

SECTION 12

FREEDOM OF MOVEMENT

Section 12

- Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 12?

You will need to consider s. 12 in assessing legislation, a policy or a program where it:

Residence and occupation

- places conditions on the ability of a person to live within Victoria;
- limits the ability of a person to choose where to live in Victoria (including their ability to move their residence);
- requires people to fulfil certain requirements before they are able to leave and enter Victoria at will;
- requires a person released on licence from detention to work in certain locations within Victoria.

Detention and restrictions on movement or activities

- allows for an intervention order against a person;
- restricts the movement of persons who are subject to a lawful order restricting their movement or where they may live;
- imposes bail conditions regarding where a person may go or not go, or requiring him or her to remain within Victoria or to surrender of his or her passport;

- restricts movement or a person's place of residence pursuant to an order of the Adult Parole Board or other lawful order, such as a family violence intervention order.

Regulation of public land, land use, land titles and entry onto land

- establishes eligibility requirements for entering Crown land;
- limits the ability of individuals to move through, remain in, or enter or depart from areas of public space;
- authorises the making of orders excluding persons from licensed premises (such as a casino or racecourse);
- seeks to amend the law of trespass, which limits the right of an individual to enter private property;
- regulates planning controls that identify permitted residential locations;
- deals with rights of way, easements, roads and road closures, public reservation of land and sale of public land (for example, land locking);

Emergency management and public order

- limits or regulates public demonstrations;
- regulates quarantine and agricultural practices (such as measures to contain the spread of infectious diseases in farming practices);

- gives a minister or a public authority the power to direct people's movement or to carry out some activity, for example, during a state of emergency or in the context of essential services.

These policy triggers are not comprehensive.

DISCUSSION

Section 12 protects various rights in relation to freedom of movement.

The following rights are recognised in s. 12:

- the right to move freely within Victoria;
- the right to choose where to live within Victoria; and
- the right to be free to enter and leave Victoria.

Who do these rights apply to?

The rights conferred by s. 12 apply only to persons who are 'lawfully' within Victoria.

A person may **not** be lawfully in Victoria:

- where legislation made in another state or territory, or a court order made in another state or territory, prohibits a person from leaving that state or territory or prohibits a person from travelling to Victoria.
- if they are unlawful non-citizens in breach of the *Migration Act 1958* (Cth).

Positive or negative obligations?

The rights protected by s. 12 impose both positive and negative obligations on public authorities. The negative obligation is that public authorities must refrain from interfering with a person's freedom of movement. The positive obligation is that they must also ensure that a person's freedom of movement is not unduly restricted by other persons, who may be either public or private persons.

Scope of the obligations

In international human rights law, freedom of movement has been described as 'an indispensable condition for the free development of a person.'⁸⁶

86 *Human Rights Committee, General Comment 27, Freedom of movement (Art.12)*, (Sixty-seventh session, 1999),

The right is closely related to the right to liberty, and is also considered to be necessary for access to economic and social rights such as health and social services.

The right to move freely within Victoria

The right to move freely within Victoria is not dependent on any particular purpose or reason for a person wanting to move or to stay in a particular place. It encompasses a right not be forced to move to, or from, a particular location.

The right includes freedom from physical barriers and procedural impediments, such as a requirement of prior notification or authorisation from a local council before entering a public park or participating in a public demonstration in a public space. However, the right does not just apply to public spaces such as a public park.

The right may also be invoked where the government actively curtails a person's freedom of movement or subjects a person to strict private surveillance or reporting obligations before or when moving.⁸⁷

These examples are not exhaustive of the scope of the right, which applies generally to a person's movement within Victoria.

The right to choose where to live within Victoria

Under the Charter a person has the right to choose where to live within Victoria. This right may be interfered with, or impacted upon, by a legislative provision that authorises courts and others to direct where those people on bail or under supervised release may live. These provisions will need to be assessed.

UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 174 (2003) [1].

87 In *Raimondo v. Italy* (1994) 281 Eur Court Hr (ser A); (1994) 18 EHRR 237 the European Court of Human Rights held that restrictions requiring a person to report to authorities, remain at home between set hours, and otherwise inform the authorities that they were leaving their home, were a breach of the person's freedom of movement.

The right to be free to enter and leave Victoria

The Charter provides that a person has the right to be free to enter and leave Victoria.

Section 92 of the Commonwealth *Constitution* guarantees freedom of interstate intercourse.⁸⁸ This aspect of the right largely duplicates this constitutional guarantee.

It means that any restrictions on the right to enter and leave Victoria must be proportionate to a legitimate government aim. If they are not, they are likely to be unconstitutional and also breach the Charter. As noted above, the Charter does not limit or abrogate any right or freedom not included in the Charter.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the right to freedom of movement may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

If you are assisting with the preparation of a policy or a program in which freedom of movement may be limited, you should examine whether the restriction would be permitted under s. 7. The restriction must be a reasonable limit and demonstrably justified.

If you are responsible for vetting legislation in a relevant context, it is important that you carefully examine whether the limitation on the right to freedom of movement can be justified under s. 7. For example, the operation of s. 7 may arise where there are:

- restrictions imposed on the freedom of movement of persons lawfully detained, such as prisoners;

- restrictions imposed on the movement of persons who are subject to a lawful order restricting their movement or where they may live, such as persons for whom a guardian has been appointed under the *Guardianship and Administration Act 1986* (Vic);
- restrictions of movement or place of residence imposed on persons pursuant to orders of the Adult Parole Board;
- restrictions of movement or place of residence imposed on persons pursuant to orders made under the *Mental Health Act 1986* (Vic);
- other lawful orders imposed on persons restricting movement, such as family violence intervention orders;
- planning controls imposed which zone residential locations away from commercial, industrial or agricultural areas.

KEY POINTS TO REMEMBER

- Section 12 establishes the following rights:
 - the right to move freely within Victoria;
 - the right to choose a place of residence within Victoria; and
 - the right to be free to enter and leave Victoria.
- Section 12 applies only to persons who are lawfully in Victoria;
- Section 12 includes the right not be forced to move to, or from, a particular location. It also includes freedom from physical barriers and procedural impediments, such as a requirement for prior notification or authorisation from a public authority before entering a public park or participating in a public demonstration in a public space;
- Like all of the rights in the Charter, the rights in s. 12 are subject to reasonable limitations under s. 7.

⁸⁸ *Cole v. Whitfield* (1988) 165 CLR 360, 393 (the Court), citing *Gratwick v. Johnson* (1945) 70 CLR 1, 17; See also *AMS v. AIF* (1999) 199 CLR 160 [153] (Kirby J), [221] (Hayne J).

MEASURES TO IMPROVE COMPLIANCE

If you are reviewing legislation or developing a new policy that may restrict a person's right:

- to move freely within Victoria;
- to choose where to live within Victoria; or
- to be free to enter and leave Victoria.

Ask yourself:

1. Does the right protected under s. 12 apply? Is the person lawfully in Victoria?
2. If so, can the restriction be justified under s. 7? The restriction should be rational and proportionate. For example, if you are considering restricting access to a public space for reasons of public order, consider the period of time during which the restriction is likely to remain in place, the criteria under which persons are to be granted or denied access, and the extent of the area covered by the restriction.
3. Does the legislation or policy also restrict one or more of the rights in s. 18 (the right to participate in public life)?
4. Does the limit on the right regulate individuals' access to educational, health or social services, or restrict their ability to exercise their cultural rights?

RELATED RIGHTS AND FREEDOMS

The right to freedom of movement has some overlap with the right to participate in public life (s. 18), the right to liberty and security (s. 21) and the right to freedom of peaceful assembly and association (s. 16). The prohibition on discrimination (s. 8) may also need to be examined in a relevant case.

HISTORY OF THE SECTION

Section 12 was modelled on article 12 of the ICCPR, although it does not reflect the limitations permitted under Article 12(3).

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

1. *AMS v. AIF* (1999) 199 CLR 160.
2. *Cole v. Whitfield* (1988) 165 CLR 360.
3. *Gratwick v. Johnson* (1945) 70 CLR 1.
4. *Raimondo v. Italy* (1994) 281 Eur Court Hr (ser A).

Other Sources

5. *Human Rights Committee, General Comment 27*, Freedom of movement (Art.12), (Sixty-seventh session, 1999), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 174 (2003).