

**HON MICHELLE ROBERTS MLA**

**MINISTER FOR POLICE AND EMERGENCY SERVICES**

**CLAUSE NOTES**

***OCCUPATIONAL SAFETY AND HEALTH AMENDMENT BILL 2002***

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<i>OCCUPATIONAL SAFETY AND HEALTH ACT 1984</i>	<i>OCCUPATIONAL SAFETY AND HEALTH AMENDMENT BILL 2002</i>	<b>CLAUSE NOTES</b>
	<p><b>1. Short title</b></p> <p>This Act may be cited as the <i>Occupational Safety and Health Amendment Act 2002</i>.</p> <p><b>2. Commencement</b></p> <p>(1) This Act, other than the provision set out in subsection (2), comes into operation on the last day of the period of 12 months after the day on which it receives the Royal Assent.</p> <p>(2) Section 8 comes into operation on the day on which this Act receives the Royal Assent.</p>	<p><b>SHORT TITLE</b></p> <p>Clause 1 of the Bill</p> <p>This Bill amends the <i>Occupational Safety and Health Act 1984</i> to extend coverage of that Act to police officers.</p> <p><b>COMMENCEMENT</b></p> <p>Clause 2 of the Bill</p> <p>(1) This subclause provides for the majority of the provisions of the <i>Occupational Safety and Health Act</i> to apply to police officers 12 months from the date of Royal Assent. This will allow for the training of all relevant personnel of the Western Australia Police Service (Police Service). It is also intended that during this period WorkSafe and the Police Service will develop a co-agency agreement to facilitate interaction between the agencies in view of the special needs of policing.</p> <p>(2) To enable the training of occupational safety and health representatives before the</p>

<p><b>3. Interpretation</b></p> <p>(1) In this Act unless the contrary intention appears -</p> <p>“<b>appointed member</b>” means a member of the Commission referred to in section 6(2)(a) or (d);</p> <p>“<b>apprentice</b>” means an apprentice under the <i>Industrial Training Act 1975</i>;</p>	<p><b>3. The Act amended</b></p> <p>The amendments in this Act are to the <i>Occupational Safety and Health Act 1984</i>*.</p> <p>[* Reprinted as at 22 March 1999. For subsequent amendments see 2001 Index to Legislation of Western Australia, Table 1, p. 260.]</p> <p><b>4. Section 3 amended</b></p> <p>(1) Section 3(1) is amended by inserting the following definitions in the appropriate alphabetical positions –</p> <p>“</p> <p>“<b>Commissioner of Police</b>” means the person holding the office of Commissioner of Police under the <i>Police Act 1892</i>;</p>	<p>application of the substantive provisions of the <i>Occupational Safety and Health Act</i>, Clause 8 of the Bill provides for an early introduction of the provisions relating to the election and training of safety and health representatives. Subclause 2(2) of the Bill provides the mechanism by which Clause 8 will come into effect earlier than the remainder of the Bill.</p> <p><b>THE ACT AMENDED</b></p> <p>Clause 3 of the Bill</p> <p>Specifies the Principal Act to which the amendments are to be applied.</p> <p><b>SECTION 3 AMENDED</b></p> <p>Clause 4 of the Bill</p> <p>(1) New definitions are added to provide for application of the <i>Occupational Safety and Health Act</i> to Police Officers. This subclause provides for application of the same definitions as those under the <i>Police Act 1892</i>.</p> <p>To provide as broad a coverage as possible,</p>
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<p>“<b>chairperson</b>” means the chairperson of the Commission;</p> <p>“<b>code of practice</b>” means a code of practice approved by the Minister under Part VIII;</p> <p>“<b>Commission</b>” means the WorkSafe Western Australia Commission established under this Act;</p> <p>“<b>Commissioner</b>” means the person holding office as WorkSafe Western Australia Commissioner under section 9;</p> <p>“<b>department</b>” means the department of the Public Service of the State principally assisting the Minister in the administration of this Act;</p> <p>“<b>employee</b>” means –</p> <ul style="list-style-type: none"> <li>(a) a person by whom work is done under a contract of employment; or</li> <li>(b) an apprentice or industrial trainee;</li> </ul> <p>“<b>employer</b>” means –</p> <ul style="list-style-type: none"> <li>(a) a person by whom an employee is employed under a contract of employment; and</li> <li>(b) in relation to an apprentice, or industrial trainee, the person by whom the apprentice or industrial trainee is employed under an apprenticeship or industrial training agreement;</li> </ul>	<p>“<b>police officer</b>” means a person appointed –</p> <ul style="list-style-type: none"> <li>(a) under Part I of the <i>Police Act 1892</i> to be a member of the Police Force of Western Australia;</li> <li>(b) under Part III of the <i>Police Act 1892</i> to be a special constable; or</li> <li>(c) under Part IIIA of the <i>Police Act 1892</i> to be an aboriginal aide;</li> </ul> <p>“<b>WA Police</b>” means the Police Force of Western Australia provided for by the <i>Police Act 1892</i>;</p>	<p>special constables and aboriginal aides have been included.</p> <p>Police cadets have not been included, for two reasons. Firstly, legal advice indicates they are employees and hence already covered by the Occupational Safety and Health Act. Secondly the Police Service currently does not employ cadets.</p>
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<p>“<b>hazard</b>”, in relation to a person, means anything that may result in -</p> <ul style="list-style-type: none"> <li>(a) injury to the person; or</li> <li>(b) harm to the health of the person;</li> </ul> <p>“<b>improvement notice</b>” means an improvement notice issued under Part IV;</p> <p>“<b>industrial trainee</b>” means an industrial trainee under the <i>Industrial Training Act 1975</i>;</p> <p>“<b>inspector</b>” means an inspector appointed under Part V;</p> <p>“<b>plant</b>” includes any machinery, equipment, appliance, implement, or tool and any component or fitting thereof or accessory thereto;</p> <p>“<b>practicable</b>” means reasonably practicable having regard, where the context permits, to –</p> <ul style="list-style-type: none"> <li>(a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;</li> <li>(b) the state of knowledge about – <ul style="list-style-type: none"> <li>(i) the injury or harm to health referred to in paragraph (a);</li> <li>(ii) the risk of that injury or harm to health occurring;</li> </ul> </li> <li>and</li> <li>(iii) means of removing or</li> </ul>		
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<p>mitigating the risk or mitigating the potential injury or harm to health;</p> <p>and</p> <p>(c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);</p> <p><b>“prescribed law”</b> means a law prescribed for the purposes of section 14(1)(b);</p> <p><b>“prohibition notice”</b> means a prohibition notice issued under Part VI;</p> <p><b>“risk”</b>, in relation to any injury or harm, means the probability of that injury or harm occurring;</p> <p><b>“safety and health committee”</b> means a safety and health committee established under Part IV;</p> <p><b>“safety and health magistrate”</b> means a person holding office as a safety and health magistrate under section 51B;</p> <p><b>“safety and health representative”</b> means a safety and health representative elected under Part IV;</p> <p><b>“self-employed person”</b> means a person who works for gain or</p>		
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<p>reward otherwise than under a contract of employment or an apprenticeship or industrial training agreement, whether or not he employs any other person;</p> <p><b>“supply”</b>, in relation to any plant or substance, includes supply and re-supply by way of sale, exchange, lease, hire, or hire-purchase, whether as principal or agent;</p> <p><b>“trade union”</b> means -</p> <p>(a) an organisation registered under section 53 of the <i>Industrial Relations Act 1979</i>;</p> <p>or</p> <p>(b) an organisation registered under the <i>Industrial Relations Act 1988</i> of the Parliament of the Commonwealth and having employees as its members, or a branch of any such organisation;</p> <p><b>“transferred law”</b> means a law or a provision of a law transferred to the administration of the Minister pursuant to an order under this Act;</p> <p><b>“workplace”</b> means a place, whether or not in an aircraft, ship, vehicle, building, or other structure, where employees or self-employed persons work or are likely to be in the course of their work.</p>		
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<p>(2) Anything that, under this Act, is required to be served on, or otherwise done in relation to, an employer in relation to a workplace or a matter related to a workplace, is deemed to have been so served or done if it is served on, or done in relation to, a person at the workplace who has or reasonably appears to have responsibility for the management or control of the workplace.</p> <p>(3) For the purposes of sections 19(7), 20(5), 21(3), 22(5), 23(5) and 23A(3), a contravention causes serious harm to a person if it causes any bodily injury to the person, or causes the person to have a disease, of such a nature as to -</p> <ul style="list-style-type: none"> <li>(a) endanger, or be likely to endanger, the person's life; or</li> <li>(b) result, or likely to result, in permanent injury or harm to the person's health.</li> </ul>	<p>(2) After section 3(3) the following subsections are inserted –</p> <p>“</p> <p>(4) For the purposes of this Act, a police officer is to be treated as an employee of</p>	<p>(2) Two new sections are to be added to section 3 of the Principal Act.</p> <p>(4) This clause provides for a police officer to</p>
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	<p>the Crown.</p> <p>(5) Without limiting any other provision of this Act, a police officer is at work during any period of time when the officer is performing a function of a police officer, whether or not the officer is rostered on duty and, in relation to a police officer, the expressions “work” and “at work” are to be construed accordingly.</p>	<p>be treated as an employee of the Crown, for the purposes of the <i>Occupational Safety and Health Act</i>.</p> <p>The reason that police officers are currently not covered by the Act is because their method of appointment, according to the weight of legal opinion, does not constitute a “master - servant” relationship, but is rather one of independent appointment to the Crown. Their unique status does not fall under the definition of employee under the <i>Occupational Safety and Health Act</i>, and consequently police officers are excluded.</p> <p>This subclause provides for police officers to be treated, under the Act, as employees of the Crown. This parallels the way those public servants who are employees of the Crown are treated under the Act.</p> <p>(5) Because of the special nature of police work, especially the likelihood that an off-duty police officer may encounter a situation where it is necessary to perform his or her functions as a police officer, it is considered necessary to clarify that the police officer is considered to be at work whenever performing a function of a police officer, regardless of whether the police officer is rostered on duty. This</p>
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<p><b>4. Application of this Act</b></p> <p>(1) This Act binds the Crown in right of the State and also, so far as the legislative power of the State extends, in all its other capacities.</p>	<p><b>5. Section 4 amended</b></p> <p>After section 4(1) the following subsection is inserted –</p> <p>“</p> <p>(1a)The functions that the Crown has under this Act because a police officer is to be treated as an employee of the Crown are, so far as they concern a police officer, to be performed by the Commissioner of Police.</p> <p>”.</p>	<p>clarification ensures there is no doubt about whether a police officer is covered by the <i>Occupational Safety and Health Act</i>, under such circumstances. The Act will apply.</p> <p><b>SECTION 4 AMENDED</b></p> <p>Clause 5</p> <p>Clause 5 provides that, in practice, the Crown’s duties to police officers, as their employer, will be fulfilled by the Commissioner of Police. This does not provide for the Commissioner of Police to be the employer of police officers for the purposes of the Act. Rather it vests in the Commissioner of Police responsibility for ensuring the Crown’s functions of the employer are carried out.</p> <p>The arrangement is similar to that which applies to most public servants who are employees of the Crown, working for agencies covered by the <i>Public Sector Management Act 1994</i>. Under the <i>Public Sector Management Act</i>, Chief Executive Officers, while not</p>
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	<p><b>6. Section 4A inserted</b></p> <p>After section 4 the following section is inserted –</p> <p>“</p> <p><b>4A. Act does not operate to affect adversely certain police operations</b></p>	<p>the employer, have statutory responsibilities for complying with the principle that employees are provided with safe and health working conditions in accordance with the <i>Occupational Safety and Health Act 1984</i>.</p> <p><b>SECTION 4A INSERTED</b></p> <p>Clause 6</p> <p>The Government recognises that the special nature of police work involves a degree of inherent danger. It is also recognised that there is a potential for circumstances to arise where there may be some conflict between the provisions of the <i>Occupational Safety and Health Act</i> and the unique operating procedure of policing with respect to covert or dangerous operations.</p> <p>For the most part, such concerns are addressed by the fact that the employer’s duty of care under the <i>Occupational Safety and Health Act</i> applies only so far as is practicable, with “practicable” being defined in the Act. This means that the employer is required to take necessary action to prevent injury and harm to employees, including providing appropriate procedures, plant and equipment, and adequate instruction training and supervision, taking into account the nature of the work and what is known about the hazards that may arise. However, the employer is not held responsible for matters truly</p>
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	<p>(1) In this section –</p> <p><b>“covert operation”</b> means the performance of a function of a police officer in circumstances where –</p> <p>(a) a covert operation is undertaken by WA Police for the purpose of obtaining information about criminal activity;</p> <p>(b) performance of the function is not practicable without exposing a police officer to a risk of imminent and serious injury or imminent and serious harm to the police officer’s health; and</p>	<p>beyond the employer’s control, or capacity to reduce the risk, where the circumstances giving rise to the hazard could not be avoided.</p> <p>Nevertheless there are some provisions of the Act not limited by the concept of practicability, and could potentially conflict with police covert or dangerous operations. The most significant of these is the right of an employee to refuse to undertake unsafe work under section 26 of the Act.</p> <p>This clause therefore provides for the exclusion of limited provisions of the <i>Occupational Safety and Health Act</i> under certain circumstances, where the provision would adversely affect or could reasonably be expected to adversely affect a covert operation or a dangerous operation.</p> <p>(1) This subclause defines a “covert operation” and a “dangerous operation”. In order to meet the respective definitions, the performance of the function must not be practicable without exposing a police officer to a risk of imminent and serious injury or imminent and serious harm to health. This provides an added protection in that, if it is practicable to do the activity without exposing a police officer to the risk, then the Act applies in full.</p>
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	<p>(c) unless the performance of the function is secret or confidential, it would be likely that –</p> <p>(i) the effectiveness of the performance of the function is reduced; or</p> <p>(ii) a person is exposed to the danger of physical harm arising from the actions of another person;</p> <p><b>“dangerous operation”</b> means the performance of a function of a police officer in circumstances where performance of that function –</p> <p>(a) is reasonably necessary; and</p> <p>(b) is not practicable without exposing a police officer to a risk of imminent and serious injury or imminent and serious harm to the police officer’s health.</p> <p>(2) A police officer cannot refuse to work as mentioned in section 26(1) if the refusal to work would adversely affect, or could reasonably be expected to affect adversely, a covert operation or a dangerous operation.</p> <p>(3) An inspector cannot issue a prohibition notice under section 49(1) to prohibit an</p>	<p>(2),(3) These subclauses specify the two provisions of the Act, sections 26(1) and 49(1), that are excluded from application when their application would or could reasonably be expected to adversely affect a covert or dangerous operation. The provisions potentially subject to this appropriate exclusion relate to a police officer’s right to refuse work that he or she considers unsafe (section 26(1))</p>
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<p><b>43. Powers</b></p> <p>(1) An inspector may, for the purposes of this Act -</p> <p>(a) at all reasonable times of the day or night, enter, inspect and examine any workplace;</p> <p>(b) enter any workplace at any other time that the performance of his functions under this Act requires such entry;</p>	<p>activity if prohibiting the carrying on of the activity would adversely affect, or could reasonably be expected to affect adversely, a covert operation or a dangerous operation.</p> <p>”.</p> <p><b>7. Section 43 amended</b></p>	<p>and the issuance of a prohibition notice by an inspector (section 49(1)).</p> <p>These exclusions do not prevent the employer being liable under the Act for any breach of the employer’s duty under the Act that may occur in relation to a covert or dangerous operation. As mentioned earlier, such duties apply only so far as is practicable.</p> <p>Similarly, a police officer’s duties as an employee under the Act continue to apply in relation to a covert or dangerous operation. The standard of the employee’s duty is to take reasonable care (under the circumstances) for his or her own safety and health and that of others, and cannot extend to matters beyond the employee’s control.</p> <p><b>SECTION 43 AMENDED</b></p> <p>Clause 7</p>
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<ul style="list-style-type: none"><li>(c) when entering any workplace, take with him such equipment and materials as he considers appropriate;</li><li>(d) conduct such examination and inquiry as he considers necessary to ascertain whether there has been compliance with this Act;</li><li>(e) examine any plant, substance or other thing whatsoever at the workplace;</li><li>(f) take and remove samples of any substance or thing, without paying for it;</li><li>(g) take possession of any plant or thing for further examination or testing or for use as evidence;</li><li>(h) take photographs and measurements, and make sketches and recordings;</li><li>(i) require the production of, examine, and take copies or extracts of, any document;</li><li>(j) require that the workplace, or any part of it, be left undisturbed for as long as is specified in the requirement;</li><li>(k) interview, either in private or otherwise, as he considers appropriate, any person whom he finds at a workplace or whom he has reasonable grounds to believe</li></ul>		
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<p>is, or was at any time during the preceding 2 years, an employee working at a workplace;</p> <ul style="list-style-type: none"><li>(l) require any person whom he interviews under paragraph (k) to answer any questions put to him and, if the inspector considers it appropriate, to verify any such answer by statutory declaration;</li><li>(m) require any person to state his name and address;</li><li>(n) require the employer or any person who works at a workplace to render such assistance to the inspector as the inspector considers necessary for the performance of his functions under this Act;</li><li>(o) exercise such other powers as may be conferred on him by the regulations or as may be necessary for the performance of his functions under this Act.</li></ul> <p>(2) In exercising any of his powers under this Act an inspector may be accompanied by any other person whose assistance the inspector considers necessary, and that person may do such things as are necessary to assist the inspector in the performance of his functions, and any thing so done shall be deemed to have been done by</p>		
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<p>the inspector.</p> <p>(3) In carrying out the functions of an inspector under this Act, an inspector shall act in such a manner as to avoid unduly or unreasonably interfering with any work or work process.</p>	<p>Section 43(3) is amended by inserting after “work or work process” –</p> <p>“</p> <p>or affecting adversely a covert operation within the meaning of section 4A(1)</p> <p>”.</p> <p><b>8. Election of safety and health representatives by police officers before the commencement of this Act</b></p>	<p>Given the wide ranging powers of inspectors and the special nature of covert operations, this clause ensures that an inspector avoids adversely affecting a covert operation in the course of exercising his or her functions.</p> <p><b>ELECTION OF SAFETY AND HEALTH REPRESENTATIVES BY POLICE OFFICERS BEFORE THE COMMENCEMENT OF THIS ACT</b></p> <p>Clause 8 of the Bill</p> <p>This clause provides for those provisions of the <i>Occupational Safety and Health Act</i> necessary to support the election and training of safety and health representatives to come into effect nine months before the rest of the Act comes into effect. This enables representatives to be in place, trained, and ready to exercise their functions from day one of the application of the full provisions of the Act.</p> <p>The functions of safety and health representatives will not come into effect until the remainder of the Act, due to the need to have all the complementary duties and responsibilities in place before exercising</p>
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	<p>(1) In this section –</p> <p>“<b>commencement day</b>” means the day on which this Act comes into operation;</p> <p>“<b>police officer</b>” has the same meaning as it has in section 3(1) of the <i>Occupational Safety and Health Act 1984</i> on and after the commencement day;</p> <p>“<b>transition period</b>” means the period of 9 months ending immediately before the commencement day.</p> <p>(2) The provisions listed in the Table to this subsection are to be treated as being in</p>	<p>functions.</p> <p>The “transition period” of nine months provides a balance between:</p> <ul style="list-style-type: none"> <li>• the need to provide sufficient time to allow safety and health representatives to be elected and trained before the rest of the Act comes into effect, given the geographical distribution of police officers within Western Australia; and</li> <li>• the need to ensure such representatives are not elected too long before their functions come into effect.</li> </ul> <p>The process of election and training can occur at any time within the “transition period”.</p> <p>(1) This subclause provides for necessary definitions to apply, given that clause 8 will come into effect before the rest of the Bill, and therefore needs to stand alone.</p> <p>(2) The table provided under this clause identifies all the provisions of the legislation that will</p>
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	<p>operation during the transition period for the purposes of allowing police officers to elect safety and health representatives for a workplace and for the training of those representatives during that period.</p> <p style="text-align: center;"><b>Table</b></p> <ol style="list-style-type: none"> <li><b>1. This Act</b> <ul style="list-style-type: none"> <li>s. 4</li> <li>s. 5</li> </ul> </li> <li><b>2. Occupational Safety and Health Act 1984</b> <ul style="list-style-type: none"> <li>s. 3(1)      s. 32(2)(b) and (c)</li> <li>s. 29        s. 35(1)(e)</li> <li>s. 30        s. 35(3)(b)</li> <li>s. 31        s. 56(1)</li> <li>s. 32(1)</li> </ul> </li> <li><b>3. Occupational Safety and Health Regulations 1996</b> <ul style="list-style-type: none"> <li>r. 2.2</li> </ul> </li> </ol>	<p>apply to support the election and training of safety and health representatives during the transition period. They relate to:</p> <ol style="list-style-type: none"> <li><b>1. This Bill</b> <ul style="list-style-type: none"> <li>clause 4 – definitions</li> <li>clause 5 – provides for the Commissioner of Police to perform the functions of the Crown under the Act in relation to a police officer being treated as an employee of the Crown.</li> </ul> </li> <li><b>2. Occupational Safety and Health Act 1984</b> <ul style="list-style-type: none"> <li>s.3(1) – definitions</li> <li>s.29 – notices requiring election of safety and health representatives</li> <li>s.30 – consultation on matters relevant to elections</li> <li>s.31 – election of safety and health representatives</li> <li>s.32(1) – provides for two year term of office for safety and health representatives</li> <li>s.32(2)(b)&amp;(c) – provides for safety and health representative to cease to hold office if: <ul style="list-style-type: none"> <li>. ceases to be an employee at the workplace for which elected</li> <li>. resigns office by notice given to</li> </ul> </li> </ul> </li> </ol>
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		<p>employer</p> <p>s.35(1)(e) – requires employer, in accordance with the regulations, to permit a safety and health representative to take time off work, with pay, to attend a training course accredited under the Act.</p> <p>s.35(33)(b) – provides for regulations to prescribe the time that a safety and health representative is permitted to take of work to attend a training course accredited under the Act</p> <p>s.56(1) – creates an offence for an employer to discriminate against an employee or prospective employee by reason of the employee or prospective employee having been a safety and health representative or committee member, performance of a function as a safety and health representative or committee member, having given assistance and information to an inspector, safety and health representative or committee member, and having made a safety and health complaint to specified categories of persons.</p> <p><b>3. Occupational Safety and Health Regulations 1996</b></p> <p>r.2.2 – introductory courses for safety and health representatives</p>
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	<p>(3) The term of a safety and health representative elected before the commencement day begins, for the purpose of section 32(1) of the <i>Occupational Safety and Health Act 1984</i>, on the commencement day.</p> <p>(4) Despite subsection (3), regulation 2.2(3) of the <i>Occupational Safety and Health Regulations 1996</i> applies to a safety and health representative elected before the commencement day in relation to the first 12 months of being so elected.</p> <p>=====</p>	<p>(3) This subclause provides that the term of office of any safety and health representative elected during the “transition period” comes into effect on the day all the provisions of the Act apply to police (and hence expires two years later).</p> <p>This ensures that representatives elected during the transition period have a full two years during which they can exercise their functions, notwithstanding the fact that they were elected prior to their functions coming into effect.</p> <p>(4) Sub-regulation 2.2(3) requires a safety and health representative to endeavour to attend an introductory safety and health representative training course within twelve months of being elected. This clause clarifies that this requirement is preserved, applying from the date of election, notwithstanding the fact that the term of office commences on the “commencement date” under subclause 8(3).</p>
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