

LIBERTY VICTORIA:

DRAFT POLICIES

Current September 2008

HUMAN RIGHTS AND THE RULE OF LAW

Reflected in s 7 of the Charter

Liberty Victoria is dedicated to the protection, strengthening and promotion of civil liberties and human rights. These encompass a range of rights and entitlements that all should enjoy in a free and democratic society. They have emerged from centuries of struggle: a struggle which continues in many parts of the world and still breaks out sporadically here in Australia.

There is much debate about the extent and nature of human rights; nevertheless the great international instruments, which have resulted from the many struggles for human rights, have defined a consistent and coherent body of norms. They include the fundamental rights to life, liberty and property; the freedoms of belief, expression and association; injunctions against discrimination and the exercise of arbitrary power; and various rights to due process under the law.

Some of these rights such as the right to life and freedom of belief are absolute and unqualified but most are subject to restrictions necessary and reasonable for the proper ordering of a free and democratic society. Much of the debate about the nature and extent of human rights concerns the qualifications and restrictions which might properly be placed on them.

Civil liberties and human rights mark out the limits of State or governmental power and in some respects also limit the freedom of action of individuals and other legal entities. They generally operate negatively to prohibit conduct inconsistent with a right or liberty but can also compel conduct where an omission or failure to act would deny a right or liberty.

The manner in which human rights and civil liberties can best be protected and promoted is a matter of controversy in Australia today. Liberty Victoria supports the statutory charter of rights model, which preserves the sovereignty of Parliament and avoids the uncertainties of the bill of rights, or constitutionally entrenched, model.

By whatever means human rights and civil liberties are recognised in our law they are meaningless without the rule of law. It is notorious that some of the most repressive regimes in history had constitutions brimming with human rights but no means of vindicating them. For human rights to be meaningful, there must be a legal system in which they can be enforced. This requires an independent judiciary to try cases without fear or

favour and access to justice for all. The procedural rights such as equality before the law and right to a fair trial are thus vital and must be jealously guarded especially for unpopular causes and persons.

To see Liberty's policies on each of these important human rights, click on the link below:

- [Right to Life](#)
- [Right to Freedom of Thought and Belief](#)
- [Right to Liberty](#) (includes freedom of movement)
- [Right to Freedom from Torture](#) (includes cruel, inhumane or degrading treatment)
- [Right to Family and Reproduction](#)
- [Right to Freedom of Association](#)
- [Right to Freedom of Expression](#)
- [Right to Privacy](#) (includes freedom from surveillance)
- [Right to Freedom to Participate in Public Life](#)
- [Right to Freedom from Discrimination](#) (includes cultural rights)
- [Right to Property](#)
- [Rights of Children and Young People](#)
- [Rights of Prisoners](#) (includes detention and treatment)
- [Police and Policing](#)
- [Right to Justice](#) (includes double jeopardy and retrospective laws)
- [Access to Justice](#) (includes right to a fair hearing)
- [An Australian Bill of Rights](#)

RIGHT TO LIFE

Reflected in s 9 of the [Charter](#)

The right to life is the most fundamental of all human rights. This right is based on the belief that every person has an essential right to live and a right not to be arbitrarily deprived of life. The concept of a right to life is central to human rights, but particularly relevant to the issues of capital punishment, [euthanasia](#), self defence, [abortion](#) and war.

Internationally, the right to life is enshrined in:

- Article 3 of the [United Nations Universal Declaration of Human Rights](#); and
- Article 6 of the [International Covenant on Civil and Political Rights](#) (ICCPR).

According to the ICCPR Committee the right to life should not be narrowly interpreted and should include measures taken to reduce infant mortality and to increase life expectancy. The Committee has also expressed concern about the proliferation of weapons of mass destruction which not only threaten life, but deplete valuable resources that could be used to promote and secure human rights, especially in developing countries. The right to life can also be seen as requiring the State to take positive steps to reduce the incidence of such things as domestic violence.

In Victoria, the right to life is recognised by section 9 of the [Victorian Charter of Human Rights and Responsibilities](#). However, there is no recognition of this right in federal law.

The most important manifestation of the right to life is the prohibition on capital punishment. This prohibition admits of no exceptions. It should be adhered to not just in the cases of Australians convicted abroad of capital offences but also for terrorists who kill Australians abroad. The possibility of errors in the legal process, the importance of mercy in sentencing, the prospects of rehabilitation, and above all the inherent value and dignity of all human life are factors which apply in every case without exception.

The absolute and unqualified nature of the right to life should not, however, obscure or confuse the principles applicable to issues like euthanasia and abortion (see below under Protection of Families).

Euthanasia or dying with dignity involves the decision by a competent person to choose the nature and timing of their own death. Euthanasia is different to suicide in that a person makes a considered and informed decision, after looking at all the options including treatment and alternative care. Suicide is an action taken by people who are not always able to make clear decisions often suffering from conditions such as severe emotional distress, or a psychiatric illness such as depression.

Australian law does not distinguish between homicide and euthanasia. While suicide and attempted suicide are no longer crimes, assisting another to do so is and has resulted in a number of high profile prosecutions against people who have assisted terminally ill patients to die.

Liberty Victoria supports the right of individuals while competent to choose whether to receive treatment when no longer competent. In particular, Liberty Victoria believes that a competent terminally ill person should be able to choose to die by active intervention either by themselves or with the help of other medically qualified people.

RIGHT TO LIBERTY AND FREEDOM OF MOVEMENT

Reflected in ss 12 & 21 of the [Charter](#)

Along with the right to life, the right to liberty is one of the most fundamental human rights. The right to liberty is the right of all persons to freedom of their person – freedom of movement and freedom from arbitrary detention by others. Historically, the protection of individual liberty was one of the crowning achievements of the common law.

The writ of *habeas corpus* is an ancient common law remedy designed to allow a person who is detained to challenge the lawfulness of their detention. Habeas corpus does not secure the release of a person held pursuant to a valid law. Detention on mental health grounds is authorised by law, and so is detention to prevent the transmission of infectious disease. Preventative detention orders for anti-terrorist purposes is authorised by the Commonwealth Crimes Act, although their constitutional validity has not yet been tested.

Every declaration of rights includes the right of liberty: from the clarion call of the French Revolution (“Liberty, equality, fraternity”) to the Universal Declaration of Human Rights (**UDHR**; 1948), Article 3: “Everyone has the right to life, liberty and security of person”; to the International Covenant on Civil and Political Rights (**ICCPR**; 1967), Article 9: “Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

International human rights conventions do not form part of Australia’s laws unless specifically adopted by an Australian Parliament. The UDHR and the ICCPR have not been incorporated into Australia’s domestic law, so they do not have any legal force in Australia. Liberty believes that Australia should adopt and protect these human rights by enacting an [Australian Bill \(or Charter\) of Rights](#).

Like most rights, the right of individual liberty is not absolute. Governments can legitimately deprive people of their liberty in appropriate circumstances: typically, after conviction for serious offences, in serious mental health cases, and to prevent the spread of infectious disease. Article 9 of the ICCPR recognizes that qualification by prohibiting *arbitrary* detention.

The [Migration Act 1958](#) (Cth) provides that a non-citizen who enters Australia without a visa must be detained, and must remain in detention until they receive a visa or until they are removed from Australia. Thus boat people and other asylum seekers may be held in detention for months or even years – despite the fact they have not committed an offence, are not accused of committing an offence, and present no risk to the community. Asylum seekers are people who have fled their country due to oppression and persecution are held by Australia in high security jails indefinitely, regardless of age, sex or state of health. The United Nations Human Rights Committee (UNHCR) has found in a number of cases that this

constitutes arbitrary detention, contrary to [Article 9](#) of the ICCPR. In addition to Article 9 of the ICCPR, indefinite detention breaches provisions of the [Universal Declaration of Human Rights](#) and the [Convention on the Rights of the Child](#). However, the Migration Act specifically authorizes the detention of non-citizens and as a result, habeas corpus is not available to secure the release of detained asylum seekers.

On 29 July 2008, the Immigration Minister Senator Chris Evans announced a change in the policy of mandatory detention. These changes, when implemented, will treat immigration detention as a last resort, to be used only for the purpose of protecting the community.

Several other Federal statutes also provide for detention without trial. Division 105 of the Commonwealth Criminal Code provides that a member of the Federal Police may apply for a preventative detention order in relation to a person. A preventative detention order will result in a person being jailed for up to 14 days, in circumstances where they have not been charged with any offence. The order is obtained in a secret hearing, based on secret evidence and when the person is taken into custody pursuant to the order, they are not to be told the evidence on which the order was based. The provisions of Division 105 are directed to combat the risk of terrorism. Whether the denial of liberty amounts to arbitrary detention is a matter of balancing the right of liberty against the objective of combating terrorism. Opinions are divided on the question whether the right balance has been struck.

In some States of Australia, Parliaments have passed measures which enable convicted sex offenders to be held in prison after completion of their term of imprisonment. Thus, although the person has “paid their debt to society” they can continue to be held in jail. Whilst protection of the public from possible commission of future offences is a worthwhile aim, continued imprisonment of a person after completion of their sentence is a very serious matter. Imprisonment of a person who might commit an offence is very different to imprisonment of a person on conviction for an offence.

Any detention of a person in Victoria and pursuant to Victorian law is subject to the provisions of Articles 21 and 22 of the [Victorian Charter of Human Rights and Responsibilities](#).

The right to liberty is also associated with the right to humane treatment while being deprived of [liberty](#), the right to freedom from forced work or labour, and the right to [freedom from torture](#).

FREEDOM FROM TORTURE AND CRUEL, INHUMANE OR DEGRADING TREATMENT

Reflected in s 10 of the [Charter](#)

Torture is the intentional infliction of severe pain or suffering (of a physical or mental nature) on a person. The prohibition on torture arises from the need to protect the inherent dignity of the human person, and protects both physical and mental integrity.

International covenants such as [Article 7](#) of the ICCPR recognise the right to be free from torture and cruel, inhumane or degrading treatment. In Australia, the [Crimes \(Torture\) Act 1988 \(Cth\)](#) prohibits torture and section 10 of the Victorian [Charter](#) of Human Rights and Responsibilities protects citizens from torture and inhumane treatment.

Torture and cruel, inhumane or degrading treatment can be inflicted by private persons or by a government. In most countries, including Australia, torture is a criminal offence.

Liberty believes, along with all civilized nations, that torture can never be justified and that freedom from torture is a basic human right, which should be protected at every level.

Conduct that inflicts a certain level of humiliation or debasement of the victim which is not severe enough to constitute torture may nevertheless be cruel, inhumane, or degrading - and an affront to the inherent dignity of the human person. Such conduct is also contrary to human rights and prohibited by international conventions.

While freedom from torture is protected in Australia, freedom from inhumane and degrading treatment is not. The use of capsicum spray or TASER guns to coerce citizens into particular behaviour, rather than by way of self defence or the defence of others, may amount to torture or inhumane treatment.

DETENTION AND TREATMENT OF PRISONERS

Reflected in ss 11 & 22 of the [Charter](#)

The right to liberty is not absolute and persons found guilty of serious crimes can properly be deprived of their liberty. But this should only happen after a fair trial and subject to proper sentencing principles, involving an exercise of discretion to take account of all the circumstances of both the offence and the offender, including mitigating factors. Mandatory sentencing is contrary to these principles.

All persons deprived of their liberty, even those guilty of the most serious offences, are entitled to humane treatment and to be treated with dignity and respect. [Article 10](#) of the ICCPR recognises this right. Despite being a signatory to the ICCPR and endorsing the UN

Standard Minimum Rules for the Treatment of Prisoners, Australia has no enforceable standards for its treatment of prisoners.¹

State and Territory governments are responsible for running prisons in Australia. In Victoria, section 11 of the Charter of Human Rights and Responsibilities protects persons against forced labour while section 22 requires the humane treatment of those in detention.

Where imposed, the conditions of imprisonment should uphold the human dignity of the prisoner.

Prison should be the last resort in the sentencing process. Imprisonment is a traumatic and usually life changing event. It has particularly detrimental consequences for indigenous persons, who continue to be imprisoned in disproportionately high numbers. Specifically, imprisonment damages prisoners and the community because it:

- disrupts families,
- risks corrupting prisoners by contact with more experienced criminals,
- compromises the prisoner's employment prospects;
- makes rehabilitation more difficult as the reintegration of released prisoners into the community poses severe problems;
- damages the mental and physical health of prisoners and their families;
- deprives the community of the positive contribution the prisoner may have made had he or she remained free;
- increases the risk of further offending; and
- is financially very expensive.

Despite overwhelming evidence to the contrary, there remains a public perception that imprisonment is an effective mechanism for punishing and rehabilitating offenders. In an apparent effort to appease that perception, Australia continues to imprison offenders rather than address the underlying causes of their offending behaviour.

Although section 22 of the Charter protects the right of all persons to humane treatment when deprived of liberty, there are many conditions imposed on prisoners which may infringe this right. For instance:

- unjustifiably harsh conditions such as shackling, strip searching, solitary confinement, unduly onerous restrictions on meeting with families, and restrictions on meeting with lawyers;
- failure by the courts and other independent bodies to adequately supervise the treatment of prisoners;

¹ See [ALRC 15 1980](#) (Sentencing of Federal Offenders) and [ALRC 44 1988](#) (Sentencing) which both note substandard treatment of prisoners in Australia.

- undue weight being given to private prison operators' interests, or to industrial relations considerations;
- siting of prisons in inaccessible locations;
- blanket rules in relation to prisoners held for certain offences, despite their individual needs, circumstances, or risk profile; and
- failure to provide an environment where families can regularly visit and maintain appropriate relationships to aid reintegration into the community.

In addition, the indefinite detention of those not convicted or even accused of any offence, such as asylum seekers, cannot be justified. The right to humane treatment while being deprived of liberty and the right to freedom from forced work or labour are associated with the [right to liberty](#).

FREEDOM OF ASSOCIATION

Reflected in s 16 of the [Charter](#)

Freedom of association is fundamental to a free and democratic society. For a functioning democracy people must be free to form and join political parties. The right extends beyond the political sphere to all forms of association: social, religious, cultural, sporting etc. A liberal, democratic society like Australia would be unimaginable without this right.

A person with particular religious or social views is likely to wish to associate with others who hold similar views. Limiting the right of association is likely to have an adverse impact on a person's practical ability to express and share those views. Thus freedom of association is intimately bound up in the freedom of assembly, freedom of belief and freedom of speech. The First Amendment in the [US Bill of Rights](#) provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". Although it does not expressly refer to freedom of association, it has been interpreted as protecting that freedom because of its connection with the other freedoms it mentions.

Freedom of Association is also closely linked with industrial democracy. It is concerned with the collective organisation of workers for the purpose of furthering their economic and social interests. Implicit in the notion of freedom of association is the recognition of the unequal bargaining power between the employer and employee. According to Lord Wedderburn 'it is the freedom of the individual which is at stake in the inequality of the employment relationship and to which fundamental rights must always be addressed.'

¹Thus the way to address the freedom of the individual in the workplace context is to recognise that for those without power collective organisation is necessary.

The right to Freedom of Association is found in a number of international instruments. Article 20 and 23(4) of the [Universal Declaration of Human Rights](#), Article 22 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR), and [International Labour Convention 87 on Freedom of Association and the Right to Organise](#) all recognise this right. The fact that the right is found in all the major international human rights instruments signifies its importance for the working man and woman.

The justification for this right can be found in the Preamble to the [Constitution of the International Labour Organisation](#) adopted in 1919 as part of the [Treaty of Versailles](#). The Preamble recognised that there was mass exploitation and economic hardship amongst the working people of Europe that contributed to social unrest and disharmony. It was believed by nations of the world that universal and lasting peace can only be established on social justice.

Liberty Victoria believes international human rights should govern the regulation of working relationships. Australia is a signatory to all these instruments and should bring its law into conformity with the rights it has ratified.

It has long been recognised in Europe that human beings enter the workforce with their rights intact. The right to freedom of association and freedom of assembly are a necessary component of industrial justice and democracy. Labour is different to other components in the productive process and should not be treated as a commodity. From the moment that Justice Higgins handed down the Harvester decision in 1907² the notion of fairness and social justice has been an important premise of the Australian industrial relations system. Unfortunately in recent times these notions have been seriously undermined with legislative attempts to curb freedom of association and assembly in the workplace context.

Liberty Victoria believes that workplace democracy and the ability to participate in workplace decision-making to ensure equitable conditions is an important adjunct to meaningful participation in the broader civic life of the nation. In addition, Liberty Victoria believes that the freedom to associate is vital to the protection of the right to hold and express opinions, especially unpopular opinions.

¹ "Common law, Labour law, Global law" in Hepple (ed) *Social and Labour Rights in a Global Context* (2002) p.30.

² *Ex parte McKay* (1907) 2 CAR 1

RIGHT TO PRIVACY AND FREEDOM FROM SURVEILLANCE

Reflected in s 13 of the [Charter](#)

The right to privacy is the right to be free from undue surveillance by Government or anyone else. Surveillance by the State should only occur if absolutely necessary and where authorised by an independent judicial officer. Personal information should only be collected and kept by the State and anyone else for a legitimate purpose authorised by law. Once collected, personal information should be destroyed as soon as it is no longer required. Not only would this protect privacy, it would also improve security. If personal information is only collected when absolutely necessary, it is less likely to fall into the wrong hands. If it is destroyed when it is no longer required, it is less likely to become incorrect and out of date.

Australia's privacy laws have expanded in recent years, but are still fundamentally flawed. They lack uniformity, they fail to recognise a right to privacy and they do not apply generally to individuals or small businesses. This means that private individuals and small businesses are largely unregulated when it comes to the collection and use of personal information about other people.

The majority of democratic countries have recognised that privacy is a fundamental human right which needs to be protected. Article 17 of the ICCPR recognises privacy as a basic human right, but Australia, despite being a signatory to the ICCPR, does not recognise privacy as an actionable human right.

Liberty believes Australia should meet its international obligations and legislate for a general right to privacy. An actionable right to privacy would enable individuals to take action against the inappropriate and illegal collection, use or disclosure of their personal information. It would not prevent the lawful collection and use of personal information for legitimate purposes.

The spread of new technologies such as CCTV and GPS presents new threats to privacy which have outpaced the law. It is futile to try to stop the spread of many of these technologies. However, the legal environment in which they spread should discourage the misuse of personal information. The most effective deterrent to the misuse of personal information would be a liability to compensate people whose privacy has been compromised for no legitimate purpose.

The right to privacy is associated with the rights to freedom of speech, freedom of movement, freedom from discrimination and the principle of government accountability.

FREEDOM OF THOUGHT AND BELIEF

Reflected in s14 of the [Charter](#)

The human right of freedom of thought and belief is fundamental and unqualified. It includes freedom of conscience, religion and belief and the free exercise of religion or belief. Though we take these freedoms for granted in Australia today they were only won over centuries of struggle and are still not enjoyed in many parts of the world.

Even in Australia vestiges of the struggle to secure this freedom can be seen in the continuing prohibition on Catholics from being our head of state. Latter day threats to the freedom can be found too in anti-terror legislation and calls for the banning of headscarves. Liberty Victoria is committed to resisting these threats and to a strict and unqualified adherence to this freedom.

Freedom of thought and belief is recognised in [Articles 18 and 19](#) of the ICCPR. Freedom of thought, conscience, religion and belief is recognised in section 14 of the Victorian Charter.

Freedom of thought and belief is associated with freedom of expression, [freedom of association](#) and [freedom from discrimination](#).

FREEDOM OF EXPRESSION

Reflected in s 15 of the [Charter](#)

Freedom of expression includes not only freedom of speech but freedom of artistic expression and freedom to communicate generally. The right to engage in communication on political matters is one of the few constitutionally protected rights we enjoy in Australia. This is because the system of democratic government created by our constitution depends on the free exchange of political communications.

Like most freedoms, freedom of expression is not absolute and must be qualified by restrictions necessary for the protection of public order. Thus the freedom does not protect calls for the violent overthrow of the State, incitement to criminal behaviour, contempt of court or defamation. Changing community standards can result in some variations over time in the extent of this freedom, for example in relation to offensive language in public and sexually explicit publications.

Difficult questions can arise regarding the extent of the qualifications on this freedom, especially in the area of racial and religious vilification. Liberty Victoria has supported the civil law aspects of racial and religious vilification legislation as an effective way of discouraging this anti-social behaviour. However, Liberty considers that, before any kind of expression is prohibited, it must be shown that it somehow threatens public order. Therefore it has opposed those parts of the racial and religious vilification laws which create new criminal offences.

PROTECTION OF FAMILIES AND REPRODUCTIVE RIGHTS

Reflected in s 17 of the [Charter](#)

The protection of families is recognised in article 23 of the ICCPR and section 17 of the Victorian Charter of Human Rights and Responsibilities. Since families are the fundamental unit of society, the well-being of society depends on them. This means, for example, that the maintenance of a family unit is a powerful mitigating factor in sentencing. It also means that deportation of non-citizens should be avoided where to do so would break up a family.

The right to a family life also has consequences for reproductive rights, including abortion.

Reproductive rights

Liberty Victoria's position on reproductive rights starts from a number of core premises.

- (a) that women and couples have the intellectual and moral capacity to make decisions about their own fertility; and
- (b) that the law governing reproductive rights should rest upon, and recognise, Australia's obligations under international human rights instruments, specifically the [Universal Declaration of Human Rights \(UDHR\)](#), the [International Covenant on Civil and Political Rights \(ICCPR\)](#), the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#), and the [Convention on the Elimination of All Forms of Discrimination Against Women \(CEDAW\)](#).

In respect of reproductive rights the relevant international instruments and provisions are:

The Universal Declaration of Human Rights ([UDHR](#))

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 3: Everyone has the right to life, liberty and security of person.

Article 12 : No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence

Convention on the Elimination of All Forms of Discrimination Against Women ([CEDAW](#))

Article 12 (1): States Parties shall take all appropriate measures to eliminate all discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health services, including those related to family planning.

Article 16 (1): States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights ...;

Liberty Victoria believes that implicit in these provisions is the individual's right to determine the course of their life including childbearing. Together these provisions support the position that men and women should exercise their own reason and conscience in relation to their own fertility. However these international instruments do not form part of Australia's domestic law.

Abortion

The right to determine the course of her life, and to exercise the right to security and liberty is '*an integral part of a modern woman's struggle to assert her dignity and worth as a human being.*'¹ Consequently, the decision whether to continue or terminate a pregnancy is a moral decision that must ultimately be made by the woman concerned.

Liberty Victoria believes that laws which seek to constrain the exercise of reproductive rights are an interference with bodily integrity and dignity, personal autonomy and a breach of an individual's right to security and liberty under international law. They are also a breach of an individual's right to privacy. As the US Supreme Court explained in *Eisenstadt v Baird* if '*the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.*'²

Laws relating to reproductive rights are generally a matter for the State or Territory Parliament. Different jurisdictions in Australia have different approaches. Liberty Victoria believes that the guiding principles for any legislation concerning reproductive rights including abortion should be the international human rights principles outlined above.³

FREEDOM TO TAKE PART IN PUBLIC LIFE

Reflected in s 18 of the [Charter](#)

Freedom to take part in public life extends to the right to vote, the right to engage in political activity, the right to contest public office and the right to public employment. Like freedom of expression, the right of all to take part in public life is a necessary precondition to our democratic system of government.

¹ *R v Morgentaler*, [1988] 1 SCR 30 – This decision looks at termination of pregnancy in relation to the right of security and liberty of the woman under the Canadian Charter of Human Rights.

² 405 US 438 at 453 (1972)

³ See also the Victorian Law Reform Commission Final Report on the [Law of Abortion \(2008\)](#).

The freedom to take part in public life, including the right to vote is recognised in [Article 25](#) of the ICCPR. The right to vote is recognised in the [Australian Constitution](#): sections 7, 24 and 41.

Like freedom of expression, the right to take part in public life is qualified: the right to vote is limited to those able to cast an informed vote; qualifications such as citizenship may be imposed on candidates for public office; and registration and other requirements may be imposed on political parties. But these restrictions should nevertheless leave political activity and participation in public life generally free.

A serious challenge to freedom of political activity comes from the growing cost of political campaigning and the role of political donations. It is becoming increasingly difficult for people or organisations without substantial financial resources to participate effectively in political activity. Furthermore, the increasing need for significant political donations threatens the integrity of the political process. These developments, unless checked, threaten the freedom to participate in public life and Liberty Victoria supports urgent attention to them.

Freedom to take part in public life is also associated with the right to freedom of expression and freedom of thought and belief.

EQUALITY, FREEDOM FROM DISCRIMINATION AND CULTURAL RIGHTS Reflected in ss 8 and 19 of the [Charter](#)

The right to equality is fundamental. As a free-standing right it is declared in article 26 of the ICCPR, and as a condition of the enjoyment of all other rights it is enshrined in article 2 of the ICCPR and ICESCR. Equality is both procedural—equality before the law—and substantive—equality under the law.

Liberty Victoria supports the right to equality and freedom from discrimination, without the limitation in the Charter to only those attributes mentioned on the Equal Opportunity Act 1995 (EOA). Australia’s obligations under international law are to ensure the right to equality on any attribute, and the EOA and Charter should say likewise. The only limitation on the right to equality should be the inherent limitations known to international law and set out in s.7 of the Charter, namely “such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.”

Liberty Victoria supports a view of equality which aims for substantive, rather than merely formal, equality, as this is what is necessary for human dignity. As the Charter rightly acknowledges at s.8(4): “Measures taken for the purpose of assisting or advancing persons

or groups of persons disadvantaged because of discrimination do not constitute discrimination.”

Cultural rights, as set out in s.19 of the Charter, are another necessary aspect of human dignity. Liberty Victoria supports their full realisation, as part of the balancing of individual and community in a multicultural society. Everyone benefits by acknowledging and celebrating the richness of the cultures of others, while having the reciprocal acknowledgement of their own. People can best participate in and contribute to the life of the community when they can also participate freely in the life of their communities of origin and of choice, safe in the knowledge that they too are respected.

PROPERTY RIGHTS

Reflected in s 20 of the [Charter](#)

The right to own, and protection for, private property is found under article 17 of the Universal Declaration of Human Rights which states:

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

Liberty Victoria supports, in accordance with the UDHR, the right to own private property and believes that individuals are entitled to:

- control and use of property
- the right to any benefit from the property
- a right to transfer or sell the property, and
- a right to exclude others from the property.

In recognising these rights, Liberty Victoria acknowledges that such rights must be exercised within the bounds of the law. Liberty Victoria further acknowledges the government may apply the following limitations on the use of private property:

- that a person’s right to private property not unreasonably interfere with the property rights of another private party and their right of quiet enjoyment and privacy, and
- that the use of private property not unreasonably interfere with public property rights, including uses required for public health, safety, peace or convenience.

This is consistent with s 20 of the Victorian Charter of Human Rights and Responsibilities which provides:

A person may not be deprived of his or her property other than in accordance with law.

Private property rights are also implicitly recognised in s 51(xxxi) of the Australian Constitution, which confers power on the Commonwealth Constitution to legislate for the acquisition of property, but only “on just terms”.

Property rights are not confined to rights to private property. They include cultural and communal rights of the kind recognised in native title in Australia. Such rights extend beyond interests in land to community-owned art, folklore and traditional remedies. However there is currently no legal protection for such rights.

POLICE AND POLICING

Reflected in s 22 of the [Charter](#)

Police powers should be exercised in aid of the rule of law. Persons granted power sometimes abuse it and police are no exception.

Since the police exercise significant powers, it is essential for the protection of human rights in Victoria that proper oversight of the police – both through the courts and through mechanisms to investigate police conduct – is maintained.

Violence by police against members of the public has the potential to unravel the fabric of the community. Sometimes such violence is unavoidable or justifiable. However, Victoria has an ongoing problem with fatal police shootings, with more deaths than all other states put together.

Capsicum spray and TASER guns have both been fatal when used against citizens, and have a very limited application. It is a false alternative to assert that it is a choice between firearms and capsicum or TASERs. Usually, capsicum spray and TASERs are used not instead of firearms, but where lethal violence could not be justified.

The use of violence in self-defence, or in defence of others is justifiable if the response is proportionate. However, the use of capsicum spray or TASER guns to coerce compliance to a desired course of behaviour from citizens is likely to amount to torture or cruel, inhumane or degrading treatment.

Police conduct has at times targeted:

- particular ethnic minorities,
- persons of particular sexual orientation, or
- persons, such as environmentalists, with particular political views.

Preventing such discriminatory abuse of police powers requires systematic work from police command.

Police have several excellent practices, such as the “caution” system for disposing of first time offenders. So far as possible such discretionary systems should be transparently regulated so that their application is not subject to the whim of the particular officer concerned.

Government should avoid bypassing police command to deal directly with police unions such as the Police Association, because such connections undermine proper police command structure and have been shown to increase the likelihood of corruption.

CHILDREN AND YOUNG PEOPLE

Reflected in s 23 of the [Charter](#)

Children and young people are entitled to equality before the law and freedom from discrimination. Young people should be consulted about, and participate in, decisions affecting them. This rarely occurs.

Where young people or children come into contact with the criminal justice system, rehabilitative programmes should acknowledge and address their developmental needs and vulnerabilities. The primary aim of any intervention should be to discover the reasons for offending, and to formulate appropriate solutions and supports for the child and their family. Liberty believes that decisions relating to children should be made with the child’s interests paramount. International and domestic research shows that the more a child becomes immersed in the criminal justice system the more likely they are to re-offend. This is not in the best interests of the child or their family, and does not advance community safety. Detention should be a last resort.

In addition, children should be consulted about policies that affect them. This is acknowledged in the United Nations Convention on the Rights of the Child, to which Australia is a signatory, but in practice it rarely occurs. Children are often excluded from having a voice in matters that concern them.

Children should be able to live free from neglect and abuse but without undue interference in their lives. Children should have sufficient resources to live on and have universal access to health and education. If parents cannot provide this then the State should adequately provide these supports in line with the UN Convention.

Section 23 of the [Victorian Charter of Human Rights and Responsibilities](#) recognises the rights of children in the criminal process. It is loosely based on the UN Convention. Section 23 states that an accused child who is detained or a child detained without charge must be segregated from all detained adults; that an accused child must be brought to trial as quickly as possible and that a child who has been convicted of an offence must be treated in a way

that is appropriate for his or her age. The Charter recognises only very limited rights in children, and should be read in conjunction with the [Children, Youth and Families Act 2005 \(Vic\)](#).

ACCESS TO JUSTICE

Reflected in ss 8 & 24 of the [Charter](#)

It is a fundamental principle of any democratic society that all those living within it have equal access to a justice system where they can expect, and be given, a determination of their rights without fear or favour, and free from external pressures upon a court or tribunal. The right to a fair hearing is recognised in the [Victorian Charter of Human Rights and Responsibilities](#) in section 24. This section is based on [Article 14](#) of the United Nations International Covenant on Civil and Political Rights (ICCPR) which Australia has signed and ratified.

Section 24 of the Charter states that a fair hearing requires that a person charged with a criminal offence or a party to a civil proceeding must have the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This is broader than the ICCPR in that it clearly includes right to a fair hearing in civil proceedings.

Liberty is firmly of the view that without the adequate provision and funding of legal aid services (this includes legal aid commissions and community legal centres) many people who are impecunious or disadvantaged may miss out on a fair hearing. A strong and vibrant legal aid system is integral to protecting the right of a fair hearing. It is a fundamental obligation of governments to adequately fund legal aid services. Pro bono legal assistance is not and should never be a replacement for such adequate funding, as it is necessarily ad hoc by nature.

Rules of procedure which discourage litigants, e.g. by requiring security for costs or undertakings as to damages, should be reviewed especially in their application to public interest litigation. Public interest litigants should also be freed of the burden of paying the other party's costs when they do not succeed in genuine cases with a real public interest.

RIGHT TO JUSTICE

Reflected in ss 26 & 27 of the [Charter](#)

Double Jeopardy

The right not to be tried or punished more than once for an offence is commonly known as the rule against double jeopardy. It is a fundamental principle of the common law and underpins criminal justice administration.

It is recognised internationally in Article 14 of the [International Covenant on Civil and Political Rights](#) (ICCPR) and Article 4(1) of Protocol 7 of the [European Convention on Human Rights](#) (ECHR) which incorporates double jeopardy provisions.

In *Green v United States* Justice Black of the US Supreme Court explained:

*The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*¹

The right against double jeopardy is a series of interrelated principles including:

- the protection from multiple prosecutions by the state about the same issue, which operates as a check on the abuse of state power;
- the need for finality in proceedings;
- the sanctity of a jury verdict;
- the prevention of wrongful conviction; and
- the need to encourage efficient investigations.

In Victoria, the right not to be tried or punished more than once for an offence is recognised in section 26 of the [Charter](#) of Human Rights and Responsibilities.

Liberty recognises that there are legitimate purposes in very limited circumstances where overall fairness and justice dictate that a case may be revisited. These exceptions, as they appear in international instruments include:²

- reopening of a case where there is fresh evidence of guilt; or
- where there is a serious flaw in the proceedings, as when an acquittal has been procured by fraud.

In New South Wales and Queensland, high profile criminal cases have led to legislative reform to allow limited exceptions. For example, the [Criminal Code \(Double Jeopardy\) Amendment Act \(Qld\) 2007](#) allows for retrial for murder if there is fresh evidence of guilt and retrial of an acquitted person of a very serious offence if the acquittal was tainted. Western Australia and Tasmania already allow for retrial following acquittal.

Liberty believes that the rule against double jeopardy ensures both procedural rights for the accused and procedural rights that protect the integrity of judicial outcomes. It is contrary

¹ 335 US 184 at 187-188 (1957), cited with approval by the High Court in *Pearce v R* (1998) 194 CLR 610 at 614.

² See Article 4, Protocol 7 [ECHR](#).

to the interests of justice to allow a person to be retried for the same offence indefinitely. Such a system would compromise public confidence in the criminal justice system and is particularly vulnerable to political interference.

Retrospective Criminal Laws

Protection against retrospective criminal offences means '*No law, made after a fact done can make it a crime ... for before the law there is no transgression of the law*'.³ That is, a person should only be charged with a law that stood at the time of the alleged criminal conduct and not one that was made after the time of the alleged conduct.

Protection against prosecution for retrospective criminal offences is a human right and is recognised by:

Article 11 of the [United Nations Universal Declaration of Human Rights \(UDHR\)](#)

Article 15 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#)

Article 99 of the [Third Geneva Convention](#)

Nationally, it is recognised in Division 268 of the [Australian Criminal Code](#) which essentially incorporates the international treaty provisions.

In Victoria, it is recognised in section 27 of the [Charter of Human Rights and Responsibilities](#).

A retrospective criminal law is unjust because it does not allow a person to know what conduct or behaviour will or will not attract criminal charges being laid or be punished. It also permits selective punishment by those in power for improper ulterior motives, and is therefore contrary to the rule of law.

Liberty believes that Australia has a duty to adhere to and protect international law which clearly prohibits retrospective laws.

³ Thomas Hobbes, *Leviathan* (1660)

AN AUSTRALIAN CHARTER OF RIGHTS

Australia is the only Western democracy without some kind of charter or bill of rights. Though the Commonwealth Constitution contains some limited rights, such as the right to interstate trade and movement and the right to free communication on political matters, there is no comprehensive charter or bill of human rights and civil liberties. Not only does this leave human rights and civil liberties vulnerable to curtailment and abrogation, it also means that Australia has not implemented in domestic law its human rights obligations under international law. Liberty believes that Australia should meet its international human rights obligations without qualification.

Australia is currently a party to the following international human rights conventions:

- The [International Covenant on Civil and Political Rights \(ICCPR\)](#)
- The [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)
- The [International Convention against Torture](#)
- The [International Convention for the Elimination of Racial Discrimination \(ICERD\)](#)
- The [International Convention for the Elimination of Discrimination against Women](#)
- The [International Convention on the Rights of the Child](#)

However, although Australia has signed and ratified these treaties and thereby become bound under international law to adhere to them, they have not been fully implemented in Australian domestic law by legislation. Thus Australians do not enjoy the full protection of these international rights in Australian law.

These conventions are important international instruments agreed to by a majority of countries to protect basic human rights. Each one should be fully enacted into Australian domestic law. At present, however, these international conventions are only sporadically incorporated in Australian law, leaving Australians with an inadequate and partial scheme of human rights protection.

Liberty notes with approval that the Commonwealth Government has announced that it will conduct a consultation to determine how best to protect human rights in Australia. Liberty urges the Government to initiate such a consultation as soon as possible. The consultative process should be independent, impartial and comprehensive. It should embrace the protection not just of civil and political rights but also the protection of economic, social and cultural rights. The consultation, however conducted, should report on its findings to the Commonwealth Government no later than June 30 2009.

There are a number of competing models for the legal recognition of civil liberties and human rights. According to the traditional view, the sovereignty of Parliament is the surest safeguard of civil liberties. This view draws on Parliament's historical role in breaking the

tyranny of executive government but overlooks the latter day failures of Parliament to hold the executive to account and the frequent abrogation of human rights by legislation.

The United States Bill of Rights model provides the most effective curb on the powers of the legislature and the executive. Under this model, rights are entrenched in the constitution and legal action can result in rulings that legislation and executive acts are invalid. Critics of this model say that it hands too much power to unelected judges.

The statutory charter of rights model, adopted in the United Kingdom, Victoria and the ACT, takes a more limited approach. It preserves the sovereignty of Parliament but requires legislation to be interpreted, and government departments to act, in accordance with legislated human rights.

There is much debate about which is the best model. Liberty takes the view that the most suitable model for contemporary Australia is the statutory charter. It has therefore enthusiastically supported the Victorian Parliament's Charter of Human Rights and Responsibilities Act 2006. It urges the Commonwealth Parliament to pass similar legislation.

Liberty considers that the arguments most frequently levelled against a charter of rights are misplaced. Such arguments proceed principally upon the basis that a charter will take power from the peoples' elected representatives and confer it upon an unelected judiciary. Under the charter model, however, the judiciary is not able to invalidate legislation as inconsistent with human rights. It is only empowered to interpret legislation in accordance with human rights and, if it finds legislation to be inconsistent with a human right, to make a declaration to that effect. It will be then for the Parliament to decide whether or not the law infringing upon human rights should be amended or repealed. Thus parliamentary sovereignty is preserved yet legislation infringing human rights can be expected to receive more scrutiny than would otherwise be the case.

Liberty believes that a federal charter of rights should contain the following categories of rights:

- **Personal Rights** including the [right to life](#), the [right to equality](#), the [right to liberty](#), the [right to security](#), [freedom from torture](#);
- **Civil and Political Rights** including freedom of conscience, [freedom of thought](#) and [expression](#), [freedom of assembly and association](#), and the [right to vote](#);
- **The Rights of Individuals in Groups** including the [right to privacy](#) and [family life](#), the [freedom of movement](#), the right to asylum in the case of persecution, the [right to property](#) and [freedom of religion](#);
- **Economic and Social Rights** including the rights to work, to education, to health, to social security, to [participate in public life](#) and other related entitlements.

- **Indigenous Rights** including [cultural rights](#); the rights to practise and revitalize their spiritual and cultural traditions, customs and ceremonies.