

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) AMENDMENT BILL 1988

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The Police Regulation (Allegations of Misconduct) Act 1978 provides for complaints against police to be made under that Act if the conduct to which the complaint relates cannot be made the subject of a complaint under the Ombudsman Act 1974. Therefore, conduct of a member of the Police Force which does not relate to a matter of administration or conduct of such a member when acting as a constable can be made the subject of a complaint under the Principal Act.

The object of this Bill is to amend the Principal Act—

- (a) to introduce the concept of a complaint of serious misconduct, being a complaint which the Commissioner determines is a complaint of serious misconduct because the conduct by the member of the Police Force involved—
 - (i) constitutes, in the Commissioner's opinion, an indictable offence, or a summary offence prescribed by the regulations; or
 - (ii) is conduct for which the Commissioner would dismiss the member of the Police Force;
- (b) to restrict the scope of the Ombudsman's powers and functions under the Act so that they are to be exercised only in relation to complaints against police which the Commissioner of Police determines are complaints of serious misconduct;
- (c) to give the Commissioner of Police a discretion to deal with other complaints of a more minor nature as the Commissioner thinks fit; and
- (d) to apply the "confidentiality provisions" of the Act (section 26) to information requested by the Ombudsman from the Commissioner to assist the Ombudsman in determining whether an investigation should be carried out.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act is to commence on a day to be appointed by proclamation.

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Clause 3 is a formal provision that gives effect to the Schedule of amendments to the Principal Act.

Clause 4 is a savings provision which provides (among other things) that a complaint against police made before the commencement of the proposed Act is to be dealt with under the provisions of the Principal Act as presently in force.

SCHEDULE 1—AMENDMENTS

Definition of serious misconduct

The Bill inserts the following definitions into the Principal Act:

- “serious offence”—an indictable offence, or a summary offence prescribed by the regulations.
- “complaint of serious misconduct”—a complaint determined by the Commissioner to be a complaint of serious misconduct. (**Schedule 1 (1) (d) and (b)**).

Determination of the seriousness of complaints against police

The Bill inserts a new Division 3 into Part 2 of the Principal Act (proposed sections 12A–12D) which will provide for the determination of the seriousness of complaints against police. (**Schedule 1 (11)**).

The Commissioner of Police will be required to determine, in respect of each complaint made under the Act, whether or not it is a complaint of serious misconduct, that is, a complaint involving an allegation of misconduct on the part of a police officer which would constitute a serious offence or for which the Commissioner would dismiss the police officer, if the conduct had occurred (proposed sections 12A and 12B). The Commissioner will be required to notify the Ombudsman of the Commissioner’s determination as to the seriousness of a complaint (proposed section 12B (1) (b)).

If a complaint relates to both serious misconduct and other conduct, the Commissioner may, in effect, determine that there are 2 complaints, one of which is a complaint of serious misconduct (proposed section 12B (3) and (4)).

Provision will also be made for the Commissioner to review a determination that a complaint is not a complaint of serious misconduct (proposed section 12C). If, in the course of an investigation of a complaint that the Commissioner has initially decided is not a complaint of serious misconduct, the Commissioner reverses that determination, an investigation will be commenced by the police under the Ombudsman’s supervision (proposed section 12C).

The Commissioner’s determination as to the seriousness of a complaint will not be subject to review by the courts (proposed section 12D).

Notification of complaints

The Bill makes amendments to the provisions relating to notification and recording of complaints as a consequence of the insertion of proposed Division 3 into Part 2 of the Principal Act. (**Schedule 1 (5)–(10)**). The Ombudsman will be required to notify the Commissioner of all complaints received by the Ombudsman. (**Schedule 1 (8)**). Similarly, a Clerk of a Local Court will be required to notify the Commissioner (instead of the Ombudsman as at present) of all complaints received at the office of the Local Court. (**Schedule 1 (6)**). The Commissioner, rather than the Internal Affairs Branch, will notify the Ombudsman of complaints received by the Branch. (**Schedule 1 (6) and (7)**). These amendments will enable or facilitate the determination by the Commissioner of the seriousness of complaints.

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The Ombudsman will be required to record the Commissioner's determinations on the register of complaints which the Ombudsman must maintain under section 12 of the Principal Act. (The Ombudsman will continue to be notified of all complaints that are not received by the Ombudsman). The Commissioner will also be required to establish a register of complaints and to record whether or not a complaint is one of serious misconduct. (**Schedule 1 (10)**).

Investigations of complaints of serious misconduct

The Bill amends Part 4 of the Principal Act which deals with investigations of complaints against police. (**Schedule 1 (13)–(20)**). At present, under this Part—

- (a) the Ombudsman may direct the Commissioner to investigate any complaint (section 18) (although the Ombudsman may not carry out an initial investigation);
- (b) the Commissioner is required to seek the Ombudsman's consent to the discontinuance or deferral of an investigation of any complaint (section 20);
- (c) the Commissioner must give the Ombudsman any information the Ombudsman may request with respect to any investigation (section 21);
- (d) at the conclusion of an investigation into a complaint, the Commissioner must provide the Ombudsman with a copy of the report of the investigation and the Commissioner's recommendations as to the action which should be taken (section 24);
- (e) the Ombudsman may commence an investigation under the Ombudsman Act 1974 if the police investigation has not been completed within a certain time (section 24A);
- (f) if the Ombudsman is not satisfied that a complaint has been properly investigated, the Commissioner must cause a further investigation to be carried out (section 25); and
- (g) if the Ombudsman cannot determine whether or not a complaint has been sustained, the Ombudsman may carry out a re-investigation under the Ombudsman Act 1974 (section 25A).

The effect of the amendments to Part 4 will be that the Ombudsman's functions and powers under that Part (outlined above) will be able to be exercised only with respect to investigations of complaints of serious misconduct, instead of all complaints as at present.

The Bill also substitutes subsections (1) and (1A) of section 18 of the Principal Act. (**Schedule 1 (15)**). The new provisions omit certain matters that the Ombudsman may or must presently take into account in determining whether a complaint should be investigated (such as whether a complaint is frivolous).

Other consequential amendments are made by **Schedule 1 (1) (a), (4) and (21)–(24)**.

Investigations of complaints other than complaints of serious misconduct

The Bill substitutes Part 3 of the Principal Act. (**Schedule 1 (12)**). The substituted Part will confer on the Commissioner a duty to direct police officers to carry out investigations of complaints (other than complaints of serious misconduct) or to otherwise deal with such a complaint (proposed section 13 (1)). A police officer conducting an investigation will be required to report the progress and the result of the investigation to the Commissioner (proposed section 13 (2)).

The substituted Part 3 will also require a police officer carrying out an investigation of a complaint under that Part to notify the Commissioner if, in that officer's opinion, the complaint involves serious misconduct (proposed section 14). The substituted Part will preserve, in respect of complaints other than those of serious misconduct, provisions in the present Part 3 which provide for conciliation of a complaint by a police officer (proposed section 15).

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Amendments as a consequence of the proposed substitution of Part 3 are made by **Schedule 1 (3), (25)–(28) and (30)**.

Confidentiality of information provided by Commissioner to Ombudsman

The Bill inserts new subsections (2) and (3) into section 52 of the Principal Act which require the Commissioner to provide the Ombudsman with certain information to assist the Ombudsman in determining whether a complaint should be investigated. (**Schedule 1 (29)**). Under the new subsections (which are in similar terms to those in section 26 of the Act), if the Commissioner is of the opinion that the publication of information would prejudice the investigation or prevention of crime, the Ombudsman may not publish that information, except in a report to the Minister for presentation to Parliament.

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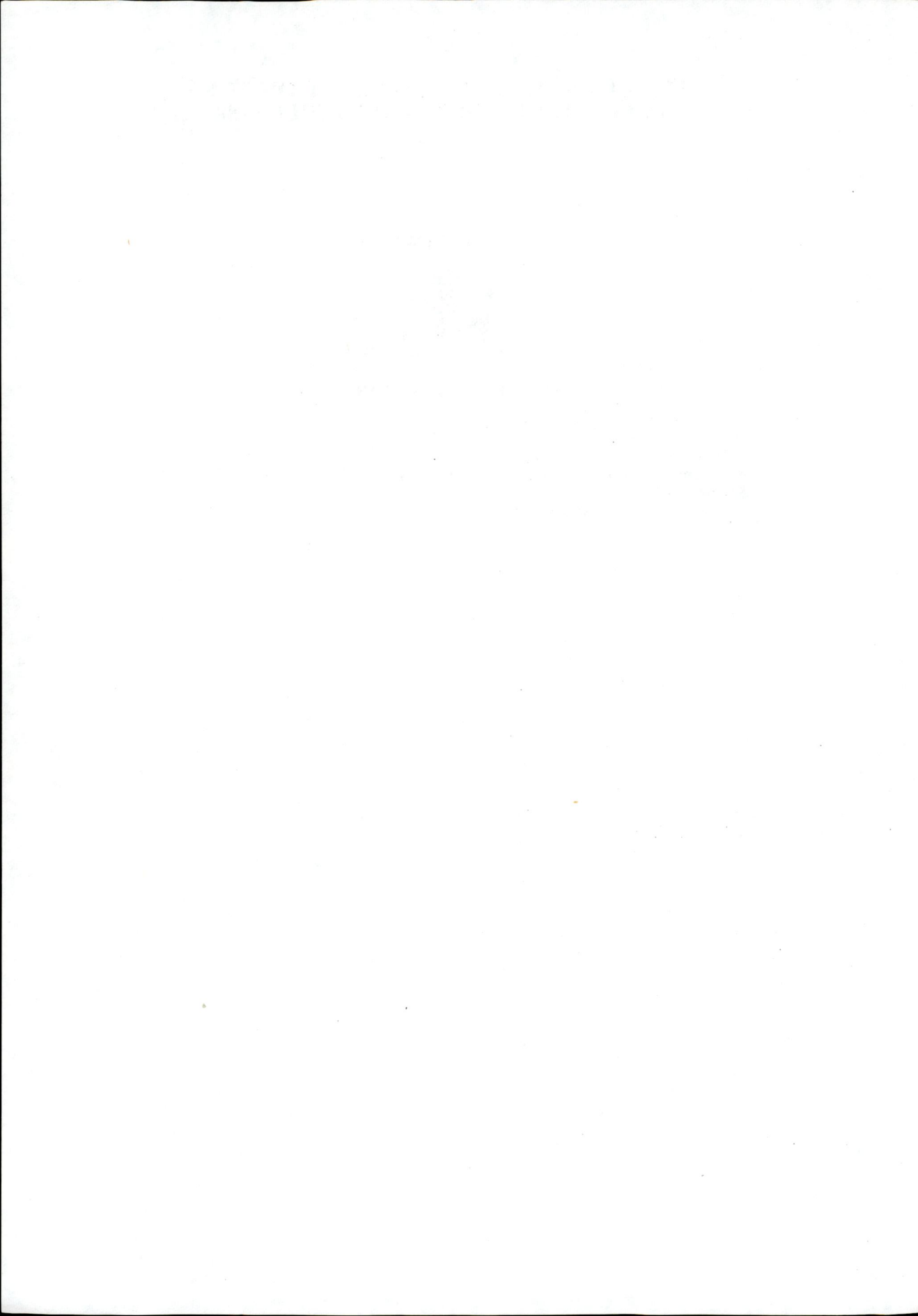
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SCHEDULE 1—AMENDMENTS



**POLICE REGULATION (ALLEGATIONS OF
MISCONDUCT) AMENDMENT BILL 1988**

NEW SOUTH WALES



5

No. , 1988

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A BILL FOR

An Act to amend the Police Regulation (Allegations of Misconduct) Act
1978 with respect to investigations by the Ombudsman of complaints
15 against members of the Police Force; and for other purposes.

Police Regulation (Allegations of Misconduct) Amendment 1988

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Police Regulation (Allegations of Misconduct) Amendment Act 1988.

5 Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Police Regulation (Allegations of Misconduct) Act 1978 No. 84

3. The Police Regulation (Allegations of Misconduct) Act 1978 is
10 amended as set out in Schedule 1.

Saving

4. (1) The Police Regulation (Allegations of Misconduct) Act 1978
applies to a complaint made before the commencement of this Act (whether
or not an investigation or a conciliation of the complaint has been
15 commenced) as if this Act had not been enacted.

(2) Subject to subsection (1), the Police Regulation (Allegations of
Misconduct) Act 1978, as amended by this Act, applies to a complaint even
though the conduct to which the complaint relates occurred before the
commencement of this Act.

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SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 4 (**Definitions**)—

(a) Definition of “complaint”—

25 After “Part 2”, insert “, including a complaint of serious
misconduct”.

(b) After the definition of “complaint”, insert:

“complaint of serious misconduct” means (except in Division
3 of Part 2) a complaint which the Commissioner determines
under that Division to be a complaint of serious misconduct;

30 (c) Definition of “investigation”—

After “under”, insert “Part 3 or”.

(d) After the definition of “President”, insert:

“serious offence” means—

35 (a) an indictable offence (including an indictable offence
which may be dealt with summarily); or

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- (b) any other offence which is declared by the regulations to be a serious offence for the purposes of this Act; or
- (c) an offence which, if committed in New South Wales, would be such an indictable offence or other offence;

5 (2) Part 2, Division 1, heading—

Before section 5, insert:

Division 1—Making of complaints

(3) Section 5 (**Complaints**)—

(a) Section 5 (3) (a)—

10 Before “Part 4”, insert “Part 3 or”.

(b) Section 5 (3) (b) (ii), (iii)—

Omit the subparagraphs, insert instead:

15 (ii) the Ombudsman has informed the Commissioner that, under section 54 (2), the Ombudsman has treated that other complaint as having been dealt with in a manner acceptable to the complainant; or

20 (iii) the Commissioner or other member of the Police Force has dealt with the other complaint under Part 3 (other than by carrying out, or causing to be carried out, an investigation of the complaint); or

(4) Section 7 (**Mixed and linked complaints**)—

(a) Section 7 (1) (a)—

After “a complaint” where firstly occurring, insert “of serious misconduct”.

25 (b) Section 7 (1) (b)—

Omit “a complaint is made in respect of”, insert instead “a complaint of serious misconduct relates to”.

(5) Part 2, Division 2, heading—

Before section 8, insert:

30 **Division 2—Notification and recording of complaints**

(6) Section 8—

Omit the section, insert instead:

Police and Clerks of Local Courts to notify complaints

35 8. (1) A member of the Police Force who receives a complaint that has not already been sent to the Commissioner shall, as soon as practicable, send the document incorporating the complaint to the Commissioner.

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SCHEDULE 1—AMENDMENTS—*continued*

(2) If a complaint is lodged at the office of a Local Court, the Clerk of the Local Court shall, as soon as practicable, send the document incorporating the complaint to the Commissioner.

5 (3) For the purposes of this Act, a Clerk of a Local Court shall (when exercising functions under this section) be taken to be an officer of the Ombudsman.

(7) Section 9 (**Commissioner**)—

Section 9 (a), (b)—

10 Omit “section 8 (1) (b)” wherever occurring, insert instead “section 8”.

(8) Section 10—

Omit the section, insert instead:

Ombudsman to notify complaints

15 10. The Ombudsman shall, as soon as practicable after receiving a complaint or being notified (except under section 9) of a complaint, cause a copy of the document incorporating the complaint to be sent to the Commissioner.

(9) Section 11 (**Notification of possible criminal offence**)—

20 Omit “he shall forthwith by telephone so notify the Commissioner, a Deputy Commissioner or the senior officer who is at the time on duty at the Internal Affairs Branch”, insert instead “that person shall immediately so notify the Commissioner”.

(10) Section 12—

25 Omit the section, insert instead:

Ombudsman and Commissioner to register complaints

12. The Ombudsman and the Commissioner shall each—

- 30 (a) establish and maintain a register of complaints received by them and complaints of which they are notified; and
- (b) record, in respect of each complaint on the register, the determination (or determinations) of the Commissioner in relation to the seriousness of the complaint under Division 3.

(11) Part 2, Division 3—

35 After section 12, insert:

SCHEDULE 1—AMENDMENTS—*continued***Division 3—Determination of the seriousness of complaints****Serious misconduct**

12A. In this Division—

5 “serious misconduct” means conduct of a member of the Police Force—

(a) which would, in the Commissioner’s opinion, constitute a serious offence; or

10 (b) for which, in the Commissioner’s opinion, the member would be dismissed from the Police Force,

if the conduct had occurred.

Initial determination of seriousness of complaint

12B. (1) The Commissioner shall, as soon as practicable after receiving a complaint or being notified of a complaint—

15 (a) determine whether or not the complaint is a complaint of serious misconduct; and

(b) notify the Ombudsman, in writing, of the determination.

20 (2) The Commissioner may determine that a complaint is a complaint of serious misconduct even though the complaint also relates to conduct that is not serious misconduct.

(3) The Commissioner may determine that a complaint, in the opinion of the Commissioner, is a complaint of serious misconduct in so far as it relates to certain conduct and is not such a complaint in so far as it relates to other conduct.

25 (4) If the Commissioner makes a determination under subsection (3), the complaint shall, for the purposes of this Act, be taken to be separate complaints.

Review of determinations by Commissioner

30 12C. (1) If the Commissioner has determined that a complaint is not a complaint of serious misconduct, the Commissioner—

(a) may, at any subsequent time, review that determination; and

35 (b) if, as a result of that review, the Commissioner determines that the complaint is a complaint of serious misconduct, the Commissioner shall notify the Ombudsman, in writing, of the determination.

40 (2) If the complaint concerned is the subject of an investigation under Part 3 which is being conducted by a member of the Police Force who is not a member of the investigative staff of the Internal Affairs Branch, the Commissioner shall—

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SCHEDULE 1—AMENDMENTS—*continued*

(a) direct that member to discontinue the investigation under that Part; and

(b) cause the complaint to be investigated under Part 4.

5 (3) If the complaint concerned is the subject of an investigation under Part 3 which is being conducted by a member of the investigative staff of the Internal Affairs Branch, the Commissioner shall direct that member to continue the investigation under Part 4.

10 (4) Nothing in subsection (2) or (3) affects the right of the Commissioner to apply to the Ombudsman under section 20 (1) for consent to defer the commencement or continuation of an investigation.

15 (5) If the Commissioner, after receipt of a report of the result of an investigation of a complaint under Part 3, determines that the complaint is a complaint of serious misconduct—

(a) the report shall, for the purposes of Parts 4 and 5, be taken to be a report provided to the Commissioner under section 23; and

20 (b) the investigation shall, for the purposes of sections 24, 25 and 31 (b) and (c), be taken to be an investigation under Part 4; and

25 (c) copies of any statements taken in the course of the investigation, or of any other documents on which the report is based, that have been provided to the Commissioner shall, for the purposes of Parts 4 and 5, be taken to have been so provided under section 23.

No appeals to lie from Commissioner's determinations

30 12D. No proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, shall lie in respect of—

(a) any determination, or notification to the Ombudsman, by the Commissioner that a complaint is, or is not, a complaint of serious misconduct; or

35 (b) any decision, proceeding, step or other matter involved in the making, or review, of any such determination or notification.

(12) Part 3—

Omit the Part, insert instead:

SCHEDULE 1—AMENDMENTS—*continued***PART 3—INVESTIGATIONS OF COMPLAINTS
OTHER THAN COMPLAINTS OF SERIOUS
MISCONDUCT****Commissioner to cause investigations of certain complaints**

5 13. (1) The Commissioner shall cause a complaint, other than a complaint of serious misconduct, to be investigated by a member of the Police Force under this Part or to be dealt with in such other manner as the Commissioner considers appropriate.

(2) Such a member of the Police Force shall—

- 10 (a) conduct the investigation in accordance with any directions given by the Commissioner; and
- (b) report to the Commissioner the progress and result of the investigation at such times as the Commissioner may direct or at the conclusion of the investigation (as the case may require); and
- 15 (c) not disclose the identity of the complainant without the consent of the Commissioner (except in a report to the Commissioner).

Possible serious misconduct

20 14. If, in the course of an investigation of a complaint under this Part, the member of the Police Force conducting the investigation forms the opinion that the complaint involves, or may involve, conduct by any member of the Police Force which—

- (a) constitutes a serious offence; or
- 25 (b) provides sufficient grounds for dismissal from the Police Force,

the member conducting the investigation shall—

- (c) notify the Commissioner accordingly; and
- 30 (d) provide the Commissioner with details of the conduct concerned.

Conciliation of complaint

15 15. (1) This section does not apply to a complaint which is a complaint of serious misconduct or in which the complainant is not identified.

(2) If a member of the Police Force—

- (a) is satisfied that, without an investigation under this Part, the member may be able to deal, in a manner acceptable to the complainant, with a complaint; and
- (b) has so informed the Commissioner,

SCHEDULE 1—AMENDMENTS—*continued*

the member may (subject to any direction of the Commissioner) proceed to deal with the complaint in that manner.

(3) A member of the Police Force who so deals with a complaint shall inform the Commissioner of the outcome and the Commissioner shall confirm the outcome with the complainant.

Proceedings to be instituted if warranted

16. (1) If it appears to a member of the Police Force conducting an investigation that sufficient evidence exists to prosecute any person for an offence, the member shall, subject to the Police Regulation Act 1899 and the rules under that Act, cause appropriate proceedings to be instituted against that person.

(2) The member of the Police Force shall inform the Commissioner of the institution of the proceedings and provide details of the alleged offence.

(3) If any such proceedings are instituted in respect of a serious offence, the Commissioner shall so inform the Ombudsman and provide details of the alleged offence.

(13) Part 4, heading—

Omit the heading, insert instead:

**PART 4—INVESTIGATIONS OF COMPLAINTS
OF SERIOUS MISCONDUCT**

(14) Section 17 (**Commissioner to cause complaints of serious misconduct to be investigated**)—

(a) Section 17 (1)—

Omit the subsection, insert instead:

(1) The Commissioner may cause any complaint of serious misconduct to be investigated under this Part.

(b) Section 17 (2)–(4)—

After “a complaint” wherever occurring, insert “of serious misconduct”.

(15) Section 18 (**Determination by Ombudsman**)—

(a) Section 18 (1), (1A)—

Omit the subsections, insert instead:

(1) The Ombudsman shall not determine that a complaint of serious misconduct, in which the complainant is not identified, should be investigated unless the Ombudsman is of the opinion that the complaint appears to contain sufficient information to enable an investigation to be carried out.

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- (1A) In determining whether a complaint of serious misconduct should be investigated, the Ombudsman may have regard to such matters as the Ombudsman thinks fit.
- (b) Section 18 (2), (4)—
 5 After “a complaint” wherever occurring, insert “of serious misconduct”.
- (c) Section 18 (3)—
 Omit the subsection, insert instead:
 (3) Such a notification to the Commissioner shall be in writing.
- 10 (d) Section 18 (4)—
 Omit “and of the document incorporating the complaint to which it relates”.
- (16) Sections 19 (1), (2), 20 (1), (2)—
 15 After “a complaint” wherever occurring, insert “of serious misconduct”.
- (17) Sections 22 (1), 23, 24 (1)—
 After “an investigation” wherever occurring, insert “under this Part”.
- (18) Section 24 (2)—
 20 After “a complaint” wherever occurring, insert “of serious misconduct”.
- (19) Section 24A (**Investigation under the Ombudsman Act 1974 where complaint not dealt with in time**)—
 (a) Section 24A (1)—
 25 After “a complaint”, insert “of serious misconduct”.
- (b) Section 24A (3) (b), (c)—
 After section 24A (3) (b), insert:
 ; or
 (c) in the case of a complaint to which section 12C (2) or (3)
 30 applies—the Commissioner notifies the Ombudsman that the complaint is a complaint of serious misconduct,
- (20) Sections 25A, 27—
 After “a complaint” wherever occurring, insert “of serious misconduct”.
- 35 (21) Section 28 (**Justified complaints**)—
 (a) Section 28 (1), (1A)—

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Omit section 28 (1), insert instead:

(1) If, after considering all the material and information provided with respect to a complaint of serious misconduct, or after an investigation under the Ombudsman Act 1974 of the conduct to which a complaint of serious misconduct relates, the Ombudsman is satisfied that a member of the Police Force is (or is apparently) guilty of conduct which—

- (a) constitutes a serious offence; or
- (b) provides sufficient grounds for dismissal from the Police Force,

the Ombudsman shall—

- (c) so inform the Minister administering the Police Regulation Act 1899 and the Commissioner, giving reasons; and
- (d) compile a report relating to the complaint, giving reasons for the conclusions and including any recommendations the Ombudsman may wish to make concerning action which should be taken.

(1A) If the Ombudsman is not satisfied that a member of the Police Force is or is apparently guilty of any such conduct, but is nevertheless satisfied that other conduct occurred which—

- (a) was contrary to law; or
- (b) was unreasonable, unjust, oppressive or improperly discriminatory; or
- (c) was in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory; or
- (d) was based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; or
- (e) was based wholly or partly on a mistake of law or fact; or
- (f) was conduct for which reasons should have been given but were not given,

the Ombudsman shall compile a report relating to the complaint concerned and the conduct, giving reasons for the Ombudsman's conclusions.

(b) Section 28 (2)—

Omit “subsection (1)”, insert instead “subsection (1A)”.

(22) Section 29 (**Distribution of report**)—

Section 29 (2)—

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Omit “, as soon as practicable after receiving the report, the Commissioner shall”, insert instead “the Commissioner may”.

(23) Sections 30A (1), 31—

5 After “a complaint” wherever occurring, insert “of serious misconduct”.

(24) Section 33 (**Serious misconduct**)—

Omit the section.

(25) Section 35 (**Duties of Internal Affairs Branch**)—

(a) Section 35 (1) (a)—

10 After “under”, insert “Part 3 or”.

(b) Section 35 (2)—

Omit “paragraph (a), (b) or (c)”, insert instead “subsection (1) (a), (b) or (c)”.

(26) Section 35A (**Reports**)—

15 Section 35A (1A)—

After section 35A (1), insert:

20 (1A) In subsection (1), a reference to details of the work and activities of the Internal Affairs Branch includes a reference to such details of investigations of complaints conducted by members of the Police Force (other than members of the investigative staff of the Internal Affairs Branch) as the Commissioner may direct to be included in a report.

(27) Section 41 (**Hearing of disciplinary charges**)—

Section 41 (1) (a)—

25 After “under”, insert “Part 3 or”.

(28) Section 51 (**Ombudsman may require further information**)—

(a) Omit “the purposes of Part 3 or for”.

(b) After “a complaint”, insert “of serious misconduct”.

(29) Section 52 (**Commissioner to provide information**)—

30 (a) After “a complaint”, insert “of serious misconduct”.

(b) Omit “for the purposes of Part 3 or”.

(c) At the end of the section, insert:

SCHEDULE 1—AMENDMENTS—*continued*

5 (2) If the Commissioner is of the opinion that publication of any explanation, comment or information which the Commissioner is required to provide to the Ombudsman might prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest, the Commissioner shall inform the Ombudsman accordingly, giving the reasons for that opinion.

(3) If the Ombudsman is provided with any explanation, comment or information in respect of which the Commissioner has given such an opinion, the Ombudsman—

10 (a) may not, except as provided in paragraph (b), publish that explanation, comment or information; and

(b) may, if in the Ombudsman's opinion the circumstances so warrant, make a report to the Minister for presentation to Parliament in relation to that explanation, comment or information.

15 (30) Section 54 (**Failure to comply with request**)—

Section 54 (2)—

Omit "under Part 3".

