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DANCING WITH A GORILLA?

THE EVER PRESENT FORCE OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

BY OSCAR ROO

Retired High Court Chief Justice Sir Gerard Brennan, in a paper delivered to Victorian judicial officers on the new Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter), recalled hearing a Canadian academic observe that “once you enact a charter of rights, the consequences are rather like the experience of dancing with a gorilla: you do not have an option about when to stop”.

This article suggests ways in which Victorian lawyers might “dance with the gorilla” in using the Charter in criminal litigation, given that the Charter became fully operational on 1 January 2008.

The Charter contains a great many provisions of relevance to criminal law and procedure. For example, s25 (“Rights in criminal proceedings”) contains no less than 14 provisions, listing numerous rights or guarantees to be accorded to persons charged with criminal offences.

Any lawyer with a passing familiarity with the criminal law will notice that many of the Charter “rights” are already recognised by the common law. For example, the right to liberty (Charter s21) has consistently been identified as “the most basic” common law right. Similarly, the privilege against self-incrimination (Charter s25(2)(k)) has been recognised by the High Court as “a fundamental rule of the common law”.1

Moreover, courts already assume that statutory provisions are not intended to abrogate human rights and fundamental freedoms in the absence of clear language to the contrary, and prefer, in the case of ambiguity, a statutory construction which is consistent with the terms of any treaties ratified by Australia, including the International Covenant on Civil and Political Rights from which the rights contained in the Charter substantially derive.

Charter rights are not absolute and are subject to “such reasonable limits as can be demonstrably justified in a free and democratic society” (Charter s7(2)).

Most importantly, a statutory provision that is incompatible with the Charter is not invalidated as a consequence of that incompatibility.

All in all, practitioners may therefore conclude that the Charter will make very little difference to the practice of the criminal law in Victoria. That conclusion may turn out to be both premature and incorrect.

The reinterpretation of legislation

Section 32(1) of the Charter requires courts to ensure that all statutory provisions, whenever enacted, are interpreted “so far as is possible to do so consistently with their purpose, in a way that is compatible with human rights”. As noted by Sir Gerard Brennan, “the purpose of the Charter is to amend all prior statutory provisions”. The Charter’s new super-added canon of construction throws open all previous constructions of statutes, including those which pertain to criminal law and procedure. Given the number of rights in the Charter itself that are

PRACTITIONERS ENGAGED IN CRIMINAL LITIGATION WILL NEED TO BE MINDFUL OF THE OBSTACLES AND OPPORTUNITIES PRESENTED BY VICTORIA’S NEW CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES.
of relevance to criminal law and procedure, the Charter’s new interpretative mandate may have a significant impact on the interpretation of criminal legislation.

The following are some key areas in the criminal law where the Charter may have an impact.

**Arrest**

Section 458 of the Crimes Act 1958 (Vic) contains a power of “citizen’s arrest” (used most commonly by store detectives and security guards) with respect to those whom the arrestor believes on reasonable grounds to be “found committing” an offence. The most authoritative construction of the phrase “finds committing” in s458 is found in *De Moor v Davies,* where Warren J of the Supreme Court construed the phrase, and its statutory extension in s462 of the Crimes Act, to apply well beyond circumstances where the alleged offender was caught in the act, or caught “red handed”. Hence we have the lawfulness of an arrest of a suspected shoplifter that occurs outside the shop after the theft has been committed.

The Charter throws the continuing correctness of this construction of the words “finds committing” in s458, as previously settled in *De Moor,* into doubt. This is a result of the Charter’s new interpretative mandate, and the countervailing rights expressed in the Charter, such as the right to liberty (Charter s21).

**Sentencing and “exceptional circumstances”**

Plea making forms the bread and butter of the criminal practice for many solicitors. To the chagrin of plea makers, the Sentencing Act 1991 (Vic) prescribes a number of circumstances where the discretion of sentences is limited by reference to the offender having to establish “exceptional circumstances” to avoid the imposition of immediate imprisonment. For example, an offender who commits an offence punishable by imprisonment during the operational period of a suspended sentence must demonstrate that “exceptional circumstances have arisen since the order suspending the sentence was made”, so as to avoid activation of the sentence held in suspense.

Moreover, the Victorian Court of Appeal has consistently construed the statutory phrase “exceptional circumstances” in ways that have not been of assistance to plea makers seeking to mitigate penalties on behalf of their clients. Currently, the most cited authority on the meaning of “exceptional circumstances” in the context of sentencing is the Court of Appeal’s 2005 decision in *R v Steggall.* Steggall eschews the relevance of “good reason in justice and the public interest” and instead provides that the circumstances must be “so exceptional as to be beyond reasonable contemplation or expectation” in order to avoid the restoration of the sentence held in suspense.

The continued authority of Steggall is now open to be reargued in light of the Charter’s new interpretative mandate. Specifically, the “exceptional circumstances” criteria in the Sentencing Act must be construed in a way that is consistent with the Charter, in particular s10 (“Protection from torture and cruel, inhuman or degrading treatment”) and s21 (“Rights to liberty and security of person”), including s21(2) which prohibits “arbitrary” detention. An offender on a 12-month suspended sentence who steals a chocolate bar valued at $1 is likely to face activation of that 12-month sentence based on the restrictive construction of “exceptional circumstances” in Steggall, given that (i) shoplifting is theft, an offence punishable by a term of imprisonment; and (ii) the activation of the suspended sentence by the commission of any offence punishable by imprisonment, albeit one down the bottom end of offence seriousness, is not “beyond reasonable contemplation or expectation”.

Indeed, in the case of the recidivist offender, the commission of such an offence over the operational period of a suspended sentence is almost to be expected. Such a drastic consequence, however, attached to the commission of such a trifling offence, is arguably both disproportionate and arbitrary punishment.
Pursuant to the Charter’s new interpretative mandate, a construction of the phrase “exceptional circumstances” that results in the infliction of such disproportionate and arbitrary punishment (i.e. the Stengall construction) should be avoided in favour of a more generous construction, which takes into account considerations of what is just and proportionate punishment. This is consistent with the approach taken by the UK Court of Appeal in R v Offen with respect to the construction of the phrase “exceptional circumstances” in the Crime (Sentences) Act 1997 (UK), given the equivalence of the human rights provisions in the Human Rights Act 1998 (UK) to those contained in ss10 and 21 of the Charter.

**Substantive defences**

The police are a “public authority” as defined in s4(1)(c) of the Charter. It is therefore unlawful for the police “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” (Charter s38(1)). Simply put, if the police do not comply with the Charter they are breaking the law.

There are a number of commonly charged offences that require the police to act lawfully in order to make out one of their constituent elements. For example, for a person to be found guilty of hindering or resisting a police officer in the execution of their duty (Summary Offences Act 1966 (Vic) ss2(1)), that police officer must be acting lawfully. It is not an offence to hinder a member of the police force if that member is acting unlawfully. Moreover, the onus is on the prosecution to prove each and every element of an offence beyond reasonable doubt. Hence, for the offence of hindering police to be made out, the prosecution must establish that the police member involved was acting lawfully at the time of the commission of the alleged offence of hindering or resisting, and acting lawfully means acting in accordance with the Charter.

Policing practices may have a specific impact on people of a particular race or ethnicity, or of a particular religious affiliation. Before the commencement of the Charter it was clearly unlawful for an arrestor to arrest and search someone without a warrant if the arrestor’s motive in doing so was, for example, overtly racist or devoid of any reasonable grounds for believing that an offence had been committed by the arrestee.

However, provided the arrestor had the requisite reasonable grounds for believing the suspect had committed an offence, it was not unlawful, for example, to engage in policing practices that were either directly or indirectly discriminatory.

Now, based on provisions of the Charter such as s8(2) (“Every person has the right to enjoy his or her human rights without discrimination”) and s19 (“Cultural rights”), it is arguably unlawful for the police (or other law enforcement bodies which meet the Charter’s definition of “public authorities”) to engage in discriminatory policing practices, notwithstanding an absence of an intention to discriminate, or the absence of a racist or other illicit motive. In particular, Aboriginal people are given specific rights “to enjoy their identity and culture” (Charter s19(2)), among other specific cultural rights. If policing public drunkenness in an area used as a gathering place by Aboriginal people becomes the catalyst for a fracas, and hindering charges are laid against Aboriginal persons, a justiciable issue arises as to whether the police were acting lawfully in focusing their policing specifically on an area known to be used by (and perhaps of some significance to) Aboriginal people.

Given the need for law enforcement authorities to comply with the Charter in order to conduct themselves lawfully, it is likely that practitioners who make requests for information from those authorities under the Freedom of Information Act 1982 (Vic), or who seek to subpoena documents or otherwise seek orders for production, will find that the legal requirement of compliance with the Charter both widens the scope of the information that can be obtained, and strengthens arguments in favour of disclosure of information.

**Warrants and committals**

Courts are public authorities when they act in an administrative capacity, including the issuing of warrants and committal proceedings (Charter s4(1)(j)). They are therefore bound to comply with the Charter when exercising those administrative functions. For example, a magistrate conducting a committal who denies an interpreter to a non-English speaking witness is arguably breaching the right to equality before the law (Charter s6(3)). A magistrate conducting a committal who denies an interpreter to a non-English speaking defendant is clearly breaching s25(2)(j) of the Charter, which confers the right to an interpreter on a person charged with a criminal offence.

It is unclear what effect the unlawful conduct of the magistrate in these circumstances will have on the lawfulness of the committal itself, or on any order of the magistrate committing the defendant to stand trial. It should be noted, however, that at least with respect to the administrative function of issuing warrants, the High Court has insisted on strict compliance with all aspects of the law regulating its exercise by courts or court officials: non-compliance leads to invalidity. It is therefore strongly arguable that the same rigorous standard would apply to the administrative function of hearing committals.

**Evidence**

Unlawful conduct by law enforcement agencies provides a basis for the discretionary exclusion of both real and confessional evidence unlawfully or improperly obtained. Breaches of the Charter by police and other public authorities will therefore provide a springboard for an argument for the exclusion of any evidence unlawfully obtained where the basis for unlawfulness is lack of compliance with the Charter.
Adjournments and delay

Delay in the prosecution of a criminal offence may lead to an order to permanently stay proceedings if the accused cannot be guaranteed a fair trial as a result of the delay. However, the Charter’s right “to be tried without unreasonable delay” (s25(2)(c)) appears to support a greater conferment of power than the common law. With respect to the identical provision in the Human Rights Act 2004 (ACT), Connolly J of the ACT Supreme Court considered whether a stay was “a proportional response to a purported human rights breach” in considering whether a stay was an “appropriate remedy”.

Conclusion

The author does not underestimate the considerable forensic hurdles that lie in the way of those who seek to run Charter-based arguments in criminal litigation. Whether the Charter is used in the ways outlined in this article will depend both on the attitude of the courts towards developing a human rights jurisprudence based on it, and on the ingenuity and willingness of Victorian practitioners to use the Charter in litigation.

As for the role of the Victorian judiciary, Supreme Court Chief Justice Marilyn Warren has delivered the following remarks to Victorian judicial officers: “But we now have a Victorian Charter … There is now a whole new jurisdiction across all levels of justice … The judiciary of Victoria has the opportunity to take the common law, foreign jurisprudence, and every ounce of our intellectual capacity to develop the first Australian jurisprudence of human rights law”.

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8. Sentencing Act 1991 (Vic), s32(3), (BA). See also s26(3A), (3B) re a breach of an intensive correction order.
10. [2001] 2 All ER 154, 171-6. The Charter expressly contemplates the consideration of foreign authorities as being relevant to both the interpretation of the Charter and other Victorian statutory provisions (Charter s32(2)).
13. See e.g. Nguyen v Elliott (unreported, Supreme Court of Victoria, Hedigan J, 6 February 1995) at 11-14.