# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252 |
| PARTIES: | **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(applicant)<br>**v**<br>**DESMOND RONALD GRANT**<br>(first respondent)<br>**CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES**<br>(second respondent)<br>**QUEENSLAND HUMAN RIGHTS COMMISSION**<br>(intervenor) |
| FILE NO: | BS 4853 of 2022 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 16 November 2022 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 November 2022 |
| JUDGE: | Applegarth J |
| ORDER: | **A supervision order be made for a period of ten (10) years commencing 10 November 2022.** |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the applicant seeks an order under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where the 78-year-old first respondent has serious health conditions and severely limited mobility – where the first respondent needs at least semi-supported, hostel-style accommodation – where the applicant acknowledged and the Court found that adequate protection of the community could be ensured by a supervision order – where the second respondent does not provide semi-supported, hostel-style accommodation for persons subject to supervision orders who need such support – where the second respondent will not permit the support to which the first respondent is entitled under his ACAT |

assessment to be provided to him at its precinct – where the first respondent's serious medical conditions and severely impaired mobility and the absence of QCS staff at the precinct make accommodation there unsuitable and unsafe for him – where the inflexible application of QCS policies to the first respondent will deprive him of reasonable access to food, health services, and other essential services while he resides at a precinct – where the first respondent wishes for a supervision order to be made despite these concerns – whether a supervision order of 10 years' duration should not be made in the circumstances despite finding that adequate protection of the community may be ensured by the making of one

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where the Court has a discretion to not make a supervision order despite finding that adequate protection of the community may be ensured by the making of one and, instead, to make a continuing detention order – where the Court has a discretion to make a supervision order that will result in the first respondent residing in unsuitable and unsafe accommodation at a precinct – whether s 5(2)(a) of the *Human Rights Act 2019* (Qld) requires the Court to apply or enforce rights that relate to the Court's function in exercising the discretion under s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – whether the "intermediate interpretation" of s 5(2)(a) of the *HRA* ought be adopted – whether the "functional approach" to s 5(2)(a) of the *HRA* ought be adopted – whether certain rights under the *HRA* relate to the Court's function in exercising the discretion under s 13(5)

*Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 6, 24
*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 13, 16, 16B
*Human Rights Act 2019* (Qld), ss 5, 6, 9, 13, 15, 17, 19, 21, 29, 30, 31, 32, 37, 48, 58, 59, Schedule 1

*Attorney-General (Qld) v Carter* [2020] QSC 217, cited
*Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324, cited
*Attorney-General for the State of Queensland v Grant* [2022] QSC 180, cited
*Attorney-General for the State of Queensland v Guy* [2017] QSC 105, cited
*Attorney-General for the State of Queensland v Guy* [2022] QSC 174, cited
*Attorney-General (Qld) v Lawrence* [2010] 1 Qd R 505; [2009] QCA 136, cited
*Castles v Secretary of the Department of Justice* (2010) 28 VR 141; [2010] VSC 310, cited

*Cemino v Cannan* (2018) 56 VR 480; [2018] VSC 535, cited
*De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111, cited
*De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237; [2009] VSCA 199, cited
*Director of Public Prosecutions (Vic) v JPH (No 2)* (2014) 239 A Crim R 543; [2014] VSC 177, cited
*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, cited
*Garlett v Western Australia* (2022) 96 ALJR 888; [2022] HCA 30, cited
*Haigh v Ryan* [2018] VSC 474, cited
*Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623; [2020] QSC 293, cited
*Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646, cited
*Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61, cited
*Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; [2013] VSCA 213, cited
*Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, cited
*Thompson v Minogue* (2021) 294 A Crim R 216; [2021] VSCA 358, cited
*Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; [2013] VSCA 37, discussed
*WBM v Chief Commissioner of Police* (2012) 43 VR 446; [2012] VSCA 159, cited
*Wood v The King* [2022] QSC 216, cited

COUNSEL: G del Villar KC SG, M Maloney and K Blore for the applicant
B Mumford for the first respondent
A Freeman for the second respondent
P Morreau for the intervenor

SOLICITORS: Crown Solicitor for the applicant
Legal Aid Queensland for the first respondent
Queensland Corrective Services for the second respondent
Queensland Human Rights Commission for the intervenor

[1] The first respondent is a 78-year-old sex offender who has served his sentence. As the applicant acknowledged at the hearing in August this year, the evidence supports a finding that adequate protection of the community may be ensured by the making of a supervision order under s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).[1] I made such a finding.[2]

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1 *Attorney-General for the State of Queensland v Grant* [2022] QSC 180 at [2] ("*Grant*").
2 *Grant* at [27].

[2] The first respondent is physically frail and has several health conditions, including diabetes. He cannot walk far and needs a walker. In June 2022, the first respondent had an ACAT assessment that deemed him eligible for a Home Care Package Level 3 to support his return to living in the community. That package will give him about 10 hours of support per week. Upon release on a supervision order, the first respondent will be accommodated at the "precinct" at Wacol or the "precinct" at Townsville. This is "contingency accommodation" for people who have no suitable accommodation in the community. It is intended as a short-term solution while the person finds, if he can, suitable accommodation that will be approved by the authorities.

[3] The difficulty for the first respondent, and other elderly individuals like him, is they are not suited to live in open parts of a nursing home, as distinct from secure sections that accommodate residents with dementia. There are insufficient hostels and similar facilities that can provide a level of supported accommodation while denying offenders access to potential victims. One reason for this is that the government has not addressed that issue despite the observations of the former Chief Justice in 2017 and other judges since then.

[4] Chief Justice Holmes observed in 2017:[3]

> "It is deeply troubling to think that people who could be managed and rendered relatively risk-free with appropriate support and accommodation, must instead, be imprisoned as the only option."

[5] Queensland Corrective Services ("QCS") works with the Department of Communities, Housing and Digital Economy and other accommodation providers to assist persons subject to supervision orders under the Act to find suitable housing in the community. This engagement occurs at "the operational level" and QCS acknowledges that there are challenges in finding public or specialist housing for individuals in need of it.

[6] There was a formal multi-agency arrangement to address this issue titled the "Inter-Agency Public Protection Committee" ("IAPPC") involving different agencies including Queensland Health. Its intent was to analyse the impact of emerging issues for government agencies and appropriate management across agencies relating to offenders under the Act. This included locating suitable accommodation, treatment programs, medical services and employment.

[7] For reasons that the Director of the High-Risk Offender Management Unit in QCS cannot explain, the IAPPC ceased operating.

[8] With increased expectation on QCS to provide accommodation for individuals with the kind of mobility and health issues that the first respondent has, the Commissioner of QCS has indicated that he intends to write to the Director-General, Department of Justice and Attorney-General in the first instance seeking assistance to re-establish and co-chair an inter-agency protection committee, with a view to addressing accommodation and risk management issues for individuals

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[3] *Attorney-General for the State of Queensland v Guy* [2017] QSC 105 at [7] ("*Guy*"). See also *Attorney-General for the State of Queensland v Guy* [2022] QSC 174 and the subsequent decisions cited at [14]-[24] therein.

under supervision orders. Other relevant agencies will then be requested to join, although there is no obligation for them to engage in such a committee.

[9] In summary, QCS cannot explain why an inter-agency committee that might have addressed the issues raised by Holmes CJ in 2017 ceased to operate. A new committee may be formed. In the meantime, the accommodation available to the first respondent at the Wacol precinct and at the Townsville precinct is distinctly unsuitable for a person like him with impaired mobility and serious medical conditions.

[10] Despite the scarcity of suitable places for an individual like the first respondent that would enable him to be "managed and rendered relatively risk-free with appropriate support and accommodation"[4] with access to the support to which he is entitled under an ACAT assessment, there is some chance that a vacancy may arise in the coming weeks or months for him in a supported accommodation facility. The in-house services available at that facility include meals, toiletries, laundry, cleaning and medication management by way of dispensing a Webster-pak. An on-site manager and support workers may enter the facility, and this would allow the first respondent's ACAT providers to give the support for which he is currently assessed and the additional support that may become available under an updated ACAT assessment. This facility caters for people aged over 50 and it is willing to accommodate the first respondent when a vacancy arises. QCS is advised by the manager of the facility that whilst it would be unusual for a child to visit the facility, if they were to visit it would be in the company of a parent.

[11] The date at which a vacancy may arise in this facility is uncertain. It could be anywhere from weeks to months. The hope is that a bed in the facility will become available toward the end of December 2022.

[12] If the first respondent is offered a vacancy at that facility and such accommodation is approved by the authorities, he will be engaged in twice per week case management meetings with a Senior Case Manager initially. That manager will conduct collateral checks with relevant services and treatment providers. The first respondent will be subject to electronic monitoring upon release and his movements would be retrospectively reviewed by his manager. An inclusion zone can be established at this facility.

[13] At the hearing in August, I raised concerns about the suitability of the precinct accommodation at either Wacol or Townsville for the first respondent if QCS's policies were not adapted in this case to address his mobility and health problems. As I wrote:[5]

> "…the policy extends to not allowing a taxi, that could pick up the first respondent and his walking frame, to collect him from the front of the house and take him to a medical appointment. The policy does not allow a Woolworths delivery driver to leave groceries at the front of the house. The powers that be would prefer someone like the [first] respondent with poor mobility and a walking frame to collect his groceries from a far-off gate (assuming they could be left there

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4 *Guy* at [7].
5 *Grant* at [6].

> without being stolen). This policy renders the Wacol precinct unsuitable for the first respondent to obtain groceries to cook for himself or even for prepared meals to be delivered to the outside of the house in which he would reside. It limits his access by taxi to medical services."

[14] The policy would not allow external care providers under the first respondent's ACAT assessment to visit him at any part of the precinct, even in an office room or on a bench or seat in an outside area. It would not enable such a care provider to pick him up from close to the front of the house in which he resided. He would have to walk up a 250-metre driveway (described as "a gentle slope") and meet the care provider there.

[15] The Townsville precinct is far outside that city and beside a prison. It has no access to public transport. As a result, a minibus can transport residents to the QCS office in Townsville. I was told from the bar table that there is a large shopping centre not far from that office. The practicalities of the first respondent being able to cross roads and walk to the centre, purchase his food and other requirements, and then transport them on his walker back to the QCS office is unknown. One reason they are unknown is that inexplicably the first respondent's lawyers made no enquiries about his ability to transport himself and his walker to get food and groceries from either precinct, and then transport items on his walker back to the precinct. They did not initiate any arrangements for his mobility and needs to be better assessed. This is despite the evidence of the doctors in their reports and in their oral evidence on 22 August 2022 that the June ACAT assessment greatly underestimates the first respondent's medical and mobility problems, partly because they depend on unreliable self-reporting. Their view was that he should have been assessed as requiring nursing home care.

[16] The first respondent's lawyers had almost three months since the August hearing, and almost four months since Dr Arthur's 22 July 2022 report, to address this matter and obtain a current and reliable assessment of the first respondent's actual mobility in the community and medical needs. They failed to do so. They had since 31 August 2022 to address the issue of the first respondent's ability to obtain food and cook for himself at either the Wacol or Townsville precinct. This was an issue highlighted by me on 22 and 31 August and a concern that led me to make an interim detention order.

[17] At the hearing on 10 November 2022, Counsel for the first respondent relied on an unreliable 3 June 2022 ACAT assessment that simply said that the first respondent "is mobilising with a wheeled walker/risk of falls". The assessment did not address his mobility and ability to shop for his food whilst resident at a precinct or anywhere else in the community. When I asked the first respondent's Counsel how the first respondent was going to be able to access food if he lived at either the Wacol or Townsville precinct, he did not have a clue. That publicly funded lawyers for the first respondent should provide no evidence or even assistance about such matters that relate to his ability to live and survive at a precinct is astounding.

[18] On 31 August 2022 I stated:[6]

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6 *Grant* at [14]-[15] (emphasis added).

> "A concern remains about the safety of leaving someone with the first respondent's health complications at such a remote residence, unsupervised and unsupported by staff who could call for an ambulance or help in the event of a medical emergency or deterioration in his condition.
>
> **The issue is not about the safety of the community and access to victims if the first respondent resided at a precinct house.** The risk of his sexual offending would be low because he would not have access to potential victims. **The concern of the doctors and the Court is with the first respondent's safety in unsupported accommodation**."

[19] A similar concern remains about the first respondent's safety in unsupported accommodation at Wacol.

[20] The problem is not that QCS has a policy of not allowing entrants, including health providers and carers, to access the precinct unless approved. That policy has an understandable justification for the security of entrants to precincts that are not staffed by QCS and where there is no security staff to monitor the safety of visitors who may enter the precincts. As I previously observed, the concern for the safety of potential entrants into houses at the precinct is understandable.[7]

[21] The problem is the application of that policy without regard to the circumstances of someone like the first respondent who has mobility and health problems. There is no evidence that QCS would grant approval, if requested, for a grocery or food service to drop bags of groceries close to a precinct house at Wacol instead of at a distant gate from which the first respondent would struggle to transport himself and the deliveries. There is no evidence that QCS would grant leave for a taxi or a support person to pick up the first respondent from close to his house rather than from what may seem to him to be a distant gate.

[22] Under its seemingly inflexible policy, QCS would rather the first respondent with his poor mobility and walking frame collect food and groceries from a faraway gate than have a grocery or food service drop the food to the first respondent close to his house and then immediately depart. QCS expects someone like the first respondent to be able to cook for himself at the precinct but will not make an exception in his case to allow the food and groceries to be delivered to the outside of his house.

[23] The government will feed the first respondent at public expense if he is detained under a continuing detention order in prison but it will not relax a policy to help him feed himself, at his own expense, in a precinct.

[24] QCS's application of a policy without exception for someone in the first respondent's physical and medical condition raised concerns about QCS's compliance with the *Human Rights Act 2019* (Qld) ("*HRA*"), not to mention a disability discrimination issue. It raised associated issues of whether such an inflexible policy is consistent with the Act's purpose in circumstances in which, as the Attorney-General acknowledged, the evidence supports a finding that adequate

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[7] At [6].

protection of the community may be ensured by the making of the supervision order, and I found that to be the case.[8]

[25] QCS's inflexible policy position in relation to the first respondent's physical and medical conditions raised the confronting question of whether he would be better off in jail.[9] That, in turn, raised the question of whether, in the face of that policy, I should *not* make a supervision order, despite finding that adequate protection of the community may be ensured by the making of one in the form that was submitted.

[26] Because of the accepted position that the first respondent is a "serious danger to the community" in the absence of a Division 3 order, a decision to not make a supervision order because of the unsuitability of accommodation at the precinct for a person with the first respondent's needs would result in a continuing detention order being made.

[27] In my earlier reasons I wrote:[10]

> "[29] The discretion under s 13(5) should not be exercised in favour of making a continuing detention order based simply on the view that the first respondent would be better off in jail. That view may be correct, yet not respect the first respondent's autonomy and rights that are protected by law under the *Human Rights Act 2019* (Qld) ("*HRA*").
>
> [30] The occasion to exercise my discretion occurs in circumstances in which Corrective Services (which is subject to the *HRA*) has a policy of not allowing someone like the first respondent who is accommodated at a precinct house to obtain the support services to which he is legally entitled. This raises serious issues about the policy's compliance with the *HRA*, including ss 30(1) and 37(1).
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> [31] At this stage, I am not inclined to make a supervision order for 10 years that consigns the first respondent to precinct accommodation under arrangements that the medical evidence indicates will jeopardise his health. Nor am I inclined to make a final continuing detention order at this stage that consigns the first respondent to indefinite detention (subject to annual review) in jail and the kind of revolving door displayed in *Guy*'s case."

[28] It was not evident to me that government policy decisions that denied the first respondent appropriate support and accommodation in precinct housing or semi-supported, hostel-style accommodation complied with the *HRA*. Also, the practical operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) in a case like this raised an issue of whether it was distinctly punitive and therefore arguably invalid in its application to him.[11]

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8 At [18] and [27].
9 At [17]-[29].
10 At [29]-[31].
11 At [33].

[29] QCS has been given an opportunity to consider its position, and the first respondent is aware of its attitude. He is aware that QCS has a blanket policy that no delivery workers or other service providers are permitted on the precinct property, even for the shortest possible time, to deliver groceries or to collect him for a medical appointment. He is aware that he will be required to enter into a Lodger Agreement that requires him to observe the Precinct Rules. They include the rule that:

> "Visitors are not permitted on QCS property unless approved. This includes NO overnight stays, family members, support persons and/or grocery, food service or taxi visits.
>
> Non-approved visitors will be considered as trespassing and criminal prosecution may be pursued."

[30] Despite the attitude of QCS to his circumstances, including practical issues in relation to food deliveries and access to health services, the first respondent still prefers to be accommodated in a precinct than to be in a prison.

[31] I adhere to the view expressed on 31 August 2022 that the discretion under s 13(5) should not be exercised in favour of making a continuing detention order based simply on the view that the first respondent would be better off in jail. That view may be correct, yet not respect his autonomy and rights that are protected by law.

[32] Therefore, I decided to make a supervision order in the form submitted. No party opposed this course.

**An irrelevant issue raised by QCS**

[33] One would have thought from the evidence I accepted and from my 31 August 2022 findings, together with the Attorney-General's acknowledgement that the evidence supported the making of a supervision order, that I had considered whether:

(a) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(b) requirements under s 16 can be reasonably and practicably managed by corrective services officers.[12]

[34] My reasons stated that the risk of his sexual offending would be low because he would not have access to potential victims.[13] I went on to find:[14]

> "A supervision order would permit the first respondent to be confined under a curfew and other restrictions on his movement at a precinct house or some other place of accommodation. Those restrictions would deprive him of access to potential victims, particularly post-pubertal boys."

[35] The submissions of QCS acknowledge that supervision orders made under the Act enable the movements of an individual to be restricted and to enable the location of that person to be monitored. This includes enabling a corrective services officer to

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12 The Act, s 13(6).
13 *Grant* at [15].
14 At [35].

give a direction to a released prisoner to remain at a stated place for stated periods and to wear a monitoring device. QCS's submissions make the point that it does not and cannot provide escorts for individuals under supervision orders whilst they are in the community. No one suggests that it could or should. Ms Cowie's affidavit refers to "the recommendation that [the first respondent] does not leave the facility unless escorted" and says that QCS cannot reasonably and practicably provide "24/7 escorts into the community".

[36] The evidence and submissions that I accepted, particularly the evidence and recommendations of Dr Arthur and Dr McVie, contain no such recommendation. Dr Brown's report referred to "a strict curfew" and stated that unless the first respondent was on a strict curfew "with 24 hour supervision he would be able to approach male children in the community and reoffend". I was not sure, and still am not sure, what she meant by "24 hour supervision". In any event, Dr Brown's report referred to release to supervision being possible to a nursing home environment (should he require this to address his physical health needs) where the first respondent would not have contact with male children and his access to the community would be "supervised".

[37] There is a difference between access to the community being supervised and providing "24/7 escorts into the community".

[38] With respect, Ms Cowie's affidavit confuses supervision, including restrictions on movement under a supervision order, with "24-hour continuous supervision" and a "24-hour staffing presence".

[39] As Ms Cowie and QCS should know, and as the Attorney-General's acknowledgement that adequate protection of the community may be ensured by the making of a supervision order seemed to imply, my finding that adequate protection of the community may be ensured by the making of a supervision order in the form submitted was not premised on the unrealistic assumption that the first respondent would be under "24-hour continuous supervision" in the community in the sense of a 24-hour staffing presence at the precinct or anywhere else, or that it was necessary for QCS to provide escorts when he left the precinct for an authorised purpose, such as to attend a medical appointment and to promptly return there. It was premised on the proposition that, like all residents of the precinct, he would be subject to an initial strict curfew and, thereafter, as curfews were relaxed, subject to reasonable directions about his movements in the community. Those directions would ensure that he did not have unsupervised access to boys under the age of 16, and more generally restrict his access to potential victims. For example, depending upon the circumstances, a direction might provide that any access to a shopping centre be during certain hours or for a limited period, or might provide for him to visit such a place only if accompanied by a professional carer or some other responsible adult. This would ensure that he did not access and groom potential victims, particularly post-pubertal boys.

[40] I expect these kinds of directions are often made for certain kinds of offenders under the Act, and there is no reason why reasonable directions cannot be given to the first respondent.

[41] Parts of QCS's submissions rely on the untenable proposition that the first respondent would be subject to "24/7 escorts into the community" and "24-hour

continuous supervision", and then assert (correctly) that QCS is unable to provide such a "24-hour staffing presence" outside of a prison setting. The fact that it does not provide a "24-hour staffing presence" at the precinct or other places in the community for the approximately 140 men currently under supervision orders under the Act, who reside at a range of community-based accommodation including the precincts, is a given. Instead, it manages by directions, supervision and monitoring to restrict the movements of persons under supervision orders and thereby deny or severely limit their access to potential victims. I would expect it to do so in this case.

[42] For completeness, I state what should have been apparent from my reasons. I considered whether "adequate protection of the community" can be reasonably and practicably managed by a supervision order.[15] I also considered whether requirements under s 16 could be reasonably and practicably managed by corrective services officers.[16] In short, these requirements relate to being under the supervision of a corrective services officer, complying with curfew or monitoring directions, complying with any reasonable direction given under s 16B, and other requirements that are concerned with protecting the community from a serious sexual offence. Having considered those matters, I concluded that adequate protection of the community could be reasonably and practicably managed by a supervision order and the relevant requirements reasonably and practicably managed by corrective services officers.

[43] There may be circumstances in which the resource demands associated with conditions of supervised release are so extensive that it would be unreasonable to expect QCS to provide them.[17] This is not such a case. There may be cases in which adequate protection of the community would require such an intensive commitment of resources by QCS to monitor compliance that it would be unreasonable to expect them to be provided, or the effective provision of such resources would be impracticable.[18] The relevant issue is the resources required to monitor compliance with the conditions of supervised release, not broader resource issues. As to the resources to monitor compliance with an order, the Act assumes that supervision will be available. In *Attorney-General (Qld) v Francis* the Court of Appeal stated that the Court should not conclude either that supervision will not be made available or will not be sufficiently available "in the absence of clear evidence to that effect and an explanation as to why its provision is regarded as unreasonable or impracticable."[19]

[44] There is no evidence that the resources required to provide effective monitoring of the first respondent's compliance with the conditions of supervised release would be so extensive that it would be unreasonable to expect them to be provided. There is no reason to conclude that any necessary supervision could not, or would not, be made available. QCS has sufficient resources to manage and monitor the first respondent's compliance with the conditions of a supervision order.

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15 The Act, s 13(6)(b)(i).
16 The Act, s 13(6)(b)(ii).
17 *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [37] ("*Francis*").
18 At [36]-[37].
19 At [37].

[45] The resourcing issue does not relate to ensuring compliance with a supervision order and thereby ensuring that adequate protection of the community may be ensured by the making of a supervision order. The resourcing issue relates to the absence of suitable accommodation in the community. One aspect of this is the first respondent's safety in unsupported accommodation at the precinct.

**The issue**

[46] The issue that delayed the final disposition of the matter, and that kept the first respondent in prison under an interim detention order for a few months beyond his full-time release date, is not about whether a supervision order can provide adequate protection of the community against the risk of a serious sexual offence. I have found that it can and I confirm my earlier finding.

[47] The issue is about a policy of QCS that, if applied to the first respondent, makes any substantial period in precinct accommodation unsuitable for a person with his mobility and other health conditions, who has to feed themselves and access health care services for serious medical conditions.

[48] The issue is not whether QCS's policy about entrants to the precinct has a justification. As I have previously stated, it has a policy of not allowing external domestic, daily living or medical supports to be provided at the contingency accommodation. This is due to safety concerns associated with the risk of assault by someone housed at the accommodation and the absence of staff there. The concern for the safety of potential entrants to the precinct, especially persons entering houses at the precinct, is understandable.[20]

[49] The specific matter of concern is QCS's anticipated inflexible application of that policy to someone with the first respondent's limited mobility and medical conditions. The evidence placed before the Court by QCS gives no indication that it would be prepared to approve, for example, a grocery delivery by a driver who left groceries at the front of the house in which the first respondent lives and to depart immediately thereafter. There is no indication that it would grant such approval subject to a requirement that the first respondent or the driver give notice of the anticipated time of arrival, that the driver would have contact only with the first respondent at the time of delivery and leave immediately thereafter. Likewise, there is no suggestion that, subject to appropriate notice and other conditions, a taxi might collect the first respondent from outside his house so as to enable him to attend a medical appointment.

[50] In my earlier reasons, I raised the issue of whether such an inflexible policy of not allowing "someone like the [first] respondent" who is accommodated at a precinct house to obtain services to which he is entitled complied with the *HRA*.[21] In referring to "someone like the [first] respondent" I was referring to someone with his mobility and medical problems who required and was entitled to support, and

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20 *Grant* at [6].

21 At [30].

who needed practical support in obtaining the necessities of life, such as food. The practical operation of QCS policy without regard to the health and individual circumstances of the first respondent seemed to me to be relevant to the proper exercise of my discretion under s 13 of the Act to make a supervision order. It was not evident that the policy and anticipated decisions that would impede reasonable access by the first respondent to food deliveries and access to health services by taxis or transportation by carers complied with the *HRA*. I also noted that the operation of such policies in a case like this made the Act's practical operation distinctly punitive and therefore arguably invalid in its application to the first respondent.

[51] The purpose of those observations was to provide QCS with an opportunity to reflect on its policy's rigid application in a case such as this and to provide an indication that the application of its policy might be reasonably adjusted to enable better access by the first respondent to food, health services and other services whilst, at the same time, ensuring the safety of potential entrants to the precinct. QCS has been given this opportunity and its position is unchanged.

[52] The first respondent now knows the regime he will face and is prepared to take his chances. This Court should not prevent him from doing so, even if his health and life expectancy would be better if he were to remain in prison.

**Possible invalidity of the policy in its application to the first respondent**

[53] The first respondent has not raised an argument that the practical operation of the Act in his case is punitive and therefore arguably invalid in its application to him. The invalidity issue not having been raised by the first respondent, either informally or in a properly-formulated claim for declaratory or other relief, I will not address the issue.

[54] I should mention that the Attorney-General submitted that the absence of suitable accommodation does not give rise to any question about the validity of the Act. But, with respect, that is a different question. I am not concerned with the constitutional validity of the Act. Its constitutional validity was upheld in *Fardon v Attorney-General (Qld)*[22] shortly after the legislation was enacted.

[55] The issue alluded to by me in my earlier reasons[23] does not relate to the terms of the Act or their interpretation. It concerns the practical operation of the Act in a case like this, including whether the inflexible operation of certain policies renders it punitive in this particular case. The Court of Appeal in *Francis*[24] recognised that the conditions of further restraint upon a person's liberty may be out of character with the preventative purpose of the Act and punitive in character. Such detention would not be authorised by the Act.[25] An associated issue is whether the inflexible

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22 (2004) 223 CLR 575; [2004] HCA 46.

23 *Grant* at [33].

24 At [31].

25 The correctness of *Francis* on that point is not doubted. The recent decision of the High Court in *Garlett v Western Australia* (2022) 96 ALJR 888; [2022] HCA 30 at [56] considered the purpose and effect of legislation in concluding that the Act could be seen as protective. The Court did not address the practical operation of conditions of detention in a particular case. Edelman J at [270]-[271] noted that the Act had been very recently enacted, Mr Garlett was not in a position to make submissions about its practical operation, and that the practical operation of that Act may arise in future.

application of QCS policy to an individual in the first respondent's position is compatible with human rights legislation that applies to QCS as a "public entity" by virtue of s 58 of the *HRA*. That issue has been considered by QCS. The first respondent has not brought a proceeding in relation to the inflexible application of the relevant policies to him or sought remedies under the *HRA* or any other legislation.

[56] Therefore, the occasion to decide the validity of those policies in their application to the first respondent or the lawfulness of future decisions due to the operation of s 58 of the *HRA* does not arise for determination in this proceeding.

**The potential relevance of the *Human Rights Act***

[57] The first respondent does not seek any relief or remedy in relation to an act or decision of QCS on the ground that, by virtue of the operation of s 58 of the *HRA*, any decision that has been made by QCS is unlawful. Therefore, he may not seek relief or remedy on the ground of unlawfulness under s 58.[26] The first respondent does not seek an injunction or similar relief to restrain anticipated future unlawful conduct by QCS in relation to decisions that will have the practical effect of denying him reasonable access to food, health services or suitable accommodation.

[58] No occasion arises in the circumstances to make orders that would grant the first respondent any relief or remedy in relation to an act or decision of QCS on the ground that the act or decision is or would be unlawful by virtue of s 58 of the *HRA*. The Court should not give an advisory opinion about the lawfulness or unlawfulness of anticipated future acts and decisions by QCS that may affect the first respondent once he resides at a precinct.

[59] I have been assisted by submissions by Counsel for the Attorney-General and by Counsel for the Queensland Human Rights Commission about the relevance of the *HRA* to the Court's discretion under s 13(5). Strictly speaking, it is unnecessary to reach conclusions about these matters. If, as the Attorney-General submits, any breaches of the *HRA* by QCS are irrelevant and do not affect the Court's function under s 13 of the Act, then, on balance, a supervision order should be made. If, on the other hand, the QHRC is right in submitting that certain human rights are relevant to the exercise of my discretion, then a supervision order should be made.

[60] Having had the benefit of submissions on a legal point from the Attorney-General and from the QHRC, namely the relevance of the *HRA* to the relevant discretion under s 13(5), I should address them to some extent. This is because the issue is an important one. It may arise in other cases in which the Court faces the stark choice to make a continuing detention order, despite adequate protection of the community being ensured by making a supervision order, because anticipated conditions for the individual in the precinct are unsuitable, unsafe or even inhumane. Addressing the legal issue may avoid the need for Counsel to again argue the same legal issue at another hearing in a proceeding under the Act. It may save public expense and Court time.

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[26] See *HRA*, s 59; *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623; [2020] QSC 293 at [269] ("*Innes*").

[61] In deciding the legal issue, it is important to identify the relevant discretion. It is a discretion that arose only after applying relevant statutory considerations I found (without any opposition from the first respondent) that he is a "serious danger to the community" in the absence of a Division 3 order. The relevant discretion arose only after I additionally found that adequate protection of the community may be ensured by the making of the supervision order. One relevant discretion is a discretion to *not* make a supervision order despite that finding, and instead to make a continuing detention order.

[62] In the circumstances of this case, there is no suggestion that the Court should make no order. I should add that under s 13(5) of the Act, there is a power to make no order. The comparable legislation in Victoria expressly confers such a power. The Queensland Act has been held to implicitly include the same power.[27]

[63] The Attorney-General submits that there is no occasion for the Court to determine whether QCS has complied with its obligations under the *HRA* and the *HRA* does not otherwise affect the Court's function under s 13(5) of the Act.

[64] One part of the submission is that, as I have noted, any alleged breaches of s 58 of the *HRA* by QCS can only be agitated if the first respondent seeks relief based on an independent ground of unlawfulness and he has not done so.

[65] Another aspect of the argument is that the Court is not a "public entity" that must comply with s 58 of the *HRA* in exercising its functions under s 13 of the Act. This contention is correct and the QHRC does not contend to the contrary. The Commission accepts that s 58(1) does not bind the Court because the Court is acting in a judicial, and not an administrative, capacity.[28]

[66] A further argument by the Attorney-General is that s 48 of the *HRA* is not relevant to the exercise of the Court's discretion. I tend to agree that no issue of the interpretation of a provision of the Act arises that requires the Court, in compliance with s 48 of the *HRA*, to interpret the provision in a way that is compatible with human rights. No issue as to the proper or preferred interpretation of s 13(5) of the Act arises. The discretions that it confers are clear. Rather than an issue of statutory interpretation, the issue concerns the possible application of certain human rights to the exercise of those discretions by operation of s 5(2)(a) of the *HRA*.

[67] The Attorney-General submits that s 5(2)(a) of the *HRA* does not require the Court to directly enforce any relevant rights in exercising a discretion under s 13 of the Act. Instead, s 5(2)(a) of the *HRA* requires the Court to directly enforce those rights that relate to its proceedings. One example is the right to a fair hearing under s 31. This is the effect of a number of Victorian authorities on the equivalent of s 5(2)(a).[29]

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27 *Francis* at [31]; *Attorney-General (Qld) v Lawrence* [2010] 1 Qd R 505; [2009] QCA 136 at [28]-[29] ("*Lawrence*").

28 Citing *HRA*, s 9(4).

29 *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237; [2009] VSCA 199 at [52]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; [2013] VSCA 37 at [248] ("*Taha*') followed in *Innes* at [214]-[224]; *Wood v The King* [2022] QSC 216, [61]-[62], [65]-[67], [73]-[75] ("*Wood*").

[68] According to the Attorney-General, the rights that the QHRC argues are engaged in connection with the discretion to make or not make a supervision order, including the right to humane treatment when deprived of liberty in s 30(1) of the *HRA,* are not rights that relate to legal proceedings. On this basis, s 5(2)(a) of the *HRA* is said to make such rights irrelevant to the exercise of a discretion under s 13(5).

[69] The QHRC contests the Attorney-General's contention that s 5(2)(a) of the *HRA* does not require the Court to directly enforce any relevant rights in exercising a discretion under s 13(5). It submits, in accordance with decisions of Victorian courts and this Court, that a provision such as s 5(2)(a) does not require all human rights to be directly applied by the Court. Instead, only those that "relate to court and tribunal proceedings" are directly applicable. This "intermediate interpretation" of s 5(2)(a) has been adopted by judges of this Court.[30]

[70] If s 5(2)(a) applies in the case of a particular right, then an issue arises as to whether its effect is to bind the Court to act compatibly with the right[31] or to consider the right as part of the proper exercise of its discretion.[32]

**Is the *HRA* irrelevant to the Court's function under s 13(5) of the Act?**

[71] Section 5(2)(a) of the *HRA* provides that the *HRA* applies to "a court or tribunal, to the extent the court or tribunal has functions under part 2 and part 3, division 3". Part 3, division 3, relates to the interpretation of laws and is not presently relevant. Part 2 contains numerous human rights. Not all of them directly apply to courts and tribunals by virtue of s 5(2)(a). Such a broad interpretation of s 5(2)(a) is unsustainable and no party contends for it.

[72] It is unnecessary to detail the reasoning of courts in Victoria or in this State about the effect of s 5(2)(a) of the *HRA*, or s 6(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("*Charter*"). The following propositions emerge from them.

[73] What has been described as the "intermediate interpretation" of the provision should be adopted.[33] This is that the functions referred to in s 5(2)(a) are the functions of applying or enforcing those human rights that relate to court proceedings.[34]

[74] The actual engagement or application of the rights enacted in Part 2 for courts and tribunals "depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding".[35]

[75] Rather than adopt the "list of rights approach" to the issue, a "functional approach" should be adopted.[36] This focuses on the function the Court is performing and identifies rights that relate to that function. It may require consideration of rights

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30 *Innes* at [222]-[224]; *Wood* at [75]-[76].
31 *Taha* at [247], [249], [252].
32 *Cemino v Cannan* (2018) 56 VR 480; [2018] VSC 535 at [146]-[147] ("*Cemino*").
33 *Innes* at [221]-[224]; *Wood* at [74]-[75].
34 *Taha* at [246]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [250] ("*Kracke*"); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61 at [32] ("*Matsoukatidou*"); *Cemino* at [108]-[110].
35 *Kracke* at [254].
36 *Innes* at [225]-[229].

that relate to the substance of the function the Court is exercising, not simply the Court's process.[37]

***Should the "intermediate interpretation" of s 5(2)(a) be applied?***

[76] In written submissions, the Attorney-General recognised that the preponderance of Victorian and Queensland authorities favoured an "intermediate construction" of s 5(2)(a), while noting that it had not been specifically endorsed by an intermediate court of appeal. In oral argument, the Solicitor-General submitted that this approach should not be followed because it makes it "very difficult to distinguish rights relating to court proceedings from other rights". He urged the adoption of what has been described as the "narrow construction". This is that s 5(2)(a) obliges the Court to enforce only those rights that are "explicitly and exclusively addressed to the courts".[38]

[77] Section 5(2)(a) was submitted to be designed to give effect to the narrow construction. The idea that the courts must enforce rights that are identified by an intermediate construction were submitted to not mesh with the structure of the *HRA*. In particular, it was difficult to mesh with the fact that in exercising its judicial functions (as distinct from acting in an administrative capacity), a court is not a "public entity" that is required by s 58:

(a) to act or make a decision in a way that is compatible with human rights; and

(b) in making a decision, to give proper consideration to a human right relevant to the decision.

[78] I prefer the "intermediate construction" to the "narrow construction" as a matter of statutory interpretation for a number of related reasons. In summary, the intermediate interpretation should be preferred because:

(a) it is better supported by the text and structure of the *HRA*;

(b) the narrow construction, like the broad construction, is hard to justify as a matter of statutory interpretation;

(c) section 5(2)(a) refers to the "functions" of courts and tribunals under Part 2, not merely obligations that are imposed on them by Part 2;

(d) the narrow construction does not advance a cogent reason, consistent with the *HRA*'s purpose, to distinguish between rights that are explicitly addressed to courts and rights that are not;

(e) the "difficulty" argument is insufficient to adopt an interpretation that is simpler to apply but not supported by the text of s 5(2)(a), its context or the *HRA*'s structure;

(f) the *HRA* was enacted against a background of authorities that adopt an "intermediate construction" of the identical Victorian provision; and

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37 See *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; [2013] VSCA 213 at [103] and [199] ("*Nigro*") as to the possible application of *Charter* rights where a discretion is to be exercised.

38 *Taha* at [246].

(g) those authorities, and the Queensland authorities that have adopted it, should be followed unless there is a compelling reason not to do so.

I shall develop some of these points.

[79] If the narrow construction is correct, it would limit a court to enforcing the few rights that are "explicitly and exclusively addressed to the courts". Those Part 2 rights might be those stated in s 29(5)(c), s 29(7), s 31(3) and s 32(4), but even some of those are arguably addressed to bodies in addition to courts. If the only Part 2 rights that a court or tribunal were required to enforce were rights explicitly addressed to courts, then s 5(2)(a) might have been unnecessary. Specific provisions in Part 2 would be sufficient to oblige a court to observe the relevant right or enforce it.

[80] Under a narrow construction, it is hard to see what additional operation s 5(2)(a) would have to a court's function in respect of Part 2 rights. Section 5(2)(a) is not confined to the functions that a court has when acting in an administrative capacity. It is not confined to the Court's interpretive function that must be performed in accordance with Part 3, particularly s 48, of the *HRA*. The reference in s 5(2)(a) to functions under Part 2 is apt to refer to functions in applying or enforcing certain Part 2 rights that relate to the function the Court is performing in that proceeding.

[81] Next, neither a broad nor narrow construction accords with the text and structure of the *HRA*. A broad construction that would require the Court to apply and enforce any and all of the rights enacted in Part 2 is hard to reconcile with the *HRA*'s provisions that impose obligations on public entities, but not on a court exercising judicial functions, the *HRA*'s provisions that deal with human rights complaints, and the express reference in s 5(2)(a) to the Court's functions under Part 2 and Division 3 of Part 3. The *HRA* does not give the Court a general function to enforce all the rights in Part 2.

[82] A narrow construction of s 5(2)(a) also is hard to justify. Why should the application of relevant rights be limited to the enforcement of rights that are explicitly and exclusively addressed to courts? Section 5(2)(a) is not cast in terms of the Court's obligations. It refers to the Court's "functions". The word "function" is broad and includes a power.[39] The word "function" is apt to refer to the Court's exercise of a discretionary power. The court's judicial function is not limited to enforcing rights. It exercises powers that include powers relating to common law and Part 2 rights.

[83] The section does not say that the *HRA* applies to rights that are explicitly addressed to courts and tribunals, and if s 5(2)(a) were to be so limited, it might have said so, at least in respect of judicial functions.

[84] The narrow construction does not adequately explain why s 5(2)(a) should apply only to certain rights that are explicitly addressed to courts, rather than certain rights that implicitly are addressed to them (such as the s 31(1) right to a fair hearing) and other rights that may relate to the substance of the judicial functions they exercise (for example, the s 29(1) right to liberty and the s 17(b) right not to be treated or punished in a cruel, inhuman or degrading way).

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39 *HRA*, s 6, Schedule 1.

[85] The narrow construction does not advance a good reason, consistent with the *HRA*'s purpose, to distinguish between rights that are explicitly addressed to courts and rights that are not. Rights that are not explicitly addressed to courts include the right to a fair hearing, the right to liberty and the right to protection from being treated or punished in a cruel, inhuman or degrading way. The narrow construction does not adequately explain why in the circumstances of a particular case such a right does not relate to the Court's function in the proceeding, such that the Court must apply the right by reason of s 5(2)(a).

[86] Any difficulty that may arise in identifying the rights that relate to the Court's function is not a sufficient reason to adopt either a narrow or wide construction in preference to an intermediate construction. Courts often face difficulty in applying statutory provisions. Any difficulty is reduced by the incremental development of approaches to the task. In the case of a provision like s 5(2)(a), the intermediate interpretation lends itself to a "functional approach" to the specific function being exercised in the particular case.

[87] The Attorney-General does not support the narrow construction by reliance on what has been described as the "drafting error" interpretation, presumably for similar reasons to those given by Ginnane J in *Cemino v Cannan* for rejecting that argument.[40]

[88] Part 3 of the *HRA*, particularly s 48, obliges a court to take into account Part 2 rights in performing the function of interpreting statutory provisions. Therefore, s 5(2)(a) is not required to make a court take account, in an appropriate case, of a relevant Part 2 right in performing the function of interpreting statutory provisions. The reference in s 5(2)(a) to "functions under part 2" suggests that it has work to do in addition to the interpretative function.

[89] The words "functions under part 2" gives rise to an issue of statutory construction and a choice between three alternative constructions to which the words are susceptible. For convenience, these have been described in academic writings and in the Victorian authorities as the narrow, the intermediate, and the broad construction.

[90] Section 5(2)(a) of the *HRA* was enacted against the background of interpretations of the comparable Victorian provision that favoured an intermediate construction. Section 5(2) was not re-cast in terms that reflected the narrow construction urged by the learned Solicitor-General. No extrinsic material is pointed to that supports the adoption of a narrow construction in preference to an intermediate construction.

[91] The Victorian authorities include the decision in *Taha* in which Tate JA considered the three alternative constructions to which s 6(2)(b) of the *Charter* was susceptible. Tate JA followed earlier Court of Appeal authority that ruled that the right to a fair hearing under s 24(1) of the *Charter* was one of the rights under Part 2 that applied directly to courts and tribunals when they exercised their adjudicative functions.[41] The right to a fair hearing related to functions that courts perform and fell within the "intermediate construction".[42] Having reached that conclusion, Tate JA found it otherwise unnecessary to determine if the intermediate construction is correct.

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40 *Cemino* at [110].
41 *Taha* at [247].
42 At [248].

[92] A provision like s 24(1) of the *Charter*, which has its counterpart in s 31(1) of the *HRA*, confers a right to a fair hearing. It is not "explicitly" (let alone "explicitly and exclusively") addressed to the courts. It implicitly is addressed to courts and other authorities to ensure that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by "a competent, independent and impartial court or tribunal after a fair and public hearing". Tate JA in *Taha* ruled that the right to a fair hearing under s 24(1) required the magistrate to give effect to the right by reason of s 6(2)(b). This conclusion is not supportive of the narrow construction and is consistent with the intermediate construction.

[93] Unlike s 24(3) of the *Charter*, which (arguably) explicitly requires, with limited exceptions, a court to do something, namely, make its judgments or decisions public, s 24(1) does not explicitly impose an obligation. Yet, it was held to directly apply to courts, by reason of s 6(2)(b) of the *Charter*.

[94] Although Tate JA found it otherwise unnecessary to determine if the intermediate construction of s 6(2)(b) is correct, her Honour's reasons accord with it rather than the narrow construction. The intermediate interpretation has been adopted in subsequent cases in Victoria[43] and by two decisions of this Court.[44] I should follow them and adopt that interpretation in preference to the narrow construction urged by the Solicitor-General, since I am not persuaded that the narrow construction is correct.

[95] In summary, the narrow construction lacks textual support in the terms of s 5(2)(a). The narrow construction distinguishes between rights that are "explicitly and exclusively addressed to the courts" and rights that are not. Such a distinction is not supported by the terms or purpose of the *HRA*. Section 5(2)(a) does not speak in terms of enforcing rights that the Court is obliged to enforce. It uses the word "functions", and this includes powers that the Court exercises in carrying out its judicial functions. Those functions include applying and enforcing rights. The intermediate construction is preferable to the narrow construction of s 5(2)(a), particularly in circumstances in which s 5(2)(a) was enacted against the background of authorities that adopted an intermediate construction of the practically identical provisions in s 6(2)(b) of the *Charter*.

***The functional approach to s 5(2)(a)***

[96] Adopting the intermediate construction of s 5(2)(a) means that the "functions" of courts and tribunals are the functions of applying or enforcing those human rights in Part 2 that relate to that proceeding.[45] This approach to the operation of s 5(2)(a) is preferred to a "list of rights approach". One reason is that the "list of rights approach" results in under- or over-inclusion.[46]

[97] Another is that the relevance of a human right to a particular court or tribunal proceeding requires proper examination of the right concerned and whether it

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43 See, for example, *Cemino* and *Matsoukatidou*.

44 *Innes* and *Wood*.

45 *Matsoukatidou* at [37] following *Kracke* at [250], and followed in *Innes* at [227]-[230].

46 *Matsoukatidou* at [39].

relates to an issue in the proceeding.[47] As was said in *Kracke*, the actual engagement and application of human rights for courts and tribunals "depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding".[48]

[98] The Solicitor-General orally submitted that later decisions in Victoria (and, by implication, the decision of Ryan J in *Innes* that followed them) were mistaken to have adopted the "functional approach" over the "list of rights approach". He argued that the "functional approach" effectively means that any human right that bears on the function of the Court "must be enforced by the Court", and that is very difficult to mesh with the structure of the *HRA* that says that courts exercising judicial functions are not public entities that are required by s 58 to act in a way that is compatible with human rights. That argument, which was raised also in relation to the choice between a narrow and intermediate construction of s 5(2)(a), remains unpersuasive. Also, the intermediate interpretation is not concerned simply with the function of enforcing rights that relate to the proceeding. It refers to the function of "applying or enforcing" specific rights that relate to the function the Court is performing in the particular proceeding,

[99] I am not inclined to reject the "functional approach". The "list of rights approach" has the effects identified by Bell J in *Matsoukatidou*, namely under- or over-inclusion. The functional approach applies s 5(2)(a) by reference to the issues in the proceeding and the function the Court is exercising. It calls for an examination of whether the function of the Court involves "applying or enforcing" specific rights that relate to the proceedings. To the extent the "list of rights approach" involves the identification of a number of human rights in Part 2 as being human rights that, by their nature, relate to legal proceedings conducted by courts and tribunals,[49] it not only carries the risk of under- or over-inclusion. It risks creating a list of rights that is treated as immutable.

[100] Also, it risks addressing the s 5(2)(a) issue in the abstract and without regard to the issues in the proceeding and the specific function that the Court is performing to which a certain right may apply. For example, no issue may arise about the right to liberty or protection from inhuman treatment in a proceeding in which those rights are irrelevant to the Court's function. By way of further example, in a particular proceeding, but not in others, the freedom of expression protected by s 21 of the *HRA* may apply if the Court is asked to exercise the power to make a suppression order.

[101] I follow Ryan J in *Innes*[50] in preferring the "functional approach" to the "list of rights approach".

***Must the Court act compatibly with the identified right or take it into consideration?***

[102] This issue was addressed in oral submissions. The submissions detected an apparent difference of approach. The difference is said to emerge from two Victorian decisions. The first is *Taha* in which Tate JA concluded that the magistrate was

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47 *Matsoukatidou* at [39].
48 *Kracke* at [254].
49 *Matsoukatidou* at [38].
50 *Innes* at [225]-[230]. *Wood* does not specifically address either approach.

under an obligation, by reason of s 6(2)(b) of the *Charter,* to give effect to the *Charter* right to a fair hearing, and concluded that the magistrate acted "incompatibly with the Charter" in failing to consider certain matters.[51] The second is *Cemino* in which Ginnane J held, in the context of the power of a magistrate to transfer proceedings to the Koori Court, that the magistrate was required to consider certain *Charter* rights in exercising the discretion to transfer.[52]

[103] I regard the suggested differences between these approaches as more apparent than real. The application of a particular right depends on the function being performed, the relevant right and the issue in the particular proceedings. In some contexts, an act or omission by a court may simply be incompatible with a right, such as the right to a fair hearing. In the circumstances, the relevant right may explicitly or implicitly require the Court to enforce the right by acting in a certain way.

[104] In other contexts, like *Cemino*, the function is the exercise of a specific discretionary power. The relevant right is one matter to be taken into account in the exercise of a discretion. Other matters may warrant consideration having regard to the terms and purpose of the power that creates the discretion. To say in that context that the Court must act "compatibly" with the relevant Part 2 right may be awkward or ambiguous. If it is taken to mean apply or enforce the right by considering it along with other matters, then it simply means that the right should be taken into account in performing the Court's function of exercising the discretion. To say, however, that it means the Court must make a decision so as to give effect to the right to the exclusion of other considerations may be inconsistent with the nature, scope and purpose of the power, and therefore incorrect.

[105] This issue highlights the need, in applying the functional approach, to have regard to the specific function the Court is performing, the relevant right, and the circumstances of the case. The function may be a general one to hear and determine proceedings in which a certain right, like the right to a fair hearing, has a direct application because the right to a fair hearing relates to the core functions courts perform.[53] The function may be the exercise of a specific discretionary power. The specific legal and factual context may require the Court to enforce a right or it may require the Court to apply the relevant Part 2 right, along with other rights and considerations in exercising the discretion. Countervailing rights and considerations may be matters that justify a limitation on the relevant Part 2 right in accordance with s 13 of the *HRA*, or they may be considerations that are not justified by s 13, but still are relevant to the Court's function in exercising the particular discretion.

***The relevant functions: the discretion under s 13(5)***

[106] Applying the "functional approach" to the facts and circumstances of this proceeding, the function being exercised by the Court under s 13(5) arises *after* that Court is satisfied, as required under s 13(1), that the individual is a "serious danger to the community" (as defined in s 13(2)) in the absence of a Division 3 order. The function is to make either:

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51 *Taha* at [252].

52 *Cemino* at [146]-[147]. The relevant rights were equality before the law and equal protection of the law without discrimination in s 8(3) and cultural rights in s 19 of the *Charter*.

53 *Taha* at [248].

(a) a continuing detention order that the person be detained in custody for an indefinite term for control, care or treatment;[54]

(b) a supervision order that the person be released from custody subject to the requirements the Court considers appropriate that are stated in the order and mandatory requirements that are imposed by virtue of s 16;[55] or

(c) to make no order.[56]

[107] To be clear, the function is not the prior evaluative task of deciding if the first respondent is an "unacceptable risk" of committing a serious sexual offence. Therefore, I am not required to address the extent to which human rights in Part 2 of the *HRA* apply to that function.[57] Nor am I required to consider the extent to which mandatory requirements of a supervision order may be compatible with rights in Part 2.[58]

[108] As noted, in the circumstances of this proceeding the Court's function is to decide if a supervision order should be made in the form proposed for a period of 10 years, or to make a continuing detention order despite finding that adequate protection of the community can be ensured by the making of a supervision order.

[109] In this matter, the terms of the supervision order are not in contest. The legal issue is whether any of the rights in Part 2 of the *HRA* apply in deciding whether to make a continuing detention order, and in deciding whether to make a supervision order instead of a continuing detention order.

**The right to liberty and arbitrary detention under a continuing detention order**

[110] A continuing detention order would deprive the first respondent of the right to liberty, being a right contained in s 29(1) of the *HRA*. He would be confined in custody for an indefinite term.

[111] If the continuing detention order were made only because of the decision of QCS to not provide suitable and humane conditions for the first respondent's accommodation at the precinct and the discriminatory effect of policies that unnecessarily impede his access to food and health services there, then the first respondent's detention in custody, under a continuing detention order, arguably would be arbitrary. Lawful detention may be arbitrary. In the context of s 29(2) of the *HRA*, the word "arbitrary" means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought.[59] Consideration of whether the detention is not "proportionate to the legitimate aim sought" requires an assessment of whether, in all the circumstances, the deprivation

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54 The Act, s 13(5)(a).

55 The Act, s 13(5)(b).

56 Such a power is implied. See *Francis* at [31]; *Lawrence* at [28]-[29].

57 See in the context of comparable but not identical Victorian legislation, *Director of Public Prosecutions (Vic) v JPH (No 2)* (2014) 239 A Crim R 543; [2014] VSC 177 at [27] and [98]. In *Nigro*, the Victorian Court of Appeal stated that 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 Part 2 of the *Charter*.

58 *Nigro* at [179], [188]-[204].

59 *Thompson v Minogue* (2021) 294 A Crim R 216; [2021] VSCA 358 at [51], [55], [221]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446; [2012] VSCA 159 at [114], [120].

of liberty by being detained in custody for an indefinite period is reasonably necessary to achieve an identified aim.

[112] If a continuing detention order were made instead of a supervision order because QCS did not provide suitable and humane conditions for the person's accommodation at the precinct or because QCS inflexibly applied otherwise sound policies that had the effect of unnecessarily impeding the person's reasonable access to food, health and other services while residing in the precinct or some other approved place of residence in the community, then a serious issue would arise as to whether the person's detention was arbitrary. The deprivation of the person's liberty by an order for continuing detention for an indefinite period because of QCS's conduct would seem capricious, unjust and unreasonable, in the sense of being beyond what was reasonably necessary to achieve the aim of the relevant policy. The aim would be the safety of a grocery delivery driver or a taxi driver who entered the precinct for a brief time for a specific purpose, on notice, and who did not enter any house. The aim of protecting them might be achieved by suitable conditions on their entry or the provision of a temporary staffing presence on the notified occasions they entered. It would not require an order for continuing detention for an indefinite period.

[113] The issue of proportionality or reasonable necessity would not turn simply upon the unreasonable failure to address the problem highlighted by Holmes CJ in 2017, including the unexplained non-operation of an interagency group that was supposed to address that problem. It also would turn upon the inflexible application of policies in the context of existing unsuitable accommodation for a person with particular medical conditions. The inflexible application of those policies to such a disabled individual raises issues of discrimination. If the inflexible application of those policies to a potential resident of the precinct deprived him of reasonable access to health and other services, or otherwise rendered his residence at the precinct unsafe, it might lead a court to make a continuing detention order. In simple terms, the unsuitable state of the accommodation at the precinct for such an individual, coupled with the inflexible application of QCS policy to someone with his medical conditions, might mean that he was better off in jail. Yet, the person's continuing detention for an indefinite period would be disproportionate to whatever was to be gained by the inflexible application, in his case, of QCS's policies about access to essential health and other services. It also would be discriminatory and, in that sense, unjust.

[114] It is sufficient to observe that the present case, insofar as it concerns the discretion to make a continuing detention order instead of a supervision order, involves the application of the right to liberty under s 29(1) and, arguably, the right not to be subject to arbitrary detention under s 29(2) of the *HRA*.

**The right to liberty and the choice between orders**

[115] I turn to the function or power of making a supervision order. Exercising the discretion to make a supervision order will deprive the first respondent of the right to liberty referred to in s 29(1). The conditions, including mandatory requirements of a supervision order, and anticipated directions that restrict where the first respondent lives and where he goes, and that govern what he does each day clearly have that effect. In addition, they affect his freedom of movement under s 19 of the

*HRA*.[60] I will confine my present consideration to the right to liberty under s 29(1). It is sufficient for the purpose of resolving the relevant legal issue to conclude that the exercise of the discretion under s 13(5) to make a supervision order concerns the application of the right in s 29(1). That right relates to the current proceeding.

[116] Insofar as the function of the Court involves choosing between a continuing detention order and a supervision order, the discretion involves the application of the right to liberty and an assessment of the respects in which each order will deprive the first respondent of his liberty. The Court has regard to the individual right to liberty in making a choice between a continuing detention order and a supervision order. A large body of authority establishes that there ought to be a preference for a supervision order over a detention order. In *Francis*, the Court of Appeal stated:[61]

> "If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that **the intrusions of the Act upon the liberty of the subject are exceptional**, **and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.**"

[117] In *Attorney-General (Qld) v Lawrence*[62] Chesterman JA (with whom Margaret Wilson J agreed) stated:

> "**The liberties of the subject** and the wider public interest are best protected by insisting that the Attorney-General, as applicant, discharges the burden of proving that only a continuing detention order will provide adequate protection to the community."

[118] In circumstances in which leading authorities regard an individual's right to liberty as relevant to the discretion under s 13(5) to make a supervision order instead of a continuing detention order, it seems evident that the right to liberty in s 29(1) of the *HRA* is a right that relates to a proceeding in which the Court is exercising such a discretion.

**Humane treatment when deprived of liberty**

[119] Arguably, other human rights in Part 2 of the *HRA* are engaged when the Court performs the function of exercising a relevant discretion under s 13(5). One of them is s 30(1) of the *HRA* that provides:

> "All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person."

[120] Section 30(1) complements the prohibition in s 17(b) on being treated in a cruel, inhuman or degrading way. Authorities on comparable provisions to s 30(1) of the

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60 *Attorney-General (Qld) v Carter* [2020] QSC 217 at [59].
61 *Francis* at [39] (emphasis added).
62 [2010] 1 Qd R 505; [2009] QCA 136 at [33] (emphasis added).

*HRA* establish that the provision may protect a person, who has been deprived of liberty, from conduct that lacks humanity but falls short of being cruel.[63]

[121] Section 17(b) may be said to prohibit "bad conduct" towards a person, while s 30(1) mandates "good conduct" towards persons who are deprived of liberty.[64]

[122] The learned authors, Evans and Petrie, state in respect of s 30(1):

> "The right is not limited to specific incidents of ill-treatment but may also encompass the general conditions of detention."[65]

[123] Justice Martin in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* observed that the s 30(1) obligation to be treated humanely requires "some level of benevolence or compassion and the infliction of the minimum of pain".[66]

[124] Presently, I am not concerned with a justification for limiting the right in s 30(1). The authorities accept that the starting point for analysing the scope of the right should be that persons who are detained must not be subject to a hardship or constraint other than that which results from the deprivation of liberty.[67] In the context of the deprivation of liberty resulting from a supervision order, this suggests that a necessary and permissible consequence of deprivation of liberty under a supervision order is that some rights enjoyed by citizens will be unavailable or compromised.

[125] As Ms Morreau of Counsel for the QHRC submitted, the right in s 30(1) is not limited to persons detained under criminal law, but applies to all forms of detention.[68]

[126] If the starting point for the application of s 30(1) to prisoners is that the right in s 30(1) is relevant whenever prisoners are "subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty",[69] then a similar principle must apply to other detainees and to persons who are deprived of liberty by an order made under s 13 of the Act. The hardship or constraint that results from the deprivation of liberty necessarily entailed by a supervision order is authorised and permissible. Hardships and constraints that are not necessary for the proper and reasonable management of the supervision order and that result in the person being treated inhumanely or without respect for their inherent dignity would involve the application of s 30(1) and may require consideration of any justifications for such treatment.

[127] Presently, I am not concerned with any such justification. My concern is with a legal issue raised by the Attorney-General that the right in s 30(1) is not a right that

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63 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [235] – [237] ("*Owen-D'Arcy*").

64 *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 at [113]; *Haigh v Ryan* [2018] VSC 474 at [81].

65 K Evans and N Petrie, *Annotated Queensland Human Rights Act*, Law Book Company (2022) [HRA.30.40] and the cases cited therein.

66 *Owen-D'Arcy* at [245].

67 Ibid, citing *Castles v Secretary of the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 ("*Castles*").

68 Explanatory Notes to the Human Rights Bill 2018 (Qld), p 25.

69 *Owen-D'Arcy* at [237]; *Castles* at [108].

relates to the current proceeding. I should address that legal issue by having regard to the specific function of the Court, the scope of the right concerned and the facts and circumstances of the individual proceeding. I do not accept the Attorney-General's submission that the right in s 30(1) does not relate to this proceeding. The circumstances canvassed earlier in these reasons relate to the conditions in which the first respondent will be required to live at a precinct, his medical conditions and the inflexible application of policies that will limit his access to food, health services, and access to carers and taxis to transport him to doctors and hospitals, including in the event of a foreseeable medical emergency. These conditions were of concern to the medical practitioners who had recently seen the first respondent. They concluded that his current ACAT assessment significantly understated his need for care. They were concerned about his safety while living at a precinct.

[128] The individual circumstances of the first respondent and the anticipated conditions in which he will be required to live at a precinct raise issues as to whether, having been deprived of his liberty by a supervision order, he will be treated by QCS as required by s 30(1). In my view, the function of the Court in making a supervision order that requires the first respondent to live in such conditions involves the application of the right in s 30(1) in this proceeding. The Court is exercising a discretion involving the application of that right. It is a right that relates to the proceeding.

**Conclusion on legal issue about s 13(5) and the *HRA***

[129] I emphasise that my consideration of the evidence is only to the extent necessary to resolve a legal issue, namely whether a specific right, such as the right in s 30(1), is relevant to the exercise of the Court's discretion under s 13(5) of the Act. I am not determining whether QCS has acted or threatens to act unlawfully because its conduct is not compatible with the particular human right.

[130] It is sufficient to resolve the legal issue to find that the function of making a continuing detention order in lieu of a supervision order in this case involves the application of at least one of the human rights in Part 2 of the *HRA*. It is sufficient to conclude that the making of a supervision order, in preference to a continuing detention order, involves the application of at least one of the human rights in Part 2 of the *HRA*. The discretion that the Court exercises involves the application of at least the right to liberty in s 29(1) and the right to humane treatment when deprived of liberty in s 30(1) of the *HRA*.

[131] I do not accept the Attorney-General's broad submission that none of the rights under the *HRA* relate to the current legal proceeding. In my view, at least s 29(1), s 30(1) and, arguably, s 29(2) are capable of application by s 5(2)(a) to the exercise of the Court's function under s 13(5) of deciding whether to make a continuing detention order or a supervision order in the circumstances of this case. I emphasise "the circumstances of this case" because the application of a particular right by force of s 5(2)(a) depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.

[132] That is sufficient to resolve the question of law joined between the Attorney-General and the QHRC. It is unnecessary to address other rights in the *HRA* that were discussed in their submissions. This includes the right of access to health services without discrimination in s 37(1) to which I referred in my reasons of 31

August 2022. Given the course of proceedings since then, in which the first respondent has not sought any remedy in relation to an alleged infringement of that right, it is unnecessary and inappropriate for me to address the nature of that right. It has been unnecessary for me to decide whether it has a potential application directly to this proceeding by reason of s 5(2)(a) of the *HRA*. I doubt whether it does.

[133] For completeness, I should add that if the Attorney-General is correct that the right to access health services without discrimination is not a right that is engaged by s 5(2)(a), then the limitations on the first respondent's access to health services without discrimination or, more generally, limitations on his access to health services, including emergency medical treatment, seem relevant to the right under s 30(1) of the *HRA*.

[134] In *Castles v Secretary of the Department of Justice*,[70] access to health care was treated as a right in the *Charter* that is the equivalent of s 30(1) of the *HRA*. That case involved the proposition that prisoners are entitled to have access to health services available to the wider community without discrimination on the grounds of their legal situation. The Court also noted that this right does not translate to a right to "every conceivable form of medical treatment that is available in the community".[71]

[135] I mention this authority because it concerns the equivalent provision to s 30(1) of the *HRA* and it did not depend upon a provision like s 37 of the *HRA*. Its implication, for present purposes, is that the right in s 30(1) of the *HRA*, when applied to persons who are deprived of their liberty and required to reside at a place like the precinct, may entail access to health services without discrimination on the grounds of their legal situation, and also require regard to the individual's medical condition and mobility. By parity of reasoning, such an entitlement to access health services without discrimination would not translate to a right to every conceivable form of medical treatment available in the wider community. It would, however, suggest access being provided to the first respondent in a way that addressed the concerns expressed by the medical experts in this proceeding. This would be a consequence of the first respondent's right to be treated with humanity and with respect to the inherent dignity of the human person.

**More than one Part 2 right may be relevant to the discretion**

[136] The application of more than one Part 2 right to a relevant discretion may mean that the rights pull in the same direction or in different directions. To take a hypothetical example, if conditions in custody under a continuing detention order would deprive the individual of food or access to health services, including treatment for a mental health condition that could be readily accessed in the community under a supervision order that provides adequate protection of the community, then both the right to liberty in s 29(1) and the right to humane treatment when deprived of liberty in s 30(1) would favour the discretion being exercised to make a supervision order. If, however, the individual would be properly fed and receive good treatment for health conditions under a continuing detention order, but inadequate food and inadequate access to health services while residing in a precinct under a supervision order, the two rights would pull in different directions. The right to liberty would

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70 *Castles* at [108].

71 At [109].

favour a supervision order and the right to humane treatment would favour a continuing detention order.

**Summary – Application of the *Human Rights Act 2019* (Qld)**

[137] The first respondent does not seek in this proceeding or in any related proceeding, any relief or remedy in relation to an act or decision of QCS on the ground that the act or decision is unlawful by virtue of s 58 of the *HRA*. Therefore, no occasion presently arises to declare that QCS has acted unlawfully in that regard.

[138] No issue of interpretation arises that requires the Court, in compliance with s 48 of the *HRA*, to interpret a statutory provision, to the extent possible that is consistent with its purpose, in a way that is compatible with human rights under the *HRA*.

[139] The Court is not a "public entity" for the purpose of s 58 of the *HRA* in exercising its judicial function under s 13(5).

[140] In this case, the Court's judicial function involves the discretion whether to make a supervision order.

[141] If a supervision order is apt to ensure adequate protection of the community, then supervision should, in principle, be preferred to a continuing detention order on the basis that the Act's intrusions upon individual liberty are exceptional, and individual liberty should be constrained to no greater extent than is warranted by the statute that authorises that constraint. This regard for individual liberty in exercising the relevant discretion under s 13(5) is well established by the authorities. It reflects and is reinforced by s 29(1) of the *HRA*.

[142] Because the Court applies that human right, the right of liberty in s 29(1) of the *HRA* relates to the Court's function in the current proceeding.

[143] A supervision order deprives a person of liberty. By operation of s 30(1), all persons deprived of liberty must be treated with humanity and with respect to the inherent dignity of the human person. A supervision order that is authorised by the Act, including its mandatory requirements, necessarily deprives the person of liberty. It also may subject the person to hardship and indignity of a kind that is a necessary consequence of compliance with the order. However, the circumstances that apply to the individual proceeding, including the personal circumstances of the person and the conditions in which the person is required to reside and live, may be such that the person would not be treated as required by s 30(1). In this proceeding, the first respondent's medical conditions, his limited mobility, and other circumstances require him to have a high level of support and make his proposed residence at the precinct unsafe for his health unless QCS has regard to his individual circumstances in applying policies that affect his access to food, health services, and other support.

[144] In exercising the discretion to make a supervision order, including in deciding whether to make a continuing detention order rather than a supervision order, the manner in which he will be treated by QCS when residing at the precinct or any other approved places of accommodation is relevant. The exercise of the relevant discretion involves the application of the human right in s 30(1) of the *HRA*.

[145] In the facts and circumstances of this individual proceeding, the human rights in at least ss 29(1) and 30(1) of the *HRA* apply to the exercise of the discretion under s 13(5). Those human rights relate to the present proceeding.

**Unresolved issues**

[146] I have resolved a legal issue between the Attorney-General and the QHRC, and rejected the Attorney-General's submission that s 5(2)(a) of the *HRA* does not apply to the exercise of the Court's discretion under s 13(5). It is unnecessary for me to resolve numerous other issues relating to the *HRA* that emerge from the submissions of the Attorney-General, QCS and the QHRC. It is also inappropriate to do so in circumstances in which the first respondent has not sought a remedy in relation to identified conduct or decisions of QCS, or apprehended conduct or decisions that will be made by QCS once he is released under a supervision order.

[147] Some general observations should be made about the *HRA* submissions. It is possible to identify conduct and decisions with different degrees of specificity. Any analysis of QCS's compliance with the *HRA* depends upon the identification of the relevant conduct. The conduct may range from the failure to provide suitable accommodation for someone with the first respondent's medical conditions at the precinct or elsewhere, through to more specific conduct, namely a refusal to apply its policies about entrants to the precinct so as to allow, subject to suitable conditions, for the first respondent to better access food, health services, or other services.

[148] The relevant conduct might be identified as the failure to allow reasonable access by the first respondent to essential services while he resides at a place that is clearly unsuitable to accommodate someone with his complex medical conditions. The relevant issue would not be the compatibility with the *HRA* of the general policy of not allowing persons to enter the precinct but the failure to grant leave for certain persons to do so on appropriate conditions that would ensure the safety of the visitor. That specific conduct, in applying an arguably justifiable policy without regard to the individual circumstances of the first respondent, might be regarded as incompatible with a right under s 30(1) of the *HRA*. Also, it might be analysed as being incompatible with a right to access health services without discrimination. Alternatively, it might be alleged to be incompatible with a more general right to equal protection of the law without discrimination and effective protection against discrimination, contained in s 15 of the *HRA*. This may require different treatment of persons whose situations are different as a means of protecting against discrimination.

[149] I mention these matters to highlight the fact that it is invidious as well as unnecessary to further address the content of the human rights that I have found apply to this proceeding by virtue of s 5(2)(a), let alone other human rights in Part 2 of the *HRA*, in circumstances in which the relevant conduct, decision or policy is not specified in a proceeding by the first respondent.

[150] Any analysis depends upon the specific conduct or policy, the specific right that is engaged and possible justifications for the conduct or policy that is specified. The

process of justification is illustrated in *Owen-D'Arcy*[72] and is helpfully discussed by learned authors in this field.[73]

[151] It may be one thing to justify the prolonged failure to provide suitable accommodation over many years. In that regard, assertions in the Attorney-General's submissions about resources are unsupported by data about the relative resource commitment of accommodating the first respondent in a house at the precinct, compared to the cost of accommodating him, supervising him, feeding him and providing health services to him in prison. If, however, the failure to provide suitable accommodation for someone like the first respondent at the precinct were justified by regard to the matters stated in s 13 of the *HRA*, that justification would not apply to different, more specific conduct. In particular, it would not justify a decision to refuse to make a small adjustment to an arguably justifiable policy that would enable the first respondent to better access food, health services and other essential services.

[152] To be clear, I have resolved a legal issue about the application of certain rights in Part 2 of the *HRA* to the exercise of the discretion in s 13(5) of the Act. The material does not permit me to conclude that any limitation on those rights is justified. In circumstances in which the first respondent has chosen not to seek any relief or remedy in relation to an act or decision of QCS on the ground that the act or decision is not compatible with human rights, let alone specify the precise act or decision that is challenged, it is unnecessary, inappropriate and impossible to resolve an issue concerning the compatibility of QCS's conduct with the *HRA*. This includes specific decisions that may be made by it relating to a refusal to allow food deliveries, or certain persons to enter the precinct's grounds to facilitate the first respondent's improved access to food, health services and other essential services.

**Disposition**

[153] A supervision order will ensure adequate protection of the community.

[154] Adequate protection of the community can be reasonably and practicably managed by a supervision order in the agreed form. Requirements under s 16 can be reasonably and practicably managed by corrective services officers.

[155] A concern remains about the safety of leaving someone with the first respondent's health complications at such a remote residence, unsupervised and unsupported by staff who could call for an ambulance or help in the event of a medical emergency or deterioration in his condition.

[156] The issue is not about the safety of the community and access to victims if the first respondent resides at a precinct house. The risk of his sexual offending would be low because he would not have access to potential victims. The concern of the doctors and the Court is with the first respondent's safety in unsupported accommodation.

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72 At [243] – [260].

73 See, K Evans and N Petrie, *Annotated Queensland Human Rights Act*, Law Book Company (2022) in its commentary on section 13.

[157] The evidence, including the medical evidence, is that a precinct house under current arrangements is an unsuitable place to accommodate someone with the first respondent's multiple medical conditions and whose condition is likely to deteriorate.

[158] The application of QCS's policies without regard to the first respondent's individual circumstances raises for consideration a familiar ground of judicial review, a number of rights protected by the *HRA*, and broader issues about different treatment of persons whose situations are different, and protection against discrimination of persons with a disability or impairment. For example, if he were to reside at the Wacol precinct, become seriously ill and call for a taxi to take him to the emergency ward of a public hospital, he would be required by QCS's policy to walk, if he possibly could, to the front gate to meet the taxi. Under the rigid application of QCS's policy to someone with his serious medical conditions and severely compromised mobility, he could not ask the taxi to pick him up close to his house and the taxi driver would face prosecution if he did so. The application of the policy to someone without his medical and mobility problems may be justifiable, but discriminatory, unjustified and inhumane if applied to someone who does.

[159] The submissions of the QHRC have usefully placed QCS on notice about the application of various rights in the *HRA* and difficulties that QCS may encounter in justifying limitations upon them.

[160] With respect, attempts by QCS to justify general policies tend to miss the point. The point is the discriminatory and arguably inhumane application of policies to a person with the first respondent's mobility and medical problems. That occurs in the context of QCS's failure to provide suitable accommodation at the precinct or to find suitable accommodation elsewhere.

[161] I am not required to decide the exposure of QCS to a claim or complaint if it applies its policies to the first respondent and others like him without regard to the person's individual circumstances. Instead, I have decided a legal issue about the application of certain rights, by operation of s 5(2)(a), to the precise function that I am required to perform in exercising a discretion under s 13(5) of the Act in the circumstances of this individual proceeding.

[162] Had I simply assumed, for the purpose of argument, that none of the rights the *HRA* protects applied to the precise discretion I am required to exercise under s 13(5), I would have made a supervision order. I would have made such an order despite my apprehension that in many respects the first respondent would be better off in jail than in unsuitable and unsafe accommodation at a precinct.

[163] This is because, applying established principles in a case in which a supervision order is apt to ensure adequate protection of the community, supervised release should, in principle, be preferred to a continuing detention order. This principle rests upon the basis that the intrusions of the Act upon individual liberty, including the liberty protected by s 29(1) of the *HRA*, are exceptional and that liberty should be constrained to no greater extent than is warranted by the law that authorises such constraint.

[164] I have found that at least the right to liberty in s 29(1) of the *HRA* and the right to humane treatment when deprived of liberty in s 30(1) of the *HRA* apply to the discretion or discretions the Court is required to exercise under s 13(5) of the Act.

[165] A supervision order should be made despite the unsafe and inhumane conditions that the first respondent will face for whatever period he resides in a precinct house. This conclusion is based upon the principle just stated, that individual liberty should be constrained to no greater extent than is warranted by the statute that authorises the constraint. It is reinforced by the first respondent's informed choice to prefer a supervision order to a continuing detention order. I should exercise my discretion, if possible, to respect his autonomy. The discretion under s 13(5) should not be exercised in favour of making a continuing detention order based simply on the view that the first respondent would be better off in a prison rather than in a precinct house.

[166] I conclude that under present policy arrangements, including the anticipated inflexible application of QCS's policies, the first respondent will not have adequate access to food, safe accommodation and health services at a precinct. Despite this, and in the absence of any submission that I should make a different order, on 10 November 2022, I exercised the discretion to make a supervision order.

[167] It was anticipated at the hearing that he would be released prior to 8 December 2022 from the Townsville Correctional Centre to the Townsville precinct. For bureaucratic reasons, it will take weeks after he is released to obtain the support to which he is entitled under his June 2022 ACAT assessment. Despite all of the medical evidence before me in August, including Dr Arthur's 22 July 2022 report, no one has initiated a process to update that ACAT assessment so that the first respondent gets the level of support the doctors say he needs.

[168] Despite all of these difficulties and risks, the first respondent prefers to take his chances in the Townsville precinct than stay in prison.

[169] The possibility exists that the first respondent's time at the precinct will not be prolonged, and he may be offered a place in a hostel that can provide him with some of the support that he clearly needs.

[170] The government has yet to do something to address a problem to which it was alerted by Holmes CJ in 2017. It may create a new interagency committee.

[171] The first respondent's residence at the precinct will be less safe than it might have been had QCS addressed a systemic problem years ago. He prefers to take his chances there rather than reside in prison for an indefinite period under a continuing detention order, long after his full-time sentence has been served.

[172] His position is entirely understandable. He is entitled to have whatever liberty he retains for the duration of a supervision order that severely restricts where he lives, where he can go, and many aspects of his daily life. He should have the choice to feed himself, as best he can, in a precinct, rather than be fed by the State in prison. He should have the choice to access health services, as best he can, from the precinct, rather than have health services supplied to him in prison.

[173] In making those choices, the first respondent's health may be compromised, he may suffer a serious medical episode in unsupported accommodation at a precinct, and his life may be much shorter than it would have been if QCS had developed suitable accommodation and policies, or had the flexibility to apply current policies to an individual with his complex medical problems and need for support.

[174] The result is that the first respondent will be released to unsuitable accommodation at the precinct. He will not have access to potential victims there or 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.

[175] The community should be safe from the relevant risk because a supervision order has been made. The first respondent, however, will not be safe. The medical evidence establishes that being accommodated at the precinct is distinctly unsafe for someone with his complex medical conditions.

[176] To consign a person, even a detestable sex offender, to such an unsafe situation is, to say the least, unsatisfactory.

[177] The supervision order will deprive the first respondent of his liberty to a great extent. This is a consequence of a valid law and the constraints that flow from the terms of the supervision order, including its mandatory requirements.

[178] A question remains whether QCS's practices and policies in relation to a person with the first respondent's medical conditions are compatible with the *HRA*, particularly ss 30 and 37. They are questions for another day and possibly for another court. It may even be the Coroners Court. In such a forum, QCS may have to justify its inertia in response to Chief Justice Holmes' 2017 judgment in *Guy*'s case. It may have to justify the inflexible application of policies that may be reasonable and justifiable for many other individuals who are accommodated at the precinct but distinctly inappropriate for an individual with acute medical and mobility problems.

[179] On 10 November 2022, I made a supervision order of 10 years' duration in the form submitted and signed by me. I did so because it was inappropriate to exercise my discretion to *not* make a supervision order and instead to make a continuing detention order of indefinite duration. These, in combination with my reasons of 31 August 2022, are my reasons for making that supervision order.