

[Act 1996 No 108]



New South Wales

# Police Legislation Further Amendment Bill 1996

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *Police Service Act 1990* so as to do the following:

- (a) to abolish the Police Board and transfer to the Commissioner of Police those of its functions that relate to the employment of police officers,
- (b) to modify the procedures for the appointment and removal from office of the Commissioner of Police, the Deputy and Assistant Commissioners of Police and other senior executive officers,
- (c) to require the Commissioner of Police to have regard to a person's integrity before appointing the person to a position in the Police Service,
- (d) to empower the Commissioner of Police to conduct integrity testing on police officers,

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\* Amended in committee—see table at end of volume.

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- (e) to empower the Commissioner of Police to remove a police officer from office if he or she ceases to have confidence in the police officer's suitability to continue as a police officer,
- (f) to abolish the upper age limit that currently applies to employment in the Police Service,
- (g) to protect a police officer from reprisal action arising from an allegation made by the police officer about the misconduct or criminal activity of other police officers,
- (h) to make provision with respect to the abuse of alcohol and drugs by police officers,
- (i) to empower the Minister to authorise persons to conduct inquiries into the administration and management of the Police Service,
- (j) to make other minor, consequential and ancillary amendments,
- (k) to enact consequential savings and transitional provisions.

The Bill also makes minor, consequential and ancillary amendments to other Acts and instruments.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the proposed Act to commence on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the Schedule of amendments to the *Police Service Act 1990*.

**Clause 4** is a formal provision giving effect to the Schedule of amendments to other Acts and instruments.

**Schedule 1** contains amendments to the *Police Service Act 1990*.

### **Abolition of the Police Board and transfer of the Board's functions to the Commissioner of Police**

There is currently a Police Board, whose functions include the appointment and employment of some police officers. It is proposed to abolish the Police Board (proposed clause 34 of Schedule 4) and transfer its functions,

including its status as a party to all contracts of employment with executive officers of the Police Service, to the Commissioner of Police (proposed clause 37 of Schedule 4). Consequential amendments will involve the repeal of Part 3 and Schedule 1, which provide for the constitution and functions of the Police Board, and the conversion of references to the Police Board in other provisions of the Act.

### **Modification of the procedures for the appointment and removal from office of the Commissioner of Police, the Deputy and Assistant Commissioners of Police and other senior executive officers**

The Commissioner of Police is currently appointed by the Governor on the recommendation of the Minister whose recommendation is based on reports from the Police Board, the internal affairs branch of the Police Service and the Parliamentary Joint Committee on the Independent Commission Against Corruption. It is proposed that in future the Minister's recommendation will be based on a report from the Police Integrity Commission (proposed section 24(6)).

The Deputy Commissioner of Police, as with all other executive officers, is currently appointed by the Governor on the recommendation of the Police Board. It is proposed that in future the recommendation will come from the Commissioner of Police, but be subject to the approval of the Minister (proposed section 36 (1A)). The same provisions will apply to Assistant Commissioners of Police.

Other senior executive officers will no longer be appointed by the Governor but will instead be appointed by the Commissioner (proposed section 36 (1) (b)).

### **Requirement for Commissioner of Police to have regard to a person's integrity before appointing the person to a position in the Police Service**

At present, appointments of both executive and non-executive positions within the Police Service are required to be the subject of a report by an internal affairs officer under section 94A. It is proposed to repeal that section, and to provide instead for the Commissioner of Police to seek information regarding a proposed appointee's integrity and, in particular, to have regard to any report by the Police Integrity Commission that bears on a proposed appointee's integrity (proposed sections 39 (3), 64 (4) and 71 (2)).

### **Power of Commissioner of Police to conduct integrity testing on police officers**

It is proposed to authorise the Commissioner to conduct integrity testing programs, being programs that are designed to test the integrity of police officers. It is further proposed to make it clear that certain acts and omissions occurring in the course of such a program are not themselves unlawful, even though they may involve the doing of things that could be construed as invitations to other persons to engage in unlawful behaviour (proposed section 207A).

### **Power of Commissioner of Police to remove a police officer from office if he or she ceases to have confidence in the police officer's suitability to continue as a police officer**

At present, a police officer can be dismissed from office only as a result of disciplinary proceedings (sections 179 and 180) or as a result of adverse information arising from the Police Royal Commission (section 181B). In some cases, an appeal against dismissal lies to the Government and Related Employees Appeal Tribunal. It is proposed to empower the Commissioner to remove a police officer from the Police Service, in circumstances where there is no proven misbehaviour, on the ground that the Commissioner no longer has confidence in the police officer's suitability (proposed section 181D).

It is proposed to confer on the Supreme Court a power to review decisions or orders of the Commissioner of Police to remove a police officer under the proposed section, but otherwise no appeal or review mechanism is to be available. The Supreme Court's jurisdiction to review such a decision or order is cast in terms that will attract the kind of judicial review referred to in such cases as *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, *Buck v Bavone* (1976) 135 CLR 110, and *Minister for Immigration v Wu Shan Liang* (1996) 70 ALJR 568. These cases relate to the review of decisions dependent on the *opinion* or *satisfaction* of an authority making a decision. In the *Wu Shan Liang* case, it was said that the judgment of Gibbs J in *Buck v Bavone* accurately reflects the position relating to judicial review at common law of such decisions (prior, in the case of Commonwealth enactments, to the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth). Gibbs J said:

It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively

reviewed by the courts will often largely depend on the nature of the matters of which the authority is *required to be satisfied*. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts. (Italics supplied.)

These principles will be made applicable to the judicial review of a decision or order of the Commissioner to remove an officer under the proposed section.

The new section will supersede section 181B, which is therefore proposed to be repealed. Also, the distinction between the dismissal procedures under sections 179 and 180 is proposed to be abolished, so enabling section 180 to be repealed.

### **Abolition of the upper age limit that currently applies to employment in the Police Service**

It is proposed to abolish the upper age limit of 65 years that currently applies to members of the Police Service. This proposal will bring the Police Service into line with the rest of the public sector.

### **Protection of police officers from reprisal action arising from allegations about the misconduct or criminal activity of other police officers**

It is proposed to encourage police officers to make use of established procedures for reporting alleged corruption and misbehaviour in the Police Service by protecting them from reprisal action from other police officers. The protection is proposed to be provided by the creation of an offence, having a maximum penalty of \$5,000 or 12 months' imprisonment, for the taking of reprisal action where an allegation has been made by a police officer in the course of his or her duty or in accordance with the complaint procedures set out in the Act (proposed section 206).

### **The abuse of alcohol and drugs by police officers**

It is proposed to provide for the random or targeted testing of on-duty police officers for the presence in their bodies of alcohol or prohibited drugs. It is further proposed to provide for the regulations to establish a code of behaviour regarding the use of alcohol and prohibited drugs by members of the Police Service and to set out the consequences for police officers who test positive for alcohol or prohibited drugs, including counselling, rehabilitation and disciplinary action (proposed sections 211A and 211B).

### **Authorisation of persons to conduct inquiries into the administration and management of the Police Service**

The Police Board is currently empowered to conduct inquiries into the administration and management of the Police Service. In the conduct of such inquiries, any person authorised by it can enter police premises, look at police files and seek information from police officers and other members of the Police Service. Following the abolition of the Police Board, it is proposed to allow these functions to be exercised by a Ministerial appointee (proposed section 217).

**Schedule 2** contains amendments to the following Acts and instruments:

- *Anti-Discrimination Act 1977 No 48*
- *Independent Commission Against Corruption Act 1988 No 35*
- *New South Wales Crime Commission Act 1985 No 117*
- *Police Integrity Commission Act 1996 No 28*
- *Police Service Regulation 1990*
- *Royal Commission (Police Service) Act 1994 No 60*

These amendments are consequential on the amendments proposed to be made to the *Police Service Act 1990*.