

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

**Submission No:** 5  
**Submitted by:** Bar Association of Queensland  
**Publication:** Public  
**Attachments:** See attachment  
**Submitter Comments:**

29 February 2024

Community Safety and Legal Affairs Committee  
Queensland Parliamentary Service  
Parliament House  
Cnr George and Alice Streets  
BRISBANE QLD 4000



By email: [CSLAC@parliament.qld.gov.au](mailto:CSLAC@parliament.qld.gov.au)

Dear Committee

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

The Association is grateful for the opportunity to make submission in respect of the *Corrective Services (Promotion Safety) and Other Legislation Amendment Bill 2024* (**the Bill**). The Association has made prior submissions in respect of a previous version of the Bill, and wishes to repeat one aspect of that submission. The Association wishes to repeat that submission as, for the reasons set out below, it considers that s 340AA of the Bill, in its present form, may not function as intended.

Please find the Association's previous comments in respect of s 340AA of the Bill repeated verbatim below.

#### *Amendments necessary to proposed s 340AA of the Bill*

The Association submits that one of the proposed provisions in the Bill; namely, s 340AA, requires amendment. The proposed section provides that certain categories of information "need not" be disclosed in "reasons for a decision or proposed decision" made under the *Corrective Services Act 2006* (**the CS Act**).

The Association submits that s 340AA, in its present form, goes beyond what is reasonably necessary to achieve the objects of the provision. In doing so, it inappropriately undermines procedural fairness and prisoners' rights to reasons under the CS Act and the *Judicial Review Act 1991* (**the JR Act**). It is also incompatible with human rights under the HR Act.

However; the Association acknowledges that, with some modifications that would not undermine the underlying object of s 340AA, the provision could be enacted in a way that is consistent with procedural fairness and the JR Act and compatible with human rights. Those modifications are outlined below in these submissions.

#### *Inconsistency with Procedural fairness*

The rules of procedural fairness are regarded by the law as a fundamental requirement that attach to administrative decision-making. So fundamental are they that the Courts generally presume that they are applicable to all administrative decision-making that affects rights and interests. Consistency of legislation with procedural fairness (which is also known as natural justice) is one of the

BAR ASSOCIATION  
OF QUEENSLAND  
ABN 78 009 717 739

Ground Floor  
Inns of Court  
107 North Quay  
Brisbane Qld 4000

Tel: 07 3238 5100  
Fax: 07 3236 1180



Constituent Member of the  
Australian Bar Association

fundamental legislative principles specified by s 4(3)(b) of the *Legislative Standards Act 1992*.

Procedural fairness is not only beneficial to those who are affected by administrative decisions. It also serves the public interest in that it is generally thought that procedural fairness leads to better decision-making by ensuring that decision-makers receive all relevant information and that information is properly tested.<sup>1</sup>

The CS Act contains provisions that seek to give effect to the rules of procedural fairness by requiring reasons for certain kinds of proposed decisions (see for example s 205(3)). The proposed s 340AA alters the effect of those provisions by permitting decision-makers to omit certain information that would otherwise be required to be included in those reasons. It does so in a manner that is inconsistent with the rules of procedural fairness. This is because it creates an “absolute rule” that a decision-maker need not disclose information within the categories specified in that section; whereas procedural fairness would ordinarily require a decision-maker to balance the public interest in non-disclosure of that information against public interest factors in favour of disclosure.<sup>2</sup>

The above inconsistency with procedural fairness could be avoided if s 340AA were redrawn so that the test for whether information may be excluded from reasons is whether it is in the public interest to do so. It could be redrawn so that a factor that would support such a conclusion is that the information falls within one or more of the categories specified in the present form of s 340AA(1). Drawing the provision in that way could ensure that the underlying object of the provision is achieved without being inconsistent with the rules of procedural fairness.

#### *Inconsistency with the JR Act*

The JR Act confers on persons aggrieved with administrative decisions a right to reasons for those decisions (ss 31 and 32). Information can be excluded from statements of reasons given under the JR Act which is the subject of a certificate by the Attorney-General certifying that disclosure of the information would be contrary to the public interest (s 36).

The proposed s 340AA is drawn in terms that would permit statements of reasons given under the JR Act for decisions made under the CS Act to not include information in any of the categories specified by s 340AA(1). This would operate to circumvent an important safeguard in the JR Act that requires an assessment of the public interest by the Attorney-General. It would create an “absolute rule” that information within the meaning of s 340AA(1) need not be included in a statement of reasons regardless of any assessment by the Attorney-General of the public interest.

The above inconsistency with the JR Act could be avoided if s 340AA were redrawn so as to make clear that it does not apply to statements of reasons under the JR Act.

---

<sup>1</sup> *R v Parole Board; In re Reilly* [2014] AC 1115

<sup>2</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [25]

### *Incompatibility with Human Rights*

Section 31 of the HR Act provides that a party to a civil proceeding has the right to have a “fair” hearing. The HR Act is beneficial legislation. The Victorian cognate equivalent of s 31 of the HR Act has been interpreted to apply to administrative decisions of the kind to which the proposed s 340AA would apply.<sup>3</sup>

The Association submits that proposed s 340AA is incompatible with s 31 of the HR Act for the following reasons.

*First*, by creating the “absolute rule” that information described in s. 340AA(1) is excluded from requirements to provide reasons, as opposed to a test based on the public interest, the provision goes further than is reasonably and demonstrably justifiable to achieve its object.

*Second*, the proposed provision contains no requirement that a decision-maker keep any record of their reasons which they are not required to disclose under the section. The section could be modified to require such a record to be kept. The section could make clear that such a record is confidential and is only required to be disclosed to a court in a judicial review of the decision (without it then being required to be disclosed to the prisoner concerned). Similar requirements have been enacted by the Commonwealth.<sup>4</sup>

Such a requirement would ensure that the object of s 340AA is not undermined by disclosure of sensitive information to the prisoner concerned. The absence of such a requirement, however, undermines the capacity of a court to examine the decision in judicial review proceedings. Given that such a requirement could be enacted without undermining the object of s 340AA, the provision goes further than is reasonably and demonstrably justifiable to achieve its object.

For the above reasons, the Association submits that proposed s 340AA is incompatible with human rights and submits that the identified incompatibility could be rectified with amendments to s 340AA providing that:

1. the test for whether information may be excluded from reasons is whether it is in the public interest to do so; and
2. requiring the decision-maker to keep a confidential record of their reasons which they are not required to disclose to the prisoner concerned but are required to disclose to a Court in judicial review proceedings of their decision.

### *Expansion of Police Powers*

The Association has reviewed the amendments proposed to ss 31 and 67FC(1) of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act (the CPA)*, which would permit police officers to photograph and inspect devices held by persons who are reportable offenders under the CPA and who are also reportable

---

<sup>3</sup> *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221 at [168]-[177]

<sup>4</sup> *Graham v Minister for Immigration* (2017) 263 CLR 1 at [10]-[18]

offenders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (**the DPSOA**).

The Association notes that the Bill's explanatory notes state that, "*Expansion of the powers to reportable offenders that are supervised under DPSOA will provide consistent mechanisms across both reportable offender cohorts to verify reported personal details and review devices. These powers are intended to compliment QCS' case management and supervision of the DPSOA offenders and promote community safety*".

However, in the experience of the Association's members, a person who is a reportable prisoner under the CPA will also be a reportable offender under the DPSOA, a situation which allows QCS staff to exercise existing powers to inspect devices and collect personal information relevant to a reportable offender. In those circumstances the Association consider that the amendments proposed in the Bill create unnecessary and undesirable duplicity to treat a scenario already canvassed in the existing legislation.

Thank you for the opportunity to provide this submission for your consideration. The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully



**Damien O'Brien KC**  
President