Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024

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Committee Secretary
Community Safety and Legal Affairs Committee

Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024

Submission by Prisoners' Legal Service

29 February 2024

Introduction

1. Thank you for the opportunity to provide feedback about the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024 (**the Bill**).

2. Prisoners' Legal Service (**PLS**) is a community legal centre that has operated in Queensland for over 30 years. We provide legal assistance to people in prison about matters arising from imprisonment. Our purpose is to promote access to justice for people who are vulnerable in prison.

3. This submission focuses on proposed parole amendments within the Bill, with a view to offering feedback and recommendations that promote community safety and support accountability, transparency and consistency in executive government decision-making.

4. PLS has significant expertise in the practical operation of parole decision-making in Queensland. Most services delivered by PLS relate to parole. Parole enquiries received by PLS cover a range of areas including parole applications, preliminary parole refusals, final parole refusals, parole suspensions and cancellations, parole conditions, human rights, and judicial review.

Premature parole amendments

5. In April 2023, PLS participated in the Queensland Parole System Review (**QPSR2**), providing feedback, information and recommendations by written submission to Mr Griffin KC. We understand that QPSR2 has now been finalised and Mr Griffin KC's report has been under consideration by the Queensland Government for several months.

6. The contents of the QPSR2 report will be of significant public interest. The scope of the review included important topics about the administration of criminal justice and management of community safety in Queensland. We acknowledge the commitment to openness and accountability through the public release of the first QPSR report and Government Response in 2017.

7. We understand that the parole amendments within the Bill are not in response to Mr Griffin KC's work on the QPSR2.[1] We consider that the changes in the Bill are premature, in light of the work or recommendations that might flow from the QPSR2 report. Indeed, the proposed s340AA of the *Corrective Services Act 2006* (Qld) (**the Act**), relating to the disclosure of sensitive information, will compound existing deficiencies that were the subject of our submissions to the QPSR2 review.

8. PLS' submission to the QPSR2 identified reoccurring themes around communication barriers, non-disclosure and delays in parole decision-making. These issues remain ongoing despite the additional funding that was provided to the Parole Board (**the Board**) in the 2023-24 Budget.

9. We are particularly concerned about the increasing numbers of First Nations people and people with disability entering prison and becoming enmeshed in the parole system because of the disadvantage they face, not because they pose an unacceptable risk to the community. These issues fell within the scope of the QPSR2, which included consideration of the need to enhance collaboration and efficiency within the Queensland Parole System, the needs of vulnerable cohorts and the Closing the Gap targets.

10. The importance of the QCSR2 findings should not be underestimated. The prison population in Queensland continues to rise, without adequate recognition of how parole decisions are impacting incarceration rates.

[1] Email from Helen Ferguson, A/Director, Legislation Group, Queensland Corrective Services to Helen Blaber, Director/Principal Solicitor, Prisoners Legal Service, 20 December 2023.

11. For example, during 2022-23, the average number of incarcerated people in Queensland was 9832.[2] In the same year, a total of 5748 parole orders were suspended.[3] These figures form part of a continuing trend of increasing parole suspensions despite the QPSR reforms introduced in 2017 aimed at reducing the numbers of people being returned to custody for suspected parole violations.[4]

12. We submit that the Queensland Government should consider the insights offered by the QPSR2 before making legislative changes that will significantly impact parole decision-making. The QPSR2 report should also be made publicly available and shared with key stakeholders at the earliest opportunity.

Changes in relation to sensitive information

13. PLS strongly objects to the proposed amendment in clause 32 of the Bill, which makes changes in respect of sensitive information relied on by decision-makers under the Act. We recommend that s340AA should be removed from the Bill.

14. The Explanatory Memorandum contextualises the new s340AA with reference to the decision in *McQueen v Parole Board Queensland* [2022] QSC 27 (McQueen), which relates to the Board's failure to provide reasons for a parole suspension decision. However, the proposed amendment goes far beyond the scope of the issues raised by McQueen, by changing the position under the Act in respect of the provision of reasons for *all* decisions, not simply parole suspensions.

15. In this section, we outline three reasons that underpin our objection to s340AA.

16. *First*, PLS considers that the proposed amendments undermine accountability and transparency in executive decision-making and fail to promote community safety. Accountability, transparency and related rights are especially important in the context of parole decision-making because these principles allow a prisoner to understand their responsibilities in relation to release and rehabilitation.

17. The proposed amendments provide expansive discretion to decision-makers under the Act to withhold details of relevant information from prisoners who are eligible for parole about why they are in custody. The practical consequence is that prisoners will remain in custody for longer because they are unable to address any community safety concerns being relied on to justify their ongoing detention (for example, by proposing alternative release arrangements).[5] This means that more prisoners will be released at the expiration of their sentence, without any parole supervision. This is contrary to best practice and fails to recognise the protective role of parole in promoting rehabilitation and reducing recidivism.[6]

18. *Secondly*, these amendments are unnecessary because public interest immunity, which is routinely invoked by the Board, already protects sensitive information from disclosure. Public interest immunity allows for documents or information to be withheld where the disclosure of such documents or information would harm the public interest.[7]

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[2] Prisoners' Legal Service, Annual Report 2022-23, 6.
[3] Parole Board Queensland, Annual Report 2022-23, 14.
[4] Robin Fitzgerald, Helen Blaber and Lucy Cornwell, *Parole Suspensions in Queensland: An Examination of Prisoners' Legal Service Case Files 2018 – 2020* (Report, 2023), 5-6; Walter Sofronoff KC, *Queensland Parole System Review* (Final Report, November 2016) 61, 84 - 85, 222 ('QPSR').
[5] As Brown J stated in *McQueen*, a prisoner's right to provide submissions to the Board "*can only meaningfully be exercised where the prisoner is informed of the reasons for the [Board] making its decision and the material relied upon*" *McQueen v Parole Board Queensland* [2022] QSC 27, [78]; see also [99(e)].
[6] See *Queensland Parole System Review* (Final Report, November 2016), [127].
[7] *R v Lipton* (2011) 82 NSWLR 123, [84] per McColl JA (with whom RS Hulme and Hislop JJ agreed); *R v Baladjam (No. 31)* [2008] NSWSC 1453, [29] per Whaley J.

19. Decision makers are required to consider whether public interest immunity attaches to adverse information being relied upon and if so, whether any details about the effect of the information can be disclosed to enable the individual to make a response.[8] This requires assessments to be conducted on a case-by-case basis about what information, if any, can be disclosed without compromising the public interest. Importantly, judicial oversight is available to test public interest immunity claims made by executive decision makers and weigh up the competing public interests around disclosure.[9]

20. The protection of confidential information where disclosure would be injurious to the public is a necessary feature of the parole system in Queensland.[10] A delicate balancing exercise must be conducted between disclosure of information being relied on by parole decision-makers, and the protection of other public interest considerations. A claim for public interest immunity would only be judicially upheld if it is "*really necessary for the proper function of the public service*" to withhold the relevant documents or information.[11]

21. Even before considering the proposed amendments, PLS was concerned about the frequency of the Board's reliance on public interest immunity to withhold disclosure of information to prisoners. PLS' experience is that public interest immunity is often invoked because intelligence reports form the source of information, without a proper assessment by decision-makers about whether all the information (including its nature and content) must be withheld from the prisoner.

22. The following case study reflects PLS' experience about the way public interest immunity claims are applied in practice in relation to intelligence reports.

> ***Case study #1***
> *B is a man in his forties with a psychosocial disability. He was returned to prison as a result of a parole suspension decision. He was subsequently issued with an Information Notice informing him that the Board's decision was based on several factors, including confidential information that was not in the public interest to disclose. B was invited to make submissions in response.*
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> *PLS made submissions on B's behalf, noting that he was unable to respond to the confidential information because he knew nothing about its nature or content. PLS sought confirmation from the Board that an assessment had been conducted and a determination made that public interest immunity properly attached to all of the withheld information, such that it was appropriate to withhold all the information from B.*
>
> *The Board subsequently provided PLS and B with an intelligence summary document which contained detailed information provided to them by the Queensland Police Service about an incident involving B that was alleged to have occurred in the community. While some of the contents of this document were redacted, it contained sufficient information to place B in a position to provide submissions in response to the previously identified confidential information.*

23. It is not clear why public interest immunity was not raised by the Board in McQueen's case. Indeed, the trial judge recognised the relevance of public interest immunity[12] and stated that the existing s341 of the Act did not abrogate that right.[13] The Explanatory Memorandum does not reference

[8] *Onea v Chief Executive, Department of Corrective Services* (2002) 136 A Crim R 488, 495; *McLaren v Rallings & Ors* [2015] 1 Qd R 438, [32], [44].
[9] *HR v R* (2019) 269 CLR 403 at 431.
[10] *Ashley v Southern Queensland Regional Parole Board* [2010] QSC 437, [21].
[11] *Sankey v Whitlam* (1978) 142 CLR 1, [38] per Gibbs ACJ.
[12] See *McQueen v Parole Board Queensland* [2022] QSC 27, [64], [113]-[114].
[13] Ibid, [119].

public interest immunity or provide any explanation about why it does not provide sufficient protection surrounding the disclosure of sensitive information.

24. We note that public interest immunity claims are often advanced in respect of procedural fairness obligations and the provision under consideration in McQueen involved a statutory obligation to provide reasons under s208 of the CSA.[14] However, s208 of the Act has been judicially recognised as constituting a procedural fairness process.[15] Regardless, public interest immunity claims apply outside of procedural fairness contexts and there can be no doubt the doctrine applies to parole decisions.[16] For this reason, the proposed amendments are unnecessary and only complicate an already complex legal process.

25. The amendments are likely to result in increased litigation against the Board to challenge decisions about what constitutes sensitive information, which would be costly and not contribute to achieving the purposes of the Act.

26. *Thirdly*, PLS is concerned that the proposed amendments do not address existing deficiencies in parole decision-making. Therefore, their practical effect will be to further undermine accountability for parole decisions without improving the efficiency of the parole system.

27. Although the arguments and reasoning in McQueen centred around confidential information, the case also provides an example of the issues that arise from the Board's consistent failure to comply with section 27B of the *Acts Interpretation Act 1954* (Qld), by not clearly outlining the reasons for parole suspension decisions. The issue then is not so much about confidentiality, but a failure to make visible the Board's reasoning, which in turn makes it impossible for prisoners to identify and address the Board's concerns.

28. Even when confidential or sensitive information is involved, in PLS' experience, the Board can often give practical advice to prisoners about the steps they must take to secure their release, without compromising that information. This is achieved by way of clearly articulating reasons. In many cases, lack of suitable accommodation is the sole reason prisoners remain in custody awaiting parole release.[17] The following example illustrates the way that the Board can make plain its reasoning (or concerns) without disclosing confidential or sensitive information.

> ***Case study #2***
> *C is a First Nations man in his early thirties. He was returned to custody on a parole suspension and invited to lodge an Accommodation Review (AR) to assess the suitability of his proposed community accommodation. Approximately ten months after the initial decision, the Board decided to lift the suspension subject to C sourcing a suitable address in the community.*
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> *Several months later, C contacted PLS seeking assistance. Since his return to custody, he had lodged six addresses that had all been deemed unsuitable by the Board 'due to confidential information that was not in the public interest to disclose'.*

[14] See discussion in *McQueen v Parole Board Queensland* [2022] QSC 27, [107]- [115].
[15] See *Central and Northern Queensland Regional Parole Board v Finn* [2018] QCA 47, [11].
[16] See for example the discussion in *McQueen v Parole Board Queensland* [2022] QSC 27, [127]-[128].
[17] As of 25 August 2023, the Parole Board and Queensland Corrective Services identified that 339 people were in prison who would otherwise be released on parole if they had suitable accommodation (213 were awaiting release on parole applications subject to accommodation and 126 were awaiting parole release on parole suspensions subject to accommodation). Question on Notice No 1000, Queensland Parliament (24 August 2023) <1000-2023.pdf (parliament.qld.gov.au)>; See also *Fitzgerald et al*., (2023) *Parole suspensions in Queensland: An examination of Prisoners' Legal Service case files, 2018-20* (The University of Queensland), 19-22.

PLS emailed the Board drawing attention to C's circumstances and seeking specific guidance about why the addresses previously lodged had all been deemed unsuitable.

All of the addresses lodged by C were in two reasons that were in close proximity. The Board advised PLS that C should consider applying for an address outside of those two regions. PLS communicated this information to C and his re-entry worker. His re-entry worker assisted him to source a seventh address in a different geographical region. The seventh address was deemed suitable and C was released on parole. He spent 14 months in custody following his suspension and over 3 months in custody after the decision was made to lift his suspension subject to suitable accommodation.

29. PLS recognises the importance of confidentiality and the proper treatment of sensitive information in the context of parole decision-making. However, the proposed amendments are unnecessary given the existing protections provided by public interest immunity and only serve to undermine accountability and transparency in parole decision-making (and all decision-making under the Act). If prisoners are not informed of the adverse information that is relied upon by the Board (or other decision makers) when making decisions, they are not able to respond in a meaningful way. In a parole context, this prevents them from being able to test the information being relied upon or make alternative release arrangements to address any community safety concerns.

30. In the current system, there are already insufficient checks and balances in place to ensure that public interest immunity claims are properly advanced in parole decisions. The proposed amendments would further undermine public confidence in the parole system and result in greater numbers of prisoners being discharged from custody without parole supervision.

Changes in respect of victim participation in parole decision-making

31. PLS recognises and acknowledges the importance of recognising victims in the criminal legal system. Indeed, many people in prison are victims of violence themselves and experience significant and ongoing trauma as a result of their victimisation. In this submission, we wish to raise three issues with the proposed amendments in the Bill regarding victim participation in parole decision-making.

32. *First,* clause 9 of the Bill amends s188 of the Act to allow victims to provide submissions otherwise than in writing (i.e. in some other form approved by the Board). In respect of this change, the Explanatory Memorandum states that "Future alternate submissions could be in the form of a voice record, via telephone or via video link".[18] We suggest that similar amendments should be made to s189 of the Act, which regulates prisoners appearing before the Board. Under s188, prisoners and their agents must apply for leave to appear before the Board and in practice, oral hearings for prisoners to appear are rare.[19] For many prisoners, particularly those experiencing disadvantage, the lack of oral hearings makes it difficult to engage in the parole process and accurately present their case.[20]

33. Oral hearings provide a valuable opportunity to make persuasive arguments before decision-makers. We submit that to ensure quality of arms in parole decisions, all impacted parties must have

[18] Explanatory Notes, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024, 11.
[19] For example, in the 2021-22 financial year 15 841 matters were considered and only 113 video conferences and 3 open hearings were conducted. Parole Board Queensland, *Annual Report 2021-22* (Report, September 2022) 18.
[20] The following groups of people face difficulties communicating with the board via written materials: people with limited education and/or who cannot read or write, people with learning disabilities or other disabilities impacting their ability to communicate in writing, First Nations people where oral traditions are more likely to be effective, people who are blind, people who speak English as a second language.

a reasonable opportunity to present their case under conditions that do not disadvantage them against the other parties in the proceeding. Such equality is key to ensuring a fair hearing for all.

34. *Secondly,* PLS is concerned about the proposed amendment to s221 of the Act, in clause 11 of the Bill, to provide for community board members to include victim representatives. The Attorney-General's statement confirming the government's intention to provide victim representation on the Board[21] did not specify that representation should be achieved by way of a community board member.[22]

35. PLS is concerned about the potential for conflicts of interest (real or perceived) that may arise in relation to high-profile victim representatives. By its nature, victim advocacy is a highly personal role. The Board deals with individual prisoners, whose matters are often the subject of ongoing controversy in the media as a result of victim advocacy. The appointment of victim representatives as community board members would potentially create conflicts of interest and undermine public confidence in parole decisions. Instead of appointment as community board member, PLS suggests consideration be given to appointment of a representative nominated by the newly established Victim's Commissioner. This appointment could operate similarly to the public service and police representatives.[23]

36. *Thirdly,* PLS is concerned about the proposed amendment to s323 of the Act, in clause 25 of the Bill, to extend "the entitlement for a person to be registered against a homicide offender if the chief executive is satisfied the registration is warranted due to the impact of the homicide offence on the individual".[24] This provision is very broad, giving significant discretion to the chief executive to register a person that may have no direct relation to the prisoner or the offence. We suggest that this amendment should be removed, unless it can be clearly explained why it is necessary, including the type of information the chief executive would be expected to take into account in determining the impact of the offence on a person.

37. Thank you for providing an opportunity for PLS to make submissions on the Bill.

Yours sincerely

[redacted]

Helen Blaber
Director/Principal Solicitor

PLS gratefully acknowledges the assistance of Marissa Dooris in the preparation of these submissions.

[21] See Queensland, *Parliamentary Debates*, 12 September 2023, 2493 (Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Domestic and Family Violence). Available at: https://documents.parliament.qld.gov.au/events/han/2023/2023_09_12_WEEKLY.pdf.

[22] Cf *Queensland Parole System Review* (Final Report, November 2016), Recommendation No. 86. We acknowledge that QPSR recommended a criterion for appointment of community members to the Parole Board should include a victim representative. It is not clear whether the QPSR considered the potential for conflicts of interest or unnecessary politicisation of parole decisions.

[23] *Corrective Services Act 2006* (Qld), ss221(d) and (e).

[24] Explanatory Notes, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024, 10.