

HIGH COURT OF AUSTRALIA

GORDON A-CJ,
EDELMAN, GLEESON, JAGOT AND BEECH-JONES JJ

RACHEL SMITH

APPELLANT

AND

CHIEF EXECUTIVE, QUEENSLAND
CORRECTIVE SERVICES & ORS

RESPONDENTS

Smith v Chief Executive, Queensland Corrective Services
[2026] HCA 37
Date of Hearing: 17 September 2026
Date of Judgment: 14 October 2026
B58/2026

ORDER

- (1) *Appeal allowed.*
- (2) *Set aside orders 2 to 5 and 7 to 10 of the Court of Appeal of the Supreme Court of Queensland made on 29 May 2026 and, in their place, order that:*
 - (i) *Appeals allowed.*
 - (ii) *Set aside the orders of the Supreme Court of Queensland made on 27 November 2024 and 5 March 2025 and, in their place, order that:*
 - (A) *Application allowed.*
 - (B) *The respondent's decision of 28 February 2024 be quashed.*
 - (C) *The matter be remitted to the respondent for determination according to law.*

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(D) The respondent pay the applicant's costs of and incidental to the application.

(iii) The respondent pay the appellant's costs of the appeals.

(3) The first respondent pay the appellant's costs of the appeal.

On appeal from the Supreme Court of Queensland

Representation

S C Holt KC with P Morreau KC, J J Underwood and K E Brown for the appellant (instructed by Owens & Associates)

S B Robb KC with L M Kruger and S M Connolly for the first respondent (instructed by Queensland Corrective Services)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorecka and K J E Blore for the second respondent (instructed by Crown Law (Qld))

K E Slack for the third respondent (instructed by Queensland Human Rights Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Smith v Chief Executive, Queensland Corrective Services

Administrative law – Judicial review – Prohibition on applying to participate in or participating in "assisted reproductive technology" – *Corrective Services Act 2006* (Qld) – Where appellant prisoner in corrective services facility – Where appellant likely to experience material reduction in fertility prior to release – Where appellant applied to first respondent for approval to undergo treatment at her own cost to extract and freeze eggs – Where application to undergo treatment refused – Whether "assisted reproductive technology" includes egg extraction and freezing – Whether *Corrective Services Act* prohibits appellant from applying to participate in or participating in treatment to extract and freeze eggs.

Words and phrases – "ART", "assisted reproductive technology", "basic human entitlements", "common meaning", "conforming interpretation", "conjugal visits", "constructional choice", "contextomy", "corrective services", "demonstrably justifiable", "egg extraction", "egg freezing", "equality", "fertility", "fertility-based punishment", "fertility preservation", "literalism", "loss of fertility", "natural meaning", "non-conforming interpretation", "parliamentary intention", "partial disapplication", "participate in ART", "participate in assisted reproductive technology", "primary meaning", "principle of legality", "prisoner dignity", "prisoner entitlements", "prisoner health", "prisoner rights", "prisoner special needs", "procedures to achieve reproduction", "procreation", "punishment", "reproduction", "reproductive autonomy", "right to preserve fertility", "right to procreate", "right to reproduce", "severance", "value judgments", "welfare of prisoners".

Acts Interpretation Act 1954 (Qld), ss 14A, 14B.

Corrective Services Act 2006 (Qld), ss 3, 22, 154.

Human Rights Act 2019 (Qld), preamble, ss 8, 13, 15, 25, 30, 37, 48.

International Covenant on Economic, Social and Cultural Rights (1966), Art 12.

1 GORDON A-CJ AND BEECH-JONES J. The appellant, Ms Smith, is a prisoner who wishes to undergo treatment to extract and freeze her eggs while incarcerated. Ms Smith will be 39 on her parole eligibility date and 41 when her sentence expires.

2 On 3 June 2023, Ms Smith applied to the first respondent, the Chief Executive, Queensland Corrective Services ("the Chief Executive"), under s 22(1) of the *Corrective Services Act 2006* (Qld) ("the CS Act") for approval to receive treatment at her own cost for the extraction and freezing of her eggs. The delegate of the Chief Executive refused Ms Smith's request.

3 Section 22 of the CS Act, headed "Private medical examination or treatment", relevantly prohibits a prisoner from applying for approval to participate in, or participating in, "assisted reproductive technology". It provides:

- "(1) Subject to subsection (2), a prisoner in a corrective services facility may apply in writing to the chief executive for approval to be examined or treated by a health practitioner nominated by the prisoner.
- (2) A prisoner in a corrective services facility can not –
 - (a) participate in *assisted reproductive technology*; or
 - (b) apply for the chief executive's approval to participate in *assisted reproductive technology*.
- (3) The chief executive may give the approval mentioned in subsection (1) if satisfied –
 - (a) the application for the approval is not –
 - (i) frivolous or vexatious; or
 - (ii) for an examination or treatment for participating in *assisted reproductive technology*; and
 - (b) the prisoner is able to pay for the examination or treatment and associated costs; and
 - (c) the health practitioner nominated by the prisoner is willing and available to carry out the examination or treatment of the prisoner.
- (4) The prisoner must pay for the examination or treatment and associated costs.

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- (5) The chief executive must consider, but is not bound by, any report or recommendation made by the nominated health practitioner." (emphasis added)

The term "assisted reproductive technology" is not defined in the CS Act.

4 The issue is whether the extraction and freezing of Ms Smith's eggs falls within the meaning of "assisted reproductive technology" under s 22(2) of the CS Act. Resolution of that issue turns on the proper construction of "assisted reproductive technology". The answer is that, properly construed, the phrase "assisted reproductive technology" includes only technology that directly assists with conception or reproduction. It does not include egg extraction and freezing, which involve technology that assists to preserve fertility.

Background

5 It was not disputed that there is a statistical reduction in a female's fertility between the age period of 33 to 35 years, and the age period of 39 to 41 years. Accordingly, Ms Smith is likely to experience a material reduction in her fertility prior to her release on parole.

6 It was also not disputed that in applying to the Chief Executive under s 22(1) of the CS Act for approval to extract and freeze her eggs, Ms Smith was willing to pay the cost for the extraction and freezing of her eggs.¹ However, the Chief Executive refused Ms Smith's request on the basis that egg freezing constituted "assisted reproductive technology" within the meaning of s 22(2) of the CS Act.

7 Ms Smith applied for a statutory order of review of the Chief Executive's decision in the Supreme Court of Queensland, contending that while s 22(2) of the CS Act prohibits prisoners from using technology to assist them to conceive in custody, it does not prohibit prisoners from using technology to preserve their ability to conceive once released. The primary judge (Sullivan J) dismissed Ms Smith's application for a statutory order of review. The primary judge answered the question "is the extraction and freezing of a female's eggs within the meaning of 'assisted reproductive technology' on the proper construction of s 22(2) of the CS Act?" in the affirmative. Construing the phrase "assisted reproductive technology", the primary judge found that the ordinary meaning of the phrase "includes the processes of egg extraction and freezing".

8 The single ground of appeal before the Court of Appeal of the Supreme Court of Queensland was whether the primary judge erred in holding that

1 As required by s 22(3)(b) and (4) of the CS Act.

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"assisted reproductive technology" did not have an available meaning that excluded the extraction and freezing of eggs (and consequently in holding that the Chief Executive's refusal of Ms Smith's application for approval was correct in law). The Court of Appeal (Mullins P, Brown and Bradley JJA agreeing) dismissed Ms Smith's appeal, holding that "assisted reproductive technology" was unambiguous and captured the extraction and freezing of eggs because "the only purpose for extracting eggs and freezing them is to have them available for reproduction purposes in the future".

9 In this Court, Ms Smith raised two grounds of appeal. The first was that the Court of Appeal erred in holding that s 22(2) of the CS Act operates to prohibit women prisoners from freezing their eggs during their custodial term. Ms Smith contends that the Court of Appeal's construction of "assisted reproductive technology" fails because, even if it was appropriate to approach the construction of s 22(2) of the CS Act on a literal basis as the Court of Appeal did, the words do not have a single, unambiguous meaning. Section 22(2) of the CS Act, read in light of its context and purpose, provides that a prisoner may not procreate either naturally or artificially while in custody. It is not directed at preventing prisoners from preserving their fertility while in custody. Extracting and freezing eggs is an end in itself, with the goal of reproductive health preservation and the preservation of future choices.

10 The Chief Executive and the second respondent, the Attorney-General for the State of Queensland, submit that the construction of s 22(2) of the CS Act by the primary judge and the Court of Appeal was correct and Ms Smith's construction should be rejected. That is, on the proper construction of s 22(2) of the CS Act, a prisoner in a corrective services facility cannot participate, or apply for the Chief Executive's approval to participate, in procedures for the purpose of assisting reproduction. Those procedures include gamete (egg) extraction (and freezing) and are therefore captured by the prohibition.

11 Ms Smith's second ground of appeal was that the Court of Appeal erred in holding that s 48(1) of the *Human Rights Act 2019* (Qld) has "no role to play in the interpretation of a statutory provision unless, when the provision is construed without reference to human rights, its language admits of at least two constructional choices". Given that the appeal succeeds on ground 1, ground 2 is not reached.

CS Act

12 Section 3 sets out the purpose of the CS Act. It relevantly provides that:

"(1) The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.

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- (2) This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.
- (3) This Act also recognises –
 - (a) the need to respect an offender's dignity; and
 - (b) the special needs of some offenders by taking into account –
 - (i) an offender's age, sex or cultural background; and
 - (ii) any disability an offender has." (emphasis added)

13 Three points should be noted at the outset. First, the purpose of corrective services is to achieve "community safety and crime prevention" through, relevantly, the "humane containment ... of offenders".² Second, the CS Act recognises that "every member of society", including offenders, "has certain basic human entitlements". For that reason, the CS Act recognises that "an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded".³ The entitlements that are "necessarily diminished" are not prescribed but their diminishment does not extend beyond the period of imprisonment. Third, the CS Act recognises "the need to respect an offender's dignity" and, importantly, the special needs of some offenders taking into account an offender's age, sex or cultural background.⁴ A "special need" of an offender is defined to mean a need the offender has, compared to the general offender population, because of the offender's age, disability, sex or cultural background.⁵

14 Division 1 of Pt 2 of Ch 2 of the CS Act (which includes s 22) contains provisions directed to the stated purpose of the CS Act. The provisions relate to the management of prisoners generally, particularly their needs relating to health, death and the registration of certain matters, in a manner that preserves a prisoner's

2 CS Act, s 3(1).

3 CS Act, s 3(2).

4 CS Act, s 3(3).

5 CS Act, Sch 4, definition of "special need". See also Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 40-41.

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entitlements (other than those that are necessarily diminished because of imprisonment) while they are in prison.

15 Section 21, for example, provides for medical examination or treatment and requires the relevant health practitioner, if it is reasonably practicable in the circumstances, to tell a prisoner certain information before carrying out a medical examination or treatment.⁶

16 Section 22 then addresses "private medical examination or treatment". Section 22(1) provides that, subject to s 22(2), a prisoner in a corrective services facility may apply in writing to the Chief Executive for approval to be examined or treated by a health practitioner nominated by the prisoner. There is a carve out. Section 22(2) provides that a prisoner cannot participate in "assisted reproductive technology"⁷ or apply for the Chief Executive's approval to participate in "assisted reproductive technology".⁸ Section 22(3) provides that the Chief Executive may give approval for the prisoner to be examined or treated by a health practitioner nominated by the prisoner if satisfied that the application for approval is not frivolous or vexatious,⁹ or for an examination or treatment for participating in "assisted reproductive technology".¹⁰ The Chief Executive must also be satisfied that the prisoner is able to pay for the examination or treatment and associated costs¹¹ and that the health practitioner nominated by the prisoner is willing and available to carry out the examination or treatment of the prisoner.¹² The prisoner must pay for the examination or treatment and associated costs.¹³ The Chief Executive must consider, but is not bound by, any report or recommendation made by the nominated health practitioner.¹⁴ In sum,

6 CS Act, s 21(1).

7 CS Act, s 22(2)(a).

8 CS Act, s 22(2)(b).

9 CS Act, s 22(3)(a)(i).

10 CS Act, s 22(3)(a)(ii).

11 CS Act, s 22(3)(b).

12 CS Act, s 22(3)(c).

13 CS Act, s 22(4).

14 CS Act, s 22(5).

consistent with the purpose of the CS Act, s 22 safeguards a prisoner's basic entitlement to medical examination or treatment.

Construction of the phrase "assisted reproductive technology"

17 Properly construed,¹⁵ the phrase "assisted reproductive technology" includes only technology that directly assists with conception or reproduction. It does not include egg extraction and freezing, which involve technology that assists to preserve fertility. In other words, the processes of extracting and freezing eggs are separate from the processes of reproduction and do not involve an exercise of the right to procreate.

18 A construction of "assisted reproductive technology" limited to technology that directly assists with conception or reproduction is consistent with the stated purpose of the CS Act and the specific purpose of s 22(2). Specifically, this construction safeguards a prisoner's general entitlement to seek or receive medical treatment at their own cost that may preserve their fertility, in circumstances where, relevantly, there is a statistical reduction in a female's fertility in a comparison between the age period of 33 to 35 and the age period of 39 to 41. In other words, this construction takes into account the dignity and special needs (relative to the general offender population) of a female prisoner (based on her sex) who is a certain age.

19 The construction adopted also provides for the management of a prisoner's needs under Div 1 of Pt 2 of Ch 2 (relating, in this case, to prisoner health) in a humane manner which safeguards the prisoner's basic entitlement to seek or receive medical treatment at their own cost that may preserve their fertility. Put in different terms, the construction adopted is not inconsistent with the reasons for the s 22(2) prohibition, being to ensure equity in decision-making between prisoners and that correctional authorities are not required to make value judgments about whether individual prisoners should be allowed to procreate while in prison.¹⁶ A prisoner who seeks or receives medical treatment at their own cost that may preserve their fertility is not enlivening any entitlement to participate in assisted reproductive technology to "procreate". Correctional authorities are therefore not required to make any inequitable decisions as between prisoners or any value judgments.

15 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770.

16 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15, 23-24, 49-50.

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20 The construction adopted is also one that is consistent with the undisputed facts. As accepted by the primary judge and the Court of Appeal, the process for egg extraction and freezing involves the following steps, none of which include reproduction: the female will receive a series of injections of drugs to stimulate egg production and maturity; the female will then undergo a medical procedure, often under general anaesthetic, to extract eggs; the eggs are then frozen and stored; and the process is repeated, usually two to three times, so as to extract and freeze a sufficient number of eggs.

21 While an individual who has undergone this process of egg extraction and freezing may, at a later point in time, seek to become pregnant using those eggs, the use of technology to have those eggs extracted and stored, of itself, cannot properly be described as participating in "assisted reproductive technology" that is being used to reproduce or conceive. Here, Ms Smith is not seeking to extract and store her eggs and have them fertilised or implanted so she can become pregnant while in prison. She is seeking to receive medical treatment that would allow her to extract and freeze her eggs so that she may preserve her fertility and choose whether to have a child once she leaves prison.

22 Moreover, as submitted by Ms Smith, the construction advanced by the Chief Executive and accepted by the lower courts is too broad in its practical effect. It would capture "any procedure for the purposes of assisting in reproduction", including, for example, the reversal of a vasectomy, treatment for endometriosis, a diagnostic laparoscopy, or the extraction and freezing of eggs as part of a standard cancer treatment. That construction is contrary to the stated purpose of the CS Act and, no less importantly, does not safeguard a prisoner's basic entitlements (other than those which are necessarily diminished, including the right to procreate), and does not take into account a prisoner's dignity and special needs (including their age or sex).

23 The Explanatory Notes accompanying the introduction of s 22 stated:¹⁷

"In Queensland, the entitlement of prisoners to receive conjugal visits was considered and rejected by the 1988 Kennedy Review and sexual activity during contact visits is clearly prohibited under the Act.

Advances in medical technology for the treatment of infertile couples, has led to an increase in requests by prisoners in custody to participate in assisted reproductive technology. Whether access to assisted reproductive technology is a right or a privilege is still undecided amongst the general population, let alone the prison population. In the community,

17 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15, 24, 49.

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decisions about whether access to assisted reproductive technologies is granted require the consideration of whether a couple is medically infertile. Prisoner requests for assisted reproductive technology do not usually relate to medical infertility and as the majority of the prison population in Queensland is male, artificial insemination is the form of assisted reproductive technology most frequently requested by prisoners.

The Bill provides that *prisoners in custody will not be entitled to access assisted reproductive technology*. This prohibition ensures *equity in decision making between prisoners and does not require correctional authorities to make value judgments as to whether individual prisoners should be allowed to procreate while they are in prison*.

...

As a result of the clear statement of intent in the Bill, prisoner access to assisted reproductive technology is prohibited. A clear prohibition *ensures equity in decision making between prisoners and does not require correctional authorities to make value judgments as to whether individual prisoners should be allowed to procreate while in prison and are suitable to parent and provide for a child*.

...

The provision makes it clear that *the right to procreate does not survive imprisonment and that a prisoner in a corrective services facility can not apply for approval to participate in assisted reproductive technology or participate in assisted reproductive technology*." (emphasis added)

24

Putting to one side some of the inappropriate language in the Explanatory Notes and the Kennedy Review, the Explanatory Notes reinforce that s 22(2) of the CS Act is concerned with prisoners in custody not being "entitled to access assisted reproductive technology" because "the *right to procreate* does not survive imprisonment" (emphasis added). In other words, the "right to procreate" by access to assisted reproductive technology is a prohibited entitlement that is, as stated in s 3(2) of the CS Act, "necessarily diminished because of imprisonment". On the construction adopted, the carve out of participating in "assisted reproductive technology" achieves that objective but, at the same time, provides for the "humane containment" of offenders by safeguarding their basic entitlements (other than those which are necessarily diminished, including the right to procreate) taking into account their dignity and special needs (including their age or sex). The first and second respondents' construction of the phrase "assisted reproductive technology" in s 22(2) of the CS Act extends to procedures that do not involve reproduction, including those that simply preserve a prisoner's fertility. The effect of that construction would be, at least in a practical

sense, to extend the denial of a prisoner's "right to procreate" to a time beyond the period of their imprisonment. That is not consistent with the stated purpose of the CS Act or the extrinsic materials.

25 For those reasons, the Court of Appeal erred in construing the phrase "assisted reproductive technology" in s 22(2) of the CS Act as "broad and not confined to excluding a prisoner from steps which pertain to fertilisation itself" on the basis that "the only purpose for extracting eggs and freezing them is to have them available for reproduction purposes in the future". The Court of Appeal's construction is inconsistent with the purpose of the CS Act and with the undisputed evidence.

26 Two further matters that were referred to in the submissions should be noted. First, in light of the construction adopted, it is not necessary to describe the interaction between the prohibition on participation in assisted reproductive technology in s 22(2)(a) of the CS Act and other legislation addressing or concerning technologically assisted procreation.¹⁸

27 Second, it is also not appropriate or necessary to attempt to describe all the limits on the Chief Executive's power to refuse to give approval under s 22(3) of the CS Act. It is sufficient to observe that, consistently with the extract from the Explanatory Notes set out above,¹⁹ the Chief Executive is not to make "value judgments" about prisoners' decisions to preserve their fertility, much less whether they should be allowed to procreate after they have ceased to be imprisoned.

Orders

28 The appeal should be allowed and orders made as proposed by Jagot J.

18 See, eg, *Assisted Reproductive Technology Act 2024* (Qld).

19 See [23] above.

EDELMAN J.

Introduction

29 Ms Smith is in prison. She is now 36 years old, and will be 39 years old when she is eligible for parole and 41 years old when her sentence ends. She wants to preserve her potential to have children. After being taken to prison, and when she was 32 years old, she applied to the Chief Executive of Queensland Corrective Services for approval for a medical procedure for "egg freezing" (oocyte cryopreservation) at her own cost. The unchallenged expert evidence and findings of the primary judge were that "the extraction and freezing of a female's eggs between the age period of 33 and 35 has the potential to reduce the risk of age-related infertility, and to reduce the risk of chromosomal abnormalities and the consequential risks which flow from that condition".²⁰

30 Section 22(1) of the *Corrective Services Act 2006* (Qld) permits a prisoner in a corrective services facility to apply to the Chief Executive for approval to be examined or treated by a health practitioner nominated by the prisoner. But that sub-section is subject to the general disability of the prisoner in s 22(2), which prevents any examination or treatment (whether by a nominated health practitioner or not), and prevents even an application under s 22(1), where the examination or treatment would involve participation in assisted reproductive technology. This case is about the meaning of s 22(2), which provides:

"A prisoner in a corrective services facility can not—

- (a) participate in assisted reproductive technology; or
- (b) apply for the chief executive's approval to participate in assisted reproductive technology."

The disability in s 22(2) which precludes a prisoner from participating, or applying for approval to participate, in assisted reproductive technology is complemented by a constraint in s 22(3)(a)(ii), which precludes the Chief Executive from giving approval "for an examination or treatment for participating in assisted reproductive technology".

31 The short question on this appeal is whether the procedure for egg freezing involves "assisted reproductive technology". The delegate of the Chief Executive held that it does. An application for a statutory order of review was dismissed by a judge of the Supreme Court of Queensland (Sullivan J),²¹ who also held that it

20 *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288 at [3].

21 *Judicial Review Act 1991* (Qld), s 20.

does. An appeal to the Court of Appeal of the Supreme Court of Queensland (Mullins P, Brown JA and Bradley JA agreeing) was unanimously dismissed.

32 The Chief Executive and the courts below adopted a wide interpretation of the disability and constraint in s 22(2) and s 22(3)(a)(ii), particularly the words "assisted reproductive technology". That wide interpretation comfortably fits with a linguistic arrangement of those words: any procedure which could assist with possible reproduction. But as Ms Smith submitted, the breadth of application of this interpretation is extraordinary: where part of a purpose for a medical procedure concerns fertility, the interpretation "could include treatment for endometriosis ...; or a diagnostic laparoscopy; or the repair of a twisted ovary; or even ... the use of an app to monitor a menstrual cycle". The wide interpretation would even include within "assisted reproductive technology" a medical treatment with such a fertility purpose for a cancer patient who will imminently be rendered infertile, and thus exclude the availability of such treatment.

33 The approach of the courts below cannot be accepted. Although that approach involves a comfortable linguistic arrangement of the statutory words, a heavy focus on a perceived common meaning and grammatical arrangement of words at the expense of the intention of Parliament, including its purposes and other context to the statutory words, involves the error of literalism. A related error is contextomy, which involves the interpretation of words without regard to all relevant context, particularly where the context is mandatory. To adapt a famous example, an illustration of contextomy is a blunt interpretation of a prohibition on "vehicles in the park"²²—ignoring the context of the liberties of people with babies and people with disabilities who use the park—as prohibiting every method of transport with wheels. This contextomy properly prohibits cars and other automobiles but it also excludes prams and wheelchairs.²³

34 In beautifully crafted written and oral submissions in this Court, Ms Smith avoided the twin errors of literalism and contextomy in the interpretation of the disability and constraint in s 22(2) and s 22(3)(a)(ii). Ms Smith insisted from the outset of her written submissions that the meaning for which she contended "better coheres with the purpose and context of the [*Corrective Services Act*], the operation of the principle of legality and ... s 48(1) of the [*Human Rights Act 2019* (Qld)]". The last is a mandatory consideration as part of the interpretive context

22 See Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593 at 607.

23 And even excludes a World War II truck, in perfect working order, mounted on a pedestal: Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630 at 663.

upon which the ordinary exercise of interpretation depends.²⁴ Subject to the constraints of procedural fairness, it is an aspect of context that must be considered. Unsurprisingly, that aspect of context occupied more than a quarter of Ms Smith's written submissions and a substantial part of the written and oral submissions of the parties (including the Attorney-General for the State of Queensland and the Queensland Human Rights Commission) before this Court.

35 The intention of Parliament in imposing the disability in s 22(2) was solely to extend a prohibition on conjugal visits to the technological equivalent by preventing the participation by prisoners in medical procedures that would achieve reproduction. The wide interpretation of the disability and constraint in s 22(2) and s 22(3)(a)(ii) concerning assisted reproductive technology does not merely go beyond Parliament's purpose for imposing that disability and constraint. It is a non-conforming interpretation because, contrary to ss 30(1) and 37(1) of the *Human Rights Act 2019* (Qld), it limits the human right to dignity and the right to access health services without discrimination in a way that cannot be demonstrably justified in the circumstances.

36 The expression "assisted reproductive technology" must be interpreted according to the intention of Parliament, consistently with the purpose of the disability and constraint in s 22 and, conformably with that purpose, with the rights under the *Human Rights Act*. The expression means procedures, using technology, that are capable, by themselves, of achieving reproduction. The appeal must be allowed.

Statutory interpretation done properly

The lodestar of parliamentary intention

37 It has been said on a number of occasions in this Court that statutory interpretation begins and ends with the text.²⁵ This does not mean that the exercise of interpretation is a literal or solely text-based exercise. It is rarely productive to focus upon dictionary meanings of single words. "Words have conventional meanings but you can only understand what they were used to mean if you know the context in which (ie background against which) they were used."²⁶ Further, as

24 *Momcilovic v The Queen* (2011) 245 CLR 1 at 217 [565]; *Director of Public Prosecutions (Vic) v Smith* (2024) 283 CLR 561 at 606 [131].

25 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

26 Hoffmann, "Language and Lawyers" (2018) 134 *Law Quarterly Review* 553 at 570.

Lord Hoffmann has explained, in words repeated by this Court:²⁷ "The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."²⁸

38 Statements in this Court that interpretation begins and ends with the text are therefore almost invariably qualified by adding that the meaning of the text must still be understood by reference to context and purpose.²⁹ But the identification of purpose is itself an interpretive exercise informed by the meaning of the text.³⁰ So how can the exercise of interpretation avoid becoming a hopelessly circular process if text-in-context is interpreted with reference to purpose, and purpose-in-context is interpreted with reference to text? For centuries, the lodestar by which text, context, and purpose is synthesised has been the notional intention of Parliament.³¹

39 The lodestar of the intention of Parliament was perhaps the legal principle that was most frequently reiterated by the first Chief Justice of this Court, whose intellectual leadership on this point persists more than a century later.³² It is a principle which accords with the ordinary language processes of interpretation of

27 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397. See also *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at 157-158 [106].

28 *R v Brown (Gregory)* [1996] AC 543 at 561.

29 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770.

30 *Hopper v Victoria* (2026) 100 ALJR 582 at 595 [45], 604 [91]; 428 ALR 691 at 704, 715.

31 *Reniger v Fogossa* (1551) 1 Plow 1 at 8 [75 ER 1 at 13]; *Stradling v Morgan* (1560) 1 Plow 199 at 204-205 [75 ER 305 at 312-315]; *Williams v Pritchard* (1790) 4 T R 2 at 3 [100 ER 862 at 862]; *R v Brady* (1797) 2 Leach 803 at 807 [168 ER 501 at 503]; *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 143 [8 ER 1034 at 1057]; *Hawkins v Gathercole* (1855) 6 De G M & G 1 at 22 [43 ER 1129 at 1136]. See also *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at 157-158 [106]; *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 283 CLR 291 at 328 [115].

32 *Dixon v Todd* (1904) 1 CLR 320 at 326-327; *Tasmania v The Commonwealth and Victoria* (1904) 1 CLR 329 at 339; *President of the Shire of Arapiles v Board of Land and Works* (1904) 1 CLR 679 at 686; *Local Board of Health of Perth v Maley* (1904) 1 CLR 702 at 710; *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94 at 107; *Higgins v Berry* (1908) 6 CLR 618 at 625.

meaning which people use to interpret the laws which apply to them.³³ Those ordinary processes involve numerous conventions, maxims, and heuristics which, despite the lawyer's use of Latin to describe them, are no more than "general features of discourse"³⁴ and the ordinary tools of everyday language.

40 One of the conventions of everyday language, especially applicable in carefully drafted legislation,³⁵ is that the more that expressions have a widely accepted primary and natural meaning, the more likely it is that the words of that expression were intended to be "understood in their primary and natural signification unless there are sufficient indications of some other meaning".³⁶ Like other language conventions employed in the interpretation of legislation, this is based upon the consideration that Parliament usually intends that "those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage".³⁷

41 The convention concerning the primary and natural meaning of words is only one convention of language relevant to the ascertainment of the intention of Parliament. Another convention, which might not always suggest the same meaning, is the so-called common law principle of legality: that the more that a meaning would detract from rights and freedoms, and the greater that the detraction would be, the less likely it is that the meaning will be taken to have been intended.³⁸ Even more fundamentally, extrinsic materials might reveal that Parliament did not

33 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at 531 [98]; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1043 [172]; 423 ALR 241 at 291.

34 Grice, *Studies in the Way of Words* (1991) at 26.

35 Compare *Re Shire of Mundaring; Ex parte Solomon* [2007] WASCA 132 at [25]; *Western Australian Planning Commission v Narcom Holdings Pty Ltd* [2011] WASC 259 at [37].

36 *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647, describing this as one "canon[] of construction". See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 162-163 [64].

37 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340. See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4].

38 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]; *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]; *Hurt v The King* (2024) 281 CLR 286 at 325 [106].

intend that the words should bear a primary and natural meaning, even one that is supported by immediate statutory context.³⁹ There will rarely be a difference in result between, on the one hand, the potentially iterative approach to statutory interpretation based on a rule enacted by Parliament⁴⁰ and, on the other hand, the common law rule of statutory interpretation which requires those extrinsic materials always to be considered in the first instance as part of a single synthesis.⁴¹ The approach generally taken is that adopted by this Court in *CIC Insurance Ltd v Bankstown Football Club Ltd*:⁴²

"[I]f the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance."

A contrary argument

42

An argument to the contrary, which denies parliamentary intention a status as a governing principle in the interpretation of legislation and purports to give primacy to so-called textual limits, is sometimes encountered in the context of criminal law. For instance, in the context of criminal law, it was said in the dissenting reasons in *R v A2*⁴³ that "[p]urposive construction ... does not extend to expanding the scope of a provision imposing criminal liability beyond its textual limits". This proposition in the dissenting reasons in *R v A2* relied upon a decision⁴⁴ which, in turn, relied upon reasoning of McHugh J in a case in which he had said no such thing.⁴⁵ McHugh J had rightly said that a court should not extend the scope of criminal liability "even if it thinks that, by inadvertence, the legislature has failed to deal with a matter", and that clear words should not be ignored "if the intention of the legislature is at best a matter of contestable opinion". McHugh J had not suggested that there were textual limits to statutory words that could justify a court denying the intentions or purposes of the legislature.

39 For instance, *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at 163 [119].

40 Such as *Acts Interpretation Act 1954* (Qld), s 14B.

41 *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at 161-162 [112]-[116].

42 (1997) 187 CLR 384 at 408.

43 (2019) 269 CLR 507 at 545 [124].

44 *Milne v The Queen* (2014) 252 CLR 149 at 164 [38].

45 *Krakouer v The Queen* (1998) 194 CLR 202 at 223 [62]-[63].

43 As a matter of principle, the proposition in the dissenting reasons in *R v A2* is also unjustifiable. A disregard of what is accepted to be the purpose of valid parliamentary legislation amounts to a refusal to carry out the intended command of Parliament because Parliament has not expressed itself well enough. Even if it were thought that there could somehow be an implied sanction from Parliament to ignore its commands in such circumstances in a criminal context, s 14A(1) of the *Acts Interpretation Act 1954* (Qld) denies that possibility. That sub-section specifically requires, without any exception, that in "the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation".

Interpretive principles of human rights

44 Sections 48(1) and 48(2) of the *Human Rights Act* relevantly provide for additional interpretive rules. Section 48(1) requires that "[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights". Section 48(2) provides that "[i]f 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 8 of the *Human Rights Act* relevantly provides that a statutory provision is compatible with human rights if the provision "(a) does not limit a human right; or (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13". Section 13 is concerned with limiting of human rights. Section 13(1) provides that a human right "may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". And s 13(2) provides for factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

46 The language of s 48, "to the extent possible that is consistent with its purpose", involves a now-familiar requirement for courts to use all interpretive techniques, consistently with statutory purpose, to ensure compatibility with, or the least departure from compatibility with, the specified human rights. Apart from a convention, little different from the principle of legality, of giving the statutory human rights weight in the interpretation process, there are three different interpretive techniques which are possible to ensure compatibility, consistently with statutory purpose. Those techniques have been sometimes conflated, sometimes described by different names, and, unfortunately, sometimes described

by the same name.⁴⁶ Confusion will only be avoided if those techniques are given different descriptions.

47 The best descriptions of the different interpretive techniques consistent with their respective roles are: (i) conforming interpretation (sometimes misleadingly described as "reading down"); (ii) severance; and (iii) partial disapplication. The first interpretive technique of conforming interpretation is a "primary principle", in the sense that it is concerned with the best meaning of the provision and is part of the single integrated approach to determining meaning.⁴⁷ Conforming interpretation does not merely give weight to human rights in an interpretive process, as the principle of legality would do, but requires a conclusion that gives preference to one interpretation over another in giving the provision a meaning which is compatible with human rights. The latter two interpretive techniques are "secondary"⁴⁸ or "contingent",⁴⁹ in that they operate as a statutory mandate to constrain the *application* of the provision once the meaning has been determined, respectively (in the case of severance) by notionally severing some of the words of the provision and thus reducing the application of the provision or (in the related case of partial disapplication) by partially disapplying the meaning of the provision from some of its applications.

48 Each of these three techniques has been applied on many occasions under s 15A of the *Acts Interpretation Act 1901* (Cth) and equivalent provisions.⁵⁰ The basic concept is the same in s 48 of the *Human Rights Act*, although s 48 does not require severance or partial disapplication of a provision in order to preserve validity but does so in order to prefer a more general rule as to human rights over a more specific statutory provision. In this respect, provided that the severance or partial disapplication is consistent with the purpose of the specific provision, the severance or partial disapplication required by s 48 does little more than reverse the common language convention⁵¹ that, in the application of legislation, the

46 See the discussion in *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650 at 684 [149]-[151]; 430 ALR 1 at 42-43.

47 *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650 at 660 [26]; 430 ALR 1 at 9.

48 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 656-657.

49 *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650 at 660 [26]; 430 ALR 1 at 9.

50 See the discussion in *Clubb v Edwards* (2019) 267 CLR 171 at 313-322 [415]-[433].

51 "*Generalia specialibus non derogant*": see *Brisbane City Council v Amos* (2019) 266 CLR 593 at 612 [36]; *CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd* (2026) 100 ALJR 703 at 720 [81]; 430 ALR 67 at 89.

specific is usually preferred over the general.⁵² The essence of the submission of the Queensland Human Rights Commission on this appeal was that a partial disapplication should occur in this case if the submissions of Ms Smith concerning the relevant aspects of the meaning of s 22(2) and s 22(3)(a)(ii) of the *Corrective Services Act* were not accepted.

49 Contrary to the submissions of the Attorney-General in this case, the latter two techniques are no more impossible under s 48 of the *Human Rights Act* than they are under s 15A of the *Acts Interpretation Act 1901* (Cth). Under both provisions, the interpretive techniques must be applied consistently with the purpose of the legislation being interpreted.⁵³ As I said in *Director of Public Prosecutions (Vic) v Smith*,⁵⁴ the same is true of the equivalent Victorian provision to s 48 of the *Human Rights Act*, and its United Kingdom analogue.⁵⁵ If, for instance, the meaning given to an open-textured statutory provision were found to have an unintended *application*, which is not a necessary consequence of the purpose of the provision but is incompatible with one of the specified human rights, then the command in s 48 of the *Human Rights Act* could not be ignored. The unintended application of the provision would have to be avoided by partial disapplication.

"Participate in assisted reproductive technology"

The two interpretations of "participate in assisted reproductive technology"

50 There are two competing interpretations of "participate in assisted reproductive technology" in issue on this appeal. Neither of those interpretations claimed to be based upon the expression "assisted reproductive technology" being a term of art. Nor did either interpretation claim to be supported by common or widespread usage of the expression. There is therefore little benefit in seeking to make "a fortress out of the dictionary"⁵⁶ or ramparts out of the thesaurus. Whether assisted reproductive technology is technology that aims to achieve reproduction

52 See *Director of Public Prosecutions (Vic) v Smith* (2024) 283 CLR 561 at 610-611 [138]-[139].

53 *Clubb v Edwards* (2019) 267 CLR 171 at 321 [431]; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1046 [183]; 423 ALR 241 at 294. See, for instance, *Hopper v Victoria* (2026) 100 ALJR 582 at 609 [116]-[118]; 428 ALR 691 at 722.

54 (2024) 283 CLR 561 at 612 [143].

55 See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32; *Human Rights Act 1998* (UK), s 3.

56 *Cabell v Markham* (1945) 148 F 2d 737 at 739, quoted in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [27].

or technology that is used as a step towards a purpose of reproduction depends upon the intention of Parliament, which requires close consideration of context and purpose in light of general and mandatory interpretive principles.

51 The first interpretation, found by the courts below and supported by the Chief Executive and the Attorney-General, is the wide interpretation of the disability and constraint in s 22, which is that the participation that is excluded is participation in procedures that are used for a purpose of assisting reproduction.

52 The second interpretation, supported by Ms Smith and the Queensland Human Rights Commission, is a narrow interpretation. The narrow interpretation is that the participation that is excluded is participation in procedures, using technology, that are capable, by themselves, of achieving reproduction.

The purpose of the Corrective Services Act

53 The primary objective of the *Corrective Services Bill 2006* (Qld) was said in the Explanatory Notes to be "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders".⁵⁷ The Explanatory Notes said that the Bill had been drafted with "due regard" to principles which included that "legislation has sufficient regard to the rights and liberties of individuals".⁵⁸

54 Consistently with the primary objective described in the Explanatory Notes, the expressed purpose of the *Corrective Services Act* is "community safety and crime prevention through ... humane containment",⁵⁹ with recognition of matters including: (i) that "every member of society has certain basic human entitlements"; (ii) that "an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded";⁶⁰ (iii) that there is a "need to respect an offender's dignity"; and (iv) the special needs of some offenders having regard, among other things, to "age" and "sex".⁶¹

57 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 1.

58 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 19. See also *Legislative Standards Act 1992* (Qld), s 4(2)(a).

59 *Corrective Services Act*, s 3(1).

60 *Corrective Services Act*, s 3(2).

61 *Corrective Services Act*, s 3(3).

The mandatory interpretive principles of the Human Rights Act

55 Although the *Corrective Services Act* was introduced earlier and is more specific than the *Human Rights Act*, s 48 of the *Human Rights Act*, for the reasons explained above, contains a primary, and not merely a contingent, command for the provisions of the *Corrective Services Act* to be interpreted, to the extent possible that is consistent with their purpose, either in a way that is compatible with human rights or, if that is not possible, in a way that is most compatible with human rights.

56 The premises of the *Corrective Services Act* include that "the operation of many rights and liberties enjoyed in the general community cannot be reasonably expected to be enjoyed by the prison population"⁶² and that "[p]risoner rights must necessarily take a significantly attenuated form" with "fewer facilities and personal freedoms than those enjoyed by the general public".⁶³ But within those constraints, the general purpose of the *Corrective Services Act* confirms that there remains room for the principle of legality⁶⁴ and that there is no inconsistency with that purpose in the application of an interpretation required by s 48, which is either an interpretation that is compatible with human rights or, if that is not possible, an interpretation that is most compatible with human rights.

57 In the courts below, Ms Smith relied upon the rights contained in two human rights provisions in the *Human Rights Act* as part of the primary interpretive exercise required by s 48, as well as the principle of legality. In the circumstances of this case, where the effect of additional human rights on the interpretation of s 22 might have been the subject of additional evidence,⁶⁵ Ms Smith should (consistently with basic requirements of procedural fairness, from which findings of legislative facts are not exempt⁶⁶) be confined in this Court to reliance upon those rights and not be permitted to expand her submissions to additional rights, including the right not to have unlawful or arbitrary interference with privacy or

62 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 19.

63 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 20.

64 Compare *Hurt v The King* (2024) 281 CLR 286 at 325-326 [107].

65 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

66 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511 [164]; *Thomas v Mowbray* (2007) 233 CLR 307 at 513 [618], 521 [636]. See also *Cross on Evidence*, 14th Aust ed (2024) at 261-262 [3159].

family⁶⁷ and various rights of non-discrimination.⁶⁸ Further, since, as will be seen, any support in those rights for Ms Smith's interpretation would not affect the proper interpretation of s 22 in this case, there is no need to consider whether this proceeding should be remitted to address those additional rights.

58 An example of the issues of procedural fairness that would arise if Ms Smith were not confined to the rights upon which she relied in the courts below can be seen by the right, upon which Ms Smith sought to rely for the first time in this Court, to be treated "equal[ly] before the law" and "to the equal protection of the law without discrimination",⁶⁹ as well as a right "to equal and effective protection against discrimination".⁷⁰ There may have been great force in the submission that the wide interpretation of the disability and constraint in s 22 would involve powerful indirect discrimination against women based on the expert evidence concerning the decline in fertility of women compared with men. The curious submission of the Attorney-General—which appeared to assume erroneously that treating people equally was the same as treating people as equals—was that, despite the differences in the decline in fertility, there is no discrimination if both men and women are disabled from procedures to freeze their gametes while in prison. But the Attorney-General is correct that relevant evidence upon which the Attorney-General might have relied in the courts below (whatever weight it might have) could have included the average age of female prisoners, the length of their sentences compared with male prisoners, and the extent to which female prisoners are released on parole earlier than male prisoners.

59 The first of the rights upon which Ms Smith relied in the courts below was her right in s 30(1) of the *Human Rights Act*, as a person deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person. In relation to the primary interpretive exercise of conforming interpretation of s 22 of the *Corrective Services Act*, the emphasis on that human right coheres neatly with the expressed recognition in relation to purpose in s 3(3)(a) of the *Corrective Services Act* of "the need to respect an offender's dignity".

60 The second of the rights upon which Ms Smith relied in the courts below was the right in s 37(1) of the *Human Rights Act* to access health services without discrimination. Ms Smith argued for an interpretation to be given to s 37(1) that was consistent with the terms of Art 12 of the International Covenant on Economic, Social and Cultural Rights (1966), which involves recognition of "the right of

67 *Human Rights Act*, s 25(a).

68 *Human Rights Act*, s 15.

69 *Human Rights Act*, s 15(3).

70 *Human Rights Act*, s 15(4).

everyone to the enjoyment of the highest attainable standard of physical and mental health" and provides that steps are to be taken in various areas for full realisation of that right, including in the areas of: infant mortality and child development; environmental and industrial hygiene; epidemic, endemic, occupational, and other diseases; and medical service and medical attention in the event of sickness.

61 By contrast, the Attorney-General effectively submitted that s 37(1) was concerned with formal equality in the provision of a health service rather than any content of the service. The surprising submission of the Attorney-General was that s 37(1) was not concerned with the content of any health services, no matter how desperately needed, no matter how easily and cheaply procured, and no matter how widely available in the general community. The effect of the Attorney-General's submission was that s 37(1) is concerned only to ensure that health services that are provided (if any) should be provided without discrimination.

62 The terms of s 37(1) markedly depart from those of Art 12 of the International Covenant on Economic, Social and Cultural Rights. To adapt for s 37(1) the comments of Emerton J in *Castles v Secretary of the Department of Justice*,⁷¹ s 37(1) is not "a right to every conceivable form of medical treatment that is available in the community ... Nor does it translate into a right to leave prison every time that a prisoner wishes to enjoy medical treatment or health care that the prisoner is able to pay for."

63 Nevertheless, as the Explanatory Notes to the *Human Rights Bill 2018* (Qld) reveal, s 37(1) was "drawn from" Art 12 and, contrary to the submissions of the Attorney-General in this case, s 37(1) includes a baseline of medical treatment, including that "[a] person must not be refused necessary emergency medical treatment".⁷² Further, r 24(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),⁷³ which is international law context relevant to the interpretation of statutory provisions including the *Human Rights Act* itself,⁷⁴ relevantly provides that "[p]risoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status". The location of the baseline beyond which there is no right to access health services or beyond which such a denial is demonstrably justifiable will depend upon all the circumstances, including the effect of the

71 (2010) 28 VR 141 at 169 [109].

72 Queensland, Legislative Assembly, *Human Rights Bill 2018*, Explanatory Notes at 5.

73 GA Res 70/175, UN Doc A/RES/70/175 (adopted 17 December 2015), Annex.

74 *Human Rights Act*, s 48(3).

treatment on the person, the cost of the treatment, and who will meet that cost. One important factor in the overall assessment will be the dignity of the human being,⁷⁵ particularly where the person is in prison.⁷⁶

The terms of s 22 in light of its purpose and interpretive principles

64 The identification of the intention of the Parliament in the use of the expression "assisted reproductive technology" in s 22(2) and s 22(3)(a)(ii) requires identification of the context in which that expression is used and the purpose of those provisions in light of the matters discussed above, namely the purpose of the *Corrective Services Act* and relevant principles of interpretation, including the principle of legality and the mandatory principles derived from the *Human Rights Act*.

65 The statutory context of s 22 includes it being contained in Ch 2, Pt 2, Div 1 of the *Corrective Services Act*, dealing with the management of prisoners generally. Immediately preceding s 22 is a welfare provision (s 21) concerned with the medical examination or treatment of a prisoner, relevantly including mandatory examinations by a health practitioner and the information that the health practitioner must provide to the prisoner. Section 22, entitled "Private medical examination or treatment", is also a beneficial provision concerned with the welfare of prisoners.

66 The immediate context of the disability in s 22(2) is that, subject to that disability, s 22(1) confers a power upon the prisoner to apply for approval for examination or treatment by a health practitioner nominated by the prisoner. The prisoner must pay for the examination or treatment and associated costs.⁷⁷ The Chief Executive has a discretion to give approval if satisfied that various conditions are met: that the application is not "frivolous or vexatious",⁷⁸ or "for an examination or treatment for participating in assisted reproductive technology";⁷⁹ that "the prisoner is able to pay for the examination or treatment and associated costs";⁸⁰ and that "the health practitioner nominated by the prisoner is willing and

75 *Human Rights Act*, preamble, s 13(1).

76 *Human Rights Act*, s 30(1).

77 *Corrective Services Act*, s 22(4).

78 *Corrective Services Act*, s 22(3)(a)(i).

79 *Corrective Services Act*, s 22(3)(a)(ii).

80 *Corrective Services Act*, s 22(3)(b).

available to carry out the examination or treatment of the prisoner".⁸¹ Although the Chief Executive has a discretion, and is not bound by (but must consider) "any report or recommendation made by the nominated health practitioner",⁸² an exercise of the discretion consistently with the purposes of the *Corrective Services Act* will, for the reasons below, usually (but not always) mean that the discretion is little different from a duty to give approval.⁸³

67 The purpose of the disability in s 22(2) concerning participating, or applying for approval to participate, in assisted reproductive technology, and of the constraint in s 22(3)(a)(ii) upon approval by the Chief Executive concerning "an examination or treatment for participating in assisted reproductive technology", was addressed in the Explanatory Notes to the *Corrective Services Bill 2006*. The Explanatory Notes explained that a "clear prohibition" on "prisoner access to assisted reproductive technology" ensured "equity in decision making between prisoners and does not require correctional authorities to make value judgments as to whether individual prisoners should be allowed to procreate while in prison and are suitable to parent and provide for a child".⁸⁴ In other words, the purpose of the disability and constraint was to ensure that the Chief Executive did not need to make decisions about which prisoners could procreate *while in prison*.

68 The Explanatory Notes also explained the motivation or reason for this purpose. They explained that it was a development, arising from "[a]dvances in medical technology", from the decision to refuse conjugal visits: "[i]n Queensland, the entitlement of prisoners to receive conjugal visits was considered and rejected by the 1988 Kennedy Review and sexual activity during contact visits is clearly prohibited under the Act".⁸⁵ The Kennedy Review did not suggest that the rejection of conjugal visits was an additional and independent punishment for convicted persons which would form a silent part of their sentence. Rather, it suggested that the rejection of conjugal visits was a consequence of the deprivation of liberty. The disability and constraint concerning assisted reproductive technology was the technological equivalent of this exclusion of conjugal visits.⁸⁶ Only in this sense

81 *Corrective Services Act*, s 22(3)(c).

82 *Corrective Services Act*, s 22(5).

83 Compare *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223.

84 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 24.

85 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15, referring to Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988).

86 See also *Corrective Services Act*, s 154(3).

was the purpose to ensure that "the right to procreate does not survive imprisonment".⁸⁷

69 The Attorney-General submitted, nevertheless, that the disability and constraint in s 22 concerning assisted reproductive technology has a purpose of punishment in addition to the purpose of ensuring that the Chief Executive did not need to make decisions about which prisoners could procreate while in prison. A submission on behalf of the Attorney-General was that the Explanatory Notes had referred to the 1988 Kennedy Review, which had said that "people have to realise that the consequences of breaking the law are not always pleasant and are part and parcel of the punishment".⁸⁸ This remarkable submission was, in effect, that the avoidable consequences of a loss of fertility for women were intended as retribution for their offending and deterrence for offending for them and other women. That submission finds no support in the Explanatory Notes. And it is contrary to the expressed objectives and purposes of the *Corrective Services Act* generally, including "humane containment" and the recognition of "basic human entitlements", the "need to respect an offender's dignity", and the "special needs of some offenders" having regard to "age" and "sex".

70 The single purpose of the disability and constraint in s 22 concerning assisted reproductive technology—establishing a consequence of deprivation of liberty to ensure that the Chief Executive did not need to make decisions about which prisoners could procreate while in prison—provides powerful support for the narrow interpretation of that disability and constraint proposed by Ms Smith. The narrow interpretation ties the meaning of the disability and constraint to its purpose in its focus upon procedures, using technology, that are capable, by themselves, of achieving reproduction. It coheres with the general dignity purpose of the *Corrective Services Act* and the weight to be given by the principle of legality to that principle of dignity in the interpretive process. By contrast, the wide interpretation has no support in the purpose of the disability and constraint and is inconsistent with the general dignity purpose of the *Corrective Services Act* and the principle of legality.

71 The wide interpretation of the disability and constraint in s 22 concerning assisted reproductive technology does not merely go beyond the purpose of that disability and constraint but, as an interpretation of the disability and constraint that is unsupported by any purpose, is a non-conforming interpretation because it limits the human right to dignity in s 30(1) of the *Human Rights Act* in a way that cannot be demonstrably justified in the circumstances (including by reference to

87 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 49.

88 Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988) at 178 [35.5].

the factors in s 13(2)) and is incompatible with that right. The same is true of the right in s 37(1) of the *Human Rights Act*, which is informed by the same notions of dignity. That right would be infringed by the wide interpretation of the disability and constraint, particularly in light of the cost of a procedure such as egg freezing being met by the prisoner and the potential importance of the procedure to the dignity of the prisoner. As the Committee on Economic, Social and Cultural Rights said in the context of Art 12 of the International Covenant on Economic, Social and Cultural Rights:⁸⁹

"[t]he right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles."

72 The wide interpretation of the disability and constraint involved in the expression "assisted reproductive technology" in s 22(2) and s 22(3)(a)(ii) would involve a denial of dignity in limiting the indispensable exercise by women of their autonomy and their right to make meaningful decisions about their lives and health. No purpose of the *Corrective Services Act* supports that wide interpretation and, certainly, no purpose of that Act is inconsistent with the principles of dignity reflected in s 30(1) and s 37(1) of the *Human Rights Act*, which require the adoption of Ms Smith's narrow interpretation as the interpretation which conforms with those human rights consistently with s 48 of the *Human Rights Act*.

Conclusion

73 Ms Smith's interpretation of s 22 of the *Corrective Services Act* should be accepted. Participating in assisted reproductive technology means participating in procedures, using technology, that are capable, by themselves, of achieving reproduction. The participation in a procedure to freeze eggs is not, therefore, participation in assisted reproductive technology. Consequently, it is unnecessary to consider whether, as the Queensland Human Rights Commission submitted, a broader interpretation of the disability and constraint in s 22 could be partially disapplied from its application in circumstances including an egg freezing procedure, without contradicting an asserted wider purpose of s 22.

74 The consequence of this decision is that further issues might arise concerning other applications of s 22(2). For instance, in this case there was a dispute between the parties about the scope of application of "participate" in

89 United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General comment No 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2016) at 7 [25].

27.

s 22(2). For forensic reasons, although inconsistently with the broad interpretation that the Chief Executive supported concerning the disability and constraint in s 22, the Chief Executive sought to give "participate" a narrow application so that the disability and constraint would not extend to the mere giving of consent to a procedure involving the use of extracted sperm or eggs. Perhaps for similar forensic reasons, Ms Smith sought to give "participate" a broad application, so that the disability and constraint would extend to giving such consent. While the purpose of s 22 might be thought to favour the approach of Ms Smith, the potential application of s 22(2) to such hypothetical situations should not be decided in this case in circumstances in which: it does not arise on the facts; it has not been fully explored; and the submissions of the parties on this point might be thought to be antagonistic to their interests.

75

The appeal should be allowed and orders made as proposed by Jagot J.

GLEESON J.

Introduction

76 The appellant is a 36-year-old female prisoner serving a 10-year custodial sentence for trafficking in a dangerous drug. In June 2023, while aged 32, the appellant applied to the first respondent ("the chief executive") under s 22(1) of the *Corrective Services Act 2006* (Qld) ("the CS Act") for approval to be treated by a health practitioner at her own expense, in order to have some of her eggs extracted and then frozen ("the s 22 application").⁹⁰ The proposed treatment is known as oöcyte cryopreservation, or, colloquially, "egg freezing" treatment.⁹¹

77 Section 22(1) permits a prisoner to apply to the chief executive for access to private medical examination or treatment by a health practitioner of their choice, but is expressly subject to s 22(2). Read together, s 22(1) and s 22(3) empower the chief executive to give the approval mentioned in s 22(1) if satisfied of certain matters. The appeal to this Court concerns the proper interpretation of s 22(2), which provides:

"A prisoner in a corrective services facility can not –

- (a) participate in assisted reproductive technology; or
- (b) apply for the chief executive's approval to participate in assisted reproductive technology."

78 The s 22 application was refused on the basis that the proposed treatment was prohibited by s 22(2)(a) and the application itself was prohibited by s 22(2)(b). Both the primary judge and the Court of Appeal found that the ordinary meaning of assisted reproductive technology ("ART") in s 22(2) includes the egg freezing treatment for which the appellant sought approval in her s 22 application.⁹²

79 The primary judge found that the processes of egg freezing treatment are ART because they are "applied solely for the purpose of assisting in reproduction"⁹³ and are "one in a series of sequential, technological steps required

90 *Smith v Chief Executive, Queensland Corrective Services* [2026] QCA 99 at [7] ("*Smith QCA*").

91 See reasons of Jagot J at [118] for a description of the treatment.

92 *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288 at [55] ("*Smith QSC*"); *Smith QCA* [2026] QCA 99 at [58]-[59].

93 *Smith QSC* [2024] QSC 288 at [63].

for the potential birth of a child".⁹⁴ The primary judge's reasons for his conclusion included dictionary definitions and scientific material that define ART broadly.⁹⁵

80 The Court of Appeal considered that "[t]he phrase 'participate in assisted reproductive technology' is broad and not confined to excluding a prisoner from steps which pertain to fertilisation itself".⁹⁶ Rather, ART in s 22(2) extends to "any step which would be participating in [ART] by engaging in the preparatory steps to enable assisted reproduction to occur".⁹⁷ For the Court of Appeal, the prohibition against participation in ART is an exception to the power in s 22(1) to approve medical examination or treatment by a private health practitioner, which "relieves the chief executive from making value judgments as to which prisoners should have access to [ART] whilst in custody".⁹⁸

81 While I agree with the other members of this Court that the Court of Appeal erred in its construction of s 22(2), and that the appeal must therefore be allowed to enable a prompt reconsideration of the s 22 application based on the correct meaning of s 22(2), I reason differently as follows.

82 In short, contrary to the conclusion of the Court of Appeal,⁹⁹ the text of s 22(2) presents two constructional choices: as to the meaning of ART, and as to the meaning of "participate". Those choices must be resolved in favour of the appellant's interpretation, relevantly by excluding egg freezing treatment from the meaning of ART.

Human Rights Act, s 48(1)

83 Section 48(1) of the *Human Rights Act 2019* (Qld) provides that "[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights". It is not permissible to overlook this statutory directive, which "forms part of the context in which a statute is to be construed".¹⁰⁰ However, in this case, the appellant's argument did not depend upon the application of s 48(1). Where the processes of

94 *Smith QSC* [2024] QSC 288 at [64].

95 *Smith QSC* [2024] QSC 288 at [70]-[84].

96 *Smith QCA* [2026] QCA 99 at [47].

97 *Smith QCA* [2026] QCA 99 at [47].

98 *Smith QCA* [2026] QCA 99 at [47].

99 *Smith QCA* [2026] QCA 99 at [58].

100 *Momcilovic v The Queen* (2011) 245 CLR 1 at 217 [565].

statutory interpretation apart from s 48(1) leave no room for an interpretation more compatible with human rights, it is unnecessary to undertake further analysis of the interpretation of the relevant provision in accordance with s 48(1).

Text

84 Section 22 of the CS Act is in Pt 2 of Ch 2. Part 2 is entitled "Management of prisoners". Section 22(2) applies to a "prisoner in a corrective services facility". "Prisoner" is defined in Sch 4 to the CS Act to mean, relevantly, "a person who is in the chief executive's custody, including a person who is released on parole". A "corrective services facility" is defined in Sch 4, relevantly, to mean a prison, a community corrections centre or a work camp. Thus, s 22(2) applies to the appellant as a prisoner in a prison. Section 22(2) will cease to apply to her if she is released on parole and is therefore no longer in a corrective services facility.

85 The two limbs of s 22(2) address different circumstances. The second limb, s 22(2)(b), is directly referable to s 22(1) because, by prohibiting applying to the chief executive for approval to "participate" in ART, it prohibits applying for approval of the kind which the chief executive may give under s 22(1) read with s 22(3). Read with s 22(1), s 22(2) necessarily implies that participation in ART involves or may involve medical examination or treatment. It follows that by directly prohibiting participation in ART, the first limb, s 22(2)(a), prohibits conduct that involves or may involve medical examination or treatment of the kind that requires an application for approval under s 22(1).

Assisted reproductive technology

86 The expression ART in s 22(2) is not defined in the CS Act and does not have an established technical meaning.

87 Where the word "assisted" plainly does not qualify "technology", ART is technology that is directed to assisted (as opposed to unassisted) reproduction. Accordingly, the meaning of ART is defined by its end, namely, the achievement of reproduction with technological assistance. Once these two premises are accepted, it must follow that a possible interpretation of ART encompasses but does not extend beyond procedures apt to achieve reproduction. On that interpretation, ART does not encompass a procedure such as the appellant's proposed egg freezing treatment, because that treatment achieves only the possibility of future reproduction via a further procedure.

88 The dictionaries (Oxford English Dictionary, Oxford Dictionary of Biology and Merriam-Webster Medical Dictionary) and publications (by the National Health and Medical Research Council, Australian Institute of Health and Welfare, Fertility Society of Australia and New Zealand and Reproductive Technology Council) cited in the courts below are varied in their scope and expression and

therefore reinforce the appellant's contention that ART has no single ordinary meaning.

89 Accordingly, ascribing a meaning to ART that encompasses egg freezing treatment involves a constructional choice. The chief executive and the second respondent ("the Attorney-General") did not dispute the need to have recourse to context and purpose to determine the meaning of ART in s 22(2).

"participate" in ART

90 The ordinary meaning of "participate" is "to take or have a part or share, as with others; share",¹⁰¹ or "[t]o take part".¹⁰² The word "participate" in relation to ART might encompass a range of ways in which a prisoner may take part in a process of ART. An obvious example is the provision of sperm for in vitro fertilisation. One interpretation of the word "participate" extends to the provision of consent for a prisoner's eggs or sperm to be used in ART to achieve conception outside the prison environment.¹⁰³ This interpretation is bolstered by the immediate context of s 22(2), which, by its juxtaposition with s 22(1), suggests that the word "participate" in s 22(2) connotes something more than "be[ing] examined or treated by a health practitioner" in s 22(1).

Purpose and objects of CS Act

91 Section 14A(1) of the *Acts Interpretation Act 1954* (Qld) ("the AIA") requires that the interpretation that will best achieve the purpose of the CS Act be preferred. Section 3(1) of the CS Act specifies the purpose of corrective services, which includes custodial corrective services,¹⁰⁴ that is, "services for prisoners in a corrective services facility".¹⁰⁵ That purpose is "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders". Section 3(2) provides that the CS Act recognises that "an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded" in accordance with the CS Act's recognition that "every member of society has certain basic human entitlements". Section 3(3) provides that the CS Act also recognises (a) "the

101 *Macquarie Dictionary* (online), "participate".

102 *Oxford English Dictionary* (online), "participate" (verb), sense 1a.

103 See below at [106].

104 *Corrective Services Act 2006* (Qld) ("CS Act"), Sch 4 (definition of "corrective services", para (b)).

105 CS Act, Sch 4 (definition of "custodial corrective services").

need to respect an offender's dignity" and (b) "the special needs of some offenders by taking into account", relevantly, an offender's age or sex.

- 92 The express purpose and objects of the CS Act are inconsistent with the contention of the Attorney-General that s 22(2) has a legitimate purpose of punishment and deterrence.

Humane containment and access to medical care during imprisonment

- 93 As a power of management over prisoners, the purpose of s 22(2) corresponds with the CS Act's stated purpose of corrective services, that is, "humane containment, supervision and rehabilitation of offenders". Section 22 should be construed so that its effect in prohibiting participation in ART goes no further than is necessary to achieve effective management of prisoners in accordance with this purpose. Since access to medical examination or treatment promotes the purpose of humane containment of offenders, a narrower meaning of ART, which will confine the operation of s 22(2), is more conducive to humane containment than a broader meaning.

- 94 Provisions similar to s 22, permitting approval of medical examination and treatment at a prisoner's expense, were found in the *Corrective Services Act 2000* (Qld) ("the 2000 Act"), s 16, and the *Corrective Services Act 1988* (Qld) ("the 1988 Act"), s 52. In 1988, the Queensland government published the final report of the Commission of Review into Corrective Services in Queensland ("the Kennedy report"). That report, which precipitated the 1988 Act, quoted a 1985 investigation ordered by the Minister for Health into the main prison in Brisbane that found that "the medical service provided to prisoners still falls short of the level of service expected in the community".¹⁰⁶ The report also identified the absence in Queensland of an "accepted philosophy regarding the level of [medical] service to be provided to the prison community".¹⁰⁷ Putting aside s 22(2), s 22 of the CS Act and its predecessors therefore recognise that prisoners have more limited access to medical services than the general community, and the provisions attempt to ameliorate the hardships that may result from that limited access. As the appellant observed, there is nothing in the extrinsic materials to suggest that the purpose of s 22(2) was to deny prisoners the opportunity to obtain medical examination or treatment to preserve their fertility.

- 95 The appellant argued that, by being refused access to egg freezing treatment, she is effectively suffering an additional punishment separate to her

106 Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988) at 170.

107 Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988) at 170.

sentence of imprisonment because of the effect of the refusal upon her reproductive autonomy and health post-release. Thus, the appellant emphasised that the purpose of her s 22 application is to preserve for herself an opportunity, when she is released from prison, to become pregnant and have a child in a way that reduces the risks flowing from the expected reduction in her fertility while in prison, including the risks of chromosomal abnormality and long-term disability in a child born to a mother aged 39 to 41 years. The appellant does not seek to have a child or children while in prison. By seeking the chief executive's approval for egg freezing treatment by a health practitioner of her choice, and at her expense, the appellant aims to reduce risks to herself and her future child or children if she decides to become a parent after her release from custody. As she puts it, she "seeks her reproductive autonomy to ameliorate the effects of the biological clock". The appellant's argument draws attention to the obvious potential for medical treatment received in prison to affect adversely the quality of a prisoner's life post-release. This raises a question about how "humane containment" may mitigate the consequences of imprisonment for a prisoner post-release.

96 The Attorney-General submitted that it remains an ordinary consequence of imprisonment for female prisoners that they may lose the opportunity to have children as a result of a lack of access to egg freezing treatment that is available to those who can afford it in the non-prison community. The difficulty with the submission was that no persuasive reason was given for why, when egg freezing treatment is an available medical treatment in the community, female prisoners must or should continue to suffer that consequence. The submission did not explain how it is congruent with the purpose of humane containment, evidently sought to be achieved by access to medical treatment under s 22, in the absence of such a reason. As explained below, the only reason proffered was to maintain the established position that "the right to procreate does not survive imprisonment".¹⁰⁸

"Basic human entitlements"

97 The "entitlements" of offenders referred to in s 3(2) are not defined but, in context, are the "basic human entitlements" of every member of society. Those "basic human entitlements" are also not enumerated in the CS Act or otherwise defined. There is no reason to doubt that basic human entitlements extend to reasonable access to medical examination and treatment. As an aspect of reasonable access to medical examination and treatment, the access permitted by s 22 is "necessarily diminished" because of imprisonment to the extent that approval is required for that access and that approval is subject to the chief executive's satisfaction about certain matters. Whether reasonable access to medical examination and treatment includes access to egg freezing treatment and,

¹⁰⁸ Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 49.

if so, in what circumstances, is a question of fact that was not addressed by the courts below. Accordingly, s 3(2) does not shed light on the meaning of s 22(2).

Dignity and special needs

98 As to the CS Act's recognition of the need to respect human dignity, reproductive freedom is an important aspect of female human dignity. The majority in *Marion's Case*¹⁰⁹ referred to the Supreme Court of New Jersey decision in *In re Grady*,¹¹⁰ which identified the ability to reproduce as "an important part of a person's social and biological identity".¹¹¹ The effect of construing ART in s 22(2) to encompass egg freezing treatment may be to deny a small class of prisoners in a corrective services facility, mainly being women whose custodial sentences extend through a period of significantly declining fertility and who can fund such treatment, the expression of that aspect of their identity through the possibility of having a child or having a child unaffected by the kinds of disability that are more likely to affect children of older mothers. Before the advent of egg freezing treatment, that deprivation was an inevitable consequence of imprisonment for this class of prisoners, and an aspect of the punishment of imprisonment. However, a broader meaning of ART would overlook the potential impact of imprisonment on a woman's post-release reproductive freedom and the relative ease with which that freedom may be facilitated since the advent of egg freezing treatment. The desire for egg freezing treatment may arise not only in the case of a woman whose fertility is waning while in prison, but also in cases where a prisoner is required to undergo chemotherapy or other treatment that may compromise her fertility.

99 The chief executive (although not the Attorney-General) acknowledged that a purpose of restricting a female prisoner's post-release reproductive freedom would be necessarily illegitimate, because it would involve an additional punishment over and above the prisoner's custodial sentence. The CS Act's recognition of the need to respect the human dignity of prisoners would be impaired by a broader meaning of ART that could stultify the prospects of a class

109 *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218.

110 (1981) 426 A 2d 467.

111 *Marion's Case* (1992) 175 CLR 218 at 247-248, quoting *In re Grady* (1981) 426 A 2d 467 at 472. See also, generally, *AL v GRH* (1975) 325 NE 2d 501, cited in *Marion's Case* (1992) 175 CLR 218 at 247, 318-319 and referred to in the decision of the Supreme Court of the United States in *Stump v Sparkman* (1978) 435 US 349 at 358-359.

of prisoners having children post-release by preventing them from preserving their reproductive health during custody.

100 The CS Act's stated recognition of "special needs" is plainly expressed in the ability to obtain approval for medical examination or treatment under s 22. A narrower meaning of ART that excludes egg freezing treatment recognises the particular situation and special needs of that small class of prisoners of a particular age and sex described above, of which the appellant is a member.

The bans on conjugal visits and conceiving children while in prison

101 The extrinsic materials, identified by Jagot J,¹¹² are relevant, pursuant to s 14B(1)(a) of the AIA, to providing an interpretation of s 22(2) of the CS Act as a "provision" of an Act that is "ambiguous or obscure".

102 Those materials show that an important reason for enacting s 22(2) was to treat prisoners fairly by addressing the mischief of using artificial means to procreate in circumstances where they were already banned from using natural means to achieve that result.

103 In 1988, the Kennedy report rejected recommendations for the introduction of conjugal visits in prison.¹¹³ The *Corrective Services Regulations 1989* (Qld) effectively precluded conjugal visits by requiring a correctional officer to observe all visits to prisoners at a prison,¹¹⁴ with only limited provision for legal representatives to interview their clients out of the hearing of a correctional officer, but not out of sight.¹¹⁵ Conjugal visits were subsequently banned by s 124(3)(a) of the 2000 Act, and s 154(3)(a) of the CS Act has prohibited a personal visitor of a prisoner from engaging in sexual activity with a prisoner since the CS Act's enactment in 2006.

104 By its very nature, imprisonment removes a person from society. Whether the opportunity to procreate while imprisoned is fundamentally inconsistent with imprisonment raises value-laden questions affecting not only prisoners but their partners and potential children, as well as questions concerning the possible responsibilities of government for the care of the partners and potential children of prisoners. The Explanatory Notes to the *Corrective Services Bill 2006* (Qld) show that the ban on conjugal visits for prisoners was understood to imply a similar ban

112 See reasons of Jagot J at [132]-[137].

113 Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988) at 178.

114 *Corrective Services Regulations 1989* (Qld), reg 17.

115 *Corrective Services Regulations 1989* (Qld), reg 18.

on conceiving children while in prison.¹¹⁶ Thus, it was said that "the right to procreate does not survive imprisonment".¹¹⁷

105 Evidently, advances in medical technology have affected the capability of prisons to enforce such a ban. Thus, the Explanatory Notes show that the possibility of male prisoners participating in artificial insemination while in prison was seen as undermining the ban on conceiving children while in prison.¹¹⁸ The chief executive and the Attorney-General noted by way of examples that a male prisoner may undermine the ban by providing his consent to in vitro fertilisation using sperm collected from him before he was imprisoned, and that a female prisoner might undertake egg freezing treatment and subsequently arrange to provide the eggs to a third party for procreation while the prisoner remains in custody. In such ways, prisoners could take advantage of medical treatment such as egg freezing treatment to have children while in custody. For the chief executive and the Attorney-General, these potential consequences are matters that are regulated by the use of the term ART in s 22(2) as an appropriate extension of the historical ban on "conjugal visits" to prisoners.

106 The appellant emphasised that her purpose in seeking egg freezing treatment is not to procreate while in prison. That emphasis does not answer the contention made by the chief executive and the Attorney-General because that purpose might change or might not be true. However, accepting that the management of prisoners extends to regulating their capacity to procreate while imprisoned, whether by direct or indirect means, the identified mischief can be addressed by a broad interpretation of the word "participate". Prohibited participation in ART can be interpreted to extend to participation by way of a prisoner's provision of eggs or sperm to enable conception by a third party, and by way of the provision of written consent from a prisoner to the use of their reproductive material to impregnate a third party outside of the prison.¹¹⁹ Were this interpretation not to be adopted, the legislative purpose could indeed be undermined in the ways suggested by the chief executive and the Attorney-General.

116 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 23-24, 49.

117 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 49.

118 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15.

119 Which consent, in Queensland, is mandatory: see *Assisted Reproductive Technology Act 2024* (Qld), ss 16, 17(1)(a) and (c).

Avoiding value judgments

107 A second reason for prohibiting participation in ART, identified in the extrinsic material, was to avoid the need for correctional authorities to make "value judgments" about who might be allowed to procreate while in prison, which would raise issues about suitability for parenting and the costs of caring for a child conceived as a result of procreation while in prison.¹²⁰ This second reason underscores that the concern addressed by s 22(2) is not mere participation in a class of technology, but the potential result of that technology, namely, procreation by prisoners while in prison. It does not support the inclusion of egg freezing treatment within the scope of ART in s 22(2), because that treatment is not capable, without more, of resulting in procreation by a prisoner while in prison.

Conclusion

108 The purpose of avoiding prisoners having children during a sentence of imprisonment is not defeated by interpreting ART to exclude egg freezing treatment, because such treatment merely harvests and preserves eggs for subsequent use in processes such as in vitro fertilisation that are, unambiguously, ART. This interpretation conforms with the statutory aim of humane containment of prisoners, and the stated need to respect human dignity and the special needs of female prisoners who, by reason of their age and sex, may experience a substantial reduction in their fertility during the course of a prison sentence.

109 Read purposively, s 22(2) is neither over- nor under-inclusive in achieving its aim of reinforcing the ban on procreation by prisoners in a corrective services facility. This interpretation, including the ascribing of a broad meaning to the word "participate" in s 22(2), avoids the prospects both of procreation by a prisoner while in custody and of value judgments having to be made by the chief executive about whether to approve medical treatment that may lead to procreation, and thus achieves the stated purposes of the legislation.

110 I agree with the orders proposed by Jagot J.

120 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15.

111 JAGOT J. Section 22(2) of the *Corrective Services Act 2006* (Qld) ("the CS Act") provides that a "prisoner in a corrective services facility can not – (a) participate in assisted reproductive technology; or (b) apply for the [chief executive of Queensland Corrective Services] approval to participate in assisted reproductive technology". The question in this appeal is whether this provision prevents the appellant, Rachel Smith (who is a prisoner in a corrective services facility), from applying for and obtaining the approval of the first respondent, the chief executive of Queensland Corrective Services, to participate in the medical treatment commonly referred to as "egg freezing". Contrary to the submissions for the chief executive and the second respondent, the Attorney-General for the State of Queensland, the answer to that question is "no".

112 As explained below, it is clear from the text, context and purpose of the provision that the legislative intention was to prevent a prisoner in a corrective services facility from participating in medical treatment involving the implantation of a fertilised human egg (a zygote) into an environment (that environment being presently confined to a human womb) to enable the gestation and subsequent birth of a child. The legislative intention was not to prevent a prisoner in a corrective services facility from participating in medical treatment to preserve their fertility, including by egg freezing.

113 This conclusion may be reached without separately considering the statutory directive in s 48(1) of the *Human Rights Act 2019* (Qld) ("the HR Act") that "[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights". The conclusion follows from the ordinary grammatical meaning of s 22(2) of the CS Act and its manifest purpose as exposed in its text and by the extrinsic material. Accordingly, it is unnecessary to consider the submissions of the third respondent, the Queensland Human Rights Commission, in respect of the provisions of the HR Act as potentially applicable to the determination of the appeal.

114 The concept central to s 22(2) is the phrase "assisted reproductive technology", which is not defined in the CS Act. In this phrase it is the adjective "reproductive" that controls the meaning. "[R]eproductive" means "serving to reproduce",¹²¹ "reproduce" having its ordinary meaning in this context of procreation (that is, the gestation and birth of a child). "[A]ssisted reproductive technology", construed in the context of the CS Act, is technology the use of which results in procreation. Fertility preservation, by egg or sperm extraction and freezing, does not serve to reproduce. It serves to enable a person to decide in the future whether or not to reproduce.

121 Macquarie Dictionary (online), "reproductive" (def 1).

115 It also follows that the primary judge in the Supreme Court of Queensland (Sullivan J)¹²² and the Court of Appeal of the Supreme Court of Queensland (Mullins P, Brown and Bradley JJA)¹²³ erred in their construction of s 22(2). In consequence, the primary judge and the Court of Appeal also erred in dismissing Ms Smith's application for a statutory order of review¹²⁴ of the chief executive's decision refusing to allow Ms Smith to participate in medical treatment to preserve her fertility by egg freezing on the basis that Ms Smith's application for approval to do so was prohibited by the CS Act. Accordingly, the appeal must be allowed, the relevant orders of the courts below must be set aside, the chief executive's decision to refuse Ms Smith's application must be quashed, Ms Smith's application must be determined by the chief executive in accordance with law, and the chief executive must pay Ms Smith's costs of the proceedings before the primary judge, the Court of Appeal, and this Court. As the appeal to this Court was expedited, and Ms Smith has been denied relief in respect of her application for more than three years, it is now incumbent on the chief executive to determine her application in accordance with law as soon as reasonably possible.

The facts

116 Ms Smith was born in June 1990. She is a prisoner in a corrective services facility serving a sentence of imprisonment of ten years. She will be eligible for parole when she is 39 years old. If she serves the full term of her sentence, she will be 41 years old on release.

117 The undisputed medical evidence is that comparing women of 33 to 35 years of age to women of 39 to 41 years of age discloses a statistical reduction in fertility. The same comparison discloses that the risk of chromosomal abnormality statistically increases. This increases the potential for long-term disability of a child born to a woman in the later age bracket. That is, the extraction and freezing of a woman's eggs when the woman is 33 to 35 years of age has the potential to reduce the woman's risk of age-related infertility and the risks of chromosomal abnormality and long-term disability in a child born to that woman compared to the extraction and freezing of a woman's eggs when the woman is 39 to 41 years of age.

118 In June 2023, when she was 32 years old, Ms Smith applied to the chief executive under s 22(1) of the CS Act to undergo an egg freezing procedure known as oocyte cryopreservation. This procedure would involve the administration of hormonal drugs to Ms Smith to stimulate egg production, the extraction of the eggs

122 *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288.

123 *Smith v Chief Executive, Queensland Corrective Services* [2026] QCA 99.

124 *Judicial Review Act 1991* (Qld), s 20.

from Ms Smith's ovaries under anaesthetic or sedation, and the freezing and storage of the extracted eggs. It is routine for this procedure to be undertaken two to three times.

119 In February 2024, the chief executive (by his delegate) refused Ms Smith's application on the basis that the procedure would constitute Ms Smith "participat[ing] in assisted reproductive technology" contrary to the prohibition in s 22(2) of the CS Act.

120 Ms Smith applied for a statutory order of review¹²⁵ of this decision. The primary judge dismissed that application in November 2024. Ms Smith appealed from the primary judge's order in December 2024, the Court of Appeal dismissing her appeal in May 2026.

Statutory provisions

121 Section 3 of the CS Act provides that:

- "(1) The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.
- (2) This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.
- (3) This Act also recognises –
 - (a) the need to respect an offender's dignity; and
 - (b) the special needs of some offenders by taking into account –
 - (i) an offender's age, sex or cultural background; and
 - (ii) any disability an offender has."

122 By Sch 4 to the CS Act, "*special need*, of an offender, means a need the offender has, compared to the general offender population, [amongst other things] because of the offender's ... (a) age; or ... (c) sex".

125 *Judicial Review Act 1991* (Qld), s 20.

123

Section 21 of the CS Act in part provides that:

- "(1) If it is reasonably practicable in the circumstances, before a health practitioner carries out a medical examination or treatment of a prisoner, the health practitioner must tell the prisoner the following –
- (a) the health practitioner considers the prisoner requires the medical examination or treatment;
 - (b) the health practitioner's reasons for requiring the examination or treatment;
 - (c) what the examination or treatment will involve.
- (2) A prisoner must submit to an examination by a health practitioner if the chief executive orders the examination to decide –
- ...
- (b) where to place the prisoner; or
 - (c) whether to transfer the prisoner to another place; ..."

124

Section 22 of the CS Act is as follows:

- "(1) Subject to subsection (2), a prisoner in a corrective services facility may apply in writing to the chief executive for approval to be examined or treated by a health practitioner nominated by the prisoner.
- (2) A prisoner in a corrective services facility can not –
- (a) participate in assisted reproductive technology; or
 - (b) apply for the chief executive's approval to participate in assisted reproductive technology.
- (3) The chief executive may give the approval mentioned in subsection (1) if satisfied –
- (a) the application for the approval is not –
 - (i) frivolous or vexatious; or
 - (ii) for an examination or treatment for participating in assisted reproductive technology; and

- (b) the prisoner is able to pay for the examination or treatment and associated costs; and
- (c) the health practitioner nominated by the prisoner is willing and available to carry out the examination or treatment of the prisoner.
- (4) The prisoner must pay for the examination or treatment and associated costs.
- (5) The chief executive must consider, but is not bound by, any report or recommendation made by the nominated health practitioner."

125 "[P]risoner" is defined in Sch 4 to the CS Act as including a person in the chief executive's custody. "[C]orrective services facility" is defined to mean, relevantly, a prison. Section 7 prescribes when a person is taken to be in the chief executive's custody which, by s 7(4), excludes (for example) when the person is on health leave in accordance with s 72(1)(d) of the CS Act.

126 Section 154(3) of the CS Act provides that "[d]uring a contact visit, a personal visitor must not ... (a) engage in sexual activity with a prisoner".

127 By s 263(1) of the CS Act, "the chief executive is responsible for ... (b) the safe custody and welfare of all prisoners". Section 266(1) provides that the "chief executive must establish or facilitate programs or services ... (b) to support the health and wellbeing of prisoners".

The approach to statutory construction

128 By s 14A(1) of the *Acts Interpretation Act 1954* (Qld), in "the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation".

129 Section 14B of the *Acts Interpretation Act* includes the following:

- "(1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –
 - (a) if the provision is ambiguous or obscure – to provide an interpretation of it; or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable – to provide an interpretation that avoids such a result; or

43.

- (c) in any other case – to confirm the interpretation conveyed by the ordinary meaning of the provision.
- (2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to –
 - (a) the desirability of a provision being interpreted as having its ordinary meaning; and
 - (b) the undesirability of prolonging proceedings without compensating advantage; and
 - (c) other relevant matters."

130 By s 14B(3) of the *Acts Interpretation Act*, "extrinsic material" is defined to mean, relevantly, "an explanatory note or memorandum relating to the Bill that contained the provision ... that was laid before, or given to the members of, the Legislative Assembly by the member bringing in the Bill before the provision was enacted", and "ordinary meaning" is defined to mean "the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act".

131 As Brennan CJ, Dawson, Toohey and Gummow JJ observed in *CIC Insurance Ltd v Bankstown Football Club Ltd*,¹²⁶ "the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ..., one may discern the statute was intended to remedy".¹²⁷ As expressed by Gageler CJ, Gordon, Jagot and Beech-Jones JJ in *Palmanova Pty Ltd v The Commonwealth*:¹²⁸

"Statutory construction is the process of attributing meaning to statutory text. The construction of a statutory provision begins and ends with the statutory text understood in context and in light of the statutory purpose – being what the provision is designed to achieve in fact – insofar as that purpose is discernible from the statutory text and context."

126 (1997) 187 CLR 384.

127 (1997) 187 CLR 384 at 408.

128 (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770.

Extrinsic material

132 The Explanatory Notes for the *Corrective Services Bill 2006* (Qld) state that the "primary objective of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders".¹²⁹ The Explanatory Notes record that the proposed legislation resulted from a review involving "[e]xtensive community consultation ... that, along with consideration of research and correctional practice in other jurisdictions, led to the development of legislative reforms which reflect community expectations and contemporary correctional practice".¹³⁰

133 The Explanatory Notes also state:¹³¹

"Assisted reproductive technology"

In Queensland, the entitlement of prisoners to receive conjugal visits was considered and rejected by the [Commission of Review into Corrective Services in Queensland 1988 – Final Report ("the Kennedy Review")] and sexual activity during contact visits is clearly prohibited under the Act.

Advances in medical technology for the treatment of infertile couples, has led to an increase in requests by prisoners in custody to participate in assisted reproductive technology. Whether access to assisted reproductive technology is a right or a privilege is still undecided amongst the general population, let alone the prison population. In the community, decisions about whether access to assisted reproductive technologies is granted require the consideration of whether a couple is medically infertile. Prisoner requests for assisted reproductive technology do not usually relate to medical infertility and as the majority of the prison population in Queensland is male, artificial insemination is the form of assisted reproductive technology most frequently requested by prisoners.

The Bill provides that prisoners in custody will not be entitled to access assisted reproductive technology. This prohibition ensures equity in decision making between prisoners and does not require correctional

129 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 1. See also CS Act, s 3(1).

130 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 2.

131 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15.

authorities to make value judgments as to whether individual prisoners should be allowed to procreate while they are in prison."

134 In dealing with the topic of "Consistency with Fundamental Legislative Principles", the Explanatory Notes state that the "Bill has been drafted with due regard to the Fundamental Legislative Principles ... as outlined in the *Legislative Standards Act 1992*", s 4(2) of which "requires that legislation has sufficient regard to the rights and liberties of individuals".¹³² According to the Explanatory Notes, "it is widely recognised that the correctional environment is one where the operation of many rights and liberties enjoyed in the general community cannot be reasonably expected to be enjoyed by the prison population".¹³³ The Explanatory Notes record also that "[p]risoner rights must necessarily take a significantly attenuated form, given the status of prisoners and the imperative necessarily associated with the conduct of corrective institutions. These imperatives include the need to maintain order and security, to prevent violence and to prevent escapes. In addition, while the focus of incarceration has moved substantially towards rehabilitation, it rightly retains a punitive and deterrent element. On that basis, it is inevitable that a prison environment will afford prisoners fewer facilities and personal freedoms than those enjoyed by the general public."¹³⁴

135 The Explanatory Notes continue as follows:¹³⁵

"Assisted reproductive technology"

The Bill provides a clear legislative prohibition on prisoners in custody accessing assisted reproductive technology. Although the [*Corrective Services Act 2000* (Qld)] is silent on whether prisoners in custody are entitled to access assisted reproductive technology, it can be implied from the prohibition on sexual activity during visits that it was never intended that prisoners should be able to conceive children whilst in custody. The 1988 Kennedy review also rejected the notion of conjugal visits in prison.

This possible breach of fundamental legislative principle must be balanced against a plethora of complicated social and financial issues which would

132 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 19.

133 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 19.

134 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 20.

135 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 23-24.

arise if both male and female prisoners were entitled to access artificial reproductive technology while in custody. It is not yet settled that persons in the general community have a right to access assisted reproductive technology and as has been recognised by the Scrutiny of Legislation Committee, prisoner's rights are not the same as free citizens.

As a result of the clear statement of intent in the Bill, prisoner access to assisted reproductive technology is prohibited. A clear prohibition ensures equity in decision making between prisoners and does not require correctional authorities to make value judgments as to whether individual prisoners should be allowed to procreate while in prison and are suitable to parent and provide for a child."

136 In explaining the effect of provisions of the *Corrective Services Bill*, the Explanatory Notes state in respect of cl 22:¹³⁶

"The provision makes it clear that the right to procreate does not survive imprisonment and that a prisoner in a corrective services facility can not apply for approval to participate in assisted reproductive technology or participate in assisted reproductive technology.

The chief executive may approve an examination or treatment other than assisted reproductive technology if the prisoner is able to pay the associated costs and the nominated doctor or psychologist agrees to perform the examination or treatment.

Any report or recommendation made by the nominated doctor or psychologist must be considered, but is not binding."

137 The Kennedy Review, to which reference is made in the Explanatory Notes, recommended against permitting "conjugal visits" in prisons noting that "people have to realise that the consequences of breaking the law are not always pleasant and are part and parcel of the punishment".¹³⁷

The meaning of s 22(2) of the CS Act

138 An immediate difficulty with s 22(2) of the CS Act is working out if it functions only as an exception to s 22(1) (which concerns a prisoner in a corrective services facility applying for the chief executive's approval for examination or

136 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 49-50.

137 Queensland, Commission of Review into Corrective Services in Queensland, *Final Report* (1988) at 178.

treatment by a health practitioner nominated by the prisoner) or imposes a free-standing prohibition preventing a prisoner in a corrective services facility from participating in "assisted reproductive technology" provided by a health practitioner whether or not nominated by the prisoner. Given that the legislative intention as exposed by the Explanatory Notes is that "prisoners in custody will not be entitled to access assisted reproductive technology", one object of which was "equity in decision making between prisoners", it would make no sense if a prisoner being treated by a health practitioner not nominated by the prisoner could participate in "assisted reproductive technology" while a prisoner being treated by a health practitioner nominated by the prisoner could not participate in "assisted reproductive technology". On this basis, s 22(2) of the CS Act, consistent with its terms, is to be read as meaning what it says – a prisoner in a corrective services facility cannot participate in "assisted reproductive technology", irrespective of whether the health practitioner providing that treatment is nominated by the prisoner or not.

139 Another apparent difficulty with s 22(2) is that it provides that a prisoner in a corrective services facility "can not" participate in "assisted reproductive technology". The provision imposes a lack of capacity on a prisoner but does not provide that a prisoner in a corrective services facility who participates in "assisted reproductive technology" (by some or other means) thereby, for example, commits an offence or any breach of discipline.¹³⁸ This, however, is hardly surprising. Leaving aside the practical difficulty involved in a prisoner in a corrective services facility using "assisted reproductive technology" without the chief executive having approved that use, punishing a prisoner for conceiving a child contrary to s 22(2) would be more than distasteful. By analogy, as the Explanatory Notes state (and as s 31(3) of the CS Act reflects), removing a child from a prisoner in a corrective services facility, where the chief executive has approved the accommodation of the child with the prisoner as it is in the child's best interests, "is not to be used as a punishment or to discipline [the] prisoner".¹³⁹

140 The form which s 22 takes – that is, the imposition of a lack of capacity on the part of a prisoner in a corrective services facility to participate in "assisted reproductive technology" in s 22(2), and an equivalent lack of capacity of the chief executive to approve a prisoner in a corrective services facility participating in "assisted reproductive technology" in s 22(3)(a)(ii) – is therefore explicable. It reflects a value judgment of the Queensland Parliament that the act (participating in "assisted reproductive technology") is not to occur but that enforcement of the prohibition by further punishment of any kind is unavailable.

138 Contrast, for example, CS Act, ss 113-124.

139 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 55.

141 The form which s 22 takes also undermines the submission for the chief executive that the concept of "participate" does not take its ordinary meaning of "to take or have a part"¹⁴⁰ in and therefore does not extend to a prisoner in a corrective services facility giving another person their permission to the use of their previously extracted eggs or sperm, as the chief executive would then have to make "value judgments" which the chief executive was not intended to undertake. The submission is misconceived. The required value judgment has been made by the legislature and is embodied in the legislation. The value judgment is that a prisoner in a corrective services facility is not to procreate while in that facility.

142 That the consequence of this may be that a person is able to give permission or consent to the use of their frozen eggs or sperm or zygotes for procreation on the day before they become a prisoner in a corrective services facility, but not on and from the day they become a prisoner until they are released from the corrective services facility, is no more arbitrary than the raft of other immediate incapacities which imprisonment inflicts on a prisoner. In addition, had the legislative intention been merely to prohibit a prisoner from using "assisted reproductive technology" while in a corrective services facility, s 22(2) could have taken that form – that is, it could have provided that a prisoner in a corrective services facility "can not use assisted reproductive technology". Section 22(2) does not take that form – it extends the lack of capacity to a prisoner "participat[ing] in assisted reproductive technology".

143 The chief executive and Attorney-General relied on the Explanatory Notes, including the references to the Kennedy Review, to support their contention that denying prisoners in a corrective services facility access to "assisted reproductive technology" legitimately furthers the purposes of the CS Act. The Attorney-General in particular submitted that: (i) the personal freedoms of prisoners in a corrective services facility are inevitably curtailed; (ii) the curtailment of personal freedoms, including the capacity to engage in conjugal relations, is part and parcel of the legitimate punishment and deterrence objectives of imprisonment; (iii) consistently with the prohibition of conjugal visits to a prisoner in a corrective services facility which forms part of the legitimate punitive and deterrent object of imprisonment, the purpose of s 22(2) is not merely to prevent a prisoner procreating while in a corrective services facility but extends to preventing such a prisoner from participating in "assisted reproductive technology" while in a corrective services facility; and (iv) on this basis, "assisted reproductive technology" should be interpreted to mean any technology which in any way and at any time could facilitate procreation.

144 The chief executive and Attorney-General contended further that the purposes of s 22(2) (to prevent a prisoner in a corrective services facility both from

140 Macquarie Dictionary (online), "participate" (def 1).

procreating and from enacting choices intended to preserve their fertility as part of the punishment and deterrence effect of imprisonment) were best served by the "blanket prohibition" of prisoners in a corrective services facility accessing any form of "assisted reproductive technology". The blanket prohibition and its breadth, they argued, ensured "equity in decision making between prisoners" and protected the chief executive from any need to make value judgments about which prisoners, if any, would be suitable to become parents, as disclosed in the Explanatory Notes.

145 None of these contentions may be accepted. They are in direct conflict with the purposes of the CS Act as expressed in s 3 and the express terms of the Explanatory Notes, including the references therein to the Kennedy Review. They involve giving an extraordinarily broad meaning to "assisted reproductive technology" in circumstances where the purposive, contextual and textual indicators relevant to construing s 22(2) uniformly indicate that a narrow construction of that phrase would best achieve the purposes of the CS Act.

146 The submissions of the Attorney-General proposing that preventing a prisoner in a corrective services facility from accessing "assisted reproductive technology" to preserve fertility is a legitimate part of the punishment and deterrence object of imprisonment must be comprehensively and emphatically rejected. Put in plain terms, the Attorney-General was submitting that the Queensland Parliament intended it to be part of the punishment of a prisoner in a corrective services facility that they should be permitted to be rendered sterile in that facility, despite medical treatment being able to be made available to them to preserve their fertility. That a prisoner serving a life sentence might well be denied any opportunity to procreate, either by sexual relations (given the ban on conjugal visits) or by assisted reproductive technology, may be accepted. That fact, however, provides no support for the attribution to the Queensland Parliament of the quasi-eugenicist notion that a prisoner in a corrective services facility is to be denied access to fertility-preserving technologies while in the corrective services facility, the prisoner's subsequent incapacity to procreate on release from imprisonment being part and parcel of their supposed punishment.

147 The Attorney-General accepted that this broad construction of "assisted reproductive technology" could mean, for example, that a prisoner serving a relatively short sentence who might have to undergo treatment for cancer while in a corrective services facility could not participate in any egg or sperm freezing procedure to preserve their potential to procreate in the future. Nor, on the broad construction, could a woman prisoner in a corrective services facility with endometriosis or any similar disease be treated if the effect of the treatment would be to preserve the woman's fertility. These are more than, as the submissions for the Attorney-General put it, "an unfortunate consequence" and a "difficult" example respectively of the operation of the statutory provision on the broad construction proposed by the chief executive and the Attorney-General and as accepted by the courts below. They are a manifest indicator that the broad

construction is untenable. When the Explanatory Notes state (and s 3 of the CS Act reflects) that the "primary objective" of imprisonment involves "the humane containment, supervision and rehabilitation of offenders",¹⁴¹ it is impossible to discern any legislative intention that the infliction of the cruelty of unwanted sterility on a prisoner in a corrective services facility, when the prisoner otherwise could avail themselves of medical treatment to avoid sterility, is contemplated by, let alone a purpose of, s 22(2) of the CS Act.

148 To the contrary of the submissions for the chief executive and the Attorney-General, and as explained in the Explanatory Notes, the CS Act recognises that the punishment and deterrence aspects of imprisonment are achieved by the fact of imprisonment itself. It is the very denial of liberty which punishes the offender and deters the offender and others from committing crimes in the future. Beyond the fact that such a denial of liberty itself necessarily and inevitably curtails certain personal freedoms, the "offender's basic human entitlements" are to be both recognised and safeguarded.¹⁴² It is in this way, by not diminishing a prisoner's basic human entitlements more than necessary from the fact of imprisonment, that the circumstances of imprisonment are "humane containment, supervision and rehabilitation".¹⁴³

149 Moreover, it is readily understandable that a ban on conjugal visits would be treated as a necessary diminution of what might be described as a "basic human entitlement" to the capacity to achieve sexual intimacy. It is also understandable that, at the time of the Kennedy Review in 1988, this ban might have been perceived as part and parcel of a prisoner's punishment. But the enactment of the CS Act, as explained in the Explanatory Notes, reflects the passage of nearly 20 years from the time of the Kennedy Review during which the prevailing view had become that the punishment is the deprivation of liberty itself, with only the necessary consequences of such deprivation on the offender's basic human entitlements being tolerated but no more. On any view, forcing a prisoner in a corrective services facility to forgo undertaking medical treatment to preserve their fertility does not reflect a "necessary" diminution of a prisoner's basic human entitlements because of imprisonment. Nor does allowing a person to become infertile when medical treatment could avoid infertility reflect, as the Attorney-General would have it, the "ordinary consequences" of imprisonment by reason of the passing of time. The potential variables of the sex of the offender, their age at

141 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 1.

142 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 1-2; CS Act, s 3(2).

143 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 1-2; CS Act, s 3(1).

the time their imprisonment commences, whether or not they have had children before their imprisonment commences, and the length of their sentence mean that infertility is not an "ordinary consequence" of imprisonment.

150 The true comparison between the ban on conjugal visits and the ban on a prisoner in a corrective services facility participating in "assisted reproductive technology" is no more than that a prisoner in a corrective services facility cannot participate in accessing technology the use of which results in procreation. Neither the extraction and freezing of eggs nor of sperm results in procreation.

151 This also accords with the manifest legislative intention of s 22(2) as exposed in the Explanatory Notes, the repeated express focus of which is to prevent procreation by a prisoner in a corrective services facility. For example, the Explanatory Notes record that, as the majority of the prison population in Queensland is male, artificial insemination is the form of assisted reproductive technology most frequently requested by prisoners.¹⁴⁴ Facilitating artificial insemination, in the sense of a process in which sperm is introduced into the female reproductive system so that fertilisation can occur and the fertilised egg (or zygote) can implant in the womb to enable gestation and the birth of a child, involves participating in "assisted reproductive technology". That is, artificial insemination in this sense is a technology the use of which results in procreation – it is "assisted reproductive technology" subject to the prohibition on participation in s 22(2).

152 The Explanatory Notes state that the value judgment which is being removed from the chief executive's decision-making power is "as to whether individual prisoners should be allowed to procreate while they are in prison". This is said to accord with the fact that "it was never intended that prisoners should be able to conceive children whilst in custody", the object being to ensure that there is "equity in decision making between prisoners" and that correctional authorities not be required "to make value judgments as to whether individual prisoners should be allowed to procreate while in prison and are suitable to parent and provide for a child".¹⁴⁵ The submissions for the chief executive and the Attorney-General fail to recognise that it is only the capacity to procreate *while a prisoner is in a corrective services facility* that is being removed by the legislation. The relevant equivalence is between acts that can result in procreation, being either sexual relations during a conjugal visit or participating in "assisted reproductive technology". It is these acts which are banned, not other acts which serve to

144 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 15.

145 Queensland, Legislative Assembly, *Corrective Services Bill 2006*, Explanatory Notes at 23-24.

preserve fertility or the capacity to procreate in the future once the prisoner is released from a corrective services facility.

153 There is no value judgment the chief executive is called upon to make about a prisoner's suitability to be a parent in the chief executive approving a prisoner in a corrective services facility undergoing egg or sperm extraction and freezing. This is because egg or sperm extraction and freezing, as submitted for the appellant, is an end in and of itself, that end being the preservation of the prisoner's capacity to procreate on the prisoner's release from the corrective services facility.

154 While it is not necessary to confine the chief executive's power in s 22(3) by construing "may give the approval ... if satisfied" to mean "must give the approval ... if satisfied",¹⁴⁶ it is plain that the chief executive's discretion is heavily qualified. The express relevant factors to be considered are confined to the application for approval not being frivolous or vexatious, the prisoner being able to pay for the examination or treatment and associated costs, and the health practitioner nominated by the prisoner being willing and available to carry out the examination or treatment of the prisoner. No doubt the chief executive would be entitled to consider related matters within the scope of the chief executive's functions as specified in s 263 of the CS Act (the security and management of all corrective services facilities, the safe custody and welfare of all prisoners and the supervision of offenders in the community) to the extent that they are relevant, but it is not for the chief executive to decide if any prisoner is more worthy or suitable than another to take steps to preserve their fertility whether by egg or sperm extraction and freezing or otherwise. In accordance with the purposes of the CS Act as expressed in s 3, including the "humane containment" of offenders, not diminishing the basic human entitlements of offenders more than necessary from the fact of imprisonment, the need to respect an offender's dignity, and the special needs of some offenders by reason of their sex, age and related fertility status, the choice whether or not to undertake medical treatment to preserve their fertility by egg or sperm extraction and freezing or otherwise is fundamentally for the prisoner in the corrective services facility to make, including by applying for the chief executive's approval to do so if the prisoner wishes to nominate their own health practitioner to undertake the treatment.

155 The submission for the chief executive that this construction of s 22(2), confining the meaning of "assisted reproductive technology" to technology the use of which results in procreation, would result in anomalies between male and female prisoners and between female heterosexual and female homosexual prisoners must also be rejected. This submission was based on the chief executive's mistaken notion that the concept of "participat[ing]" in "assisted reproductive technology"

¹⁴⁶ cf *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135; *Leach v The Queen* (2007) 230 CLR 1 at 17 [38].

within the meaning of s 22(2) would not include a prisoner in a corrective services facility giving their permission or consent to another person to use their frozen eggs or frozen sperm to procreate. On that mistaken basis, the chief executive submitted that the only effect of the lack of capacity in s 22(2) would be on a female prisoner such as Ms Smith who was in a corrective services facility. It would then follow that a male or female prisoner in a corrective services facility who had had their eggs or sperm extracted and frozen before being imprisoned would be able to permit or consent to another person using their frozen eggs or sperm to procreate. Similarly, it would then follow that a male or female prisoner in a corrective services facility who had had their eggs or sperm extracted and frozen while in a corrective services facility would be able to permit or consent to another person using their frozen eggs or sperm to procreate. As discussed above, however, a male or female prisoner in a corrective services facility who has had their eggs or sperm extracted and frozen while in a corrective services facility cannot, while they are a prisoner in a corrective services facility, give their permission or consent to any person (including any medical practitioner) to use their frozen eggs or sperm to enable the gestation of a child. That is the incapacity imposed by s 22(2)(a) on a prisoner. That is also the equity between prisoners that s 22(2) creates.

Conclusion and orders

156 The courts below misconstrued s 22(2) of the CS Act. Ms Smith was entitled to apply to participate in egg extraction and freezing to be undertaken by her nominated health practitioner, which is not "assisted reproductive technology" within the meaning of that phrase in s 22 of the CS Act. The chief executive can approve that participation in accordance with s 22(3) of the CS Act. In circumstances where this appeal has been granted expedition, and Ms Smith has been denied the opportunity to obtain a timely approval of her application, it is now incumbent on the chief executive to decide her application as soon as reasonably possible.

157 The orders to be made are:

- (1) Appeal allowed.
- (2) Set aside orders 2 to 5 and 7 to 10 of the Court of Appeal of the Supreme Court of Queensland made on 29 May 2026 and, in their place, order that:
 - (i) Appeals allowed.
 - (ii) Set aside the orders of the Supreme Court of Queensland made on 27 November 2024 and 5 March 2025 and, in their place, order that:
 - (A) Application allowed.
 - (B) The respondent's decision of 28 February 2024 be quashed.

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- (C) The matter be remitted to the respondent for determination according to law.
 - (D) The respondent pay the applicant's costs of and incidental to the application.
- (iii) The respondent pay the appellant's costs of the appeals.
- (3) The first respondent pay the appellant's costs of the appeal.

