WAPOU
WA Prison Officers' Union

Secretary J E P Welch
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Ref;

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Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Dear Committee Members

Submissions Regarding the Custodial Legislation (Officers Discipline) Amendment Bill 2013

We refer to your invitation to make submissions in relation to the proposed amendments to the disciplinary regime set out in the *Prison Act 1981* proposed in the *Custodial Legislation) Officers Discipline Amendment Bill 2013.* We set out our submissions below.

1.0 About the WAPOU & CPSU/CSA

1.1 The Western Australian Prison Officers' Union (the "***WAPOU***") is a trade union that represents prison officers in Western Australia. It is affiliated with the Unions WA, Australian Council of Trade Unions and the ALP (Australian Labor Party).

1.2 It currently has over 2200 members throughout the public prison service.

1.3 Since 2013 the WAPOU has been the state branch of its Federal Affiliate, the Community & Public Sector Union / Civil Service Association (the "**CPSU/CSA")**

1.4 WAPOU assists its members through disciplinary processes and no other organisation external to the Department of Corrective Services is as familiar with the issues relating to discipline of prison officers.

2.0 Background

2.1 On 20 November 2013 the Western Australian State Government introduced the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* (the "***Bill***").

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2.2 The Bill replaces a disciplinary procedure found in Part X of the *Prisons Act 1981* (WA) (the "***Prisons Act***") and replaces it with a procedure that requires an officer to show cause why he or she should not be terminated on being notified that the Chief Executive Officer of the Department of Corrections has lost confidence in the officer's suitability to continue as a prison officer, having regard to the officer's integrity, honesty, competence, performance or conduct ("***Removal Process***").

2.3 The Removal Process is taken from Part 11B of the *Police Act 1892* (WA) (the "***Police Act***"). Those provisions were initially taken from the *Police Act 1990* (NSW) following recommendations from the Royal Commission into the New South Wales Police Service 1997.

2.4 The Bill also introduces a second tier of processes by introducing the *Public Sector Management Act 1994* (WA) (the "***PSMA***") Disciplinary Process[1].

3.0 Executive Summary

3.1 Central to this submission is the priority we believe should be given to ensure that Correctional Officers receive a quick, fair and equitable disciplinary process.

3.2 While there is no evidence that the current process is broken: the current bill represents a substantial departure from Prison disciplinary procedure. If the current system is not to be retained, then we propose that the simplest and most appropriate course is to apply the current PSMA process to Prison Officers.

3.3 If the Removal Process is to be retained in its current form then the Bill should provide for:

(1) Guidance on how the Chief Executive Officer ("***CEO***") exercises his or her discretion between adopting the removal process so as to ensure that simple misdemeanours or performance issues do not get caught up in the Removal Process through poor management;

(2) An obligation on the CEO to make actual findings of misconduct following an investigation and before commencing the Removal Process;

(3) The full disclosure of documents relied upon by the CEO in initiating the Removal Process be given to the Prison Officer so that an early and realistic assessment can be given to the Officer's review prospects;

(4) The preservation of the Prison Officer's privilege against self-incrimination;

(5) A standard Western Australian Industrial Relations Commission ("***WAIRC***") unfair dismissal process instead of a process that is heavily weighted in favour of the CEO; and

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[1] See section 98 of the Bill.

(6) The Removal Process be expressed in terms of a "show cause" notification rather than refer to a "loss of confidence" which will reduce prejudice the Officer is likely to suffer if the Officer is reinstated after a successful appeal to the WAIRC.

4.0 Current Provisions in Part X of the *Prisons Act*

4.1 The current disciplinary provisions for Prison Officers are contained in Part X of the *Prisons Act*. These provisions are unique to Prison Officers. They are not replicated or applicable to other public officers. Prison Officers are currently outside the PSMA regime.

4.2 The current disciplinary provisions are also very prescriptive. Briefly, the procedure consists of:

(1) The laying of a charge of a disciplinary offence in writing containing the particulars of the alleged offence[2]. The charge is validated by the Superintendent[3] and the Officer must indicate whether he disputes or admits the charge within 48 hours[4]

(2) On admission of the charge, the Superintendent may further investigate the matter and may issue a caution, reprimand or fine not exceeding $50.

(3) Alternatively, the Superintendent may refer the matter to the CEO who in addition to the powers of the Superintendent may issue a fine not exceeding $250, a suspension without pay not exceeding 10 days, a reduction in rank, a requirement to resign under threat of dismissal or a dismissal.

(4) On denial or non-admission of the charge:

a) The Superintendent holds an inquiry into the matter[5]. He may then either deal with it by issuing a caution, reprimand or fine not exceeding $50[6].

b) Alternatively, the Superintendent may refer it the CEO[7]. If he does so he must suspend the Officer[8].

c) The CEO must then determine the matter. He may issue a caution, reprimand, a fine not exceeding $250, a suspension without pay not exceeding 10 days, a reduction in rank, a requirement to resign under threat of dismissal or a dismissal.

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[22] s 99(1)(b) Prisons Act
[3] s 99(1)(c) Prisons Act
[4] s 99(1)(d) Prisons Act
[5] s 99(2) Prisons Act
[6] s102(1) Prisons Act
[7] s105 Prisons Act
[8] s 105(1) Prisons Act

4.3 The above process is subject to strict time frames.[9] The Superintendent is not bound by the rules of evidence[10] and the Officer is not entitled to legal representation[11].

4.4 The Prison Officer may appeal:

(1) The finding or penalty imposed by a Superintendent to the CEO within 10 days;[12]

(2) The findings or penalty imposed by the CEO to the Appeal Tribunal[13] which consists of a Magistrate appointed by the Minister, a person appointed by the CEO and a person elected by ballot by members of the Union.[14]

4.5 The main characteristics of the current system is that it creates incentives to keep minor or routine breaches at a low level within the disciplinary process and provides for a fair appeals process.

5.0 Current Provisions in other Australian States.

5.1 It does not appear that Prison Officers in other Australian States are subject to the Removal Process[15].

5.2 In other jurisdictions, Prison Officers are simply subject to the Public Sector Management Acts in that jurisdiction and the appeals process applicable to other public sector employees.

5.3 The powers therefore proposed for the CEO for the Department of Correction represents a radical departure from the administration of prison Officers' employment both in terms of the history of prison management within this state and the rest of Australia.

5.4 Furthermore, the proposal in the Bill is to remove one functional disciplinary procedure and in its place impose two disciplinary systems, without any guidance on which system the CEO should employ.

5.5 We submit imposing two disciplinary systems will add confusion and uncertainty to the process. There will also be an incentive on the CEO to "short-cut" disciplinary processes by adopting the Removal Process as the experience in the Police Force indicates. This can promote poor management practices as the temptation will exist for the CEO to remove an officer rather than tackle the root causes of poor performance and systemic issues in the workplace.

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[9] ss 99(1)(d), 99(4) Prisons Act
[10] s 100(2) Prisons Act
[11] s 101 Prisons Act
[12] s 103(1) Prisons Act
[13] s 108(1) Prisons Act
[14] s107(1) Prisons Act
[15] See *Halsbury's Laws of Australia* at [335-45] accessed 24/09/2014 at 18:28

6.0 Police Act Review

6.1 The WA Police Union made some observations on the effect of Part IIB of the *Police Act 1892,* which is the model for the Bill, as part of its response to the Amendola Review[16]. The Review included the opinion that:

(1) The Commissioner of Police has shown an increasing propensity to use s 33L provisions as the first option for the overwhelming majority of offences.

(2) The purpose behind 33L was historically to remove officers who may be involved in covert, corrupt activities, which could not be proven on normal evidentiary breaches, but not for routine disciplinary breaches.

(3) To this end, the *Police Act* retains further disciplinary mechanisms to deal with routine disciplinary breaches. This is further justification for retaining the Superintendent's jurisdiction to deal with smaller matters.

7.0 CEO's Power of Investigation

Power to Compel Answers to Questions

7.1 Section 101(7)(4) of the Bill allows the CEO to require the Prison Officer to answer any questions or produce any document which is in the custody or control of the Prison Officer.

7.2 Section 101(7)(5) of the Bill does not excuse the Prison Officer from giving information or answering any question on the ground that it may incriminate the Prison Officer or render them liable to a disciplinary measure.

7.3 Section 101(7)(6) of the Bill provides that the information obtained from a Prison Officer is not admissible in any criminal proceedings for an offence, save for prosecuting the Officer for not answering a question or providing a false or misleading answer.

7.4 Section 101(7)(7) of the Bill provides that the penalty for not answering a question is $4000.00 or 12 months imprisonment.

7.5 These provisions are not included in Part 11B of the *Police Act 1892* (WA). The effect of the amendments are to impose a greater standard on Prison Officers than that on Police Officers where Prison Officers have a much more limited role and duty to the public than Police Officers.

7.6 At first blush, while it appears that section 101(7)(7) mirrors the process in section 11A of the *Evidence Act 1906*, ("the ***Evidence Act***") it:

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[16] 11 September 2009

(1) may not prevent prosecution in other jurisdictions outside Western Australia;[17]

(2) does not replicate section 12 of the Evidence Act which allows for the trier of fact to restrict the publication of the incriminatory material.

7.7 The removal of the right to self-incrimination is a serious step for the legislature to take. It is fundamental to the proper administration of justice in that:

(1) Would-be witnesses will be more reluctant to come forth and give evidence;

(2) It is necessary to protect the human dignity of the Prison Officer from the "cruel tri-lemma" of punishment for refusal to testify, punishment for truthful testimony and punishment for perjury,[18] especially in the context where the employer will have advanced surveillance and investigatory resources at its disposal;

(3) It disturbs the right of the Prison Officer to a fair trial in the event criminal charges are pressed. By way of recent example, In the case of *Lee v R*[19] the High Court considered a case where the record of interview compiled by the Australian Crime Commission was seen by the DPP prosecutor. The prosecutor did not seek to tender the record of interview as evidence in the criminal trial. In that sense, the prosecutor would have complied with section 101(7)(6) of the Bill. The prosecutor was simply 'forearmed' as to potential responses the accused may make at trial. A joint judgment of the full bench of the High Court considered that a prosecutor being simply 'forearmed' affected the criminal trial in a fundamental respect by shifting the balance of power in favour of the prosecution.

(4) The prospect of the incriminatory material being raised and published by the WAIRC diminishes the value of Prison Officers' exercising the option of appealing the termination to the WAIRC.

7.8 The power of compulsory examination is unnecessary, and an overreach in relation to the Removal Action. The CEO can proceed with justification to termination where the Prison Officer fails to make a candid and thorough disclosure.

8.0 Status of Prison Officers in the Bill

8.1 One assumption that appears embedded in the Bill is that Prison Officers and Police Officers share the same sort of public duty and power over members of the public that justifies special scrutiny and special powers to dismiss Prison Officers. For instance:

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[17] See Haydon D *Cross on Evidence* (8th Australian Ed) at [25175]
[18] See *EPA v Caltex* (1993) 178 CLR 477 at 498 and 514.
[19] (2014) HCA 20

(1) By section 107(4)(b)(i) and (ii) of the Bill, the WAIRC is to consider the "special nature of the relationship between the CEP and Prison Officers."

(2) By Section 107(2) of the Bill, the burden of establishing an unfair dismissal is "at all times" on the Prison Officer, whereas in typical unfair dismissal cases for summary dismissal, the burden shifts to the employer once the employee has made out a *prima face* case[20].

(3) In the Second Reading Speech, the Minister for Corrective Services said: "*This scrutiny is due to the powers these officers have over members of the public they serve. One of those powers is to use lawful force. The potential abuse of this power, in itself demands high standards of accountability".*

8.2 This represents a major re-evaluation of the role of Prison Officer. There is no principal at law that Prison Officers have a "special relationship" with their CEO. Prison Officers are simply public employees pursuant to section 6(3) of the Prison Act.

8.3 It is a well-established rule of the common law that members of the police force are not 'employees'. The Privy Council made it clear as long ago as 1955, in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*,[21] that the relationship of master and servant does not exist between the Crown and its police officers, but that police constables are independent office-holders exercising 'original authority' in the execution of their duties.

8.4 While it is an initially attractive proposition that Prison Officers and Police Officers share the same sphere of activity and Prison Officers should be subject to a higher standard, the argument, in our submissions falls away when considering that:

(1) Police may enter Prisons and assume the responsibilities of Prison Officers on the invitation of a Prison Officer or CEO[22] but Prison Officers have no power over members of the public not in a Prison;

(2) Police officers are required to deal with members of the public in a variety of circumstances not always under the control of the Commissioner of Police. They are in effect, always on duty. Prison officers are not open to such a breadth of experience however. They will typically only have authority over prisoners in a highly regulated environment. They are always under surveillance in the workplace.

(3) It is difficult to understand just what is proposed by a "special relationship" between the Prison Officer and the CEO. Certainly it involves:

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[20] *See Moylan v Chairman Of Commissioners City of South Perth Council* [2001] WAIRC 03981 at [31] "where the dismissal is justified on the basis of an allegation of misconduct or incompetence, it would be for the employer to establish that the alleged misconduct or incompetence in fact warranted summary dismissal."

[21](1955) 92 CLR 113. This relationship is confirmed in section 6 of the *Police Act 1892* in that Police Officers hold commissions under the hand of the Governor for such appointments; and such commissioned officers shall be subject to the control and discipline of the Commissioner of Police.

[22] s 15 *Prisons Act*

a) a duty of trust and fidelity, but that term is hardly a "special relationship" as it is a term commonly imposed into an ordinary employment relationship[23];

b) physical control and restraint of prisoners, however that is not so special, or the power imbalance greater than a teacher's duty to protect children in their care, or a nurses' duty to not cause physical harm to patients; and

c) upholding the law, but it would not involve a greater onus than between a lawyer and a client.

8.5 If there is no "special relationship" between the Prison Officer and the CEO then there is no need for a separate specialised unfair dismissal process within the WAIRC.

8.6 It is submitted that it is more efficient and easier for all participants in the industrial relations system if on termination from employment, the Prison Officer accessed the normal unfair dismissal process, in the same way a teacher or nurse may do so if aggrieved by their termination of employment.

8.7 If the Prison Officer's application to the WAIRC is successful then the officer should be compensated for lost wages.

9.0 Natural Justice and the Removal Process

9.1 The principles of Natural Justice require that an adjudicator:

(1) make findings that are based upon material that logically tends to show the existence of facts consistent with those findings; and

(2) listen to any relevant evidence that conflicts with any proposed finding and any rational argument against such a finding that a person who is adversely affected by the finding may wish to put before the adjudicator[24].

9.2 The difficulty with the Bill in respect of the obligation is that:

(1) The language of the Bill at section 101(3) takes away the need to find actual misconduct, because;

a) The conditions that trigger the Removal Process is that the CEO simply "does not have confidence in the Prison Officer"; and

b) The CEO "may" (and not 'shall') conduct an investigation into the misconduct[25]. While it is appreciated that the Bill is designed to

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[23] See generally *Maken's Law of Employment (6th ed)* [5.405]-[5.425]
[24] *Mahon v Air New Zealand* [1984] 1 AC 808
[25] s101(3) of the Bill

remove the officer where it is difficult to prove a case, such as the conduct relates to organised covert criminal activity, the CEO or Superintendent has the ability to refer the matter to the Corruption and Crime Commission[26], which has significant powers of investigation.

(2) The significance of the phrase that the CEO has "lost confidence" in a Prison Officer does not indicate a preliminary adjudication as the result of an investigation but a declaration that for all intents and purposes the employment is at an end. This was noted by the WAIRC in the decision of *AM v the Commissioner for Police* [2010] WAIRComm 61 in which the WAIRC, while reinstating the Police Officer noted the difficult position of the Commissioner of Police having made such a declaration:

> *"having to assign the duties to the* [officer] *that requires the exercise of extensive police powers when interacting with the community where the Commissioner of Police believes that* [the officer] *represents a risk to the community.*[27]"

9.3 Finally, the obligation to hear relevant contradictory evidence depends on the Prison Officer's ability to properly respond to the allegations as the result of the CEO's investigations. It is appropriate that the CEO be required by the statute to provide the Officer with the source documents that were used to prepare the Notice in section 102 of the Bill. It would also have the advantage of allowing the Officer to make an early and realistic assessment of their prospects on review.

10.0 Power to suspend Officers under investigation in the Bill

10.1 Section 110J of the Bill provides that it does not derogate from the CEO's power to stand an Officer down or transfer a Prison Officer.

10.2 The CEO's discretion to suspend is increased under the Bill. Section 105 of the *Prisons Act* required a Superintendent to suspend an Officer once he or she determined the matter should be escalated to the CEO.

10.3 Under the current Part X process an Officer may appeal the terms of the suspension to the Appeals Tribunal. That is not the case in the current provision, where the CEO is required to review the suspension every 60 days. There is no ability for the Officer to appeal the terms of the suspension under the Bill, and that suspension may be on conditions such as requiring the suspension to be without pay.

10.4 A complicated or protracted investigation could then be used strategically to "starve out" an officer rather than encouraging the CEO to conduct a proper investigation.

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[26] s 25 *Corruption and Crime Commission Act 2003.* Note that the Inspector of Custodial Services has an obligation to notify the CCC of misconduct: s 28 Corruption and Crime Act 2003

[27] *AM v Commissioner of Police* [2010] WAIRComm 61 at [13]

11.0 Conclusion

11.1 The Bill represents a radical departure to the discipline of Prison Officers which is not justified by the empirical evidence.

11.2 The Bill will create an unfair disciplinary process that will operate not do anything to improve recruitment, retainment and morale of the Prison Officers in the State.

11.3 The WAPOU would be pleased to provide appear before the Committee and discuss these submissions and answer questions.

Yours Faithfully

Andy Smith
Acting Secretary