



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

BETWEEN:

RACHEL SMITH
Appellant

10 **CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES**
First Respondent

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
Second Respondent

and

QUEENSLAND HUMAN RIGHTS COMMISSION
Third Respondent

20 **APPELLANT’S SUBMISSIONS**

PART I — CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II — CONCISE STATEMENT OF ISSUES

2. Section 22(1) of the *Corrective Services Act 2006* (Qld) (**CSA**) permits a prisoner to apply to the chief executive for access to private medical treatment by a health practitioner of their choice. Section 22(2) qualifies that permission by providing that a prisoner “can not — (a) participate in assisted reproductive technology; or (b) apply for the chief executive’s approval to participate in assisted reproductive technology.”
3. This appeal turns on the meaning attributed to the words “assisted reproductive
30 technology.” In particular, it turns on whether they operate to prohibit female prisoners from applying for and participating in private medical treatment to extract and freeze their eggs.
4. That overarching question raises several discrete issues of statutory interpretation, including whether the Court of Appeal was correct to conclude that s 48(1) of the *Human Rights Act 2019* (Qld) (**HRA**) is engaged only after it has been determined,

without reference to human rights, that the language of the provision admits of at least two constructional choices.

PART III — SECTION 78B NOTICES

5. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV — CITATION OF REASONS BELOW

6. Neither the reasons of the Court of Appeal nor the reasons of the primary judge have been reported. Their medium neutral citations are, respectively: *Smith v Chief Executive, Queensland Corrective Services* [2026] QCA 99 (AJ) and *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288 (J).

PART V — FACTS

7. Rachel Smith is a 36-year-old woman currently serving a term of imprisonment. She will be 39 years old when she is eligible for parole and 41 years old at the end of her sentence.¹ Ms Smith wishes to preserve her fertility. There is no suggestion she intends to become pregnant while she is incarcerated. Rather, she wants to preserve her ability to have children once she is released, and to reduce medical risks associated with any future pregnancy.²
8. To that end, she applied to access privately funded egg freezing under s 22(1) of the CSA in June 2023. Egg freezing (oocyte cryopreservation) involves the administration of hormonal drugs to stimulate egg production, a medical procedure under anaesthetic or sedation to extract eggs, and the freezing and storage of the extracted eggs. The process is usually repeated two to three times.³ Egg freezing cannot, by itself, result in a pregnancy. A frozen egg can contribute to a pregnancy only if it is later thawed, fertilised and the resulting embryo implanted.
9. Uncontested evidence below, accepted by the primary judge, established that there is a statistical reduction in a woman's fertility between 33 and 41 and that the risk of chromosomal abnormality, with attendant risks of pregnancy loss and long-term

¹ J [1] (CAB 6) (the primary judge stated that Ms Smith was “currently 33” years of age; in fact, when the primary judgment was published, she was 34); AJ [6] (CAB 36-37).

² J [4], [7] (CAB 7); AJ [6]-[7] (CAB 36-37).

³ J [5], [59]-[62] (CAB 7, 18-19); AJ [6], [20] (CAB 36-37, 42).

disability in a child, statistically increases over that period with maternal age.⁴ The same evidence established that egg freezing before the age of 35 can reduce the risk of age-related infertility and of chromosomal abnormalities.⁵ Having first applied at age 33, and recently turned 36, Ms Smith’s window to take such steps is closing.

10. The first respondent’s delegate refused Ms Smith’s application in February 2024, on the basis that egg freezing is “assisted reproductive technology” within the meaning of s 22(2)(b) of the CSA. The delegate acknowledged that the decision would “have significant consequences which will last while Ms Smith remains in custody and will likely limit her human rights”.⁶
11. Ms Smith sought statutory review of the delegate’s refusal. Her application was dismissed in November 2024.⁷ Her appeal was dismissed some 18 months later in May 2026.⁸ This Court granted special leave on an expedited basis on 6 August 2026.⁹

PART VI — ARGUMENT

Statutory framework and overview

12. Section 3(1) of the CSA provides that “the purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.” Section 3(2) recognises that “every member of society has certain basic human entitlements, and that, for this reason, an offender’s entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.” Section 3(3) additionally recognises “(a) the need to respect an offender’s dignity; and (b) the special needs of some offenders by taking into account — (i) an offender’s age, sex or cultural background; and (ii) any disability an offender has.” Section 22 of the CSA appears in that context, under Pt 2 (Management of Prisoners).

⁴ J [2]-[3] (CAB 6-7); AJ [6] (CAB 36-37).

⁵ J [3] (CAB 7); AJ [6] (CAB 36-37).

⁶ J [8] (CAB 7); Delegate’s reasons dated 28 February 2024 (exhibit AO-5 to the affidavit of Andrew James Owens sworn on 27 March 2024) (ABFM 16).

⁷ J [119] (CAB 26).

⁸ AJ [60], [85] (CAB 50, 56-57).

⁹ CAB 62.

13. Below, the Court of Appeal held that the meaning of “assisted reproductive technology” was “unambiguous.”¹⁰ It further held that for s 48(1) of the HRA to have any role in the interpretation of s 22(2) “there must be at least two constructional choices for the language of the provision.”¹¹ Having determined that no such constructional choices arose, it dismissed the appeal, without considering s 48(1).¹² The Court of Appeal’s construction should be rejected.
14. *First*, the construction fails on its own terms. Even if it was appropriate to approach the question of construction on a literal basis,¹³ the words “assisted reproductive technology” do not have a single, unambiguous meaning.
15. *Secondly*, properly construed, the meaning for which Ms Smith contends better coheres with the purpose and context of the CSA, the operation of the principle of legality and with s 48(1) of the HRA.
16. Section 48(1) operates at the outset of the process of interpretation. Far from being relegated to a tie-breaker once all other relevant principles of statutory construction have been applied, s 48(1) is better understood as part of the “iterative process by which the many parts come together to arrive at the legal meaning to be attributed to the text.”¹⁴ Where, ultimately, a posited construction is not compatible with one or more human rights, s 48(1) and 48(2) operate to require a compatible or more compatible construction, to the extent possible consistent with the provision’s purpose.

A literal construction fails on its own terms

17. The “literal” approach of both the primary judge and the Court of Appeal is wrong as a matter of interpretive method. Even words with an apparently clear ordinary meaning may be ascribed a different legal meaning after the process of construction is complete, because context, considered at the first stage of that process and in its widest sense, may tell against the ordinary usage.¹⁵

¹⁰ AJ [58] (CAB 50).

¹¹ AJ [56] (CAB 49).

¹² AJ [58], [60] (CAB 50-51).

¹³ Cf *R v A2* (2019) 269 CLR 507 at [32] (Kiefel CJ and Keane J; Nettle and Gordon JJ agreeing at [148]).

¹⁴ *Centurion Australia Investments Pty Ltd v APM Group (Aust) Pty Ltd* [2023] VSCA 324 at [54] (Ferguson CJ, Niall and Kennedy JJA), there concerning the operation of s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁵ *A2* at [32]-[33] (Kiefel CJ and Keane J; Nettle and Gordon JJ agreeing at [148]); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and

18. But, even if the approach were correct, the claimed literal reading fails on its own terms. “Assisted reproductive technology” is a composite expression lacking a settled ordinary meaning from which the appellant’s construction could be said to be a departure. The materials before the primary judge demonstrated as much:¹⁶
- a. The Oxford English Dictionary defines the phrase as “such technology used for the treatment of infertility, typically involving the manipulation of eggs, sperm and embryos”.¹⁷
 - 10 b. The Merriam-Webster Medical Dictionary defines it as “the use of technology to assist human reproduction in the treatment of infertility”, “especially: a procedure (such as in vitro fertilization or gamete intrafallopian transfer) that involves the removal of eggs from an ovary and fertilization by sperm in vitro”.¹⁸
 - c. The National Health and Medical Research Council (NHMRC) Ethical Guidelines on the Use of Assisted Reproductive Technology define the phrase as “the application of laboratory or clinical techniques to gametes and/or embryos for the purposes of reproduction”.¹⁹
 - d. The Australian Institute of Health and Welfare’s (AIHW) assisted reproduction technology series describes the “main ART procedures” as including in vitro fertilization (IVF), Intracytoplasmic Sperm Injection (ICSI) and Gamete
20 Intrafallopian Transfer (GIFT)—each a procedure defined by reference to *fertilisation*.²⁰

Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], [78] (McHugh, Gummow, Kirby and Hayne JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ), [36]-[37] (Gageler J); *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [4]-[6] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

¹⁶ See, J [42]-[47] (**CAB 15-16**).

¹⁷ *The Oxford English Dictionary*, online version (August 2026), “reproductive technology (noun)” (“assisted reproductive technology” is further defined within this definition).

¹⁸ *Merriam-Webster Medical Dictionary*, online version (August 2026), “Assisted reproductive technology”.

¹⁹ NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017, updated 2023) (**NHMRC Ethical Guidelines**) at 2 (explanation of key terms).

²⁰ AIHW, National Perinatal Statistics Unit and Fertility Society of Australia, *Assisted Reproduction Technology Series No 12* (September 2008) at 1.

- e. The Reproductive Technology Council’s glossary defines the phrase as a “range of methods used to circumvent human infertility”, listing IVF, embryo transfer, GIFT and artificial insemination.²¹

19. The definitions do not speak with one voice. Some are cast in terms of the treatment of infertility (which Ms Smith does not presently have but is at risk of developing over the term of her imprisonment); others are cast in terms of procedures directed to achieving fertilisation or pregnancy (which egg freezing is not). If the definitions establish anything, it is that the phrase has no single “literal” meaning. The literal text admits of a range of meanings, and it is simply not the case that the mass noun “assisted reproductive technology” admits of no other meaning than one that encompasses egg freezing. Ascribing that meaning to the text involves a constructional choice.
20. That conclusion is unsurprising, because the absence of a settled meaning is built into the semantic structure of the phrase. A composite expression of this kind can be read in two different ways: (i) as an ordinary description assembled from its parts, or (ii) as a term of art. This phrase functions as both, having its own acronym and lending its name to registries, professional bodies, and statutes.
21. Read as a description of an activity, the phrase can only mean technology for assisted reproduction: “assisted” does not qualify “technology”—the technology is not the thing being assisted, but the reproduction at which the technology is directed. So read, the phrase is defined by its end—the achievement of reproduction with technological assistance. It is at least an available meaning (in truth, the more natural one) that the phrase reaches only procedures apt to achieve reproduction. Egg freezing is not such a procedure: it involves one gamete, no fertilisation, and no attempt to procure a pregnancy.²²

²¹ J [44]-[47] (CAB 15-16), [78]-[81] (CAB 20).

²² The purposive element is near-universal in the attested definitions: Zegers-Hochschild et al, ‘The International Glossary on Infertility and Fertility Care, 2017’ (2017) 32(9) *Human Reproduction* 1786 at 1790 (“for the purpose of reproduction”); NHMRC Ethical Guidelines at 2 (“for the purposes of reproduction”); *Assisted Reproductive Technology Act 2024* (Qld), s 5(1) (“procures, or attempts to procure, pregnancy”).

22. Read instead as a term of art, the phrase means whatever the relevant expert communities stipulate—and their stipulations conflict, as the various definitions noted above at paragraph [18] demonstrate.
23. On neither mode of meaning does the phrase have the “unambiguous” breadth attributed to it below, said necessarily to include egg freezing.
24. The awkwardness of fitting egg freezing within the nomenclature of infertility practice likely stems from its recency. Although the first pregnancy from a frozen human oocyte was reported from Adelaide in 1986, the procedure remained formally “experimental” until October 2012—six years after the CSA was enacted—and elective egg freezing at any scale is a phenomenon of the last decade.²³ When Parliament employed the composite phrase in 2006, the salient exemplars of “assisted reproductive technology” were conception-directed procedures. The now-common vocabulary, distinguishing the preservation of fertility from the assistance of reproduction, postdates s 22 entirely.
25. The *Assisted Reproductive Technology Act 2024* (Qld) drives this point home. When the Queensland Parliament came to define the field, it defined an “ART procedure” as a “medical treatment or other procedure that procures, or attempts to procure, pregnancy in a person other than by sexual intercourse”, giving as examples artificial insemination, IVF, and GIFT—each of which is capable of procuring a pregnancy, unlike egg freezing.²⁴ Subsection (3) provides that the person who “undergoes” an ART procedure is the person who becomes or seeks to become pregnant “as a result of the procedure”.
26. It then created the deliberately wider concept of an “ART service”, which reaches the storage of gametes and the obtaining of a gamete from a gamete provider.²⁵ The 2024

²³ Chen, ‘Pregnancy after human oocyte cryopreservation’ (1986) 327(8486) *The Lancet* 884; Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, ‘Mature oocyte cryopreservation: a guideline’ (2013) 99(1) *Fertility and Sterility* 37; American Society for Reproductive Medicine (Ethics Committee), ‘Planned oocyte cryopreservation to preserve future reproductive potential: an Ethics Committee opinion’ (2023) at 604 (“In 2012, the ASRM Practice Committee removed the experimental label”). In Australia, the AIHW’s reporting did not capture data on oocyte freezing until 2009: see, AIHW, ‘Assisted Reproductive Series No 15: Assisted Reproductive Technology in Australia and New Zealand’ (2009) at 2. See also, as to prevalence in countries including Australia: Johnston et al, ‘A major increase in oocyte cryopreservation cycles in the USA, Australia and New Zealand since 2010 is highlighted by younger women but a need for standardized data collection’ (2020) 36 (3) *Human Reproduction* 624.

²⁴ *Assisted Reproductive Technology Act 2024* (Qld), s 5(1) and (3).

²⁵ *Assisted Reproductive Technology Act 2024* (Qld), s 6.

Act is not in *pari materia* with the CSA and the appellant does not suggest that it controls the construction of s 22(2).²⁶ The point is a more modest one: the statute demonstrates both that the phrase has no fixed meaning of the kind attributed to it below, and that when Parliament wished to reach the collection and storage of gametes—as distinct from the procedures that procure pregnancy—it did so expressly.

27. Ordinary usage marks the same distinction. A woman who has frozen her eggs is not ordinarily said to have undergone assisted reproduction; she is said to have preserved the possibility of it.

10 28. The Court of Appeal’s conclusion that “the only purpose for extracting eggs and freezing them is to have them available for reproduction purposes in the future”²⁷ misses the mark. Having eggs “*available*” for reproduction is conceptually distinct from having them “*for* reproduction.” The procedure is intended to preserve fertility. The *choice* and reproductive autonomy that this preservation of fertility creates for women is its own end, distinct from reproduction itself.

29. The text, then, leaves the question open. At its highest for the respondents, the text is neutral. The choice falls—as it always does—to be made not by recourse to the fortress of the dictionary, but by reference to text, context, purpose, and the operation of relevant principles of statutory interpretation. Of course, each of those can only be explained one at a time. But that does not mean that they are a series of gateways with the next only reached when the former has been passed through. Rather, each brings its own weight and influence to bear in an integrated process of construction.

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Proper construction

Text and purpose of the CSA

30. Section 14A(1) of the *Acts Interpretation Act 1954* (Qld) requires that the interpretation that will best achieve the purpose of the Act be preferred.²⁸ The purpose of a provision, identified at the appropriate level of generality, is “that which the law is designed to

²⁶ Cf J [110]-[111] (CAB 25).

²⁷ AJ [58] (CAB 50).

²⁸ See also, generally, *SZTAL* at [14] (Kiefel CJ, Nettle and Gordon JJ), [39] (Gageler J).

achieve in fact”.²⁹ The purpose of s 22(2) emerges with clarity from the text of the CSA, read with the explanatory materials.

31. The purpose of the CSA is “community safety and crime prevention *through humane containment*”.³⁰ Section 3(2) specifically recognises that which is true at general law:³¹ “every member of society has certain basic human entitlements” and for that reason “an offender’s entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.” Section 3(3) recognises “the need to respect an offender’s dignity” and the special needs of some offenders having regard to, among other things, “age” and “sex”.³²
32. In other words, the framework of the CSA is designed to ensure that prisoners are treated with dignity and that their basic entitlements as human beings are only diminished insofar as necessary because of their imprisonment. The Act discloses a clear textual intent not to intrude otherwise on such entitlements, and to accommodate special needs based on “age” and “sex.”
33. Considering that patent intent, the construction embraced by the Court of Appeal is surprising. Not only does it diminish prisoners’ basic entitlements beyond the necessary incidents of imprisonment; it extends beyond legitimate managerial concerns, in that its effect is to deprive many prisoners of their basic human entitlements *long after* their term of imprisonment is complete. Those enduring effects are borne, disproportionately, by female prisoners.
34. The explanatory materials do not pull in any different direction. Three passages in the Explanatory Notes to the Corrective Services Bill 2006 are particularly telling.³³
35. The first records the origin of the provision: sexual activity during contact visits was prohibited under the predecessor Act, and “it can be implied from the prohibition on

²⁹ *Palmanova* at [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

³⁰ CSA, s 3(1) (*italics added*).

³¹ See below at [45].

³² CSA, s 3(1)-(3).

³³ Explanatory Notes, Corrective Services Bill 2006 (Qld) at 14-15, 23-24; extracted at J [27]-[29] (**CAB 10-12**).

sexual activity during visits that it was never intended that prisoners should be able to *conceive children whilst in custody*.”³⁴

36. The second records the new development to which the provision responded: “[a]dvances in medical technology for the treatment of infertile couples” had “led to an increase in requests by prisoners in custody to participate in assisted reproductive technology”, with most requests made by male prisoners for artificial insemination.³⁵
37. The third records what the prohibition was designed to achieve: “[a] clear prohibition ensures equity in decision making between prisoners and does not require correctional
10 authorities to make value judgments as to whether individual prisoners should be allowed to *procreate while they are in prison* and are suitable to parent and provide for a child.”³⁶
38. The purpose those passages disclose is specific. Prisoners were already prevented from procreating naturally while in custody. Medical technology had opened an artificial path to the same end, and prisoners were asking to use it. Section 22(2) closed that path. The provision thus completes a symmetry: a prisoner may procreate neither naturally nor artificially while in custody. The mischief was *procreation* in custody by artificial means; the remedy was a prohibition on the technologies that make such procreation possible.³⁷
- 20 39. Nothing in the text of the CSA or in the extrinsic material suggests that the purpose of the provision extended further—to preventing prisoners from preserving their fertility. That subject is nowhere even hinted at, much less identified and confronted. The operative language of the Explanatory Notes is consistently temporal: “whilst in custody”; “while they are in prison”; “while in custody”. Fertility preservation—a different subject, engaging different considerations—receives no mention. And, given the relative recency of the technology, that is not surprising.³⁸

³⁴ Ibid at 23-24 (italics added).

³⁵ Ibid at 15.

³⁶ Ibid at 24 (italics added).

³⁷ A2 at [33] (Kiefel CJ and Keane J, Nettle and Gordon JJ agreeing at [148]): “The mischief may point most clearly to what it is that the statute seeks to achieve.”

³⁸ See above at [24].

40. Reading the Act in light of its context and purpose, the legal meaning of s 22(2) is not a close call. Section 22(2) does not prohibit access to egg freezing technologies. The operation of the principle of legality bolsters that construction.

The principle of legality

41. The process of statutory interpretation is “an expression of the constitutional relationship between the arms of government.”³⁹ Within that relationship, the principle of legality is an important “working hypothesis, the existence of which is known to both Parliament and the courts ... The hypothesis is an aspect of the rule of law.”⁴⁰
- 10 42. According to the principle, “a legislative intention to abrogate or curtail a fundamental right or freedom should not be imputed unless clearly manifested by unmistakable and unambiguous language”.⁴¹ The presumption enhances the parliamentary process “by securing a greater measure of attention to the impact of legislative proposals on fundamental human rights.”⁴² It also exists “to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law.”⁴³ The operation of the principle is “not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable at common law”, but “extends to the protection of fundamental principles and systemic values.”⁴⁴ The principle will “vary with the context in which it is applied”.⁴⁵ In particular, “[t]he required clarity increases the more that the rights are ‘fundamental’ or ‘important’ and the greater the abrogation of the rights to which the interpretation would lead.”⁴⁶
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³⁹ *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

⁴⁰ *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 at [21] (Gleeson CJ).

⁴¹ *TCXM v Minister for Immigration and Citizenship* [2026] HCA 13 at [48] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [30]. (Gleeson CJ). See also *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁴² *Coco* at 437-438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁴³ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [313] (Gageler and Keane JJ).

⁴⁴ *Ibid.*

⁴⁵ *Hurt v The King* (2024) 281 CLR 286 at [106] (Edelman, Steward and Gleeson JJ), citing *Electrolux* at [19] (Gleeson CJ).

⁴⁶ *Ibid.*, citing *Stephens v The Queen* (2022) 273 CLR 635 at [34] and *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [159].

43. On the construction embraced by the Court below, s 22(2) of the CSA would abrogate or curtail fundamental common law rights, values, and principles.
44. *First*, the construction interferes with prisoners’ bodily integrity and autonomy, which this Court has made clear are recognised fundamental rights at common law.⁴⁷ Female prisoners are denied procedures to preserve their fertility, with profound and enduring impacts on their reproductive health and autonomy. That interference concerns not only bodily autonomy, but also bodily integrity: “a right not to be prevented from being biologically capable of reproducing ... is a right to bodily integrity.”⁴⁸
- 10 45. *Second*, it offends the common law principle, reflected in s 3 of the CSA, that people are sent to prison *as* punishment, not *for* punishment.⁴⁹ The deprivation of liberty is itself the punishment; prisoners retain all basic civil rights and entitlements that are not necessary incidents of imprisonment.⁵⁰
46. As detailed above,⁵¹ the language of the CSA is neither unmistakable nor clear. Especially in circumstances where the technology became commonly used only *after* the enactment of s 22(2), the principle of legality has particularly important work to do in avoiding inadvertent abrogation of fundamental rights.
47. Section 48(1) of the HRA further confirms the position.

The HRA’s interpretive obligation

20 Statutory framework and operation of s 48

48. The main objects of the HRA are to: protect and promote human rights, to help build a culture in the Queensland public sector that respects and promotes human rights and

⁴⁷ *Potter (a Pseudonym) v The King* [2026] HCA 25 at [55] (Gageler CJ, Gordon, Steward, Jagot, Beech-Jones JJ); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [9] and [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *Secretary, Department of Health and Community Services v JWB (Marion’s case)* (1992) 175 CLR 218 at 233 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *EGH19 v The Commonwealth* (2026) 100 ALJR 400 at [68]-[69] (Gordon J), [207] (Edelman J), [292], [306] (Jagot J).

⁴⁸ *Marion’s case* at 254 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁴⁹ See, eg, *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250 at [237] (Martin J); *R v Hodson* [2024] NSWCCA 238 at [86] (Dhanji J, agreeing with the majority and writing additionally); *Rich v Secretary, Department of Justice* [2010] VSC 390 at [45] (Bell J); *El-Jalkh v R* [2011] NSWCCA 236 at [33] (Harrison J, with whom McClellan CJ at Common Law and Latham J agreed).

⁵⁰ See, *Raymond v Honey* [1983] 1 AC 1 at 10, 14, cited with approval in *Minogue v Victoria* (2018) 264 CLR 252 at [88] (Gageler J).

⁵¹ See [17]-[29] above.

to help promote a dialogue about the nature, meaning and scope of human rights.⁵² One of the mechanisms by which those purposes are achieved is “requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way that is compatible with human rights.”⁵³

49. Section 8 of the HRA defines the phrase “compatible with human rights” by reference to the test set out in s 13: a statutory provision is compatible with human rights if it either does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.

10 50. Section 13(1) in turn provides that “a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.” Section 13(2) indicates several factors that may be relevant to that assessment.⁵⁴ The process of applying those factors should recognise that a purpose said to justify a limit on human rights would necessarily be a weighty one, that the means chosen to achieve that purpose should be capable of doing so, and that there should be no other equally effective way of doing so.⁵⁵

51. In that context, s 48(1) provides that “all statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.” Section 48(2) provides that “if a statutory provision cannot be
20 interpreted in a way that is compatible with human rights, the provision must, to the

⁵² HRA, s 3.

⁵³ HRA, s 4(f).

⁵⁴ Those matters are: (a) the nature of the human right; (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; (d) whether there are any other less restrictive and reasonably available ways to achieve the purpose; (e) the importance of the purpose of the limitation; (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and (g) the balance between the matters mentioned in paragraphs (e) and (f).

⁵⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 at [549]-[564] (Crennan and Kiefel JJ); *Thompson v Minogue* (2021) 67 VR 301 at [70]-[78] (Kyrour, McLeish and Niall JJA); *Re Major Crime Act* (2009) 24 VR 415 at [144]-[150] (Warren CJ); *Re Islam* (2010) 4 ACTLR 235 at [243]-[250] (Penfold J); *Owen-D’Arcy* at [104]-[110] (Martin J). Chen, ‘Acts, Decisions and Conduct Obligations: Implications from Recent Australian Human Rights Acts Cases’ *Federal Law Review* (2026) 54; Tate, ‘Proportionality under the Australian State-Level Human Rights Statutes’ (2025) 44(2) *University of Queensland Law Review* 151; Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP, 2012); Blore and Booth-Marxson, ‘Breathing Life into the *Human Rights Act 2019* (Qld): The Ethical duties of Public Servants and Lawyers acting for Government’ (2022) 41(1) *University of Queensland Law Review* 1.

extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.”

52. The Court of Appeal was incorrect to conclude that s 48(1) only operates on constructional choices identified without reference to the HRA. The purposes of the HRA are best achieved not by relegating s 48(1) to the role of a tie-breaker, but by treating human rights as part of the context against which all Queensland statutory provisions ought to be construed.⁵⁶ In other words, the HRA ought to be considered at the outset, and may bear on the range of constructional choices available. This is consistent with conventional approaches to context. The approach was adopted by Bond JA in *Hunt v Gerrard*⁵⁷ and, in relation to the similar (albeit differently framed) interpretative provision under the *Charter*, by three Justices of this Court in *Momcilovic*,⁵⁸ and Tate JA in *Taha*.⁵⁹
53. It is in that context that s 48(1) specifically requires courts to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way that is compatible with human rights within the meaning of s 8. That is, to interpret statutory provisions such that they either do not limit human rights or limit them only to an extent that can be demonstrably justified by reference to s 13. The words “to the extent possible” serve to ensure that the construction reached remains consistent with the provision’s purpose. This approach does not prohibit departure from the ordinary textual meaning of a provision.⁶⁰ Rather, what it prohibits is a construction that “goes against the grain” of the purpose of a provision; a construction that the provision’s

⁵⁶ As to interpretative methodology, see: Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1 at 1-2; Gageler, ‘Legislative Intention’ (2015) 41 *Monash University Law Review* 1; Edelman, ‘Implications’ (2022) 96 *Australian Law Review* 800 at 809; Crawford and Meagher, ‘Statutory Precedents under the “Modern Approach” to Statutory Interpretation’ (2020) 42(2) *Sydney Law Review* 209; Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP, 2009) Part III (Interpretation), especially chapters 10 (Interpretation Without Retrieval) and 11 (Intention in Interpretation).

⁵⁷ *Hunt v Gerrard*; *Ishiyama v Aitken* [2025] QCA 126 at [103]-[104] (Bond JA). The other members of the Court agreed with Bond JA but reserved the position on this part of his Honour’s judgment.

⁵⁸ *Momcilovic* at [51] (French CJ), [565] (Crennan and Kiefel JJ).

⁵⁹ *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1 at [187]-[188], [195] (Tate JA).

⁶⁰ The Queensland Court of Appeal appears to be split on this question. In apparent contrast with the approach of the Court below, in *Chief Executive, Department of Environment, Science and Innovation v Nagana Yarrbayn Wangan and Jagalingou Cultural Custodians Ltd* [2026] QCA at [113], Doyle JA (with whom Mullins P and Boddice JA agreed) accepted that the construction adopted does not have to “mirror the literal meaning of the words used.”

purpose cannot bear.⁶¹ In the present case, however, the full strength of the presumption need not be brought to bear because, properly understood, the appellant's construction fits comfortably with the purpose of s 22(2).

The Court of Appeal's construction limits human rights

54. The Court of Appeal's construction of s 22(2) profoundly limits the rights of female prisoners. In particular, it limits their rights:⁶² under s 25(a) not to have one's privacy or family unlawfully or arbitrarily interfered with; under s 30(1), as a person deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person; under s 37(1), to access health services without discrimination; and under s 15, to enjoy human rights without discrimination.
55. Section 25(a) is drawn from article 17(1) of the International Covenant on Civil and Political Rights (**ICCPR**). The Explanatory Notes to the Human Rights Bill 2018 explained that the "scope of the right to privacy is very broad. It protects privacy in the narrower sense including personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity; freedom of thought and conscience; legal personality; individual identity, including appearance, clothing and gender; sexuality; family and home."⁶³ That broad understanding of the right is reflected in the Australian authorities.⁶⁴ In *Director of Housing v Sudi*, for example, the cognate right in the *Charter* was described in the following terms:⁶⁵

The rights to privacy, family, home and correspondence in section 13(a) are of fundamental importance to the scheme of the Charter. The purpose of the rights is to protect and enhance the liberty of the person — the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure everybody can develop individually, socially and spiritually in that sphere, which provides the civil

⁶¹ See further, *Momcilovic* at [170] (Gummow J, with whom Hayne J agreed). See further, *Director of Public Prosecutions v Smith* (2024) 98 ALJR 1163 at [129]-[143] (Edelman J).

⁶² The appellant acknowledges that the rights under ss 25(a) and 15(2) were not specifically pressed below. They could not, however, have been met with any different evidence. Moreover, the constructional imperative in s 48(1) is a principle of statutory construction directed at courts and tribunals; it does not depend for its operation on the submissions of the parties.

⁶³ Explanatory Notes, Human Rights Bill 2018 (Qld) at 22.

⁶⁴ See, eg, *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [593]-[594] (Bell J). As to the broader significance of privacy and dignity in Australian law and the close link between them, see, *Clubb v Edwards* (2019) 267 CLR 171 at [49]-[51], [82] (Kiefel CJ, Bell and Keane JJ).

⁶⁵ (2010) 33 VAR 139 at [29] (Bell J), decision set aside on appeal but this statement of principle not doubted.

foundation for their effective participation in democratic society. The rights protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement.

56. It also coheres with the understanding of cognate rights under international law,⁶⁶ which make clear that the right extends to protecting reproductive autonomy.⁶⁷ That conclusion is not surprising. Decisions concerning one's own reproductive health and whether or not to have children and in what circumstances are intimately personal, and can have a profound impact on the course of a person's life.⁶⁸
57. Not every interference with privacy and family will be a limit on s 25(a); the provision is internally limited, extending only to unlawful or arbitrary interferences. "Arbitrary" extends beyond the concept of lawfulness to include any interference that is "capricious, or has resulted from conduct, which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought."⁶⁹ On the construction adopted by the Court of Appeal, s 22(2) unquestionably meets that description.
58. Section 30(1) is drawn from article 10(1) of the ICCPR. The Explanatory Notes to the Human Rights Bill 2018 explained, in terms strikingly similar to s 3 of the CSA, that "the underlying principle is that a person's rights should only be curtailed to the extent

⁶⁶ See further, *Pretty v United Kingdom* (2002) 35 EHHR 1 at [61], cited with approval in *Kracke* at [599] (Bell J).

⁶⁷ See, *Artavia Murillo et al v Costa Rica* (preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights, 28 November 2012) (concerning a general prohibition on IVF and the American Convention on Human Rights, including article 11); *Dickson v The United Kingdom* (2007) Grand Chamber of the European Court of Human Rights, Application No. 44362/04, 4 December 2007 ECHR (concerning prisoners' access to IVF and the European Convention on Human Rights, including article 8).

⁶⁸ The conclusion that the cognate right under the *Charter* did not incorporate "a right to become a parent" in *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 at [43]-[62] (Emerton J): (a) was decided in a very different statutory context, given the explanatory materials applicable in that case, that have no application here and (b) is in any event open to serious doubt—a decision not to include a positive right to found a family cannot, given the purposes and context of the *Charter*, tell against the significance of reproductive autonomy and choice to the right to privacy.

⁶⁹ *Thompson* at [55] (Kyrou, McLeish and Niall JJA), cited with approval in *Mizner v State of Queensland (Corrective Services)* [2025] QCA 169 at [211] (Crowley J, with whom Bond JA and Gotterson AJA agreed). See also, *Thompson* at [56] and *Mizner* at [214]: the question of arbitrariness does not mean that express consideration must be given to the matters set out in s 13(2) of the HRA.

necessary due to the confinement, reflecting that the punishment is intended to be limited to the deprivation of liberty.”⁷⁰

59. The right provides “certain minimum standards of treatment” for prisoners,⁷¹ recognising their particular vulnerability.⁷² Humane treatment involves “some level of benevolence or compassion and the infliction of the minimum of pain.”⁷³ Whereas the right not to be treated in a cruel, inhuman, or degrading way prohibits “bad conduct” towards any person, the cognate right in the *Charter* mandates “good conduct” towards prisoners.⁷⁴ Respect for the dignity of prisoners is guaranteed under the same conditions as for everyone else.⁷⁵ The right requires provision of medical treatment.⁷⁶
60. Section 37(1) is drawn from article 12 of the International Covenant on Economic, Social and Cultural Rights. There can be no doubt that the right to access health services without discrimination includes the right to access reproductive health services. The General Comment on the Right to Reproductive and Sexual Health under article 12 makes that clear, and specifically mandates a substantive equality approach.⁷⁷
61. Section 15 draws upon articles 2, 16 and 26 of the ICCPR. The fundamental value behind them is the equal dignity of every person; a natural incident of that dignity being that everyone equally enjoys their human rights, comes before the law equally,

⁷⁰ Explanatory Notes, Human Rights Bill 2018 (Qld) at 25.

⁷¹ Ibid.

⁷² *Castles* at [93], [108] (Emerton J).

⁷³ *Owen-D’Arcy* at [245] (Martin J).

⁷⁴ *Castles* at [99] (Emerton J). See further, United Nations Human Rights Committee, **General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)**, 44th sess, UN Doc HRI/GEN/1/Rev.1 (1992).

⁷⁵ *General Comment No 21* at [3].

⁷⁶ See generally, Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) at 300-303. See also, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015, particularly rule 24; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Resolution adopted by the General Assembly on 21 December 2010, particularly rule 10.

⁷⁷ Committee on Economic, Social and Cultural Rights, *General comment No 22 (2016) On the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC.22 (2016), especially at [25]: “The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles.”

and is protected by the law without discrimination.⁷⁸ The provision contains standalone rights as well as additional protection for other HRA rights.

62. Section 15(2) provides the right to the equal enjoyment of human rights ‘without discrimination,’⁷⁹ and is limited here, because the rights of women prisoners are differentially burdened by the blanket prohibition.⁸⁰ Sections 15(3) and (4) contain autonomous rights described as “distinct but overlapping”,⁸¹ where the first part of s 15(3) requires *formal* equality before the law—it proscribes arbitrary or discriminatory enforcement of the law. The second part of s 15(3), together with s 15(4), requires *substantive* equality in the content and operation of the law. There is both a negative and positive property to this injunction; a prohibition on discriminatory laws and a requirement for laws to afford equal and effective—even if this means differential treatment of persons whose situations are different—protection against discrimination.⁸² This right, too, is limited here.
63. Although these rights are each individually limited by the construction adopted below, the limitations on the rights are best understood collectively. The rights protect intersecting and mutually dependent interests. The denial of health services here has a consequential impact on bodily integrity and reproductive autonomy, which concerns not only privacy and dignity interests, but is inextricably linked to gender equality.

20 The limitations on rights cannot be demonstrably justified

64. On the Court of Appeal’s construction of s 22(2), the limits cannot be demonstrably justified. The impact of the blanket interference on rights is profound. Prisoners are denied the ability to control the most intimate decisions concerning their health and reproductive futures. That involves significant contraventions of ss 25(a) and 30(1), impacting the privacy, dignity, and autonomy of all affected. The impact is also discriminatory. Due to the biological window of fertility, female prisoners bear a

⁷⁸ *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286 at [277] (Bell J), also at [107] and [110].

⁷⁹ *Re Lifestyle* at [120], [280].

⁸⁰ See generally, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). The same can also be said for other cohorts; a male prisoner about to commence chemotherapy, for example, who is denied the ability to preserve his fertility.

⁸¹ *Re Lifestyle* at [126], [284].

⁸² *Re Lifestyle* at [114], [137]-[141], [143], [145], [283]-[288]; *Cemino v Cannon* (2018) 56 VR 480 at [129] (Ginnane J); *Thlimmenos v Greece* [2000] ECHR 162 at [44].

disproportionate burden of the prohibition, with profound impacts on their reproductive futures and health, which endure long after a term of imprisonment.⁸³

65. The purpose disclosed by the explanatory materials—preventing procreation whilst in prison—bears little if any rational relationship to egg freezing.⁸⁴ Even on a kind of rational basis review, that purpose is ‘smoked out’. Perhaps the controlling purpose is that identified by the First Law Officer of the State in her special leave response: “the purpose of the ban, at least in part, was to ensure incarceration ‘retains a punitive or deterrent element’.”⁸⁵ If so, that purpose is deeply *inconsistent* with a free and democratic society based on human dignity, equality, and freedom. The suggestion that interference with reproductive autonomy and health—borne disproportionately by women—could be a valid form of State punishment offends against the most basic notions of human dignity and equality.
66. It has also been suggested the blanket prohibition ensures “equity in decision making between prisoners” and relieves correctional authorities from making value judgments about who should be permitted to procreate.⁸⁶ But the equity described in the Explanatory Notes is equity in decisions about whether prisoners should be “allowed to procreate *while they are in prison*”. That purpose bears no rational relationship to egg freezing, which does not result in procreation. And the claim to equity is, in any event, really a claim for administrative convenience. It is no answer to a contravention of human rights to say they are contravened equitably; that simply speaks to the scale of the contravention. Once the claim is understood as one for administrative convenience, it becomes clear that the importance of preserving the rights must prevail over the importance of attaining the purpose,⁸⁷ particularly given that the appellant’s construction is an obvious and less restrictive way to achieve the asserted purpose.⁸⁸ Importantly, there has been no suggestion—nor any skerrick of evidence—that, beyond the administrative inconvenience involved at the decision-making stage, any

⁸³ HRA, s 13(a), (f).

⁸⁴ HRA, s 13(c).

⁸⁵ Attorney-General’s Special Leave Response dated 14 July 2026 at [20], quoting Explanatory Notes, Corrective Services Bill 2006 (Qld) at 20 and 23.

⁸⁶ J [95] (CAB 23); AJ [47] (CAB 48); Explanatory Notes, Corrective Services Bill 2006 (Qld) at 24.

⁸⁷ HRA, s 13(e)-(g).

⁸⁸ HRA, s 13(d).

further administrative inconvenience would be caused. The very premise of s 22(1) is that prisoners can access privately funded medical care.

67. The irresistible result is that, even if the Court of Appeal's construction were correct without regard to the HRA (which is denied), s 48(1) would require the Court to depart from that construction, to prefer a construction compatible with human rights.

PART VII — ORDERS SOUGHT

68. The appeal should be allowed. The orders of the Court of Appeal should be set aside. In their place, it should be ordered that the appeal to that Court be allowed, the orders of the primary judge be set aside, the first respondent's decision of 28 February 2024 be quashed, and the appellant's application be remitted to the first respondent for determination according to law. The first respondent should pay the appellant's costs of the appeal to this Court, of the appeal to the Court of Appeal, and of the proceeding in the Trial Division.

PART VIII — ESTIMATE OF TIME FOR ORAL ARGUMENT

69. The appellant estimates that the presentation of her oral argument will require 1.5 hours.

Dated: 19 August 2026

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ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to *Practice Direction No. 1 of 2024*, the Appellant sets out below a list of the statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Corrective Services Act 2006</i> (Qld)	1 Nov 2023 Reprint	ss 3 and 22	Version in force when delegate refused s 22 application	28 Feb 2024
2	<i>Human Rights Act 2019</i> (Qld)	Current	Pts 1–3	Version in force when delegate refused s 22 application	28 Feb 2024
3	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Current	s 32	Illustrative purposes	
4	<i>Assisted Reproductive Technology Act 2024</i> (Qld)	Current	ss 5 and 6	Illustrative purposes	
5	<i>Acts Interpretation Act 1954</i> (Qld)	Current	s 14A	Version in force when delegate refused s 22 application	28 Feb 2024