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BAR ASSOCIATION OF QUEENSLAND

15 March 2019

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Committee Secretary

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

The Bar Association of Queensland (*'the Association'*) is grateful for this opportunity to comment on the *Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019* ('the Bill').

The Association supports the comprehensive changes proposed in the Bill and believes that the new system will be a great improvement on the current system of police discipline. The Bill is likely to result in a fairer and more effective disciplinary process for the Queensland Police Service (*'QPS'*).

Although members of the QPS will be directly affected by the Bill, the Association notes that a robust police disciplinary system is vital for the criminal justice system, generally, and for society as a whole.

The Association has identified some aspects of the Bill that, with respect, ought to be reconsidered:[1]

7.3 Definition of '*disciplinary history*' should include Professional Development Strategies

The Association understands that it is intended that the imposition of a Professional Development Strategy (*'PDS'*) will be included in a subject officer's disciplinary history but this is not made explicit in the Bill. The definition of disciplinary history in the new section 7.3 is silent in this regard, in the Association's view the new section 11.25(2) creates a strong inference that a PDS would be included.

The Association's members who practice in Criminal Law often use a police officer's disciplinary history in criminal trials to support a client's allegation of inappropriate conduct by a police officer. The Association's members have anecdotally noted a pattern of complaints against an officer but have been unable to prove that pattern of complaint conduct at trial because the subject officer was dealt with by 'managerial guidance'.

BAR ASSOCIATION OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000

Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au

Constituent Member of the Australian Bar Association

[1] All references are to new numbered sections of the *Police Service Administration Act 1990.*

Under the existing regime 'managerial guidance' does not necessarily involve any 'finding' by a prescribed officer. In those circumstances, judges and juries have been deprived of evidence that is considered likely to have been relevant to the assessment of the police officer's conduct.

Recommendation: The Association urges the Committee to explicitly articulate that a PDS will form part of the subject officer's disciplinary history.[2]

7.12 Status of disciplinary proceedings while criminal proceedings are on foot

The Bill is structured on an understanding that disciplinary investigations and proceedings will be placed on hold while criminal proceedings are on foot. The Association notes that, in general, these proceedings will be against a criminal defendant who is not the subject officer. The Association considers that this historic practice of putting disciplinary complaints on hold "pending court outcome" is inappropriate and this Bill should be used to end this practice.

The Association notes that a "pending court outcome" suspension usually arises where a criminal defendant alleges misconduct by police during an investigation that results in the criminal defendant being charged. An example of this might be where there is an allegation of excessive force being used during an arrest.

The logic being applied in suspending a disciplinary matter "pending court outcome" is that the resolution of the criminal charge before the courts may make further investigation or disciplinary proceedings unnecessary. This assumes that a guilty finding by a court necessarily means that a complaint is false.

The logic behind the "pending court outcome" practice appears flawed in that it ignores the following:

- The majority of criminal charges are resolved by plea;
- Pleas of guilty based on convenience can and do occur in Queensland;
- A defendant may have other concurrent charges such that successfully contesting the related disciplinary complaint charge may make no meaningful difference to sentence;
- Legal Aid is not available for the majority of contested matters in the Magistrates Court; and a defendant may not have the resources, inclination or ability to defend him or herself.
- A disciplinary investigation is conducted for the benefit of the community as a whole, not for the subject officer or the complainant.

The Association acknowledges that a disciplinary investigation into police conduct prior to a criminal trial might assist a criminal defendant but the Association considers this to be an argument *in favour* of immediate disciplinary investigation.

[2] The appropriate place to add such clarification might be at the new 7.42.

The Association notes that there is no reason, in principle, that disciplinary proceedings cannot proceed at the same time as a criminal complaint.[3] Given that the practice of awaiting the outcome of criminal proceedings is one of the key causes of delay in disciplinary proceedings, such delay should occur rarely and only for very good reason.

Recommendation: The Bill should include a default requirement that disciplinary investigations should proceed immediately unless an officer of appropriate rank identifies specific reasons why this cannot occur. The fact that a complaint is related to a criminal matter is not, in itself, an acceptable reason not to immediately investigate a complaint. A similar requirement should be introduced in relation to commencing disciplinary proceedings once the investigation is complete.

7.16 Abbreviated Disciplinary Proceedings

The Association supports the proposed framework for Abbreviated Disciplinary Proceedings ('*ADP*') and, in particular, supports the strong oversight role given to the Crime and Corruption Commission ('*CCC*'). Nevertheless, the Association considers that there is an inherent danger in the system, a desire for the speedy resolution of complaints may incline the QPS to offer a subject officer a factual basis and sanction that is as 'attractive' as possible. Although the CCC will act as a safeguard, the CCC will necessarily rely on information aggregated by the QPS in deciding whether or not to agree to a factual basis for an ADP. In light of this, the Association recommends that the complainant be advised of the factual basis being offered to a subject officer and that the complainant be given the opportunity to comment on that factual basis before the matter proceeds to ADP.

Recommendation: Before the CCC endorses an offer of ADP to a subject officer, the complainant in a disciplinary matter be advised of the factual basis being offered to a subject officer and be given a limited timeframe to comment on that offer.

7.35 Sanctions: Removal of reduction in pay as an available sanction

The Association notes the assertion in the Minister's Speech[4] and the Explanatory Memorandum[5] that reducing an officer's level of salary can have long term unintended consequences and that such a sanction inappropriate is therefore not included in the new regime. The Association understands that the unintended consequences in question include uncertainty about the time it will take the subject officer to regain a particular pay level and the superannuation consequences of a reduction in salary.

The Association notes that, complex though it may be, QCAT routinely considers the broad consequences of a reduction in salary[6]. Equally, the personnel department of the QPS is competent to provide appropriate projections for QCAT and for decision makers within the QPS.

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[3] That is, a complaint against a third party criminal defendant. This submission does not suggest that a subject officer should face disciplinary and criminal charges at the same time.

[4] On 13 February 2019

[5] At page 3

[6] For examples see *CCC v Ass Commissioner Dawson & Anor* [2017] QCA 37; *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA309

Moreover, these complexities are arguably even greater in relation to a full reduction in rank, which will remain available as a sanction under the proposed new system.

The Association is concerned that the proposed Bill leaves a very large gap between the maximum fine that can be imposed (approx. $6,500) and the sanction of demotion (in rank).

Recommendation: The sanction of a reduction in salary level, whether permanent or for a specific period, be included as a sanction.

7.37 Sanctions: Comprehensive Transfer

The Bill would empower the Commissioner to transfer a subject officer to a location that could require the subject officer to relocate her or his residence, even where the subject officer did not consent.

In relation to this sanction, the Association submits that:

- This sanction could be quite a severe sanction depending on the relationship and family status of the subject officer;
- This sanction is apt to cause injustice: the impact on a single person with no children perhaps being minimal while the same sanction could be life-changing for an officer with a working partner and/or school-aged children.
- This sanction, implemented on its own, could result in the relocation of a problem rather than the resolution of a problem.

Recommendation: That a comprehensive transfer not be available as a sanction on its own and should only be available in conjunction with other sanctions such as probation or professional development strategies.[7]

7.39 Sanctions: Community Service

The Association agrees that community service can be an appropriate sanction but the Association is aware of at least one instance where community service was imposed 'requiring' the subject officer to continue to act in a voluntary role he was already fulfilling at the time the sanction was imposed.

Recommendation: That community service must be an activity that the subject officer will perform that is different to and in addition to any activity he has habitually undertaken within the previous 24 months.

7.41 Suspension of disciplinary sanctions

The Association notes that suspended sanctions have a clear role to play in the criminal justice system but their role in disciplinary proceedings is not obvious to the Association.

[7] The Association would also recommend that the operation of the word 'reasonably' in 7.37(a) should be clarified.

The courts recognise that the actual imprisonment of certain offenders can result in their corruption.[8] As such, the imprisonment of youthful or first-time offenders tends to increase their risk of reoffending rather than reducing it. In such circumstances courts will often suspend terms of imprisonment.

The Association notes there is a substantially lower risk that a police officer can be corrupted by the imposition of a fine, probation, demotion, etc.

The Association further notes that the criminal law does not allow for the suspension of fines or community service. It is most unusual that these sanctions can be suspended in police disciplinary matters.

The availability of suspension also creates the risk of injustice within the police disciplinary system because relatively minor matters may attract actual fines, while more serious matters may attract suspended sanctions, which may never eventuate.

The Association acknowledges that suspended sanctions are available in other disciplinary regimes and that it is reasonable to consider that a criminal offender may be deterred from future offending by a suspended sanction 'hanging over' his or her head. The police disciplinary system faces the unusual challenge of maintaining good conduct among thousands of women and men who wield very substantial powers. The police disciplinary system is protective in nature. The sanctions available should, by themselves, be sufficient to deter unacceptable conduct. An outcome that deems a 'suspended' sanction necessary to further deter a police officer is, with respect, inappropriate.

The Association notes that the Bill abolishes the power to suspend the sanction of probation and dismissal. The Association endorses this approach but urges that suspended sanctions be abolished entirely.

Recommendation: That suspended sanctions not form part of the disciplinary system.

Conclusion

Thank you for the opportunity for the Association to provide input into this Bill. The Association would be pleased to provide further feedback or answer any queries you may have on this matter.

Yours faithfully

Rebecca Treston QC
President

[8] For example *R v Williams* [2017] QCA 307