian Federal Police (Categories of Conduct) Determination 2023

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*.

Overview of the Disallowable Legislative Instrument

The *Australian Federal Police (Categories of Conduct) Determination 2023* replaces the *Australian Federal Police (Categories of Conduct) Determination 2013*.

Subsection 40RM(1) of the *Australian Federal Police Act 1979* (the Act) provides that the Australian Federal Police (AFP) Commissioner and the Commonwealth Ombudsman may jointly determine, by legislative instrument, the kind of conduct considered to constitute category 1, 2 or 3 conduct for the purposes of the Act.

The category into which conduct falls determines how it will be dealt with by the AFP and the Office of the Commonwealth Ombudsman. Categorisation is for the purpose of investigation and oversight. When a complaint is first considered it is categorised based on its characterisation when it comes to the attention of the AFP. If, during the course of or following an investigation, it becomes apparent that the conduct is of a more (or less) serious nature it can be escalated (or lowered) to the appropriate category as necessary.

Human rights implications

This Determination engages the following rights related to safe and healthy, and just and favourable, working conditions:

- The right to safe and healthy working conditions in Article 7 of the *International Covenant on Economic, Social and Cultural Rights*.
- The right to protection of health and to safety in working conditions in Article 11(1)(f) of the *Convention on the Elimination of All Forms of Discrimination Against Women*.
- The right to just and favourable conditions of work in Article 5(d)(i) of the *International Convention on the Elimination of all Forms of Racial Discrimination*.

This Determination promotes these specific human rights by making it clear that sexual harassment, discriminatory conduct, or workplace bullying and harassment of an AFP appointee by another AFP appointee constitutes conduct required to be appropriately addressed under the AFP's professional standards framework.

This Determination also engages the following human rights related to racial and gender discrimination:

- That States Parties shall not permit public authorities to incite or promote racial discrimination in article 4(c) of the *International Convention on the Elimination of All forms of Racial Discrimination*.
- That States Parties shall ensure public authorities refrain from engaging in any act of the practice of discrimination against women in article 2(d) of the *Convention on the Elimination of All Forms of Discrimination Against Women*.

This Disallowable Legislative Instrument promotes these specific human rights by making it clear that discriminatory conduct by an AFP appointee to a member of the public constitutes conduct required to be appropriately addressed under the AFP's professional standards framework.

Clarifying that sexual harassment, discriminatory conduct, or workplace bullying and harassment by AFP appointees are 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

The Determination is compatible with human rights because it promotes the protection of human rights.