

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

SUBMISSION FROM THE MINISTER FOR CORRECTIVE SERVICES

Introduction

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 of prison officers and youth custodial officers and to introduce removal action.

The proposed reform entails: (1) aligning the disciplinary procedures of prison officers and youth custodial officers to the *Public Sector Management Act 1994* (PSMA); and (2) enabling removal of these officers due to loss of confidence.

The purpose of the amendment is to:

- engender internal and external trust in the corrections system;
- provide consistency in managing performance and conduct for all employees in the corrections workforce;
- reduce technical issues that delay the removal of corrupt or seriously disruptive officers; and
- diminish the risk of prison officers and youth custodial officers misusing their special powers, such as the lawful use of force and deprivation of liberty.

The key reforms introduced by the Bill are based on existing legislation.

The disciplinary procedures under PSMA already apply to other public sector employees. Adoption of these procedures would promote consistency in the management of performance and conduct across the workforce within the Department of Corrective Services, and would result in the improvement of the custodial workforce.

As a managerial tool, removal due to loss of confidence serves to promote integrity of the workforce by enabling prompt removal of unsuitable officers. Removal due to loss of confidence is already being practised by the Western Australian Police and has proved to be effective.

In order for the Department to adequately safeguard the community, staff and offenders in its custody, the legislative amendments as proposed are required.

Managing Performance and Conduct under the PSMA

Managing performance and conduct under the PSMA was introduced by the Public Sector Reform Bill 2009, which was passed with unanimous support from Parliament. The purpose of the reform was to streamline the public sector disciplinary process. The reformed process is provided in Part 5 of the PSMA.

The Bill proposes that the PSMA process will apply to:

- (i) Prison officers as defined by section 13(1) of the PA; and
- (ii) Custodial officers (commonly known as youth custodial officers) as defined in Part 3 clause 11 of the Bill.

Prison Officers

The current disciplinary procedures for prison officers consist of a cumbersome and adversarial process which involves an appeal to the Prison Officers Appeal Tribunal. This delays the discipline of prison officers for even minor infringements. In addition, prison officers do not have access to improvement actions under the current disciplinary procedures.

Attachment A to this submission demonstrates the process by which a minor infringement is currently dealt with under the PA. This process is contrasted with a description of how this same matter would be dealt with under the PSMA provisions.

The Public Sector Commissioner has set out comprehensive guidelines for public sector agencies in formulating their own disciplinary procedures. These guidelines are intended to ensure procedural fairness in all disciplinary proceedings whilst providing flexibility to individual agencies in the management of performance and conduct.

The alignment with PSMA will enable the Department of Corrective Services (the Department) to devise its own procedures. In practice, these will be the same procedures as already applies to the Department's staff employed under the PSMA. It is intended that prison officers' performance and conduct are managed in a way to encourage improvement, such as training and development to address a particular performance or conduct issue.

Where investigations or inquiries are necessary, lengthy delays and costs associated with oral hearings will no longer be incurred. The Prison Officers Appeal Tribunal will no longer be required and will be abolished. Instead, prison officers may appeal against a disciplinary action directly to the Western Australian Industrial Relations Commission (WAIRC).

Youth Custodial Officers

Disciplinary procedures for youth custodial officers will mirror those applied to prison officers, as described above.

Provisions for the discipline of youth custodial officers are currently contained in the Young Offenders Regulations 1995. The Bill will allow for the repeal of these provisions and for their substitution with PSMA disciplinary procedures.

The Contemporary Custodial Environment

Custodial officers are exposed to situations where the potential for compromise and corruption is greater than it is for most public servants. These risks are further heightened by the special powers held by custodial officers, such as the lawful use of

force and deprivation of liberty. These powers are similar to those held by police. It can be argued that the exercise of such powers in a closed environment heightens the likelihood, however small, of misuse.

Custodial officers occupy a unique position within the Western Australian public service. They interact on a daily basis with offenders with differing criminal histories, in a closed environment with relatively little public scrutiny. In this environment, findings confirm that criminals use behaviours from grooming to outright intimidation of prison officers in a bid to progress their own interests. While the vast majority of officers maintain the highest standards, a small number of officers choose to compromise these standards, providing criminals with leverage to manipulate them, ultimately compromising the safety and security of custodial facilities and the community. In other cases, officers may actively manipulate their position for their own gain, choosing to put their own personal interests ahead of those of the Western Australian community.

○ These risks were publicly aired in July 2013 when there was extensive media coverage concerning allegations of serious criminal activity, misconduct and corruption within the state's prisons. These events had the potential to seriously undermine public confidence in the criminal justice system. It resulted in the Western Australian Government requesting that the Western Australia Police (WAPol) assist the Department in tackling these problems.

In response to this request, in August 2013 WAPol and the Department established the joint-agency Taskforce Ulysses.

Taskforce Ulysses was established to facilitate the contribution of WAPol investigative and analytical support to the Department to assist in the investigation of drug and contraband trafficking into prisons (which may include serious misconduct and corruption), and to promote a more collaborative exchange of information and intelligence between the agencies.

○ Taskforce Ulysses comprised members of WAPol and the Department. It was established for an initial period of six months. It continued for an additional six months and resulted in the creation of a permanent Police Prisons Team within the Organised Crime Division in September 2014.

Taskforce Ulysses resulted in the arrest of 73 people during its twelve-month period of operation, including three custodial officers employed by the Department. These charges related to a range of offences, including drug possession and corruption.

Taskforce Ulysses has highlighted the need for a more robust disciplinary response from the Department in dealing with corruption and serious misconduct.

Removal Due to Loss of Confidence

Provisions in the Bill will empower the chief executive officer to remove a prison officer or youth custodial officer when the chief executive officer has lost confidence in the officer's suitability to remain in her/her employment. In making this decision, the chief executive officer may take into account an officer's integrity, honesty, competence, performance or conduct.

The loss of confidence procedure will apply to:

- (i) Prison officers as defined in section 99 of the proposed Part X in the Bill; and
- (ii) Custodial officers (commonly known as youth custodial officers) as defined in Part 3 clause 11 of the Bill

These provisions are modelled on similar provisions in the *Police Act 1891* (Part IIB), which were enacted in 2002.

After having been in place for four years, the loss of confidence process in the *Police Act 1891* was reviewed by the Minister for Police in 2006. The review found the process to be effective and therefore recommended its retention. In essence, the review found that the removal process enabled the Commissioner of Police to adopt “a managerial approach in WA policing to maintaining discipline and the commitment to ethical standards in policing”.

The findings of this review are of particular relevance to the custodial workforce. Prison officers and youth custodial officers exercise powers similar to police officers such as the lawful use of force and deprivation of liberty. These officers must retain the confidence of the chief executive officer to exercise their powers appropriately.

Removal due to loss of confidence is not based on the finding of guilt of an officer but rather on the chief executive officer’s appraisal of the officer. Such managerial intervention will enable prompt removal of an officer if the chief executive officer no longer has confidence in the officer to remain in his/her employment.

As for disciplinary procedures under the PSMA, a prison officer or youth custodial officer may appeal a removal action to the WAIRC.

Youth custodial officers provide a role model to the detainees whom they supervise. Although they are fewer in number, they perform similar functions to prison officers and should be subject to the same disciplinary process.

It is acknowledged that the reach of organised crime into juvenile detention facilities is less extensive than for adult prisons. Regardless, the community has the right to expect that the same standard of integrity, honesty, competence, performance and conduct would apply to those charged with the care of young (and particularly vulnerable) people, as would apply to those responsible for the care of adult offenders.

Abrogation of the Privilege of Self Incrimination

The Bill introduces provisions to abrogate the privilege against self-incrimination.

The privilege against self-incrimination is an immunity possessed by all persons from being compelled to answer questions if the answer may incriminate them.

The provisions to abrogate the privilege against self-incrimination are introduced by the Bill in Part 2, section 101 (4) - (7), and Part 3 sections 11C (4) – (7).

The information obtained from the use of this power cannot be admitted to criminal proceedings other than proceedings for not complying with the production of the information. This will assist the expeditious conduct of investigations.

Other jurisdictions have attempted to abrogate privilege against self-incrimination by relying on existing legislation. For example, the Western Australian Police Force Regulations 1979 (Regulation 603) require police officers not to disobey a lawful order. The Police Regulations of New South Wales also contains a similar regulation.

The New South Wales regulations were tested in a recent court case; *Baff v New South Wales Commissioner of Police* [2013] NSWSC 1205. The Court ruled that the relevant regulation could not abrogate the common law privilege against self-incrimination, and that specific legislative provisions were necessary for the abrogation to occur.

The Bill includes specific provisions for the abrogation of privilege against self-incrimination.

Two scenarios based on fact are provided at Attachment B to demonstrate when it would be appropriate to use loss of confidence powers and abrogation of the privilege against self-incrimination.

Maintenance Payment

The Bill introduces maintenance payment of 28 days and subject to the Minister's discretion, a possible extension for a period of up to six months following removal. The payment will equate to an officer's normal salary.

The 28 day maintenance payment is consistent with current entitlements for prison officers and youth custodial officers. The Prison Officer's Enterprise Agreement provides for payment of 28 days in lieu of notice for termination. Likewise, the YOA provides for one month's pay in lieu of notice for termination.

The possibility of an extended maintenance payment provides an additional benefit to the officers.

Proposed Amendments to the Bill

The Opposition moved some proposed amendments to the Bill at the Legislative Assembly on 25 February 2014 (Assembly Notice Paper No.61). The Opposition also gave notice for proposed amendments to the Bill at the Legislative Council on 21 August 2014 (Supplementary Notice Paper No.47 Issue No.2).

The two sets of proposed amendments referred to above were the same in substance and effect. For ease of reference, a copy of the Notice Papers is attached (Attachment C).

The proposal for the amendments was considered at the Legislative Assembly. The proposed amendments were rejected by the Government based on advice given by

the State Solicitor's Office. A table of the amendments and the reasons for not supporting the amendments is attached (Attachment D).

The proposed amendments were not considered at the Legislative Council due to the Bill being discharged and referred to the Standing Committee on Legislation.

NOTICES AND AMENDMENTS

Custodial Legislation (Officers Discipline) Amendment Bill 2013 (No. 47-I)

Clause 7.

Mr P. Papalia: To move –

Page 5, lines 30 to 33 – To delete the lines.

Mr P. Papalia: To move –

Page 6, lines 7 to 9 – To delete the lines and substitute:

- “
- (a) the chief executive officer has formed the opinion on reasonable grounds that the officer:
 - (i) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (ii) is no longer a fit and proper person to hold a position as a prison officer; and
- ”

Mr P. Papalia: To move –

Page 6, lines 25 and 26 - To delete the words “does not have confidence in a prison officer’s suitability to continue” and substitute:

“

has formed the opinion on reasonable grounds that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position

”

Mr P. Papalia: To move –

Page 7, lines 8 to 10 – To delete the lines and substitute:

- “
- (3) The chief executive officer shall conduct any investigation to determine that a prison officer:
 - (a) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (b) is no longer a fit and proper person to hold a position as a prison officer.
- ”

Mr P. Papalia: To move –
Page 7, lines 24 to 28 – To delete the lines and substitute:

“
document might incriminate the prison officer.
”.

Mr P. Papalia: To move –
Page 7, line 31 – To insert before “proceedings” where it first occurs:

“
or disciplinary
”.

Mr P. Papalia: To move –
Page 8, lines 19 and 20 – To delete “or 12 months’ imprisonment, or both”.

Mr P. Papalia: To move –
Page 8, line 21 - To delete “Notice of loss of confidence” and substitute:

“
Written notice of CEO’s determination
”.

Mr P. Papalia: To move –
Page 8, lines 24 and 25 – To delete “does not have confidence in the prison officer’s suitability” and substitute:

“
has determined that the prison officer is not a fit and proper person
”.

Mr P. Papalia: To move –
Page 9, lines 13 and 14 – To delete “does not have confidence in a prison officer’s suitability to continue as” and substitute:

“
determines that the person is not a fit and proper person to be
”.

Mr P. Papalia: To move –
Page 10, lines 7 to 10 – To delete the lines and substitute:

“

- (2) Where a prison officer has commenced an appeal under section 106, the Minister shall direct that a maintenance payment must be paid to the prison officer for a specified period after the maintenance period unless there are exceptional circumstances justifying that the prison officer should not be paid a maintenance payment.

”

Mr P. Papalia: To move –
Page 10, after line 14 – To insert:

“

- (4A) At the end of the specified period, the Minister shall review the progress of the appeal and renew the maintenance period for a further specified period not exceeding 6 months unless:
- (a) the appeal has been determined by the WAIRC; or
 - (b) there are exceptional circumstances justifying why the prison officer should not be paid a maintenance payment.

”

Mr P. Papalia: To move –
Page 10, after line 17 – To insert:

“

- (5) A prison officer who has commenced an appeal under section 106 and is aggrieved by:
- (a) a period of suspension; or
 - (b) the exercise of the Minister’s discretion to not make a maintenance payment that results in undue hardship to the prison officer,
- may apply to a commissioner in the WAIRC who may either substitute or vary or affirm the decision of the chief executive officer, or the Minister, as the case may be.

”

Mr P. Papalia: To move –
Page 12, line 14 – To delete “section” and substitute:

“

subdivision

”

Mr P. Papalia: To move –
Page 12, after line 25 – To insert:

“

- (d) fourth, it must consider the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a prison officer.

”.

Mr P. Papalia: To move –
Page 12, lines 26 to 30 – To delete the lines.

Mr P. Papalia: To move –
Page 13, after line 13 – To insert:

“

- ; and
- (c) the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and is no longer a fit and proper person to hold a position as a prison officer.

”.

Mr P. Papalia: To move –
Page 14, lines 5 to 13 – To delete the lines.

Mr P. Papalia: To move –
Page 15, after line 30 – To insert:

“

- ; and
- (c) the WAIRC must allow the appellant to amend any reasons why the dismissal was harsh, oppressive or unfair.

”.

Mr P. Papalia: To move –
Page 19, line 12 – To delete “(not exceeding 12 months)”.

Mr P. Papalia: To move –
Page 21, lines 13 and 14 – To delete the lines.

Mr P. Papalia: To move –
Page 22, lines 2 to 6 – To delete the lines and substitute:

“

element of an offence of which the prison officer has been convicted.

”.

Mr P. Papalia: To move –
Page 22, after line 30 – To insert:

“

- (3A) A prison officer aggrieved by the period of suspension may appeal the chief executive officer's decision under section 103(5).

”

Clause 16.

Mr P. Papalia: To move –
Page 28, lines 4 and 5 – To delete “due to loss of confidence”.

Mr P. Papalia: To move –
Page 29, lines 11 to 14 – To delete the lines.

Mr P. Papalia: To move –
Page 29, lines 21 to 23 – To delete the lines and insert:

“

- (a) the chief executive officer has formed the opinion on reasonable grounds that the custodial officer:
- (i) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (ii) is no longer a fit and proper person to hold a position as a custodial officer; and

”

Mr P. Papalia: To move –
Page 30, lines 5 to 8 – To delete the lines and insert:

“

- (1) If the chief executive officer has formed the opinion on reasonable grounds that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a custodial officer, the chief executive officer may remove the custodial officer.

”

Mr P. Papalia: To move –
Page 30, lines 12 to 14 – To delete the lines and insert:

“

- (3) The chief executive officer shall conduct any necessary investigation to determine if a custodial officer is a fit and proper person to be a custodial officer.

”

Mr P. Papalia: To move –
Page 30, lines 28 to 32 – To delete the lines and substitute:

“
document might incriminate the custodial officer.

”

Mr P. Papalia: To move –
Page 31, line 3 – To insert before “proceedings” where it first occurs:

“
or disciplinary

”

Mr P. Papalia: To move –
Page 31, lines 23 and 24 – To delete “and imprisonment for 12 months”.

Mr P. Papalia: To move –
Page 31, line 25 – To delete “Notice of loss of confidence” and substitute:

“
Written notice of CEO’s determination

”

Mr P. Papalia: To move –
Page 31, lines 28 to 30 – To delete the lines and substitute:

“
which the chief executive officer has formed the view that the custodial officer has engaged in corrupt conduct or is no longer a fit and proper person to hold a position as a custodial officer.

”

Mr P. Papalia: To move –
Page 33, lines 9 to 12 – To delete the lines and substitute:

“
(2) Where a custodial officer has commenced an appeal under section 11CH, the Minister shall direct a maintenance payment must be paid to the custodial officer for a specified period after the maintenance period unless there are exceptional circumstances justifying that the custodial officer should not be paid a maintenance payment.

”

Mr P. Papalia: To move –
Page 33, after line 16 – To insert:

“

- (4A) At the end of the specified period referred to in subsection (3), the Minister shall review the progress of the appeal and renew the maintenance period for a further specified period not exceeding 6 months unless:
- (a) the appeal has been determined by the WAIRC; or
 - (b) there are exceptional circumstances justifying why the custodial officer should not be paid a maintenance payment.

”

Mr P. Papalia: To move –
Page 33, after line 19 – To insert:

“

- (5) A custodial officer who has commenced an appeal under section 11CH and is aggrieved by:
- (a) a period of any suspension; or
 - (b) the exercise of the Minister’s discretion to not make a maintenance payment that results in undue hardship to the custodial officer,
- may apply to a commissioner in the WAIRC who may either substitute or vary or affirm the decision of the chief executive officer, or the Minister, as the case may be.

”

Mr P. Papalia: To move –
Page 35, after line 25 – To insert:

“

- (d) fourth, it must consider the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a custodial officer.

”

Mr P. Papalia: To move –
Page 35, lines 26 to 30 – To delete the lines.

Mr P. Papalia: To move –
Page 36, after line 13 – To insert:

66

- (c) the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and is no longer a fit and proper person to hold a position as a custodial officer.

22

Mr P. Papalia: To move –
Page 38, after line 30 – To insert:

66

- (c) the WAIRC must allow the appellant to amend any reasons why the dismissal was harsh, oppressive or unfair.

"

Mr P. Papalia: To move –
Page 42, line 19 – To delete “(not exceeding 12 months)”.

Mr P. Papalia: To move –
Page 45, lines 1 and 2 – To delete the lines.

Mr P. Papalia: To move –
Page 45, lines 21 to 25 – To delete the lines and substitute:

66

element of an offence of which the custodial officer has been convicted.

22

Mr P. Papalia: To move –
Page 46, after line 31 – To insert:

66

- (4) A custodial officer aggrieved by the period of suspension may appeal the chief executive officer's decision under section 11CE(5).

99

PETER J. McHUGH

Clerk of the Legislative Assembly

WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

AMENDMENTS AND SCHEDULES

Supplementary Notice Paper No. 47
Issue No. 2

THURSDAY, 21 AUGUST 2014

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT
BILL 2013 [47-1B]

When in committee on the *Custodial Legislation (Officers Discipline) Amendment Bill 2013*:

Clause 7

Hon Kate Doust: To move –

1/7 Page 5, lines 30 to 33 — To delete the lines.

Hon Kate Doust: To move –

2/7 Page 6, lines 7 to 9 — To delete the lines and insert —

- (a) the chief executive officer has formed the opinion on reasonable grounds that the officer —
 - (i) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (ii) is no longer a fit and proper person to hold a position as a prison officer; and

Hon Kate Doust: To move –

3/7 Page 6, lines 25 and 26 — To delete “does not have confidence in a prison officer’s suitability to continue” and insert —

has formed the opinion on reasonable grounds that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position

Hon Kate Doust: To move –

4/7 Page 7, lines 8 to 10 — To delete the lines and insert —

- (3) The chief executive officer shall conduct any investigation to determine that a prison officer —
- (a) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (b) is no longer a fit and proper person to hold a position as a prison officer.

Hon Kate Doust: To move –

26/7 Page 7, lines 24 to 28 — To delete the lines and insert —

document might incriminate the prison officer.

Hon Kate Doust: To move –

27/7 Page 7, line 30 — To insert after “criminal” —

or disciplinary

Hon Kate Doust: To move –

28/7 Page 8, lines 19 and 20 — To delete “or 12 months’ imprisonment, or both”.

Hon Kate Doust: To move –

29/7 Page 8, line 21 — To delete “Notice of loss of confidence” and insert —

Written notice of CEO’s determination

Hon Kate Doust: To move –

30/7 Page 8, lines 24 and 25 — To delete “does not have confidence in the prison officer’s suitability” and insert —

has determined that the prison officer is not a fit and proper person

Hon Kate Doust: To move –

31/7 Page 9, lines 13 and 14 — To delete “does not have confidence in a prison officer’s suitability to continue as” and insert —

determines that the person is not a fit and proper person to be

Hon Kate Doust: To move —

5/7 Page 10, lines 7 to 10 — To delete the lines and insert —

- (2) Where a prison officer has commenced an appeal under section 106, the Minister shall direct that a maintenance payment must be paid to the prison officer for a specified period after the maintenance period unless there are exceptional circumstances justifying that the prison officer should not be paid a maintenance payment.

Hon Kate Doust: To move —

6/7 Page 10, after line 14 — To insert —

- (3A) At the end of the specified period, the Minister shall review the progress of the appeal and renew the maintenance period for a further specified period not exceeding 6 months unless —
- (a) the appeal has been determined by the WAIRC; or
 - (b) there are exceptional circumstances justifying why the prison officer should not be paid a maintenance payment.

Hon Kate Doust: To move —

7/7 Page 10, after line 17 — To insert —

- (5) A prison officer who has commenced an appeal under section 106 and is aggrieved by —
- (a) a period of being stood down; or
 - (b) the exercise of the Minister's discretion to not make a maintenance payment that results in undue hardship to the prison officer,
- may apply to a commissioner in the WAIRC who may either substitute or vary or affirm the decision of the chief executive officer, or the Minister, as the case may be.

Hon Kate Doust: To move —

32/7 Page 12, line 14 — To delete "section." and insert —

subdivision.

Hon Kate Doust: To move —

33/7 Page 12, after line 25 — To insert —

- (d) fourth, it must consider the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a prison officer.

Hon Kate Doust: To move –

34/7 Page 12, lines 26 to 30 — To delete the lines.

Hon Kate Doust: To move –

35/7 Page 13, after line 13 — To insert —

- (c) the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and is no longer a fit and proper person to hold a position as a prison officer.

Hon Kate Doust: To move –

36/7 Page 14, lines 5 to 13 — To delete the lines.

Hon Kate Doust: To move –

8/7 Page 15, after line 30 — To insert —

- (c) the WAIRC must allow the appellant to amend any reasons why the dismissal was harsh, oppressive or unfair.

Hon Kate Doust: To move –

9/7 Page 19, line 12 — To delete “(not exceeding 12 months)”.

Hon Kate Doust: To move –

10/7 Page 21, lines 13 and 14 — To delete the lines.

Hon Kate Doust: To move –

11/7 Page 22, lines 3 to 6 — To delete the lines and insert —

of which the prison officer has been convicted.

Hon Kate Doust: To move –

2/7 Page 22, after line 30 — To insert —

- (2A) A prison officer aggrieved by the period of being stood down may appeal the chief executive officer’s decision under section 103(5).

Clause 16

Hon Kate Doust: To move –

13/16 Page 28, lines 4 and 5 — To delete “due to loss of confidence”.

Hon Kate Doust: To move –

14/16 Page 29, lines 11 to 14 — To delete the lines.

Hon Kate Doust: To move –

37/16 Page 29, lines 21 to 23 — To delete the lines and insert —

- (a) the chief executive officer has formed the opinion on reasonable grounds that the custodial officer —
 - (i) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and
 - (ii) is no longer a fit and proper person to hold a position as a custodial officer; and

Hon Kate Doust: To move –

38/16 Page 30, lines 5 to 8 — To delete the lines and insert —

- (1) If the chief executive officer has formed the opinion on reasonable grounds that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a custodial officer, the chief executive officer may remove the custodial officer.

Hon Kate Doust: To move –

39/16 Page 30, lines 12 to 14 — To delete the lines and insert —

- (3) The chief executive officer shall conduct any necessary investigation to determine if a custodial officer is a fit and proper person to be a custodial officer,

Hon Kate Doust: To move –

40/16 Page 30, lines 28 to 32 — To delete the lines and insert —

document might incriminate the custodial officer

Hon Kate Doust: To move –

15/16 Page 31, line 2 — To insert after “criminal” —

or disciplinary

Hon Kate Doust: To move –

16/16 Page 31, lines 23 and 24 — To delete “and imprisonment for 12 months”.

Hon Kate Doust: To move –

17/16 Page 31, line 25 — To delete “Notice of loss of confidence” and insert —

Written notice of CEO’s determination

Hon Kate Doust: To move –

18/16 Page 31, lines 28 to 30 — To delete the lines and insert —

which the chief executive officer has formed the view that the custodial officer has engaged in corrupt conduct or is no longer a fit and proper person to hold a position as a custodial officer.

Hon Kate Doust: To move –

19/16 Page 33, lines 9 to 12 — To delete the lines and insert —

- (2) Where a custodial officer has commenced an appeal under section 11CH, the Minister shall direct that a maintenance payment must be paid to the custodial officer for a specified period after the maintenance period unless there are exceptional circumstances justifying that the custodial officer should not be paid a maintenance payment.

Hon Kate Doust: To move –

41/16 Page 33, after line 16 — To insert —

- (3A) At the end of the specified period referred to in subsection (3), the Minister shall review the progress of the appeal and renew the maintenance period for a further specified period not exceeding 6 months unless —
- (a) the appeal has been determined by the WAIRC; or
 - (b) there are exceptional circumstances justifying why the custodial officer should not be paid a maintenance payment.

Hon Kate Doust: To move –

42/16 Page 33, after line 19 — To insert —

- (5) A custodial officer who has commenced an appeal under section 11CH and is aggrieved by —
- (a) a period of being stood down; or
 - (b) the exercise of the Minister's discretion to not make a maintenance payment that results in undue hardship to the custodial officer,
- may apply to a commissioner in the WAIRC who may either substitute or vary or affirm the decision of the chief executive officer, or the Minister, as the case may be.

Hon Kate Doust: To move –

43/16 Page 35, after line 25 — To insert —

- (d) fourth, it must consider the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a custodial officer.

Hon Kate Doust: To move –

44/16 Page 35, lines 26 to 30 — To delete the lines.

Hon Kate Doust: To move –

20/16 Page 36, after line 13 — To insert —

- (c) the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and is no longer a fit and proper person to hold a position as a custodial officer.

Hon Kate Doust: To move –

21/16 Page 38, after line 30 — To insert —

- (c) the WAIRC must allow the appellant to amend any reasons why the dismissal was harsh, oppressive or unfair.

Hon Kate Doust: To move –

22/16 Page 42, line 19 — To delete “(not exceeding 12 months)”.

Hon Kate Doust: To move –

23/16 Page 45, lines 1 and 2 — To delete the lines.

Hon Kate Doust: To move –

24/16 Page 45, lines 22 to 25 — To delete the lines and insert —

of which the custodial officer has been convicted.

Hon Kate Doust: To move –

25/16 Page 46, after line 31 — To insert —

- (4) A custodial officer aggrieved by the period of being stood down may appeal the chief executive officer's decision under section 11CE(5).



ATTACHMENT D

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

AMENDMENTS PROPOSED BY THE OPPOSITION AT LEGISLATIVE ASSEMBLY

The amendments were moved by Mr Paul Papalia MLA at the Legislative Assembly on 24 February 2014 via Assembly Notice Paper No.61. The motions were defeated. The intent or effect of the amendments and reasons for not supporting the amendments are tabled below in accordance with advice obtained from the State Solicitor's Office.

(Please note: Items 1 to 24 of the table relate to clause 7 of the Bill).

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
1	Page 5, lines 30 to 33 – To delete lines : suitability to continue as a prison officer means suitability to continue as a prison officer having regard to the officer's integrity, honesty, competence, performance or conduct;	Lines 30 to 33 provide a definition for " <i>suitability to continue as a prison officer</i> ". By removing the definition, the Opposition seeks to remove "suitability to continue as a prison officer" as a criterion for the removal of a prison officer. The Opposition's intention is to replace this criterion with another criterion as set out in (2) below.	The Opposition's amendment would defeat the purpose of introducing the loss of confidence (LOC) provisions in the Bill. Please also see reasoning in (2) below.
2	Page 6, lines 7-9 – To delete the lines and substitute: (a) the chief executive officer has formed the opinion on reasonable grounds that the officer: (i) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and (ii) is no longer a fit and proper person to hold a position as a prison officer; and	Lines 7 to 9 provide that the CEO may remove a prison officer if he "does not have confidence in a prison officer's suitability to continue as a prison officer". The Opposition's amendment replaces the above criterion for removal with a more restrictive criterion, i.e. to remove a prison officer for corrupt conduct or an indictable offence only.	This amendment is unnecessary. At present, the CEO can already refer corrupt conduct or any criminal behaviour to the police and the Corruption and Crime Commission for investigation and prosecution. As mentioned earlier, the proposed criterion is restrictive and will defeat the purpose of introducing the LOC provisions (which deals not only with corruption but also performance and competence).

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
3	<p>Page 6, lines 25 and 26 – To delete “does not have confidence in a prison officer’s suitability to continue” and substitute:</p> <p>has formed the opinion on reasonable grounds that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position</p>	<p>Please refer to (1) and (2) above.</p> <p>This amendment is consequential upon the above amendments.</p>	<p>Please refer to (1) and (2) above.</p>
4	<p>Page 7, lines 8 to 10 – To delete lines and substitute:</p> <p>(3) The chief executive officer shall conduct any investigation to determine that a prison officer: (a) has engaged in corrupt conduct (or any other conduct constituting an indictable offence); and (b) is no longer a fit and proper person to hold a position as a prison officer.</p>	<p>Please refer to (1) and (2) above.</p> <p>This amendment is consequential upon the above amendments.</p>	<p>Please refer to (1) and (2) above</p>
5	<p>Page 7, lines 24 to 28 – To delete the lines and substitute:</p> <p>Document might incriminate the prison officer.</p> <p>Refer section 101(5).</p>	<p>Section 101(5) prohibits a prison officer from refusing to provide information or documents on the grounds of (a) self-incrimination or (b) liability to a disciplinary measure or removal under LOC.</p> <p>The Opposition proposes to delete (b). This has the effect of denying the application of the abrogation of the privilege against self-incrimination to LOC proceedings.</p>	<p>The abrogation of the privilege against self-incrimination is essential to LOC proceedings.</p> <p>The abrogation facilitates investigation of serious allegations, which are the subject of any LOC proceedings.</p>
6	<p>Page 7, line 30 – To insert before “proceedings” where it first occurs:</p> <p>or disciplinary</p>	<p>Section 101(6) provides that the information, answer or document obtained under abrogation of the privilege against self-incrimination cannot be used against the prison officer in any criminal proceedings other</p>	<p>Not supported due the effect identified from the proposed amendment.</p>

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
	Refer section 101(6)	<p>than proceedings against the prison officer for not producing the information, answer or documents.</p> <p>The Opposition proposes that the information, answer or document so obtained cannot be used in disciplinary proceedings in addition to criminal proceedings. This has the effect of doing away with the abrogation of the privilege against self-incrimination. Part X of the Bill deals with discipline of prison officers. Discipline means disciplinary procedures under both the Public Sector Management Act and LOC proceedings.</p>	
7	Page 8, lines 19 and 20 – To delete “or 12 months’ imprisonment, or both”.	<p>The proposed amendment will reduce the statutory penalty for not complying with the production of information, answer or document from “a fine of \$4000 or 12 months’ imprisonment or both” to a fine of \$4000 only.</p> <p>Refer section 101(7).</p>	<p>This is inconsistent with other penalty provisions in the Prison Act.</p> <p>Section 49 (6): \$1000 or 12 months imprisonment or both; Section 50(1),(2) and (4):\$2000 or 12 months imprisonment or both; Section 50(3):\$1000 or 12 months imprisonment or both; Section 52(1):\$1500 Or 18 months imprisonment; Section 52(3): \$1000 or 12 months imprisonment; Section 60(4): \$1500 Or 18 months imprisonment; Section 60A(2): \$2000 or 12 months imprisonment.</p>
8	Page 8, line 21 – To delete “ Notice of loss of confidence ” and substitute: Written notice of CEO’s determination	The effect is to remove the requirement for notice of loss of confidence.	The proposed amendment will do away with LOC proceedings.

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
9	<p>Page 8, lines 24 and 25 – To delete “does not have confidence in the prison officer’s suitability” and substitute:</p> <p>has determined that the prison officer is not a fit and proper person</p>	<p>The proposed amendment does away with the key element for LOC, i.e. suitability” of a prison officer to remain as a prison officer.</p>	<p>The proposed amendment will do away with LOC proceedings.</p>
10	<p>Page 9, lines 13 and 14 – To delete “does not have confidence in a prison officer’s suitability to continue as” and substitute:</p> <p>Determine that the person is not a fit and proper person to be</p>	<p>This proposed amendment is consequential upon the proposed amendment in (9) above.</p>	<p>Not supported since (9) above is not supported.</p>
11	<p>Page 10 lines 7 – 10 – To delete lines and substitute:</p> <p>(2) Where a prison officer has commenced an appeal under section 106, the Minister <i>shall</i> direct that a maintenance payment must be paid to the prison officer for a specified period after the maintenance period unless there are exceptional circumstances justifying that the prison officer should not be paid a maintenance payment.</p>	<p>Use of the word ‘shall’ is an attempt to lock in payment of maintenance payment during appeal.</p>	<p>Use of this word has no meaning – given the clause already ensures Minister has to consider/decide what would be an exceptional circumstance – current wording gives Minister discretion – saying you must do something in a situation over which you have discretion is contradictory.</p> <p>In addition it is worth reiterating that the intent of this section is for custodial officers who are removed are only be paid for 28 days (that is one month in which they can make provisions for pay from alternative source – employment or Centrelink).</p>
12	<p>Page 10, after line 14 – To insert –</p> <p>(4A) At the end of the specified period, the Minister shall review the progress of the appeal and renew the maintenance period for a further specified period not exceeding 6 months unless:</p> <p>(a) the appeal has been determined by the</p>	<p>The Bill at lines 11 – 14 provides for maintenance payment to be extended for 6 months.</p> <p>The Opposition proposes that after the 6 month extension, the maintenance payment would be extended for a further specified</p>	<p>In effect, this amendment means that in exceptional circumstances a prison officer who has been removed could continue receiving maintenance payments for up to 12 months if their appeal is ongoing.</p>

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
	WAIRC; or (b) there are exceptional circumstances justifying why the prison officer should not be paid a maintenance payment.	period of not more than 6 months	This is inconsistent with the <i>Police Act</i> 1892, s33M(3)
13	Page 10, after line 17 – To insert – (5) A prison officer who has commenced an appeal under section 106 and is aggrieved by: (a) a period of suspension; or (b) the exercise of the Minister's discretion to not make a maintenance payment that results in undue hardship to the prison officer, may apply to a commissioner in the WAIRC who may either substitute or vary or affirm the decision of the chief executive officer, or the Minister, as the case may be.	The insertion would provide WAIRC with overriding powers	S106 of the Bill does not permit a prison officer to appeal over suspension – not sure why this has been inserted here? S106 only allows appeal on removal decision – it is not the intent of the Act for WAIRC to be able to decide payment following removal. This amendment is inconsistent with s33M of the Police Act.
14	Page 12, lines 14 – To delete "section." and substitute: subdivision	This changes the word "section" to "subdivision" in section 106, which deals with appeal right. The effect is to potentially expand the grounds of appeal.	To avoid the effect as identified.
15	Page 12, after line 25 – To insert – (d) fourth, it must consider the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct and is no longer a fit and proper person to hold a position as a prison officer.	This proposed amendment seeks to give the WAIRC the ability to consider the validity of the facts. This would have the effect of the WAIRC questioning the competency of the CEO and the investigations undertaken by the Department of Corrective Services.	The WAIRC has acknowledged: <ul style="list-style-type: none"> it should not "second guess" the opinion formed by the chief executive officer as to the suitability of a prison officer, and the chief executive officer is plainly the person best placed to make an assessment about an suitability; Refer the <i>WA Prison Officers Union v The Minister for Corrective Services</i> 2013 WAIRC 00706.

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
			<p>Secondly, the proposed amendment is superfluous.</p> <p>The Bill already provides the ability for the WAIRC to consider the reasons for the CEO's decision to remove. In addition, the appellant prison officer can question the validity of the facts and present a case to the WAIRC to show that the CEO's decision was unfair.</p>
16	<p>Page 12, lines 26 to 30 – To delete the lines.</p> <p>The lines are:</p> <p>(2) The appellant has at all times the burden of establishing that the removal decision was harsh, oppressive or unfair.</p> <p>(3) Subsection (2) has effect despite any law or practice to the contrary.</p>	<p>The deletion would remove the burden of establishing that the decision was harsh, oppressive or unfair.</p>	<p>Thirdly, the proposed amendment is inconsistent with Police Act.</p> <p>The proposed amendment changes the intent of the appeal process.</p> <p>It is inconsistent with section 33 Q of the Police Act.</p>
17	<p>Page 13, after line 13 – To insert –</p> <p>; and</p> <p>(c) the validity and cogency of the facts on which the chief executive officer has determined that the officer has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and is no longer a fit and proper person to hold a position as a prison officer.</p>	<p>This proposed amendment is similar to (15) above – It seeks to give the WAIRC the ability to consider the validity of the facts.</p> <p>In this particular instance, the proposed amendment seeks to give the WAIRC the ability to consider the CEO's determination of a prison officer's corrupt conduct and the officer's fitness to remain as a prison officer.</p>	<p>The WAIRC should not be placed in a position to assess the officer's fitness or suitability. Refer (15) above.</p> <p>In any event, the concept of fitness based on corrupt behaviours is not supported. Refer (2) above.</p>

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
18	<p>Page 14, lines 5 to 13 – To delete the lines.</p> <p>The lines are: (4) In the exercise of its discretion under subsection (3), the WAIRC must have regard to — (a) whether or not the appellant was aware of the substance of the new evidence before the appellant's removal; and (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access before the appellant's removal.</p>	<p>The deletion will broaden the scope of the WAIRC's consideration to whether or not to permit the appellant to tender new evidence during an appeal.</p>	<p>If an appellant knew of the evidence, they need to produce it in their defence during LOC proceedings, i.e. when they respond to the CEO's notice of LOC.</p> <p>It is inappropriate that they be given an opportunity to now use it at the appeal stage.</p> <p>The proposed amendment is inconsistent with section 33RR of the Police Act.</p>
19	<p>Page 15, after line 30 – To insert: ; and (c) the WAIRC must allow the appellant to amend any reasons why the dismissal was harsh, oppressive or unfair.</p>	<p>Insert a clause which allows the appellant to amend their argument.</p>	<p>Inconsistent with s33R of the Police Act.</p>
20	<p>Page 19 line 12 – To delete "(not exceeding 12 months)"</p>	<p>Deletion of the lines would enable adjournment of appeal for potentially longer than 12 months.</p>	<p>Cannot see any reason why an officer would want to do this – given payment provisions (i.e. limiting payment to 28 days). Inconsistent with s33T of the Police Act.</p>
21	<p>Page 21, lines 13 and 14 – To delete the lines. (4) The amount must not exceed 12 months' remuneration as a prison officer.</p>	<p>Deletion of the lines would remove the restriction of 12 months compensation payable to a prison officer who is wrongfully removed.</p>	<p>Inconsistent with s33U of the Police Act.</p>
22	<p>Page 22, lines 2 to 6 – To delete the lines and substitute:</p>	<p>The Bill, at lines 3 to 6, provides that the CEO can still take removal action, where the act or omission that gives rise to a removal is an element of an offence for which the officer has</p>	<p>No similar provision in the Prison Act</p>

	Opposition's amendments	Intent/Effect of amendments	Reasons for not supporting
	element of an offence of which the prison officer has been convicted.	been charged, convicted or acquitted. The replacement of current provisions as proposed by the Opposition would result in restricting CEO ability to remove an officer when charged with an offence – would instead mean officer could only be removed once convicted.	
23	Page 22, after line 30 – To insert: (3A) A prison officer aggrieved by the period of suspension may appeal the chief executive officer's decision under section 103(5).	Insertion of an appeal right to the period of suspension under s105 (5)	As the amendment inserting s105 (5) was not agreed to this amendment is voided. Refer to (7) above.
24	Clause 16 amendments (These amendments relate to youth custodial officers, and they duplicate the amendments proposed by the Opposition for prison officers	Proposing same amendments as proposed under clause 7	Amendments already defeated during debate re: clause 7. Move on mass and put to vote.

Suitability – appropriate for the position

Integrity – adherence to moral and ethical principals

Honesty – freedom from deceit or fraud

Competence – possession of required skill, knowledge, qualification or capacity (to perform)

Performance – ability to do the work, mode of conduct or behaviour

Conduct – personal behaviour