REPORT 25

STANDING COMMITTEE ON LEGISLATION

CUSTODIAL LEGISLATION
(OFFICERS DISCIPLINE) AMENDMENT
BILL 2013

Presented by Hon Robyn McSweeney MLC (Chair)

November 2014
STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

4.1 A Legislation Committee is established.

4.2 The Committee consists of 5 Members.

4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.

4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

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

Staff as at the time of this inquiry:

Alex Hickman (Advisory Officer (Legal))       Mark Warner (Committee Clerk)

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REPORT OF THE STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

EXECUTIVE SUMMARY

1 On Tuesday 9 September 2014 the Legislative Council referred the Custodial Legislation (Officers Discipline) Amendment Bill (the Bill) to the Standing Committee on Legislation (the Committee) for its consideration and report by 28 October 2014.

2 An extension of time to report was subsequently granted to the Committee, to report no later than 11 November 2014.

3 The Bill amends the Prisons Act 1981 and the Young Offenders Act 1994. The key changes include:

- the introduction of a power to remove custodial officers based on a loss of confidence by the insertion of a new Part X into the Prisons Act 1981 and a new Part 3 Division 3 into the Young Offenders Act 1994. This proposed power is intended to mirror section 8 and Part IIB of the Police Act 1892;

- the adoption of Part 5 of the Public Sector Management Act 1994, also in the proposed new Part X, which deals with substandard performance and disciplinary matters; and

- the abrogation of the privilege against self-incrimination, which would compel custodial officers to provide the Commissioner for Corrective Services with information relevant to an investigation.

4 The Committee has received evidence from a variety of employee representative organisations, Government agencies and other organisations. This evidence has revealed a number of opposing views about the key changes outlined above.

5 The Committee has detailed the evidence it has received in this Report to demonstrate the diversity of views it has considered for the benefit of the Legislative Council.
Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Custodial Legislation (Officers Discipline) Amendment Bill 2013 be amended to reflect the reference in the Second Reading Speech that:

.Importantly, the compelled information will not be used in any other proceedings and the officer must be advised of the implications of the abrogation, and the relevancy of the required information.

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Recommendation 2: The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council whether information gathered pursuant to clause 7, proposed new subsection 101(4) and clause 16 proposed new subsection 11CC(4) of the Custodial Legislation (Officers Discipline) Amendment Bill 2013 will be available for use by other agencies and, if so, the method by which it can be used.

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Recommendation 3: The Committee recommends that, given:

(a) the Commissioner for Corrective Services deals with disciplinary actions under Part 5 of the Public Sector Management Act 1994 and proposed under clause 7 and clause 16 of the Custodial Legislation (Officers Discipline) Amendment Bill 2013;

(b) the requirement under section 79 of the Public Sector Management Act 1994 for an investigation to be held; and

(c) the evidence given to the Committee by Western Australia Police about current practice under Part IIB of the Police Act 1892 and the evidence from the Department for Corrective Services that an investigation would be undertaken if removal for loss of confidence is contemplated,

the Minister representing the Minister for Corrective Services assure the Legislative Council, that, despite the word ‘may’ appearing in clause 7 proposed new subsection 101(3) and clause 16 proposed new subsection 11CC(3), an investigation will be held when removal action is contemplated.
Recommendation 4: The Committee recommends that the Minister representing the Minister for Corrective Services assure the Legislative Council that once a decision has been made to take removal action against a custodial officer, the provision of a written notice to the custodial officer by the Commissioner for Corrective Services shall not be discretionary.

Recommendation 5: The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council whether the intention of the Bill is to restrict the right of appeal against a removal decision to that provided for in clause 7, proposed new subsection 106(6) and clause 16, proposed new subsection 11CH(6) to the exclusion of any other causes of action.

Recommendation 6: The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council why clause 7, proposed new section 110A and clause 16, proposed new section 11CL does not appear to include an opportunity for the appellant, with or without leave, to tender new evidence in response to the Commissioner’s reformulation of reasons and tendering new evidence, such as is the case under clause 7, proposed new sections 108 and 109 and clause 16, proposed new sections 11CJ and 11CK.

Recommendation 7: The Committee recommends that the Minister representing the Minister for Corrective Services reconfirm the Department’s advice that the Industrial Relations Commission’s jurisdiction to hear an appeal against a decision to stand down a custodial officer is not ousted by the Bill.

If this is the case, the Committee recommends that the Bill be amended to remove any doubt as to whether an appeal is available.
Minority recommendations

Recommendations of a minority of the Committee, comprising Hon Sally Talbot MLC and Hon Lynn MacLaren MLC, are grouped as they appear in the text at the page number indicated:

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**Minority Recommendation 1:**

A minority of the Committee recommends that:

All clauses relating to the application of loss of confidence provisions be deleted from the Bill.

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**Minority Recommendation 2:**

A minority of the Committee recommends that:

The Minister representing the Minister for Corrective Services provide to the Parliament a clarifying statement confirming that removal power for loss of confidence will not be used in cases where custodial officers are medically unfit.

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**Minority Recommendation 3:**

A minority of the Committee recommends that:

All clauses relating to the abrogation of the privilege against self-incrimination be deleted from the Bill.

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**Minority Recommendation 4:**

A minority of the Committee recommends that:

Applications for an extension of the maintenance period should be referred to an independent third party.
Minority Recommendation 5:

A minority of the Committee recommends that:

Clause 7, proposed new subsection 106(5) and clause 16, proposed new subsection 11CH(5) of the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* be deleted.

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Minority Recommendation 6:

A minority of the Committee recommends that:

The current arrangement whereby there is no cap on the amount of compensation payable to a prison officer who is reinstated to their position following a successful appeal be maintained and the Bill is amended accordingly.
REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

1 REFERENCE AND PROCEDURE

Referral

1.1 On 1 April 2014 Attorney-General Hon Michael Mischin MLC representing the Minister for Corrective Services, (Minister) introduced the Custodial Legislation (Officers Discipline) Amendment Bill 2013 (Bill) into the Legislative Council.

1.2 On 9 September 2014 during debate on the second reading of the Bill the following procedural motion was moved and agreed to:

That the Custodial Legislation (Officers Discipline) Amendment Bill 2013 be discharged and referred to the Standing Committee on Legislation for consideration and report not later than 28 October 2014.1

1.3 On 23 October 2014 the Committee reported to the Legislative Council, requesting an extension of time to report until 11 November 2014. The request for an extension of time to report was granted.

1.4 While the Committee notes the referral took place before the conclusion of the Second Reading Debate, the Committee has proceeded on the basis that the referral does not include inquiring into the policy of the Bill.

Inquiry procedure

1.5 The Committee called for submissions by contacting 11 key stakeholders directly, and also by way of advertisements placed in the general news section of the West Australian on Wednesday 17 September 2014 and Saturday 20 September 2014.

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1 Hon Helen Morton MLC, Minister for Mental Health, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 9 September 2014, pp3-4.
1.6 Submissions closed on Thursday 25 September 2014, with four submissions received from employee representatives; 3 three submissions received from Government agencies; 3 one submission from the Minister for Corrective Services 4 and one submission received from the Law Society of Western Australia. 5 All submissions are available on the Committee’s website.

1.7 Seven public hearings were held on 2 and 7 October 2014.

1.8 Details of stakeholders invited to make a submission, submissions received and the hearing of witnesses, are contained in Appendix 1. Given the short reporting deadline faced, the Committee wishes to thank all submitters and witnesses who made themselves available. Copies of the transcripts of the hearings are also available on the Committee’s website.

2 THE PURPOSE OF THE BILL

2.1 According to the Second Reading Speech, the Bill amends two Acts – the Prisons Act 1981 and the Young Offenders Act 1994 (the Acts) to:

- engender internal and external trust in the corrections system,
- reduce difficulties and technical delays currently encountered in removing corrupt or seriously disruptive officers and diminish the risk of prison officers and youth custodial officers misusing their special powers. 6

2.2 The significant changes to the Acts proposed in the Bill are:

- the introduction of a power to remove custodial officers based on a loss of confidence by the insertion of a new Part X into the Prisons Act 1981 and a new Part 3 Division 3 into the Young Offenders Act 1994, intended to mirror section 8 and Part IIB of the Police Act 1892;

- the adoption of Part 5 of the Public Sector Management Act 1994 (PSMA) also in the proposed new Part X, which deals with substandard performance and disciplinary matters; and

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2 Submission No 3 from Unions WA, 25 September 2014; Submission No 4 from CPSU-CSA, 25 September 2014; Submission No 5 from the Western Australian Prison Officers’ Union, 25 September 2014; and Submission No 6 from the WA Police Union, 30 September 2014.

3 Submission No 1 from the Public Sector Commission, 24 September 2014; Submission No 8 from the Commissioner of Police, 29 September 2014; and Submission No 9 from the Corruption and Crime Commission, 7 October 2014.

4 Submission No 7 from the Minister for Corrective Services, 25 September 2014.

5 Submission No 2 from the Law Society of Western Australia, 25 September 2014.

6 Hon Michael Mischin MLC, Attorney-General, Parliamentary Debates (Hansard), 1 April 2014, pp1789.
• the abrogation of the privilege against self-incrimination, which would compel custodial officers to provide the Commissioner for Corrective Services with information relevant to an investigation.\(^7\)

### 3 SUMMARY OF THE STRUCTURE OF THE BILL

3.1 Part 1 of the Bill contains preliminary clauses.

3.2 Part 2 of the Bill amends the *Prisons Act 1981* to provide:

• for the application of the disciplinary processes in Part 5 of the PSMA. This is undertaken by prescribing prison officers for the purposes of section 76(1)(b) of the PSMA, which incorporate some of the following features:

  a) An employee can have an increment of remuneration withheld, their classification reduced, or have their employment terminated if the employing authority determines their performance to be substandard.

  b) A breach of discipline by an employee, which includes disobeying a lawful order, can result in a range of penalties, including a reprimand, a fine, a transfer to another public sector body and dismissal.

  c) A special disciplinary inquiry can take place which can result in various responses, including dismissal.

  d) An employee who is aggrieved by a disciplinary decision can appeal to the Industrial Relations Commission (IRC) constituted by a Public Service Appeal Board and dealt with under Part IIA of the *Industrial Relations Act 1979* with employees able to appear in person, by an agent or with legal representation, with all usual remedies available (such as compensation and reinstatement).

• For the application of loss of confidence provisions, the main features of which include:

  a) The Chief Executive Officer (the Commissioner for Corrective Services, *Commissioner*) may take removal action against a prison officer if they do not have confidence in their suitability to continue in their role.

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\(^7\) Hon Michael Mischin MLC, Attorney-General, *Parliamentary Debates (Hansard)*, 1 April 2014, pp1789.
b) The Commissioner may conduct an investigation and may compel the officer to provide them with any information or documentation.

c) A prison officer may not refuse to provide the compelled information on the grounds it might incriminate them. This information cannot be used in evidence in any criminal proceedings except for failing to provide the information or providing false information.

d) A payment may be made to the prison officer for a period of 28 days following removal.

e) Removal actions can be withdrawn or revoked by the Commissioner.

f) An appeal is open to the IRC on the grounds the removal was harsh, oppressive or unfair and must be instituted before the maintenance period expires.

g) The prison officer has the burden of establishing the removal was harsh, oppressive or unfair.

h) There are circumstances where new evidence can be considered by the IRC (evidence other than that taken into consideration by the Commissioner in the making of the removal decision).

i) Certain provisions of the *Industrial Relations Act 1979* are applied to appeals from removal decisions.

j) The IRC can make an order that the removal is of no effect or order compensation.

3.3 Part 3 of the Bill amends the *Young Offenders Act 1994* in similar terms to amendments proposed by Part 2. However, for the purposes of this Report, the key difference is that clause 14 of the Bill proposes to insert a new section 11(1C) providing that regulations may prescribe youth custodial officers for the purposes of section 76(1)(b) of the PSMA. See further paragraphs 6.8 to 6.13 below.
4 **REMOVAL FOR LOSS OF CONFIDENCE**

4.1 The principal initiative introduced by the Bill is the application of the power of the Commissioner to remove a custodial officer\(^8\) based on a loss of confidence of the Commissioner in that officer’s suitability for the role.

4.2 The Second Reading Speech states:

> The loss-of-confidence provisions in the bill mirror section 8 and part IIB of the Western Australian Police Act 1892.\(^9\)

4.3 The Explanatory Memorandum states:

> This division empowers the CEO to remove a prison officer due to loss of confidence. The provisions contained in this division are modelled on similar provisions in the Police Act 1891 (sic) (Part IIB) which empower the Commissioner of Police to remove a police officer due to loss of confidence in the officer’s (sic) suitability to remain as a police officer having regard to the officers’ integrity, honesty, competence, performance or conduct.\(^10\)

4.4 In *Carlyon v Commissioner of Police*, useful principles were enunciated by the IRC about the nature of the power to remove a police officer based on a loss of confidence, as follows:

> Removal of an officer from the Police Force is not done as a punitive measure. In this case there is no charge of misconduct nor was it to be the basis upon which punishment was determined. Removal action results from the Commissioner of Police’s lack of confidence in a member’s suitability to continue in the Police Force, it is effected to protect the public, to maintain proper standards of conduct of members and to protect the reputation of the Police Force.

> Removal from the Police Force under the Commissioner of Police’s loss of confidence is not an avenue through which to exact retribution (*Minister for Police & Another v Smith (1993) 73 WAIG 2311 at 2327*).

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\(^8\) In this Report, when references are made to custodial officers, they are intended to encompass prison and youth custodial officers.

\(^9\) Hon Michael Mischin MLC, Attorney General, *Parliamentary Debates (Hansard)*, 1 April 2014, pp1789.

The effectiveness of the police in protecting the community rests heavily upon the community’s confidence in the integrity of members of the Police Force, upon their assiduous performance of duty and upon judicious exercise of their powers (Public Service Board and Another v Morris and Martin (1984-85) 156 CLR 397 at 412).

In considering the case presented it is important from the Respondent’s viewpoint for the WAIRC to appreciate that the Commissioner of Police is entrusted with the statutory responsibility to maintain an efficient and effective Police Force in which the public has confidence. In performing this duty the Commissioner of Police is given wide powers under section 8 of the Police Act 1892 to remove officers in whom he has lost confidence.

Importantly, it is emphasised that it is not the WAIRC’s role to take over the management of the Police Force with respect to the retention or removal of the Appellant as a member of the Police Force, by substituting our opinion for that of the Commissioner of Police. Adopting what was said by the WAIRC to the Minister in a report under section 80ZE of the Industrial Relations Act dated 18 December 1998 “… the question is whether the recommendation of the Commissioner of Police (to remove the Appellant) was one which was open to a fairminded person charged with the statutory responsibilities of the Commissioner of Police.”

In our view this provision serves to remind the WAIRC to take into account that the nature of the relationship between the Commissioner of Police and members of the Police Force extends beyond those duties and obligations which are implied in normal employer/employee relationships. It goes beyond the member’s duty of honesty, fidelity, obedience and to co-operate and the Commissioner of Police’s duty to provide training and a safe work environment. It encompasses the commitment of a member to discharge the requirements of

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12 Ibid, at paragraphs 177 to 178.
his/her commission whether on duty or off duty and to serve as a member of a disciplinary force. While the very nature of policing assumes that the environment in which members discharge their duties will not always be safe it is the duty of the Commissioner of Police to ensure that members receive appropriate education, training, information and supervision in order for them to make decisions appropriate to the proper discharge of their duties and in the public interest.\textsuperscript{13}

4.5 Due to the nature of this power, the Committee received evidence from a number of witnesses with conflicting views about whether it should apply to custodial officers in Western Australia. Central to concerns over the power were those regarding procedural fairness and the abrogation of the privilege against self-incrimination. These are discussed in detail below.

5 \textbf{PRELIMINARY MATTERS}

\textbf{References to provisions in the Bill}

5.1 The provisions in the Bill are almost identical in their application to prison and youth custodial officers, with the exception of the application of Part 5 of the PSMA. The Committee will therefore make reference to those provisions applying to prison officers, with this one exception, in the body of the Report but to both prison and youth custodial officers in the recommendations.

\textbf{Review of Part IIB of the Police Act 1892}

5.2 On the basis of the stated intention for the Bill to mirror Part IIB of the \textit{Police Act 1892}, the Committee has had regard to a review of Part IIB of the \textit{Police Act 1892} conducted by the Government of the day in 2006. A copy of this review is set out in \textit{Appendix 2} for the information of the Legislative Council.

\textbf{Discipline of custodial officers in other jurisdictions}

5.3 The Committee has surveyed legislation in other Australian jurisdictions governing the discipline of custodial officers as follows.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Jurisdiction} & \textbf{Legislation governing custodial officer discipline} & \textbf{Loss of confidence provisions?} \\
\hline
New South Wales & Corrections officers are public service officers and discipline is & No. \\
\hline
\end{tabular}
\end{table}

\textsuperscript{13} (2004) WAIRC 11966 at paragraph 186.
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>Corrections officers are public service officers and discipline is dealt with under section 63 of the <em>Public Administration Act 2004</em>, which provides for the Public Sector Standards Commissioner to prepare and issue Codes of Conduct based on the public sector values.</td>
<td>No.</td>
</tr>
<tr>
<td></td>
<td>Regulation 6 of the Corrections Regulations 2009 requires a custodial officer to disclose to the Governor of the prison various matters, such as criminal charges and findings arising out of these charges.</td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td>Corrections officers are public service officers and discipline is dealt with under chapter 6 of the <em>Public Service Act 2008</em>, which provides the framework for disciplining public service employees.</td>
<td>No.</td>
</tr>
<tr>
<td></td>
<td>It sets out the grounds on which disciplinary findings may be made (section 187) and lists (non-exhaustively) examples of disciplinary action that may be taken against a public service employee (section 188) and a former public service employee (section 188A).</td>
<td></td>
</tr>
<tr>
<td>South Australia</td>
<td>Correctional Officers are public sector employees employed pursuant to the <em>Public Sector Act</em></td>
<td>No.</td>
</tr>
<tr>
<td>State</td>
<td>Law/Process Description</td>
<td>No.</td>
</tr>
<tr>
<td>---------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Corrections officers are subject to the same disciplinary processes as other State Service employees. These are in the Code of Conduct established under section 9 of the <em>State Service Act 2000</em>.</td>
<td>No.</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Discipline is dealt with under the <em>Public Sector Employment Management Act 1993</em>. Under this Act the Commissioner for Public Employment can issue Employment Instructions and Employment Instruction No.7 rules for undertaking a discipline process.</td>
<td>No.</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Correctional officers are employed under the <em>Public Sector Management Act 1994</em> and their discipline provisions are currently within the Justice and Community Safety Enterprise Agreement 2011-2013.</td>
<td>No.</td>
</tr>
</tbody>
</table>

5.4 The Committee notes that Western Australia is the only Australian jurisdiction currently proposing to introduce a power to remove custodial officers for loss of confidence. This accounts for the views of some witnesses that the Bill is contentious.

**Consultation on the drafting of the Bill**

5.5 The Committee received evidence from the Department for Corrective Services (*Department*) that the following stakeholders had been consulted regarding the drafting of the Bill.

- Public Sector Commission;
- Western Australian Prison Officers’ Union;
- Community and Public Sector Union and Civil Service Association;
Legislation Committee

- Western Australian Industrial Relations Commission;
- Office of the Inspector of Custodial Services; and
- Western Australia Police.\(^{14}\)

5.6 In the opinion of the Western Australian Prison Officers’ Union their views had been overlooked during the drafting of the Bill.\(^{15}\)

Observations on the current system

5.7 The Committee received evidence from a number of witnesses about how they thought the current disciplinary processes under the Acts were operating. Some of the observations were as follows.

5.8 In its submission, the Corruption and Crime Commission stated:

> Discussions with DCS indicated that at the root of the problem was the disciplinary regime provided for in the Custodial Legislation. The disciplinary provisions are outdated and ineffective insofar as they fail to facilitate the efficient handling of misconduct and other performance related matters. In particular, there is little scope for the removal of a DCS officer from duty or termination of employment. As a result, DCS has been relying on the Commission to investigate and make findings and recommendations with respect to DCS officers engaging in misconduct in order to provide a basis for dealing with that officer in an appropriate way.\(^{16}\)

5.9 In his submission, the Minister for Corrective Services stated:

> The current disciplinary procedures for prison officers consist of a cumbersome and adversarial process which involves an appeal to the Prison Officers Appeal Tribunal. This delays the discipline of prison officers for even minor infringements. In

\(^{14}\) Mr Allan Adams, Acting Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, p2. Mr Steven Norris, Acting Executive Director, Policy and Legislation, Department of Corrective Services, Transcript of Evidence, 2 October 2014, p3.

\(^{15}\) Mr Andrew Smith, Acting Secretary, Western Australian Prison Officers’ Union, Transcript of Evidence, 2 October 2014, pp1-2.

\(^{16}\) Submission No 9 from the Corruption and Crime Commission, 7 October 2014, p1.
addition, prison officers do not have access to improvement actions under the current disciplinary procedures.  

5.10 In evidence to the Committee, the Western Australian Prison Officers’ Union stated:

Mr Smith: 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.

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.

...  

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: 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.

17 Submission No 7 from Hon Joe Francis MLA, Minister for Corrective Services, 25 September 2014, p2.
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.18

…

Mr Millman: 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.19

5.11 In evidence to the Committee, Unions WA stated:

Ms Hammat: Our primary submission is that in respect of prison officers and youth custodial officers, we do not believe that there is adequate evidence that the system is broken and in need of fundamental reform. We do not accept the

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18 Mr Andrew Smith, Secretary, Western Australian Prison Officers’ Union, Transcript of Evidence, 2 October 2014, pp3-4.
proposition that there needs to be wide-scale reform to these provisions. 20

Comparisons between police and custodial officers

5.12 As part of the rationale for applying to custodial officers loss of confidence provisions which appear in Part IIB of the Police Act 1892, comparisons were made between the work undertaken by police and custodial officers. Differing views were expressed in evidence.

5.13 Some arguments put in evidence supported the view that the role of custodial officers and police officers are similar, while others did not.

5.14 For example, it was proposed by some witnesses that, like police officers, custodial officers:

• have a special relationship with their Commissioner;21
• are authorised to use force, 22 and, while not customarily armed, may be armed, in the case of prison officers (such as if they are, for example, part of a primary or emergency response group);23
• enforce deprivation of liberty (within the confined, closed environment of a custodial facility) to ensure the safety of the community;24
• work in an environment:
  a) which is volatile;25
  b) where they are more vulnerable to corruption;26
  c) where they may have to be involved in a rapid decision cycle;27 and

20 Ms Meredith Hammat, Secretary, Unions WA, Transcript of Evidence, 2 October 2014, pp1-2.
21 Mr Allan Adams, Acting Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, p4. See clause 7, proposed new section 107(4)(b)(ii) and clause 16, proposed new section 11CI(4)(b)(ii) which requires the Industrial Relations Commission to have regard, in determining an appeal from a removal action, to the “special nature of the relationship between the chief executive officer and prison officers”.
22 Mr James McMahon, Commissioner for Corrective Services, Transcript of Evidence, 2 October 2014, pp1-2 and 5. See also Submission No 9 from the Corruption and Crime Commission, p7.
26 Submission No 8 from the Corruption and Crime Commission, 7 October 2014, p7.
d) where they have to be able to trust their colleagues implicitly.28

5.15 Western Australia Police made the following points to the Committee as follows:

Mr BROWN: I see a number of similarities in the operating environment that our police officers work within that happens in the corrective services environment. There are certainly some parallels in the risk that faces those officers in the course of their work, particularly in regards to custody settings and personal interaction with known criminals.29

5.16 It was further stated, with respect to youth custodial officers:

The CHAIR: What is your view about the application of part II B loss-of-confidence provisions to prison and youth custodial officers under the bill, having regard to any comparisons between police and prison and youth custodial officers?

Mr BROWN: I do not have a detailed understanding of the prison system, but I have a somewhat contemporary view from a distant observer. I see a number of similarities in the operating environment that our police officers work within that happens in the corrective services environment. There are certainly some parallels in the risk that faces those officers in the course of their work, particularly in regards to custody settings and personal interaction with known criminals. So my broad statement is I see those parallels making the loss-of-confidence process, from my view, quite open to further exploration and use in the corrective services environment.30

27 Mr James McMahon, Commissioner for Corrective Services, Transcript of Evidence, 2 October 2014, p5.
28 Ibid, p2.
29 Mr Stephen Brown, Acting Commissioner of Police, WA Police, Transcript of Evidence, 7 October 2014, p3.
30 Mr Steven Brown, Acting Commissioner, Western Australia Police, Transcript of Evidence, 7 October 2014, p3.
5.17 The IRC has observed that the prison service operates “under a paramilitary regime within the ranks of prison officers”.31

5.18 By contrast, evidence was received by the Committee from some witnesses proposing differences between custodial officers and police officers.

5.19 In its submission, the Western Australian Prison Officers’ Union stated:

> Police officers are required to deal with members of the public in a variety of circumstances not always under the control of the Commissioner of Police. They are in effect, always on duty. Prison officers are not open to such a breadth of experience however. They will typically only have authority over prisoners in a highly regulated environment. They are always under surveillance in the workplace.32

5.20 In evidence to the Committee, the Western Australian Prison Officers’ Union further stated:

> 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.33

> Police may enter Prisons and assume the responsibilities of Prison Officers on the invitation of a Prison Officer or CEO but Prison Officers have no power over members of the public not in a Prison.34

5.21 In its submission, the Community & Public Sector Union/Civil Service Association of WA stated that, regarding youth custodial officers:

31 Prison Officers’ Union of Workers v The Minister for Corrective Services (2013) WAIRC 00706 at paragraph 43 per Commissioner SJ Kenner.

32 Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 8.4.

33 Mr Andrew Smith, Secretary, Western Australian Prison Officers’ Union, Transcript of Evidence, 2 October 2014, p8.

34 Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 8.4.
YCOs are employees of the Commissioner for Corrections and are not officers of the Crown, like Police officers. They do not exercise powers of an independent statutory officer.\textsuperscript{35}

5.22 The Committee also received evidence from the Department that youth custodial officers are never armed.\textsuperscript{36}

5.23 Some witnesses sought to draw comparisons between custodial officers and public servants, as follows.

\begin{quote}
Mr Millman: 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.
\end{quote}

... 

\begin{quote}
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.\textsuperscript{37}
\end{quote}

5.24 The response from the Department was as follows.

\begin{quote}
Mr McMahon: Maybe volatility of environment is point one when it comes to the difference between a teacher, and I think point two is decision cycle, judgement. I have to talk about youth custodial officers too, but prison officers, their decision cycle ......we have a term “dynamic security”. So, the ability to talk someone down, you cannot go and ask your principal for advice; you have to think on your feet.
\end{quote}

... 

\textsuperscript{35} Submission No 4 from the Community & Public Sector Union/Civil Service Association of WA, 25 September 2014, p2.

\textsuperscript{36} See Mr James McMahon, Commissioner for Corrective Services, Department of Corrective Services, \textit{Transcript of Evidence}, 2 October 2014, p6.

\textsuperscript{37} Mr Simon Millman, Practice Group Leader, Industrial Law, Slater and Gordon Lawyers, \textit{Transcript of Evidence}, 2 October 2014, pp7-8.
But could I put to you the difference with a teacher is the level of force and how quickly it escalates and the decision cycle to escalation....

...

Then you have got closed environments. You have people with no hope—they think they have no hope. So that environment, it is severe at any level compared to a teacher, and I think the parameters and the tools we have to work in that environment, they are more severe because of the severe nature of what it is.\(^{38}\)

Committee comment

5.25 In considering this issue and balancing the competing factors, in addition to the evidence of witnesses, the Committee notes as follows:

- the nature of a custodial officer’s job means that the community has a right to expect the highest levels of integrity, honesty, competence, performance and conduct from people holding this position;

- there is a need for a high degree of trust and confidence between individual custodial officers as well as the Commissioner due to the extremely volatile nature of their working environment;

- the oaths taken by police and custodial officers differ in several respects, with police charged with keeping Her Majesty’s peace and prison officers charged with maintaining the security of the prison in which they serve.\(^{39}\) It was noted that not all public servants swear an oath;

- there are some differences between police and custodial officers in terms of their interactions with the public and the environment in which they work.

5.26 Accordingly, the Committee formed the view that the question about whether the extent of similarities between the roles of police and custodial officers justify loss of confidence provisions in the Bill is a matter about which reasonable minds may differ.

\(^{38}\) Mr James McMahon, Commissioner for Corrective Services, Department of Corrective Services, Transcript of Evidence, 2 October 2014, p5.

\(^{39}\) See section 13 of the Prisons Act 1981 and section 10 of the Police Act 1892.
Comparisons between the Bill and Part IIB of the Police Act 1892

5.27 The Minister stated in the Second Reading Speech that:

The loss of confidence provisions in the Bill mirror section 8 and Part IIB of the Western Australian Police Act 1982.\(^{40}\)

5.28 The Committee notes, however, the following four differences between the Bill and Part IIB of the Police Act 1892 for the attention of the Legislative Council:

- the abrogation of the privilege against self-incrimination is not replicated in Part IIB of the Police Act 1892;
- there is no equivalent provision in the Police Act 1892 to clause 7, proposed new section 101(3) in the Bill providing that the Commissioner may conduct any necessary investigation to determine suitability to continue;
- there is no equivalent provision in the Police Act 1892 to clause 7, proposed new section 106(6) of the Bill restricting the right of appeal from a removal decision to that provided for in the section, namely, an appeal to the IRC; and
- the equivalent provision in the Police Act 1892 to clause 7, proposed new section 110J(1)(b), Section 33Y, only provides for the power to stand down a police officer “on full pay” whereas in the Bill the wording is “with or without pay”.

5.29 The Committee notes the following evidence and information which may assist the consideration of these differences.

Self-incrimination

5.30 Regulation 603 of the Police Force Regulations 1979 provides:

603. Lawful order not to be disobeyed

A member shall not disobey a lawful order and shall not, without good and sufficient cause, fail to carry out a lawful order.

5.31 The WA Police Union stated in its evidence as follows.

\(^{40}\) Hon Michael Mischin MLC, Attorney General, Parliamentary Debates (Hansard), 1 April 2014, pp1789.
Mr Tilbury: In order to compel police officers to answer questions, they are given an order pursuant to regulation 603 of the Police Force Regulations. Regulation 603 provides that

A member ... shall not disobey a lawful order and shall not, without good and sufficient cause, fail to carry out a lawful order.

Pursuant to regulation 603, police officers are ordered to answer questions and can only refuse if they have good and sufficient cause. In our view, it is telling that Parliament has not seen fit to expressly provide in the Police Act that a police officer must answer questions; rather, Parliament has deemed that police officers must follow orders.

The CHAIR: It is interesting that “good and sufficient” phrasing. Is the effect of this an imposition of a higher standard on prison officers than police officers?

Mr Tilbury: Yes. Clearly, the bill seeks to place a heavier onus on custodial officers than police officers.41

5.32 Western Australia Police stated in its evidence as follows.

Mr ADAMS: WA police officers must answer questions asked to them in respect to allegations of unprofessional conduct. Regulation 603 of the Police Force Regulations says that a police officer must follow a lawful order. There has been a court ruling that, under 603, that lawful order includes the answering of questions related to their duty; and, as such, a police officer does not have an ability not to answer. If they did not answer, it is likely that they would be subject to the LOC [loss of confidence] provisions that we are talking about here today.42

5.33 In Baff v NSW Commissioner of Police the New South Wales Supreme Court held that the privilege against self-incrimination was not abrogated by the equivalent to Regulation 603 in the Police Regulations 2008 (NSW). The Court held:

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41 Mr George Tilbury, President, WA Police Union, Transcript of Evidence, 2 October 2014, pp3-4.

42 Mr Allan Adams, Acting Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, pp5-6.
The plaintiff’s assertion of the privilege does not prevent the Commissioner taking action on the basis of the evidence he has been able to collect from other sources in relation to the incident. The Commissioner is not, however, entitled (sic) take any action against the plaintiff by reason of his refusal to answer questions about the incident since his refusal amounts to the exercise of a right which has not been abrogated. Any order or direction requiring him to answer such questions would not be a lawful order. Nor is the Commissioner entitled to draw inferences adverse to the plaintiff by reason of his exercise of the privilege. 43

Although he or his delegate are entitled to ask the plaintiff any question, the Commissioner is not entitled to direct the plaintiff to answer a question once the privilege has been claimed. On the basis of my construction of the Act and Regulations, the plaintiff has available to him the privilege against self-incrimination. Once it is claimed, any order directing him to answer would not be a lawful order since it would amount to a breach of the privilege. Since the plaintiff has undertaken only to obey lawful orders, he would not be in breach of the order or his undertaking, if he refused to answer a question once he had claimed the privilege. 44

5.34 The WA Police Union agrees with this decision, 45 while Western Australia Police have stated that it is of interest to Western Australia but not binding. 46

Clause 7, proposed new section 101(3) of the Bill

5.35 The fact there is no equivalent provision in the Police Act 1892 to clause 7, proposed new section 101(3) in the Bill is explained by the evidence set out in section 9 below.

Restriction of right of appeal not in Part IIB

5.36 The fact that there is no equivalent provision in the Police Act 1892 to clause 7, proposed new subsection 106(6) of the Bill restricting the right of appeal from a removal decision can be explained by the Department’s

43  [2013] NSWSC 1205 at paragraph 116, per Adamson J.
44  Ibid, at paragraph 118, per Adamson J.
45  Submission No 6 from the WA Police Union, 30 September 2014, pp1-2.
46  Mr Allan Adams, Acting Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, p6.
confirmation that clause 7, proposed new subsection 106(6) is a new provision that is not reflected in Part IIB of the Police Act 1892.47

Standing down on full pay/with or without pay

5.37 The Committee considered why the terms of section 33Y of the Part IIB of the Police Act 1892 were different to clause 7, proposed new subsection 110J(1)(b) in that section 33Y only provides for the power to stand down a police officer “on full pay” whereas in clause 7 proposed new subsection 110J(1)(b) the wording is “with or without pay”.

5.38 Western Australia Police explained 33Y of the Police Act 1892 as follows.

The CHAIR: Why does section 33Y(1)(b) of the Police Act provide for standing down on full pay rather than full, partial or no pay?

Mr ADAMS: The information on hand, again, suggests that that was negotiation by the WA Police Union on behalf of their members at the time of the drafting of the legislation.48

5.39 The Committee further notes that:

- currently, section 105(1)(a) of the Prison Act 1981 provides that a superintendent may suspend a prison officer from duty on full, partial or without pay and other entitlements where a charge brought against them cannot be adequately dealt with by them and is forwarded to the Commissioner for consideration; and

- section 82 of the PSMA provides that the employing authority may suspend an employee on full, partial or no pay if a decision has been made to initiate disciplinary proceedings against them or charge them with having committed a serious offence.

5.40 The Department has explained that “with pay” in clause 7, proposed new subsection 110J(1)(b) is meant to include partial pay.49

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47 Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 16 October 2014.
48 Mr Allan Adams, Acting Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, p15.
49 Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 9 October 2014.
6 APPLICATION OF PART 5 OF THE PUBLIC SECTOR MANAGEMENT ACT 1994

Generally

6.1 Part 5 of the PSMA contains disciplinary and substandard performance processes for public service officers and any other prescribed employees or classes of employees. Such processes provide for a range of responses to conduct that is substandard or constitutes a breach of discipline, including improvement action; a reduction in classification level; the withholding of remuneration; a fine; a reprimand and dismissal.

6.2 Section 76(1) of the PSMA provides:

76. Application and effect of Part 5

(1) Subject to subsections (3) and (4), this Part applies to and in relation to —

(a) all public service officers and ministerial officers; and

(b) such other employees, or members of such other class of employees, as are or is prescribed for the purposes of this section.

6.3 As stated above, the Bill, for the purposes of section 76(1)(b) of the PSMA:

- prescribes prison officers; and
- provides that regulations may prescribe youth custodial officers.

Evidence considered

6.4 The majority of witnesses who gave evidence to the Committee supported the application of Part 5 to custodial officers. The Committee received the following evidence:

- According to the Western Australian Prison Officers’ Union:
  a) Most other states apply processes that are akin to public sector management.\(^{50}\)
  b) There are systems and safeguards in place to protect a custodial officer through the PSMA system.\(^{51}\)

\(^{50}\) Mr Andrew Smith, Acting Secretary, Western Australian Prison Officers’ Union, Transcript of Evidence, 2 October 2014, p4.
c) If the current system was not to be maintained, there exists a well-established, procedurally fair and reasonable alternative under Part 5 of the PSMA.\(^{52}\)

d) The role of the prison officer is more akin to that of a public servant and this makes the PSMA process appropriate.\(^{53}\)

- According to the Department, the alignment with the PSMA will enable performance improvement processes to be utilised as opposed to having to use a disciplinary process.\(^{54}\)

- According to the Public Sector Commission, the application of the provisions of Part 5 of the PSMA would provide a more contemporary, flexible and appropriate disciplinary framework.\(^{55}\)

6.5 The Community & Public Sector Union/Civil Service Association of WA was, however, not supportive of the application of PSMA to youth custodial officers. It pointed out that the investigation process under the current *Young Offenders Act 1994* is more rigorous than under the PSMA. For example, it pointed to certain rights, such as cross examination and re-examination, given to youth custodial officers under the *Young Offenders Regulations 1995*, which do not exist under Part 5 of the PSMA.

*Committee comment*

6.6 The Committee recognises the benefits of a standardised disciplinary process applying across the Western Australian public sector in terms of efficiency and equal application. In that regard, the Committee notes the finding of the Legislative Assembly Public Accounts Committee referring to Commissioner’s Instruction No.3 (dealing with general discipline):

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51 Mr Andrew Smith, Acting Secretary, Western Australian Prison Officers’ Union, *Transcript of Evidence*, 2 October 2014, p12.

52 Western Australian Prison Officers’ Union, *Written response to line of indicative questions*, 2 October 2014, paragraph 1.6. See also Mr Simon Millman, Practice Group Leader, Industrial Law, Slater and Gordon Lawyers, *Transcript of Evidence*, 2 October 2014, p7, where he states: “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.”


54 Mr James McMahon, Commissioner for Corrective Services, Department of Corrective Services, *Transcript of Evidence*, 2 October 2014, p2.

55 Submission No 1 from Mr MC Wauchope, Public Sector Commissioner, 24 September 2014, p3.
Finding 13

Standardising the procedural requirements in Commissioner’s Instruction No. 3: Discipline – general, so that they also apply to disciplinary proceedings outside the current remit of the Public Sector Management Act 1994, would promote efficiency by encouraging the development of a more uniform disciplinary regime.\(^{56}\)

6.7 Given:

- the wide array of approaches to substandard performance and breaches of discipline available under the PSMA, enabling a flexible approach by employing authorities;
- the fact such approaches are already available to a number of public sector employees; and
- the preponderance of evidence received in favour of its application,

the Committee supports the application of Part 5 of the PSMA to custodial officers and supports that part of the Second Reading Speech which states:

*The proposed amendments will enhance consistency on performance improvement and performance management within the Department and align it with the rest of the public sector.*\(^{57}\)

Delegation of legislative making power

Generally

6.8 As stated above, the Bill provides that Part 5 of the PSMA may be prescribed for youth custodial officers by regulation.

6.9 This raises the fundamental legislative principle that legislative power should only be delegated in appropriate cases and to appropriate persons.\(^{58}\)

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\(^{57}\) Hon Michael Mischin MLC, Attorney-General, *Parliamentary Debates (Hansard)*, 1 April 2014, pp.1789.

Evidence considered

6.10 The Department said the rationale for prescribing Part 5 of the PSMA in the Bill for prison officers and by regulation for youth custodial officers is to reflect how the Acts currently deal with disciplinary procedures. This is provided for in the Prisons Act 1981 for prison officers but may be set out in regulations for youth custodial officers as stated in section 11(1b)(b) of the Young Offenders Act 1994, which provides:

\[(1b) \text{The custodial officers appointed under subsection (1a)(a) } \]

\[\text{—}\]

\[(b) \text{in prescribed circumstances, may be subject to such disciplinary procedures as are set out in the regulations.}\]

6.11 The Community & Public Sector Union/Civil Service Association of WA outlined a risk associated with the prescription of youth custodial officers for the purposes of section 76 of the PSMA being undertaken by regulation rather than under the Bill, as follows.

Proposed clause 14(1C) purports to amend s. 11 YO Act to bring JCOs within the coverage of the PSM Act by regulation. If there are no regulations operating at the time that the loss of confidence provisions came into force, then JCOs would not have the protection of the PSM Act because their current disciplinary regime would also have been deleted. During the interim JCOs would be at the mercy of Departmental policy.

If YCOs were to come under the PSM Act immediately, s. 82 permits the employing authority to suspend an employee on full pay, partial pay or without pay. The most common suspension is suspension on pay because s.78(2) PSM Act provides a right of appeal for suspension on partial pay or without pay; and not suspension on full pay. Thus the requirements for regulating suspensions in the Commissioner's Instructions and Discipline Guidelines are capable of being circumvented. The requirements strive to limit suspension to the following reasons:

a) employee/public safety; or

59 Department of Corrective Services, Answers to Questions on Notice, 7 October 2014, p8.
b) the integrity of evidence relevant to the disciplinary matter; or

c) the operations of the organisation; or

d) the investigation of the disciplinary matter.

There are no criteria in the Bill specifying how the employing authority would exercise its power to stand JCOs down for disciplinary reasons unlike the PSM Act and the Commissioner's Instructions and Guidelines.

The better option is for Parliament, if it is intended, is to amend the Bill by declaring expressly in the Bill that JCOs are subject to Part 5 PSM, including s.39 termination on the grounds of ill-health. This option would obviate the need for a loss of confidence regime.\(^\text{60}\)

6.12 On raising this matter with the Minister for Corrective Services, the Committee was informed as follows:

As you may be aware, the Department is currently reviewing the Young Offenders Act 1994. Therefore, for timeliness purposes I recommend that the public sector disciplinary procedures for youth custodial officers are prescribed in the regulations, as proposed, with the intention of transferring them into the Act when the Young Offenders Act 1994 legislation is amended.\(^\text{61}\)

Committee comment

6.13 The Committee is satisfied from the response of the Minister for Corrective Services that the prescription of Part 5 of the PSMA will be inserted into the Young Offenders Act 1994 when it is amended following its review.

7 APPLICATION OF THE LOSS OF CONFIDENCE PROCESS

Justification for the application

7.1 The Committee received a variety of views from witnesses on the justification for the introduction of a power for the Commissioner to remove a custodial officer for loss of confidence.

\(^\text{60}\) Letter from Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association, 7 October 2014, p3.

\(^\text{61}\) Letter from Hon Joe Francis MLA, Minister for Corrective Services, 29 October 2014, pp1-2.
7.2 The Department gave the following evidence for the introduction of the removal power:

Mr McMahon:...the environment, as you know, is a very complex one; I have been in front of these committees before and I have explained the complexity so I will not go through the detail. But we are dealing with people who have a range of issues, all in a fairly confined, closed environment. The second point to that is that in that environment we need to use the use of force, so part of the amendments here are to do with making sure that we have parameters around that use of force. That is important. Also, there is the deprivation of liberty. So the standards and the tools we need, which is what this amendment will enhance, are about those two major issues. My background is 24 years in the military, and I make the point that when I am using force in the military it is at the end of lethal force; we want that extra scrutiny so that we as a body are held accountable because we need to exercise the highest standards. The first point is about the environment we work in, and the use of force particularly and the deprivation of liberty. We need a catch-all set of amendments that allow us to exercise that in the best possible manner for the good of the prison community—I mean all the stakeholders; I will not go through them.

If I go back through the loss-of-confidence provisions, it is about half a per cent of people that really, unfortunately, may have moved into the integrity-related issues. It is half a per cent. But it actually supports 99.5 per cent of people who are very proud of the uniform they wear, whether it is a youth or an adult.62

7.3 The Minister for Corrective Services also submitted to the Committee:

As a managerial tool, removal due to loss of confidence serves to promote integrity of the workforce by enabling prompt removal of unsuitable officers. Removal due to loss of confidence is already being practised by the Western Australian Police and has proved to be effective.

62 Mr James McMahon, Commissioner for Corrective Services, Transcript of Evidence, 2 October 2014, Transcript of Evidence, pp1-3.
In order for the Department to adequately safeguard the community, staff and offenders in its custody, the legislative amendments as proposed are required.\(^{63}\)

Removal due to loss of confidence is not based on the finding of guilt of an officer but rather on the chief executive officer's appraisal of the officer. Such managerial intervention will enable prompt removal of an officer if the chief executive officer no longer has confidence in the officer to remain in his/her employment.\(^{64}\)

7.4 The Public Sector Commissioner was supportive of the removal power as outlined in his submission to the Committee:

> Given the nature of the services provided by prison officers and the power they have over the members of the public that they serve, as well as the high standards of integrity and accountability that are expected of them in the discharge of those powers, I consider that it is open to Government and the Parliament to determine that the public interest lies in the Commissioner for Corrective Services being afforded the power to remove those officers in whom he has lost confidence with regard to their suitability as a prison officer.\(^{65}\)

7.5 The Corruption and Crime Commission was also supportive of the removal power as outlined in its submission to the Committee.

> The CLODA Bill amendments provide a mechanism for the CEO to either initiate disciplinary proceedings under Part 5 of the PSMA or to remove a DCS officer by terminating his or her employment based on a loss of confidence in the officer's suitability to continue in that role. These provisions will improve the means by which DCS can deal with an officer's substandard performance or misconduct and as such is likely to have a positive impact by reducing the incidence of misconduct at an organisational level.\(^{66}\)

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\(^{63}\) Submission No 7 from Hon Joe Francis MLA, Minister for Corrective Services, 25 September 2014, p1.

\(^{64}\) Ibid, p4.

\(^{65}\) Submission No 1 from Mr MC Wauchope, Public Sector Commissioner, 24 September 2014, p4.

\(^{66}\) Submission No 8 from the Corruption and Crime Commission, 7 October 2014, p4.
7.6 As noted earlier, the evidence provided by Western Australia Police was as follows:

Mr BROWN: I do not have a detailed understanding of the prison system, but I have a somewhat contemporary view from a distant observer. I see a number of similarities in the operating environment that our police officers work within that happens in the corrective services environment. There are certainly some parallels in the risk that faces those officers in the course of their work, particularly in regards to custody settings and personal interaction with known criminals. So my broad statement is I see those parallels making the loss-of-confidence process, from my view, quite open to further exploration and use in the corrective services environment.67

7.7 The Western Australian Prison Officers’ Union presented an alternative point of view, regarding the introduction of the removal power as a “radical departure to the discipline of Prison Officers which is not justified by the empirical evidence.”68 It observed that:

Mr Smith: 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.69

7.8 Unions WA and the Community & Public Sector Union/Civil Service Association of WA held the same view, stating:

Ms Hammat: Our primary submission is that in respect of prison officers and youth custodial officers, we do not believe that there is adequate evidence that the system is broken and in need of fundamental reform.70

Ms Walkington: There has been no evidence provided in the consideration of this bill concerning why the disciplinary

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67 Mr Stephen Brown, Acting Commissioner of Police, Western Australia Police, Transcript of Evidence, 7 October 2014, p3.
68 Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 11.
69 Mr Andrew Smith, Secretary, Western Australian Prison Officers’ Union, Transcript of Evidence, 2 October 2014, p3.
70 Ms Meredith Hammat, Secretary, Unions WA, Transcript of Evidence, 2 October 2014, p1.
provisions governing youth custodial officers need to be addressed, or that there are any gaps in that process.\(^{71}\)

7.9 Additionally, the Community & Public Sector Union/Civil Service Association of WA is of the view that the removal power contravenes International Labour Organisation obligations. In its submission to the Committee, it stated:

*The power to dismiss where the Commissioner of Corrections loses confidence in an officer's ability to perform their duties contradicts the procedural protections afforded by the Convention and opportunity to respond as well as the substantive requirement that there be a valid reason for dismissal related to capacity or conduct as opposed to a subjective loss of confidence.*\(^{72}\)

7.10 The majority of the Committee is of the view that the loss of confidence removal power proposed by the Bill is justified based on the evidence received by the Committee.

7.11 While the whole Committee formed the general view that the validity of the comparison between the professional duties, responsibilities, expectations and obligations carried out or borne by police officers on the one hand and prison officers on the other is a matter on which reasonable minds may differ, a minority of the Committee was not willing to accept that the similarities established sufficient grounds to warrant the extension of the loss of confidence provisions currently applying to police officers to prison officers. This minority view was based on the observation that while both police and prison offers are required to take an oath before assuming office (as are a number of other office holders like court officers and members of Parliament), the oath sworn by police officers obliges them to “cause Her Majesty’s peace to be kept and preserved, and...prevent ...all offences against the same”. This is an extremely broad injunction, without any obvious limitation on the scope of that obligation. A prison officer, by contrast, swears specifically to serve the State (not the monarch) and “maintain the security of every prison in which I serve and the security of the prisoners and the officers employed at the prison” and to “uphold the Prisons Act 1981”. While such an injunction may well mean that a demonstrated breach of the oath is grounds for terminating employment, a minority of the Committee found that prison officers do not have placed upon them the effectively limitless, 24/7

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\(^{71}\) Ms Toni Walkington, Branch Secretary, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 October 2014, p3.

\(^{72}\) Submission No 4 from Community & Public Sector Union/Civil Service Association of WA, 25 September 2014, p9.
obligations imposed on police officers and that, therefore, they are more appropriately disciplined by the same measures applying to the majority of public service officers rather than by the exceptional measures constituted by loss of confidence provisions. Further, a minority of the Committee found compelling the evidence of employee representative organisations that identified flaws and malfunctions of existing statutory provisions for disciplining prison officers were largely attributable to the lack of resources available to ensure the efficient functioning of those provisions. A minority of the Committee therefore found that the existing provisions of the Act, particularly if amended to apply Part 5 of the PSMA to prison officers, are adequate to deal with prison officers whose behaviour breaches established professional standards.

7.12 Accordingly, a minority of the Committee recommends as follows:

**Minority Recommendation 1:**

A minority of the Committee recommends that:

**All clauses relating to the application of loss of confidence provisions be deleted from the Bill.**

**Broad discretionary power in clause 7, proposed new section 100**

7.13 This proposed new section provides:

**100. Application of Subdivision**

(1) This Subdivision applies if —

(a) the chief executive officer does not have confidence in a prison officer’s suitability to continue as a prison officer; and

(b) the chief executive officer —

(i) decides not to take, or continue to take, disciplinary proceedings under the Public Sector Management Act 1994 Part 5 against a prison officer; and

(ii) decides instead to take removal action in relation to the prison officer; and
(c) in the case of a prison officer engaged under section 13(1), the Minister consents to the taking of removal action in relation to the prison officer.

(2) This Subdivision applies despite the Public Sector Management Act 1994 section 76(2).

7.14 The Committee notes the terms of this provision are very broad, with no criteria beyond the definition of “suitability to continue as a prison officer” which is defined in clause 7, proposed new section 99 as follows:

**suitability to continue as a prison officer** means suitability to continue as a prison officer having regard to the officer’s integrity, honesty, competence, performance or conduct;

7.15 This replicates what is stated in section 33L(1) of the Police Act 1892, which states:

**33L. Notice of loss of confidence to be given before removal action is taken**

(1) If the Commissioner of Police does not have confidence in a member’s suitability to continue as a member, having regard to the member’s integrity, honesty, competence, performance or conduct, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member’s suitability to continue as a member.

7.16 Beyond this definition, the Bill does not provide guidance as to the exercise of the discretion of the Commissioner on whether to apply disciplinary proceedings under Part 5 of the PSMA or removal action. Indeed, the content of this definition does not greatly assist in setting apart the basis for a removal action from disciplinary action under the PSMA, either of which can result in dismissial.

**General principles in exercising discretionary powers**

7.17 The Australian Administrative Law Policy Guide states that administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear.\(^3\)

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7.18 The Committee notes the following view of the Western Australian Ombudsman regarding the exercise of discretionary powers.

In exercising discretionary powers, decision-makers should have regard to any specific requirements as well as satisfy general administrative law requirements. Some of the general principles relevant to the exercise of discretion are:

• Acting in good faith and for a proper purpose;

• Complying with legislative procedures;

• Considering only relevant considerations and ignoring irrelevant ones;

• Acting reasonably and on reasonable grounds;

• Making decisions based on supporting evidence;

• Giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance;

• Giving proper consideration to the merits of the case;

• Providing the person affected by the decision with procedural fairness; and

• Exercising the discretion independently and not under the dictation of a third person or body.

A failure to act within the power provided or to comply with general administrative law principles can result in a review and overturning of a decision.  

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7.19 The Committee sought advice from the Department on this matter as follows:

**The CHAIR:** Thank you. Clause 7, proposed new section 100(1), and clause 16, proposed new section 11CB, are drafted very broadly, with no criteria to guide the exercise of the discretion to take removal action rather than disciplinary proceedings under the Public Sector Management Act 1994 beyond the definition of “suitability to continue as a prison officer”. In what circumstances would this discretion be exercised, and would you support the insertion of clear criteria in the bill to guide the exercise of this discretion?

**Mr Fong:** The proposed new sections are broadly worded so as to give the commissioner a broad discretion to remove a prison officer or youth custodial officer. However, the bill already spells out some criteria. In considering the suitability of an officer, the commissioner must have regard to five criteria. They are integrity, honesty, competence, performance, and officers’ conduct. So they are the criteria.

7.20 The Committee sought advice from Ms Maria Saraceni, Perth Industrial Relations Barrister, which was as follows:

**Ms Saraceni:**…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:** 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

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75 Mr Robert Fong, Team Leader, Policy and Legislation, Department of Corrective Services, *Transcript of Evidence*, 2 October 2014, p7.
understanding, I would think, would be much wider than those five pillars.\textsuperscript{76}

7.21 The evidence of the WA Police Union regarding written criteria to govern the exercise of the discretion was as follows:

**Mr Tilbury**: We are unaware of any written criteria that the Commissioner of Police uses to invoke the loss-of-confidence processes as opposed to other disciplinary processes. We understand that each individual case is judged on its merits.\textsuperscript{77}

7.22 The evidence of the Western Australia Police regarding written criteria to govern the exercise of the discretion was as follows:

**Mr ADAMS**: As stated earlier, WA Police has moved away from the disciplinary punitive model in the section 23 process. The commissioner’s confidence in a member relates to the member’s integrity, honesty, competence, performance and conduct as stipulated in section 33L(1) of the Police Act. Generally, the behaviours that trigger the LOC process are broken into two categories. You have that serious unprofessional conduct and I suppose I could probably best articulate it as a catastrophic incident—a police officer being charged with a sex offence or a drug-related offence or a serious assault. That isolated incident by itself could be worthy of triggering the LOC process. The other half of the equation is that constant unprofessional conduct, probably at a lower level of seriousness, but despite the efforts to train, develop and guide an individual, they have not taken up the cudgel in that respect. Obviously, at a point in time there will be a behaviour that the agency will say, “We’ve had enough and we’re going to put you in front of the commissioner for consideration, that he lost his confidence in you.” Generally, that will not occur until the person has been given an assistant commissioner’s warning notice. Essentially, when that is delivered, the individual understands they have no credits left in the bank and they are expected to walk a very fine line in terms of their professional conduct. So I think that

\textsuperscript{76} Ms Maria Saraceni, Barrister, *Transcript of Evidence*, 2 October 2014, p5-6.

\textsuperscript{77} Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 2 October 2014, p6.
The Committee also received from Western Australia Police a copy of their ‘Managerial Intervention Model’ which sets out the directions investigations take depending on their severity and the resulting decision-making process. This is attached as Appendix 3.

When the Department was asked whether they planned to develop similar documentation, it informed the Committee that documented procedures are in the process of being developed and are yet to be finalised.

The Committee notes the WA Police have well established and publicly available guidelines and criteria and these would appear to provide a good model for the Department to adapt.

**Medically unfit custodial officers**

The Committee’s attention was drawn to concerns about whether a custodial officer who was medically unfit for duty could be subject to loss of confidence provisions.

The evidence provided by the Department on this matter was as follows.

**Hon DONNA FARAGHER:** We received some evidence today from the police union with respect to loss-of-confidence provisions and that they are also used with respect to police who have a medical condition and, for whatever reason, it might be that they utilise those provisions to terminate or dismiss that officer. They have put to us that that is unfair and that they would be going through the same processes as someone who may have been acting illegally. I have some sympathy for that, I must say, and the committee does as well.

**Mr McMahon:** Absolutely; as do I.
Hon DONNA FARAGHER: With respect to the provisions within this bill, in the case of a prison officer who for medical reasons, whatever that may be, is no longer able to perform the duty of prison officer, are there provisions within the current act that deal with those circumstances? I am interested to know that because that is an issue that has been raised with respect to the police and the use of the loss-of-confidence provisions they have.

Mr Norris: We have a process that I am not completely familiar with; however, it is a medical boarding process. There is an existing framework for officers who do not meet the criteria in terms of their operational readiness to effect their duties. I can say that there is no intent to utilise these provisions in that manner.  

7.28 Ms Maria Saraceni also gave evidence that “there are other ways of dealing with persons who are not medically fit to do their job.”

7.29 Despite the advice from the Department, the Committee noted the Explanatory Memorandum states (emphasis added):

The determination of suitability is a managerial decision, and is based on the prison officer’s integrity, honesty, competence, performance or conduct (refer definition of suitability in section 99 above). These considerations are sufficiently broad to ensure that the CEO retains a wide managerial discretion to remove prison officers where their suitability is in question. They are also broad enough to ensure the CEO is able to remove a prison officer who is medically unfit to continue performing the duties of a prison officer.

7.30 The Committee is concerned by this passage in the Explanatory Memorandum given the evidence it has heard as well as the fact that, currently, the discharge of a custodial officer on medical grounds occurs in accordance with regulation 5 of the Prisons Regulations 1982 and regulation 51 of the Young Offenders Regulations 1995. The Committee is of the view it is inappropriate to use a
removal power for loss of confidence in cases where custodial officers are medically unfit.

7.31 On raising this matter with the Minister for Corrective Services, the Committee was informed that the Bill does not intend to override the regulations governing the discharge of a custodial officer on medical grounds.86

7.32 A minority of the Committee found troubling the apparent contradiction between the Second Reading Speech statement that the CEO could use the provisions for removing a medically unfit prison officer and the Department’s assurance that the provisions were not intended to be used for removal of a medically unfit prison officer.

7.33 Accordingly, a minority of the Committee recommends as follows.

**Minority Recommendation 2:**

A minority of the Committee recommends that:

The Minister representing the Minister for Corrective Services provide to the Parliament a clarifying statement confirming that removal power for loss of confidence will not be used in cases where custodial officers are medically unfit.

8  **ABROGATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION**

8.1 The abrogation of the privilege against self-incrimination in the Bill raises the fundamental legislative principle: ‘Does the Bill provide appropriate protection against self-incrimination’.

8.2 The abrogation and other relevant provisions is provided for in clause 7, proposed new subsections 101(4)-(7), which provides:

**101. Removal action**

(4) For the purpose of the investigation the chief executive officer may require the prison officer to do all or any of the following —

86  Letter from Hon Joe Francis MLA, Minister for Corrective Services, 29 October 2014 p2.
(a) provide the chief executive officer with any information or answer any question that the chief executive officer requires;

(b) produce to the chief executive officer any document in the custody or under the control of the prison officer.

(5) The prison officer is not excused from giving information, answering any question or producing a document when required to do so under subsection (4) on the ground that the information, answer or document might —

(a) incriminate the prison officer; or

(b) render the prison officer liable to a disciplinary measure under Division 2 or removal under this Division.

(6) The information, answer or document is not admissible in evidence against the prison officer in any criminal proceedings except in proceedings for an offence under subsection (7).

(7) A prison officer must not, in response to a requirement under subsection (4) —

(a) fail or refuse to provide the required information or answer or produce the required document; or

(b) give information or an answer that is false or misleading in a material particular; or

(c) produce a document that the prison officer knows is false or misleading in a material particular —

(i) without indicating that the document is false or misleading and, to the extent the prison officer can, how the document is false or misleading; and

(ii) if the prison officer has, or can reasonably obtain, the correct information
— without providing the correct information.

Penalty: a fine of $4 000 or 12 months’ imprisonment, or both.

General principles

8.3 The privilege against self-incrimination has, as its source, the common law rule that an individual accused of a criminal offence should not be obliged to incriminate themselves. In Sorby v Commonwealth, Gibbs CJ said:

It has been a firmly established rule of the common law, since the seventeenth century, that no individual can be compelled to incriminate himself (or herself). An individual may refuse to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him (or her) into the peril and possibility of being convicted as a criminal’.

8.4 This general principle has been enshrined in section 24 of the Evidence Act 1906, which provides:

24. Questions tending to crimate

Except as hereinbefore provided, nothing in this Act shall render any person compellable to answer any question tending to crimate himself.

8.5 Sections 8(1)(d) and 11 of the Evidence Act 1906 provide exceptions to this rule, as follows.

8. Accused persons in criminal cases

(1) Except as in this Act it is otherwise provided, every person charged with an offence shall be a competent but not a compellable witness at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person: Provided as follows —

... 

(d) a person charged and being a witness in pursuance of this section may be asked any question

87 (1983) 152 CLR 281 at 288.
in cross-examination, notwithstanding that it would
tend to criminate him as to the offence charged;

11. Court may compel answer to incriminating question

(1) Whenever in any proceeding any person called as a
witness, or required to answer any interrogatory, declines
to answer any question or interrogatory on the ground that
his answer will criminate or tend to criminate him, the
judge may, if it appears to him expedient for the ends of
justice that such person should be compelled to answer
such question or interrogatory, tell such person that, if he
answers such question or interrogatory, and other
questions or interrogatories that may be put to him, in a
satisfactory manner, he will grant him the certificate
hereinafter mentioned.

(2) Thereupon such person shall no longer be entitled to
refuse to answer any question or interrogatory on the
ground that his answer will criminate or tend to criminate
him; and thereafter if such person shall have given his
evidence to the satisfaction of the judge, the judge shall
give such person a certificate to the effect that he was
called as a witness or interrogated in the said proceeding
and that his evidence was required for the ends of justice,
and was given to his satisfaction.

8.6 In some circumstances, it has been acknowledged that the authorities may
need information to enable them to carry out their duties to the community.
Thus the privilege against self-incrimination may not be absolute and can be
modified or excluded by legislation to facilitate investigative activities. Also,
it has been recognised that the public benefit from a negation of the privilege
needs to outweigh the resultant harm from its removal.88

8.7 It is further argued that, if, for sufficient reason, the law requires the
abrogation of the privilege against self-incrimination, the law should generally
provide safeguards.89

88 Western Australia, Legislative Council, Standing Committee on Legislation, Report 15,
Criminal Investigations (Exceptional Powers) Fortification Removal Bill 2001, 9 May 2002,
p72.

89 See Queensland Law Reform Commission, The Abrogation of the Privilege Against Self-
Incrimination, Report No 59, December 2004, p63 and 95, accessible at:
8.8 The Committee notes the legislative approach adopted by the Queensland Scrutiny of Legislation Committee has been that a removal of the privilege against self-incrimination may be justified:

- if the matters concerned are matters peculiarly within the knowledge of the persons denied the benefit of the privilege and which it would be difficult or impossible to establish via any alternative evidentiary means;
- the bill prohibits the use of the information obtained in prosecutions against the person;
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any condition such as formally claiming the right.90

8.9 The Committee also notes the Queensland Law Reform Commission has stated that:

\[
\text{abrogation might also be justified where there is an immediate need for information to avoid risks such as danger to human life, serious personal injury or damage to human health, serious damage to property or the environment, or significant economic detriment, or where there is a compelling argument that the information is necessary to prevent further harm from occurring.}^{91}
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Evidence considered

8.10 The Committee received evidence both in favour of and against the abrogation of the privilege against self-incrimination as provided for in the Bill.

8.11 Some of the evidence from employee representative organisations was as follows:

- According to the Western Australian Prison Officers’ Union:

> The power of compulsory examination is unnecessary, and an overreach in relation to the Removal Action. The CEO can

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proceed with justification to termination where the Prison Officer fails to make a candid and thorough disclosure.\footnote{Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 7.8.}

- According to the WA Police Union:

\begin{quote}
It is our respected opinion that in the context of removal action, it is not necessary. Our opinion is based on the premise that it is hard to imagine circumstances in which an individual’s right to a fair and just trial should be abrogated for an investigation which need only prove a loss of confidence, not a finding of fact or guilt.\footnote{Submission No 6 from WA Police Union, 30 September 2014, p1.}
\end{quote}

8.12 The WA Police Union also raised concerns about how any compelled information might be used in any subsequent prosecutions, despite not being admissible in any criminal proceedings.\footnote{Ibid, p2 and Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 7.7, citing \textit{Jason Lee v NSW Crime Commission} [2013] HCA 39, where the issue of ‘direct use immunity’ and ‘derivative use immunity’ was discussed and the potential, under the Bill, for compelled information to lead to further evidence being obtained by other means.}

8.13 The Law Society of Western Australia is opposed to the abrogation of the privilege as provided in the Bill for a number of reasons, including:

- Subsections 101(4) to (7) operate in a way that is contrary to the privilege against self-incrimination, which has come to be regarded not merely a rule of evidence but a substantive right (the nature of a human right as recognised by the High Court in \textit{Environment Protection Authority v Caltex Refining Co Pty Ltd} (1993) 178 CLR 477 at 508).

- The privilege against self-incrimination is consistent with Article 11(1) of the Universal Declaration of Human Rights:

\begin{quote}
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
\end{quote}

- Without subsections 101(6) and (7), there would be no failure to accord with human rights and the provisions would be consistent with the duty of good faith and fidelity of an employee implied in the
employment agreement to provide information to the employer. The imposition and breach of this duty could have disciplinary consequences.

- Subsection 101(7)(a) makes a criminal offence of a simple failure to provide information or an answer, whether or not the prison officer has the information or answer.

- Subsection 101(7)(b) makes a criminal offence an act of giving information or an answer which is false or misleading in a material particular whether or not the prison officer has any knowledge that the information or answer is false or misleading.

8.14 Some of the evidence in support of the abrogation can be summarised as follows:

- According to the Minister for Corrective Services, it will assist the expeditious conduct of investigations.

- According to the Department, it is not uncommon for officers to refuse to answer questions during an investigation, thereby hampering those investigations, causing significant delays. This may also result in the investigation being discontinued. It was also argued that a failure to answer a question could place the integrity of the custodial facility in doubt.

8.15 Additionally, in evidence before the Committee, when asked why the only safeguard in the Bill appears to be that the compelled information is not admissible in any other criminal proceedings rather than, also, other disciplinary proceedings, the Department advised as follows.

**Mr Norris:** *Discipline and loss of confidence are two distinct processes. Information gathered under loss-of-confidence abrogation of privilege against self-incrimination will not be used in a Public Sector Management Act discipline process.*

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95 Submission No 2 from the Law Society of Western Australia, 25 September 2014.
96 Submission No 7 from Hon Joe Francis MLA, Minister for Corrective Services, 25 September 2014, p2.
97 Mr Steven Norris, Acting Executive Director, Operational Support, Department of Corrective Services, Transcript of Evidence, 2 October 2014, p8.
98 Mr James McMahon, Commissioner for Corrective Services, Department of Corrective Services, Transcript of Evidence, 2 October 2014, p8.
99 Mr Steven Norris, Acting Executive Director, Operational Support, Department of Corrective Services, Transcript of Evidence, 2 October 2014, p8.
Furthermore, Ms Maria Saraceni gave the following evidence.

**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?
Committee comment

8.17 The Committee appreciates the importance of custodial officers answering questions in matters that may have disciplinary repercussions given the nature of their role outlined above. A failure to do so could, in certain circumstances, raise issues of integrity, which may have serious repercussions for the custodial facility and, potentially, community safety.

8.18 The Committee notes section 9 of the Prisons Act 1981, as noted in Appendix 5, already abrogates the privilege against self-incrimination. This is in circumstances where a person is required to give any information or answer any question as part of an inquiry set up by the Commissioner. However, such compelled information cannot be used in any other proceedings, including any disciplinary proceedings, other than proceedings for failure to give an answer.

8.19 The Committee has surveyed the provisions of some other legislation which abrogate, to various degrees, the privilege against self-incrimination to facilitate investigative activities. These are set out in Appendix 5 for the information of the Legislative Council.

8.20 While the Committee has noted that the Second Reading Speech states:

\[\text{A penalty will be imposed for not producing the required information. Safeguards do apply. Importantly, the compelled information will not be used in any other proceedings and the officer must be advised of the implications of the abrogation, and the relevancy of the required information.}\]

it would appear that the stated intention it not clearly articulated in the Bill.

8.21 The Committee has also taken into consideration the following:

- the Department’s evidence that information obtained under clause 7, proposed new section 101 of the Bill will not be used in disciplinary action under the PSMA;
- concerns expressed in evidence about the use of compelled information by other agencies; and
- the existing safeguards in section 9(4) of the Prisons Act 1981.

\[100\] Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, pp2-3.
8.22 The Committee recognises that custodial officers work in a closed environment, requiring a heightened degree of trust and confidence.

8.23 As such, the majority of the Committee believes it is justified for the abrogation of the privilege against self-incrimination to be extended to removal actions.

8.24 However, noting the minority view at paragraph 8.25 below, to reflect the intent of the Second Reading Speech, the Committee makes the following recommendations:

**Recommendation 1:** The Committee recommends that the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* be amended to reflect the reference in the Second Reading Speech that:

> Importantly, the compelled information will not be used in any other proceedings and the officer must be advised of the implications of the abrogation, and the relevancy of the required information.

**Recommendation 2:** The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council whether information gathered pursuant to clause 7, proposed new subsection 101(4) and clause 16 proposed new subsection 11CC(4) of the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* will be available for use by other agencies and, if so, the method by which it can be used.

8.25 A minority of the Committee found that the privilege against self-incrimination is fundamental to the protection of individual liberty and correctly regarded as a substantive right. It agreed with the Law Society of Western Australia and employee representative organisations that, particularly if a removal power for loss of confidence is available, such abrogation is unjustified and, indeed, unnecessary.

8.26 A minority of the Committee therefore recommends as follows.

**Minority Recommendation 3:**

A minority of the Committee recommends that:

All clauses relating to the abrogation of the privilege against self-incrimination be deleted from the Bill.
8.27 Should these amendments not be made to the Bill, the minority of the Committee join the majority of the Committee to make recommendations 1 and 2 unanimous.

9 OTHER SPECIFIC PROVISIONS CONSIDERED BY THE COMMITTEE

Clause 7, proposed new subsection 101(3)

9.1 This proposed new section provides:

101. Removal action

... (3) The chief executive officer may conduct any necessary investigation to determine a prison officer’s suitability to continue as a prison officer.

Evidence considered

9.2 Employee representative organisations expressed concerns about the appearance of the word ‘may’ rather than ‘shall’, suggesting there is no mandatory requirement to conduct an investigation in a matter which may result in removal for loss of confidence.101

9.3 The Committee sought the advice of the WA Police Union about the equivalent provision in the Police Act 1892 regarding whether investigations always occur before removal action is taken:

The CHAIR: Are there always investigations that take place before removal actions are taken under part IIB?

Mr Tilbury: We are informed and invariably believe that investigations have always taken place prior to removal action being taken.102

9.4 The Department provided the following evidence.

Mr Norris: The word “may” allows the commissioner to decide whether or not to conduct an investigation when presented with a complaint against a prison officer or youth

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101 See Submission No 3 from Unions WA, 25 September 2014, p1; Ms Meredith Hammat, Secretary, Unions WA, Transcript of Evidence, 2 October 2014, p7.

102 Mr George Tilbury, President, WA Police Union, Transcript of Evidence, 2 October 2014, p6.
custodial officer. The discretion is necessary because the bill introduces two options for discipline—the first, Public Sector Management Act discipline, and the second, the loss-of-confidence proceedings for removal. If the commissioner decides to pursue the Public Sector Management Act discipline, then he will not conduct an investigation for loss-of-confidence proceedings. The Police Act 1892 does not contain the Public Sector Management Act discipline, thus there is no need for the Commissioner of Police to exercise that discretion that applies to the Commissioner of Corrective Services.

Hon DONNA FARAGHER: So if it was under the loss-of-confidence provisions, not through the PSMA, would an investigation be held?

Mr Norris: Every allegation would turn on its own set of facts, but, yes, I would agree.

Hon DAVE GRILLS: There was some discussion with regard to the word “may”.

Hon DONNA FARAGHER: That is why I have come back to you on that, because that is a point that has been raised—that it should be “shall”. I understand now the distinction that you have just put. But in the other subset of the non-PSMA side of things, you are saying that there would be an investigation?

Mr Norris: There would be an investigation, yes.

9.5 The Department further stated that the Commissioner needs to have flexibility in deciding whether to conduct a formal investigation as initial inquiries may lead to a decision to adopt PSMA disciplinary processes. For example, a matter may appear serious when it is first raised but this may not be supported by further inquiries. It was confirmed that once it became clear that the matter was, indeed, serious enough to warrant consideration of removal for loss of confidence, an investigation would be undertaken.

9.6 When this issue was posed to Western Australia Police in the context of Part IIB of the Police Act 1892, their evidence was as follows:

103 Mr Steven Norris, Acting Executive Director, Operational Support, Department of Corrective Services, Transcript of Evidence, 2 October 2014, pp7-8. See also Submission No 3 from Unions WA, 25 September 2014, p1.

104 Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 16 October 2014.
Hon DONNA FARAGHER: Taking up that point, and recognising that there are individual circumstances in the way that they deal with them, in the bill that is before us, there is a provision that the commissioner “may”, rather than “shall”, undertake an investigation, and that has been a point of discussion by other witnesses that have appeared before us. I am just interested to know—perhaps it is going back to one of the earlier questions with respect to how often review officers are appointed for inquiries—who makes the decision for an inquiry or an investigation to be undertaken. Is that the assistant commissioner for professional standards? I am just trying to get an understanding of who makes, I suppose, the threshold question as to when an investigation would actually be undertaken.

Mr ADAMS: Pretty well all allegations of police unprofessional conduct are subject to a degree of investigation. That may be at a low-level tabletop resolution. The classic example is someone who shows a bit of bad attitude when they hand out a traffic infringement. That may be dealt with by what is referred to as the ECAT within our police complaints area—unfortunately I do not know what the acronym stands for. They will work with the local supervisor, the person that is aggrieved and the police officer to come to, hopefully, a very short, sharp resolution. That might result in an apology being made to the person that is aggrieved or an agreement to agree to disagree. Obviously, as you walk up the scale of seriousness, as soon as you start heading into neglect of duty, conduct unbecoming and excessive force, there will always be an investigation. The investigation breadth and depth will always alter as it heads up the seriousness scale. Last year the internal affairs unit investigated in excess of 1 300 allegations against police officers. Because the internal affairs unit is not the only investigative body of police officer unprofessional conduct, the districts also have a role to play, and I think they had slightly more allegations that they investigated. I think it was around the 1 500 or 1 600 mark. There will always be a degree of investigation. Obviously, the further up the scale you go, the much more in-depth it will be, but there is always a degree of consideration about what happened, who did what, what do we need to do to prevent this happening again,
and are there some more deep-seated seated policy-related issues within WA Police that need attention.  

Committee comment

9.7 The stated intention there would be an investigation before a removal power was exercised is not clearly provided for in clause 7, proposed new subsection 101(3) or anywhere else in the Bill.

9.8 In assessing the degree of procedural fairness extended to custodial officers in the Bill, the Committee has had regard to the principle that the failure of a primary decision maker to afford procedural fairness is a well established basis of jurisdictional error.  

9.9 Also, while the Committee understands the rationale provided by the Department for the appearance of ‘may’ rather than ‘shall’ in the provision, it is unclear how the threshold question of whether to use PSMA disciplinary processes or removal action will be dealt with if not under section 101(3), given it refers to “any necessary investigation”.

9.10 It is also notable that section 79(5) of the PSMA provides:

79. Substandard performance, definition of and powers as to

... 

(5) If an employee does not admit to his or her employing authority that his or her performance is substandard for the purposes of this section, that employing authority shall, before forming the opinion that the performance of the employee is substandard for those purposes, cause an investigation to be held into whether or not the performance of the employee is substandard.

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105 Mr Allen Adams, Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, pp9-10.

106 In the case of Kirk v Industrial Relations Commission of NSW & Workcover the High Court quashed the conviction of Mr Kirk on a number of grounds, including a failure to conduct the proceedings against him in a satisfactory manner. This included the charges against him failing to identify what measures should have been taken by Mr Kirk to avoid being prosecuted under the Occupational Health and Safety Act 1983 (NSW). One of the most important principles to arise from Kirk was the recognition of the constitutional entrenchment of the supervisory powers of State Supreme Courts over inferior courts and tribunals and the ability for this supervision to correct jurisdictional errors. This jurisdiction becomes enlivened where there is a denial of procedural fairness. See also Justice J Gilmour, Kirk: Newton’s apple fell, a paper presented at the 2010 Conference of the Samuel Griffith Society, 29 August 2010, Perth, p25 and Davis, Malcolm, Implications of the High Court’s Decision in Kirk v Industrial Relations Commission of NSW & Workcover NSW, p7 (accessed at archive.hrnicholls.com.au/archives/vol30/2010davis.pdf on 16 October 2014).
9.11 It would seem reasonable that the Bill require the same before a removal power is exercised.

9.12 The Committee therefore makes the following recommendation:

Recommendation 3: The Committee recommends that, given:

(d) the Commissioner for Corrective Services deals with disciplinary actions under Part 5 of the Public Sector Management Act 1994 and proposed under clause 7 and clause 16 of the Custodial Legislation (Officers Discipline) Amendment Bill 2013;

(e) the requirement under section 79 of the Public Sector Management Act 1994 for an investigation to be held; and

(f) the evidence given to the Committee by Western Australia Police about current practice under Part IIB of the Police Act 1892 and the evidence from the Department for Corrective Services that an investigation would be undertaken if removal for loss of confidence is contemplated,

the Minister representing the Minister for Corrective Services assure the Legislative Council, that, despite the word ‘may’ appearing in clause 7 proposed new subsection 101(3) and clause 16 proposed new subsection 11CC(3), an investigation will be held when removal action is contemplated.

Clause 7, proposed new section 102

Section 102(1)

9.13 This proposed new subsection provides:

102. Notice of loss of confidence

(1) The chief executive officer may give a prison officer a written notice setting out the grounds on which the chief executive officer does not have confidence in the prison officer’s suitability to continue as a prison officer.

9.14 The Committee received evidence from some employee representative organisations regarding their concerns with the appearance of the word ‘may’ rather than ‘shall’ or ‘must’ in this provision. In their view, the provision would allow the Commissioner to have a discretion about whether to give a written notice where it has been decided that removal action will be taken. They argued that this would deny procedural fairness to the custodial officer,
with no guarantee of an opportunity to ascertain the nature or content of allegations made against them.  

9.15 In response to these concerns the Department stated:

There is no discretion for the Commissioner about whether to give a written notice once a decision to commence removal action has been made. The written notice is necessary to commence removal action.

The word ‘may’ in section 102(1) refers to the fact that the Commissioner could either give the prison officer a written notice, indicating a decision to take removal action or take no action or some other actions.

9.16 Both Western Australia Police and the WA Police Union stated they were not aware of any instances where the Commissioner of Police has not provided written notice to a police officer when removal action is taken.

Committee comment

9.17 It would appear that the intent that there be no discretion to give written notice where a decision has been made to remove a custodial officer is not clearly provided for in proposed new subsection 102(1), despite the evidence of the Department.

9.18 The Committee notes that paragraph 1.4 of Commissioner’s Instruction No.3 issued under Part 5 of the PSMA states:

No finding can be made that an employee has committed a breach of discipline unless in the course of the disciplinary process:

a) the employee is notified in writing:

i. of the conduct relating to the possible breach of discipline, in sufficient detail to enable the employee to know what is alleged against him or her, and

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107 See Submission No 6 from WA Police Union, 30 September 2014, pp2-3; Ms Meredith Hammat, Secretary, Unions WA, Transcript of Evidence, p8; Mr George Tilbury, WA Police Union, Transcript of Evidence, pp4-5.

108 Department of Corrective Services, Answers to questions on notice, 7 October 2014.

109 See Mr Allen Adams, Assistant Commissioner, Professional Standards, WA Police, Transcript of Evidence, 7 October 2014, p5; Mr George Tilbury, President, WA Police Union, Transcript of Evidence, 2 October 2014, pp4-5.
ii. that if a breach of discipline is found to have occurred, action may be taken which may range from counselling to dismissal.\textsuperscript{110}

9.19 The Committee respects the principle that a custodial officer should receive a written notice from the Commissioner if removal action against them is contemplated to ensure procedural fairness. This is consistent with the advice of the Department.

9.20 The Committee therefore makes the following recommendation:

\begin{quote}
\textbf{Recommendation 4:} The Committee recommends that the Minister representing the Minister for Corrective Services assure the Legislative Council that once a decision has been made to take removal action against a custodial officer, the provision of a written notice to the custodial officer by the Commissioner for Corrective Services shall not be discretionary.
\end{quote}

\textit{Section 102(2)}

9.21 This proposed new subsection provides:

\textit{102. Notice of loss of confidence}

\begin{quote}
\ldots
\end{quote}

\begin{quote}
(2) The prison officer may make written submissions to the chief executive officer in relation to the notice within the following period (the submission period) —
\end{quote}

\begin{quote}
(a) 21 days after the day on which the notice is given; or
\end{quote}

\begin{quote}
(b) any longer period after that day allowed by the chief executive officer.
\end{quote}

9.22 Employee representative organisations raised similar concerns to those raised regarding clause 7, proposed new subsection 102(1).\textsuperscript{111}

9.23 The Western Australia Police advised the Committee as follows.

\textsuperscript{110} Commissioner’s Instruction No.3 of 8 November 2012 entitled “Discipline — general”, 8 November 2012.

\textsuperscript{111} See Submission No 6 from WA Police Union, 30 September 2014, p3; Mr George Tilbury, President, WA Police Union, \textit{Transcript of Evidence}, 2 October 2014, p5.
The CHAIR: Have there been any circumstances where under section 33L(1), a written notice has not been given where a removal action takes place?

Mr ADAMS: The available data and information on hand strongly indicates that a written notice has on every occasion been given to the subject officer when removal action has taken place.112

9.24 The WA Police Union also provided the following evidence.

The CHAIR: I refer to the second and third paragraphs on page 3. Have there been any instances under the equivalent provision in the Police Act, section 33L(2), where the Commissioner of Police has refused to provide a police officer with an opportunity to make written submissions?

Mr Tilbury: We are not aware of any instances where the Commissioner of Police has refused to provide a police officer with an opportunity to make a written submission. However, we maintain our view that the chief executive officer should be required to provide custodial officers with an opportunity to make a written submission.113

9.25 The Committee is satisfied that clause 7, proposed new subsection 102(2) does not preclude a custodial officer from making written submissions to the Commissioner in relation to the notice of loss of confidence.

Section 102(6)

9.26 This proposed new section provides:

102. Notice of loss of confidence

... (6) Except as provided in the regulations, the chief executive officer must, within 7 days after giving the decision notice —

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112 See Mr Allen Adams, Assistant Commissioner, Professional Standards, Western Australia Police, Transcript of Evidence, 7 October 2014, p5.

113 Mr George Tilbury, President, WA Police Union, Transcript of Evidence, 2 October 2014, p5.
(a) give to the prison officer a copy of any documents that were considered by the chief executive officer in making the decision; and

(b) make available to the prison officer for inspection any other materials that were considered by the chief executive officer in making the decision.

Generally

9.27 To assist the Committee in its consideration of this provision, the Committee requested the following information from the Department:

- how ‘documents’ and ‘other materials’ are distinguished;
- why only inspection is permitted of ‘other materials’;
- the stage in the process at which copies of documents are given to the custodial officer and inspection of materials made available; and
- why there was a need for seven days to give the officer a copy of documents and inspection of materials.

Evidence considered

Distinguishing ‘documents’ and ‘other materials’ and inspection of materials

9.28 On the issue of how ‘documents’ and ‘other materials’ are distinguished, the Department advised the Committee that:

- ‘Other materials’ may include non-documentary evidence such as occurrence books, computer printouts, closed circuit television footage or other physical evidence.\(^\text{114}\)

- Inspection rather than copying of materials is permitted because materials (such as physical evidence) may be unable to be copied or otherwise reproduced and that inspection is provided in the interests of natural justice and procedural fairness.\(^\text{115}\)

\(^\text{114}\) Department of Corrective Services, *Answers to questions on notice*, p1.

\(^\text{115}\) Ibid.
The stage in the process for copying and inspection

9.29 Some employee representative organisations considered that copies of relevant documents and materials should be provided and inspection made available at the time the removal notice is issued. It was argued that this would enable the custodial officer to respond comprehensively to the written notice and may assist in avoiding unnecessary appeals.\(^{117}\) The Committee is working on the understanding that written notice of the removal is always provided to the custodial officer (see recommendation 4 regarding the Committee’s views about the need to clarify this point).

7 days for copying and inspection

9.30 In response to these concerns, the Department stated that documents and other materials may not be immediately available for logistical reasons. Furthermore, it was suggested that persons with an interest in the documents and other materials (e.g. witnesses) may also need to be advised prior to these documents and other materials being made available to the custodial officer.\(^{118}\)

9.31 The Department also advised the Committee that, in relation to the provision of notices pursuant to clause 7, proposed new subsections 102(1) and 102(6):

\[
\text{The normal turn-around time for documents to be made available for inspection is two to three days after the issuance of the notices.}^{119}
\]

The Police Force Regulations 1979

9.32 The Department has stated that the regulations to be made following the passage of the Bill will mainly mirror those in the \textit{Police Force Regulations 1979} relating to removal actions under Part IIB of the \textit{Police Act 1892}.\(^{120}\)

9.33 Regulation 6A05(2)-(4) of the \textit{Police Force Regulations 1979} provides that:

\(^{116}\) Department of Corrective Services, \textit{Answers to questions on notice}, p1.

\(^{117}\) See Submission No 6 from WA Police Union, 30 September 2014, p3; Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 9.3.

\(^{118}\) Department of Corrective Services, \textit{Answers to questions on notice}, p1.

\(^{119}\) Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 15 October 2014.

\(^{120}\) Mr Robert Fong, Team Leader, Policy and Legislation, Department of Corrective Services, \textit{Transcript of Evidence}, 2 October 2014, p3.
(2) As soon as practicable after the Commissioner gives a notice to a member, the Commissioner shall —

(a) provide to the member a copy of any of the following documents relating to the decision to give the notice —

(i) the Summary of Investigation and any supplementary Summary of Investigation;

(ii) the Inspection List and any supplementary Inspection List;

(iii) any document examined and taken into account in deciding to issue the notice; and

(b) make available to the member for inspection any other material examined and taken into account in deciding to issue the notice.

(3) Subregulation (2) does not apply to any document or material that is privileged.

(4) If the Commissioner does not provide a member with a copy of a document or make available to the member for inspection any other material because it is privileged the Commissioner shall advise the member of the ground for the document or material being privileged.

9.34 Regulation 6A09(2)(a) provides that:

(2) The Commissioner is not required to comply with section 33L(5)(b) of the Act —

(a) to the extent that he or she has already provided the member with a copy of the documents or made available to the member for inspection any other materials under this Part;

9.35 The Department further advised the Committee as follows:

The CHAIR: Will the grounds set out in the removal notice refer to documents that have been taken into account as in the case set out in regulation 6A05(2) and 6A06 of the Police Force Regulations 1979?
Mr Fong: Yes, the principles of natural justice and procedural fairness apply to loss of confidence. It is anticipated that the removal notice will include a brief of evidence outlining all evidence relied on by the commissioner.\(^\text{121}\)

9.36 Section 33L(5)(b) of the Police Act 1892 is the equivalent of clause 7, proposed new subsection 102(6) of the Bill and provides that:

**33L. Notice of loss of confidence to be given before removal action is taken**

... (5) If the Commissioner of Police decides to take removal action — ...

(b) except to the extent that the regulations otherwise provide, the Commissioner shall, within 7 days of giving the notice of the decision under subsection (3)(b), provide to the member a copy of any documents and make available to the member for inspection any other materials that were examined and taken into account by the Commissioner in making the decision;

9.37 During the hearings Western Australia Police provided the following evidence:

The CHAIR: With respect to section 33L(5)(b) of the Police Act, how are the documents and other materials referred to distinguished; and, why is there a need for seven days to give the officer a copy of documents and inspection of materials?

Mr ADAMS: The second part of that question is simply for management purposes, as far as we can tell. It just gives an ability to get what is needed together. In respect to the first half of the question, I did a fair amount of follow-up on this yesterday to get my head around the process, but at the point in time when the police officer is provided with the commissioner’s intention to remove them, they are provided primarily with the investigation summary, which is a

\(^{121}\) Mr Robert Fong, Team Leader, Policy and Legislation, Department of Corrective Services, *Transcript of Evidence*, 2 October 2014, p12.
document produced by the independent review officer. It is not the investigation file itself; it is a summary of that investigation file and the findings of that independent review officer. Attached to that are references to psychological reports that might be relevant in terms of the longer term prospects of rehabilitation by the police officer and particular statements that are pivotal to the change against that police officer. So, there is a set of documents that provide details of all the information that was provided or that was considered by the commissioner in reaching that decision.122

Committee comment

9.38 The Committee notes that, should regulation 6A05 of the Police Force Regulations 1979 be replicated for custodial officers, they will have access to copies of documents and be able to inspect materials taken into account by the Commissioner in issuing a removal notice pursuant to clause 7, proposed new subsection 102(1). This will enable custodial officers to take documentation into account when making any submissions pursuant to clause 7, proposed new subsection 102(2).

9.39 Similarly, should regulation 6A09(2)(a) of the Police Force Regulations 1979 be replicated for custodial officers, documents and materials referred to in clause 7, proposed new subsection 102(6) may also refer to those not provided to the custodial officer for copying or inspection in the first instance but which become relevant following submissions made by the custodial officer.

9.40 Without the benefit of having a copy of the draft regulations, which the Committee understands are still being formulated, the Committee is relying on advice from the Department about the intended replication of Regulation 6A05(2)-(4) of the Police Force Regulations 1979. On this basis, the Committee supports the application of the equivalent regulations as they relate to the production of documents to custodial officers.

Clause 7, proposed new section 103

9.41 This proposed new section provides:

103. Maintenance payment

(1) If a prison officer is removed as a result of removal action, the prison officer is entitled to receive a payment (a

122 Mr Allen Adams, Assistant Commissioner, Professional Standards, WA Police, Transcript of Evidence, 7 October 2014, pp7-8.
maintenance payment) for the period of 28 days after the day on which the prison officer is removed (the maintenance period).

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

(3) For the purpose of subsection (2), the specified period is a period not exceeding 6 months specified by the Minister but in any event ending on the day any appeal is determined by the WAIRC.

(4) Any maintenance payment must be determined on the basis of the salary of the prison officer at the time of the removal.

9.42 The Explanatory Memorandum for the Bill provides the following rationale behind limiting the payment to 28 days.

The intent of limiting (sic) maintenance payment to 28 days is to discourage frivolous appeals. If an appeal has no prospect of success, the prison officer is unlikely to pursue it because he or she might not be granted any income support beyond the 28 days.

... It is intended the maintenance payment will be equivalent to the salary of the prison officer at the time of his or her removal.

Evidence considered

9.43 In response to questions posed by the Committee it was further stated by the Department that:

The period of 28 days is the time during which a person who has lost his/her employment can seek provision for income from an alternative source, eg Centrelink.

The 28 day period is consistent with current entitlements for prison officers and youth custodial officers. The Prison Custodial Legislation (Officers Discipline) Amendment Bill 2013, Explanatory Memorandum, pp4-5.
Legislation Committee

Officers’ Enterprise Agreement provides for payment of 28 days in lieu of notice for termination. The Young Offenders Regulations 1995 (Clause 52) provides for one month’s pay in lieu of notice for termination.  

9.44 In her evidence, Ms Maria Saraceni was of the view that the 28 day period was reasonable on the basis that 28 days is the time limit someone in the private sector would have to sue for unfair dismissal.  

9.45 There was some support from employee representative organisations for the existence of a maintenance payment.  

9.46 The Western Australian Prison Officers’ Union stated:

The Union has no objection to the maintenance payment. The Union observes that the time taken to resolve unfair dismissal cases is often much greater than 28 days.  

9.47 The WA Police Union stated:

The 28 day maintenance period provided for by s.33M of the Police Act effectively provides procedural fairness for a Member to be able to consider an appeal as per s.33P or resign in accordance with s.330. While there is provision for the Minister to extend that maintenance period beyond 28 days, and up to a period of 6 months in exceptional circumstances, we are not aware of any cases where Members have sought extensions because of exceptional circumstances. That being said, such circumstances might arise, and the extension provision would have the benefit of extending procedural fairness in those cases.  

9.48 The Community & Public Sector Union/Civil Service Union of WA made the following criticisms of proposed new subsection 11CE applying to youth custodial officers:

The maintenance payment under the proposed s. 11CE is for a period of 28 days after the day on which the YCO has been removed. In essence it is similar to a payment in lieu of

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124 Department of Corrective Services, Answers to questions on notice, 7 October 2014, p2.
125 Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, p6.
126 Western Australian Prison Officers’ Union, Written response, 2 October 2014, paragraph 1.9.
127 Letter from Mr George Tilbury, President, WA Police Union, 6 October 2014, p2.
notice if the termination is for misconduct, other serious misconduct. The Minister, not the employing authority, can direct the payment to be for a specified period up to six months.

There are several drawbacks to this arrangement.

First, it is the Minister’s decision, and there are no criteria specified as to how the Minister would exercise his or her discretion. What are exceptional circumstances? Exceptional circumstances are usually determined by which party has the sufficient leverage. An ordinary JCO would not have much power at all.

Secondly, the purpose of the legislation is to curtail the rights of a JCO to make a claim for unfair dismissal. For example, proposed s. 11CG limits a claim of constructive dismissal because it sanctions an offer of resignation during the maintenance period. It acts as a carrot and stick by using statutory pressure to induce a resignation, for which there is no right of challenge to the overarching pressure.

Thirdly, the time taken for appeals to be heard, as evidenced by various police cases, means that the JCO would be out of pocket, and obliged to find other work, if it is available.

Finally, the maintenance payment is discounted in a claim for back pay in the event of reinstatement, and in the event of compensation being payable if reinstatement is impracticable. A survey of the decided cases on loss of confidence indicates that very few have been successful.\textsuperscript{128}

9.49 Despite having no objection to the maintenance payment, the Western Australian Prison Officers’ Union made the following observation.

The Union has grave reservations about the proposal that applications for the extension of the maintenance payment are to be made to the same person who determined the termination of the employment. In the interests of procedural

\textsuperscript{128} Letter from Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Union of WA, 7 October 2014, p5.
fairness and to dispel any allegation of bias, such applications should be made to an independent third party.129

Committee comment

9.50 The majority of the Committee is satisfied that the terms of clause 7, proposed new subsection 101(3) are reasonable in the circumstances.

9.51 A minority of the Committee was not satisfied that the terms of clause 7, proposed new subsection 101(3) are reasonable in the circumstances and therefore recommends as follows:

**Minority Recommendation 4:**

A minority of the Committee recommends that:

**Applications for an extension of the maintenance period should be referred to an independent third party.**

Clause 7, proposed new subsection 106

Section 106(5)

9.52 This proposed new subsection provides:

**106. Appeal right**

...

(5) The only parties to the appeal are the prison officer and the chief executive officer.

9.53 A similar provision in section 33P(5) of the Police Act 1891 provides:

**33P. Appeal right**

...

(5) The parties to an appeal are the appellant and the Commissioner of Police and no other person may be a party to the appeal.

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129 Western Australian Prison Officers’ Union, Written response, 2 October 2014, paragraph 1.9.
9.54 Under the current system, the Western Australian Prison Officers’ Union can appeal to the Prison Officers Appeal Tribunal (POAT) on behalf of a prison officer or more than one prison officer at a time. The procedures for the hearing at the POAT are determined by the Chairman of the POAT who is a magistrate.\textsuperscript{130}

9.55 The Committee notes that the IRC has the power to direct parties to be joined or struck out in unfair dismissal claims under section 27(1)(j) of the Industrial Relations Act 1979. Further, section 29B of the Industrial Relations Act 1979 provides that the parties to proceedings are the applicant and any other persons, bodies, organisations or associations upon whom an application is served.

9.56 The Committee further notes these sections do not apply to appeals against removal decisions by virtue of not having been included in the table set out under clause 7, proposed new section 110B of the Bill. Rather, the Bill operates to restrict the parties that would ordinarily be permitted under the Industrial Relations Act 1979.

Evidence considered

9.57 In its submission to the Committee, the WA Police Union stated as follows:

\begin{quote}
We note that section 106(5) provides that the “only parties to the appeal are the prison officer and the chief executive officer”. We query the utility in such a limiting provision. In our view, the legislature should not seek to restrict the appeal process in this way. There may be cogent reasons why a further party should be allowed to join as a party to an appeal. In considering whether it is appropriate to allow parties to join appeal proceedings, we note that the Courts have had regard to the nature and strength of the interests of the applicant in the decision under appeal, the contribution which the applicant is likely to make to a proper resolution of the matter and whether the interests of the applicant and the evidence to be lead will be adequately dealt with by the persons already before the Court. Ultimately, if the joining of a party to the appeal proceedings is in the interests of justice, it should be allowed. For that reason, we recommend the removal of section 106(5).\textsuperscript{131}
\end{quote}

\textsuperscript{130} Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 10 October 2014.

\textsuperscript{131} Submission No 6 from WA Police Union, 30 September 2014, p4.
In a hearing before the Committee, the WA Police Union also gave the following evidence:

**The CHAIR:** Thank you. I refer to the fourth paragraph on page 4 regarding joining parties. What has been the experience under the equivalent section under part IIB of the Police Act, section 33P(5)?

**Mr Tilbury:** We are unaware of any circumstances where a party has wanted to join another to appeal proceedings in the Industrial Relations Commission. However, we maintain the view that this option should be available if it is in the interests of justice.132

The Committee posed a question on notice to the Department about the rationale behind the restriction on the number of parties in clause 7, proposed new subsection 106(5). In its answer, the Department explained the restriction on the basis that removal due to loss of confidence arises from a breach of trust alleged by one party, the Commissioner, against another party, the prison officer or youth custodial officer.133

The following evidence was also received from Ms Maria Saraceni in relation to the issue of the limitation of the number of parties to an appeal from a removal decision:

**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.134

Committee comment

132 Mr George Tilbury, President, WA Police Union, Transcript of Evidence, 2 October 2014, p5.
133 Department of Corrective Services, Answers to questions on notice, pp2-3.
134 Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, p7. Section 44 referred to is section 44(7)(a)(i) of the Industrial Relations Act 1979, which provides that the IRC may exercise the power to summon the attendance at a conference before the IRC on application of any organisation, association or employer.
The Committee recognises that the *Industrial Relations Act 1979* enables parties to proceedings for unfair dismissal to be all parties upon whom the application for unfair dismissal is served.\(^{135}\) It also enables the IRC to join parties to appeals from unfair dismissals, if it is in the interests of justice to do so and appropriate for the proceedings. The Committee notes this right has been removed in section 33P of the *Police Act 1892* and this is replicated under clause 7, proposed new section 110B of the Bill. The Committee has, however, established to its own satisfaction, under the terms of the Bill, that the custodial officer retains the right to be represented during an appeal by his or her union or other representative.

A minority of the Committee found that where the IRC determines that the interests of justice are better served by making other persons a party to the appeal, the capacity to make that determination should not be removed by the Bill.

Accordingly, a minority of the Committee recommends as follows.

**Minority Recommendation 5:**

A minority of the Committee recommends that:

Clause 7, proposed new subsection 106(5) and clause 16, proposed new subsection 11CH(5) of the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* be deleted.

**Section 106(6)**

This proposed new subsection provides:

106. Appeal right

... 

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

This provision amounts to a ‘privative clause’ (also known as an ‘ouster’ clause) because it seeks to restrict the judicial review of the decision to remove a custodial officer.

\(^{135}\) Section 29B of the *Industrial Relations Act 1979*. 
The established authority with respect to privative clauses is *R v Hickman; Ex parte Fox and Clinton*. This set down the following guiding principles:

- A privative clause will successfully oust judicial review only if:
  
  a) The tribunal's decision was a bona fide attempt to exercise its power.
  
  b) The decision relates to the subject matter of the legislation.
  
  c) The decision is reasonably capable of reference to the power given to the tribunal.

- The High Court has held that:
  
  a) a basic rule that applies to privative clauses, generally, is that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed;

  b) a clause providing that a ‘decision’ is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal cannot be applied to prevent the High Court from determining whether a Commonwealth officer's decision was affected by jurisdictional error and issuing relief under section 75(v) of the Constitution;

  c) the power “to confine inferior courts and tribunals within the limits of their authority to decide” by granting prohibition, mandamus and certiorari on the grounds of jurisdictional error is a “defining characteristic of State Supreme Courts” which cannot be removed by State Parliaments.

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136 (1945) 70 CLR 598.


138 Ibid.

139 *Kirk v Industrial Court of New South Wales* (2010) HCA 1. See also Davis, Malcolm, *Implications of the High Court’s Decision in Kirk v Industrial Relations Commission of NSW & Workcover NSW*, p7 (accessed at archive.hrnicholls.com.au/archives/vol30/2010davis.pdf on 16 October 2014). Prohibition directs a subordinate to stop doing something the law prohibits; mandamus is an order issued by higher court to compel or to direct a lower court or a government officer to perform mandatory duties correctly and certiorari is an order by a higher court directing a lower court to send the record in a given case for review.
There is a strong presumption that a privative clause will not be effective to exclude judicial review generally, particularly of a jurisdictional error including a breach of procedural fairness.\(^\text{140}\)

Section 90 of the *Industrial Relations Act 1979* applies to the decision of the IRC, by virtue of clause 7, proposed new section 110B, giving a limited right of appeal to the Western Australian Industrial Appeal Court on the following grounds:

(a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or

(b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or

(c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.

Clause 7, proposed new section 110B, modifies the application of section 90 of the *Industrial Relations Act 1979* by providing:

*A reference in subsection (1) to “any decision of the President, the Full Bench, or the Commission in Court Session” is to be read as if it were a reference to “a decision of the Commission under the Prisons Act 1981 section 110E”.*

Clause 7, proposed new subsection 110E(1) provides:

**110E. Decision by WAIRC**

(1) *This section applies if the WAIRC decides on an appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair.*

The Department has stated that the effect of these provisions is that if the Commissioner’s decision to take removal action is confirmed by the IRC, there is no appeal avenue for the custodial officer.\(^\text{141}\) This leaves, according to the Department, the only avenue of appeal from the decision of the IRC that

\(^\text{140}\) This is also referred to as natural justice.

\(^\text{141}\) Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 16 October 2014.
the removal was harsh, oppressive or unfair to the Industrial Court of Appeal from the Commissioner on the grounds set out above.

9.71 The Committee received evidence from Ms Maria Saraceni on this clause, who questioned whether it was the intention of the provision to preclude the possibility of other avenues of appeal.

Ms Saraceni: 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?142

9.72 Ms Saraceni referred to a scenario concerning possible discrimination and whether an action for discrimination under the Equal Opportunity Act 1984 was open to a custodial officer following a removal action.143

Committee comment

9.73 The Committee is of the view that clause 7, proposed new subsection 106(6) intends to restrict an appeal by a custodial officer from a removal decision only to the question of whether the removal decision was harsh, oppressive or unfair.

9.74 However, with respect to whether clause 7, proposed new subsection 106(6) read with the provisions referred to above is effective to deny any further avenue of appeal to a custodial officer, the Committee notes that in the case of Alistair Lindsay Gordon v Commissioner of Police, the Industrial Court of Appeal, while recognising that a police officer did not have a right of appeal against a decision of the IRC that a removal was not harsh, oppressive or unfair, also stated:

A member may appeal to the court against a decision that he be paid compensation rather than reinstated or against a decision as to the amount of compensation.144

9.75 Accordingly, it is the Committee’s view that a custodial officer would have a right of appeal to the Industrial Court of Appeal on this basis.

142 Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, p8.
143 Ibid.
Regarding other types of actions that may be taken by custodial officers, such as a complaint under the *Equal Opportunity Act 1984* leading to a determination by the Equal Opportunity Tribunal, the Committee notes that the grounds of appeal to the IRC could include those covered by this legislation by virtue of the appeal being based on whether the removal action was harsh, oppressive or unfair.

The Committee seeks clarification from the Government of the intent of the provision and therefore makes the following recommendation.

**Recommendation 5:** The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council whether the intention of the Bill is to restrict the right of appeal against a removal decision to that provided for in clause 7, proposed new subsection 106(6) and clause 16, proposed new subsection 11CH(6) to the exclusion of any other causes of action.

Clause 7, proposed new subsections 107(2) and (3)

These proposed new subsections provide:

107. Proceedings on appeal

\[...
\]

\[(2)\] The appellant has at all times the burden of establishing that the removal decision was harsh, oppressive or unfair.

\[(3)\] Subsection (2) has effect despite any law or practice to the contrary.

Evidence considered

The Committee heard evidence from a number of witnesses about the reasonableness of these provisions and whether they accord with current practices.

Evidence from employee representative organisations stated the onus of proof in summary dismissal actions is on the employer to prove the conduct justifying the summary dismissal and compared the power to remove an officer under the Bill with summary dismissal.\(^{145}\) This was done in support of

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\(^{145}\) Submission No 3 from Unions WA, 25 September 2014, p2; Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 8.1(2).
their view that clause 7, proposed new subsection 107(2) reverses this onus of proof.

9.81 The WA Police Union submitted that the onus to be applied, being the balance of probabilities, should be inserted into clause 7, proposed new subsection 107(2).\(^{146}\)

9.82 In answer to a question on notice posed by the Committee about whether the onus of proof in clause 7, proposed new subsection 107(2) reflects existing practice in proceedings before the IRC for unfair dismissal, the Department stated:

- the burden of proof is founded on the principle that he who asserts bears the burden of proving the assertion, which is applied in WAIRC in unfair dismissal proceedings; and

- the standard of proof required is on the balance of probabilities.\(^{147}\)

9.83 The Department referred to the case of *The Federated Miscellaneous Workers’ Union of Australia (WA Branch) v Coca Cola Bottlers* as confirming these principles, where the IRC stated:

> The onus in this matter, the dismissal not being a summary dismissal, was on the appellant to establish that the dismissal was unfair, on the balance of probabilities.\(^{148}\)

9.84 Evidence provided to the Committee on this matter from Ms Maria Saraceni was as follows:

**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.

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\(^{146}\) Submission No 6 from WA Police Union, 30 September 2014, p4.

\(^{147}\) Department of Corrective Services, *Answers to questions on notice*, 7 October 2014, pp3-4.

\(^{148}\) [1999] WAIRC 1 at 13 per Sharkey P.
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.149

Committee comment

9.85 The Committee notes that, through evidence, there have been some parallels drawn between the removal process proposed by the Bill and summary dismissal in that the removal action may be carried out when the notice is given pursuant to clause 7, proposed new subsection 102(7). However, the Committee notes that summary dismissal is instant, whereas pursuant to clause 7, proposed new subsection 102(1) a written notice is given to the officer setting out the grounds for a loss of confidence to which they have an opportunity to respond in writing. This is a notable difference.

9.86 The Committee notes the remarks in The Federated Miscellaneous Workers’ Union of Australia (WA Branch) v Coca Cola Bottlers regarding the burden and standard of proof referred to above.150

149 Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, pp6-7.

Additionally, clause 7, proposed new subsection 107(1)(a) provides that, on the hearing of the appeal, the IRC is required to first consider the Commissioner’s reasons for the removal decision.

The Committee also draws the attention of the House to recommendations 3 and 4. The Committee believes that an assurance from the Minister for Corrective Services that written notice will be provided and an investigation will be held, distinguishes the removal process from summary dismissal. This being the case, the Committee is of the view that the terms of clause 7, proposed new subsection 107(2) are reasonable in the circumstances, taking into account the above factors.

Clause 7, proposed new sections 108 and 109

These proposed new sections provide:

108. Leave to tender new evidence on appeal

(1) New evidence cannot be tendered to the WAIRC during a hearing of an appeal unless the WAIRC grants leave under subsection (2) or (3).

(2) The WAIRC may grant the chief executive officer leave to tender new evidence if —

(a) the appellant consents; or

(b) it is satisfied that it is in the interests of justice to do so.

(3) The WAIRC may grant the appellant leave to tender new evidence if —

(a) the chief executive officer consents; or

(b) the WAIRC is satisfied that —

(i) the appellant is likely to be able to use the new evidence to show that the chief executive officer has acted upon wrong or mistaken information; or

(ii) the new evidence might materially have affected the chief executive officer’s removal decision; or

(iii) it is in the interests of justice to do so.
(4) In the exercise of its discretion under subsection (3), the WAIRC must have regard to —

(a) whether or not the appellant was aware of the substance of the new evidence before the appellant’s removal; and

(b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access before the appellant’s removal.

109. Opportunity to consider new evidence

(1) If the chief executive officer is given leave to tender new evidence under section 108(2) —

(a) the WAIRC must give the appellant a reasonable opportunity to consider the new evidence; and

(b) the appellant may, without the leave of the WAIRC, tender new evidence under this section in response to the new evidence tendered by the chief executive officer.

(2) If the appellant is given leave to tender new evidence under section 108(3), the WAIRC must give the chief executive officer a reasonable opportunity to consider the new evidence.

General principles

9.90 Generally, in civil cases, where the appeal is by way of rehearing, appellate courts have a power to receive further evidence on appeal. Where the appeal is from a judgment after a trial or a hearing on the merits, it will be necessary in some jurisdictions to show special grounds or some insistent demand of justice before the new evidence is received. This is unless the evidence concerns matters occurring after the trial or hearing. The exercise of the power is discretionary.\footnote{Halsbury’s Laws of Australia, at paragraph 195-8405. See also \textit{Ellis v Leeder} (1951) 82 CLR 645 at 654, 655; [1951] ALR 708; (1951) 25 ALJ 414 per Dixon, Williams and Kitto JJ.}

9.91 The general principles a judicial body will consider on an application to admit new evidence are whether the evidence:
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- could not have been obtained with reasonable diligence for use at the trial;\textsuperscript{152}

- is such that there is a high degree of probability that there would be a different verdict had it been available at the trial;\textsuperscript{153} and

- is appropriately credible.\textsuperscript{154}

9.92 The IRC has considered requests for the tendering of new evidence under Section 33R of Part IIB. For example, in \textit{Neil Stimpson v Commissioner of Police}, the IRC stated:

\textit{Section 33R of the Police Act 1892 governs the granting or otherwise of new evidence. Section 26(1)(a) of the Industrial Relations Act, 1979 also has application to the exercise of our jurisdiction by virtue of s.33S.}\textsuperscript{155}

9.93 The IRC permitted the introduction of new evidence, in the form of an affidavit of a witness, on the basis that if the evidence in it was to be accepted, it would considerably weaken, if not eliminate, the allegation of having acted corruptly.

\textit{Evidence considered}

9.94 Evidence was received by the Committee on the proposed powers of the IRC to receive new evidence.

9.95 The WA Police Union, in their submission, stated:

\textit{In our view, it is appropriate that new evidence be tendered at the WAIRC if the prison officer or CEO consents or it is in the interests of justice to do so. However, section 108 provides for one test for a prison officer and another for the CEO. In our view, it is unfair and unnecessary to provide a different and more onerous test to prison officers in order that he/she be able to admit fresh evidence (as is provided for in section 108(3)). In our view, the correct test is as set out in section 108(2), however, the test should be applied to both a prison}\textsuperscript{152}

\textsuperscript{152} Cicic \textit{v} Snowy Mountains Hydro-Electric Authority [1964-65] NSW R 178 at 183 per Sugerman J.

\textsuperscript{153} Ibid, at p182 per Sugerman J.

\textsuperscript{154} Council of the City of Greater Wollongong \textit{v} Cowan (1955) 93 CLR 435 at 444.

\textsuperscript{155} (2005) WAIRC 00103 at paragraph 5. Section 26(1)(a) refers to the IRC acting according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
officer and CEO alike. It is not apparent to us why a prison officer should be treated differently to the CEO before the WAIRC and for that reason, the distinction as proposed in section 108 can only be seen as unfair.\textsuperscript{156}

9.96 The WA Police Union also gave the following evidence:

\textbf{The CHAIR:} In what circumstances do you envisage there would be a practical difference between the application of the two tests?

\textbf{Mr Tilbury:} The practical difference between the two tests is that there is more involved in relation to the police officer. In other words, a police officer must satisfy the commission of much more than the Commissioner of Police.\textsuperscript{157}

9.97 In answer to a question on notice posed by the Committee to the Department about the operation of the new evidence provisions, the Department stated it will discuss the operation of these amendments with the IRC to ensure that a streamlined process is implemented.\textsuperscript{158}

9.98 When asked by the Committee why there is a different test for the Commissioner and the prison officer in obtaining leave to tender new evidence, comparing clause 7, proposed new subsections 108(2)(b) and (3)(b)(i), the Department stated that “since the prison officer bears the burden of proof, the prison officer must satisfy the WAIRC that the new evidence that he/she intends to adduce will advance his/her case, as provided in 108 (3)(b)(i). The Commissioner does not bear the burden of proof.”\textsuperscript{159}

9.99 Ms Maria Saraceni also provided the following evidence in relation to whether the processes for tendering new evidence in clause 7, proposed new sections 108 and 109 are consistent with current evidentiary rules.

\textbf{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.

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)?

Ms Saraceni: I guess it flows from what I said earlier, so no.160

Committee comment

9.100 The Committee notes the feedback contained in the review of Part IIB of the Police Act 1892, some of which is to the effect that the tendering of new evidence under the equivalent provision, section 33R, can be unwieldy and time consuming. The Committee was referred to the case of Mark Antonio Polizzi v Commissioner of Police as an example of when new evidence is sought to be tendered.161

9.101 While the Committee recognises that there is a difference in the test for tendering new evidence for the Commissioner and the custodial officer, it accepts that this is because the custodial officer bears the burden of proof to demonstrate that the removal was harsh, oppressive or unreasonable. Also, while recognising that the extent of the delays caused by the tendering of new evidence will depend on the circumstances of each case, the Committee is satisfied that the IRC is not restricted under the proposed new evidence provisions from dealing fairly with both parties.162

Clause 7, proposed new section 110A

9.102 This proposed new section provides:

160  Ms Maria Saraceni, Barrister, Transcript of Evidence, 2 October 2014, p9.
162  Section 26(1)(a) and (b) of the Industrial Relations Act 1979 states:

26. Commission to act according to equity and good conscience
(1) In the exercise of its jurisdiction under this Act the Commission —
(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and
(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just.
110A. Revocation of removal after consideration of new evidence

(1) If, having considered any new evidence, the chief executive officer revokes the removal under section 104(2) —

(a) the chief executive officer must give the WAIRC notice of the revocation; and

b) the hearing of the appeal is discontinued when the WAIRC receives the notice.

(2) If the chief executive officer does not give notice under subsection (1), the hearing of the appeal must continue but the chief executive officer may —

(a) reformulate his or her reasons for not having confidence in the appellant’s suitability to continue as a prison officer; and

(b) without the leave of the WAIRC, tender new evidence under this section in response to the new evidence tendered by the appellant.

(3) Reasons reformulated under subsection (2)(a) may differ from, or be additional to, the reasons given to the appellant in the decision notice.

(4) If the chief executive officer reformulates reasons under subsection (2)(a) —

(a) the chief executive officer must give the WAIRC and the appellant notice in writing of the reasons before the resumption of the hearing of the appeal; and

(b) the WAIRC must consider the reasons as if they had been reasons given to the appellant in the decision notice.

9.103 A number of employee representative organisations were critical of the terms of clause 7, proposed new section 110A, as the following evidence demonstrates.
Evidence considered

9.104 In its submission the Western Australian Prison Officers’ Union raised concerns about clause 7, proposed new section 110A:

- The Process in the Bill is heavily in favour of the CEO in that:
  
  (c) Section 110A of the Bill allows the CEO to reformulate his case if a party has obtained leave to introduce new evidence. That reformulated case stands in place of the initial case. The Officer is not then given the opportunity to draft a reply to the reformulated case.163

9.105 Further, in its submission to the Committee, the WA Police Union stated:

- The importance of fresh evidence being heard by the WAIRC that is in the interests of justice is highlighted by section 110A(1). Section 110A(1) gives the CEO power to revoke the removal notice after having considered the fresh evidence. This is a sensible and fair provision and ensures that prison officers are treated justly.

  However, in our view, section 110A(2) is in direct conflict with section 110A(1) in that it allows the CEO to receive the fresh evidence and then reformulate his/her reasons for removal of the prison officer. Section 110A(2) is also in direct conflict with the purpose of an appeal being a complaint by a prison officer that the decision of the CEO was harsh, oppressive or unfair. On one view, section 110A(2) is an avenue by the CEO to have “another go” at removing the prison officer when it appears that the decision was indeed harsh, oppressive or unfair.

  In our view, section 110A(2) is completely at odds with the fundamental principles of an appeal process and allows the CEO to effectively “move the goal posts” to ensure that a prison officer is removed. Further, section 110A(2) creates a hybrid appeal process incorporating de novo principles. The differences in section 110A can only be described as a double standard which is at odds with one of the functions of the

163 Western Australian Prison Officers’ Union, Written response, 2 October 2014, paragraph 1.6(c)(1)(c).
In response to the concerns expressed, the Department provided the following advice to the Committee.

*The purpose of allowing the CEO to reformulate his reasons for a removal is to avoid having the WAIRC to second guess what the CEO’s decision would have been in light of the new evidence given by the appellant (prison officer).*

*Allowing the prison officer to reformulate his new evidence will in effect be allowing the prison officer to amend his own evidence.*

**Committee comment**

The Committee can understand there may be circumstances where the Commissioner chooses to reformulate the reasons in the decision notice in response to new evidence from the custodial officer which may justify the custodial officer needing to revise their original grounds of appeal.

The Committee asked the Department whether clause 7, proposed new subsections 108(3)(b)(i) and 109(1)(b) apply to the reformulation of reasons and the tendering of new evidence under clause 7, proposed new subsection 110A(2). The Department responded as follows:

*Section 110A(2) allows the CEO to (a) reformulate his reasons for loss of confidence, and (b) to tender new evidence without leave to respond to the prison officer’s (appellant) new evidence. In essence, section 110(2) allows the CEO to revise his reasons for loss of confidence based on the new evidence tendered by the prison officer during appeal.*

*The purpose of section 110A(2) is to avoid having the WAIRC to second guess what the CEO’s reasons for loss of confidence might have been in light of the new evidence tendered by the prison officer.*

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164 Submission No 6 from WA Police Union, 30 September 2014, p5.
165 Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 9 October 2014.
You refer to sections 108(3) and 109(1)(b) of the Bill which allow the prison officer to tender new evidence, and query if these sections can be used by the prison officer to tender new evidence to respond to the CEO’s reformulated reasons and/or new evidence. You cited a recent case, Polizzi v Commissioner of Police in relation to your query.

Sections 108(3) precedes section 110A(2), and is not intended to be used in relation to section 110A(2). This is to prevent a situation where the prison officer could amend his/her own evidence, i.e. to say to the WAIRC: I am not happy with the CEO’s reformulated reasons which are based on my new evidence and I am going to change my (new) evidence.

Polizzi holds that “an application to tender new evidence is able to be made at any stage of an appeal once it is filed, including during an appeal”.

Based on the Polizzi decision, the prison officer would be able to seek leave to amend his/her own evidence under section 108 (3). However, the Polizzi decision does not say if leave could be granted in such a situation.

In relation to section 109(1)(b), the prison officer may tender new evidence in response to new evidence tendered by the CEO with leave from the WAIRC. However, the new evidence tendered by the CEO under section 110A(2) is tendered without leave from the WAIRC.

Thus, section 109 (1)(b) is inapplicable to section 110A(2). The prison officer can only rely on section 109 (1)(b) to tender new evidence in response to new evidence tendered by the CEO with leave, and not evidence tendered by the CEO without leave.  

The Committee notes section 27(1)(l) of the Industrial Relations Act 1979, which is listed in the table in clause 7, proposed new section 110B, as applicable to appeal mechanisms of the Bill. This gives the IRC the power to permit the custodial officer to amend their grounds of appeal on such terms as

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166 Email from Ms Marlene Hamilton, Manager, Policy and Legislation, Department of Corrective Services, 6 November 2014.
it thinks fit.\textsuperscript{167} That this could be in response to the reformulation of the Commissioner’s reasons pursuant to clause 7, proposed new section 110A(2)(a) has been confirmed by the Department.\textsuperscript{168}

9.110 The Committee also notes that in the decision of \textit{Mark Antonio Polizzi v Commissioner of Police} the IRC stated that:

\begin{quote}
...the power given to the Commission in s 33R(2) to grant the Commissioner of Police leave to tender new evidence is not confined or restricted; neither for that matter is the power given to the Commission in s 33R(3) of the Act to grant an appellant leave to tender new evidence confined or restricted: either may make such an application at any point during a hearing of an appeal (s 33R(1)).\textsuperscript{169}
\end{quote}

9.111 Taking into account paragraph 9.108 and 9.109 above, the Committee makes the following recommendation.

\begin{center}
\textbf{Recommendation 6: The Committee recommends that the Minister representing the Minister for Corrective Services advise the Legislative Council why clause 7, proposed new section 110A and clause 16, proposed new section 11CL does not appear to include an opportunity for the appellant, with or without leave, to tender new evidence in response to the Commissioner’s reformulation of reasons and tendering new evidence, such as is the case under clause 7, proposed new sections 108 and 109 and clause 16, proposed new sections 11CJ and 11CK.}
\end{center}

\textbf{Clause 7, proposed new section 110F}

9.112 This proposed new section provides:

\begin{quote}
\textit{110F. Determining amount of compensation}

(1) An amount of compensation ordered under section 110E(2)(b) must be determined in accordance with this section.
\end{quote}

\textsuperscript{167} In \textit{Gerald Jean-Noel Laurent -v- Commissioner of Police} (2009) WAIRC 00515, at paragraphs 55 and 57, the IRC held that the power to allow the amendment of any proceedings applies to grounds of appeal.

\textsuperscript{168} Email from Ms Marlene Hamilton, Manager, Policy and Legislation, Department of Corrective Services, 6 November 2014.

\textsuperscript{169} (2014) WAIRC 00302 at p11.
(2) In determining the amount, the WAIRC must have regard to all of the following —

(a) the efforts, if any, of the chief executive officer and the appellant to mitigate the loss suffered by the appellant as a result of the removal;

(b) any maintenance payment received by the appellant;

(c) any redress the appellant has obtained under another enactment where the evidence necessary to establish that redress is also the evidence necessary to establish on the appeal that the removal was harsh, oppressive or unfair;

(d) any other matter that the WAIRC considers relevant.

(3) In determining the amount, the WAIRC may have regard to the average rate of remuneration as a prison officer received by the appellant during any relevant period of service.

(4) The amount must not exceed 12 months’ remuneration as a prison officer.

Evidence considered

9.113 The Western Australian Prison Officers’ Union gave the following evidence on clause 7, proposed new section 110F.

Currently, if a person who has been unfairly dismissed is reinstated to his or her employment, there is no cap on the amount of compensation payable.

The Union has no objection to compensation being capped for Prison Officers who are not successful in being reinstated. ¹⁷⁰

9.114 The Western Australian Prison Officers’ Union made the following observations about the proposed new compensation cap in clause 7, proposed new section 110F.

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)

¹⁷⁰ Western Australian Prison Officers’ Union, Written response, 2 October 2014, paragraph under heading “Regarding 8.7”.

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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.\textsuperscript{171}

9.115 Ms Maria Saraceni advised the Committee as follows.

\textbf{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?

\textbf{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.\textsuperscript{172}

9.116 The Department’s written answer to a question on notice stated the provision adopts the precedent set by section 33U(6) of the \textit{Police Act 1892}\textsuperscript{173}, which states:

\[(6) \text{The amount ordered to be paid under subsection (3) shall not exceed 12 months’ remuneration as a member.}\]

\textit{Committee comment}

9.117 While the Committee notes the evidence of the WA Police Union that some appeals from removal decisions may take longer than 12 months, this can also occur in other appeals from disciplinary decisions elsewhere in the public service.

\textsuperscript{171} Mr Andrew Smith and Mr Simon Millman, Acting Secretary, Western Australian Prison Officers’ Union and Practice Group Leader, Industrial Law, Slater and Gordon Lawyers, \textit{Transcript of Evidence}, 2 October 2014, p13.

\textsuperscript{172} Ms Maria Saraceni, Barrister, \textit{Transcript of Evidence}, 2 October 2014, p10.

\textsuperscript{173} Department of Corrective Services, \textit{Answers to questions on notice}, 7 October 2014, p5.
9.118 The majority of the Committee is of the view that clause 7, proposed new subsection 110F(4) is fair and reasonable and that it is desirable to have some uniformity on the terms of compensation across the PSMA and removal for loss of confidence disciplinary processes. This is on the basis that:

- section 101 of the PSMA also imposes a limit of 12 months remuneration for compensation for termination of employment; and
- the maximum amount of compensation payable under section 23A of the *Industrial Relations Act 1979* for unfair dismissal claims is not to exceed 6 months’ remuneration\(^ {174} \) (or 12 months if an order made by the IRC under section 23A is not complied with).\(^ {175} \)

9.119 In the view of a minority of the Committee, it is a fundamental principle of modern industrial relations that the employee has the right to a fair hearing without penalty. Loss of confidence provisions, abrogation of the right to silence and the associated appeal mechanisms are measures that ought to warrant extreme caution and satisfy concerns about rigorous protections and limitations being in place. A minority of the committee was not satisfied that these protections and limitations are included in the clauses of the Bill relating to loss of confidence and abrogation and has made recommendations about the deletion of these clauses. With respect to the question of compensation, it is noted that uniformity between removal measures under loss of confidence provisions and removal measures under the PSMA, while satisfying a bureaucratic preference for standardisation, may be neither equitable nor fair. In the case where a loss of confidence action takes more than 12 months to achieve a final resolution, a prison officer could suffer very serious damage to reputation and physical and mental health as well as being significantly disadvantaged financially.

9.120 A minority of the Committee therefore recommends as follows.

**Minority Recommendation 6:**

A minority of the Committee recommends that:

The current arrangement whereby there is no cap on the amount of compensation payable to a prison officer who is reinstated to their position following a successful appeal be maintained and the Bill is amended accordingly.

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\(^ {174} \) See section 23A(8) of the *Industrial Relations Act 1979*.

\(^ {175} \) See section 83B(7)(b) of the *Industrial Relations Act 1979*. 
The Committee also notes the Department’s confirmation that the back pay received by the custodial officer who is reinstated pursuant to clause 7, proposed new subsection 110E(2)(a) is not limited to 12 months as the IRC’s order is that the removal is taken to have always been of no effect. Accordingly, the custodial officer would receive back pay from the date of removal.

Clause 7, proposed new section 110I

This proposed new section provides:

110I. Failure to comply with procedure

An act or omission of the chief executive officer is not invalid, and cannot be called in question, if —

(a) the act or omission comprises a failure to comply with procedure prescribed for the purposes of this Division; and

(b) the failure is not substantive.

The Committee notes the Bill does not provide any criteria to determine what is, or is not, substantive for the purposes of this section and raised this with the Department.

The Department provided the following evidence about what constitutes a failure that is not substantive as opposed to substantive and whether criteria should be inserted in the Bill to clarify this:

- A failure that is not substantive results from non-compliance with procedures on a minor scale, while a substantive failure is one that infringes the rights, obligations or duties of an individual (in this case the prison officer/youth custodial officer);

- It would not support criteria being inserted as the IRC is capable of deciding what is substantive.

The Western Australian Prison Officers’ Union also gave the following evidence.

Section 110I allows the CEO a greater freedom to not comply with WAIRC procedure. This freedom is not available to the

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176 Email from Ms Marlene Hamilton, Manager, Policy and Legislation, Department of Corrective Services, 6 November 2014.

177 Department of Corrective Services, Answers to questions on notice, 7 October 2014, p5.
9.126 The Committee also received the following evidence from Ms Maria Saraceni.

**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.  

9.127 The Committee is satisfied that the issue of what is or is not substantive can be decided by the IRC on any appeal based on a removal being harsh, oppressive or unfair.

**Clause 7, proposed new section 110J**

**Generally**

9.128 This proposed new section provides:

**110J. Transfer, standing down and leave of prison officer**

(1) This Division does not derogate from the chief executive officer’s power to —

(a) transfer a prison officer; or

(b) stand a prison officer down from performing that prison officer’s usual duties, with or without pay, until the prison officer is directed by the chief executive officer to return to those duties; or

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178 Western Australian Prison Officers’ Union, *Written answers to questions*, 2 October 2014, paragraph 1.6(c)(1)(b).


180 See *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 at 895, per Kennedy J, who held that, in an appropriate case, the Commission and Full Bench would have power to find that there was a lack of procedural fairness which would justify an order directing an employer to reinstate an employee.
(c) allocate duties to a prison officer other than the prison officer’s usual duties.

(2) If the chief executive officer stands down a prison officer in relation to whom removal action is being taken, the chief executive officer must review the decision to stand the prison officer down every 60 days and advise the prison officer in writing of the result of the review.

(3) The chief executive officer must not direct a prison officer in relation to whom removal action is being taken to take leave during the removal action unless the leave accrues during any period that the prison officer is stood down from performing the prison officer’s usual duties.

9.129 In considering this proposed section, the Committee has assumed that when employee representatives have used the term ‘suspend’ they are referring to the power to stand down.

Evidence considered

9.130 According to Unions WA:

...we are concerned that the CEO’s power to suspend is unreasonably increased under the Bill and Custodial Officers would have no ability to appeal a suspension decision. Furthermore, where suspensions occur without pay they may unreasonably prejudice the ongoing employment of the officer.  

9.131 According to the Western Australian Prison Officers’ Union:

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

Under the current Part X process an Officer may appeal the terms of the suspension to the Appeals Tribunal. That is not the case in the current provision, where the CEO is required to review the suspension every 60 days. There is no ability for the Officer to appeal the terms of the suspension under the

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181 Submission No 3 from Unions WA, 25 September 2014, p2.
Bill, and that suspension may be on conditions such as requiring the suspension to be without pay.

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

9.132 In answer to a question on notice posed by the Committee about the circumstances in which the power to stand down will be exercised, the Department stated that procedures guiding decisions to stand down officers are being developed. Consistent with the Public Sector Commissioner's Instruction 3, they will include consideration to the risk posed by an officer to:

- the safety and security of the community, employees, offenders, and the Department's operations;

- the integrity of any evidence relevant to the matter; and

- any investigation of the matter.  

9.133 The Department also stated that it has been the practice of the Department to suspend with pay and “in the very exceptional circumstances where the Department may consider suspension on partial or no pay, the officer is afforded the opportunity to provide reasons as to why this should not occur”.

Committee comment

9.134 The Committee notes that, currently, under section 108 of the Prisons Act 1981 and section 78 of the PSMA, an appeal is available to the POAT and the Public Service Appeal Board, respectively, from decisions to suspend.

9.135 The Committee is of the view that it is unclear from the Bill whether there is an appeal from a decision to stand down a custodial officer for the following reasons. Neither clause 7, proposed new section 106(1), which refers to an appeal from a removal action (once an officer has been removed) nor clause 7,  

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182 Submission No 5 from Western Australian Prison Officers’ Union, 26 September 2014, paragraph 10.1.

183 Department of Corrective Services, Answers to questions on notice, 7 October 2014, p7.

184 Id.
proposed new section 106(6), setting out the restriction on the right of appeal against a removal decision, refers to a decision to stand down.\textsuperscript{185}

9.136 The Committee also does not regard a review by the Commissioner pursuant to clause 7, proposed new section 110J(2), of any decision to stand down an officer in relation to whom a removal action is being taken, as akin to an appeal.

9.137 In response to a request for clarification by the Committee, the Department confirmed that the IRC’s jurisdiction to hear an appeal against a stand down decision is not ousted by the Bill. The Committee has been informed that the State Solicitor’s Office concurs with this view. However, the Department noted an alternate view could be taken that the CEO’s decision to stand down cannot be appealed to the IRC because the Bill already provides for the CEO to review a stand down decision every 60 days in section 110J(2).\textsuperscript{186}

9.138 The Committee is of the view that it would be appropriate for the Minister for Corrective Services to reconfirm that a custodial officer has a right of appeal from a decision to stand down. The Committee therefore makes the following recommendation:

\begin{itemize}
\item \textsuperscript{185} As well, the list of provisions of the \textit{Industrial Relations Act 1979} set out in the table under clause 7, proposed new section 110B as applying to appeals to the IRC relates to an appeal from a removal action, not a decision to stand down. This table does not refer to section 23(3)(d) of the \textit{Industrial Relations Act 1979}, which provides:

\textit{23. Jurisdiction of Commission}

\ldots

(3) The Commission in the exercise of the jurisdiction conferred on it by this Part shall not —

\ldots

(d) regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind;

Accordingly, it is arguable section 23(3)(d) may be applicable to a decision to suspend under the Bill. If so, the jurisdiction of the IRC is ousted if there is provision for the regulation of suspension and provision for an appeal from suspension.\textsuperscript{185} The Committee had also had regard to the case of \textit{Debra Lee Smallshaw v The Minister for Corrective Services} (2014) WAIRC 00956, where the IRC held that its jurisdiction was excluded by section 23(3)(d) of the \textit{Industrial Relations Act 1979} due to there being a provision in Part X of the \textit{Prisons Act 1981} for appeals from suspensions.

\textsuperscript{186} Email from Ms Jane Larke, Director, Knowledge and Information Technology, Department of Corrective Services, 21 October 2014.
Recommendation 7: The Committee recommends that the Minister representing the Minister for Corrective Services reconfirm the Department’s advice that the Industrial Relations Commission’s jurisdiction to hear an appeal against a decision to stand down a custodial officer is not ousted by the Bill.

If this is the case, the Committee recommends that the Bill be amended to remove any doubt as to whether an appeal is available.

Minority Recommendation 6:

A minority of the Committee recommends as follows:

That the Bill be amended to ensure that the IRC’s jurisdiction to hear an appeal from a decision to stand down is not ousted by the Bill.

10 CONCLUSION

10.1 The Committee recognises that Western Australia is the only jurisdiction currently seeking to extend loss of confidence provisions to custodial officers. There were a number of stakeholders that regarded some aspects of the Bill as contentious. It is therefore hoped that this Report will assist the House by informing the remaining Second Reading debate and Consideration in Detail about the range of views concerning the Bill.

Hon Sally Talbot MLC
Deputy Chair
11 November 2014
APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION,
SUBMISSIONS RECEIVED AND PUBLIC HEARINGS
APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION,
SUBMISSIONS RECEIVED AND PUBLIC HEARINGS

Stakeholders invited to provide a submission

1. Department of the Premier and Cabinet
2. Department of Corrective Services
3. Public Sector Commission
4. Western Australia Police
5. Corruption and Crime Commission
6. Inspector of Custodial Services
7. Western Australian Prison Officers’ Union
8. Unions WA
9. WA Police Union
10. Law Society of Western Australia
11. Maria Saraceni

Submissions received

1. Minister for Corrective Services
2. Commissioner of Police
3. Unions WA
4. Community & Public Sector Union/Civil Service Association of WA
5. Public Sector Commission
6. Western Australian Prison Officers’ Union
7. WA Police Union
8. Law Society of Western Australia
9. Corruption and Crime Commission

Public hearings

The Committee held public hearings with the following witnesses from departments, entities and unions on 2 and 7 October 2014. Transcripts of the public hearings are available at the Committee’s website at http://www.parliament.wa.gov.au/leg.

2 October 2014

1. Western Australian Prison Officers’ Union
   - Mr Andrew Smith, Acting Secretary
   - Ms Rebeka Marton, Industrial Officer
   - Mr Simon Millman, Counsel

2. Unions WA
   - Ms Meredith Hamatt, Secretary, Unions WA
   - Ms Toni Walkington, Branch Secretary, Community & Public Sector Union/Civil Service Association of WA
   - Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association of WA

3. WA Police Union
   - Mr George Tilbury, President
   - Mr Paul Hunt, Secretary
   - Ms Rachael Shaw, Solicitor

4. Department of Corrective Services
   - Mr James McMahon, Commissioner
   - Mr Robert Fong, Policy and Legislation
   - Mr Steven Norris, Operational Support
   - Dr Owen Kelly, Acting Executive Manager

5. Ms Maria Saraceni, Barrister
6. Public Sector Commission
   - Mr Malcolm Wauchope, Public Sector Commissioner
   - Mr John Lightowlers, General Counsel, Public Sector Commission
   - Mr Lindsay Warner, Director, Policy and Reform, Public Sector Commission

7 October 2014

7. Western Australia Police
   - Mr Stephen Brown, Acting Commissioner
   - Mr Allan Adams, Acting Assistant Commissioner
   - Mr Mathew Sampson, Acting Director, Legal and Legislative Services
APPENDIX 2

REVIEW OF PART IIB OF THE POLICE ACT 1892
APPENDIX 2

REVIEW OF PART IIB OF THE POLICE ACT 1892

REPORT ON PART II B OF THE POLICE ACT 1892
PURSUANT TO THE REVIEW
CONDUCTED UNDER S 33 Z OF THE ACT

24 February 2006
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Introduction

Section 8 under Part I of the Police Act 1892 refers to the removal of Commissioned and Non-Commissioned Officers from WA Police by the Commissioner of Police.

The power of removal is subject to compliance with S 33 L under Part II B of the Act. Under this section:

“If the Commissioner of Police does not have confidence in a member’s suitability to continue as a member, having regard to the member’s integrity, honesty, competence, performance or conduct, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member’s suitability to continue as a member.”
(S 33 L (1))

The section goes on to provide for the member to address in a written submission the grounds upon which loss of confidence was based. It then provides for the Commissioner of Police to take this into account before deciding on whether or not to remove the officer. Written notice of the decision is to be given by the Commissioner of Police and if removal is pursued, the member is to be given a “copy of any documents and (for Commissioner of Police to) make available to the member for inspection any other materials that were examined and taken into account” by the Commissioner of Police in making that decision.

Other provisions of Part II B go to:

- maintenance payment for 28 days after removal (S 33 M)
- maintenance payments beyond 28 days in exceptional circumstances (S 33 M)
- revocation of removal action (S 33 N)
- the opportunity for a member removed to resign (S 33 O)
- an appeal right to the Western Australian Industrial Relations Commission (the WAIRC) no later than 28 days after removal from office (S 33 P)
- the proceedings on appeal including the provision that the WAIRC shall have regard to:
  a) the interests of the appellant; and
  b) the public interest which is taken to include:
     (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
     (ii) the special nature of the relationship between the Commissioner of Police and members of the Force. “(S 33 Q (4))
- the basis upon which new evidence can be admitted on appeal (S 33 R)
- incorporating a range of provisions from the Industrial Relations Act, 1979 that are to apply with necessary and appropriate modifications from claims for unfair dismissal.

These include the following:
- the WAIROC is to act according to equity, good conscience and the substantial merits of the case
- the limitation on issuing summons
- the general requirement to conduct proceedings in public
- the entitlement of parties to be legally represented
- the availability a modified conciliation process
- the availability of a limited right of appeal from a decision of the WAIROC to the Western Australian Industrial Appeal Court under Section 90 of the Industrial Relations Act 1979. (S 33 S)
- The regulation of adjournments of appeals if an appellant is charged with an offence (S 33 T)
- Decisions of the WAIROC where an appeal is upheld and the relief that can be ordered including compensation (S 33 U)
- The restriction on publication of evidence or content of documents in the public interest (S 33 V)
- The effect of charges for offences or acquittals not precluding the Commissioner of Police from taking action under loss of confidence (S 33 W)
- The effect of failure to comply with procedure not rendering the action of removal invalid if the failure is not substantive(S 33 X)
- Nothing under Part II B derogates from the Commissioner of Police’s powers to
  - transfer a member
  - stand down a member; or
  - allocating the member to other duties

(2) Under S 33 Z of Part II B, the Minister is to carry out a review of this Part of the Act as to its operation and effectiveness. A report based on the review is to be laid before each House of Parliament not taken than 30 months after the commencement date of the Police Amendment Act 2003 (ie by 26th February 2006). S 33 Z (2) provides that “in the course of that review the Minister is to consider and have regard to:

a) the effectiveness of the Part;
b) the need for the retention of the Part; and
c) any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Part.” (S 33 Z (3))

(3) The provisions of the Police Amendment Act 2003 which amended S 8 of the Police Act 1892 established the right of appeal and other provisions under Part II B reflect a “landmark agreement” between the Government and the WA Police Union in 2002.

These statutory provisions formulated an administrative arrangement which operated with Cabinet approval under the aegis of the WAIRC from 1998 until 2003. That arrangement followed industrial action by the WA Police Union in 1998.

The statutory scheme under Part II B set out to meet the challenge of providing “a suitable appeal mechanism to ensure fairness without undermining the Commissioner of Police’s ability to summarily remove officers whose suitability is in doubt.” (refer to Police Amendment Bill 2002. Second reading: Hon. Nic Griffiths 5.12.03)

(4) Pursuant to the requirement of S 33 Z (3) in carrying out the review, the Minister has consulted with and had regard to the views of the Chief Commissioner of the Western Australian Industrial Relations Commission, the Commissioner of Police and the Western Australian Police Union of Workers.

Views have also been sought on Part II B of the Police Act 1892 from officers of the Corruption and Crime Commission of Western Australia, the State Solicitors Office and the Ombudsman.

(5) It is noted that the Amendments to the Police Act that established the appeal provision under Part II B preceded the conclusion of the Kennedy Royal Commission. When the legislation enacting Part II B was before Parliament it was noted that the review of the operation and effectiveness of this Part should take into account “any relevant recommendations that the royal commission may make.”

Kennedy Royal Commission

The Kennedy Royal Commission did not make any recommendations which specifically went to the “loss of confidence” provisions, under the operation of Part II B of the Police Act 1892.

Nevertheless, “Key Reform Areas” were identified.

“Doing the Job Right” covers those Key Reform Areas associated with providing a professional environment where staff members are encouraged to do the right thing, and with ensuring that appropriate mechanisms are in place for those who fail to meet the required standards. These Key Reform Areas describe an approach that eschews the traditional command and control/disciplinary style of management in favour of a more managerial and remedial approach.”

(Kennedy Royal Commission Final Report Volume II p328)
The Royal Commission reviewed the provisions of Section 8 and Part II B of the Police Act 1892.

"The amendments represent a significant improvement and reflect a focus on removal as a managerial decision rather than a punitive process. It is too early to tell whether the amendments will affirm their objective and prove to be a fair and effective managerial tool." (Final Report Volume II p212)

Based on the form of the new provisions and on the NSW experience under "Loss of Commissioner’s Confidence" (Police Service Act N.S.W), the following matters were the subject of comment by the Kennedy Royal Commission:

- On the requirement that the Commissioner of Police obtain the approval of the Minister before removing a non-commissioned officer, the Royal Commission noted that previously this may have been justified on the basis that it provided a safeguard and a measure of accountability, for what on the face was otherwise a largely unfettered power. However, with the right of appeal the additional step in the process was considered to be no longer required to ensure fairness.

- The reference to the special nature of the relationship between the Commissioner of Police and members of WA police may be seen to be “abstruse”. However, given the “special powers vested in police officers that necessitate the need for a high level of trust and personal accountability”, there should be recognition of the particular risk that corrupt officers can have if they are not removed quickly and decisively.

The Royal Commission comments that “it is not, however, entirely clear what factors are intended to be taken into account by the IRC and what weight they are to be given. (Final Report Volume II P213)

- It is noted that the provisions of Part II B do not exclude other forms of review. Prerogative waits in order to challenge aspects of the removal process were cited. This may thwart the intended effect of Part II B.

The Royal Commission notes that “there would appear to be a good argument for excluding, or at least limiting, other avenues of review”. (Final Report Volume II P213)

- The Royal Commission notes that under the “new evidence” provision of Part II B there should be no reason why a strict fresh evidence test could not be applied. “New evidence would not be admissible unless the officer did not know and could not reasonably have known of its existence prior to the removal decision”. (Final Report Volume II P213)

- To ensure that an appeal under Part II B is not a de novo hearing and thereby introduces reconsideration of the merits of the decision to remove, the Kennedy
Royal Commission submits that appeal grounds should be limited to matters that apply in the judicial review of administrative decisions. (Final Report Volume II P214)

- The Royal Commission notes that the amendments under Part II B are clearly designed to minimise unnecessary delays. In this respect it emphasises that WA Police must closely monitor all section 8 matters and establish appropriate benchmarks to ensure that management action is timely and effective. (Final Report Volume II P215)

- According to the Royal Commission, the amendments to section 8 and the provision of Part II B do not resolve some issues. These include a change in the Commissioner of Police whilst an appeal is pending. Also, there is the matter of operationally sensitive documents being disclosed in a public hearing. These may be prejudicial to continuing criminal investigations. (Final Report Volume II P215)

Finally, the Kennedy Royal Commission notes:

"In the past, a Commissioner of Police’s ability to use S 8 as an instrument to effectively and expeditiously remove officers whose performance or integrity was lacking has been significantly inhibited. The new provisions offer improvements and reduce the incentives to engage in lengthy appeal processes. There remains some, though reduced, potential for the processes to be used to frustrate appropriate management action. The extent to which there are deficiencies will become apparent in time and it is noted that the amending Act contains provision for a review of the effectiveness of Part II B after two years." (Final Report Volume II P215)

**Loss of Confidence and action taken pursuant to Part II B of the Act Statistics and the Statutory and Administrative process under the Act and Regulations**

(6) In the 28 months from when Part II B of the Act came into operation until the end of December 2005, “Loss of Confidence” under S8 of the Act has been initiated against 108 members of WA Police.

By rank the members were:

<table>
<thead>
<tr>
<th>Rank</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>APLO (Aboriginal Aide)</td>
<td>8</td>
</tr>
<tr>
<td>Probationary Constable</td>
<td>1</td>
</tr>
<tr>
<td>Constable</td>
<td>18</td>
</tr>
<tr>
<td>Senior Constable</td>
<td>53</td>
</tr>
<tr>
<td>Sergeant</td>
<td>20</td>
</tr>
<tr>
<td>Senior Sergeant</td>
<td>5</td>
</tr>
<tr>
<td>Inspector</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>108</strong></td>
</tr>
</tbody>
</table>

5
Legislation Committee

(7) Outcomes of initiatives commenced pursuant to “Loss of Confidence”:

- Members “stood back up”, loss of confidence not proceeded with: 19
- Member deceased: 1
- Members reinstated after response to notice of intention to remove: 12
- Members resigned: 42
- Members medically discharged: 7
- Members who lodged appeals under Part 2 II B: 10
- Members removed under “loss of confidence” and no appeal: 2
- Members (APLO) whose appointments were revoked and no appeal: 3
- Loss of Confidence matters still on foot: 12

In the period of review, 10 appeals were filed in the WAIRC:

- Withdrawn before conciliation: 1
- Withdrawn or discontinued after conciliation: 5
- Heard and dismissed: 3
- Adjourned under S 33T(3) until June 2006: 1

(8) The process by which a matter progresses to removal for loss of confidence is regulated by administrative arrangements, statutory provisions (under S8 and Part II B of the Police Act 1892) and Regulations pursuant to the Police Force Amendment Regulations 2003.

(9) When serious issues are raised about a member’s integrity, honesty, competence, performance or conduct following an investigation into a complaint or from information received, either from external or internal sources, a “Loss of Confidence Nomination Report” is prepared by the local area Manager (ie Superintendent).

(10) Where the matter progresses beyond the “Loss of Confidence Nomination Report” the Commissioner usually stands the member down from duty. While consideration is being given to a member’s suitability to continue, the member’s pay cannot be suspended (Regulation 6A12. Police Force Amendment Regulation 2003).

(11) A review officer is appointed by the Commissioner of Police or the Assistant Commissioner (Corruption Prevention and Investigation) under Regulation 6A02.

Under a review of procedures instituted in June 2005 by the Assistant Commissioner (Corruption Prevention and Investigation) the review officer is directed to complete the review “by 21 days or sooner”. If an extension is needed, an application must be made to the Assistant Commissioner detailing reasons for the need for extension.
In another initiative to “streamline” the process, review officers are appointed from the Corruption Prevention and Investigation Portfolio. This has ensured the development of expertise in these matters.

The review officer provides a “review and oversight role” in relation to the assessment as to whether an officer should be removed for loss of confidence. “Loss of Confidence Nomination Report” provides the starting point. The inquiry will focus on reviewing the key issues identified in that investigation. Where necessary, the review officer will cause further investigations to occur.

Regulation 6A02(2) requires that, if practicable, a review officer will not be an officer involved in an investigation that resulted in the complaint to the Commissioner or Assistant Commissioner that resulted in the “Loss of Confidence Nomination Report”. This independence is designed to increase confidence in the objectivity of the process.

Amongst other things to which the review officer’s attention is drawn in conducting an inquiry, the officer is to consider whether the member has been given a “fair go all round”. The review officer is required to ensure that a balanced view is presented to the Commissioner of Police.

Also under administrative arrangements implemented by WA Police, the member subject to the loss of confidence inquiry is to be provided with a mentor or support person appointed for welfare purposes. This is the responsibility of the District or Divisional Superintendent.

If the Commissioner of Police issues a “Notice of Intention to Remove” a member in whom he has lost confidence pursuant to S 33 L(1) of the Act, the provisions of Regulation 6A05 particularises the documentation that shall be made available to the member.

By administrative requirement, that information including the Summary of Investigation, Inspection List and any documents examined and taken into account by the Commissioner in issuing the notice, is to be made available to the member when the “Notice of Intention to Remove” issues.

Furthermore, under the reviewing officer’s responsibility to include in the “Summary of Investigation” reference to “relevant materials” that were gathered by the reviewing officer for the purpose of the inquiry (Regulation 6A03(2)), that officer is advised to exercise caution. A failure to adequately gather materials may impact on the Summary of Investigation and the perceived fairness of any resulting removal action taken by the Commissioner.

By administrative direction, the review officer is required to take reasonable steps to satisfy himself or herself that any materials of significance have been identified and
gathered. This is emphasised to be particularly important if the materials assist the member.

(20) Although s 33 L(2) of the Police Act is silent as to any time frame in which the Commissioner of Police must consider the member's submission in response to the "Notice of Intention to Remove", Regulations 6A07(2) and 6A07(3) impose requirements as time limits.

The Commissioner of Police must decide within 21 days where practicable and in any event within 42 days of the expiry of the period in which the member was given to make written submissions as to whether or not a period for further investigation or analysis is necessary.

If a further period is required, the Commissioner shall endeavour to complete the investigation or analysis within 7 weeks of receiving the member's submission.

(21) Finally, a notice of dismissal by the Commissioner shall be given to the member within 7 days of making the decision to take removal action. (Regulation 6A09(1)).

(22) An examination of the time taken from when a member was stood down with the advent of a Loss of Confidence Nomination Report until a review was forwarded to the Commissioner of Police shows that this step in the process was characterised by extensive delays in 2002 – 2004.

The decision to only appoint review officers from the Corruption Prevention and Investigation Portfolio has contributed to a turn-around in the length of time taken. Since February 2005, on the information available, most matters have been dealt with within a matter of weeks. However, one matter took 12 weeks and another 6 weeks. This is recognised as being unacceptable. The next matters were dealt with within 4 weeks, with many being disposed of in 1 or 2 weeks.

The imposition of a "21 days or sooner" requirement on the appointment of a review officer for the review to be presented to the Commissioner of Police should ensure that this standard of expedition is maintained.

(23) The genesis of a loss of confidence action is a complaint or information which goes to the issue of the member's suitability to perform the duties to the standard demanded. If the Complaints Management System implemented to address the Kennedy Royal Commission recommendations is applied to the initial investigation and subsequent steps in the "loss of confidence" meet minimum administrative and statutory time frames in the process, a loss of confidence would be disposed of to the point of removal in 14 weeks.

This time frame assumes a 60 day completion for investigating a complaint which results in a "Loss of Confidence Nomination Report", 21 days for the review officer to present his or her report, a decision by the Commissioner of Police on receipt of that report to
issue a “Notice of Intention to Remove”, 21 days for the member to formulate and submit a response and immediate action by the Commissioner of Police and the Minister if removal of the member is then the outcome.

**Views expressed by parties specified under S 33 Z(3) and other bodies with an interest in Part II B**

(24) In undertaking this review, the consultative approach followed afforded each of the parties interviewed with the opportunity to express views on issues of particular interest and concern, and to comment on matters raised by other persons or parties with an interest.

(25) Through the General President, the Western Australian Police Union of Workers made clear, the importance that its members place on the retention of a fair and expeditious process, which not only addresses the interests of the community through the Commissioner of Police’s power under S8 of the Police Act, but which also ensures equity and justice for members the subject of proceedings under Part II B of the Police Act.

Issues which surround the “loss of confidence” power and appeal process were the subject of industrial action in 1998. The Statutory scheme which subsequently developed reflects the balances and compromises that were addressed with Government in the period up to the enactment of the existing provisions.

(26) In addressing the effectiveness of Part II B, the WA Police Union seeks to ensure that the principles upon which Part II B was developed have been retained in practice through the operation of the statute and the administrative and regulatory processes which support it. In this respect the member’s ability to access relevant information and to challenge evidence brought against him or her, upon which the Commissioner of Police’s “loss of confidence” is based, is fundamental to the effectiveness of Part 11B.

(27) To the Commissioner of Police, S8 is an important “management tool” which should not be undermined by any variations to Part II B of the Police Act which limit or detract from his ability to remove members in whom he has lost confidence, having regard to the member’s integrity, honesty, competence, performance or conduct.

Consistent with the managerial approach to maintaining discipline identified and emphasised by the Kennedy Royal Commission, the statutory scheme recognises the special nature of a police officer’s position. Powers which enable police to arrest, to deprive members of the community of their liberty, to subject them to lawful force and to enter their homes necessitates a high level of trust, integrity and accountability. Police are not like employees. The appeal process under Part II B is not comparable with the WAIRC’s “unfair dismissal” jurisdiction and in the view of the Commissioner of Police, should not operate to make it so. Consistent with the general view supported by the WA Police Union, the Commissioner of Police sees that the Part II B process should be “fair, simple and expeditious”.

9
However, there is a fundamental difference between the Commissioner or Police and WA Police Union. This goes to the extent to which the Part II B of the Act incorporates “merit” into elements of the appeal.

The Chief Commissioner identified a number of matters arising from the WAIRC’s experience in dealing with appeals.

- It would be more efficient and timely if interlocutory proceedings could be dealt with by one of the members of the WAIRC hearing the appeal rather than all three members.

- There is no statutory provision allowing for appeals to be withdrawn or discontinued. After consultation with the Commissioner of Police and the WA Police Union, the WAIRC has made Regulation 94 in the Industrial Relations Commission Regulations to accommodate withdrawal or discontinuance. The Chief Commission proposes that Regulation 94 be enacted in the Police Act 1892.

- The present provisions of S 33 R regarding the tendering of new evidence can be time consuming. The process which facilitates consideration of the new evidence by the Commission of Police prior to the evidence being considered by the WAIRC necessarily leads to adjournments and delay. The Chief Commissioner acknowledges that it is a policy matter whether it is intended that the ability to produce new evidence is to be so restricted.

- In almost every appeal, the WAIRC is faced with a submission that the discretion of the Commissioner of Police has been wrongly exercised by recourse to S8 when the matter should have been dealt with under disciplinary provisions of S23. With the moratorium on the use of S23, the Chief Commissioner notes that there should not now be greater recourse to S8 as an alternative. The question is raised that if S23 is not to be utilised, whether the Commissioner of Police should have general powers of dismissal or removal with the right of appeal to the WAIRC.

- The Public Service Appeal Board is a constituent authority of the Commission and deals with appeals against a range of decisions made in disciplinary matters including the decision to dismiss. The Chief Commissioner notes that it is a matter of policy as to whether disciplinary matters are dealt with under the Police Act or otherwise.

- As presently considered there may be no opportunity for an appellant to give oral evidence, the appeal under Part II B is effectively decided on the papers with oral submission being made. On occasions, the issue of credibility is such that there may be a disadvantage to an appellant in not being able to give evidence. However, this may open proceedings to become a hearing *de novo* rather than the present review. The Chief Commissioner considers that this is a policy matter and is not one on which a position is put.
The Ombudsman notes that since amendments to the Police Act in 2003 which established Part II B, there have not been any complaints about the loss of confidence process lodged with the Ombudsman’s Office. However, it is noted that complaints might still arise about procedural fairness. An officer may be aggrieved by the circumstances which lead to removal action being taken even though that was not the eventual outcome.

It is the role of the Ombudsman to ensure that whatever power or model is exercised, the process provides natural justice and is open and accountable.

The Corruption and Crime Commission of Western Australia expressed the view “that whatever loss of confidence process is in place, the net effect should be that the Commissioner of Police should not be hampered by lengthy approvals, appeals and administrative processes in order to properly manage officers in whom he has lost confidence”.

Consistent with the Kennedy Royal Commission’s findings, the Commission’s experience has been that under Part II B there remains the potential to engage in lengthy appeal processes.

The Commission’s main concerns are that the process under Part II B is “long winded” and that S8 is under-used due to the complexity of the process. A case study was cited to demonstrate issues with the current system for removal of recalcitrant and high risk officers.

The following points are presented in summary form. These were matters raised in the course of consultation with parties and bodies interviewed. Some of these points reiterate the general issues and positions already identified in the preceding paragraphs.

(a) No one has submitted that there is no need for the retention of Part II B of the Police Act. However, the following matters were raised:

- The legislation has failed to reflect the intent to provide a merit based appeal. Although the process envisaged an appeal on the papers, the exception was when there was a dispute about the evidence. The way it’s turned out the only avenue to challenge evidence is through the “new evidence” provision.

- “Merit” is an objective test applied by the Commissioner of Police when he uses the power under S8. He exercises it on the basis of information before him. An appeal addresses the question as to whether the decision was reasonably open to him. It is not a hearing de novo.

- The S8 and Part II B process is frustrating. The fact is that the Commissioner of Police does not have the power to summarily dismiss a member. Even in circumstances where a member is convicted of an offence which carries a custodial sentence the “Loss of Confidence” process applies. Removal from WA Police should be automatic when a member is convicted of an offence carrying a custodial sentence.
• The test under S 33 Q(4) of the Police Act sets the bar too high. An appellant can never succeed.

• There are problems with unreliable evidence being submitted to support S8. The Commissioner of Police does not always get the “full story”.

• The Minister should not have power to approve the Commissioner of Police’s determination of loss of confidence. There is the potential for political interference. The Commissioner of Police has the responsibility and accountability for monitoring the public interest and the public’s confidence in police. His power to remove in circumstances of loss of confidence should not be “second guessed”.

• It is important for the Minister to have the power to approve removal under the Commission of Police’s determination of “loss of confidence”. This prevents an “abuse of power”. Any reliance on the “separation of power” to justify removing the Minister from the process is misplaced. The autonomy of the Commissioner of Police ignores reality. The present arrangement reflects the outcome under which the present legislation was enacted with support from all parties.

(b) In considering the effectiveness of Part II B of the Act, views were expressed that this is inhibited by:

• Part II B going too far in terms of setting down process.

• Interlocutories are protracted.

• Part II B is convoluted and its complexity militates against its use.

• The “new evidence provisions” are unwieldy and time consuming.

• There is a “power imbalance” between the Commissioner of Police and the member. This is manifested in access to witnesses. The appellant does not have access.

• Conciliation is useless. The Commissioner of Police is never going to compromise the decision that he has lost confidence in a member.

• Difficulty is experienced by the appellant in accessing documents for appeal. “Inspection” is being narrowly applied. Copies of documents should be made available.

• “Inspection” should not be an issue; copies should be available on the undertaking that they will not be used other than for the appeal and will be returned to the Commissioner of Police.

• Although the Commissioner of Police usually grants appellants an extension beyond the 21 days in which to submit their response to the “Notice of Intention to Remove”, the appellant has a finite period. However, the Commissioner may take anything up to 12 months to formulate a position with respect to the basis for the loss of confidence.
(c) Provision of initiatives which should be incorporated into Part II B:

- Officers undertaking investigation of matters which are being considered for S8 action should not be making the recommendation to the Commissioner of Police for a "loss of confidence".
- There should be provision for demotion in the "Loss of Confidence" outcome.
- Demotion would be an avenue that could be used instead of removal. However, there must be an appeal right and the awarding of Police Medals needs to be protested.
- Demotion is inconsistent with loss of confidence. However, to introduce this notion there would need to be a distinction between loss of confidence as a police officer and loss of confidence to perform the duties at a particular level. The latter introduces the possibility of an appeal based on merit.
- There should be provision under Part II B to prevent officers claiming "stress" and refusing to be interviewed when confronted with matters which may result in loss of confidence action.
- Part II B should provide for withdrawal or discontinuance of an appeal.
- To assist in reviewing evidence, a loss of confidence appeal should be heard by a single Commissioner with an appeal to the Commission in Court Session.
- Part II B should provide for the appointment of an "officer’s advocate" for the member the subject of the loss of confidence action.
- The position of "members" for the purpose of Part II B should include recruits who are presently removed under Regulation 505 A(2).
- There should be protection in Part II B against the use of S8 to remove members who are injured in the course of duty. There is no mechanism for compensation for these members.

The Effectiveness of Part II B of the Police Act 1892 including particular matters commented on by the Kennedy Royal Commission

(33) The effectiveness of Part II B should be assessed against the objective set by parliament when the amendment was enacted.

(34) The objective was to provide a suitable appeal mechanism to ensure fairness without undermining the Commissioner of Police’s ability to summarily remove officers whose suitability is in doubt. Part II B recognises that the removal of a police officer for loss of confidence involves a managerial decision rather than a finding of guilt. It is an instrument that accommodates, on the one hand, the Commissioner of Police’s ability to effectively and expeditiously remove an officer in whom he has lost confidence in order to maintain public confidence in police and on the other, an independent right of appeal against S8 removal decisions.
It is sometimes argued that the effectiveness of removal for loss of confidence may be enhanced with the provision of an unfettered right of summary dismissal. A hearing *de novo* would be the response to such a power. A shift to both or either of these extremes would fundamentally change the balance and nature of Part II B.

This review has not disclosed any fundamental flaw in Part II B which has impugned its effectiveness in meeting the objective to provide an appeal mechanism to ensure fairness without undermining the Commissioner of Police’s power to remove a member in whom he has lost confidence.

Anecdotally, it was claimed when Part II B was enacted, that recourse to S8 and Part II B would be rare. However, in the period under review, there have been 108 cases in which removal action was initiated. Of these, fifteen (15) resulted in removal. Ten (10) of these officers lodged appeals under Part II B but only five (5) progressed to hearing.

In forty two (42) cases, members the subject of S8 proceedings resigned within 28 days of receiving the notice of removal and seven (7) were discharged on medical grounds. Thirty one (31) officers were either reinstated following consideration of their response to the Commissioner of Police after receiving a Notice of Intention to Remove or as a result of investigations being carried out by the Commission of Police following a Notice of Loss of Confidence Nomination.

It is to be remembered that the removal of a police officer for loss of confidence involves a managerial decision rather than a finding of guilt. In this respect, the operation of Part II B appears to have been effective.

It is of deep concern to the WA Police Union that the opportunity to challenge particular evidence upon which the Commissioner of Police has lost confidence in a member should be open to challenge under an appeal pursuant to S 33 P of the Police Act. This aspect of the appeal, in the WA Police Union’s view, encompasses that element of “merit” which was to be recognised as being part of the fairness incorporated into Part II B.

It is noted that under S 33 S of the Police Act which applies provisions of the Industrial Relations Act 1979 to appeals, S26(1)(a) and (b) and S 26(3) of that Act apply in relation to an appeal and a determination of an appeal instituted under Part II B.

These provisions of the Industrial Relations Act 1979 state:

“S26 (1) In the exercise of its jurisdiction under this Act, the Commission –

(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities on legal forms;

(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just;

......”
“S26 (3) Where the Commission, in deciding any matter before it proposes or intends to take into account any matter on information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.”

Under the terms of S 33 Q in Part II B of the Police Act 1892 which regulates proceedings on appeals, there is a provision which states:

“S 33 Q ……
(4) Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to –
(a) the interests of the appellant; and
(b) the public interest which is taken to include –
(i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
(ii) the special nature of the relationship between the Commissioner of Police and members of the Force.”

(emphasis added)

(40) It is considered that when the provisions of S 26(1)(a) and (b) and S 26(3) of the Industrial Relations Act, 1979 and S 33 Q(4) of Part II B of the Police Act are taken into account, there is sufficient scope within the proceedings of an appeal for the WAIRC to consider particular evidence which may challenge that relied upon by the Commissioner of Police in formulating his loss of confidence. Furthermore, there is also sufficient scope in these provisions for the WAIRC in appropriate circumstances to test the credibility of an appellant without fundamentally changing the nature of the appeal by making it a hearing de novo.

It is also noted that S 33 V of Part II B of the Police Act 1892, which provides for the WAIRC to direct restriction on publication of matters in the public interest, covers both documents presented to the Commissioner and "any evidence given before the Commission" (S 33 V (1)). The possibility that evidence will be presented to the WAIRC is accommodated in Part II B of the Act.

(41) Consistent with the recognition that the removal of a police officer for loss of confidence involves a managerial decision rather than a finding of guilt, the task is, as the WAIRC has expressed it to be, to determine whether there was a fair and reasonable explanation for the decision of the Commissioner of Police, which when viewed objectively, would be regarded by fair-minded persons as being legitimate. In the context of an appeal, the question is whether the decision of the Commissioner of Police was one which was open to a fair-minded person charged with the statutory responsibilities of the Commissioner of Police. (refer to Carlyon v Commissioner of Police 2004 WAIRC 11966 at [119])
At paragraph 23 of this review, a time frame of 14 weeks from the time of receipt of complaint on information which culminated in the removal of an officer was cited as a possible objective if minimum statutory and administrative investigation and review periods are adhered to.

Within this part of the process the only possible reduction which may be achieved is in the time for conducting the investigation which results in the “Loss of Confidence Nomination Report”. However, it may be unrealistic to expect that anything less than 60 days could be allowed for this investigation (that being the time frame in which complaints are investigated).

Given the dual objectives of expedition and fairness, the statutory time frames for an appellant’s response to the “Notice of Intention to Remove” and the time in which consideration must be given to that submission, the 14 week time frame should be the benchmark. It may be appropriate to entrench the 60 day period to complete an investigation as an amendment to the Police Force Amendment Regulations 2003.

The concerns expressed by the Kennedy Royal Commission and reiterated by the Corruption and Crime Commission for this review about the potential for delays occurring from lengthy appeal processes have, to some extent, been addressed by the Chief Commission, WAIRC.

An amendment to Part II B which enables one member of the appeal body to deal with interlocutory matters may assist in addressing the potential for delay. This may also facilitate a more formal case management approach by the WAIRC. However, it is noted that the appeal process operates after the member in whom the Commissioner of Police has lost confidence is removed from WA Police. The appeal does not act to stay the removal.

Consistent with the observation made by the Kennedy Royal Commission that WA Police must monitor all section 8 matters and establish appropriate benchmarks to ensure management action is timely and effective, Corporate Risk Management within the Corruption Prevention and Investigation Portfolio of WA Police has implemented a project “Loss of Confidence – Streamlining the Process”. Under this project all stages are monitored for adherence to statutory and administrative time frames. Under this initiative, policies have been put in place since June 2003 to:

- Impose a 21 day period for reporting to the Commissioner of Police following the issuing of the “Loss of Confidence Nomination Report” to when the Commissioner’s “Notice of Intention to Remove” is to be served.

- Implementation of administrative arrangements for applications for extension of time in which the member may respond to the “Notice of Intention to Remove” to be dealt with by the Assistant Commissioner Corruption Prevention and Investigation Portfolio or the Superintendent Corporate Risk Management.

- All “loss of confidence” files are locked into timeline reporting schedules for Corporate Risk Management attention.
• The rank of senior sergeant is now included in the role of “review officer” on loss of confidence matters involving officers of that rank or lower.

• An officer at the rank of Inspector undertakes on a full time basis, an analysis of the “loss of confidence” reviews.

• The Corruption Prevention and Investigation Portfolio has a weekly meeting agenda item dedicated to monitor review timelines so that action can be initiated in appropriate cases.

(45) The issues which arise from the statutory requirement for the Commissioner of Police to obtain the Minister’s approval before removing a non-commissioned officer under S8 was the subject of comment by the Kennedy Royal Commission and was canvassed by the Commissioner of Police, the WA Police Union and the State Solicitor’s Office. The respective positions have already been documented in this report.

It must be conceded that the requirement to seek the Minister’s approval to remove a non-commissioned officer has the potential to cause delay. To date, that has not occurred. More relevantly, from the WA Police Union’s viewpoint this position, accepted by the Parliament when the legislation was enacted, is part of the “checks and balances” inherent in the process under Part II B. Any departure from the existing statutory provision invites further amendments.

(46) The special relationship between the Commissioner of Police and members of WA Police was noted by the Kennedy Royal Commission. It has not been the subject of any submission by any other party in this review.

The Commissioner of Police’s responsibility in maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of WA Police is specified as a matter to which the WAIRC must have regard in determining an appeal under S 33 Q (4) of Part II B of the Police Act 1892.

This provision is accompanied by the requirement for the WAIRC to have regard to the special nature of the relationship between the Commissioner of Police and members of WA Police. (S 33 Q (4)(b)(ii))

The provisions are not two ways of saying the same thing.

The WAIRC has given some insight into the way this should be interpreted and applied. In Carlyon v Commissioner of Police (2004 WAIRC 11966 at [186]) the WAIRC commented that the Commissioner has a duty “to ensure that members receive appropriate education, training, information and supervision in order for them to make decisions appropriate to the proper discharge of their duties and in the public interest”. Further, the Commissioner of Police also has a duty to maintain the well-being of members (Supra at [208]).
This aspect of the Part II B appeal process goes to its effectiveness in providing fairness to members.

The Kennedy Royal Commission referred to the possibility of prerogative merits inhibiting the removal process. This has not occurred. As to other appeals arising from Part II B, the availability of an appeal from a decision of the WAIRC to the Industrial Appeal court is circumscribed by the application of S 90 of the Industrial Relations Act through S 33 S of the Police Act. No appeals have been lodged under this provision.

It is common ground with many of the parties providing comment for this review, that the "new evidence" provisions (S 33 R) are complex, time consuming and restrictive. This was also a matter upon which the Kennedy Royal Commission commented. The terms of S 33 R may be excessively prescriptive. Maybe in the interests of expedition, the matter of new evidence should be left to the WAIRC to determine an application for the admission of new evidence on the basis of principles already set down by the WAIRC in that jurisdiction.

This would necessitate a repeal of S 33 R. However, given the WA Police Union’s issue on the ability to present evidence to challenge that on which the Commissioner has relied in deciding to remove a member, S 33 R may be one avenue through which it was envisaged that access could be achieved. This matter should be considered with a degree of caution.

Notwithstanding the concerns expressed by the Kennedy Royal Commission about the sensitivity of documentation and information being submitted in public hearings in appeals under Part II B, no issues have arisen in this regard in the review.

The provisions of S 33 or part II B (Restrictions on Publication) have not been pointed to as being inadequate or impacting on the effectiveness of the removal and appeal process.

Inconsistency in the application of S8 by different Commissioners has been raised without that necessarily being a matter which affects the effectiveness of Part II B.

More specifically, the Kennedy Royal Commission considered the circumstances of a change in Commissioner whilst an appeal was pending. Again, this was not a matter which concerned any party on the effectiveness of Part II B. Whilst this may have occurred during the period of this review, the new appointee to the office of Commissioner of Police has had the opportunity to reconsider the position. In this respect, the conciliation proceedings before the WAIRC have facilitated any reassessment by the new appointee.

**Initiatives proposed to contribute to the effectiveness of Part II B of the Act**

While these initiatives are proposed in order to contribute to the effectiveness of Part II B the existing balance of maintaining a suitable appeal mechanism to ensure fairness
without undermining the Commissioner of Police’s ability to summarily remove officers in whom he has lost confidence has been kept in mind.

(52) It is considered that the provisions of S 33 S of Part II B which incorporates S 26 (1)(a) and (b) and S 26 (3) of the Industrial Relations Act as well as S 33 V of Part II B of the Police Act 1892 make it clear that issues considering the presentation of evidence were comprehended when the legislation was enacted. No further amendments are necessary in the interests of fairness in this regard.

Automatic Loss of Confidence

(53) It is considered that the balance inherent in Part II B of the Act would not be disturbed if provision was made for the Commissioner of Police’s loss of confidence to be automatically invoked if a member was convicted and imprisoned. The possibility of a successful appeal may have to be accommodated.

This initiative would require an amendment to the Police Act 1892.

Making conciliation more relevant and introducing an incentive to finalise a loss of confidence action

(54) Conciliation provisions conducted under the terms of Part II B of the Act should be amended to facilitate settlement of an action pursuant to S8. Conciliation should be available once a member is stood down from duty. This usually occurs with the “Loss of Confidence Nomination Report”. The fact of lodging an appeal should not be the basis for the availability of conciliation.

The Commissioner of Police should be given discretion to conciliate an outcome, with payment of up to 3 months salary, to the member stood down from duty at any time up to the point in the process where a member is served with a notification of the Commissioner of Police’s decision under S33 L (3)(b) to remove the member in whom he has lost confidence.

This initiative may require statutory and regulatory amendments.

Access to copies of documents sought under “inspection”

(55) Inspection of documents provisions pursuant to S 33 L (5) of the Police Act 1892 by a member served with a “Notice of Intention to Remove” should provide for copies to be made available to the member and his or her legal representative on the undertaking that they will not be used other than for the appeal and will be returned to the Commissioner of Police when the appeal under Part II B has concluded. (Relevant amendments to Regulations 6A03, 6A05, 6A06 and 6A08 of the Police Force Amendment Regulations 2003 will be required.)
Enhancing the objectivity of the Review Officer

Regulation 6A02(3) should be amended to delete the words “If practicable” to ensure that the review officer appointed under Regulation 6A02(i) in relation to a loss of confidence inquiry is not an officer involved in the preceding police investigation that resulted in the loss of confidence review process being initiated.

Entrenching the administrative arrangement to expedite the review from which the Commissioner of Police determines whether or not to issue a “Notice of Intention to Remove”

The administrative direction for the nominated review officer to complete the report within 21 days or seek an extension from the Assistant Commissioner (CP1) on a member to be nominated for loss of confidence prior to the issuing of “Notice of Intention to Remove” or stood up for duty should be specified in the Police Force Amendment Regulations 2003.

Provision for withdrawal or discontinuance of an appeal against removal

WAIRC Regulation 94 should be incorporated into Part II B of the Police Act. This will complete procedural requirements for a withdrawal or discontinuance of an appeal.

The amendment will replicate Regulation 94.

“94. Withdrawal or discontinuance of an appeal against removal

(1) An appellant may withdraw or wholly discontinue an appeal against removal, or withdraw any part of the appeal –

(a) by completing and filing in the office of the Registrar 3 copies of a notice of withdrawal or discontinuance;

(b) by serving a stamped copy of the notice on the Commissioner of Police; and

(c) by having a declaration of service completed, and filing the declaration.

(2) The notice of withdrawal or discontinuance and the declaration of service must be in an approved form.”

Expedition of Interlocutory Proceedings under an appeal

Part II B of the Police Act should be amended to provide for one member of the appeal bench of the WAIRC to be designated by the Chief Commissioner or the Senior Commissioner presiding on the bench, to deal with interlocutory matters and to progress the appeal under a formal case management process.
Provision for demotion under Loss of Confidence

(60) Where a member of WA Police is the subject of loss of confidence rising out of his or her performance, competence or conduct but which does not involve any issues of integrity and or honesty and the Commissioner of Police otherwise retains confidence in the member to perform duties at another level, consideration should be given to including a provision for the Commissioner of Police being able to demote a non-commissioned member.

Demotion in these circumstances would be subject to appropriate conditions concerning a time limit for eligibility for consideration for future promotion and the Commissioner of Police being satisfied that there were no past issues of criminality or corrupt behaviour that may inhibit the member’s ability to perform at a designated level. Issues of an appeal against demotion under these circumstances and the impact on the awarding of Police Medals would need to be addressed.

To prevent duplication of documentation and prevent delay

(61) Regulation 6A08 should be amended to exclude from the copies of documents to be provided to the member, the member’s own submission that was received as a response to the Commissioner of Police’s “Notice of Intention to Remove”.

This is only an administrative matter but reduces duplication of documentation which can contribute to delaying access to material.

Other matters

(62) There are several matters which were raised in the course of the review which raise matters of concern outside the scope of consideration of the effectiveness or retention of Part II B.

Member covered by Regulation 505A

(63) One issue involves the position of a police recruit at the Academy and the operation of Regulation 505A. The circumstances of recruits was the subject of consideration by the WAIRC in Finnerty v Commissioner of Police (2005 WAIRC 01496).

At present, recruits at the Academy are specifically excluded from the operation of Part II B. If this statutory arrangement is to change, that will be a separate matter. It does not at present, affect Part II B but is a concern to WA Police Union.

Appeal to a Single Commissioner of WAIRC

(64) The suggestion was made that in the first instance, an appeal should be heard by a member of the WAIRC sitting alone with a subsequent appeal to the Commission in Court Session. Again, that would be a matter which changes the nature of the existing
appeal process. It would, on the face of it, change the balance between expedition and
fairness struck under the present process.

\textit{Loss of Confidence and a member's incapacity through injury}

(65) Concern was expressed that S8 should not be used to dispose with the services of a
member of WA Police injured in the course of his or her duties and who is no longer able
to perform policing duties.

Although no cases have been cited, it would be disappointing to think that S8 could be
used for such a purpose. It has not, and matters of medical fitness and the capacity to
perform duties are health and welfare issues which should not find their resolution under
Part II B of the Police Act.

\textbf{Conclusion}

(66) There has been nothing put up in the review to consider that Part II B of the Act should
not be retained.

(67) The effectiveness of the Part could be enhanced by the introduction of initiatives
proposed. However, as has been emphasised, it is the balance between providing a
suitable appeal mechanism to ensure fairness and ensure that the Commissioner of
Police’s ability to remove officers is not prejudiced.

(68) Administrative processes to support Part II B of the Police Act 1892 and the Police Force
Amendment Regulations 2003 are being monitored by the Corruption Prevention and
Investigation Portfolio and benchmarked by Corporate Risk Management.

(69) Delays which occurred in finalising investigations in the past are being addressed.
Matters to which the Kennedy Royal Commission drew attention and in which the
Corruption and Crime Commission have a vital interest are kept under review.

Finally, in the management of complaints, the Commissioner of Police has moved to a
managerial approach in WA Police to maintaining discipline and the commitment to
ethical standards in policing. This model functions on the basis of addressing behaviour,
conduct and performance and holding officers and supervisors accountable for achieving
and maintaining outcomes that are consistent with values under WA Police’s Code of
Conduct.

(70) As the Corruption and Crime Commission noted in this review, “the model gives
managers the assurance of documented remedial action to identify and remove officers
whose professionalism is in doubt despite management intervention to improve
performance.”

(71) The managerial approach under S8 identified when the provision of Part II B was enacted
complements initiatives taken by the Commissioner of Police maintaining discipline
through managerial intervention and accountability. With this focus on remedial rather than punitive outcomes in supervision, the cultural change may be reflected in a reduction in numbers subject to S8 action – at least for those that respond positively to proper supervision and maintain standards of trust and integrity to retain public confidence in WA Police. This is the overwhelming majority of members of WA Police.
APPENDIX 3

WESTERN AUSTRALIA POLICE MANAGERIAL INTERVENTION MODEL
APPENDIX 3

WESTERN AUSTRALIA POLICE MANAGERIAL INTERVENTION MODEL

HR-31.01 Managerial Intervention Model

Policy and Purpose
Policy Statement and Summary of Protocols

Best Practice
The Western Australia Police (WA Police) are committed to the development and implementation of best practice policy for the management of demonstrated and identified unprofessional conduct by Police personnel. The primary objectives of the Policy are to improve the ethical health of the agency; demonstrate openness and accountability; reinforce and improve corruption resilience and to maintain and improve public confidence in WA Police.

In order to maintain best practice and consistency of application, managers and supervisors at all levels within the agency, are expected to demonstrate and live the established standards of behaviour, conduct and professionalism and accept both responsibility and accountability for their personal conduct and for the conduct of the personnel they may supervise and lead during the ordinary course of business. This approach reinforces the discretion and flexibility leaders, managers and supervisors need to effectively manage human and general resources and work areas.

The policy has been developed in the context of Government policy and direction, the WA Police Strategic Plan, the reform agenda of the WA Police and the changing cultural environment of policing.

Purpose
The purpose of this policy is to ensure:

- All managers/supervisors first adopt a managerial approach to the resolution of all incidents and complaints of unprofessional conduct
- All managers/supervisors are responsible and accountable for the management of unprofessional conduct
- All managers/supervisors are required to discuss with subject officers the outcome of internal complaint investigations; make clear how demonstrated and or identified unprofessional conduct failed to meet the standards set by the WA Police Code of Conduct; and how the identified unprofessional conduct will be addressed through either managerial intervention and or by other means
- All WA Police employees are aware of the principles and key responsibilities that underpin the managerial approach (the MIM)
- All managers/supervisors and senior leaders model behaviour, conduct, performance and decision-making that supports the cultural change sought by the agency and this policy
- WA Police recognises the need to build on the ethical health of the agency and achieve a high level of professionalism and integrity to further build on community trust and confidence and that by oversight bodies and key stakeholders
- To create an environment and management system to make clear, to reinforce and to promote the acceptance of roles, responsibilities and accountabilities
- To create balance and equity in the rights and responsibilities of all interested and involved parties, including those lodging a complaint and those who are subject of a complaint.

The policy intent is also to embody and maximise the agency’s commitment to valuing and developing all employees in order to maximise potential and commitment to performance.
Definitions

Aboriginal Police Liaison Officer – refers to Aboriginal Police Liaison Officers appointed under Part IIIA of the Police Act 1892 (Police Act), employed by the Commissioner of Police (Commissioner).

Assistant Commissioner’s Warning Notice – refers to a formal notice issued and delivered by an Assistant Commissioner to a subject officer to demonstrate the seriousness of unprofessional conduct and to detail the consequences should such conduct continue. It is the highest form of management intervention and places a subject officer on notice to correct behaviour and conduct. The ‘Warning Notice’ reinforces the premise that a subject officer’s continued employment with the agency may be at risk should any form of unprofessional conduct be further demonstrated and or identified.

Custody Officer – refers to persons employed under the Public Sector Management Act 1994 who have specific provisions in their Certificate of Appointment that enables them to perform the custody role as Special Constables under Section 36 of the Police Act 1892.

Delegated Officer – for purposes of this policy, refers to the Assistant Commissioner Professional Standards or person acting in that capacity, delegated by the Commissioner to determine key decisions, actions and outcomes.

Delegations – The levels to which authority has been delegated in relation to the management of complaints and discipline are contained in the Delegation Schedule published within the Corporate Knowledge Database, Manuals and Guidelines (ADS-1 Human Resource Management and Administration).

Employee – for the purposes of this Policy and respective Guidelines, refers to Police Officers, Aboriginal Police Liaison Officers, Police Auxiliary Officers, Police Staff (including Police Cadets and Custody Officers) and wages staff.

Equity or Equitable – refers to the Macquarie Dictionary definition of; 1. the quality of being fair or impartial, fairness, impartiality; 2. that which is fair and just and; 3. Law - the application of the principles of natural justice.

Management Action Plan (MAP) – refers to an instrument to record and manage a behavioural modification action as recommended and agreed following an internal investigation where unprofessional conduct is sustained.

Managerial Intervention – refers to behavioural modification actions/strategies including MAP’s, Managerial Notice and/or Assistant Commissioner’s Warning Notice, all designed to address unprofessional conduct/behaviour, and/or work performance deficiency/ies.

Managerial Notice - refers to a formal notice which is the second highest form of managerial intervention, to demonstrate to a subject officer the seriousness of the unprofessional conduct engaged in and the consequences that may follow should any form of unprofessional conduct re-occur.

Officer/s – refers to Police Officers, Police Auxiliary Officers and Aboriginal Police Liaison Officers appointed under the Police Act 1892.

Police Auxiliary Officer – refers to employees who are employed under Section 38C of Police Act 1892 with their own set of terms and conditions (limited police powers) who are employed to assist police officers and be used in specific support roles where full police powers or police training is not required.

Police Staff - refers to employees (including Police Cadets employed as trainees) employed under the Public Sector Management Act 1994 (and various wages awards) by the Commissioner.

Procedural Fairness - refers to those principles which ensure that decision-making is fair and reasonable (that is, industrially defensible) and in accordance with the WA Police Code of Conduct.
**Subject Officer** - refers to officers or employees appointed under the *Police Act 1892* and/or the *Public Sector Management Act 1994* against whom a complaint is lodged or investigation conducted.

**Unprofessional Conduct** - refers to behaviour, actions and conduct as defined in Sections 3 and 4 of the *Corruption and Crime Commission Act 2003*, notably 'Reviewable Police Action' and 'Misconduct'; conduct which contravenes the 'General Rules Relating to Discipline in Part VI of the Police Force Regulations 1979'; conduct which contravenes the *WA Police Code of Conduct*; conduct which is (prima facie), criminal conduct; and conduct which has the potential to cause damage to agency reputation and/or erosion of public confidence in WA Police.

**Verbal Guidance** - is the lowest form of managerial intervention and is intended to bring to a subject officer's attention, identified and sustained low level unprofessional conduct; the remedial action required; and to remind a subject officer of the required standards of behaviour and conduct.

**Policy**

It is the policy of the WA Police that all managers and supervisors will, in the first instance, adopt a managerial approach to the resolution of demonstrated and identified unprofessional conduct.

The policy also commits the WA Police to ensuring the procedures and practices employed to deal with concerns and complaints against police assist in building the trust and confidence of the community, oversight bodies and key stakeholders. Within the WA Police the managerial approach is known as the Managerial Intervention Model (MIM).

The MIM is a remedial/developmental approach which recognises that officers will make honest mistakes and provides for a "fair go" to change behaviour and conduct to achieve improvement in both individual and organisational performance. To this end, a learning and developmental approach will be adopted.

The mechanisms for the management of complaints are not enough on their own to bring about significant changes to organisational culture. Complaints management mechanisms need to be linked to and integrated with other initiatives including training, professional development, performance management, corruption prevention, risk management, and performance reporting.

While managerial intervention may be appropriate for most incidents of unprofessional conduct managed by the WA Police, the MIM approach also recognises the need for more serious incidents to be dealt with by other means, more notably by:

- Preferring criminal/statutory charge/s
- Preferring disciplinary charge/s (dealt with by section 23 of the *Police Act 1892*)
- Commencing Commissioner's Loss of Confidence action (pursuant to section 8 of the *Police Act 1892*).

Further to the above, in those instances where a criminal investigation is undertaken, investigators will need to refer to the Complaints against Police Investigation Guidelines and where applicable, the WA Police Investigation Doctrine.

**Explanatory Notes:**

1. An Assistant Commissioner's Warning Notice may also be issued in circumstances where an officer fails to comply with a previously agreed management intervention and in circumstances of a repeated failure to correct behaviour and conduct.

2. A Managerial Notice is neither a sanction nor a penalty but rather a notice documenting unprofessional conduct and creating a mechanism for formal acknowledgement. The Managerial Notice stands in its own right in terms of an outcome to an internal
Legislation Committee

investigation. A Managerial Notice may also be accompanied by behavioural modification actions as a joined up approach to address unprofessional conduct.

3. Accountability for managing a MAP, resides with the relevant Commander/Superintendent/Branch Head, whilst responsibility for day-to-day administration of a MAP resides with the officer-in-charge and manager/supervisor of the officer subject of the MAP.

4. The more common managerial interventions and actions include the following:
   i. Coaching
   ii. Mentoring
   iii. Re-training and re-education
   iv. Personal development
   v. Increased supervision
   vi. Verbal guidance
   vii. Counselling
   viii. Improvement strategies
   ix. Restricted duties
   x. Re-assignment of duties
   xi. Change of shift
   xii. Transfer
   xiii. Managerial Notice
   xiv. Assistant Commissioner's Warning Notice.

[Source: Fisher Review (page 67)]
HR-31.01.1 Introduction

The Managerial Intervention Model (MIM) applies to all officers within the WA Police irrespective of rank, although it is recognised the majority of complaints about police involves officers below the ranks of Commander and Superintendent. The Policy does not preclude the application of the MIM to the ranks of Commander and Superintendent and above and where that is the case, a reference within the Policy to Commander/Superintendent/Branch Head is to be read as a reference to the rank/police staff classification immediately senior to that of the officer subject of the MIM.

The MIM is an approach adopted by the WA Police to deliver managerial intervention in response to identified and demonstrated unprofessional conduct (Police Staff subject of a complaint are generally managed under the provisions of the Public Sector Management Act 1994)

The application of the MIM will not limit or touch on the agency's performance management programs and, where performance falls below the required standard, the Substandard Performance Management Policy is to be applied.

In addition, the WA Police Strategic Plan and Service Delivery Standards make clear the requirement in providing responsive and quality policing services. This premise is extended by the MIM to ensure WA Police similarly responds to community concerns and complaints against police and in dealing with demonstrated and reported incidents of unprofessional conduct.

Officers and employees who engage in criminal conduct will be held criminally responsible and be subject to the same provisions at law as all others are in the community.

Officers who are subject of a criminal/disciplinary/statutory charge/s and/or Commissioner’s Loss of Confidence action may remain in the workplace when determined appropriate by the outcome of a risk assessment completed within the scope of the Organisational Risk Management framework – (AD-95.00 & HR-31.01.10 – Stand-Down/Stand-Aside).

Managerial Intervention through behavioural modification actions recorded on a Management Action Plan will, when deemed necessary, be employed to manage and influence an officer’s conduct during a period of internal/criminal investigation or whilst awaiting the outcome of criminal/disciplinary charges and or Commissioner’s Loss of Confidence action.

The primary onus is on the subject officer to change behaviour and address unprofessional conduct. To reinforce and promote positive outcomes in this regard, all managers and supervisors agency wide will be held both responsible and accountable in facilitating for all subject officers, opportunities for both behavioural modification and personal development.

The MIM is Premised on the Following

- Ensuring managerial intervention is applied to all incidents of demonstrated and or identified unprofessional conduct, whether by a reporting mechanism, investigation or otherwise
- Restricted use of disciplinary charges confined to more serious incidents of unprofessional conduct and for those incidents that fail short of the Commissioner of Police losing confidence in a subject officer
- Fair and equitable application to achieve behavioural modification.

The MIM will contribute to

- Maintaining and Improving professional standards and professional conduct within and throughout the agency, including making a significant contribution to the ethical health of the agency
- Changing and positively improving the ethical and professional culture within and throughout the agency
• Building corruption resilient and organisational professionalism to secure the trust of the community, partner agencies and groups, key stakeholders and all oversight bodies.

**In General Terms the MIM is characterised by**

• The **WA Police Code of Conduct** as the primary standard and reference point for the behaviour, conduct and performance

• A ‘top down’ commitment, touching all in the agency and focusing on ethical and professional conduct, with a strong commitment to performance

• A focus on managerial intervention to address demonstrated and identified unprofessional conduct

• A remedial/developmental approach which recognises that officers will make honest mistakes and which provides a ‘fair go’ to positively change behaviour and conduct to improve both individual and organisational performance and ethical health by:
  - Maximising the opportunity to improve service delivery
  - Enhancing the professional and personal development of individuals
  - Contributing to organisational learning and development
  - Contributing and enhancing the public confidence in the WA Police and strengthening organisational integrity and professionalism
  - Encouraging and empowering managers and supervisors at all levels to respond effectively and react in a timely manner to all instances of demonstrated and identified unprofessional conduct
  - A contribution to achieving sustainability in building positive peer pressure between officers; officer self regulation; and positive organisational culture
  - Restricted use of disciplinary charges, confined for more serious and systemic breaches of conduct
  - Managers and supervisors accepting both responsibility and accountability for the development of relevant behavioural modification actions capable of changing and positively influencing behaviour and conduct and to ensure such actions are managed to a successful conclusion (MAP). Additionally, it is critical the day-to-day administration of a MAP rests with the subject officer’s direct line officer-in-charge and or manager
  - Management Action Plans (behavioural modification actions) being delivered by senior officers to reinforce the need to change behaviour and address demonstrated and identified unprofessional conduct
  - Senior managers positively engaging subject officers during the delivery of a MAP to secure the willingness and agreement of the subject officer to actively participate in the agreed behavioural modification action/s (note - without a willingness by the subject officer to participate in a behavioural modification action, behaviour and unprofessional conduct will not change)
  - Accountability by Commander/District-Divisional Superintendent/Branch Heads for the implementation and administration of the MIM within their respective areas of command is in the ordinary course of business, monitored by the Police Complaints, Ethical Standards Division (ESD) and externally by the Corruption and Crime Commission (CCC).
HR-31.01.2 Achieving Outcomes

The management of subject officers is based primarily on the principle of modifying behaviour by training and development and by addressing demonstrated and identified unprofessional conduct through managerial intervention.

HR-31.01.3 Standards

The standards for assessing behaviour and conduct with respect to demonstrated and identified unprofessional conduct are found in the WA Police Code of Conduct and the Police Force Regulations 1979.

HR-31.01.4 MIM Principle

The MIM is premised on a remedial/developmental approach with fairness and equity to all parties being key and to provide members of the community with the right and opportunity to make and lodge complaints against police officers or other police employees with a clear expectation that all complaints will be either examined and or thoroughly investigated in a timely and thorough manner.

The application of the MIM must demonstrate and ensure procedural fairness with respect to all involved parties and in all relevant practices, process and outcomes.

HR-31.01.5 Managerial Intervention Outcome

When considering the most appropriate form of managerial intervention to address demonstrated and or identified unprofessional conduct; the following are to be key considerations:

1. The WA Police Code of Conduct is the primary reference document
2. Selection of managerial intervention is the most appropriate in the circumstances with a real and measurable capacity to correct unprofessional conduct
3. The subject officer/s complaint history is carefully and contextually considered
4. Whether any deficiency in supervision and or management contributed in any way to the demonstrated and or identified unprofessional conduct
5. If applicable, whether any Health and Welfare issues contributed in any way to the demonstrated and identified unprofessional conduct
6. Timelines of incidents/unprofessional conduct
7. Utilisation/application of all opportunities to enhance professional and personal development and learning and contribute to organisational learning and ethical health
8. Utilisation/application of the opportunity to improve commitment to service delivery and contribute to the enhancement of community confidence and in the professionalism and integrity of the WA Police
9. If applicable, consider prior applications of managerial intervention action/s and the extent to which a specific outcome was achieved as well as the extent to which behaviour and conduct was positively influenced
10. Whether the managerial intervention/behavioural modification action being considered is reasonable, fair and equitable.
Explanatory Note:
Considerations are not to be confined to those above and an attempt is to be made to identify all which will assist in determining the most beneficial form of managerial intervention to deliver the best outcome.

HR-31.01.6 Delivery of a Management Action Plan (MAP)

- Following the decision to progress management intervention by way of behavioural modification action/s, the senior officer engaging the subject officer in this regard is to fully explain the decision and seek the subject officer’s agreement to participate. Without agreement, this form of behavioural modification is not to proceed and another form of managerial intervention will need to be considered. To progress behavioural modification actions in the absence of the subject officer’s agreement, is considered a wasted effort, given behavioural modification will not occur unless the subject officer is a willing participant.

- For more serious incidents of unprofessional conduct, it is a requirement for the respective Commander/Superintendent/Inspector/Branch Head or person acting in these positions, to deliver the MAP.

- In circumstances where a Managerial Notice also forms part of the outcome of either an examination and or investigation, (in addition to a behavioural modification action/s), the delivery of both the Managerial Notice and MAP is to be facilitated by the Commander/Superintendent/Branch Head (an exception to this applies to select districts within Regional WA - refer to the MIM Guidelines for information).

- For a MAP arising from Local Complaint Resolution (LCR), Local Dispute Resolution (LDR) and Short Format Investigation, the delivery may be by an officer other than the Commander/Superintendent/Inspector/Branch Head, but not by an officer below the rank of Sergeant and providing the delivery officer is senior to the subject officer.

- For a behavioural modification action (the action) arising from an Internal Affairs Unit investigation, the action and MAP will be delivered by the Superintendent/Inspector Internal Affairs Unit in conjunction with the Commander/Superintendent/Branch Head of the subject officer.

- Irrespective of who delivers a MAP, it is incumbent upon the Commander/Superintendent/Branch Head of the subject officer to endorse and take overall responsibility and accountability for the management of the MAP and to ensure behavioural modification actions are discharged and the MAP formally concluded.

- When the requirements of a MAP have been finalised, (both on development/service and subsequent discharge) Police Complaints is to be advised and provided a copy in all instances.

- A MAP is to be forwarded to and retained by Police Complaints and a copy placed on a subject officer’s Employee Management File.
HR-31.01.7 Management of a MAP

The delivery officer is to communicate in writing (email will suffice), with the subject officer when significant milestone/s in the MAP have been achieved.

When all behavioural modification actions have been successfully completed, the delivery officer is to advise the subject officer in writing accordingly and to formally advise the MAP is ‘discharged’. It is also recommended the delivery officer personally engage with the subject officer in this regard as a follow up, to receive feedback and to reinforce the original key messages. A copy of the written communication in this regard and other feedback, notes of discussions, are to be forwarded to Police Complaints.

The delivery officer is required to personally meet with the subject officer when time frames to complete behavioural modifications actions either have not been met or are unlikely to be met. The subject officer is to be reminded of the agreement to undertake the behavioural modification actions and or consequences for such actions not being undertaken. The delivery officer is then to make a written record of the meeting and a copy of the record either attached to the internal investigation file or forwarded to Police Complaints for placement on the file.

Should behavioural modification actions not be completed after the follow up meeting, the delivery officer is to immediately consider other forms of managerial intervention and engage the subject officer accordingly. Police Complaints are to be immediately advised in this regard.

Transfer or other change in deployment status and location (including a change in rank), does not free a subject officer from the agreement and obligation to complete outstanding behavioural modification action/s. In such circumstances, the respective MAP is to be formally presented/delivered by the delivery officer to the Commander/Superintendent/Branch Head of the subject officer’s new workplace and forms part of the Employee Management File.

The Commander/Superintendent/Branch Head on receiving the MAP effectively takes over the delivery officer role and assumes accountability in this regard and within a reasonable time, is required to meet with the subject officer and make clear the original agreement and expectations. The new delivery officer will then engage the area OIC/Manager/Supervisor to whom the subject officer has transferred to. This officer then assumes responsibility for the management of MAP.

In all instances an OIC/Manager/Supervisor, on an officer being transferred to a new area, is to check the officer’s Employee Management File as a back up to ensure an outstanding MAP is identified and managed accordingly.

HR-31.01.8 Disciplinary Offences/Charges

Disciplinary charges may be brought against police/auxiliary/Aboriginal police liaison officers pursuant to section 23 of the Police Act 1892.

A Commander/Superintendent/Branch Head may recommend a disciplinary charge. Approval to progress such a charge can only be made by either the Commissioner of Police or the Assistant Commissioner Professional Standards. Officers acting as the Commissioner of Police and Assistant Commissioner Professional Standards have delegated authority to approve disciplinary charges.

The recommendation and associated disciplinary referral materials are to be forwarded together with the completed internal investigation file to Police Complaints. Recommendations by the Internal Affairs Unit are referred direct to the Assistant Commissioner Professional Standards.

When considering disciplinary charges, it is important that an officer’s behaviour and conduct during the course of the disciplinary charge process be carefully considered. It may be appropriate to consider a behavioural modification action to assist with the management and control of a subject officer’s behaviour and conduct. Such considerations are to be made in context, relevant to the behaviour and conduct and be individualised to the subject officer.
It is mandatory for the Commander/District/Divisional Superintendent/Branch Head to continue to be both responsible and accountable for the subject officer prior to, during and after the disciplinary charge process has commenced. With regard to the latter, the process commences as soon as the recommendation is made.

A recommendation to deal with a matter by way of a disciplinary offence is not to be used as a means, or indeed a premise, not to prefer/consider either criminal and or statutory charges. With regard to the latter, the Police Prosecution Policy is the primary reference and it stands alone.

**HR-31.01.9 Management of Officers Subject to other Managerial Intervention Action**

Officers subject of criminal/statutory charges and or Commissioner's Loss of Confidence proceedings are also to be carefully managed and consideration on whether to engage in behavioural modification actions should always occur in the ordinary course of business. Responding to an officer's health and welfare needs is also critically important with respect to either direct action or by way of consideration only.

**HR-31.01.10 Stand-Down/Stand-Aside**

Stand-Down and Stand-Aside action needs to be considered in all instances where serious unprofessional conduct has been exhibited and or demonstrated. The premise for such action is risk assessment/mitigation and the 'Organisational Risk Framework' is to be employed (risk summary). The decision to Stand-Down/Stand-Aside should not be solely premised on the seriousness of the conduct.

The risk assessment should consider the capacity to achieve and influence the day to day management of a subject officer. For these reasons and if risks can be sufficiently mitigated, it may be more appropriate to have subject officer/s remain in the work place.

**Stand-Aside**

Once a risk summary has been completed, a Stand-Aside application is to be presented to the Portfolio Head for consideration of approval. For matters investigated and or oversighted by the Internal Affairs Unit, the Superintendent, Internal Affairs Unit has the authority to approve a Stand-Aside Notice. Employees who are subject of Stand Aside need to be subject of managerial oversight and or managerial intervention (to manage behaviour/documented on a MAP).

The Superintendent, Ethical Standards Division, is to be advised of all Stand-Aside Notices issued and be kept informed of the Notice status.

**Stand-Down**

An application for a Stand-Down is to be presented to the Assistant Commissioner Professional Standards by the Commander/District/Divisional Superintendent after approval by the respective Portfolio Head. The Assistant Commissioner Professional Standards will consider and progress the Stand-Down application to the Commissioner of Police for consideration of approval. Should the Commissioner of Police not be immediately available, a Stand-Down Notice may be then considered/approved by a Deputy Commissioner or the Assistant Commissioner Professional Standards.

Officers on Stand-Down will be appointed a welfare officer by the District Divisional Superintendent and the appointed welfare officer will maintain regular contact (weekly) with the officer to manage and guide the officer throughout the period of Stand-Down. With regard to the latter, a running
sheet is to be maintained detailing the contact times/dates and general matters discussed/raised at each contact.

**General**

During a period of Stand-Down/Stand-Aside, responsibility and accountability for the management of the subject officer does not shift from the district/division/portfolio to which the officer is attached. In addition to legislative requirements, both Stand-Down and Stand-Aside are to be the subject of regular reviews by the district/divisional head.

The Superintendent, Ethical Standards Division, is to be advised of all Stand-Down Notices issued and be kept informed of the Notice status.

**HR-31.01.11 Criminal/Statutory Offences and Legal Opinion**

Where a criminal/statutory offence is identified during the course of an internal investigation, there may be instances where the investigator, because of legal complexities, requires legal advice. In these instances, the investigator is encouraged to source such assistance and advice from the agency's Legal and Legislative Services business area.

There is no need to seek legal opinion for matters where prima-facie evidence clearly supports a criminal/statutory offence and considerations in this regard are in accord with the agency's Prosecution Policy and Guidelines.

In cases where prima-facie evidence exists but the preferred recommendation of the Commander/Superintendent/Branch Head is not to proceed by way of a criminal/statutory charge (either indictable or summarily), the following is to apply:

- Analysis and comment is to be made in the internal investigation final report with respect to considerations relative to criminal/statutory charges. Such considerations need to include reference the agency’s Prosecution Policy and Guidelines
- Approval by the Portfolio Head (Assistant Commissioner and/or Commander where applicable), to not prefer a criminal/statutory charge/s when prima facie evidence has been established
- Recording of the decision not to prefer criminal/statutory charges in the district/division Discretionary Register for all indictable and summary offences. The Register entry is to be endorsed by the respective Portfolio Head.

In circumstances where the investigating portfolio is not represented by an Assistant Commissioner and/or Commander then approval not to proceed by way of a criminal/statutory charge is to be made by the Assistant Commissioner Professional Standards Portfolio.
HR-31.01.12 Complaints Generally and Complaint Allocation Rules

In all instances where unprofessional conduct has been reported, suspected, demonstrated and or identified by other means, a Police Conduct Report is to be immediately submitted to Police Complaints. All such matters will be the subject of examination and/or internal investigation.

Complaints/Incidents of unprofessional conduct and solely of a managerial/disciplinary nature (not criminal conduct):

- Alleged unprofessional conduct is to be investigated by the portfolio/district/division where the member is ordinarily assigned to on a full time basis, including periods of secondment. It is irrelevant whether the member is on duty or off duty.

Criminal Conduct

- To be investigated by the district in which the alleged criminal conduct occurs
- In circumstances whether the alleged criminal behaviour is either in the place of work (whilst on duty) or arising directly from official and rostered duties, the alleged unprofessional conduct will be investigated by the portfolio/district/division in which the officer is assigned to on a full time basis, including periods of secondment
- In certain circumstances and to accord with the State Crime Portfolio Service Delivery Charter, a criminal allegation involving a member may be allocated to a specialist crime squad (various) for investigation
- Any criminal investigation undertaken must have regard to the Complaints against Police Investigation Guidelines and the WA Police Investigation Doctrine.

Allocation Determinations

- In all instances where criminal conduct is being investigated, the portfolio/district/division in which the officer is assigned on a full time basis, including periods of secondments, will conduct an internal examination of the member’s unprofessional conduct and be responsible to progress general disciplinary/managerial action in accordance with legislative provisions and those in the Managerial Intervention Model.

Explanatory Note:

The criminal investigation and internal examination are to be conducted simultaneously and relevant legislative/managerial action is to be taken at the earliest opportunity and not unnecessarily delayed:

- There will be occasions, premised on demonstrated need, special circumstances, policy requirements, when Police Complaints and Internal Affairs Unit protocols, determine an investigation (for either criminal/unprofessional conduct) is to be assigned contrary to the general allocation rules
- The Superintendent Ethical Standards Division and Superintendent Internal Affairs Unit, have authorised discretion to alter the allocation rules, premised on demonstrated need, reasonable opportunity/capacity for investigation and special circumstances.

In instances when multiple districts/divisions are conducting separate investigations for either criminal and or unprofessional conduct matters involving the same officer/s and incident, immediate liaison, communication and consultation is to occur to ensure completeness of legislative, policy and procedural requirements.

Further information about these requirements and the Complaint Investigation Allocation Rules is contained in the MIM Guidelines.
When a criminal charge has or is to be preferred against a WA Police employee, the investigating officer shall as soon as practical, prepare a briefing note and a draft media release setting out the details of the charge/s and court date for the advice of the Commissioner, Assistant Commissioner Professional Standards, Director Media and Corporate Communications, and the Superintendent Ethical Standards Division.

**HR-31.01.13 General Responsibilities, Accountabilities and Obligations**

HR-31.01.13.1 For Commanders/Superintendents/Branch Heads

HR-31.01.13.2 For Commanders/Superintendents/Branch Heads and Others who Deliver Managerial Intervention

HR-31.01.13.3 For Subject Officers

HR-31.01.13.4 For Officers in Charge and Managers/Supervisors (Attending Officers)

HR-31.01.13.5 For Police Complaints

**HR-31.01.13.1 For Commanders/Superintendents/Branch Heads**

- To conduct a risk assessment and general analysis on receipt of a complaint investigation file and or allegation of unprofessional conduct
- To appoint a suitably skilled and experienced investigator.

**Important Considerations in Appointing the Internal Investigator**

The appointed investigator is to be of equal or higher rank to that of the subject officer/s and must have the capacity to complete the investigation within established timeframes. The investigator is also required to have the necessary skills, attributes, knowledge and experience to conduct the investigation to the agency standard:

- In appointing an investigator, personal associations and conflict of interest issues will need to be considered, although the association and conflict will need to be compelling and supported by real facts in issue. Being a subject officer’s direct line manager and or supervisor is not sufficient to premise a decision with respect to the latter. The primary intent is that an investigation should not be compromised and the integrity of the investigation and professionalism of the investigator, are to be preserved and demonstrated. It is imperative the investigation is not allocated to an officer who may be either a party to or involved in the matter to be investigated
- A compelling conflict of interest or supported perceived conflict of interest, are to be declared and a Declaration Form is to be submitted (refer to the MIM Guidelines and Police Complaints for further advice about conflicts of interest and other issues to be considered when determining an appropriate investigator. Refer also to the [WA Police Code of Conduct](#) and [AD-B4.10 Conflict of Interest](#) to gain an understanding of what is considered a conflict of interest).
Additional Roles, Responsibilities and Accountabilities are as Follows

- Ensuring all investigations are completed in a timely manner and to the highest possible standard
- Ensuring investigations are completed in a fair and equitable manner and in accordance with procedural fairness
- Where appropriate, seeking the advice from specialist areas (such as Health and Welfare Services, Human Resources Equity Unit, Workplace Relations Branch and Occupational Safety and Health Branch)
- Ensuring investigation recommendation/s are proportionate, supported by the evidence and reasonably defensible
- Accept both responsibility and accountability for managing the behaviour and conduct of subject officers during the course of the investigation and then in applying managerial intervention and or other action in response to demonstrated and identified unprofessional conduct
- Researching and developing real and measurable behavioural modification action/s which have the capacity to positively modify and influence conduct and then to record and manage the behavioural modification action on a MAP
- In applying managerial intervention, to maximise all opportunities to ensure service delivery standards are not adversely affected; to ensure the ongoing professional and personal development/learning of affected officers; and to ensure community confidence and the integrity of WA Police is preserved and improved
- Ensuring the managerial intervention and outcomes are consistent with values articulated in the WA Police Code of Conduct
- Ensuring the identification of training, supervision, legislative, process, policy and procedural issues which may require change and/or amendment, and in formally communicating the latter
- Ensuring learning outcomes arising from the conduct of internal investigations are communicated
- Acknowledging and accepting the extent of management and supervision required by the MIM and the extent to which the application of the MIM will be assessed and evaluated as part of performance reviews and formal evaluations.

HR-31.01.13.2 For Commanders/Superintendents/Branch Heads and Others who Deliver Managerial Intervention

- On a decision being made to engage a subject officer in a form of managerial intervention, direct communication is to occur with the subject officer and his/her officer-in-charge/manager. Relevant details and information is to be provided to the parties to ensure sufficient understanding and to afford the opportunity for cognisance and preparation
- With respect to behavioural modification actions, it is important to secure the agreement of the subject officer during the course of the MAP delivery. Should agreement not be forthcoming, another form of managerial intervention is to be considered.

Explanatory Note:

Behavioural modification actions will not succeed without willing participants being sincere in their intentions to modify their behaviour. The actions are not to be considered or interpreted as punitive actions and this point needs to be made clear by the delivery officer. Similarly a MAP does not have a punitive intent and/or purpose and accordingly, should not be considered and/or
portrayed as such. They merely provide the mechanism to record and manage a behavioural modification action/s.

- During the delivery meeting, engage in open and honest discussion with the subject officer in a non-threatening environment and manner, to:
  - Inform officers of the findings of the investigation and the outcome/s
  - Make clear managerial intervention is not a punitive remedy rather a genuine attempt to change behaviour and conduct
  - Ensure understanding, to explain the intent and deliverables of the behavioural modification action/s and making clear the expectations with respect to the MAP generally and in terms of timeframes
  - Achieve agreement on the behavioural modification action and adopt a consultative and collaborative approach
  - Make clear to a subject officer the consequences of non compliance to either engaging or completing agreed behavioural modification actions
  - Take into consideration and resolve concerns that may be raised by the subject officer. Such concerns may be about the conduct of the investigation; the integrity of the investigation; the investigation outcome; professionalism of the investigator; and the appropriateness of recommendations and or managerial intervention. Disagreement with the investigation outcome without valid argument is not in itself sufficient reason for the subject officer not to accept the behavioural modification action
  - Make a record of the concern/s raised by the subject officer and the outcome achieved and for such record to be attached to the investigation file
  - In instances where agreement cannot be reached on a behavioural modification action, to consider another managerial intervention action and advise the subject officer accordingly either at the time, or subsequent to the delivery meeting
  - Advise the subject officer that a copy of the MAP will be attached to the officer’s Employee Management File

- On successful completion of a behavioural modification action, to formally advise the subject officer accordingly.

Explanatory Note:

The attendance at the delivery meeting by the subject officer’s manager or supervisor is either by mutual agreement between the parties or when determined necessary by the delivery officer.

**HR-31.01.13.3 For Subject Officers**

- On being advised of an impending managerial action to be delivered, ensure familiarisation with the relevant and broader provisions of the MIM
- Accept responsibility and be prepared to engage in open, honest and reasonable discussion with the delivery officer
- Respond positively to the intended/proposed managerial intervention
- Acknowledge and ensure absolute understanding of the consequences should there be a failure to comply with any form of managerial intervention
- Be prepared to accept responsibility and accountability for demonstrated and identified unprofessional conduct
- Be prepared to accept responsibility and accountability for the outcome of decisions and actions
- Be prepared to raise any issues or concerns about any aspect of the internal investigation, the internal investigation outcome, and or delivery meeting
- Be accepting that managerial intervention is about a genuine attempt by all parties to positively change behaviour and conduct and it is neither a punitive remedy nor action
- Where a MAP is a part of the managerial intervention action, be an active participant in the planning, organising and in ensuring successful completion
- Seize the opportunity for managerial intervention to enhance both professional and personal development and so maximise opportunity for career potential and continued employment
- Learn from the experience and self regulate to reinforce the need to accept both responsibility and accountability for behaviour and conduct into the future.

**HR-31.01.13.4 For Officers in Charge and Managers/Supervisors (Attending Officers)**

The attending officer is to be of equal or higher rank to that of the subject officer.

- Following advice being received that a managerial intervention action is to be delivered, the attending officer is to personally meet with the subject officer prior to the delivery meeting and:
  - Provide the subject officer with support and explain the process, conduct and intent of the delivery meeting
  - Advise the subject officer to fully familiarise themselves with the relevant and broader provisions of the MIM and to assist the subject officer in this regard
- The attending officer is to attend with the subject officer and participate in the delivery meeting
- The attending officer for the delivery of an Assistant Commissioner’s Warning Notice will in all cases, be the subject officer’s district/divisional superintendent
- On invitation by the delivery officer and or on permission being sought from the delivery officer, attending officers may actively participate during the delivery of the managerial intervention
- After the delivery meeting, the attending officer will engage the subject officer to reinforce and make clear expectations arising from the delivery meeting and to further reinforce the consequences should unprofessional conduct reoccur and or continue
- In instances where a MAP is a part of the managerial intervention, the attending officer will be held accountable in terms of planning, organising and in ensuring successful completion.

**HR-31.01.13.5 For Police Complaints**

- Provide support, assistance, advice and information to all both internal and external stakeholders
- Recording (milestone and other) dates associated with various aspects of investigation files and monitoring compliance with those dates
- Reviewing, assuring and influencing the standard and quality of internal investigations and the application of the MIM
- Reviewing, assuring and influencing the quality of internal investigation outcomes and managerial intervention generally
• Provide timely feedback to all involved and interested parties on all relevant aspects of the MIM
• Ensure timely, accurate and comprehensive recording of all information and data obtained through the review/quality assurance (QA) process
• Following the QA process, review recommendations for disciplinary charge/s and/or Loss of Confidence nomination/s and referring those matters in the first instance to the Superintendent Ethical Standards Division and then to the Assistant Commissioner Professional Standards for approval/endorsement
• Communicating with relevant oversight bodies to ensure business expectations and deliverables are being met
• Facilitate and enable first point of contact and ongoing communication with the Corruption and Crime Commission for matters touching Police Complaints’ roles, responsibilities and deliverables
• Providing advice and assistance to district/divisional heads, governance officers and investigators to ensure the timeliness, quality and consistency in investigations and investigation outcomes.

HR-31.01.14 Verbal Guidance

Verbal Guidance is the lowest form of managerial intervention and is intended to bring to a subject officer's attention the identification of unprofessional conduct, the remedial action required and to remind a subject officer of the required standards of behaviour and conduct.

The application of verbal guidance will be confined to minor incidents involving low level unprofessional conduct.

Verbal Guidance requires acceptance and acknowledgement by the subject officer and when such is not forthcoming other forms of managerial intervention action/s will need to be considered.

A process for review is not provided for as the delivery involves communication, consultation and agreement.

HR-31.01.15 Managerial Notice

A Managerial Notice is the first level 'high end' form of managerial intervention action to demonstrate to a subject officer the seriousness of the unprofessional conduct engaged in and the consequences that may follow, should any form of unprofessional conduct re-occur. A Managerial Notice is to be promoted as a genuine attempt by all parties to positively change the behaviour and conduct of a subject officer.

A Managerial Notice is neither a punitive remedy nor outcome, rather an instrument to encourage and promote professional conduct into the future. A Managerial Notice is to be considered when behavioural modification action/s alone, are not considered sufficient to modify both behaviour and conduct or when unprofessional conduct continues.
Generally, a Managerial Notice

- Stands alone or may be part of a wider solution/outcome involving both disciplinary offences and or behavioural modification action/s as managed by a MAP
- Is approved and personally delivered by the Commander/Superintendent/Branch Head (delivery officer) - (An exception to the latter applies to select districts within Regional WA - by reason of remoteness - refer to the MIM Guidelines for information)
- Is a written record of a subject officer’s unprofessional conduct and it is to be attached to the officers Personnel File, Employee Management File and the Internal Investigation File.

A delivery officer issuing a Managerial Notice will engage the subject officer in discussion on the facts and issues/decision/s giving rise to the Managerial Notice and attempt to secure the subject officer’s commitment to both accept the Managerial Notice and to change his/her behaviour and conduct. Sufficient notes will be recorded by the delivery officer to adequately represent the nature and outcome of the discussion and delivery. A formal written response is not required by the subject officer.

Should a subject officer not accept a Managerial Notice, the details of such non acceptance are to be recorded by the delivery officer and other action will then need to be considered. Such action need not be decided on at the time of delivery, however the delivery officer is to immediately inform the subject officer that by reason of non acceptance, he/she will need to further consider the outcome/intended actions.

Following non acceptance of a Managerial Notice, the delivery officer is to carefully consider the interim management of the officer which is to include operational status (stand down/stand aside) and or engaging the officer in behavioural modification action/s.

When a Managerial Notice is part of a wider solution/outcome which also involves behavioural modification action/s as recorded on a MAP, a copy of the MAP is also to be attached to the officers Personnel File, Employee Management File and the Internal Investigation File. Additionally and as a consequence of the latter, the delivery officer is also required to directly communicate with the subject officer with regard to the completion/outcome of the MAP.

A process of review is not provided for as the delivery involves communication, consultation and agreement.

**HR-31.01.16 Assistant Commissioner’s Warning Notice**

An ‘Assistant Commissioner’s Warning Notice’ is the highest level of managerial intervention. Its primary purpose is a formal warning notice to reinforce the premise that a subject officer has to correct and address any identified unprofessional conduct and should there be a failure in this regard, continued employment and engagement with the agency may be at risk.

It may also be issued in circumstances where a subject officer refuses to discharge a previously agreed managerial intervention, or in circumstances where there is repeated failure to correct unprofessional conduct.

A Notice may be issued in response to serious and sustained unprofessional conduct. It may also be considered appropriate in circumstances where there is repeated failure by a subject officer to correct unprofessional conduct and in circumstances when a subject officer refuses to either accept or discharge managerial intervention actions previously agreed to.

The issue and service of a Notice is a formal and documented process designed intentionally for personal delivery and presentation to reinforce the key messages and deliverables. A subject officer will present personally before the respective Assistant Commissioner in the uniform of the day.
Generally, an Assistant Commissioner’s Warning Notice

- Is recommended and prepared by, the subject officer’s Commander/Superintendent/Branch Head, or in the case of a matter investigated by the Professional Standards Portfolio the Superintendent Internal Affairs Unit
- Must be considered and supported by the respective Assistant Commissioner before issue. If not supported, the investigation file is to be returned to the District/Division for alternate action to be considered
- Once supported by the respective Assistant Commissioner, the internal investigation giving rise to a Notice is to be quality assured by Police Complaints in the first instance and then, the issue of the Notice is to be approved by the Assistant Commissioner Professional Standards to ensure consistency in application and approach (note: for IAU investigations, IAU QA protocol to be applied)
- After consideration by the Assistant Commissioner Professional Standards, the investigation file will be returned to the respective Portfolio Assistant Commissioner for the outcome to be progressed
- Is to contain a detailed written record of the summary of facts giving rise to the unprofessional conduct and likely consequential outcomes
- Is to be personally delivered by the respective Assistant Commissioner or in the case of unprofessional conduct sustained through an Internal Affairs Unit investigation, by the Assistant Commissioner Professional Standards in the presence of the subject officer’s District/Divisional Superintendent
- After delivery, a copy is to be placed on the subject officer’s Personnel File (held at Personnel Services) with a copy retained on the investigation file and the subject officer’s Employee Management File
- When the Portfolio Head is not an Assistant Commissioner, the Notice will be delivered by the Assistant Commissioner Professional Standards.

The personal delivery of a Notice by the respective Assistant Commissioner or Assistant Commissioner Professional Standards provides the opportunity for full discussion of the issues and the subject officer can either respond to, or comment on, the Notice content. The Assistant Commissioner will make note of the time, date and location of delivery on the notice and record any response or comment/s made by the subject officer. Accordingly, a formal written response from the officer is not required.

During delivery, it is critical the subject officer is clearly made aware of the magnitude of the unprofessional conduct engaged in and to reinforce the subject officer’s continued employment and engagement with the agency may be at risk should there be any further form of unprofessional conduct demonstrated and/or identified.

To this end, the respective Assistant Commissioner will explain to the subject officer the severity of the unprofessional conduct and/or non acceptance of managerial intervention, the likely consequences of any form of unprofessional conduct continuing into the future and agency and community expectations with respect to the member’s conduct. In detailing the consequences, the subject officer is to be left in no doubt that continued employment will be at risk of termination should there be continuance of any form of unprofessional conduct. The subject officer is to also be encouraged to acknowledge the delivery and service of the notice and sign the receipt of service.

A process of review is not provided for as the delivery involves communication, consultation and agreement.

Any notes made during the delivery of the Notice and any communication with the subject officer are to be attached to the investigation file. Again, a copy of the warning notice and receipt of service is to be placed on the officer’s Personnel File and Employee Management File.
Explanatory Note (1)

The Assistant Commissioner’s Warning Notice template is available in the WA Police Intranet at: Ethics and Integrity/Professional Standards/Police Complaints/Managerial Intervention Model

Explanatory Note (2)

It is open for the Commissioner of Police and Deputy Commissioners of Police to respectively prepare and deliver a ‘Warning Notice’. In these instances, the policy as it applies to the Assistant Commissioner’s Warning Notice will also apply to a Commissioner’s and Deputy Commissioner’s Warning Notice.

HR-31.01.17 No Right of Review

The MIM is premised on fairness, equity and professionalism and outcomes are premised on communication, consultation and agreement. Accordingly, a right of review is not provided for and issues with respect to non agreement and concerns are to be communicated, considered and dealt with during the delivery process.

Managerial Intervention is a genuine attempt by the agency to positively involve officers who have engaged in sustained unprofessional conduct, to positively change behaviour and conduct and so make an investment in the officer’s continued development and performance.

For any form of managerial intervention to be successful, all parties have to be in agreement and it is firmly held that behavioural modification will not occur if a subject officer is not a willing and genuine participant. Mere objection and defiance, work against the intent and deliverables of the MIM.

To mitigate perceived concerns in not providing a review mechanism, Police Complaints, in the ordinary course of business and in facilitating the QA process, consider in all instances, the following factors:

- Whether the internal investigation complies with or has been conducted in accordance with relevant legislation and or the established agency investigative protocols/standards (Complaints against Police Investigation Guidelines and WA Police Investigation Doctrine)
- Whether the managerial intervention action is supported by real and sustained facts in issue
- Whether there has been an appropriate analysis of the evidence
- Whether the outcome is proofed on the balance of probability
- Whether there have been other issues that have influenced the investigation outcome and or management intervention action
- Whether the managerial intervention action is fair and reasonable considering all the circumstances and extent of unprofessional conduct engaged in
- Whether the managerial intervention action is consistent with the intent and deliverables of the MIM.

All deficiencies identified by Police Complaints in the QA process, will be referred to the respective district/divisional officer in the ordinary course of business.

It is also open for the Superintendent Ethical standards Division to personally engage the district/divisional officer for identified deficiencies in dispute and if required, refer such matters to the Assistant Commissioner Professional Standards for adjudication.
HR-31.01.18 Conclusion

The extent of ethical and professional conduct by all WA Police employees, is fundamental to the agency delivering a quality policing service to the community of Western Australia and in significantly making a contribution to the overall ethical health of WA Police.

Effectively and decisively managing complaints against police is a key influence with respect to community confidence in police and in assisting the agency to achieve statutory and internal/external policy obligations.

The MIM is a contemporary approach to managing employees’ subject of complaints and premises a framework focused on managerial intervention and behavioural modification, in a genuine attempt to change a subject officer’s behaviour and conduct and to provide an opportunity and mechanism for all subject officers to do so. It relies on communication, consultation and agreement to achieve the intents and deliverables of the policy.

The MIM framework and approach has been constructed to ensure associated practices, procedures and outcomes are fair, reasonable and equitable.

Further Information and Assistance

For further information support or assistance, contact is to be made with Police Complaints on 9223 1000 or access the MIM Guidelines, Complaints against Police Investigation Guidelines and associated documents in the WA Police Intranet at Ethics and Integrity/Professional Standards/Police Complaints/Managerial Intervention Model.

For recommendations to either improve or enhance the policy, please contact the Superintendent Ethical Standards Division.

Relevant Statute Law

Police Act 1892
Police Force Regulations 1979
Public Sector Management Act 1994
Equal Opportunity Act 1994
Occupational Safety and Health Act 1984

References

WA Police Code of Conduct

WA Police Policy HR-01.01 (Establishment, Maintenance and Security of Employee Records)

Report of the Royal Commission into Whether There Has Been Corrupt Or Criminal Conduct By Any Western Australian Police Officer – Final Report: Kennedy Royal Commission (specifically Chapter 9 relating to ‘Complaints’ and Key Reform Area 8 relating to ‘Complaints Management and Discipline’)


WA Industrial Relations Commission’s decision in Carlyon v Commissioner of Police (2004 WAIRC 11428)


The Ombudsman’s Redress Guidelines; Parliamentary Commissioner for Administrative Investigations, February 2008

Putting the picture together: Inquiry into response by government agencies to complaints to family violence and child abuse in Aboriginal communities; Gordon. (The Gordon Inquiry)

WA Police Local Complaint Resolution Guidelines
WA Police Managerial Intervention Model (MIM) Guidelines
WA Police Complaints Against Police Investigation Guidelines
WA Police Investigation Doctrine
Public Sector Standards in Human Resource Management
HR-18.00 (General Principles of Human Resource Management)
HR-27.01 (Managing Staff Performance Policy)
HR-27.03 (Substandard Performance Management)
WA Police Equal Opportunity Complaint Resolution Guidelines
HR-05.00 (Equal Opportunity)
WA Police Strategic Plan
WA Police Service Delivery Standards
APPENDIX 4

FUNDAMENTAL LEGISLATIVE PRINCIPLES
APPENDIX 4

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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<tr>
<th>Does the Bill have sufficient regard to the rights and liberties of individuals?</th>
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<tbody>
<tr>
<td>1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?</td>
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<td>2. Is the Bill consistent with principles of natural justice?</td>
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<td>3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?</td>
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<td>4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?</td>
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<td>5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?</td>
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<td>6. Does the Bill provide appropriate protection against self-incrimination?</td>
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<td>7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?</td>
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<td>8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?</td>
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<td>9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?</td>
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<td>10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?</td>
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<td>11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?</td>
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<th>Does the Bill have sufficient regard to the institution of Parliament?</th>
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<td>12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?</td>
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<td>13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?</td>
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<td>14. Does the Bill allow or authorise the amendment of an Act only by another Act?</td>
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<td>15. Does the Bill affect parliamentary privilege in any manner?</td>
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<td>16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?</td>
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*Western Australian legislation committees have used FLPs as a framework for scrutinising bills since 2004 when the Uniform Legislation and General Purposes Committee (which scrutinised uniform and other bills) considered these principles. During the 37th and 38th Parliaments, the Standing Committee on Legislation and Standing Committee on Uniform Legislation and Statutes Review (established in 2005) continued the practice of considering whether a bill abrogated or curtailed FLPs.*
APPENDIX 5

SOME PROVISIONS ABROGATING THE PRIVILEGE AGAINST SELF-INCrimINATION IN AUSTRALIA
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SOME PROVISIONS ABROGATING THE PRIVILEGE AGAINST
SELF-INCRIMINATION IN AUSTRALIA

1.1 The following provisions abrogate the privilege against self-incrimination to varying degrees.

Australian Securities and Investments Commission Act 2001 (Cth)

1.2 Section 68 of the Australian Securities and Investments Commission Act 2001 (Cth), provides:

68 Self-incrimination

(1) For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:

(a) to give information; or
(b) to sign a record; or
(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies where:

(a) before:

(i) making an oral statement giving information; or
(ii) signing a record;

pursuant to a requirement made under this Part, Division 3 of Part 10 or Division 2 of Part 11, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and
(b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

(3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of:

(c) in the case of the making of a statement—the falsity of the statement; or

(d) in the case of the signing of a record—the falsity of any statement contained in the record.

1.3 Section 75(5) provides that a person must comply with an order made by the Australian Securities and Investments Commission for non-compliance under the Division (25 penalty units or imprisonment for 6 months, or both – a penalty unit is $100).

Equal Opportunity Act 1984 (WA)

1.4 Section 164 of the Equal Opportunity Act 1984 (WA) provides:

164. Self incrimination

It is not a reasonable excuse for the purposes of section 158 for a person to refuse or fail to furnish information or produce a document that the furnishing of the information or the production of the document might incriminate the person, but evidence of the furnishing of the information or the production of the document is not admissible in evidence against the person in any civil or criminal proceeding before a court, other than a proceeding for an offence under section 159.

1.5 Section 158 provides that a person shall not, without reasonable excuse, refuse or fail to furnish information when required to pursuant to section 86 (power of the Commissioner to obtain information by notice in writing) ($1,000 penalty for a natural person and $5,000 for a corporation).
1.6 Section 160 of the Corruption and Crime Commission Act 2003 abrogates the privilege against self-incrimination by providing that a person summoned as a witness is not entitled to refuse to answer a question relevant to an investigation being undertaken by the CCC on the grounds that an answer might incriminate or tend to incriminate the person or render the person liable to a penalty. By refusing to answer the witness is in contempt of the CCC.

1.7 Such a summons could be issued to a prison officer about which an allegation of misconduct has been made in the course of the CCC’s investigations into such an allegation.

Police Act 1892 (WA)

1.8 There is a reference in the Police Act 1892 to self-incrimination in the context of tortious claims against a police officer. Sections 8(a) and (9) contain the abrogation (emphasis in underline added).

137. Protection from personal liability

(3) An action in tort does not lie against a member of the Police Force for anything that the member has done, without corruption or malice, while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

(4) An action in tort does not lie against a person for anything that the person has done, without corruption or malice, in assisting a member of the Police Force who is performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

...
(a) to answer any question, including a question the answer to which is or may be self-incriminating; or

(b) to produce any object or recorded information in the person’s possession or control, that is relevant to the defence of the action.

(9) If a person, in cooperating with the Crown in the defence of an action referred to in subsection (8), gives an answer that is or may be self-incriminating, the answer is not admissible in any criminal or disciplinary proceedings against the person except proceedings for a criminal or disciplinary offence arising from the giving of a false answer.

It is notable that subsection (9) above provides the answer is also not admissible in any other disciplinary proceedings, whereas proposed new subsection 101(6) does not refer to other disciplinary proceedings.

**Prisons Act 1981 (WA)**

1.10 Section 9 of the *Prisons Act 1981* authorises the Commissioner to set up a prison inquiry. Section 9(4) provides that the Commissioner may compel prison officers to answer questions in relation to the inquiry, but these will not be used in other proceedings except those for failing to supply compelled information under section 10, including proceedings under Part X of the *Prisons Act 1981*.

1.11 It is notable that the outcome of such an inquiry may have disciplinary ramifications, as is the case with clause 7, proposed new section 101 of the Bill, but immunity is conferred for all other proceedings.