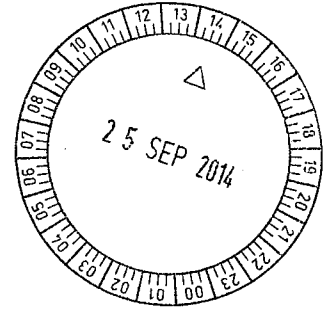


Our ref: 73521
Your ref: CLO

24 September 2014

Hon Robyn Mary McSweeney MLC
Committee Chair
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Attention: Samantha Parsons, Committee Clerk



**STANDING COMMITTEE ON LEGISLATION INQUIRY INTO THE CUSTODIAL
LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013**

I refer to your correspondence of 12 September 2014 inviting me to make a submission to the Committee's inquiry into the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* (Bill). In response, I am pleased to provide the following submission addressing the inquiry's terms of reference.

I understand the Bill intends to introduce three significant changes aimed at addressing cultural challenges facing the Department of Corrective Services. Two of the proposed amendments bear particular relevance to my role and functions as Public Sector Commissioner.

Disciplinary Provisions

Firstly, I note the Bill proposes to extend application of the disciplinary and substandard performance provisions contained within Part 5 of the *Public Sector Management Act 1994* (PSM Act) to prison officer staff. I am supportive of this proposal.

Upon commencement of the PSM Act in 1994, Part 5 applied only to chief executive officers (CEOs), Senior Executive Service (SES) officers, other public service officers and ministerial officers. The only more general application of Part 5 to the broader public sector at this time related specifically to a failure to comply with a direction under section 94(4) (redeployment and redundancy), by virtue of section 67(3) of the PSM Act.

Since its introduction, the application of Part 5 has been extended to broader employee categories on several occasions. In December 2000, the *School Education Act 1999* resulted in the application of Part 5 of the PSM Act to teaching and wages staff of the Education Department. In addition, section 76(1)(b) of the PSM Act makes provision for the application of Part 5 to be extended to other classes of public sector employees by way of regulation. To date, this power has been exercised on two occasions:

- in 1996 when regulation 14 of the *Public Sector Management (General) Regulations 1994* was made, which prescribed persons employed under the *Education Act 1928* in the Western Australian Department of Training, as well as academic staff and other staff employed under section 31(1)(a) of the *Colleges Act 1978* at Karratha College; and
- more recently in August 2014 when regulation 14 was amended to extend application of Part 5 to Social Trainers employed by the Disability Services Commission.

Such arrangements have been introduced with both employer and employee support.

Historically, it has been noted that the disciplinary and substandard performance processes contained within Part 5, as originally enacted, did not always provide a contemporary and streamlined regime for the management of such issues. In April 1996, the then Industrial Commissioner and Public Service Arbitrator, Gavin Fielding AM, in his review of the PSM Act, noted that the procedures provided under Part 5 were '*by any measure...complex and convoluted*'. He also considered that while there was an ideal that a uniform manner for dealing with disciplinary matters in the public sector should exist, there may be vocational consideration specific to certain categories of employees that warrant a separate disciplinary code.

More recently, measures have been taken to correct the procedural inefficiencies that had been identified in the former disciplinary processes under the PSM Act. In March 2011, amendments to disciplinary provisions of the PSM Act commenced as a result of passage of the *Public Sector Reform Act 2010*. The former three-stage investigative process was rationalised into a single process, and the capacity for an employing authority to continue to pursue disciplinary proceedings despite an employee's transfer or resignation was included.

The new provisions within Part 5 outline the procedural requirements for employing authorities when dealing with a disciplinary matter. These requirements are supplemented by Commissioner's Instruction No.3: Discipline – general (which is issued by me pursuant to section 22A of the PSM Act) and with accompanying Guidelines. Together these instruments direct employing authorities as to the process to be followed in disciplinary proceedings in relation to public sector officers who are subject to Part 5 of the PSM Act.

The potential for broader application of Part 5 to the wider public sector has been enhanced by the subsequent introduction of these more streamlined procedures.

The Public Accounts Committee recently had regard to the operation of this revised disciplinary framework in *Report 6 – Final Report of the Inquiry into Amendments to*

the *Public Sector Management Act 1994*. At paragraphs 5.60 to 5.62, the Committee discusses the benefit to this framework applying more broadly across the public sector. At Finding 13 of the Report the Committee noted:

“Standardising the procedural requirements in Commissioner’s Instruction No.3: Discipline – general, so that they apply to disciplinary proceedings outside the current remit of the Public Sector Management Act, would promote efficiency by encouraging the development of a more uniform disciplinary regime”.

In principle, I am supportive of the Committee’s recommendation. However, rather than unilateral application across the public sector, any consideration of the suitability of Part 5 should, have regard to any particular vocational or employment considerations applicable to the category of public sector employee.

Currently the Commissioner of Corrective Services employs staff of different categories with differing substandard performance and disciplinary arrangements applying to them. This results in processes and procedures that are less efficient and more complicated than they need to be. The simplification and standardisation of these arrangements is likely to be beneficial to all involved.

In considering the matter and the circumstances, I am confident that the application of the provisions of Part 5 of the PSM Act to prison officers would provide a more contemporary, flexible and appropriate disciplinary framework for these classes of employees.

Loss of confidence powers

The Bill’s proposes the introduction of new powers whereby the Commissioner for Corrective Services may ‘remove’ prison officers and other custodial officers due to loss of confidence, as set out in clause 7 (proposed division 3 of the *Prisons Act 1981*) and in Part 3 (proposed amendments to the *Young Offenders Act 1994*).

Removal as a result of loss of confidence results in the termination of employment.

At present the capacity for a government employer to dismiss an employee due to loss of confidence is very limited. No public sector employees are subject to equivalent loss of confidence provisions in the absence of a criminal conviction or disciplinary outcome. Members of the Police Force are the only government employees that are subject to loss of confidence powers to dismiss on the part of the Commissioner of Police.

As an entity listed in Schedule 1 of the PSM Act, members of the Police Force are not part of the public sector for the purposes of the PSM Act and as such the provisions of the PSM Act do not apply. In contrast, prison officers and other custodial officers employed by the Department for Corrective Services are part of the public sector, and the operational provisions of the PSM Act (other than Part 5) do apply.

Despite this difference, prison officers and other custodial officers carry out law enforcement duties and exercise special powers that involve balancing custody and duty of care in relation to vulnerable and disempowered persons. Comparisons may

be drawn between the special powers and standards of integrity and accountability of these roles to those of Police Force officers.

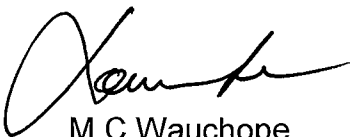
Given the nature of the services provided by prison officers and the power they have over the members of the public that they serve, as well as the high standards of integrity and accountability that are expected of them in the discharge of those powers, I consider that it is open to Government and the 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.

In my view, it is imperative that the introduction of any such powers be balanced with appropriate rights of review to ensure that they are not applied in a manner which is harsh, oppressive or unfair. Further, the use of loss of confidence powers should be used when substandard performance or disciplinary powers are inadequate to deal with the matter at hand.

In this regard I note that the Bill provides a degree of procedural fairness for prison officers who may be subject to loss of confidence powers. The Bill requires that officers are provided with an opportunity to make written submissions in response to the grounds on which the Commissioner has lost confidence, prior to any decision whether or not to take removal action is taken. The Commissioner is also required to provide a prison officer with the reasons for taking removal action against them, as well as making available to the officer any materials considered by the Commissioner in making the decision. Prison officers may also appeal against the removal to the Western Australian Industrial Relations Commission on the grounds that the removal was harsh, oppressive or unfair.

I would be pleased to elaborate on my submission should you desire. If you have any queries, I am available on 6552 8551 or I may be contacted by email at mal.wauchope@psc.wa.gov.au.

Yours sincerely



M C Wauchope
PUBLIC SECTOR COMMISSIONER