

Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019

Explanatory Notes

For

Amendments To Be Moved During Consideration In Detail By The Honourable Mark Ryan MP, Minister for Police and Minister for Corrective Services

Short title

Police Service Administration (Discipline Reform) and Other Legislation Amendment
Bill 2019.

Objectives of the Amendments

The objectives of the amendments to be moved during consideration in detail of the Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019 (the amendments to the Bill) are to:

- a) amend the *Crime and Corruption Act 2001* (CC Act) to provide the Crime and Corruption Commission (CCC) with an ability to apply for the review of the decision by the Commissioner of the Queensland Police Service (QPS) (a QPS decision) to neither issue a notice nor hold a disciplinary hearing under section 7A.3 'Procedure' of the *Police Service Administration Act 1990* (PSAA) which commences the process to determine if a disciplinary declaration will be made against a former officer; and
- b) amend the definition of *relevant criminal proceeding* contained in clause 9 of the Bill, specifically within draft section 7.12 'When disciplinary proceeding must be started', to ensure the definition is limited to criminal proceedings brought against the subject officer of a complaint, another member of the QPS, or a former officer that substantially relate to the grounds for disciplinary action against the subject officer.

The amendments to the Bill will align the review rights of the CCC under Part 7A ‘Disciplinary declarations against former officers’ of the PSAA with the review rights being afforded to the CCC by the Bill in relation to part 7 ‘Discipline process for officers’.

The Bill implements Recommendation 15 of the Parliamentary Crime and Corruption Committee Report 97 *Review of the Crime and Corruption Commission* tabled on 30 June 2016 by providing the CCC with an ability to review a QPS decision not to commence disciplinary proceedings against an officer under the new part 7 ‘Discipline process for officers’ of the PSAA.

Currently, section 219BA ‘Meaning of *reviewable decision*’ of the CC Act provides that a *reviewable decision* includes a decision to make a disciplinary declaration against a former officer under section 7A.2 ‘Disciplinary action that may be taken against a former officer’. Accordingly, the CCC can apply for review of a decision not to make a disciplinary declaration against a former officer after the procedures and processes outlined in Part 7A have been followed. Similarly, a former officer against whom a disciplinary declaration is made may also apply for review of that decision.

The Bill does not change these review mechanisms, except to amend procedural requirements, relocate provisions or modernise the drafting language to be consistent with other clauses of the Bill.

However, the ability of the CCC to apply for review of the decision whether or not to make a disciplinary declaration against a former officer, is contingent upon the QPS having fulfilled the procedural requirements in section 7A.3 ‘Procedure’ of the PSAA that commences the formal process to determine if a disciplinary declaration will be made.

Part 7A ‘Disciplinary declarations against former officers’ of the PSAA does not require the QPS to issue a notice or hold a disciplinary hearing under section 7A.3(1)(a) or (b). If the QPS decides not to issue the required notices under section 7A.3 to commence the disciplinary declaration process for any reason, the CCC is unable to review this decision.

The amendments to the Bill will provide the CCC with an ability to apply for review of the QPS decision to neither issue a notice under section 7A.3(1)(a) nor hold a disciplinary hearing under section 7A.3(1)(b).

The amendments to the Bill will ensure that the CCC will have consistent review rights in the new police discipline system as the CCC will be able to review a QPS a decision not to commence a disciplinary proceeding against a current officer and a decision not to commence a disciplinary declaration process against a former officer.

The proposed amendment to the Bill relating to the definition of *relevant criminal proceeding* contained in clause 9 of the Bill, specifically draft section 7.12 ‘When disciplinary proceeding must be started’, will restrict the operation of draft section 7.12(1)(c) to matters where a criminal proceeding has been brought against the subject officer of a complaint, another member of the QPS or a former officer and those criminal proceedings substantially relate to the ground for disciplinary action against the subject officer of the complaint.

The ongoing trial of the new police discipline system, in so far as current legislation allows, has highlighted that the wide definition of *relevant criminal offence* contained in the Bill may have an unanticipated impact on the operation of the new police discipline system. Accordingly, the proposed amendment seeks to limit the scope of the definition of *relevant criminal proceeding*.

The proposed restriction of this section will not unduly affect the operation of the new police discipline system and will prevent the operation of draft section 7.12(1)(c) from delaying disciplinary proceedings being commenced in matters where criminal charges are brought against a defendant who is not a member of the QPS or former officer. This will enhance the timeliness of disciplinary proceedings and ensure higher accountability of officers if a complaint is made by a defendant who was charged with a criminal offence by the subject officer.

For example, the wider definition of *relevant criminal proceeding* as contained in the Bill could have delayed disciplinary proceedings relating to a complaint of excessive use of force made by a defendant charged with a public nuisance offence. If the complaint of excessive force was directed at the arresting officer, the public nuisance charge could be argued to be a *relevant criminal proceeding* in relation to the ground for disciplinary action against the subject officer. In such case, the investigation of the complaint of excessive force and any subsequent disciplinary proceedings against the subject officer need not be finalised in the ordinary timeframes contained in section 7.12 'When disciplinary proceedings must be started' and may have occurred subsequent to the criminal proceedings against the defendant.

In this example, an unfairness could be perpetuated against both the defendant who made the complaint and the subject police officer. The defendant may not have been afforded the benefit of evidence gained through an internal disciplinary proceeding that could potentially demonstrate the charge of public nuisance should be discontinued. Similarly, the subject police officer is not afforded a timely investigation and resolution of the complaint of excessive force, regardless of whether this complaint is substantiated or not. If the investigation does not substantiate this complaint, the officer can continue in their role with the knowledge that the complaint has been finalised and the defendant may be informed of this outcome before the criminal proceeding is heard.

Alternatively, a timely investigation of the complaint may substantiate the allegations against the officer and if so, both the defendant and officer benefit by resolving the matter swiftly. The operation of draft section 7.12(1)(c) as currently contained in the Bill may negate such timely resolutions and benefits for both the complainant and officer.

The mere fact that criminal proceedings have been instituted against any person will not be cause to delay disciplinary investigations and subsequent proceedings. The proposed amendment will limit the delay of disciplinary proceedings to those instances where criminal proceedings have commenced against current or past QPS officers and other current members of the QPS.

The proposed amendment to the Bill will still ensure that the QPS is not required to commence disciplinary proceedings until related court matters are finalised if the subject officer themselves, another member of the QPS or a former officer is the person

charged with a criminal offence substantially relating to the grounds for disciplinary action.

The ability to delay these disciplinary proceedings until the criminal proceedings are finalised protects the integrity of both the criminal proceedings and the subsequent disciplinary proceedings. The operation of section 7.12(1)(c) will ensure that subject officers are not potentially tainted as witnesses in criminal trials against other officers due to material disclosed to the subject officer through the disciplinary proceeding. Similarly, the subsequent disciplinary proceeding will have the benefit of considering material produced in the criminal trial and any relevant comments made by the presiding judicial officer.

This proposed amendment balances the integrity of the new police discipline system and the need for timely resolution in the majority of matters as most complaints do not involve criminal charges being brought against a subject officer, another member of the QPS or a former officer.

Importantly, the proposed amendment to the Bill does not prevent the finalisation of disciplinary complaints against officers through the Abbreviated Disciplinary Proceedings. Regardless of whether the *relevant criminal proceeding* is commenced against the subject officer of the disciplinary proceeding, another member of the QPS or a former officer, a disciplinary proceeding against a subject officer can still be finalised through the Abbreviated Disciplinary Proceedings. This allows for the timely resolution of complaints against subject officers who admit to their wrongdoing.

Achievement of policy objectives

The objectives are achieved by the amendments to the Bill:

- inserting a further subparagraph (c) into section 219BA(1) ‘Meaning of *reviewable decision*’ of the CC Act that extends the definition of *reviewable decision* to include a decision under section 7A.3(1) ‘Procedure’ of the PSAA to do neither of the things mentioned in section 7A.3(1)(a) or (b);
- inserting the new section 219FA ‘Proceedings relating to particular reviewable decisions about former officers’ of the CC Act providing the procedural requirements for applications by the CCC for QCAT review of the decision mentioned in new subparagraph 219BA(1)(c), including:
 - the timeframe to apply to QCAT for review of 28 days after becoming aware of the decision; and the application must be made as otherwise provided by the QCAT Act;
 - the CCC must give the former officer a copy of the application for review; and
 - the parties to the proceeding;
- inserting the new section 219JA ‘Requirement to return particular matters to commissioner of police’ of the CC Act providing the procedural requirements that must occur if QCAT upholds an application for review made by the CCC under new section 219FA ‘Proceedings relating to particular reviewable decisions about former officers’;

- amending applicable sections of Chapter 5, Part 2, Division 3 and 4 of the CC Act to restrict the operation of relevant sections to *reviewable decisions* mentioned in section 219BA(1)(a) or (b); as new sections 219FA ‘Proceedings relating to particular reviewable decisions about former officers’ and 219JA ‘Requirement to return particular matters to commissioner of police’ provide requirements for *reviewable decisions* mentioned in s219BA(1)(c);
- inserting new transitional provision section 452A ‘Application of ch 5, pt 2 – particular reviewable decisions relating to former officers’ of the CC Act which provides that a decision to do neither of the things mentioned in section 7A.3(1)(a) nor (b) of the PSAA after the commencement of the amending Act will be a *reviewable decision*, regardless of whether the relevant disciplinary ground arose before the commencement of the amending Act; and
- amending proposed section 7.12(4) ‘When disciplinary proceeding must be started’ of the PSAA to limit the definition of *relevant criminal proceeding* to criminal proceedings commenced against a member of the QPS or a former officer, that substantially relates to the ground for disciplinary action.

Alternative ways of achieving the policy objectives

There is no alternative way to achieve the policy objective.

Estimated cost for government implementation

The proposed amendments to the Bill may increase the number of applications by the CCC to QCAT for review. However, the actual number of applications for review is expected to be minimal and will be met from existing budgets.

Consistency with fundamental legislative principles

The proposed amendments to the Bill have been prepared with due regard to the fundamental legislative principles outlined in the *Legislative Standards Act 1992* (LSA). Potential breaches of fundamental legislative principles are addressed below.

Whether a Bill has sufficient regard to the rights and liberties of individuals (Sections 4(2)(a) and 4(3) of the LSA)

Consistency with natural justice

The proposed amendments to the Bill will provide the CCC with an ability to review a QPS decision to neither issue a written notice under section 7A.3(1)(a) nor hold a disciplinary hearing under section 7A.3(1)(b) ‘Procedure’ of the PSAA. The decision being examined by QCAT will relate to whether or not the QPS should have commenced the procedural requirements to consider whether a disciplinary declaration should be made against that former officer.

The proposed amendments to the Bill ensure natural justice is maintained for the former officer whose alleged conduct is central to the review before QCAT. The proposed amendments require the CCC to provide notice of the application for review to the former officer. The former officer may elect to become a party to the review.

Additionally, the proposed amendments to the Bill do not provide QCAT with the ability to make a disciplinary declaration against the former officer. If QCAT upholds the CCC application for review, QCAT must return the matter to the Police Commissioner with a direction to issue a written notice under section 7A.3(1)(a) or hold a disciplinary hearing under section 7A.3(1)(b) 'Procedure' of the PSAA. The determination whether a disciplinary declaration should be made will advance through the ordinary processes for decision making as provided in Part 7A 'Disciplinary declarations against former officers' of the PSAA, including providing the former officer with a right to make submissions. If a disciplinary declaration is ultimately made against the former officer, the proposed amendments do not alter the former officer's existing right to review that decision.

Retrospectivity

The proposed amendments to the Bill include a transitional provision to be inserted into the CC Act, proposed section 452A 'Application of ch 5, pt 2-particular reviewable decisions relating to former officers'. The effect of this provision is that a QPS decision to do neither of the things mentioned in section 7A.3(1)(a) nor (b) after the commencement of the amendments to the Bill will become a *reviewable decision* under the CC Act, regardless of whether the ground for disciplinary action arose before or after commencement.

Therefore, the new ability for the CCC to apply for review of a QPS decision under section 7A.3(1)(a) or (b) in relation to a former officer may apply to matters that have arisen before the commencement of the amending Act that otherwise are not subject to the new review power.

Section 4(3)(g) of the LSA outlines that legislation should not retrospectively affect rights and liberties or impose obligations retrospectively. The previous Scrutiny Committee brought to Parliament's attention any provisions in a Bill that had retrospective application, regardless of whether the Scrutiny Committee was concerned about the implications of the provisions.

The Scrutiny Committee had regard to the following factors when evaluating the effect of provisions with retrospective effect:

- a) whether the retrospective application is beneficial to persons other than the Government; and
- b) whether individuals have relied on the legislation and have a legitimate expectation under the legislation before retrospective clauses commence.

The Scrutiny Committee had no concerns regarding retrospective legislation that did not adversely affect any person other than the State. However, the Scrutiny Committee did object to the retrospective imposition of a liability to pay a penalty.

The retrospective application of the Bill is justified in this instance. The extent of the retrospective application of the transitional provision and the extent of the CCC's ability to apply for review of relevant decisions is limited by other existing provisions in the PSAA and new provisions inserted in the amendments to the Bill.

Firstly, existing section 7A.1(4) 'Power to conduct disciplinary investigation against a former officer' of the PSAA is unchanged by the Bill nor the amendments to the Bill. Subparagraph (4) provides that the investigation of the alleged conduct and any

disciplinary action must be taken within 2 years after the former officer's employment ends.

Secondly, proposed new section 219FA 'Proceedings relating to particular reviewable decisions about former officers' of the CC Act provides that the CCC must make application to QCAT for review of the *reviewable decision* within 28 days after becoming aware of the decision.

Therefore, the ability of the transitional provision to impact on former officers is limited to QPS decisions to do neither of the things mentioned in sections 7A.3(1)(a) or (b) of the PSAA within two years of the former officer ceasing their employment as an officer; and the CCC has been aware of the QPS decision for less than 28 days.

The amendments to the Bill will have only limited application and balance the need to ensure accountability of the police discipline process with the rights of the former officer. The amendments to the Bill ensure that if the CCC exercise the ability to apply for review of a QPS decision whether to commence a disciplinary declaration process section 7A.3(1)(a) or (b) of the PSAA, the former officer must be given a copy of the review application and may elect to join the review. Furthermore, QCAT is unable to make a disciplinary declaration and must return the matter to the Commissioner to undertake the normal process for deciding if a disciplinary declaration must be made. Therefore, the retrospective application of the amendments to the Bill are justified to ensure community confidence is maintained in the police discipline system, including through the oversight and review mechanisms afforded to the CCC.

Consultation

Consultation has been undertaken with the Crime and Corruption Commission, the Queensland Police Commissioned Officers' Union of Employees and the Queensland Police Union of Employees.

Notes on provisions

Amendment 1 Clause 9 (Replacement of pt 7 (Internal command and discipline))

Clause 9 in the Bill inserts new section 7.12 ‘When disciplinary proceeding must be started’ of the PSAA. Amendment 1 amends the definition of *relevant criminal proceeding* in section 7.12(4) to limit the definition to criminal proceedings started against a member of the service or a former officer, that substantially relates to the ground for disciplinary action. This amendment will restrict the scope of section 7.12(1)(c) to criminal proceedings brought against a member of the QPS or a former officer, and therefore similarly restrict the extension of the ordinary timeframes for the commencement of disciplinary proceedings.

Amendment 2 Clause 22 (Amendment of s 219BA (Meaning of *reviewable decision*))

Clause 22 amends section 219BA ‘Meaning of *reviewable decision*’ of the CC Act. Amendment 2 inserts a further category of *reviewable decision* as defined in section 219BA. Amendment 2 inserts subparagraph (1)(c), being a decision of the Commissioner under section 7A.3 ‘Procedure’ of the PSAA to neither issue a written notice under section 7A.3(1)(a) nor commence a disciplinary hearing under section 7A.3(1)(b) against the former officer. If the Commissioner decides not to do at least one of the actions in section 7A.3(1)(a) or (b), the failure to do so may be subject to a CCC application for review of the decision in QCAT.

Amendment 3 After clause 22

Amendment 3 inserts new clause 22A into the Bill. This clause inserts new section 219FA ‘Proceedings relating to particular reviewable decisions about former officers’ of the CC Act. This section provides the procedural requirements for the review of decisions referred to in section 219BA(1)(c), as amended by Amendment 2. The CCC may apply for review of the decision in section 219BA(1)(c) within 28 days after becoming aware of the decision and must make application as otherwise provided by the QCAT Act. The CCC must also provide the relevant former officer with a copy of the application for review, within the period provided by section 37(2) ‘Notice’ of the QCAT Act.

Clause 22A also provides that the parties to the application for review are the CCC, the person who made the *reviewable decision* and the former officer upon his or her election. If the former officer elects to become a party, the former officer must provide notice of their election to QCAT, the CCC and the person who made the *reviewable decision* within 14 days of being given the notice of application for review by the CCC.

Amendment 4 Clause 23 (Amendment of s 219G (Proceedings relating to reviewable decisions))

Clause 23 amends section 219G ‘Proceedings relating to reviewable decisions’ of the CC Act. Amendment 4 inserts new subsection (1A) into section 219G. Section 219G(1A) restricts the operation of section 219G to *reviewable decisions* mentioned in section 219BA(1)(a) or (b). This reflects that *reviewable decisions* mentioned in new

section 219BA(1)(c) as inserted by Amendment 2 are dealt with separately in new section 219FA as inserted by Amendment 3.

Amendment 4 also makes corresponding amendments to the heading of section 219G and subparagraph (1).

Amendment 5 Clause 23 (Amendment of s 219G (Proceedings relating to reviewable decisions))

Amendment 5 makes a technical amendment to clause 23 as a result of Amendment 4 inserting new subparagraphs (1)-(3) in clause 23. Amendment 5 renumbers the existing instructions of clause 23 as subparagraph (4).

Amendment 6 Clause 26 (Amendment of s 219J (Additional power for reviewable decisions))

Amendment 6 makes a technical amendment to the heading of section 219J ‘Additional power for reviewable decisions’ of the CC Act.

Amendment 7 Clause 26 (Amendment of s 219J (Additional power for reviewable decisions))

Amendment 7 amends clause 26 to restrict the operation of section 219J ‘Additional power for reviewable decisions’ of the CC Act to those *reviewable decisions* mentioned in section 219BA(1)(a) or (b).

Amendment 8 After clause 26

Amendment 8 inserts new clause 26A ‘Insertion of new s 219JA’ into the Bill. Clause 26A inserts the new section 219JA ‘Requirement to return particular matters to commissioner of police’ of the CC Act. This section outlines what QCAT may order if QCAT upholds the CCC application for review of a *reviewable decision* mentioned in section 219BA(1)(c) and sets aside the original decision.

Section 219JA provides that QCAT must return the matter to the Police Commissioner with a direction to give the former officer a written notice under section 7A.3(1)(a) or hold a disciplinary hearing under section 7A.3(1)(b) ‘Procedure’ of the PSAA; and QCAT may also make any other direction QCAT considers appropriate. If the matter is returned, the Police Commissioner must ensure the required notice mentioned under section 7A.3(1)(a) or (b) is given to the former officer within 6 months of the making of the order by QCAT.

Amendment 9 Clause 29 (Insertion of new ch 8, pt 16)

Clause 29 inserts new Part 16 ‘Police Service Administration (Discipline Reform) and Other Legislation Amendment Act 2019’ of the CC Act. This new chapter provides transitional provisions for the Bill.

Amendment 9 inserts new section 452A ‘Application of ch 5, pt 2-particular reviewable decisions relating to former officers’ of the CC Act. The new section 452A provides transitional provisions relating to the new *reviewable decision* mentioned in section 219BA(1)(c) as amended by Amendment 2. Section 452A provides that Chapter 5, Part

2 'Particular reviewable decisions relating to former officers' of the CC Act, as amended by the Bill, will apply to a decision to do neither of the things mentioned in section 7A.3(1)(a) or (b) of the PSAA even if the disciplinary ground arose before the commencement.

Amendment 10 Schedule 1 (Acts amended)

Amendment 10 makes technical amendments to Schedule 1 'Acts amended' in the Bill, reflecting the preceding amendments to the Bill.