CITATION:	*Gibson v Northern Territory of Australia & Anor* [2024] NTSC 13
PARTIES:	GIBSON, Tony By his Litigation Guardian Sister Brigid Arthur v NORTHERN TERRITORY OF AUSTRALIA and ANTI-DISCRIMINATION COMMISSIONER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising territory jurisdiction
FILE NO:	2022-02092-SC
DELIVERED:	18 March 2024
HEARING DATE:	7 February 2023
JUDGMENT OF:	Grant CJ

CATCHWORDS:

HUMAN RIGHTS – Discrimination – Context – Provision of goods, services and facilities – Ground – Disability discrimination – Legislation – *Anti-Discrimination Act 1992* (NT) – Statutory exceptions

Appeal from decision of the Northern Territory Civil and Administrative Tribunal dismissing the appellant's complaint made to the Anti-Discrimination Commission – Whether Tribunal erred in finding transfer decisions exempt by operation of s 53 of the *Anti-Discrimination Act* –

Necessary to establish that Tribunal wrong in finding transfers did not fall within 'services and facilities' – Decisions to transfer the appellant between detention centres to maintain order and ensure safe custody not properly characterised as conduct in the area of activity of 'goods, services and facilities' – No error in Tribunal's finding that first respondent made adequate or appropriate provision to accommodate the appellant's special need – Appeal dismissed – Decision of the Tribunal affirmed.

Anti-Discrimination Act 1992 (NT) s 19, s 24, s 28, s 41, s 53, s 91, s 106, s 107
Interpretation Act 1978 (NT) s 55
Youth Justice Act 2005 (NT) s 151, s 153, s 168A

DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (2014) 8th ed, LexisNexis at [4.24]

Bourne v Norwich Crematorium Ltd [1967] 1 WLR 691, *CEO v Clarke* (2004) 138 FCR 121, *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194, *Commissioner of Police, NSW Police Service v Estate of Edward John Russell* [2001] NSWSC 745, *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 150 ALR 1, *Complainant v Western Australia* [1994] EOC 92-610, *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308, *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388, *Director-General of Department of Community Services v MM* [2003] NSWSC 1241, *Druett v New South Wales* (Unreported, HREOC, 17 April 2000), *Falun Dafa Assn of Victoria Inc v Melbourne CC* [No 1] (2003) 20 VAR 394, *IW v Perth City* (1997) 191 CLR 1, *Malaxetxebarria v State of Queensland* [2007] QCA 132, *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595, *Purvis v New South Wales* (2003) 217 CLR 92, *Rainsford v State of Victoria and Anor* (2004) 184 FLR 110, *Rainsford v State of Victoria* [2008] FCAFC 31, *Rainsford v Victoria* (2005) 144 FCR 279, *Rainsford v Victoria* [2007] FCA 1059, *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, *State of Victoria v Schou* [2004] VSCA 71, *Waters v Public Transport Corporation* (1991) 173 CLR 349, referred to.

REPRESENTATION:

Counsel:

Appellant:	T Goodwin with J Zhou
First Respondent:	T Cramp
Second Respondent	T Keys

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
First Respondent:	Solicitor for the Northern Territory
Second Respondent	Northern Territory Anti-Discrimination Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gibson v Northern Territory of Australia & Anor [2024] NTSC 13
No. 2022-02092-SC

BETWEEN:

TONY GIBSON by his litigation guardian SISTER BRIGID ARTHUR
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND:

ANTI-DISCRIMINATION COMMISSIONER
Second Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 18 March 2024)

Introduction

[1] This is an appeal from the decision of the Northern Territory Civil and Administrative Tribunal (**Tribunal**) made on 25 July 2022 to dismiss the appellant's complaint made to the Anti-Discrimination Commission (**Commission**) pursuant to various provisions of the *Anti-Discrimination Act 1992* (NT). An understanding of the context in which the complaint was made is necessary to appreciate the grounds of appeal.

Factual and legislative context

[2] The appellant is an Aboriginal male who was born on 28 July 2004. He turned 18 years of age three days after the delivery of the decision of the Tribunal which is the subject of this appeal. He was raised between Titjikala and Laramba in Central Australia. At the age of eight he was placed in the care of the child welfare authority due to substantiated reports of neglect and violence in the family context. He first came into contact with the criminal justice system in 2016, when he was 12 years of age. He was first sentenced to a period of detention in 2017. He has been diagnosed with Foetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Post Traumatic Stress Disorder and intellectual disability. As a consequence of those conditions he has complex neurodevelopmental, mental health and behavioural needs.

[3] As at August 2018, the appellant was subject to a sentence of detention. Between August 2018 and November 2020, the appellant was transferred from the Alice Springs Youth Detention Centre (**ASYDC**) to the Don Dale Youth Detention Centre (**DDYDC**) in Darwin on seven different occasions. The ASYDC is a low to medium security risk facility and the DDYDC is a high to extreme security risk facility.

[4] On 16 November 2020, two of the appellant's treating medical practitioners wrote to the appellant's legal representative opining that his mental health had deteriorated since his arrival in the DDYDC on 28 October 2020 and recommending that he be returned to ASYDC. Both letters suggested that

the deterioration in the appellant's mental health was attributable in part to the placement in Darwin rather than in Alice Springs.

[5] On receipt of the correspondence, the appellant's legal representative wrote to the Superintendent of the DDYDC requesting that the appellant be transferred urgently to Alice Springs. That request was made on the basis of an imminent risk of harm to the appellant's health and well-being, and the Superintendent's responsibility for the 'physical, psychological and emotional welfare of detainees in the detention centre' under s 151(2) of the *Youth Justice Act 2005* (NT).

[6] On 17 November 2020, the Superintendent of Youth Justice Programs advised the appellant's legal representative that the appellant was not being considered for a return to the ASYDC, with reference to s 168A of the *Youth Justice Act*. That provision empowers the superintendent of a detention centre 'to determine, as the superintendent considers appropriate, that a detainee held in a detention centre is to be transferred to another detention centre'.

[7] On 23 November 2020, the appellant's legal representative replied to the Superintendent of Youth Justice Programs expressing concern that the medical opinion had not been given proper consideration and advising that a complaint had been lodged with the Commission. The complaint document provided in essence that Territory Families, as the agency responsible for the management of both detention centres, had engaged in 'prohibited

conduct' within the meaning of s 4 of the *Anti-Discrimination Act* by contravening the duty to accommodate the appellant's special needs because of race, sex and impairment. The correspondence accompanying the complaint form particularised the failure or refusal to accommodate the appellant's special needs as:

> (a) Refusing to provide the appropriate therapeutic and cultural interventions, being [the appellant's] urgent transfer from [DDYDC] to [ASYDC] in light of his deteriorating mental health and medical opinion support[ing] this action;
>
> (b) Refusing or failing to provide the appropriate therapeutic and cultural support to [the appellant] while in ASYDC in the past; and
>
> (c) Refusing or failing to commit to providing the appropriate therapeutic and cultural support by keeping [the appellant] in ASYDC given this is an existing and ongoing need as a result of his impairment and in light of his deteriorating mental health and medical opinion supporting this action.

[8] The correspondence accompanying the complaint implicitly recognised that there were institutional and behavioural reasons underlying the history of transfers by stating that 'rather than sending [the appellant] to DDYDC, Territory Families should have taken steps to support and manage [the appellant's] needs in ASYDC by utilising therapeutic and culturally appropriate methods'.

[9] On 1 March 2021, the complaint was amended by including that 'Territory Families have also failed to accommodate a special need arising from the attribute of religious belief or activity'.

[10] On 24 May 2021, the Commission referred the complaint to the Tribunal. The allegation of prohibited conduct was described in that referral as a

breach of the duty to accommodate a special need in compliance with s 24 of the *Anti-Discrimination Act*, being the '[f]ailure to accommodate a special need in the area of goods, services and facilities (arising from the attribute of race, religious belief or activity – Aboriginal spiritual belief or activity and impairment)'. Section 24 of the *Anti-Discrimination Act* provides:

> **Duty to accommodate special need**
>
> (1) A person must reasonably accommodate a special need that another person has because of an attribute.
>
> (2) For subsection (1):
>
> (a) reasonable accommodation of a special need of another person means making adequate or appropriate provision to accommodate the special need; and
>
> (b) reasonable accommodation of a special need takes place when a person acts in a way that reasonably provides for the special need of another person who has the special need because of an attribute.
>
> (3) Whether a person reasonably provided for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:
>
> (a) the nature of the special need; and
>
> (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and
>
> (c) the financial circumstances of the person; and
>
> (d) the disruption that accommodating the special need may cause; and
>
> (e) the nature of any benefit or detriment to all persons concerned.
>
> *Example for section 24*
> *Providing an accredited interpreter to a person who needs one.*

[11] The referral identified the 'Northern Territory of Australia' as the entity liable in the event the allegation was established. The referral identified the scope of the allegations in the same terms as the particulars contained in the

correspondence accompanying the initial complaint form, with the qualifications that the complaint about transfer related to the period 'from around 28 October 2020 onwards'; and the allegation of refusing or failing to provide appropriate therapeutic and cultural support while in ASYDC related to periods 'from 2018 to on or around 28 October 2020'.

[12] On 6 August 2021, the Tribunal ordered the provision of further and better particulars of the complaint. On 27 August 2021, the Commission provided the following particulars under the designation 'Scope of allegations':

> Mr Gibson has the following special need as a young Central Australian Aboriginal male living with disabilities currently in youth detention:
>
> - Need for stability and predictability of living and caring arrangements.
> - Stable and consistent therapeutic intervention including continuity of therapy and support programs.
> - Need for link with family.
> - Need for support workers that Mr Gibson perceives as being 'safe'.
> - That each of the above needs can only be met in Alice Springs because:
>   - His cultural connections to Alice Springs (being an initiated Aboriginal man from Central Australia) these links connect to his race, religious beliefs and his family.
>   - Effective therapeutic interventions are only available in Alice Springs because this is where the perceived 'safe' adults he needs are located, being his support workers, including his Alice Springs NDIS support workers.
>
> That his special need is not being met is demonstrated by the deterioration in his mental health.
>
> The accommodations not provided by the Respondent are alleged as follows:
>
> 1. That on or around 28 October 2020 onwards up until the date of complaint (23 November 2020) the failure to transfer Mr Gibson to the Alice Springs Youth Detention Centre (ASYDC), following

requests for this to occur is alleged to be an ongoing breach of section 24.

2. Failure to accommodate special needs when in ASYDC from 2018 until on or around 28 October 2020. Example discontinuation of ADHD medication upon entry to ASYDC, lack of behavioural management support.

3. Failure to accommodate a special need by not allowing Mr Gibson to remain in ASYDC. This refers to 8 transfers from ASYDC to Don Dale Youth Detention Centre over a period of two years.[1]

The Tribunal's decision

[13] The Tribunal determined that the decisions to transfer the appellant to Darwin, and to decline to transfer him back to Alice Springs, were actions that fell within the general exemption under s 53 of the *Anti-Discrimination Act*, read together with s 168A of the *Youth Justice Act*.[2] Section 53 of the *Anti-Discrimination Act* relevantly provides:

> **Acts done in compliance with legislation, etc.**
>
> Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by:
>
> (a) an Act or regulation of the Territory; or

[14] As already described above, s 168A of the *Youth Justice Act* empowers the superintendent of a detention centre to determine, as he or she considers appropriate, that a detainee held in a detention centre is to be transferred to another detention centre. The Tribunal approached the operation of this management prerogative on the basis that it conferred discretion in relation to both a decision to transfer and a decision not to transfer upon request.

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1 During the course of the Tribunal's consideration of the matter, the appellant's representatives revised that particular on the basis that the evidentiary material disclosed seven transfers over the relevant period.

2 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [23]-[38].

The Tribunal found the operation of that exemption was subject to the requirement that the discretion to transfer not be exercised capriciously, on discriminatory grounds, for an improper purpose or on the basis of irrelevant considerations.

[15] Allowing for those limitations on the scope of the discretion, the Tribunal found that the first respondent had established the exemption had application in the circumstances.[3] Those circumstances included that the appellant had been involved in 441 incidents since he was first admitted to detention in 2017, 311 of which occurred at the ASYDC. The incidents which precipitated the appellant's transfer on each occasion were, in chronological order,[4] a serious physical assault on a staff member; an attempted escape and threatening behaviour; a pattern of behaviour which included two assaults and an attempt to take keys from a staff member; uncontrolled behaviour on admission; a pattern of behaviour which included an assault and an attempt to take keys from a staff member; making threats to another inmate; and a pattern of behaviour which included threatening behaviour and assaults. A number of those incidents resulted in criminal charges, including assaulting a worker, damaging property and participating in a riot. During the course of the Tribunal proceedings, the appellant's legal representatives did not dispute that he had engaged in the behaviours recorded, or that they were problematic in the management of his detention.

3 Section 91(2) of the *Anti-Discrimination Act* provides that '[w]here a respondent wishes to rely on an exemption, it is for the respondent to raise and prove, on the balance of probabilities, that the exemption applies'.

4 The dates of transfer were 5 September 2018, 11 January 2019, 5 March 2019, 10 October 2019, 31 May 2020, 14 October 2020 and 28 October 2020.

[16] In making the finding that the transfers were subject to the exemption, the Tribunal was satisfied that the Superintendent of the DDYDC had relied and acted upon the records of those incidents, that it was reasonable for him to do so, and that it was reasonable in the exercise of the management prerogative to transfer the appellant to the higher security detention centre in Darwin in response to each incident. The Tribunal noted that all of the transfers predated the medical opinion which the appellant's legal representatives provided to the Superintendent on 16 November 2020. However, even after the Superintendent had become aware of the medical opinion, he genuinely and reasonably considered that it was appropriate to continue to detain the appellant in the higher security environment of the DDYDC.

[17] Although the Tribunal found that the decisions to transfer and not transfer the appellant were subject to the exemption, it went on to consider in the alternative the allegation of a failure to accommodate the appellant's special needs while in ASYDC from 2018 until on or around 28 October 2020. The Tribunal's ultimate finding in relation to that allegation was that the appellant had not established any failure to accommodate a special need in the relevant sense.[5] In making that determination the Tribunal accepted that

5 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [53]-[74].

the appellant had the relevant attribute of 'impairment'[6] within the meaning of s 19 of the *Anti-Discrimination Act*.

[18] However, the Tribunal was unable to find that the appellant had a relevant special need because of the attribute of 'religious belief or activity'.[7] That was because the opinion evidence adduced by the appellant to that effect was directed generally to the importance of connection to country and culture, and the person expressing the opinion had never met and did not know the appellant. Although the appellant himself had attested that it was important for him to be in Alice Springs so that he was close to family and friends, there was no evidence of any subscription by him to any relevant religious belief or activity, or any adherence by him to particular cultural beliefs and practices. Even leaving that matter aside, the Tribunal noted that the allegation of a special need associated with religious belief or activity was directed exclusively to the question of transfer, rather than to the appellant's accommodation in ASYDC from 2018 until 28 October 2020.

[19] The appellant's legal representatives contended that the accommodations required to meet his special needs arising from the attribute of impairment included 'continuity of care … available to him only at ASYDC'; 'face to face support from his family and health and social workers'; 'being close to his country, culture, family and Andrew Lockley, his Throughcare case

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6 The *Anti-Discrimination Act* has been subsequently amended to substitute the attribute of 'disability' for that of 'impairment'.

7 Section 91(1) of the *Anti-Discrimination Act* provides that 'it is for the complainant to prove, on the balance of probabilities, that the prohibited conduct … alleged in the complaint is substantiated'.

manager'; 'implementation of appropriate behaviour management approaches'; and 'consistent and uniform implementation of social support plans [which] can only be achieved in Alice Springs'. Although the Tribunal accepted that the appellant had special needs for therapeutic care and case management, and that continuity in the provision of those services may well be optimal, the appellant's relocation to Darwin did not amount to a failure to adequately or appropriately accommodate the relevant special need. The accommodation required to adequately and appropriately address that special need did not in those circumstances extend to the assignment of any particular individual, or to the appellant's maintenance in a particular location. The Tribunal found in any event that the first respondent took steps to maintain the continuity of the appellant's engagement with Lockley during the periods of transfer to Darwin; and, to the extent it was alleged that the special need required the appellant to be kept in Alice Springs, the decision to transfer the appellant to Darwin was subject to the exemption already found.

[20] To the extent that the appellant's complaint under this particular was directed squarely to a failure to accommodate his special needs while in ASYDC during the relevant period (independently of the issue of transfer), it was to the effect that the incidents involving the complainant were caused by inappropriate behavioural management responses and a failure to provide therapeutic and cultural support. In particular, the appellant asserted there was a failure to implement (or to consistently implement) the various

positive behaviour support plans, including before a determination was made to transfer him to Darwin; and a 'lack of any therapeutic model of care in ASYDC'.

[21] In the determination of those allegations, the Tribunal found that the appellant had failed to establish with the necessary precision what 'appropriate cultural and therapeutic intervention' had not been provided; what 'appropriate interventions' would have ameliorated the appellant's behaviour such that the question of transfer would not have arisen; and what facts constituted the failure to implement the positive behaviour support plans on any particular occasion. To the extent that the appellant relied upon evidence to the effect that the Centre Cycle Classification System was a model of behaviour management with which the appellant was unable to comply due to inability rather than defiance, that evidence was all directed to the application of that model and the appellant's non-compliance during his time in Darwin. There was no evidence about any inadequacy of the therapeutic model of care in ASYDC, or the manner in which that model provided inadequately or inappropriately for the appellant's needs in that facility. The Tribunal also made the following observations in relation to therapeutic intervention generally (footnotes omitted):

> In light of [the appellant's] history, the suggestion that if 'appropriate' interventions (without specifically identifying them) had been utilised, [the appellant's] behaviour would not, or may not, have been problematic and the question of transfer would never have arisen seems to be optimistic. It must be remembered that [the appellant's] problematic behaviours do not occur only while he is in detention. Despite a number of attempts at conditional release aimed at regulating

> his behaviour, he also tends to reoffend when out of detention. Problematic behaviours including theft, property damage and bullying have been evident in his home community. Despite attempts at conditional release aimed at regulating his behaviour, he has a tendency to reoffend. The idea that 'appropriate' responses might suddenly materialise within the environment of detention and make a significant difference in the short term seems fanciful.
>
> …
>
> The argument seems to be that the [therapeutic model of care] is not suitable for [the appellant] because he is not capable of maintaining a high status. As a measure of his security risk though, he has no ***right*** to be progressed through a behaviour management model with a consequence that he will ultimately be housed in a minimum-security environment. Whatever model is in place needs to be capable of assessing behaviour, and hopefully regulating it, not accommodating or adjusting to it. The obligation of the Respondent is that there is an appropriate [positive behaviour support plan] in place for [the appellant] and that it is reasonably implemented in the hope that it will be effective.[8]

[22] The other example provided in the particularisation of this allegation was the 'discontinuation of ADHD medication upon entry to ASYDC'. Although this allegation was not incorporated as part of the original complaint, it was a matter referred to in one of the medical reports dated 16 November 2020. That reference was a recounting of the appellant's assertion of what his medication regime had been at one time, and was not the subject of any further evidence or submission by the appellant's legal representatives. The Tribunal found that this allegation was not substantiated.

[23] Despite the findings that the transfer decisions were exempt by operation of s 53 of the *Anti-Discrimination Act*, the Tribunal went on to consider whether those allegations of prohibited conduct were in the area of 'services

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8 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 25 July 2022, 2021-01301-CT) at [64], [74].

and facilities' as provided and required by s 28 of the *Anti-Discrimination Act*.[9] The appellant's submission was in essence that the responsibility imposed on a superintendent of a youth detention centre under s 151 of the *Youth Justice Act* for the physical, psychological and emotional welfare of detainees constituted the provision of facilities or, alternatively, services. That section provides:

> **Superintendent of detention centre**
>
> (1) The CEO must appoint a public sector employee to be the superintendent for a detention centre.
>
> (2) The superintendent of a detention centre is responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre.
>
> (3) The superintendent of a detention centre:
>
> (a) must promote programs to assist and organise activities of detainees to enhance their wellbeing; and
>
> (b) must encourage the social development and improvement of the welfare of detainees; and
>
> (c) must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise; and
>
> (d) is responsible for the maintenance and efficient conduct of the detention centre; and
>
> (e) must supervise the health of detainees, including the provision of medical treatment and, where necessary, authorise the removal of a detainee to a hospital for medical treatment.

[24] The appellant's submission followed that facilitating contact with family members and health and social workers for the purpose of cultural and therapeutic interventions necessarily formed part of the services or facilities provided by a detention centre. Conversely, the respondent's submission

9 With reference to the formulation in *Laverty v Anti-Discrimination Commissioner* (2018) 341 FLR 115.

was that it was incumbent on the appellant to identify the necessary accommodations which had not been provided, and then to identify with precision how that failure was characterised to be in the area of services and/or facilities. It was not sufficient to point to a superintendent's general statutory responsibilities and to assert that anything done in the discharge of those responsibilities constituted the provision of services or facilities in which accommodations were required to be made.

[25] The Tribunal accepted the respondent's formulation, and concluded that the decisions to transfer or not transfer did not involve the provision of a service or facility.[10] That was because although s 151 of the *Youth Justice Act* created responsibilities to be exercised and obligations to be discharged in the performance of youth detention, they did not of themselves amount to services or facilities in the relevant sense. The qualification 'as far as practicable' appearing in that section recognised that it was necessarily a tension between the punitive and managerial aspects of detention on the one hand, and the welfare of detainees on the other hand. In the discharge of their management responsibilities, superintendents had authority to make decisions which would not always be compatible with the physical, psychological or emotional welfare of an individual detainee.

[26] By way of example, the Tribunal drew attention to the fact that measures implemented in the discharge of those responsibilities might include the use

10 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [78]-[92].

of approved restraints in accordance with s 151AB of the *Youth Justice Act*. Such a measure may be necessary to 'maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre', notwithstanding that the determination might have consequences incompatible with the accommodation of a special need arising from an attribute. To the extent that a decision to transfer the appellant to a higher security environment was made in the interests of maintaining good order and ensuring the safe custody and protection of persons within the presence of a detention centre, it could not amount to the provision of a service or facility to the appellant in the relevant sense. The Tribunal found that the decision to transfer the appellant was not 'conduct in the areas of … services' because it was directed to the operational needs of the detention centre, rather than for the appellant's benefit;[11] and that conduct undertaken within the physical structure of a facility is only properly characterised as 'conduct in the areas of … facilities' where it involves the supply of some facility within a building or complex of buildings (such as bathroom facilities), also for the appellant's benefit.[12]

[27] Finally, the Tribunal concluded that even if it had found that the appellant's attributes gave rise to special needs which were not accommodated appropriately or adequately, it would have found that the decision to transfer

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11 This was said to be consistent with the decision in *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSW ADT 308, in which it was said that the touchstone of 'service' is whether the act is helpful or beneficial to the relevant class of persons to which the complainant belongs.

12 With reference to *The Applicant v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 25 July 2022, 2021-01516-CT) at [26]-[28].

the appellant and keep him detained in Darwin were reasonable.[13] The Tribunal found that not only was the transfer appropriate in balancing the appellant's needs against the safe management of each detention centre, while in Darwin the appellant was afforded face-to-face visits with his Throughcare case manager, conferences by audio-visual link with his case manager as required, monthly conferences by audio-visual link with his child protection caseworker, and the facility for visits by or conferences with the appellant's family and Aboriginal mentors.

[28] The proceeding was ultimately dismissed by the Tribunal on those bases.

The grounds and nature of the appeal

[29] The appellant has filed a Notice of Appeal from the decision of the Tribunal. The grounds of appeal pressed are:

(1) The Tribunal erred by:

(a) finding that the decisions to transfer (and not to transfer) the appellant between the ASYDC and the DDYDC were specifically authorised by s 168A of the *Youth Justice Act* and so were exempt from the operation of the *Anti-Discrimination Act* by s 53 of that Act;

13 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [93]-[95].

(b) failing to find that the effect of s 153(2)(f) of the *Youth Justice Act*[14] is that conduct amounting to unlawful discrimination under the *Anti-Discrimination Act* is not specifically authorised by the *Youth Justice Act*; and

(c) consequently, failing to find that s 53 of the *Anti-Discrimination Act* did not apply to the conduct complained of by reason of it being unlawful discrimination.

(2) The Tribunal erred by finding that the transfer and detention of the appellant between the ASYDC and the DDYDC were not in the 'area of activity' of 'services' or 'facilities' (or both) for the purposes of s 28 of the *Anti-Discrimination Act*.

(3) The Tribunal erred in finding in the alternative that any failure to accommodate the appellant's special needs was reasonable. Specifically:

(a) the Tribunal failed to have regard to the factors prescribed by s 24(3) of the *Anti-Discrimination Act*; and

(b) the Tribunal failed to have regard to the unreasonableness of the first respondent's use of the Centre Cycle Classification System to justify its refusal to transfer the appellant back to the ASYDC.

14 That provision requires that the superintendent of a detention centre must not take 'any kind of unlawful discriminatory treatment', and must take reasonable steps to ensure that the staff of the detention centre also do not take prohibited action of that type.

(4) The Tribunal erred in finding that the respondent did not fail to accommodate the appellant's special needs when the appellant was in the ASYDC from 2018 until on or around 28 October 2020, specifically:

(a) the Tribunal erred in finding that the respondent did not fail to follow the appellant's positive behaviour support plans; and

(b) the Tribunal erred in finding that the respondent did not fail to accommodate the appellant's special needs by requiring that the appellant comply with the Centre Cycle Classification System.

[30] Section 106 of the *Anti-Discrimination Act* provides that an appeal to the Supreme Court from a decision of the Tribunal may be on a question of law or fact or law and fact. The relief sought by the appellant pursuant to s 107 of the *Anti-Discrimination Act* is that the appeal be allowed and the decision of the Tribunal be quashed and remitted to the Tribunal differently constituted for rehearing according to law.

[31] Although the appeal is not restricted to errors of law, it is not a retrial of the issues between the parties, as if the case was being heard the first time. Even in this class of appeal, the appellant must demonstrate error in the sense that the decision challenge was plainly wrong in law and/or fact, or unjust because of a serious procedural or other irregularity in the

proceedings below.[15] Where a ground of appeal seeks to challenge the findings of fact made by the tribunal below, the appeal court will intervene only rarely and will not interfere with a finding of fact merely because it takes a different view of the matter. This reticence applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

Whether the decisions to transfer were exempt

[32] As already extracted above:

(a) s 53 of the *Anti-Discrimination Act* provides in effect that acts necessary to comply with or specifically authorised by other Northern Territory legislation are exempt from or not contrary to the provisions of the *Anti-Discrimination Act*;

(b) s 168A of the *Youth Justice Act* empowers the superintendent of a detention centre 'to determine, as the superintendent considers appropriate, that a detainee held in a detention centre is to be transferred to another detention centre'; and

(c) s 153(2)(f) of the *Youth Justice Act* provides that the superintendent of a detention centre must not take 'any kind of unlawful discriminatory treatment', and must take reasonable steps to ensure that the staff of the detention centre also do not take prohibited action of that type.

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15 See, for example, *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194 at 203-204.

[33] There was and is no contention by the first respondent that the decisions to transfer (and not transfer) were necessary to comply with some specific legislative provision. The operative question is whether they were authorised by legislation, and specifically s 168A of the *Youth Justice Act*. It is apparent from both a plain reading of s 153(2)(f) of the *Youth Justice Act*, and the legislative purpose described in the Explanatory Statement to the amending legislation which introduced the provision,[16] that 'unlawful discriminatory treatment' includes any action which would be unlawful under the *Anti-Discrimination Act*.

[34] The nub of the appellant's complaint in this first ground of appeal is that the Tribunal found that the transfer decisions were authorised by s 168A of the *Youth Justice Act* and therefore exempt by operation of s 53 of the *Anti-Discrimination Act*, without considering whether those decisions and the consequences which followed amounted to unlawful discrimination under the *Anti-Discrimination Act*. There is no doubt that the Tribunal did have regard to s 153(2)(f) of the *Youth Justice Act* in reaching its conclusion. The Reasons for Decision relevantly state:

> Nevertheless, while I accept the Respondent's submission that section 168A allows the superintendent a broad discretion to transfer a detainee to another detention centre, the discretion is not at large. The decision to transfer cannot be made capriciously. Any decision to transfer must genuinely be considered appropriate by the Superintendent. In circumstances where a decision to transfer or not was clearly without substance or was based on inappropriate considerations, for example discriminatory grounds, section 168A is unlikely to provide an

16 *Justice Legislation Amendment Act 2018*, Serial No 48, Explanatory Statement, p 4.

> exemption under section 53. Further, I note that section 153 of the [*Youth Justice Act*] prohibits "any kind of unlawful discrimination" by the superintendent or staff.[17]

[35] It may be accepted that the relevant test for the operation of the exemption, including whether or not the action in question involved unlawful discrimination, is not fully comprehended by enquiring whether the superintendent reasonably considered a transfer to be appropriate.[18] It may also be accepted that the exemption in relation to acts authorised by legislation operates only in respect of a 'specific obligation directly imposed by an actual provision of another Act',[19] rather than to all acts referable to or consequent upon the exercise of a general statutory power such as a power of transfer. However, it is plain from a reading the Tribunal's Reasons for Decision as a whole that it also found there was no unlawful discrimination under the *Anti-Discrimination Act* in the form of any failure to accommodate a special need as a consequence of not allowing the appellant to remain in ASYDC or as a consequence of refusing to transfer the appellant from Darwin back to the ASYDC.

[36] The challenge to the Tribunal's decision on this ground cannot be read or determined in isolation from the findings made by the Tribunal in relation to the asserted failures to accommodate a special need. The avenue of appeal

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17 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [28].

18 Cf *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [29].

19 See *Waters v Public Transport Corporation* (1991) 173 CLR 349 at [1], [20]-[21], [51]-[55]. See also *Malaxetxebarria v State of Queensland* [2007] QCA 132 at [53], [121].

does not lie against the reasons for the decision of the Tribunal. It permits an appeal against the correctness of the order or judgment made by the Tribunal, although that challenge may involve attacking the reasons given for the order or judgment.[20] The order subject to appeal is that the appellant's proceeding alleging breaches of the *Anti-Discrimination Act* is dismissed. As the first respondent submits, for the appellant to have that decision and order quashed, and to have a different decision or order substituted or the matter remitted to the Tribunal, he would also need to establish that the Tribunal was wrong in finding both that the transfers did not fall within the area of activity of 'services and facilities' and that the decisions to transfer the appellant to Darwin were reasonable.

Whether transfer and detention in the area of 'services' or 'facilities'

[37] The second ground of appeal is that the Tribunal erred by finding that the transfer and detention of the appellant between the ASYDC and the DDYDC was not in the 'area of activity' of 'services' or 'facilities' (or both) for the purposes of s 28 of the *Anti-Discrimination Act*. As described above, the Tribunal found that the decision to transfer the appellant was not 'conduct in the areas of … services' because it was directed to the operational needs of the detention centre, rather than for the appellant's benefit; and that conduct undertaken within the physical structure of a facility is only properly characterised as 'conduct in the areas of … facilities' where it involves some form of supply, rather than conduct related in some sense to a building

20 See, in relation to an avenue of appeal of similar scope under s 51 of the *Supreme Court Act 1979* (NT), *Lawrie v Lawler* [2016] NTCA 3 at [49].

or complex of buildings, and for which there is also some element of benefit flowing to the appellant.[21]

[38] The term 'services' is defined non-exhaustively in s 4 of the *Anti-Discrimination Act* to include:

> (a) access to or use of any land, place, vehicle or facility that members of the public are, or a section of the public is, permitted to use; and
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> (b) banking or the supply of loans, finance, credit guarantees, hire purchase schemes or any other type of financial accommodation; and
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> (c) services connected with the selling or leasing of an interest in land; and
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> (d) recreation, including entertainment, sports, tourism and the arts; and
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> (e) the supply of refreshments; and
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> (f) services connected with transport and travel; and
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> (g) services of any profession, occupation, trade or business; and
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> (h) services provided by a government, statutory corporation, a company or other body corporate in which a government has a controlling interest, or a local government council;
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> but does not include insurance and superannuation.

[39] That definition is broadly consistent with the definitions of the term 'services' found in anti-discrimination legislation in other Australian jurisdictions. Although the term is broadly defined, and even though anti-discrimination legislation is to be interpreted beneficially, not every governmental activity is capable of characterisation as a 'service'. By way of example, the High Court has determined that the consideration of planning applications and the exercise of planning powers is of a

21 With reference to *The Applicant v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 25 July 2022, 2021-01516-CT) at [26]-[28].

deliberative and quasi-judicial nature, rather than a service.[22] Even those members of the majority who took a broader view of the term 'services' concluded that the exercise of a discretion to withhold planning approval did not constitute a failure to provide services.[23] On the other hand, governmental functions such as the protection of persons in police custody from injury or death,[24] administrative activities in relation to jury service,[25] determining who may participate in council parades[26] and the assessment of foster parent applications,[27] have all been held to constitute 'services' in the relevant sense. The decisions in relation to the management of custodial facilities come from various levels of the court and tribunal hierarchy, and are not always consistent in approach or result.

[40] In drawing its conclusion, the Tribunal relied on the decision in *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308,[28] in which it was said that the touchstone of 'service' is whether the act is helpful or beneficial to the relevant class of persons to which the complainant belongs. The Administrative Decisions Tribunal was in that case considering a claim that a prison policy providing that unlawful non-citizens could not progress beyond a certain security level, which gave rise

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22 *IW v Perth City* (1997) 191 CLR 1 at 15-18.

23 *IW v Perth City* (1997) 191 CLR 1 at 23, 44.

24 *Commissioner of Police, NSW Police Service v Estate of Edward John Russell* [2001] NSWSC 745.

25 *Druett v New South Wales* (Unreported, HREOC, 17 April 2000).

26 *Falun Dafa Assn of Victoria Inc v Melbourne CC [No 1]* (2003) 20 VAR 394.

27 *Director-General of Department of Community Services v MM* [2003] NSWSC 1241.

28 *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308.

to various adverse consequences in terms of early release, was both direct and indirect discrimination on the ground of race in relation to the provision of services. The definition of the term 'services' in the New South Wales legislation was in similar terms to the definition of that term in the *Anti-Discrimination Act*, and included 'services provided by a … public authority'.

[41] Reference was made in *Contreras-Ortiz* to the various decisions in the federal jurisdiction in *Rainsford v State of Victoria*. The relevant question was whether the provision of accommodation and prison-related transport by the body politic and its prison authority constituted a 'service' within the meaning of the Commonwealth disability discrimination legislation. The applicant asserted that he was discriminated against in respect of a back injury because he was required to travel in prison transportation vans for extended periods without the opportunity to properly stretch and exercise his back, and because during one period of accommodation in a special prison unit he was also not provided with adequate opportunity to stretch and exercise his back.

[42] The Federal Magistrates Court determined that the incarceration, accommodation and transportation of prisoners involved the exercise of the coercive powers of the state pursuant to a statutory obligation, rather than the provision of a service.[29] The decision of the Federal Magistrates Court

29 *Rainsford v State of Victoria and Anor* (2004) 184 FLR 110 at [24].

was ultimately overturned by the Full Court of the Federal Court on other grounds. However, the Full Court did make the following observations *obiter dicta* concerning the characterisation of custodial activities as services:

> The question of whether an activity is a service for the purposes of s 24 of the [*Disability Discrimination Act*] is essentially a matter of characterisation. In discharging statutory duties and functions and in exercising statutory powers in the public interest, a body may also be engaged in the provision of services to particular individuals ... The Federal Magistrate erroneously relied on a distinction that he drew between the provision of services pursuant to a statutory discretion and "the situation ... where no discretionary element exists" ...
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> …
>
> In addition to the management and security of prisons" the purposes of the *Corrections Act 1986* (Vic) includes provision for the welfare of offenders. The custodial regime that governs prisoners under this Act is compatible with the provision of services to them ... In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the [*Disability Discrimination Act*] will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.[30]

[43] The matter was remitted by the Full Court to a single judge of the Federal Court. Justice Sundberg adopted the following formulation as a test of whether an act or activity could be characterised as services:

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30 *Rainsford v Victoria* (2005) 144 FCR 279 at [54]-[55].

> The question must be whether the act is helpful or beneficial to the relevant class of persons to which the person alleging discrimination belongs.[31]

[44] In the application of that test, Sundberg J concluded that prison transport and accommodation were fundamental integers of the prison system and an inherent part of incarceration which were not in either design or effect helpful or beneficial activity so far as prisoners were concerned. They were purely administrative and prison management matters which formed 'part and parcel of the statutory duty and cannot be described as the provision of service or services'.[32] Justice Sundberg qualified and explicated those findings in the following terms:

> Attending to the welfare of prisoners is an important legal obligation placed on both respondents. This is all the more so given the vulnerabilities of prisoners who are unable to do much to control their circumstances within prisons. It is for this reason that I accept that certain facilities provided by the respondents to prisoners may constitute services for the purposes of the [*Disability Discrimination Act*]. However, for the reasons I have identified, I do not consider either of the postulated services to fit the definition in the [*Disability Discrimination Act*]. In addition, it is important not to focus only on the prisoner welfare purposes of the *Corrections Act* and the Prison Services Agreement. The first purpose listed in the *Corrections Act* is "to provide for the establishment management and security of prisons and the welfare of prisoners": s 1(a). This purpose demonstrates the balancing act that prison authorities must perform. Their obligations are not just to the welfare of prisoners but also to the general public and prison staff through providing adequate security measures, to other prisoners by ensuring that prisoners do not harm one another, and to the general good governance of the prison. To suggest that transport of prisoners or cell accommodation is a service to prisoners is to ignore the fact that they are functions performed in order to comply with the

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31 *Rainsford v Victoria* [2007] FCA 1059 at [74].

32 *Rainsford v Victoria* [2007] FCA 1059 at [77]-[78], citing *Secretary of the Department of Justice and Industrial Relations v Anti-Discrimination Commissioner* (2003) 11 Tas R 324 at 341.

> sometimes competing obligations of prison management to its prisoners, its staff, the public and the good governance of the prison.[33]

[45] Justice Sundberg went on to find that even if transport and accommodation were properly characterised as 'services', the applicant had not been required to comply with a requirement or condition with which he was unable to comply by reason of his disability. The condition on transportation was that a prisoner claiming to be unfit to take the regular transport service for medical reasons was required to obtain a medical certificate stating that alternative transport arrangements should be made. The applicant had not been refused certification by the prison medical authorities. To the extent any condition on accommodation could be formulated, it was that if a prisoner is medically unfit for a particular type of cell he or she is required to demonstrate that to prison authorities. There was no evidence that the applicant had sought a medical certificate in relation to that matter.

[46] The Full Court of the Federal Court dismissed an appeal against Justice Sundberg's findings that the applicant had not relevantly been required to comply with a requirement or condition by reason of his disability. Although it was unnecessary for the Full Court to consider the finding in relation to 'services', the Court did say:

> We observe that, although the meaning of "service" is not simple to resolve, and the matter was not argued in depth, we see some strength

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33 *Rainsford v Victoria* [2007] FCA 1059 at [80].

> in the view that the provision of transport and accommodation even in prison, may amount to a service or facility.[34]

[47] It is unclear whether the Full Court was there questioning the correctness of a test for 'services' which required the act in question to be helpful or beneficial to the relevant class of persons, or questioning whether integers required for the management and security of prisons were excluded from characterisation as 'services' for the purposes of anti-discrimination legislation. The Tribunal in *Contreras-Ortiz* clearly took it to be the latter, because it found that while a prison authority discharging statutory duties and functions might also be engaged in the provision of services, 'the touchstone for a service is whether the act is helpful or beneficial to the relevant class of persons to which the person alleging discrimination belongs'.[35] The Tribunal in *Contreras-Ortiz* concluded on that basis that the process of assessing inmate access to forms of early and conditional release such as local leave permits and community service work were capable of being characterised as 'services'.

[48] Unlike 'services', the term 'facilities' is not defined in the *Anti-Discrimination Act*, although the rubric 'goods, services and facilities' is used in anti-discrimination legislation in some other Australian jurisdictions. However, there would not appear to be any authority dealing with the meaning of the term 'facilities' in this context. In his written

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34 *Rainsford v State of Victoria* [2008] FCAFC 31 at [9]. See also *Complainant v Western Australia* [1994] EOC 92-610 in which it was found that the State provides services to prisoners in relation to such matters as access to work, education and recreation.

35 *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308 at [115].

submissions at least, the appellant's principal focus under this ground of appeal is on the Tribunal's determination that the term 'facilities' in this context does not encompass a building or complex of buildings *per se*, and requires the conferral of some form of advantage or benefit on the class to which the appellant belongs.

[49] The requirement of advantage or benefit imported into the term 'services' derives originally from the reasons of Brennan CJ and McHugh J in *IW v City of Perth*, where their Honours referred to the dictionary definitions of the term, which included 'an act of helpful activity' and 'the providing or a provider of some accommodation required by the public'.[36] One common dictionary definition of the term 'facility' is not far removed from that notion of services. That is, 'an amenity or service which enables something to be done' and 'favourable conditions for the easy or easier performance of something, *esp* the physical means or equipment required in order to do something'. While it may be accepted that in more recent times the meanings accorded to the term 'facilities' have enlarged to include a building or complex of buildings designed for a specific purpose, the process of statutory construction requires the term to be interpreted having regard to its statutory context and purpose.

[50] Section 28 of the *Anti-Discrimination Act* prescribes its application to 'prohibited conduct in the areas of … goods, services and facilities'. The

36 *IW v Perth City* (1997) 191 CLR 1 at 11.

'prohibited conduct' asserted in this particular case is the contravention of a duty to accommodate a special need. However, all forms of 'prohibited conduct' created by the legislation, and the areas of activities in which those forms of conduct are proscribed, contemplate undertakings rather than the physical location in which those undertakings are performed. Apart from the descriptors used, so much is also apparent from the fact that the heading to Part 4 of the legislation is 'Areas of activities where discrimination prohibited'.[37]

[51] By way of illustration, the mere fact that something takes place in a school building or a building in which people are employed or a hotel does not mean that the conduct takes place in education, work or accommodation, as the case may be. Rather, the prohibited conduct complained of must be capable of characterisation as occurring in the activity of education, work or accommodation as the case may be. A refusal to provide a disabled student with reasonable access to an educational institution would *prima facie* be a failure to accommodate a special need to which the *Anti-Discrimination Act* applies. Although that result arises directly from the specific reference to 'education' as a relevant area of activity, this is not to say that the physical environment of a building could not be characterised as 'facilities' where, for example, the building is open to the public and used to provide amenities like education, transportation, communications and medical services. It is also the case that the provision of amenities and necessities to inmates in the

37 The heading to a Part of an Act forms part of the Act for the purposes of statutory interpretation: see *Interpretation Act 1978* (NT), s 55(1).

operation of a detention centre might also be properly characterised as conduct in the areas of 'services and facilities', but that result derives from the provision of amenities and necessities rather than the fact that a detention centre is ordinarily constituted by a building or complex of buildings.

[52] If the appellant's construction of the term 'facilities' was taken to its logical conclusion, the *Anti-Discrimination Act* would have application to every building regardless of its character as public or private and regardless of the activities undertaken in that building. That would clearly go beyond the policy underlying the legislation and the objects described in s 3 of the *Anti-Discrimination Act*. To continue with the example from the preceding paragraph, the fact that a building does not have disabled access would not of itself constitute prohibited conduct in the area of 'facilities'. It would be necessary to establish that the lack of disabled access constituted a failure to accommodate a special need, or some other form of prohibited conduct, in an area of activity prescribed by s 28 of the *Anti-Discrimination Act*. That result might arise from the nature of the amenities provided in that building, or because the matter falls within a specified area of activity. It may be noted in that respect that the term 'services' is defined in s 4 of the *Anti-Discrimination Act* to include 'access to or use of any land, place, vehicle or facility that members of the public are, or a section of the public is, permitted to use'.

[53] That result accords with the syntactical presumption that the meaning of a word is to be derived from its context. It is apt to lead to a distorted result if the individual words in a compound phrase are severed from that phrase, each defined by reference to a dictionary meaning divorced from the context in which it appears, and then put back together.[38] As Spigelman CJ observed in *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388 at [13]:

> This general principle of the law of interpretation that the meaning of a word can be gathered from its associated words – *noscitur a sociis* – has a number of specific sub-principles with respect to the immediate textual context…. The relevant sub-principle for the present case is the maximum propounded by Lord Bacon: *copulatio verborum indicat acceptationem in eodem sensu* – the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word 'stands with' other words it 'must mean something analogous to them'. (*Evans v Stevens* (1791) 4 TR 224; 100 TR 986 at 987.)[39]

[54] By the application of that presumption, a word of wide possible connotation will be delineated and limited by the context in which it appears. That is particularly so where a word has different shades of meaning.[40] In this particular context, the accompanying words 'goods' and 'services' refer to things supplied and received rather than to a building or infrastructure. When construed in that context, the term 'facilities' is better understood in the sense of 'an amenity or service which enables something to be done' and 'the physical means or equipment required in order to do something'.

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38 See, for example, *Bourne v Norwich Crematorium Ltd* [1967] 1 WLR 691 at 696; *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595 at 599-600.

39 *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388 at [13].

40 See generally DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (2014) 8th ed, LexisNexis at [4.24].

[55] That construction receives support from the fact that s 41 of the *Anti-Discrimination Act* specifies the prohibition on discrimination in the area of goods, services and facilities by reference to failing or refusing to supply or receive facilities; the imposition of terms and conditions on the supply or receipt of facilities; the manner in which facilities are supplied or received; or treating a person less favourably in connection with the supply or receipt of facilities. That specification of discriminatory conduct is not compatible with the conception of facilities as buildings *per se*, as opposed to the provision of amenities. Although s 41 of the *Anti-Discrimination Act* is concerned with discrimination rather than specifically with the duty to accommodate a special need, it is a fundamental rule of construction that the same meaning should be accorded to the term 'facilities', and the compound phrase 'goods, services and facilities', wherever it appears in the statute.

[56] Those considerations may go some way to explaining why, in the proceedings before the Tribunal, the appellant put its case on the basis that the relevant 'facility' was the process of determining and effectuating transfer, rather than the detention centre itself. In this appeal as well, the appellant propounded the adjunct argument that a decision to transfer or not transfer him to a different custodial institution, and the act of transfer between custodial institutions, was conduct in the area of facilities. This illustrates the well-accepted requirement that the facilities (or goods or services) must be identified with sufficient precision to relate them to the facts of the case. The facilities asserted must be identified in sufficiently

concrete terms to enable a determination as to, first, whether they are in fact 'facilities' in the relevant sense and, secondly, whether there has been a failure to accommodate a special need in relation to those facilities.[41]

[57] It may readily be accepted that in discharging statutory duties and functions and exercising powers with respect to the management and security of youth detention centres, the first respondent and its officers may in some activities be providing services and facilities to the detainees. That derives from circumstances in which detainees are unable to provide for their own requirements in respect of matters such as food, accommodation, education and medical treatment, and are dependent on the first respondent for the provision of those aspects of daily living. However, on either characterisation put forward by the appellant, the transfer of, or refusal to transfer, an inmate between different detention centres to maintain order and ensure the safe custody and protection of persons within the precincts of those detention centres is not properly characterised as conduct in the area of activity of 'goods, services and facilities' as that phrase is properly understood; although the manner in which food, accommodation, education and medical treatment are provided in a detention centre may attract that characterisation.

[58] It is unnecessary for these purposes to decide whether there is also a requirement that the amenities provided be helpful or beneficial in order to

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41 See by analogy with the identification of 'services' referred to in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 404-5.

qualify as 'facilities' within the meaning of the legislation, as the authorities suggest is the case in relation to 'services' in this context. However, it would also seem inherent in the notion of the supply and receipt of goods and facilities that it is something which has beneficial effect,[42] just as the supply and receipt of 'services' connotes an element of benefit. It is that very element of benefit which characterises government activity in relation to the provision of goods, services and facilities, and which in the private sphere creates a market for goods, services and facilities. It is that element of benefit which, in turn, underlies the legislative policy to proscribe discrimination and prohibit other conduct in that area of activity.

[59] Again, however, even if the Tribunal was wrong in finding that the transfer decisions did not fall within the area of activity of 'services and facilities', in order to have that decision and order quashed, and a different decision or order substituted or the matter remitted to the Tribunal, the appellant would also need to establish that the Tribunal was wrong in finding that the first respondent reasonably provided adequate or appropriate provision to accommodate the special need.

Whether any failure to accommodate special need was reasonable

[60] The third ground of appeal asserts that the Tribunal erred in finding that any failure to accommodate the appellant's special needs was reasonable. That error is said to arise from the fact that the Tribunal failed to have regard to

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42 Cf the submission on behalf of the Anti-Discrimination Commissioner to the effect that the application of the requirement of benefit to the supply and receipt of goods would produce an absurd result.

the factors prescribed by s 24(3) of the *Anti-Discrimination Act*, and failed to have regard to the unreasonableness of the first respondent's use of the Centre Cycle Classification System to justify its refusal to transfer the appellant back to the ASYDC.

[61] As extracted above, s 24(3) of the *Anti-Discrimination Act* provides that the determination whether a person reasonably provided for the special need of another person depends on:

(a) all the relevant circumstances of the case;

(b) the nature of the special need;

(c) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;

(d) the financial circumstances of the person;

(e) the disruption that accommodating the special need may cause; and

(f) the nature of any benefit or detriment to all persons concerned.

[62] The relevant inquiry under the terms of that provision is not whether the failure to accommodate a special need was reasonable. It is whether such measures as were taken by the first respondent reasonably accommodated the appellant's special need in the sense of acting in a way that reasonably provided adequate or appropriate provision to accommodate the special need. The Tribunal's summary of finding in that respect was as follows:

> Section 24 of the [*Anti-Discrimination Act*] requires a consideration of reasonableness. Even if I was to find that [the appellant's] attributes gave rise to special needs which were not accommodated appropriately,

> adequately or at all, I would have held that the decisions to transfer [the appellant] and keep him detained in Darwin were reasonable.
>
> As has already been addressed, there is ample evidence that [the appellant] is a particularly difficult detainee to manage and needs to be in the higher security centre. Despite his own desire to be in Alice Springs and despite the adverse health impacts on him, I find that the transfer was reasonable in terms of the capacity of the facilities. The Superintendent clearly had a need to weigh [the appellant's] interests with those of other detainees and staff in the context of the respective capacity of each detention centre.
>
> The act of transfer is made more reasonable by the [first respondent's] measures to accommodate [the appellant's] needs while he was in Darwin which included:
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> - Face-to-face visits from through care manager Andrew Lockyer. Mr Lockyer is flown to Darwin two monthly at the [first respondent's] expense;
> - Additional video-links to Mr Lockyer as needed;
> - Monthly video links with child protection case worker;
> - Attempts to arrange in-person visits and/or video links with family noting that family have a poor history of visiting [the appellant];
> - Visiting Aboriginal mentors from Central Australia every month;
> - Implementation in DDYDC of a [positive behaviour support plan].[43]

[63] It is clear from this summary that the Tribunal had regard to the factors in s 24 of the *Anti-Discrimination Act*, and concluded that the first respondent had reasonably accommodated the appellant's special need despite the transfer to Darwin. Although those factors and the related considerations were not individually traversed in that summary determination, they were, to the extent necessary, addressed at some length in the body of the reasons for decision.

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43 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [93]-[95].

[64] In the particular circumstances of this case, the cost of accommodating the special need and the financial circumstances of the appellant were not material considerations. There was no suggestion that the decision to transfer the appellant to Darwin was made on financial grounds, and no suggestion that the appellant might have been able to make provision for his needs from his own resources. The appellant was an inmate in a custodial facility whose transfer to Darwin was made for security reasons. In those circumstances, the relevant considerations were the nature of the special need, the circumstances of the appellant's detention in Darwin, the number of people who would benefit from or be disadvantaged by a transfer back to Alice Springs, the disruption that accommodation would cause, and the nature of any benefit or detriment to all persons concerned.

[65] The Tribunal accepted that the appellant had the relevant attribute of 'impairment' (now 'disability') within the meaning of s 19 of the *Anti-Discrimination Act*. The attribute of impairment arose from the appellant's various diagnosed disorders and the associated intellectual disability.[44] There is no dispute about that characterisation. The Tribunal determined that the appellant had not established that he had a relevant special need because of the attribute of 'religious belief or activity',[45] and that finding was not challenged in the submissions on appeal.

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44 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [42].

45 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [43]-[45].

[66] So far as the nature of the special need was concerned, the Tribunal accepted that the appellant had special needs arising from his impairment, and catalogued the nature of the requisite accommodations asserted by the appellant to include 'continuity of care … available to him only at ASYDC'; 'face to face support from his family and health and social workers'; 'being close to his country, culture, family and Andrew Lockley, his Throughcare case manager'; 'implementation of appropriate behaviour management approaches'; and 'consistent and uniform implementation of social support plans [which] can only be achieved in Alice Springs'.[46]

[67] The term 'reasonable' and its various grammatical parts should be given their ordinary meaning for these purposes.[47] As s 24(3) of the *Anti-Discrimination Act* makes express, that assessment is to be conducted having regard to all the circumstances of the case. Many of the considerations which the authorities have identified as relevant to that assessment in this general context[48] have also been specifically incorporated into s 24(3). The meaning of 'reasonableness' was considered by the Federal Court in *CEO v Clarke*.[49] Although that consideration was directed to the reasonableness of a requirement or condition under s 6 of the Commonwealth *Disability Discrimination Act*, some of the interpretive principles described are of more general application.

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46 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [47]-[48].

47 See *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 410-11.

48 See, for example, *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 383-4, 395.

49 *CEO v Clarke* (2004) 138 FCR 121 at [115].

[68] First, the test of reasonableness is an objective one.[50] In this particular context, that requires the tribunal to weigh the nature and extent of the special need against the accommodations made for it. Second, the subjective preferences of the aggrieved person are not determinative, but they may be relevant in assessing the question of whether or not an accommodation is reasonable.[51] Third, the test of reasonableness is less demanding than one of necessity, but more demanding than a test of mere convenience.[52] Fourth, the fact that there may be reasonable alternatives – even more reasonable alternatives – to accommodate the special needs of the aggrieved person does not of itself establish that reasonable accommodations have not been made.[53]

[69] In that assessment of reasonableness, the Tribunal accepted that the appellant had special needs for therapeutic care and case management, and that continuity in the provision of those services may well be optimal, but concluded that the appellant's relocation to Darwin, and the refusal to transfer him back to Alice Springs, did not amount to a failure to adequately or appropriately accommodate the relevant special need. In essence, that was a finding that the circumstances of the appellant's detention in Darwin did adequately and appropriately accommodate the appellant's special needs.

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50 See *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 383, 395-6; *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263.

51 *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74 at 82-3.

52 *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263.

53 *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 150 ALR 1 at 88; *State of Victoria v Schou* [2004] VSCA 71 at [26].

That finding was predicated on the Tribunal's opinion that the necessary accommodations did not extend to the assignment of any particular individual as the appellant's caseworker, or to the appellant's maintenance in a particular location. To the extent those matters remain relevant considerations, the Tribunal found that the first respondent had taken steps to maintain the continuity of the appellant's engagement with Mr Lockley during the periods of transfer to Darwin, and had established therapeutic supports at the DDYDC.[54] Although those findings and observations were directed to the question of whether the appellant had established a failure to accommodate a special need, they were equally informative of the question whether the first respondent had in any event reasonably accommodated the appellant's special needs.

[70] The most obvious and overarching contextual circumstance in the assessment of reasonableness was that the appellant was subject to an order of detention by a court of competent jurisdiction requiring him to be detained in a custodial institution, and that the executive had various duties, functions and powers with respect to the management and security of youth detention centres. So far as the considerations of benefit, disadvantage, disruption and detriment were concerned, the Tribunal had already recounted and accepted the evidence concerning the matters precipitating the

54 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [50]-[51]. Those supports were also repeated and expressly listed at [95].

appellant's various transfers to Darwin.[55] Those matters included the extremely high number of recorded incidents involving the appellant while in detention. Those incidents included serious physical assaults on staff members and other inmates, participation in riots, property damage, attempted escapes, and uncontrolled and threatening behaviours towards staff and other inmates.[56] The serious nature of that behaviour was manifest from the evidence. By way of example, the General Manager of Youth Justice and Emergency Management described an incident which led to one of the transfer decisions in the following terms:

> On 26 August 2018, [the appellant] was transferred from ASYDC to DDYDC in consequence of a serious physical assault in the common room at ASYDC. On 25 August 2018, [the appellant] joined in a physical confrontation between another young person and youth justice staff. [The appellant], who was not involved in the incident, king hit YJO [name redacted]. As a result of the assault by [the appellant], YJO [name redacted] was hospitalised. YJO [Name redacted] sustained a cognitive brain injury and is now unable to work for [the first respondent].
>
> [The appellant's] behaviour on this occasion was extremely dangerous, and followed [the appellant's] involvement in 20 incidents. [The appellant's] pattern of behaviour included six physical assaults on members of staff, two physical assaults on other young people in detention, four instances of property damage, and one escape from ASYDC. [The appellant] could no longer be accommodated at ASYDC due to the risk posed to the safety of staff and young people within the centre.[57]

[71] It is clear that the first respondent made efforts to accommodate the appellant in the Alice Springs facility whenever possible. The evidence

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55 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [31]-[33].

56 Appeal Book (**AB**) 439-441, 445.

57 AB 439.

established that all young people who were transferred from ASYDC to DDYDC based on safety and security risks were regularly assessed by the senior leadership team to determine whether and when it was appropriate to transfer that young person back to Alice Springs.[58] Over the course of 2018, 2019 and 2020 there were a number of transfers from Alice Springs to Darwin and back again after the appellant's behaviours were considered to have stabilised. The General Manager described the reasons for the decision to transfer the appellant from Alice Springs to Darwin on 27 October 2020 in the following terms:

> On 27 October 2020, [the appellant] was transferred from ASYDC to DDYDC. The transfer occurred in consequence of [the appellant's] behaviour at ASYDC. [The appellant] was involved in six serious incidents, culminating in the physical assault of another young person with four peers. [The appellant] could no longer be accommodated at ASYDC due to the risk posed to the safety of staff and young people within the centre.[59]

[72] The evidence clearly established that the appellant's behaviours in the low to medium security environment of the ASYDC was detrimental to both members of staff and other inmates;[60] that the appellant's behaviours were disruptive to the operations of the detention centre, including the delivery of programs for other inmates;[61] and that the appellant's behaviours were able to be accommodated without the same levels of attendant disruption and

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58 AB 170, 796.

59 AB 440-441.

60 AB 448, 450.

61 AB 450.

detriment within the high security environment at the DDYDC.[62] It was on those bases that the DDYDC was determined to be the more appropriate detention centre to accommodate the appellant, and the appellant's request for transfer back to the ASYDC was refused.[63]

[73] The Tribunal found that it was reasonable, having regard to the obvious disadvantages, disruptions and detriments arising from the appellant's continued detention in the lower security Alice Springs detention centre, for the Superintendent to transfer and hold the appellant in the higher security detention centre in Darwin. That finding must be read in conjunction with the Tribunal's other findings that the treatment and accommodations available in the Darwin detention centre reasonably catered to the appellant's special needs. Those accommodations included services, treatment and support directed to managing the appellant's mental state and the attendant risks, which included in the medical evidence self-harm and suicide as a possible outcome of his psychological condition.

[74] The requirement to consider all the relevant circumstances of the case included the requirement to take into account the challenges presented by the appellant's violent and disruptive behaviours. The fact that those behaviours were the consequence of the appellant's various disabilities and impairments did not exclude them from an assessment of the reasonableness of the Superintendent's determinations in the exercise of the management

62 AB 433-437.

63 AB 798-799.

prerogative. An analogous question arose in *Purvis v New South Wales*, in which a majority of the High Court held that a comparison of how the discriminator treated or would have treated another person without the aggrieved person's disability, in circumstances that were not materially different, required that comparison to assume that the other person also manifested violent behaviours.[64] That was so notwithstanding that the aggrieved person's violent behaviours were entirely attributable to the disability which constituted the relevant attribute. On that analysis, it was determined that the aggrieved person had not been treated disadvantageously by his expulsion from an educational facility.

[75] While detention in Darwin may not have been the appellant's subjective preference, there was no error in the Tribunal's finding that the accommodations which were made for the appellant in Darwin were adequate and appropriate to provide for the appellant's special need when weighed against the potential detriment to others that may have resulted from his detention in a lower security facility. The Superintendent's determination in that respect was not one of mere convenience. It is not enough to establish material error in these circumstances that the appellant's mental state and sense of well-being may in some respects have been enhanced by his return to Alice Springs. The Tribunal accepted that placement in Alice Springs may have been 'optimal' in conformity with the appellant's subjective preference and the medical opinion. However, any

64 *Purvis v New South Wales* (2003) 217 CLR 92 at [224]-[225].

approach which adopted the appellant's interests as the sole or determinative factor in the assessment of reasonableness would disregard the interests of other people who would have been disadvantaged, the detriment to other people concerned and any associated disruption.

[76] The second limb of this ground of appeal relates specifically to the assertion of a failure on the part of the Tribunal to have regard to the unreasonableness of the first respondent's use of the Centre Cycle Classification System to justify its refusal to transfer the appellant back to the ASYDC. The evidence established that the system was employed by the first respondent to encourage inmates of detention facilities to improve their behaviours. In the appellant's case, his suitability for transfer back to Alice Springs was contingent in part on achieving a lower security classification in accordance with the system.[65] Under that system, the appellant's security risk rating had fluctuated between high and extreme since 2018, which was beyond the low to medium security rating of the ASYDC.[66]

[77] It is both unsurprising and unremarkable that the mechanism used to determine whether a detainee's safety and security risk had been ameliorated to a level which would allow transfer back to a lower security facility would focus on whether the detainee in question had been involved in incidents giving rise to safety and security concerns. The classification process was described by the Superintendent of the DDYDC in the following terms:

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65 AB 171, 803-805.

66 AB 448-450, 798-799.

> Each Incident Report filed for the fortnightly period is considered by the Centre Cycle Review Committee. Depending on the severity of the incident (Level 1, 2 or 3), they have different consequences for the relevant young person's classification. For example, Level 1 and 2 incidents (such as serious disturbances and assaults on young people and youth justice staff) result in an immediate demotion to "Standard" status, subject to approval from myself or the Executive Director of Youth Justice. Before approving such a demotion, I consider whether the incident has been appropriately categorised as Level 1 or 2. That process may involve me interviewing the staff member, and the young person. I have on some occasions re-classified an incident based on my appreciation of what occurred and the level of severity.[67]

[78] The Tribunal's reasons for decision give some relatively detailed consideration to the complaints made in relation to the use of the Centre Cycle Classification System.[68] That consideration took into account evidence from the Danila Dilba Health Service that inmates with cognitive, neurological, psychological and/or other disabilities were unable to comply with a model which required a continuing demonstration of positive behaviours, and the avoidance of poor behaviours, in order to achieve a lower security classification.

[79] That criticism does nothing more than identify the fact that inmates incapable of controlling disruptive, threatening or violent behaviours will attract a higher security classification – even allowing for the fact that the lack of capacity is referable to the relevant impairment or disability. As *Purvis* establishes by analogy, those disruptive, threatening or violent behaviours are still properly taken into account as circumstances relevant to

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67 AB 171.

68 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [69]-[74].

the assessment. The use of a program of that nature does not of itself establish a failure on the part of the first respondent to act in a way that reasonably provided adequate or appropriate provision to accommodate the appellant's special need. When distilled to its essence, the appellant's argument in this respect is that a transfer back to Alice Springs was the only manner in which the appellant's special need could be reasonably accommodated. That contention should be rejected.

[80] The notion of what is reasonable in any given set of circumstances is one of the most commonly contested concepts in the law generally, and in the application of statutory tests specifically. It will mean different things to different people. However, the general principle is that conduct, including the exercise of a statutory or administrative function, will not be unreasonable if a reasonable person standing in the shoes of the functionary would or could have made the decision. That is so even allowing that the assessment of reasonableness in this context must also take into account the perspective of the aggrieved person.

[81] The balancing exercise which had been undertaken in determining what reasonable accommodations should be made to accommodate the appellant's special need was evident in the evidence given by the Superintendent of the DDYDC. That evidence was that the relevant youth detention policy required him to take into account the health and well-being of both an individual detainee and everyone else working and living

within the relevant detention centre, together with matters of safety and secure custody. In making that assessment, the Superintendent was aware of the medical opinion that there had been a deterioration in the appellant's mental health while in Darwin. However, given the behaviours that the appellant was manifesting it was not safe to put him on an aeroplane back to Alice Springs because of threats he had made, previous attempts he had made to compromise transfer flights and the general risks to safety and security he presented. The conclusion was that the risk of transfer back to Alice Springs was too high notwithstanding the medical advice in relation to the deterioration in the appellant's mental state.[69]

[82] Having regard to all the circumstances of this case and the considerations stipulated in s 24(3) of the *Anti-Discrimination Act*, I am unable to conclude that the Tribunal erred in finding in relation to the appellant's transfer from Alice Springs to Darwin, and his continued detention in Darwin, either that the first respondent did not fail to reasonably accommodate a special need that the appellant had because of his impairment or, to put it in the terms of the statutory language, that the first respondent made adequate or appropriate provision to accommodate the appellant's special need. Accordingly, this ground of appeal should be dismissed.

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69 AB 799.

Whether failure to accommodate special need in ASYDC

[83] The fourth and final ground of appeal is that the Tribunal erred in finding that the first respondent did not fail to accommodate the appellant's special needs when the appellant was in the ASYDC from 2018 until on or around 28 October 2020. The two limbs of this ground of appeal are that the first respondent failed to follow the appellant's positive behaviour support plans, and that the first respondent failed to accommodate the appellant's special needs by requiring compliance with the Centre Cycle Classification System. This ground of appeal raises some of the same issues and principles already addressed in the context of the third ground of appeal, but in relation to the appellant's detention in Alice Springs culminating in the subsequent decision to transfer him to Darwin.

[84] During the Tribunal proceedings the appellant's complaint in this respect was directed to matters such as a failure to provide 'appropriate therapeutic and cultural interventions' and the failure to implement 'appropriate behaviour management approaches'. To the extent that the complaint descended into specifics, it was that the first respondent failed to consistently implement the appellant's positive behaviour support plan, and this had precipitated the incidents and behaviours which resulted in his transfer to Darwin. The evidence adduced and relied upon by the appellant in support of this ground comprised a letter from the Danila Dilba Health Service suggesting that the appellant's positive behaviour support plan had

not been updated to reflect his circumstances at the DDYDC;[70] and reports referable to incidents occurring at the DDYDC between November 2020 and March 2021.[71] I accept the first respondent's submission that the evidence relied upon by the appellant for those propositions does not sustain any finding that there was a failure to implement the appellant's positive behaviour support plan while he was detained in the ASYDC between 2018 and 27 October 2020.[72] Nor was there evidence on which to find in more general terms 'the lack of any therapeutic model of care in ASYDC'.[73]

[85] The evidence before the Tribunal established that the relevant positive behaviour support plan was adopted and implemented from September 2019.[74] The plan was a tool used by the staff of the ASYDC and the DDYDC to manage and respond to the appellant's behaviours, both positive and challenging.[75] The plan could not, and did not purport to, prescribe a precise response to every incident. Although the plan was followed as far as was practicable and in accordance with its general precepts, the response to each incident was dependent upon the particular circumstances. In circumstances where the appellant's behaviour escalated beyond the

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70 AB 74.

71 AB 501-656, 482-500.

72 See in particular the Tribunal's finding in *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [66] that the table of incidents created by and relied upon by the appellant did not address the period in question in Alice Springs when the historical failure to accommodate the appellant's special needs was said to have arisen..

73 See *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [68].

74 AB 235-238.

75 AB 421, 792.

circumstances and measures contemplated by the plan, staff of the detention centre adopted other means of response in accordance with their training.[76] The incident reports prepared in accordance with the plan required only a summary of the incident in question directed to recording the relevant behaviours, rather than being designed to record or otherwise capture the manner in which the requirements of the plan had been implemented.[77] Even if the evidence concerning the implementation of the appellant's positive behaviour support plan in Darwin could be extrapolated to the situation which obtained in Alice Springs, as the appellant suggests it should, that evidence did not sustain a finding that the positive behaviour support plan had not been implemented so far as was reasonably and practically possible.

[86] The evidence also fell short of establishing any failure to accommodate the appellant's special needs by requiring compliance with the Centre Cycle Classification System during his detention at the ASYDC. The criticism by the Danila Dilba Health Service referred to above, the Monitoring Report by the Children's Commissioner referred to in evidence, and the appellant's own account of his inability to maintain a low security status were all directed to the suitability of the system in its implementation at the DDYDC. To the extent that those criticisms of the system in its application in Darwin might also be attributed to its implementation in Alice Springs, the contingent submission that the implementation of appropriate

76 AB 792-793; *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [67].

77 AB 812; *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 27 July 2022) at [66].

interventions would have controlled the appellant's behaviours and obviated the need for transfer is entirely speculative. That is principally because there is no identification of what form of interventions would have been more appropriate in the circumstances of each incident, or any basis on which to conclude some other form of intervention would have obviated the need to transfer the appellant to a higher security facility.

[87] In its submissions on appeal, the appellant is highly critical of the Tribunal's observations that the appellant's previous conditional releases to his home community in order to place him in a therapeutic and culturally appropriate environment had not ameliorated his behaviours, and that the appellant had continued to engage in threatening, violent and criminal behaviours in his home communities.[78] It was in that context that the Tribunal described as 'fanciful' any suggestion that treatment modalities and behavioural plans might in their short-term application obviate the appellant's problematic behaviours.

[88] The appellant describes that reasoning as 'illogical, irrational and irrelevant', because it is said to conflate the appellant's problematic behaviours in detention with his offending outside youth detention. That criticism is expressly predicated on the assertion that the appellant's problematic behaviours in detention were caused by the first respondent's failure to follow his positive behaviour support plan. For the reasons I have

78 *Gibson v Northern Territory of Australia* (Northern Territory Civil and Administrative Tribunal, 25 July 2022, 2021-01301-CT) at [64].

attempted to describe, that assertion has not been made out. In any event, the proposition is entirely at odds with the evidence that the appellant's problematic behaviours were the consequence of the complex neurodevelopmental, mental health and behavioural issues which constituted the relevant attribute and gave rise to the special need. Contrary to the appellant's submission, the Tribunal's observations were not to the effect that the appellant was incapable of rehabilitation with appropriate intervention. The purpose and import of the Tribunal's observations was that the appellant's manifestation of problematic behaviours was not *ipso facto* evidence of a failure in the implementation of the positive behaviour support plan.

[89] In any event, for the reasons described in the context of the third ground of appeal, an inability to maintain a low security classification for reasons referable to the relevant impairment or disability does not necessitate a finding that the first respondent failed to reasonably accommodate a special need that the appellant had because of that impairment. This ground of appeal should also be dismissed.

Disposition

[90] The appeal is dismissed and the decision and order of the Tribunal made on 25 July 2022 is affirmed.

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