

**CASE NOTE:**

## *Attorney-General for the State of Queensland v Grant* [2022] QSC 180; and *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252

Court/tribunal	Supreme Court
Cause of action	Application under the <i>Dangerous Prisoners (Sexual Offenders) Act 2003</i>
Application of <i>Human Rights Act 2019</i>	5 (direct application)
Rights engaged	Right to liberty (s 29), Humane treatment when deprived of liberty (s 30).
Outcome	Release under supervision order
Commission intervened?	Yes
Date of decision:	31 August 2022 and 10 November 2022

### Background

*The Dangerous Prisoners (Sexual Offenders) Act 2003* (the DPSO Act) provides a scheme for the Attorney-General to apply to the court for convicted sex offenders who have served their term of imprisonment to remain in detention or be released under supervision, if they remain a serious danger to the community. In these decisions, the Supreme Court concluded the *Human Rights Act* applies to its discretion to make such orders.

The application concerned a 78-year-old man whose five-year sentence for sexual offences had expired. He has several medical conditions and limited mobility and requires support. The prisoner and the Attorney-General accepted that the evidence, particularly the prisoner's history, and the assessments of risk by expert psychiatrists, suggested that the court should release him under a supervision order.

## Interim orders

In its first decision, the Court expressed concerns about releasing the prisoner under supervision to one of two precincts operated by Queensland Corrective Services (QCS) in Brisbane and Townsville, because of his frail condition and health needs. QCS has a policy of not allowing people to enter the precincts to provide domestic, daily living or medical supports, or to deliver groceries or collect a resident in a taxi. The Court questioned whether the prisoner could live independently without these supports. The Court was also concerned about the lack of alternative, supported accommodation options for such prisoners. It noted the government had apparently not responded to remarks made in 2017 by the then Chief Justice about the growing need for individuals in the man's age category to receive supported accommodation.

The Court initially made an interim order continuing the prisoner's detention in prison. The Court noted the *Human Rights Act 2004* (HR Act) may be relevant to its discretion and asked that the Queensland Human Rights Commission (QHRC) be informed of the proceedings. The Court also added the Chief Executive of Queensland Corrective Services (QCS) as a party to the proceeding. The QHRC subsequently intervened.

## Subsequent hearing

In its second decision, the Court considered the HR Act in some detail. QCS is a public entity with obligations under the HR Act to act and make decisions compatibly with human rights. However, the court concluded that it could not grant any relief or remedy for the acts or decisions of QCS that might be incompatible with human rights because it was only dealing with the application under the DPSO Act. The prisoner had not made any application, such as an injunction or judicial review, that would allow the court to decide whether QCS had contravened the obligations under the HR Act.

The Court accepted that s 48 of the HR Act, which requires legislation to be interpreted compatibility with human rights, was not relevant to the exercise of the court's discretion under the DPSO Act. The key question was therefore how the HR Act applied to the Court by operation of s 5(2)(a).

## Direct application of the HR Act

Section 5(2)(a) provides that the HR Act applies to a court or tribunal to the extent that the court or tribunal has functions under part 2, which contains the human rights. The Court considered the various approaches discussed in previous Queensland and Victorian decisions as to how s 5 and its Victorian equivalent may operate. The court favoured the 'intermediate approach', which looks to the functions that the court or tribunal is performing in the particular proceedings.

The Court then considered whether the intermediate approach required it to 'act compatibly' with the identified right or to merely consider the right. It regarded the suggested differences between these approaches as more apparent than real. It will depend on the specific function the court or tribunal is performing, the relevant right, and the circumstances of the case.

The discretion to be exercised by the Court under the DPSO Act arose after it was satisfied that the prisoner was a 'serious danger to the community' in the absence of an order. The relevant legal issue was whether any of the rights in Part 2 of the HR Act apply in deciding whether to make a continuing detention order or a supervision order.

The Court concluded that the function of making a continuing detention order in lieu of a supervision order in this case would involve the application of at least the right to liberty in s 29(1) and the right to protection against arbitrary detention in s 29(2). If the continuing detention order were made only because of the decision of QCS to not provide suitable and humane conditions for the prisoner's accommodation at the precinct and the discriminatory effect of policies that unnecessarily impede his access to services there, then the prisoner's detention would arguably be arbitrary.

In contrast, the making of a supervision order in preference to a continuing detention order would involve at least the application of s 30 of the HR Act (right to humane treatment when deprived of liberty). All persons deprived of liberty must be treated with humanity and with respect to the inherent dignity of the human person. The prisoner required a high level of support which made his proposed residence at the precinct unsafe for his health, unless QCS has regard to his individual circumstances in applying its policies.

Other rights may have been relevant, such as freedom of movement (s 19), or right to access health services without discrimination (s 37) but the Court found it unnecessary to consider these rights in detail, particularly when its function was not to determine whether QCS had acted unlawfully under the HR Act. However, the Court noted that QCS was on notice about the application of various rights in the HR Act and that QCS may encounter difficulties in justifying limitations on them.

## Conclusion

After his release to the Townsville precinct, it would take some weeks for the prisoner to obtain community support. At a later time, he may be offered a place in a hostel that can provide him with further support. The Court noted he will not have access to potential victims on any occasions that he manages to leave the precinct for approved purposes and subject to directions that deny or severely limit his access to potential victims. The community should be safe from the relevant risk because a supervision order would be made. However, the prisoner would not be safe. The medical evidence established that being accommodated at the precinct was distinctly unsafe for someone with his complex medical conditions.

To consign a person, even a detestable sex offender, to such an unsafe situation was, in the Court's view, unsatisfactory. However, these were ultimately questions for another day and possibly another court. It ordered the prisoner be released under a supervision order for 10 years duration.