

IN THE SUPREME COURT OF QUEENSLAND

Registry: Brisbane
No. BS 4853/22

Applicant ATTORNEY-GENERAL OF QUEENSLAND

and

First Respondent DESMOND RONALD GRANT

and

Second Respondent CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES

and

Intervener QUEENSLAND HUMAN RIGHTS COMMISSION

Submissions on behalf of the Queensland Human Rights Commission

Background

1. The Court has already found that the first respondent, Mr Grant, is a serious danger to the community in the absence of a division 3 order for the purposes of s 13(1) the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (**DPSO Act**).
2. The evidence supports, as the applicant Attorney-General (**AG**) acknowledges, that a supervision order under s 13(5)(b), in the form proposed by Mr Grant, could ensure adequate protection of the community (thus satisfying the paramount consideration pertaining to the decision, in s 13(6)(a)). Given the significant intrusions made by the DPSO Act on “*the most elementary and important of all common law rights*”¹ – the right to personal liberty – the least intrusive order warranted by the Act should be preferred.²
3. Ordinarily, a person released to supervision under the DPSO Act who does not have other suitable accommodation readily available, is initially accommodated by the second respondent, the Chief Executive of Queensland Corrective Services (**QCS**), in one of two ‘precincts’ established in Wacol and Townsville. However, QCS policy applicable to the precincts does not allow for in-home care of the kind which has been assessed as necessary for Mr Grant’s medical conditions – either at the lower level assessed by the Aged Care Assessment Team (**ACAT**) or to the greater extent anticipated as necessary for the duration of any supervision order by psychiatrist Dr Arthur. And, despite attempts by QCS

¹ *Trobridge v Hardy* (1955) 94 CLR 147, 152, cited in *Williams v The Queen* (1986) 161 CLR 278, 292 and *Attorney-General v Fardon* [2003] QSC 331 at [19].

² *Attorney-General v Francis* [2007] 1 Qd R 396. (**Francis**), 405 [39]; *Kynuna v Attorney-General* [2016] QCA 172 at [64].

staff to seek to arrange it, there is presently no other supported accommodation option available.³

4. Mr Grant seeks release to a precinct pending more suitable accommodation, despite its limitations.
5. The Court has sought submissions as to the effect of the *Human Rights Act 2019* (Qld) (**HR Act**), if any, on the discretion yet to be exercised under s 13(5). The Court is concerned that the QCS policy decisions that deny Mr Grant support in the precincts, and which do not otherwise provide accommodation for someone with his medical conditions, do not abide his right to humane treatment in custody (s 30) and his right of access to health services (s 37). The Court has also indicated its concern that the practical implication of these policy decisions is to make the DPSO Act distinctly punitive and therefore arguably invalid in its application to Mr Grant.⁴

The Court's function under s 13 DPSO Act

6. The Court has a discretion whether to make an order under s 13(5) and if so, which one.⁵ Mandatory considerations for that exercise are set out in s 13(6). They are not drawn in exhaustive terms. In addition to the paramount consideration of adequate protection of the community, under s 13(6)(b) the court must consider whether:
 - (a) adequate protection of the community “*can be reasonably and practicably managed*” by a supervision order; and
 - (b) the conditions of the order “*can be reasonably and practicably managed*” by QCS.
7. Whilst the Court may not impose obligations upon QCS as part of any order,⁶ s 13(6)(b)(ii) makes relevant the practicality and reasonableness of QCS’ proposed management of any supervision order. A court will assume supervision is available unless there is clear evidence it is not, which explains why the supervision is unreasonable and impracticable.⁷
8. Because Mr Grant does not seek to raise any question of constitutional validity, the QHRC as intervenor does not here seek to advance that case. Nevertheless, if the Court considers detention of Mr Grant is truly punitive in character, then, as recognised by the Court of Appeal in *Attorney-General v Francis*,⁸ “*there is no basis for the court to make an order*”. This is because the conditions of further restraint upon the detainee’s liberty would be out of character with the intention of the legislature, that restraint is preventative, not punitive.⁹
9. In submitting for the validity of the DPSO Act, the AG makes the additional submission that Mr Grant has not put on evidence of any systemic impacts of the legislation in the

³ One aged and disability supported accommodation service provider has agreed to take Mr Grant when a place becomes available, but it is unknown when that will be. First affidavit of Cassandra Cowie (**Cowie affidavit**) [53]-[56], [65].

⁴ *Attorney-General v Grant* [2022] QSC 180 at [30], [33].

⁵ *Fardon v Attorney-General* (2004) 223 CLR 575 (**Fardon**), 592, 597; *Attorney-General v Lawrence* [2010] 1 Qd R 505, 511-512 [28]-[29]; *Attorney-General v Kanaveilomani* [2015] 2 Qd R 509, 516 [3], 520 [25],

⁶ *Attorney-General v Sambo* [2012] QCA 171 at [18].

⁷ *Francis*, 404 [37]

⁸ *Ibid*.

⁹ *Francis*, 401 [31], referring to Gummow J in *Fardon*, 620-621 [113].

form of ‘legislative facts’, as described by Edelman J in the recent decision of *Garlett v Western Australia*¹⁰ as necessary to support such a finding. It is difficult to see how Mr Grant could do so. Nevertheless, recent published decisions under the DPSO Act reveal that on numerous occasions the Court has ordered a detention order in lieu of a supervision order because of the absence of suitable accommodation for a variety of impairments that necessitate greater support.¹¹

Section 48(1) HR Act

10. Whilst s 48(1) HR Act enables, in the QHRC’s submission, broad statutory discretions to be construed as subject to human rights limitations, for the reasons expressed by the Victorian Court of Appeal in *Nigro & Ors v Secretary to the Department of Justice & Anor*,¹² considering a similar argument in its application to the power to make a supervision order under Victorian dangerous prisoner legislation, it is accepted that such a requirement would be inconsistent with the text and statutory purpose of s 13(5) of the DPSO Act.¹³

Section 5(2)(a) HR Act

11. However, it is not contrary to the DPSO Act scheme for the Court’s power to be constrained by the requirement to adhere to s 29(2) HR Act, through the application of s 5(2)(a) HR Act.
12. Section 29(2) HR Act provides the right, relevantly, not to be subjected to “arbitrary ... detention”. The QHRC submits that this right relates directly to the functions being performed by the Court in making a division 3 order.
13. It is accepted that s 58(1) does not bind the Court because the Court is acting in a judicial, and not administrative, capacity.¹⁴
14. However, s 5(2)(a) states that the HR Act applies to a court or tribunal to the extent it has functions under part 2 and part 3, division 3 of the Act. Part 3, division 3 relates to the interpretative function and part 2 contains all of the protected human rights. Victorian Courts have adopted an approach under the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*¹⁵ which reflects that the equivalent to s 5(2)(a) does not require all human rights are to be directly applied by courts, rather, only those “that relate to court

¹⁰ *Garlett v Western Australia* [2022] HCA 30 at [270]-[275].

¹¹ *Attorney-General for the State of Queensland v Guy* [2020] QSC 288 at [47]-[55]; *Attorney-General (Qld) v Guy* [2019] QSC 177 at [34]-[39]; *Attorney-General v Guy* [2018] QSC 179 at [18]-[22]; *Attorney-General for the State of Queensland v Gibson* [2019] QSC 206 at [31]-[36]; *Attorney-General for the State of Queensland v Gibson* (2021) 7 QR 371 at [18]-[26]; *Attorney-General for the State of Queensland v HGD* [2020] QSC 295 at [71]; *Attorney-General for the State of Queensland v Banwell* [2021] QSC 66 at [17]-[32]; *Attorney-General for the State of Queensland v Banwell* [2019] QSC 312 at [78] – [86]; *Attorney-General for the State of Queensland v ECA* [2021] QSC 220 at [47], [71]; *Attorney-General for the State of Queensland v Thompson* [2021] QSC 123 at [12], [27]; *Attorney-General for the State of Queensland v Schultz* [2018] QSC 275 at [26]-[29]; *Attorney-General for the State of Queensland v Barlow* [2019] QSC 121 at [47] to [57]; *Attorney-General v Tiers* [2018] QSC 130 at [51]-[53]; *Attorney-General v Tiers (No 2)* [2018] QSC 229 at [8]-[9]; *Attorney-General v Buckby* [2018] QSC 139 at [40]; *Attorney-General v Respondent* [2017] QSC 288.

¹² *Nigro & Ors v Secretary to the Department of Justice & Anor* (2013) 41 VR 359 (**Nigro**).

¹³ AG submissions [34].

¹⁴ Section 9(4) HR Act.

¹⁵ Section 6 of the *Charter*.

and tribunal proceedings”. This approach has also been adopted by single judges of this Court under the HR Act.¹⁶

15. The question of whether a particular right relates to court and tribunal proceedings may turn on the nature of the right, and whether it expressly or impliedly applies to the judicial process. Further, a right may relate to the proceeding because it is directly relevant to the functions that are being performed by the court or tribunal in the particular case.¹⁷
16. When the Court is dealing with an application under s 13 of the DPSO Act, it is empowered to order the person’s continued detention post-sentence. Section 29(2) HR Act pertains specifically to detention and arrest. Whilst detention may also arise in other factual circumstances, the power to lawfully detain an individual is a peculiarly judicial function.
17. The effect of s 5(2)(a) HR Act is to directly apply such rights to court proceedings. In *Victoria Police Toll Enforcement v Taha*,¹⁸ Tate JA considered that this bound the court to act compatibly with the right. However, in *Cemino v Cannon*,¹⁹ Ginnane J held that it only required a court to *consider* the right as part of the proper exercise of discretion, but the court was not bound to give effect to the right in the decision being made.
18. The QHRC submits that Tate JA’s approach to the *Charter* equivalent of s 5(2)(a) was correct and should be followed in Queensland. Adherence to Mr Grant’s right not to be subject to arbitrary detention is consistent with the DPSO Act regime which does not intend a punitive result.

Effect of s 59 HR Act

19. The QHRC also submits, contrary to the AG, that where the impracticability of a supervision order is caused by breaches of a person’s human rights by the QCS, that *is* a relevant circumstance that can inform the assessment of whether the requisite supervision is reasonable or unreasonable.
20. It is not to the point that Mr Grant has not sought relief as against QCS on the grounds of unlawfulness, triggering the application of s 59 HR Act.²⁰ Section 59 is a facilitative section that provides an additional cause of action on the grounds of unlawfulness. Its unavailability here does not mean, *ipso facto*, that compliance or otherwise by the QCS with the requirements of s 58 HR Act is excluded from consideration, or irrelevant.
21. The question of what is relevant or irrelevant to the decision under s 13(5) is determined by construction of that power within the DPSO Act;²¹ matters will only be irrelevant if excluded by the nature, scope and purpose of the power.

¹⁶ *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J) (***Re Kracke***) at [250], [254], adopted by Ryan J in *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293 (***Innes***) at [222]-[224] and Davis J in *Wood v The King* [2022] QSC 216 at [75]-[76].

¹⁷ *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37]-[39], adopted by Ryan J in *Innes* at [228]-[230].

¹⁸ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [248].

¹⁹ *Cemino v Cannon* [2018] VSC 535 at [146]-[147].

²⁰ Cf. AG supplementary submissions [13], [22], [25]-[26].

²¹ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

22. The AG relies upon the approach by Maxwell P in *Director of Housing v Sudi*,²² to support the submission that s 59 precludes review of the QCS decisions on human rights grounds. That aspect of his Honour's decision was *obiter*; as he considered it unnecessary to decide whether a person seeking to challenge an antecedent decision was in fact seeking 'any relief or remedy' on the grounds of unlawfulness. This was because VCAT did not have the jurisdiction to review the lawfulness of the antecedent decision.²³ That finding was central to each of the other justices' decisions too. The Chief Justice noted that whilst *Ousley v R*²⁴ and *Attorney-General (Cth) v Breckler*²⁵ both make clear that administrative decisions can be collaterally challenged in a court, a tribunal was a different beast.²⁶ Justice Weinberg did go further, but again only in *obiter*, noting that it "can be argued" that unlawfulness under the *Charter* could only be relied upon in a proceeding the object of which was to seek relief or remedy in respect of that same act.²⁷
23. Justice Ryan in *Stenner v Crime and Corruption Commission*²⁸ distinguished *Sudi*, emphasising the importance of the different role and jurisdiction of VCAT in comparison to the supervisory jurisdiction of the Supreme Court.²⁹
24. Furthermore, in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*³⁰ Martin J accepted the AG's submission that s 59 could not be used to permit the court to 'deal with' other decisions not being judicially reviewed before the Court, the failure or omission referred to was part of the background which could be taken into account when considering whether the decisions under review. All the circumstances of that applicant's detention formed the basis upon which consideration started and continued.³¹
25. Accordingly, whilst the determination of the Court relates to the application for division 3 orders under the DPSO Act, the practicality and reasonableness of QCS' capacity to support the conditions of the supervision order is relevant, and the circumstances of Mr Grant's detention and proposed supervision, including the reasons for those circumstances being in breach of his human rights, are relevant too.
26. The common law right to liberty has been accepted to be relevant to the exercise of discretions under the DPSO Act.³² The right to liberty and protection from arbitrary detention in s 29(1) and (2) HR Act, and the associated breaches of Mr Grant's human rights by the actions or inactions of QCS, are also relevant. As the Court in *Nigro* said of its similar³³ legislation:

[103] The evaluative task in determining an "unacceptable risk" necessarily involves consideration of the values accorded to liberty at common law and the values ascribed to the rights in Pt 2 of the Charter. Those considerations are intrinsic to the notion of

²² *Director of Housing v Sudi* (2011) 33 VR 559.

²³ *Ibid*, 580 [94]-[98].

²⁴ *Ousley v R* (1997) 192 CLR 69.

²⁵ *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 108 [36].

²⁶ *Sudi*, 565-567 [24]-[31], 569 [43], [46]-[49];

²⁷ *Sudi*, 607 [281]-[282].

²⁸ *Stenner v Crime and Corruption Commission* [2019] 2 Qd R 89.

²⁹ *Ibid*, 110 [99] – 117 [118].

³⁰ *Supra*.

³¹ *Owen-D'Arcy* at [100]-[101].

³² *Yeo v Attorney-General* [2012] 1 Qd R 276 [54], [63].

³³ Notwithstanding the Victorian legislation contains a prohibition on considering the means of managing the risk or the likely impact of a supervision order on the prisoner: s 9(4) *Serious Offenders Act 2018* (Vic).

*an unacceptable risk, which requires those values to be balanced against the risk. Were it otherwise, any risk would be unacceptable. The threshold test in s 9(1) provides for the manner in which the court may strike a balance between protection of the community and the restriction of the offender's human rights. Although the impact on the offender of the making of an order is excluded from the test, the conceptual value of individual liberty and other human rights remain to be weighed in the balance. Though the test of unacceptable risk involves no prediction of the impact of an order on the particular individual, it necessarily involves consideration of the value which is placed on liberty and other human rights. **The legislative framework for s 9 contemplates that the nature of any order that is made and its effects upon the offender, including its impingement upon his rights, are matters to be taken into account when exercising the discretion under subs (7).** So much was not in issue on the appeal. The legislature thus seeks to achieve a balance between the offender's rights and the right of members of the public to be protected against the risk of the offender committing further sexual offences. When the degree of risk and its nature makes it unacceptable has been left to the courts to determine.*

Relevant human rights

27. An act or decision will limit a human right if it “places limitations or restrictions on, or interferes with, the human rights of a person”.³⁴
28. In assessing whether any act or decision limits human rights, the scope of each right must first be identified. In doing so, rights are to be construed in the ‘broadest possible way’ by reference to the fundamental values and interests expressed in them and absent any limitation.³⁵ This is consistent with a beneficial approach to construction of the provisions of the HR Act that bestow, protect or enforce human rights.³⁶

Section 15 – Right to equality

29. The rights set out in s 15 HR Act are drawn from Articles 2, 16 and 26 *ICCPR*. The fundamental value behind them is the equal dignity of every person; a natural incident of that dignity being that everyone equally enjoys their human rights, comes before the law equally and is protected by the law without discrimination.³⁷ The provision contains standalone rights as well as additional protection for other HR Act rights.
30. Section 15(2) provides the right to the equal enjoyment of human rights ‘without discrimination’,³⁸ reinforcing the protection of the other human rights contained in the HR Act. Sections 15(3) and (4) contain autonomous rights which act independently from the other rights in the HR Act; with two elements, described as ‘distinct but overlapping’.³⁹
31. The first part of s 15(3) requires *formal* equality before the law; it proscribes arbitrary or discriminatory enforcement of the law. The second part of s 15(3), together with s 15(4),

³⁴ *Innes* at [291]; *Owen-D’Arcy* at [130]; *Patrick’s case* at 384 [36].

³⁵ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J) (*Owen-D’Arcy*) at [130], citing *DPP (Vic) v Kaba* (2014) 44 VR 526 at 556 [105] per Bell J and *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J) *Re Kracke* at 29 [79].

³⁶ *Owen D’Arcy* (ibid) at [118]-[120].

³⁷ *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 (*Re Lifestyle*) at [277], also at [107] and [110].

³⁸ *Re Lifestyle* at [120], [280].

³⁹ *Re Lifestyle* at [126], [284].

requires *substantive* equality in the content and operation of the law. There is both a negative and positive property to this injunction; a prohibition on discriminatory laws and a requirement for laws to afford equal and effective – even if this means differential treatment of persons whose situations are different – protection against discrimination.⁴⁰

32. In contrast to s 8 of the *Charter*, discrimination under the HR Act is not limited to what is covered in the *Anti-Discrimination Act 1991* (Qld) (**AD Act**) but also has a more general sense.⁴¹ Discrimination under the AD Act encompasses two complementary concepts:
- (a) less favourable treatment of a person with a relevant attribute (here, relevantly, impairment) (direct discrimination);⁴² and
 - (b) the imposition of a term that a person with a relevant attribute does not or cannot comply with, and which a higher proportion of people without the attribute are able to comply, that is not reasonable in the circumstances of the case (indirect discrimination).⁴³
33. Insofar as discrimination encompasses direct or indirect discrimination within the meaning of the AD Act on the basis of an attribute in section 7 of that Act, whether an exemption under the AD Act might render such conduct lawful is not relevant to assessing discrimination for the purposes of the HR Act.⁴⁴

Section 37 – Right to health services

34. Section 37(1) relevantly provides the right to access health services without discrimination. Consistent with the Explanatory Notes,⁴⁵ the right has been drafted more narrowly than the international right to health⁴⁶ and even the right to access health services contained in the South African Constitution.⁴⁷ There is no such right contained in the other Australian or New Zealand human rights instruments.
35. The right focuses on non-discrimination in one's access to health services. Given its wording, s 37 would cover discrimination in physical access, or in the availability of health services.⁴⁸

⁴⁰ *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, [114]; *Cemino v Cannon* at [129]; *Re Lifestyle* at [137]-[141], [143], [145], [283]-[288]; *Thlimmenos v Greece* [2000] ECHR 162 at [44].

⁴¹ The definition of 'discrimination' in Sch 1 HRA is a non-exhaustive definition. However, even under the *Charter*, the right is not limited to discrimination established as unlawful under anti-discrimination law: *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, [2017] VSC 61 at [47].

⁴² *Anti-Discrimination Act 1991* (Qld) (**AD Act**), s 10.

⁴³ *Ibid*, s 11.

⁴⁴ *DPP v Natale (Ruling)* [2018] VSC 338 at [88].

⁴⁵ Explanatory Notes, *Human Rights Bill 2018 (Qld)*, p 28.

⁴⁶ Article 12(1) *International Convention of Economic, Social and Cultural Rights* contains a right to enjoy the 'highest attainable standard of physical and mental health conducive to living a life of dignity'. This encompasses availability of services, accessibility, acceptability (ethically and culturally) and quality: *General Comment No. 14 (2000) The Right to the highest Attainable Standard of Health*, UN Committee on Economic, Social and Cultural Rights, 2000, par 12.

⁴⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 27(1)(a) 'right to have access to health care services'.

⁴⁸ Noting these form part of the four interrelated elements encompassed by the international right: *General Comment No. 14*, *ibid*.

Section 30(1) – Right to treatment with humanity and respect

36. Section 30(1) HR Act requires that all persons deprived of liberty be treated “*with humanity and with respect for the inherent dignity of the human person.*” The right recognises the particular vulnerability of persons in detention.⁴⁹
37. This right, modelled on Article 10(1) *ICCPR*, places a positive obligation on the State to ensure that persons detained by it do not suffer any hardship or constraint more than that which is a consequence of the imprisonment itself. It is not limited to persons detained under criminal law, but all forms of detention.⁵⁰
38. Respect for the dignity of such persons must be guaranteed under the same conditions as for free persons.⁵¹ It is “*the starting point*” for consideration of prisoners’ rights.⁵² The Explanatory Notes also refer to this right as providing “*certain minimum standards of treatment*” for incarcerated persons.⁵³ Whether or not the entitlement has been denied is a question of fact and degree in all the circumstances.⁵⁴

Section 29 – Right to liberty

39. The right to liberty in s 29(1) and (2) is modelled on Art 9 *ICCPR*.
40. Detention may be legally permitted but still remain arbitrary, because arbitrariness is not to be equated with lawfulness.
41. In *WBM v Chief Commissioner of Police*, Warren CJ, with whom Hansen JA agreed, accepted United Kingdom authority to the effect that arbitrariness under the *Charter* extends to encompass “*capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought*”.⁵⁵
42. In *PBU*,⁵⁶ Bell J stated that the concept of arbitrariness under the *Charter* is the specialised human rights concept which requires consideration of the *proportionality* of the interference and in *Patrick’s case*,⁵⁷ his Honour embraced the Human Rights Committee’s approach to the concept, prompting consideration of whether the limit is *necessary* in the circumstances of the case.

⁴⁹ *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 (*Castles*), [93], [108].

⁵⁰ Explanatory Notes, p 25.

⁵¹ UN Human Rights Committee, ‘General Comment 21: Article 10 (Humane Treatment of persons deprived of their liberty)’, UNDOC HRI/GEN/1/Rev.9 (Vol. I) (10 April 1992), [3].

⁵² *Castles* at [108].

⁵³ Explanatory Notes, p25.

⁵⁴ *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20 at [87]

⁵⁵ *WBM v Chief Commissioner of Police* (2012) 43 VR 446 (*WBM*) at [114], [120] (Warren CJ, Hansen JA).

See also *PJB v Melbourne Health (Patrick’s case)* (2011) 39 VR 373 (Bell J) (*Patrick’s case*) at [85].

⁵⁶ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 (Bell J) at [124]; *Patrick’s Case* at 395.

⁵⁷ *Patrick’s case* (supra) at 393 [77] – 395 [85]. HRC, *Views: Communication No 488/1992 (Toonen v Australia)*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) at [8.3]; *A v Australia* (1997) 4 BHRC 210, cited in *PJU* at 394 [82].

43. Detention may be arbitrary if the manner of treatment does not relate to the purpose for which the person is ostensibly detained.⁵⁸
44. The punitive effect of an order under the DPSO Act in respect of its application to Mr Grant specifically is reinforced by considerations of arbitrariness. But for his medical impairments, he would be released on a supervision order.

Limits upon Mr Grant's human rights

45. The QCS actions which engage Mr Grant's human rights, are:
 - (a) QCS policy, based on the security risk presented by the precinct's residents, that there cannot be any in-reach support services; residents are expected to be able to live independently (**in-reach support policy**).
 - (b) QCS policy not to permit another resident at the precinct to be a (paid) carer for Mr Grant, based upon, primarily the temporary nature of residency at the precinct (**carer support policy**).
 - (c) QCS is not funded to, and does not, provide accommodation to supervisees following an initial period at a precinct. This has a more deleterious effect on persons with medical care needs that would best be met in an aged care facility or semi-supported hostel-style accommodation. The evidence is clear that there are difficulties and extreme delays finding such accommodation provided by other service providers (**non-provision of accommodation**).
46. The in-reach support policy and the carer support policy directly discriminate against Mr Grant in that he is excluded from eligibility for release to the precincts on the basis of his medical impairment, limiting his right to equality (s 15 HR Act) and his right to access health services without discrimination (s 37).
47. Mr Grant's exclusion from the precincts (through the in-reach support policy and the carer support policy) and the non-provision of accommodation by QCS indirectly discriminates against Mr Grant in that he, unlike others without his impairment, is far less likely to obtain suitable accommodation and is exposed to the risk of continuing detention orders, limiting both his right to equality (s 15 HR Act) and his right to liberty (s 29(1) and (2)).
48. Each of the actions limit Mr Grant's right to humane treatment in detention (s 30).

Justified limitation?

49. Section 13(1), together with s 8 of the HR Act, recognise that rights may be limited and actions remain compatible with human rights, if the limits are reasonable and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
50. Section 13(2) lists a number of matters that may be relevant to determining whether the limits are reasonable and justifiable, which may be conveniently grouped as follows.

⁵⁸ United Nations Human Rights Committee, 'General Comment 35: Right to Liberty and Security', UN DOC CCPR/C/GC/35, [11]-[12], [14], the latter para citing *Fardon v Australia*, 1629/2007, par 7.4.

- (a) *The nature of the human right; The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;*

Discrimination is unlawful quite apart from the HR Act: see the AD Act. The right to protection from discrimination (s 15) and the right to non-discrimination in access to health services (s 37) reflect this more fundamental premise. Each of these rights are completely abrogated by the decisions.

The right to liberty has long been considered a fundamentally important human right. The relevant protection here is against arbitrary detention (s 29(2)), which, in a free and democratic society would be avoided. The making of a detention order because of the absence of suitable accommodation (and not to meet the purposes of the power granted to the Court under the DPSO Act) would completely abrogate Mr Grant's right to be protected from arbitrary detention.

The right to humane treatment is a minimum standard right, which again is a hallmark of a free and democratic society.

Each of the rights engaged here are important and at serious risk.

- (b) *The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; The importance of the purpose of the limitation; The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose:*

The limits are not imposed by design but as a consequence of particular policies that have been adopted. The in-reach support policy is sought to be justified on the grounds of safety risk to such carers, which is an important aim that is advanced by the policy.

The carer policy is sought to be justified on pragmatic grounds only.

The non-provision of accommodation is sought to be justified on financial grounds.

- (c) *Whether there are any less restrictive and reasonably available ways to achieve the purpose;*

QCS could permit security to attend with any in-reach carers or explore the possibility of the carers attending a centralised building.

QCS could pay for fellow residents (where willing) to act as an internal carer.

QCS and/or the State (here represented by the AG) could expend funds to acquire suitable facilities and personnel in order to provide accommodation for what is a compulsory regime imposed upon Mr Grant.

Conclusion

51. For the reasons outlined, Mr Grant's human rights to liberty and protection from arbitrary detention, his rights to be protected from discriminatory acts generally and more specifically in relation to this access to health services, and his right to humane treatment

in custody, are all limited by the QCS policies outlined above. Those limits are not justified, in a free and democratic society based on human dignity, equality and freedom.

52. These breaches of his human rights are relevant to the Court's determination under s 13(5), for the reasons set out above.
53. To avoid imposing detention that is arbitrary, and punitive in nature, in the QHRC's submission, the Court would decline to impose a detention order.
54. A supervision order requiring his initial accommodation in one of the precincts before transfer to other suitable accommodation should be made. His circumstances at the precinct, on a temporary basis, would be bettered by permitting him to engage (by agreement) the assistance of a resident carer, and providing him with suitable mobility aids to enable his access to outside medical services.

P Morreau

Counsel for the Queensland Human Rights Commission
2 November 2022