SUBMISSION ON THE HUMAN RIGHTS BILL 2018, CLAUSE 48

1. This submission addresses a single question arising from the Human Rights Bill 2018 ('the Bill'), which is the scope given to courts by cl 48 of the Bill in striving to achieve interpretations of legislation compatible with human rights. The focus of the submission is narrow but relates to one of the most important provisions in the Bill, which will have a far-reaching application.

EXECUTIVE SUMMARY

2. This submission draws attention to the possibility that cl 48 may have a broader operation than its drafters envisaged. This is because of its reference to the concept of legislative purpose as opposed to the concept of the intention of Parliament (which is expressly referred to in the Explanatory Notes ('the Notes') accompanying the Bill). The submission explains how purpose is broader than intention. It then describes three potential amendments to cl 48, which may accord better with what the Notes suggest it was designed to achieve. The potential amendments are:
    a. substitution of a reference to legislative intention for the references to purpose;
    b. deletion of the clause in its entirety; or
    c. an insertion making the clause subject to the provision of the Acts Interpretation Act 1954 (Qld) that provides that 'the interpretation that will best achieve the purpose of [an] Act is to be preferred to any other interpretation.'

    The submission then considers an amendment proposed in another submission authored by Dr Janina Boughey and Professor George Williams AO, arguing that this would be even further from what the Notes suggest cl 48 was designed to achieve. Finally, a technical amendment is proposed in the event that no other amendments are made to the clause.

RELEVANT CLAUSES AND EXPLANATORY MATERIALS

3. Clause 48 is currently as follows:

> **48 Interpretation**
> (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

This is reinforced by cl 4(f), which in setting out how 'the main objects [of the Bill] are to be achieved' refers to 'requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights'.

4. The Notes describe 'a number of important features to note about the interpretative provision.'[1] One of these is that 'the emphasis on giving effect to the legislative purpose means that the provision does not authorise a court to depart from Parliament's intention. However, a court may depart from the literal or grammatical meaning of the words used in exceptional circumstances.'[2]

DISTINGUISHING THE UNITED KINGDOM APPROACH TO INTERPRETATION

5. The passage from the Notes quoted directly above refers to issues raised in the Committee's 2016 *Inquiry into a Possible Human Rights Act for Queensland*.[3] The report from that inquiry described the approach of United Kingdom ('UK') courts to s 3 of the Human Rights Act 1998 (UK) — the equivalent provision to cl 48 of the Bill. In particular, it cited from the leading case of *Ghaidan v Godin-Mendoza*[4] the statement of Lord Nicholls that 'Section 3 may require the court to … depart from the intention of the Parliament which enacted the legislation.'[5]

6. The Notes appear to be directed at this issue. The assertion is that the references to purpose in cl 48 will differentiate it from the equivalent UK provision, the further implication being that Queensland courts ought not to follow the approach of the UK courts.

7. The accuracy of the assertion in the Notes is doubtful. This is because it appears to be based on an assumption that 'Parliament's intention' is the same concept as 'legislative purpose'. While these two concepts overlap, they are not one and the same.

[1] Explanatory Notes to the Human Rights Bill 2018 (Qld) 30.
[2] ibid.
[3] Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (2016).
[4] [2004] UKHL 30, [2004] 2 AC 557.
[5] ibid [30].

THE INTENTION OF PARLIAMENT AND LEGISLATIVE PURPOSE — GENERAL PRINCIPLES

8. Lord Nicholls described the 'intention of Parliament' in *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions*[6] as 'a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.'[7] A definition similar to that of Lord Nicholls was given by Lord Hoffmann in *R (Wilkinson)* v *IRC*:[8] 'One means the interpretation which the reasonable reader would give to the statute read against its background …'[9]

9. By contrast, the concept of purpose derives from the concept of 'mischief', that is, what a statute is aimed to remedy.[10] It is therefore considerably broader than the concept of intention:

> in general legal usage the word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish.[11]

10. These general observations on the nature of intention and of purpose demonstrate the difficulty with the assertion in the Notes. However, this assertion becomes even more problematic in light Queensland legislation dealing with the concept of purpose.

THE INTENTION OF PARLIAMENT AND LEGISLATIVE PURPOSE IN QUEENSLAND

11. Section 14A(1) of the Acts Interpretation Act 1954 (Qld) provides: 'In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.' There is a crucial distinction in this provision between the subject of s 14A(1) — 'a *provision* of an Act' — and the breadth of the purpose that is relevant to the mandated interpretation — simply the purpose of 'the Act' as a whole. This is reinforced by the definition of 'provision' found in sch 1 to the Acts Interpretation Act 1954 (Qld) (given force by s 36 of that Act):

> '***provision***, in relation to an Act, means words or other matter that form or forms part of the Act, and includes—

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[6] [2001] 2 AC 349 (HL).
[7] ibid 396.
[8] [2005] UKHL 30, [2005] 1 WLR 1718.
[9] ibid [18].
[10] Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law Com No 21, Scot Law Com No 11, 1969) para 81(b)(i), fn 177.
[11] Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown & Co 1975) 88.

> (a) a chapter, part, division, subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph, of the Act apart from a schedule or appendix of the Act; and
> (b) a schedule or appendix of the Act or a section, subsection, paragraph, subparagraph, sub-subparagraph, item, column, table or form of or in a schedule or appendix of the Act; and
> (c) the long title and any preamble to the Act.'

12. The breadth of the concept of purpose under the Acts Interpretation Act 1954 (Qld) is moreover confirmed by its definition in sch 1: '***purpose***, for an Act, includes policy objective.' This was noted by the High Court of Australia in a case on appeal from Queensland, *Lacey v A-G for The State of Queensland*.[12] Prior to 1994, this definition referred to 'object' rather than 'policy objective'[13] (s 14A had only been inserted into the Act in 1991[14]). The current form appears to be somewhat broader.

13. The upshot of the analysis in this and the previous section of this submission is that cl 48 as currently framed would provide the courts with the power to depart from the intention of Parliament, so long as they could characterize a proposed interpretation as consistent with the broad overall purpose — which may simply be a broad policy objective — of the legislation being interpreted. When purpose is identified at such a high level of abstraction, its role as a constraint on the courts in the interpretive process is limited, and certainly more limited than the Notes claim.[15]

THREE OPTIONS FOR AMENDMENT OF CLAUSE 48

14. How then might the clause be amended to reflect its aim as described in the Notes? I suggest three options.

[12] [2011] HCA 10, (2011) 242 CLR 573 [45] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[13] See Statutory Instruments and Legislative Standards Amendment Act 1994 (Qld), s 14.
[14] Acts Interpretation Amendment Act 1991 (Qld), s 11.
[15] While I have framed the interpretive question in terms of the power of the courts, it clearly reaches beyond this context; administrators and citizens will also have to read and apply all legislation in accordance with cl 48. I focus on the courts because the constitutional implications of cl 48 are most acute in relation to the judicial branch of government.

Option one: Substitution of a reference to legislative intention for the references to purpose

15. First, an express reference to the intention of Parliament could be inserted, perhaps by way of an additional subsection. For instance, this could be inserted as a new cl 48(2) (with the current subclause (2) being renumbered as subclause (3)):

> (2) Notwithstanding subsection (1), this section does not authorize any interpretation of a statutory provision that would be contrary to the intention of Parliament in relation to the statutory provision being interpreted.

16. An express reference in legislation to the intention of Parliament is not without difficulty (although this has not prevented a reference to 'the intention of Parliament' being used in s 43(4) of the Bill[16]), especially in light of recent dicta of the High Court of Australia casting doubt over the concept.[17] There is also merit in referring to the concept of purpose, given that purpose is the express focus of s 14A(1) of the Acts Interpretation Act 1954 (Qld). I am therefore not convinced of the wisdom of inserting a new subsection as outlined above. I merely raise the proposal as a way of giving effect to what it appears that cl 48 is designed to do, but which in terms it simply does not do.

Option two: Deletion of the clause in its entirety

17. A second possible amendment would be to delete cl 48 in its entirety; this would bring the Bill closer to the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). Given that the option of modelling the Bill on the Commonwealth scheme has been explicitly rejected,[18] it seems unlikely that deleting cl 48 would be seriously entertained.

Option three: Insertion of a new reference to the Acts Interpretation Act 1954 (Qld)

18. A third potential way of amending cl 48 lies somewhere between these approaches. It would entail the insertion of language clarifying that cl 48(1) is subject to s 14A(1) of the Acts Interpretation Act 1954 (Qld) (the existing references to purpose could then be deleted as superfluous). This would reflect the initial form of s 30 of the Human Rights Act 2004 (ACT) — the first of this type of interpretive provision in Australia. This provided

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[16] 'It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.'
[17] *Lacey v A-G for The State of Queensland* [2011] HCA 10, (2011) 242 CLR 573 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Cf Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 Syd LR 39.
[18] Explanatory Notes to the Human Rights Bill 2018 (Qld) 9–10.

a more clear constraint than either the current form of s 30; the equivalent Victorian provision on which that was modelled[19] when s 30 was amended in 2008;[20] or cl 48 of the Bill. The ACT equivalent of s 14A(1) of the Acts Interpretation Act 1954 (Qld) uses similar language to the Queensland provision.[21] It is noteworthy that s 30 of the Human Rights Act 2004 (ACT) was amended before any significant case law dealing with it had emerged; it was not amended because of a demonstrated problem with its operation.[22]

19. To give effect to this proposal, it would be necessary to delete the phrase (and the adjacent commas) 'to the extent possible that is consistent with their purpose' from both cl 48(1) and (2). The phrase 'Subject to s 14A(1) of the Acts Interpretation Act 1954,' could be inserted at the beginning of cl 48(1). The provision would therefore read as follows:

> **48 Interpretation**
> (1) Subject to s 14A(1) of the Acts Interpretation Act 1954, all statutory provisions must, ~~to the extent possible that is consistent with their purpose,~~ be interpreted in a way that is compatible with human rights.
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, ~~to the extent possible that is consistent with its purpose,~~ be interpreted in a way that is most compatible with human rights.

Conclusion on three options for amendment

20. As currently drafted, cl 48 leaves the issue of the relevance of the intention of Parliament up to the courts to decide. This may be seen as a convenient solution in that Parliament avoids dealing with the issue directly in the legislation and this is probably assumed to be a safe course on the basis that Queensland courts will be unlikely to follow the approach of the UK courts — as that has been the pattern elsewhere in Australia.[23] However, if this is a deliberate strategy, its risks ought to be recognized. If the courts decided to take a different tack and to adopt an approach closer to that of the UK courts, there would be no express bar on this in the Bill. And there are strong constitutional reasons why it would not be appropriate for Queensland courts to adopt the approach of the UK courts in this regard, including the principle of legal certainty.[24]

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[19] Charter of Human Rights and Responsibilities 2006 (Vic), s 32(1).
[20] See Human Rights Amendment Act 2008 (ACT), s 5.
[21] Legislation Act 2001 (ACT), s 139(1): 'In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.'
[22] See Australian Capital Territory Department of Justice and Community Safety, *Human Rights Act 2004 — Twelve-month Review — Report* (2006) 25–28.
[23] See *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.
[24] Some of the relevant issues were canvassed in both the Government members' and non-government members' sections of the Committee's 2016 report: see Legal Affairs and Community

BOUGHEY AND WILLIAMS' PROPOSED AMENDMENT

21. Following the analysis above of options for amendment of cl 48 in its current form, I wish to address the submission of Dr Janina Boughey and Professor George Williams AO to this inquiry in relation to cl 48.[25] They advocate the amendment of cl 48 to 'indicate to courts and tribunals that s 48 is intended to be stronger than its Victorian and ACT counterparts'[26] while eschewing the suggestion of giving courts the power to interpret legislation in accordance with the approach of the UK courts, which they describe as a 'remedial' approach.[27] Their proposed amendment is as follows:

> So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.[28]

22. It is unclear where lies the supposed middle position between the approach of the UK courts and that of Australian courts in relation to the equivalent Victorian and ACT provisions. It is not the case that UK courts disregard language, context or purpose in approaching their task under s 3 of the Human Rights Act 1998 (UK), and yet they do take what Boughey and Williams describe as a 'remedial' approach. This proposal seems to be even further from what cl 48 in its current form appears to be designed to achieve, and would simply magnify the risks described at paragraph 20 above.

CLARIFYING SUBCLAUSE (2) IF NO OTHER AMENDMENT

23. If no substantive amendment is made to cl 48, it ought at least to be amended by substitution of the words 'least incompatible' for 'most compatible' in subsection (2). The subsection in its current form is illogical; if a statutory provision 'can not be interpreted in a way that is compatible with human rights', then it will be impossible to interpret it 'in a way that is *most* compatible with human rights.' If it is incompatible, then it is incompatible. The question is actually one of interpreting the statutory provision in a way that is *least in*compatible with human rights.

Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (2016) xviii (non-government members), para 4.4.3 (Government members). A more detailed analysis of the constitutional implications is beyond the scope of this submission.

[25] Janina Boughey and George Williams, Submission No 8 to Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into the Human Rights Bill 2018*, 14 November 2019 [*sic*], 3–4.

[26] ibid 4.

[27] ibid 3.

[28] ibid.

24. This drafting difficulty has possibly come about as a result of a desire to use the phrase 'compatible with human rights' because that is a defined phrase for the purposes of the Bill.[29] If this phrase must be used in this context, it would be preferable to substitute 'nearest to being' for 'most' in cl 48(2). While less economical with language it would at least accord with logic.

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[29] See cl 8. See also sch 1.
[*] This submission is not to be taken as representing the views of either of the institutions with which I am affiliated.