STANDING COMMITTEE ON LEGISLATION

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 2 OCTOBER 2014

SESSION ONE

Members

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

Hearing commenced at 10.07 am

Mr ANDREW SMITH
Acting Secretary, Western Australian Prison Officers' Union, sworn and examined:

Ms REBEKA MARTON
Industrial Officer, Western Australian Prison Officers' Union, sworn and examined:

Mr SIMON MILLMAN
Practice Group Leader, Industrial Law, Slater and Gordon Lawyers, 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.

[Witnesses took the affirmation.]

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

The Witnesses: 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 and for the record. Please be aware of the microphones and try to talk into them, ensure that you do not cover them with paper or make noise near them, and please try to speak in turn. 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?

Mr Smith: Yes, I would. I will be referring to two documents, one being the "Department of Corrective Services Prison Officers' Enterprise Agreement 2013" and I will make reference to a letter that I have provided you with a copy of between Hon Joe Francis and one of our members, whom I have named in the opening address.

The CHAIR: Were you consulted on the drafting of the bill; and, if so, can the committee have a copy of your submission?

Mr Smith: Would you like me to provide an opening address first?

The CHAIR: Yes. Sorry.

Mr Smith: I need to make four points obvious before we start. We are concerned and we would like to ensure that the bill as it is presented, if there are to be changes in our current disciplinary process, that prison officers would be equated with the same rights and protections that public servants are afforded foremost. Secondly, fundamental common law rights such as the rights to silence and privilege against self-incrimination should not be derogated from. Thirdly, the employment relationship between prison officers and the Department of Corrective Services enjoys special recognition under the law. It is recognised as being a unique relationship into which

common law has historically implied a number of terms which recognise the personal character of the service performed. It is imperative that no new legislative provisions are introduced that would disturb that balance by allowing either party in the relationship to have significantly more power over the other.

The final point that we would like to make—I will have to go to my submission shortly—is that the Prison Officers' Union does not tolerate criminality in any way. Any evidence of criminal activity should be investigated and criminal activity should be prosecuted to the full extent of the law. As an ex-prison officer, I would like to elaborate on the point that I have made there. Having worked at three of the state's prisons and worked extensively with a number of officers—in excess of 500 or 600 officers—I share their opinion that prison officers who perform acts that are illegal need to be out of the job. No prison officer wants to work next to an officer who is doing anything that would be considered to be illegal or an illegal act.

You have in front of you the submission that I am going to read. Hopefully, if you have any questions and want me to elaborate on any points I make, feel free to do so. I have given you my name. I am currently the acting secretary of the WA Prison Officers' Union. Some of you may be familiar with John Welch. He would normally be sitting in my position. Unfortunately, he chose this particular time to go on five weeks' annual leave. He is right across this issue and it has now come across me. Bear with me if I am not as articulate as John may be in this current situation.

The CHAIR: I am sure you will be.

Mr Smith: I was previously a prison officer between 2004 and 2012, which is eight years. I achieved the rank of senior officer and I acted in the roles of senior supervisor, a public servant position, level 6; as a manager at Hakea Prison; and acted in the role of principal officer, which is the highest rank that you can achieve as a sworn prison officer.

The WA Prison Officers' Union has approximately 2 300 members, with a current density of around 98 per cent. This effectively demonstrates that we represent most prison officers in all of the prisons across the state, including the private sector prisons at Acacia and Wandoo.

WAPOU has represented prison officers since the 1920s in Fremantle Prison and have assisted or represented prison officers through the current disciplinary process since 1981–82 when the Prisons Act and the regulations came into force. The current disciplinary system is a fair system that allows all officers natural justice, the ability to answer accusations made against an officer and to provide evidence to prove innocence. Through three successive governments this union has actively sought to have the current disciplinary process updated to meet the changed prison system, the increase in both prisoner and prison officer numbers and the appropriateness of the disciplinary outcomes. It is important to focus on the need for the disciplinary process and the fact that no more than two or three cases over the last two to three years required the CEO to consider forced dismissal.

Paying attention to the reports in the media about the number of "corrupt" officers in the system distorts the focus for change. The WA Police task force Ulysses was broadly reported on in the media. Seventy-three people were charged with offences as a result of this operation and only three of them were prison officers. I might digress there. One of those officers was a trades officer from a regional prison. I might point out that they are not provided training and required, on successful application to a position, to appear for their job on the first day without any formal or official training. So they are at risk of committing offences or committing digressions that they would not normally be aware of. These figures that I have quoted were provided to one of our members from Hon Joe Francis, Minister for Corrective Services—I have provided you with a copy of that letter—to officer Gardiner.

Introducing this bill in its current form will not add to the existing powers of the CEO as the power to dismiss already exists. We believe that the bill will capture officers that would ordinarily be found not guilty of charges. In fact, the current acting assistant commissioner custodial operations,

James Schilo, and Craig Castle, who previously acted in that position, would both have been dismissed from the service many years ago because of serious charges against them that were subsequently overturned under the current process. Both have gone on to serve the department well for many years very successfully.

Most of the investigations and charges against officers dealt with by the department are for lower range allegations. Changes that are necessary are in the outcomes that are available to superintendents at each facility to enable them to effectively deal with minor charges and not to escalate them unnecessarily to another level. Under section 102, the maximum penalty available to a superintendent is a fine of $50, which in 1982 was a large percentage of a prison officer's weekly income, but clearly by today's standards grossly inadequate.

The main failing and cost to the Department of Corrective Services is not the number of charges and allegations made against officers but the delays in dealing with the variety and complexities of them and the appropriateness of the methods applied. Recently an officer from Bunbury Regional Prison was charged and suspended from duty with pay for eight months. Through the disciplinary process this officer subsequently pleaded guilty to the charges, which were recognised by both the departmental investigators and the hearing superintendent to be inappropriately raised, and he was fined $200 with a caution and a reprimand.

[10.15 am]

I may add that the cost to the department in this particular instance in the payment of the officer's wages during that period of time and the replacement of his position at Bunbury Regional Prison by officers on overtime—I might add also there that that is because we have a gross shortage of prison officers and no miscellaneous officers to place in there on single time—was approximately $150 000 for, in effect, what was returned in a $200 fine. If the new bill was applied in its current form, this officer may have been dismissed by the CEO due to a loss of confidence, as the charge in its initial form provided no ability for the officer to see the evidence against him and provide answers and the defence that he was ultimately able to do.

This union cannot support the removal of the right to silence for an officer. The application of a large fine or imprisonment for a person exercising a right available to all other Australian citizens, including those that are in the care of prison officers, is in itself an injustice. Prison officers deserve the rights afforded to those that are in their care. If a prisoner is accused of or charged with an offence, he or she is entitled to a hearing before a superintendent, or a visiting magistrate if it is a more serious case. That prisoner has the right to silence, is presented with evidence and is able to present evidence themselves and call witnesses in their defence. This bill in its current form will deny an officer those rights and create a situation where a frivolous accusation by a disgruntled prisoner, or even by a fellow officer, may result in dismissal when they are unable to effectively provide a response or a defence.

This union agrees that the existence of the Prison Officers' Appeal Tribunal in its current form needs change and should be more in line with the public sector, as the involvement of a magistrate rather than an industrial commissioner has led to outcomes based on technical and legal argument rather than an industrial or employment focus.

The CHAIR: I think you have already said that you were never formally requested.

Mr Smith: We were never formally requested to make submissions on the bill. However, I may add that I was party to some conversation between the secretary, John Welch, and the president of the union, Mr Ken Brown, with the minister in his office where we articulated our concerns for far-reaching powers that we are now covering in this conversation and in our submission.

Hon LYNN MacLAREN: Can we ask when that was? When was that meeting?

Mr Smith: I could not pin it to an actual date. It was soon after Mr Francis was appointed to his role, but I could not pin it exactly.

Hon LYNN MacLAREN: But you talked to him before you saw the bill.

Mr Smith: We did not see the bill at that time; it was just purely a conversation. It was actually a meeting that Mr Francis organised where we had informal discussion generally about the prison system, and the conversation of the bill came up, at which John Welch made comment that two previous governments had been actually actively involved in change to the disciplinary process. It was just general comments were made that we would be averse to certain powers, like the loss of confidence and so on. But that was about the extent of the conversations.

Hon LYNN MacLAREN: You mentioned that over three terms of government, there was an interest in updating the prison officers' legislation. In particular, you highlighted the low fines. Have you made submissions to the minister at any point as to how the prison officers' disciplinary processes might be updated?

Mr Smith: With Mr Francis, there were only general comments at that meeting. I believe that the points that I have raised—the $50 fine, for instance—were, from memory, flippantly added. It is a remarkably small amount and totally not in line with what should exist today.

The CHAIR: You say that the current disciplinary process works effectively and fairly and is accepted by both prison officers and those tasked to investigate and apply the procedure. Did you want to add anything further to that?

Mr Smith: Having assisted officers over a number of years as a prison officer, an advocate for them when I was a prison officer myself and now industrially involved with the union, I firmly believe that all prison officers regard the current system as fair in that they are afforded the right to provide evidence, to answer charges and to always openly answer any allegations made against them. In my experience, it has been effectively applied in all cases that have come certainly before me.

Hon DONNA FARAGHER: Could I just pick up on that? An alternative view to that that has been put to us is that the current procedures can be overly cumbersome and adversarial. Would you agree with that position? I note in your opening statement that you said there is room for improvement, particularly with respect to the tribunal. But that is an alternative view that has been put in some of the submissions. I am keen to hear your view on that.

Mr Smith: Certainly, I have put in my submission that it is a cumbersome system. There is a lengthy process and officers can sometimes be suspended for long periods of time. It is extremely costly to the department to replace their labour on-site and to pay them while they are off. It is excessively stressful to the officer and their family while that process is being dealt with. This comes down not necessarily to the disciplinary process in its written form, but to how it is applied. Since the early 1980s, we have probably come close to doubling the amount of prison officers in the system. The department has not addressed that in the provision of services for dealing with cases that arise. So, to investigate and to follow the procedure from start to finish is now a very lengthy process not due to what is legislated, but due to the lack of provision of services to deal with those allegations. As the prison officers' union and as a delegate or an advocate on-site, we have close contact with—they have had a number of names over the years—internal investigations and the professional conduct and review department, and they are inundated with allegations. I might add that that is not necessarily reflective of the number of guilty prison officers but of the number of allegations. Most of these are very, very low level allegations that are either dismissed, not dealt with or dealt with as a management or a professional behavioural dealing on-site by a senior member of staff. I hope that answers your question.

Hon DAVE GRILLS: What happens to an officer that is in that situation and they are in this process? What would you do? Would you let them stay on duty and continue their active duty? What would you do?

Mr Smith: It depends on the allegation itself. If it is a serious allegation, the officer will be prevented from entering the jail. Obviously, if it is a security aspect or if it is a serious allegation,

the officer would have the opportunity to speak with or come into contact with people that may be integral in dealing with the case.

Hon DAVE GRILLS: So you separate between serious stuff and non-serious stuff, so it is not just that you have done something and we need to look at this, so we will take you out and put you somewhere else. There is a difference. You can continue to do your job—your task.

Mr Smith: In a lot of instances, the process is that once an allegation is made or a charge is laid against an officer, they are suspended, but the CEO, in most cases if it is a minor allegation, will reinstate them to duty, so they will automatically come back to work and be able to work in the prison.

Hon DAVE GRILLS: So they are suspended and they are reinstated to duty. Is it the same duty as they would have done before?

Mr Smith: Again, depending on what the allegation is, they may be prevented from working in that particular point. If there is a problem with another officer or a prisoner in that department or prison, it may be that they can work in another environment.

Hon DAVE GRILLS: You have talked about how much it costs to do that. That is a decision that is made at the prison at that level, so they would take that into account. Would they have any management strategy to work around that or is it just to get people in to work overtime and cover that? Is that managed?

Mr Smith: It is actually only a decision that the CEO can make. In that case, it is always recommended by the superintendent pertinent to that prison. He or she would make the recommendation to the CEO to either reinstate or to suspend. If they are reinstated, the recommendation would be for the officer to either continue their duty—for instance, a security issue may simply be that an officer leaving duty for the day passes through a checkpoint at the gatehouse accidentally with their keys and may return to the jail. That is a chargeable offence; they would be charged with that, but it would not be deemed to be serious enough to prevent them from continuing their duty.

Hon DAVE GRILLS: So that is an internal thing in the prison and the superintendent at the prison would be aware that he is taking an officer out of that system and he must have to make up for that. That is an internal management process.

Mr Smith: Yes. Understandably, if the superintendent—I refer to the incident at Bunbury Regional Prison that I have noted prior—is party to the laying of a charge in which initially the wording is very serious, and that person is then prevented from coming into that workplace for a period of eight months in that case, subsequently the wording, because of the process, was not dealt with for eight months and it was found that that was actually a minor charge.

Hon DAVE GRILLS: So that meant that that was managed within the prison then, so it is not an external thing that anybody else needs to do. It is a thing that is managed within the prison, so there is no need to get another officer or get whatever from anywhere else. That is something that should be managed within the prison. What you have said is that what happens when somebody within the prison does something to a prison officer is they have to manage that loss of personnel and what have you, and it comes out of their budget in their management strategy.

Mr Smith: In effect, when it is a lower end case, the superintendent, under section 102, can deal with the issue and follow it right through to a charge and issue a penalty up to a $50 fine, so they can deal with it internally.

Hon DAVE GRILLS: Basically, there is no difference between doing that and having what the bill proposes to do with regard to the outcome of how staff are —

[10.30 am]

Mr Smith: I am not sure I understand exactly what you are saying.

Hon DAVE GRILLS: What I mean is if it is a smaller offence or a bigger offence, there is no difference between when you take an officer out of service and put them somewhere else. Is it the same process?

Mr Smith: Technically, yes.

The CHAIR: You said that the current disciplinary processes were working with respect to prison officers. What about youth custodial officers? Do you think that it works effectively and fairly for them as well?

Mr Smith: Look, the youth custodial officers actually perform a duty very akin to prison officers. I would believe that they are in the same environment with the same risks and the potential for the same allegations, so I would believe that the system should apply in an equitable form between prison officers and youth custodial officers.

The CHAIR: Do the opinions in your submission apply equally to the youth custodial officers? You have just said you do not make any distinction between both of them.

Mr Smith: There are obviously, because of the age of the detainees, fundamental differences, but, overall, we believe the rights should be the same for youth custodial officers.

The CHAIR: With respect to paragraph 3.2 in your submission, what are your views about how the disciplinary processes under part 5 of the Public Sector Management Act 1994 compare with the existing provisions in part X of the Prisons Act 1981?

Mr Smith: If the committee permits, I might hand over to Simon Millman as representative of us on legal matters.

The CHAIR: I believe we have a little bit of a problem in the fact that your legal counsel is not here to appear as a witness before the committee to give legal advice; you are, but your legal counsel is not, if I am correct. You are allowed the benefit of counsel; your counsel is allowed to —

Hon LYNN MacLAREN: He is sworn in.

The CHAIR: Yes; I am taking advice from the advisory officer. He is a witness, but not as legal counsel, so —

Mr Smith: What we are proposing to present is not necessarily legal advice or a legal response, but a response to your questions that you provided us with yesterday that have legal connotations. Thereby, Simon is going to present you with an answer, and if you have subsequent questions, he will be the best person to answer those questions, not myself. Basically, I will be reading verbatim an answer, and if you had questions, I would need to refer to my counsel to reply.

The CHAIR: I think we will just break for a little minute and clear the room. Thank you.

Proceedings suspended from 10.33 to 10.37 am

The CHAIR: You are very welcome as a sworn witness, but we do have something to ask so that you have put it on record.

Hon SALLY TALBOT: Can you just make it clear for the committee and for the record that you are not in fact seeking legal counsel as a witness appearing in front of the committee? My understanding is that Mr Millman is assisting the union to present its case, and you are simply asking Mr Millman to elaborate on that particular aspect of the union's case.

Mr Smith: That is correct; they are purely process questions, and he has just assisted in the fabrication of our answers.

Hon SALLY TALBOT: Thank you; as you were! Can you remember the question?

The CHAIR: Would you like me to ask the question again?

Mr Millman: No, thank you, committee chair. I understand the question to be consistent with the question in the line of indicative questions 1.6, the first bullet point, which refers to paragraph 3.2 of the prison officers' submissions. My response will not be legal so much as process, just reflecting on what Mr Smith has already said. I take members of the committee to the fourth page of the document that was provided this morning, headed "Written Response to the Line of Indicative Questions". You will see that there are numbered paragraphs, and our response is contained at 1.6, under "Bullet Point One". We have heard evidence this morning from Mr Smith that although it is accepted that the current process is cumbersome, that is a question of resources rather than a question of legislative operation. The union's primary position is that the current system ought be maintained. The advantage with a Public Sector Management Act process, in the event that the current system is not maintained, is that the Public Sector Management Act process is well understood. In the language of lawyers, there is established jurisprudence with respect to how the Public Sector Management Act process under part 5 of the act operates. There are, in our submission, powers under the PSMA that would achieve the outcomes that Parliament is desirous of achieving by virtue of the proposal that is before Parliament without necessarily having to go so far as to abrogate those common law rights. We say that the current system should be maintained, but, in the alternative, part 5 of the Public Sector Management Act sets out a very clear process that can be easily understood.

The CHAIR: Would you like to keep going with "Bullet Point Two"?

Mr Millman: Yes, certainly.

In response to the indicative questions, the next question relates to the police force regulations. I repeat Mr Smith's earlier proposition advanced at the start, that the role of a prison officer is less akin to a prison officer and more akin to that of a public servant. That makes the PSMA process appropriate. With respect to the provision of reports, as we say, procedural fairness requires that a person under investigation know the case against him or her so that he or she can respond. Once they have the investigation report, they can respond on the question of guilt or innocence. Once that response has been considered, then the decision-maker can then move in a separate process to the imposition of penalty, and a separate hearing on penalty is also required. The provision of the disciplinary investigation report to the suspect, if I can use that word, is consistent, we say, with the obligations that would exist under procedural fairness anyway.

Hon SALLY TALBOT: Can I just be absolutely clear what you are saying, Mr Millman. You are you saying that a prison officer's position is more similar to a public servant?

Mr Millman: Yes, that is —

Hon SALLY TALBOT: I think you might have just used the wrong term there. I think you used "prison officer" twice. So you are saying —

Mr Millman: I beg your pardon.

Hon SALLY TALBOT: — prison officers are like public servants —

Mr Millman: That is correct.

Hon LYNN MacLAREN: Not police officers.

Mr Millman: That is correct. If I may be permitted, members of the committee, prison officers enjoy a unique position statutorily and at common law under the laws of Western Australia and Australia. I think it is erroneous to conflate the role of a prison officer with a police officer. A prison officer is discharging a public service function; public servants also enjoy a unique position within the legal realm when it comes to the functions and roles that they perform, and they have particular obligations and a lot of those are founded in the PSMA. If you have prison officers characterised as public servants, then you have a proper appreciation of the actual role that they perform. If I might also be permitted, one of the things that we discussed when we were preparing

our submissions is that prison officers are custodians of the prisoners under their care. An analogy that might be useful for the committee in its deliberations is a schoolteacher with pupils under his or her care. In exactly the same way that part 5 of the PSMA applies to employees of the Department of Education—schoolteachers—it can also apply to prison officers. That is the analogy I would like to leave the committee with. I hope that is helpful. I wonder, committee chair, if Mr Smith can be —

Mr Smith: As an ex-prison officer myself, prison officers are significantly different from police officers. Police officers make judgement calls on a daily basis and are directed to deal with members of the public in the discharge of their duties, whereas prison officers will work with members of the public who may come into a prison from time to time to deliver education or other programs or medical services. However, they are strictly guided by the act and the regulations into what duties they can actually perform and the orders that they can issue against prisoners that are already subjected to incarceration. There are a very limited number of charges that they can lay against the prisoners, and the process for that is very, very limited, as opposed to a police officer that is dealing with members of the public, makes judgement calls on a whole range of laws and procedures.

[10.45 am]

Hon LYNN MacLAREN: Was it in your submission that you looked at how prison officers were treated in other states and whether for prison officers in other states the disciplinary procedures were similar to police officers? Was that in your submission?

Mr Smith: We have certainly touched on other jurisdictions.

Hon LYNN MacLAREN: What did you find?

Mr Millman: Ms MacLaren, committee chair, through you, I wonder whether I can direct Ms MacLaren to our response dated 26 September. That has numbered paragraphs—paragraph 5.2.

Hon LYNN MacLAREN: Yes, thank you.

Mr Smith: That gives you reference to our actual submission. However, we on an almost daily basis are in contact with other prison officer unions in other states and thereby we are fully aware of disciplinary processes applied to prison officers in other states. We only recently, as much as probably six weeks ago, met specifically to discuss disciplinary processes in other states. Most other states apply processes that are akin to public sector management. I might make reference—we specifically at the end of the conference that I attended and presented in regard to these went from probably the fairest system to what we believe to be, under this bill, probably the harshest system in comparison to other states, which do employ, as Mr Millman has pointed out—if there was a process akin to the Public Sector Management Act, that would be a fairer process than what is proposed before us today.

Hon DAVE GRILLS: If you were to say it is a harsh system, and you said previously as being a prison officer and you wanted to get rid of prison officers that were not good for the job, why would you say it would be harsh on people who need to get out of the job? Why is it harsh in that respect to move people on? Why do you think that?

Mr Smith: It is not harsh to move people on. As an ex–prison officer and where I currently sit as the acting secretary, there is no way that I would propose that it would be harsh to dismiss an officer. However —

Hon DAVE GRILLS: No; I am just saying you said we are going from a fair system to a harsh system. Why do you think it is harsh?

Mr Smith: The application—the loss of confidence does not provide a prison officer with the right to defend himself in a fair way, giving him natural justice. That is the only analogy that I will make. Under the current system, we have a full investigative process that allows a prison officer to gather

evidence, to bring witnesses, to defend himself and actually provide a reason for his actions. What is proposed in the bill under the loss-of-confidence provisions is harsh because it does not get that afforded to them.

Hon DAVE GRILLS: With regard to what happens with the police under section 8 and what we are talking about here, what is the difference? Why is there a difference?

Mr Smith: I am not necessarily saying that there is a difference. With the police, they still may be presented with evidence. As we have tried to explain with the last couple of questions, there is a clear distinction between the police officers and prison officers. Prison officers work in a fairly unique environment, where we are dealing with people that are already incarcerated, and great numbers of them all in one position. A police officer would be dealing with one event at one particular time on one particular case. As prison officers. we are constantly confronted with—at Hakea Prison, for instance, 1 000 people that have been incarcerated for various reasons that are only unlocked for a period of 12 hours and constantly in contact with prison officers. Some of them—not all—just get on with their daily business, but the inherent nature of a prisoner—some have a desire to create the most havoc with the system or with prison officers. Prison officers may be accused frivolously with a charge, and I have worked with officers that have been and have followed through a process that is open and transparent, that they are able to answer the allegation and prove that they are frivolous, or prove that whilst it is at this level, it is actually at this level. The harshness—with a prison officer they need more incidences where they would have to have the ability to provide evidence to defend themselves.

Hon DAVE GRILLS: We have got correspondence from the Commissioner of Police that talks about how the police do it, and having been a 20-year serving police officer, I am not really sure I totally agree with what you say. But that is a different thing. I want to know the reason why you guys think that it is a bit different from what the police service does.

Mr Smith: Police officers are constables of the state. Prison officers are sworn officers, but have a very, very restrictive task in what they apply. Police officers do have to make judgement calls and certainly work within the law, but they are not subjected to the concentrated effects of incarcerating people in a small area on a day-to-day basis, 12 hours, constantly in contact with people that are proven to be people that have broken the law.

Hon SALLY TALBOT: This is really picking up on the same point. I like the example that you use of the Bunbury officer. I wonder whether you could just replay that scenario. You have told us what happened under the current statutes, and I think we can probably all agree that if it is reasonable to say that we are looking for a system that is both timely and equitable, certainly the timeliness and the cost that was involved in the example you have given us is pretty hair-raising. I wonder if you could just rework it for us as if it was under the new provisions. So, what you are suggesting is, if I understand you correctly, and from your submission, that under the new provisions that officer may have actually lost his or her job six months or five months earlier without an opportunity to address the issue. Then, perhaps, can you also incorporate some comments about the right to silence in your reworking of that scenario?

Mr Smith: Certainly. If I may put a few more facts into that particular occurrence. What we had on that instance is an officer—what we would call a single pip officer, the lowest rank that you have—acting in the role of a senior officer on a day when Bunbury Regional Prison was severely understaffed. For various reasons on a weekend they were understaffed. That acting senior officer picked up the telephone and gave information over the phone that ordinarily he should not have given or would not have given. Now, the charge, the way it was worded, was that it, basically, accessed the prisoner records and had given out just a snippet of information to a member of the public. The way the charge was worded, and I firmly believe the way the bill is presented now, would have been presented to the CEO and in such a way that the CEO would have had a loss of confidence in that officer to perform his duties as a prison officer by giving away things on the

phone. In reality, under the current system and the way that it transpired, the officer was forced to work in a position or at a rank that he was not due to circumstances that were not in his control. He was not trained to do the task that he was doing, and under extreme duress, because there were different things happening at the time and there was shortness of staff, he gave out information. When all this information came out in the subsequent investigation and his hearing, it was proved that—this is the hearing superintendent put it into perspective that what should have happened, perhaps, was that whilst it was not a breach of any security of the prison, it was not a breach of the prisoner's rights and he has a right to privacy, the person on the other end of the phone already knew the snippet of the information that was given out. They were already aware of that fact, so it did not interfere with the prisoner's rights on that basis. He should have been counselled and retrained and prevented from the opportunity of acting in that position until such time as he was trained to be able to do it correctly and properly. So, they are two different paths. Under the current system, or what is proposed here in the bill, the CEO would have almost had no choice but to say, "I have lost confidence in that person. This is a serious breach of security and a prisoner's rights", when, in reality, when more information came out and he had the opportunity to answer, it would have been, "Okay; what I need is more training and a more appropriate use of staff within Bunbury Regional Prison."

There was another question following that.

Hon SALLY TALBOT: I was wondering whether you could also make some comments, perhaps by devising a similar sort of scenario, where you talk about how things work now and how they are proposed to work under the provisions of the bill as far as the right to silence goes.

Mr Smith: The right to silence now—I might put it into perspective. A prison officer has the right to silence during an investigation. It is not to say that subsequently at a hearing that person may not be required to provide evidence at the hearing that sort of negates his right to silence. He actually will answer questions. In fact, we, on a daily basis, if prison officers are required to submit to an interview, they have the right to silence. They will always engage and say, "We have the right to silence", but a prison officer will always ask for any particular questions that are required by the investigator to be put in writing, in which case they will respond in writing. Whilst they have the right to silence, they do not always actually apply that. That automatically engages the fair disciplinary process that we have in that they will have the right to silence. Evidence will be gathered from other witnesses and from other situations that will present at the case that will be heard before a superintendent, and at that point they then have the right, and they always exercise the right, to answer those accusations and to reply to evidence that is presented to them. Under the bill, basically, if you take away that right to silence, there are two issues there. People should be able to answer allegations made against them, and in the correct process and in the same way that prisoners are able to do both inside the prison and under the legal system, but at the end of it they should not be—what is proposed is a mandatory fine or imprisonment for exercising a right that is a right of every Australian in every other jurisdiction.

Hon DAVE GRILLS: With regard to the Bunbury prison, we are talking about legislation, black–white legislation. We are talking about areas. You are talking about lack of staff, which is another issue, and that person's inability to do the role they did by giving out that. Do you think there is any chance of some confusion between the legislation as it stands and what it is intended to do against situations like that, where that happens, and then you go back to the legislation and say the legislation is bad because that might happen? Is there another way of looking at with regards to stopping putting people inadvertently into that position?

Mr Smith: Certainly, there are things that could have been put into place to avert that situation. What we are saying is currently what is proposed in the bill to remove staff that—those already exist. If it is a gross act of misconduct or if it is an illegal act, there currently exists the right for the CEO to dismiss or remove somebody from the job. What has happened there, and putting aside that

there was lack of staff and so on, there were certain things that happened in that occurrence that could have been dealt with in a much different way, but under what is proposed in the bill, it would not come into effect.

Hon DAVE GRILLS: I am just saying, though, that inadvertently that person was in that position and unknowingly, unwittingly did what they did, and then you are turning around and saying that the proposed legislation would have that person put down because the supervisor would think that. Now, I would think that any supervisor that is a manager would look at that and say, "Goodness, we need to address something else here. I'm not going to dismiss this bloke just because legislation says I can." I am just trying to get some definition from you and your union with regard to that, because I think that is a very important point.

Mr Smith: I agree with you and I share your opinion. You actually put it in perspective. If it came before any good manager, but what we do not know is the person that is there—any person without any prior prison experience may look at it in a different manner. If it is presented to them in the wording that that particular charge was put to them and the evidence from only one source was put to them, they would probably—I am saying it is hypothetical anyway, but a CEO would look at it and say, "The charge is worded in this way. The evidence is this," but by the time they say, "This categorically fits into the case of loss of confidence. They are unable to perform their duties as a prison officer. Then give me an answer"—by the time you have reached that stage, the CEO has indicated they have lost confidence in that individual.

Hon DAVE GRILLS: So what you are saying is it is a personal thing, it is a procedure thing, not a legislation thing.

Mr Smith: No. Currently, we have a process that actually takes away the possibility of that occurring. The bill in its current form actually lends itself to providing a situation where you are trapped into making that decision. The CEO would only be provided with, "This is a loss of confidence. This is a gross act of misconduct." The process is not there to protect the officer to provide information until such time as the CEO has already indicated a loss of confidence. We are not providing a fair system for the officer to present his evidence, to present an alternative case.

[11.00 am]

Hon LYNN MacLAREN: Have you considered the impact of the proposed changes on a whistleblower? Say you had a prison officer who was a whistleblower, have you looked at how the new system employed would treat the officer differently from how he would be treated under the current system?

Mr Smith: To be honest with you, I have not looked at that as an alternative. I could not see that there would be significant change there. Currently the system would allow for whistleblowers to have protection and a number of different ways that evidence or accusations can be made, and they could be protected internally.

Hon LYNN MacLAREN: So, in the new system?

Mr Smith: I have not looked at that as an alternative and I could not answer your questions.

Ms Marton: If I may, committee? Currently, if there is a situation where there is a whistleblower or an officer thinks there is something serious going on in the prison, they have their opportunity to report it to the IIU or the CCC, who then have extensive powers in dealing with that information if they believe it fits that criteria of serious and corrupt matters, because those powers exist as it is at the moment.

Hon LYNN MacLAREN: Will the legislation change that?

Ms Marton: No; I suppose I do not believe it will.

Mr Smith: If a prison officer has information that they want to put forward, there are a number of methods of access to the computer system where they can put an anonymous information report to the justice information service. So, they can put an anonymous accusation or report in. They can make a formal report on the total offender management system. There are a number of ways that they could initiate an accusation and be protected there, and I do not think that would change. Those things still exist. The ability to put a JIS report, a TOMS report and so on, they would still have access to those.

Hon SALLY TALBOT: I want to take you back to the Bunbury example, if I may. In your submission you talk about the fact that the existing system is actually being replaced by two different systems. I wonder if you could talk, first, about one of those, which we know is the loss of confidence. What is the other one, and can you talk us through that empirical example? Then, could you go on to talk about how you think the bill could be improved by the inclusion of some specific direction about which disciplinary avenue is to be taken in particular cases?

Mr Smith: I think the reference to the Bunbury incident—I am sorry, just a minute. The reference I have made to two different systems would be the PSMA system being fundamentally different. That can still operate in that we agree there are systems and safeguards that are in place to protect the officer through that system. The concern that I would have if you are trying to put into place two significantly different systems, the loss of confidence and PSMA system, we expect that there would be safeguards put into place to restrict and recognise that the loss of confidence specifically applied to these cases and that the other system would come into play only when it was outside of those cases.

Hon SALLY TALBOT: How would you do that? Would you talk about specific offences? How specific would you need to be?

Mr Smith: I think it would need to be reasonably specific in that it would need to be criminal matters, under which we would have no objection to an officer being removed for criminal matters if there was sufficient evidence to do that; or matters of significant misconduct or gross misconduct. It would not be hard under the duties of prison officers to outline specific areas that would automatically come under those systems. Prison officers' duties are fairly well detailed and outlined and you could itemise certain areas so that the loss of confidence would apply to these and any other matter could be dealt with under the PSMA; or even keeping or maintaining the ability for a superintendent within a prison to deal with minor matters, rather than escalate them outside into another cumbersome system or a system that is already overloaded with a burgeoning number of prison officers.

Hon SALLY TALBOT: Do you think that you could live with the loss-of-confidence provisions were they so circumscribed in the bill?

Mr Smith: Thank you for the question. If there were strict guidelines in place—certainly we would like to see them and have the ability to comment if there were proposals put forward—for loss of confidence before it was imposed, we would certainly consider those. I could not categorically say we would accept what was proposed. As Mr Millman has just pointed out, the PSMA already has in place strict guidelines. So, if the same applied, we could certainly do that.

The CHAIR: I have just one last question, because I notice that it is in all the amendments. What is your opinion of the maximum amount of compensation specified by 110F and 11CQ in the bill being 12 months?

Mr Smith: If I may, we discussed this matter in great length this morning and Mr Millman might take it.

Mr Millman: The answer is very brief and it is regarding 8.7 on the second last page of the written submissions we provided. The criteria that are set out in 110F and 11CQ(4) determine that compensation is capped at 12 months. If a person is unfairly dismissed from their employment and

they seek reinstatement for an unfair dismissal claim and they are successful in being reinstated, the commission has the power to order that they be compensated for the whole period of time that they are off work. Unfortunately, sometimes unfair dismissal claims can take longer than 12 months, so we would be concerned if a prison officer's compensation for reinstatement was prescribed at 12 months because that would put them in a different category than other employees. For prison officers who are not successful in having their employment reinstated, there is no objection to the compensation being 12 months. There is nothing we can really say about that.

The CHAIR: Thank you. I notice that we have run out of time, so, on behalf of the committee, I would like to thank you all for coming in. Thank you for providing those questions at short notice. It has been appreciated. Thank you.

Hearing concluded at 11.08 am

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