



HIGH COURT OF AUSTRALIA

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Details of Filing

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

BETWEEN:

RACHEL SMITH
Appellant

CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES
First Respondent

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ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
Second Respondent

and

QUEENSLAND HUMAN RIGHTS COMMISSION
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

20 **I Certification**

1. These submissions are suitable for publication on the internet.

II What Ms Smith seeks

2. By freezing her eggs, Ms Smith seeks to reduce risks to herself and her child if she decides to become a parent after she is released: **AS[7]; 1R[5]; 2R[7]**.
3. Ms Smith has not decided to become a parent; she may never decide to become a parent. She seeks to preserve the option of having a safe pregnancy at a future date, post-release; she does not seek treatment to procure a pregnancy now, pre-release.
4. Ms Smith has not made—and does not seek the first respondent's permission to facilitate—a choice to become a parent while she is in custody.
- 30 5. She wants to preserve her liberty to make a safe reproductive choice after she is released. She seeks her reproductive autonomy to ameliorate the effects of the biological clock.

III The text, syntax and grammar of s 22

6. Grammatical meaning and legal meaning differ. The former assists to determine the latter, but they are not coincident.

7. The first and second respondents contend that, grammatically, the words “assisted reproductive technology” can only mean technology or procedures employed for the purpose of assisting reproduction: **1R**[11], [22]; **2R**[13]. They treat any technology deployed for the purpose of (directly or indirectly) assisting a person to reproduce (now or in the future) as within the scope of the phrase.
8. The contention is flawed even as a matter of grammar and syntax:
 - (a) There is no grammatically coherent way to interpret “assisted reproductive technology” – every construction involves grammatical compromise.
 - 10 (b) The compromise that the first and second respondents choose is grammatically incoherent – it converts an adjective into a verb, introduces the concept of purpose and fails to grapple with the bracketing paradox.
 - (c) By so doing, they broaden the potential scope of the phrase radically, to encompass a host of treatments and interventions.
9. The most grammatically coherent meaning of “assisted reproductive technology” is technology apt to achieve reproduction, e.g. artificial insemination or IVF: **AS** [8], [21].
10. That meaning is also consistent with common usage, legislative usage and (although not universally) expert usage. The meaning can *at least* be described as not foreclosed by the grammatical certainty of the phrase.
- 20 **IV The purpose of s 22 is clear**
 11. The purpose of s 22 is to prevent prisoners from using technological assistance to “procreate while they are in prison”: **Explanatory Notes at 24; AS** [37].
 12. Section 22 was enacted to address the mischief of prisoners using artificial means to procreate in circumstances where they were already banned from using natural means to procreate: **AS** [38].
 13. The mischief was not participation in “a kind of technology” (**2R**[15]) as if the technology were harmful *per se*; the mischief was the *product* of the technology—procreation.
 14. The appellant’s purpose: (i) serves the stated purpose of the CSA (**s 3(1)–(3)**); (ii) reflects the Division in which s 22 is located (titled ‘Management of Prisoners’); and
30 (iii) coheres with the rehabilitative aspect of punishment.
 15. Section 22’s purpose is not to prevent prisoners from becoming parents *at all*, including post-release: cf **1R** [22]–[23]; **ARep** [8]. Regardless, Ms Smith has not applied to become a parent.

16. Nor is s 22's purpose to punish and deter: cf **2R [33], [62]; ARep [9]**. There is no basis to conclude that Parliament intended to stultify prisoners' prospects of becoming parents post-release by preventing them from preserving their reproductive health during custody. That purpose is anathema to the rehabilitative aspect of punishment.
17. The first and second respondents' concerns about gametes outside prison walls becoming children is illusory and unlikely, no evidence has been led to justify the concern and it is, in any event, wholly divorced from the facts of this case.

V Section 48 and the wider context compel the appellant's construction

10 Section 48

18. The appellant's construction (which allows prisoners to preserve their reproductive health while in custody) is consistent with the purpose of s 22 (which is to prevent prisoners from procreating while in custody). So, there is no bar to applying s 48.
19. The appellant's construction is more compatible with human rights than the first and second respondents' construction. Theirs limits human rights in an unjustifiable way: (i) the right to privacy: **HRA, s 25(a); AS [55]-[57]**; (ii) the right to humane treatment in custody: **HRA, s 30; AS [58]-[59]**; (iii) the right to healthcare: **HRA, s 37; AS [60]**; (iv) the right to equality: **HRA, s 15; AS [61]-[63]**. Section 48 mandates the appellant's construction.

20 Wider context, including principle of legality

20. The first and second respondents' construction has a dramatic effect on the rights and lives of Ms Smith in particular and women prisoners in general. That effect is part of the wider context in which their construction is to be assessed.
21. The first and second respondents' construction interferes with Ms Smith's right to bodily integrity and autonomy—her right to choose what happens to her own body: *Marion's Case* at 254 **JBA Part C vol 5 at 1419 (Mason CJ, Dawson, Toohey, Gaudron J); JBA 1431-1432 (Brennan J); Potter v The King** at [55] **JBA Part D vol 7 at 2150; YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs** (2024) 99 ALJR 1 **JBA Part D Vol 8 at 2351**.
- 30 22. A statute will not be interpreted to infringe rights unless clear words are used. There are no such words here.



S Holt KC
07 3369 5907
sholt@8pt.com.au



P Morreau KC
07 3367 2537
pmorreau@8pt.com.au



J Underwood
07 3511 7169
junderwood@8pt.com.au



K Brown
03 9225 8444
Katharine.brown@vicbar.com.au

