CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

Second Reading

Resumed from 8 May.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [7.38 pm]: I am continuing the remarks I have begun twice before. I know that members have all been waiting on the edge of their seats to see where my remarks were going to go to next and I know that they spent, I am sure, the better part of their July winter recess thinking, "What is she going to canvass and let's hope we remember what she said when we come back." I will help members by just reviewing the things I had said and I am hopeful that I can finish my contribution to the second reading debate this evening. I had made the point that I think there is a lack of evidence before us as the Parliament, and publicly, that there is some real systemic cultural problem within custodial services that cannot be addressed other than by adopting the guilty until proven innocent approach and by eroding the principles of procedural fairness in the disciplinary matters that apply to prison officers once an allegation is made.

I also made the point that there is a credibility gap. Although the Minister for Corrective Services is relatively new to his portfolio, of course he is not the first corrective services minister in this government. It appears that the current Minister for Corrective Services would have us believe that he is the first one to have discovered that there is in fact, according to him, some sort of systemic, cultural corruption and misconduct going on within custodial services and that none of his predecessors since the government was elected in 2008 had noticed this or, if they had, had done anything about it.

The bill before us seeks to deal with four matters. The second reading speech tells us that the bill will apply to four elements—incompetence, criminality, corruption and a lack of integrity. I agree, and I made this point in my original contribution, that rigorous disciplinary measures ought to be put in place to deal with systemic criminality, corruption and a lack of integrity. However, I think that applying those same measures, including the loss-of-confidence measures, to incompetence is not appropriate. I do not think the way to deal with incompetence, which is essentially a skills deficit, is to put incompetence on the list of measures that need to be bundled into a new disciplinary process that effectively dismisses someone without them being able to see the evidence on which that dismissal is based, and I had made that point.

The other three elements that the second reading speech tells us that the bill is directed at—that is, criminality, corruption and a lack of integrity—are very serious matters. When they are put in the context of a closed and dangerous environment such as a custodial setting in which there is the potential for abuse of power, it is indeed appropriate that there be a rigorous mechanism in place to deal with them. However, I argue that the mechanisms in this bill tip the balance so that procedural fairness for prison officers who are subject to allegations of that sort is out the window and no longer applies.

I also made the point that this bill deals with what I described as the back end of dealing with criminality, corruption and a lack of integrity—that is, what is done once there is awareness of a breach, corruption or misconduct. I had set out what is at the front end—that is, the structural mechanisms that the Department of Corrective Services has long had in place to deal with professional standards and to be proactive to stop criminality, corruption and misconduct occurring before they start. I had set out the previous structural mechanisms in the department, as well as those that the new minister has put in place. I had begun to go to the existing legislative framework that deals with these serious matters. I was making the point that it seemed to me that the existing disciplinary measures in the Prisons Act, in particular sections 98 and 106, address the issues that the minister says that we need to deal with under this bill. Section 98 of the Prisons Act states amongst other things —

> (1) A prison officer who —
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> …
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> (d) commits any act of misconduct which relates to the performance of his duties or his fitness to hold office as a prison officer …
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> …
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> is guilty of a disciplinary offence.

A range of other things make a prison officer guilty of a disciplinary offence, but certainly misconduct is one of them.

Section 98(1)(d) of the current Prisons Act goes to fitness to hold office. It is already possible for a prison officer to be found not fit to hold the office of prison officer. The government says that the bill that is before us will take

us down a different path from the one that is set out in the existing legislation. I have not found in either the second reading speech or the public commentary—including the most recent public commentary, which I think was yesterday or the day before, when there was an article in the paper about a woman prison officer who had been found guilty of misconduct—evidence that the existing powers have proved to be inadequate. I would invite the Attorney General in his response to set out what parts of the current Prisons Act, particularly sections 98 and 106, are inadequate or have failed to deal with the situation that needs to be dealt with.

The other piece of legislation that governs prison officers, of course, because they work in the public sector, is the Corruption and Crime Commission Act 2003. The annual report for the Department of Corrective Services tells us that in 2012–13 there were 387 misconduct reports. That was not just of prison or custodial officers but across the department. Of the 387 cases that were assessed, 377 were reported to the Corruption and Crime Commission, and 98 per cent of those cases were reported to the CCC within a day of the assessment having been undertaken.

The relevant provisions of the Corruption and Crime Commission Act are sections 4, 18 and 28. The definition of "misconduct" in section 4 states, to paraphrase, that misconduct occurs if a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; or a public officer corruptly takes advantage of their office or employment to obtain a benefit; or a public officer commits an offence punishable by two or more years of imprisonment; or a public officer engages in conduct that adversely affects the honest or impartial performance of the functions of a public authority or public officer, or constitutes or involves the performance of his or her functions in a way that is not honest or impartial, or constitutes or involves a breach of the trust placed in the public officer as a consequence of the office that they hold, or involves the misuse of information or material that the public officer has acquired in connection with their particular function and constitutes or could constitute an offence against the Statutory Corporations (Liability of Directors) Act 1996 or any other written law, or a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act, whether or not the public officer is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct. Therefore, section 4 of the Corruption and Crime Commission Act clearly captures a person who works within custodial services.

Section 18 of the Corruption and Crime Commission Act deals with the misconduct function and gives a head of power to the Corruption and Crime Commission to ensure that an allegation about, or information or matter involving, misconduct, is dealt with in an appropriate way. The CCC can receive and initiate allegations of misconduct; it can consider whether action is needed; it can investigate or take any other action in relation to allegations and matters related to misconduct; or it can refer the allegation to independent agencies or appropriate authorities. Therefore, the CCC can take action itself or it can refer it back to the department to be dealt with internally.

Section 28 of the Corruption and Crime Commission Act lists the officers who are obliged to notify misconduct. These are the independent persons whose job it is to conduct assessments and investigations as to how our custodial services are conducting themselves. Those officers are the Parliamentary Commissioner, the Inspector of Custodial Services, the principal officer of a notifying authority, and an officer who constitutes a notifying authority. The rest of that section sets out who else has a duty to notify.

That division of the Corruption and Crime Commission Act then goes on to set out that the duty to notify is paramount—there is an obligation—and what the commission is to do when it has received a breach, for example, of someone not reporting when they should report. The minister can probably remember this better than I do. A report was released in the last couple of days of a female prison officer who was found guilty of one of the provisions under the CCC act. It seems to me that this is an example of the existing legislation dealing with a matter. I am fairly sure that that person was found guilty and there were consequences for her actions due to the findings and investigations of the CCC. I again invite the minister to point out where in that process, for example, there was a flaw in the existing legislative tools that prevented the Department of Corrective Services from dealing with that issue. It seems to me that it was dealt with under the existing CCC procedures. I do not think any evidence has been put before us that the existing legislative framework is deficient, is not working or is obstructing the department in dealing with misconduct, lack of integrity or criminality.

My point is that no-one is arguing that there may not be officers committing offences and no-one is arguing that we do not need to be vigilant about identifying, reporting and responding to the potential for misconduct and corruption between prison officers and criminals, particularly around organised crime. But given that internal structures and mechanisms exist within the department and legislative frameworks that allow for those things to be investigated and action taken against them, where is the evidence that those existing measures have failed and that corruption has occurred because the current system could not pick it up or was corrupt?

I turn now to proposed section 102 in clause 7 of the Custodial Legislation (Officers Discipline) Amendment Bill before us, which introduces "Notice of a loss of confidence". In this case, the Commissioner of Corrective Services can issue a notice that he or she does not have confidence in an officer. It sets out the grounds for why the commissioner has formed that view, but does not require the commissioner to provide any evidence of those grounds and there is no reference, for example, to witness reports or anything like that. Once one of those notices has been issued, the prison officer has 21 days to respond. There is no examination of evidence; there is no questioning of the grounds. The prison officer is required to just respond in writing. Having received the prison officer's response in writing, the commissioner will then make a decision about whether the officer is to be removed—that is, dismissed—and the reasons for the decision. Unless the regulations say otherwise why that would be the case—this is in proposed section 102(6)—the commissioner can give copies of any documentary evidence the commissioner has considered and allow the prison officer to inspect, but not actually take away with them, copies of any other material the commissioner considered in making that decision. Meanwhile, proposed section 102(7) states —

> The removal action may be carried out when the notice is given or at any time after that.

The removal action can be immediate once the notice is given. I make the assumption here that it is the original notice of removal. It is not clear to me whether proposed section 102(7) is the loss of confidence notice, the decision notice or the removal notice. There are too many uses of the word "notice" in this part, with different meanings. I think that those seeking to implement this legislation will get tripped up in that. I invite the Attorney General to make that clearer to me.

While an officer is going through the loss of confidence process, proposed section 103 provides for a maintenance payment to maintain their salary for 28 days from the date that they were removed. That 28 days is important because proposed section 106 sets out the appeal mechanism. The appeal mechanism is to the WA Industrial Relations Commission. That appeal needs to be heard by three commissioners, one of whom must either be the chief commissioner or the senior commissioner. That is important because the current make-up of the WAIRC comprises the president, the chief commissioner, the senior commissioner and three other commissioners. In order to hear an appeal in this process, the appeal needs to be heard by three commissioners, one of whom has to be the chief or the senior. A total of six people can be drawn upon, and one of those six has to be either the chief commissioner or a senior commissioner. There is only one chief commissioner and there is only one senior commissioner. That is a very tight, small group of people who constitute the panel that listens to the appeal. Getting that panel constituted within 28 days of the removal notice being issued, which is the length of the maintenance period, I suggest to the Attorney General will be very difficult. Anyone who has worked within the industrial relations system knows that trying to get a panel from a pool of commissioners convened—including restrictions that one of them needs to be the senior or the chief—the hearing heard and the matter resolved while a person is still on their 28 days' worth of maintenance money is setting the system up for that person to pursue an appeal against their dismissal well beyond the time when the money runs out. That is not practical. The matters will not be able to be dealt with within 28 days. It is highly likely to run out. There is the power for exemptions to extend that maintenance pay, but I reckon those exemptions will in fact become the norm, not the exception.

In respect of the actual proceedings to hear the appeal, it turns out that the normal process of hearing appeals is turned on its head. The appellant does not go first—the person who says they have been wronged does not go first; the commissioner does. I am interested in why that has been turned on its head. I invite the Attorney General to advise me why that is the case.

The other element of procedural fairness that this bill turns on its head, which other politicians more recently seem to hold dear to their heart, is the right to silence. In the current policy directives of the Department of Corrective Services in respect of hearing disciplinary matters, an officer has the right to silence. A witness does not, but the officer does. A witness must give evidence about whether or not they saw something. New section 101(4) provides —

> (4) For the purpose of the investigation the chief executive officer may require the prison officer to do all or any of the following —
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> (a) provide the chief executive officer with any information or answer any question that the chief executive officer requires;
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> (b) produce to the chief executive officer any document in the custody or under the control of the prison officer.

I think this is a live issue right now. A prison officer has the right to silence. There is a pretty strong argument—I think the Premier agrees with me—that as members of Parliament we are held to a higher standard than others. The former Treasurer's recent reliance on his right to silence caused a fair degree of angst in the community

when he had charges made against him relating to events with him, a wedding and a car on that infamous night. I think the Premier agrees that that is someone who should be held to a higher standard in terms of the right to silence, but here we are legislating that prison officers who currently have the right to silence will no longer have the right to silence. A prison officer is not allowed to receive or test the evidence behind a notice of a loss of confidence and cannot rely on the right to silence. Let us transpose the former Treasurer into that set of circumstances and I think we would be a lot wiser about what happened on that night, but we will not be because he has exercised his right to silence, a right that we are about to take off prison officers.

Hon Michael Mischin: Does the Treasurer have the power to control people who are in custody and entirely at his mercy?

Hon SUE ELLERY: No, the Attorney General is quite right that he does not.

Hon Michael Mischin: Is this not a similar thing that has been done to police officers where the Commissioner of Police can require police officers to explain their behaviour? Why is it not analogous to that?

Hon SUE ELLERY: The Attorney General is quite right. It is right to say that we need to apply a rigorous standard in this context because the people exercising power over this group of people will more often than not be criminals and may well be associated with organised crime. We need to apply a high standard; there is no question about that. My point, which I was about to get to, but the Attorney General led me there earlier, is that if the government can present evidence that the existing right to silence has failed it because of example X in which it could not take action because Y would not say anything, we would consider that evidence. There are plenty of instances when, for example, members of outlaw motorcycle gangs have refused to give evidence in cases. If there are cases such as those regarding prison officers, I would be interested to hear about them.

Hon Michael Mischin: I have a recollection of one several months ago when police were conducting a search of premises that were being used for the purveyance of drugs and a prison officer turned up and declined to speak to the police. I would have thought that that is a situation in which we would expect a prison officer to be called in and asked what they were doing at a drug dealer's place. If he were to say, "None of your business. I am exercising my right to silence", we may never know. If we are looking at someone who is in contact with the criminal element every day in the course of their employment and in which the commissioner and the public must have confidence, should we not be entitled to question them and find out in the same manner as if a police officer had turned up at that place while others were raiding it? Is there not an element that sometimes we have to find out what is going on to find out whether we have confidence in that person? I am looking at it analogous to the police and the Labor government supported loss-of-confidence provisions for police; is this not similar? Sometimes the only person who knows what happened is the one who was there, or his mates.

Hon SUE ELLERY: I think the Attorney General is quite right regarding a scenario in which we have suspicion about links with organised crime. I have not heard about that case, but let us take it on face value that he is telling the truth. I do not disagree that when it comes to contact between prison officers and organised crime, there needs to be a higher standard. My point is that when we have been asked to consider this legislation, no evidence has been put before us. Maybe the Attorney General has offered some evidence now, but no evidence was given in the second reading speech, or in the articles by the minister that appeared in the media, that showed where the current system had let us down. I am asking the Attorney General to make the case. It is our intention to support this bill at the second reading.

Hon Michael Mischin: I thought Hon Ljiljanna Ravlich said that she was opposed to this bill.

Hon SUE ELLERY: The opposition will support the bill at the second reading. We will then move some amendments, and if the government does not accept those amendments, we will consider how we will vote in the third reading. That is our position.

Several members interjected.

The ACTING PRESIDENT (Hon Brian Ellis): Order, members. I have been prepared to let the interjections go, and tell me if I am wrong, Leader of the Opposition, but you appear to have been prepared to accept them, but if you are not, I am prepared to respect your wishes.

Hon SUE ELLERY: You are very kind. Thank you, Mr Acting President. I might go back to the points that I was trying to make, and remind myself where I was.

It looks to me as though there is a bit of spin going on here. Much has been made of this minister riding in on his white horse, wearing his cowboy hat, to clean up the investigation end of the process by disbanding the internal investigations unit and establishing a new investigation services directorate and internal investigations component of that directorate. He made much of that in April this year when he said on radio —

> The old internal investigations union in the Department's been disbanded, there's a new intelligence service directorate that has been established with whole new staffing models and brand new staff members from outside that particular, outside the old section of the department.

In Parliament on that same day, 8 April, the minister answered a question from the member for Warnbro, who asked —

> Why did the minister go on morning radio this morning—on both ABC and 6PR—and claim that the personnel in the internal investigations unit have changed when he should know that that individual is definitely still in that investigations unit?

In his reply the minister said —

> There has been a large amount of change in the personnel who work in the Department of Corrective Services investigating improper conduct. A lot of new people have gone in there.

In *The West Australian* of the same date, an article by Gary Adshead and Grant Taylor stated —

> The prison department's own internal investigations unit was a dysfunctional mess and so Mr Francis went to the WA police.

A question asked by Hon Amber-Jade Sanderson in this place of the Attorney General representing the Minister for Corrective Services on 7 May 2014 tried to unpick this. She referred to the minister's answer to question without notice 431 about the former internal investigation unit and asked how many people were employed in the former unit before its disbandment; how many people are employed in the new functions; how many of those people who were in the old unit are now in the new unit; how many people in the second component of the old formation are now in the new unit; and how many of the seven new investigators were previously employed in the former professional standards division. The answer to the question of how many people were employed in the professional standards division and the former internal investigation unit was 41 in the former professional standards division and 10 in the former investigations unit. The answer to the question of how many people were employed in the new investigation services directorate and the new investigations component of the directorate was 22 and nine. The next question was: how many of the people who were employed in the old unit are now employed in the new unit? The answer was 22. This dysfunctional unit that the minister advised was completely replaced has been completely replaced with exactly the same people! The minister stated —

> All persons employed in central investigations on 7 May 2014 were employed in central investigations on 11 March 2014—the day of professional standards' disbandment.

There is a bit of spin going on here, and it is not necessarily the case that the clean-up has been as the Minister for Corrective Services has suggested. If the problem was, as the minister told *The West Australian*, that corruption is hidden or is not revealed because the internal investigation unit is a dysfunctional mess, why have all the same people been moved into the new unit? I have not seen or heard evidence of widespread or systemic corruption, but this legislation is asking us to tip the balance against procedural fairness for prison officers in the new disciplinary measures. There is no evidence of any change at the front end, which is those investigation units that I just referred to; in fact, there has not been a clean-out by this minister. The minister has wanted to find an agenda to shine a light, not on corruption but on him, and this is the mechanism that will do that; he will use a sledgehammer to crack a nut. The bill does need significant amendment and, as I just flagged in my exchange with the Attorney General, the opposition will move some amendments in committee.

With those comments, I indicate that at this point the opposition thinks this is a flawed piece of legislation. We intend to vote for it at the second reading stage, but we will move some amendments in committee. We will see how they go and determine what position we will take on the third reading of the bill.

HON AMBER-JADE SANDERSON (East Metropolitan) [8.13 pm]: I also rise this evening to make my contribution to the Custodial Legislation (Officers Discipline) Amendment Bill 2013. According to the second reading speech from the minister in this place and also in the other place, the bill has a range of purposes, one of which is to give the Commissioner of Corrective Services power to remove officers when the commissioner has lost confidence in their integrity, performance, competence and conduct. The bill also aims to change a range of disciplinary procedures in the way the commissioner is able to deal with officers facing either charges or disciplinary issues. The bill has three aspects. Firstly, there is the introduction of no-confidence procedures; and, secondly, there is what is claimed by the minister as streamlined and contemporary disciplinary procedures. I feel suspicious when I hear the words "streamlining" or "flexibility" when it comes to industrial arrangements, because in my experience when employers attempt to streamline or make more flexible industrial arrangements, it does not end well for the employee and usually means a reduction in their rights and ability to appeal any procedures that may fall upon them. A good example of that is Australian workplace agreements and the great WorkChoices mantra of flexibility: we need flexibility in the workplace and employers need flexibility so they

are able to hire and fire, so they do not have to pay so many penalty rates and generally to make it easier for the employer. There is a cost to that and the employee generally pays that cost. I am wary of the language and the content of this bill about disciplinary procedures and I am concerned that procedural justice is applied. The third aspect of the bill I am concerned about is the abrogation of the privilege to remain silent. That is a fundamental right, and it is not clear in the bill what representation officers who find themselves affected by the provisions of this clause will be allowed. What kind of representation or advice will either be present in the room or they have access to?

I have asked myself whether there is a need for this bill. Like Hon Sue Ellery, I do not believe that to date there has been a demonstrated need for these quite extreme industrial measures placed in one person—the commissioner. The bill reminds me of the Workforce Reform Bill 2013, which passed through this place earlier this year and which I had the opportunity to look at in great detail when I was on the Standing Committee on Legislation. A lot of the same questions about that bill apply to this bill. Are there now existing industrial arrangements to deal with this? Does the Public Sector Management Act not already allow for a range of issues? What are the managers of the people who are deemed incompetent doing? What are the managers of the custodial officers in the prisons doing if they need such extreme loss-of-confidence provisions? I believe many of these issues can be dealt with through proper management and, if necessary, performance management of employees or addressing skills' deficits, and not necessarily cutting off incomes and imposing such extreme labels as loss of confidence when someone's income and ability to provide are at stake.

Some of the claims that have been made by the Minister for Corrective Services in the other place have been a little exaggerated. In the second reading speech in the other place, Minister Francis stated that in each of the three years, up to three and a half per cent of Department of Corrective Services staff working with people in custody have been charged with a disciplinary offence and that from July 2011 to June 2013, 59 custodial officers were charged under the Prisons Act 1981 and that, of those officers, only three were dismissed, while a further 10 resigned during the course of the investigation and/or as a result of disciplinary action. If they were fully investigated and the disciplinary process flowed, and three were dismissed and 10 resigned, I would say that the processes are working because they are weeding out those officers who are not necessarily doing the right thing. But when I dug a little deeper through the facts, I found that "up to three and a half per cent" actually refers to the percentage of youth custodial officers charged, which is seven out of 200. The percentage of prison officers charged in that year was actually only 1.8 per cent. Seven of the youth custodial officers charged involved no cases of abuse of authority. Five involved conflict of interest or improper association and five cases involved neglect of duty and failure to report, such as not turning up to work. Five of those cases—neglect of duty and failure to report—can be dealt with within the existing industrial framework by a proper manager. I think that the three and a half per cent figure is misleading and does not show the true picture.

The number of officers charged decreased by 59 per cent between 2011–12 and 2012–13. Of the 58 cases in 2012–13, only 24 were followed through. Many of those 24 officers were charged only with offences that did not seem to be of the serious nature that the minister proposed. I do not have the details, but certainly on initial reading, it does not look like it. Offences such as disobeying a lawful order, unprofessional conduct and compromising security are serious and should be dealt with. According to figures provided by the WA Prison Officers' Union, in the last three years only three officers have been charged with trafficking contraband and none of them are still working in WA prisons. Those officers who were charged were removed from prisons and none are currently working in prisons. Of those 59, there is no evidence provided by the minister that any of them were involved in corruption. In his second reading speech, the minister did not provide a single tangible example of when an officer should have been dismissed. That is a concern. We need to know how the laws are going to apply and whether they are really necessary. What are the examples and where are these people?

I would say that the current laws are essentially working, similar to the state industrial laws under which a number of people are working through the redeployment, retraining and redundancy process. It seems to be more of a campaign, the purpose of which is not entirely clear to me. Hon Sue Ellery said that it is about raising the profile of the minister, and that may well be the case. He does seem to have waged a bit of a war on prison officers, who need to uphold very high standards of integrity. The vast majority of them do, but they also work in incredibly difficult and challenging environments. None of us here could probably do their job. I could not do it. I am thankful that there are people who do it and do it well. My grandfather was a medical officer in the prison system. He worked in Fremantle Prison and then in the prison at Canning Vale before it was privatised. He loved his job. It was a tough job and it was not well paid. It is something that people are very dedicated to doing. I think we can put in place a better balance for these workers and the system than this legislation provides.

In May last year the minister claimed that there were very high levels of sick leave and that prison officers were rorting the system of leave entitlements. He made these claims at the same time as these officers were negotiating their latest enterprise bargaining agreement. It seemed more like he was running a publicity

campaign than being effective. He insulted the entire workforce by claiming that they were all rorting the system. Then he claimed that if these workers are accessing their sick leave, they are clearly not thick-skinned enough. He was quoted in *The West Australian* as saying —

> "There are obviously a lot of dedicated and hardworking prison officers but I would also suggest that some people just may be in the wrong job.
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> "You need a certain thickness of skin to work in corrections."

That is probably true to a large degree but they are under huge amounts of stress and strain, they are subject to assault and they operate in a system that is currently overcrowded and requires people to sleep on the floor in a number of instances, including at Bandyup Women's Prison, and that creates a particularly stressful environment for those workers. For the minister to insult them like that is extraordinary. They deal with very complex and difficult situations. They are not just custodial officers; they are also essential to rehabilitation in a way that police officers are not necessarily. It is not comparing oranges with oranges or apples with apples; these officers work in different environments.

The loss-of-confidence provisions are of concern. The legislation is very broad on this. Yes, it does reflect the Police Act and it needs to be used as a last resort. Page 5 of the draft amendment bill defines "suitability to continue as a prison officer" as —

> … suitability to continue as a prison officer having regard to the officer's integrity, honesty, competence, performance or conduct;

That is incredibly broad. Could we include being late for work in losing confidence in one's conduct? We could under this legislation. It is so broad that we could easily capture some of those more minor performance management issues. Frankly, the department needs to engage better with those officers to ensure that they are not doing that.

Again, there does not seem to be justification for extending the powers beyond corruption. Corrupt prison officers should not be in the system; there is no question about that. I absolutely support removing those officers from the system, and so do the majority of the other officers. Corrupt prison officers compromise the majority of the other officers, they help to make prisons even more unsafe and they drive down the integrity of the whole role, so I support corrupt prison officers being removed from the system. Why do these loss-of-confidence provisions need to be extended beyond performance or conduct or competence? I think that is incredibly unnecessary and goes way beyond what we need to do to manage this issue. Those provisions could capture a range of potentially unwitting officers simply caught up in poor management, and they would not be able to return from that. Coming back from a loss of confidence is incredibly difficult and almost impossible under the current industrial relations system, which I will get to later.

Hon Michael Mischin interjected.

Hon AMBER-JADE SANDERSON: I am not taking interjections; I am making my contribution. There is an opportunity to do that in Committee of the Whole, and I am not taking interjections now.

As an example, if an officer repeatedly fails to lock down cells at night, it is obviously a serious security issue. What is the manager doing with that officer to make sure that that happens, and what checks are in place? Is that something that could result in a loss of confidence and a 28-day appeal, when it could have been dealt with by a good manager in a clearer and more open system? Under the loss-of-confidence provisions in division 3, as Hon Sue Ellery highlighted, once the officer is removed, they are given a maintenance payment of 28 days until the issue can be heard by the commission. Getting three commissioners in a room for a hearing is very difficult, and it cannot be done in 28 days. As was pointed out by previous speakers, anyone who has worked in the industrial relations system will know that it is not possible to get three commissioners in a room within 28 days, let alone the president or the senior commissioner.

This is an attempt to weed out "frivolous appeals", but it is also essentially a starving-out of appeals. People are starved out, they fold, they take a lesser offer than has been put on the table and they do not have their case heard properly because they need to pay their mortgage and their bills. It is a strategy that is used regularly by employers in cases in which there are limited rights of appeal and pay, and it essentially starves out those employees from having their appeal heard. It is not long enough. There are limited provisions to extend the payment, but it is not long enough and it is not realistic within the current commission time frames.

Under the current industrial relations system, even if it is found that the loss-of-confidence provisions attached to them by the commissioner were unfair and they were found to be innocent, they can still lose their job; there is no guarantee that they will actually get their job back under the current provisions because the employer has lost confidence in them, and the commission rightly takes very seriously the issue of an employer losing confidence.

If that is the case, their only remedy is compensation, and under this bill that is capped at 12 months' wages minus any maintenance payments they might have received. Most people want their jobs back, but by then it is too late.

I will provide an example. The Western Australian Industrial Relations Commission in the case of AM v Commissioner of Police on 11 February 2010 considered the practical application of reinstating a police officer after it had been found that the commissioner had lost confidence, but they had won their appeal to the commission. In a case such as this, the loss of confidence by the Commissioner of Police does not allow any prospect of remedial activity by which the officer can regain that trust. The Commissioner of Police would be in the difficult position of having to assign duties to the appellant that would require the use of extensive police powers in interacting with the community in a situation in which the commissioner believes that the appellant represents a risk to the community. The commission will always consider arguments about appropriate remedy, and it will not always consider that returning to employment is an appropriate remedy, particularly when someone has been found innocent. For example, if the commissioner has lost confidence in an employee because he has been accused of having had an inappropriate relationship with a prisoner, the employee appeals and it is found that he did not actually have any inappropriate relationship with a prisoner, he is likely to be given financial compensation because commissioners are unwilling to reinstate employees who have had that loss-of-confidence provision applied to them. At the end of the day, most employees do not want financial payout; they want their jobs back, and this makes it harder for those who have been found innocent to actually get their jobs back. It is also incredibly difficult to come back from with their colleagues, because they have to face these people every day, and they have the black cloud of a loss of confidence hanging over them. Despite the fact that they have been found innocent, there are major trust issues with their colleagues. It is a very close working environment in which officers need to work constructively together.

There has also been some concern raised, particularly in the other place, about the concentration of power in a single person. When we match that with the lack of appeal process for all these disciplinary procedures, it is a worry. Minister Francis's response to this criticism, which I think was an incredibly naive response, was —

> … the current commissioner, is a man of absolutely impeccable character and I have complete faith in his suitability to exercise judgement in these situations.

That is, I am sure, true. I have no doubt that the commissioner is of impeccable character and that he possibly has excellent judgement. However, laws are not written with one individual in mind. That is not the way we should be legislating, just as a job description is not written for one individual in a company. It is written for what is actually needed, what is fair and what is required. This commissioner may be exempt and probably will be exemplary in the way he will conduct himself and exercise these extraordinary powers, but what is to say that the following commissioner will not be? We do not know that that will be the case. There are very few checks and balances on this legislation, and that is a concern.

It is worth noting that the WA Police has indicated that when these loss-of-confidence provisions are available, they are often used as a way of not exercising proper leadership and management over employees who are not doing the right thing. Instead of using the processes and leadership skills around developing high standards and correcting bad behaviour and addressing bad behaviour when it comes up, these are forgone in favour of just letting bad behaviour go to a point when management can use loss-of-confidence provisions to remove people and let them go. It could potentially be used as a cop-out similar to the provisions in the Public Sector Management Act and the Workforce Reform Bill that we dealt with earlier this year.

There seems to have been a lack of consultation around this bill. Usually when we see legislation for significant industrial reform, there is consultation. My understanding is that little to no consultation has taken place with the WA Prison Officers' Union, the people who represent custodial officers, and I will be interested to hear why that was the case when we get to the committee stage.

I have other questions around this bill. As I stated, we have existing industrial relations powers to deal with a lot of this legislation. However, if an officer were to be found to have committed a crime or were to be accused of corruption, why would that officer not be referred to the Corruption and Crime Commission? Do we not have existing legislative arrangements to deal with corrupt public officers through the CCC instead of these unilateral powers that will be delivered to the commissioner; or are both powers able to be used? Will the commissioner be able to exercise both avenues—the CCC and this legislation?

One of the questions I have, which I hope the Attorney General can answer in committee, is: what kind of notice and representation will be allowed under these new provisions of the Prisons Act for employees caught up in these provisions? Secondly, will they be allowed representation in the room when they are being questioned? This question particularly comes down to the removal of the right to silence. My understanding is that an investigation commences immediately and the same disciplinary process applies, but a more extensive range of

punitive and non-punitive actions are available. I am therefore interested to know exactly what they are. Thirdly, one of the issues I have with this bill is the ability for the commissioner to force people to incriminate themselves. This is really a fundamental right that most people exercise, and, as Hon Sue Ellery and other members who have spoken on this before me have stated, this right is exercised and has been exercised recently by someone in this Parliament. I look forward to hearing in the minister's response why those officers should not be given that right. Also, I want to know what kind of representation and advice those employees will be allowed to seek during those hearings, as I assume they are, with the commissioner and how those employees will be able to represent themselves, whether it be through the union or any other industrial representation they have.

In summary, I think these are unnecessarily broad powers. We have existing laws that are working. I think the minister has failed to execute the arguments that we actually really need these laws. Prison officers and youth custodial officers are operating in very stressful environments. We have a system with overcrowding, poor planning and the potential for further privatisation, and, rather than developing better protocols and using existing ones, the minister's response has been to attack them and essentially wage a campaign against them. I think limiting the rights of appeal is incredibly unfair and the removal of the right to remain silent is unnecessary and draconian, and it is a shame that we see this before us. I am interested to see what information we can glean from the committee process and with that I conclude my comments.

HON NICK GOIRAN (South Metropolitan) [8.36 pm]: I intend to be brief and just raise two short matters on the Custodial Legislation (Officers Discipline) Amendment Bill 2013. The first is in respect of a related statutory review and the second is in regard to proposed new section 96. The reason I want to raise these now, certainly in relation to the first matter, is that there is no other time to raise them but now, although I suppose they could be raised under clause 1 in the event that the bill gets to the committee stage. The second matter relating to proposed new section 96, I think, is just a point of clarification in order to avoid pain for all concerned when we get to the committee phase. In respect of the related statutory review, it is my understanding that the bill will introduce new disciplinary provisions for police officers under the Prisons Act 1981 and for custodial officers under the Young Offenders Act 1994. In both cases the existing disciplinary provisions in these acts would be entirely replaced with two things: first of all, provisions facilitating the application of the disciplinary processes provided for under part 5 of the Public Sector Management Act 1994; and, secondly, special provisions for the removal of prison officers or custodial officers on the grounds that the respective chief executive officer does not have confidence in the officer's suitability to continue as a prison or custodial officer, having regard to the officer's integrity, honesty, competence, performance or conduct. The point I want to raise is that the removal provisions are modelled on the provisions in section 8 and part IIB of the Police Act 1892. The operation of those provisions in the Police Act 1892 commenced on 27 August 2003 and they were the subject of a statutory review under section 33Z of the act. The report of this review was tabled in this chamber in March 2006 as tabled paper 1171.

When members have the opportunity to consider that statutory review, there is one particular paragraph that I am seeking clarification on. Obviously, the statutory review covers a whole raft of matters and we could spend an abundance of time talking about those things but there is only one in particular that I think requires some clarification or, indeed, consideration—that is, paragraph 59 of the report of the statutory review. It would enable a single commissioner to deal with interlocutory matters and to progress the appeal under formal case management processes. By way of explanation, paragraph 59 of the statutory review report proposes that while retaining the provision for the three industrial commissioners, one of whom must be the president or the senior commissioner, to hear the substantive appeal, provision should be made for a single commissioner to deal with interlocutory matters and to progress the appeal under formal case management processes. It seems to me that that is an eminently sensible recommendation and would no doubt result in improved efficiency and reductions in the time taken for the resolution of appeals. It seems to me to be an unnecessary waste of the commission's resources to require three members, including the president, to be involved in these routine processes. I was away from the chamber on urgent parliamentary business but I did hear Hon Sue Ellery make some comments potentially on this point. I do not know whether it is exactly on point or a different one —

Hon Sue Ellery: I was saying that you're not going to be able to convene the combination of people required—it has to be three, one of whom has to be the chief or the senior—and do it in a timely fashion, and that has a relationship to the maintenance payment that the person receives while they are conducting their appeal. That is the point I was making.

Hon NICK GOIRAN: So it is cumbersome.

Hon Sue Ellery: Yes.

Hon NICK GOIRAN: Good.

Hon Sue Ellery: That's twice in one day, Hon Nick Goiran!

Hon NICK GOIRAN: I know; it is scary. I must be unwell!

I think that that matter is worthy of consideration. I raised this issue many moons ago, because there have been other higher priority pieces of legislation for the government, so this one has been with us for a while. When I raised this issue in November last year, the minister in the other place indicated to me that he would liaise with the Minister for Commerce about this matter, so it seems convenient for me to raise it. He indicated that he would get back to me after the summer recess, but of course now it is after the winter recess so this is my last opportunity to raise it. Before it gets missed, I thought this would be the best opportunity.

The second matter is in respect to proposed new section 96. This requires a bit of explanation. Proposed new section 96 will, in defining the term "prison officer" for the purposes of proposed new part X of the Prisons Act 1981, omit the reference in current section 96(b) to —

> a person engaged as a prison officer prior to the coming into operation of section 13 and deemed to be a prison officer for the purposes of this Act by Schedule 2.

The Prisons Act 1981 came into effect on 1 August 1982, so my view is that it is worth confirming that it is not the case that there are currently serving prison officers who were engaged as a prison officer prior to 1 August 1982 when that act came into effect, because if there are any such prison officers, the effect of the bill would be that they are not subject to proposed new part X—arguably anyway—or indeed to any disciplinary provisions under the Prisons Act 1981. My view is that to remedy this arguable defect, the reference in current section 96(b) to "a person engaged as a prison officer prior to the coming into operation of section 13" should be incorporated in proposed new section 96 in this bill; and, if there were agreement about that, there would be a need to additionally amend proposed new sections 100(1)(c) and 101(1)(b) to ensure that these provisions also apply to prison officers appointed prior to 1 August 1982. This is not a matter that I am raising for the first time. Indeed, when I asked informally about this matter—this was in November of last year—I was advised that there are 96 currently serving officers who have been employed since prior to 1 August 1982. The response that I received further indicated that all of these officers would have had to subscribe to an oath of engagement as set out in section 13(2) in order to make them prison officers under section 13(1).

It was not clear to me at that time, and it probably is still not clear, that to simply take the oath as prescribed in section 13(2) of any provision in schedule 2 of the Prisons Act 1981 would be sufficient to deem an officer a prison officer under section 13(1), which specifically refers to being engaged by the minister. Indeed, if the 96 officers who were employed prior to 1 August 1982 had not subsequently been formally engaged as prison officers by the minister, it is not clear that they would be section 13(1) prison officers. For all those reasons, it was my view, and to some extent still is, that it would be helpful to ensure that this was addressed in the current section 96(b) of the act.

However, to bring this matter to some conclusion, the view of the world of parliamentary counsel on this matter is as follows —

Hon Sue Ellery: They are not all perfect, you know.

Hon NICK GOIRAN: That is exactly why I want it get it on the record. Parliamentary counsel states —

> It is my view that the amended *Prisons Act 1981*, including part X, will continue to apply to such officers. This is because Schedule 2 clause 4 states:
>
> > "Each person appointed or engaged under the repealed Act and holding office immediately before the coming into operation of this Act shall continue to hold office and shall be deemed to have been appointed or engaged, subject to this Act and to the terms of his appointment or engagement, to a corresponding office under this Act."
>
> It is important to note that Schedule 2 clause 4 is not affected by the *Custodial Legislation (Officers Discipline) Amendment Bill 2013*: it continues to operate *exactly as it has since it came into operation on 1 August 1982*.
>
> No doubt it has been noted that paragraph (b) of the definition of "prison officer" in current section 96 of the *Prisons Act 1981* refers to "a person engaged as a prison officer prior to the coming into operation of section 13 and deemed to be a prison officer for the purposes of this Act by Schedule 2." Furthermore it has certainly been noted that the replacement section 96 omits such a reference. In my view it does so *correctly* in terms of achieving *the desired legal effect* (ie. the inclusion of both prison officers engaged under section 13 and those appointed or engaged before that section came into operation).
>
> It seems to me that the reference in Schedule 2 was only ever inserted into section 96 *out of an abundance of caution*. While this motivation might have been understandable at the time, I cannot help

> but feel that it was misguided since Schedule 2 was always clear in its effect. In other words, I am of the opinion that paragraph (b) of the definition in section 96 has always functioned as a mere *repetition*.
>
> It is standard legislative drafting practise to avoid repetition, since the latter can only serve to create doubt as to the (otherwise unambiguous) scope of the original provision which is being repeated. In this case it is my opinion that Schedule 2 clause 4 is clear on its face. Any repetition would only cast doubt on the (clear) scope of Schedule 2 clause 4.
>
> The dangers of repetition are well illustrated in the case of present section 96:
>
> Your instructions —

I should add at this point that they were not my instructions —

seek advice as to whether are "any other provision of the Bill that need amendment" in similar terms. The short answer is, that once you start repeating a provision like this, you end up having to do so in *each instance* (just to make sure that you haven't excluded someone). In other words, if one wished to repeat the effect of Schedule 2 clause 4 in certain provisions (eg. section 96), it would become tempting (and indeed, prudent) to do so in respect of *every single reference* to "prison officer" in the *Prisons Act 1981*. This would produce a very cumbersome result.

> Accordingly I would strongly advise against repeating the effect of schedule 2 clause 4 in *any* clause. That Schedule should have the effect that it already has: it should speak but once. In my view this is the best way of ensuring its unambiguous effect, namely that "a prison officer engaged under section 13" includes reference those a prison officer appointed or engaged before the coming into operation of that section.

So ends the opinion of parliamentary counsel. I share all of that simply because, as has already been indicated by the Leader of the Opposition by interjection, parliamentary counsel does not always get it right. They are no doubt very experienced and very learned. This is their view and I understand it is consistent with the Minister for Corrective Services' view, and that is fine. My only concern is that in this provision, we are removing words that could be interpreted as this chamber intending something different. I think it would be helpful either in reply to the second reading or when the relevant clause is dealt with for the government to make it crystal clear that its position is as per parliamentary counsel's opinion so that we do not have to come back at some later stage, assuming any or all of us are still here then, to fix what could be a problem.

Hon Sally Talbot: Will you take an interjection?

Hon NICK GOIRAN: I would love to, even though it is never reciprocated.

Hon Sally Talbot: Is that a letter from parliamentary counsel that you have just read into the record?

Hon NICK GOIRAN: It is information I have got from parliamentary counsel but not to me, and I will not disclose where it came from, in fairness to the person who received it and has kindly given it to me.

Hon Sue Ellery: If you are asked to identify the document, you have to identify the document.

Hon NICK GOIRAN: The Leader of the Opposition will raise the appropriate point of order if she thinks that is the case. I hasten to add before the member rises —

Point of Order

Hon SALLY TALBOT: I ask Hon Nick Goiran to identify the document to which he is referring.

Hon NICK GOIRAN: I can short-circuit this whole process by indicating that I have referred to a confidential email that I received from parliamentary counsel. I hasten to add that I have it in my possession; it is not an email that I received.

Hon NICK GOIRAN: Unless there is anything further, I propose to conclude my remarks at this stage by summarising that I think the issue of the statutory review is worthy of the government's consideration. As for new section 96, it only requires confirmation that that is what is intended.

The ACTING PRESIDENT (**Hon Liz Behjat**): On that point of order, under standing order 59(2), I assume you are stating that the document is confidential and, therefore, you are not prepared to table it.

Hon SUE ELLERY: Hon Sally Talbot asked that the member identify the document. She did not ask him to table it and, yes, he identified it. I will ask him to table it and then he can say whatever he wants to in response.

Hon NICK GOIRAN: I appreciate members' interest in my contribution this evening. As I have indicated, it is a confidential email that I have in my possession from parliamentary counsel to an individual other than me. It is confidential and I do not propose to table it.

The ACTING PRESIDENT: Under standing order 59(2), the member is not required to table the document if he claims confidentiality, and he has done that, so we can move on.

Debate Resumed

HON SALLY TALBOT (South West) [8.54 pm]: Now I have to make good on my promise to take interjections from Hon Nick Goiran, which I am sure I have done in the past! I take the opportunity to contribute to debate on the Custodial Legislation (Officers Discipline) Amendment Bill 2013. This debate, as honourable members know, has been going on for months and months. That has meant that members who want to contribute to this debate have had to follow it quite closely because we have never quite known when we would get to make a contribution. I have listened very closely to the two previous speeches tonight. I thought Hon Nick Goiran made some very interesting points. I am not without hope that his close attention to the provisions of this bill might mean that over the course of the next few hours of debate he might come to support the opposition on a few other changes that the opposition is encouraging the government very strongly to consider to make this bill more fair and equitable, and indeed, as Hon Nick Goiran just raised, more practical in terms of its implementation.

Although I deeply disagree with the direction the government takes on many of these bills, it shows a remarkable degree of consistency in blowing the dog whistle. A whole series of bills have come through this place in the past couple of months, all of which have had the same kind of hairy-chested, breast-beating and hoped-for outcome by the government. I refer to bills such as the Workforce Reform Bill, which Hon Amber-Jade Sanderson referred to, which is all about bringing public servants into line, capping their wages and making sure they cannot stay on the public purse when they are not actually doing any work. We get the flavour of that kind of rhetoric and the kind of language that surrounds these bills. It is all about blowing that dog whistle on certain elements that the community is alarmed to hear about, working on the principle that there is no smoke without fire. People wake up and listen to what the government is doing, so the government will say it has cut red tape and it has brought the public service back into line.

Law and order is a classic issue on which conservative governments play these kinds of cards. We have had anti-association measures brought into this place —

Hon Michael Mischin: Organised crime measures.

Hon SALLY TALBOT: "Anti-association measures" was the tag under which that legislation was brought into this place.

Hon Michael Mischin: It was called the Criminal Organisations Control Bill.

Hon SALLY TALBOT: We have had prohibited behaviour orders; the same sort of thing. The government had to control out-of-control youth who were terrorising the streets. There have been all these kinds of dog whistle and moral panic-type measures. Stop and search was another one, which I know is very close to Hon Michael Mischin's heart. All the same sort of language was used. With this bill, we are seeing this headline talk in big, flashing neon lights: "Corruption in the prison system! We have to address corruption in the prison system. Here we are; the big, hairy-chested government marching through the streets saying, 'We're going to clean up corruption in the prison system.'" One of the most astonishing remarks that I came across when putting together my notes for this speech was a comment made by the Minister for Corrective Services in the other place, Hon Joe Francis, on 20 March this year, when he said —

> The opposition does not believe that youth custodial officers and prison officers should be accountable to the commissioner for their actions.

I put it to the house that that is simply wrong. During hours and hours of debate in the other place and many days of debate in this chamber, not once did anybody on this side of the house say anything that could give a member sitting on the government benches cause to say that the opposition does not believe that prison officers and youth custodial officers should be accountable to the commissioner for their actions. It is arrant nonsense. It is a lie to stand and make that kind of statement in any Parliament or in the media. Nobody believes that, nobody has said that and nobody has intimated that on this side of the house. Where there is corrupt or illegal behaviour, it must be stopped. Every contribution from this side of the house in this chamber and from the Labor Party in the other place has made that point clearly and consistently. Corrupt and illegal behaviour must be stopped. We should put measures in place to ensure that the commissioner has the power to act when the commissioner believes that that kind of activity is taking place. There has never been any deviation from that belief on the part of anybody in the WA Labor Party. Hon Amber-Jade Sanderson and Hon Sue Ellery went into this in quite some detail and I will

not recount the measures in this bill clause by clause because that has already been done at some length by the Leader of the Opposition in her speech. We are all familiar with the provisions of the bill. We have been saying that those measures are already in place. We are not saying that just because we are the opposition and so we have to oppose what government members are doing. We are not doing it for the sake of doing it or for the pleasure of standing in this place and saying that the government is getting it wrong. We have produced the evidence to show the government that the alarm and the panic that it is trying to spread about what is happening in the prison system are unfounded. What is more, these measures will not result in what the government claims will be the outcome. We do not need these kinds of harsh draconian measures to fix the problems in the prison system. No-one on this side of the house is saying that the prison system does not have problems. That is equally clear from the evidence that we have produced on this side of the house. We are saying that the government is simply dressing up a piece of propaganda that it thinks will help it win the support of public opinion. It is a trick; it is a sleight of hand, which is not needed. Nevertheless, the government hopes it will buy it that precious moment of air time.

Hon Nick Goiran: Will you take my question now?

Hon SALLY TALBOT: Yes, I will take Hon Nick Goiran's question. Does the member have one for me? No, he can hold it for me, because I am just getting into the swing of things here. The member can listen to more of this.

Let us look at the second reading speech, which I am sure everyone in this place has done. The second reading speech starts off in quite an encouraging way. No-one on this side of the house has any problem with the concept of public accountability in the prison system. I remember a couple of decades ago now when there were very, very serious allegations about police corruption in other states. Some members might remember seeing what for me was one of the most stunning pieces of documentary filmmaking I have ever seen, and that was the documentary that was screened on the ABC called "Cop It Sweet", which was about corruption in the New South Wales Police Force. I am going back now probably 25 years. I think it was on *Four Corners* or it might have been an ABC documentary special.

Hon Stephen Dawson: Some of us were only children then, member.

Hon SALLY TALBOT: I know that it is available on YouTube, as I looked it up the other day. So even if members were too young to watch late-night television in those days, they can watch it now on YouTube. I remember having a conversation with a friend of mine who was a prison officer at that stage, and he said to me that his big fear was that in Western Australia the corrupt behaviour was not endemic to the police force, but there was a real risk that it was becoming endemic amongst prison officers in the prison community. I think that we responded to that very, very strongly and effectively all those years ago. As I said, these are not simply ideals that are coming off the top of our head on this side of the chamber. Every member who has spoken so far has referred to the answers to all those questions on notice that we have been putting together now for years. I notice some of the questions go back to the previous Parliament and were asked by Hon Ed Dermer when he was a member for the North Metropolitan Region.

Getting back to the second reading speech, it starts in very promising terms by talking about public accountability. The first paragraph states —

> Accountability prevents the abuse of power and ensures that power is instead directed towards the achievement of efficiency, effectiveness, responsiveness and transparency.

There is absolutely nothing wrong with that—so far so good. Unfortunately, that is only halfway down the first page, and from then on it begins to go very wrong. On the second page we see that the talk about accountability has suddenly morphed into talk about disciplinary processes and improving performance and behaviour. How does that happen? In a matter of under 100 words the second reading speech goes from talking about public accountability to talking about discipline and performance management amongst prison officers. I suggest to honourable members that that betrays the true intention of the government. It is exactly as Hon Amber-Jade Sanderson described it—the same sentiment that was the underpinning structure of the philosophy driving the Workforce Reform Bill. It is all about making headline statements that have no foundation, and then moving in to implement an industrial workplace agenda that is far from acceptable to the community of Western Australia. It is dressed up in all this panicked language about having to stamp out corruption in the prison system. That is what this bill is about; it is not about stamping out corruption in the prison system, because we already have the mechanisms to do that. It is about changing the workforce culture in our prisons, and that is exactly what this conservative government has as one of its covert agendas. The government will not sell it like that because it knows that that is not acceptable to the community of Western Australia. That is what we find as we begin to take the bits out of this bill and deconstruct it to look at the underlying ideology.

What are the challenges for the prison system? I have already said that nobody on this side of the chamber is arguing that everything is hunky-dory. Massive challenges are being faced by the prison system, but they are not the challenges that this government is trying to lay out in front of us. They are not the challenges that would be posed by a workforce that has some kind of endemic, insidious, corrupt elements working within it. The challenges are things like overcrowding. All this is on the public record. We do not have to go much further than our search engines or the Parliamentary Library to establish what real challenges confront the prison system. The challenges most definitely include overcrowding. There are also things such as the way the prison system deals with or, more accurately, fails to deal with the very high incidence of mental illness amongst prisoners, and the very high incidence of addiction and all the various difficulties posed by trying to care for people with some kind of substance abuse problem. Most recently, we saw a most horrifying report released into the way foetal alcohol syndrome is dealt with in prisons. I will have a little bit more to say about that in a moment, but let us just take these things one at a time. These are the real problems confronting the prison system.

Let us begin by looking at the overcrowding issue. A couple of journalists in this town do a fantastic job of providing quite detailed analysis of these kinds of problems. One of them is Amanda Banks, who writes for *The West Australian*. On 19 March this year there were two relevant articles in *The West Australian*. The first was by Daniel Emerson, "Jail strain as cells sit empty". In this report we see that the prison system has reached 96.5 per cent of its operational capacity. Government members may say that is fine and the system is still operating within capacity. The problem is that areas of the jail system are not being used or have been closed down because there are not enough prison officers to staff those areas; and for a whole variety of problems that I do not have time to talk about here. In this article, Daniel Emerson talks about some of these factors. It reads —

> WA's prison system has reached 96.5 per cent of its operational capacity, with the Government yet to get a handle on the projected impact of burglary laws designed to jail more people for longer.

This is where the article by Amanda Banks in the same newspaper comes in. She talks about the modelling that has not been done and what the needs of the present system will be if the government manages to pass its legislation increasing the range of offences for which a mandatory sentence is applicable. I guess we will get the hairy-chested breast-beating at some stage over the next 12 months or so. Amanda Banks' article is headed "Tough line to add to jail crush", and she writes —

> When the policies were announced in the lead-up to the election in February last year, Police Minister Liza Harvey conceded that there had been no economic modelling of the extra prison beds that would be needed and the cost of the changes.

I particularly like the phrase used by the journalist when in her concluding paragraph she states —

> It would be interesting to hear what the new Treasurer thinks of such fiscally flippant approaches among his colleagues in the lead-up to a challenging State Budget.

If that does not count as one of the major challenges facing the prison system, I do not know what does. We have a crisis in a system that is already running at capacity. I should add by way of explanation that the Daniel Emerson article goes on to point out that the Department of Corrective Services has admitted that two units designed for 128 inmates sit empty at Hakea Prison while it negotiates with the WA Prison Officers' Union on how to overcome staff shortages. Our prison system is effectively already running at capacity and the government wants to keep putting more and more people into that system. Previous speakers have referred to the fact that many of our prisons are effectively double-bunking at the moment. That is a crisis that should be absorbing the government's energies. Have we seen any acknowledgement of this problem? Not one single thing! Instead, the government comes to this place with a bill like this that is, in fact, about a very nasty right-wing industrial relations regime and has nothing to do with improving the service that is offered by the prison system in Western Australia. That is the issue of overcrowding.

I also talked about mental illness, and I want to put something on the record. Just in case somebody has problems with me reading articles by journalists—what would they know about what is going on?—or is worried that I am using only the local paper as my reference point, I decided to go somewhere else to substantiate a point. I went to the Mental Health Commission website, which of course is a government website. A page on that website is headed "Justice and mental health", and reads —

> People with a mental health problem are over-represented in the criminal justice system at all levels in Western Australia. About 40 per cent of adults and juveniles who pass through courts and prisons have a mental health problem and very few receive the care they need.

They are the words of a government body talking about an absolutely immense problem. What is the prison population? The prison population in Western Australia is 5 000-plus, and 40 per cent of those people—that is, thousands of people in the prison system—have some kind of mental illness, and the Mental Health Commission

is saying that very few receive the care they need. That is something that the government should be coming into this place and talking about. Why does the Minister for Mental Health not come in here? I would be happy for her to use up the time allotted to member's statements if she does not want to use up the time allotted for ministerial statements to talk about the conversations she is having with her colleagues around the cabinet table about how we might address the disgraceful fact that in Western Australia in 2014 the government's mental health agency is saying that very few of the people with mental illness in WA prisons receive the care they need.

Point of Order

Hon MICHAEL MISCHIN: On a point of order, I know that Hon Sally Talbot is keen to show off the fruits of her research and that she has finally realised, notwithstanding that she was eight years in government, that people in prisons have mental health problems and these other revelations about mental health and crime and the connections that this government is well aware of and is dealing with, with things like court diversion services and a variety of other strategies that were not in evidence before the change of government, and that Hon Sally Talbot seems to have neglected to learn about until now, and that it has absolutely nothing to do with a bill dealing with the discipline of prison officers and the potential for incompetence, corruption or criminal behaviour of prison officers unless they happen to also be prisoners. It would be nice if we got back to the point, if Hon Sally Talbot can manage it at all.

The ACTING PRESIDENT (Hon Liz Behjat): I have been listening to the contribution of Hon Sally Talbot and I note that in parts she is probably straying somewhat from the substance of the matter at hand, but I am sure that she is going to bring her comments back to the Custodial Legislation (Officers Discipline) Amendment Bill 2013.

Debate Resumed

Hon SALLY TALBOT: Thank you very much, Madam Acting President. I am surprised that the point I am making is lost on Hon Michael Mischin, because I am saying that the prison system is indeed facing some very serious challenges. I suggest to Hon Michael Mischin and every member sitting on government benches that those challenges faced by the prison system are not accurately classified under disciplinary measures applying to prison officers. They are, however, correctly characterised as the issues relating to the very high prevalence of mental illness in prisons, the very high prevalence of people with substance abuse problems and the grave risks faced by both prisoners and custodial officers due to overcrowding, which is becoming absolutely chronic and is going to only get worse. The fact is that the prison system is very poorly equipped to cope with the incidence of foetal alcohol spectrum disorder, which we can barely even begin to talk about because the government has not even done the research to show what the incidence of that is. Because Hon Michael Mischin said that it would be "nice" if I were to address specifically how we are going to exert more discipline over prison officers, I will attempt to get right up his nose by telling him about the piece of research to which I was referring—that is, "Foetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice in the Western Australian justice system", carried out by Dr Raewyn Mutch in April 2013. To get straight back to the major provisions of this bill, I will just refer to one short sentence in the conclusion of the executive summary of that report, which states —

> Despite some differences in perceptions and practice between professionals working in different sectors of the justice system, participants —

That is, participants in this survey —

> generally indicated a limited capacity to formally identify and respond to the needs of people with FASD, and supported the need for a coordinated approach to the development of policies to improve the management of people with FASD within the WA justice system.

This is the sort of thing that we should be on our feet debating tonight; that is, how we can start coming to terms with these very real, difficult and complex problems that beset the WA prison system. We should not be talking about how we can root out corruption that the government's own figures—the information put together by the government in response to questions from members on this side of the house—prove is not the problem that the government says it is.

As I and other members have said, we can never guarantee that every single person working for the Department of Corrective Services is as competent as they might be. Of course there have to be provisions to remove people—I will now use the terms that are used in the Custodial Legislation (Officers Discipline) Amendment Bill—who are incompetent, criminal or corrupt or who lack integrity. Not one member on this side of the house would dispute the fact that those people ought to be removed. This bill is like taking a sledgehammer to crack a nut. We have here a fundamental change in the very basic rights that should apply in every workforce—that is, the right of a worker to have a fair hearing in their workplace and the right of a worker to be able to establish that

they can do the job. The onus of proof ought to be on an employer to show that that person cannot carry out those functions or that that person is criminal or corrupt or lacks integrity.

I know that we will have an opportunity in the committee stage to canvass these points in more detail because there are amendments on the supplementary notice paper, so I will not attempt to go through all of them in my second reading contribution. Let us take for a starter the loss-of-confidence provision, which is one of the headline items in this bill. The problem with a loss-of-confidence provision of this kind is that it is a kind of catch-all phrase. What does it actually mean? Is it the same as a misconduct charge? I am using these phrases that come from the answers that the opposition has received to questions, so these are the government's own words. When we look at the incidence of what I shall call disciplinary matters that have come to the attention of the commissioner over the past three years, we find things such as neglect of duty, misconduct and negligence, yet somehow all these are now being blanketed or whited out into this loss-of-confidence provision. The problem here is that when we start talking about loss of confidence, we are not talking about the employee. That is the fundamental assumption that good industrial relations practice encompasses. We ought to be talking about the capacity of the employee. All of a sudden we have shifted the focus onto the commissioner or the commissioner's delegate. Loss of confidence is not about the employee; it is a complete reversal of the onus of proof. The problem here is that once we put in place a measure like this, it becomes part of the industrial landscape in which people are working, so all of a sudden employees have a crucial part of their autonomy and agency over their working lives taken away from them because all of a sudden it is the commissioner, or the commissioner's delegate, who has to decide whether they have confidence in the person's performance.

My colleagues who have spoken before me in this debate have done a very thorough job of pointing out that when we change the onus of proof so fundamentally, we put the employee at a very fundamental disadvantage. Basically what we are looking at with this bill are provisions to effectively starve someone out of a job. Whether that can be solved by looking at the kind of provision that both Hon Sue Ellery and Hon Nick Goiran canvassed I am not sure; I am not sure that taking that step to make it a more practical outcome to have commissioners sitting together will solve it on its own. This is such a fundamental change to those basic rights pertaining to any workplace that I am not sure it can be taken out with some minor changes to clauses within the bill. As I say, nobody from the government, during hours and hours of debate, has been able to talk to us about the fact that this is an improvement to the culture of the workplace. In fact, the opposite is true, because every time someone from the government benches opens their mouth, our fears deepen about what the effects of these kinds of changes might be.

One of the fundamental tensions in a workplace is about management of behaviour, and we all come across this. One of the interesting things about becoming a member of Parliament is that all of a sudden there are staff to manage, where one might never have been in that position before. Unions encounter it all the time; they have to manage their own staff as well as represent employees in often large workplaces. A lot of what happens in our workplaces is about how people behave in those workplaces. When we see somebody behaving in a way that is not benefiting the organisation or is not benefiting the employer or is in some way inappropriate, then that behaviour has to be managed, and we all know the ways to do that. There are any number of ways to do that, from taking the employee aside and saying, "You might like to think about doing this in a different way", to much more formal processes that are actually about helping people to see how they might do things better, whether it is delivering a service for a customer or managing an internal process in an organisation.

A fundamental part of the employer/employee relationship is about how behaviour is managed. We need to think about what we are doing if we change the culture of a workplace so that it has something like this loss of confidence provision. All of a sudden, the whole incentive for managing behaviour so that it better fits the kind of culture that the organisation is trying to promote goes out of the window. We no longer have those kinds of productive, creative relationships in the workplace; we no longer have that incentive to say, "Maybe there's a better way of doing this," because once this catch-all provision is in place, that behaviour goes on and on and on, and there is no reason why a manager in the workplace should intervene; why would they do that? That is complicated. Sometimes it means confrontation; sometimes it means that they have to go home at the weekend and work out a strategy for dealing with something. They do not have to do that anymore, because they can just let that behaviour go on and then, when they get to a certain point, they can get rid of that employee because they can say, "Sorry, under this catch-all provision in the bill, I no longer have confidence in your abilities to do the job." As members pointed out earlier, we can effectively now starve somebody out. These provisions make it very hard to get maintenance payments in place in the first place, as Hon Sue Ellery said, and it is very hard to imagine that that can be done efficiently and in a timely way. In any case, anything beyond the basic 28-day provision will not happen unless someone has enormous resources at their disposal to be able to make a plea for special dispensation for those provisions to carry on. Why, therefore, is a change to the culture of the workplace

a better culture? Why is it a culture that we should be expected to embrace when it entails that basic erosion of the rights of people employed in that workplace?

I end up with a series of quite basic but profound questions about the way in which this legislation is supposed to work. I have condensed them into five, which I will put to the minister now because it will give him a chance to make a response in his second reading summary. Then perhaps, if he does not deal with them adequately, we can take them up in debate on the specific provisions of the bill.

My first question is: why is the Public Sector Management Act not sufficient? We have already been through a very lengthy debate about those provisions in the context of the Workforce Reform Bill, so we are all very familiar with them. Given that we have that element, why do we have to go beyond those existing provisions of the bill? I think there are problems even with that aspect of the bill, and we can go into those later if we have time, but why do we need to go one step further and introduce a further provision? Hon Nick Goiran talked about the police service, and I think Hon Michael Mischin did also tonight by way of interjection, saying, "Police officers already have these provisions. What's your problem? You brought in these in 2003, or whenever it was, why can't we just extend them to prison officers and youth custodial officers?" There is a fundamental problem there because, of course, police officers have a unique place in our society. Police officers are police officers 24 hours a day, seven days a week, 365 days a year, and 366 in a leap year. It is a bit like being a politician: we get no downtime; therefore, of course special provisions relate to police. That is clearly not the case with prison officers. It is about time that the government stopped using that argument as a way of trying to justify what it is doing to prison officers' employment conditions.

My second question is about the specific loss of confidence provisions, which is fundamentally the same point I made about the workforce reform measures. Honourable members may remember that one of the very troubling aspects of that whole debate, and indeed about the lengthy committee inquiry that formed the background to that debate, was the conflicting accounts from the government about the intent of the legislation. There were conflicting accounts from different government ministers and also from the senior public servants who were to be responsible for putting the measures into place and for drafting the regulations. It is exactly the same with this bill—exactly the same! Is this bill therefore just about a couple of bad apples in the system?

I again refer to the second reading speech. My recollection is that somewhere near the top of the second page the speech refers to 59 custodial officers having been charged under the Prisons Act in the two years leading up to June 2013. In fact in the final 12 months, as other members have referred to, the number was only 24. The second reading speech goes on —

> Of these officers, only three were dismissed … a further 10 resigned during the course of the investigation …

We therefore cannot draw any conclusion about those; however, three were dismissed. The second reading speech continues in the next paragraph —

> One officer known to have undeclared links and associations with organised crime groups over the course of a number of years was able to evade internal prosecution by the department …

One officer! We are in the same mess created by the government that we were in with the Workforce Reform Bill. It seems that we have a whole bill here taking up dozens and dozens of hours of parliamentary debating time and all the government is able to say is that one officer was able to evade internal prosecution—a whole bill for one officer. That is my second question: is this just about the most serious cases? The problem is, of course, that the police are telling us that this is now the default position for the less serious cases, and Hon Amber-Jade Sanderson raised the issue of timekeeping—if somebody is late for work and the commissioner loses confidence in their ability to perform the job, what right of reply does the employee have?

My third question is: are the appeal processes fair? This is that basic point about whether a person can actually be starved out of a job, something that was very common in Dickensian times, but we would like to think that in 2014 we have more robust provisions in place to protect employees. I am very, very sad to say that I think if this bill is passed in its current form, we will no longer be able to put our hands on our hearts and say that, because the appeal provisions under this bill are so arduous that I fear that many people will not risk being starved out of the job but will realise that they do not have a hope of arguing their case and will leave the system. They, of course, will be the very people we would want to keep in the system, because they will be people with a sense of fairness.

My fourth question relates to my third question about whether the appeal processes are fair. I cannot get my head around this, so I ask the minister to respond to my quite genuine puzzlement. How can someone successfully appeal against a finding that the commissioner no longer has confidence in their ability to do the job? How is confidence restored in another person? I suppose we could say there would be a series of tasks—if a person can

do A, B, C and D, if they can jump over these hurdles, they will be deemed fit to do the job. Of course, we know it will not work like that. If the commissioner turns around to employee and says, "I am firing you under the loss-of-confidence provisions", how on earth can an appeal be mounted against that? Even if the appeal were successful, and I would like the minister to explain how an appeal could be successful, how can a person go back into the workforce? They will be identified as the employee in whom the commissioner lost confidence last year. How on earth will that work? It will not, that is the simple answer, but I want to hear the minister try to give a sense of how he or the government thinks it will work.

My final question is: how often does the government think these provisions will be used? It is exactly the same question we asked in the context of the Workforce Reform Bill. How often will a prison officer be subject to these new provisions? When I referred earlier to the fact that the system we have already works, I said that we were not making this up just for the sake of being contrary. We need look no further than the recent case in April this year of what happened to the two prison officers who got caught up in a misconduct case revolving around Mercanti. I will just remind honourable members of the substance of the case. *The West Australian* on 30 April called it an astonishing lapse of security at WA's high security prison. The article states —

> Details of the astonishing lapse of security at WA's highest security prison have emerged in a decision published by WA Industrial Relations Commissioner … this week.
>
> … prison officer … was subject to a serious charge of negligence and carelessness in performing his duties when escorting a violent offender —

The violent offender was Mercanti. A senior officer —

> … was clearly left in the position of substantial risk, to both himself and other prison officers, through the negligence of …

It is an officer who I will not name. What is relevant here is the fact that there were disciplinary proceedings taken against the offending prison officer who was taken out of the high security unit because the commissioner did not think he was up to the job. If that can happen in Casuarina Prison, our high-security unit, why do we need the provisions in the bill? It just does not make sense.

We could have started from a different point. We could have been standing here tonight talking about how we could enhance the profession of prison officer. We could have been talking about how we could increase the job satisfaction. We know that there is a shortage of prison officers in the state. We know that it is not a preferred occupation, and that is largely because, in the last five years, this government has been party to the rumour and innuendo, the moral panic and the dog-whistle politics around corruption in the prison system. How could we increase job satisfaction? How could we increase productivity in that sector? How could we build, or rebuild, confidence that prison officer is a worthy occupation? What measures has the government taken to go down that track? I put it to honourable members that the answer is that it has taken not one single measure. In fact, it has done the opposite; it is steadily eroding the profession of prison officer as an honourable thing to do.

HON STEPHEN DAWSON (Mining and Pastoral) [9.40 pm]: I rise to make some brief comments on the Custodial Legislation (Officers Discipline) Amendment Bill 2013. However, members will look forward to the fact that I will again make a contribution tomorrow, so they will get a double whammy. Given that there is not much time left this evening, I will not take too many interjections from honourable members opposite, much as I do love to hear from them.

Several members interjected.

Hon STEPHEN DAWSON: Mr President, it is good that I have woken up some members opposite this evening and that they have finally come back from their urgent parliamentary business to pay attention to the proceedings in the chamber.

Several members interjected.

The PRESIDENT: Order! I know there are only a few minutes left, but we have not finished yet.

Hon STEPHEN DAWSON: As I was saying, I rise to speak this evening on the Custodial Legislation (Officers Discipline) Amendment Bill 2013. As a member representing the Mining and Pastoral Region, I have a number of prisons in my electorate; in fact, there are probably more prisons in my electorate than in any other electorate.

Hon Helen Morton: No; in east metro we've got them all, mate.

Hon STEPHEN DAWSON: We might do a bit of an exercise overnight to see who has the most prisons in their electorate. Certainly, I have Broome Regional Prison, Eastern Goldfields Regional Prison, Roebourne Regional Prison, Warburton Work Camp, West Kimberley Regional Prison in Derby and Wyndham Work Camp. I have two work camps and four prisons. I look forward to the minister's contribution tomorrow when she tells me on

the record how many prisons she has in her electorate. In a past life, I assisted prison officers and I know many prison officers at many of the prisons in my electorate.

Many of my colleagues who have spoken on this bill so far have given a raft of reasons why we think this is a flawed piece of legislation. As the Leader of the Opposition said earlier this evening, we will support the bill at the second reading stage; however, Hon Kate Doust, who is away from this place on urgent parliamentary business, has a number of amendments on the supplementary notice paper and we look forward to those amendments being debated. I hope that members on the opposite side of the chamber will listen to those amendments and will indeed support those amendments. We believe they are very valuable amendments and we think they will make this a better piece of legislation. Having said that, given that we suspect that the government will not support the amendments, if it does not support them at that stage, we will vote against the bill.

Debate adjourned, pursuant to standing orders.