

Legislative Council—No 170A

As reported with an amendment, report adopted, Standing Orders suspended and passed remaining stages, 16 October 2013

South Australia

Statutes Amendment (Police) Bill 2013

A BILL FOR

An Act to amend the *Police Act 1998*; the *Police (Complaints and Disciplinary Proceedings) Act 1985*; and the *Public Intoxication Act 1984*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Police) Act 2013*.

2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Police Act 1998*

4—Amendment of section 27—Probationary appointment

(1) Section 27(2)—delete subsection (2) and substitute:

(2) For the purposes of subsection (1), the period of probationary service of a member of SA Police does not include—

- 15 (a) if the Commissioner so determines—the whole or a part of any period during which the member, while on full or reduced pay—
- (i) is absent from duty (other than on recreation leave);
or
- 20 (ii) performs duties that have been limited or varied by reason of physical or mental disability or illness of the member; or
- (b) except where the Commissioner determines to the contrary—
- 25 (i) any period during which the member is absent from duty without pay; or
- (ii) any period during which the member's appointment is suspended.

(2) Section 27(3)(b)—delete "subsection (1)" and substitute:
this section

30 (3) Section 27(4)—delete subsection (4)

(4) Section 27—after subsection (6) insert:

(7) This section does not apply to the following appointments:

- 35 (a) appointment as the Commissioner, the Deputy Commissioner or an Assistant Commissioner;
- (b) appointment for a term under this Division;

(c) subject to subsection (8)—appointment of a member of SA Police to another position of the same rank as that held by the member immediately before the appointment to the other position;

(d) appointment as a community constable.

(8) If the appointment of a member of SA Police to a position is on probation and the member is, during the probationary period, appointed to another position of the same rank, the period of probation carries over to that other appointment (and the provisions of this section (other than subsection (7)(c)) apply accordingly).

5—Amendment of heading to Part 6

Part 6, heading—delete "Misconduct" and substitute:

Conduct

6—Insertion of heading to Part 6 Division 1

Before section 37 insert:

Division 1—Code of Conduct

7—Amendment of section 37—Code of conduct

(1) Section 37(2)—delete "The Code may make provision concerning" and substitute:

Without limiting the generality of subsection (1), the Code may include provisions relating to

(2) Section 37(2)—after paragraph (b) insert:

(ba) drug and alcohol testing of members of SA Police and police cadets;
and

(3) Section 37(2)(h)—delete "other matters" and substitute:

any other matter

8—Amendment of section 40—Orders for punishment following offence or charge of breach of Code

(1) Section 40(1)(g)—delete paragraph (g) and substitute:

(g) where the person is a member of SA Police, transfer of the member to another position in SA Police for a specified period (whether with or without a reduction in rank, seniority or remuneration);

(2) Section 40—after subsection (1) insert:

(2) If the period for which a member of SA Police is transferred under subsection (1)(g) is less than 12 months, the member is entitled, on the expiration of the specified period, to return to the position occupied by the member before being so transferred.

9—Insertion of Part 6 Division 2

After section 41 insert:

Division 2—Drug and alcohol testing of police, police cadets, etc

41A—Interpretation

(1) In this Division—

alcotest means a test by means of an apparatus of a kind approved for the conduct of alcotests under the *Road Traffic Act 1961*;

biological sample means a sample of blood, urine or oral fluid;

breath analysing instrument means an apparatus of a kind approved as a breath analysing instrument under the *Road Traffic Act 1961*;

breath analysis means an analysis of breath by a breath analysing instrument;

classified appointment or position means an appointment or position in respect of which it is an essential requirement that an applicant for the appointment or position undergo a medical or psychological assessment as part of the application process;

critical incident means an incident where a person is killed or suffers serious bodily injury—

- (a) while detained by a member of SA Police; or
- (b) as a result of the discharge of a firearm or an electronic control device; or
- (c) in circumstances involving a police aircraft, motor vehicle, vessel or other mode of transport; or
- (d) as a result of alleged police action;

drug means a substance that is a controlled drug under the *Controlled Substances Act 1984*;

drug and alcohol testing—see section 41B(1);

forensic material means any human material from which the person from whom the material was taken could be identified;

oral fluid includes saliva;

oral fluid analysis means an analysis of oral fluid by means of an apparatus of a kind approved under the *Road Traffic Act 1961* for the purpose of conducting oral fluid analyses.

(2) For the purposes of this Division, a person *uses a drug* if the person—

- (a) consumes, smokes or administers to himself or herself the drug; or
- (b) permits another person to administer the drug to him or her.

41B—Drug and alcohol testing of members and cadets

(1) A member of SA Police or a police cadet may, in accordance with this section, be required to do any of the following:

- (a) to submit to an alcotest or breath analysis, or both, for the purpose of testing for the presence of alcohol;
- (b) to provide a biological sample for the purpose of a blood test, urinalysis or an oral fluid analysis to test for the presence of alcohol or drugs,

(drug and alcohol testing).

(2) A member of SA Police or a police cadet may be required to undergo drug and alcohol testing, in accordance with orders or directions of the Commissioner, in any of the following circumstances:

- (a) if the member or police cadet has, while on duty, been involved in a critical incident;
- (b) if the member or police cadet has, while on duty, engaged in driving that is classified by the Commissioner in orders as high risk;
- (c) if there is a reasonable cause to believe that the member or police cadet has recently consumed alcohol or used a drug;
- (d) if the member or police cadet is applying for a classified appointment or position.

41C—Drug and alcohol testing of applicants to SA Police

(1) A person to whom this subsection applies will, in accordance with orders or directions of the Commissioner, be required to do any of the following:

- (a) to submit to an alcotest or breath analysis, or both, for the purpose of testing for the presence of alcohol;
- (b) to provide a biological sample for the purpose of a blood test, urinalysis or an oral fluid analysis to test for the presence of alcohol or drugs.

(2) Subsection (1) applies to—

- (a) a person applying to be a police cadet; and
- (b) a person who is not either a member of SA Police or a police cadet applying for appointment to SA Police.

41D—Procedures for drug and alcohol testing

(1) The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Division.

(2) Without limiting the generality of subsection (1), the regulations may—

- (a) prescribe procedures for drug and alcohol testing; and

- 5
- (b) provide for the authorisation of persons to conduct drug and alcohol testing and operate equipment for that purpose; and
- (c) regulate the collection of biological samples taken from persons for the purposes of drug and alcohol testing under this Division; and
- (d) provide for the analysis of test results, including the accreditation of persons conducting the analysis; and
- (e) provide for the approval of devices used in carrying out drug and alcohol testing and analysis; and
- 10 (f) provide for the use of results from any testing or analysis, or the steps that may be taken on account of any testing or any evidence or information produced as a result of testing; and
- (g) prescribe the circumstances that amount to a defence to a breach of the Code or the regulations, including where the consumption of alcohol or drugs occurs after police work has been carried out; and
- 15 (h) prescribe evidentiary provisions to facilitate proof of contraventions of the Code or the regulations for the purposes of proceedings relating to those contraventions; and
- 20 (i) provide for the confidentiality of test results; and
- (j) regulate the destruction of biological samples collected for testing; and
- 25 (k) provide for the protection of persons involved in taking or conducting testing from liability for acts or omissions done in good faith and in accordance with this Division.

41E—Biological samples, test results, etc not to be used for other purposes

- 30 (1) A biological sample (and any other forensic material taken incidentally in the course of testing a person for the presence of drugs or alcohol) taken under this Division must not be used for any purpose other than—
- (a) for a purpose contemplated by this Division; or
- (b) in connection with the control and management of SA Police; or
- 35 (c) for the purpose of disciplinary proceedings under this Act.
- (2) The results of any drug and alcohol testing or analysis conducted under this Division, or an admission or a statement made by a person relating to such drug and alcohol testing, is not admissible in any
- 40 proceedings other than disciplinary proceedings under this Act.

10—Insertion of heading to Part 6 Division 3

Before section 42 insert:

Division 3—Minor misconduct

11—Amendment of section 42—Minor misconduct

5 (1) Section 42(1)—delete "and refer the matter to a member of S.A. Police determined in accordance with the orders and directions of the Commissioner for an informal inquiry"

(2) Section 42—after subsection (1) insert:

10 (1a) The Commissioner must inform the member of SA Police or police cadet concerned—

(a) of the nature of the suspected breach of the Code and the particulars of the breach; and

(b) that the Commissioner has determined that the matter involves minor misconduct; and

15 (c) that the member or police cadet is entitled to require that the matter—

(i) be dealt with as an alleged breach of the Code under Division 1; or

20 (ii) be referred to a member of SA Police determined in accordance with the orders and directions of the Commissioner for an informal inquiry under this section.

(3) Section 42(2)—delete "subsection (1)" and substitute:
this section

25 12—Amendment of section 55—Right of review

Section 55(1)—delete subsection (1) and substitute:

(1) After a selection process has been conducted in relation to a prescribed promotional position, the Commissioner must publish in the Police Gazette—

30 (a) notice of the selection decision; or

(b) if no person has been selected for appointment to the position—notice of that fact.

13—Substitution of section 59

Section 59—delete the section and substitute:

35 59—Appointment of special constables

(1) Subject to subsection (2), the Commissioner may appoint a person to be a special constable for the whole or a part of the State.

- 5 (2) The Commissioner may only appoint a police cadet to be a special constable for the whole or a part of the State if a declaration has been made under Part 4 Division 3 of the *Emergency Management Act 2004* (and the term of any such appointment will be for the period specified in the declaration under that Act and, if the period of the declaration is extended under that Act, for such further periods).
- (3) An appointment under this section may be made—
- 10 (a) if a declaration has been made under Part 4 Division 3 of the *Emergency Management Act 2004*—orally; or
- (b) in any other case—by instrument in writing.
- (4) If the appointment is made orally, the Commissioner must, as soon as practicable, confirm the appointment by instrument in writing.
- 15 (5) An instrument of appointment or confirming the appointment of a special constable must specify the term and conditions of the appointment, including—
- (a) if the appointment is for the whole of the State—that fact; and
- (b) in any other case—the part of the State for which the special constable is appointed.

20 **14—Amendment of section 61—Duties and powers of special constables**

Section 61(2)—delete subsection (2) and substitute:

- 25 (2) The Commissioner may, when appointing a special constable, impose limitations on his or her powers, responsibilities or immunities—
- (a) if the appointment is made orally under section 59(3)(a)—orally; or
- (b) if the appointment is made by instrument in writing—by the instrument of appointment.
- 30 (3) If a limitation is imposed orally, the instrument confirming the appointment of the special constable under section 59(4) must specify the limitation.
- (4) The Commissioner may, by notice in writing to a special constable, vary or revoke a limitation imposed under this section.

35 **14A—Substitution of section 65**

Section 65—delete the section and substitute:

65—Protection from liability for members of SA Police

- 40 (1) A member of SA Police does not incur any civil or criminal liability for an honest act or omission in the exercise or discharge, or the purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act or any other Act or law.

- 5
- (2) A liability that would, but for subsection (1), lie against a member of SA Police lies instead against the Crown.
- (3) A person (the *injured person*) who suffers injury, loss or damage as a result of the act or omission of a member of SA Police may not sue the member personally unless—
- 10
- (a) it is clear from the circumstances of the case that the immunity conferred by subsection (1) does not extend to the case; or
- (b) the injured person brings an action in the first instance against the Crown but the Crown then disputes, in a defence filed to the action, that it is liable for the act or omission of the member.
- 15
- (4) Where a question arises as to whether the immunity conferred by subsection (1) extends to the case and the member of SA Police claims to come within the immunity so conferred, the burden of proving that the act or omission was dishonest lies on the party seeking to establish the personal liability of the member.
- 20
- (5) If a member of SA Police is sued personally for an act or omission in the exercise or discharge, or purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act or any other Act or law—
- 25
- (a) unless the Crown is alleging that the member is personally liable for the act or omission—the Crown must represent the member; or
- (b) if the Crown does not represent the member and the member is found by the court not to have acted dishonestly—the Crown must indemnify the member for legal costs properly incurred by the member (but not exceeding 80% of the Supreme Court scale of costs applying at the time the case is determined).
- 30

15—Amendment of section 67—Divestment or suspension of powers

Section 67—after subsection (3) insert:

- 35
- (4) If the Commissioner grants leave to a member of SA Police for an extended period, the Commissioner may, by instrument in writing, suspend for the period of the leave all powers and authorities vested in the member by or under this or another Act or any law as a member of SA Police or constable.
- 40
- (5) If the Commissioner grants leave to a member of SA Police on account of physical or mental disability or illness of the member, the Commissioner may, by instrument in writing, suspend all powers and authorities vested in the member by or under this or another Act or any law as a member of SA Police or constable.
- (6) An instrument in writing under subsection (5) must include reasons for the Commissioner's decision.

- (7) A suspension under subsection (5) remains in force until it is revoked by the Commissioner by further instrument in writing.

16—Amendment of section 70—Suspension or revocation of suspension under Act or regulations

- 5 (1) Section 70(2)—delete subsection (2) and substitute:
- (2) Despite subsection (1), remuneration may only be withheld under that subsection for more than 3 months if—
- (a) the person has been committed for trial for a serious offence;
or
- 10 (b) the person has been found guilty of a serious offence; or
- (c) the person has admitted or been found guilty of a breach of the Code in respect of which the most probable outcome is termination of the person's appointment.
- (2) Section 70(4)—delete "under this Act or the regulations" and substitute:
- 15 of a person's appointment
- (3) Section 70(5)—delete "circumstances referred to in subsection (4) or otherwise" and substitute:
- particular circumstances
- (4) Section 70—after subsection (5) insert:
- 20 (6) In this section—
- serious offence* means an offence that is punishable by imprisonment for 2 years or more.

17—Amendment of Schedule 1—Police Review Tribunal

- (1) Schedule 1, clause 1(2) to (7)—delete subclauses (2) to (7) (inclusive)
- 25 (2) Schedule 1, clause 2—delete clause 2 and substitute:

1A—Constitution of Tribunal for purposes of proceedings under Part 8 Division 1 or 2

- (1) The Tribunal will, for the purposes of proceedings under Part 8 Division 1 or 2, be constituted of a magistrate appointed by the Governor.
- 30 (2) The magistrate appointed to constitute the Tribunal will be appointed for such term of office, not exceeding 3 years, as the Governor may determine and, on the expiration of his or her term of office, will be eligible for reappointment.
- 35 (3) The Governor may appoint another magistrate to be the deputy of the magistrate appointed to constitute the Tribunal and the Tribunal will, for any period for which the magistrate appointed to constitute the Tribunal is absent or unavailable, be constituted of that other magistrate.

1B—Constitution of Tribunal for purposes of proceedings under Part 8 Division 3

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- (1) The Tribunal will, for the purposes of proceedings under Part 8 Division 3, consist of a person appointed by the Minister under subclause (2) or, if that person is unable to act, a person appointed as a deputy under subclause (3).
- (2) The Minister may appoint a person to the Tribunal for a term of 3 years and on conditions determined by the Minister.
- 10 (3) The Minister may appoint a deputy of a person appointed to the Tribunal under subclause (2).
- (4) The appointment of a deputy will be for a term of 3 years and on conditions determined by the Minister.
- (5) A person appointed under subclause (2) or (3)—
- 15 (a) must be a legal practitioner of at least 5 years standing; and
- (b) is eligible for reappointment at the end of a term of office; and
- (c) may be removed from office by the Minister—
- 20 (i) for breach of, or non-compliance with, a condition of appointment; or
- (ii) for misconduct; or
- (iii) for failure or incapacity to carry out official duties satisfactorily.
- (6) The office of a person appointed under subclause (2) or (3) becomes vacant if the person—
- 25 (a) dies; or
- (b) completes a term of office and is not reappointed; or
- (c) resigns by written notice to the Minister; or
- (d) ceases to satisfy the qualification by virtue of which the person was eligible for appointment; or
- 30 (e) is removed from office under subclause (5).

2—Secretary to Tribunal

- (1) There will be a Secretary to the Tribunal.
- (2) The Secretary will be a member of SA Police or a Public Service employee.
- 35 (3) The position of Secretary may be held in conjunction with any other position in SA Police or the Public Service.
- (4) The Secretary will have the duties and functions conferred by this Act or any other Act and such other duties and functions as may be directed by the Tribunal.

Part 3—Amendment of *Police (Complaints and Disciplinary Proceedings) Act 1985*

18—Amendment of section 46—Appeals in respect of discipline

Section 46—after subsection (2) insert:

- 5 (2a) A designated officer (other than a person appointed to be a police
cadet under the *Police Act 1998*) may appeal to the Court against an
order of the Commissioner made after the commencement of this
subsection imposing punishment on the designated officer for having
10 been found guilty of an offence against a law of this jurisdiction or
another jurisdiction.

Part 4—Amendment of *Public Intoxication Act 1984*

19—Amendment of section 4—Interpretation

- (1) Section 4, definition of *officer in charge*—delete "member of the police force" and
substitute:

15 police officer

- (2) Section 4—after the definition of *relative* insert:

responsible officer, in relation to a police station, means—

- (a) the officer in charge of the police station; or
(b) if a police officer has, for the time being, been designated by the
20 officer in charge of the police station as the officer with
responsibility for persons accepted into custody at the police
station—that officer;

20—Amendment of section 7—Apprehension of persons under the influence

- (1) Section 7(1)—delete "member of the police force" wherever occurring and substitute
25 in each case:

police officer

- (2) Section 7(2)—delete "member of the police force" and substitute:

police officer

- (3) Section 7(3)—delete "member of the police force" and substitute:

30 police officer

- (4) Section 7(4)—delete "officer in charge of that" and substitute:

responsible officer for the police

- (5) Section 7(4)(a)—delete "officer in charge" and substitute:

responsible officer

- 35 (6) Section 7(9)(b)—delete "officer in charge of" and substitute:

responsible officer for

(7) Section 7(10)—delete "officer in charge of" and substitute:
responsible officer for

(8) Section 7(11)—delete "an officer in charge of" and substitute:
a responsible officer for

5 **21—Amendment of section 10—Custody of persons detained**

(1) Section 10(1)(b)—delete "the officer in charge of" and substitute:
the responsible officer for

(2) Section 10(2)—delete "member of the police force" and substitute:
police officer

10 **Schedule 1—Transitional provisions**

1—Transitional provisions

(1) Section 27 of the *Police Act 1998*, as amended by Part 2 of this Act, applies to an appointment—

(a) made on or after the commencement of this clause; or

15 (b) made prior to the commencement of this clause if the period of probation for the appointment has not ended before that commencement.

(2) Section 55 of the *Police Act 1998*, as amended by Part 2 of this Act, applies to a selection process conducted after the commencement of this clause.