

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

Second Reading

Resumed from 6 May.

HON DARREN WEST (Agricultural) [3.39 pm]: I was discussing the government's Custodial Legislation (Officers Discipline) Amendment Bill earlier in the week. The thrust of my comments was that, without real need, the government is using this bill as a blunt instrument to erode the rights of the extraordinarily hardworking prison officers in our prison system. I pointed out that I had visited several prisons and met with several prison officers and seen firsthand the difficult job they perform and the trying circumstances under which they perform it, especially in today's prison system, which houses about 5 100 prisoners in prisons designed to house in the order of 3 000 or so prisoners—a difficult work environment indeed. I was pointing out to the house and to anyone who chooses to read *Hansard* that I think prison officers are grossly undervalued by this government. They certainly feel that way, and this legislation suggests they are looked down on by those in the Western Australian government.

As I pointed out, there are problems in the prison system that are attributable to a range of issues. They are not attributable to only our hardworking prison officers. As I may have pointed out earlier, overcrowding of prisons, with extra prisoners in cells, presents a certain number of challenges. One prisoner per cell is clearly easier to manage than two or up to six, which I have seen in some of our jails. Clearly, overcrowding creates more work for prison officers and a more difficult environment. It certainly provides a range of challenges and issues that may not occur otherwise.

I noted also in my tour of the prisons—it is not something we should be at all proud of—a very high number of Indigenous prisoners, especially Indigenous male prisoners. Recidivism rates for Indigenous male prisoners are extraordinarily high. Repeatedly locking up male Aboriginal prisoners should not be seen as a mark of success. Recidivism creates yet another set of challenges for our prison officers. Many of the prisoners who come back into the prisons are known to prison officers. Although a professional relationship is always maintained with the prisoners, I am sure many prison officers experience disappointment when they see returning to the prisons the Aboriginal prisoners they have worked with to try to rehabilitate so that they do not return to the prison system. I think it is extremely difficult in prisons where there is a mixture of male and female prisoners. That, indeed, creates another set of challenges for prison officers.

To recap a little bit, as I may have touched on last week, prison officer work is dangerous work. Prison officers work with a group of very unpredictable, sometimes desperate, people, who, clearly, do not want to be in that environment and therefore often undertake activities to help their cause. Sometimes they may try to get out of that environment and sometimes, I think it is true to say, prison officers are the target of some of these vexatious behaviours so that prisoners can gain some sort of advantage of the system. In a library, if I can use that analogy, no-one would hide behind the bookshelves and have a crack at the librarian so that their case may be better when it is time to return a book late. That is clearly not the case in the prison system. Some people in the prison system work the system to try to gain some sort of advantage or favour by dobbing in a prison officer for something he may or may not have done. A lot of the investigations in the prison system prove fruitless. As I pointed out with my statistics last time, over the last three years there has been a significant reduction in the number of both officers charged and offences they have been charged with. I think that is because of some really good work done in the present system and because of the officers themselves. They have to conduct themselves in a way that is over and above the full force of the law, and that is how it should be.

I do not know why the government is so suspicious of prison officers. The prison officers who commit crimes at work, for example, are subject to criminal law. If a prison officer takes drugs into a prison for whatever reason they choose, they will be subjected to the full force of criminal law. If an officer were charged and convicted of a criminal offence, it would not invoke this new legislation. They would be dealt with—just as any other member of the community would be dealt with for bringing drugs into a prison—under criminal law. It is an illegal activity and so it should be. Under those circumstances, a prison officer would be deemed to be innocent until proven guilty of the charge. I will come back to that in a short while towards the end of my contribution. They would be tried with the presumption of innocence until proven guilty. While being charged, the prison officer would be entitled to remain silent, and during the criminal process they would be presumed innocent until proven guilty. If they were found guilty, they would be sentenced, and that is how it should be.

If officers are corrupt, there are mechanisms in place such as the Corruption and Crime Commission to investigate the corruption. I have never been in front of the CCC and I hope never to be so. I have not been convicted of anything to cause me to be in front of the criminal court system either, but I am more au fait with that than I am with the CCC system. In recent times we have seen anti-corruption organisations such as the Independent Commission Against Corruption in New South Wales and some very high-profile fallout due to the

activities of organisations aimed at stamping out corruption. That sort of process is available here in Western Australia.

I come back to the right to remain silent. Under common law, as far as I understand it, everyone has the right to remain silent. We have a very high profile of a person in this Parliament who has the right to remain silent and who has exercised quite lawfully that right.

Hon Simon O'Brien: If only you would exercise the right to remain silent. Practice what you preach.

Several members interjected.

The ACTING PRESIDENT: Order!

Hon DARREN WEST: Thank you, Hon Simon O'Brien. I make no apologies at all for standing up against a bad piece of legislation. That is what taxpayers pay me to do. I come into this place to review poor pieces of legislation on behalf of my electorate. Hon Simon O'Brien may wish me to remain silent, but I can assure him that when poor pieces of legislation come before the Parliament that need to be scrutinised and need a *Hansard* record of the debate for all to see, I will not remain silent.

I return to the point I was making. If someone who has achieved the high office of a government minister has the right to remain silent and chooses to exercise that right, and no-one argues they should not have that right, that is their prerogative, and there is little we can do about it. We may encourage the person not to remain silent but, lawfully, we have no way of ensuring they do not. If the Premier of the day defends the right of a government minister to remain silent —

Point of Order

Hon SIMON O'BRIEN: How is an attack on members in another place in any way relevant to the question before the Chair?

The ACTING PRESIDENT (Hon Alanna Clohesy): There is no point of order.

Debate Resumed

Hon DARREN WEST: I can answer Hon Simon O'Brien's question in this way. The legislation before us exemplifies this government's double standard. Under this legislation, prison officers will lose their right to remain silent. The connection I am trying to make is that if a government minister has the right to remain silent and the Premier of the day of that government defends the right to remain silent, how can there be a double standard that removes the right of a prison officer under investigation to remain silent? That is exactly what this bill does. It is wrong to take away anybody's right to remain silent, especially when the double standard I have pointed out to the house exists. I will therefore never stand for the removal of anybody's right to remain silent. It is a basic right in a civilised western country like ours.

Hon Simon O'Brien: It would be interesting if you ever make police minister one day! That would be very interesting!

Hon DARREN WEST: I look forward to Hon Simon O'Brien's prophecy coming true! Like any new politician, of course I have ambitions such as he portrays, but let us see about that. It is very hypothetical and would be a long way away, if at all.

I will get back to the point I make. I have been quite liberal, dare I say it, in my acceptance of interjections but I am not all the way through my prepared comments and I have got to this very important point extraordinarily late in my contribution. If a government minister has the right to remain silent and the Premier defends that right, why would the government bring legislation to the house that removes that right? If three prison officers are involved in an activity of investigation, under the current circumstances the officer under charge has the right to remain silent but the other two officers associated with that officer do not. That is perhaps not a bad case of events. This would act as a deterrent for people who may be working in collaboration and meandering down the wrong path to instigate a criminal offence.

Madam Acting President, I seek leave to have a short extension.

The ACTING PRESIDENT (Hon Alanna Clohesy): The member seeks leave to be granted an extension—of 15 minutes?

Hon DARREN WEST: Yes, but I will not need 15 minutes.

[Leave granted for the member's time to be extended.]

Hon DARREN WEST: I will be conscious of the time. I accepted quite a lot of interjections during my contribution that perhaps in hindsight I should not have.

If three prison officers are collaborating together, two of those officers do not have the right to remain silent but the officer charged still has the right to remain silent. I think that is a very important distinction to make and for people to remember when they vote on this bill. They will be voting for a worker in that workplace to lose his right to remain silent. Anybody outside that workplace has that right, Joe Citizen has that right and indeed government ministers have that right, as do other members of Parliament. It is a right that has been fought for and should be retained.

Hon Nick Goiran: Are you sure about that?

Hon Simon O'Brien: Because your leader in another place is insisting they go. You are very inconsistent on this.

Hon DARREN WEST: The point I am trying to make is that we may encourage people to revoke their right to remain silent. We may even insist that people revoke their right to remain silent. But the law says that they have the right to remain silent.

Several members interjected.

The ACTING PRESIDENT: Order! Hon Darren West has the call. If members reduce the number of interjections, we may get through the debate quicker.

Hon DARREN WEST: Another matter I want to touch on that concerns the WA Prison Officers' Union is the loss-of-confidence provisions in the bill. I look forward to subsequent contributions from members to suggest to me that I am wrong, but I understand that these provisions to allow for a loss-of-confidence notice to be issued—for reasons still undetermined—to a prison officer could be for arriving late for work on multiple occasions. I accept that of course officers should be at work on time. However, surely their managers are managing those officers. If there is a management problem, perhaps we should be looking at disciplining the management rather than the officers themselves. Let us use that as an example. Under this bill the officer is issued with a loss-of-confidence notice. The officer has 21 days to respond to the notice. I presume that under that set of circumstances, the officer is guilty of not having the confidence of his superior and must prove that he is competent for the position he holds. After the officer, he or she, has responded to the loss-of-confidence notice, the officer is paid for 28 days while the matter is heard before three commissioners at the Western Australian Industrial Relations Commission. Anyone who has had dealings with the Western Australian Industrial Relations Commission would agree with me that being able to get three commissioners in the same room at the same time within 28 days with the prison officer, or the defendant in this case—I am not sure whether that is the word but members would know what I mean—is highly unlikely. On the twenty-ninth day, the prison officer, who has had no more than a loss-of-confidence notice placed before him and has responded to it, is effectively starved out because he or she has no income while this process is ongoing.

This process may go on for several months if it is a difficult case. I understand that the minister has the discretion to continue to pay that officer while the hearings go on, but what if he does not do that? What happens if the minister says, "No, look, I don't think this is a legitimate case; I think this bloke isn't competent enough; I'm supporting the management of the department on this one, and I don't think that I want to pay this prison officer for any more than 28 days"? If this hearing lasts for three to six months, this poor prison officer who the minister chooses not to support and who has done nothing wrong, has not been charged with any offence or breach of discipline and who has only had a loss-of-confidence notice placed in front of him, is out on his own and on the street. As we know with the cost of living these days, nobody can afford to be without income for a great period of time. In that case the department could starve out the officer because the officer would have no income, and he or she would have to seek employment elsewhere, so ultimately the matter would go away. That is a very unfair system and it is a very unfair way to treat workers who do a difficult and important job in our community. Under that set of circumstances in which a prison officer could be pushed out the door and starved out for no good reason at all, many people might reconsider their position as a prison officer in the Department of Corrective Services.

Hon Ljiljanna Ravlich in her contribution pointed out that a search of the Parliamentary Library website can reveal many articles on the problems related to the prison system. She pointed out that many of these stories are based around other issues, such as riots in prisons and the now infamous Serco prisoner transfer contract. These are areas that perhaps warrant further investigation by government rather than just bringing the axe down on poor prison officers, who I think are the hardworking pawns in this whole debate. I think the government is on an agenda for the right at any time it sees fit to sack workers and remove their entitlements. It is terribly unfortunate that a mass employer would ever feel that way. Most of these stories that can be searched on the Parliamentary Library website are not at all the fault of prison officers. All sorts of articles about how prisoners are moved at a cost of over \$30 000 to the state to attend funerals can be found on the website.

The final comment I want to make is that in my view the best way to rebuild the prison system, to get it the best it can be and to improve it so that we are proud of the way it is run, is to work with all stakeholders in the system

and with prison officers and those who do this difficult work—not to vilify and blame them at every opportunity and look for ways of pushing them out the door. One photo in *The West Australian* is not a reason to pull the rug out from under all our hardworking prison officers.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [4.00 pm]: I rise to make my contribution to the debate on the Custodial Legislation (Officers Discipline) Amendment Bill 2013. It seems there is a serious lack of evidence before the Parliament and publicly of a systemic cultural problem within custodial services that cannot be addressed other than by adopting a guilty until proven innocent approach and by eroding the principles of procedural fairness in the disciplinary matters that apply to prison officers.

We have a credibility gap as well. The Minister for Corrective Services, Minister Francis, would have us believe that it was only when he became the minister, some five years after this government was elected in 2008, that a systemic culture of abuse of power by prison officers revealed itself and that none of the Barnett government's previous corrective service ministers were advised by either the director general or Commissioner of Corrective Services that there was a problem and that no evidence was presented to them. Minister Francis would have us believe that, in the years before he was appointed, none of the previous ministers noticed that there was this widespread systemic culture of abuse of power going on within corrective services. That is hard to believe, because system-wide misconduct, corruption and abuse of power do not appear in an instant; they are built up over time. It is lacking in credibility that he is the first one to see it. However, if we are to believe the minister that he was the first one to see it, what were the other ministers and the government doing for the four and a half or five years before he was appointed? He would have us believe that in a workforce of just over 2 000 there is a systemic culture of abuse of power. If that is the case, and if the minister representing him in this place is able to demonstrate that we are talking about not just a small cohort of rogue prison officers but system-wide corruption, misconduct and criminal behaviour, then the opposition will happily work with the government to make whatever legislative changes are needed to address it.

The bill addresses the process to apply once a number of points are identified. The second reading speech listed four points that tell us what the bill will apply to—incompetence, criminality, corruption and lack of integrity. The bill puts in place the disciplinary measures that are to apply in those circumstances. The first one is really interesting because it is incompetence. By including incompetence in that list, which the minister has done in his second reading speech, the government goes way beyond dealing with cultural and system-wide abuses of power. Incompetence is all about performance management. It seems that we are being asked to authorise the government to abrogate any responsibility to improve performance and make sure that the skills base is lifted; it is using a sledgehammer to crack a nut.

Hon Michael Mischin: How so?

Hon SUE ELLERY: We will put in place very serious disciplinary measures. I will talk about the process in a minute. For example, according to the second reading speech, loss of confidence —

Hon Michael Mischin: Leaving that aside for the moment, a major component of the bill is to align the disciplinary proceedings with those under the Public Sector Management Act. What is wrong with that?

Hon SUE ELLERY: I do not have a problem with that, but we are told that the purpose of the bill and the application of all of the elements, the loss-of-confidence provisions included, is to also address incompetence.

Hon Michael Mischin: No. That is the policy behind the bill generally, but I take it from what you are saying that the opposition has no problem with reforming the disciplinary proceedings and aligning them or including them under those that are currently available under the Public Sector Management Act. I have detected a bit of confusion as to which bits we are talking about. Is there any problem with that part of it?

Hon SUE ELLERY: The Attorney General knows that the opposition has problems with the Public Sector Management Act because of what we have just done to that act. If the Attorney General lets me work my way through the structure of my speech I will present my position, which is completely consistent with the position of all of my colleagues. Rigorous disciplinary measures ought be in place to deal with systemic criminality, corruption and lack of integrity. The first point I make is that using those same measures, including the loss-of-confidence measures, to apply to incompetence is not appropriate. If the Attorney General lets me build my case he can, I am sure, deal with it in his usual fashion.

The point I am trying to make is that, in the first instance, putting incompetence on that list of measures that the government says needs to be bundled into a new disciplinary process that includes effectively dismissing someone without them being able to see the evidence on which that dismissal is based—which is the shorthand way of describing what happens in a loss-of-confidence motion; I will explain that step by step as I go on—is undermining the reasons that the government says it wants this legislation. This bill does not make sense. It is not good human resources management and the government will cause itself a whole lot of grief dealing with a skills deficit by issuing something like a loss-of-confidence motion. If the Attorney General thinks I have got

that wrong, I hope he will point that out in his reply. As I understand the bill, an officer who is not performing competently may be issued with a loss-of-confidence notice and given 21 days to respond, and, if the commissioner is not satisfied, may be dismissed. If the avenue of appeal is impractical and designed to starve the officer out of the service, I do not think that is the right way to deal with issues of competence. The government should deal with issues of competence by dealing with its performance management system.

I refer now to the other three elements that the second reading speech tells us this bill is aimed at—that is, criminality, corruption and lack of integrity. They are very serious matters, and within a closed and dangerous environment, such as a custodial setting, where there is the potential for abuse of power, it is proper that there is a rigorous and appropriate mechanism in place to deal with them. However, the mechanism in this bill tips the balance so that procedural fairness for prison officers subject to allegations of such matters no longer applies. That is the element that I want to explore in my comments.

Despite this minister wanting us to believe it was ground zero when he became the minister and nothing existed before he became the minister, in fact, a series of mechanisms has long been available to the Commissioner of Corrective Services to deal with the professional standards of his or her workforce. Indeed, the annual report sets out some of the internal mechanisms in place at the front end of identifying potential corruption, lack of integrity and criminality. As a sidebar, I make the point that this bill deals with the back end—that is, what is done once it is found there has been a breach, corruption or misconduct. At the front end, the Department of Corrective Services has long had in place a series of mechanisms to deal with professional standards—indeed, that is why they call it professional standards.

The department's annual report and its website set out a couple of things that are useful to note. On the department's website, under its "Interim Organisational Structure (April 2014)", is the heading "ED Operational Support". The minister may correct me if I am wrong but I assume that "ED" stands for executive director. The person who has that responsibility and who reports directly to the commissioner on operational support is responsible for a range of areas of functionality within the Department of Corrective Services, which includes professional standards, standards and review, and integrity. I then went to the annual report to see what measures are in place to determine whether those elements of the structure are working well. It is worth noting that the minister has reviewed the structure that deals with that front end of identifying corruption and misconduct. He is on the public record as saying that previously it was completely dysfunctional and he has completely reviewed it. Members may be surprised to know that despite his claims that he has completely reinvigorated, reinvented and restaffed that area, the evidence would suggest that that is not the case. I will get to that in due course.

The section at the beginning of the most recent annual report of the Department of Corrective Services is about significant issues facing the agency, which every annual report includes. This 2012–13 annual report was signed off by the minister and tabled in about September, I presume. To be fair to him, he had been the minister since only March last year. Nevertheless, it has his little photo in it. Under "Significant Issues", it states —

It has also been identified that a retrospective funding model has been problematic for the Department and its ability to plan for future operations. A switch to prospective funding, which looks at projected population figures, has been requested and the Department is working in partnership with the Department of Treasury to develop a demand and cost model to support this prospective approach.

An increased prison population has a significant impact on all Departmental operations. This impact is not confined to 'making room': prisoners bring with them a set of needs that draw on resources across the Department. Prisoners must be connected to employment or education and any appropriate programs to address their offending behaviour.

The report goes on to talk about the importance of building a funding model that lets the department deal with the complexity of issues that only a custodial service will face.

Under "Professional Standards" on page 71 of the 2012–13 annual report is the heading "Key challenges for 2012/13", which states —

- Delivering contemporary risk-based services in an environment of tight fiscal restraint.
- ...
- Timeliness of reporting, a critical success factor, continues to be impacted by resourcing.
- Increases in the role and functions of the Standards and Review Directorate without commensurate resourcing impacts the ability the directorate to report to Executive on the degree to which compliance is occurring in the operational environment.

It goes on to state —

... the Directorate —

That is, the standards and review directorate —

continually struggles to meet key timelines, due in part to limited resources.

The annual report that the minister signed off states that the people in the department responsible for the front end of fixing the problems are constrained in their ability to do their job due to the fact that they do not have enough money to meet the time lines they are required to meet in a timely fashion.

Debate interrupted, pursuant to standing orders.

[Continued on page 3035.]

Sitting suspended from 4.15 to 4.30 pm