

# Explanatory Memorandum

## ***POLICE AMENDMENT (MEDICAL RETIREMENT) BILL 2019***

### **Part 1 – Preliminary**

#### **Clause 1. Short Title**

Pursuant to clause 1, when the Police Amendment (Medical Retirement) Bill 2019 receives Royal Assent, it will be known as the *Police Amendment (Medical Retirement) Act 2019* (the Act).

#### **Clause 2. Commencement**

Clause 2 provides that the short title comes into effect on Royal Assent.

The remainder of the Act comes into operation on a day fixed by proclamation.

Transitional provisions at proposed section 33ZQ will commence on proclamation. These provisions outline the application of the Act to members when a removal action under Part IIB on medical grounds is already in progress, or a member has been directed to undergo medical examination, but the process has not been completed before commencement of the Act. The provisions provide that the member's medical retirement is to be considered to be under the new medical retirements provisions.

### **Part 2 – *Police Act 1892* amended**

#### **Clause 3. *Police Act* amended**

Clause 3 specifies that the amendments contained in Part 2 of the Bill are amendments to the *Police Act 1892* (*Police Act*).

#### **Clause 4. Section 8 amended**

Section 8 of the *Police Act* permits the Commissioner of Police to remove a member from office.

Under clause 4 the term “disability” is removed wherever it is referred to under section 8(1). Removal of this term ensures that where a police officer is retired on medical grounds, (which may include physical disability), that member is to be medically retired in accordance with Part IIC, as proposed at clause 6 of the Bill, and not section 8.

This amendment disassociates the new Part IIC from the powers of the Commissioner of Police to remove a member on disciplinary or misconduct grounds under section 8 and Part IIB of the *Police Act*.

## **Clause 5. Section 33K Amended**

Clause 5 corrects an anomaly in the current 'Removal of Members' provisions in Part IIB of the Police Act.

Currently, Part IIB defines '*removal action*' to include methods of recommending removal of commissioned officers, non-commissioned officers and Aboriginal police liaison officers. In contrast, the definition of "*removal from office*" includes these officers and police auxiliary officers.

Clause 5 inserts 'police auxiliary officer' in the definition of '*removal action*' to align this definition with the definition of "*removal from office*".

This ensures that removal action by the Commissioner of Police also expressly applies to a police auxiliary officer. This resolves any ambiguity about a police auxiliary officer's right of appeal to the Western Australian Industrial Relations Commission (WAIRC) against a removal decision made by the Commissioner of Police.

## **Clause 6. Part IIC inserted**

Clause 6 inserts a new Part after section 33Z of the Police Act, "Part IIC – Medical retirement".

### **Division 1 – Preliminary**

#### **Section 33ZA Summary of Part inserted**

A summary of the Part is inserted to clearly explain that this Act implements a scheme for retirement of medically unfit police members, as distinct from removal from office on other disciplinary or misconduct grounds under section 8 and Part IIB of the Police Act.

This Bill makes amendments to the Police Act to provide a stand-alone legislative scheme to medically retire an officer if, in the opinion of the Commissioner of Police, the member is unfit on medical grounds to perform the functions of the office or role to which the member is appointed by including provisions under Part IIC.

#### **Section 33ZB Terms used inserted**

Section 33ZB provides definitions specific to Part IIC. Included are the following -

"Appellant" is defined to mean the person who institutes an appeal under section 33ZI.

"Disputed decision" is defined by reference to section 33ZI(2) and refers to the decision of the Commissioner of Police to retire a member on medical grounds. This decision may be the subject of appeal to the Western Australian Industrial Relations Commission under section 33ZI.

The definition of “medically unfit” means unfit to perform the functions of the office to which the member is appointed and includes any physical and / or mental condition.

The definition of “member”, for the purposes of this Part, includes a commissioned or non-commissioned officer, constable, an Aboriginal police liaison officer and a police auxiliary officer.

The definition of “retire” refers to a member’s retirement from office on medical grounds. This term is used throughout this Part to distinguish Part IIC from Part IIB of the Police Act which uses the term “removal from office”.

The terms “retire” and “retirement day” are defined to provide clarity for the purpose of calculating specific dates when a member is considered to cease to hold office.

## **Division 2 – How members can be retired on medical grounds**

### **Section 33ZC Examination of member by medical board inserted**

This provision substantially replicates the regulation 1402 of the *Police Force Regulations 1979* (the Regulations).

The Commissioner of Police may direct a member to submit to an examination by the medical board. The direction must be in writing, and may include requirements to be met by the member regarding the conduct of the examination or to facilitate the assessment or examination.

The threshold for the exercise of this power is that the Commissioner of Police ‘reasonably suspects that a member is ‘medically unfit’ as defined in proposed section 33ZB.

The medical board is to consist of at least three medical practitioners.

The medical board’s report is to be given to the Commissioner of Police. This requirement overcomes any possible claim of privilege or doctor-patient confidentiality if a member subject to examination does not consent to the report being provided to the Commissioner of Police.

Regulations may be issued under section 138A of the Police Act to provide for the appointment of persons to the medical board, constitution and governance of the medical board, as well as other matters. Other matters, which are not exhaustive, including the provision of reports, and costs associated with the medical board.

Non-compliance with the Commissioner of Police’s direction is an offence against the discipline of the Police Force. This offence has been expressly provided for and replicates current wording in regulation 603 of the Regulations regarding lawful orders.

### **Section 33ZD Notice that Police Commissioner is of opinion that member is medically unfit inserted**

This provision substantially replicates section 33L(1)-(2) in Part IIB of the Police Act.

After having considered the medical board's report, if the Commissioner of Police is of the opinion that a member is medically unfit, the Commissioner of Police may give the member a written notice of that opinion. The notice will inform the member that the Commissioner of Police is deciding whether the member should be retired on medical grounds.

Once notice is given, the member has 28 days to respond by written submission and to provide any reports or documents to the Commissioner of Police. The Commissioner of Police may extend the period for the member to make submissions. The period of 28 days (or longer) is greater than the 21 days provided for in Part IIB of the Police Act.

### **Section 33ZE Power to retire member on medical grounds inserted**

Section 33ZE facilitates the medical retirement of a member. This provision substantially mirrors section 33L(3)–(11) in Part IIB of the Police Act.

After the 28 day (or longer) period set out in proposed section 33ZD(4) expires, the Commissioner of Police must decide whether to retire the member. The Commissioner of Police cannot do so unless everything received from the member has been considered and the Commissioner of Police remains of the opinion that the member is medically unfit.

If the decision is made to retire the member on medical grounds, the reasons must also be provided to the member.

Within 7 days of giving notice, the Commissioner of Police must give the member a copy of, or access to inspect, documents or materials that were taken into account by the Commissioner of Police in making the decision (subsection (5)), except those materials and documents that are considered privileged.

The Commissioner of Police initiates the action in each case for a member to cease to hold the office to which the member has been appointed by exercising a power under subsections (6), (7) or (8). The Commissioner of Police must give the member notice that the member has been retired on medical grounds. This power may be exercised at any time after the notice under subsection (1)(b) is given. The provisions replicate existing requirements under Part IIB concerning removal action and removal from office for specific classes of officer.

Retirement from office on medical grounds for Aboriginal police liaison officers and police auxiliary officers is finalised by the Commissioner of Police. For a non-commissioned officer, it requires the approval of the Minister. For a commissioned officer, medical retirement requires the approval of the Governor on advice of the Minister.

The member's retirement on medical grounds takes effect at the end of the day that this formal retirement from office is finalised. The Act defines this as 'retirement day' in section 33ZB.

If the decision to retire a member on medical grounds is revoked (in circumstances provided for in section 33ZG(2)), the decision itself, and any actions taken by the Commissioner of Police under subsections (4) to (10) of section 33ZE are taken to not have any effect.

Future Regulations can provide for requirements for service of notices and provision of documents or materials to the member. These regulation making powers rely on section 138A(5) of the Police Act.

### **Section 33ZF Maintenance payment inserted**

This provision substantially replicates section 33M in Part IIB of the Police Act.

Section 33ZF provides an entitlement for a member to continue to receive a maintenance payment for 28 days after their retirement day, which is calculated on the basis of their salary on retirement day.

There is provision for the Minister to direct that this maintenance payment to continue for a further six months after this 28 days period ends. The maintenance payment must cease if an appeal is instituted against the decision to retire the member.

### **Section 33ZG Revocation of decision that member should retire inserted**

This provision substantially replicates section 33N in Part IIB of the Police Act.

Section 33ZG provides for the Commissioner of Police to revoke a decision to retire a member on medical grounds. Revocation of the Commissioner of Police's decision after retirement day can occur even if an appeal has been instituted.

If retirement from office has not taken effect (by finalisation of the retirement under s 33ZE (6) – (10) inclusive), the Commissioner can revoke the decision by notice to the Minister.

If retirement from office has occurred, the Commissioner may still revoke the decision by notice in the Government Gazette. Ministerial approval is required to give notice in the Government Gazette if the member is a commissioned officer.

If medical retirement by the Commissioner of Police is revoked by notice in the Government Gazette, it is deemed that the medical retirement is of no effect. Accordingly, a member who has a medical retirement decision revoked, is entitled to be back-paid salary (minus any maintenance payment received under 33ZF) as if the officer had never been medically retired.

### **Section 33ZH Resignation of member who has been retired on medical grounds inserted**

This provision substantially replicates section 33O in Part IIB of the Police Act.

Section 33ZH provides an opportunity for a member to resign at any time within 28 days after retirement day, however, resignation cannot occur if an appeal has been instituted against the decision.

If a member chooses to resign, the resignation takes effect 28 days after medical retirement takes effect (“retirement day”) and the medical retirement is deemed to have never been of any effect.

### **Division 3 – Appeal against decision that member should be retired on medical grounds**

#### **Section 33ZI Appeal right inserted**

This provision substantially replicates section 33P in Part IIB of the Police Act.

Appeal provisions under Part IIC apply the same procedural and conduct requirements for proceedings on appeal, and for determination and effect of the WAIRC decision as currently exists in Part IIB of the Police Act.

Section 33ZI provides for appeal to the WAIRC on the grounds that the decision to medically retire a member was harsh, oppressive or unfair. This provision in the Bill mirrors what is already in place under section 33P of the Police Act in relation to officers who have been removed under section 8 of that Act.

An officer may institute an appeal at any time after their retirement has effect but must do so no later than 28 days after the retirement day. A member cannot institute an appeal if they have resigned.

A member must lodge an appeal via the service of a notice on the Commissioner of Police. Any such notice must set out the reasons why the decision is considered harsh, oppressive or unfair and detail what relief is sought from the WAIRC.

In appeals instituted under this section, the WAIRC must be constituted by at least three industrial commissioners, at least one of whom is the Chief Commissioner or the Senior Commissioner.

Only the member who institutes the appeal, (defined as the ‘appellant’ in proposed section 33ZB) and the Commissioner of Police, may be parties to the appeal.

#### **Section 33ZJ Proceedings on appeal inserted**

This provision substantially replicates section 33Q in Part IIB of the Police Act.

Section 33ZJ sets out the procedure for the WAIRC to deal with an appeal against a decision by the Commissioner of Police to retire a member on medical grounds. This

is an appeal against “the disputed decision” as defined in section 33ZB by reference to section 33ZI(2).

In the proceedings on appeal, the WAIRC must consider the following in relation to the disputed decision -

- (a) the Commissioner of Police’s reasons; and
- (b) the case presented by the appellant as to why the decision was harsh, oppressive or unfair; and
- (c) the Commissioner of Police’s case in answer to the appellant’s case.

The burden of proof and onus is on the appellant to prove that the decision of the Commissioner of Police was harsh, oppressive or unfair.

The WAIRC must have regard to the interests of the appellant and the public interest.

Particular regard is to be had by the WAIRC to the special nature of the relationship between the Commissioner of Police and members of the WA Police Force. The public interest is taken to include the importance of maintaining public confidence in the WA Police Force.

This provision does not provide an exhaustive list of matters relevant to the public interest, or of matters the WAIRC may have regard to in determining the appeal.

### **Section 33ZK New evidence on appeal inserted**

This provision substantially replicates section 33R in Part IIB of the Police Act.

There are limited circumstances in which new evidence may be provided during an appeal to the WAIRC.

“New evidence” is defined in proposed section 33ZK. It refers to documents or other materials that have not been relied upon at any stage of the medical retirement process.

New evidence may not be admitted during an appeal unless the WAIRC grants leave for it to be tendered. Differing requirements in section 33ZK(3),(4), exist for each of the parties to the appeal who may seek to tender new evidence to the WAIRC.

If leave is granted to tender the new evidence, both parties must be given opportunity to consider the new evidence and the member may respond with further new evidence without the need to seek leave.

Under section 33ZK(8) the Commissioner of Police may revoke the decision to retire the member at any time after retirement day (section 33ZG). If, however, the decision is revoked after consideration of new evidence, during appeal proceedings, the Commissioner of Police must give the WAIRC notice of that decision. The WAIRC proceedings will be discontinued as a consequence.

Under section 33ZK(9) if the Commissioner of Police does not revoke the retirement decision, the reasons for making the decision may be reformulated and the Commissioner of Police may also tender new evidence in response without leave of the WAIRC. Any reformulated reasons are treated as if they were the original reasons for decision. The Commissioner of Police must give the member written notice of the reasons.

This provision ensures that the WAIRC is therefore not put in an unsatisfactory position of being required to speculate whether the new evidence may have altered the Commissioner of Police's decision, or of substituting its own view of the merits for that of the Commissioner of Police. It also overcomes arguments that the original decision was harsh, oppressive or unfair when viewed in light of the new evidence.

When appeal proceedings resume the issue to be determined will be whether the further decision of the Commissioner, having taken into account the new evidence, was harsh, oppressive or unfair.

### **Section 33ZL inserted – Application of *Industrial Relations Act 1979* to the appeal**

This section sets out in table form the provisions of the *Industrial Relations Act 1979* that will apply to appeals under this Act. They mirror existing provisions in the Police Act for appeals section 33S in Part IIB of the Police Act. References throughout this provision to 'Commission' are references to the WAIRC. Some of these provisions are modified expressly as they apply to police officers to ensure that the WAIRC has adequate powers to conduct appeal proceedings in these matters.

### **Section 33ZM Decision by the WAIRC inserted**

This provision substantially replicates section 33U in Part IIB of the Police Act.

The WAIRC has the power to substitute its decision for that of the Commissioner of Police and to make orders that provide certain remedies for the affected member.

The WAIRC may make an order that nullifies the member's retirement on medical grounds. The effect of this is that the member will effectively be reinstated from the date the retirement on medical grounds took effect.

If reinstatement of the member is impracticable, the WAIRC may order the Commissioner of Police to pay compensation for loss or injury to the member caused by the retirement.

If compensation is granted, it is limited to twelve months' remuneration, and may be modified if the Commissioner of Police has made efforts to mitigate the loss suffered by the member. The amount may also be varied to take into account any maintenance payments made, if the member has obtained any associated redress, or by any other matter the WAIRC considers relevant.

### **Section 33ZN Restriction on publication inserted**

This provision substantially replicates section 33V in Part IIB of the Police Act.

Section 33ZN empowers the WAIRC to make in effect, suppression orders, where it is in the public interest, in relation to any evidence given or documents produced on an appeal.

The provision establishes an offence for failing to comply with a non-publication direction. This offence attracts a penalty of imprisonment for up to 12 months and a fine of up to \$4,000.

### **Division 4 – General**

#### **Section 33ZO Failure to comply with procedure inserted**

Section 33ZO provides protections for decision makers for an insubstantial failure to comply with procedures relating to medical retirement. This provision substantially replicates section 33X in Part IIB of the Police Act.

#### **Section 33ZP Transfer, standing down and leave of member inserted**

This provision substantially replicates section 33Y in Part IIB of the Police Act.

The Commissioner of Police retains powers to transfer, stand down (on full pay) or require a member to take leave whilst undergoing the medical retirement process under Part IIC. The Commissioner of Police is also required to review that decision every 60days.

#### **Section 33ZQ Transitional provisions inserted**

Transitional provisions are inserted to ensure that any pre-existing direction, decisions or actions commenced under Part IIB, or under the relevant *Police Force Regulations 1979*, involving removal of a member on medical grounds are recognised by, and continued under Part IIC, upon the commencement of the new Part.

### **Clause 7: Section 138A amended**

Section 138A of the Police Act is to be amended to confer additional regulation-making powers dealing with procedural matters and issues necessary to give effect to the provisions of Part IIC.

**PART 3 – *Industrial Relations Act 1979* amended**

**Clause 8. *Industrial Relations Act* amended**

Clause 8 specifies that the amendments contained in Part 3 of the Bill are amendments to the *Industrial Relations Act 1979*.

**Clause 9. *Industrial Relations Act* section 113 amended**

To avoid any doubt, section 113 has been amended to expressly empower the Chief Commissioner of the WAIRC to make regulations in relation to the practice and procedure, to be in relation to appeals under Part IIC of the Police Act.

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