Federal criminal law under a rights charter*

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INTRODUCTION

The Commonwealth may or may not be about to tread the oft-trodden path leading to a non-entrenched statute setting out and (to an extent) promoting human rights. In a development that could not have surprised even the least jaded observer of the 2020 summit, the Australian governance stream 'expressed strong support for a statutory Bill or Charter of Rights, with minority support for a parliamentary Charter.'[1] The May budget earmarked several million dollars for 'supporting nationwide community consultation on the most appropriate methods of protecting human rights', particularised as a line item on the 'national consultation on human rights and responsibilities.'[2] Federal Attorney-General Robert McClelland emphasises that 'that the outcome of the consultation is not predetermined - any new approach to human rights will flow from the views of the Australian people.'[3]

The Australian history of similar consultation processes casts some doubt on the latter claim. In Victoria, for instance, the announcement of a consultation coincided with a government 'statement of intent' setting out the proposed statute's name, its sources, its scope and its limitations. The ensuing community consultation yielded a committee report that backed every word of the statement. In Western Australia, the government left nothing to chance by issuing a detailed draft bill before any consultation. By the same token, despite findings of overwhelming community support for a rights charter in both Tasmania and WA, those jurisdictions' governments have taken advantage of the proposed federal consultation to postpone implementation of any statute indefinitely.

The consultation process carries a further lesson: criminal law (and criminal justice more generally) is unlikely to feature in the debate on the adoption of a charter, which will instead focus on the theories of governance (i.e. buzzwords like 'culture', 'dialogue', 'sovereignty' and 'activism'); and a couple of hot-button political issues like abortion, gay marriage and socio-economic rights (all of which will be dodged, one way or another, in any bill that emerges.) A few lefties will raise the prospect of an Australian Guantanamo

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1 *Australia 2020 Summit: Final Report,* p. 342, available at <http://www.australia2020.gov.au/final_report/index.cfm>

2 Attorney-General's Portfolio Overview, at < http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~02+pbs08-09_AGD_final.pdf/$file/02+pbs08-09_AGD_final.pdf>

3 McClelland, Strengthening Human Rights and the Rules of Law, < http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_7August2008-StrengtheningHumanRightsandtheRuleofLaw>

as part of the case for better rights protection, only to be shushed by pro-Charter groups who will assure Australians that domestic criminal law protections are already way ahead of those demanded by international human rights law. The anti-Charter mob will use that very same argument to triumphantly push their 'if it ain't broke, don't fix it' line, albeit wincing while Bob Carr trots out anecdotes from his English 'mate' about how the UK's *Human Rights Act* has left its cops too 'scared' to deal with 'street louts'.[4]

History also shows that the actual interaction of any charter with the criminal law is likely to be as noisy as debate about it is quiet. Overseas charters (both statutory and constitutional) are raised most often in criminal matters, with attention to the various criminal process rights overshadowing better known rights like the right to life and freedom of assembly. While none of that noise will necessarily translate into much in the way of actual change in Australian criminal law or process – statute-based rights law is characterised by its vast scope and almost-as-vast caveats – it will have enormous ramifications for one group in particular: the community of practitioners and others whose work focuses around the criminal law.

To use myself as a non-representative example, in 2006 I was a criminal and evidence law academic with little knowledge or interest in international human rights law but (fortunately) a hobby of reading interesting criminal law cases from overseas courts that routinely refer to their own domestic rights statutes. I paid no attention whatsoever to the Victorian debate over the proposed Charter, wrongly assuming that it would never make it to, let alone through, parliament. In mid-2006, I returned from some overseas travel to find that the new bill had become law, one year after the consultation started (and two years after it was first mooted), and that every aspect of my professional life had been completely invaded by it.

Two years later, I've adjusted to making routine reference to the Charter in virtually every class I teach in evidence and criminal law. I'm presently writing or co-writing three books on Australian law that incorporate a significant international human rights component. I've taken on a second job advising a parliamentary committee on human rights (and not just criminal rights). And I've devoted a lot of my academic life to alternately calling for more attention to the new statute and recoiling at some of the courts' first forays into it, all chronicled with lengthy blog posts I write several times a week and sometimes several times a day. Even though it's possible that Victoria may yet become the first Western jurisdiction to repeal a charter of rights, I already find it hard to remember my pre-Charter life or imagine a post-Charter one. At the same time, I remain undecided on whether the Charter is a good or a bad thing.

In this paper, I make some observations about the effect of a Charter-like statute on criminal law, focussing on substantive criminal law rather than the probably vaster (and certainly vastly more complicated) topic of criminal process. Reflecting my current thinking (and the present uncertainty about the operation of the Victorian Charter and the prospects of a federal one), I'll alternate between lauding and deprecating the prospect of a new human rights statute applicable to federal criminal law.

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[4] Carr, 'Lawyers are already drunk with power', The Australian, < http://www.theaustralian.news.com.au/story/0,25197,23588943-7583,00.html>

The operative provision of human rights statutes that typically gets the most attention (and is the provision most likely to appear in any federal charter) is what I call the interpretation mandate:[5]

> 32(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.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

As those familiar with statutory interpretation will see, the first sub-section is a new addition to the long list of interpretative 'principles', with some similarity to the presumption against the abrogation of common law rights and freedoms.

What makes this rule different is that it is so pushy, incorporating words like 'must' and '[s]o far as it is possible'. Indeed, its counterpart in the UK has been understood as not just permitting but *requiring* courts to do things that go well beyond 'reading' a statute - read-down, read-in, read-out – and the House of Lords has boldly said that it will not be bound by mere words, but rather only the 'fundamental features' of a statutory scheme.[6] There is considerable controversy about this approach, which could be characterised as judicial legislation. (I've argued elsewhere that the interpretation mandates in Australia's statutes are not so bold.[7]) Sub-section (2), while not so pushy, conclusively resolves the debate about whether international and comparative materials can be properly considered in interpreting statutes, especially where the relevant materials pre-date the statute or have no other connection to Australia's legal system. In Victoria, they now can, at least where the overseas source is a part of an international law or any court decision relating to human rights.

Criminal lawyers, though, could not be blamed for responding to all this with a yawn. A significant part of the 'general part' of the criminal law consists of a very bold form of statutory interpretation: the reading-in of fault elements into criminal offences despite the complete absence of supporting language. As it was put by Brennan J in the seminal case of *He Kaw Teh*:[8]

> 1. There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the *actus reus* does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.
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> 2. There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either -
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> (a) knows the circumstances which make the doing of that act an offence; or
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> (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.

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[5] *Charter of Human Rights and Responsibilities Act 2006* (Vic)

[6] *Ghaidan v. Godin-Mendoza* [2004] UKHL 3, [67]

[7] < http://charterblog.wordpress.com/2008/08/02/interpreted-interpreted/>

[8] *He Kaw Teh v R* [1985] HCA 43

3. The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. Prima facie, knowledge is that state of mind.

Justice Brennan's 'presumption' language may (or may not) be weaker than the imperative of the interpretation mandate's 'must'. The requirement to choose a state of mind that is 'more consonant with the fulfilment of the purpose of the statute' seems to be more restrictive than the interpretation mandate's limitation that the right-compatible interpretation be consistent with a statute's purpose, although the 'prima facie' knowledge requirement might override that. In any case, under Chapter 2 of the Commonwealth, ACT and NT Criminal Codes, the reading-in is mandatory, regardless of the purpose of a provision, and is subject only to contrary words in the provision (which may or may not be limited to an express statement that an offence or element is one of strict or absolute liability.)

That the criminal law's approach can go considerably further than that of human rights law was clearly demonstrated in the middle of June this year when two contrasting judgments emerged from the top courts of Australia and the UK on the same issue: whether a statute that criminalises underage sex should have a mistake of fact defence read into it, despite contrary indications from legislative history and surrounding provisions. The High Court, in a 6-1 ruling, applying Australian criminal law, held that it should.[9] In the UK, whose criminal law lacks the *He Kaw Teh* presumption, in a unanimous ruling applying the UK's *Human Rights Act*, held that it shouldn't.[10]

Australian criminal lawyers are so used to the operation of very bold statutory interpretation for criminal offences that they may forget how problematic life can be when those presumptions don't operate. A reminder of those difficulties can be seen from the sole dissenting judgment in either decision. Justice Heydon doubted the view that the *He Kaw Teh* presumptions are equivalent to statutory interpretation principles in their ability to override (what he saw as) contrary indications from more mundane interpretation arguments.[11] (His argument somehow saw some significance in the omission of the presumption of *mens rea* from Chief Justice Spigelman's recent speeches on presumptions in statutory interpretation.) Instead, he embraced the pitfalls that can flow from defining criminal offences solely with dictionaries, comparison with neighbouring provisions and parliamentary debate.

In what may be a first, Heydon J cited a landmark overseas human rights judgment, *Griswold v Connecticut*, where the US Supreme Court invalidated the criminalisaiton of contraceptives.[12] Naturally, Heydon J cited the dissent, which eschewed a role for courts in decisions about whether the features of stupid criminal laws:[13]

> The appellant contended that the Court of Criminal Appeal's construction should be rejected because it was "Draconian"… But once the conclusion is reached that legislation bears a particular construction, even if a court thinks that legislation may be "uncommonly silly", "unwise, or even asinine", that consideration cannot prevail over the legislative language

Conversely, the majority approach in *CTM* indicates how regular Australian criminal law can make even the current High Court behave like the Warren Court in its heyday.

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[9] *CTM v The Queen* [2008] HCA 25

[10] *R v G* [2008] UKHL 37

[11] *CTM v The Queen* [2008] HCA 25, [202] and fn. 178.

[12] Id at [237], citing *Griswold v Connecticut* 381 US 479

[13] *Griswold v Connecticut* 381 US 479 at 527 (1965) per Stewart J

As strong as the *He Kaw Teh* and Criminal Code presumptions are, they are limited in their scope. As all Australian criminal lawyers know, reading in corresponding fault elements won't help much if the physical elements are badly drafted. Indeed, the interpretation of physical elements of crimes is not a specialised part of the criminal law, but rather is just a matter of ordinary statutory interpretation.

This was demonstrated in the recent decision of the Federal Court invalidating one of the World Youth Day Regulations.[14] While that judgment is lauded as a victory for human rights, doubly important because of the participation of both Australia's new Chief Justice and the next head of the federal human rights commission, it was actually founded some very ordinary interpretation of these statutory provisions:

> Section 46(3) A person must not sell or distribute a prescribed article during the sales control period in an Authority controlled area without the approval of the Authority.
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> Reg 4(1) For the purposes of the definition of "prescribed article" in section 46 (10) of the Act, the following classes of articles are prescribed: (a) items of food and drink, (b) religious items (for example, rosary beads, candles, candle holders, prayer tokens and prayer cards), (c) items of apparel, including headwear, (for example, t-shirts, jumpers, jackets, pants, pyjamas, singlets, tank tops, shorts, wet weather jackets, caps, visors and hats), (d) clothing accessories (for example, scarves, bandannas, socks, shoes and thongs), (e) jewellery, (f) giftware (for example, key rings, lapel pins, zipper pulls, magnets, removable tattoos, button badges, wristbands, mobile phone accessories, computer accessories, sunglasses, stickers and photo frames), (g) hardgoods (for example, bottles, mugs, plates, spoons, ceramics and umbrellas), (h) stationery, (i) textiles (for example, beach towels and tea towels); (j) philatelic and numismatic articles (for example, coins, postage stamps, envelopes and first day covers).
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> 7 (1) An authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that: (a) is a risk to the safety of the person or others, or (b) causes annoyance or inconvenience to participants in a World Youth Day event, or (c) obstructs a World Youth Day event.
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> (2) A person must not, without reasonable excuse, fail to comply with a direction given to the person under subclause (1). Maximum penalty: 50 penalty units.

The Federal Court's interpretations included:

- 'distribute' includes non-commercial distributions (but does not include giving things to an individual, as opposed to many people)[15]
- With respect to the list in Reg 4(1):
    - The list doesn't cover condoms, deemed not to be appropriate gifts for WYD participants, or 'symbolic coat-hangers', which apparently are not clothing accessories[16]
    - 'Stationery' doesn't include printed material[17]
    - 'button' badges' and 'stickers', as 'giftware', are limited to things appropriate as gifts to World Youth Day participants and thus exclude

[14] *Evans v State of NSW* [2008] FCAFC 130
[15] Id [44]-[49]
[16] Id [53]
[17] Id [53]

gifts with political slogans (or, at least, slogans unlikely to appeal to participants.)[18]

- 'T-shirts' likewise don't include t-shirts with slogans[19]
- 'Candles' distributed 'to raise awareness about the fact that same-sex marriage, abortion, birth control and homosexuality are not obstacles to world peace' may or may not be 'religious items'[20]

- 'annoyance' covers any person who is ruffled, troubled, vexed, disturbed, displeased or slightly irritated, and there is no objective criterion to judge it.[21]
- 'inconvenience' means objective inconvenience, objectively judged.[22]

Such interpretation would warm Heydon J's heart for its insistence on asinine outcomes.

The Federal Court, in considering the less controversial requirement of approval for 'sales or distribution', pointlessly insisted that the regime extended to non-commercial activities, justified by, of all things, the King James Bible and its reference to Jesus 'distributing' loaves and fishes[23] (presumably not as a loss leader!) Apparently to compensate for this curiously wide reading, the Court then gave bizarrely narrow interpretations of a straight-forward list of what anyone might want to sell to WYD participants. As a result of the case, a commercial seller could (without authorisation) set up a store to sell condoms, slogan-bearing t-shirt and coat-hangers (but not candles or plain t-shirts) to WYD participants, and could give anything they wanted on an individual basis.

More disturbingly, reg 7, a provision obviously designed (rightly or wrongly) to protect participants in WYD from hecklers, had to be interpreted in the broadest possible way, banning anything that any individual participant felt was a bit of a bother (whereas participants were only protected from 'objectively' determined inconveniences.) The protection against being slightly vexed didn't help those participants at all, as the reading was so broad that it was *ultra vires*. The judges sadly explained that they couldn't imagine any 'intelligible boundary within which the 'causes annoyance' limb of reg 7 can be read down to save it'. At the same time, the judge's dictionary allowed them to declare that 'inconvenience' had a sufficiently objective component to preserve it, leaving the protesters still at the mercy of overzealous enforcers. In short, ordinary statutory interpretation allowed judges to convert poorly-drafted provisions into nonsense.

(It may well have been that, if reg 7 was in an *ultra vires*-proof head statute, then the Constitution's freedom of political communication could have been applied to read in an objective criterion into the word 'annoyance'. But that approach has two flaws: first, it is limited to the boundaries of the Constitution's tepid rights protection (and the High Court's tepid interpretation of it); and, second, as this case shows, such interpretation only arises as a fall back if ordinary interpretation fails to keep the statute within limits, including asinine limits.)

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[18] Id [54]-[55]
[19] Id [56]
[20] Id [58]
[21] Id [81]-[83]
[22] Id [84]
[23] Id [46]

In my view, this is where an interpretation mandate like those in human rights statutes comes into its own, permitting a poorly-drafted provision to instead be transformed into something that makes sense. Why?:

- The mandate doesn't require a dramatic trigger, like potential invalidity. Instead, it applies to all statutory interpretation.
- The mandate doesn't require ambiguity, like the rule about construing penal statutes narrowly. Indeed, it requires the reinterpretation of statutes with settled interpretations.
- Nor is it about one-way interpretation, like the penal statutes rule, but rather may require that some criminal offence provisions are read more broadly.
- Unlike the main other rule designed to make sense out of drafting nonsense, the purposive interpretation rule , the interpretative mandate doesn't require an artificial divination of a purpose (which, especially in the case of criminal provisions, is at best non-existent and at worst itself draconian)
- Nor is it single dimensional, like most interpretation rules (penal statutes, purpose, etc), instead requiring the balancing of competing rights
- Nor is it limited to a list of 'fundamental' or 'common law' rights, but instead direct attention to both the international law on human rights and also its application in myriad overseas courts.

For example, it seems to me that, had the *World Youth Day Act* been part of Victorian law, there would surely have been no difficult in distinguishing between commercial distribution and non-commercial distribution, given the latter's special – indeed exclusive – impact on expressive acts. There would then have been no need to draw bizarre distinctions between slogan-bearing and plain t-shirts, or symbolic and non-symbolic coat-hangers, in order to meet that section of the Act's apparent goal of regulating trade practices (but not political practices) surrounding WYD.

Likewise, had the World Youth Day Regulations been part of Victorian law – and, indeed, there are a number of anti-'annoyance' provisions that are a part of Victorian law – the court would have had no difficulty in reading 'annoyance' with an objective test, just as many courts (including three of the seven judges in *Coleman v Power*[24]) were willing to do. It's true that the main overseas judgments[25] interpreted language that was narrower than 'annoyance' – indeed, their common mantra was that the offences required more than mere annoyance! – but their tenor was a focus away from individual subjective annoyance and towards behaviour that involves a significant element of public harm. Any new reading under a human rights statute reading would need to take into account not just freedom of expression but also freedom of religion of the WYD participants. Doubtless framing a test will be difficult, but I'm unable to see how a court that was satisfied with that the term 'inconvenience' had a sufficiently objective component would be unable to come up with something similarly satisfactory for annoyance (to the extent that those grouped terms shouldn't be read as concerned with a common level of interference in the freedom of religion of the WYD participants.)

In short, my view is that if the case had been decided under a human rights statute, like those in the ACT and Victoria, then the regulations would not have been struck down,

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[24] *Coleman v Power* [2004] HCA 39.

[25] See *Brooker v Police* [2007] NZSC 30 and judgments discussed therein.

but rather have their poor drafting cured. The cure would flow, not from the murkiness of common law, but rather from an intentional statutory rule that directs consideration to judgments of the world's courts, rather than editors of the world's dictionaries or the imagination of a single jurisdiction's judges.

Human rights statutes actually have much more to offer substantive criminal law than some more robust readings of the words actually used in statutes. They can also offer robust set of principles designed to distinguish between good and bad forms of criminalisation and criminal responsibility, and a set of ready-made doctrines that may convince courts or criminal justice decision-makers to bridge the gap between them.

Although a lot of the talk about human rights is about rights and people, the core concept in modern human rights law is about laws. Laws that limit rights have to obey this rights mandate:[26]

> 7(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-
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> (a) the nature of the right; and
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> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This formulation, found in Canada's, New Zealand's and South Africa's human rights laws, and drawn from foundational modern human rights jurisprudence of Israel and Europe, is a recipe for sensible law-making, including such basic requirements as minimalist intrusion, evidence-based law-making and proportionality. The absence of such features in Australian criminal laws is the most routine complaint made about them (at least by defence lawyers.) Human rights statutes in the Victorian model offer the prospect of laws being scrutinised against this standard prior to their enactment, interpreted to bring them in line with this ideal or, failing that, of courts declaring that they fail the test (albeit without legal consequence.)

The potential benefits of this core feature of human rights law go beyond a chance to judge the statutory outputs of law-and-order politics. More importantly, they also carry the prospect of injecting public law doctrines well-established in overseas courts into our domestic criminal law, including the following overlapping doctrines[27] relating to:

- overbreadth (i.e. laws whose scope exceeds their purpose)
- arbitrariness (i.e. laws that have effects that do not match any rational purpose)
- vagueness (i.e. laws whose scope is inappropriately left in the hands of the courts)
- inappropriate delegation (i.e. laws whose scope is inappropriately left in the hands of the executive)

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[26] *Charter of Human Rights and Responsibilities Act 2006* (Vic)

[27] See, e.g. Dresssler, *Understanding Criminal Law*, LexisNexis (4th ed), Chapter 5; Hogg, *Constitutional Law of Canada*, Thomson (5th ed, Volume 2), 416-429

- inaccessibility (i.e. laws that the public can't understand)
- chilling (i.e. laws that, through vagueness or otherwise, effectively prevent people from doing things that the law doesn't actually prevent)

While this list looks like (and indeed is) a set of common policy critiques of criminal laws, it is important to recognise that in each instance there is a matching legal doctrine with numerous examples of court decisions that can be called on in making legal arguments in accordance with human rights statutes.

A compelling recent example of such doctrines and their application is a judgment of a US Appeals Courts about a well-known incident: Janet Jackson's infamous wardrobe malfunction.[28] After half-a-million Americans complained (or put their names to form letters complaining) about this 9/16th of a second incident, the US's broadcasting regulator prosecuted CBS and its affiliates, fining it around $5M for breaching this provision:

> 18 USC § 1464 Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

The American legal system gives regulators a surprising role in defining the above terms, including their application to visual indecency like Ms Jackson's. But the courts also scrutinise both the meaning and application of the law to ensure its conformity with the US Constitution's due process jurisprudence. In the case of the wardrobe malfunction, the 3rd Circuit Court of Appeal held that CBS's fine infringed two constraints imposed by American public law: first, CBS was not given notice of a change in the FCC's enforcement policy from being forgiving of brief indecency during live events to prosecuting for it; and, second, CBS was fined despite ample evidence that it had exercised due diligence to prevent the very incident that occurred.

Although indecency in Australian broadcasting is regulated in a much more detailed way, Australian online providers are subject to a similarly rule to the one applied by the FCC:[29]

> 58(1) A person must not use an on-line information service to publish or transmit, or make available for transmission, to a minor material unsuitable for minors of any age.
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> Penalty: (a) if the material is objectionable material-240 penalty units or imprisonment for 2 years; (b) in any other case-60 penalty units or imprisonment for 6 months.

Such material is defined as including material that 'describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult' as well as material classified as R18+ or worse by the Classification Board. I'd argue that the above provision would, in Victoria, be interpreted as including defences along the lines discussed in the US litigation, requiring both unambiguous predictability of an adverse classification (or reasonable offence) and the absence of due diligence.

(As it happens, the Victorian statute is accompanied by a statutory due diligence defence.[30] My point, though, is that human rights law would read such a defence in even

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[28] *CBS v FCC*, United States 3rd Circuit Court of Appeal, 21st July 2008 at < http://www.ca3.uscourts.gov/opinarch/063575p.pdf>

[29] *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic)

[30] *Crimes Act 1958* (Vic), s. 58(2)

if Parliament omitted it, whereas criminal law would add only a narrower mistake of fact defence. Moreover, human rights law would read-in a requirement, unknown to and even adverse to traditional criminal law, of predictability and fair notice in the decision-making of bodies like the classification board, a matter of no small importance for photography artists in current times.[31])

A difference between Australian-style human rights laws and many overseas ones is that some of the public law doctrines developed overseas are geared towards a court nullifying a statutory provision (including a criminal offence) either completely or to the extent it goes out of bounds (with the latter often achieved by introducing 'constitutional defences' into existing criminal offences.) By contrast, Australian courts will never be able to invalidate a statute (although, just as the Federal Court did in the World Youth Day case, they can invalidate a regulation.)) The closest analogy in Australia's human rights statutes, the declaration of incompatibility (or, in Victoria, inconsistent interpretation[32]) can identify statutes that infringe these norms, but such identifications have no legal effect (and, in particular, won't affect any criminal convictions.) Nevertheless, the somewhat weaker operative provisions of Australian human rights statutes – the interpretation mandate, pre-enactment scrutiny and obligations of public authorities – may potentially fill at least some of the breach.

To give a speculative example from Victoria this year. A few weeks after Victoria's Charter came fully into operation, a teenager held a notorious party at his Melbourne home while his parents were away. The widespread notoriety of the teen involved was soon diminished when Victoria Police charged him with the common law offence of public nuisance (attracting a maximum of five years in prison) and the statutory offence of making child pornography (attracting a maximum of ten years.) The latter charge (reportedly involving camera footage he shot of minors engaged in a 'sex act' at his party, handed to police by his step-father) is part of an unusual Victorian trend, later noted in the *Herald Sun*:[33]

> TEENAGERS are becoming major makers of child pornography in Victoria, new statistics show. Statistics reveal adolescents last year outnumbered middle-aged men two to one as the main offenders in child porn production. Youths 10 to 14 were among the alleged offenders. But new sentencing statistics have revealed that possession-of-child pornography cases coming before the courts overwhelmingly involve adult men. All 197 offenders dealt with by magistrates in the past three years for possession were men.

While it's possible that Victorian child porn is predominately made by kids and exclusively possessed by adults, I suspect that this trend is the result of a curious quirk in Victoria's child porn laws. Minors who take sexual pictures or movies of eachother typically cannot be prosecuted for possessing those pictures or movies because of these defences:[34]

> 70(2) It is a defence to a prosecution for an offence against subsection (1) to prove…
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> (d) that the defendant made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or

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[31] *Crimes Act 1958* (Vic), ss. 68-70

[32] *Charter of Human Rights and Responsibilities 2006* (Vic), s. 36

[33] Crawford & Wilkinson, "Making pornography is now kids stuff" Herald Sun, 2 July 2008 at < http://www.news.com.au/heraldsun/story/0,21985,23955429-2862,00.html>

[34] *Crimes Act 1958* (Vic)

being given the film or photograph, the defendant was not more than 2 years older than the minor was or appeared to be; or

(e) that the minor or one of the minors depicted in the film or photograph is the defendant.

That, I suspect, is why only grown-ups face possession charges. But the more serious offences of making and procuring child pornography lack this defence.[35]

It's clearly absurd that kids are allowed to possess films that they were the ones who made them, but aren't allowed to make them! It's also easy to see how this quirk is in breach of a number of public law doctrines: overbreadth, arbitrariness, inappropriate delegation (to police and prosecutors), inaccessibility and chilling (of behaviour that, presumably, the Victorian parliament decided it didn't want to prevent, at least via criminalisation.) As the developments in the Melbourne party case and the statistics reported in the *Herald Sun* show, Victoria Police are more than willing to exploit that absurdity. (That being said, there has been at least one well-publicised instance of a highly disturbing film made by teens of another teen.[36] Human rights law may regard the s70(2) defences as incompatible with minors' right to protection by the state.[37])

Criminal defence lawyers become used to these absurdities, though they sometimes become adept at highlighting them for courts in the hope that a judge may find away to circumvent the problem (or failing that to lower the punishment that follows.) The Charter, I argue, legitimises and eases this particular dance. Notably, one solution would be to read the defence in s70(2) as applying to the procurement and making offences too. This is, it must be said, a bold form of statutory re-interpretation, exclusively drawn from the structure of the three provisions and an analogy between them, rather than any particular words in the procurement and making offences. But such bold interpretation is what the interpretation mandate is for, in this case on the argument that otherwise the two offences are not reasonable limits on teens' rights to freedom of expression (subject to any response based on teens' right to protection by the state.)

(Two caveats – the internal limitation on freedom of expression for laws 'necessary' to protect public morality [38]; and the limitation on the interpretation mandate to interpretations consistent with a provision's 'purpose'[39] – should be mentioned, but I don't think either of these limitations, while significant in other settings, would stop a court from fixing the absurdity of the present laws. The greater barrier – courts' willingness to regard reading in a whole new defence into an offence that lacks it as 'interpretation' – may well be a deal-breaker, but it must be noted that such reading-in of defences is commonplace in the general criminal law.)

The Charter provides two other potential avenues to remedy this problem. One is the new regime for pre-enactment scrutiny of all bills and new regulations, including new offences.[40] While all of the Ministerial 'statements of compatibility' to date have rendered positive verdicts about every bill and regulation that has appeared since 1/1/7, there is some reason to think that the human rights scrutiny process is having an effect on some

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[35] Ss 68-69, *Crimes Act 1958* (Vic)

[36] Miletic, 'Outcry over teenage girl's assault recorded on DVD', *The Age* at < http://www.theage.com.au/news/national/outcry-over-teenage-girls-assault-recorded-on-dvd/2006/10/24/1161455722271.html>

[37] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s17(2)

[38] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s15(3)

[39] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s32(1)

[40] *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 28-30.

criminal offence drafting behind the scenes. Moreover, the Scrutiny of Acts and Regulations Committee has given less rosy reports on numerous criminal offences (although it must be said that, to date, only one amendment has been forthcoming. Notably, though, that was to fix an absurd drafting error in the major criminal offence of incest.[41])

A second – and for now much more speculative – option is a Victorian Charter provision (drawn from the UK's *Human Rights Act*) that regulates how public authorities can act and make decisions, which I call the conduct mandate:[42]

> 38(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

The definition of 'public authority' includes Victoria police and the Director and Office of Public Prosecutions,[43] so this provision is potentially a rare constraint on prosecutorial decision-making. Perhaps it might require prosecutors to refrain from charging under offences that go beyond the limits of comparative public law. However, this argument is untested and must surmount a number of hurdles: whether or not charging is an interference with rights[44]; whether or not a prosecutorial decision-making is protected by the defence of being unable to 'reasonably have acted differently' under a statutory provision; and whether or not there is any useful relief against such decision-making (given the traditional common law and statutory restraints on challenges to criminal justice decision-making prior to a trial.)

These caveats on the operative provisions of the Victorian Charter bring me back into negative territory. As I stated earlier, human rights documents are known both for their vast scope – as the previous two sections show – and their almost-as-vast caveats. Caveats to the Charter include:

- Internal caveats on particular rights (e.g. the gloss on criminal defendants' right to confront witnesses against them that exempts bars on confrontation 'provided by law'[45])
- Savings provisions (e.g. the exemption of 'laws relating to abortion or child destruction', past or future![46])
- The courts and the common law (e.g. the conduct mandate doesn't apply to courts or tribunals exercising non-'administrative functions'[47], due to speculative constitutional concerns about Australia's national common law and an objection

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41 See < http://www.parliament.vic.gov.au/sarc/Alert_Digests_07/07alt14min.htm #Crimes_Amendment_Rape_Bill_2007>

42 *Charter of Human Rights and Responsibilities Act 2006* (Vic)

43 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s4

44 See *R v G* [2008] UKHL 37, [10] but c.f. *Doherty v Birmingham City Council* [2008] UKHL 57, [155]

45 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s25(2)(g)

46 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s48

47 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s4(1)(j)

to applying human rights law to private interactions; though note that the limitation goes far beyond both of those concerns)

- Exemptions by regulation (e.g. the current – and possible continuing – exemption of Victoria's parole boards[48])
- Transitional provisions (e.g. the exemption of all proceedings commenced before 1/1/7[49], currently interpreted as covering all criminal matters where charges were laid in 2006 or earlier)
- Application provisions (e.g. limiting the Charter's rights to 'human beings'[50], and hence denying all rights to corporations, including criminal process rights to corporate defendants)
- Notice requirements (e.g. a requirement for notice to the Attorney-General and Victoria's statutory human rights commission[51], which courts have regarded as preventing urgent or spontaneous reliance on the Charter)
- Limits on operational provisions (e.g. the limits identified at the end of the last section)

Each of the above limitations on the Charter is the product of the political process of getting a human rights statute up and running. But, as I've argued in detail, they also have much of the arbitrariness that comparative public law is opposed to. Their result is that the Charter's influence on Victorian criminal law is patchy; some parts are subject to positive reform in line with the best of overseas practice, others aren't. For example, the litigation in Victoria concerning the airing of Underbelly – which can affect both the criminal prosecutions of Melbourne's alleged gangsters and the potential prosecution of individuals for contempt – has, to date, not involved the Charter, despite the clear free expression and fair trail rights that are raised.[52] The reasons – the transitional provisions, the notice requirements, the exemption of courts and the exemption of corporations – are not ones that are at odds with the values of criminal law, which typically requires the same general approach to all potential prosecutions, regardless of timing, the nature of the parties, the tribunal or the legal issues raised.

The most significant gaps in the Charter's influence on the criminal law are actually laid down by the scope of human rights law itself. While that scope if broad, the criminal law's scope of regulation is broader. Many of the arguments I've referred to in this paper concern the right to freedom of expression. But similar laws on topics that don't touch on this right may be treated differently. Thus, my argument above that the World Youth Day Regulation ban on causing 'annoyance' to WYD participants should be re-interpreted to require an objective test for annoyance probably could not be made about a Victorian offence that uses the same word:[53]

> 4 Any person who-
>
> …(d) in a public place-
>
> (i) flies a kite; or

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[48] *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007*

[49] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s49(2)

[50] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s6(1)

[51] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s35(1)

[52] *General Television Corporation Pty Ltd v DPP & Anor* [2008] VSCA 49, [38]

[53] *Summary Offences Act 1966* (Vic)

(ii) plays at a game-

to the annoyance of any person;

…shall be guilty of an offence.

Penalty: 5 penalty units.

This isn't objectionable when what is at stake is interpreting a word to better conform with a particular right. But it is unfortunate when an offence provision falls short of the comparative public law requirements I discussed in the previous section. For example, the poorly drafting of a Victorian incest provision that was picked up by the Parliament's Scrutiny of Acts and Regulations Committee could only be raised because the Committee characterised the problem as one that engaged the rights of families and children to protection. Without this somewhat slim justification, the Committee's terms of reference (and any court's ability to re-interpret or any controls on prosecutorial discretion) could not have been triggered and a bad law would remain on the books. Another pertinent example is the House of Lords judgment I mentioned earlier that refused to read in a mistake of fact defence into a child sexual assault statute; the Lords characterised the statute not limiting privacy rights, because those rights didn't extend to a right to have sex with minors.[54] Criminal lawyers would presumably characterise the issue differently as a right to have sex with people you reasonably think are not minors.[55]

In making the above critique (which I also made in greater detail in relation to the effect of the Charter on evidence law)[56], I've sometimes received the response that this is an unfair criticism of the Charter, which aims to promote human rights, rather than any particular law reform agenda. My view, however, is that, whatever might be said of the goal of promoting human rights, it is fair to evaluate human rights law according to its effects on the law (which is one of the primary means by which human rights are promoted and therefore a primary subject of the Charter's operative provisions.) Criminal lawyers can justly complain if the broad values of their area of law – notably the role of general, universal principles in enacting, interpreting and applying criminal offences – are compromised by the Charter. Indeed, it may well be argued that the political compromises that created gaps in the Charter are themselves at odds with the well known principle of the universality and inalienability of human rights.

This brings me back to the coming federal consultation. Because any federal charter will effect federal criminal law, federal criminal lawyers should involve themselves in the consultation, *whether or not they have any interest or strong feelings about human rights*. It is important that human rights law is not left to the human rights lobby. One option, for those who see no value in human rights, may be to oppose a federal charter. But, for those who either support human rights or recognise that the charter may nevertheless be enacted, but who also value having a uniform criminal law that is uniformly open to the benefits of human rights law, more specific contributions are required. One such contribution may be to lobby against the above limitations. However, human rights politics being what it is, that may not be a winning argument.

A better approach would be to seek to exempt criminal law from the limitations. So, for example, if (say) corporations are to be exempt from having human rights (e.g. due to fears or prejudices about granting free speech rights to powerful commercial interests), then it might be appropriate to lobby that the exemption should not extend to criminal

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[54] *R v G* [2008] UKHL 37, [7], [46]

[55] C.f. *R. v. Wong*, [1990] 3 S.C.R. 36

[56] Gans, 'Evidence Law under Victoria's Charter' (2008) *Public Law Review*, forthcoming.

process rights (such as the right against retrospective criminal laws or punishments.) If the common law is to be exempted from the operation of a federal charter (e.g. due to concerns about imposing human rights on private actions), or if ongoing matters are to be exempted (e.g. due to concerns about changing the rules mid-stream), then it may be appropriate to lobby against the application of either of these rules to criminal proceedings. If (say) marriage is to be exempt from a federal charter (just as abortion is exempt from Victoria's), it may be necessary to ensure that any criminal proceedings (e.g. for bigamy) still give the full benefit of Charter rights to defendants.

However, criminal law 'opt-outs from the opt-outs' won't ensure a universal approach to federal criminal law, because the effects of any federal charter will still be limited to the subject-matter of rights law, rather than the potentially broader subject-matter of criminal law. Here, an alternative may be to lobby against the practice (followed in the ACT, Victoria and the other jurisdictions that have done consultations) of focussing almost entirely on the rights in the *International Covenant on Civil and Political Rights*. These have the considerable disadvantage of being a compromise between competing legal systems, which notably differ in their approach to criminal justice. Rather, consideration should be given to following the approach taken in the United States and Canada:

> No person shall… be deprived of life, liberty or property without due process of law.[57]
>
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[58]

Each of these rights have been interpreted as requiring that all criminal offences (or, at least, ones that may lead to imprisonment) must have a rational basis of the sort required by comparative public law. (By contrast, the Victorian Charter's right to 'liberty and security' is accompanied by an Explanatory Memorandum that attempts to prevent any reference to Canada's jurisprudence in its interpretation.)

There is one last option worth considering for those who wish to take the good without the bad from human rights law: forget the charter. An alternative is to take advantage of an existing set of general principles about how federal criminal offences should work: the federal Criminal Code. That Code was, of course, heavily influenced by the US Model Penal Code. But, the Model Penal Code was designed to work within the US's public law system. A reform program for the federal Code should consider enacting the principles of comparative public law (from the US and elsewhere) in the Code itself, either as general interpretive principles or (perhaps more realistically) by adapting or adding to the existing principles in a way that is more consonant with comparative public law. Potential options for reform may include: the rather limited mistake of law defences in the Code; a provision for a due diligence defence; or defences relating to inappropriate official conduct. More broadly, the proud tradition of comparative criminal law should be expanded to include comparative public law; in other jurisdictions with domestic human rights laws, the two fields are not studied separately, but together.

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[57] *US Constitution*, 5th Amendment

[58] *Canadian Charter of Rights and Freedoms*, s. 7.