Prisons Procedure 403
Youth Custodial Procedure 115

Removal action due to loss of confidence

Procedure approved by the Deputy Commissioner Regulation and Operational Services

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For further information regarding this Procedure, please contact:
Operating Standards and Procedures
Regulation and Operational Services Division
DCSOSP@correctiveservices.wa.gov.au
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1. **Introduction**

The Commissioner of Corrective Services is responsible for the management, control and security of all prisons and detention centre(s) and the welfare and safe custody of all prisoners and young persons in detention in Western Australia.

In 2013, the Minister for Corrective Services initiated amendments to the *Prisons Act 1981* and *Young Offenders Act 1994* to carry out a number of changes:

- Repeal the discipline provisions in the *Prisons Act 1981* and the Young Offenders Regulations 1995
- Replace these provisions with a performance management process under the *Public Sector Management Act 1994* (PSMA)
- Introduce the ability to take removal action due to the Commissioner's loss of confidence in a custodial officer
- Introduce the abrogation of privilege against self-incrimination for loss of confidence investigations.

These changes came into operation on 24 August 2015.

2. **Purpose**

2.1. This procedure covers removal action for loss of confidence. The procedure relating to discipline under the PSMA is under *Disciplinary Procedures – Public Sector Management Act 1994*.

2.2. The Commissioner is empowered under the *Prisons Act 1981* and *Young Offenders Act 1994* to take removal action against custodial officers if, he/she has lost confidence in their suitability to continue as a custodial officer. When making this decision, the Commissioner will have regard to the custodial officer’s integrity, honesty, competence, performance or conduct, particularly where this poses a threat to the safety of colleagues and/or the safety and security of offenders.

2.3. The Deputy Commissioner Regulation and Operational Services via the Investigation Services Directorate (ISD) - is the Corporate Executive member authorised by the Commissioner to utilise the LOC prerogative as defined in the procedures.

3. **Scope**

3.1. These procedures apply to officers with a custodial function as listed below:

- Prison officers appointed under section 13(1) *Prisons Act 1981*, whereupon the Commissioner may recommend removal action to the Minister
- Persons appointed under section 6 (3) *Prisons Act 1981* and who are listed in the Schedule to *Prison Rule 401* as having positions with custodial functions (excluding those with limited custodial functions), whereupon the Commissioner may take removal action
- Youth Custodial Officers appointed under section 11(1a) *Young Offenders Act 1994*, whereupon the Commissioner may take removal action
• Persons appointed under section 11(1) Young Offenders Act 1994 and who are listed in the Schedule to Youth Custodial Rule 113 as having positions with custodial functions (excluding those with limited custodial functions), whereupon the Commissioner may take removal action.

4. **Principles**

4.1. In the exercise of these Procedures, all employees are expected to abide by the Department’s core values of Integrity, Respect, Accountability, Excellence and Learning and to uphold the behavioural standards set out in the [Department of Corrective Services Code of Conduct 2015](#) in the daily performance of their work.

4.2. The principles of natural justice and procedural fairness must underpin the processes of any LOC investigation and any subsequent removal action. This means:

4.2.1. Custodial officers subject to an LOC investigation will be informed of the following:

- Allegations against them.
- Abrogation of the privilege against self-incrimination.
- Right to be heard, including making a written submission to the Commissioner.
- Right to appeal the Commissioner’s decision.
- Whether it will proceed as a LOC process or divert to a PSMA process.

4.2.2. The LOC process will be conducted:

- Thoroughly, with allegations fully and justly investigated and all relevant submissions and evidence considered.
- In a timely manner with no undue delay in investigations and proceedings.
- With confidentiality respected and maintained within the constraints of the need to fully investigate the matter and subject to any legal requirements for disclosure and privilege.

5. **Application of LOC proceedings**

5.1. LOC is a statutory prerogative exercised by the Commissioner via the Deputy Commissioner Regulation and Operational Services only.

5.2. LOC may commence following a single act or omission or a series of acts or omissions by the custodial officer.

5.3. LOC focuses on the custodial officer’s alleged conduct and whether it is so serious or exceptional that it may and does give rise to the Commissioner losing confidence in the officer’s suitability to continue as a custodial officer, primarily when safety and/or security issues arise and/or are compromised. Refer to Appendix D for examples of such conduct.
5.4. LOC is not a default position when determining dismissal or serious misconduct of a custodial officer.

5.5. The threshold test for applying the LOC process over the PSMA disciplinary/performance management process will include the Commissioner deciding whether:
- In the circumstances it is appropriate to apply PSMA discipline, improvement action and/or performance management; and
- The custodial officer has committed serious unprofessional conduct or serious misconduct, whereby the suitability of the custodial officer could be called into question.

5.6. LOC proceedings can be ceased and PSMA disciplinary process commenced at any stage.

5.7. If the Commissioner maintains confidence in an officer's suitability to remain a custodial officer, the Commissioner may direct that disciplinary action is commenced under the Public Sector Management Act 1994 and/or direct the officer to undertake Improvement Action and/or performance management. Refer Disciplinary Procedures – Public Sector Management Act 1994.

5.8. Abrogation of the privilege against self-incrimination may apply during an LOC investigation. It will only apply if information required is not obtainable from another source and the privilege would prejudice the investigation.

5.9. Any information, answer or document compelled from a custodial officer in a LOC proceeding is not admissible in evidence against the custodial officer in any criminal proceedings, other than in proceedings for a failure to produce information or documents, or providing false or misleading information or documents under the LOC provisions. (Section 101(6)-(7) Prisons Act 1981 and section 11CC(6)-(7) Young Offenders Act 1994)

5.10. Where an LOC proceeding has been ceased and a PSMA disciplinary process commenced for the same matter or conduct being investigated, any information, answer or document compelled from a custodial officer in the LOC proceeding may be used in evidence against the custodial officer in disciplinary action under the PSMA. (Sections 101(5)(b) Prisons Act 1981 and 11CC(5)(b) Young Offenders Act 1994 and regulations 32F(5) Prisons Regulations 1982 and 61(5) Young Offender’s Regulations 1985).

5.11. Where an LOC proceeding has been ceased and a disciplinary action under the PSMA commenced on a new matter, any information, answer or document compelled from a custodial officer in a LOC proceeding is not admissible in evidence against the custodial officer.

5.12. Removal action due to LOC is not dependent on:
- A finding of guilt in a criminal or disciplinary process. While it may be relevant that the officer has been found guilty of a criminal or disciplinary offence, public confidence cannot be maintained if officers can only be removed following a formal hearing and/or conviction.
• Discipline processes under the Public Sector Management Act 1994 or other criminal/disciplinary action.

5.13. **Officers’ rights**

5.13.1. Custodial officers facing discipline will be informed in writing:

- Which process applies to them at the outset (LOC or PSMA);
- When a process is ceased and/or diverted to the other process ie LOC process is stopped and PSMA disciplinary action/improvement action and/or performance management is to commence or vice versa; and
- Of the reasons as to why the process has been commenced, ceased or diverted.

5.13.2. Sections 101(5)-(7) Prisons Act 1981 and 11CC(5)-(7) Young Offenders Act 1994 provide an abrogation of privilege against self-incrimination during a LOC investigation. Custodial officers will be advised of this abrogation and its implications at the commencement of any LOC investigation interview, including that they:

- Must answer any question and provide any information or document required by the Commissioner or his delegated authority for the purpose of a LOC investigation, even if this information might incriminate the officer or render the officer liable to any disciplinary or removal action.
- May face a penalty under the legislation ($4000 fine and/or 12 months imprisonment) for failure to do so.

5.13.3. Custodial officers facing removal action will be afforded the right to be heard during the LOC process and may make a written submission to the Commissioner demonstrating why he or she should not be removed from the role of custodial officer.

5.13.4. A custodial officer who has been removed due to LOC has the right to appeal to the Western Australian Industrial Relations Commission against the Commissioner’s removal decision.

5.13.5. The LOC process will be carried out in confidence so as to minimise any effect on a custodial officer’s reputation and in accordance with the Departmental Confidentiality and Information Privacy Policy.

6. **Roles and responsibilities**

6.1. **Misconduct Assessment Unit**

6.1.1. Receives information pertaining to misconduct via the Investigation Services Directorate misconduct reporting process or referral from other business areas (as per processes under the Reporting and Management of Suspected Misconduct and/or Criminal Activity by Employees Policy and the Staff Misconduct and/or Criminal Activity Reporting Procedures and Assessment Process).
6.1.2. Considers all information received for misconduct, including LOC (as per the process under Misconduct Investigation Procedures – Central Investigations).

6.2. **Tasking Assessment Group**

6.2.1. Assesses a number of matters pertaining to discipline and misconduct, including whether information amounts to an LOC matter.

6.2.2. Makes recommendations to the Delegated Authority regarding referrals for misconduct or LOC matters.

6.3. **Review officer**

6.3.1. Must be independent from any previous investigation and/or decision making that resulted in information being supplied to the Commissioner regarding the officer’s suitability to continue as a prison officer or youth custodial officer. This is in accordance with regulation 32A(2) Prisons Regulations 1982 and 56(2) Young Offenders Regulations 1995.

6.3.2. Must comply with the requirements of the DCS Misconduct Investigation Procedures – Central Investigations when interviewing other officers as witnesses during any LOC process instigated against a custodial officer facing removal action.

6.3.3. Conducts an LOC investigation into the custodial officer and impartially reviews the investigation and available evidence.

6.3.4. Prepares materials for the Commissioner as required under the regulations including:

- A summary of the investigation, inspection list and any material referred to in the inspection list; and
- A written notice of loss of confidence (NOLOC) advising of the particular conduct or behaviour on which the Commissioner’s loss of confidence is based.

6.4. **Custodial officer subject to an LOC investigation**

6.4.1. Must comply with a direction to attend an interview at a time and place nominated by the review officer.

6.4.2. Must answer the review officer’s questions.

6.4.3. Must answer truthfully and honestly.

6.4.4. May elect to provide a written statement in response to the allegation.

6.5. **Commissioner**

6.5.1. Makes a clear and impartial decision as to whether he/she has lost confidence in a custodial officer’s suitability to continue as a custodial officer, having regard to the custodial officer’s integrity, honesty, competence, performance or conduct, particularly where this poses a threat to the safety of colleagues and/or the safety and security of offenders.
7. **Procedure**

7.1. **Investigation/Information prior to commencement of LOC investigation**

7.1.1. Prior to the commencement of an LOC investigation, an incident, complaint or other information which calls into question a custodial officer’s suitability to continue as a custodial officer is brought to the attention of the Misconduct Assessment Unit (within the Investigation Services Directorate).

7.1.2. The Misconduct Assessment Unit will consider the information for misconduct as per the process [Misconduct Investigation Procedures – Central Investigations](#).

7.1.3. All information will be passed to the Tasking Assessment Group to:

- Assess whether the information amounts to an LOC matter ie does the information raise questions about a custodial officer’s suitability to continue as a custodial officer, having regard to his/her integrity, honesty, competence, performance or conduct, particularly where this poses a threat to the safety of colleagues as well as the safety and security of offenders

- Make a recommendation to the Delegated Authority.

7.1.4. If the Delegated Authority forms the opinion that the information gives rise to the need for an LOC investigation, he/she will initiate a LOC investigation under section 101(3) **Prisons Act 1981** or section 11CC(3) **Young Offenders Act 1994**.

7.2. **Loss of confidence investigation**

7.2.1. The Delegated Authority will initiate the commencement of an investigation under the LOC process through the appointment of an independent review officer(s). This is in accordance with section 101(3) **Prisons Act 1981** and regulation 32A(1) **Prison Regulations 1982**; or 11CC **Young Offenders Act 1994** and regulation 56(1) **Young Offenders Regulations 1995**.

7.2.2. The review officer will notify the custodial officer in writing of:

- The commencement of the LOC investigation

- Any obligations; and/or

- Any actions which may include a direction to the custodial officer that he/she is to attend an interview, be stood down, transferred or stood aside from specific duties while the matter is under investigation.

7.2.3. If the custodial officer is required to attend an interview, the review officer will advise the custodial officer prior to the interview and for the purposes of the investigation of all requirements to provide information or answer any question that the Commissioner requires.

7.2.4. If the custodial officer is required to give the Commissioner any document in the custody or under the control of the custodial officer, the review officer will advise the custodial officer of this requirement in a timely manner.
7.2.5. The review officer will conduct the LOC investigation including interviewing the custodial officer and other necessary persons in the course of the investigation, and reviewing all information available.

7.2.6. When the LOC investigation is complete, the review officer will prepare and provide to the Commissioner:

- A summary of the investigation;
- An inspection list; and
- Any material referred to in the inspection list the review officer considers appropriate.

The review officer must identify any material in the inspection list for which privilege is being claimed including the grounds for privilege.

The Commissioner will review the materials provided by the review officer.

7.2.7. The Commissioner will only determine whether he/she has lost confidence in the officer’s suitability to continue as a custodial officer once he/she is satisfied that there is sufficient evidence to support that determination.

7.2.8. If the Commissioner requires further evidence in order to make a decision on removal action, he/she will request that the review officer provide further materials or conduct further investigation before making the decision. This is accordance with regulations 32C Prison Regulations 1982 and 58 Young Offenders Regulations 1995.

7.2.9. If the Commissioner requests further materials or investigation, the review officer will prepare and provide to the Commissioner:

- A supplementary summary of the investigation;
- A supplementary inspection list; and
- Any supplementary material referred to in the inspection list the review officer considers appropriate.

The review officer must identify any material in the supplementary list for which privilege is being claimed including the grounds for privilege.

Supplementary material may include further interviews with Departmental staff or further investigation of primary and secondary reports and information pertaining to misconduct.

7.2.10. If the Commissioner finds from the materials given to him/her that the matter is so serious or exceptional that it may and does give rise to him/her losing confidence in the officer’s suitability to continue as a custodial officer, he/she will make a decision to give notice of loss of confidence and will advise the review officer of the decision.

7.3. Notifying the custodial officer

7.3.1. The review officer will notify the custodial officer of the outcome by providing them with the NOLOC via the legislated service process (refer 8.8 Service of notices or documents).
7.3.2. If the custodial officer is a prison officer appointed under section 13(1) *Prisons Act 1981*, the review officer will also provide a copy of the NOLOC to the Minister for Corrective Services for his/her information.

7.3.3. The NOLOC will set out the following details (refer Appendix A for NOLOC template) in accordance with regulation 32D Prison Regulations 1982 and 59 Young Offenders Regulations 1995:

- The grounds on which the Commissioner does not have confidence in the custodial officer’s suitability to continue as a custodial officer.
- The particular conduct or behaviour on which the Commissioner’s loss of confidence is based.
- That the custodial officer has 21 days from receiving the NOLOC to make written submissions to the Commissioner in respect of the grounds on which the Commissioner has lost confidence.
- That the custodial officer has 14 days from receiving the NOLOC to make written requests to the Commissioner for permission to inspect any material (other than material already provided to the officer under the regulations) that he/she has seen or created in the course of his or her duties as a custodial officer and is relevant to any issue concerning the custodial officer referred to in the NOLOC.

7.3.4. Along with the NOLOC, the review officer will also provide the custodial officer with:

- A copy of the original and supplementary (if any) summary of the investigation, inspection list and any material referred to in the inspection list the review officer considers appropriate.
- The grounds upon which the Commissioner decides a document or material cannot be inspected due to privilege.

7.3.5. Following the service of the NOLOC, the Officer may be stood down, transferred or stood aside from his/her duties by the Commissioner, if this has not previously occurred.

7.4. Submission period

7.4.1. The custodial officer, within the 21 day submission period, may make written submissions to the Commissioner in response to the grounds on which the Commissioner has lost confidence. This is in accordance with section 102(2) *Prisons Act 1981* and section 11CD(2) *Young Offenders Act 1994*.

7.4.2. During the submission period, the review officer will make any material considered and taken into account in deciding to give the NOLOC (other than any document or material that is privileged) available for inspection by the custodial officer.

7.4.3. The review officer will respond to any written requests from the custodial officer to the Commissioner for permission to inspect any material and facilitate the inspection of material requested by the custodial officer or his/her legal representative under regulations 32E(2) Prisons Regulations 1982 or 60(2) Young Offenders Regulations 1995.
7.5. **Assessment of custodial officer's submissions**

7.5.1. The review officer will receive all submissions on behalf of the Commissioner from the custodial officer subject to a NOLOC.

7.5.2. After the submission period, the review officer will prepare a report for the Commissioner to allow him/her to decide whether:
   - The decision to take removal action stands;
   - To request a further investigation or analysis of any submissions of the custodial officer if necessary; or
   - Other disciplinary action may be more appropriate.

7.5.3. The review officer will coordinate and arrange that the Commissioner makes the decision within 21 days of the end of the submission period if possible (and in any event within 42 days). This is in accordance with regulation 32F Prisons Regulations 1982 and regulation 61 Young Offenders Regulations 1995.

7.5.4. If the Commissioner decides that a further period for investigation or analysis is required, the review officer will coordinate any further investigation under section 101(3) *Prisons Act 1981* or section 11CC(3) *Young Offenders Act 1994*.

7.5.5. Any further investigation or analysis should be completed within seven weeks of receiving the custodial officer’s submissions.

7.5.6. If the further investigation or analysis cannot be completed within seven weeks, the Commissioner through the review officer must give the custodial officer a notice stating the following:
   - The reason for the further investigation or analysis
   - The time period required to complete the further investigation or analysis
   - The reason for the need for that time period.

7.5.7. After assessing the custodial officer’s submission the Commissioner may do the following:
   - Decide he/she has lost confidence in the custodial officer on the ground(s) set out in the original NOLOC; or
   - Decide he/she has lost confidence in the custodial officer on ground(s) other than a ground in the original NOLOC; or
   - Consider taking other action under the Act or regulations other than removal action.

7.6. **Further ground(s) for removal**

7.6.1. If the Commissioner decides he/she has lost confidence in a custodial officer on a ground(s) other than a ground(s) set out in the original NOLOC, the Commissioner must:
   - Commence a new process in line with the process used for the original investigation (refer to process under 7.3 Notifying the custodial officer)
• Identify a specified period of time for the custodial officer to respond to the further ground(s).
• This is in accordance with regulations 32G Prisons Regulations 1982 and 62 Young Offenders Regulations 1995.

7.6.2. The specified period of time for the custodial officer to respond to the further ground(s) must be within 21 days, beginning on the latest date of the following days:
• Day on which the custodial officer is given the NOLOC for the further ground(s)
• Day on which the custodial officer is given copies of all of the documents or materials required to be given under regulation 32G(1)(b) Prisons Regulations 1982 or 62(1)(b) Young Offenders Regulations 1995; or
• Any extension that has been approved before the end of the submission period.

An extension is only valid if it is made by the Commissioner, either by his/her own accord, or approved following an application made by the officer.

7.7. **Commissioner's decision on removal action**

7.7.1. The Commissioner may do the following:
• Decide to take removal action as he/she has lost confidence in the custodial officer on the ground(s) set out in the original NOLOC or the NOLOC for the further ground(s); or
• Consider taking action under the Acts or Regulations other than removal action, such as discipline under the PSMA.

7.7.2. If removal action is in regards to prison officers engaged under section 13(1) Prisons Act 1981:
• The Commissioner will advise the Minister of his/her recommendation. The review officer will prepare the written recommendation notice to the Minister.
• The Minister will make the final approval on the removal and advise the Commissioner.

7.7.3. The review officer will provide a written decision notice (refer Appendix B: Decision Notice) to the custodial officer within 7 days of the Commissioner/Minister deciding to take removal action. This is in accordance with regulation 32H Prisons Regulations 1982 and regulation 63 Young Offenders Regulations 1995.

7.7.4. Copies of documents or material previously made available for inspection or provided to the custodial officer, or documentation that has previously been identified as privileged where the grounds for privilege have already been notified to the officer, will not be reissued.

7.8. **Service of notices or documents**

7.8.1. Notices will be given to custodial officers in the following manner:
• Personally delivered to the officer
• Prepaid post to the usual or last known address
• Leaving it for the custodial officer at his/her usual or last known residential address; or
• Leaving it for the custodial officer at an address for service provided to the Commissioner in writing.

7.8.2. Service is to be taken to have occurred:
• At the time of delivery to the custodial officer
• When delivered in the ordinary course of post (pre-paid)
• At the time the letter was left at the custodial officer’s residential address; or
• At the time the letter was left at the address advised by the officer to the Commissioner.

This is in accordance with regulation 32I Prisons Regulations 1982 and regulation 64 Young Offenders Regulations 1995.

7.9. **Transfer, standing down and leave of a custodial officer**

7.9.1. During the LOC investigation phase or after issuing a NOLOC, the Commissioner will consider whether the custodial officer should remain in the workplace. This will include considering whether to:
• Transfer a custodial officer; or
• Stand a custodial officer down from performing his/her usual duties with pay, until the custodial officer is directed by the Commissioner to return to those duties; or
• Allocate duties to the custodial officer other than the custodial officer’s usual duties.

This is in accordance with section 110J *Prisons Act 1981* and section 11CU *Young Offenders Act 1994*.

7.9.2. Where the Commissioner decides to stand a custodial officer down, this decision will be reviewed every 60 days by the Commissioner/Delegated Authority. The Delegated Authority/review officer will advise the custodial officer in writing of the result of the review.

7.9.3. A custodial officer facing removal action will not be eligible for higher duties or any other acting arrangements.

7.9.4. Where there are periods of extended stand down, the Commissioner/Delegated Authority may require the custodial officer to clear accumulated leave, and will instruct them as required.

7.10. **Maintenance payment**

7.10.1. A custodial officer who has received a NOLOC is entitled to receive a maintenance payment based on the custodial officer’s current salary for a
maintenance period of 28 days. This is in accordance with section 103 Prisons Act 1981 or 11CE Young Offenders Act 1994.

7.10.2. The Minister may extend the maintenance period in exceptional circumstances; however the extension period must not exceed 6 months or extend beyond the determination of an appeal by the Western Australian Industrial Relations Commission (WAIRC).

- The custodial officer or his/her representative may make an application to extend the maintenance period. In this circumstance:
  - The custodial officer is to provide the request, including the reasons for extension, in writing to the review officer.
  - The review officer provides a briefing, via the Delegated Authority and Commissioner, to the Minister with a recommendation supporting or not supporting the extension.
  - Following the Minister’s decision, the review officer will advise the custodial officer and Director Human Resources in writing of the Minister’s decision.

- The Commissioner or Delegated Authority may make an application to extend the maintenance period. In this circumstance:
  - The Commissioner/Delegated Authority requests the review officer to prepare a briefing to the Minister including reasons for the extension and a recommendation supporting the extension, via the Delegated Authority and Commissioner.
  - The Commissioner or Delegated Authority may choose to withdraw the application to extend the maintenance period.
  - Following the Minister’s decision, the review officer will advise the custodial officer and Human Resources in writing of the Minister’s decision.

7.10.3. A custodial officer who has been stood down from duties or directed to remain away from the workplace prior to receiving a NOLOC will remain on full pay until notified otherwise by the Commissioner.

7.11. Withdrawal

7.11.1. The Commissioner may withdraw from the removal action against a prison officer engaged under section 13 Prisons Act 1981:

- Any time after the NOLOC is issued to the prison officer
- Before the Commissioner makes the removal decision, which he/she then recommends to the Minister.

This is in accordance with section 104(1) Prisons Act 1981.

The Commissioner’s ability to withdraw from the removal action within this timeframe is critical. This is because following the Commissioner’s recommendation to remove the officer, the NOLOC is sent to both the section 13 prison officer and to the Minister (as the authority who makes the final decision to remove the prison officer). Withdrawal by the Commissioner must occur before the Minister’s final decision.
7.11.2. The Delegated Authority/review officer will notify the section 13 prisoner officer in writing of the decision to withdraw.

7.11.3. Withdrawal action does not apply to prison officers appointed under section 6 (3) Prisons Act 1981 and youth custodial officers.

7.12. Revocation

7.12.1. If a custodial officer has been removed, and the Commissioner wishes to revoke the removal, the Delegated Authority/review officer will notify the custodial officer in writing of:

- The decision to revoke
- That the removal is to be taken to be of no effect and to have never had any effect.

This is in accordance with section 104(2) Prisons Act 1981 or section 11CF(1) Young Offenders Act 1994.

7.12.2. If an appeal has been instituted against the removal, the Commissioner will notify the WAIRC of the revocation in writing.

7.12.3. Following the revocation, the LOC file will be closed with a reference regarding that the removal is of no effect. Documentation will be managed as described in 8.13.3.

7.12.4. Following the revocation, the custodial officer will not be paid any salary for any period that the officer received a maintenance payment.

7.13. Resignation

7.13.1. A custodial officer may resign at any time before the end of the maintenance period ie even after he/she has been removed. This is in accordance with section 105 Prisons Act 1981 or section 11CG Young Offenders Act 1994.

7.13.2. If the custodial officer resigns, his/her removal is to be considered as though it never happened.

7.13.3. After resignation, the LOC file will be the only record of any actions taken in regards to the LOC investigation. No records will be retained on other DCS files pertaining to the LOC investigation and the custodial officer’s personnel file will only reflect that he/she resigned from service as a custodial officer.

7.13.4. A custodial officer cannot resign if an appeal has been instituted against the removal.

7.13.5. If the custodial officer resigns during the maintenance period, the resignation will take effect at the end of the maintenance period.

7.14. Appeal to WAIRC

7.14.1. A custodial officer may appeal to the WAIRC against the removal decision on the ground that it was harsh, oppressive or unfair and must set out the following by notice to the Commissioner:

- The reasons for the removal decision being harsh, oppressive or unfair
• The nature of the relief sought.

This is in accordance with sections 106-110G *Prisons Act 1981*, sections 11CH-11CR *Young Offenders Act 1994*.

The particulars for an appeal to the WAIRC, including the relevant forms that must be used by the custodial officer, are set out under Parts 9A and 9B *Industrial Relations Commission Regulations 2005*.

7.14.2. The custodial officer and the Commissioner are both parties to the appeal. The Commissioner may be represented by the State Solicitor’s Office. The Workplace Relations Manager or another delegate may appear on behalf of the Commissioner.

7.14.3. The custodial officer has the responsibility (onus of proof) of establishing that the removal decision was harsh, oppressive or unfair.

7.14.4. The appeal cannot be instituted after the maintenance period, or if the custodial officer has resigned.
8. **Glossary**

8.1. The following glossary of terms apply for the purposes of these procedures

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tr>
<td><strong>Abrogation of the privilege against self-incrimination</strong></td>
<td>The custodial officer is not excused, during an LOC investigation, from giving information, answering any question or producing a document when required to do so on the grounds that the material might incriminate him/her or render him/her liable to a disciplinary measure or removal.</td>
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<tr>
<td><strong>Custodial officers</strong></td>
<td>The term used in this procedure to collectively describe prison officers and youth custodial officers as defined below.</td>
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<tr>
<td><strong>Date of removal</strong></td>
<td>Date specified in the decision notice from which removal action of the officer due to LOC will take effect.</td>
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<tr>
<td><strong>Decision notice</strong></td>
<td>Written notice of the Commissioner’s decision on whether or not removal action will be taken against an officer.</td>
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| **Delegated Authority** | Persons to whom the Commissioner’s authority to conduct a LOC investigation is delegated. These are:  
- Deputy Commissioner Regulation and Operational Services – for custodial officers of all ranks.  
- Director Investigation Services for custodial officers below the rank of Superintendent and staff below PSMA Classification Level 9. |
| **Investigator** | Person responsible for conducting a preliminary investigation into a custodial officer, incident or matter that may give rise to a loss of confidence investigation. |
| **Inspection list** | A written list of relevant evidentiary material gathered by a review officer for the purpose of a LOC investigation. |
| **LOC** | Loss of confidence |
| **LOC investigation** | The investigation process undertaken in order to determine a custodial officer’s suitability to continue in the role of a custodial officer in accordance with section 101(4) Prisons Act 1981 or 11CC(4) Young Offenders Act 1994. |
| **Maintenance payment** | Payment to a custodial officer during the maintenance period which is equivalent to four weeks’ pay. |
| **Maintenance period** | The period of 28 days after the day on which the custodial officer is removed, as advised in the decision notice. |
| **Notice of Loss of Confidence (NOLOC)** | Written notice issued by the Commissioner to a custodial officer that sets out the grounds on which the Commissioner does not have confidence in the officer’s suitability to continue as a custodial officer. |
| **Privilege** | Includes protection from the production of:  
- a document prepared for the purpose of pending or contemplated legal proceedings in connection with the obtaining or giving of legal advice; |
- a document or any material where the production would not be in the public interest; and
- a document or any material under a written law.

**PSMA discipline**
Disciplinary action taken against a custodial officer in accordance with Part 5 *Public Sector Management Act 1994*.

**Review officer**
A person whom the Commissioner appoints to conduct a loss of confidence investigation when contemplating taking removal action.

**Removal**
Termination of employment with the Department.

**Removal action**
Action taken by the Commissioner under section 101(1) *Prisons Act 1981* or section 11CC(1) *Young Offenders Act 1994* when he/she has lost confidence in a custodial officer which results in the custodial officer’s dismissal.
- For prison officers appointed under section 6(3) *Prisons Act 1981* and all youth custodial officers as defined, the action is removal of the officer.
- For prison officers engaged under section 13(1) *Prisons Act 1981*, the action is a recommendation to the Minister.

**Removal decision**
Commissioner’s decision to take removal action against a custodial officer (dismissal) as stated in the decision notice.

**Revocation of removal**
Repeal of decision to remove the custodial officer, after removal has taken place, including where an appeal has been lodged against the removal with the Western Australian Industrial Relations Commission.

**Submission period**
The period of 21 days after the day on which the notice of LOC is given or any longer period after that day allowed by the Commissioner.

**Suitability to continue as a custodial officer**
The suitability of a custodial officer to continue in their role having regard to the custodial officer’s integrity, honesty, competence, performance or conduct. This meaning is consistent with section 99 *Prisons Act 1981* and section 11CA *Young Offenders Act 1994*.

**Tasking Assessment Group**
Senior management group within the Investigation Services Directorate comprising:
- Assistant Director Investigations
- Principal Investigator
- Principal Review Officer
- Principal Assessment Officer

**Withdrawal of removal action**
Cessation of removal action against a prison officer after the notice of loss of confidence has been issued and before removal has taken place. Note this does not apply to youth custodial officers.

**Youth custodial officers**
Custodial officers appointed under section 11(1a)(a) *Young Offenders Act 1994* and other officers with custodial functions appointed under section 11(1) *Young Offenders Act 1994*. 

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9. **Relevant instruments and other documents**

9.1. **Legislation**

- Industrial Relations Act 1979
- Industrial Relations Commission Regulations 2005
- Prisons Act 1981
- Prison Regulations 1982
- Public Sector Management Act 1994
- Young Offenders Act 1994
- Young Offenders Regulations 1995

9.2. **Policies and Directives**

- Disciplinary Procedures – Public Sector Management Act 1994
- Misconduct Investigation Procedures – Central Investigations
- Prison Rule 401 – Designation of officers as custodial officers
- Reporting and Management of Suspected Misconduct and/or Criminal Activity by Employees Policy
- Staff Misconduct and/or Criminal Activity Reporting Procedures and Assessment Process
- OSH Focus – Counselling and Staff Support
- Youth Custodial Rule 113 – Designation of officers as custodial officers

9.3. **Awards and Agreements**

- For various Awards and Agreements in effect, refer to the Awards and Agreements page on the Intranet (CSinet).

9.4. **Other Documents**

- Department of Corrective Services Code of Conduct 2015
- West Australian Public Sector Commission Code of Ethics

10. **Appendix**

- Appendix A: Notice of Loss of Confidence (NOLOC) – example
- Appendix B: Decision Notice – example
- Appendix C: Process overview for removal action due to loss of confidence
- Appendix D: Example of incidents that may give rise to LOC investigation

11. **Version control and amendments**

11.1. Version 0.1 - 26 February 2016 - Procedures for removal action due to loss of confidence – Daphne Fernandes/ Darren Ackerman
Appendix A: Notice of Loss of Confidence (NOLOC) – example

NOTICE OF LOSS OF CONFIDENCE

Section 102 (1) Prisons Act 1981
Section 11CD (1) Young Offenders Act 1994

To: xxxxxxxxxxxx

[For section 13(1) Prisons Act 1981 custodial officers.] I hereby give you notice that I intend, in the absence of being persuaded otherwise, to recommend to the Minister for Corrective Services that he/she approve your removal from the Department of Corrective Services in Western Australia (the Department).

[For section 6(3) Prisons Act 1981 and 11(1) and 11(1a) Young Offenders Act 1994 custodial officers.] I hereby give you notice that I intend, in the absence of being persuaded otherwise, to approve your removal from the Department of Corrective Services in Western Australia (the Department).

I intend to recommend/take this removal action because I no longer have confidence in your suitability to continue as a prison officer/youth custodial officer.

My loss of confidence in your suitability to continue as a member of the Department is based on the matters set out in the summary of investigation prepared by the Review Officer and in particular, allegations that you:

[Details of allegations. The following are provided as examples only.]

1. On xxxx 2015 at xxxx, you were in the company of known members of an outlaw motor cycle gang, this being an association which is inappropriate of a member of the Department of Corrective Services;

2. On xxxx 2015 at xxxx, you were questioned by your Superintendent regarding your association with ex-prisoners. When responding you were evasive and unable to satisfactorily explain the relationship, which resulted in your Superintendent having concerns about your future conduct which could affect the good government, good order and security of the prison.

I enclose a copy of the Summary of Investigation and Inspection List of Materials that I examined and took into account in making my decision and the documents referred to in that list, gathered by the Review Officer.

You are invited to respond to this Notice by making a written submission, within 21 days from the date of service of this Notice, in relation to the grounds on which I have lost confidence in your suitability to continue as a member of the Department. You should not assume that an extension will be granted to respond to this Notice.
During this period, by prior arrangement with the Review Officer, you or your legal representative may inspect any of the materials on the Inspection List that are not subject to a claim of privilege.

Your access to the Department’s computer system has been temporarily suspended pending further consideration of these issues.

You are not to enter the Department’s buildings, land and properties except on official departmental business and only then, with the approval of the Executive Director Operational Services.

The exclusion from attending the Department’s buildings, land and properties does not include formal direction to attend any of these premises for the purpose of facilitating investigation for the above or other matters requiring investigation.

If you choose to respond to this Notice, I strongly recommend that you specifically address the allegations outlined above, which are elaborated on in the Summary of Investigation.

You will be stood down from all duties following service of this Notice and until advised otherwise, you will continue to be paid during this period.

After the submission period and further review of any submission you may wish to make, you will be advised via my decision notice of the outcome to this matter.

I recommend that you familiarise yourself with the procedures: Removal action due to loss of confidence available on the Department’s intranet (CSinet).

All communication in regards to any matters raised in this letter is to be via the Review Officer appointed to manage this matter:
- Name:
- Telephone:
- Email:

I encourage you to engage with employee welfare during this process and seek counselling as required.
- Telephone: 1300 361 008 (Counselling service both metropolitan and regional. It is a 24 hour 7 days/week number).
- Website https://au.liveandworkwell.com
- Location Optum
  St Martins Place Level 27
  44 St Georges Terrace
  PERTH WA 6000

Commissioner

date
Appendix B: Decision Notice – example

DECISION NOTICE- REMOVAL ACTION DUE TO LOSS OF CONFIDENCE

Section 101 *Prisons Act 1981*

Section 11CC *Young Offenders Act 1994*

To: xxxxx

Further to my letter of notice of loss of confidence (NOLOC) dated xxxxx which was served on you on xxxx; I have now received and reviewed your submission to me regarding my intended removal action.

[For section 13(1) *Prisons Act 1981* custodial officers.] In accordance with section 101(1)(b) *Prisons Act 1981* I have now received the consent of the Minister for Corrective Services to remove you from the service of the Department of Corrective Services.

[For section 6(3) *Prisons Act 1981* and 11(1) and 11(1a) *Young Offenders Act 1994* custodial officers.] In accordance with section 101(1)(a) *Prisons Act 1981* or 11CC (1) of the *Young Offenders Act 1994* I have decided to remove you from the service of the Department of Corrective Services.

You are now removed and your formal appointment is therefore cancelled, effective on and from the date of this decision notice.

Section 105 *Prisons Act 1981* or section 11CG *Young Offenders Act 1994*, provides that an officer who has been removed from office as a result of removal action, may resign at any time before the end of the maintenance period, unless an appeal has been instituted against the removal.

Section 103 *Prisons Act 1981* or section 11CE *Young Offenders Act 1994* provides a maintenance payment for a 28 day maintenance period from the date of removal in the decision notice. The payment is calculated on your salary at the time of removal from office excluding allowances. Human Resources will manage the payment of your entitlements owed.

Under section 106 *Prisons Act 1981* or section 11CH *Young Offenders Act 1994* you may appeal to the Western Australian Industrial Relations Commission. An appeal can only be instituted during the maintenance period.

Commissioner

date
Appendix C: Process overview for removal action due to Loss of Confidence

<table>
<thead>
<tr>
<th>Investigation Services</th>
<th>Commissioner</th>
<th>Review Officer</th>
<th>Custodial Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information received prior to commencement of LOC Investigation</td>
<td>Commissioner/Delegate decides to serve Notice of Loss of Confidence (NOLOC) upon Custodial Officer</td>
<td>Review Officer to prepare relevant documents and carry out service</td>
<td>Custodial Officer may make written submissions</td>
</tr>
<tr>
<td>Investigation Services may undertake a LOC Investigation</td>
<td>If Custodial Officer is engaged under s13(1) Prisons Act 1981, Commissioner will recommend to Minister that Officer is removed</td>
<td>Review Officer to prepare relevant documents and carry out service</td>
<td>If removal proceeds, Officer may, within 28 days from date of removal (or until end of maintenance period): • Resign; • Appeal to WAIRC; or • Take no action.</td>
</tr>
<tr>
<td>Commissioner considers written submissions and may request further material, investigation or grounds for approval</td>
<td>Commissioner makes decision on removal action</td>
<td>Review Officer to prepare relevant documents and carry out service</td>
<td>Remains with DCS (no LOC) • Other disciplinary action; or • No further action.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Exit from DCS • Resign; or • Removal due to LOC</td>
</tr>
</tbody>
</table>
Appendix D: Example of incidents that may give rise to LOC investigation

These examples are based on actual cases, with details changed to protect the confidentiality and privacy of those concerned.

Example one
Investigation has revealed evidence that:
- A Prison Officer is associating with known criminals in an Outlaw Motorcycle Gang (OMCG).
- The officer is present when drug deals are suspected to have taken place.
- The officer has been seen on a number of occasions in the company of known criminals of a particular OMCG.
- The officer has been observed going out of her way to speak in private with prisoners from the same OMCG.

Example two
Investigation has revealed evidence that:
- A Youth Custodial Officer has formed a close personal relationship with a young person in custody.
- Following the young person’s release, the YCO escalates this personal relationship to the point where the family expressed concerns to the Department for the young person’s wellbeing.
- The young person’s family noted that the young person was under the care of the officer while in detention.

Example three
Other examples may include (but are not limited to) where:
- A custodial officer has been charged with a sex offence, drug related offence or serious assault; or
- A custodial officer has a performance issue (act/omission) so significant in nature or that has a significant consequence to give rise to the Commissioner losing confidence in the custodial officer’s suitability to continue in that role.