

**A report on the
Commonwealth Ombudsman's
activities under Part V of the
*Australian Federal Police Act 1979***

FOR THE PERIOD 1 JULY 2015 TO 30 JUNE 2016

**Report by the Commonwealth Ombudsman
under the *Australian Federal Police Act 1979***

May 2017

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EXECUTIVE SUMMARY

This report presents the results of the Commonwealth Ombudsman's (the Ombudsman) review of the Australian Federal Police's (AFP) administration of Part V of the *Australian Federal Police Act 1979* (the Act) for the period 1 July 2015 to 30 June 2016.

The Ombudsman conducted one review during the period which covered records of complaints that were finalised between 1 March 2015 and 29 February 2016.¹

Overall, the records indicated that the AFP is investigating matters appropriately. The records demonstrated that the AFP's administration of Part V of the Act, relating to how conduct and practices issues are dealt with, is comprehensive and adequate.

Nevertheless, we identified deficiencies in records detailing the consideration of potential conflicts of interest by complaint managers, investigators and adjudicators. As this has been an ongoing issue, we have made the below recommendation.

Recommendation 1

That the Australian Federal Police demonstrate the consideration of conflict of interest in accordance with the instructions set out in sections 13(c) and 14 of the *AFP National Guideline on Complaint Management*.

We have also made three suggestions where compliance with the relevant legislation, the AFP Commissioner's Orders, AFP National Guidelines and other instructions made pursuant to those documents could be improved. These suggestions relate to the inclusion of more information in outcome letters to complainants and the recording and follow-up of practices issues.

The AFP's overall adherence to its timeliness benchmarks had decreased slightly from 2014-15. Professional Standards (PRS) reported that new key staff members have since been appointed, and a new strategy to reduce the time taken to finalise complaints is being implemented. Our office will continue to monitor this issue closely at future reviews.

¹ See *Introduction*, page 3 for details of the Ombudsman's Part V review periods.

Additionally, during 2015-16 we engaged with the AFP to better inform our reviews by:

- participating in PRS induction training for new investigators;
- undertaking a site visit to the ACT Watchhouse and discussing procedures with Watchhouse staff; and
- liaising with, and commenting on proposed strategies identified by, PRS.

We will continue this engagement with the AFP, and we positively acknowledge the AFP's cooperativeness and its responsiveness to identified issues.

INTRODUCTION

Part V prescribes the process for recording and dealing with AFP conduct and practices issues and other issues relating to the AFP. An AFP conduct issue relates to whether an AFP appointee has engaged in conduct that contravenes AFP professional standards or has engaged in corrupt conduct.

Part V divides complaints into four categories, depending on the seriousness of the conduct:

- Category 1 and 2 conduct issues represent less serious conduct such as discourtesy, customer service issues and other conduct that may be regarded as minor misconduct;
- Category 3 conduct issues represent more serious matters of misconduct, such as an AFP appointee being arrested, summonsed or charged in relation to an alleged criminal offence; and
- a corruption issue is an issue regarding the engagement or potential engagement of a member of a law enforcement agency in corrupt conduct in the past, present or future (categorised in the AFP systems as a 'Category 4' issue).

An AFP practices issue relates to an issue that raises concerns about the practices and procedures of the AFP.

Information that raises an AFP conduct or practices issue may be given under s 40SA of the Act. This information may be given by a member of the public and/or by an AFP appointee. The AFP defines the giving of this information as a complaint.

Section 40RD of the Act requires the Commissioner to constitute a unit within the AFP to undertake investigations of AFP Category 3 conduct issues and corruption issues that relate to conduct engaged in by AFP appointees. PRS is the independent business area within the AFP that has the responsibility for managing the professional standards framework, and developing and maintaining professional standards throughout the organisation.

The Ombudsman's role

Section 40XA(2) of the Act requires that at least once in each review period, the Ombudsman must inspect the records of AFP conduct and practices issues that have been, or are being, dealt with under Part V during that period.² This type of review is called an *annual review*.

In addition to conducting annual reviews, the Ombudsman may also inspect the records of AFP conduct and practices issues dealt with at any time outside the relevant review period under s 40XB of the Act. This type of review is called an *ad hoc review*.

Section 40XD of the Act requires the Ombudsman to report to Parliament as soon as practicable after 30 June each year on review work and activities conducted during the preceding 12 months. The report must include comments as to the comprehensiveness and adequacy of the administration of matters dealt with under Part V.

As a result of our reviews, we may make recommendations and/or suggestions to the AFP in relation to its administrative practices.

How we review the AFP

We have developed a set of review methodologies that are based on legislative requirements and best-practice standards in auditing. We focus our reviews on areas of high risk and take into consideration the impact of non-compliance. Our review activities include:

- conducting on-site inspections of physical and electronic records;
- reviewing internal guidance documents and other instructional material;
- interviewing staff from PRS and/or complaint management teams and observing their processes;
- testing the veracity of records and processes; and
- monitoring progress on previous review findings and recommendations.

To ensure that the AFP is aware of what we will be assessing, we provide it with a broad outline of our criteria prior to each review. This assists the AFP in identifying the best sources of information to demonstrate compliance.

It is also our practice to examine any progress made by the AFP in relation to previous review findings and consider these findings over a long-term period to identify any systemic issues.

² Section 40XA(1) of Part V defines a review period as the period of 12 months commencing on the day on which the *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* commenced (30 June 2006); and each succeeding period of 12 months.

We encourage the AFP to be upfront and self-disclose any instances of non-compliance to our office and inform us of any remedial action taken. At the end of each review we discuss our preliminary findings with the AFP so it can take any immediate remedial action, if necessary.

Review objective

The objective of the review is to assess the AFP's administration of, and to determine the extent of its compliance with, Part V. In doing so, we also assess whether the AFP provides a fair and reasonable complaint management process to both the public and AFP appointees, who may be complainants or the subject of a complaint. We use the following broad criteria to make an assessment of compliance:

- How has the AFP performed against its internal timeliness benchmarks?
- Were conduct issues and corruption issues dealt with appropriately?
- Were practices issues dealt with appropriately?
- Were complaints appropriately withdrawn?
- Were complaints appropriately deleted from the AFP's Complaints Records and Management System (CRAMS)?
- Did the AFP notify our office of all Category 3 conduct issues raised during the inspection period?
- Were ministerially directed inquiries appropriately conducted?

In addition to the provisions under Part V, ss 38 and 39 of the Act require adherence to any orders made by the Commissioner of the AFP. For this reason, in developing the review criteria, we also had regard to:

- the *AFP Commissioner's Order on Administration* (CO1);
- the *AFP Commissioner's Order on Professional Standards* (CO2) which establishes the AFP's professional standards and Code of Conduct;
- the *Australian Federal Police Categories of Conduct Determination 2013* which is the legislative instrument jointly drafted by the Commissioner and the Ombudsman in accordance with s 40RM(1) of the Act to determine the category of conduct; and
- relevant standard operating procedures.

We also considered the *AFP National Guideline on Complaint Management* (National Guideline) and the *Commonwealth Ombudsman Better Practice Guide to Complaint Handling* (Better Practice Guide).³

A list of our review criteria, and methodology of how we assess the AFP against them, can be found at [Appendix A](#).

³ The National Guideline includes the Better Practice Guide as a reference item.

How we report

To ensure procedural fairness, after a review the AFP is provided with a draft report for comment. The report is then finalised, desensitised and forms the basis of the Ombudsman's annual report to Parliament under s 40XD.

During a review, there may be a range of issues identified, including minor administrative errors, instances of serious non-compliance and systemic issues. We may make suggestions or formal recommendations if we identify an issue that has not been addressed by the AFP, or if we think it is warranted in the circumstances. We also comment on what we understand of the AFP's policies and procedures to ensure compliance with Part V of the Act, based on the information provided during the review.

REVIEW DETAILS

The Ombudsman conducted one review of complaints that were finalised between 1 March 2015 and 29 February 2016 (the review period).

The below table provides an overview of the records inspected at the AFP by overall complaint category⁴. Where one CRAMS record referred to multiple complaints finalised during the inspection period, all complaints within the record were reviewed. For example, one CRAMS record may contain three separate complaints that relate to two AFP appointees.

Overall complaint category	Number of CRAMS records finalised by the AFP during the period	Number of complaints finalised by the AFP during the review period	Number of complaints inspected
Category 1	57	133	44 (33%)
Category 2	213	474	76 (16%)
Category 3	160	364	81 (22%)
Category 4 (corruption issues)	20	25	15 (60%)
Total	450	996	216 (22%)

⁴ These figures are based on information made available to our office at the time of the review. For a full breakdown of the number of complaints received by the AFP, refer to the AFP's Annual Report <https://www.afp.gov.au/about-us/publications-and-reports/annual-reports>

PROGRESS SINCE PREVIOUS REPORT

At each review, we monitor progress made by the AFP in relation to previous findings. A number of issues were discussed in the previous report⁵ and we are satisfied that the AFP has taken appropriate remedial action for all but two issues.

Previously, we identified deficiencies in records detailing the consideration of potential conflicts of interest by complaint managers, investigators and adjudicators. This issue was identified again during this review period and we have made a formal recommendation as a result.

Additionally, our previous report identified eight instances where there was insufficient information to determine whether appropriate action had been, or was being taken, by the relevant business area to address practices issues. The AFP advised that it would issue notifications to business areas and note that a matter would not be closed until a response was received. The issue was identified again at this inspection and is discussed in more detail below.

⁵ A report on the Commonwealth Ombudsman's activities under Part V of the *AFP Act 1979* (1 July 2014 to 30 June 2015).

RESULTS OF THE REVIEW

Overall, our review found that the AFP's administration of Part V is comprehensive and adequate. The AFP has a comprehensive framework governing the management of complaints it receives, both from members of the public and from AFP appointees, and the AFP administers this framework fairly and reasonably.

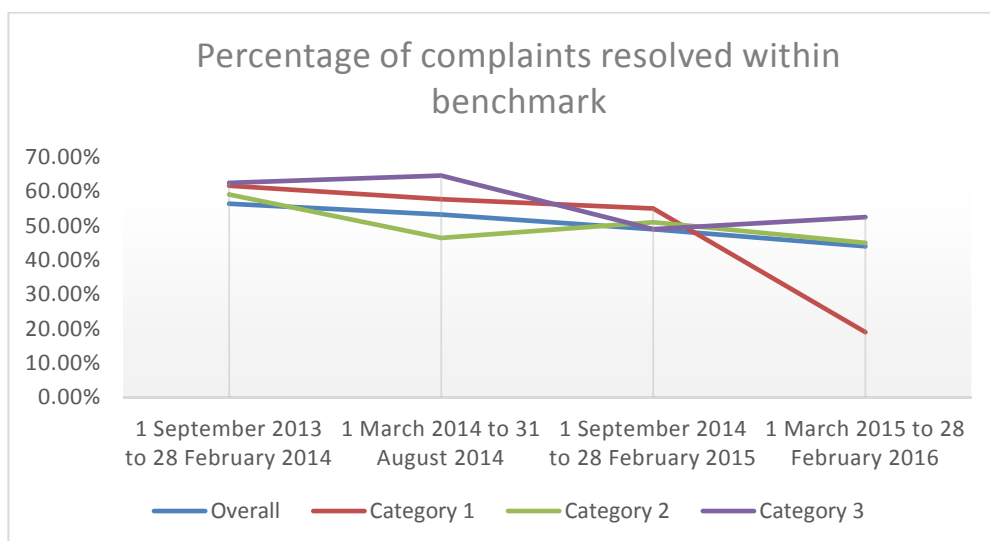
Notwithstanding, we noted issues in relation to the complaint management process in a number of instances and made one recommendation and three suggestions to assist the AFP to address these issues

While we identified some issues in relation to the complaint management process for a number of complaints, in our view they did not generally impact the outcomes of those complaints. We appreciate the AFP's constructive response to our recommendation and suggestions, and we will continue to liaise with the AFP in relation to certain remedial action.

The key issues identified during the review are set out below.

AFP's performance against its internal timeliness benchmarks

The below graph demonstrates the AFP's overall performance against Criterion 1 during the current and previous review periods, based on information provided by the AFP.



We noted that the overall adherence to the AFP's timeliness benchmarks had decreased slightly from 49% to 44% since 2014-15. PRS reported that new adjudicators have since been appointed, which will assist with delays in progressing conduct issues.

At the invitation of the AFP, we provided feedback in relation to its strategy aimed to reduce timeframes and enable it to focus time and resources on more complex matters. This strategy was implemented in August 2016 and we will continue to monitor this issue at future reviews.

The AFP has advised it will continue to seek changes to the way PRS operates and are working actively with other business areas to achieve a decrease in investigation times, a less stressful process for AFP appointees under investigation, a more open rather than confrontational approach to the investigation of allegations and a greater opportunity for the AFP to increase their focus on the investigation of serious allegations.

Conflict of interest issues

Sections 13(c) and 14 of the National Guideline require that either a complaint manager or PRS investigator to whom a complaint has been allocated complete a 'Conflict of Interest Declaration'. Principally, an investigation into a complaint and or misconduct issue should be conducted impartially and without bias. Managing conflicts of interest helps sustain the integrity of an investigation. As part of our review, we check whether the complaint manager or PRS investigator had considered conflicts of interest prior to undertaking the investigation. This could be demonstrated by a completed conflict of interest declaration form, or any other record.

For Category 1 and 2 conduct issues⁶, more than half of the inspected records did not demonstrate that conflict of interest had been considered. This included instances where the officer in charge of investigating the complaint was the supervisor of the appointee who was the subject of the complaint. In these cases there was no evidence that any steps had been taken to disclose or manage any potential conflict of interest. For Category 3 conduct issues⁷ and corruption issues, just under one third of the records inspected did not demonstrate that conflict of interest had been considered. This issue was also identified at previous reviews, and therefore we have made the below recommendation.

Recommendation 1

That the Australian Federal Police demonstrate the consideration of conflict of interest in accordance with the instructions set out in sections 13(c) and 14 of the *AFP National Guideline on Complaint Management*.

⁶ Assessed against Criteria 2

⁷ Assessed against Criteria 3

We specifically recommend that the AFP update relevant guidelines to reflect the importance of recording and storing Conflict of Interest Declarations centrally, and creating administrative electronic files in records management systems as a visual reminder to investigators to complete and upload their Conflict of Interest Declarations.

In response to this finding, the AFP advised that it would liaise with our office, review the relevant guidelines and include a process for PRS staff to check that all necessary Conflict of Interest Declarations are uploaded when quality assuring the complaint prior to approving it for finalisation. In addition, PRS has advised that an IT solution is being investigated and considered as part of a new complaint management capability which provides scope to build Conflict of Interest Declarations into the IT architecture.

We also suggested that adjudicators demonstrate consideration of conflict of interest in every adjudication. The AFP advised that PRS would reinforce the requirement to complete conflict of interest forms when undergoing quality assurance or adjudication.

Provision of information in outcome letters to complainants⁸

Section 40TA(2)(b) of the Act requires that the Commissioner must, so far as practicable, ensure that the complainant (if any) is advised of any action taken in relation to a conduct issue.

Section 4.5 of the Better Practice Guide suggests:

When the investigation of a complaint is completed, the complainant should be told the particulars of the investigation, including any findings or decisions reached.

The inclusion of further information in outcome letters to complainants improves the transparency of the investigation process. Additionally, it demonstrates to complainants the actions taken by the AFP in investigating an individual complaint. We acknowledge that the amount of detail included in individual letters will vary depending on the circumstances of each investigation.

In this review we identified 10 complaint notification letters, for Category 3 conduct issues, which provided few or no reasons for a decision.

We understand the need to be cautious in releasing information about an investigation. However, the AFP could provide guidance for giving an appropriate level of detail regarding an investigation without breaching the

⁸ Assessed against Criteria 3

privacy of the AFP appointee, witnesses or the complainant. We suggested that PRS include such guidance in its PRS Toolkit to reflect the appropriate level and type of detail that should be provided in outcome letters.

The AFP acknowledged that the provision of appropriate information in outcome correspondence is best practice and is reviewing how its processes can be enhanced to support this. The AFP also advised that it would seek legal advice regarding how much information can be provided in correspondence. Additionally, the AFP will liaise with our office when updating and implementing PRS support tools.

Shortfalls in the recording and implementation of practices issues⁹

Section 40TX(2) of the Act provides that where an AFP practices issue is present in a complaint, or is brought to the attention of an AFP appointee via a Category 1 or 2 conduct issue or in a s 40TU report¹⁰, the Commissioner must ensure that appropriate action is taken to have the issue dealt with.

PRS provided the Practices and Procedures Register for the records which fell within the review period. Where practices issues had been recorded, the register did not reflect what, if any, action had been taken.

We acknowledge that PRS must work with other business areas of the AFP to follow up on practices issues. We suggested that, as part of any preparation of a business case for a replacement records management system, PRS investigate mechanisms for receiving feedback from AFP business areas on practices issues.

The AFP agreed with this suggestion and advised that PRS continues to seek system enhancements to capture and record actions taken for the implementation of recommendations concerning practices issues.

Michael Manthorpe PSM
Commonwealth Ombudsman

⁹ Assessed against Criteria 4

¹⁰ Section 40TU of the Act requires that, upon completion by the AFP of a Category 3 or corruption investigation, the AFP must prepare a written report detailing the results of the investigation.

APPENDIX A – DETAILED REVIEW CRITERIA

1. How has the AFP performed against its internal timeliness benchmarks?

Under this criterion we assess whether the AFP finalised complaints in accordance with its internal timeliness benchmarks.

The AFP's benchmarks indicate the number of days within which complaints of a particular overall category should be finalised. The overall category of a complaint is the highest category issued to a conduct issue within a complaint. For example, where a complaint record contains a Category 1 conduct issue of 'Discourtesy' and a Category 3 conduct issue of 'Serious Breach of the AFP Code of Conduct', the overall category of the complaint record will be Category 3 and the relevant benchmark will apply.

The below table outlines the previous and current investigation timeframe benchmarks. There is no specific benchmark for complaints containing corruption issues given that such complaints are referred to, and may be investigated by, the Australian Commission for Law Enforcement Integrity.

Overall complaint category	Benchmark prior to, and including, 31 August 2012 (days)	Benchmark after 31 August 2012 (days)
1	21	42
2	45	66
3	180	256

2. Were Category 1 and 2 conduct issues dealt with accurately and according to the correct procedure?

Under this criterion we have regard to the following:

- whether all conduct issues were identified and categorised in accordance with the *Australian Federal Police Categories of Conduct Determination* 2006 or 2013
- where a conduct issue may belong to more than one category, the conduct issue was taken to belong to the higher or highest category (s 40RK(6) of the *Australian Federal Police Act 1979* (the Act))
- the category to which conduct belongs may change as more information is obtained in relation to the complaint (s 40RK(7)). If the

category to which conduct belongs changed, there was a reasonable explanation for the change on the record

- the complaint manager recorded conflict of interest considerations and any potential or actual conflicts of interest were appropriately managed (PRS Disclosure of Conflict of Interest Flowchart: 2014 – 15 Ombudsman annual report paragraph 3.2.1)
- where appropriate, the AFP acknowledged the complaint and explained the complaint process to the complainant (paragraph 4.1 Better Practice Guide; AFP internal guidance documents for complaint managers)
- the complainant was kept informed of the progress of the complaint as frequently as reasonable, and to the extent that was reasonable, in the circumstances (ss 40TA(2) and 40TA(3))
- both the complainant (if any) and the AFP appointee had the opportunity to be heard in relation to the conduct issue (s 40TH(1)(a))
- the complaint manager identified relevant witnesses and attempts were made to contact them, and relevant independent enquires were made (AFP internal guidance documents for complaint managers)
- the investigation report indicated that relevant evidence was adequately considered (AFP internal guidance documents for complaint managers)
- where a recommendation was made to take no further action in relation to a complaint under s 40TF(2), the recommendation was not unreasonable and was made by a delegated person (CO1 Delegations)
- the complaint manager determined what action, if any, was to be taken in relation to s 40TI or s 40TJ regarding established conduct (s 40TH(1)(c))
- the complaint manager gave consideration to whether the complaint, or information obtained in the course of dealing with the conduct issue raised an AFP practices issue (s 40TH(d)(i) and (ii)) and if so, brought the practices issue to the attention of an appropriate AFP appointee (s 40TK(2))
- upon completion of an investigation, the Complaint Management Team (CMT) quorum either endorsed the recommendations or

applied new findings, and reasons for new findings were recorded (s 22 of the National Guideline)

- the AFP advised the complainant of the outcome(s) of the complaint investigation and provided reasons for the outcome(s) (s 40TA(2)(b) of Part V and paragraph 4.5 of the Better Practice Guide)
- the complaint record contained all relevant information referred to in the investigation report and details of action taken during the investigation (ss 40WA(1) and (2)).

3. Were Category 3 conduct issues and corruption issues (Category 4) dealt with appropriately?

Under this criterion we have regard to the following:

- whether all conduct issues were identified and categorised in accordance with the 2006 Determination or the 2013 Determination
- where a conduct issue may belong to more than one category, the conduct issue was taken to belong to the higher or highest category (s 40RK(6))
- the category to which conduct belongs may change as more information is obtained in relation to the complaint (s 40RK(7)). If the category to which conduct belongs changed, there was a reasonable explanation for the change on the record
- the Category 3 conduct issue or corruption issue was allocated to an appropriate person for investigation (ss 40TN and 40TP)
- the investigator completed a Conflict of Interest Declaration form (section 14 of the National Guideline)
- where appropriate the AFP acknowledged the complaint and explained the complaint process to the complainant (paragraph 4.1 Better Practice Guide)
- the complainant was kept informed of the progress of the complaint as frequently as reasonable, and to the extent that was reasonable, in the circumstances (ss 40TA(2) and (3))
- both the complainant (if any) and the AFP appointee had the opportunity to be heard in relation to the conduct or corruption issue (s 40TQ(2)(a))

- the investigator complied with directions given by the Commissioner or the Manager of AFP Professional Standards (MPRS) as to the manner in which the investigation was to be conducted (ss 40VB(3) and (5))
- the investigator obtained sufficient evidence in the course of the investigation (AFP internal guidance documents for investigators)
- where a recommendation was made to take no further action in relation to a complaint under s 40TF(2), the recommendation was not unreasonable and was made by a delegated person (CO1 Delegations)
- where Category 3 conduct or a corruption issue was established, the investigator recommended appropriate action be taken in relation to the AFP appointee (s 40TR of the Act)
- the investigator gave consideration to whether the complaint or information obtained during the investigation raised AFP practices issues (s 40TQ(2)(b)) and if so, the investigator identified the practices issue in the s 40TU report (s 40TW(2)(a))
- the investigator prepared and submitted a written report of the investigation to the MPRS (ss 40TU(1) and (3))
- there was sufficient evidence to show that recommendations in the s 40TU report were fully considered and appropriate action was taken in relation to the issue (s 40TV of Part V and section 15 of the National Guideline)
- the AFP advised the complainant of the outcome of the complaint investigation and provided reasons for the outcome (s 40TA(2)(b) of Part V and paragraph 4.5 of the Better Practice Guide)
- the complaint record contained all relevant information referred to in the investigation report and details of action taken during the investigation (ss 40WA(1) and (2)).

4. Were AFP practices issues dealt with appropriately?

Section 40TX(2) provides that where an AFP practices issue is present in a complaint, or is brought to the attention of an AFP appointee either during the course of dealing with a Category 1 or 2 conduct issue or in a s 40TU report, the Commissioner must ensure that appropriate action is taken to have the

issue dealt with. In assessing this criterion, we have regard to the AFP's procedures for dealing with AFP practices issues that are identified in complaint investigations.

We may also consider a sample of practices issues to determine whether the AFP has taken appropriate steps to have those AFP practices issues dealt with.

5. Were complaints appropriately withdrawn?

Section 17 of the National Guideline provides that where a complainant indicates a desire to withdraw a complaint, the complaint manager or the responsible CMT shall request the complainant provide a written request to withdraw the complaint which details the reasons for the withdrawal. This process is also detailed in the PRS standard operating procedure (SOP).

We acknowledge that it is not within the AFP's power to compel the complainant to put their request to withdraw a complaint in writing. Therefore, our main consideration when assessing this criterion is that the record as a whole indicates that the complainant requested the withdrawal of the complaint either verbally or in writing, prior to the complaint being withdrawn by the AFP.

6. Were complaints appropriately deleted from the AFP's Complaints Records and Management System (CRAMS)?

Section 18 of the National Guideline provides that a complaint which has been entered into CRAMS may only be deleted if:

- it was entered in error, including where another form of reporting is more appropriate
- it is a duplicate of an existing complaint
- it is deemed to be a non-complaint.

The National Guideline further provides that only authorised appointees may delete a complaint from CRAMS. Within PRS, this is the MPRS or the Coordinator of Investigations (Table of Authorisations contained within the *AFP Commissioner's Orders on Professional Standards*).

The PRS SOP requires that, prior to deleting a matter, an email must be sent to the PRS Operations Monitoring Centre (PRS OMC) requesting the deletion. Once the PRS OMC has approved the request via return email, the matter can be deleted. In assessing this criterion we have regard to these emails.

7. Did the AFP notify the Ombudsman of all Category 3 conduct issues raised during the period?

Section 40TM(1) requires the AFP to notify the Ombudsman of Category 3 conduct issues.

In assessing this criterion, we have regard to s 40TM(1) notifications contained on records within the Ombudsman's office and in AFP administrative files.

8. Were ministerially directed inquiries appropriately conducted?

In assessing this criterion, we have regard to provisions under Division 4 of Part V.

Additional documents considered

In developing the review criteria, we also had regard to:

- the AFP Commissioner's Order on Administration (CO1)
- the AFP Commissioner's Order on Professional Standards (CO2), which establishes the AFP's professional standards and internal guidance documents for complaint managers and investigators
- the *Australian Federal Police Categories of Conduct Determination 2013*, which is the legislative instrument jointly drafted by the AFP Commissioner and the Ombudsman in accordance with s 40RM(1) of the Act
- relevant standard operating procedures.

We also considered the *AFP National Guideline on Complaint Management* and the *Commonwealth Ombudsman Better Practice Guide to Complaint Handling*.