

Western Australia

## **Police Amendment Bill 2002**

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### CONTENTS

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1.	Short title	1
2.	Commencement	2
3.	The Act amended	2
4.	Section 8 amended	2
5.	Section 23 amended	3
6.	Part IIB inserted	3
7.	Section 38A amended	20
8.	Section 138A amended	21
9.	Transitional provisions	21
10.	<i>Industrial Relations Act 1979</i> amended	25



Western Australia

LEGISLATIVE ASSEMBLY

**Police Amendment Bill 2002**

**A Bill for**

**An Act to amend the *Police Act 1892* —**

- **to provide a procedure for removing members of the Police Force and for dealing with appeals in relation to those removals;**
- **to amend the maximum fine for disciplinary offences, and for related purposes.**

The Parliament of Western Australia enacts as follows:

**1. Short title**

This Act may be cited as the *Police Amendment Act 2002*.

**s. 2**

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**2. Commencement**

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

5     **3. The Act amended**

The amendments in this Act are to the *Police Act 1892\**, unless otherwise indicated.

[\* *Reprinted as at 12 January 2001.*

*For subsequent amendments see Act No. 6 of 2002.]*

10    **4. Section 8 amended**

- (1) Section 8 is amended by inserting before “The Governor” the subsection designation “(1)”.
- (2) At the end of section 8 the following subsections are inserted —  
“

15           (2) The powers of removal referred to in subsection (1) can only be exercised if the Commissioner of Police has complied with section 33L and that removal action has not been revoked under section 33N(1).

20           (3) Subsection (2) does not apply where a person is removed from a commissioned office to be appointed to another commissioned office so long as that appointment —

25               (a) is to an office at a level not less than the level of the office from which the person was removed; or

              (b) is made with the consent of the person.

- (4) Subsection (2) does not apply to the removal of a police probationary constable.

”.

**5. Section 23 amended**

Section 23(4)(b) is deleted and the following paragraph is inserted instead —

“

- 5                   (b) a fine of not more than 3% of the annual base rate of pay of the member or cadet;

”.

**6. Part IIB inserted**

After section 33J the following Part is inserted —

10   “

**Part IIB — Removal of members****Division 1 — Preliminary****33K. Interpretation**

In this Part, unless the contrary intention appears —

15                   **“appellant”** means a person who institutes an appeal under section 33P;

**“Chief Commissioner”** has the same meaning as it has in the *Industrial Relations Act 1979*;

20                   **“industrial Commissioner”** has the same meaning as “Commissioner” has in the *Industrial Relations Act 1979*;

**“legal practitioner”** has the same meaning as “practitioner” has in the *Legal Practitioners Act 1893*;

25                   **“member”** means —

- (a) a commissioned officer;
- (b) a non-commissioned officer;
- (c) a constable;
- (d) an aboriginal aide;

s. 6

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**“removal action”** means —

- (a) a recommendation by the Commissioner of Police that the Minister advise the Governor to remove a commissioned officer under section 8;
- (b) a recommendation by the Commissioner of Police that the Minister approve the removal of a non-commissioned officer or constable under section 8;
- (c) the revocation of the appointment of an aboriginal aide under section 38A(1a);

**“removal from office”** means —

- (a) a removal under section 8; or
- (b) a revocation of the appointment of an aboriginal aide under section 38A(1a);

**“Senior Commissioner”** has the same meaning as it has in the *Industrial Relations Act 1979*;

**“WAIRC”** means The Western Australian Industrial Relations Commission continued and constituted under the *Industrial Relations Act 1979*.

**Division 2 — Removal of members**

**33L. Notice of loss of confidence to be given before the removal action is taken**

- (1) If the Commissioner of Police does not have confidence in a member’s suitability to continue as a member, having regard to the member’s integrity, honesty, competence, performance or conduct, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member’s suitability to continue as a member.

- 5 (2) If a notice is given to a member under subsection (1),  
the member may, before the expiration of the period of  
21 days after the day on which the notice is given or  
such longer period as is allowed by the Commissioner  
of Police, make written submissions to the  
Commissioner of Police in respect of the grounds on  
which the Commissioner has lost confidence in the  
member's suitability to continue as a member.
- 10 (3) After the end of the period referred to in subsection (2),  
the Commissioner of Police shall —  
(a) decide whether or not to take removal action;  
and  
(b) give the member written notice of the decision.
- 15 (4) The Commissioner of Police shall not decide to take  
removal action unless the Commissioner —  
(a) has taken into account any written submissions  
received from the member under subsection (2)  
during the period referred to in that subsection;  
and  
20 (b) still does not have confidence in a member's  
suitability to continue as a member, having  
regard to the member's integrity, honesty,  
competence, performance or conduct.
- 25 (5) If the Commissioner of Police decides to take removal  
action —  
(a) the notice under subsection (3)(b) shall advise  
the member of the reasons for the decision;  
(b) except to the extent that the regulations  
otherwise provide, the Commissioner shall,  
30 within 7 days of giving the notice of the  
decision under subsection (3)(b), provide to the  
member a copy of any documents and make  
available to the member for inspection any  
other materials that were examined and taken

**s. 6**

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into account by the Commissioner in making the decision; and

- (c) the removal action may be taken when, or at anytime after, the notice under subsection (3)(b) is given.

**33M. Maintenance payment**

- (1) If removal from office occurs by or as a result of removal action taken in accordance with section 33L, the member is entitled to receive a maintenance payment for the period of 28 days after the day on which the member is removed.
- (2) In relation to a period after the 28 day period referred to in subsection (1), the Minister may, in exceptional circumstances, direct that a maintenance payment shall be paid to the member for a specified period.
- (3) For the purpose of subsection (2), the specified period is such period not exceeding 6 months as is specified by the Minister but in any event ending on the day any appeal instituted under section 33P is determined by the WAIRC.
- (4) Any maintenance payment is to be calculated on the basis of the salary of the member at the time of removal from office.

**33N. Revocation of removal action**

- (1) If removal action has been taken in accordance with section 33L but removal from office has not resulted from it, the Commissioner of Police may, by notice in writing to the Minister, revoke the removal action.
- (2) If removal from office has occurred by or as a result of removal action taken in accordance with section 33L, the Commissioner of Police may, by notice in the *Gazette*, revoke the removal action.



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- (3) The Commissioner of Police shall not revoke removal action under subsection (2) in the case of a commissioned officer without the approval of the Minister.
- 5 (4) Subsection (2) applies even if an appeal has been instituted under section 33P in respect of the decision under section 33L to take removal action.
- (5) Despite any other enactment, if removal action is revoked under subsection (2) the removal from office is to be taken to be of no effect and to have never had any effect.
- 10 (6) If the Commissioner of Police revokes removal action in relation to a member under subsection (2), the member is not entitled to be paid his or her salary for any period the member received a maintenance payment under section 33M.
- 15

**33O. Resignation of member who has been removed**

- (1) Even if a member has been removed from office by or as a result of removal action taken in accordance with section 33L, the member may resign at any time before the expiration of the period of 28 days after the day on which the removal occurs.
- 20 (2) Subsection (1) does not apply if an appeal has been instituted under section 33P in respect of the decision to take removal action.
- 25 (3) A resignation under subsection (1) takes effect at the end of the 28 day period referred to in the subsection.
- (4) Despite any other enactment, if a member resigns under subsection (1), the removal from office is to be taken to be of no effect and to have never had any effect.
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**Division 3 — Appeal in relation to removal**

**33P. Appeal right**

- 5 (1) A member who has been removed from office by or as a result of removal action taken in accordance with section 33L may appeal to the WAIRC on the ground that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair.
- 10 (2) The appellant shall institute an appeal by a notice to the Commissioner of Police stating —
- (a) the reasons for the decision the subject of the appeal being harsh, oppressive or unfair; and
- (b) the nature of the relief sought.
- 15 (3) The appeal shall not be instituted later than 28 days after the day on which the member was removed from office and shall not be instituted if the member has resigned under section 33O(1).
- 20 (4) For the purposes of proceedings relating to an appeal instituted under this section the WAIRC is to be constituted by not less than 3 industrial Commissioners, at least one of whom shall be the Chief Commissioner or the Senior Commissioner.
- 25 (5) The parties to an appeal are the appellant and the Commissioner of Police and no other person may be a party to the appeal.

**33Q. Proceedings on appeal**

- 30 (1) On the hearing of an appeal instituted under this Part, the WAIRC shall proceed as follows —
- (a) first, it shall consider the Commissioner of Police's reasons for deciding to take removal action;

- 
- (b) secondly, it shall consider the case presented by the appellant as to why that decision was harsh, oppressive or unfair;
- (c) thirdly, it shall consider the case presented by the Commissioner in answer to the appellant's case.
- (2) The appellant has at all times the burden of establishing that the decision to take removal action was harsh, oppressive or unfair.
- (3) Subsection (2) has effect despite any law or practice to the contrary.
- (4) Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to —
- (a) the interests of the appellant; and
- (b) the public interest which is taken to include —
- (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
- (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

**33R. New evidence**

- (1) New evidence shall not be tendered to the WAIRC during a hearing of an appeal instituted under this Part unless the Commission grants leave under subsection (2) or (3).
- (2) The WAIRC may grant the Commissioner of Police leave to tender new evidence if —
- (a) the appellant consents; or

**s. 6**

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- (b) it is satisfied that it is in the interests of justice to do so.
- (3) The WAIRC may grant the appellant leave to tender new evidence if —
- 5 (a) the Commissioner of Police consents; or
- (b) the Commission is satisfied that —
- 10 (i) the appellant is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information;
- (ii) the new evidence might materially have affected the Commissioner of Police's decision to take removal action; or
- (iii) it is in the interests of justice to do so.
- 15 (4) In the exercise of its discretion under subsection (3) the Commission shall have regard to —
- (a) whether or not the appellant was aware of the substance of the new evidence; and
- 20 (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access,
- before his or her removal from office.
- 25 (5) If the Commissioner of Police is given leave to tender new evidence under subsection (2), the WAIRC shall give the appellant a reasonable opportunity to consider the new evidence and the appellant may tender new evidence without the leave of the WAIRC under this section in response to the new evidence tendered by the Commissioner.
- 30 (6) If the appellant is given leave to tender new evidence under subsection (3), the WAIRC shall give the

Commissioner a reasonable opportunity to consider the new evidence.

- 5 (7) If, having considered any new evidence, the Commissioner of Police revokes the removal action under section 33N(2), the Commissioner shall give the WAIRC notice of the revocation and the hearing of the appeal is discontinued when the WAIRC receives the notice.
- 10 (8) If the Commissioner of Police does not give notice under subsection (7), the hearing of the appeal shall continue but the Commissioner of Police may —
- 15 (a) reformulate his or her reasons for not having confidence in the appellant's suitability to continue as a member, having regard to the appellant's integrity, honesty, competence, performance or conduct; and
- (b) tender new evidence without the leave of the WAIRC under this section in response to the new evidence tendered by the appellant.
- 20 (9) Reasons reformulated under subsection (8)(a) may differ from, or be additional to, the reasons given to the appellant under section 33L(5)(a).
- (10) If the Commissioner of Police reformulates reasons under subsection (8)(a) —
- 25 (a) the Commissioner shall give the WAIRC and the appellant notice in writing of the reasons before the resumption of the hearing of the appeal; and
- 30 (b) the WAIRC shall consider the reasons as if they had been reasons given to the appellant under section 33L(5)(a).

s. 6

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(11) In this section —

“**new evidence**” means evidence other than evidence of —

- 5                   (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
- 10                   (b) the notice given under section 33L(1);
- (c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);
- (d) the notice given under section 33L(3)(b); and
- (e) a notification of the removal from office.

15                   **33S. Application of *Industrial Relations Act 1979* to appeals**

                     The provisions of the *Industrial Relations Act 1979* listed in the Table to this section apply, subject to this Part, any necessary modifications, and any specific modifications set out in that Table, to and in relation to

20                   an appeal and a determination of an appeal instituted under this Part.

**Table**

- s. 26(1)(a)  
and (b)
- s. 26(3)
- s. 27(1)(b), (c), (d), (e), (f), (h), (ha), (hb), (l), (m), (n), (o)  
and (v)
- s. 27(1a)
- An order under section 27(1)(o) may be made by any one of the industrial commissioners constituting the WAIRC to hear the appeal.

- s. 28 But only in relation to powers conferred by section 27 listed in this Table.
- s. 31(1) Paragraphs (b) and (c) do not apply but the subsection is to be read as if it contained the following paragraphs —
- “ (b) with the leave of the Commission, by an agent; or
- (c) by a legal practitioner. ”.
- s. 31(3)
- s. 31(5)
- s. 31(6)
- s. 32 Section 32(1) is to be read as if a reference to “Where an industrial matter has been referred to the Commission the Commission shall, unless it” were a reference to “Where the Commission is dealing with an appeal instituted under section 33P of the *Police Act 1892*, a member of the Commission may recommend that the parties to the appeal, unless he or she”.
- References to “the matter” and “an industrial matter” are to be read as if they were references to “the appeal”.
- For the purposes of subsections (2) and (3), “Commission” does not include an industrial commissioner constituting the WAIRC to hear the appeal.
- Subsections (4), (6), (7) and (8) do not apply.

**s. 6**

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- s. 33            A summons shall not be issued under section 33(1)(a) to the Governor.  
A summons may be issued to the Commissioner of Police or the Minister but only at the direction of a Commissioner appointed under the *Industrial Relations Act 1979* if that Commissioner is satisfied that there are extraordinary grounds for doing so.  
A summons may not be issued to any other person except at the direction of a Commissioner.
- s. 34            A reference in subsection (1) to “an award, order, or declaration” is to be read as if it were a reference to “an order”.  
A reference in subsection (3) to “the President, the Full Bench, or the Commission” is to be read as if it were a reference to “the Commission”.  
A reference in subsection (4) to “no award, order, declaration, finding, or proceeding of the President, the Full Bench, or the Commission” is to be read as if it were a reference to “no decision, order, finding or proceeding of the Commission”.
- s. 35
- s. 36
- s. 86            But not in relation to costs and expenses other than expenses of witnesses.
- s. 90            A reference in subsection (1) to “any decision of the President, the Full Bench, or the Commission in Court Session” is to be read as if it were a reference to “a decision of the Commission under section 33U of the *Police Act 1892*”.



**33T. Adjournment in relation to an appellant charged with a relevant offence**

(1) If an appellant has been —

(a) charged with an offence relating to any matter, act or omission that was taken into account by the Commissioner of Police in deciding that he or she did not have confidence in the appellant's suitability to continue as a member; and

(b) the charge has not been finally determined by a court or otherwise disposed of,

the Commissioner or the appellant may apply to the WAIRC for an adjournment of the hearing of the appeal.

(2) If an application is made by the Commissioner of Police, the WAIRC may adjourn the hearing of the appeal if it considers that it is in the interests of justice to do so.

(3) If an application for an adjournment is made by the appellant, the WAIRC shall adjourn the hearing of the appeal.

(4) An adjournment under subsection (3) shall be for such period not exceeding 12 months as is requested by the appellant.

(5) If the charge is finally determined by a court or otherwise disposed of before the expiration of the period of the adjournment, the Commissioner of Police or the appellant may apply to the WAIRC for the hearing of the appeal to be resumed on a date specified by the Commission.

(6) Before the expiration of any period of adjournment under this section, the Commissioner of Police or the

appellant may apply to the WAIRC for a further adjournment under this section and, if it is in the interests of justice to do so, the WAIRC may grant a further adjournment for a period specified by it.

### 33U. Decision by the WAIRC

- 5
- (5) In deciding the amount of compensation for the purpose of making an order under subsection (3), the WAIRC shall have regard to —
- (a) the efforts, if any, of the Commissioner of Police and the appellant to mitigate the loss suffered by the appellant as a result of the removal;
- (b) any maintenance payment received by the appellant under section 33M;
- 10 (c) any redress the appellant has obtained under another enactment where the evidence necessary to establish that redress is also the evidence necessary to establish on the appeal that the removal was harsh, oppressive or unfair; and
- 15 (d) any other matter that the WAIRC considers relevant.
- (6) The amount ordered to be paid under subsection (3) shall not exceed 12 months' remuneration as a member.
- 20 (7) For the purpose of subsection (5), the WAIRC may calculate the amount on the basis of the average rate of remuneration as a member received by the appellant during any relevant period of service.
- 25 (8) If the WAIRC makes an order under subsection (2), the appellant shall not be entitled to be paid his or her remuneration as a member for any period the appellant received a maintenance payment under section 33M.
- 30 (9) An order under this section may require that it be complied with within a specified time.

**33V. Restriction on publication**

- (1) If the WAIRC is satisfied that it is in the public interest, it may direct either or both that —

- (a) any evidence given before the Commission;  
(b) the contents of any document produced to the Commission,

on an appeal must not be published or must not be published except in such manner, and to such persons, as the Commission specifies.

- (2) A person must not make a publication in contravention of a direction given under this section.

Penalty: Imprisonment for 12 months and a fine of \$4 000.

**Division 4 — General**

**33W. Effect of charge for an offence or an acquittal**

To avoid doubt, it is declared that if a member —

- (a) has been charged with committing an offence;  
or  
(b) has been acquitted of an offence,

that charge, the existence of proceedings relating to that charge or the acquittal does not preclude the Commissioner of Police from taking any action under this Part in relation to any matter, act or omission relating to or being an element of the offence.

**33X. Failure to comply with procedure**

An act or omission of the Governor, the Minister or the Commissioner of Police shall not be invalid or called in question on the ground of a failure to comply with the procedure prescribed under Division 2 or regulations relating to the removal of members on the ground of a

failure to comply with the procedure prescribed under that Division or those regulations if the failure is not substantive.

**33Y. Transfer, standing down and leave of member**

- 5 (1) Nothing in this Part derogates from the Commissioner of Police's power to —
- (a) transfer a member;
- (b) stand a member down from performing that member's usual duties on full pay until the member is directed by the Commissioner to return to those duties; or
- 10 (c) allocate duties to a member other than the member's usual duties.
- (2) If the Commissioner stands down a member who is being dealt with under this Part, the Commissioner shall review the decision to stand the member down every 60 days and advise the member in writing of the result of the review.
- 15 (3) The Commissioner shall not direct a member who is being dealt with under this Part to take leave during the period the member is being dealt with under this Part unless the leave is leave that has accrued during any period that the member is stood down from performing the member's usual duties.
- 20

**33Z. Review of Part**

- 25 (1) In this section —
- “commencement day” means the day on which section 6 of the *Police Amendment Act 2002* comes into operation.
- 30 (2) The Minister is to carry out a review of the operation and effectiveness of this Part as soon as is practicable

**s. 7**

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after the expiration of 24 months after the commencement day and in the course of that review the Minister is to consider and have regard to —

- 5                   (a) the effectiveness of the Part;
- (b) the need for the retention of the Part; and
- (c) any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Part.
- 10           (3) Without limiting subsection (2), in carrying out a review under that subsection, the Minister shall consult with and have regard to the views of the Chief Commissioner of The Western Australian Industrial Relations Commission, the Commissioner of Police and the Western Australian Police Union of Workers.
- 15           (4) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared (and in any event not more than 30 months after the commencement day), cause it to be laid before each House of Parliament.

”.

**7. Section 38A amended**

Section 38A(1) is repealed and the following subsections are inserted instead —

“

- 25           (1) The Commissioner of Police and any commissioned officer of police authorised in that behalf by the Commissioner may, in writing, appoint an aboriginal person to be an aboriginal aide.
- 30           (1a) Subject to section 33L(5)(c), the Commissioner of Police may, by order, revoke any appointment under subsection (1).

”.

**8. Section 138A amended**

After section 138A(3) the following subsection is inserted —

“

(4) Without limiting subsection (1), regulations may be made —

(a) requiring and regulating the provision of documents or other material by the Commissioner of Police to a member who has been given a notice under section 33L(1);

(b) prescribing the procedure to be followed in relation to a removal from office under section 8 or the revocation of an appointment under section 38A;

(c) prescribing restrictions in relation to any period during which consideration is being given to a member's suitability to continue as a member of the Police Force on the exercise of any power of the Commissioner of Police or the Governor to suspend the member's pay; and

(d) prescribing the means of service of documents that are required to be served under Part IIB or regulations relating to that Part.

”.

**9. Transitional provisions**

(1) In this section —

**“commencement day”** means the day on which section 6 of this Act comes into operation;

**“member”** has the same meaning as it has in section 33K of the *Police Act 1892* (as inserted by section 6 of the *Police Amendment Act 2002*).

**s. 9**

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(2) If on or after 5 July 2002 and before the commencement day —

(a) a person is removed under section 8 of the *Police Act 1892*; or

(b) a person's appointment is revoked under section 38A(1)(b) of that Act,

because the Commissioner of Police does not have confidence in the person's suitability to continue as a member, the provisions of Part IIB of the *Police Act 1892*, listed in the Table to this subsection, as inserted by section 6 of the *Police Amendment Act 2002*, apply to that removal or revocation as if the removal or revocation took place on the commencement day but subject to any necessary modifications and any modifications set out in the Table.

**Table**

s. 33K

s. 33N The reference to removal action taken under section 33L and removal from office is to be read as if it referred to action referred to in paragraph (a) or (b).

s. 33P Subsection (1) does not apply but the section is to be read as if it contained the following subsection —

“

(1) A person —

(a) who is removed under section 8 of the *Police Act 1892*; or

(b) whose appointment is revoked under section 38A(1)(b) of that Act,

may appeal to the WAIRC on the ground that the removal or revocation decision of the Commissioner of Police was harsh, oppressive or unfair.

”.

s. 33Q



s. 33R In subsections (9) and (10)(b), the references to the “reasons given to the appellant under section 33L(5)(a)” are to be read as a reference to reasons given by the Commissioner of Police to the appellant before the commencement day relating to or arising out of the member’s removal under section 8 of the *Police Act 1892* or revocation of appointment under section 38A(1)(b) of that Act.

In subsection (11), in the definition of “new evidence” —

- (a) in paragraph (a), the reference to removal action is to be read as a reference to action referred to in paragraph (a) or (b) of this subsection;
- (b) paragraphs (b), (c), (d) and (e) do not apply but the definition is to be read as if it contained the following paragraphs —

“

- (b) any notice given to the appellant by the Commissioner of Police before the day on which section 6 of the *Police Amendment Act 2002* comes into operation relating to or arising out of the member’s removal under section 8 or revocation of appointment under section 38A(1)(b) of the *Police Act 1892*;
- (c) any written submission made before the day on which section 6 of the *Police Amendment Act 2002* comes into operation by the appellant to the Commissioner of Police relating to or arising out of the member’s removal under section 8 or revocation of appointment under section 38A(1)(b) of the *Police Act 1892*;
- (d) a notification before the day on which section 6 of the *Police Amendment Act 2002* comes into operation by the Commissioner of Police to the appellant that the appellant was removed under section 8 of the *Police Act 1892* or that the

**s. 9**

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appellant's appointment was revoked under  
section 38A(1)(b) of that Act.

”.

s. 33S-33Y

- (3) If before the commencement day the Commissioner of Police has lost confidence in a member's suitability to continue as a member and has given the member a notice of intention but has not —

- 5           (a) removed the member under section 8 of the *Police Act 1892*; or
- (b) revoked the member's appointment under section 38A(1)(b) of that Act,

10           Part IIB of the *Police Act 1892*, as inserted by section 6 of the *Police Amendment Act 2002*, applies with any necessary modifications as if —

- (c) that notice were a notice given under section 33L(1) of the *Police Act 1892*; and
- 15           (d) the notice were given to the member on the commencement day.

- (4) Part IIB of the *Police Act 1892*, as inserted by section 6 of the *Police Amendment Act 2002*, does not affect any legal proceedings commenced before, on or after the commencement day relating to —

- 20           (a) the removal of a person under section 8 of the *Police Act 1892*; or
- (b) the revocation of a person's appointment under section 38A(1)(b) of that Act,

before the commencement day.

**10. Industrial Relations Act 1979 amended**

- (1) The amendment in this section is to the *Industrial Relations Act 1979*\*.

[\* Reprinted as at 4 February 2000.

5       For subsequent amendments see 2001 Index to Legislation of Western Australia, Table 1, p. 177 and Act No. 20 of 2002.]

- (2) After section 113(1)(c) the following paragraph is inserted —

“

- 10       (d) without limiting paragraph (c), regulating the practice and procedure to be followed in relation to appeals under section 33P of the *Police Act 1892*;

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