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30 September 2014

Honourable Robyn McSweeney MLC
C/o Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms McSweeney

SUBMISSION – CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

Thank you for inviting us to make submissions on the *Custodial Legislation (Officers Discipline) Amendment Bill* 2013 (the Bill). The Bill proposes amendments to the *Prisons Act 1981* (the Act) and the *Young Offenders Act 1994* (YOA), to insert 'loss of confidence' removal provisions which mirror the provisions in the *Police Act 1892*. We note that the proposed amendments to the Act mirror the proposed changes to the YOA.

As the Union that represents almost all police officers in Western Australia, in our view, we are well placed to assist and advise, on the proposed amendments to the Act that seek to mirror the *Police Act*. For that reason, we set out below our views and recommendations in relation to the Bill.

Removal action and abrogation of privilege against self-incrimination

We note that section 101(5)(a) expressly removes a prison officer's common law right to decline to answer questions on the grounds that the answer may tend to incriminate him/her. This is concerning in the context of the wide power of removal action for loss of confidence. For example, a prison officer may be acquitted of a criminal offence but still be removed from office due to a loss of confidence pursuant to section 111H(b).

Although the need for higher than normal standards of accountability is acknowledged in the case of prison officers, the legislature should not take away the legal rights of individuals entrenched in common law and convention, unless absolutely necessary. It is our respectful 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.

In the case of *Baff*[1], the New South Wales Supreme Court decided that a police officer who claimed the privilege, although ordered to answer questions by his superiors in circumstances where the legislation did not expressly preclude the availability of the privilege, was within his rights to do so.

[1] *Baff v NSW Commissioner of Police* [2013] NSWSC 1205.

In *Baff*, Adamson J held that *"it might be thought that those who enforce the law ought also have the benefit of its most significant protections"*.[2] We agree with these comments of Adamson J and submit that they apply also to prison officers.

In our view, despite section 101(6), if a prison officer was put on written notice for removal due to alleged criminal activity and was compelled to answer questions that may tend to incriminate that officer, the current proposed legislation may significantly affect the outcome of criminal charges at trial. However, if the allegations were such that a loss of confidence ensued, then this would be sufficient grounds for removal regardless of the outcome in the criminal jurisdiction. It would even be sufficient grounds if the criminal allegations had not yet been decided. For that reason, compelling a prison officer to answer questions is unnecessary.

In the High Court Case of *Lee*[3], the difference between 'direct use immunity' and 'derivative use immunity' was discussed. We note that direct use immunity is provided for by section 101(6) which restricts any answers compulsorily given by a police officer from being used in any subsequent criminal proceedings. However, these provisions do not prevent the answers being used to discover additional evidence for use in criminal proceedings, which would be admissible against the prison officer.

Hayne J (dissenting) held in *Lee* that it is a fundamental principle that whether an accused *"be in fact guilty or not, [the accused] is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he [or she] committed"*.[4] Currently, the Bill allows for answers to compulsory questions to lead to further evidence being obtained by other means which may harm the prison officer's right to put the prosecution to proof on the evidence that was available without the compulsory examination.

The Second Reading Speech asserts the intention that the abrogation of the privilege will only apply if the required information was not obtainable from an alternative source and the privilege would prejudice the investigation. We respectfully note that this intention is not expressly provided in the provisions of the Bill and thus should be expressly provided for in the Bill. Without it, there is no limit as to what type of information the CEO can compel a prison officer to answer. Clearly, such a broad power has the scope for embarrassment and abuse. For example, it is so broad that it would enable the CEO to compel a prison officer to reveal information as to his/her sexual preferences, political affiliation and religious beliefs. Clearly, a prison officer should not be compelled to answer such questions from the CEO.

Furthermore, we reiterate that fact finding (although preferable) and declarations of guilt are not necessary for the purpose of removal action due to loss of confidence. In this context, it is our respectful opinion, that the abrogation of the privilege is not warranted in loss of confidence removal investigations.

Notice & Implementation of Loss of Confidence

The use of the word 'must' and 'may'

For the avoidance of doubt, section 102(1) should be amended so that it commences: *"If the chief executive officer does not have confidence in the prison officer's ..."* This is consistent with section 33L(1) of the *Police Act*.

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[2] Ibid at 112.

[3] *Jason Lee & Anor* v NSW Crime Commission [2013] HCA 39.

[4] Ibid at 83, as per *Tuckiar v The King* [1934] HCA 49; (1934) 52 CLR 335 at 346.

We note that section 102(1) of the Bill states that the CEO *may* give a prison officer a written notice setting out the grounds on which the CEO does not have confidence in the prison officer's suitability to continue as a prison officer. It is a fundamental principle of procedural fairness that a party at risk of being adversely affected, have the opportunity to ascertain the relevant issues and the nature and content of any adverse material.[5] In our view, in order to ensure that procedural fairness is afforded to prison officers, the word *"may"* that appears in section 102(1) should be substituted with the word *"must"*. This will ensure that written notice is provided to prison officers in every case.

Similarly, section 102(2) provides that a prison officer *"may"* make written submissions in response to the written notice provided by the CEO. In our view, a prison officer should have the option as to whether or not he/she wishes to respond to a written notice, but that the opportunity must be provided to every prison officer in every case.

Therefore, we recommend that section 102(2) be amended as follows: *"The prison officer must be given the opportunity to make written submissions to the Chief Executive Officer in relation to the notice within the following period..."*

Documents and Materials Considered

We note that in section 102(6) of the Bill, the CEO must, within 7 days after giving the 'decision notice,' give to the prison officer a copy of any documents that were considered by the CEO in making the decision; and make available to the prison officer for inspection any other materials that were considered by the CEO in making the decision.

In our opinion, it is appropriate for the relevant documentation and materials on which the written notice was based, to be provided, or be made available for inspection, to the prison officer at the time the written notice is issued. This will assist the prison officer to respond to the written notice comprehensively in the first instance and may assist to avoid unnecessary appeals. In other words, the prison officer must have access to all material that is considered by the CEO and have an opportunity to respond to that material before the CEO makes his/her decision to remove the prison officer.

In *Robb and Dale*[6] the Supreme Court of Victoria found that procedural fairness was not accorded to Mr Robb or Mr Dale (both police officers) because the Chief Commissioner of Police, Christine Nixon, denied their request for access to material considered by her in making the decision to remove them.[7] We note that at the time of the case of *Robb and Dale*, the Victorian legislation did not expressly allow for access to such materials by police officers. Despite this, the Court held that the minimum requirements afforded by the legislation did not negate the obligation to accord procedural fairness - a fundamental requirement of which includes the subject of an enquiry having access to all material put against that person *"that is credible, relevant and significant to the decision to be made."*[8]

Furthermore, if additional documentation was relied upon by the CEO in making the final decision, after receiving the prison officer's written response, then the current rights provided by s102(6) should continue to apply. This would allow for the provision of these additional documents, or inspection of additional materials, to be available to the prison officer. The right of appeal would then apply.

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[5] *Robb and Dale v Chief Commissioner of Police* [2005] VSC 310 as per *Dixon v Commonwealth* (1982) 55 FLR 34, 41.
[6] *Robb and Dale v Chief Commissioner of Police* [2005] VSC 310.
[7] Ibid at [85] and [120].
[8] Ibid as per *Kioa v West* (1985) 159 CLR at 628-629.

The above recommendations, if implemented, have the potential to create increased obligation and complexity. However, this was discussed in *Robb and Dale* where the Court found that this was a *"necessary and justifiable consequence of procedural fairness."*[9] This is especially necessary in matters with limited appeal processes, such as the loss of confidence provisions in the Bill.

Removal Action

Section 102(7) states that removal action (once a decision has been made) can be carried out when the notice is given or anytime after that. The stress associated with a prison officer knowing that removal will occur, but not knowing when, is particularly unfair – and unnecessarily so. In our view, the Bill should be amended to provide that upon receiving the decision notice, the prison officer must be informed of the date on which his/her removal will take effect and such date should be no earlier than 14 days after receipt of the notice.

Withdrawal of removal action and revocation of removal

Section 104(1) provides that if removal action does not result in the removal of a prison officer, the chief executive officer *may* withdraw the removal action. We are at a loss to understand why the word *"may"* is proposed. Surely it is incumbent on the CEO to withdraw the removal action once it is clear that a prison officer is not being removed. For that reason, we recommend that the word *"may"* is replaced with *"must"* in section 104(1).

Matters on appeal

Joining parties

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.[10] 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).

The onus

We note that section 107(2) provides that the appellant has the burden of establishing that the removal decision was harsh, oppressive or unfair. For the avoidance of doubt, we recommend that the onus to be applied, namely the balance of probabilities, is inserted into section 107.

New Evidence

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 officer and CEO alike. It is not apparent

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[9] Ibid at [77].

[10] See, for example, *Pitt v Environment Resources and Development Court* (1995) 66 SASR 274 and *OneSteel Manufacturing Pty Ltd v Environment Protection Authority* (2005) 92 SASR 67.

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.

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 WAIRC namely to ensure a *"fair go all round"*.[11] For the reasons canvassed, we strongly oppose sections 110A(2), (3) and (4).

We trust these comments are of assistance and that you will consider adopting our recommended changes before the Bill progresses through Parliament.

I will also apprise the Minister of our position.

Yours sincerely

George Tilbury
President

[11] *Carlyon v. Commissioner of Police* [2004] WAIRComm 11966 at [188] cited with approval in *Gordon v Commissioner of Police* [2010] WAIRComm 937 at [47].