Learning from Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation

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Human rights legislation in the Australian Capital Territory ('ACT'), Victoria and Queensland contains interpretive provisions to the effect that legislation is to be interpreted consistently or compatibly with the rights set out in the relevant statute. This article is an attempt to analyse these interpretive provisions as a matter of statutory interpretation; that is, the rules of statutory interpretation are applied to the interpretive provisions. Courts in the ACT and Victoria have interpreted the provisions as conferring modest powers, similar to the common law principle of legality. As a matter of the application of the principles of statutory interpretation, this appears to be the correct approach. Queensland courts may be expected to follow their ACT and Victorian counterparts in this respect.

I Introduction

The *Human Rights Act 2019* (Qld) ('*QHRA*') came fully into force on 1 January 2020.[1] The *QHRA* is modelled on the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') and the Australian Capital Territory's *Human Rights Act 2004* (ACT) ('*ACTHRA*').[2] Each of these statutes contains an interpretive provision to the effect that legislation is to be interpreted consistently or compatibly with the rights set out in the statute.[3]

There is as yet little literature on the *QHRA*.[4] The literature on the Victorian and Australian Capital Territory ('ACT') legislation tends to adopt the perspective

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1 Proclamation, Subordinate Legislation 2019 No 224 (14 November 2019). Certain provisions came into force earlier, on 1 July 2019: Proclamation, Subordinate Legislation 2019 No 97 (13 June 2019).

2 Explanatory Notes, Human Rights Bill 2018 (Qld) 11.

3 *Human Rights Act 2019* (Qld) s 48 ('*QHRA*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32 ('*Charter*'); *Human Rights Act 2004* (ACT) s 30 ('*ACTHRA*').

4 See Editorial, 'The Human Rights Act 2019' (2019) 38(2) *Queensland Lawyer* 73, 73–4; Dan Rogers, 'Guarding the Rights of All Queenslanders: Human Rights Bill 2018 (Qld)' (2019) 39 (February)

of human rights law,[5] constitutional theory[6] or comparative law.[7] Less common is analysis from the perspective of statutory interpretation.[8] This article is an attempt to analyse the interpretive provisions in this Australian human rights legislation as a matter of statutory interpretation. That is, the rules of statutory interpretation are applied to interpret the interpretive provisions, adopting a contextual approach.[9] This allows for an assessment of the correctness of the courts' approaches to those provisions to date.

The history of proposals for bills of rights and similar legislation in Australia is long and mostly fruitless;[10] it has been argued that there is an 'Australian reluctance about rights'.[11] This background makes it likely that courts will be

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Proctor 20. See also George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81.

5 See Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia, 2008); Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019).

6 See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) esp ch 8; Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) esp ch 11.

7 See Ronagh JA McQuigg, *Bills of Rights: A Comparative Perspective* (Intersentia, 2014).

8 But see Dan Meagher, 'The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)' (2009) 20(3) *Public Law Review* 214; Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006* (2013) 74 *Australian Institute of Administrative Law Forum* 67; Matthew Groves, 'Interpreting the Effect of Our Charters', in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) 2.

9 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J). This approach is broadly consistent with the 'spiral' approach advocated by a current Justice of the Supreme Court of New Zealand: Susan Glazebrook, 'Filling the Gaps', in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ, 2004) 169–76. See also, in the Australian context, Jeffrey Barnes, 'Contextualism: The Modern Approach to Statutory Interpretation' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1090.

10 See Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Rights Protection in Australia's States & Territories' (2007) 28(1) *Adelaide Law Review* 177, 182–4; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths Australia, 2009) 143–8; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 26–34; George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 97–111.

11 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195; Hilary Charlesworth, 'The Australian Reluctance about Rights', in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, 1994) 21; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002) 35–9. See also Brian Galligan, 'Australia's Rejection of a Bill of Rights' (1990) 28(3) *Journal of Commonwealth & Comparative Politics* 344; Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes towards an Australian Bill of Rights', in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (Federation Press, 1997) 144; George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30(3) *Melbourne University Law Review*

cautious when approaching the *ACTHRA*, the *Charter* and the *QHRA*. Furthermore, there are constitutional considerations affecting the scope of the interpretive provisions, which militate against overly expansive uses of such provisions (these are considered in Part III below, in which Victoria is discussed, as they received the most prominence in a High Court case on appeal from Victoria[12]).[13] The most striking feature, however, of the legislative history and context of the Australian interpretive provisions is the importance of their express references to purpose, and the fact that those references were clearly designed to distinguish what is often seen as a radical approach taken by United Kingdom ('UK') courts to the equivalent interpretive provision in that country, s 3 of the *Human Rights Act 1998* (UK) ('*UKHRA*').[14]

The UK approach is exemplified by the case of *Ghaidan v Godin-Mendoza* ('*Ghaidan*'),[15] and in particular by the following passage in the speech of Lord Nicholls:

880, 883–5; Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 20–4.

12 *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic* (HCA)').

13 See Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (2009) 11 (May/June) *Constitutional Law and Policy Review* 86, 91–4; cf Meagher (n 8) 229–30; Richard McHugh, 'Implications of the Proposed *Human Rights Act* for the Rule of Law as Manifested in Australian Courts' (Is the Rule of Law under Challenge in Australia? Conference, 20 November 2009) 13 <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Media-3-12-09-Implications-of-the-proposed-Human-Rights-Act-for-the-rule-of-law-as-manifested-in-Australian-courts-Richard-McHugh.pdf>; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28(1) *University of Queensland Law Journal* 143, 149 (see also at 149–52, 159–64); Pamela Tate, 'A National Charter on Human Rights in Australia? Views from Victoria' (2009) 18 *Commonwealth Lawyer* 27, 32–3; Helen Irving, 'The Dilemmas in Dialogue: A Constitional [sic] Analysis of the NHRC's Proposed Human Rights Act' (2010) 33(1) *University of New South Wales Law Journal* 60, 77–80; Wendy Lacey, 'Beyond the Legalese and Rhetoric: Improving Human Rights Protection in Australia' (2010) 16(1) *Australian Journal of Human Rights* 1, 10–18. For brief overviews, see Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 11–17; David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs* 359, 372–4. Certain constitutional doctrines are also increasingly protecting rights: Ronald Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters' (2011) 18(2) *Australian Journal of Administrative Law* 67.

14 *Raytheon Australia Pty Ltd & ACT Human Rights Commission* [2008] ACTAAT 19, [77] (Mr Peedom, President) (leave to appeal refused: *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55); *Re Application for Bail by Islam* (2010) 4 ACTLR 235, 261 [107] (Penfold J) ('*Islam*'); Evans and Evans (n 5) 95–6 [3.32]; James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 84–5; Byrnes, Charlesworth and McKinnon (n 10) 60–1. Cf Kris Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality', in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 93, 103.

15 [2004] 2 AC 557 ('*Ghaidan*').

> In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.[16]

A similar reading of the Australian interpretive provisions has been expressly rejected in both the ACT[17] and Victoria[18] (as it had been in New Zealand, albeit on the basis of rather different legislative history and context[19]).

The express references to purpose in the Australian interpretive provisions are not themselves conclusive of how those provisions are to be applied, in light of the flexibility of the concept of purpose. The purposes of legislation are capable of identification at varying levels of abstraction and it is therefore possible to characterise *Ghaidan* as consistent with purposive interpretation.[20] However, to reiterate, the importance of the references to purpose lies in what their inclusion reveals about the design of the interpretive provisions, which informs contextual interpretations of the provisions. The fact of the inclusion of such references signals that the concept of purpose is generally to be deployed at a relatively low level of abstraction, and is therefore a more significant constraint on radical applications of the interpretive provisions than has been the case under the *UKHRA*.

The structure of this article takes the jurisdictions in turn, first setting out the relevant general principles of statutory interpretation, before analysing the interpretive provisions in the relevant human rights legislation. The jurisdictions are considered in chronological order of the enactment of each piece of relevant

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16 Ibid 571 [30].

17 *R v Fearnside* (2009) 3 ACTLR 25, 47 [89] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]).

18 *Slaveski v Smith* (2012) 34 VR 206, 214 [20] (Warren CJ, Nettle and Redlich JJA), citing *Momcilovic* (HCA) (n 12) 36–7 [18], 50 [51] (French CJ), 210 [544], 217 [565], [566] (Crennan and Kiefel JJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 250 [684] (Bell J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*'). Cf *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 62 [189]–[190] (Tate JA) ('*Taha*').

19 *R v Hansen* [2007] 3 NZLR 1. See Benedict Coxon, 'The Prospective (Ir)Relevance of Section 3 of the Human Rights Act: A Comparative Perspective' (2020) 41 *Statute Law Review* (forthcoming).

20 See generally Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 *Modern Law Review* 294. See also Anthony Mason, 'Human Rights and Legislative Supremacy', in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013) 199, 204. Some observers have drawn a link between the references to purpose in the Australian interpretive provisions and *Ghaidan*: Lord Walker of Gestingthorpe, 'A United Kingdom Perspective on Human Rights Judging' (2007) 8 *The Judicial Review* 295, 297; Luke Beck, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 *Public Law Review* 97, 102; Gledhill (n 14) 108. Cf Ian Dennis, 'The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333, 334–5.

human rights legislation. The first jurisdiction to be considered, therefore, is the ACT.

II Australian Capital Territory

In the ACT, s 139(1) of the *Legislation Act 2001* (ACT)[21] provides: '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.' Section 139(2) provides: 'This section applies whether or not the Act's purpose is expressly stated in the Act.' Section 7(3) provides: 'A reference to an *Act* includes a reference to a provision of an Act.'[22] Reference must also be made to s 138. It defines 'working out the meaning of an Act' as:

> (a) resolving an ambiguous or obscure provision of the Act; or
> (b) confirming or displacing the apparent meaning of the Act; or
> (c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
> (d) finding the meaning of the Act in any other case.

The following provisions in the Act deal with context, including setting out (non-exhaustively) material that may be considered in that regard. Section 140 provides that the provisions of an Act being interpreted 'must be read in the context of the Act as a whole'. Section 141(1) adds that 'material not forming part of the Act may be considered', and s 142 includes a table setting out material that may be considered. Relevantly for present purposes in relation to the *ACTHRA*, s 142 provides for consideration of the report of the consultation committee whose report preceded the draft Bill,[23] the draft Bill itself,[24] second reading speeches[25] and other proceedings in the Legislative Assembly,[26] explanatory statements,[27] and the Long Title.[28]

As originally enacted in 2004, s 30 of the *ACTHRA* provided as follows:

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21 Compare its predecessor, *Interpretation Act 1967* (ACT) s 11A. This is not dealt with here, as the *ACTHRA* (n 3) post-dates the *Legislation Act 2001* (ACT).

22 See *Islam* (n 14) 246 [33] (Penfold J).

23 *Legislation Act 2001* (ACT) s 142, Table 142, col 2, item 2.

24 Ibid item 4.

25 Ibid item 5.

26 Ibid item 6.

27 Ibid item 4.

28 Ibid item 1. It has been argued that the Long Title is actually part of the Act, although this proposition does not appear to be supported by an explicit judicial statement: Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths Australia, 8th ed, 2014) 193 [4.48].

> **30 Interpretation of laws and human rights**
>
> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
> (2) Subsection (1) is subject to the Legislation Act, section 139.
> (3) In this section:
> ***working out the meaning of a Territory law*** means—
> (a) resolving an ambiguous or obscure provision of the law; or
> (b) confirming or displacing the apparent meaning of the law; or
> (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
> (d) finding the meaning of the law in any other case.

The original form of s 30 attracted criticism, including that it was 'poorly drafted and ambiguous',[29] and it was amended in 2008[30] to mirror the Victorian provision. The new *ACTHRA* s 30 provides as follows:

> **30 Interpretation of laws and human rights**
>
> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

Section 32(2) provides: 'If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right'. The fourth paragraph of the Preamble[31] asserts: 'Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation.' This does not shed any light on the nature of interpretation under s 30. The Long Title (probably strictly not part of the Act, but undoubtedly a permissible interpretive aid) puts the focus on human rights: 'An Act to respect, protect and promote human rights'.

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[29] Carolyn Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32(2) *Federal Law Review* 291, 305 ('Responsibility for Rights'). See also *Fearnside* (n 17) 47 [88] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]); Hilary Charlesworth, 'Human Rights and Statutory Interpretation', in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 100, 117; Carolyn Evans, '*Human Rights Act* and Administrative Law' (Assessing the First Year of the ACT Human Rights Act Conference, 29 June 2005) 6 <http://acthra.anu.edu.au/documents/afyhra_conf_2005/EvansC_The_Human_Rights_Act_and_Administrative_Law.pdf>; Bailey (n 10) 198. On the original s 30 generally, see Hilary Charlesworth, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 289, 294–6; Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*' (Law and Policy Paper No 28, Centre for International and Public Law, 2006) 7–9; Peter Faris and Mirko Bagaric, *Human Rights: Charters in Australia* (Sandstone Academic Press, 2008) 43.

[30] *Human Rights Amendment Act 2008* (ACT) s 5. See Bailey (n 10) 198; Byrnes, Charlesworth and McKinnon (n 10) 83–4.

[31] This forms part of the *ACTHRA* (n 3) by virtue of *Legislation Act 2001* (ACT) s 126(3).

However, this general description provides limited assistance in light of the qualifications on the interpretive power contained in s 30.

Turning to material not forming part of the Act that may be considered, we may first observe that the enactment of the *ACTHRA* followed the publication of a report by the ACT Bill of Rights Consultative Committee, recommending the adoption of a bill of rights.[32] The Committee recommended that an interpretive provision be enacted as follows: 'A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.'[33] There is no reference to purpose in this suggested provision and, indeed, it is strikingly similar to s 3(1) of the *UKHRA*. However, the Committee should not be taken to have sanctioned an expansive approach such as that under s 3. The Committee's report was published prior to the House of Lords' decision in *Ghaidan*. It therefore had to set out what it saw as competing approaches in the earlier case of *R v A [No 2]*.[34] The Committee concluded that what it saw as the more conservative approach appeared to be 'the most influential in decisions under the *Human Rights Act*'.[35] Nothing can therefore be drawn from the Committee's omission of a reference to purpose in its recommended provision. As the Committee saw the state of UK jurisprudence as not representing as expansive an approach as *Ghaidan* stands for, there was no need to include such a reference.

In any event, the Committee's recommendation was not implemented in those terms.[36] Instead, when the Human Rights Bill 2003 (ACT) was presented in the Legislative Assembly,[37] the draft interpretive provision was as follows:

> **30 Interpretation of laws and human rights**
>
> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is to be preferred to any other interpretation.
> (2) If applying subsection (1) and Legislation Act, section 139 to a Territory law would achieve a different result, only section 139 is to be applied.
> (3) In this section:
> ***working out the meaning of a Territory law*** means—
> (a) resolving an ambiguous or obscure provision of the law; or
> (b) confirming or displacing the apparent meaning of the law; or
> (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

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32 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (Report, May 2003) 5 ('*Towards an ACT Human Rights Act*').

33 Ibid app 4, 4.

34 [2002] 1 AC 45.

35 *Towards an ACT Human Rights Act* (n 32) 50, citing as examples *Matthews v Ministry of Defence* [2002] 1 WLR 2621; *R v Shayler* [2003] 1 AC 247.

36 See Evans, 'Responsibility for Rights' (n 29) 294.

37 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4244 (Jon Stanhope, Attorney-General).

(d) finding the meaning of the law in any other case.

The crucial subclause was (2). No similar provision had appeared in the Committee's draft Bill. The Government, which presented the Bill through the then Attorney-General, clearly decided that the purposive approach to statutory interpretation was to remain supreme.

The Explanatory Statement sought to describe the interaction between cl 30 and s 139(1) of the *Legislation Act 2001* (ACT) thus:

> Clause 30(1) is subject to the purposive rule of construction set out in subclause [sic] 139(1) of the *Legislation Act 2001*. Subclause [sic] 139(1) requires that Territory laws must be interpreted in a way that best achieves the purpose of the Act. Consequently, the interpretation most beneficial to human rights will best achieve the purpose of the Bill.[38]

One ACT judge has said of this: 'I am not convinced that the explanation ... given in ... the Explanatory Statement ... was either coherent or correct.'[39] Indeed, the Statement provides no assistance.

The Attorney-General referred to cl 30 of the Bill in his second reading speech, highlighting that legislative intention was to play a key role:

> [T]he bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that is consistent with the human rights protected in the act. Unless the law is *intended* to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail.[40]

During the detail stage of the debate, the Attorney-General proposed amendments to the clause, such that sub-ss (1) and (2) would be omitted and substituted by the following:

> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
> (2) Subsection (1) is subject to the Legislation Act, section 139.

The Attorney-General stated:

> The purpose of these amendments is to make clause 30 easier to read and understand. It is to make it as clear as possible that, while we expect the judiciary to read rights into statutory provisions, they may not override the clear intention of the Assembly to legislate inconsistently with human rights. The amendment to clause 31 [sic] includes

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38 Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

39 *Islam* (n 14) 258 [89] (Penfold J); see further at [92].

40 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4247 (Jon Stanhope, Attorney-General) (emphasis added). See also Meagher (n 8) 224–5.

> the words 'is as far as possible'. This picks up the language used in the United Kingdom *Human Rights Act* and provides some nuance to the existing clause.
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> The amendment to clause 2 is a simplification of the language. As ordinary legislation, the *Human Rights Act* is subject to the *Legislation Act 2001* and the rules of interpretation in chapter 14 of that act. Section 139 of the *Legislation Act* requires that where there is a choice to be made, the interpretation at [sic] best achieves the purpose of the legislation of [sic] the one to be adopted. This means that, where a human rights consistent interpretation is in conflict with interpretation that achieves legislative purpose, the latter will prevail.[41]

The amendment was agreed to as proposed, and the clause was agreed to as amended.

From the Committee's report and the parliamentary materials, it is clear that s 30(2) was designed to preserve the purpose or intention behind legislation impugned under the *ACTHRA*, albeit that its language was tempered by the amendment, which ensured that the Act would have some effect. Of course, this is clear from the language used, but, as noted above, this language is no longer found in the Act.

The 2008 amendment brought the ACT provision into line with the Victorian provision. The amendment was made in response to a recommendation of the Government department with responsibility for the Act in a report that it published on the operation of the Act during its first 12 months in force. The Department of Justice and Community Safety recommended that the provision be amended 'to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation'.[42] The clause passed the Assembly without amendment.[43] The amendment has been described as 'strengthening' the Act,[44] and particularly 'the requirement for consistency with human rights'.[45]

The Explanatory Statement explained the effect of the amended s 30 as follows:

> It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a

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41 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 571–2 (Jon Stanhope, Attorney-General).

42 Australian Capital Territory Department of Justice and Community Safety, Human Rights Act 2004*: Twelve-Month Review* (Report, June 2006) 33 (Recommendation 5).

43 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 4 March 2008, 394.

44 Gabrielle McKinnon, 'Strengthening Human Rights: Amendments to the Human Rights Act 2004 (ACT)' (2008) 19(3) *Public Law Review* 186. See also McQuigg (n 7) 87, 194.

45 *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority (ACT)* (2008) 2 ACTLR 44, 54 [39] (Refshauge J). Cf *Islam* (n 14) 260 [98] (Penfold J) (merely 'change').

> way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection [sic] 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley's Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.[46]

The reference to *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation*[47] does not assist in ascertaining the meaning and effect of s 30[48] because of the cursory nature of the citation in that case of *Ghaidan*. Indeed, one ACT judge referred to the phrase in the Explanatory Statement 'intended to operate in a way that is inconsistent with the right in question', and noted that '[t]his seems to be directly in conflict with the *Ghaidan* view that it may be possible to "depart from the intention of the Parliament which enacted the legislation" in order to achieve consistency with human rights.'[49]

In his second reading speech, the Attorney-General stated that the Bill would 'clarify the operation of the interpretive provision, to better promote a human rights consistent interpretation of our statute book'.[50]

Overall, it seems that the 2008 amendment was designed to allow s 30 of the *ACTHRA* to play a greater role in statutory interpretation, but the reference to purpose still constrains courts from applying the interpretive power in a way similar to that of UK courts under the *UKHRA*.

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46 Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 3 (unnumbered).

47 [2006] ACTCA 9.

48 *Fearnside* (n 17) 46–7 [86]–[87] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]). See also *Casey v Alcock* (2009) 3 ACTLR 1, 22 [108] (Besanko J, Refshauge J agreeing at 5 [11]–[12]); *Islam* (n 14) 264–5 [119] (Penfold J); Spigelman (n 14) 85. Cf *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* (2006) 206 FLR 328, 335 [22] (Gray J); *Devenport v Commissioner for Housing (ACT)* (2007) 210 FLR 325, 331 [20] (Higgins CJ, Gray and Connolly JJ); Priyanga Hettiarachi, '*Some Things Borrowed, Some Things New*: An Overview of Judical [sic] Review of Legislation under the Charter of Human Rights and Responsibilities' (2007) 7(1) *Oxford University Commonwealth Law Journal* 61, 83 n 96; Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different If Australia Had a Bill of Rights Like Victoria?' (2007) 18(2) *Public Law Review* 119, 129; Gledhill (n 14) 108–9.

49 *Islam* (n 14) 262 [110] (Penfold J). See also McQuigg (n 7) 144. Cf *Momcilovic* (HCA) (n 12) 180–1 [449] (Heydon J, in dissent); Evans and Evans (n 5) 86 [3.9]; Elise Parham, *Behind the Moral Curtain: The Politics of a Charter of Rights* (Centre for Independent Studies, 2010) 15; Suzanne Zhou, '*Momcilovic v The Queen*: Implications for a Federal Human Rights Charter' (2012) 11–12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128005>. See Beck (n 20) 110.

50 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4028 (Simon Corbell, Attorney-General). See also *Islam* (n 14) 265 [121] (Penfold J).

III Victoria

Victoria shares with the ACT a general approach to statutory interpretation involving a focus on purpose. Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides:

> In the interpretation of a provision of an Act or subordinate instrument—
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object ...

While Victoria has no statutory provision equivalent to s 140 of the *Legislation Act 2001* (ACT), the meaning of a provision being interpreted nonetheless 'must be determined "by reference to the language of the instrument viewed as a whole"'.[51] In addition, s 35(b) sets out various materials to which consideration may be given. Relevantly for our purposes in relation to the *Charter*, these include the consultation committee report that preceded the enactment of the *Charter*,[52] the Explanatory Memorandum[53] and reports of proceedings in Parliament.[54]

Turning to the *Charter* itself, s 32 relevantly provides:

> **32 Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> ...
>
> (3) This section does not affect the validity of—
> (a) an Act or provision of an Act that is incompatible with a human right; or
> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Section 36(2) is also pertinent, providing that 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section'. The purpose clause of the *Charter* likewise juxtaposes the interpretive and declaratory powers: s 1(2) describes that '[t]he

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51 *Project Blue Sky* (n 18) 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ); *South West Water Authority v Rumble's* [1985] AC 609, 617 (Lord Scarman, Lord Diplock, Lord Roskill, Lord Brandon and Lord Templeman agreeing at 622).

52 *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iv).

53 Ibid s 35(b)(iii).

54 Ibid s 35(b)(ii).

main purpose of this *Charter* is to protect and promote human rights by' at once 'ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights'[55] and 'conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right'.[56] The summary of the interpretive power without the qualification of s 32(1)'s reference to purpose potentially indicates that possibility is the 'predominant limit' rather than consistency with purpose,[57] but this seems to accord too much weight to the purpose clause over the more specific provision in s 32. Moreover, summarising a provision without restating it in its entirety is a sensible approach to drafting a purpose clause (otherwise purpose clauses may simply contain duplicate provisions or be difficult to navigate due to their length), and the omission of some language for the sake of conciseness should not be mistaken for a considered assessment of the importance of the omitted words as compared with the importance of those included in the clause.[58]

Beyond the text of the *Charter*, we may turn to the documents to which s 35(b) of the *Interpretation of Legislation Act 1984* (Vic) permits consideration. In 2005, the Victorian Human Rights Consultation Committee published a report in which it recommended the enactment of a 'Charter of Human Rights and Responsibilities'.[59] The Committee referred to *Ghaidan* and this reference has sometimes been taken as authority for s 32 being a codification of the *Ghaidan* principles.[60] However, the passages quoted by the Committee did not speak of the

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55 *Charter* (n 3) s 1(2)(b).

56 Ibid s 1(2)(e).

57 Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340, 358. See also Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 52 ('Parliamentary Sovereignty and Dialogue'); Julie Debeljak, 'Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have' (2011) 22(1) *Public Law Review* 15, 30–1 ('Who Is Sovereign Now?').

58 Perhaps one risk of this approach to drafting is the labelling of such purpose clauses as containing '"motherhood" statements': Russell Solomon, 'The Social Construction of Human Rights Legislation: Interpreting Victoria's Statutes through Their Limitations' (2017) 22(1) *Deakin Law Review* 27, 28.

59 Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Report, November 2005) vi.

60 Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 50–1; Hettiarachi (n 48) 82–3 n 96; Andy Gargett, Paula Gerber and Melissa Castan, 'A Right to Birth Registration in the Victorian *Charter*? Seek and You Shall *Not* Find!' (2010) 36(3) *Monash University Law Review* 1, 18; Gledhill (n 14) 108. See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 55 [215] (Bell J,

'unusual and far-reaching character' of the interpretive obligation under s 3 of the *UKHRA* or of s 3 requiring a court 'to depart from the unambiguous meaning the legislation would otherwise bear'.[61] Rather, the Committee quoted passages in which two of the Law Lords described limitations on the process of interpretation under s 3.

Lord Nicholls, quoting from Lord Rodger's speech (in the second sentence of the quotation), held that '[t]he meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must … "go with the grain of the legislation".'[62] Lord Rodger held that 'it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen'.[63] In the light of these passages themselves not lending support to an especially expansive approach to the interpretive power, the Committee's reference to *Ghaidan* provides no support for such an approach.[64]

As well as the Committee's reference to UK authority, some advocates of an expansive approach[65] have relied on its statement that the reference to purpose would provide the courts 'with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question'.[66] This is simply a rephrasing of s 32 that sheds no light on the meaning of the provision. Indeed, the Victorian Court of Appeal in *R v Momcilovic* ('*Momcilovic* (VCA)')[67] quoted a longer passage from the Committee's report, including the above statement, and came to the conclusion that s 32 should be given a narrow operation.[68]

President) ('*Kracke*'); *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)* [2009] VCAT 1869, [91] (Bell J, President); *Momcilovic* (HCA) (n 12) 179–80 [447] (Heydon J, in dissent). Cf South (n 13) 148.

61 *Ghaidan* (n 15) 571 [30].

62 Ibid 572 [33].

63 Ibid 596 [110].

64 See Simon Evans and Julia Watson, 'Australian Bills of Rights and the "New Commonwealth Model of Constitutionalism"', in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013) 221, 225–6. Cf Alison Duxbury, 'Human Rights and Judicial Review: Two Sides of the Same Coin?', in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 70, 87 n 115.

65 *Kracke* (n 60) 55 [215] (Bell J, President); Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 50.

66 *Rights, Responsibilities and Respect* (n 59) 82–3.

67 *R v Momcilovic* (2010) 25 VR 436 ('*Momcilovic* (VCA)').

68 Ibid 457 [73]–[74] (Maxwell P, Ashley and Neave JJA). See also *Director of Public Transport v XFJ* [2010] VSC 319, [62] n 59 (Ross J). Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 26.

A similarly ambiguously bland statement appears in the Explanatory Memorandum: 'The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights.'[69] While it has been argued that this supports an expansive approach,[70] it is of no real assistance in ascertaining the meaning and effect of s 32. Indeed, it illustrates the point — not always true, but apt in this case — made by the Chief Justice of the ACT when he referred to an explanatory memorandum and described 'the apparent purpose of such documents of explaining as little as possible'.[71] The Explanatory Memorandum continues:

> The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.[72]

The Court of Appeal in *Momcilovic* (VCA) distinguished this from the position under *UKHRA* s 3(1).[73]

The most instructive part of the legislative history of s 32 is the parliamentary debates. The Attorney-General was the Minister promoting the Bill in the Legislative Assembly. In his second reading speech, he referred to s 32 and said that it 'recognises the *traditional role* for the courts in interpreting legislation passed by Parliament'.[74] The Court of Appeal in *Momcilovic* (VCA) made the point that '[h]ad it been the Government's intention that Victorian courts be given a role under the *Charter* which was "fundamentally different [from] their role under the standard principles of interpretation", the Minister would have been obliged to say so.'[75] While the Court should not be taken to be referring to a *legal* obligation on the Minister, there is a *political*, and perhaps *moral*, obligation. The fact is that one would expect the Minister to draw attention to a major shift in the courts' role if this were intended.

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69 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

70 Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 54.

71 *SI bhnf CC v KS bhnf IS* (2005) 195 FLR 151, 165 [82] (Higgins CJ). See generally Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29(2) *Australasian Parliamentary Review* 116, 121–4.

72 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

73 *Momcilovic* (VCA) (n 67) 459 [85] (Maxwell P, Ashley and Neave JJA). Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 34–6.

74 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General) (emphasis added). See also Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2556 (Justin Madden, Minister for Sport and Recreation). The Attorney-General has been said to have 'stressed the important limitations of the proposal': James Waghorne and Stuart Macintyre, *Liberty: A History of Civil Liberties in Australia* (UNSW Press, 2011) 192.

75 *Momcilovic* (VCA) (n 67) 459 [83] (Maxwell P, Ashley and Neave JJA), citing *Kracke* (n 60) 55 [218]; cf [99]–[100]. Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 32–3.

Indeed, far from being 'Delphic',[76] the Minister's statement is particularly instructive when compared[77] with Lord Woolf CJ's observations on s 3 of the *UKHRA*:

> When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to *adjust their traditional role* in relation to interpretation so as to give effect to the direction contained in section 3.[78]

As the previous Chief Justice of Australia has said, '[t]he strong interpretive approach undertaken by the House of Lords in *Ghaidan* might be seen in the Australian context as altering the constitutional relationship between the court interpreting a statute and the parliament which enacted it.'[79]

This leads us to a matter of broad context that will bear relevance to any application of the Australian interpretive provisions: the strict separation of judicial power under the *Australian Constitution*.[80] Heydon J, in dissent, held in *Momcilovic v The Queen* ('*Momcilovic* (HCA)') that s 32(1) failed the *Kable*[81] test of invalidity, as it conferred a legislative function on the courts that altered their character.[82] This was on the basis of his assumption that s 32(1) was designed to have the same effect as s 3 of the *UKHRA*.[83] The other six Justices rejected this assumption, leading Heydon J to note that '[t]he adoption by a majority of this

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76 *Momcilovic* (HCA) (n 12) 178 [445] (Heydon J, in dissent).

77 See *Momcilovic* (VCA) (n 67) 459 [83] (Maxwell P, Ashley and Neave JJA).

78 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72 [75] (emphasis added).

79 RS French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech, Anglo-Australasian Lawyers Society, and Constitutional and Administrative Law Bar Association, 5 July 2012) 26 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>. See also Groves (n 8) 11.

80 See James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths Australia, 2010).

81 See *Kable v DPP (NSW)* (1996) 189 CLR 51.

82 *Momcilovic* (HCA) (n 12) 183–4 [454]. See also JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 (July) *Law Quarterly Review* 392, 400, 401–2. Cf John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Centre for Comparative Constitutional Studies Constitutional Law Conference 2015, 24 July 2015) 5–6 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Basten_20150724.pdf>.
In addition, Heydon J was joined by Gummow (Hayne J agreeing on this point) in finding that the declaration mechanism provided for in s 36 was also invalid on the application of this principle: *Momcilovic* (HCA) (n 12) 185 [457], 97 [188], respectively. See Bateman and Stellios (n 13) 17–29; HP Lee and Michael Adams, 'Defining Characteristics of "Judicial Power" and "Court": Global Lessons from Australia' (2013) 21(2) *Asia Pacific Law Review* 167, 190–5.

83 *Momcilovic* (HCA) (n 12) 179–81 [447]–[449]. See Gledhill (n 14) 109–10. See also Stephenson (n 6) 209 n 78.

Court of a narrow interpretation of s 32(1) ensures validity.'[84] Arguably the majority was simply applying the presumption that 'the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid',[85] a presumption given statutory force in Victoria by s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) (as well as in the ACT by s 120(2) and (3) of the *Legislation Act 2001* (ACT), and in Queensland by s 9(2) and (3) of the *Acts Interpretation Act 1954* (Qld)).

While these constitutional considerations were not alone determinative, they no doubt played an important role in the background to the interpretive arguments ventilated in *Momcilovic* (HCA) (along with the prevailing political culture of rights protection in Australia[86]) and will continue to inform the

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84 *Momcilovic* (HCA) (n 12) 184 [455]. See Melissa Perry, 'The Efficacy of the Human Rights Acts in the ACT and Victoria: Challenges and Lessons Learnt' (Administrative Law and Human Rights in Australia Seminar, 16 September 2011) 9 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/MPerry_Paper.pdf>; Bateman and Stellios (n 13) 15; Joanna Davidson, 'The Victorian Charter of Human Rights and Responsibilities' (2014) 10(4) *Policy Quarterly* 46, 47; Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25(4) *Public Law Review* 265, 271; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter*: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69, 76; Chief Justice Helen Murrell, 'ACT Human Rights Act: A Judicial Perspective' (Ten Years of the ACT *Human Rights Act*: Continuing the Dialogue Conference, 1 July 2014) 8 <http://www.hrc.act.gov.au/res/ACT_Human_Rights_Act_1July2014-Chief_Justice_Murrell.pdf>; Adrienne Stone, 'Constitutional Orthodoxy in the United Kingdom and Australia: The Deepening Divide' (2014) 38(2) *Melbourne University Law Review* 836, 852–3; cf 855–7; Jack Maxwell, 'One Step Forward, One Step Back: The Victorian *Charter* in *Bare v Independent Broad-Based Anti-Corruption Commission*' (2016) 40(1) *Melbourne University Law Review* 371, 387; Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44(2) *Federal Law Review* 227, 247 n 71; Mark Weinberg, 'Human Rights, Bills of Rights, and the Criminal Law' (Bar Association of Queensland 2016 Annual Conference, 27 February 2016) 13 <http://assets.justice.vic.gov.au/supreme/resources/2f16da99-9fb5-4121-ba36-dfdf858f059f/human+rights+bills+of+rights+and+the+criminal+law++27+feb+2016.docx>. See also Dame Sian Elias, 'A Voyage around Statutory Protections of Human Rights' (2014) 2 *Judicial College of Victoria Online Journal* 4, 6. Cf Rachel Ball, 'Human Rights and Religion in Australia: False Battle Lines and Missed Opportunities' (2013) 19(2) *Australian Journal of Human Rights* 1, 15; Claudia Geiringer, 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14(1) *International Journal of Constitutional Law* 156, 172; Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90(5) *Australian Law Journal* 324, 324–5.

85 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted).

86 Russell Solomon, 'Reviewing Victoria's Charter of Rights and the Limits to Our Democracy' (2017) 42(3) *Alternative Law Journal* 195, 199. See also Chintan Chandrachud and Aileen Kavanagh, 'Rights-Based Constitutional Review in the UK: From Form to Function', in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing, 2016) 63, 92; Julie Debeljak 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation', in Chris Hunt, Lorne Neudorf and Micah Rankin (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Carswell 2018) 183, 185.

approach of Australian courts to interpretive provisions in human rights legislation.[87]

IV Queensland

Queensland is closer to the ACT than to Victoria in the language of the relevant provisions mandating a purposive approach to statutory interpretation and permitting consideration of extrinsic materials. Section 14A of the *Acts Interpretation Act 1954* (Qld) provides, in part:

> (1) 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.
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.

The Act elsewhere stipulates that '*purpose*, for an Act, includes policy objective'.[88]

As in Victoria, Queensland has no statutory provision equivalent to s 140 of the *Legislation Act 2001* (ACT), but, again, the meaning of a provision being interpreted nonetheless must be determined by reference to the language of the instrument viewed as a whole. Section 14B(1) provides:

> Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—
> (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or
> (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.

'Ordinary meaning' is defined in s 14B as 'the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act'.

Relevantly for the purposes of interpreting s 48 of the *QHRA*, s 14B defines extrinsic material to include the parliamentary committee report preceding the Bill,[89] the explanatory notes to the Bill,[90] the parliamentary committee report on the Bill itself,[91] the speech made to the Legislative Assembly by the Member bringing in the Bill when introducing it,[92] and material in an official record of proceedings in the Legislative Assembly.[93]

Turning to the *QHRA*, s 48 provides as follows:

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87 See Stephenson (n 6) 208.
88 *Acts Interpretation Act 1954* (Qld) s 36(1), sch 1.
89 *QHRA* (n 3) s 14B(3)(b).
90 Ibid s 14B(3)(e).
91 Ibid s 14B(3)(c).
92 Ibid s 14B(3)(f).
93 Ibid s 14B(3)(g).

> **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.

As in the ACT and Victoria, the element of the text most crucial to delimiting the interpretive power is the reference to consistency with purpose. This is reinforced by s 4(f) of the *QHRA*, which in setting out how 'the main objects [of the Act] 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'. Section 53(2) of the Act provides: 'The Supreme Court may, in a proceeding, make a declaration … to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights.'[94] Beyond these indications in the *QHRA*, we must consider extrinsic materials to place s 48 in context.

Unlike in the ACT and Victoria, the body that carried out an inquiry as to the desirability of enacting human rights legislation in Queensland was a parliamentary committee.[95] A majority of the Committee (composed of Government Members) recommended that 'the Queensland Parliament move to legislate for a human rights act in Queensland'.[96] The non-Government Committee members issued separate comments, indicating that they did 'not support the introduction of a human rights act for Queensland'.[97] The resulting report described the approach of UK courts to s 3 of the *UKHRA*. In particular, it cited from *Ghaidan* the statement of Lord Nicholls that '[s] 3 may require the court to … depart from the intention of the Parliament which enacted the legislation'.[98] However, the Committee stopped short of recommending a specific form of interpretive provision.

The Explanatory Notes accompanying the Bill describe 'a number of important features to note about the interpretative provision'.[99] 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

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94 See also s 4(g).
95 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30, 55th Parliament, June 2016).
96 Ibid xx.
97 Ibid xiii.
98 *Ghaidan* (n 15) 571 [30].
99 Explanatory Notes, Human Rights Bill 2018 (Qld) 30.

words used in exceptional circumstances.'[100] The reference to this qualification hints at the then cl 48 potentially being slightly more powerful than the common law principle of legality, although not of the same strength as s 3 of the *UKHRA*.[101]

The Legal Affairs and Community Safety Committee of the Parliament of Queensland held another inquiry, this time into the Bill.[102] The Committee made a single recommendation: 'that the Human Rights Bill 2018 be passed'.[103] Opposition Members made a 'Statement of Reservation', primarily objecting to the declaration of incompatibility mechanism.[104] The Committee's report did not make any specific recommendation in relation to cl 48. However, the report did quote extensively from a document prepared by the Government department responsible for the Bill (the Department of Justice and Attorney-General), responding to written submissions that had been submitted to the inquiry.[105] This provided further detail in addition to the Explanatory Notes, clarifying that a *Ghaidan*-style interpretive approach was not envisaged and that cl 48 would be similar to the principle of legality (although recognising, as had the Explanatory Notes, that cl 48 might do slightly more work than that principle):

> The interpretative provision in the Bill (clause 48) has been drafted in light of criticism and interpretations of the equivalent provision in the Victorian Charter, particularly the decision of the High Court in *Momcilovic v The Queen*. … The provision has been drafted with the policy intention of avoiding a remedial approach by the courts associated with human rights legislation in some international jurisdictions. The emphasis on giving effect to the legislative purpose means that the provision is not intended to authorise a court to depart from Parliament's intention.
>
> Therefore it is not intended that the provision empower courts to remedy deficient legislation, by changing the meaning of legislation so as to make it compatible with human rights. This is reflected in the emphasis on giving effect to the purpose of the statute. It is expected that the approach under clause 48 would be similar in nature to

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100 Ibid.

101 Cf *Taha* (n 18) 62 [190] (Tate JA), citing *Momcilovic* (HCA) (n 12) 92 [170]: 'compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, *might more stringently require* that words be read in a manner "that does not correspond with literal or grammatical meaning" than would be demanded, or countenanced, by the common law principle of legality' (emphasis added). See also Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the *Charter* — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 63 ('Statutory Interpretive Techniques under the Charter').

102 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No 26, 56th Parliament, February 2019).

103 Ibid 2.

104 Ibid 137.

105 Department of Justice and Attorney-General, *Response to Legal Affairs and Community Safety Committee: Issues Raised in Written Submissions* (3 December 2018).

> the common law principle of legality (that is, that absent words of clear intent that a statutory provision should be interpreted in a way that is compatible with fundamental rights). Nevertheless, it is still considered that the statutory requirement in the Bill would point to a stronger approach, and may for example involve a court departing from the literal or grammatical meaning of the words in a statute in exceptional circumstances. Clause 48 clarifies that if the court is unable to interpret a statutory provision compatibly 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. Unlike the Victorian provision, clause 48(2) makes it clear that the interpretative provision has work to do in directing the court to select the option which is most compatible with human rights, even though none of the options available are compatible with human rights.[106]

The modesty of the interpretive provision, and of the proposed *QHRA* as a whole, was a recurring theme in the parliamentary debates on the Bill. In her second reading speech, the Attorney-General specifically addressed the interpretive provision:

> The government has achieved the correct balance. The interpretative provision at clause 48 has been very carefully drafted in light of experience from other jurisdictions and is intended to avoid a strong remedial approach that would facilitate a legislative role by the courts. The emphasis on giving effect to the legislative purpose in interpretation means that the provision does not authorise a court to depart from parliament's intention.[107]

Also relevant to the interpretive power was the Attorney-General's reliance on the other Australian jurisdictions with similar human rights legislation:

> Further, experience from Victoria and the ACT, which both have similar legislative frameworks, does not indicate a misuse of the rights in the bill or an explosion of frivolous complaints. The High Court's decision in the case of *Momcilovic v the Queen* is authority for the proposition that the Victorian *Charter of Human Rights and Responsibilities Act 2006*, the model upon which this bill is based, is valid, rejecting suggestions that it gives courts some type of remedial legislative power or law-making function that is inconsistent with the judicial function of courts.[108]

The Opposition sought to amend the Bill to remove the declaration of incompatibility mechanism.[109] One feature of many of the contributions of Opposition Members to the debate on the Bill was a lack of clarity as to whether

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106 Ibid 49–50.

107 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice).

108 Ibid 378 (Yvette D'Ath, Attorney-General and Minister for Justice).

109 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice) 475–6; Explanatory Notes to David Janetzki's Amendments, Human Rights Bill 2018 (Qld).

they were objecting to the interpretive power to be conferred on (among others) courts, or whether their objections were mainly directed at the declaration mechanism, which they sought to remove. The Shadow Attorney-General, David Janetzki, seemed to criticise the interpretive power:

> The opposition's primary objection is that the bill infringes orthodox principles of statutory construction by requiring courts to interpret the bill's provisions in a way that is compatible or most compatible with another act, that is, the human rights listed in the bill. This will constitute a significant change in the relationship between the courts and the parliament and will increase the relative power of the courts.[110]

He later referred to the possibility that 'the express legislative intent of the parliament might be ignored by unelected judges'.[111] The concern of Opposition Members over the courts ignoring legislative intent was expressed on numerous occasions,[112] as was a concern that the courts would be empowered to 'rewrite' legislation.[113] Confusingly, some of the statements about 'rewriting' were followed by assertions that the proposed amendments to remove the declaration mechanism would address this concern.[114] It is therefore not clear whether the references to rewriting were directed at cl 48, or whether the 'rewriting' envisaged was the indirect effect of Parliament regarding itself as effectively bound to change its legislation to ensure consistency with the courts' interpretation of the relevant human rights law.[115]

More generally, Opposition Members expressed concern that the Bill would alter the relationship between the three branches of government in Queensland.[116] Government Members (including the Chair of the parliamentary committee that had inquired into the Bill) asserted the constitutional orthodoxy of the Bill, arguing that no such change would be effected.[117]

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110 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 380 (David Janetzki, Shadow Attorney-General and Shadow Minister for Justice).

111 Ibid 381 (David Janetzki, Shadow Attorney-General and Shadow Minister for Justice).

112 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 446 (Lachlan Millar), 452 (Anthony Perrett), 465 (Stephen Bennett).

113 See Queensland, *Parliamentary Debates*, Legislative Assembly, 26–7 February 2019, 384 (James Lister), 452 (Anthony Perrett), 465 (Stephen Bennett).

114 Ibid 384 (James Lister), 452 (Anthony Perrett).

115 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 455 (Christian Rowan): 'As the vast international and indeed domestic experience has shown, rulings of incompatibility have rarely, if ever, been made which have not resulted in the parliament of the day amending or repealing provisions. While in theory the dialogue model is attractive to many, in practice it would take, to paraphrase Sir Humphrey Appleby, a very courageous government and Attorney-General to reject any ruling of incompatibility. This is no way to hold a dialogue.'

116 Ibid 440–1 (Samuel O'Connor), 442 (Andrew Powell), 452 (Anthony Perrett), 471 (Daniel Purdie).

117 See Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice), 383 (Peter Russo).

The most detailed consideration of cl 48 came from an Opposition Member. After quoting cl 48(2), he asserted:

> We are moving from judicial interpretation to judicial legislation. What happens is this: at the moment the courts interpret the law. This provision gives them the obligation to interpret the law, if it does not find a way to do so, in accordance with the bill and that is in a way that is 'most compatible with human rights'. It is enlarging their jurisdiction and moving well and truly beyond the capacity they have at the moment.[118]

The Member referred to Lord Bingham's speech in *Sheldrake v Director of Public Prosecutions*,[119] in which the senior Law Lord stated that 'the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament'.[120] The Member continued:

> Here we have the House of Lords raising the point exactly contained in clause 48(2) that at some point in time the court may need to divert from the intention of the parliament. That enlarges the jurisdiction of a court to a point that this body [the Parliament of Queensland] becomes a secondary body.[121]

The broad messages from the various background materials support the view that s 48 is similar to the principle of legality. Despite the concerns of some Opposition Members (many of which may in fact have related to the declaration power in s 53), the views expressed in the Explanatory Notes, the Department's response to the written submissions received by the parliamentary inquiry, and the statements of Government Members during the second reading debate on the Bill all emphasise that neither s 48 nor the *QHRA* as a whole was expected to effect a change to prevailing constitutional arrangements — including the interpretive function of the courts. The express references to the principle of legality should assist courts in interpreting s 48 when it falls for judicial consideration.

This is not to say that s 48 ought to be regarded as having no effect beyond what could already be achieved by the application of the principle of legality.[122] Rather, the emphasis on that principle demonstrates that the more radical aspects of the UK's *Ghaidan* approach are not to be imported via s 48. The position is somewhat complicated by the extent to which the principle of legality has developed in both Australia and the UK in the period since the enactment of the

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118 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 450 (Mark McArdle).

119 [2005] 1 AC 264.

120 Ibid 303 [28].

121 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 450 (Mark McArdle).

122 Cf Tate, 'Statutory Interpretive Techniques under the Charter' (n 101). See also *Taha* (n 18) 62 [189]–[190] (Tate JA).

ACTHRA and the *Charter*.[123] The common law principle has gained in prominence and strength in both countries, although, at least for the time being, it cannot be said to encompass the full force of *Ghaidan*.[124]

V Conclusion

The interpretive provisions in Australian human rights legislation have been interpreted as conferring relatively modest powers on Australian courts (and other interpreters of legislation), similar to (if not entirely coextensive with) the common law principle of legality. As a matter of the application of the principles of statutory interpretation, this appears to be the correct approach. It is consistent with the text of the interpretive provisions, with their express references to the necessity of interpretations being consistent with legislative purpose, and with the respective contexts of their enactment.

In the ACT, the original form of s 30 subjugated the interpretive power to the purpose of the legislation being interpreted. In Victoria, a less restrictive approach was taken, but the background materials emphasised the modesty of s 32. The ACT having amended s 30 to mirror the Victorian legislation, Queensland has now followed this example as well. With the benefit of the experiences in the ACT and Victoria, Queensland's interpretive provision has most clearly been drafted to function in a similar way to the common law principle of legality, eschewing the approach of UK courts to s 3 of the *UKHRA*. Whatever view one takes of the merits of these interpretive provisions, one thing is obvious from their history: the pattern of Australian jurisdictions learning from the experiences of other Australian jurisdictions is as strong in the area of human rights legislation[125] as it is in others.[126]

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123 See generally Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017); Jason NE Varuhas, 'Conceptualising the Principle(s) of Legality' (2018) 29 *Public Law Review* 196.

124 On the possibility of further developments in this regard in the UK, see Coxon (n 19).

125 Williams and Reynolds (n 10) 142, 146.

126 See, eg, Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) ch 1.