

Introduction

Prisoners Legal Service is a community legal service specialising in matters related to incarceration. To this end, we provide prison related legal advice, assistance and representation to 100-150 prisoners and their families per week as well as engaging in advocacy and community legal education.

As primarily an administrative law service, our office assists with queries about applications made under the *Freedom of Information Act* (Qld) 1992 (hereafter The Act).

It is well recognised that prisoners should not be deprived of any of their rights or freedoms other than those which are a necessary incident of the deprivation of liberty itself. This principle and basis of reasoning have been articulated by the United Nations as follows:

Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings¹

We note that changes to the Act have not historically considered this reasoning. For example, we note Minister Spence's comments in relation to recent changes to the Act.

"The bill gets tough on prisoners and makes it clear that prisoners do not have the same rights to access things the way law-abiding community members do."²

The focus of our submissions is to ensure that any legislative change considers the United Nations principles and ensures that prisoner have equal and sufficient access to Freedom of Information provisions. To this end, our submissions focus on the exclusion under section 11E and access difficulties of prisoners.

Section 11E

Section 11E of the Act reads:

11E Application of Act to offenders or agents

¹ UN Minimum Rules for the Treatment of Prisoners, articles 57,59.

² Second reading speech, Corrective Services Bill 2006 Hansard

(1) An offender, or an offender's agent, is not entitled to obtain access to a risk assessment document received, or brought into existence, by—

(a) the department in which the Corrective Services Act 2006 is administered;
or

(b) a parole board as defined under that Act.

(2) In this section—

offender means an offender as defined under the Corrective Services Act 2006—

(a) who is serving a term of imprisonment for a prescribed offence, or serving a period of imprisonment that includes a term of imprisonment for a prescribed offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section; or (b) who is a detained dangerous prisoner (sexual offender), or a supervised dangerous prisoner (sexual offender), as defined under the Corrective Services Act 2006.

Section 11E prohibits access to risk assessment documents for prisoners who have committed certain offences, namely serious violent offenders and persons charged with unlawful stalking or murder. We note that this section operates as an exclusion, rather than an exception or exemption.

We submit that this exclusion is not consistent with the aims of the FOI act, namely ensuring open discussion of public affairs and accountability. Specifically, positing s11E as an exclusion with no public interest test means that members of the community do not have access to information held by government in relation to their personal affairs and hence are not provided with a way to ensure the information is accurate, complete, up-to-date and not misleading.

In relation to the operation of exclusions, we note the comments of Blair Stewart, Office of the Privacy Commissioner New Zealand,

To ensure a broad based and effective privacy law, well drafted statutory exemptions from particular principles are to be preferred over exclusion from the Act of an entire class of agencies or information. Until a jurisdiction enacts a privacy law which covers basically all the public and private sectors the task of providing effective privacy law is not complete. Excluded agencies do interfere with people's privacy. Appropriate limited exemptions can ensure that the special needs and quirks of some agencies can be met while still, for the most part, having a comprehensive law.³

The use of an exclusionary legislation in this instance means that the principles of open discussion and accountability simply never apply to persons in this category. It is in this sense stricter than existing exemptions, including exemptions such as *matter created for ensuring security or good order of corrective services facilities* (s42AA of the Act). An provision with a public interest test attached would allow for a

³ Stewart, B (1997) *The New Privacy Laws: Exemptions and Exceptions to Privacy*; Paper prepared for The New Privacy Laws: A Symposium on Preparing Privacy Laws for the 21st Century <http://www.privacy.org.nz>.

balanced consideration of the relevant issues pertaining to a particular factual circumstance.

The legislative background to s11E

Section 11E was enacted on 31 May 2005 as "a new provision restricting disclosure of certain risk assessment documents to prisoners convicted of serious violent offences."⁴

The explanatory notes go on to say:

"The Bill provides that an offender, whilst subject to a term of imprisonment or a post prison release order, is not entitled to access documents under the FOI regime that are used by the Department of Corrective Services and the Community Corrections Boards for the assessment of risk that such an offender may pose to the community or to the security or good order of a corrective services facility. This is limited to offenders who have been convicted of certain offences, being trafficking or serious violent offences as defined in the Bill.

*This may raise issues regarding consistency with Fundamental Legislation Principles in that these offenders are not entitled to receive personal information about themselves. **However, it is considered that the public interest outweighs this right of offenders. The public interest being served is the security and good order in corrective services facilities and public safety, as a result of fully informed decisions being made.** These decisions impact upon the safety of staff, offenders and the community with the management of offenders in corrective service facilities as well as the release of offenders into the community."⁵
(emphasis added)*

Whilst we agree that in some instances the public interest would outweigh the right of access, we disagree that this is necessarily the case in every occasion and submit that this broad application of the public interest test is not appropriate.

More recently in relation to the Corrective Services Bill 2006, it was proposed to amend s11E to also exclude access to recordings made for security purposes. In amendments agreed to during consideration this was instead incorporated into s42AA and a public interest test was attached.

At the same time, access to risk assessment documents were further restricted by removing the right of an agent to view the documents.

⁴ Explanatory notes to the Freedom of Information and Other Legislation Amendment Bill 2005

⁵ Ibid.

Our office would support the right of a prisoner to have an agent view relevant documents. Our office has assisted clients in this manner in relation to s42AA material. For example, where video footage of an alleged assault by an officer was unable to be provided to the prisoner directly, our office has viewed the relevant footage and provided advice on the relevant contents including whether there was evidence to support the allegation.

Such an accountability mechanism is important to ensure that abuse, including physical abuse, does not occur.

Risk Assessment Documents

Risk assessment documents define a person's progression through the prison system and the conditions under which they must live while incarcerated. Increasingly, risk rather than rehabilitation is defining important progression through the prison system. For example, a quick scan of the *Corrective Services Act 2006* reveals that there are fifty-six mentions of the word of 'risk', while 'rehabilitation' is only mentioned on two occasions. A general search of the Queensland Corrective Services website reveals 89 documents that include the term 'risk assessment'.

Section 11E does not provide adequate definition to clarify what is classed as a risk assessment document and it is our opinion that the section is being used or could be used in many situations where the public interest would not be compromised by the release of the information.

Documents that may be classified as risk assessment tools used to assess (a) the risk an offender may pose to the community; or (b) a risk to the security or good order of a prison include the following:

1. *Psychiatric and psychologist assessments;*
2. *Sentence management reviews prepared for event based or regular reviews such as classification or placement reviews, including reviews under s12 (2) CSA;*
3. *Risk assessment undertaken prior to placing a prisoner on solitary confinement under a safety order (s53-59 CSA);*
4. *Risk assessment for self harm/suicide undertaken by a risk assessment team (QCS Procedure 'At-Risk Management');*
5. *Offender Risk Needs Inventory Revised- (QCS Procedure 'Assessment');*
6. *Assessment of placement of a child in a prison s31(1)(f) CSA;*
7. *Document or authorisation relied upon to justify a general search under s33(2)(a), a strip search under s36(1) or a body search s39(b) CSA;*
8. *Documents or authorisation to read mail under s48(1) (a) CSA;*
9. *Documents or authorisation ending communication between a prisoner and an outside party (s52(4)(c) CSA;*
10. *Assessment documents related to placement or continuation of a maximum security order. s60 CSA;*
11. *Assessment of privileges received while on a safety or maximum security order s 62 CSA;*
12. *Documents or authorisation related to seizure of a prisoners property under s138 CSA;*

13. Documents considered when deciding whether a contact visit can take place under s154 CSA; and
14. Documents or authorisation to use a corrective services dog under s280 (1)(d) CSA.

Because of the nature of a secure prison environment, risk assessments are part of the daily life of prisoners. In many of the above instances, legislation or procedure place positive obligations on QCS to respond to situations in specified ways, such as by ensuring health checks, making records or considering the best interest of a child.

There is a definite inconsistency in the passing of laws and procedures designed to provide accountability and responsibility for the actions of government agents, whilst on the other hand taking away the right absolutely to access documents that are often the only way to ascertain and/or prove that these laws and procedures have not been followed.

To illustrate the importance of gaining access to risk assessment documents, we draw your attention to the case of *Attorney-General for the State of Queensland v Toms* [2006] QSC 298. This case was an application for a continuing detention order under the *Dangerous Prisoner (Sexual Offenders) Act (2003)*. A psychologist report was considered in this instance and the court raised the following concerns:

This bleak and condemnatory report has some disturbing features. The first is that it contains a serious dishonesty. It is not true that the respondent refused to participate in an interview as part of the assessment of his suitability for release into the community. Ms McEvoy's statement to that effect, on oath in her affidavit, and in her report, is false and she must have known it to be false. It was corrected late and only when Ms McEvoy knew she was required to face cross-examination. The truth was, as she eventually explained, that the respondent was never asked to participate in the interview which Ms McEvoy always intended to conduct by reference only to the prison files.

...
[37] *The portrayal of the respondent as a recalcitrant, uncooperative prisoner was damaging to the respondent's prospects of release. Ms McEvoy must have known that, but was prepared to maintain the falsehood.*

[38] *The second disturbing feature is Ms McEvoy's readiness to indulge in speculation that the respondent indulged in paraphiliac behaviour when given leave of absence in 1996, ten years after he had been imprisoned. Such behaviour would have been cogent evidence of ongoing psychiatric disturbance which would have cast serious doubt on the respondent's suitability for release. There was no such evidence. Ms McEvoy was prepared to invent it.*

[39] *The third feature is that Ms McEvoy focused her assessment and her psychometric testing of the respondent on his past conduct, and particularly his criminal and anti-social activity which culminated in his conviction and imprisonment in 1986. The relevant question was whether, 20 years later, the respondent should be released from prison or whether his release would be an unacceptable risk that he would commit further serious sexual*

*offences. Ms McEvoy did not attempt that assessment but was still prepared to recommend strongly that the respondent should remain in prison.*⁶

We raise this particular case as an example of how access to a risk assessment document can ensure accountability. This document or similar documents may have been relied upon throughout the incarceration of this respondent who would be prevented by s11(e) from accessing it at any stage prior to such a court application. This particular court application did not take place until after the conclusion of the prisoner's sentence, as it was an application for continuing detention.

When access was finally made available, it became clear that the report should never have been relied upon. S11E means that the mistakes listed above could have been relied on for matters relating to programs, classification and transfer for up to 20 years without being subjected to scrutiny or complaint.

Our office is dealing with a number of complaints against psychiatrists and psychologists where our clients have been asked by the investigating board to provide copies of relevant reports but are unable to because of section 11 (e). It is difficult for prisoners, our organisation or the relevant professional body to determine what is a valid complaint without access to these documents.

We note that this specific circumstance was considered in the explanatory notes to the Bill that originally introduced s11E:

*This limitation of access is to ensure that information can be freely provided, can be objective and can be given without fear of reprisal. For example, psychologists and psychiatrists will be able to make objective evaluations of the risks posed by prisoners without threat of reprisal or intimidation. This will ensure the soundness of decision-making processes, including decisions about the release of offenders to the community, where public safety is the paramount consideration.*⁷

We submit that the application of s11E creates the opposite effect to its stated intention. The soundness of decision-making processes is undermined because psychologists and psychiatrists have no fear of reprisal, should they base their assessments on known falsehoods as in the case of AG v Toms.

When prisoners are unaware of the contents of these reports and agents cannot view the reports to investigate allegations of falsehoods it is likely that falsehoods major substantive errors would remain unscrutinised. Access to such documents can therefore be seen to be essential to ensuring government accountability and should not be restricted.

Prescribed offences

⁶ Attorney-General for the State of Queensland v Toms [2006] QSC 298 Chesterman J 20/10/2006, 14.

⁷ **Freedom of Information and Other Legislation Amendment Bill 2005, Explanatory Notes**

We submit that it cannot be said to be in the public interest to exclude prisoners charged with certain offences from accessing documents. The notions of *risk* and *the public interest* are a much more complex equation than simply looking at a person's offence. For example, a person who has just been convicted of *escape lawful custody* may prove to be of more risk than a person who is nearing the end of a long sentence for a serious violence offence and has been of good institutional behaviour for many years. A strict exclusion does not allow for a common sense approach to such matters.

We also note that the definition in section 11E includes prisoners released at or after the conclusion of their sentence under a Dangerous Prisoners (Sexual Offender) Act (2003) supervision order. In order to be released on such an order, two psychiatrists and the Supreme Court would need to have determined that the prisoner is an acceptable level of risk to reside in the community with supervision. Usually such prisoners will have a treating psychologist, psychiatrist or doctor who could provide a professional opinion about the risk of release of any particular document. Such orders can last up to 20 years beyond a prisoners release from custody. A blanket exclusion clause is not appropriate given these circumstances.

To conclude this point, we cannot see any reason to maintain the exclusion in s11E. Access to risk assessment documents is an important part of ensuring accountability for government decision making that affects the daily lives of prisoners and those released on supervision orders. The justification for such restrictions can be shown to be counterproductive to the aims for which it was originally introduced.

Recommendation 1:
That s11E of the Act be removed.

In the alternate, we recommend that the exclusion is re-drafted as an exemption with a public interest test applied.

Recommendation 2:
That the restriction on a prisoner's agent's access under s11E be removed.

8.5 Applications for access

Many prisoners experience difficulty accessing FOI provisions because of lack of literacy. Over 70% of prisoners have not attained a grade 10 level education and many are functionally illiterate.

Such prisoners are generally reliant on other prisoners to complete required forms. Our office provides limited assistance in such matters, but we are extremely understaffed and our telephone advice service records between 5000-8000 missed calls a month that we do not have the resources to respond to.

Prisoners are not able to view relevant websites, contact FOI departments directly, contact the Information Commissioner or Justice and Attorney General's department, including the JAG FOI helpline. This is because of a procedural restriction that

prohibits prisoners listing a government department (other than an approved law enforcement agency) on their telephone account.⁸

Another problem arises when a prisoner has not been given sufficient time to seek legal advice and respond. We are aware of at least one instance where a prisoner with very limited literacy was given three working days to prepare a response to a refused FOI application.

Recommendation 3.

That prisoners are given free access to the information contained at www.foi.qld.gov.au, www.oic.qld.gov.au the OIC contact phone number and the Department of Justice and Attorney General's FOI helpline.

Recommendation 4.

That prisoners with low literacy be able to access a free and confidential service to assist with preparation of FOI applications.

Recommendation 5.

That minimum timeframes for response be provided to FOI applications.

⁸ Section 3.2 (2) QCS Procedure *Telephone and Videoconference calls for Offenders*, www.correctiveservices.qld.gov.au, 11 March 2008.