

# ACTS AMENDMENT (POLICE IMMUNITY) BILL 1999

## EXPLANATORY MEMORANDUM

The purpose of this Bill, which will amend the Police Act 1892, is to provide clear and unequivocal protection to members of the Police Service against civil action.

In this increasingly litigious society, police are more often finding themselves being sued as an individual for their actions as a police officer. Other people such as public servants paid by the State to provide a service to the community are protected by vicarious liability legislation where their actions are in good faith. This legislation seeks to extend similar protection to police acting lawfully in the performance of their functions as a member of the Police Service.

A variety of factors have underscored the need to introduce legislation that provides protection for police officers from civil liability claims arising from the execution of their duties.

First, the existing legislative provision is antiquated and regarded widely as unable to protect adequately police officers that are subject to civil proceedings. Section 138 of the *Police Act 1892* invokes Section H of *The Shortening Ordinance 1853*, which states that no action lies against any "policeman or constable" unless there is direct proof of corruption or malice. In addition, Section 53(K) of the *Police Act 1892* seeks to indemnify Police Officers from civil liability for anything done or omitted to be done in good faith.

The second factor is that significant changes have occurred in both statute and common law since the middle of last century, when these provisions were enacted, leading to concerns regarding their applicability today.

Thirdly, this matter has been one of the principal concerns held by the WA Police Union of Workers Inc. over the past few decades.

This Bill will provide the protection necessary for police officers to carry out their lawful duties in the firm knowledge that they will not be held liable for the consequences of any of their lawful actions, unless they are acting in a corrupt or malicious manner.

Outlined below is an examination of the contents of the Bill on a clause by clause basis.

### PART 1 - PREMILMINARY

**Clause 1**      Short title and citation

**Clause 2**      This clause provides for the Act to come into operation on the day on which it receives Royal Assent.

## PART 2 - POLICE ACT 1892 AMENDED

**Clause 3** This clause provides for the amendments in Part 2 to be made to the *Police Act 1892*

**Clause 4** Subclause (1) amends Section 53K of the *Police Act 1892* such that civil liability protection can be provided through new sections to the Act (Sections 136 and 137).

Subclause (2) repeals Section 53K(2), which relates to Section 138 of the *Police Act 1892*, which in turn is repealed by Clause 6 of the Bill.

**Clause 5** This clause inserts Sections 136 and 137 into the *Police Act 1892* as follows:

**Section 136** provides interpretations for Sections 137 and 138.

Subclause (1) provides a meaning for “**member of the Police Force**” as a person appointed under Part I, III or IIIA.

Under this definition a member of the Police Force includes:

- (i) the Commissioner of Police, officers holding commissions and non-commissioned officers;
- (ii) special constables employed to maintain the peace for such time as is deemed fit and necessary; and
- (iii) Aboriginal aides (known as Aboriginal Police Liaison Officers).

Subclause (2) provides that the term *doing of anything* includes *an omission to do anything*. This extends the protection under this Bill to any instance where a member of the Police Service has omitted to take any action that is considered reasonable and / or necessary in any circumstance.

**Section 137** provides the protection from personal liability.

Subclause (1) provides for this section to apply despite any other written law, with two notations, as follows.

Subclause (1)(a) provides that this Section is in addition to Section 5 of the *Criminal Code Act 1913*.

Subclause (1)(b) provides that this Section does not affect any right to recover damages from the owner or driver of a motor vehicle in respect of the death of or bodily injury to a person directly caused by, or by the driving of, the motor vehicle. This means that the recovery of any personal damages arising from a motor vehicle accident will be sought through the existing third party insurance system rather than through the provisions of this Bill.

Subclause (2) provides for this section to apply immediately following the commencement of the *Acts Amendment (Police Immunity) Act 1999*.

Subclause (3) provides that a member of the police force is protected from personal liability for anything that the member has done, under the following conditions:

- (i) there will be no protection for any action which is deemed to have been malicious or corrupt;
- (ii) the member is protected for anything done while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

This means that members are protected for any action undertaken whether or not they are on duty and whether or not that action is provided for under any written law, the common law or other law.

As per Section 136, Subclause (2), this protection is also provided where it is deemed that a member of the Police Force omitted to act in an instance where it was considered reasonable or necessary for that member to have taken some action.

Subclause (4) provides the same protections, under the same conditions, as in subclause (3) for any person who is assisting a member of the Police Force. This will ensure that any person who volunteers, or is requested to assist a police officer is not personally liable for any act or omission.

Subclause (5) provides for the Crown to be held liable for those situations covered under subclauses (3) and (4).

Subclause (6) protects the Crown from exemplary or punitive damages. These are awarded by courts in order to make an example of, or to punish the defendant, rather than to provide compensation to the claimant. For this reason, it is not considered appropriate for the Crown to assume responsibility for such damages.

Subclause (7) refers to an action in tort being defended by the Crown under the provisions of the Bill. It provides that the Crown can recover the costs of defending any person, as well as any damages awarded against the Crown, where the person does not cooperate fully with the Crown in defence of the action.

This subclause recognises that there is a duty on the person, who is being defended rightfully by the Crown under these provisions, to cooperate fully in the defence of the action.

Subclause (8) explains that the term “does not cooperate fully with the Crown” is defined as where a person refuses:

- (a) to answer any question, including a question the answer to which is or may be self-incriminating; or
  - (b) to produce any object or recorded information in the person’s possession or control,
- that is relevant to the defence of the action.

Subclause (9) refers to a person who, in cooperating with the Crown in the defence of an action referred to in subclause (8), gives an answer that is or may be self-incriminating. Under this subclause, such an answer is not admissible in any criminal or disciplinary proceedings against the person except in proceedings for a criminal or disciplinary offence arising from giving a false answer.

This provision supports subclause (7) by acting as a penalty for providing false information to the Crown.

#### **Clause 6**

This clause repeals the existing Section 138 of the *Police Act 1892* and replaces it with a new Section 138.

**Section 138** provides that the Crown is not vicariously liable for corrupt or malicious acts by people who would otherwise be protected under the Bill.

Subclause (1) defines the conditions under which Section 138 applies. It provides that Section 138 applies if, in an action in tort, the claimant is awarded damages against a member of, or a person assisting a member of the Police Force, for anything done maliciously or corruptly. Also, the thing to which the proceedings refer must have occurred after the commencement of the *Acts Amendment (Police Immunity) Act 1999*.

Subclause (2) provides that the claimant may request the Treasurer of Western Australia to pay any damages awarded (other than exemplary or punitive damages) and any costs ordered to be paid by the claimant. The Treasurer will have discretion over whether this request is granted, subject to subclauses (3) and (4).

Subclause (3) provides that the Treasurer may pay the claimant all or some of the damages and costs if satisfied of two things. First, that the claimant is unlikely to recover them from the defendant. Secondly, that the defendant is not likely to benefit or advantage if the claimant were paid the damages and costs.

Subclause (4) provides that any amount paid by the Treasurer to the claimant is considered a debt owed by the defendant to the Crown. Further that debt may be recovered through the courts.

### PART 3 – CONSEQUENTIAL AMENDMENTS

- Clause 7** This clause amends Section 60 of the *Explosives and Dangerous Goods Act 1961*, which provides personal liability protection to Police Officers acting under that legislation. The *Acts Amendment (Police Immunity) Act 1999* will provide protection from personal liability regardless of whether the action was carried out under the provisions of any written or other law.
- Clause 8** This clause amends Section 160A of the *Mining Act 1978*, which provides personal liability protection to Police Officers acting under that legislation. The *Acts Amendment (Police Immunity) Act 1999* will provide protection from personal liability regardless of whether the action was carried out under the provisions of any written or other law.
- Clause 9** This clause amends Section 101 of the *Road Traffic Act 1974*, which provides personal liability protection to Police Officers acting under that legislation. The *Acts Amendment (Police Immunity) Act 1999* will provide protection from personal liability regardless of whether the action was carried out under the provisions of any written or other law.
- Clause 10** This clause amends Section 61 of the *Transport Coordination Act 1968*, which provides personal liability protection to Police Officers acting under that legislation. The *Acts Amendment (Police Immunity) Act 1999* will provide protection from personal liability regardless of whether the action was carried out under the provisions of any written or other law.
- Clause 11** This clause amends Section 160A of the *Veterinary Preparations and Animal Feeding Stuffs Act 1976*, which provides personal liability protection to Police Officers acting under that legislation. The *Acts Amendment (Police Immunity) Act 1999* will provide protection from personal liability regardless of whether the action was carried out under the provisions of any written or other law.