

1983

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

OMBUDSMAN (MISCELLANEOUS AMENDMENTS) BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
Assisting the Prime Minister
for Public Service Matters)

OUTLINE

This Bill makes amendments, primarily to the Complaints (Australian Federal Police) Act 1981, which complement the provisions of the Ombudsman Amendment Bill 1983.

The Complaints (Australian Federal Police) Act 1981 in part provides for the independent investigation by the Ombudsman of complaints against the Australian Federal Police. The Act provides a role for the Ombudsman in relation to complaints, substantially similar to that in the Ombudsman Act 1976. Parallel amendment of both Acts is desirable to ensure basic uniformity in the Ombudsman's powers and duties in relation to complaints.

The Bill also makes certain additional minor amendments to the Complaints (Australian Federal Police) Act 1981, and minor consequential amendments to the Audit Act 1901 and Administrative Decisions (Judicial Review) Act 1977.

NOTES ON CLAUSES

Clauses 1 and 2

1. The first two clauses of the Bill provide for the short title and commencement of the legislation. With the exception of Part IV, the provisions of the Bill will come into effect on the day on which the Ombudsman Amendment Bill 1983 receives Royal Assent. Part IV, which inserts into the Audit Act 1901 a reference to the office of Defence Force Ombudsman, will come into effect on the day when the provisions of the Ombudsman Amendment Bill 1983 which establish that office are proclaimed.

Clause 3 - Principal Act

2. This clause indicates that Part II of the Bill makes amendments to the Complaints (Australian Federal Police) (AFP) Act 1981 referred to in this Part of the Bill as the Principal Act.

Clause 4 - Interpretation

3. This clause makes it clear that 'taking of action' as defined by paragraph (3)(d)(ii) includes the 'formulation of a proposal'.

Clauses 5, 6 and 7 - Meaning of action taken by a member
and Application of Act

4. Clause 7 makes it clear that the Act's provisions apply both within and outside Australia and extend to every external territory. Clauses 5 and 6 remove specific references to this effect.

Clause 8 - Investigation Division to refrain from
investigation in certain circumstances

5. Clause 11 (paragraph 11 below) extends the Ombudsman's discretion to determine that a complaint should not be investigated or investigated further under the Act to take account of the number of complaints that are made originally to the AFP with their particulars being furnished to the Ombudsman under sub-section 6(3). Clause 8 amends section 9(3) of the Principal Act to provide that where the Ombudsman exercises his discretion in relation to such a complaint the Commissioner may, in his discretion, direct the Investigations Division to refrain from investigating or further investigating that complaint.

Clause 9 - InterpretationSub-clause 9(a)

6. The Bill amends the Principal Act to provide that it shall apply both within and outside Australia and extend to external territories (see paragraph 4 above) The Act is amended by sub-clause 9(a) to indicate that the Ombudsman's jurisdiction extends to actions taken by Commonwealth and Territory administrations in Cocos (Keeling) Islands and Christmas Island. However that jurisdiction does not extend to the executive governments of Northern Territory or Norfolk Island.

Sub-clause 9(b)

7. This sub-clause provides in a new sub-section 21(6) that a reference to an 'Ombudsman of a State' means 'Ombudsman' as a generic term to include the 'Parliamentary Commissioner for Administrative Investigations' in Queensland and Western Australia. New sub-section 21(7) provides that a reference to an 'Ombudsman of a State' includes a reference to the Northern Territory Ombudsman. Similarly a reference to a law of a 'State' in this context includes a reference to an enactment of the Northern Territory.

Clause 10 - Complaints to Ombudsman concerning action of members

8. Clause 10(a) provides for greater ease in making a complaint to the Ombudsman. New sub-sections 22(2) and (3) allow that a complaint to the Ombudsman may be made orally, and not just in writing. The Ombudsman may, however, put an oral complaint into writing or require the complainant to do so. Sub-clause 13(c) (see paragraph 15 below) requires that if the Ombudsman wishes to pursue an investigation in the formal manner provided in section 25 (with its attendant investigatory powers under sub-section 25(7) and section 27) the complaint must be put into writing.

9. New sub-sections 22(4), (4A) and 4(B) make it easier for a person in custody to complain to the Ombudsman. They also protect the confidentiality of communications between such a complainant and the Ombudsman. (The current provisions allow a complaint to be made confidentially to the Ombudsman but do not protect further communications between the complainant and the Ombudsman). The new provisions also enable the Ombudsman to make arrangements with the appropriate authority of a State or Territory for the delivery of confidential communications from the Ombudsman to persons in State or Territory custodial institutions.

This formalises, on the Commonwealth's part, the existing practice.

10. Clause 10(b) amends section 22 with the effect that the Ombudsman's powers under the Freedom of Information Act will apply equally to complaints concerning the AFP, as to complaints concerning other government agencies.

Clause 11 - Ombudsman may determine that complaint should not be investigated

11. This clause amends section 24 to provide the Ombudsman with greater flexibility in exercising his discretion that a complaint should not be investigated, or further investigated formally under the Principal Act. This discretion allows the Ombudsman to respond to complaints in the most appropriate and effective fashion. Sub-section 24(1) is amended to take account of the number of complaints that are made originally to the AFP with their particulars being furnished to the Ombudsman under sub-section 6(3). The sub-section is also amended to simplify the conditions in which the Ombudsman might exercise his discretion. A new

sub-section 24(2A) has been inserted which allows that the Ombudsman may determine that a complaint might be better investigated by a court or tribunal. This provision mirrors that in section 6 of the Ombudsman Act as amended by the Ombudsman Amendment Bill 1983.

12. Where the Ombudsman determines that a complaint should not be investigated or further investigated under the Act he is required to inform the complainant of his decision and provide reasons for it. However, clause 11 provides that the Ombudsman may arrange with the Commissioner about how and when such information will be provided to him for specified kinds of complaints. These arrangements could reflect administrative practice as it develops.

Clause 12 - Preliminary Inquiries

13. This clause creates new section 24A which allows the Ombudsman to make inquiries of the Commissioner or designated contact officers to determine whether a complaint concerns action taken by a member of the AFP, and if it does whether the complaint requires formal investigation under the Act. Preliminary inquiries can be used by the Ombudsman to determine whether a formal investigation under section 25 is required or whether the complaint can be more readily resolved.

Clause 13 - Investigations

14. At present the Ombudsman, before undertaking an investigation, must inform the responsible Minister and the Commissioner that the complaint is to be investigated. New sub-section 25(1A) enables the Ombudsman and the Commissioner to make arrangements about how and when the Ombudsman will furnish that advice. Similarly with new sub-section 24(2A) this provision will enable administrative practices as they develop under the Act to be formalised.

15. The clause also inserts new sub-section 25(9A) which requires that the Ombudsman, before invoking his power to require a person to appear before him and make submissions (under sub-section 25(7)) or to furnish information or documents (under section 27), should formalise his investigations, if he has not already done so, by informing the responsible Minister and putting the complaint in writing. This does not alter the provision (in sub-section 25(10) of the Principal Act) that the Ombudsman may discuss an investigation with the responsible Minister at any time.

Clause 14 - Investigations by Commonwealth and State
Ombudsmen

16. This clause proposes, in a new section 25A, a statutory basis for the Commonwealth Ombudsman to make arrangements with his State and Territory counterparts for investigations where both Commonwealth and State responsibilities are involved. This section complements clause 11 of the Ombudsman Amendment Bill 1983 which applies in relation to the Ombudsman's general jurisdiction. Clause 25 of that Bill provides that the Ombudsman may accept delegations from State ombudsmen. Such a delegation could be accepted by the Ombudsman in pursuance of an arrangement under the new section 25A.

Clause 15 - Power to obtain information and documents

17. Sub-clauses (a) and (b) provide, in new sub-sections 27(1) and (3) for an expansion of the provisions which enable the Ombudsman to require persons to testify: he will be allowed to specify the time and place at which information is to be made available to him and will also be allowed to make full use of documents and records provided to him. While documents or records are in the Ombudsman's possession, however, those people who would normally have access to them are to be allowed to examine them at any reasonable time.

18. Sub-clause (b) also inserts new sub-section 27(3A) which removes the stipulation that the Ombudsman must seek ministerial approval before he can call any person (other than the complainant, a person or body who requested the complainant to make the complaint, a member of the AFP or officer of a department or authority) who he believes able to provide information relevant to an investigation.

19. Sub-section 27(4) of the Principal Act provides that the Attorney-General may issue a certificate preventing the Ombudsman from seeking certain kinds of information the disclosure of which would be contrary to the public interest. Sub-clause (c) makes clear that the Attorney-General's discretion to issue such certificates is to be exercised within the particular context of Ombudsman access. Sub-clause (e) amends the sub-section to include information that would involve the disclosure of deliberations of the Executive Council.

20. Sub-clause (f) amplifies sub-section 27(5) so that any information provided by people called before the Ombudsman is not admissible in evidence against them except in proceedings under section 44 or under the new sub-section 28A(1) (see clause 17 paragraph 22 below).

Clause 16 - Reference of question to the Administrative Appeals Tribunal

21. Existing section 28 of the Principal Act provides that the Ombudsman may recommend to the Commissioner that a specified question relating to action taken under a 'discretionary' power conferred by an enactment which is under investigation by the Ombudsman or the Investigation Division be referred to the Administrative Appeals Tribunal for an advisory opinion. Clause 16 expands the section to allow the Ombudsman to refer a question to the AAT whether or not the action concerned was taken under a 'discretionary' power.

Clause 17 - Power of Federal Court of Australia to make orders

22. This clause provides that the Ombudsman may apply for a Federal Court order where a person fails to comply with a notice under section 27 to furnish information to produce documents or records or to attend before him. New sub-section 28A(3) provides that the relevant Minister must be informed of the reasons for the intended application. This is to ensure that all opportunities for settling the matter by agreement have been explored.

Clause 18 - Reports by Ombudsman

23. This clause makes it clear that a failure to take relevant considerations into account is a ground of defective administration on which the Ombudsman may report.

Clause 19 - Persons affected to be informed of results of investigation by Ombudsman

24. This clause provides the Ombudsman with a discretion, in a new sub-section 34(3) to direct to the AFP, any Department, body or person any 'comments or suggestions' that arise out of his investigations. The discretion is different from the Ombudsman's role under section 31 to report adversely on defective action taken by a member of the AFP; instead it recognizes the role the Ombudsman has to play in the general promotion of fair, just and efficient administration of the AFP's responsibilities. It would enable him, for example, to direct to the attention of the Commissioner trends or patterns which have emerged in his investigations.

25. New sub-section 34(4) provides that the Ombudsman may provide any complainant with a copy of a recommendation he has made in a section 31 report. At present he is simply required to do so when adequate action is not taken in relation to a recommendation.

Clause 20 - Action to be taken upon receipt of report of an investigation

26 This clause, similarly to clause 19 (paragraph 24 above) provides the Ombudsman with a discretion to make 'comments or suggestions' arising out of an investigation of a complaint by the AFP's Investigation Division, a report of which has been received by him. Such 'comments or suggestions' might bring together trends or patterns that have emerged in his and the Investigation Division's investigations of complaints.

Clause 21 - Ombudsman to inform complainant of results of investigations

27. New sub-section 37(2A) provides that the Ombudsman may, in any case, provide a complainant with a copy of any recommendations made in a notification to the Commissioner under paragraphs 36(1)(b) and 36(2)(b). At present he is simply required to do so when adequate action is not taken in relation to these recommendations.

Clause 22 - Ombudsman not be be sued

28. This clause makes clear that, as with the Ombudsman, a delegate of the Ombudsman is protected from

any action, suit or proceeding which arises out of any action taken in good faith in the exercise, or purported exercise, of the powers or authority conferred by the Principal Act.

Clause 23 - Delegation

29. This clause amends section 40 to remove the stipulation that the Ombudsman must seek ministerial approval before he may delegate to a person, other than a member of his office, his powers under the Principal Act (other than his reporting powers under sections 31,32 and 33 and the power of delegation).

Clause 24 - Officers to observe secrecy

30. This clause amends section 41 which ensures confidentiality to take account of the need to protect information which may be passed between Commonwealth and State ombudsmen. This clause acknowledges that adequate assurance of confidentiality is a necessary condition of co-operation between Ombudsmen.

31. Information gained from a State Ombudsman or by the Commonwealth Ombudsman acting under a delegation from a State Ombudsman is specifically subjected by this clause to the same confidentiality provisions as information obtained by the Commonwealth Ombudsman. The Ombudsman

may, in turn, furnish to his State counterparts any information, document or extract or copy of a document relevant to an investigation being carried out under the new co-operative arrangements or to a matter arising under a State law. The Ombudsman must, however, be satisfied that the State's laws ensure confidentiality in a manner similar to the Principal Act.

Clause 25 - Disclosure of information by Ombudsman

32. This clause creates a new section 41A which provides that the Ombudsman has the discretion, exercisable in the interests of any person (including a member of the AFP), the AFP or other agency or otherwise in the public interest, to disclose information or make statements either on the general operation of his office or, subject to certain conditions detailed below, about particular investigations. This section would, for example allow the Ombudsman to set the record straight in answer to uninformed public comment. This section is not intended, however, to alter the essentially private nature of investigations. Any public statement is not to:

- . hinder the proper completion of investigations, or pre-empt the reports that follow them
- . set out opinions that are, either expressly or implicitly, critical of the AFP, a Department, prescribed authority or person (including a member)

unless all the persons concerned have been given an opportunity to make submissions on that investigation as provided under sub-section 25(7) of the Principal Act

- . unreasonably identify a complainant

Clause 26 - Offences

33. This clause simply clarifies the existing provision in section 44 that a person shall not fail or refuse to comply with a request made by the Ombudsman unless he has a reasonable excuse.

Clause 27 - Protection from civil actions

34. This clause amends section 45 to make it clear that civil actions (for example defamation proceedings) cannot be taken against a person where it is alleged that that person in making a complaint to the Ombudsman or making a statement, furnishing a document or information to an officer of the Ombudsman's office in good faith (whether or not that statement, document or information was required by that officer under the Act), causes loss, damage or injury of any kind to another person.

Clause 28 - Principal Act

35. This Clause indicates that Part III of the Bill amends the Administrative Decisions (Judicial Review Act 1977.

Clause 29 - Rights conferred by this Act to be additional to other rights

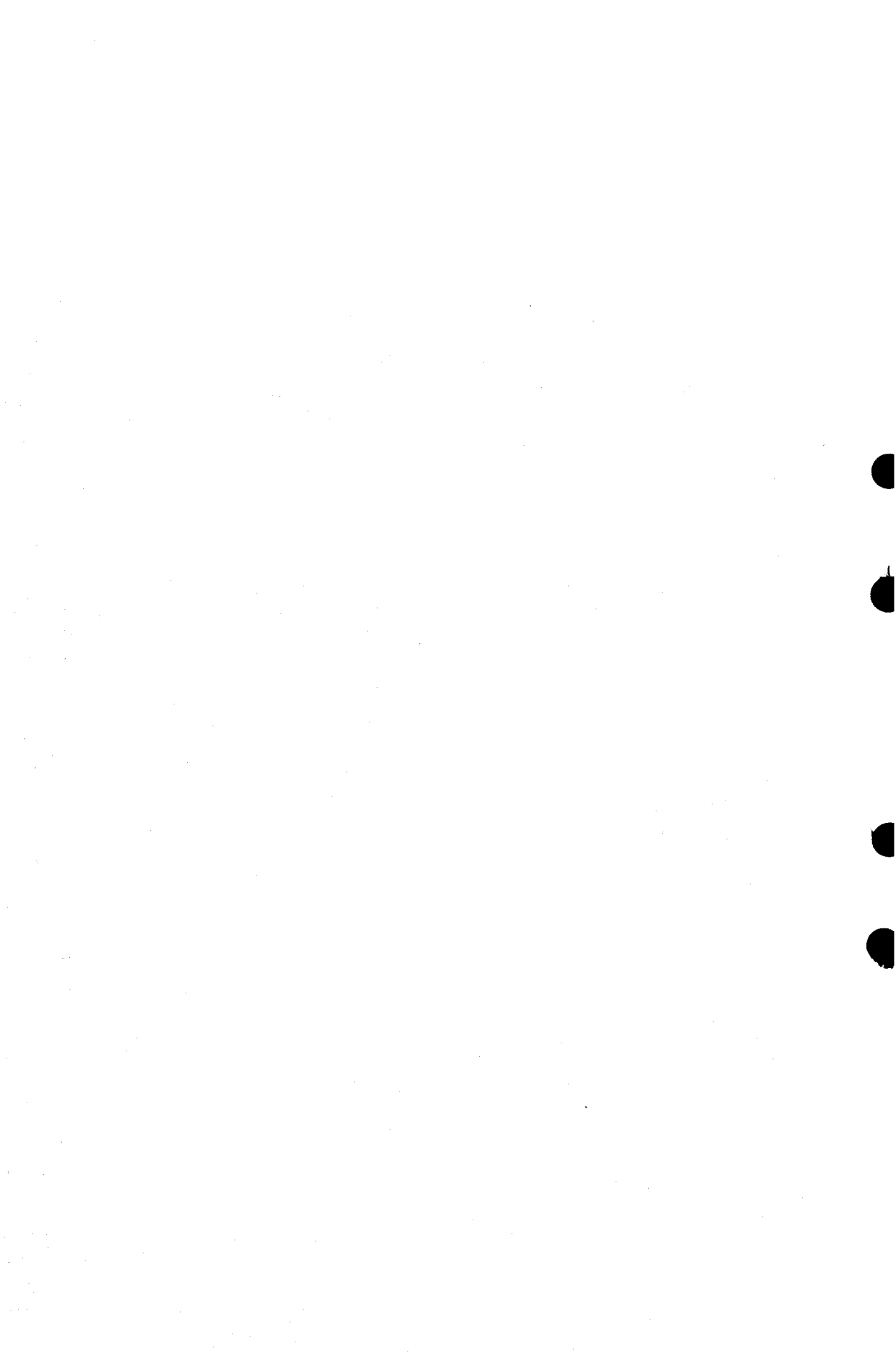
36. This clause indicates that the simple existence of a right of review of an action under the Administrative Decisions (Judicial Review) Act does not preclude the Ombudsman from investigating that action on complaint under the Complaints (Australian Federal Police) Act 1981.

Clause 30 - Principal Act

37. This clause indicates that Part IV of the Bill amends the Audit Act 1901.

Clause 31 - Public authorities of the Commonwealth

38. This clause amends section 48B of the Audit Act to take account of the creation in the Ombudsman Amendment Bill 1983 of the statutory office of Defence Force Ombudsman.

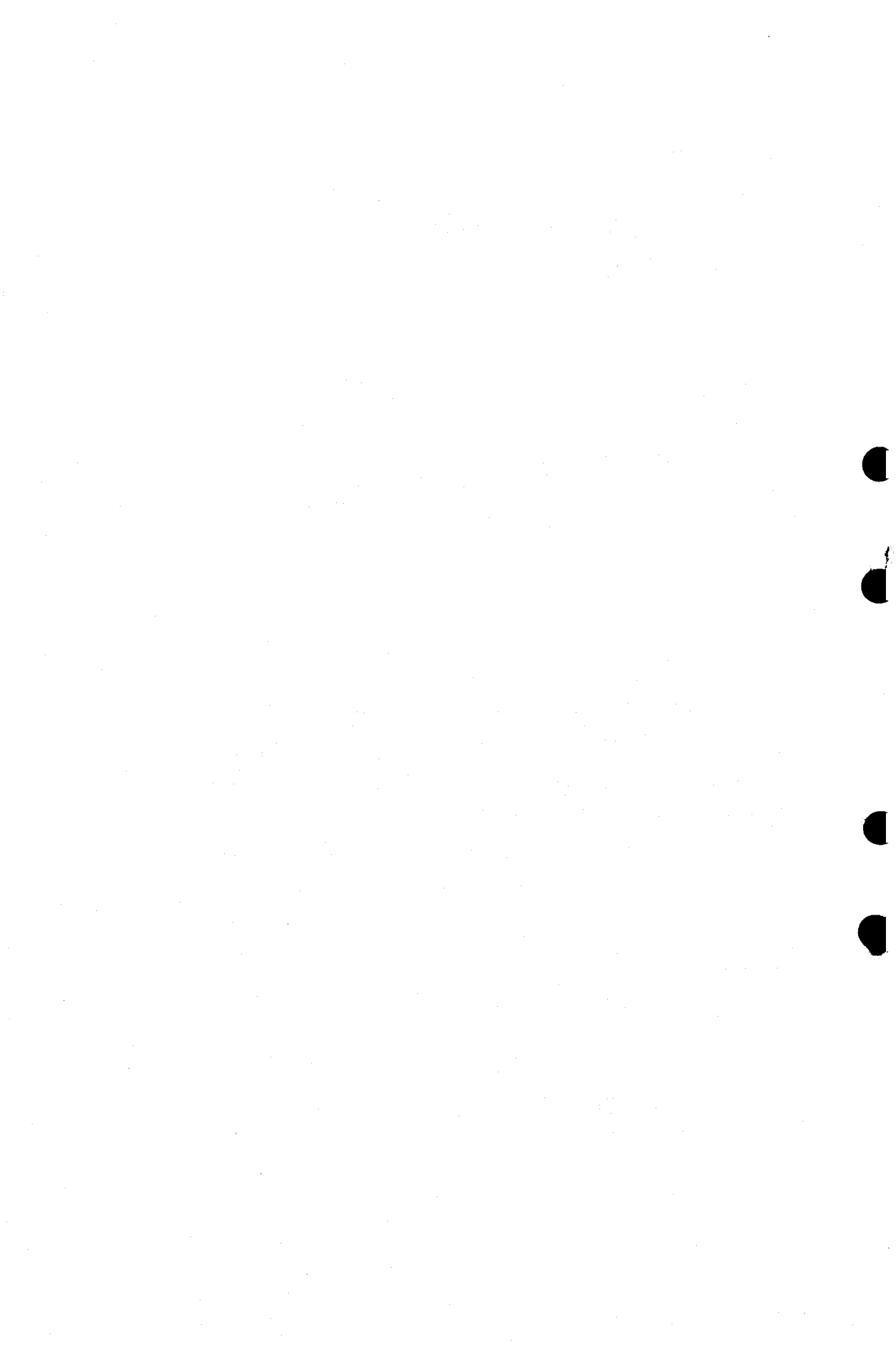


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