

## Liberty Victoria Calls on Government to find COVID-safe ways for Protest Activity

Liberty Victoria is disappointed in the Premier's reported comments this week that now is not the time to be protesting. Freedom of expression, the right of peaceful assembly and freedom of association are fundamental human rights protected by the Charter of Human Rights and Responsibilities. Those rights are also fundamental to a healthy democracy.

The COVID-19 pandemic has thrown unprecedented challenges at governments and as a society, we have shown that we can adapt and innovate to those challenges as they arise. Liberty Victoria is therefore confident that the community and political leaders can find safe ways to manage COVID-19 challenges while still upholding democratic rights, such as freedom of expression, peaceful assembly and freedom of association.

Liberty Victoria President, Julia Kretzenbacher, says:

*“Freedom of expression is a fundamental human right that should not be placed in the “too-hard” basket due to COVID-19. The pandemic has forced us to find innovative ways in which we can lead COVID-safe lives. Community and political leaders should find safe and lawful ways in which to enable Victorians to exercise rights such as freedom of expression and peaceful assembly”.*

In November last year, Liberty Victoria [expressed its concerns](#) about arrests and the issuing of infringement notices for persons engaged in peaceful protests.

During the COVID-19 pandemic, Liberty Victoria has supported limitations on human rights protected by the Charter of Human Rights and Responsibilities, including the human rights of freedom of expression and peaceful assembly as protected by ss 15 and 16 of the Charter, where such limitations are proportionate and based on expert public health advice.

However, the environment Victoria finds itself in is now very different. As of today, Victoria marks its sixteenth day without community transmission of COVID-19<sup>1</sup> and the more recent cases of community transmission have been able to be dealt with by public health officials.

As we have previously said, in the Supreme Court case of *Loiello v Giles*<sup>2</sup> (where the previously imposed curfew was found to be lawful), the State of Victoria accepted that the public authorities making the directions pursuant to the *Public Health and Wellbeing Act 2008* (Vic) are bound by s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Act).<sup>3</sup>

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<sup>1</sup> <https://www.theage.com.au/national/victoria/no-local-covid-19-cases-for-16th-day-in-victoria-as-tennis-player-tests-positive-20210122-p56w1i.html>.

<sup>2</sup> [2020] VSC 722. This concerned the curfew between 9:00pm and 5:00 contained in the Stay at Home Directions (Restricted Areas) (No 15).

<sup>3</sup> *Loiello* [2020] VSC 722, [207], fn 195.

Where the rights of freedom of expression and peaceful assembly are clearly limited by a direction, the onus of “demonstrably justifying” the limitations in accordance with s 7(2) of the Charter resides on the Government.<sup>4</sup> In light of what must be justified, the standard of proof is high.<sup>5</sup>

Presently, while the directions permit members of the public to lawfully be in a crowd of more than 100 people at shopping centres and the Chief Health Officer can give exemptions for crowds to gather in public places for activities such as sporting events, other public gatherings in outdoor spaces cannot exceed that number.

The continued denial of the rights of freedom of expression, peaceful assembly and association on the basis of public health reasons cannot be justified in circumstances where the Chief Health Officer’s directions allow gathering in large crowds for purposes such as shopping and watching sport.

President of Liberty Victoria, Julia Kretzenbacher says:

*“If we have the will and ability to ensure that crowds gathering in shopping centres or at sporting events is done in a safe way, then surely we can find COVID-safe ways for peaceful public protests.”*

Liberty Victoria continues its calls for peaceful protest activity to be permitted in the current environment and asks that the Chief Health Officer amend the directions so that rights of freedom of expression, peaceful assembly and association can be exercised safely and are not unnecessarily curtailed.

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<sup>4</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004; DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381; (2009) 24 VR 415 (*DAS*), 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, 498 [175] (John Dixon J).

<sup>5</sup> *Ibid.* In *DAS* at 449 [148], Warren CJ cited with approval the observations of Dickson CJ in the celebrated judgment of *R v Oakes* [1986] 1 SCR 10, 43 [70]:

There are... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.” [citations omitted]