

Human Rights Law – Table of Contents

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4 - THE RIGHT TO LIBERTY

Overview of liberty

- Definition for freedom/liberty - A condition in which a man's will regarding his own person and property is unopposed by any other will.
- It is a right to control and direct one's own wishes without interference.
- It is based on the idea that 'we should be able to do whatever we want, so long as we don't hurt others'.
- This right is not absolute – consider laws regarding arrest
- It does not provide a right to harms others.
- How important is it when compared to other rights?
 - Happy people, prosperous people tend to be the kind of people who have a high degree of control over their activities (long and short term) people given a high level of direction are less happy. Correlation between the choice of what you are doing and your happiness.
 - I.e. if prisoners are given some level of autonomy (such as the construction of their cell) are happier than those prisoners who do not enjoy that same freedom.
- Consider the American Standard '...the Right to life, Liberty and pursuit of happiness'.
- The way the law in Australia best protects our freedom is by the rule that we are not liable for that which we have not done.
 - We are not liable for omissions.
 - We are only required to act if there is a clear positive legal obligation on us.
 - We are free to do whatever we want unless there is a law to the contrary, preventing that Action.
- The main exception to our liberty:
 - There are a significant number of laws that prevent or limit our freedom, broadly these laws are based on the rationale or justification that they inhibit our freedom if it might cause harm to others.
 - We cannot directly damage others

Criminal offences and Torts that protect the right to Liberty

- the right to personal liberty is considered the (most) fundamental at common law. At its core the right protects us from physical interference or restraint by the State and other persons.
- As a (maybe the) fundamental common law right, it is judicially protected through the application of the principle of legality when interpreting legislation.
- A classic recent example of the right and its protection through this important common law interpretive principle comes from the dissenting judgment of Gleeson CJ in *Al-Kateb v Godwin*.
- His Honour applied the principle of legality to the relevant provisions of the Migration Act 1958 (Vic) (see below) and concluded that they did not authorise the indefinite detention of asylum seekers.
- The Act does not in terms provide for a person to be kept in administrative detention permanently, or indefinitely.
- The right to personal liberty is also protected directly by a range of criminal and tort laws:
 - assault,
 - kidnapping and
 - false imprisonment for example.
- What these laws have in common is legal protection for the physical integrity and security of a person, and serious consequences if infringement of that liberty occurs.
- Moreover, the requirement that there must be reasonable grounds for an arrest and the presumption in favour of bail are underpinned by the common law's concern for and right to personal liberty.