

POLICE AMENDMENT BILL 2002

CLAUSE NOTES

Clause 1. Short Title

Provides for the Act to be cited as the *Police Amendment Act 2002*.

Clause 2. Commencement

The Act comes into operation on a day fixed by proclamation. Different days may be fixed for the commencement of different provisions.

(Transitional provisions are set out in clause 9 of the Bill. These set out the application of the Act to matters where the removal of a police officer or aboriginal aide is already in progress but has not been completed before the commencement of the Act or where the removal has occurred after 5 July 2002 but before the commencement of the Act.)

Clause 3. The Act amended

Amendments in this Bill are to the *Police Act 1892*. A consequential amendment is also made by clause 10 of the Bill to the *Industrial Relations Act 1979*.

Clause 4. Section 8 amended

Amends the power to remove members of the police force under section 8 of the Act by introducing a requirement to the effect that before a member can be removed from office under section 8 the Commissioner must have lost confidence in the member's suitability to continue as a member having regard to the member's integrity, honesty, competence, performance or conduct. Procedures for the removal are set out in section 33L, introduced by clause 6 of the Bill.

Section 8(3) clarifies that the above requirement and procedures do not apply where a person is required to be removed from an existing commissioned office to be appointed to another commissioned office, provided that the new office is at least of the same level or the person consents.

Section 8(4) clarifies that the above requirement and procedures do not apply to the removal of police probationary constables. They will continue to be removed under the general section 8 power of removal and regulation 505A of the *Police Force Regulations 1979*.

The ability to dismiss or discharge a member following conviction of a disciplinary offence under s23 of the *Police Act 1892* remains unaffected.

Clause 5. Section 23 amended

Increases the existing maximum fine that can be imposed on a member or cadet found to have committed a disciplinary offence from \$200 to not more than 3% of the annual base rate of pay of the member or cadet.

Clause 6. Part IIB inserted

Part IIB – Removal of members

Inserts a new Part IIB into the *Police Act 1892* in relation to the process for removing members of the police force / revoking the appointment of aboriginal aides (Division 2) and subsequent appeal right to the Western Australian Industrial Relations Commission ("WAIRC") (Division 3).

Division 1 – Preliminary

Section 33K. Interpretation

Inserts definitions for the purposes of Part IIB.

The definition of "member" extends to aboriginal aides. Except for the absence of a requirement of Ministerial involvement, aboriginal aides are to be subject to the same removal and appeal process as ordinary members.

The definition of "removal action" relates to the initial action taken by the Commissioner under s33L to effect the removal of a member after he has given the member an opportunity to respond to the grounds on which he has lost confidence in the member's suitability to remain as a member. In the case of a constable or officer, this involves a recommendation to the Minister. In the case of an aboriginal aide, it involves the revocation of the aide's appointment.

The definition of "removal from office" refers to the actual removal of a member from office. Non-commissioned officers and constables are removed by the Commissioner with Ministerial approval, commissioned officers are removed by the Governor and aboriginal aides are removed by the Commissioner by revoking their appointment. In the case of aboriginal aides, "removal from office" occurs at the time when "removal action" is taken because there is no requirement for Ministerial approval.

Division 2 – Removal of members

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

- (1) Sets out the procedure to be followed to remove a member where the Commissioner does not have confidence in the member's suitability to continue as a member having regard to the member's integrity, honesty, competence, performance or conduct. They are sufficiently broad to ensure that the

Commissioner retains a wide managerial discretion to cause members to be removed where their suitability is in question. They are also broad enough to ensure the Commissioner is able to remove a member who is medically unfit to continue performing the duties of a member.

- (2) The member is required to be given a written notice of the grounds of the Commissioner's loss of confidence and at least 21 days to provide a written submission to the Commissioner in relation to the grounds on which the Commissioner has lost confidence. This affords the member procedural fairness by giving the member a reasonable opportunity to respond to the Commissioner's concerns. The time frame also reflects the intention that the process be expeditious due to its managerial nature.

- (3) and (4)

The Commissioner must give the member written notice of his decision whether to take removal action. If, despite taking into account the written submission, the Commissioner still has a loss of confidence in the member's suitability, he may take "removal action" (defined in s33K). In the case of an aboriginal aide, the aide's appointment will be revoked. In the case of other members a recommendation will be made to the Minister. If the Minister endorses the recommendation the Commissioner (in the case of non-commissioned officers) or the Governor (in the case of commissioned officers) will then remove the member under section 8 of the Act.

- (5) Where the Commissioner decides to take removal action, certain steps must be taken to disclose to a member information in relation to the decision. The written notice of the decision must advise the member of the Commissioner's reasons for decision. The nature and extent of the reasons will depend on the circumstances but, given the managerial and summary nature of the decision, are not expected to be elaborate. Within 7 days of providing the notice, the Commissioner is also required to provide to the member a copy of any documents and make available to the member for inspection any other materials that the Commissioner examined and took into account in making the decision. Materials recognised by the Courts as generally being privileged from production for reasons including legal professional privilege and public interest immunity are intended to be excluded from this disclosure requirement by regulation.

Section 33M. Maintenance payment

Significantly modifies the practice under previous administrative arrangements whereby members could appeal to the WAIRC after the Commissioner recommended their removal, but before being removed. Members also continued to receive pay and could generally resign prior to the appeal being determined. This acted as an incentive for members to appeal, even where the appeal had no merit.

Now a member removed from office will receive a maintenance payment, based on their previous salary, for 28 days after being removed. During this period the member may resign (see section 33O), appeal to the WAIRC (see section 33P) or take no further action.

While members will no longer receive pay during the appeal process, the Minister is vested with a discretion, in exceptional circumstances, to direct that the member be paid a further maintenance payment for no more than 6 months pending determination of an appeal.

Section 33N. Revocation of removal action

Allows the Commissioner to revoke his or her decision to take “removal action” (see definition in s33K) at any time (including during the course of any subsequent appeal). Where revocation occurs after a member has actually been removed from office, a notice must be published in the Gazette to formalise the revocation and Ministerial approval is required in the case of commissioned officers in recognition that the original removal from office was given effect to by the Governor.

The effect of a revocation is that the member is to be treated as if the member had never been removed from office. The member’s entitlements to remuneration will therefore be reinstated, except to the extent that the member has received a maintenance payment. This ensures flexibility so that the Commissioner is able to promptly and effectively reinstate a member in circumstances such as where, as a result of “new evidence” (see s33R), his confidence in their suitability to continue as a member is restored. The Commissioner is not prevented from re-initiating the loss of confidence removal process at a later date if he or she considers it to be appropriate.

33O. Resignation of member who has been removed

Enables a member who has been removed from office to resign in substitution for being removed, within 28 days of the removal, provided that the member has not appealed. This provision is intended to encourage members not to lodge frivolous appeals. It reflects a recognition that removal of a member for loss of confidence involves a managerial decision rather than a finding of guilt and that the public interest is best served by members considered to be unsuitable promptly leaving the police force, irrespective of whether it occurs by their removal or resignation.

Division 3 – Appeal in relation to removal

Introduces an appeal process that affords members an independent right of review of the Commissioner’s “removal action” (defined in s33K) before the WAIRC. While it has certain similarities to unfair dismissal claims for employees the process has been modified to reflect the special nature and importance of the Commissioner of Police’s power of removal and the importance of ensuring that the highest standards and public confidence are maintained in the police force.

The appeal process is broadly based on the legislative model applicable to NSW police officers (see s181E *Police Act 1990 (NSW)*), subject to certain important modifications to clarify and streamline the appeal process (see, in particular, section 33R in relation to “new evidence”).

33P. Appeal right

Entitles a member removed from office for loss of confidence to appeal to the WAIRC in relation to alleged unfair “removal action” within 28 days. The notice of appeal must include a statement of the reasons that the appellant contends the Commissioner of Police’s decision was harsh, oppressive or unfair.

Consistent with the practice under previous administrative arrangements, the appeal is to be heard before three Commissioners, including the Chief Commissioner or the Senior Commissioner, rather than before one Commissioner as occurs for unfair dismissal claims.

In contrast to ordinary unfair dismissal claims, the only persons who may be parties to an unfair removal appeal are the former member and the Commissioner of Police.

33Q. Proceedings on appeal

Sets out the procedure required to be followed in conducting an unfair removal appeal. The procedure is similar to the procedure under the NSW model (see s181F of the *Police Act 1990 (NSW)*). It differs from the hearing process for ordinary unfair dismissal claims in certain significant respects.

The WAIRC is specifically required to consider the Commissioner’s reasons for deciding to take action to remove the member, the case presented by the appellant on appeal as to why the decision was harsh, oppressive or unfair and the case presented on appeal by the Commissioner in answer. The onus is reversed and the appellant must demonstrate the Commissioner of Police’s decision was “harsh, oppressive or unfair”. While the test is intended to involve consideration of the interests of the appellant in the traditional sense of whether the appellant has been given a ‘fair go all round’, this is required to be considered in the context of the special public interest considerations that arise in the relation to policing. Consistent with the WAIRC’s approach under previous administrative arrangements, in assessing the “harshness, oppressiveness or unfairness” of the Commissioner of Police’s decision, particular regard must be had to the public interest in the importance of maintaining public confidence in the police force and the special nature of the relationship between the Commissioner of Police and members of the force. Police officers are not like other employees. The fact that police officers are empowered to serve the community, with special powers and privileges, justifies special measures and high standards being imposed by the Commissioner of Police for the maintenance of the integrity of, and public confidence in, the police force.

33R. *New evidence*

Unlike ordinary unfair dismissal cases, the evidence before the WAIRC on an appeal is generally required to be confined to materials examined and taken into account by the Commissioner of Police in making a decision to take “removal action” (defined in s33K), any written submissions made by the appellant to the Commissioner under s33L(2), the Commissioner’s grounds for his or her initial loss of confidence and reasons for the Commissioner’s decision to take removal action.

In limited circumstances “new evidence” may be tendered on an appeal under s33R. The parties may consent to new evidence being tendered or the WAIRC in its discretion may allow new evidence to be tendered in specified circumstances, including where it is in the interests of justice.

Members are expected to act reasonably. If a member fails to refer the Commissioner of Police to the substance of evidence that the member was aware of or that was contained in any document to which the member had reasonable access prior to being removed the member will not generally be entitled to rely on that evidence on appeal. The WAIRC retains a discretion however to grant the appellant leave to tender such evidence to cater for circumstances such as where the member acted reasonably but did not appreciate the significance of the evidence prior to being removed from office.

This section improves on the NSW model by clearly specifying how the appeal is to be conducted where new evidence is received by the WAIRC. It is intended to give due recognition in the appeal process to the managerial nature of the decision by the Commissioner of Police to remove a member and the special advantage he holds, given his experience and position, to determine whether a member should be removed.

Where a party is given leave to tender new evidence the other party is required to be given a reasonable opportunity to consider the new evidence and to tender new evidence in reply. If having considered any new evidence (whether tendered by the appellant or the Commissioner of Police) the Commissioner of Police revokes his decision to take removal action against the appellant, the appeal will be discontinued forthwith. (Revocation of “removal action” is dealt with at section 33N).

Alternatively, the hearing will continue but the Commissioner may reformulate his original reasons for his loss of confidence and his new reasons are to be treated as if they were his original reasons. The WAIRC is therefore not put in the unsatisfactory position of being required to speculate whether the new evidence may have altered the Commissioner’s decision or of substituting its own view of the merits for that of the Commissioner. This procedure is also intended to overcome arguments that the original decision of the Commissioner was harsh, oppressive or unfair when viewed in light of the new evidence. In effect, when the appeal resumes, the question will then

be whether the further decision of the Commissioner, having taken into account the new evidence, was harsh, oppressive or unfair.

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

Sets out in tabular form a range of provisions from the *Industrial Relations Act 1979* that will apply, with necessary and appropriate modifications, to unfair removal appeals. This ensures that the WAIRC has adequate powers to conduct the appeals. The effect of the provision includes that:

- The WAIRC is required to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms. It is not bound by any rules of evidence and may take evidence on oath or affirmation, subject to the specific evidentiary restrictions in s33R.
- While summonses may be issued in appropriate cases, certain restrictions are imposed to reflect the special nature of appeal process. The Governor may not be summonsed. The Commissioner of Police or Minister may not be summonsed except if a Commissioner is satisfied that extraordinary grounds exist and issues a direction. Leave must be obtained before a summons is issued to any other person to ensure that the WAIRC retains control over the circumstances and extent to which summonses are issued, particularly given the special nature of the appeal process and evidentiary restrictions in s33R of the Bill.
- The WAIRC is generally required to conduct its proceedings in public. This represents a deliberate departure from the previous administrative arrangement where appeals were heard in private. This led to speculation and concern because the public could not be adequately informed about these matters.
- Given the complexity usually associated with these type of appeals, parties are entitled to be legally represented. An agent may however only appear on behalf of a party with leave of the WAIRC. This ensures that the WAIRC has a discretion whether to grant or withhold leave based on considerations such as its assessment of the experience and competence of the agent to represent a client in such matters.
- The ordinary industrial relations conciliation process is modified. Recommendations may be made that the parties endeavour to resolve the process by conciliation. A Commissioner hearing the appeal may not participate in the conciliation process.
- Members are provided with a further limited right of appeal from a decision of the WAIRC to the Western Australian Industrial Appeal Court, of a similar nature to the existing appeal right in relation to decisions of the President, the Full

Bench, or the Commission in Court Session under s90 of the *Industrial Relations Act 1990*.

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

Enables the appellant or the Commissioner of Police to apply for an adjournment of the appeal where the appellant has been charged with a criminal offence relating to a matter taken into account by the Commissioner in deciding he or she has lost confidence in the member. If an appellant seeks an adjournment pending the final determination or disposition of the charge, the WAIRC must grant an adjournment but for no longer than 12 months. If in the mean time the matter is concluded, either party may apply for the appeal to resume. In appropriate cases, it would be open to either party to the appeal to seek to tender a copy of evidence led during the criminal proceedings subject to the new evidence criteria in section 33R being satisfied.

33U. Decision by the WAIRC

Provides that if the WAIRC determines the appeal in favour of the appellant the primary remedy is for the WAIRC to order that the appellant's removal from office is to be and to be taken to have always been of no effect. The effect of this is that the member will effectively be reinstated from the date of removal with full entitlements and will as a result receive back pay, less any amount already received by way of maintenance payment.

Consistent with the approach to ordinary unfair dismissal claims, compensation is available only where the WAIRC considers it impracticable for the above order to be given effect. In appropriate cases it anticipated that the WAIRC will firstly determine whether the removal decision was harsh, oppressive or unfair, and then, if necessary, hear further evidence and submissions as to the remedy that should be granted.

If compensation is granted, it is limited to twelve months' remuneration. In assessing the amount of compensation for any loss or injury caused by the removal similar considerations are to be taken into account as in unfair dismissal cases. While it is not generally expected that the Commissioner will have taken steps to mitigate any loss suffered by the appellant as a result of the removal, if steps have been taken this may be taken into account by the WAIRC. If an appellant has failed to take steps to mitigate a loss, such as by attempting to find alternative employment, this may affect the amount of compensation awarded.

S33V. Restriction on publication

Empowers the WAIRC to make suppression orders, where it is in the public interest, in relation to any evidence given or documents produced on an appeal. In the course of certain appeals (which are generally to be held in public) sensitive information might be disclosed (such as information disclosing confidential police methodology or operations, or the identity of an informant) that in the public interest

should not be made public. It is anticipated that in those circumstances an appropriate order under this section will be made.

Division 4 – General

S33W. Effects of charge for an offence or an acquittal

Clarifies that the Commissioner is entitled to take action to remove a member irrespective of whether the member has been charged with a related criminal offence or has been acquitted of an offence. This recognises the managerial and summary nature of the Commissioner's decision and importance that he or she be able to act promptly to remove unsuitable officers and not be required to await the outcome of any criminal proceedings.

S33X. Failure to comply with procedure

Ensures that any act or omission of the Governor, the Minister or the Commissioner connected with a loss of confidence removal process cannot be challenged or invalidated on the grounds of a non-substantive failure to comply with procedures specified. This discourages an unduly technical approach and avoids collateral challenges to the removal process. Even if there is a substantive non-compliance with a procedure it does not follow that any resulting removal action will be harsh, oppressive or unfair. This will depend on an evaluation by the WAIRC of all the circumstances.

S33Y. Transfer, standing down and leave of member

Clarifies that the Commissioner's power to transfer a member, stand the member down from duties with pay or allocate the member set duties is not affected by the member being subject to the Part IIB removal process. These managerial powers will frequently be exercised when a member is subject to the loss of confidence removal process, to maintain public confidence in, and the effective operation of, the police force. Regular review is required (every 60 days) of any decision by the Commissioner of Police to stand down a member who is subject to the loss of confidence removal process. The member may not be directed to take leave during that process except for leave accumulated during any period of stand down.

S33Z. Review of Part

Requires the Minister to review the operation and effectiveness of the Part after 2 years and to report to Parliament. This is intended to allow a reasonable period of time for the new removal and appeal processes to be tested. It also recognises that those processes are an interim measure that may need to be modified or replaced based on experience and any recommendations from the current Police Royal Commission.

Clause 7. Section 38A amended

Removes the existing power of the Commissioner or a commissioned officer to revoke the appointment of an aboriginal aide. Substitutes a requirement to the effect that the Commissioner may, by order, revoke the appointment of an aboriginal aide where he has lost confidence in the aide's suitability to continue as an aide. Aboriginal aides will be subject to similar removal and appeal processes as ordinary members.

Clause 8. Section 138A amended

Expressly confers regulation-making power in relation to issues intended to be included in complementary regulations to the Act.

Clause 9. Transitional provisions

Sets out the application of the Act to matters where the removal of a police officer or aboriginal aide is already in progress but has not been completed before the commencement of the Act or where the removal has occurred after 5 July 2002 but before the commencement of the Act.

A member who has been issued with a notice of intention to remove the member under previous administrative arrangements will be treated as if the notice had been given to the member on the commencement date. The procedures set out in Part IIB of the Act will then apply to subsequent steps in the removal process.

Where a person has been removed from office before the Act commences the member may appeal to the WAIRC as if the removal occurred on the commencement date and any other legal proceedings in relation to that removal are unaffected.

Clause 10. *Industrial Relations Act 1979* amended

To avoid doubt, specifically empowers the Chief Commissioner to make regulations in relation to the practice and procedure to be followed in relation to unfair removal appeals.