



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

RACHEL SMITH

Appellant

and

CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

Second Respondent

QUEENSLAND HUMAN RIGHTS COMMISSION

Third Respondent

THIRD RESPONDENT'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. As the phrase “assisted reproductive technology” is not defined in the *Corrective Services Act 2006* (Qld), the question arising in this appeal concerns ascertainment of the applicable shade of ordinary meaning of that phrase. That “turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.”¹
3. The proper approach to the ascertainment of the meaning of a statutory provision in Queensland following the introduction of the *Human Rights Act 2019* (Qld)² is addressed in paragraphs 9 to 12 below.
4. The Third Respondent concurs with the submissions made concerning the text, immediate context and purpose of s 22 of the CS Act as set out in paragraphs 12 to 40 and 65 to 66 of the Appellant’s Submissions.

¹ *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565, 594-5 [88] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ) citing *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 557 [66]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ).

² Which applies to legislation introduced prior to the introduction of the HRA: s 108(1) HRA.

5. It is clear, for the reasons stated in paragraphs 15 to 17 below concerning the contextual importance of the principle of legality as well as, for the reasons stated in paragraphs 18 to 59 below, the significant contextual impact of the human rights compatible approach mandated by the HRA, the appellant's construction is the "one right answer".³

PART III: SECTION 78B NOTICES

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

PART IV: FACTS

7. The third respondent agrees with the facts set out at AS [7]-[11].
8. Additionally, uncontested evidence below was to the effect that egg freezing is aimed at avoiding age-related decline in fertility and the associated psycho-social impact of that reality on the prospective mother as well as the risks of chromosomal abnormalities with consequent early and late pregnancy loss and long-term disability.⁴ "[E]lective egg freezing is considered routine and appropriate care for any Australian woman under the age of 35 who chooses or must delay pregnancy until her late thirties or forties."⁵

PART V: ARGUMENT

Approach to statutory construction in Queensland post introduction of the HRA

9. The task of "statutory construction involves attribution of meaning to statutory text".⁶ Identifying the meaning of a word or a phrase is necessary, irrespective of the starkness of the relevant "constructional choice".⁷ Meaning is to be ascertained by application of the principle of purposive construction – the

³ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 565 [54] (Gageler J), 582 [127] (Edelman J).

⁴ Appellant's Book of Further Materials, p 27-28 (report of A/Prof Anusch Yazdini).

⁵ ABFM, p 28 (report of A/Prof Anusch Yazdini).

⁶ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J).

⁷ a concept that was intended to simply reflect "the plasticity and shades of meaning and nuance that are the natural attributes of language": *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [50] (French CJ). As Kenny J recognised, language is "characteristically malleable and nuanced; and there are almost always constructional choices to make by reference to text, context and purpose": *Garrett v FCT* (2015) 233 FCR 226, 229 [12]. That is because "even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete": (Kiefel CJ and Keane J).

meaning of a statutory provision is informed by the text, context and purpose of the provision.⁸

10. Context is to “be considered in the first instance and not merely at some later stage when ambiguity might be thought to arise.”⁹ Context is understood in its widest sense¹⁰ and encapsulates both the whole of the statutory text within which the word or phrase being construed appears¹¹ and, a broader context that includes legislative history, extrinsic materials¹² (which is guided “by a non-exhaustive list of categories of material statutorily recognised to have potential to illuminate the statutory context”¹³), the existing state of the law (including existing legal rights, presumptions¹⁴ and principles (for example, the principle of legality)), and the mischief¹⁵ to be addressed, as well as the directive in s 48 of the HRA.
11. Each of the former attributes of context have “utility if, and in so far as, it assists in fixing the meaning of the statutory text”¹⁶ and “will vary with the context in which [they are] applied.”¹⁷ Whereas the modal auxiliary repeated in s 48(1) and (2) confirms that s 48 of the HRA is relevant context as “a particular statutory

⁸ *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ). See too ss 14A and 14B of the *Acts Interpretation Act 1954* (Qld).

⁹ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [35] (Gageler J) citing *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason P). See too *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J), 560 [163] (Edelman J).

¹⁰ *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J), 545 [124] (Bell and Gageler JJ); *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1365 [5] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

¹¹ *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J).

¹² *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565, 594 [87] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ) citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] and *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22]. See too s 15AB *Acts Interpretation Act 1954* (Qld).

¹³ *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1365 [5] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) as provided for in s 14B(3) of the *Acts Interpretation Act 1954* (Qld).

¹⁴ Described by Edelman J as “loose aids to ascertaining meaning” in *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1376 [72].

¹⁵ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

¹⁶ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). After citing this in *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1365 [6], Gageler CJ, Gordon, Jagot and Beech-Jones JJ said, “Focus on the statutory text is not to the exclusion of extrinsic material that has the potential to assist in fixing its meaning.”

¹⁷ *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 328 [19] (Gleeson CJ). See, for example, *Binsaris v Northern Territory* (2020) 270 CLR 549, 571 [54] (Gordon and Edelman JJ) and *AB v Independent Broad-based Anti-corruption Commission* (2024) 278 CLR 300, 312 [21] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

reflection of a general systemic principle”.¹⁸ That is confirmed by the Preamble to the HRA which relevantly provides, “[h]uman rights should be limited only after careful consideration, and should only be limited in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law.” One of the means by which the main object of the HRA to “protect and promote human rights”¹⁹ will be achieved is by “requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights.”²⁰

12. Objective discernment of statutory purpose²¹ is integral to contextual construction²² and critical to application of the statutory mandate in s 48(1) and (2) of the HRA. Accordingly, it is convenient to commence the task of attributing meaning to statutory text by considering the words of the provision itself²³ and then addressing the question of “what did Parliament mean by the words it used” by reference to those words²⁴ and the context in which the words appear (in the widest sense).²⁵
13. It is this interpretive synthesis “by which text, context and purpose all inform each other and together shape the meaning of the provision.”²⁶
14. The task is to be performed alive to the reality that statutes are “always speaking” and so the scope of a provision “is usually to be determined by the contemporary application of its essential meaning that will best give effect to the legislative purpose.”²⁷

¹⁸ In the same way that s 15AA of the *Acts Interpretation Act 1901* (Cth) is: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [39] (Gageler J) citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23].

¹⁹ s 3(a) HRA.

²⁰ s 4(f) HRA.

²¹ See description of what is meant by that word in *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1019 [41] (Gageler J) and in *Hopper v Victoria* (2026) 100 ALJR 582, 604 [90] (Edelman J).

²² s 14A *Acts Interpretation Act 1954* (Qld); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [39] (Gageler J).

²³ *R v A2* (2019) 269 CLR 507, 520 [32] (Kiefel CJ and Keane J).

²⁴ *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1020 [43] (Gageler J).

²⁵ *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1364-1365 [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), 1376 [75] (Edelman J).

²⁶ *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, 1376 [77] (Edelman J).

²⁷ *R v A2* (2019) 269 CLR 507, 562-563 [169]-[170] (Edelman J).

Relevant common law context - the principle of legality²⁸

15. On both the Court of Appeal's and appellant's constructions,²⁹ s 22(2) of the CS Act encroaches upon the appellant's common law right identified at AS[44]; specifically, the aspect of the right to bodily and personal integrity to do with one's person what one chooses.³⁰ That is, the right to bodily integrity encompasses a person's autonomy to determine what is done to his or her body and what occurs with respect to his or her own person. The relevant aspect of that right at issue in this case (in circumstances where the appellant is lawfully imprisoned) is the appellant's right to exercise control over her body's capacity³¹ to reproduce.³²
16. The question is how far the encroachment in s 22(2) permissibly extends³³ – either in the limited way of infringing on a female prisoner's capacity to reproduce while serving her term of imprisonment or, more expansively by infringing on female prisoners' capacity to reproduce both while imprisoned and after the term of the custodial sentence has been served.
17. As the nature of the right at issue is quintessentially “fundamental” or “important”, that question is to be resolved by adopting the construction that minimises the interference except insofar as the interference is unmistakably indicated (i.e. a high degree of clarity is necessary³⁴).³⁵ For the reasons stated at

²⁸ The common law remains a distinct source of rights in Queensland as confirmed by s 12 of the HRA.

²⁹ The appellant accepts that on her construction, s 22 prevents her from participating in “assisted reproductive technology” for the purpose of becoming pregnant while serving a term of imprisonment.

³⁰ *Potter (a Pseudonym) v The King* [2026] HCA 25, [55] (Gageler CJ, Gordon, Steward, Jagot and Beech-Jones JJ); *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218, 233 (Mason CJ, Dawson, Toohey and Gaudron JJ), 267-268 (Brennan J), 309-310 (McHugh J).

³¹ It is not submitted that the appellant has a right to reproduce.

³² While the formulation of rights relevant to application of the principle of legality are typically negative in form – a guarantee of protection from interference (as in *Marion's Case*), the principle is “not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law” and extends to the “protection of fundamental principles and systemic values”: *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ). It is a principle that necessarily will “vary with the context in which it is applied”: *Hurt v The King* (2024) 281 CLR 286, 325 [106] (Edelman, Steward and Gleeson JJ) citing *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328 [19] (Gleeson CJ).

³³ *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310-311 [314] (Gageler and Keane JJ); *Hurt v The King* (2024) 281 CLR 286, 325 [106] (Edelman, Steward and Gleeson JJ).

³⁴ *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ).

³⁵ *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 582 [11] (French CJ, Kiefel and Bell JJ); *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron JJ); *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, 1191 [134] (Edelman J).

AS[17]-[39] the more expansive infringement is not “clearly manifested by unmistakable and unambiguous language”³⁶ or “expressed with irresistible clearness”³⁷ and, therefore, the Court of Appeal was wrong to construe s 22 accordingly. That is so even if, consequently, the words of s 22 are “to be read in a way that does not correspond with the literal or grammatical meaning.”³⁸

Relevant statutory context - the HRA

18. Sections 48(1) and (2) of the HRA mandate that the option that is “compatible with human rights” (s 48(1)) or, if neither is, is “most compatible with human rights” (s 48(2)) is to be adopted, provided it is possible to do so consistently with the purpose of s 22.³⁹ Section 48 therefore requires “close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation”⁴⁰ as well as the purpose of the statutory provision being interpreted.
19. The phrase “compatible with human rights” used in s 48(1) and (2) is defined in s 8. It is apparent from s 8(b) that the legislature is permitted, to an extent, to interfere with human rights, provided the limitation is proportionate to the object or purpose it seeks to achieve. In identifying the extent of permissible interference, s 13(2) sets out a non-exhaustive list of factors to be considered. Section 13, in effect, embodies a proportionality test⁴¹ to determine whether the

³⁶ *TCXM v Minister for Immigration and Citizenship* [2026] HCA 13, [48] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) citing *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

³⁷ *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, 471 [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ) citing *United States v Fisher* (1805) 6 US 358 at 390; *Potter v Minahan* (1908) 7 CLR 277, 304; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [158] (Kiefel J).

³⁸ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

³⁹ That is because the interpretation that will best achieve the purpose of the CS Act is to be preferred to any other interpretation: s 14A *Acts Interpretation Act 1954* (Qld); *R v A2* (2019) 269 CLR 507, 522 [37] (Kiefel CJ and Keane J). In *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen* (2011) 245 CLR 1, the Victorian Court of Appeal and the High Court rejected the argument that s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was intended to reflect the approach to s 3(1) of the *Human Rights Act 1998* (UK) adopted by the House of Lords in *Ghaidan v Mendoza* that the court where necessary could “depart from the intention of the Parliament which enacted the legislation.”

⁴⁰ *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).

⁴¹ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QdR 250, 291 [104]-[105] (Martin J).

potential interpretations are justified before the ultimate meaning of the provision is ascertained.

20. Before the primary judge the appellant relied on the right to health services provided for in s 37(1) of the HRA and, the right to humane treatment when deprived of liberty provided for in s 30(1) of the HRA. For the reasons outlined in paragraphs 21 to 59 below, both ought to have been (a) considered in the course of construing s 22(2) of the CS Act and (b) determinative in ascribing the meaning to s 22 as contended for by the appellant. Before this Court, the appellant also relies on the right not to have a person's privacy unlawfully or arbitrarily interfered with provided for in s 25(a) of the HRA and the right to enjoy the person's human rights without discrimination provided for in s 15(2) of the HRA. The rights in s 15(3) and s 15(4) are also relevant. While the rights analysis is stepped through in respect of each right relied on, below, it is important to bear in mind that the rights are best understood collectively because they protect intersecting and mutually dependent interests.

The right to health services (s 37(1) HRA)

21. Section 37(1) of the HRA provides, “[e]very person has the right to access health services without discrimination”.

Both constructions limit the appellant's right to access health services

22. “Every person” includes prisoners.⁴² Oocyte cryopreservation is a “health service”.⁴³ Indeed, for s 22(1) to have application, approval must have been sought “to be examined or treated by a health practitioner”, clear indicia of the provision of a “health service”. Accordingly, limiting a female prisoner's access to egg freezing limits her access to a health service.
23. Because “assisted reproductive technology” (partially disapplied to egg freezing) is also a “health service”, the appellant's construction also limits her right to access a health service.

⁴² s 11(1) HRA; *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QdR 250, 285 [81] (Martin J).

⁴³ Consistently with *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 146 [5], 172 [123] (Emerton J) and the meaning of “health services” in Queensland provided for in s 15 of the *Hospital and Health Boards Act 2011* (Qld): “a service for maintaining, improving, restoring or managing people's health and wellbeing”.

The appellant's construction is most compatible with her right to access health services

24. *The nature of the human right (s 13(2)(a))*: The right to access health services, as part of the internationally-recognised right to health, is “indispensable for the exercise of other human rights” and is “conducive to living a life in dignity”.⁴⁴
25. *The nature of the purpose of the limitation (s 13(2)(b))*: On both constructions the undisputed purpose of s 22 is to prevent prisoners from procreating while in prison. In the context of the management of prisoners, that is consistent with a democratic society based on human dignity and substantive equality. It is a fallacy, for the reasons outlined below with respect to the right to enjoy human rights without discrimination, that equal application of the Court of Appeal’s construction of s 22(2) as between male and female prisoners ensures that “all prisoners are treated equitably”.⁴⁵ Rather, it gives rise to substantive inequality between the sexes of imprisoned persons in their ability to safely and effectively procreate post-release, which is not consistent with a democratic society based on human dignity, substantive equality and freedom.
26. *Relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose (s 13(2)(c))*: Plainly, preventing female prisoners from participating in assisted reproductive technology directly aimed at procuring a pregnancy has a close relationship with the purpose of preventing prisoners from procreating while in prison. In contrast, the expansive construction and the extent of the limitation it imposes goes well beyond that purpose such that it impacts their ability to safely reproduce post-release. As a consequence of the reality that egg freezing as a discrete activity is incapable of resulting in reproduction, it is only when the facts of the appellant’s case are improperly conflated with the distinct factual scenario of sperm freezing (which gives rise to a separate question of construction concerning whether the ordinary meaning of the phrase “assisted reproductive technology” is to also be partially disappplied to the distinct factual scenario of sperm freezing⁴⁶), that a close relationship between the extent of the limitation determined

⁴⁴ Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000), [1].

⁴⁵ *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288, [95] (Sullivan J) (Core Appeal Book, p 23).

⁴⁶ *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1056-57 [227]-[228] (Edelman J). The submission is not one that is properly capable of demonstrating an unintended consequence of the appellant’s

by the Court of Appeal and the purpose of s 22 can purportedly be demonstrated.⁴⁷ What remains, then, is a burdensome limitation on the right to health services imposed on all female prisoners in order to address the remaining risk that the purpose of s 22 might be undermined by the potential for some female prisoners to become biological parents during their term of imprisonment via surrogate or by a female partner (who does not wish to or cannot use their own egg(s)). For the reasons stated in paragraph 28 below, the importance of preserving the right of female prisoners to access egg freezing outweighs this modest opportunity for the purpose of the provision to be potentially undermined.

27. *Are any less restrictive and reasonably available ways to achieve purpose (s 13(2)(d))*: The appellant's construction is a less restrictive and reasonably available way of achieving the purpose of preventing prisoners from procreating while they are in prison.
28. *Balance between the importance of the purpose of the limitation and preserving the human right, taking into account the nature and extent of the limitation (s 13(2)(e), (f) and (g))*: The importance of preserving the right of imprisoned females to access health services that maintain and manage their health and wellbeing outweighs a construction that may be more likely to prevent any and all risks of procreation while a prisoner is incarcerated by disproportionately restricting the s 37(1) right. Any risk that a female prisoner might seek to have her eggs frozen so that she can become a mother via a surrogate while she is in prison would be subject to regulation⁴⁸ and any other risk of becoming a biological parent can be addressed by the first respondent in rigorous administration of the approvals process performed pursuant to s 22 of the CS Act.⁴⁹ Properly understood, the determination of any decision under s 22 will be largely dependent on the substance, quality and weight to be given to the medical evidence provided in support of an application having regard to a prisoner's individual circumstances⁵⁰ and their ability to pay for the treatment.

construction because it is made in the absence of any factual basis to confirm that it is, in fact, capable of being a consequence.

⁴⁷ There is no evidence as to what is required for sperm extraction and freezing and whether as a matter of fact it is capable of falling within the ordinary meaning of "assisted reproductive technology".

⁴⁸ ss 21, 22(2)(b) of the *Surrogacy Act 2010* (Qld).

⁴⁹ And, in particular, what is taken into account for the purposes of considering whether s 22(3)(a)(ii) of the CS Act is satisfied.

⁵⁰ Including the length of a prisoner's sentence and the period of their life that it traverses, in addition to any specific evidence as to fertility status or specific risks of decline in fertility status.

The right to humane treatment when deprived of liberty (s 30(1) HRA)

29. Section 30(1) of the HRA provides, “[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.”

The right to humane treatment when deprived of liberty is limited on either construction

30. The right in s 30(1)⁵¹ of the HRA relevantly incorporates at least the following three aspects:
- (a) prisoners should not be subjected to hardships or constraints other than those which necessarily result from the deprivation of liberty consequent upon them serving a term of imprisonment;
 - (b) prisoners should progress through their sentence in an environment that provides reasonable opportunity for them to rehabilitate themselves towards the kind of responsible and crime-free life that they envisage post-release; and,
 - (c) access to health care is a fundamental aspect of the right to dignity⁵² and the right of detainees to be treated humanely includes access to health care.
31. This right⁵³ is premised on the proposition that persons who are detained must not be subject to hardship other than that which results from the deprivation of their liberty.⁵⁴ This is consistent with the underlying principle of s 30 which is that “a person’s rights should only be curtailed to the extent necessary due to the confinement, reflecting that the punishment is intended to be limited to the deprivation of liberty.”⁵⁵ While recognising that a “necessary consequence of deprivation of liberty is that some rights enjoyed by other citizens will be unavailable or compromised”, “[t]o be treated humanely requires some level of benevolence or compassion and the infliction of the minimum pain.”⁵⁶ As a prisoner, the appellant is to be treated humanely,⁵⁷ with

⁵¹ Which was modelled on Article 10(1) International Convention on Civil and Political Rights, opened for signature: 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵² *Castles v Secretary Department of Justice* (2010) 28 VR 141, 169 [108], 170 [113] (Emerton J).

⁵³ Which was intended to establish a “minimum standard” of treatment of incarcerated persons: Explanatory Note, Human Rights Bill 2018 (Qld) 25.

⁵⁴ *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 173 [108] (Emerton J) concerning s 22(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which is in the same terms as s 30(1) HRA. See too Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess, (10 April 1992), [3]; Human Rights Committee, *Views: Communication No 1818/2008*, 100th sess, UN Doc CCPR/C/100/D/1818/2008 (25 October 2010) annex, [6.8] (*McCallum v South Africa*’).

⁵⁵ Explanatory Note, Human Rights Bill 2018 (Qld) 25.

⁵⁶ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QdR 250, 324 [245] (Martin J).

⁵⁷ s 3(1) CS Act.

respect for her dignity⁵⁸ and with due consideration for her particular human needs.⁵⁹ People are sentenced to imprisonment in jail as punishment, not for punishment.⁶⁰ The “prison system shall not...aggravate the suffering inherent in such a situation”.⁶¹ That is, s 30 mandates “good conduct” towards people who are detained⁶² and ought to incorporate recognition that “gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.”⁶³

32. One of the purposes for which a sentence may be imposed on an offender is to provide conditions that will help the offender to be rehabilitated.⁶⁴ “Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of [their] wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen.”⁶⁵ That involves facilitating reasonable opportunities for a prisoner to rehabilitate themselves towards the kind of responsible and crime-free life that they envisage for themselves post-release.⁶⁶ That may include becoming a genetic parent. If achieved, rehabilitation “is likely to be the most durable guarantor of community protection and is clearly in the public interest.”⁶⁷
33. By having no access to egg freezing in order to preserve the ability to safely give birth to a genetic child post-release, on the Court of Appeal’s construction, the appellant is being subjected to hardships that go beyond those that necessarily result from her imprisonment and, therefore, her right to humane treatment while imprisoned is being limited.

⁵⁸ s 3(3)(a) CS Act.

⁵⁹ *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 166 [94] (Emerton J).

⁶⁰ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QdR 250, 323 [237] (Martin J).

⁶¹ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (9 January 2016, adopted 17 December 2015) annex, rule 3. The Attorney-General accepted that the Mandela Rules were relevant in *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QdR 250, 323 [238] (Martin J).

⁶² *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 167 [99] (Emerton J).

⁶³ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (the Bangkok Rules)*, UN Doc A/RES/65/229 (21 December 2010) rule 10(1).

⁶⁴ s 9(1) *Penalties and Sentences Act 1992* (Qld); *Veen v R (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ). This was recognised in the Explanatory Note to the CS Bill at p 20.

⁶⁵ *Vartzokas v Zanker* (1989) 51 SASR 277, 279 (King CJ).

⁶⁶ Nelson Mandela Rules, rules 4, 107.

⁶⁷ *Hogan v Hinch* (2011) 243 CLR 506, 536-7 [32] (French CJ).

34. Having regard to the aspect of this right identified in paragraph 30(c) above, the appellant's right to humane treatment while deprived of liberty is also limited on her construction of s 22, for the reasons stated in paragraph 23 above.

The appellant's construction is most compatible with the right to humane treatment when deprived of liberty

35. *The nature of the human right (s 13(2)(a))*: Treating all persons deprived of their liberty with humanity and with respect for their dignity is "a fundamental and universally applicable rule".⁶⁸ The way that a society treats those over whom it exercises power, particularly those held in its institutions, reflects the democratic health of that society. Ensuring that any limitation imposed on this right is as constrained as the purpose of the provision permits, is therefore highly important.
36. *The nature of the purpose of the limitation (s 13(2)(b))*: Paragraph 25 above pertains.
37. *Relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose (s 13(2)(c))*: Paragraph 26 above pertains.
38. *Any less restrictive and reasonably available ways to achieve purpose (s 13(2)(d))*: Paragraph 27 above pertains.
39. *Balance between the importance of the purpose of the limitation and preserving the human right, taking into account the nature and extent of the limitation (s 13(2)(e), (f) and (g))*: The expansive construction offends human dignity because it subjects female prisoners, imprisoned for periods that substantially traverse the end stages of their reproductive prime, to the additional hardship of unnecessarily exposing her, in the post-release life of her own design, to the risks of, at least, a geriatric pregnancy including the associated increased mortality and morbidity. The appeal court's construction reaches beyond restricting a woman's ability to procreate while in prison and limits her ability to safely fall pregnant and bear her own biological child post-release. That encroachment on the inherent dignity of female prisoners and the additional emotional hardship imposed on them undermines their right to humane treatment while in prison and is not justified and is disproportionate to the aim of preventing procreation while in prison. The appeal court's construction undermines the rehabilitative goals of incarceration as the reduced likelihood of safe procreation post-release may diminish a prisoner's incentives to rehabilitate themselves.⁶⁹ The

⁶⁸ Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess, (10 April 1992), [4].

⁶⁹ *Dickson v United Kingdom* (2007) (European Court of Human Rights, Grand Chamber, Application No 44362/04, 4 December 2007) [75].

absence of benevolence and the aggravation of suffering resulting from the appeal court's construction weighs against it.

Equality and non-discrimination (s 15(2), (3) and (4) HRA)

40. Section 15(2) of the HRA provides, “[e]very person has the right to enjoy the person’s human rights without discrimination.” Section 15(3) provides, “[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination.” Section 15(4) provides, “Every person has the right to equal and effective protection against discrimination.”
41. Schedule 1 of the HRA provides, “*discrimination*, in relation to a person, includes direct discrimination or indirect discrimination, within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute stated in section 7 of that Act”.⁷⁰
42. Section 15(2) operates as an accessory to the other rights protected in the HRA,⁷¹ whereas ss 15(3) and 15(4) are autonomous rights that act independently from the other rights in the HRA.⁷² Each is concerned with substantive equality.⁷³ “This is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally.”⁷⁴

The Court of Appeal’s construction limits the appellant’s right to enjoy her human rights without discrimination

43. On the Court of Appeal’s construction, the appellant is indirectly discriminated against as compared to male prisoners on the basis of her sex⁷⁵ because, as a female,

⁷⁰ There is conflicting authority as to whether this definition is inclusive or exhaustive: see e.g. *Austin BMI Pty Ltd v Deputy Premier (No 1)* (2023) 16 QdR 377, 486-88 [316]-[320] (Freeburn J); *Johnston v Carroll* (2024) 19 QdR 1, 86-7 [294]-[298] (Martin SJA). See also *Mizner v Queensland (Corrective Services)* [2025] QCA 169, [180] and [197]. However, irrespective of that debate, ‘sex’ is clearly a prohibited ground of discrimination within the legislative definition.

⁷¹ *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 314 [120].

⁷² *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 315 [126]. The elements of s 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are reflected in HRA ss 15(3) and (4).

⁷³ The first part of s 15(3), which provides that “every person is equal before the law” is also concerned with formal equality before the law; it proscribes arbitrary or discriminatory enforcement of the law: *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 316-17 [135]-[136], in relation to the cognate aspect of the right protected by s 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁷⁴ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 70-1 [210] (Tate JA, Osborn JA agreeing); *Thlimmenos v Greece* (2001) 31 EHRR 15 [44]. See too *Gerhardy v Brown* (1985) 159 CLR 70, 128-131 (Brennan J).

⁷⁵ Sch 1 HRA definition of “discrimination”; “sex” ss 7(a), 8(a) *Anti-Discrimination Act 1991* (Qld) and “indirect discrimination” ss 9, 11 *Anti-Discrimination Act 1991* (Qld).

she is biologically limited in her ability to become a genetic parent to a much greater extent than incarcerated males.⁷⁶

44. While the primary judge found that the expansive construction⁷⁷ “ensures that “all prisoners are treated equitably”,⁷⁸ that does not account for the subjective inequality it exposes the appellant to. “Even facially identical treatment of men and women may discriminate if it fails to take into account women’s different needs.”⁷⁹ The appellant is discriminated against in her ability to become a genetic parent post-release as a female with a limited reproductive window as compared to male prisoners. “Equality means substantive equality, not just formal equality.”⁸⁰ Pursuant to Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, “State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”⁸¹ In this regard, it has been recognised that, “[g]ender 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”⁸² and, “[s]eemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive equality requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to...reproductive health.”⁸³

The Court of Appeal’s construction is not a reasonable and demonstrably justified limit

45. *The nature of the human right (s 13(2)(a))*: “Equality and non-discrimination are the foundation of the rule of law and democratic society in which everybody knows they

⁷⁶ While some imprisoned men may, for a variety of reasons, wish to have their sperm frozen so as to ensure their ability to reproduce after the expiry of their term of imprisonment, women are uniquely disadvantaged because of biological limitations inherent in female reproduction.

⁷⁷ *Smith v Chief Executive, Queensland Corrective Services* [2026] QCA 99, [56] (Mullins P, Brown and Bradley JJA agreeing) (CAB, p 50).

⁷⁸ *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288, [95] (Sullivan J) (CAB, p 23).

⁷⁹ Human Rights Committee, *Views: Communication No 2324/2013*, UN Doc. CCPR/C/116/D/2324/2013 (31 March 2016) (*Mellet v Ireland*), [11]. See also [10] and [12]-[13] and Individual opinion of Committee member Sarah Cleveland (concurring) [6]-[12].

⁸⁰ *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 342 [107] (Bell J sitting as President of VCAT).

⁸¹ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 12.

⁸² 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 (1 May 2016), [25].

⁸³ *General Comment No 22*, [27].

are recognised in law as human beings of equal worth and potential, and equally deserving of concern, respect and consideration.”⁸⁴ Unequal treatment has the potential to “have serious, and even traumatic, social or economic consequences for the individual and their families.”⁸⁵ “The human right to equal protection of the law without and against discrimination expresses the fundamental value of substantive equality in the content and operation of the law. It protects the interests that all people have, as of right, in being equally protected by the law from discrimination, including protection from laws that are discriminatory in nature.”⁸⁶ Accordingly, it is considered “a right of fundamental importance which is high in the hierarchy of rights” recognised in the statutory scheme.⁸⁷

46. *The nature of the purpose of the limitation (s 13(2)(b))*: Paragraph 25 above pertains. If a purpose of the ban is “to ensure incarceration ‘retains a punitive or deterrent element’”⁸⁸ then it puts beyond doubt that it operates in a discriminatory manner towards women because the effect is that women, particularly women coming to the end of the reproductive stage of their life, will be punished more harshly than men who are convicted of the same crime and sentenced to the same period of imprisonment.
47. *Relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose (s 13(2)(c))*: Paragraph 26 above pertains.
48. *Any less restrictive and reasonably available ways to achieve purpose (s 13(2)(d))*: Paragraph 27 above pertains.
49. *Balance between the importance of the purpose of the limitation and preserving the human right, taking into account the nature and extent of the limitation (s 13(2)(e), (f) and (g))*: Paragraph 39 above pertains. The appeal court’s construction of s 22(2) does not strike the right balance between the importance of the purpose and the importance of preserving the human right because it limits a prisoner’s ability to procreate while in prison *and also* prevents female prisoners, inherently limited by their biology, to take any step to preserve their ability to safely do so post-release (which, as a consequence of their biology, males need not be primarily concerned

⁸⁴ *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 342 [277] (Bell J sitting as President of VCAT).

⁸⁵ *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 310 [109] (Bell J sitting as President of VCAT).

⁸⁶ *Re Lifestyle Communities (No 3)* (2009) 31 VAR 286, 344 [287] (Bell J sitting as President of VCAT).

⁸⁷ *PJB v Melbourne Health (‘Patrick’s Case’)* (2011) 39 VR 373, 385 [42], (Bell J), discussing s 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁸⁸ Attorney-General’s Special Leave Response dated 14 July 2026, [20].

by).⁸⁹ The discriminatory effect of s 22(2) means that females in the appellant's position do not enjoy equal protection of the law and do "harder time" than males of the same or similar age in prison.

The right to privacy (s 25(a) HRA)

50. Section 25(a) of the HRA provides, "a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with...". The right to privacy "is a broad right, with many dimensions",⁹⁰ encompassing a person's right "to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability".⁹¹ A person's body concerns the most intimate aspect of one's private life,⁹² and the choice to become a genetic parent has been considered "a particularly important facet of an individual's existence or identity".⁹³
51. The right will only be limited if interference is 'unlawful' or 'arbitrary'. It has been held that "[t]he notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate. Arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought."⁹⁴ If an interference with privacy is arbitrary, it will be very difficult to establish that it is justified under HRA s 13.⁹⁵

Both constructions limit the appellant's right to privacy

52. On the appellant's construction, there is a blanket and automatic ban on accessing artificial insemination and in vitro fertilisation services while in prison and as such,

⁸⁹ ss 29 and 30 of the CS Act demonstrate that Parliament is prepared to treat male and female prisoners differently in respect of matters concerning children.

⁹⁰ *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266, [231] (Crowley J). See also Explanatory Note, Human Rights Bill 2018 (Qld) 22.

⁹¹ *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 131 [619] (Bell J sitting as President of VCAT).

⁹² *Williams v Director General Justice* (2025) 397 FLR 280, 324 [223].

⁹³ *Dickson v United Kingdom* (2007) (European Court of Human Rights, Grand Chamber, Application No 443362/04, 4 December 2007) [78].

⁹⁴ *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266, [230] (Crowley J). See also *Mizner v Queensland* [2025] QCA 169, [211], [214] (Crowley J, Bond JA and Gotterson AJA agreeing); *Thompson v Minogue* (2021) 67 VR 301, 318 [55] adopting the human rights meaning of the term described by Warren CJ in *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 470-71 [103]-[113].

⁹⁵ *Thompson v Minogue* (2021) 67 VR 301, 318-19 [58] (Kyrou, McLeish, Niall JJA).

there is an arbitrary interference with the appellant's privacy.⁹⁶ On the Court of Appeal's construction, the arbitrary interference with the appellant's autonomy and reproductive freedom reaches well beyond a time when the lawful restrictions on her liberty have been lifted. Additionally, on the Court of Appeal's construction, the right to privacy is further limited by denying access to medical technology necessary to exercise the right to privacy concerning psychological integrity because that aspect of the right "is harmed by denying ... her the possibility of acceding to a procedure that makes it possible to exercise the desired reproductive freedom"⁹⁷ in future.

53. For the reasons stated in paragraphs 15, 25, 33 and 37 herein, the Court of Appeal's construction constitutes an arbitrary interference with the appellant's right to privacy.

The appellant's construction is most compatible with the right to privacy

54. *The nature of the human right (s 13(2)(a))*: The right to privacy is considered to be "of fundamental importance" in the statutory scheme.⁹⁸ It reflects the fundamental values of "physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person."⁹⁹ Accordingly, this right protects and enhances a person's liberty.¹⁰⁰ The right to privacy is underpinned by the concept of human dignity which has been recognised as "the source from which all other human rights are derived."¹⁰¹ As outlined above with respect to the s 30 right, and as is confirmed by s 3(3) of the CS Act, the dignity of prisoners is to be respected.
55. *The nature of the purpose of the limitation (s 13(2)(b))*: Paragraph 25 above pertains.
56. *Relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose (s 13(2)(c))*: Paragraph 26 above pertains.
57. *Any less restrictive and reasonably available ways to achieve purpose (s 13(2)(d))*: Paragraph 27 above pertains.
58. *Balance between the importance of the purpose of the limitation and preserving the human right, taking into account the nature and extent of the limitation (s 13(2)(e), (f) and (g))*: When egg freezing is incapable of resulting in procreation, the balance

⁹⁶ *Dickson v United Kingdom* (2007) (European Court of Human Rights, Grand Chamber, Application No 443362/04, 4 December 2007) [65]-[71], [77]-[85].

⁹⁷ *Murillo v Costa Rica* (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights, Series C No 257, 28 November 2012), [282].

⁹⁸ *Director of Housing (Vic) v Sudi* (2010) 33 VAR 139, 145 [29] [(Bell J sitting as President of VCAT) (reversed on appeal on other grounds), in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)].

⁹⁹ *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 131 [620] (Bell J sitting as President of VCAT).

¹⁰⁰ *Director of Housing v Sudi* (2011) 33 VAR 139, 145 [29] (Bell J sitting as President of VCAT).

¹⁰¹ *Clubb v Edwards* (2019) 267 CLR 171, 196 [49]-[50] (Kiefel CJ, Bell and Keane JJ).

clearly lies in favour of a prisoner's inherent dignity to decide, and pursue options to preserve their autonomy, to eventually become a genetic parent post-release.

The Appellant's construction is not inconsistent with the purpose of s 22(1)

59. For the reasons stated in the AS, the purpose of s 22(2) of the CS Act is to prevent prisoners from procreating while in prison. As egg freezing, as an isolated activity, is incapable of resulting in procreation, the appellant's construction which is most compatible with the human rights in ss 15(2), (3) and (4), 25(a), 30(1) and 37(1) of the HRA, is consistent with the purpose of s 22(2). Accordingly, the result is that there must be partial disapplication of s 22 such that the phrase "assisted reproductive technology" does not include oocyte cryopreservation.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

60. The third respondent estimates that the presentation of its oral argument will require up to 15 mins.

Dated 31 August 2026



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ANNEXURE TO THIRD RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Corrective Services Act 2006</i> (Qld)	1 Nov 2023 Reprint	ss 3, 22, 29, 30	Version in force when delegate refused s 22 application	28 Feb 2024
2	<i>Human Rights Act 2019</i> (Qld)	Current	Pts 1-3, sch 1	Version in force when delegate refused s 22 application	28 Feb 2024
3	<i>Acts Interpretation Act 1954</i> (Qld)	Current	ss 14A, 14B, 15AB	Version in force when delegate refused s 22 application	28 Feb 2024
4	<i>Acts Interpretation Act 1901</i> (Cth)	Current	s 15AA	Illustrative purposes	
5	<i>Anti-Discrimination Act 1991</i> (Qld)	1 March 2023 Reprint	ss 7, 8, 9, 11	Version in force when delegate refused s 22 application	28 Feb 2024
6	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Current	ss 8, 13, 22, 32	Illustrative purposes	
7	<i>Penalties and Sentences Act 1992</i> (Qld)	Current	s 9	Illustrative purposes	
8	<i>Hospital and Health Boards Act 2011</i> (Qld)	Current	s 15	Illustrative purposes	
9	<i>Surrogacy Act 2010</i> (Qld)	Current	ss 21, 22	Illustrative purposes	