STANDING COMMITTEE ON LEGISLATION

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 2 OCTOBER 2014

SESSION FIVE

Members

Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Lynn MacLaren

Hearing commenced at 2.47 pm

Ms MARIA G. SARACENI
Barrister, Francis Burt Chambers, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation.

[Witness took the oath.]

The CHAIR: Thank you. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Ms Saraceni: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement to the committee?

Ms Saraceni: Nothing other than to elaborate. I said earlier that I am a barrister. My practice areas are mainly employment law, industrial relations and occupational safety and health, and it is in that capacity, I understand, that that I am here to answer some questions.

The CHAIR: Could you generally give a comparison between the appeal processes currently applicable to disciplinary proceedings for prison and youth custodial officers and those proposed by the bill?

Ms Saraceni: The current provisions, in my opinion, provide a very stepped approach to dealing with some discipline, and it is very adversarial, even though lawyers are not entitled to be there or be present. The steps are quite pedantic and, as I understand, they take quite a bit of time. Despite the seriousness of it, the fact that there is no legal representation is bizarre, but when you look at what happens after a written charge has been laid—it starts with a written charge—once a written charge is laid so the person knows what they are accused of, then they have time to admit or deny the charge, and then an inquiry can be held, and then penalties et cetera could be imposed. If a decision is made then, which the prison officer, for example, wants to appeal, then it goes to the Prison Officers' Appeal Tribunal, and that tribunal is not dissimilar in how it operates to the proposed appeal tribunal, being three members of the WA Industrial Relations Commission. The one difference is that no written charge is provided to the prison officer under the new proposed legislation; it goes straight into "show cause why you should not be removed", I guess is the best way to say it, and then there is an ability to provide written answers, and consideration of those, before a decision is made. The review process really is in the hands of the specialists within the Industrial Relations Commission.

The CHAIR: What are your views on the effect of the bill on the substantive and procedural processes applicable to the discipline of custodial officers?

Ms Saraceni: I will start with the procedural processes because I think that moves much more easily. Procedural fairness, or in the old days natural justice, is still there in the new provisions as it is in the old provisions. Disclosure of documents and information that has been relied on by the CEO in deciding whether to remove will eventually be provided to the officer, and the officer can then comment on those to the proposed new appeal tribunal—three-persons—under the Industrial Relations Commission. For the purpose of a procedural fairness perspective, I do not see a huge problem. I think it is an advantage, being a lawyer, that they can be represented under the new regime by lawyers who can understand the legislation that is becoming very complex, and the regulations and the Public Sector Management Act issues of fairness; that is what lawyers do all the time. Procedurally, it works better.

If I could just perhaps make a comment from an occupational, safety and health perspective that the prison officers are employees. They have rights under section 19 of the Occupational Safety and Health Act, as it now stands, although I understand that that act might be amended in the next 18 months or so. One of the considerations is the health as well as the safety of employees. Mental health and wellbeing is very important as an employer. You need to be able to give to your employees. Holding something in front of them for a long period of time with no decision made, in my view, could harm someone's mental health and wellbeing rather than a decision taken much more expeditiously—basically show cause why you should not be removed but then you still have an opportunity to respond before the new proposed appeal tribunal. That seems to work better than the very long process that is currently in place where the written charge is laid against you. You may be suspended; you may not be suspended. Then there is toing and froing. During that period, either you are expected to continue working as normal and do what the commissioner requires of you or you might go on sick leave or you might have workers' compensation leave for stress. That then will delay, lengthen and further add difficulty to the prison officer, let alone the management of that prison officer by the commissioner.

Hon DAVE GRILLS: How do you see that link in with section 20 of the Occupational Safety and Health Act—the employees' requirements to do the right thing?

Ms Saraceni: My recollection of section 20 is that they have to do what is reasonable to ensure their own safety and not do anything to endanger the health and safety of others by act or omission. They need to exercise reasonable care. I think that is very important. Unfortunately, in workplaces that section is often forgotten about.

Hon DAVE GRILLS: Absolutely.

Ms Saraceni: In relation to a disciplinary process, reasonable care, yes. It may be that the commissioner says, "We have employee assistance programs", which is very common in the public sector as well as the private sector. "If you are not coping with the process, it is great that you have the union and great that you have a lawyer but perhaps you might like some counselling and we provide confidential free counselling to assist." If the employee is helping themselves by doing what is reasonable, that is fine but not everybody reacts the same way to being confronted with a disciplinary process.

Hon DAVE GRILLS: I just thought it was a bit of a long bow to draw because the employee has a certain responsibility as well.

Ms Saraceni: With respect, I beg to differ. The issue of the employer's obligations under section 19 are huge. Even the police now, although not employees, are subject to the Occupational Safety and Health Act. It is something that people are taking very seriously out in the employment world. Under the Public Sector Management Act, it is a big thing there as well.

The CHAIR: What are your views on the abrogation of the privilege against self-incrimination and the safeguards provided for?

Ms Saraceni: My personal opinion is I do not have a difficulty with the right of silence being removed provided that there are strict provisions, perhaps stricter than what are there already, so that that information obtained—documents obtained—are not then handed across to another government agency, such as the DPP and/or the CCC, of that ilk. I think that is the biggest risk with this. It is fine that the information and answers are not to be used against them in criminal proceedings unless they lie or mislead essentially and those provisions are in lots of acts, even the Occupational Safety and Health Act. It is there so it is not unexpected in this. Why are you asking someone to give away the right to silence? Because you are trying to get to the truth, to the bottom of things, or if you had an ulterior motive, then it becomes a problem. With safeguards around it, more than what is there, I think, I do not have a problem with it.

Hon LYNN MacLAREN: Can you point us to where adequate safeguards might be expressed? Is there another act that you could point to that does have adequate safeguards in place for removing the right of silence?

Ms Saraceni: Not sufficiently there but there are some cases that have been argued in various tribunals and courts where it has become an issue. The way the jurisprudence is going, it is likely going to make it clearer and you ring fence those things so that other government entities or others do not deal with it.

Hon SALLY TALBOT: If I can just translate this into a non-legal framework or non-legal language. You are suggesting that we might need additional safeguards so that where a prison officer has self-incriminated in order to meet the terms of this bill, that information could not be passed by the commissioner to, for example, the CCC or the DPP?

Ms Saraceni: Yes.

Hon SALLY TALBOT: There would be an obligation on that person to keep that information confidential but they could still act on it.

Ms Saraceni: Yes, and for the purposes of acting on it, they would be acting on it under the Prisons Act as it now stands or the Young Offenders Act. If the purpose is to use that information or those answers beyond outside that, other than the person has lied or mislead, that is where the problems arise.

Hon SALLY TALBOT: And then of course if the DPP came along and said, "We think we will have this person in to talk to them because they have been subject to a non-confidence finding" —

Ms Saraceni: They do their own investigation. Everyone does their own investigation. Although you might think initially it might save time and money—you have already done it, you are a government department, just hand it across—that is where the problems —

[3.00 pm]

Hon SALLY TALBOT: It is a contravention of the proper processes in order to do that.

Ms Saraceni: Yes. The issues and concepts in the federal Privacy Act are the sorts of things that we are talking about as well.

The CHAIR: Do you believe there are sufficient comparisons to be drawn between police and custodial officers to justify the application of loss-of-confidence provisions under the bill?

Ms Saraceni: I have some difficulty in answering this question because a police officer is not an employee, whereas a prison officer is an employee. Essentially, they are two different beings. When I was waiting outside, I was thinking how I could describe it. In a lot of the industrial relations tribunals now, they do not like lawyers appearing; you can appear if you are an advocate or a union advocate, but not a lawyer. The union advocate often does exactly what the lawyer is doing, except the lawyer has a legal qualification, they have a licence, they have a code of ethics and a code of conduct and can be reprimanded, and we are subject to the courts. When you are

looking at a police officer and a custodial officer, there are some comparisons; there are some similarities. Fidelity, trust, faithfulness are very important. Commissioner Kenner, in a decision involving a prison officer last year, talked about the prison service as a quasi-paramilitary force, not as a military force. So there is a need to have a disciplined group of people to do their job and that is what you have, whether it is in the defence forces or the police.

Hon SALLY TALBOT: Was that Polizzi? Do you know the case?

Ms Saraceni: The Mr Sell decision. Commissioner Kenner went through and very succinctly made some comments about prison officers and how the Industrial Relations Act deals with unfair dismissals as opposed to the disciplinary process under the Prisons Act currently. Because of the nature of the work they do, they are required to comply with policies and procedures and obey lawful instructions, which most employees are. But in the nature of the prison environment, if you cannot trust that the person has the same cultural understanding of what their job is—it is not like the old days where they turned the key and that was what a prison officer's job was; it is much more than that now—and you cannot trust that the persons you have employed to do that do that, why are they there? Some might say, "But you have a nine-month probationary period; surely that is the time to weed out the ones that are not suitable." There is some merit to that argument, but it is like saying, "Well, Maria, you got a driver's licence"—I will not tell you exactly how many years ago—"when you were 18", but no-one has tested my driving ability in the decades that have passed since, so just because I was okay then, and the fact that I have not got a speeding ticket or whatever now, does not mean I am a good or safe driver. I think that answers that probationary period. Suitability is something that needs to be considered on an ongoing basis, but trust in the officers is very important, and it is the same for the police.

Hon SALLY TALBOT: Can I just ask, then, how you weigh those two things up? It sounds to me as though you are saying on the one hand, at least in a technical sense, there is a very great difference between police officers and prison officers, but, on the other hand, we probably make some similar assumptions about issues surrounding trust and integrity.

Ms Saraceni: I guess the similarities are that, yes, they need to be people of integrity. A criminal record is obviously not something that either a police officer or a prison officer ought to have to the extent that that criminal record is relevant to the nature of what they do. Parking fines and speeding fines are not included, obviously. They need to make decisions very quickly in very volatile environments. People look to them for safety and for security. These are the similarities. They represent the state, the Crown—whatever you want to say—to the extent that they are exercising their functions as they have been told to do—that is, under either the Prisons Act or the Police Act. I was thinking also of the Fremantle prison riots years ago. The paramilitary sort of kicks in again. If you do not have people that are suitable to the task and you can trust, what is going to happen? You would have to call in the police or the armed services to quell an issue in the prisons, which I understand are overcrowded and there are issues there, but that is not for today.

The CHAIR: With respect to the broad exercise of discretion provided for in clause 7, proposed new section 100, and clause 16, proposed new section 11CB, about whether to take disciplinary proceedings under the Public Sector Management Act or removal action based on a loss of confidence, in your experience how will an exercise of discretion be made by the commissioner and what factors will be taken into account; and should there be clear criteria to guide the exercise of that discretion?

Ms Saraceni: When I came in, I heard the end of the submissions being made by the gentleman who has just left. The question was asked about a prison officer who is ill and cannot perform their job because of illness or injury. I was thinking about that, but when you look at the definition proposed for "suitability to continue as a custodial officer", which is a defined term under the bill, I think the gentlemen before were commenting on the five pillars, they said, being integrity, honesty, competence, performance and conduct. I looked at performance, and I would have thought

inability to perform your duty, as well as performing it poorly, comes in under performance. Although there is a regime for requiring a prison officer to attend on a medical person to make sure that the medico thinks the person is fit to do things, I just was not as convinced that things like, for example, performance in here could not deal with it, which leads me to say, in answer to this question, which was a long way around, perhaps some criteria in relation to how those five pillars are to be looked at would be useful. I do not know that it needs to be prescriptive, but there should be something around it—the parameters of what are we talking about when we talk about integrity. The word "corruption" is not there, but we know integrity and honesty are the other side of corruption. What exactly is being talked about with competence, performance and conduct? I think that might add some clarity.

Hon DONNA FARAGHER: For example, just to pick up on the medical side of things, perhaps there would be some greater clarity that medical condition would not be part of performance in this regard and that would be dealt with under a separate section, as was suggested in the evidence earlier. That is, I suppose, an example of providing a bit more clarity in terms of —

Ms Saraceni: If you have—sorry to interrupt—a prison officer who for some reason, either through mental or physical inability, can no longer continue, there would obviously be a workers' compensation claim; and if there was not a workers' compensation claim, they would be directed to attend a medical review for an assessment as to competence or ability to do the task, and then, if the answer is "not competent", unless they are under the workers' compensation system, what do you do with them? You must terminate their employment. There still needs to be a system for termination. I am just not that sure of whether the Public Sector Management Act provision deals with it; I am not convinced that it does. I did look at the industrial award out of the state Industrial Relations Commission that covers prison officers currently, and that deals with termination for other than discipline. I think it is worthwhile remembering that you have got an act—I do not want to tell you how to suck eggs—and regulations and then you do have the award, plus you have got policies, codes of conduct, codes of ethics and all the other things, but they need to be looked at as the whole gamut of tools that the CEO has in relation to making decisions.

Hon DAVE GRILLS: We heard from the fire brigade with regard to what they have. They call it fire officers off the truck, which is what they call it when they have people who cannot perform as a firefighter, or like a police officer, whether you are a front-line police officer or whether you are a prison guard, with regard to that. Do you think that there is the opportunity and the opportunity has been taken, as with Constable Butcher, with regard to not being able to perform your job but still have a place within the police service or the fire service or as a prison warden, where the actual commissioner or the actual organisation itself makes that decision based on the right thing to do?

Ms Saraceni: I can answer that in two ways. If there is a workers' compensation claim that the ill or injured officer has made, then obviously you are bound by the workers' compensation provisions and the return-to-work provisions and the rehab and the re-education and redeployment stuff under the workers' compensation system.

[3.10 pm]

If there is not a workers' compensation claim and the person, for example, is suffering from cancer or it is not necessarily work-related but has some other inability to do the job, then arguably there is. But then there are things you could do, like a private sector employer would do, to put someone in another position—an adequate alternative, a position for which they have skills—that assists. Whether that is feasible in the environment of a prison and the management of those people—if there are enough persons within the system that can manage it—well and good, but if someone is suffering from anxiety outside of work and they have anxiety disorder, to go to work and then be in a confined, locked down–type environment which the prison officers are almost to the same extent as the prisoners, then that may not be good for them either. Even sitting in an office; the fact that

they have to walk through all the security and it is all locked down may not assist their anxiety condition. So it could work, but there does need to be an alternative.

Hon DAVE GRILLS: I should have said that it has been assessed and that the person can do that job, and in fact wants to, and that is a good thing that they want to. That is what I meant; not just box people. The point I was trying to make is that we are not going to use this legislation to put people off because they are sick.

Ms Saraceni: I would hope not. There are other ways of dealing with persons who are not medically fit to do their job.

The CHAIR: Are you saying that it really could be a backdoor way? We had a discussion about this before, and I could not see how loss of confidence could be used, under the provisions that we all know about, to sack somebody who is mentally ill, got cancer or some kind of sickness. I do not believe loss of confidence is intended for that, but could it be used for that?

Ms Saraceni: I accept that the intention is not there, and reading it, it does not seem that the intention is there. However, not so much with a physical disability, but if it is a mental disability—if someone is suffering from depression, and the depression, for example, impacts on how the person performs their work or does not perform their work, or it means that the person needs to take more time off work than would otherwise be required or needs time off to go to visit a psychiatrist—whatever it is, then that really does impact on someone's performance, and are they suitable? If you focus on the word "suitability" for the position—are they suitable for the position?—potentially not.

The CHAIR: That is what I was going to ask —

Hon DONNA FARAGHER: That is where you are saying perhaps some greater guidance and criteria may assist in making that clearer?

Ms Saraceni: Yes. I think it is the word "suitability"; you have got the five pillars, but they do not necessarily fit comfortably with suitability. Suitability, in a layperson's understanding, I would think, would be much wider than those five pillars.

The CHAIR: Thank you; you put that beautifully.

Do you think the 28-day maintenance period provided for in clause 7, proposed new section 103, and clause 16, proposed new section 11CE, is reasonable?

Ms Saraceni: Why is it there? A private sector employee does not have the advantage of being sacked and being on paid 28 days while I decide whether I am going to appeal my decision or not—having got that off my chest! Well, it is true; a private sector employee gets notice of termination or they get paid out in lieu of termination, and then they are expected to go through the unfair dismissal provisions that are in the commission. For some reason there is a different regime happening for prison officers, but then again it may be that there was a need because of—I think it may not be there now because the work climate is a bit soft and you might have more people wanting to become prison officers than when the mining industry was high and everyone wanted to be there and not work as a prison officer. But there may be reasons why that 28-day maintenance period is appropriate. Is it reasonable? Well, 28 days is the time limit a normal person—a non–public sector person—would have to sue for unfair dismissal in the state commission. Is it reasonable? Yes. The reason and philosophy about why it is there and what it is doing is, I think, another question. If my question is only: is it reasonable? I think it is.

The CHAIR: With respect to clause 7, proposed new section 106(5), and clause 16, proposed new section 11CH(5), what is your opinion on this provision? Does this reflect established practice in unfair dismissal proceedings? And, what would be the practical effect of this provision on proceedings?

Ms Saraceni: The way I would answer this is that normally when there is an unfair dismissal and termination has been on notice—either paid out or a person has worked out a notice period—then it

is up to the employee to prove that the decision to terminate was harsh, oppressive and unfair. However, if the reason for termination is gross misconduct, not just misconduct—in the federal system, under the Fair Work Act, they call it serious misconduct and it is defined, but otherwise known as gross misconduct, and there is summary termination; that is, without notice—then, even now under the industrial relations system, it is the employer who bears the evidentiary onus of proving why the termination was valid. That is because it was in the employer's mind, not the employee's mind—the "I don't know why you sacked me"–type scenario. That unfortunate Moylan case is a very big case with the City of South Perth. But the regime that is proposed here, yes, I guess it is not clear which onus is being referred to. Does the act propose that the commission use its normal powers under section 27 of the Industrial Relations Act and deal with things normally? Because sometimes with summary dismissal, the commission has actually asked the employer to present first, rather than the employee, whereas usually the person bringing the action goes first in court. Sometimes they do it in reverse to assist with that onus. It is not always there, but it is an evidentiary onus; it is still up to the employee to prove that they have been sacked and that it was unfair, and it is up to the employer to then meet that evidentiary onus.

If I could say, the federal system is set out a little better than the state system with the unfair dismissals. If anyone was keen to have a look, I would suggest the Fair Work Act, and if you did not want to read the Fair Work Act, there is bench book that has been produced. If you go to the website of the Fair Work Commission under "unfair dismissal" there is a bench book and it is there for laypeople to help them deal with unfair dismissal. That works quite well.

If I could just say one other thing: apart from this summary dismissal and the reverse onus of proof, in some of the areas of employment where there is a discrimination-type allegation, then a reverse onus happens quite often. Under the federal system—it does not exist in the state system—there is a general protections and adverse action claim, and there the employer must disprove, or must prove, that the reason I sacked you had nothing to do with the fact that you wanted to be a union member or that you had rights under the safety act. That reverse onus does exist in other areas of employment law.

The CHAIR: In the bill, proposed subsections (5) and (6) —

Ms Saraceni: Is there a page, sorry?

The CHAIR: It is proposed section 106, under the appeal rights. It is on page 12, and it reads —

> (5) The only parties to the appeal are the prison officer and the chief executive officer.
>
> (6) The prison officer does not have any right of appeal against the removal decision other than under this section.

What is your opinion on those two?

Ms Saraceni: The issue in relation to the parties, I guess what that is dealing with is the current regime under the Industrial Relations Commission: if there is an unfair dismissal, you can either bring it under section 29 by the employee personally, or under section 44, which is by the union on behalf of the employee. There are two ways that you can get before the commission for an unfair dismissal. So proposed subsection (5), I do not see, causes me personally any issue. The only parties are the prison officer and the CEO, but I think it deals with removing someone else being named as part of that action.

[3.20 pm]

An unfair dismissal is normally by an employee. Section 44 of our Industrial Relations Act is a bit of a hangover from another time. Proposed section 106(6) states —

> The prison officer does not have any right of appeal against the removal decision other than under this section.

We go back to the decision of Commissioner Kenner in the Mr Sell case. There is a provision under the current Industrial Relations Act, section 23(3)(d), which is interesting because it sets up an issue as to if there is a code of discipline, a code of termination under the Prisons Act, and then we have our own termination under the Industrial Relations Act, which one takes precedence—which is what occurred in the Sell case. That section here is interesting to the extent that having more than one way of appealing could lead to some legal uncertainty as to where you go or how you start it or when you do it. So, that does give legal certainty, but when I looked at subsection (6) in the bill, I thought: what if the prison officer believes that they have been—I will say something very silly. Let us just say in the current times where terrorism is an issue and alert levels have been raised, if there happened to be a hypothetical prison officer who was of the Muslim faith and perhaps in his or her own time they were posting things on Facebook or making public statements about their view of people who do wrong things et cetera et cetera and that, for example, were to come to the attention of the Commissioner of Corrective Services, would that give rise to questioning whether that person is suitable to continue working in that environment where you are needing to mix with people who may be there on terrorist offences or who may be there on drug offences or other offences that may be offensive to your religion—whatever. The person then gets disciplined and they get removed, could they then sue for discrimination on the basis of race or religion under the Equal Opportunity Act or one of the federal acts? Subsection (6), when I looked at it, is that stopping someone from dealing with unfair dismissal in anywhere other than the state Industrial Relations Commission through the proposed new tribunal? Is that also stopping them, perhaps, from suing for breach of contract in the civil courts, in the District Court or the Supreme Court?

Hon SALLY TALBOT: It is a limiting clause.

Ms Saraceni: Yes, but is it limiting them if there has been some unlawfulness i.e. breach of the equal opportunity legislation? Can they do that? Or is this just dealing with unfairness? When I read subsection (6), it was not clear to me how—I think there is still a bit of leeway there as to what exactly is meant. Given that the High Court has ruled on the decision about mutual trust and confidence just recently, that was one of the things that I was thinking of in relation to breach of contract, that the employer breaches its duty to the employee by lack of mutual trust and confidence. The High Court has scotched that. It is not an implied duty unless it is written into the legislation or into someone's contract. Apologies for being a bit verbose.

The CHAIR: No, I always love your analogies.

Ms Saraceni: I think it was my mother's cooking last time.

The CHAIR: That got into our report, too. Can you confirm if the burden of proof set out in clause 7, proposed new section 107(2) and clause —

Ms Saraceni: Have we not dealt with that, sorry?

The CHAIR: Sorry, we have. In your experience is it often possible to arrange for a hearing before three commissioners within 28 days from application?

Ms Saraceni: The short version is: yes, thanks to the Fair Work Act where the workload of the state Industrial Relations Commission is greatly reduced.

The CHAIR: Could you clarify the effect of clause 7, proposed new section 106(6) and clause 16, proposed new section 11CH(6) in terms of restricting further appeals, or you have covered that really?

Ms Saraceni: I think I have.

The CHAIR: Yes, you have. Please explain the method by which the Industrial Relations Commission will balance the matters it will have regard to in determining an appeal.

Ms Saraceni: Section 107 in the bill, particularly subsection (4), provides a non-exhaustive list of matters that the three commissioners on an appeal bench of the commission would be looking at—

so, the interests of the employee and then the public interest. That, I guess, is the starting point in relation to where it would go. The bill also provides that section 26 of the Industrial Relations Act would still have a life, i.e. equity, good conscious and substantial merits of the case. These are the traditional ways that the commissioners will balance matters on an appeal. Under the federal system, I like the use of the word "fair go all around". That is how they deal with it. I guess as a layman's term that is what the state commission does as well.

The CHAIR: Can you give some practical examples of the types of matters that would be considered by the Industrial Appeal Court under section 90 of the Industrial Relations Act 1979, which is incorporated by clause 7, proposed new section 110B, and clause 16, proposed new section 11CM?

Ms Saraceni: My understanding of the question then is that a prison officer has sought a review by the three-person commissioners of the Industrial Relations Commission. Once they have delivered a decision, then there is still dissatisfaction and there is an appeal to the Supreme Court. Am I on the right track that this is what this is referring to? Yes, the industrial court of appeal. With the changes to section 90 of the Industrial Relations Act, the industrial court of appeal does very little these days in IR matters. Very, very little—if they do two a year, it is amazing. I guess the things that could go to the Industrial Appeal Court after the Industrial Relations Commission is that there was an error of law in how the three commissioners interpreted the new bill or section of the bill or the regulation, or that the prison officer was denied a right to be heard, or that the way the commission dealt with it was in excess of its jurisdiction and it was not an actual industrial matter. There are some things that Industrial Appeal Court could do but they are very, very limited and it is not just for this; it was limited years ago.

The CHAIR: Are the processes for tendering and considering new evidence set out in clause 7, proposed new sections 108 and 109, and clause 16, proposed new sections 11CJ and 11CK, consistent with current evidentiary rules?

Ms Saraceni: The provisions proposed are not dissimilar to what the law requires now; it has to be new additional evidence, something that was not available at the time, not that you were too lazy to go and get a hold of. They are, basically, so that people are looking at the same set of facts and circumstances and information and documents so when the three-person tribunal is second-guessing, if I could call, what the Commissioner of Corrective Services has done in relation to the removal notice, they are looking at the same facts and circumstances. Allowing new evidence in in certain circumstances is not appropriate. There was actually a case that I have got a note of: Gordon v Commissioner of Police, a 2010 decision reported at WA Supreme Court at page 168, and that was in relation to adducing further evidence. There was an allegation that the person had been denied the right to be heard. In that case it failed because what the court said was what the argument was about was really about prejudgement, bias, as opposed to new evidence. But that was the only case that I could find that even talked about it relevant—similar. It was police rather than prison officer, but it was there. So, I do not really have a problem with new additional evidence or limited circumstances.

The CHAIR: Is there any practical difference in the test under clause 7, proposed new section 108(2)(b) and (3)(b)(i) and proposed new section 16, proposed new section 11CJ(2)(b) and (3)(b)(i)?

[3.30 pm]

Ms Saraceni: I guess it flows from what I said earlier, so no.

The CHAIR: Is the amount of compensation specified in clause 7, proposed new section 110F, and clause 16, proposed new section 11CQ(4), standard across the public service?

Ms Saraceni: The quick answer is that under the Public Sector Management Act, section 101 says that the maximum compensation is 12 months. That is the short version.

The CHAIR: What would you describe as a substantive failure to comply with procedure under clause 7, proposed new section 110I and clause 16, proposed new section 11CT?

Ms Saraceni: If it is an insignificant omission, then it should not be enough to overturn everything. As to what is insignificant or what is not significant, if you cannot trust the head of a government department to make that call, no matter how much you put things in, it is just not going to make a difference.

The CHAIR: Thank you.

Ms Saraceni: Sorry, if that was a little bit too blunt.

The CHAIR: No, that is very plain.

Hon LYNN MacLAREN: It is good to get that advice from you.

The CHAIR: While there is an existing ability to appeal a suspension decision under the current part X of the Prisons Act 1981, would there still be a basis to do so to the Industrial Relations Commission under the bill, with respect to appealing a decision to suspend made under clause 7, proposed new section 110J and clause 16, proposed new section 11CU? Does section 23(3)(d) of the Industrial Relations Act have any application given that proposed section 106(6) only refers to the removal decision? I am very glad you are a lawyer and the one answering that question.

Ms Saraceni: It is very verbose and I am not sure I have actually understood exactly what the point is, but if I could say that Commissioner Kenner's decision in the matter of prison officer Sell is something that I would commend to the committee to have a quick read. It is reported at 2013 93 *WA Industrial Gazette* 1439. I do not know if the committee knows about the matter—no? He was a probationary prison officer and had gone through the probationary period and, I believe, they were at the conclusion of the probationary period but he had not yet taken the oath, and permission was requested and the granted for them to have and shindig at the club. I did not know there was a club, but there is a club somewhere wherever they were doing this training.

Hon SALLY TALBOT: A prison officers' club?

Ms Saraceni: Yes, a prison officers' club, and booze was involved. You had male and female police officers, and lots and lots of booze. There was a fight at the end of the day between Sell and another probationary officer. As a result of that, as I read the decision, the commissioner found that, not Mr Sell but the other guy—whose name escapes me—was not the instigator of the fight. It was Seel who was the instigator of the fight, as a result of which he was sacked. The question came up that you had a probationary prison officer who had been disciplined, as in terminated, and are they a prison officer or not, and does section 10 of the Prisons Act apply, or could the person go through the normal unfair dismissal provisions under section 29 or 44 of the Industrial Relations Act? Now, reading Commissioner Kenner's very erudite comments—that is when he talks about the paramilitary; I referred to it earlier—he says that part X "provides a comprehensive regime for the disciplining of prison officers". He found that a probationary prison officer is a prison officer, so part X deals with probationary prison officers as well as those who have taken the oath. And his question is: what is the relationship between it—regulation 5(4)—and the unfair dismissal provisions under the act? He was looking at: can they all fit in or can they not fit in? Sorry, I have read so many cases in preparation for today. My recollection is that he found that the disciplinary code under part X was all-exclusive and that there was no ability to go outside of that for this probationary prison officer, because he was caught under "prison officer", and "prison officer" is under part X of the Prisons Act. So, that case, I think, is very interesting.

There was another decision. Another unfair dismissal was brought by another prison officer—very recently this year it was heard—her name was Smallshaw. This case is Smallshaw v Minister for Corrective Services. It is reported at 2014 WAIRC 00956; the decision is 19 August this year, so very recent. It is unfortunate that the substantive matter was never dealt with because there was a procedural hiccup. She was a prison officer for eight years who was charged with two serious

disciplinary offences, according to the decision, under section 98(1)(a) to (d) of the Prisons Act. She was suspended on full pay. There was a hearing on 17 December 2013. She admitted she had done the wrong thing, therefore, she was about to be sacked. She was given the option—she resigned. For normal people that would be constructive dismissal, but it is not here for the public service—that is okay. There you had an issue about whether the same things that Commissioner Kenner had decided were being argued here, but she had a problem in that she lodged her unfair dismissal application outside the 28-day time limit. In fact, although there is a power to extend time, there was just no reason to extend time because the substantive issue as to whether the regime under part X was what she should have dealt with, or under the unfair dismissal had already been decided by Kenner and it would never have succeeded because the regime under part X she could not sue for unfair dismissal in the normal jurisdiction. That was, for example, a recent case, so when I heard earlier on that the committee made a comment that the prison officers were unhappy with the system, I guess that is the last most recent attempt at getting it dealt with and it was rebuffed.

Hon DAVE GRILLS: Let us go back to the one before that.

Ms Saraceni: The Sell case—the probationary officer, yes.

Hon DAVE GRILLS: They established that a probationary officer is an officer.

Ms Saraceni: Is a police officer for the purposes —

Hon DAVE GRILLS: Prison officer, yes.

Ms Saraceni: — under part X of the act, yes.

Hon DAVE GRILLS: He got dismissed?

Ms Saraceni: Yes.

Hon DAVE GRILLS: And he got dismissed for a lack of confidence?

Ms Saraceni: Misconduct. I can only go on what I read in the decision. I did not see the letter of termination, but under the current provisions —

Hon SALLY TALBOT: It would not be loss of confidence because we do not have it currently.

Hon DAVE GRILLS: I just wanted to know what the effective charge was.

Ms Saraceni: Yes; gross misconduct, I believe. But, again, a prison officer in a difficult situation with booze or with drugs—I do not know, I have heard that sometimes there are drugs in prison—a prison officer is meant to be dealing with that situation and how he comported himself then, even if there was not a lack of confidence, would you be confident that he could deal with that sort of situation in a prison environment? So, suitability, confidence, however you want to —

Hon DAVE GRILLS: I was just trying to draw the link.

Ms Saraceni: I understand it was gross misconduct, but I did not see the letter of termination, so I cannot answer you specifically, but that is what I guess.

Hon DAVE GRILLS: And the other young lady that committed the two offences, she got put off?

Ms Saraceni: She resigned rather than being sacked.

The CHAIR: Just to be clear, under this bill do you think there is still a right to appeal a suspension?

Ms Saraceni: A suspension from employment?

The CHAIR: Yes.

Ms Saraceni: As opposed to a termination?

The CHAIR: Or removal, yes.

Ms Saraceni: Are we talking a suspension under the public sector management HR disciplinary process or a suspension as a result of the new replacement to part X?

The CHAIR: The new replacement, because the existing one gives them the right to appeal to the Prison Officers' Appeal Tribunal for suspension; so does this bill still give them that right?

Ms Saraceni: That is a very good question. When I read it, I was focused so much on termination, if it is there, I have read it but I cannot tell you. If you could perhaps direct me to where it is, I am happy to have a look.

Hon DAVE GRILLS: That is part of the point of what we are trying to establish, because there have been suggestions that it is not fair and, in fact, it does not give good value or a good outcome.

[3.40 pm]

The CHAIR: It is at page 22, Maria, clause 110J.

Ms Saraceni: Can I just take a moment to have a look?

The CHAIR: Of course.

Ms Saraceni: So can a prison officer take issue with the fact that they have been suspended?

The CHAIR: Yes.

Ms Saraceni: I do not read it that they can.

Hon LYNN MacLAREN: Is that why they review it every 60 days?

Ms Saraceni: Yes.

Hon LYNN MacLAREN: There is no appeal right.

The CHAIR: Does anyone else have any questions for Maria? I would like to keep her here for hours!

Ms Saraceni: There is just one thing that came to mind while I was sitting in the back, if you do not mind, when I was listening to the other people speaking, from a HR-type perspective, where at the end of the day a prison officer is able to convince the commissioner not to terminate—not to remove them—what happens? Where is this information kept? On their normal HR file, or is there a separate file with that information? Who has access to it? Where it is kept and what seal is placed on it I think is something that from a HR perspective is important.

Hon DAVE GRILLS: That is a good point, because we discussed the fact that for teachers, it goes on the registry, and somebody actually bought that up about other people who do things like that and where is that information kept.

Hon SALLY TALBOT: And it relates to the point that you probably heard the commissioner making about how sensitive some of that material might be. I think the Chair asked whether the prison officer would have access to the documents before the charge was heard, and the answer was no, because it could be very sensitive material.

Ms Saraceni: But if at the end of the day the decision is not to remove, and they stay, so they have successfully fought the allegations —

Hon SALLY TALBOT: There could still be sensitive material.

Ms Saraceni: Yes. Where is all that going to be kept, and is there a note on their personal file to say there was a complaint made against Mr Sulk, to use his name, and no more detail? So it is just there for the purpose of performance management, which is part of the public sector management scheme—that you can performance manage—and someone knows that there has been a note of something, but then what happens? If I can just say, one other thing I did think of when I was preparing for today, Mr Ward, the prisoner who died in the back of a paddy wagon. Although they were privately employed prison officers through G4S, because there was no criminal charge against

them personally other than for breach of the Occupational Safety and Health Act under section 20, I just wonder what would have happened to them under the regime if they were a public sector person rather than a private sector person, as to suitability for their employment and meeting the five pillars of integrity? That just came to my mind, and I think it is a useful exercise.

Hon SALLY TALBOT: Can you keep going with that thought? Can you just go a bit further, so what you are suggesting is that if they had been public sector employees, there may have been grounds for —

Ms Saraceni: Would that not have been enough grounds for loss of confidence—that they are unsuitable; they do not meet the five pillars, or one or two or three of the five pillars?

The CHAIR: I would suspect so.

Ms Saraceni: But under the system that is there now, under the disciplinary system, and going through things, I just wonder how that would have ended up if they had been in the public rather than the private sector, given the seriousness of that incident.

The CHAIR: Yes; it was a terrible incident, was it not?

On behalf of the committee, I would like to thank you for coming in. As usual, you have given us food for thought and a wonderful presentation. So thank you very much.

Hearing concluded at 3.43 pm

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