



HIGH COURT OF AUSTRALIA

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

BETWEEN:

RACHEL SMITH
Appellant

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CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES
First Respondent

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
Second Respondent

and

QUEENSLAND HUMAN RIGHTS COMMISSION
Third Respondent

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APPELLANT’S REPLY

PART I — CERTIFICATION

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

PART II — REPLY

2. Is it to be inferred that, by enacting s 22(2) of the CSA, Parliament intended (a) to prohibit prisoners from using technology to preserve their reproductive health whilst in custody, **or** (b) to prohibit them from using technology to assist them to procreate whilst in custody?¹ That is the question at the heart of this appeal.
3. It is one of inference because the words alone do not settle it. The first and second respondents submit otherwise: fertility-preserving procedures—egg freezing in particular—*necessarily* fall within ‘assisted reproductive technology’ because, as a matter of “ordinary grammar[r]”, they are technological procedures whose “ultimate purpose” is “assisting reproduction (now or potentially in the future)”.² The submission is misguided.

¹ On inferring legislative intent or purpose see: *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 (Kitto J); *Singh v Commonwealth* (2004) 222 CLR 322 at [19] (Gleeson CJ).

² RS2 [13]; RS1 [16], [20].

4. Its fundamental flaw is to assume that words have a fixed “ordinary meaning”. They do not: meaning depends on the context and purpose for which a word is used. ‘Assisted reproductive technology’ is a classic example: medical dictionaries use it for one purpose, Parliaments for another, individuals for others still. The search for a fixed, ordinary meaning is quixotic. That is the trap into which the courts below and the first and second respondents have fallen: they treat this mass noun as having settled semantic content, then ask whether context and purpose adjust it—splitting the interpretive process in two. Ascertaining meaning involves a concurrent appreciation of the content encoded in the words *and* the context and purpose for which they are deployed, as this Court has said for decades. The appellant’s recourse to medical dictionaries and to the *Assisted Reproductive Technology Act 2024* (Qld) makes no fortress of the dictionary, nor a friend of *in pari materia*; it makes a more basic point: the meaning of the phrase is open.
5. Nor is context confined to a provision’s place in a statute, or to the legal landscape generally: it encompasses the practical effects of an interpretation on rights and lives. Statutory interpretation is not the solving of linguistic puzzles, as if the result were free of real-world consequence. When Parliament speaks, it also acts.³ That practical effect is what underlies and justifies what we call the principle of legality—and why it cannot be relegated to a later stage of the analysis. Yet that is the effect of the first and second respondents’ submissions. At root, it is why they are wrong.
6. Purpose is the pivot on which this case turns. The appellant submits that it was to prohibit prisoners from “procreat[ing] whilst in custody”—which is how Parliament explained what it was doing. The first and second respondents invite a broader purpose: to absolve “the Chief Executive of being required to make difficult value judgments about whether individual prisoners should be parents”;⁴ to ensure that imprisonment “remain[ed] punitive and deterring”.⁵ Both invitations should be rejected.
7. The first is impossible to square with Parliament’s stated purpose. It declared:⁶

A clear prohibition ensures equity in decision making between prisoners and does not require correctional authorities to make value judgments as to

³ See generally JL Austin, *How To Do Things With Words* (Clarendon Press, 1962).

⁴ RS1 [22]-[24], [30].

⁵ RS2 [33]; see also RS2 [62].

⁶ Explanatory Notes, *Corrective Services Bill 2006* (Qld) at 24; extracted at RS1 [29].

whether individual prisoners should be allowed to procreate while in prison and are suitable to parent and provide for a child.

8. The first respondent insists the sentence be read as a whole (as it must), and says that, so read, Parliament's purpose was to relieve correctional authorities from "making decisions and value judgments about whether individual prisoners should be allowed, and are suitable, to become a parent" *at all*.⁷ It discloses nothing of the sort: to read it that way is to read it as if the words "allowed to procreate while in prison" were missing. Much as the first respondent would like those words to disappear, they are there. The purpose was designedly narrower: to relieve authorities from judging whether prisoners should be "allowed to procreate while in prison"—which is not what Ms Smith seeks. Nor do the words "suitable to parent and provide for a child" save the day: they attach to the scenario the sentence contemplates—procreation in prison—not to reproductive choices after release.
9. The second posited purpose—that incarceration retain a punitive element—is alarming. It amounts to the proposition that Parliament's purpose was, at least in part, that female prisoners' reproductive health be left to deteriorate over their custodial term *as a punishment to them and a deterrent to others*. So cast, the purpose is viscerally inconsistent with a free and democratic society based on human dignity, equality and freedom.⁸ Attributing it to Parliament would warrant a statement of the clearest intent. There is none. Parliament doubtless intended to stop prisoners using technology to "procreate while in prison"; there is not a hint of the far more radical step of immiserating them by depriving them of the liberty to preserve their reproductive health.
10. The first and second respondents' remaining core argument is that the appellant's construction is not fit for purpose.⁹ Here they deploy the *in terrorem* contention that prisoners will deceive prison authorities, applying to freeze their gametes for fertility preservation whilst secretly intending to procure surrogate pregnancies in women outside the prison walls.¹⁰ It should be rejected. It is unfounded in fact: nothing

⁷ RS1 [30].

⁸ HRA, s 13(2)(b).

⁹ RS1 [37]-[42] and fn 39.

¹⁰ The surrogacy pathway could not in any event result in the appellant becoming a parent whilst in custody. Unless and until a parentage order is made, the parentage presumptions under the *Status of Children Act 1978* (Qld) continue to apply, so that the birth mother remains the child's parent: *Surrogacy Act 2010* (Qld), s 17. A parentage order may be made only if the court is satisfied that the child has

suggests that this is what Ms Smith intends, or any other prisoner. It is unfounded in principle: statutes are not construed to limit rights on the footing that, otherwise, individuals might deceive authorities charged with their enforcement. And it is unfounded in the scheme: s 22(2) sits in Division 1 (Management of prisoners generally) of Part 2, and neither pathway posited would affect the management of prisoners other than modestly and indirectly.

11. Aside from these, the first and second respondents make a miscellany of discrete points, all of which fail. *First*, they call in aid the statute is always speaking rule;¹¹ but it fails at the threshold. It is not only the denotation of ‘assisted reproductive technology’ that has changed over time, but its connotation.¹² In 2006, the phrase had not reached mainstream dictionaries, and egg freezing was a burgeoning, experimental technology.¹³ To the extent it had an accepted meaning then, it contemplated conception-directed procedures, not the *preservation* of fertility. Egg freezing is not a new instance of the former: it is a meaningfully different category. In any event, the rule does not displace the principle of legality: it is one thing that language changes as technology advances, another that fundamental rights may be eclipsed by semantic extension absent Parliamentary attention and sanction. Parliament did not “squarely confront” the impact of a blanket prohibition upon fertility preservation:¹⁴ because egg freezing was not mainstream, the breadth of the provision’s application passed unnoticed in the democratic process.
12. *Secondly*, they frame the appellant’s case as requiring positive rights, asserting that s 22(2) simply does not “alleviate” the “natural consequences” of imprisonment.¹⁵ That is not the correct frame. Under the CSA prisoners retain all basic entitlements save those necessarily diminished by imprisonment; under s 22(1) a prisoner may apply for private health services, and a decision on that application is subject to s 58 of the

resided with the applicant for at least 28 consecutive days before the day the application was made, was residing with the applicant when the application was made, and is residing with the applicant at the time of the hearing: s 22(2)(b)(i)-(iii). A prisoner in custody could satisfy none of those conditions.

¹¹ RS1 [17]; RS2 [21].

¹² *Lake Macquarie Shire Council v Aberdare City Council* (1970) 123 CLR 327 at 331 (Barwick CJ, Menzies J agreeing).

¹³ See *Oxford English Dictionary*, ‘reproductive technology’, entry history (first entry 2009); AS [24]. See also *Macquarie Dictionary* (Fourth ed, 2005), *Macquarie Dictionary* (Fifth ed, 2009): neither phrase appears in either edition.

¹⁴ RS2 [43]; cf RS1 [52]-[53].

¹⁵ RS2 [33]; see also RS2 [62].

HRA.¹⁶ Section 22(2) creates a *departure* from that position, by legislative prohibition. So viewed, it negatively interferes with human rights. That some *facilitation* may be required is not to the point: negative rights often require it, and the line between the positive and negative aspects of rights is neither precise nor useful.¹⁷ Nor is the answer on s 25(a) of the HRA to the point: Ms Smith asserts no positive right to become a genetic parent, and the question is whether s 25(a) is to be read down to exclude interference with decisions about fertility preservation. It is not.¹⁸

13. Relatedly, the second respondent's submissions about public expense are surprising.¹⁹

10 It has never been suggested that the State bears any positive obligation to fund the treatment. Ms Smith has always been willing and able to pay for all of it herself. Private funding is the very premise of s 22.

14. *Thirdly*, they dismiss the common law right to bodily integrity as irrelevant.²⁰ Not so. Bodily integrity is often conceived as personal inviolability or security, but it is not so limited: the values it protects are autonomy and dignity. Ms Smith does not assert a right to have her "personal choices facilitated". She asserts a right to make decisions about her own body—decisions with enduring medical and personal consequences for the course of her life—and asks respect for her liberty and dignity to make them herself, after release. Queensland law gives her those rights. Parliament ought not be taken, by
20 the sidewind of s 22(2), to have taken them away.

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¹⁶ CSA, s 3(2); HRA, ss 58, 9(1)(i).

¹⁷ See further *Dickson v United Kingdom* (2008) 46 EHRR 41 at [50], [70]-[71].

¹⁸ RS2 [57]-[59], relying on *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at [62] (Emerton J). Emerton J's view that the cognate privacy right did not extend to a right to become a parent rested on that Act's bespoke history—an explanatory memorandum stating that "it is not Parliament's intention to create a right to found a family in the Charter". Nothing of the kind attends the HRA.

¹⁹ RS2 [60]. See ABFM 5 [10]; CSA, s 22(4).

²⁰ RS2 [38]-[42]; the "personal choices facilitated" submission is at RS2 [40].