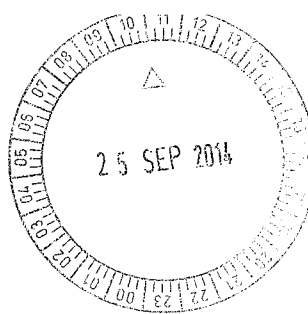




Community & Public Sector Union
Civil Service Association of WA



25 September 2014

Ms S Parsons
Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

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Dear Legislative Councilors [Standing Committee on Legislation]

RE: Submissions - the Custodial Legislation (Officers Discipline) Amendment Bill 2013.

I refer to your invitation to make submissions in respect of the proposed amendments to Young Offenders Act and its Regulations whereby it is proposed to bring Youth Custodial Officers under the disciplinary provisions of Part 5 Public Sector Management Act 1994, and to establish a loss of confidence regime base on the Police Act.

The CSA has made submissions on these issues previously to the Department of Corrective Services. These submissions are a reiteration of the previous submissions, and are set out in the attached Schedule.

I am also willing to appear before the Committee to elucidate these submissions, and to answer questions.

Yours sincerely

Toni Walkington
Branch Secretary

Att.

Schedule

The Civil Service Association Submissions

Executive Summary

While the Civil Service Association (CSA) acknowledges that moving Youth Custodial Officers (YCOs) to the disciplinary regime of the Public Sector Management Act 1994 (PSM Act) has been foreshadowed in 2009, the CSA's submissions tend to make out a case that there should be no change based on the environmental factors of youth detention.

In particular, the CSA opposes the proposal to impose a loss of confidence procedure on YCOs as another ground for terminating their employment for the following reasons:

- (a) 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.
- (b) Since 2007 there have been very few breaches of discipline brought against YCOs, who are members of the CSA and of those that have occurred, none have touched upon the YCO's integrity or honesty tantamount to corruption. The number is less than 20 matters have been handled by the CSA since 2007.
- (c) Allegations of breaches of discipline have been effectively managed through Part 8 Young Offender Regulations.
- (d) There has been very little litigation in the WA Industrial Relations Commission [WAIRC] to challenge disciplinary decisions. The most notable are:
 - (i) *Amourous v Commissioner for Corrections* (2007) WAIRC 00548 – PSAB; and
 - (ii) *CSA v Commissioner for Corrections* (2008) WAIRC 00251 – PS Arbitrator.
- (e) YCOs serve a period of 12 months' probation as mandated by the Juvenile Custodial Officers General Agreement, and undergo a period of training at the Academy.
- (f) Issues of substandard performance are rare.
- (g) The Minister's speech provided no evidence of corruption or conduct amounting to loss of confidence relevant to youth detention or the activities of YCOs.

There is therefore no need for another disciplinary layer to be imposed. More detailed submissions follow.

Background

The CSA is a Union registered under the Industrial Relations Act 1979 (WA). It, along with the Community and Public Sector Union, WA Branch (CPSU) represents fifteen and half thousand members in the public sector. The CPSU is a Union registered under the Fair Work (Registered Organisations) Act 2009.

Included within the CSA's membership coverage are Prison Superintendents, who are Public Service Officers, engaged under Part 3 PSM Act; and Youth Custodial Officers, who are Government Officers engaged under the Young Offenders Act.

The current position under the Young Offender's Act and Regulations

The status of YCOs under the Young Offenders [YO] Act and Regulations was discussed by the Public Service Arbitrator in *CSA v Commissioner for Corrections*. In short, the Chief Executive officer appoints YCOs, formerly known as group workers under s. 11(1a)(a) YO Act. They are clearly employees and Government Officers. They are not Public Service Officers employed under the PSM Act. Under s. 11(1a) the Commissioner, being the Chief Executive Officer, is authorised to *terminate the appointment of YCOs in prescribed circumstances*.

The Commissioner's powers of termination are set out in Part 8, YO Regulations. R. 48(1) refers to the *employment provisions* for YCOs and miscellaneous employees. Division 2, YO Regulations set out the grounds for termination as follows:

- (a) Inability to perform their duties properly by reason of physical or mental health under r. 51(1) after a prescribed medical examination;
- (b) Providing *false, incomplete or misleading information in or with respect to an application for engagement* under r. 51(4);
- (c) During or at the end of the probationary period the Commissioner takes the view that the YCO is *unsatisfactory in the performance of their duties or unsuitable to be a YCO*; and
- (d) Proven breaches of discipline under r. 54. These are similar to those set out in s. 80 PSM Act. They are:
 - Disobeying or disregarding a lawful order;
 - Breaches of duty or responsibility imposed by the YO Act or Regulations or rules made under the Act;
 - Committing an act of misconduct that relates to the performance of duties or fitness as an employee;
 - Being negligent or careless in the performance of their functions; or
 - Committing an act of victimisation under the Public Interest Disclosure Act 2003.

The usual practice is for allegations of breach of discipline are investigated internally. If the investigation finds that there is sufficient evidence to sustain a charge, then a charge is laid requiring the YCO to make a formal response. If the YCO disputes the charge, the Commissioner may set up an inquiry under r. 61 YO Regulations, chaired by the Commissioner or their nominee.

Under r. 60(1) the YCO is entitled to lay representation, and under r. 61 cross examination and re-examination of witnesses is permitted. Such rights do not exist under the PSM Act. It also prescribes a procedure for hearing similar to a court or the WAIRC.

The findings are presented to the Commissioner for consideration. If there is an adverse finding against the YCO, then the YCO may ask the Commissioner to review the finding. In the case of dismissal there is a right of appeal to the Public Service Appeal Board [PSAB] under s. 80I IR Act, whilst other findings or penalties are heard by the Public Service Arbitrator under s. 80E IR Act.

Comments on the current position

Under r. 54 integrity or honesty issues or corruption can be dealt with as acts of misconduct that relate to performance of duties or go to the fitness of the YCO to remain employed. Negligent or careless performance is also covered. So if a loss of confidence regime is introduced, then there will be considerable overlap between the two processes. If the Police model is enacted, then it would be difficult determine which process should be chosen. Indeed there is evidence that under the Police regime, loss of confidence is the easy option: see the Police Union's submission to the Amendola Review.

Also poor performance is regulated by r. 51 if the cause is the YCO's physical and mental health. Save for a corroborative medical examination, there is no right to an inquiry. Further, integrity or honesty issues or corruption is covered by r. 51(4) if it involves the YCO providing *false, incomplete or misleading information in or with respect to an application for engagement*. Basically the contract is void from the beginning if the representation is material.

In addition, if the Police model is enacted, then there would be another overlap between an inquiry process and the loss of confidence process, which is similar to PSM investigations, which tend to be done on the papers, notwithstanding interviews of witnesses, who are not subject to cross-examination by the person under investigation. Further there would be an overlap between the current jurisdiction of the PSAB and the Commission in Court Session, although the rules for determination would be different.

The context of Juvenile custody and complaints

The CSA's experience is that many disciplinary allegations or charges against YCOs result usually from complaints by detainees; e.g. excessive force or rough handling during restraint, speaking inappropriately to a detainee, or mere untruths. This contrasts

with disciplinary allegations arising under the PSM Act which tend to come from peers or managers or in some circumstances a customer complaints; e.g. lack of courtesy, bullying or offensiveness.

The CSA's IMIS database indicates that the CSA assisted seven members between July 2011 and June 2013. One JCO had the allegations dismissed. Three received reprimands. Three received other penalties, but were not dismissed. From 2007 onwards, the CSA has represented less than 20 YCOs with allegations of breach of discipline. The type of misconduct is usually minor or on the lower side of the scale.

The nature of the custodial environment is such that detainees have a variety of motivations to make complaints against YCOs. The combination of having one's liberty restricted and being under the control of YCOs means that the relationship between a detainee and YCOs can become fraught quite quickly and easily without any initiation from the YCO. This tension will often motivate the making of a complaint and often the complaint will be without foundation. Other motivations for making a complaint might involve to ameliorate boredom or to attempt to exert power or influence over the YCO by threats.

Apart from cases of envy or psychopathic behaviour, the situation outside the custodial environment is likely to be different. There is generally no ulterior motive for a complaint or reason for a relationship between service provider and co-workers or customers to be so fraught. This difference in the nature of complaints and source of disciplinary action is great, and such as to throw considerable doubt on the suitability of a "paper based" investigation process for the custodial environment, which requires greater scrutiny of the evidence of malefactors through a conventional hearing.

Credibility is at the fore of the vast majority of complaints resulting in disciplinary action in the custodial environment. In the vast majority of disciplinary matters instigated by detainees, the detainee's motivation for making the complaint and credibility are squarely in issue. The complaints are often of such a nature that the issue is whether or not certain conduct occurred, not whether the conduct constituted misconduct, or what is the appropriate sanction given the gravity of the conduct alleged. Credibility issues cannot be properly tested on the papers as is the norm for the Police loss of confidence process. Rather the complainant should be available for cross examination and the YCO ought to be entitled to test the complainant's evidence. The decision maker needs to have the benefit of hearing and seeing the complainant, including other parties to the complaint to properly assess issues of credit.

The current disciplinary procedure under the YO Regulations cover this eventuality. These elements of the process are important in the custodial environment as the prospect of being cross examined acts to deter frivolous or vexatious complaints, and the ability to hear evidence from witnesses directly greatly assists the person determining the charge to assess credibility.

YCOs should not have inferior disciplinary rights compared with detainees.

A loss of confidence process would give YCOs lesser rights of hearing when the right of Youth Offenders are considered under YO Act and regulations.

Part 9 YO Act deals with offences committed by detainees during detention. The Charges against detainees are heard and determined in the presence of the detainee charged. The Regulations enable witnesses to be called, questioned and cross examined by the detainee charged. Indeed the procedure seems to mirror the process for disciplinary hearings involving YCOs.

A loss of confidence process which does not contain a right to:

- a hearing in the presence of the YCO
- call witnesses; and to
- cross examine witnesses

will afford YCOs inferior rights to be heard in the determination of disciplinary matters compared with detainees. This is manifestly unacceptable.

Police Act 1892 provisions are inappropriate to employment of YCOs

Prison officers are in a significantly different position in relation to their tenure and appointment when compared with police officers. Police officers are not employees of either the Minister for Police or the Commissioner of Police, but are appointed public officers in the service of the Crown.

At common law and under their Act, police officers are by their appointment by the Governor. They are bound to serve the Crown, but the Crown is not obliged to retain a police officer and at common law, the Governor may dismiss at will. At common law, police officers have no security of employment and police officers are not in a contractual relationship with the Commissioner of Police, although under the statute they are subject to the discipline of the Commissioner.

Police officers are the "*law enforcement*" arm of government. Their engagement has been described as "*a regular service of the Crown*"; "*a disciplined force of the Crown.*" (*Pense v Hemy* [1973] WAR 40 at 42; *Minister of Police v WAPU* (2000) WAIRC 01174 at 76). Webb J described a police officers' role in *Attorney-General (NSW) v Perpetual Trustee Co* (1952) 85 CLR 237 in this way:

"A police constable has always been an arm of the law and never a servant employed to do a masters bidding on all occasions and in any circumstances. His authority is original and not derived from a mater or exercised on behalf of one, but is exercised on behalf of the public."

In respect to a substantial area of police work, police officers have independent authority to act and cannot be directed in the performance of their duties. They are *"servant of none but the law."*

The concepts of honesty and integrity are paramount to the proper workings of law enforcement as independent of government. It is in this context that s. 8 Police Act was enacted, its purpose being to maintain proper standards of conduct by members of the police force and protect the reputation of the police force in the absence of reciprocity that exists generally between employee and employer, and the control and discipline that an employer may influence over an employee.

It is this unique position as crown officers which is the rationale for the powers in s. 8 and Part IIB Police Act. The rationale has no application to the employment of YCOs. They are employed by the Commissioner and who must, by s. 11A, obey *"all lawful orders given to by the superintendent or other officer under whose control or supervision YCO is placed and the orders and directions of the chief executive officer."*

In these circumstances there is a heightened need for trust in police officers and special powers are warranted. Special powers are not warranted for JCOs because the structures of the employment relationship provide for the necessary accountability, discipline and control of conduct.

The risks involved with corruption as between YCOs and police officers are different

There is a significant difference between the risks involved with corruption in the police when compared with corruption in Youth detention. Basically, police corruption can lead to individuals wrongly losing their liberty, in crime going unpunished and undetected and in the associated loss and damage.

Corruption in Youth detention has serious consequences, but is not at the extremes of the possible consequences of police corruption.

Accordingly, it is inappropriate to apply the same measures as against the two categories.

Police officers and military officers the subject of loss of confidence powers have corresponding entitlements to compensate for the loss of security and tenure.

Because of the historical recognition of the lack of security of employment of police officers and members of the armed forces as officers of the Crown, industrial entitlements have developed and tailored to that situation, such as more beneficial schemes for compensation for injury, greater sick leave entitlements and pension schemes.

These benefits are not part of the industrial entitlements of YCOs.

The proposed power will contravene ILO obligations concerning security in employment.

The Commonwealth Government has ratified the ILO Convention (No 158) concerning Termination of Employment at the initiative of the employer (The Convention) and the Termination of Employment Recommendation 1982, Recommendation No. R166 (see Fair Work Act s. 771(c) and (d)).

The Convention has been ratified in Australia since the passage of the *Industrial Relations Act 1988* (Cth). The *Industrial Relations Act 1979* in Western Australia incorporated the content of the Commonwealth unfair dismissal provisions, which is based on the Convention as follows:

- Article 4 the Convention provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
- Article 7 the Convention provides a procedural protection against termination in that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.
- Article 8 the Convention provides that: a worker considered to be unjustly terminated is entitled to appeal the termination to an impartial body, such as a Court, labour tribunal, arbitration committee or arbitrator.

The terms of international convention, which Australia has ratified, may inform domestic law on the same subject matter and regard may be had to them, within limits, in the application of domestic law¹. Those Conventions are considered to be the accepted and standard expectations of the community and a significant guide to proper procedure².

That position is buttressed by the long standing availability of unfair dismissal provisions in both Commonwealth and State legislation. The Full Court of the Federal Court

¹ *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 128 ALR 353

² See *TG Thompson v Taira (T&T) Pty Ltd* (1995) AILR 3-175 and also *Trades Labour council of Western Australia v Minister for Consumer Protection, & Australian Mines and Metal Association* [2005] WAIRC 1341

determined that the terms of the Conventions applied to sworn officers, such as police officers³:

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.

³ *Konrad v Victoria Police* [1999] FCA 988