



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B58/2026

BETWEEN:

**RACHEL SMITH**  
Applicant

and

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

and

**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
Second Respondent

and

**QUEENSLAND HUMAN RIGHTS COMMISSION**  
Third Respondent

**SECOND RESPONDENT'S SUBMISSIONS**

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Filed on behalf of the second respondent

31 August 2026

## **PART I: CERTIFICATION**

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

## **PART II: ISSUES**

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2. Under s 22(2) of the *Corrective Services Act 2006* (Qld) (**CS Act**), a prisoner in a corrective services facility cannot participate in assisted reproductive technology.
3. The appellant was convicted of numerous serious drug offences<sup>1</sup> and is a prisoner in a corrective services facility. She wants to have her eggs extracted and frozen. That would involve the following steps (probably being repeated two or three times):<sup>2</sup>
  - (a) the appellant receiving, under medical supervision, a series of injections of drugs to stimulate egg production, stop ovulation and initiate the process of egg maturation;
  - (b) the appellant undergoing a medical procedure to extract those eggs—this involves the use of an ultrasound probe which assists in the guiding of a needle, which then allows each follicle to be aspirated by suction;
  - (c) each extracted egg being examined and stripped of its cumulus (surrounding cells) by a scientist; and
  - (d) the eggs being frozen by vitrification and stored.
4. The issue presented by this appeal is whether what the appellant wants to do would amount to participating in assisted reproductive technology. The primary judge, and the unanimous Court of Appeal, held that it would.
5. That conclusion was correct. The appeal should be dismissed.

## **PART III: SECTION 78B NOTICE**

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

## **PART IV: FACTS**

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7. The Appellant's recitation of the facts in **AS [7]-[11]** is accurate.

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<sup>1</sup> Appellant's book of further materials (**ABFM**) 7.

<sup>2</sup> Primary judgment (**PJ**) [5], [59]-[62] (**CAB 7, 17-18**); Appeal judgment (**AJ**) [20] (**CAB 42**).

## PART V: ARGUMENT

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### Summary

8. Section 22 of the CS Act is headed ‘Private medical examination or treatment’. Subsection (1) allows a prisoner to apply in writing to the chief executive for approval to be examined or treated by a health practitioner nominated by the prisoner.
9. Section 22(1) is subject to subsection (2). Subsection (2) provides that a prisoner in a corrective services facility cannot ‘participate in assisted reproductive technology’ or ‘apply for the chief executive’s approval to participate in assisted reproductive technology’.
10. The appellant’s case is that a prisoner participates in assisted reproductive technology for s 22(2) *only* if a person—but not necessarily the prisoner—undergoes a procedure which is ‘apt to achieve reproduction’ or involves an ‘attempt to procure a pregnancy’ (AS [21]<sup>3</sup>). That is a meaning divorced from the text, context and (true) purposes of s 22(2). The principle of legality and s 48 of the *Human Rights Act 2019* (HR Act) do not assist the appellant, for neither principle permits s 22(2) to be attributed with a meaning which would undermine, rather than further, the provision’s purposes.

### The text and its natural and ordinary meaning

11. The appellant attacks the primary judge and the Court of Appeal as taking an impermissibly ‘literal’ approach to the construction of s 22(2) (AS [14], [17]). But neither court did so. Both the primary judge and the Court of Appeal construed the words actually used in s 22(2),<sup>4</sup> in light of their context and purpose.<sup>5</sup> To begin with the ordinary meaning of words and find that meaning confirmed by context and purpose is not ‘wrong as a matter of interpretative principle’ (AS [17]). It is orthodox.<sup>6</sup>
12. That orthodox analysis does not ‘fail’ on the basis that the phrase ‘assisted reproductive technology’ lacks an ordinary meaning (AS [18]). On the contrary, the grammatical meaning of the words, the dictionary definitions, and the material before the primary

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<sup>3</sup> See also the appellant’s Special Leave Reply, [5].

<sup>4</sup> AJ [30], [39] (CAB 44, 46); PJ [35], [56] (CAB 13, 17).

<sup>5</sup> AJ [30]-[31], [34]-[36] (CAB 44-46), [39]-[47] (CAB 46-48); PJ [37]-[38] (CAB 14), [85]-[95] CAB 21-23).

<sup>6</sup> ‘[A] court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning’: *Masson v Parsons* (2019) 266 CLR 554, 572 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Esso Australia v Australian Workers Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

judge as to common usage all indicate an ordinary meaning of ‘assisted reproductive technology’ which plainly accommodates egg extraction and freezing.

13. The ordinary grammatical meaning of ‘assisted reproductive technology’ is technology employed for the purpose of *assisting* reproduction (cf **AS [21]**). Technological steps preparatory to a step that is capable of producing a pregnancy fall within that grammatical meaning, because those preparatory steps also *assist* reproduction. Likewise, to apply technology to promote the future possibility of reproduction is to apply technology to *assist* reproduction.
14. The appellant wants to undergo processes whereby egg production is stimulated and eggs are extracted. Her intention is that those eggs will then be frozen. The first two steps—egg production and extraction—involve technology and are necessary preconditions to a step which is capable of producing a pregnancy. The last step—egg freezing—is a technology employed to assist reproduction to occur in the future.<sup>7</sup> As the primary judge put it: ‘All of these processes involve the use of technology and are applied solely for the purpose of assisting in reproduction’.<sup>8</sup> The Court of Appeal made the same point slightly differently: ‘the only purpose for extracting eggs and freezing them is to have them available for reproduction purposes in the future’.<sup>9</sup>
15. The appellant suggests that the Court of Appeal’s observation ‘misses the mark’ because having eggs ‘available’ for reproduction is ‘conceptually distinct’ from having them ‘*for* reproduction’ (**AS [28]**). But it is the appellant’s submission which misses the mark. The relevant question is whether the technologies which make eggs *available* for reproduction are technologies which are employed for the purpose of assisting reproduction. The answer to that question is ‘yes’. The appellant seeks to avoid this result by approaching s 22(2) as if it referred to participation in technologically assisted *reproduction*. But s 22(2) is not concerned with participation in a kind of reproduction. It is concerned with participation in a kind of technology: technology that would *assist* (not produce) reproduction.

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<sup>7</sup> As the appellant’s evidence shows, ‘egg freezing is an effective, accepted and standard treatment that has the potential to improve cumulative live birth outcomes for women’: Anusch Yazdani, ‘Expert Report’ (14 June 2024) [22] (**ABFM 28**).

<sup>8</sup> PJ [63] (**CAB 18**).

<sup>9</sup> AJ [58] (**CAB 50**).

16. That ordinary grammatical reading of the words actually used in s 22(2) is reinforced by the dictionary definitions and materials which were before the primary judge (cf **AS [18(a) and (b)]**).
- (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’. To extract and freeze a woman’s eggs so that she may avoid age-related infertility is a treatment of infertility; both processes involve the manipulation of eggs.<sup>10</sup>
  - (b) The Merriam-Webster Medical Dictionary defines the phrase as ‘the use of technology to assist human reproduction in the treatment of infertility’, ‘especially: a procedure (such as invitro fertilization or gamete intra fallopian transfer) that involves the removal of eggs from an ovary and fertilization by sperm in vitro’. That definition uses different words from, but is consistent with, the Oxford definition. It accommodates the extraction and freezing of eggs.
17. The dictionaries, therefore, belie the appellant’s claim that ‘assisted reproductive technology’ lacks a ‘settled ordinary meaning’ (**AS [18]**), as well as her claim that the ‘more natural’ meaning of the term is limited to procedures which attempt to procure a pregnancy. Both dictionary definitions suggest a meaning which encompasses egg extraction and egg freezing.
18. The appellant also refers to several documents that were before the primary judge: the 2023 National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology (**NHMRC Guidelines**) (**AS [18(c)]**); the 2008 Australian Institute of Health and Welfare’s assisted reproduction series (which reported on ART in 2006) (**AIHW 2008**) (**AS [18(d)]**); and a glossary published by the Reproductive Technology Council (**AS [18(e)]**). Further, she now refers to several other documents concerning the history of egg freezing technologies and their use in Australia which were not before the primary judge (**AS [24], fn 23**).
19. None of these documents assist the appellant. They *do* ‘speak with one voice’ (cf **AS [19]**)—against her case. Each document indicates that the term ‘assisted reproductive

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<sup>10</sup> See PJ [74] (**CAB 19**).

technology’ is widely used and understood as including egg extraction and freezing.<sup>11</sup> None limit the term to steps attempting to procure a pregnancy. In particular:

- (a) The NHMRC Guidelines contain a glossary which defines ‘assisted reproductive technology’ as the ‘application of laboratory or clinical techniques to gametes and/or embryos for the purposes of reproduction’.<sup>12</sup> That definition is wide enough to encompass egg extraction and freezing. Indeed the NHMRC Guidelines explicitly describe ‘fertility preservation’ as an ‘ART practice’.<sup>13</sup>
- (b) The AIHW 2008 describes the ‘main ART procedures’ as IVF,<sup>14</sup> ICSI<sup>15</sup> and GIFT.<sup>16</sup> The appellant seeks to make something of the fact that each of those procedures involves fertilisation (**AS [18](d)**). The significance of ‘fertilisation’ for her argument is unclear, given it may occur without any attempt to procure a pregnancy (such as when an embryo is created and frozen<sup>17</sup>). Moreover, the AIHW 2008 makes plain that these ‘main’ assisted reproductive technologies do not define the field.<sup>18</sup>
- (c) Finally, the Reproductive Technology Council’s glossary defines the phrase to include ‘a range of methods used to circumvent human infertility’, including IVF, GIFT and artificial insemination (**SRBFM 228**). Egg extraction and freezing is a method to ‘circumvent human infertility’.

<sup>11</sup> PJ [82] (**CAB 20**).

<sup>12</sup> NHMRC Guidelines, 2 (Second respondent’s book of further materials (**SRBFM 38**)).

<sup>13</sup> See Chapter 8, ‘Practices that raise specific ethical issues’, p 42 (**SRBFM 78**). Moreover, the section of the Guidelines headed ‘Ethical Guidelines for the Clinical Practice of ART’ covers the extraction, freezing and storage of gametes: see [4.1.3], [4.2.6], [4.6.4] (**SRBFM 58, 60, 65**). Likewise, the definition contained in the 2021 Code of Practice for Assisted Reproductive Technology Units (p 5), published by the Fertility Society of Australia and New Zealand (to which the appellant does not refer, but which was also before the primary judge) contains a definition of assisted reproductive technology which expressly includes ‘embryo or gamete cryopreservation’ (**SRBFM 8**).

<sup>14</sup> ‘In-vitro fertilisation’: ‘in which eggs and sperm are combined in the laboratory for fertilisation outside the body and replaced in the uterus’ (AIHW 2008, 1; **SRBFM 166**).

<sup>15</sup> ‘Intracytoplasmic sperm injection’: ‘in which a single sperm is injected into the egg for fertilisation outside the body and replaced in the uterus’ (AIHW 2008, 1; **SRBFM 166**).

<sup>16</sup> ‘Gamete intrafallopian transfer’: ‘in which eggs and sperm are placed in the fallopian tubes for fertilisation inside the body’ (AIHW 2008, 1; **SRBFM 166**).

<sup>17</sup> Embryos are routinely created and frozen for later use: AIHW 2008, 5; **SRBFM 170**.

<sup>18</sup> The AIHW 2008 describes ‘ART’ as encompassing ‘procedures and techniques involving the manipulation of gametes, zygotes and embryos’: AIHW 2008, 1; **SRBFM 166**). The absence of any specific reference to egg freezing in AIHW 2008 is likely explained by the fact that in 2006 egg freezing was emerging as a commercially available technology in Australia: see Carol Nader, ‘The hot topic: freezing fertility’, *The Age* (online, 25 March 2006) <<https://www.theage.com.au/national/the-hot-topic-freezing-fertility-20060325-ge20a8.html>>. The AIHW report published in 2011 (**AS [24], fn 23**) shows that by 2009, egg freezing had been recognised as a ‘new ART treatment type’: AIHW, *Assisted Reproductive Series No 15: Assisted Reproductive Technology in Australia and New Zealand* (2011) 2.

20. There is no ‘awkwardness’ to fitting egg freezing within the ‘nomenclature of infertility practice’ or ‘assisted reproductive technology’ (cf **AS [24]**). On the contrary, egg freezing is now considered ‘an important component of human assisted reproductive technology’.<sup>19</sup> The fact that a woman who has had her eggs frozen might not be described as having undergone ‘assisted reproduction’ is hardly to the point (**AS [27]**, emphasis added). The relevant question is whether that woman would be described as having ‘participated in assisted reproductive technology’.
21. The appellant gains nothing from the observation that when the CS Act was enacted in 2006, egg freezing was an emerging technology (**AS [24]**<sup>20</sup>). If the appellant intends to submit that the phrase ‘assisted reproductive technology’ in s 22(2) is limited to conception-directed procedures because in 2006 the ‘salient exemplars’ of that technology were conception-directed, that submission should be rejected. Legislation is always speaking: ‘if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included’.<sup>21</sup> Nor is it apparent how the connotation of ‘assisted reproductive technology’ in 2006 could have been only technology that is ‘conception-directed’.<sup>22</sup>
22. The appellant’s supposedly ‘modest’ reliance on the *Assisted Reproductive Technology Act 2024* (Qld) is mistaken (**AS [26]**). The appellant suggests that because Parliament expressly included egg extraction and freezing in the definition of ‘ART service’, those procedures must be excluded from the ordinary meaning of ‘assisted reproductive technology’.<sup>23</sup> That does not follow. The *Assisted Reproductive Technology Act*—an Act that is not *in pari materia* with the CS Act—is irrelevant.
23. The text, then, is *not* ‘neutral’: **AS [29]**. As the primary judge and the unanimous Court of Appeal held, the words ‘assisted reproductive technology’ have an ordinary meaning which includes egg freezing and extraction. A court may depart from the ordinary meaning of words, if it is ‘plain’ that Parliament intended a provision to have a different

<sup>19</sup> Debra A Gook, ‘History of oocyte cryopreservation’ (2011) 23 *Reproductive BioMedicine Online* 281, 281.

<sup>20</sup> Egg freezing may have been ‘formally’ classed as ‘experimental’ by the American Society for Reproductive Medicine until 2012: **AS [24]**, fn 23. Notwithstanding, egg freezing appears to have been available in Australia in 2006: see Nader, above n **Error! Bookmark not defined.**. See also Viv Groskop, ‘Babies on ice’, *The Guardian* (online 4 March 2006) <<https://www.theguardian.com/society/2006/mar/04/health.familyandrelationships1>>.

<sup>21</sup> *Aubrey v The Queen* (2017) 260 CLR 305, 321 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

<sup>22</sup> *Lake Macquarie Shire Council v Aberdale County Council* (1970) 123 CLR 327, 331 (Barwick CJ).

<sup>23</sup> See *Assisted Reproductive Technology Act 2024* (Qld) ss 5, 6.

meaning.<sup>24</sup> In this case, however, context and purpose reinforce the conclusion that if the appellant undergoes the procedures outlined at [3] above, she will ‘participate in assisted reproductive technology’.

### Context and purpose

24. As this Court has recognised, the identification of the purpose of a law is itself ‘a process of construction’.<sup>25</sup> It involves ‘considering the meanings of statutory words in the provision, meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective’.<sup>26</sup> The purpose should be ‘identified at a higher level of generality than the meaning of the words of the provision, focusing instead on the “mischief” to which the provisions are directed’.<sup>27</sup> The purpose of a law is, generally, distinct from the means utilised to give effect to that purpose.<sup>28</sup> Instead, it equates to the ‘end’ or ‘object’ of the law—in other words, what the law is designed to achieve in fact.<sup>29</sup>
25. The appellant submits that the purpose of s 22(2) is to prevent prisoners procreating whilst in prison by artificial means (**AS [38]**). The submission ought to be rejected, for several reasons.
26. **First**, it ignores the text. Text does not define the purpose, but it does inform it.<sup>30</sup> As explained above, the text indicates that Parliament’s concern was incarcerated prisoners’ participation in a certain kind of technology, not procreation *per se*.
27. **Second**, it ignores the context. Section 22(2) is concerned with the physical management of prisoners whilst they are in prison. It forms an exception to s 22(1), which provides that a prisoner ‘may apply in writing to the chief executive to be examined or treated by a health practitioner nominated by the prisoner’. Under s 22(3),

<sup>24</sup> *Masson v Parsons* (2019) 266 CLR 554, 572 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Eso Australia v Australian Workers Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

<sup>25</sup> *Hopper v Victoria* (2026) 100 ALJR 582, 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ). See also 604 [91] (Edelman J).

<sup>26</sup> *Ruddick v Commonwealth* (2022) 275 CLR 333, 384 [133] (Gordon, Edelman and Gleeson JJ), quoting *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J).

<sup>27</sup> *Hopper v Victoria* (2026) 100 ALJR 582, 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

<sup>28</sup> *Hopper v Victoria* (2026) 100 ALJR 582, 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

<sup>29</sup> *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1364-5 [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1019 [41] (Gageler CJ).

<sup>30</sup> *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1019-20 [43] (Gageler CJ), *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Ruddick v Commonwealth* (2022) 275 CLR 333, 384 [133] (Gordon, Edelman and Gleeson JJ); *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1364-5 [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

the chief executive may approve the application, if satisfied of certain matters (including that the application is not for an ‘examination or treatment for participating in assisted reproductive technology’). Both subsections (1) and (2) apply, expressly, only to prisoners ‘in a corrective services facility’.<sup>31</sup> That context makes it unlikely that the words ‘assisted reproductive technology’ refer to procedures that attempt to procure a pregnancy (including in a person outside prison), but do not refer to procedures undergone by a prisoner in prison, such as ovarian stimulation and egg retrieval.

28. **Third**, the appellant relies heavily on three passages of the Explanatory Notes to the Corrective Services Bill to support her identified purpose (AS [34]-[38]). That reliance is misplaced.
29. The Explanatory Notes set out that one of the main policy objectives of the Bill was to ‘clarify that certain human entitlements are necessarily diminished as a result of imprisonment’.<sup>32</sup> The Notes make clear that the prohibition on prisoners participating in assisted reproductive technology was directed to fulfilling that objective.<sup>33</sup>
30. The Explanatory Notes then consider the ‘fundamental legislative principles’ set out in the *Legislative Standards Act 1992* (Qld).<sup>34</sup> Those principles include, in s 4(2), that legislation have sufficient regard to the ‘rights and liberties of individuals’. The Notes explain that while the prohibition on assisted reproductive technology may breach that requirement, the breach is justified by the countervailing consideration that prisoner’s access to assisted reproductive technology would give rise to a ‘plethora of social and financial issues’. One of those issues was prisoners’ access to a technology to which ‘free citizens’ did not necessarily have access, thereby undermining the ordinary consequences of imprisonment.<sup>35</sup> Another was the requirement for correctional authorities to make value judgments—not only about whether individual prisoners

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<sup>31</sup> That contrasts with other provisions in the same division Chapter 2 (‘Prisoners’), part 2 (‘Management of prisoners’), division 1 (‘Management of prisoners generally’), such as those about marriage of prisoners and civil partnerships (ss 26, 26A), change of a prisoner’s name (s 27) and the alteration of a prisoner’s recorded sex (s 27AA)—which apply to any prisoner, including a prisoner on parole. Those provisions apply to a ‘person in the chief executive’s custody’, which includes a prisoner on parole: see Schedule 4 Dictionary, definition of ‘prisoner’.

<sup>32</sup> Explanatory Notes, Corrective Services Bill 2006 (Qld) 1 (Explanatory Notes).

<sup>33</sup> Explanatory Notes, 14-15.

<sup>34</sup> Explanatory Notes, 19.

<sup>35</sup> Explanatory Notes, 19-20, 24, see also at 15.

should be allowed to ‘procreate while in prison’, but also about whether a prisoner is ‘suitable to parent and provide for a child’.<sup>36</sup>

31. It is true the Notes state that under the previous Act, ‘it was never intended that prisoners should be able to conceive children whilst in custody’.<sup>37</sup> This implies that s 22(2) was intended to achieve the same result. But it does not imply that this was *all* that s 22(2) was intended to achieve. Indeed, in the next sentence the Notes refer to the 1988 Kennedy review. When that review recommended against conjugal visits, it did so partly from the need to maintain the ordinary consequences of imprisonment.<sup>38</sup> Any mischief which might arise from prisoners procreating or becoming parents whilst in prison went unmentioned. That is a ‘symmetry’ which tells against the appellant’s argument (cf **AS [38]**).
32. **Fourth**, s 3 of the CS Act does not assist in fixing the meaning of s 22(2) (**AS [30]–[33]**). Section 3(1) provides that the CS Act recognises that ‘an offender’s entitlements, other than those that are necessarily diminished because of imprisonment, should be safeguarded’. As is evident from the extrinsic materials, Parliament was intending by s 22(2) to make clear that participation in ‘assisted reproductive technology’ is an entitlement ‘necessarily diminished’ by imprisonment. It is therefore difficult to understand how s 3(2) can inform the meaning of the phrase ‘assisted reproductive technology’.<sup>39</sup>
33. Section 22 alleviates what would otherwise be a consequence of imprisonment: a prisoner’s loss of access to private health care. Section 22(2) means that ‘alleviation’ does not apply in respect of assisted reproductive technology. Parliament chose not to alleviate an effect of imprisonment, in part to ensure incarceration retained ‘a punitive and deterrent element’.<sup>40</sup>
34. Section 3(3) says that the CS Act recognises ‘the need to respect an offender’s dignity’ (s 3(3)(a)) and ‘the special needs of some offenders by taking into account...an offender’s age, sex or cultural background’ (s 3(3)(b)). The relevance of s 3(3) is, at

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<sup>36</sup> Explanatory Notes, 24.

<sup>37</sup> Explanatory Notes, 23–24.

<sup>38</sup> JJ Kennedy, *Commission of Review into Corrective Services in Queensland 1988* (Final Report, August 1988) 178.

<sup>39</sup> As Gleeson CJ observed in *Carr v Western Australia* (2007) 232 CLR 138, 143 [5], a statutory purposes clause ‘may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act.’

<sup>40</sup> Explanatory Notes, 20.

best, doubtful (**AS [31]-[32]**). As to s 3(3)(a), specific provisions of the CS Act recognise the need to respect a prisoner's dignity.<sup>41</sup> Section 22(2) is not expressed to be such a provision. As to s 3(3)(b), on any view, s 22(2) is not a means by which the CS Act recognises the special needs of some offenders by taking into account an offender's age, sex or cultural background.

35. The text, structure, historical context and extrinsic materials thus reveal that the purpose of s 22(2) was two-fold. First, the prohibition was designed to avoid prisoners accessing new technologies which would enable them to avoid the ordinary consequences of imprisonment. Those consequences include the effects of the effluxion of time on a prisoner's reproductive capacity. Second, the prohibition was designed to avoid the mischief of correctional authorities being tasked with determining which prisoners were or were not 'suitable to parent and raise a child'.<sup>42</sup>
36. The appellant is right that the legal meaning of s 22(2) is 'not a close call' (**AS [40]**). Nothing in the text, context or purpose of the provision supports her construction. Nor does the principle of legality or s 48 of the HR Act.

### Principle of legality

37. The appellant has invoked the principle of legality and submits that Parliament should be presumed not to have intended to override the common law right to bodily integrity or the common law principle that a prisoner should not be punished beyond being deprived of their liberty, in the absence of a clearly evinced legislative intention to do so (**AS [41]-[46]**).
38. However, '[o]utside its application to established categories of protected common law rights and immunities', the principle of legality 'must be approached with caution'.<sup>43</sup> The common law does prize bodily integrity (**AS [44]**), but its concern is with personal inviolability or personal security; that is, a negative right not to be subject to acts that interfere with bodily integrity, such as battery,<sup>44</sup> sexual assault,<sup>45</sup> medical procedures

<sup>41</sup> See ss 38(3)(b), 39A(2)(b), 319B(1)(b), 319G(3)(h), 319H(2)(h).

<sup>42</sup> Explanatory Notes, 24.

<sup>43</sup> *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 382 [67] (Gageler J). See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36] (McHugh J); *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298-9 [28]-[30] (McHugh J); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328 [19] (Gleeson CJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [312] (Gageler and Keane JJ).

<sup>44</sup> *Binsaris v Northern Territory* (2020) 270 CLR 549, 561 [25] (Gageler J), 583 [101] (Gordon and Edelman JJ).

<sup>45</sup> *Potter (a pseudonym) v The King* [2026] HCA 25, [55] (the Court).

without consent,<sup>46</sup> or corporal punishment.<sup>47</sup> The common law ‘right’ to bodily integrity does not extend to a situation where a person remains free to consent or withhold their consent to interferences with their body.<sup>48</sup> Even further removed from the common law is a conception of bodily integrity as a positive right requiring the State to take positive steps to facilitate a person’s exercise of autonomy.<sup>49</sup> That is the conception of bodily integrity the appellant seeks to invoke in this case.

39. The appellant contends that *Marion’s Case* is authority that ‘a right not to be prevented from being biologically capable of reproducing ... is a right to bodily integrity’ (**AS [44]**). What the joint judgment in *Marion’s Case* actually said was that ‘if the so-called right to reproduce comprises a right not to be prevented from being biologically capable of reproducing, that is a right to bodily integrity’.<sup>50</sup> Their Honours doubted that a ‘right to reproduce’ beyond a right to ‘personal inviolability’ was sufficiently fundamental or even a useful concept, if it existed at all.<sup>51</sup> Moreover, the statement must be read in the context of the case, which was about authorisation of a sterilisation procedure, not an obligation to take positive steps to enable reproduction. That is why their Honours concluded that ‘it is inviolability that is protected, not more’.<sup>52</sup>
40. The positive right relied upon by the appellant to have personal choices facilitated is not a right recognised by the common law and does not engage the principle of legality.<sup>53</sup>
41. The appellant also calls in aid what she describes as a ‘common law principle’ that

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<sup>46</sup> *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 253-4 (Mason CJ, Dawson, Toohey and Gaudron JJ) (*‘Marion’s Case’*).

<sup>47</sup> *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 11-12 [12], [14]-[15] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 68 [297] (Beech-Jones J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 419-420 [68]-[69] (Gordon J).

<sup>48</sup> *Kassam v Hazzard* (2021) 106 NSWLR 520, 543-4 [95]-[99] (Bell P, Meagher JA agreeing), 555-6 [166] (Leeming JA, Meagher JA agreeing); *Kassam v Hazzard* (2021) 362 FLR 113, 122 [9], 133-7 [55]-[70] (Beech-Jones CJ at CL).

<sup>49</sup> The traditional ‘triggers’ for the principle of legality are vested rights to property, liberty and physical integrity at common law, which are generally negative rights. While the range of triggers has expanded, it has not expanded to positive rights such as socio-economic rights: Jason Varuhas, ‘The Principle of Legality’ (2020) 79 *Cambridge Law Journal* 578, 580-3. Similarly, Beech-Jones CJ at CL noted that the common law ‘right’ based on the restraint of trade doctrine does not extend to welfare obligations imposed on the State in *Kassam v Hazzard* (2021) 362 FLR 113, 169 [199].

<sup>50</sup> *Marion’s Case* (1992) 175 CLR 218, 254 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>51</sup> *Marion’s Case* (1992) 175 CLR 218, 254 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>52</sup> *Marion’s Case* (1992) 175 CLR 218, 254 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Goodwin v Turner*, 702 F Supp 1452, 1454 (WD Mo, 1988) (‘There is simply no comparison between sterilization ... and denial of the facilitation of artificial insemination’).

<sup>53</sup> Alternatively, it is not a common law right that is ‘fundamental’ or ‘important’, and therefore demands less clarity to conclude that Parliament intended to override it: *Hurt v The King* (2024) 281 CLR 286, 325 [106] (Edelman, Steward and Gleeson JJ); *Stephens v The Queen* (2022) 273 CLR 635, 653 [34] (Keane, Gordon, Edelman and Gleeson JJ).

prisoners should only be punished by depriving them of their liberty (AS [45]). However, the authorities she cites for that proposition describe that principle as an aspect of a human right protected by a human rights instrument,<sup>54</sup> or as a sentencing consideration;<sup>55</sup> they do not describe the principle as a ‘common law principle’. Relatedly, she refers to the residuum principle that prisoners retain their civil liberties except those that are not necessarily diminished by detention. Again, that is not a ‘common law principle’ that engages the principle of legality;<sup>56</sup> instead, the principle of legality may be engaged by specific common law rights such as the right of access to the courts,<sup>57</sup> or ‘some measure of the common law right to liberty’ (being rights that prisoners retain).<sup>58</sup>

42. But even if the residuum principle were a common law principle that might engage the principle of legality, the freedom to seek private medical care is necessarily diminished by imprisonment. Moreover, as explained above, by enacting the CS Act, Parliament sought to clarify which entitlements are ‘necessarily diminished’ because of imprisonment. That being the case, ‘[i]t is of little assistance, in endeavouring to work out the meaning of [s 22(2) of the CS Act], to invoke a general presumption’ against the overriding of liberties other than those necessarily diminished by detention.<sup>59</sup>
43. More fundamentally, even if the construction of s 22(2) revealed by its text, context and purpose did engage one or more common law rights or principles, the principle of legality only has operation if a constructional choice is open.<sup>60</sup> As outlined above, there is only one construction open in this case. Moreover, the extrinsic material reveals that Parliament ‘squarely confronted’ the impact of a blanket ban on prisoners accessing

<sup>54</sup> *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 323 [237] (Martin J); *Rich v Secretary, Department of Justice* [2010] VSC 390, [45] (Bell J). To the extent the appellant submits the principle of legality is ‘triggered’ by the human rights set out in the *Human Rights Act 2019*, that would give the human rights a freestanding operation the Act does not intend to give to them: *Innes v Electoral Commission of Queensland [No 2]* (2020) 5 QR 623, 667 [197] (Ryan J); *Chief Executive, Department of Environment, Science and Innovation v Nagana Yarrbayn Wangan and Jagalingou Cultural Custodians Ltd* [2026] QCA 7, [103] (Doyle JA, Mullins P and Boddice JA agreeing).

<sup>55</sup> *R v Hodson* [2024] NSWCCA 238, [86] (Dhanji J); *El-Jalkh v The Queen* [2011] NSWCCA 236, [33] (Harrison J, McClellan CJ at CL and Latham J agreeing).

<sup>56</sup> In fact, under the law of attainder the common law removed any residual civil liberties from certain prisoners: William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 7<sup>th</sup> ed, 1775) vol 4, 380-1.

<sup>57</sup> *Raymond v Honey* [1983] 1 AC 1, 10 (Lord Wilberforce, Lords Elwyn-Jones, Russell and Lowry agreeing).

<sup>58</sup> *Minogue v Victoria* (2018) 264 CLR 252, 280 [88] (Gageler J).

<sup>59</sup> *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43] (the Court).

<sup>60</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 135-6 [32] (French CJ, Crennan and Kiefel JJ); *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ).

emerging forms of technology.<sup>61</sup> The principle of legality is ‘fulfilled in accordance with its rationale’ where—as in this case—the objects, terms or context make plain that Parliament has directed its attention to the human impact and nonetheless determined to proceed.<sup>62</sup>

## Section 48 of the HR Act

44. Section 48 of the HR Act relevantly provides:

### 48 Interpretation

- (1) 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.
- (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

45. Section 48’s command is about how statutory provisions are to be ‘interpreted’. The command has ‘two aspects’: ‘the consistency of an interpretation with the provision’s purpose’ and ‘an interpretation which is “compatible with human rights”’.<sup>63</sup>
46. Interpretation is ‘the art or process of discovering and expounding the intended signification of the language used’.<sup>64</sup> Consequently, while interpretation may involve a choice between possible meanings, it does so only if the words ‘are capable of more than one meaning’.<sup>65</sup> To ascribe words with a meaning which, in the context, they are not capable of signifying must be to depart from their intended signification. In the context of statutory interpretation, to ascribe a provision with such a meaning would involve departing from the meaning intended by the Parliament. Without clear<sup>66</sup> statutory authorisation to do so (see, eg, s 15A of the *Acts Interpretation Act 1901* (Cth)),<sup>67</sup> ascribing such a meaning to a provision is impermissible.<sup>68</sup>

<sup>61</sup> *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

<sup>62</sup> *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310-11 [314] (Gageler and Keane JJ), endorsed in *Hurt v The King* (2024) 281 CLR 286, 325-6 [106]-[107] (Edelman, Steward and Gleeson JJ).

<sup>63</sup> *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31, 72 [114] (Applegarth J); *SQH v Scott* (2022) 10 QR 215, 255 [109] (Williams J).

<sup>64</sup> *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650, 682 [143] (Edelman J), citing Black, *Handbook on the Construction and Interpretation of the Laws* (1896) 1.

<sup>65</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 45 [39] (French CJ), citing *Jones v Director of Public Prosecutions* [1962] AC 635, 662 (Lord Reid).

<sup>66</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 47-8 [46] (French CJ).

<sup>67</sup> See also *Acts Interpretation Act 1954* (Qld) s 9.

<sup>68</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

47. Section 48 does not permit such departures from Parliament's intent. Unlike s 15A of the *Acts Interpretation Act 1901* (Cth), it is not a declaration of Parliament's 'contingent intention'.<sup>69</sup> Section 48 is not a declaration of what Parliament would intend a provision to mean, in the event that Parliament's actual intended meaning were incompatible with human rights. Instead, where there are ambiguities and multiple potential available meanings consistent with the provision's purpose, s 48 assists in fixing the primary intention of the Parliament by indicating what constructional choice ought to be made. As the Explanatory Notes to the Human Rights Bill 2018 explained:

[T]he emphasis on giving effect to the legislative purpose means that the provision does not authorise a court to depart from Parliament's intention. However, a court may depart from the literal or grammatical meaning of the words used in exceptional cases.<sup>[70]</sup> ...

[S]ubclause (2) means that if a provision can be interpreted in more than one way but none of the options would be compatible with human rights, then the court should apply the analysis required under clause 13 to each of the available options and select the option that is most compatible.

48. As s 48 is concerned with Parliament's primary intended meaning, it does not permit techniques which 'go beyond' requiring a choice of constructions which are reasonably open.<sup>71</sup>
49. Section 48 will sometimes act as a 'tie-breaker' between competing constructions which are available on the language and consistent with the provision's purpose. As such, s 48 is functionally similar to many other principles of interpretation. For example, there is a common law principle that in making a choice between competing constructions, courts should assume that legislatures 'intend to enact legislation that is valid and not legislation that is invalid'.<sup>72</sup> Likewise, under s 48, courts should assume that Parliament intends to enact legislation that is compatible with human rights, not incompatible.

<sup>69</sup> *Clubb v Edwards* (2019) 267 CLR 171, 218 [140] (Gageler J).

<sup>70</sup> As Gummow J explained in *Momcilovic v The Queen* (2011) 245 CLR 1, 92 [170], that is a permissible manner of 'interpretation', provided the reading is still consistent with the statutory provision's purpose. See also *Momcilovic v The Queen* (2011) 245 CLR 1, 45 [39]-[40] (French CJ), *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Slaveski v Smith* (2012) 34 VR 206, 215 [24] (Warren CJ, Nettle and Redlich JJA); *Chief Executive, Department of Environment, Science and Innovation v Nagana Yarrbayn Wangan and Jagalingou Cultural Custodians Ltd* [2026] QCA 7, [113] (Doyle JA, Mullins P and Boddice JA agreeing).

<sup>71</sup> *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650, 660 [26] (Gageler CJ, Gleeson and Jagot JJ). If Parliament had intended, by s 48, to introduce a principle of construction which engaged the same techniques as s 15A of the *Acts Interpretation Act 1901* (Cth), it could easily have adopted words which replicate the words of that provision. It did not do so. Compare *Re Islam* 4 ACTLR 235, 250 [53], 265-6 [123] (Penfold J).

<sup>72</sup> *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ).

50. That does not mean that s 48 cannot bear on what constructional choices are available (a proposition the appellant wrongly attributes to the Court of Appeal: **AS [52]**). Again, in this respect s 48 is functionally similar to other principles of interpretation. So, for example, provisions like s 15AA of the *Acts Interpretation Act 1901* (Cth)<sup>73</sup> mean that the court ‘may consider the purposes of the relevant legislation in determining whether there is more than one possible construction’.<sup>74</sup> However, such provisions do not allow a court to ‘rewrite the legislation in light of its purposes’. It remains the case that ‘[a]ny meaning must be consistent with the language in fact used in the relevant legislation’.<sup>75</sup>
51. For the reasons set out above, there is no ‘tie’ between competing meanings of s 22(2) which s 48 might resolve. If ‘assisted reproductive technology’ were limited to procedures intended to procure a pregnancy (as the appellant contends it should be), a female prisoner might undergo procedures to stimulate egg growth, extract the eggs, have the eggs fertilised *and* have the resulting embryo frozen—all without ‘participating in assisted reproductive technology’. Indeed, on the appellant’s construction the prisoner would not ‘participate in assisted reproductive technology’ *even if* she undertook these steps with the subjective intention of donating the eggs to procure a pregnancy in another person. That is an implausible result. In light of s 22(2)’s context and purpose, it is a meaning that the words ‘assisted reproductive technology’ are incapable of bearing. Such a construction would exclude from s 22(2)’s operation—and would thereby give prisoners access to—almost every available form of technology which assists reproduction. And—because the chief executive would have to decide prisoner’s applications for access to such procedures—it would reintroduce the ‘plethora of social and financial issues’ which Parliament sought to avoid.<sup>76</sup>

### Compatibility with human rights

52. The second aspect of s 48(1) directs attention to the availability of an interpretation that is ‘compatible with human rights’. According to s 8, an interpretation will be compatible with human rights if it does not limit any human right set out in Part 2 of the

<sup>73</sup> Section 15AA provides: ‘In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation’. See also *Acts Interpretation Act 1954* (Qld) s 14A.

<sup>74</sup> *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515, 531 [15] (Kiefel CJ, Gagler, Gleeson and Jagot JJ), citing *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).

<sup>75</sup> *Disorganised Developments Pty Ltd v South Australia* (2023) 280 CLR 515, 531 [15] (Kiefel CJ, Gagler, Gleeson and Jagot JJ).

<sup>76</sup> Compare *Esso Australia v Australian Workers Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

HR Act, or if it does limit one or more human rights, but that limit is nonetheless justified in accordance with the test of proportionality set out in s 13 of the HR Act. At the outset, ‘close attention’ must be paid ‘to the particular rights said to be engaged by the statutory provision that falls for interpretation’.<sup>77</sup>

The appellant has asserted but not established any discrimination

53. The ‘right to access health services without discrimination’ in s 37(1) of the HR Act turns on discriminatory access to health services.<sup>78</sup> Section 22(2) of the CS Act prevents both men and women from accessing assisted reproductive technology and does not discriminate between them (cf **AS [60]**).<sup>79</sup>
54. Section 15(2) of the HR Act turns on discriminatory enjoyment of another human right in Part 2.<sup>80</sup> The appellant does not say which human right (**AS [62]**). In substance, she appears to assert that s 22(2) of the CS Act discriminates against women in the enjoyment of the right to found a family, but, as will be seen, the HR Act protects no such right.
55. The right to ‘equality before the law’ in 15(3) is directed to the enforcement of law and not its content.<sup>81</sup> It is not relevant to determining the content of s 22(2) of the CS Act.
56. The right to ‘equal protection of the law without discrimination’ in s 15(3) and the right to ‘equal and effective protection against discrimination’ in s 15(4) are standalone non-

<sup>77</sup> *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, 1176 [58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 64 [195] (Tate JA).

<sup>78</sup> One of the ‘immediately realisable’ aspects of the right to health in art 12 of the *International Covenant on Economic, Social and Cultural Rights* is non-discrimination. As the text of s 37(1) confines the right to non-discrimination in access to health services, it appears to implement that aspect of the right, rather than the ‘progressively realisable’ aspects. See *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) [30].

<sup>79</sup> The primary judge did not make any finding of discrimination against women in access to health services. His Honour observed that ‘it seems clear that s 22(2) of the CS Act operates to discriminate against prisoners (as compared to the larger community)’: PJ [11] (**CAB 7**). However, status as a prisoner is not a protected attribute for the purposes of ‘discrimination’ under the HR Act: see fn 83 below. Even in Canada, where ‘analogous grounds’ are protected, prisoner status does not amount to an ‘analogous ground’: *Alcorn v Canada (Commissioner of Corrections)*, 2002 FCA 154, [7] (Sexton JA); *Tan v Canada (Attorney-General)*, 2015 FC 907, [56] (Heneghan J); *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 621 [192], 622 [195] (Gonthier J).

<sup>80</sup> *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 314 [120], 315 [126] (Bell J), discussing the equivalent right in s 8 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

<sup>81</sup> See William Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (NP Engel, 3rd ed, 2019) 746 [16]; *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 344 [285]–[286] (Bell J); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 640 [52], 642–3 [58], 657 [104] (Bell J).

discrimination rights and are both directed to the content of laws.<sup>82</sup> They turn on the concept of ‘discrimination’, defined in sch 1 to the HR Act by reference to direct or indirect discrimination under the *Anti-Discrimination Act 1991* (Qld).<sup>83</sup> The appellant has not sought to show direct or indirect discrimination, for example, by identifying a ‘term’ with which women cannot comply. Moreover, the appellant has raised this discrimination right for the first time in this Court. Had it been raised below and a term articulated, evidence could have been led in response (cf **AS fn 62**).<sup>84</sup> In any event, no straightforward assumption can be made that women are disproportionately impacted when it is unknown whether female prisoners are more likely to be granted parole and where s 22(2) of the CS Act applies predominantly to male prisoners,<sup>85</sup> who tend to be older than female prisoners,<sup>86</sup> and serve longer sentences compared to female prisoners.<sup>87</sup>

#### The right to privacy does not protect a right to found a family

57. The right not to have one’s privacy unlawfully or arbitrarily interfered with in s 25(a) of the HR Act does not protect a positive right to found a family as the appellant asserts for the first time in this Court (AS [55]-[57]). **First**, such a positive right cannot be accommodated by the negative formulation of the right in s 25(a) of the HR Act. That can be compared with the positive formulation of a right to respect for private life in art

<sup>82</sup> William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (NP Engel, 3rd ed, 2019) 749 [21]. See also *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 317 [139], 344 [287]-[288] (Bell J); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 641 [53], 657 [105] (Bell J).

<sup>83</sup> See *Anti-Discrimination Act 1991* (Qld) ss 7, 10, 11. On the application of the definition of ‘discrimination’ in the HR Act, see: *Austin BMI Pty Ltd v Deputy Premier [No 1]* (2023) 16 QR 377, 487 [317]-[318] (Freeburn J); *Johnson v Carroll* (2024) 19 QR 1, 86-7 [294]-[295] (Martin SJA); *Bobeldyk v Moreton Bay City Council* [2026] QSC 27, [424] (Smith J).

<sup>84</sup> *Coulton v Holcombe* (1986) 162 CLR 1, 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ). Constitutional or legislative facts are no exception: *Zurich Insurance plc v Koper* (2022) 110 NSWLR 380, 396 [61] (Bell CJ, Ward P and Beech-Jones JA agreeing).

<sup>85</sup> From 30 June 2024 to 30 June 2025, 10,200 of 11,276 prisoners in Queensland were male: Australian Bureau of Statistics, ‘Prisoners in Australia’ (11 December 2025) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2025>>.

<sup>86</sup> As at 2025, the mean age of male prisoners in Queensland was 37.1 compared to 35.4 for female prisoners. The median age for male prisoners in Queensland was 35.5 compared to 33.7 for female prisoners: Australian Bureau of Statistics, ‘Table 15: Prisoners, selected characteristics by state/territory’ (2025) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2025>>.

<sup>87</sup> Klaire Somoray and Samuel Jeffs, *Baseline Report: The sentencing of people in Queensland* (Queensland Sentencing Advisory Council, 2021) 40.

8 of the *European Convention on Human Rights (ECHR)*, which more readily accommodates a positive right to become a genetic parent.<sup>88</sup>

58. **Second**, while the HR Act incorporates most of the rights in the *International Covenant on Civil and Political Rights (ICCPR)*, the Queensland Parliament elected not to incorporate the specific right to found a family in art 23(2) of the ICCPR. That is consistent with the position in Victoria and the ACT.<sup>89</sup> In *Castles v Secretary, Department of Justice*, Emerton J held that the right to privacy in s 13(a) of the Victorian Charter cannot be taken to include a right to found a family by implication, when Parliament had decided not to include that very right.<sup>90</sup> The appellant seeks to distinguish *Castles* on the basis that the extrinsic material accompanying the Charter revealed an intention not to create a right to found a family (**AS fn 68**). However, Queensland adopted s 25(a) after *Castles* had been decided and may be presumed to have intended to adopt the same interpretation.<sup>91</sup> That conclusion is reinforced by the fact that Queensland modelled the HR Act upon the Charter and made a conscious decision to include more human rights compared to the Charter,<sup>92</sup> but not art 23(2) of the ICCPR.<sup>93</sup>
59. The position in Queensland also contrasts with the ECHR and the *American Convention on Human Rights*, both of which protect an express right to found a family (in arts 12 and 17(2) respectively) alongside the right to privacy (in arts 8 and 11 respectively). That key difference in context means the implied right to become a genetic parent cannot simply be transplanted from their privacy right to ours (cf **AS [56]**).<sup>94</sup>

<sup>88</sup> See *Dickson v United Kingdom* (2008) 46 EHRR 41, 947 [69]-[71]. That positive formulation means the European jurisprudence on a very wide concept of privacy may not necessarily translate to a negatively formulated right to privacy: see *MA v Director of Immigration* [2012] HKCA 514, [58]-[67] (Fok JA, Stock VP and Kwan JA agreeing).

<sup>89</sup> Both implement only art 23(1) of the ICCPR in s 17(1) of the Victorian Charter and s 11(1) of the *Human Rights Act 2004* (ACT).

<sup>90</sup> *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 159 [62], 161 [72], 164 [81] (Emerton J).

<sup>91</sup> *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236, 1243-1244 [19] (Kiefel CJ), 1250 [52] (Bell, Keane, Nettle and Edelman JJ). See also Perry Herzfeld and Thomas Prince, *Interpretation* (Lawbook Co, 3<sup>rd</sup> ed, 2024) 186 [8.60].

<sup>92</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (YM D'Ath, Attorney-General); Explanatory Notes, Human Rights Bill 2018 (Qld) 11; Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No 26, February 2019) 120 [2.9.2].

<sup>93</sup> Explanatory Notes, Human Rights Bill 2018 (Qld) 4, 22 (noting that cl 26 was modelled on art 23(1) of the ICCPR).

<sup>94</sup> *Eg Dickson v United Kingdom* (2008) 46 EHRR 41, 945 [66]; *Murillo v Costa Rica* (Inter-American Court of Human Rights, 28 November 2012) [143], [145] (emphasising that the rights to privacy and to found a family in arts 11 and 17 are interconnected). Cf *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 160-1 [69], 163-4 [80]-[81] (Emerton J).

The right to humane treatment does not require access to egg freezing

60. The right to humane treatment when deprived of liberty in s 30(1) requires the State to meet the ‘basic needs’ of detainees for human dignity.<sup>95</sup> That means the State must provide—at public expense if necessary—for all prisoners’ basic medical needs, including prenatal care for women prisoners who are pregnant and postnatal care for those who have given birth.<sup>96</sup> As egg freezing is not a basic need of that kind, the State is not required by s 30(1) to provide for egg freezing at public expense.
61. The right in s 30(1) is also informed by the residuum principle that detainees retain their rights other than those that are necessarily diminished by reason of their detention.<sup>97</sup> Even if the HR Act did protect the right to found a family, that right is necessarily diminished by imprisonment.<sup>98</sup> Any liberty to seek private medical care is also necessarily diminished by detention. The State has chosen to partially restore the liberty to seek private medical care by enacting s 22(1) of the CS Act, but the State is not required by s 30(1) of the HR Act to do so. That the State has not restored the liberty to seek some forms of private medical care does not disclose a limit on s 30(1).<sup>99</sup>
62. Even if the ordinary reading of s 22(2) of the CS Act did limit the right in s 30(1) of the HR Act, that reading pursues Parliament’s stated objective of ensuring that the natural consequences of imprisonment are preserved in the face of technological advances.<sup>100</sup> While the State could conceivably take positive steps to reduce the ordinary incidents of detention to the greatest extent possible, as Emerton J said in *Castles*, that ‘would,

<sup>95</sup> William Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (NP Engel, 3<sup>rd</sup> ed, 2019) 276 [12].

<sup>96</sup> Rule 28 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015).

<sup>97</sup> Explanatory Notes, Human Rights Bill 2018 (Qld) 25; UN Human Rights Committee, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess (1992) [3]; *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [108] (Emerton J); *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 323 [237] (Martin J); *Thompson v Minogue* (2021) 67 VR 301, 320 [66] (Kyrrou, McLeish and Niall JJA).

<sup>98</sup> *Gerber v Hickman*, 291 F3d 617, 623 (9<sup>th</sup> Cir, 2002), certiorari denied: *Gerber v Hickman*, 537 US 1039 (2002). The majority of European Court of Human Rights came to the opposite conclusion in *Dickson v United Kingdom* (2008) 46 EHRR 41, 948 [74], but cf joint dissenting opinion at 955 [O-II3].

<sup>99</sup> *Castles v Secretary, Department of Justice* (2010) 28 VR 141 is not authority to the contrary. In that case, Emerton J held that a specific statutory right to private health care in s 47(1)(f) of the *Corrections Act 1986* (Vic) included IVF treatment: at 177 [147]. It appears her Honour reasoned that the content of s 22(1) of the Victorian Charter (the equivalent of s 30 of the HR Act) was informed by s 47(1)(f) (at 169 [108]), but there is no similar statutory provision here.

<sup>100</sup> Explanatory Notes, *Corrective Services Bill 2006* (Qld) 20 (introducing several other provisions which engage fundamental legislative principles, including s 22(2)—as to which, see at 23).

arguably, be inconsistent with the very purpose of imprisonment itself'.<sup>101</sup> Ultimately, the legitimate aims of imprisonment include punishment and deterrence,<sup>102</sup> and Parliament is entitled to let it remain punitive and deterring.

63. The appellant asserts that aim would be illegitimate for the purposes of the proportionality analysis under s 13 of the HR Act (**AS [65]**). Even if that were true, it would serve to reinforce that the only reading 'consistent with [s 22(2)'s] purpose' is its ordinary reading. Another reading is not possible 'where the purpose and context of the statutory provision indicate that the provision is not compatible with [human] rights'.<sup>103</sup>

64. The appeal should be dismissed.

#### **PART VI: TIME ESTIMATE**

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65. It is estimated that the second respondent will require 45 minutes for oral argument.

Dated 31 August 2026



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<sup>101</sup> *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 170 [112] (Emerton J).

<sup>102</sup> *Dickson v United Kingdom* (2008) 46 EHRR 41, 935 [28], 955 [O-II3]; *Gerber v Hickman*, 291 F3d 617, 621 (9<sup>th</sup> Cir, 2002).

<sup>103</sup> *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, 1193 [140] (Edelman J).

## ANNEXURE TO SUBMISSIONS FOR THE SECOND RESPONDENT

Pursuant to *Practice Direction No. 1 of 2024*, this annexure sets out the statutes and statutory instruments referred to in these submissions.

| No.                           | Description                                                        | Version                                               | Provisions                                                                                                      | Reason for providing version | Applicable date or dates |
|-------------------------------|--------------------------------------------------------------------|-------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|------------------------------|--------------------------|
| <b>Australian legislation</b> |                                                                    |                                                       |                                                                                                                 |                              |                          |
| 1.                            | <i>Acts Interpretation Act 1901</i> (Cth)                          | Current – 28 March 2026 reprint                       | ss 15A, 15AA                                                                                                    | Illustrative purposes        | Current                  |
| 2.                            | <i>Acts Interpretation Act 1954</i> (Qld)                          | Current – 1 Feb 2024                                  | ss 9, 14A                                                                                                       | Date of decision             | 28 February 2024         |
| 3.                            | <i>Anti-Discrimination Act 1991</i> (Qld)                          | 1 March 2023 reprint                                  | ss 7, 10, 11                                                                                                    | Date of decision             | 28 February 2024         |
| 4.                            | <i>Assisted Reproductive Technology Act 2024</i> (Qld)             | Current – 1 March 2026 reprint                        | ss 5, 6                                                                                                         | Illustrative purposes        | Current                  |
| 5.                            | <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) | Current – Version 15 – 1 June 2022 reprint            | ss 8, 13(a), 17(1), 22(1)                                                                                       | Illustrative purposes        | Current                  |
| 6.                            | <i>Corrections Act 1986</i> (Vic)                                  | Version 82 – 1 Jan 2010                               | s 47(1)(f)                                                                                                      | Illustrative purposes        | 1 June 2010              |
| 7.                            | <i>Corrective Services Act 2006</i> (Qld)                          | 1 Nov 2023 reprint                                    | ss 3, 22, 26, 26A, 27, 27AA, 38(3)(b), 39A(2)(b), 319B(1)(b), 319G(3)(h), 319H(2)(h), sch 4 (def of ‘prisoner’) | Date of decision             | 28 February 2024         |
| 8.                            | <i>Human Rights Act 2004</i> (ACT)                                 | Current - Republication No 17 – 17 March 2025 reprint | s 11(1)                                                                                                         | Illustrative purposes        | Current                  |
| 9.                            | <i>Human Rights Act 2019</i> (Qld)                                 | Current – 20 Sept 2023 reprint                        | ss 8, 13, 15, 25, 26, 30, 37, sch 1 (def of                                                                     | Date of decision             | Date of decision         |

|                                  |                                                                                                                                                                                   |                    |                   |                                                  |               |
|----------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|-------------------|--------------------------------------------------|---------------|
|                                  |                                                                                                                                                                                   |                    | 'discrimination') |                                                  |               |
| 10.                              | <i>Legislative Standards Act 1992 (Qld)</i>                                                                                                                                       | 8 Dec 2003 reprint | s 4               | When <i>Corrective Services Act 2006</i> enacted | 29 March 2006 |
| <b>International conventions</b> |                                                                                                                                                                                   |                    |                   |                                                  |               |
| 11.                              | <i>American Convention on Human Rights</i> , opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)                                               | Current            | Art 11, 17(2)     | Illustrative purposes                            | Current       |
| 12.                              | <i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) | Current            | arts 8, 12        | Illustrative purposes                            | Current       |
| 13.                              | <i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)                              | Current            | art 23            | Illustrative purposes                            | Current       |
| 14.                              | <i>International Covenant on Economic, Social and Cultural Rights</i> , opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976)                     | Current            | art 12            | Illustrative purposes                            | Current       |