

STANDING COMMITTEE ON LEGISLATION

CUSTODIAL LEGISLATION (OFFICERS DISCIPLINE) AMENDMENT BILL 2013

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 2 OCTOBER 2014**

SESSION FOUR

Members

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

Hearing commenced at 1.32 pm

Mr JAMES McMAHON

Commissioner of Corrective Services, sworn and examined:

Mr ROBERT FONG

Team Leader, Policy and Legislation, Department of Corrective Services, sworn and examined:

Mr STEVEN NORRIS

Acting Executive Director, Operational Support, Department of Corrective Services, sworn and examined:

Dr OWEN KELLY

Acting Executive Manager, Operational Support, Department of Corrective Services, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take that either the oath or affirmation, and when you do that could you please state your full name, contact address and the capacity in which you appear before the committee.

[Witnesses took the oath.]

The CHAIR: You will have signed a document entitled “Information for Witnesses”; have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard; a transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of the hearing for the record. Please be aware of the microphones and try to talk into them; ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee?

Mr McMahon: Yes, if I may.

In sitting here today, obviously we have looked at this as a department over many, many, many months now, and obviously we are re-looking over it. In doing that, and having the opportunity to speak, there are three points I would like to make about the environment we work in within Corrective Services. The first one is that 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.

The second point I make is one that jumps out at me. I have been 11 months in the job now, and I want to make a point about the operational effectiveness of our custodial facilities. The two amendments we are looking at here are the alignment with the Public Sector Management Act, which I think is critical, but if I talk about effectiveness, anything that aligns us with that that moves us into the world of performance improvement versus going straight to discipline makes a lot of sense. That is about growing our capability. The other side of it is that there is an efficiency around that, and I have seen things across my desk where we are spending a lot of time on things that, quite frankly, are performance improvement issues. The effect of that on prison officers on the ground is quite simple: it affects morale. It affects morale because things go for a long period of time, and it is done in a discipline matter, not a performance matter under the Prisons Act 1981; we need to move into that performance improvement arena. I make that point. Alignment with Public Sector Management Act for our youth custodial officers and prison officers, and what the rest of the department is on, to me improves effectiveness because we are dealing with it in a growth sense, and we are dealing with it in a morale sense. I just make that point.

[1.40 pm]

Under the operational effectiveness with the loss of confidence, the major point I make there with the loss of confidence is it is about the commissioner saying there is a loss of confidence for a person who is working in the Department of Corrective Services. Specifically under that, if I give an example of the cell door is open, asking someone why that cell door is open and getting a response that says, “I’m not answering that”. That is an issue, because that could potentially lead into a question of integrity, and for people on the ground, that integrity is essential. I have been in this environment where the person alongside you needs to be trusted implicitly, because we are talking two o’clock in the morning, cell extraction, putting the right gear on with someone who might not be completely stable. You need to trust that person completely. These provisions enhance the safety of the individual prison officer. Equally important is the safety of the prison officer alongside him—actually, also the safety of prisoners and, as you know, we have got issues in prisons with standover tactics and grooming et cetera, but right at the end of the day, it enhances the safety of the custodial facility, which is about the safety of the community, and we have had an escape this year at Acacia. I am happy to talk about it because everyone knows about it. The reality is these two provisions enhance the effectiveness of our custodial environment. I am saying that with 24 years of a different environment, but a similar environment.

The last point I make is, having read through it all, and an opening comment, I understand, having seen investigations that have gone for three to four years in the Defence Force and the debilitating effect that has had on families, let alone the person involved. In that particular case, I am referring to everyone that was actually innocent, but it took so long to get to that point, to the point where I think it actually caused harm to the people involved. This allows us to move quickly and get things done. In line with that, the natural justice, the ability to appeal to the same body through the Western Australia Industrial Relations Commission, they are all there and procedural fairness is all there. As the commissioner, I would not be supporting these if I thought the procedural fairness is not there, because I do have a responsibility to my prison officers and my youth custodial officers, who, let me tell you, do an unbelievably outstanding job on behalf of Western Australian people. I mean that. I have seen it for 11 months now. I am more impressed the more I see. 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. Just those three points, Madam Chairman.

The CHAIR: Thank you. Could you outline the stakeholder consultation conducted when the bill was being drafted and give us a summary of that feedback?

Mr Norris: Yes. The stakeholder engagement included the Public Sector Commission, the WA Prison Officers' Union, the Community and Public Sector Union, the CPSU–CSA, the Western Australian Industrial Relations Commission and the Office of the Inspector of Custodial Services. The department sent letters to stakeholders outlining the content of the bill. The summary of the feedback is the PSC supported the bill and gave advice to the department. WAPOU did not support the bill. The CPSU–CSA did not support the loss-of-confidence provisions in the bill. The WAIRC, as the bill is government policy and a matter for Parliament, did not wish to comment. However, the WAIRC is willing to discuss relevant practical issues to the department. The Office of the Inspector of Custodial Services did not respond. During recent conversations with WAPOU, they advised that they are keen to continue consultation.

The CHAIR: Who consulted with CPSU–CSA?

Mr Fong: The department, ma'am. We wrote to the unions with an outline of the bill and then they responded to us.

Hon DONNA FARAGHER: You might need to take this on notice, but when was that correspondence actually sent?

Mr Fong: That was some time last year before the introduction of the bill. I apologise; I do not have the facts here.

Hon DONNA FARAGHER: No, that is fine. I am happy for you to take it on notice. That would be useful.

Mr McMahon: We will take that on notice and give you the facts, the exact dates.

The CHAIR: Are regulations intended to be drafted pursuant to the provisions of the bill? If so, can a draft be provided to the committee?

Mr Fong: Yes. The regulations will be drafted to support the provisions of the bill, but at the moment we have not finalised the drafting and it is still a work in progress.

The CHAIR: That is usual. How will the content of the regulations compare with those contained in the Police Force Regulations pursuant to part IIB of the Police Act?

Mr Fong: In the main, the regulations will mirror those in the Police Force Regulations because we are modelling the Police Act on the loss-of-confidence provisions.

The CHAIR: What industrial agreement or award applies to the employment of custodial officers?

Mr Fong: There are two agreements: the Department of Corrective Services Youth Custodial Officers' General Agreement 2011, and for the prison officers it is the Department of Corrective Services Prison Officers' Enterprise Agreement 2013.

The CHAIR: Do any provisions of the bill operate to effectively override any terms of such agreement or award?

Mr Fong: The answer is no.

The CHAIR: Before the introduction of the bill, is there any recognised and established principle that prison officers have a special relationship with their commissioner of a type comparable with that of police officers with their commissioner?

Mr Norris: Yes, The department has always recognised that prison officers have a special relationship with their commissioner of a type comparable to the police officers with their commissioner. Police are entrusted by the Commissioner of Police with great powers and responsibility, as outlined by our commissioner. As such, the Commissioner of Police needs to ensure that the police officers maintain the trust, and he responds to them. In this context it is appropriate that the Commissioner of Police should be able to promptly remove those in whom he has no confidence. Prison officers exercise similar powers to police officers. It is the responsibility of the Commissioner of Corrective Services to remove officers who are no longer suitable for their jobs. The principle was confirmed by the WAIRC in a recent case, the Western Australian Prison Officers' Union of Workers v the Minister For Corrective Services WAIRC CR 68 of 2012. That is the full citation. I do not have that at hand. Secondly, in the loss-of-confidence provisions —

Hon SALLY TALBOT: Sorry, can I just interrupt you. Were you intimating that that was relied on in that judgement, the point about the special relationship?

Mr Norris: It was referred to by, I think it was, Kenner at the WAIRC. I do not have it at hand. His commentary was specifically around that special relationship. It was a comparison —

Hon SALLY TALBOT: It said that there was a special relationship?

Mr Norris: That it existed, and he compared it to the New South Wales Police Force Commissioner and the relationship he has with his constables.

Hon LYNN MacLAREN: It is probably relevant to ask about consultation with the police officers' union.

The CHAIR: I do not think you finished what you were —

Mr Norris: No. I take your point; we have not consulted with the WA police officers' union, albeit I understand that the WAPOU obviously have had consultation. We have had discussions where they have mentioned their experiences with the loss-of-confidence process, but, no, I can confirm the department has not engaged directly.

Hon SALLY TALBOT: I am just going to ask you again to expand on that point about the special relationship. I accept everything that the commissioner has said about the role, the significance of the role that custodial officers play. But why is it more special? Can I put it another way: why is it more like a police officer with the commissioner than it is like a teacher to the teacher's employer?

[1.50 pm]

Mr Norris: For a number of reasons, having accepted the previous comments of the commissioner, we compare, for instance, the use of force. It is an extraordinary power entrusted, hence, under the Prisons Act, to a prison officer through his employment. And, obviously, swearing the oath pursuant to section 13, there are a number of very serious responsibilities, obligations and, equally, powers entrusted to prison officer and equally youth custodial officers. The deprivation of liberty that the commissioner referred to is, of course, one of the greatest powers when we ensure the safety of the community and, obviously, the incarceration of prisoners. They are very extraordinary powers and we would say they are commensurate in many respects to that of a police officer.

Hon SALLY TALBOT: Are they identical to a police officer?

Mr Norris: No; in my opinion, they are not identical, they are different.

Hon SALLY TALBOT: Can you outline the differences for us?

Mr Norris: We could do that. There are significant differences.

Hon DONNA FARAGHER: Can I perhaps jump in? We heard evidence earlier today with respect to the role of custodial officers, and it has been brought in a roundabout way that the role of a custodial officer is more akin to a public service officer rather than a police officer and that the role of a police officer is unique—obviously it comes under the Police Act and the like and they are

police officers 24/7. Indeed, reference was made to the role of custodial officers and prisoners and the role of teachers and students—an analogy was put in that regard. It is appreciated that police are different to custodial officers, but I am keen—you have alluded to this in your opening comments—to hear what you see as the clear distinction between custodial officers and public service officers. Indeed, it would be helpful—perhaps this again needs to be taken on notice—to see those list of powers that you have which might perhaps separate the role from that of a teacher or someone else. That would be useful.

Mr McMahon: Sure, let me do that because I think 24/7, when people are required to be on duty or not—I mean, sure there are shifts within a system, but if things are happening at the end of a shift, you do not go home; you are there because it potentially averts a riot, a suicide et cetera et cetera. That one, generally, I would say if a teacher had an issue—I will do teacher–prison officer—I am sure they would stay, but at some point it could be all hands on deck, so to speak, because it is a very volatile environment. 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 about—so, 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. At that point, you have a 120-kilo man who most probably has some type of issue that is not because of the environment he is in, it is maybe because of where he has come from; he really has got a problem about continuing to be in his cell. At that point, you cannot go to a principal and ask for advice. If you have got a wayward child, you would generally go to the principal or get the right architecture; you have to think on your feet. In the environment, generally we would operate in pairs, but there are occasions—this is from me now—I have seen there are, just because of the dynamic nature of what is going on where, we are doing a lot of rehabilitation programs—prison officers might be cornered in an area and they have to think on their feet. So I will call the second point judgement and decision cycle; I think that is different. The third one I just want to reiterate—I will be very quick—the use of force. It has come up recently actually in some schools, you know, how much force and how we do that. 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—so, wrap that up. I think that is a major difference. I think also liberty is a big thing. Now the sit-in-a-corner issue in a school is very different from “You’re now cuffed and you’re going into a management unit that is designed to help you for the space you’re in.” Again, it is the severity of what you are doing. It is not that a teacher does not say “Sit in the corner”. And a prison officer, the principle is the same, because it is management of a situation; it is the severity of what they are doing. The other one with youth custodial officers, because we have got this as part of them as well, is vulnerable children. I mean, today there are just under 150 kids in Banksia. The way the youth custodial officer interacts with that child could be the difference between suicide or not. I mean, I even find it, you know, that is tough for that youth custodial officer. I know in most schools it is maybe not that severe. I think the word I am coming to is the level of severity between a teacher and dysfunction. 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. And I think that is the reason the amendments are there. So, that is without going into the detail. They are just broad principles.

Hon SALLY TALBOT: Are prison officers armed?

Mr McMahon: Some of them, they have got what they call a primary response team that will have the right agents to use. So, it is a cascading level of being armed, right through to the emergency response group. It is not something we talk about, but they have an ability to use lethal force.

Hon SALLY TALBOT: Are youth custodial officers the same?

Mr McMahon: No. In fact, we have just gone through all our drills. We make sure that everything is as low key as it can be in a youth environment. I am saying to the point that the use of any agents is done by outside parties.

Hon SALLY TALBOT: For youth custodial officers?

Mr McMahon: Yes; and the reason is because that environment we really need to focus—I mean, we need to focus on rehabilitation for everything we do, but those children are very vulnerable.

Hon DAVE GRILLS: I guess what you are talking about is what is situationally appropriate for the legislation or the role that you have. Having said that, that is different for teachers, police officers and things like that; it goes to the same place, but different ways of doing it.

Mr McMahon: Yes.

Hon DAVE GRILLS: Perhaps one thing you could do, just so my colleagues might get some understanding, is, as you said, swearing in and the oath. We have not heard that before, but if you could give us an idea of the oath that the prison officer takes, and give us some idea, when that person takes that oath, that the commissioner and the police commissioner has to have his confidence in that person who has taken the oath, and that is what he is going to do. It might just highlight a point or two.

Mr Norris: Would you like it read?

Hon DAVE GRILLS: Yes, please, sir.

Mr Norris: Section 13 of the Prisons Act 1981, “Engagement of prison officers” —

- (1) The Minister may engage prison officers as employees and, subject to any industrial award or agreement that is applicable in relation to a particular case or class of cases, persons so engaged shall be employed on such terms and conditions as the Minister, on the recommendation of the Public Sector Commissioner, determines.
- (2) No person shall be engaged under subsection (1) to be a prison officer until he shall have subscribed in the presence of and attested by a justice or an officer not below the rank of superintendent, the following oath of engagement —

I, ... —

Prison officer’s name —

engage and promise that —

- (a) I will well and truly serve the State as a prison officer of Western Australia; and
- (b) I will do my utmost in the performance of my duty as a prison officer to maintain the security of every prison in which I serve and the security of the prisoners and the officers employed at the prison; and
- (c) I will uphold the Prisons Act 1981, as amended from time to time, and the regulations, rules and standing orders made under that Act from time to time; and
- (d) I will deal with prisoners fairly and impartially; and
- (e) I will obey the lawful orders of an officer under whose control or supervision I am placed.

It goes on with subsection (3).

[2.00 pm]

Hon DAVE GRILLS: Thank you for that. So basically, then, commissioner, with regard to the current environment, when you stand next to that person, the person not only has to be there to do the job, but if the person was not there to do the job the way you wanted them to do it, with that oath, would you say that you would have confidence in that person, or not?

Mr McMahon: Under that oath, I would have confidence in that person.

Hon DAVE GRILLS: But if that person was not to do that job and did not do that, would you have confidence in that person then?

Mr McMahon: No. Again, this is a personal thing, if I can expand on that —

Hon DAVE GRILLS: Absolutely.

Mr McMahon: But when people's integrity is in doubt, in my experience, when the pressure or the severity of their job is in doubt, cracks appear, and that is the point—you cannot afford it—let alone the morale of the organisation. Because if you are going in to get someone out of a cell, and if you are working down in the wing of a prison, you have got to be able to rely that the person has shut the other cells. Because if you are doing an extraction, what happens is there is a bit of a domino effect sometimes, and if those people are not doing their job because they have actually demonstrated a lack of integrity—this goes back to resilience and who you are—then that could have catastrophic effects for the safety of a prison officer. I am not—what is the word?—trying to be “over-dramatic” with the catastrophic effect piece. It is like for me, in my old environment: someone alongside a soldier. If that soldier does not do what he needs to do at that point in time, that is a catastrophic effect. That is why discipline was put into the Defence Act and all those other things.

Could I come back to the police engagement? The staff here have prepared outstanding briefings. But I did read, if I may—you might be able to enhance on this—we did not engage the police officers' union, but I know, because I read it in my notes, that after four years of it being in, there was a review done that said the principles of it make sense, and we endorse where it is going. I do not know if that is a piece of evidence that you need to see or not.

The CHAIR: Fine. You can table that if you have got it.

Mr McMahon: A legislative review, I think it was.

Dr Kelly: I do not have a copy of that here.

The CHAIR: We can get hold of that.

Mr McMahon: It was a question I had about how has it gone with the police.

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.

The CHAIR: Thank you. With respect to clause 7, proposed new section 101(3), and clause 16, proposed new section 11CC(3), why does it state you “may” rather than “shall” conduct any necessary investigation? In what circumstances would no investigation be necessary or justified? Why is this provision in the bill, when there is no equivalent provision in part IIB of the Police Act 1892?

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 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.

The CHAIR: With respect to clause 7, proposed new section 101(4), and clause 16, proposed new section 11CC(4), the committee notes that this is broadly drafted, referring to “any information” and “any document”. Do you believe the current wording is appropriate to prevent information or documentation being requested that may not be directly relevant to the investigation?

Mr Norris: The headnote in subsection (4) provides that (a) “any information”, or (b) “any document”, is to be obtained for the purpose of the investigation. Accordingly, there is no power for the commissioner to obtain information and documents that are not relevant to the investigation. To do otherwise would constitute an abuse of power. A prison officer/youth custodial officer may challenge the commissioner on the ground that the information or document so requested is irrelevant to the investigation.

The CHAIR: With respect to clause 7, proposed new section 101(5), and clause 16, proposed new section 11CC(5), regarding the abrogation of the privilege against self-incrimination, the committee notes that the explanatory memorandum states the intent of the abrogation is to facilitate investigations; and the second reading speech states the abrogation would apply only if the required information was not obtainable from an alternative source, and the officer must be advised of the implications of the abrogation. Have disciplinary proceedings under the current Prisons Act 1981 been hampered by the application of this privilege?

Mr Norris: As mentioned in the opening address by Commissioner McMahon, yes, it is not uncommon for officers to refuse answers to questions during investigation. This refusal hampers investigations, causing significant delays, as alternative avenues of inquiry are identified and exhausted. Investigations are frequently discontinued, as an officer’s refusal to answer questions prevents a full and proper testing of the allegation.

The CHAIR: Thank you. Why is the only safeguard in the bill that the compelled information is not admissible in any other criminal proceedings except those under section 101(7), rather than also other disciplinary proceedings?

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.

The CHAIR: Thank you. Would compelled answers under section 101(5) be used to discover additional evidence for use in criminal proceedings; and would answers be able to lead to further evidence being obtained by other means?

Mr Norris: The only criminal proceedings for which compelled answers can be used is criminal proceedings for not complying with the commissioner's request for information or documents. Compelled answers are used for an investigation. Thus the compelled answers may lead the investigator to further inquiry about the matter under investigation. The department is required to report any criminal activity of which it becomes aware to the Western Australia Police and to the Corruption and Crime Commission of Western Australia. However, any compelled answers from a prison officer/youth custodial officer cannot be adduced in evidence by the Western Australia Police or the Corruption and Crime Commission for the prosecution of a crime.

The CHAIR: Why does section 101(7) not contain a provision for the restriction of the publication of the incriminatory material, like section 11A of the Evidence Act 1906, and this is left for the Industrial Relations Commission to consider on appeal pursuant to section 110G? Are there any circumstances where it would be appropriate to restrict publication at the time the evidence is first given?

[2.10 pm]

Mr Norris: Madam Chair, section 101(7) is an internal administrative process conducted by the department. The issue of publication does not arise.

Hon SALLY TALBOT: Can I ask for a little more information about the first question the chair asked you in this section, which was about whether disciplinary proceedings under the existing legislation had been hampered because there is no right to silence, and you said "yes". Are we referring back to the commissioner? Commissioner, you might like to answer this yourself; I am just looking at all of you. Commissioner, you referred in your opening remarks to the situation where someone says, "Why is this door open?"

Mr McMahon: Yes, the cell door.

Hon SALLY TALBOT: "Why is this cell door open", yes. That is not actually a disciplinary procedure, is it? That is very much an operational matter. Is the answer that you gave in which I think you said yes, there were many documented examples—or what did you say; you did not give us any details?

Mr Norris: No, there was no detail. However, yes, you are right, there are examples. They are not documented here today. So, in the course of an investigation, it does hamper efforts. And I think I referred to, obviously, in the absence of an explanation from an officer, an investigator would need to seek alternative avenues of inquiry and obviously build, I guess, a brief of evidence in terms of other inquiries, discussions with witnesses, documentary evidence and other evidence that would have to be kept.

Hon SALLY TALBOT: Can you see what is slightly concerning me here?

Mr McMahon: I can, but what I should have said with the cell door, was the person who went out of the cell door was a very, very dangerous criminal who had links to associated people that we know have links back to that particular officer. That is the fullness of the bit around it. So I would not be moved —

Hon SALLY TALBOT: It is not actually about getting the cell door closed, you know, to keep the person inside; it is not an operational matter in that sense?

Mr McMahon: It is interesting. So, in the first instance—criminal connections; why I am doing it—that to me, potentially, is that issue of, you know, I would be doing that based on, I think it was articulated, that is the integrity issue for me, because there are a lot of pointers that go to that. So if someone is not—that is a confidence issue for me about that person. The thing is if it is a cell door and no-one has come out but there was an issue of—that is a performance issue. So that aligning with the PSMA—the Public Sector Management Act; sorry—and the loss of confidence, I would not do a loss of confidence. And the procedure is you say, "I am now moving to a loss of

confidence.” To me, the moving is about the integrity-related issue. If the door was open and there was not any other connection and reason for me to—I would not move there. I would say, “It is a performance issue, they’ve only done it once. Nothing severe has happened. The prisoner got out but he got locked within his wing”, because that is what happens at night. I would be going, “It’s a performance issue”, but if it happened 10 times in a row, I might have an issue and if it happened with the wrong set of prisoners that were all colluding that we know about, then I might move to a loss-of-confidence provision. Does that —

Hon SALLY TALBOT: Yes, we are getting there, but can you just take us through how that situation would play out under the existing act? I want to get to the point where there is clearly some hampering of a disciplinary proceeding. So, it is not about getting the door shut to keep the guy in or out; it is about finding out what happened. So, I want to get to the moment at which you say, “Ah, we can’t do what we need to do in order to get the right outcome.”

Mr McMahon: Sure. So, take us through what would happen now, Steve.

Mr Norris: Currently, an investigation would occur under the Prisons Act. An investigator would obviously respond, would gather evidence and then we would—not dissimilar to a PSMA process—articulate an allegation and put that to the prison officer. In our experience, the prison officer has a choice to make. So, if we identify him in terms of procedural fairness and natural justice as a respondent, he is afforded a set of rights; and part of those, as it stands at the moment, is that he has a right to silence. The difficulty, and maybe one of the differences in relation to your first question earlier around the difference maybe between a police officer or a schoolteacher is the nature of the environment. The commissioner talked about it being very complex; it is also very closed, particularly in the custodial setting. Our ability to gather evidence and to determine what happened in a prison context becomes, obviously, reliant generally on witnesses; so those witnesses will give us evidence. It is our strong experience, particularly more recently and unfortunately, that some officers are reluctant to give evidence against other officers. We are often then left with some evidence from either prisoners or other evidence which may be gleaned from documentary evidence; however, what we do not have is the final piece, I guess, of the explanation; and that is, what happened and why, and from the respondent, the prison officer, themselves. Another example may be where in a more complex environment, remembering of course that prisoners have day-to-day access to serious and organised criminals, is around their association. So, we may learn that they have an association with a known criminal and we may put that to them. As it stands at the moment, they do not have to answer that question, and we are left with the question: is that person involved in criminality or are they not? I guess to get to your question, as it stands at the moment anything in terms of complexity, the answer generally is that they will not comply, they will not answer and they will remain silent. So, in terms of ending the investigation process off, we are unable to do that.

Hon SALLY TALBOT: But it would still be open to the commissioner, presumably, to find those integrity questions unanswered, and therefore to dismiss the person.

Mr McMahon: Yes. To me, and this is part of that special relationship, you are working through a graduated response from it is performance improvement. If there is nothing to indicate it is anything to do with integrity et cetera, there is no need to do it, because in performance improvement it is, “Did you lock the cell properly?” “I did not.” “Okay, we need to do some more training.” I mean, it is a very basic example.

Hon SALLY TALBOT: Yes, because the answer to the question, “Do you have an association with this known criminal?” may well be yes, but that in itself would not be grounds for dismissal.

Mr McMahon: Absolutely, so if there is a perfectly reasonable and responsible argument to the performance —

Hon SALLY TALBOT: It always comes back to the performance.

Mr McMahon: It is a performance issue. And if you think about loss of confidence, if you say you are moving to loss of confidence, just say for the sake of the debate we are having that the person says, “Yes, I did this and I did this”, fantastic; we know what happened, and that means I have confidence in the system and the person because he has told me why. I understand, and it all checks out.

Hon SALLY TALBOT: Rather than take up more time on this question, perhaps I could just say, by way of concluding this point, that the problem I am having is making that good, solid connection between pretty harsh provisions like loss of confidence and losing the right to silence, and performance improvement. Perhaps I can just leave you with that observation and as we move through the next period, however long we have got, perhaps you could see opportunities to frame your answers in terms that might help me build that bridge that is not quite there in my mind.

Mr McMahon: Yes. And if I could put the other side—so if you are reverse-engineering it—if we actually suspect a whole lot of things, under the current system we do not know because the person says, “I’m not saying anything”, that means the integrity of that custodial facility is in doubt, and that is about the safety of the public.

The CHAIR: Quite right.

Mr McMahon: So there are degrees here. I think we have got to remember the environment we are working in.

Hon DAVE GRILLS: The other side of that, too, was with regard to people saying, “We haven’t got enough staff, we haven’t got enough training and people are doing jobs they aren’t appropriately trained for.” We discussed before about the opportunity for somebody inadvertently getting in a position where this might kick in. We had that discussion and you said that does not kick in because, hopefully, you would look in your own organisation within your own running of it to fix that problem.

Mr McMahon: I did say it in my opening statement, but there is the natural justice, procedural fairness and reasonableness in everything we do in formed bodies within the law in Australia. There are all those provisions of appeal and all those things, so that is why when I said I was comfortable, we have to work through a whole series of pretty much the immediate assessment, because that is what we call it. So, if something happens in a prison tonight—an immediate assessment, what happened? I have to work out very quickly and, quite frankly, within a very short period of time what happened, because the whole integrity of the facility might be in doubt. That is that extremity I was talking about before. I do not want to keep referring back to it, but —

[2.20 pm]

Hon SALLY TALBOT: That is not quite the same context as a disciplinary proceeding though, is it? It is disciplinary proceedings you are going to use the ending of the right to silence; the decision you have to make at midnight tonight is not actually materially affected by that particular measure, is it?

Mr McMahon: It may be if I cannot work out why something has or has not happened. Do you know what I mean? The longer that goes, we have a question mark over the integrity of the facility. I will try to do the reverse engineering for you, because I understand where you—the other side to it is, just say, if that person is not the right person and his integrity is in doubt, what else does it affect along the way? But, it is graduated, it is natural justice, it is procedural and there is, obviously, the ability to appeal, and that is all about reasonableness. That is where I felt there was a sense of comfort that, if you like, it —

Hon SALLY TALBOT: I like your reverse engineering mechanism, I think that is quite useful! I just have trouble getting to the point where I can see in my mind a prison officer who is the model prison officer, performance wise —

The CHAIR: I can see you make perfect sense, so let us move on.

Hon SALLY TALBOT: — and yet they are corrupt to such an extent that you need to get rid of them.

Mr Norris: We have that difficulty and equally we have a difficulty under our existing part X arrangements under the Prisons Act with dismissals. So, obviously, in affording natural justice and procedural fairness, we need to speak to—it becomes the respondent. We experience difficulties with being able to get to the bottom of what happened in a very complex environment and then, obviously, getting to the dismissal stage because the community has an expectation that those officers who have sworn that oath are discharging that duty properly. I would say they are interrelated. Do we have model prison officers doing the wrong thing? Unfortunately, we do. As the commissioner stated in his opening remarks, it has been a very, very small percentage, but that small percentage can have a catastrophic effect on the good order and security of our prisons in our state. That is all this is about. It is no way to similar to, again, getting back to that, the relationship between the Commissioner of Police and his constables and the Commissioner of Corrective Services and his prison officers.

The CHAIR: With respect to clause 7, proposed new section 102 and clause 16, proposed new section 11CD, why is documentation only available for inspection after it has been cited that removal actions will be taken?

Mr Fong: The commissioner may rely on certain documents in deciding whether or not to remove a custodial officer. So until and unless the removal decision is made, there will be no need for the officer to inspect the documents.

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.

The CHAIR: Would it not be of assistance to the process of making a removal decision that copies of such documentation be made available to the officer before a removal decision is made so that submissions in response can comment on such documentation?

Mr Fong: The answer is no. There would be no need for the custodial officer to comment should the commissioner decide not to take removal action.

The CHAIR: Why is there an absence of an oral hearing, which is part of the disciplinary process under the current part X of the Prisons Act 1981?

Mr Fong: The loss-of-confidence proceeding is a managerial process, not a proceeding to determine the guilt or innocence of an officer, thus there is no need for an oral hearing.

Hon SALLY TALBOT: I am just going to take it back, if I may, to that third answer you provided there. The Chair's question was: would it not be of assistance to the process of making a removal decision that copies of such documentation be made available to the officer? Presumably, the situation the Chair is referring to is where you might want to correct the information. We did hear an example this morning in an open hearing with the prison officers of a case where there was a substantive charge made against an officer, but it turned out that he was acting way above his designated level and had never been trained for that position. I think that is what the Chair is getting at. Would it not be helpful to have that information checked so that an officer could say, "Well actually, this is wrong. I am not an officer level 3, I am only a 1", or something like that.

Mr Fong: I think that would be part of the investigation process.

Mr Norris: In answer to your question, and again go back to the opening remarks, loss of confidence would be at the extreme end of the integrity–honesty–competency questioning and some of that evidence, and I know we are drawing a distinction largely between performance and integrity and competence, may be very sensitive. For example, again, getting back to our maximum security prison environment, talking about intelligence, talking about information that you may give about somebody else that may result in somebody else being hurt. So, obviously the information is very, very sensitive. Of course, investigators would elicit information from informants, from witnesses—from a variety of sources. It may be related to security and, I guess, it is almost a question around security and public interest and we would need to first, examine the information and material, and then make a decision around that. I take your point—that is right. I would accept that the loss-of-confidence investigation would be a very, very complex, long and thorough investigation, given the test being around the severity. I am not familiar with the example you alluded to, but this would be the very serious set of circumstances, if you take my point.

Hon SALLY TALBOT: I understand the point you are making. The thing that slightly worries me is that while I can see that once you get to the stage where you are looking at a removal decision it is a very significant point to arrive at, but I still do not quite have the sense that there is a crescendo of activity building up to that moment. We have received submissions from people who are critical of the legislation that say that we are replacing—I do not think anybody was saying that the existing system was perfect, and the prison officers made the point very clearly that they have actually been advocating for change over the course of three governments. But the existing system, which is indeed in need of improvement, is being replaced by two systems and it is the commissioner who has the choice about which system to use. What is worrying me is that you get to the point where you are making a removal decision and rather than being the endpoint of a long process, it is actually a process that has taken place up here, above and beyond any other process, so it actually hits the officer like a bolt from the blue, whereas a disciplinary procedure is going to be subject to all the natural justice and rights in the workplace provisions.

Mr McMahon: I can only go back to the answer that I gave similarly. I think if everything points under natural justice to a performance-related issue, it is a performance-improvement issue. Our historic data will tell us that the majority is performance related, so back to the half a per cent. I think the thing is, if we talk at the severity of this, to move them to a loss of confidence would be that we have now gathered a whole lot of evidence around this that I think is integrity and honesty related, and then I am now moving to a loss-of-confidence provision—I am trying to give you on the ground—and then it is, “Could you explain this?”, and if the person says, “I’m not explaining it”, that would be an issue of me having no confidence in that particular prison officer.

[2.30 pm]

Do not forget that at that point, the prison officer can say, “Oh, this is why.” That solves the issue and we all move on and we solve the operational issue. We also solve his integrity issue. I think that is expedient and quick for everyone. That is where it works for me—sorry, as in the commissioner. It works for me because we have gathered all this, could you explain this, please? You are asking the question. I get a response, “Okay, fine.” If I do not get a response—if someone says, “I’m not answering that”—you wear a uniform and you are proud of what you do. I would go through a series of checks but I would have to question my confidence in that person to work alongside the 99.5 per cent of people who would go, “Commissioner, this is why.” I think that goes back to the bit about the special relationship: “Commissioner, this is why.” Currently, we cannot do that which means long, drawn-out things. Sometimes we do not get to the bottom of things. Evidence stacks up that I go back to; therefore, the custodial facility’s integrity becomes a little bit more in doubt. I am being very operationally focused. That is what I do.

The CHAIR: Thank you. Commissioner, we are out of time and I have many questions to ask. Would it be appropriate for you to take those away and give us some written answers?

Mr McMahon: Absolutely.

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.

Hon SALLY TALBOT: I am glad there is no intent but could they be used that way?

Mr Norris: I think the five pillars around integrity, honesty, competence, performance and conduct are exactly that. It is around we lose confidence in the abilities of that officer, or the commissioner does, to go about their duties and we already have a process. Could they? I would have to take that on notice; however, there is no reason for to us to stray from a process that is already working and is effective.

Mr McMahon: This is my opinion, so it is not a legal one, but as an appropriateness level, that would not pass my test. It is not appropriate.

The CHAIR: On behalf of the committee, I would like to thank you all for appearing before us. It has been very valuable for us to have you here. If you could provide the answers to the questions.

Mr McMahon: Thank you, Madam Chair and thank you, committee.

Hearing concluded at 2.33 pm
