

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

The Custodial Legislation (Officers Discipline) Amendment Bill 2013 (the Bill) provides for an Act to amend the *Prisons Act 1981* (PA) and the *Young Offenders Act 1994* (YOA) to reform the discipline (including removal) of prison officers and youth custodial officers

The Bill is set out as follows

- PART 1 (clauses 1- 2) Preliminary matters of the Bill
- PART 2 (clauses 3 - 9) Amends the PA
- PART 3 (clauses 10 -22) Amends the YOA

PART 1- Preliminary

Clause 1 Short title

The Act will be called the *Custodial Legislation (Officers Discipline) Amendment Act 2013*

Clause 2 Commencement

This clause provides the commencement date for the Act as being a day fixed by proclamation

PART 2 – Prisons Act 1981 amended

Clause 3 Act amended

This clause states the purpose of Part 2, i e to amend the PA

Clause 4

This clause amends section 3, which provides for definitions of terms used in the PA

“Appeal Tribunal” is deleted from section 3 because it will no longer exist under the new disciplinary process to be introduced by the Act

“Remove” is added to section 3 It needs to be defined as it is a critical concept in the new disciplinary process

Clause 5

This clause amends section 8

Section 8 (1) provides that the Chief Executive Officer (CEO) cannot delegate certain functions including disciplinary functions under sections 104 -106 Sections 104 -106 are now deleted from section 8 (1) because they will be made redundant by the new disciplinary process to be introduced by the Bill

Clause 6

This clause amends section 13(3), which requires the CEO to obtain the Minister's consent to dismiss a PO

"Dismiss" is now substituted with "remove"

Clause 7

This clause introduces the proposed reforms to prison officers. Prison officer discipline is currently contained in Part X of the PA. Part X is removed from the PA in its entirety and replaced with a reformulated Part X, as follows

Part X – Discipline of prison officers

Division 1 - Preliminary

Section 96 Term used: prison officer

This section defines the meaning of prison officer to whom Part X of the Act will apply

Division 2 – General discipline

Section 97 Regulations, rules to be strictly observed

This section retains section 97 of the PA, which provides for the requirement for prison officers to strictly observe the Act, Regulations, rules and standing orders

Section 98 Application of *Public Sector Management Act 1994* Part 5

This section empowers the CEO to apply disciplinary process provided in Part 5 of the *Public Sector Management Act 1994* (PSMA) to prison officers

Division 3 – Removal of prison officers due to loss of confidence

This division empowers the CEO to remove a prison officer due to loss of confidence. The provisions contained in this division are modelled on similar provisions in the *Police Act 1891* (Part IIB) which empower the Commissioner of Police to remove a police officer due to loss of confidence in the officer's suitability to remain as a police officer having regard to the officers' integrity, honesty, competence, performance or conduct

Subdivision 1 – Preliminary

Section 99 Terms used

This section defines the terms used in Division 3. Note: The definition of prison officer is expanded to include superintendents and other officers performing custodial functions

Subdivision 2 – Removal of prison officers

Section 100 Application of Subdivision

This section sets out the conditions under which removal will occur

- (a) The CEO does not have confidence in the prison officer's suitability to continue as a prison officer,
- (b) The CEO decides to take removal action instead of disciplinary actions under the PSMA, and
- (c) If the prison officer is engaged under section 13(1), the Minister consents to the removal action

The disciplinary process under the PSMA will not apply when the CEO has decided to institute removal for loss of confidence

Section 101 Removal action

This section authorises the taking of removal action against prison officers for loss of confidence

Sub-sections (1)(a) and (1)(b) account for the differences between prison officers appointed under section 6(3) and prison officers engaged under section 13(1), the former are public servants and their removal does not require the Minister's consent while the latter are not public servants and their removal does

Sub-section (2) clarifies that prison officers who are public servants will have removal for loss of confidence applied to them as an alternative to the disciplinary process under the PSMA

Sub-sections (3) – (7) relate to the CEO's power to investigate prison officers for the purpose of determining their suitability to remain as prison officers. The CEO can compel a prison officer to produce information or documents for the investigation. The privilege against self-incrimination is abrogated in this instance. The intent is to facilitate investigations.

There is a penalty for not complying with the CEO's request for information or documents, or producing information or documents that are false.

The information or documents obtained from the investigation cannot be used in criminal proceedings other than those relating to the above non-compliance.

Section 102 Notice of loss of confidence

This section prescribes the rules of procedural fairness to be followed in a removal process.

• Giving of notice

- (1) The notice must be given in writing and set out the grounds for loss of confidence in the prison officer's suitability to remain as a prison officer.

- (2) The prison officer must be given a reasonable opportunity for response

The determination of suitability is a managerial decision, and is based on the prison officer's integrity, honesty, competence, performance or conduct (refer definition of suitability in section 99 above) These considerations are sufficiently broad to ensure that the CEO retains a wide managerial discretion to remove prison officers where their suitability is in question They are also broad enough to ensure the CEO is able to remove a prison officer who is medically unfit to continue performing the duties of a prison officer

The prison officer is given at least 21 days to respond (via a written submission) The time frame is considered reasonable given that the intention is to deal with matter expeditiously

- Making of decision

- (3) After the period for a response by the prison officer, the CEO must decide whether or not to remove the officer and notify the officer of the decision in writing
- (4) The CEO must first consider any written submission from the prison officer, and only decide to remove the prison officer if he still does not have confidence in the officer
- (5) Where removal action is decided, the CEO must provide the prison officer with the reasons for the decision The nature and extent of the reasons will depend on the circumstances but, given the managerial and summary nature of the decision, are not expected to be elaborate
- (6) The CEO is also required to provide the prison officer with a copy of any documents, and make available to the prison officer for inspection any other materials that the CEO examined and took into account in making the decision As a rule, disclosure is subject to exclusion for reasons of legal professional privilege and public interest immunity
- (7) Removal may be carried out when the notice of the decision is given or anytime after that

Section 103 Maintenance payment

A prison officer has 28 days after removal to appeal, and is entitled to receive a maintenance payment during this period

The intent of limiting maintenance payment to 28 days is to discourage frivolous appeals If an appeal has no prospect of success, the prison officer is unlikely to pursue it because he or she might not be granted any income support beyond the 28 days

However, a prison officer may seek an extension of the maintenance payment in exceptional circumstances Extension is granted solely at the discretion of the Minister, and will be a maximum of 6 months

It is intended the maintenance payment will be equivalent to the salary of the prison officer at the time of his or her removal

Section 104 Withdrawal of removal action and revocation of removal

The CEO can terminate a removal process in the following ways

- (1) Where a notice for loss of confidence has been issued to the prison officer, the CEO can withdraw the notice anytime before a removal decision is made. This process is critical for prison officers engaged under section 13 because the notice has to be sent to both the prison officer and the Minister whose consent is required for the removal.
- (2) The CEO can revoke the removal by notice in writing to the prison officer.
- (3) The decision to remove can also be revoked by the CEO even if an appeal is pending.
- (4) Revocation of removal treats the decision to remove as if it has never been made.
- (5) Revocation of removal entitles the prison officer to be paid his or her salary less any maintenance payment.

This section gives the CEO flexibility in the removal process. For instance, the CEO may wish to terminate the removal process where new evidence has come to light which restores his or her confidence in the prison officer. If removal has already been instituted, the CEO can also promptly reinstate the prison officer and prevent any loss to the officer's entitlements.

Section 105 Resignation of prison officer who has been removed

A prison officer is given the opportunity to resign within 28 days of removal unless an appeal against the removal has been lodged. The resignation takes effect at the end of the maintenance period.

This enables the CEO to secure a prompt departure of the officer, either by resignation or removal.

Subdivision 3 – Appeal against removal from office of prison officer

This subdivision describes the appeal process.

Section 106 Appeal right

This section establishes the entitlement to appeal against a removal.

The grounds for appeal are based on that for unfair dismissals, i.e. the removal is harsh, oppressive or unfair.

Unlike unfair dismissal claims, the only persons who may be parties to an unfair removal appeal are the prison officer and the CEO.

An appeal cannot be instituted after the maintenance period or if the prison officer has resigned

It is intended that the appeal is heard by three Industrial Commissioners

Section 107 Proceedings on appeal

This section sets out the procedure to be followed in conducting an appeal

The WAIRC must consider the CEO's reasons for removal, the case presented by the appellant and the case presented by the CEO in answer

The onus is on the appellant to prove that the CEO's decision is unfair, oppressive or harsh

In determining whether the appellant has been given a "fair go all round", the WAIRC must have regard to the interests of the public and the special nature of the relationship between the CEO and the prison officer

The public would expect a high standard of conduct from prison officers because of the nature of their occupation and the trust that has been reposed in them by the CEO in fulfilling the requirements of their occupation

Section 108 Leave to tender new evidence on appeal

This section sets out the rules for tendering of "new evidence" as defined in section 99 above

Unlike unfair dismissal cases, the evidence before the WAIRC on an appeal is generally confined to materials examined and taken into account by the CEO in making a decision to take removal action, any written submissions made to the CEO by the appellant, the CEO's grounds for the loss of confidence and reasons for the CEO's decision to take removal action

In limited circumstances, new evidence may be tendered on an appeal. The parties may consent to new evidence being tendered or the WAIRC may permit new evidence to be tendered in specified circumstances, including where it is in the interests of justice to do so

Appellants are expected to act reasonably. The WAIRC will not permit new evidence from an appellant if the evidence was based on information that the appellant was aware of or had access to, before the CEO made the removal decision. An exception is where the appellant did not present the evidence to the CEO prior to being removed because he or she did not appreciate the significance of the evidence at the time

Section 109 Opportunity to consider new evidence

This section sets out another rule of procedural fairness, i.e. either party must be given reasonable time to consider the new evidence

Section 110A Revocation of removal after consideration of new evidence

This section provides an opportunity for the CEO, having considered the new evidence, to seek a discontinuance of the appeal proceedings by revoking the removal decision

If the CEO does not seek to discontinue the proceedings, he or she may reformulate his or her original reasons for loss of confidence. The WAIRC will then determine whether or not removal based on the reformulated reasons for loss of confidence is harsh, oppressive or unfair. This procedure reflects the managerial nature of the CEO's decision, and absolves the WAIRC from having to speculate what the CEO's decision might have been in light of the new evidence

Section 110B Application of *Industrial Relations Act 1979* to appeals

This section tabulates a range of provisions from the *Industrial Relations Act 1979* (the IR Act) that will apply, with necessary and appropriate modifications, to appeals against removal. This ensures that the WAIRC has adequate powers to conduct the appeals. The effect of the provisions includes that

- The WAIRC conducts itself with more procedural flexibility than a court. The WAIRC is not bound by any rules of evidence, and may admit evidence where it is relevant. It is to act according to equity and good conscience, and determine the merits of a case based on substance rather than form
- Restrictions are imposed on the issuance of summonses due to the special nature of appeal process. The Governor may not be summonsed. The CEO or Minister may not be summonsed except if an Industrial Commissioner is satisfied that extraordinary grounds exist and issues a direction. Leave must be obtained before a summons is issued to any other person to ensure that the WAIRC retains control over the circumstances and extent to which summonses are issued, particularly given the special nature of the appeal process and evidentiary restrictions in section 108 and 109
- The WAIRC is generally required to conduct its proceedings in public so that the public could be adequately informed about these matters
- Given the complexity usually associated with these types of appeals, parties are entitled to be legally represented. An agent may however only appear on behalf of a party with permission of the WAIRC. The WAIRC will decide whether or not to give permission based on considerations such as its assessment of the experience and competence of the agent to represent a client in such matters
- The ordinary industrial relations conciliation process is modified. Recommendations may be made that the parties endeavour to resolve the process by conciliation. A Commissioner hearing the appeal may not participate in the conciliation process
- The CEO may appeal against a decision of the WAIRC to the Supreme Court under section 90 of the IR Act

Section 110C Adjournment of appeal if appellant charged with offence

This section allows for adjournment of an appeal when the appellant has been charged with a criminal offence relating to a matter taken into account by the CEO for a loss of confidence

An adjournment can be sought by either the CEO or the appellant. If the adjournment is sought by the appellant, it must be granted by the WAIRC but for no longer than 12 months

Section 110D Resumption of appeal before end of adjournment

If the criminal offence referred to section 110C above is disposed of before the adjournment ends, the CEO or the appellant may apply for the appeal to resume

In appropriate cases, it would be open to either party to seek to tender a copy of evidence led during the criminal proceedings subject to the new evidence criteria in section 108 being satisfied

Section 110E Decision by WAIRC

If an appeal is decided in favour of the appellant, the WAIRC may order one of the two remedies below

- The primary remedy is for the WAIRC to order that that the appellant's removal from office is and is to be taken to have always been of no effect. This means that the prison officer will effectively be reinstated from the date of removal with full entitlements and will as a result receive back pay, less any amount already received by way of maintenance payment
- In the alternative, compensation may be ordered as a remedy. The WAIRC may order compensation if it is impracticable for the prison officer to be reinstated

In appropriate cases, it is anticipated that the WAIRC will firstly determine whether the removal decision was harsh, oppressive or unfair, and then, if necessary, hear further evidence and submissions as to the remedy that should be granted

Section 110F Determining amount of compensation

Compensation is limited to twelve months' remuneration

In assessing the amount of compensation for any loss or injury caused by the removal similar considerations are to be taken into account as in unfair dismissal cases. While it is not generally expected that the CEO will have taken steps to mitigate any loss suffered by the appellant as a result of the removal, if steps have been taken this may be taken into account by the WAIRC. If an appellant has failed to take steps to mitigate a loss, such as by attempting to find alternative employment, this may affect the amount of compensation awarded

Section 110G Restriction on publication

This section enables the making of suppression orders

The purpose is to prevent publication of sensitive information tendered in evidence during the appeal proceedings. Such information may include confidential prison records or the identity of an informant.

Subdivision 4 – General

Section 110H Effect of charge for, or conviction or acquittal of, offence

Where a prison officer is charged with a criminal offence, the CEO can remove the prison officer irrespective of the outcome of the charge.

This section is consistent with the managerial and summary nature of the CEO's decision.

Section 110I Failure to comply with procedure

This section preserves the validity of a removal process where the failure to comply with specified procedure is not substantive.

The intent is to discourage an unduly technical approach and to avoid collateral challenges to the removal process.

Section 110J Transfer, standing down and leave of prison officer

This section empowers the CEO to take certain actions against a prison officer during the removal process. The prison officer may be transferred, stood down or directed to take leave. Standing down is subject to regular review by the CEO.

These actions are necessary to maintain public confidence and effectiveness of prison operation.

Section 110K Review of Division

The application of loss of confidence provisions is subject to review by Parliament. The review will be conducted 2 years after the commencement of these provisions to give it a reasonable time to evaluate their impact.

Clause 8

This clause amends section 110 which empowers the Governor to make Regulations relating to certain matters.

Two of the matters require revision in view of the new disciplinary processes,

One of the matters is termination of service of prison officers with the exception of termination arising from or connected with disciplinary matters. The exception is now reworded as "removal of prison officers under Part X" to reflect the introduction of removal due to loss of confidence.

The other matter is reference to the Appeal Tribunal. This reference is deleted because the Appeal Tribunal will no longer exist.

Clause 9

This clause creates a new part to the PA, namely Part XII.

Section 118 Purpose

This section states the purpose of Part XII, i.e. to provide for savings and transitional provisions

Section 119 Disciplinary offences before commencement day

This section preserves pre-existing entitlements of prison officers

Where misconduct occurred before the Act commences, the following rules will apply

- 1 If an action for misconduct is still in progress when the Act commences, then the action will continue under the former provisions of the PA (i.e. provisions that existed before the PA is amended by the Act)
- 2 If an action for misconduct is instituted after the Act commences, then the action will proceed under the new disciplinary processes (i.e. PSMA discipline or loss of confidence provisions)
- 3 If the misconduct would have been a disciplinary offence under the former provisions, then the penalty can only be one that is available under the former provisions of the PA

PART 3 - Young Offenders Act 1994 amended

Clause 10 Act amended

This clause states the purpose of Part 3, i.e. to amend the YOA

Clause 11 Section 3 amended

This clause amends section 3 to insert a definition for custodial officer. PSMA discipline and loss of confidence provisions will apply to all personnel who come under the definition of custodial officers [Note: Custodial officers are commonly referred to as youth custodial officers.]

This clause also inserts a definition for “remove”

Clause 12

This clause reformulates Division 1 of Part 3 of the YOA to facilitate referencing

Division 1 will now contain only provisions which relate to the functions and powers of CEO (i.e. sections 9 and 10)

Clause 13

As a result of the reformulation of Division 1, a new division is created, i.e. Division 2 – Other officers and employees

Division 2 will contain existing provisions relating to the appointment, duties and powers of other officers and employees (i.e. sections 11 – 11B)

Clause 14

This clause updates the language used in section 11 and introduces PSMA discipline to youth custodial officers. These are put into effect as follows

- (1) Delete “group worker” from sub-section (1a)(a), the term is obsolete
Delete “terminate the appointment of” an officer in sub-section (1a)(b) and substitute with “remove”
- (2) Youth custodial officers as defined in section (1a)(a) are to be brought within the ambit of PSMA disciplinary via Regulations to the YOA
- (3) Sub-section (1c) is added to section 11 to enable the making of Regulations referred to in (2) above

Clause 15

Reference to “a person who is employed under section 11(1) or (1a) as a custodial officer” is replaced with “custodial officer”

Clause 16

This clause introduces loss of confidence provisions to youth custodial officers via a new division (i.e. Division 3 - Removal of custodial officers due to loss of confidence)

Division 3 contains provisions that mirror provisions for loss of confidence proposed for prison officers (i.e. sections 99 – 110K PA)

Division 3 is set out as follows

Division 3 - Removal of custodial officers due to loss of confidence

Subdivision 1 – Preliminary

11CA Terms used

This section mirrors section 99 PA, Refer clause notes for section 99 on page 2
[Note definition of prison officer is deleted from 11CA]

Subdivision 2 – Removal of custodial officers

11CB Application of Subdivision

This section mirrors section 100 PA, Refer clause notes for section 100 on page 3

11CC Removal action

This section mirrors section 101 PA except that the Minister’s consent is not a requirement under the YOA for the removal of custodial officers. Refer clause notes for section 101 on page 3

11CD Notice of loss of confidence

This section mirrors section 102 PA, Refer clause notes for section 102 on pages 3 and 4

11CE Maintenance payment

This section mirrors section 103 PA, Refer clause notes for section 103 on page 4

11CF Withdrawal of removal action and revocation of removal

This section mirrors section 104 (2) – (5) PA, Refer clause notes for section 104 (2) – (5) on page 5

Note Section 104 (1) is not duplicated because it is unnecessary Removal of custodial officers does not require the Minister's consent

11CG Resignation of custodial officer who has been removed

This section mirrors section 105 PA, Refer clause notes for section 105 on page 5

Subdivision 3 – Appeal against removal of custodial officer

11CH Appeal right

This section mirrors section 106 PA, Refer clause notes for section 106 on page 5

11CI Proceedings on appeal

This section mirrors section 107 PA, Refer clause notes for section 107 on page 6

11CJ Leave to tender new evidence on appeal

This section mirrors section 108 PA, Refer clause notes for section 108 on page 6

11CK Opportunity to consider new evidence

This section mirrors section 109 PA, Refer clause notes for section 109 on page 6

11CL Revocation of removal after consideration of new evidence

This section mirrors section 110A PA, Refer clause notes for section 110 on page 7

11CM Application of Industrial Relations Act 1979 to appeals

This section mirrors section 110B PA, Refer clause notes for section 110B on page 7

11CN Adjournment of appeal if appellant charged with offence

This section mirrors section 110C PA, Refer clause notes for section 110C on page 8

11CO Resumption of appeal before end of adjournment

This section mirrors section 110D PA, Refer clause notes for section 110D on page 8

11CP Decision by WAIRC

This section mirrors section 110E PA, Refer clause notes for 110E on page 8

11CQ Determining amount of compensation

This section mirrors section 110F PA, Refer clause notes for section 110F on page 8

11CR Restriction on publication

This section mirrors section 110G PA, Refer clause notes for section 110G on pages 8 and 9

Subdivision 4 – General

11CS Effect of charge for, or conviction or acquittal of, offence

This section mirrors section 110H PA, Refer clause notes for section 110H on page 9

11CT Failure to comply with procedure

This section mirrors section 110I PA, Refer clause notes for section 110I on page 9

11CU Transfer, standing down and leave of custodial officer

This section mirrors section 110J PA, Refer clause notes for section 110J on page 9

11CV Review of Division

This section mirrors section 110K PA, Refer clause notes for section 110K on page 9

Clause 17

This clause brings sections 11C – 17 YOA under a new heading, i.e. Division 4 – Management, control, security and well-being of young offenders

The new heading is similar to headings under the PA, and provides a better structure for the YOA

Clause 18

This clause makes adjustment to section 11C (1) and (2) similar to that of clause 15 above

Clause 19

In line with the changes made by clause 15 above, reference to “custodial officers appointed under section 11(1) or (1a)” in section 11E is replaced by “custodial officers”

Clause 20

This clause makes adjustments to section 11F (2) similar to that of section 11E above

Clause 21

In view of the creation of new divisions for Part 3 of YOA, the existing Division 2 is now renumbered as Division 5

Clause 22

This clause makes adjustments to section 169A similar to that of clauses 15 and 18 above