

25 September 2014

Ms Samantha Parsons
Committee Clerk
Standing Committee on Legislation
Legislative Council, Parliament House
GPO Box A11
Perth WA 6837

Dear Ms Parson

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

The Law Society of Western Australia, which represents members of the legal profession in this State, wishes to express its concern to the Standing Committee on Legislation that a particular provision of the above Bill, in its present form, denies the fundamental human right against self-incrimination of any prison officer subjected to it.

Proposed subsection 101(1) empowers the Chief Executive Officer ("CEO") to take 'removal action' in relation to a prison officer where the CEO does not have confidence in a prison officer's suitability to continue as a prison officer.

The CEO is empowered by sub-section 101(3) to conduct an investigation to determine a prison officer's suitability to continue as a prison officer.

Proposed subsection 101(4) empowers the CEO to **require** a prison officer to provide the CEO with any information or answer to any question that the CEO requires and to produce any document in the custody or under the control of the prison officer. The provision empowers the CEO to create a legal **obligation** in a prison officer.

Proposed subsection 101(5) then provides that 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 incriminate the prison officer or render the prison officer liable to a disciplinary measure or removal. The provision negates the privilege against self-incrimination.

Proposed subsection 101(6) provides that 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). The first part subsection 101(6) negates the effect of the removal in subsection 101(5) of the privilege against self-incrimination. However, the exception again takes away the privilege against self-incrimination in respect of an offence under subsection 101(7).

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Proposed sub-section 101(7) makes it a criminal offence to fail to provide the information, answer or a document which may be required to be provided under sub-section 101(4) or give information or an answer that is false or misleading in a material particular or producing a document known by the prison officer to be false or misleading in a material particular without indicating that it is and providing the correct information if the officer can reasonably obtain it.

Sub-section 101(7)(a) is of additional concern because, in its terms, it 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.

Sub-section 101(7)(b) is also of additional concern because it prohibits and makes liable to a criminal conviction 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 it is false or misleading.

Proposed sub-sections 101(4) to (7) operate in a way which is contrary to the privilege against self-incrimination (see *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 310).

The privilege against self-incrimination has come to be regarded, in modern democratic societies, as a significant factor in the protection of individual liberties. As a result, it is now considered as not merely a rule of evidence but rather as a substantive right. As Mason CJ and Toohey J said in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per at 508:

"The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them."

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

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.

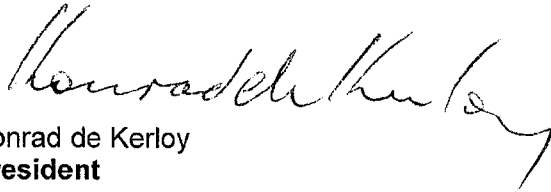
There is extensive discussion of this privilege and its human rights significance in Report 59 of the Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, December 2004 (<http://www qlrc.qld.gov.au/reports/r59.pdf>), which the Society commends to the Committee.

Sub-sections 101(4) to (6), without the exception in sub-section 101(6) and subsection 101(7), would not have given rise to a failure to accord human rights. All those provisions in subsections 101(4) to (6) would create an obligation of an officer to provide information to the officer's employer. That would be consistent with the duty of 'good faith and fidelity' of an employee implied in an employment contract. The imposition of the duty and a breach of that duty could appropriately have

consequences attached to it: a disciplinary measure, such as demotion or a reduction in income, under Division 2; or removal under Division 3. Those measures would be usual for a breach of the duty of good faith and fidelity in an employment relationship. There is no adequate justification for the legislation to impose a criminal sanction upon conduct of an employee in response to a requirement of an employer.

The Society recommends that the Committee report to the Legislative Council that the exception to subsection 101(6) and subsection 101(7) be deleted from the Bill.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Konrad de Kerloy". The signature is written in black ink and is positioned above the printed name and title.

Konrad de Kerloy
President