

REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

REPORT NO. 10

OCTOBER 1990

REGULATION REVIEW COMMITTEE

MEMBERS

Mr. A.J. Cruickshank, M.P. (Chairman)
Mr. G.A. Yeomans, B.A., Dip.Ed. M.P. (Vice-Chairman)
Mr. R.F. Chappell, M.P.
Mr. R.W.J. Christie, M.P.
Mr. S.A.J. Knowles, M.P.
Mr. J.A. Longley, B.Ec., M.Ec., F.C.P.A., S.P.T.C., M.P.
Mr. J.C. Mills, B.Sc (Hons), M.Sc., A.R.A.C.I., C. Chem., M.P.
The Hon. S.B. Mutch, M.A., LL.B., M.L.C.
The Hon. B.H. Vaughan, LL.B., M.L.C.

STAFF

Mr. J.B. Jefferis, B.A. LL.B., Director
Mr. G.S. Hogg, Dip.Law (B.A.B.), Dip.Crim., Legal Officer
Ms. P. Azarias B.A. (Hons) (Sydney) M.A. (Oxon) M.P.A.
(Princeton), Project Officer/Specialist
Ms. H. Minnican B.A. (Hons), Committee Clerk.
Ms. C. Sciara, Stenographer

REPORT

The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of it is to consider all regulations while they are subject to disallowance by Parliament.

In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:-

- (a) that the regulation trespasses unduly on personal rights and liberties;
- (b) that the regulation may have an adverse impact on the business community;
- (c) that the regulation may not have been within the general objects of the legislation under which it was made;
- (d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- (e) that the objective of the regulation could have been achieved by alternative and more effective means;
- (f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- (g) that the form or intention of the regulation calls for elucidation; or
- (h) that any of the requirements of the Subordinate Legislation Act, 1989 appear not to have been complied with.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

Police Service Regulation 1990 made under the Police Service Act 1990 (Gazette 29 June 1990 at p. 5726)

The object of this Regulation was to remake the Police Rules 1977 with the necessary modifications as a consequence of the repeal of the Police Regulation Act 1899 and the establishment of the Police Service.

The Police Rules, as remade, include provisions with respect to certificates of discharge of police officers. Clause 16 of the new regulation provides:-

"A police officer is entitled to be issued with a certificate of discharge by the Commissioner on resignation or retirement, except if the officer -

- (a) is dismissed from the Police Service; or
- (b) is discharged from the Police Service during the period of the officer's probation; or
- (c) is permitted to resign or retire from the Police Service while the subject of an investigation concerning the conduct of the officer by another police officer or under the Ombudsman Act 1974."

This clause is in exactly the same form as Clause 15 of the old Police Rules 1977.

In reaching its present form the Rule has undergone a significant modification. On 31 March, 1989 it was amended to overcome an anomaly whereby a Police officer retiring or resigning while under investigation was still automatically entitled to a certificate of discharge. The amendment in creating a new clause 15(2)(c) gave the Commissioner for Police a discretion to issue a certificate or not in the circumstances of each case.

The Committee was concerned that if the officer was ultimately exonerated by the investigation he or she had no right to a certificate of discharge and the Commissioner would still have

the ultimate discretion to issue a certificate or not. It therefore requested the Minister for Police to amend the regulations to restore the right to a certificate in such cases.

Minister's first Response:

In his letter of 6 September, 1989 the Minister said as follows:

"In the process of consultation with the Parliamentary Counsel's Office which preceded the making of the amended Rule, conscious attention was paid to those considerations required to be taken into account by your Committee.

You will appreciate there could be no end to the number of refinements or provisos capable of being suggested to any Rule, Regulation, etc. which is expressed in other than absolute terms.

One immediate concern in relation to the proposal put forward in your letter is that "exoneration" is not a term used in criminal or disciplinary jurisdictions. Other issues which come to mind include:

- . dismissal of a matter made subject to an investigation does not necessarily equate with innocence - the essence of such a result is the inability of the prosecution to discharge its onus of proof.
- . a "deemed not sustained" finding, arising from the Ombudsman not being able to determine whether or not a complaint has been sustained, does not amount to an "exoneration".
- . there may be multiple reasons for a decision to discontinue an investigation - a discontinuance does not mean exoneration.

I am satisfied the reservation of a discretion to the Commissioner is the most appropriate way to ensure proper account can be taken of the various contingencies which might affect the circumstances within the scope of Clause 2(c) of Rule 15.

I am sure you would not wish to raise any inference that the discretion in relation to the issue of a certificate of discharge would be exercised in any way other than a just and equitable manner. I believe that to change Rule 15 along the lines you have suggested could well be interpreted as a reflection on the integrity of the Commissioner of Police. The potential for such a reflection must be rejected out-of-hand.

I trust that in the light of the matters I have outlined your Committee might agree to the Rule not being further amended."

The Committee noted that the meaning of "exonerate" in the Macquarie Dictionary is, "to clear, as of a charge; free from blame; exculpate". The Committee resolved to inform the Minister, in line with this definition that it had in mind cases where the officer was found to be totally blameless, not merely where there was insufficient evidence to proceed and that its request did not raise any imputation concerning the Commissioner. The Committee stated that it was concerned that where there was formerly an unqualified right to a certificate of discharge on the part of officers who retired or resigned while under investigation, that right should be retained in the case of officers who are cleared of any blame after that investigation.

Minister's second Response:

In his response of 24 November 1989 the Minister stated:

"Whilst I noted your further advice, I am of the view that the matters advanced in my earlier letter remain apposite and it would be inappropriate to include an amendment of the nature suggested by your Committee."

View of the New South Wales Police Association

The Committee resolved to write to the New South Wales Police Association for its views on the matter.

The Legal Officer of the Police Association of New South Wales in her letter of 13 February 1990 said as follows:

"The Association agrees with the Committee that an officer where exonerated should have the right to a certificate of discharge. It would appear to be a denial of natural justice to deny to an officer cleared of all charges entitlement to a certificate.

This is a matter which the Association regards as important. It is our belief that the words "unless subsequently exonerated" should be included at the end of section 15(1)(c) of the Act.

We look forward to hearing from the Committee as to the outcome of this matter."

Committee's Further Action:

The Committee advised the Minister that its view was supported by the Association and sought the attendance of a Senior Officer of the Police Department to discuss the difficulties the Minister had in implementing the Committee's recommendations.

Minister's Third Response:

In his letter of 17 April 1990 the Minister said:-

"I note that the substance of your most recent letter is essentially a re-iteration of an issue raised in earlier correspondence.

My stance on this matter was outlined in detail in my letter of 6 September 1989 and I consider that letter to have provided a comprehensive response to the Committee's concerns as expressed to that time.

In the absence of any fresh matters since being advanced, I am unable to see that any advantage could arise from a discussion at Officer level and I regret I am not able to accede to your request."

Advice from Attorney General

The Committee was concerned that the matter could not be advanced further on a co-operative basis and accordingly sought the Attorney General's view on the matter.

The Attorney General in his letter of 8 June, 1990 said:

"I refer to your letter of 15 May 1990 concerning an amendment to clause 15 of the Police Rules 1977 in relation to a certificate of discharge.

The Rule appears to have been validly made and provides that pursuant to clause 15 of the Regulation a member of the Police Force is entitled to be issued with a certificate of discharge by the Commissioner upon resignation or retirement but is not so entitled if the member is dismissed, discharged during probation or permitted to resign or retire while the subject of an investigation.

I note that the Committee is of the view that when an officer resigns or retires during an investigation and is ultimately exonerated then there should be an entitlement to a certificate of discharge.

This is, of course, a question of policy rather than law and accordingly a matter for the Minister to determine. However I would note that the Police Rules are in the course of being re-written following the passing of the Police Service Bill. It may well be that the Rule in question will be re-examined in the course of this exercise."

Although the Attorney General stated that the matter is one of policy this had not been claimed by the Minister. Certificates of Discharge are not part of any formal government policy so as to exclude their examination by the Regulation Review Committee.

On 29 June 1990 clause 15 was remade as clause 16 of the Police Service Regulation 1990. In a letter dated 27 September, 1990 the Minister was offered a further opportunity to put any additional

matters before the Committee on the new clause 16. In its letter the Committee informed the Minister as follows:

"My Committee has had regard to the difficulties you raised in connection with the use of the word "exoneration". It considers these would be met if the regulation entitled a police officer to a certificate of discharge in the following circumstances:

- (i) where after investigation, the Ombudsman finds the complaint is unjustified;
- (ii) where proceedings are instituted as a consequence of an investigation and are subsequently dismissed.

The Regulation would, of course, still retain the discretionary right of the Commissioner to issue a certificate of discharge in other circumstances covered by section 16(2)(c).

In the absence of your agreement to the above amendment my Committee will consider, at its meeting on 11 October 1990, whether it should recommend to Parliament the disallowance of clause 16(2)(c). If you wish to present any further arguments to the Committee in respect of the matter I would be grateful if they could be supplied prior to that meeting."

In a letter to the Committee dated 10 October 1990 the Minister re-affirmed his intention to oppose any change to clause 16(2).

Committee's Opinion

The Regulation Review Committee is of the opinion that clause 16(2)(c) in its present form trespasses unduly on personal rights and liberties. The Committee believes that the regulation does so in that officers who resign or retire while subject to investigation by the Ombudsman or by a police officer have been deprived of their right to a certificate of discharge even though

they may subsequently be cleared of any improper conduct by that inquiry or by a subsequent finding of the police tribunal or a court of law.

Further, the Regulation Review Committee is of the opinion that the proposal put forward by the Committee to the Minister in its letter dated 27 September 1990 for the modification of that clause constitutes an alternative and more effective means for achieving the objective of the regulation.

Recommendation

The Regulation Review Committee recommends disallowance of clause 16(2)(c) of the Police Service Regulation 1990.

Dated:

Chairman

Regulation Review Committee
