SUPREME COURT OF QUEENSLAND

CITATION:	*Boyy v Executive Director of Specialist Operations of Queensland Corrective Services* [2019] QSC 283
PARTIES:	**BRENTON WILLIAM ALFRED BOYY** (Applicant) **v** **EXECUTIVE DIRECTOR OF SPECIALIST OPERATIONS OF QUEENSLAND CORRECTIVE SERVICES** (Respondent)
FILE NO/S:	BS No 8508 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	21 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2019
JUDGE:	Bowskill J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – REASONS FOR ADMINISTRATIVE DECISIONS – REQUEST FOR REASONS — where the applicant applies for an order under s 38 of the *Judicial Review Act* 1991 (Qld) requiring the respondent to provide to him a written statement of reasons under s 32 of the Act in relation to the decision to attach an "enhanced security offender" warning flag indicator to his electronic prison file, in accordance with administrative procedures in relation to the management of prisoners during the course of their sentence, which are made under s 265 of the *Corrective Services Act* 2006 (Qld) – whether the decision to attach a warning flag indicator to a prisoner's electronic file is a decision to which the *Judicial Review Act* 1991 *Corrective Services Act* 2006 (Qld) s 12, s 19, s 263, s 264, s 265, s 271 *Judicial Review Act* 1991 (Qld) s 3, s 4, s 31, s 32, s 38, 49, 50 *Statutory Instruments Act* 1992 (Qld) s 7, s 242E, s 265 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR

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Australian National University v Burns (1982) 5 ALD 67
Blizzard v O'Sullivan [1994] 1 Qd R 112
Griffith University v Tang (2005) 221 CLR 99
McLean v Gilliver [1995] 1 Qd R 637
Palmer v The Chief Executive, Qld Corrective Services & Ors [2010] QCA 316
The Proprietors – Rosebank GTP 3033 v Locke & Anor [2016] QCA 192

COUNSEL: The applicant appeared on his own behalf
R H Berry for the respondent

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the respondent

[1] The applicant applies for an order under s 38 of the *Judicial Review Act* 1991 (Qld) requiring the respondent to provide to him a written statement of reasons under s 32 of the Act in relation to a decision made by the respondent to attach an "enhanced security offender" flag to his prison file.

[2] Section 32(1) of the *Judicial Review Act* provides:

> "If a person makes a decision to which this part applies, a person who is entitled to make an application to the court under section 20 in relation to the decision may request the person to provide a written statement in relation to the decision."[1]

[3] As defined in s 31, a "decision to which this part applies" is "a decision to which this Act [ie the *Judicial Review Act*] applies", subject to two exceptions which do not apply in the present case.

[4] A "decision to which this Act applies" is defined in s 4 to mean, relevantly:

> "a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)".

[5] The applicant is a prisoner serving a period of 5 years and 3 months' imprisonment for offences of grievous bodily harm and serious assault.[2] He says that, in the process of making an application for parole, he found out that an "enhanced security offender" flag had been placed on his prison file. He has requested a written statement of the reasons for this flag being placed on his file.

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1 Underlining added.
2 See *Boyy v Parole Board Queensland* [2018] QSC 175 at [2]-[7].

[6] The applicant identifies a document headed "reception processes – admission and assessments"[3] as the source of the power to make the decision to place this flag on his file. This document sets out the processes undertaken when a prisoner is received into a corrective services facility, and covers things such as advising prisoners of their obligations, rights, entitlements and rehabilitation opportunities, as well as assessment of prisoners' immediate risks and needs. Relevantly to the present matter, the document includes the following:

> "**Identify Need and Refer for Activation of Warning Flag Indicators**
>
> All corrective services officer must familiarise themselves with the Practice Directive Sentence Management: Assessment and Planning – Criteria for Warning Flag Indicators Appendix SM1 and refer a prisoner to the responsible authorising officer for activation or deactivation of any relevant warning flag indicators.
>
> At a minimum all prisoners must be assessed for identification as Enhanced Security Offender (ESO) High Profile (HP), Identified Risk (IR) or Notorious (NOT).

Additional Considerations – Enhanced Security Offender (ESO)	Includes but is not limited to prisoners who are determined to be of significant risk such as: • subject to an indefinite sentence • designated as an IOMS Restricted Access Offender • in custody in relation to offences under the *Terrorism (Commonwealth) Powers Act* 2002 or equivalent state legislation • otherwise determined to be of significant risk, for example individual members of identified gangs or groups. The General Manager of a corrective services facility or Regional Manager Probation and Parole may also refer a prisoner/offender for identification as an Enhanced Security Offender. [Redacted]
Additional Considerations – High Profile (HP)	Includes prisoners that have or would be likely to generate media interest at the time of sentencing, throughout their sentence and/or upon progressing in the correctional system including reduction in classification, transfer to low custody or release to the community.

[3] A copy of which, bearing the implementation date 2 July 2018, is exhibit A to the applicant's affidavit affirmed 26 August 2019. This document is also annexed as exhibit BT-2 to the affidavit of Mr Tannock, filed on 4 October 2019.

	Further this may include prisoners that have committed crimes of an exceptional nature or the prisoner was previously in a position of trust such as an ex-politician or ex-police officer.
Additional Considerations – Notorious (NOT)	Includes prisoners who are well known or prominent in the correctional system as a result of their significant offence history and/or continued offending in custody and/or significant breach/incident history. Notorious prisoners are likely to include prisoners who have attracted stakeholder attention.

[7] At the hearing, the respondent clarified that the correct document to have regard to is headed "sentence management – assessment and planning".[4] This document sets out procedures which apply during the course of a prisoner's sentence, further to the document above, which sets out procedures which apply at the time of entering a correctional facility. Both documents are described as a "Custodial Operations Practice Directive".

[8] The "sentence management – assessment and planning" document articulates a "performance standard":

> "To ensure relevant information is gathered, analysed and interpreted using preliminary assessments of risk and need to inform the management of prisoners and to plan the prisoner's progression throughout their sentence and to ensure a prisoner's progress is reviewed at appropriate points throughout their sentence."

[9] The stated "outcomes" are:

> "Calculates general risk of offending.
>
> Develops a progression plan to encompass the prisoner's sentence including their transition to the community (for eligible prisoners).
>
> Reviews a prisoner's progression plan."

[10] In relation to warning flag indicators, the "sentence management – assessment and planning" document includes the following:

> "**Activate or Refer for Activation of Warning Flag Indicators**
>
> Warning flag indicators are used to highlight in IOMS any current and/or historical factors that must be taken into consideration in the management of a prisoner throughout their sentence.
>
> All prisoners must undergo preliminary assessment and be assessed on an ongoing basis throughout their sentence for activation or deactivation of any

[4] See exhibit 1.

relevant warning flag indicators in IOMS in accordance with the Criteria for Warning Flag Indicators Appendix SM1.

Activate Warning Flag Indicators

Where necessary the relevant manager must activate or deactivate any relevant warning flag indicators and establish a process that ensures any relevant warning flag indicators are activated or deactivated at appropriate points throughout a prisoner's sentence. Refer Criteria for Warning Flag Indicators Appendix SM1.

At a minimum all prisoners must be assessed for identification as Enhanced Security Offender (ESO), High Profile (HP), Identified Risk (IR) or Notorious (NOT)."

[11] There follows a table, in the same terms as that set out above, in relation to the categories of Enhanced Security Offender, High Profile and Notorious, and with the additional category "Identified Risk (IR)", as follows:

Identified Risk (IR)	Sentence Management Services must ensure the Intelligence Officer is advised as soon as possible after the prisoner's criminal history has been received if the prisoner has any conviction/s for escape, attempted escape or assist/procure escape and/or assault of a Queensland Police Service (QPS) officer or a Corrective Services Officer. If information indicates a prisoner presents with an elevated risk of escape or has demonstrated problematic behaviours to indicate a higher level of supervision and management may be required (eg a risk of assaulting staff), the prisoner must be assessed in accordance with the Criteria for Identification of Identified Risk Prisoners Appendix INT3 and Criteria for Warning Flag Indicators Appendix SM1.

[12] Evidence from Mr Tannock, the Acting State-wide Manager of the Serious Offenders Unit of Queensland Corrective Services (**QCS**), explains the warning flag indicator system.[5] QCS uses an electronic system called IOMS (Integrated Offender Management System) for management of offenders in custody or on community based supervision orders. Mr Tannock says that warning flag indicators are used in IOMS to highlight any current and/or historical factors that must be taken into consideration by QCS in the management of a prisoner throughout their sentence. Consistently with the documents referred to above, Mr Tannock says that all prisoners undergo a preliminary assessment, upon entry into the QCS system, as to whether a warning flag indicator will be activated on their electronic IOMS record; and that QCS also assesses on an ongoing

[5] Affidavit of Mr Tannock filed 4 October 2019 and supplementary affidavit of Mr Tannock filed 23 October 2019.

basis, throughout a prisoner's sentence, the need for activation or deactivation of any relevant warning flag indicators.

[13] Mr Tannock is a member of the Community Protection Advisory Committee (**CPAC**), the role of which is "to provide expert oversight of QCS' highest risk offenders, referred to as 'Enhanced Security Offenders', who are either due for discharge from custody to liberty or to reporting to the Probation and Parole Service, or are being supervised in the community by the Probation and Parole Service".

[14] Mr Tannock says that:

> "An ESO flag does not impact upon a prisoner's ability to progress within a custodial or community-based supervisory environment. It is a management tool for QCS to identify prisoners whose management requires CPAC's oversight".

[15] According to the terms of reference for the CPAC, paragraph 3:[6]

> "The Committee is responsible for:
>
> - Assessing, on recommendation from the relevant operational area if an offender poses a significant risk to the safety of the community requiring Committee oversight or will do on discharge from custody.
>
> - Endorsing the raising of the Enhanced Security Offender (ESO) flag in the Integrated Offender Management System (IOMS) for prisoners assessed by the Committee as posing a significant risk to the community requiring Committee oversight.
>
> - Assessing, on recommendation from the relevant operational area, if an offender's risk has reduced or is being managed in such a way that the offender no longer requires Committee oversight.
>
> - Endorsing the removal of the ESO flag in IOMS for prisoners determined to no longer require the oversight of the Committee.
>
> - Reviewing parole applications for all ESO offenders and making a collective recommendation to the Queensland Parole Board regarding the prisoner's suitability for parole.
>
> - Oversighting reintegration planning for ESO prisoners identified by the Committee as requiring this level of operational oversight and allocating, where relevant, additional risk management tasks.

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[6] Exhibit BT-1 to Mr Tannock's first affidavit.

- Allocating, where determined necessary by the Committee, responsibility for notifications to be made to external agencies regarding the risks posed by ESO prisoners on their release to custody."

[16] In relation to the review of parole applications, Mr Tannock explains that in most instances where a prisoner makes an application for parole, a Parole Board Assessment Report (**PBAR**) is prepared by QCS for the prisoner (whether or not they have a warning flag indicator on their file). Once that report has been prepared, it goes to the General Manager of the correctional centre where the prisoner is in custody. The General Manager decides whether or not to endorse the recommendation in the PBAR report, and may provide additional comments. If the prisoner has an ESO flag active on their electronic file, prior to the PBAR going to the General Manager, it is sent to CPAC for review. In terms of this process, Mr Tannock says:

> "CPAC does not write the PBAR or make the initial recommendation. It either endorses or notes the recommendation, or provides feedback on the information contained in the report. Such feedback could include, for example, raising a factual error identified within the report and asking for it to be corrected, or advising of information that has not been included in the report which may be relevant for consideration by the Board."
>
> "CPAC can also request that further information be provided to the Board to assist the parole decision-making process…"
>
> "The difference in the PBAR process where there is CPAC involvement is that … CPAC oversees and either endorses, notes or provides further information for the PBAR prior to provision to the [Parole] Board."

[17] The applicant filed an additional exhibit, which he describes as "case notes", and which appears to be an extract from his IOMS record. Consistently with the description of the process outlined by Mr Tannock and set out above, the notes in this exhibit include the following:

> "02/07/2018 On 26 June 2018, CPAC considered the Parole Board Assessment Report for BOYY dated 22 June 2018 and endorsed the recommendation of the author. CPAC weighted its recommendation on BOYY's recent violation history, inclusive of threats to the PBQ in combination with his failure to complete the CSCP program which was foundational to the Board prior decision to not grant this prisoner Parole. CPAC recommended that BOYY is not considered suitable for release to Parole at this time."

[18] In relation to CPAC's responsibility for oversight of "reintegration planning for ESO offenders", Mr Tannock explains that this may involve, where necessary, initiating discussions within relevant areas of QCS, to ensure arrangements are in place specific

to the prisoner's needs and risks, including in relation to accommodation, post-release reintegration support workers and employment. He says this process is not unique to a prisoner with an ESO flag; this process also occurs in relation to prisoners without such a flag, facilitated by a reintegration support worker or QCS officer.

[19] In relation to CPAC's responsibility for notifications to external agencies, Mr Tannock explains that this may involve notifications to agencies such as the National Disability Insurance Agency and also the Queensland Police Service. Again, Mr Tannock says that this kind of task is regularly undertaken by QCS for prisoners "re-entering the community where particular issues, risks or reintegration needs have been identified". He says the difference is that, for an offender with an active ESO flag, CPAC oversees the process.

[20] Finally, Mr Tannock says that the applicant's request for a review of his ESO flag was discussed at a meeting of the CPAC on 9 July 2019. In his affidavit, Mr Tannock says that it was decided that, "based on current intelligence holdings, the ESO flag would remain active". A redacted copy of the minutes of this meeting are annexed as exhibit B-3. Those minutes record as the "reason for ESO", "[i]ntelligence holdings and institutional management concerns".

[21] The respondent submits that the raising of an "enhanced security offender" flag on the applicant's IOMS electronic file is not a decision to which the *Judicial Review Act* applies because it is not a decision made under an enactment, and in any event the imposition of such a flag is a management tool only, and does not affect the applicant's legal rights or obligations.

[22] In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 Mason CJ said that:

> "… a reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.
>
> Another essential quality of a reviewable decision is that it be a substantive determination…"

[23] In *Griffith University v Tang* (2005) 221 CLR 99 the High Court further considered the meaning of a "decision of an administrative character made … under an enactment". The focus of the decision was on the latter part of the definition, but as Gummow,

Callinan and Heydon JJ noted, although the cases have tended to focus on discrete elements of the definition, "there are dangers in looking at the definition as other than a whole" (at [60]). Their Honours' discussion of the preferred construction of the phrase provides further guidance as to the character of a reviewable decision:

> "[79] The decision so required or authorised [by the enactment] must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under* an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
>
> [80] The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins,*[7] does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?
>
> …
>
> [85] The legal rights and obligations which are affected by the authority of the decision derived from the enactment in question may be those rights and obligations founded in the general or unwritten law…
>
> [86] However, that which is affected in the fashion required by the statutory definition may also be statutory rights and obligations. An example is that given by Toohey and Gaudron JJ in *Bond* [at 377] of a requirement, as a condition precedent to the exercise of a substantive statutory power to confer or withdraw rights (eg, a licence), that a particular finding be made. The decision to make or not to make that finding controls the coming into existence or continuation of the statutory licence and itself is a decision made under an enactment.
>
> …
>
> [89] The determination of whether a decision is 'made … under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant

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7 *Australian National University v Lewins* (1996) 68 FCR 87 at 103.

> decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."[8]

[24] The respondent submits that the decision to activate a warning indicator flag on a prisoner's electronic file does not meet either of the two limbs referred to in *Griffith University v Tang* at [89]: it is not a decision which is expressly or impliedly required or authorised by an enactment; and it does not affect legal rights or obligations.

[25] There is no provision in the *Corrective Services Act* 2006 (Qld) which deals with warning indicator flags. Relevantly, under s 263(1) of the *Corrective Services Act*, the chief executive is responsible for the security and management of all corrective services facilities, the safe custody and welfare of all prisoners, and the supervision of offenders in the community. Under s 264(1), the chief executive has the power to give an administrative *direction* to facilitate the effective and efficient management of corrective services. Under s 265(1), the chief executive must make administrative *procedures* to facilitate the effective and efficient management of corrective services. The administrative procedures must take into account the special needs of offenders; and must be published on the department's website unless publication might pose a risk to the security or good order of a corrective services facility (s 265(2), (3) and (4)). The chief executive may delegate a function (or power) to an appropriately qualified person, including a corrective services officer (s 271).

[26] The respondent accepts that the "sentence management – assessment and planning" document is produced and published under s 265 of the *Corrective Services Act*, as an administrative procedure to facilitate the effective and efficient management of corrective services. The document does provide for the activation (and deactivation) of warning flag indicators, as part of sentence management procedures. But the respondent submits that a decision to do so, in relation to any particular prisoner, cannot be described as a decision made under, in the sense of being expressly or impliedly required or authorised by, s 265 of the *Corrective Services Act*. I accept that submission. Section 265 confers a general power to make administrative procedures. It would strain the language of "under an enactment" to conclude that a step taken in accordance with administrative procedures made under the general power of s 265 constitutes a decision made under s 265, in the relevant sense for the purposes of the *Judicial Review Act*.[9]

[27] But that is not the end of the enquiry. The applicant refers to the definition of "enactment", in s 3 of the *Judicial Review Act,* as meaning an Act or a statutory

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[8] References omitted. Underlining added.

[9] See *Australian National University v Burns* (1982) 5 ALD 67 at 77-78; *Blizzard v O'Sullivan* [1994] 1 Qd R 112 at 117; and *Palmer v The Chief Executive, Qld Corrective Services & Ors* [2010] QCA 316 at [23].

instrument; and argues that the "sentence management – assessment and planning" document is a "statutory instrument".

[28] As defined in s 7 of the *Statutory Instruments Act* 1992 (Qld), to be a "statutory instrument", an instrument (defined in s 6 to mean any document) must be, relevantly, made under an Act (or another statutory instrument) (s 7(2)) *and* be a document of a type mentioned in s 7(3), which provides:

> "(3) The instrument [made under an Act or another statutory instrument] must be of 1 of the following types –
>
> - a regulation
> - an order in council
> - a rule
> - a local law
> - a by-law
> - an ordinance
> - a subordinate local law
> - a statute
> - a proclamation
> - a notification of a public nature
> - a standard of a public nature
> - a guideline of a public nature
> - another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity."

[29] The potentially relevant types of instrument are those referred to in the last two bullet points.

[30] As already noted, the respondent accepts that the "sentence management – assessment and planning" document is made under s 265 of the *Corrective Services Act*, as part of the administrative procedures required to be made under that section. But the respondent submits it is not a "guideline of a public nature", merely a documentation of procedures; nor does it fall within the last bullet point.

[31] The applicant submits the "sentence management – assessment and planning" document is a guideline of a public nature, emphasising that it is expressly said, on the first page, to be available to the public. That reflects the requirement, under s 265(3), for the chief executive to publish administrative procedures on the department's website, unless publication might pose a risk to the security or good order of a corrective services facility (s 265(4)).

[32] There is no definition of "guideline" in the *Statutory Instruments Act*. The ordinary meaning of the word, as informed by the Macquarie Dictionary (online), is "a statement which offers advice on the implementation of a policy" or "general instructions". As noted above, the "sentence management – assessment and planning" document is described as a "Custodial Operations Practice Directive". The document does contain general instructions in relation to its overall objective, which is "to ensure relevant information is gathered, analysed and interpreted using preliminary assessments of risk and need to inform the management of prisoners and to plan the prisoner's progression throughout their sentence and to ensure a prisoner's progress is reviewed at appropriate points throughout their sentence". In relation to warning flag indicators in particular, the "relevant manager" is instructed to activate or deactivate "any relevant warning flag indicators", at appropriate points throughout a prisoner's sentence, and is referred to criteria for warning flag indicators. In that sense, the document can be described as a "guideline" in the ordinary sense of the word.

[33] But is it a guideline of a public nature made under an enactment, relevantly, s 265 of the *Corrective Services Act*?

[34] In *The Proprietors – Rosebank GTP 3033 v Locke & Anor* [2016] QCA 192 at [133] McMurdo JA drew a distinction between a document which has a public function or purpose; and a document which only applies to a limited class or category of persons, but which is available to the public (in that case, a bylaw made by a body corporate in relation to a group title). His Honour earlier observed, at [128], that it is "far from clear" that such bylaws are a statutory instrument. However, whether the meaning of the limitation "of a public nature" has the first, or extends to the second, meaning, was not determined in that case; it being unnecessary to do so to decide the appeal.

[35] The limitation "of a public nature" was added to s 7(3) following the decision of the Court of Appeal in *Blizzard v O'Sullivan* [1994] 1 Qd R 112, which concerned a contract of employment between the Commissioner of Police and an executive officer of the Queensland Police Service.[10] At the time that case was decided, s 7(1) defined a statutory instrument as an instrument made under an Act (or under a statutory instrument), including various examples (such as a guideline). In that case, Thomas J said it would be "a startling conclusion" if "every document brought into existence by any statutory authority with the power to bring documents into existence is to be deemed a statutory instrument" (at 121-122). His Honour accepted, as an implicit

[10] See the discussion in *McLean v Gilliver* [1995] 1 Qd R 637 at 645-646 per Lee J.

limitation in the s 7 definition of "statutory instrument", that the requisite character of an instrument, to be a statutory instrument, may be described as legislative, public or having an effect through unilateral exercise of power (at 121). That implicit limitation became explicit, with the amendment to the definition in s 7 by the addition of the qualifier "of a public nature" in relation to, inter alia, guidelines; and with the addition of reference to "another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity".

[36] As already noted, by force of s 265(4) of the *Corrective Services Act*, the chief executive need not publish an administrative procedure, if the publication might pose a risk to the security or good order of a corrective services facility. It is apparent that some parts of the "sentence management – assessment and planning" have been redacted which, for present purposes, I accept has been done in reliance on s 265(4).

[37] Although the matter is not free from doubt, I do not consider that the mere fact that the document (or at least some parts of it) is available to the public makes it a guideline of a public nature [made under an Act] for the purposes of the definition of "statutory instrument". The document sets out administrative procedures relating to the assessment of risk posed by, and planning for the management of, prisoners serving a custodial sentence. Whilst it may be made available, at least in part, to the public for information purposes, the document has no public function, purpose or operation.

[38] In that regard, the document may be contrasted with the Ministerial Guidelines made under s 242E of the *Corrective Services Act*, which provides that the Minister "may make guidelines about policies to help the parole board in performing its functions". Such a Guideline does have a public function, purpose or operation, because it contains guidelines and policies to be taken into account by a statutory body, the Parole Board, in performing its decision-making functions under the Act. Those Guidelines have been held to be a statutory instrument within the meaning of s 7 of the *Statutory Instruments Act.*[11]

[39] It is important to construe the definition in s 7 of the *Statutory Instruments Act* as a whole, including by reference to the types of instrument contemplated in s 7(3). Looked at in isolation and narrowly, the "sentence management – assessment and planning" may be described as a "guideline" in the ordinary sense of the word, because it contains a set of instructions reflecting the administrative procedures which have been made. But it is not, in my view, in the context of s 7 as a whole, aptly described as an instrument [document] made under, relevantly, s 265 the *Corrective Services Act,* of a type referred to in s 7(3), relevantly, a guideline of a public nature.

[40] It is clearly not "another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity". The document is a

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[11] See also *Calanca v The Queensland Parole Board* [2016] QSC 3 at [43].

record of administrative procedures; no rights or liabilities are unilaterally affected by the document itself.

[41] For those reasons, in my view, the "sentence management – assessment and planning" document is not a statutory instrument within the meaning of s 7 of the *Statutory Instruments Act.*

[42] However, even if the document is properly described as a guideline of a public nature, and therefore a statutory instrument, in my view, the decision to activate a particular warning flag indicator on the applicant's prison file is not, in any event, a decision *made under* that "enactment" for the purposes of the *Judicial Review Act*. That is because it does not satisfy the second limb of the test identified in *Griffith University v Tang:* that the "decision" (to activate the flag) must itself confer, alter or otherwise affect legal rights or obligations, and derive the force to do that from the "enactment".

[43] The applicant submitted that the presence of an "enhanced security flag" on his prison file does have an impact on him, for the following reasons. Firstly, he refers to s 12 of the *Corrective Services Act*, which requires the chief executive to classify a prisoner when they are admitted to a corrective services facility for detention as either maximum, high or low security. The applicant has a high security classification. He submits that the activation of an ESO warning flag indicator is an additional "security classification", not provided for by s 12 of the Act, which hampers his movement through the custodial environment (for example, his ability to move from maximum security to a prison farm). In that regard, he submits that the warning flag "affects my obligations and right to be a normal prisoner".

[44] The applicant further submitted that the presence of an ESO warning flag affects him when applying for parole, making "the whole process a lot more difficult" because of the additional "rigmarole" arising from CPAC's involvement. Relatedly, the applicant submitted the presence of an ESO warning flag, and consequential role of CPAC in relation to any application he makes for parole, impacts on his parole eligibility date.

[45] The applicant also expressed concern about the responsibility of CPAC for notifying external agencies, including the Queensland Police Service, regarding the risks posed by a prisoner with an ESO warning flag, on their release from custody on parole. He submits this affects his "legal right or obligation" not to have certain notifications released to police.

[46] It is unnecessary to deal with some of the other points raised by the applicant, including that the activation of a warning indicator flag on his file breaches the laws against double jeopardy; that it breaches s 115 of the *Corrective Services Act* (which provides that a prisoner is not to be punished twice for the same act or omission), s 16 of the *Criminal Code* (person not to be twice punished for the same offence) and s 34 of the

Human Rights Act 2019[12] (affirming the right of a person not to be tried or punished more than once for the same offence); that redacting (or "blacking out") parts of the "sentence management – assessment and planning" document is misleading the public and, because it is blacked out, this raises the operation of s 22 of the *Criminal Code* (ignorance of the law – bona fide claim of right); that he was not afforded procedural fairness, in the sense of being given an opportunity to be heard, and make submissions, before the activation of the ESO flag on his file; and that the respondent has "fabricated" evidence contrary to s 126 of the *Criminal Code*.

[47] As to the last point, there is no basis before the court for such a submission. As to the second last point, this would be a factor to consider, if the decision to activate the flag was found to be judicially reviewable (and a review application was made), but is not relevant to the issue the subject of this application (whether the decision to activate an ESO flag is a decision to which the *Judicial Review Act* applies). As to the other matters referred to in paragraph [46], with respect to the applicant and the concerted effort he has made, without legal representation, to present comprehensive arguments in support of his application, these matters lack merit and it is not necessary to address them further.

[48] I have otherwise taken into account, and considered carefully, the submissions made by the applicant. I acknowledge that his perception is that the presence of a warning flag indicator, such as an ESO flag, affects or has an impact on him. However, as a matter of law, and having regard to the sworn evidence before the court from Mr Tannock, I find no basis to conclude that a warning flag indicator does have any impact on his legal rights or obligations, as a prisoner or otherwise. The evidence, which I accept, is that warning flag indicators are an internal risk assessment and management tool used by QCS. Warning flag indicators are not an additional "classification", inconsistent with s 12 of the *Corrective Services Act*. Whilst the security classification under s 12 of the Act does impact on a person's ability to progress within the custodial environment,[13] the evidence of Mr Tannock is that warning flag indicators do not have any such impact.

[49] The role of CPAC in relation to applications for parole does not affect either the date by which the prisoner is eligible to apply for parole (which is either fixed by operation of, for example, s 184 of the *Corrective Services Act*, or by the court at the time of sentence, as in the applicant's case) or the decision-making processes of the repository of the power to grant or refuse parole, which is the Parole Board Queensland. It is merely an additional source of information to be provided to that decision-maker. The fact that it may result in additional "rigmarole", to use the applicant's word, does not support the conclusion that CPAC's responsibilities in relation to management oversight of prisoners with an "enhanced security offender" flag, including in relation to reviewing parole applications, affect the prisoner's legal rights and obligations.

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[12] Which will commence on 1 January 2020 (see SL 2019 No. 224).

[13] See also s 19 of the *Corrective Services Act.*

[50] In terms of post-release notifications, the evidence, which I accept, is that the process is no different from that which applies to a prisoner without an ESO flag; it is just that, where a prisoner does have an ESO flag, the body within QCS which takes on this responsibility is CPAC. I am not persuaded that CPAC's role in this regard, in relation to prisoners with an ESO flag, can be said to affect the prisoner's legal rights or obligations.

[51] The warning flag indicator system is appropriately described as a risk assessment and management measure adopted by QCS, in order to enable the chief executive (or their delegate) to discharge their responsibilities under s 263 for the security and management of all corrective services facilities, the safe custody and welfare of all prisoners, and the supervision of offenders in the community. It is not appropriately characterised as a measure by which the rights and responsibilities of prisoners are affected in a manner which would enliven, as a matter of policy, the statutory power to review decisions taken to give effect to, or in relation to, such measures.

[52] I find that the decision, or action, of placing an enhanced security offender warning flag on the applicant's prison file is not a decision to which the *Judicial Review Act* applies, and therefore is not a decision in respect of which the applicant is entitled to demand a written statement of reasons. That conclusion is, in my view, consistent with the policy considerations referred to by Mason CJ in *Australian Broadcasting Tribunal v Bond* at 336-337, in the sense that a contrary conclusion, that such a management decision is amenable to statutory judicial review, would impair the effective and efficient management of corrective services.

[53] The application is dismissed.

[54] At the conclusion of the hearing, the applicant flagged that, in the event he was unsuccessful, he would be applying under s 49(2)(a) of the *Judicial Review Act*,[14] for relief from any costs order, on the basis that he is unable to meet any costs because he is bankrupt. Section 49 applies to costs of review applications. Section 50 applies to costs of an application for reasons for decision, such as the present application.

[55] Under s 50(b), on an application for a statement of reasons, the court may only order that the applicant pay the costs of the respondent:

(i) if the applicant is wholly unsuccessful in obtaining the relief sought; and

(ii) if the application –

A. does not disclose a reasonable basis; or

B. is frivolous or vexatious; or

[14] The transcript (at 1-37) records the applicant referring to s 42(2)(a); but this is clearly an error, and I take the applicant to have intended to refer to s 49(2)(a), which requires the court, in considering a costs application under s 49(1), to have regard to the financial resources of the applicant.

C. is an abuse of the process of the court.

[56] In the event that the respondent makes an application for costs, following delivery of these reasons, I will hear submissions from each of the parties about the application of s 50(b).