CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

Consideration in Detail

Resumed from 11 March.

Clause 7: Part X replaced —

Debate was adjourned after the clause had been partly considered.

Mr P. PAPALIA: Just to refresh my memory, I think we were up to me moving the next motion. The minister will recall that just prior to finishing last night the passage of my last amendment was defeated and we are at another one now.

Mr J.M. Francis: Sure.

Mr P. PAPALIA: I move —

Page 7, line 31 — To insert before "proceedings" where it first occurs —

or disciplinary

This amendment continues on from our discussion last night in many respects. It is related to how individuals affected by this legislation will be effectively subjected to a disciplinary process as well as the potential to be deemed as having lost the confidence of the commissioner. Our proposal acknowledges that it is unfair to have both of these systems. However, prior to entering that discussion and eliciting some sort of response from the minister, I want to take the opportunity—I think I can under this clause but if there is great objection, I will stop—to discuss further the actual process to which police are subjected under a finding of loss of confidence. I have sought advice on that —

Mr J.M. Francis: So have I.

Mr P. PAPALIA: No doubt the minister has. I was disappointed that he had not sought advice prior to last night. I sought advice from the Western Australian Police Union on the current process for police officers who are subjected to the procedure leading up to a letter informing them of a loss of confidence. I am referring to the time prior to receiving the letter when they are in the process of being investigated and have been called before the commissioner or his deputy, or whoever. At that time they are entitled to have a friend present. That is in accordance with what the minister said last night. However, I am informed that that person can be a lawyer.

Mr J.M. Francis: Yes.

Mr P. PAPALIA: Clearly, in most cases that would be someone appointed by the union. I want to elicit from the minister, for the purposes of *Hansard* and for the record, confirmation that prison officers and youth custodial officers, in the likely event that this legislation passes through this place and becomes law, will be entitled to the presence of a friend, which I understand in the police can be either another police officer or a lawyer. I want to get on the record that they are entitled to the presence of a lawyer, because it is a very important fact. There was a lot of uncertainty last night and I think it is a very important fact that we need to confirm.

Mr J.M. FRANCIS: Certainly, member for Warnbro, that is easily done. As requested by the member, I also sought advice on exactly how the current process—not the future process—in Western Australia Police is followed. I make it perfectly clear that as of today the current status is that police officers interviewed under the provisions may have another police officer or a legal practitioner present during the interview as an interview friend. The role of an interview friend is to ensure procedural fairness and not to provide counsel or legal advice or to influence the conduct of the interview. An investigation of alleged unprofessional conduct may lead to a loss of confidence or other managerial intervention to correct behaviour. The Police Act does not provide a rule for legal representation during the loss-of-confidence process. However, the Western Australian Police Union will ordinarily provide legal counsel to an officer in the preparation of the response to the commissioner. Part IIB of the Police Act enables an appeal on removal to the Western Australian Industrial Relations Commission. The rigour of the loss-of-confidence process within Western Australia Police is such that appeals to the Western Australian Industrial Relations Commission do not regularly occur. One loss-of-confidence matter from 2013 is currently before the WAIRC; one appeal in 2012 was dismissed; and one appeal in 2011 was withdrawn. My understanding is that the Western Australian Industrial Relations Commission ruled on two matters relating to police: one resulted in a compensation payout and one in the reinstatement of an officer.

Mr P. Papalia: While you are on your feet, could I ask you to confirm that your intent and expectation will be the same?

Mr J.M. FRANCIS: It is exactly the same.

Mr P. Papalia: In the event that a lawyer is provided, it is quite possible that the lawyer would be from the WA Prison Officers' Union or the union representing youth custodial officers. Does the minister say that is fine and is that his expectation?

Mr J.M. FRANCIS: The intent is to absolutely mirror what happens with Western Australia Police, so the answer to that is yes.

Mr P. PAPALIA: I will take the opportunity to explore the minister's knowledge of the police system and how he expects it to operate with prison officers and youth custodial officers. What is the minister's understanding of the number of—I am not sure what the correct terminology would be—applications within the system or the proposed number of loss-of-confidence cases? At what rate are they rejected by the commissioner? How many applications are found by the commissioner not to be worthy of pursuing and then rejected at that stage by the commissioner himself?

Mr J.M. FRANCIS: As I said yesterday from my conversation with the Commissioner of Police, it is estimated there are 50 per year, of which about 25 per cent are carried on with. In the past 12 months there were 25, give or take one or two. As a snapshot, there were about 25.

Mr P. Papalia: Seventy to 75 per cent were rejected by the commissioner?

Mr J.M. FRANCIS: About 35 to 50 per cent—about half.

Mr P. Papalia: The ones that are knocked back by the commissioner, are they referred to an alternative disciplinary process under the Public Sector Management Act?

Mr J.M. FRANCIS: Some of them are not carried on within police, for whatever reason. That is my understanding.

Mr P. Papalia: While the minister is standing, does he want to respond to my proposed amendment?

Mr J.M. FRANCIS: Sorry; absolutely. We had another look at this. I was pretty tired last night. We are talking about proposed section 101(5)(a) and (b) commencing, "The prison officer is not excused from giving information". It is pretty clear if the member thinks about it this way: a prison officer cannot refuse to answer a question on the ground that it may incriminate him if it will either render him liable to disciplinary action or removal. If a prison officer facing a loss-of-confidence procedure is asked a question about performance, or something related to that procedure, and that information cannot be obtained from an alternative source, the officer cannot answer, "I don't want to answer that question"—even though it is part of a loss-of-confidence procedure—"because it may jeopardise a disciplinary procedure under the Public Sector Management Act", and vice versa. It cannot be used as an excuse not to answer the question for the other. Does that make sense?

Mr P. Papalia: Yes. It is okay; we will probably disagree on it and move on.

Mr J.M. FRANCIS: The ultimate outcome of that clause is that performance management or a disciplinary process cannot be used as reasons not to answer questions as part of the loss-of-confidence process.

Mr P. PAPALIA: Is this not some sort of double jeopardy thing or anything like that?

Mr J.M. Francis: No.

Mr P. PAPALIA: Is the minister saying they are separate issues and he expects that someone might try to use that as an excuse?

Mr J.M. Francis: That is exactly right.

Amendment put and negatived.

Mr P. PAPALIA: I move —

> Page 8, lines 19 and 20 — To delete "or 12 months' imprisonment, or both".

A very serious penalty seems to apply here. This is all about refusing to provide information. The minister is subjecting people to a $4 000 fine or 12 months' imprisonment, or both. Can the minister explain where that came from? Is that a duplication of the police penalty or has the minister ramped up penalties? In the course of providing an explanation, what sort of penalties are prison officers and youth custodial officers currently exposed to within their disciplinary processes? Short of being dismissed, what sort of penalties are they currently exposed to such as fines? Beyond a criminal matter with a penalty of imprisonment, what penalty currently applies?

Mr J.M. FRANCIS: Under section 49(6) of the Prisons Act 1981 the penalty is a fine of $1 000 or 12 months' imprisonment, or both. This is one section that is not common to the police procedure, but, to put it in context, penalties applying in other jurisdictions were considered as part of the $4 000 fine or up to 12 months'

imprisonment or both. For example, the penalty in the commonwealth Australian Securities and Investments Commission Act 2001 is up to two years' imprisonment. I mentioned this yesterday.

Mr P. Papalia: I should know this, but what is it here for the Corruption and Crime Commission; for instance, if a similar offence was committed?

Mr J.M. FRANCIS: I am advised that it is up to two years' imprisonment.

Mr P. Papalia: What about the monetary penalty?

Mr J.M. FRANCIS: I have not got that advice.

Mr P. Papalia: Is the penalty two years? It seems a bit excessive.

Mr J.M. FRANCIS: I am advised that it is up to two years' imprisonment for the Corruption and Crime Commission.

Mr P. Papalia: Is the minister's justification purely to align it with other jurisdictions?

Mr J.M. FRANCIS: And it is a balance. The commonwealth Australian Securities and Investments Commission Act provides a penalty of two years' imprisonment. Under the current Prisons Act 1981, the penalty is a $1 000 fine or 12 months' imprisonment, or both. That was back in 1981. It is reasonable to say $4 000 or up to 12 months or both in this circumstance.

Mr P. Papalia: That is a fourfold increase.

Mr J.M. FRANCIS: In the monetary value; it is the same for the time.

Mr P. Papalia: It makes it a little skewed. Time in prison is cheaper than it was eight years ago!

Mr J.M. FRANCIS: The reality is that the easiest option is for people to be truthful and answer questions to the commissioner about their conduct.

Amendment put and negatived.

Mr P. PAPALIA: The next amendment standing in my name is to delete "Notice of loss of confidence" and substitute "Written notice of CEO's determination". Noting the minister has already rejected a proposal to change the terminology, I will not move my proposed amendment. It does not mean I do not think it is valid nor does it mean I resile from the observation that I think "loss of confidence" in the title for the process could easily result in an individual who enters the process subsequently being found not guilty and those charges being dismissed. They subsequently cannot get back the confidence of the CEO. That is a negative consequence we could have avoided through changing the terminology. Noting that the minister has already rejected that argument, I will not move that amendment. What I will do, though, is seek leave to move the next two amendments after that en bloc.

Mr P. PAPALIA by leave: I move —

> Page 8, lines 24 and 25 — To delete "does not have confidence in the prison officer's suitability" and substitute —
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> > has determined that the prison officer is not a fit and proper person
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> Page 9, lines 13 and 14 — To delete "does not have confidence in a prison officer's suitability to continue as" and substitute —
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> > determines that the person is not a fit and proper person to be

To be clear, because it is getting quite complex, it is really the same argument as for the title; I know that the minister is not going to accept my proposed amendment. I feel I need to move these two amendments to be consistent. To confirm that the argument we conveyed earlier still stands, I do not think it has been disproved or effectively countered. Nevertheless, I will not divide on it. I just want to repeat the point that I do not think that just replicating the police system for a loss-of-confidence notice is necessarily the right way to go. I know that the minister will say, and has consistently said, that Labor introduced it for police officers. Yes, we did, but police officers are different from prison officers and youth custodial officers, as we discussed in a fair amount of detail last night with people far more knowledgeable than I and the minister about industrial relations matters. I felt it was an interesting and worthwhile debate last night about the differences between police officers and these officers. I concede that they have a use-of-force capacity that is in some ways similar to that of police, but they do not encounter the public in anywhere near the range of areas or situations as police officers do; therefore, the suggestion that they should be held to exactly the same standards as police is questionable. Having said that, we have said that people who break the law and who are corrupt should be dealt with in the appropriate manner. We will not resile from our observation that there are currently adequate powers, appropriate authorities and

appropriate legislation to deal with those people. Anyone in the prison officer or youth custodial officer workforce who is corrupt or acts in an illegal fashion can be dealt with now. I do not think the minister has made any argument to the contrary. That is why we have proposed these particular amendments. I will not die in a ditch over these amendments. We will move on if the minister wants to respond briefly.

Mr J.M. FRANCIS: I will respond briefly to the two points. Firstly, on the amendment moved by the member to lines 24 and 25 on page 8, which relates to the term "suitability to continue as a prison officer", it is almost a matter of semantics. I bring the member back to the bottom of page 5 of the bill. The term is contained in the definitions clause and states —

> ***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;

At the end of the day, it is a matter of uniformity throughout the bill.

Mr P. Papalia: I understand.

Mr J.M. FRANCIS: It is used all the way through the bill. I cannot see the point in changing the term at this stage.

I turn to the member's second amendment. I know I mentioned this yesterday, but I appreciate, as does the member, that there are smarter people in this game than both of us, if I can be so bold. The State Solicitor is a former commissioner of the Western Australian Industrial Relations Commission and his advice is that the position of prison officers is analogous to that of police officers; both are members of a paramilitary service in which powers over others have been responded such that there should be no reasonable suspicion, as a matter of public interest, in the suitability of a person to be a member of either service. The State Solicitor has said essentially that the nature of the service is the same to the point at which the same provisions should apply. He is a former commissioner of the Industrial Relations Commission. I will accept his advice on this.

Mr D.J. KELLY: I am interested in the comments of the minister. He should be careful what he wishes for. If he is saying that prison officers are analogous to police officers and therefore all these other things follow, I say to him that he will be looking at a pay claim for prison officers based upon the fact that they will be working under the same regime as police officers. I am just saying to the minister that he will, for no good reason other than, I suspect, it was part of some strategy he had to position himself when he first took on this job, be imposing a regime on prison officers that is not currently there because he says that they do pretty much the same thing as police officers. He should anticipate that what he has just said will be read back to him in a claim for additional pay for prison officers to match the new responsibilities that they will have under this legislation.

Mr J.M. FRANCIS: I am not saying that they are the same, but there are similarities in the use of force on individuals, and the expectations of integrity are absolutely the same. I do not shy away from that.

Amendments put and negatived.

Mr P. PAPALIA: The next amendment focuses on fairness. I move —

> Page 10, lines 7 to 10 — To delete the lines and substitute —
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> (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.

The wording in the bill gives the option for a maintenance payment to be paid. I think the concern in the workforce will be that people could be effectively starved out of disputing these matters. In the event that an individual is subjected to and enters into the process outlined in the bill, it is quite possible that they could be prevented from challenging it and fighting the accusations made against them if they believed that they had been wrongly made through no more than a lack of economic means, because they need only be prevented from being paid before their means and capacity to dispute the matter is greatly undermined. As the minister knows, this is very important. The use of the words "may" and "shall" in legislation has significant outcomes. The word "may" gives the minister the option of not doing it; the word "shall" means that the minister will do it. If the minister does not think it is appropriate and if there are exceptional circumstances justifying that the maintenance payment should not be made, that option is still there. However, the proposed amendment seeks to substitute the word "shall" for "may" because that is just a matter of fairness. There should not be a liberal approach by the minister. The minister should not be given that opportunity just on a whim. I am not suggesting that the minister would do that, but, as we said last night, this legislation is for ever until it is changed, and so it must be as fair as possible.

Mr J.M. FRANCIS: The reason we do not accept the amendment is that if there were no date by which this matter needed to be resolved, we would be opening ourselves up to frivolous appeals. An automatic extension of the maintenance period, as the member has suggested, would act as an incentive to appeal, even when the appeal has no merit. I will not go into them, but I guarantee that there are cases at the moment in which processes have been dragged out that do not justify the payment of taxpayers' dollars to officers who have dragged out an appeal that has absolutely no merit. In fact, if members of the public were aware of some of those situations—I will not highlight them now—they would be outraged. I do not accept the amendment. Once again, we can agree to disagree on this. The reality is that if there were no time set for the matter to be concluded and we continued to pay someone beyond a reasonable time while they went through the appeal process—do not forget that there is a 28-day limit on this—we would be encouraging frivolous appeals.

Mr P. PAPALIA: I do not agree with the minister. I will give an example, which is not related to police officers, prison officers or youth custodial officers but which is related to someone in the minister's department, of a case that the minister is very familiar with, where effectively the system chose to prevent someone from being paid and therefore compelled them to comply with a course of action that they might not otherwise have taken. That case concerns one of the whistleblowers whose name has been mentioned in this place on a number of occasions. She was sent on leave without pay, without her consent and without much in the way of consultation, whilst the wheels of the administrative processes ground themselves slowly forward, in effect, in my view—in fact, I reckon pretty much undeniably—to compel her to take a course of action that she would not otherwise have taken had she had financial means and been able to dispute the situation she found herself in. That is a classic example of the way the system can unfairly deal with someone and prevent someone from engaging in a reasonable and fair process, purely through economic hardship—preventing them from having an income. If a prison officer is charged, they are still due and entitled to the presumption of innocence until the process is complete. They should not be confronted with this loss-of-confidence measure. When I was discussing with the WA Police Union the way things are dealt with, the Police Union views it as unfair and a system that deprives people of their presumption of innocence. At the very least, in the event that the minister is going to oppose this entire amendment, would the minister consider changing the word "may" to "shall" in the current wording so that we actually compel the minister? If not, why is the minister not prepared to do that? Other than Mr Buckingham shaking his head, why would the minister object to changing the word "may" to "shall", noting that in law that means something? The minister knows that in this legislation "shall" compels the minister to do nothing else than direct a maintenance payment. In all the circumstances that the minister has already outlined and as all the circumstances that are detailed in the rest of the paragraph remain unchanged, why should we not have the word "shall" instead of "may" so that it would read, "shall in exceptional circumstances"?

Mr J.M. Francis: Shall consider?

Mr P. PAPALIA: I am referring to subsection (2) of proposed section 103, which states —

> The Minister may, in exceptional circumstances, direct that a maintenance payment must be paid to the prison officer for a specified period …

In the event that the rest of my amendment is not taken, why would the minister not remove "may" and replace it with "shall" so that, at the very least, in exceptional circumstances a minister is compelled to consider giving a maintenance payment?

Mr J.M. FRANCIS: Because, member for Warnbro, it states —

> The Minister may, in exceptional circumstances, direct that a maintenance payment must be paid to the prison officer for a specified period after the maintenance period.

It does not say "may consider that in exceptional circumstances"; it just says "may, in exceptional circumstances". I think we are getting lost in the words here. Let us say there was a loss of confidence and for whatever reason a fair person says exceptional circumstances existed and a minister is asked to consider whether a payment may or may not be made, effectively the outcome is the same. By putting the word "shall" in there instead of "may", it would say that the minister "shall" direct it. I would like to think that any person who serves as a minister of the Crown especially in not only this portfolio, but also any portfolio, is reasonable and fair-minded enough that if exceptional circumstances existed, they would do the right thing by a person who is appealing that.

Mr P. Papalia: You can't do that. The legislation must be fair itself. You can't expect an individual to have that responsibility to make that determination.

Mr J.M. FRANCIS: This happens in government all the time.

Mr P. Papalia: No—well, it does in respect of the overall legislation. What we are talking about here is that the word "may" gives the option for someone not to. Can I give you an example? For instance, currently the minister

has not really been able to give us too much detail about cases that go on for longer than six months. We know there are very few of them. We know that the minister claims that there were two exceeding six months in the last year.

Mr J.M. FRANCIS: I did say I would seek further information on that.

Mr P. Papalia: How much of the delay can be attributed to the actual department and the investigative processes, which can take time—not the individual concerned and the focus of the investigation, but the actual people conducting the investigation? How much of that could be attributed to them? Then the question is raised: if there is a determination of the time frame that has been put in of 12 months of maintenance payments at the most, how fair is it if the delays are not due to the individual entirely themselves and they are then deprived of the opportunity to continue to fight the case because they will not be given any more money?

Mr J.M. FRANCIS: I did seek further information about the length of time that people drag these things out for. The member for Warnbro's question is whether they are dragged out through the fault of either the officer who is under the disciplinary process at the moment or through the department dragging its feet to some degree. My advice is that most of the time it is through the actions of the person who has been dealt with, using a number of different instruments to drag out the process, even when in good faith they know that it is not going to end in their favour.

While I am on my feet, I will provide that information that I undertook to get in response to the questions of the member for Warnbro yesterday about the length of time it takes to deal with those cases. In the 2012–13 year, there were 18 charges among 11 officers that took less than six months to deal with. For greater than six months, there were six charges involving three officers. In 2010–11—the year we were looking at mostly last year—for less than six months, 43 charges amongst 30 officers; for greater than six months, nine charges over six officers. It might be easier for me to just provide the member with this.

Mr P. Papalia: Can you table the paper?

Mr J.M. FRANCIS: I have to delete some names from it.

Mr P. Papalia: If you could table it, that would do.

Mr J.M. FRANCIS: I will just get this into *Hansard*, because I did undertake to do this for the member. Over the past two years there appears to have been three allegations of sexual relationships between prison officers and detainees. Of these, one was referred to the department by WA Police, which was conducting its own inquiries. Another was not investigated in view of the low veracity of the information. The third was referred to WA Police by the Department of Corrective Services.

Mr P. PAPALIA: I appreciate that, but could you table that document?

Mr J.M. Francis: When we come back. I will delete some names.

Mr P. PAPALIA: I am going to pursue the likelihood of the administrative process exceeding the time frame for which maintenance payments are made available, not as result of the individual concerned being the person who is being charged. We have got evidence and recent experience of the professional standards division within the department actually having serviced failures. It is not inconceivable that a department or a part of the department might be, as a consequence either of malicious intent or actual incompetence or failure, responsible for delays in the investigative process that exceed the time frame for which maintenance is currently allowed.

That is a reason for the opposition proposing that the minister extend the opportunity for maintenance payments. We would compel the minister to consider those extensions, because the minister is assuming that it is all the responsibility of the person who is charged and there is no possible intent or failure or responsibility on behalf of the department and the people involved in the investigation and pursuing the charge. The minister is assuming that they will be absolutely without failure or flaw, and the evidence does not support them. There is evidence that suggests that this department in particular has reason to be concerned about professional standards.

Mr J.M. FRANCIS: The problem is that the case to which the member for Warnbro referred is not being dealt with under any of these provisions. It is a workers' compensation matter that is still subject to arbitration.

Mr P. Papalia: No, I am talking about the breakdown of procedures around that case. I am not talking about her case, but about people taking documents and leaving them next to the photocopier so that other people can find them within the professional standards division, as reported in *The West Australian*.

Mr J.M. FRANCIS: We will come back to this, but obviously we will agree to disagree.

The ACTING SPEAKER (Mr N.W. Morton): Members, please keep it down for the purposes of Hansard. There is not long to go. Thank you.

Mr J.M. FRANCIS: The issue is that if we encourage someone to make a frivolous complaint and appeal to the Western Australian Industrial Relations Commission, even though there is no likelihood whatsoever of that decision of loss of confidence being overturned by the commission, many people will take it as an opportunity to drag it out so that they continue to be paid. Therefore, I think it is perfectly appropriate that in exceptional circumstances the decision is with the minister.

Debate interrupted, pursuant to standing orders.

[Continued on page 1094.]