

SECTION 13

PRIVACY AND REPUTATION

Section 13

A person has the right –

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 13?

Privacy – general

In the context of privacy, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- involves powers of entry, search, seizure, confiscation or forfeiture (including a strip-search for detention or entry into a controlled environment);
- involves surveillance of persons for any purpose (such as closed-circuit television, CCTV);
- allows publication of personal information (for example, results of surveillance, medical tests, electoral roll);
- provides for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced gynaecological or other medical examination; or corporal punishment;
- provides for treatment or testing of a patient without his or her consent;
- regulates the public acknowledgment of gender reassignment of transsexual persons;
- involves a professional duty of confidence;

- provides for mandatory disclosure or reporting of information (including disclosure of convictions, injury or illness);
- regulates a person's name, private sexual behaviour, sexual orientation or gender identification.

Information privacy

In the specific context of information privacy you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- involves or authorises surveillance or other monitoring where recorded personal information is collected, accessed, used or disclosed;
- establishes or amends a public register;
- involves the collection of personal information, compulsorily or otherwise;
- envisages a new use for personal information that is already held;
- changes or creates a system of regular disclosure of personal information, whether to another part of state or local government, or to the private sector, or to the public at large;
- restricts access by individuals to their own personal information, for example by affecting the *Freedom of Information Act 1982* (Vic.), *Information Privacy Act 2000* (Vic.) or *Health Records Act 2001* (Vic.);

- changes or creates any confidentiality provisions or secrecy provisions relating to personal information;
- creates new offences or amends existing offences relating to the misuse of personal information;
- creates new requirements or amends existing requirements to store, secure or retain particular personal information;
- creates an identification system;
- proposes to link or match personal information across or within agencies;
- involves the exchange or transfer of personal information outside Victoria, whether with another government or otherwise;
- relates to handling personal information for research or statistics;
- affects the exemptions or overrides the provisions of the *Information Privacy Act* (Vic.) or the *Health Records Act* (Vic.).

Unlawful and arbitrary interference with family

In the context of the right to freedom from unlawful and arbitrary interference with a person's family, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- affects the ability to form and maintain close or enduring personal relationships;
- recognises or fails to give legal recognition to close or enduring personal relationships;
- may provide for the removal of children from a family unit by a public authority;
- provides for a family intervention order;
- regulates adoption, including any restrictions on eligibility and disclosure of information;
- regulates guardianship;
- regulates childcare or children remaining with their mothers in a prison;
- provides for mandatory reporting of injuries or illnesses.

Unlawful and arbitrary interference with a person's home

In the context of the right to freedom from unlawful and arbitrary interference with a person's home, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- provides for powers of entry into and search of a person's home or workplace;
- provides for a power of arrest;
- regulates requisition, compulsory occupation, compulsory acquisition, destruction or removal of a home;
- regulates tenancy or eviction;
- regulates a state-run care facility or mental health service;
- regulates planning or environmental law;
- regulates the standards of public housing and the consultation and procedures operating in respect of public housing.

Unlawful and arbitrary interference with a person's correspondence

In the context of the right to freedom from unlawful and arbitrary interference with a person's correspondence, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- may involve the interception of postal articles or other communications (including communications from a prisoner or detainee);
- provides for the censorship of correspondence;
- monitors a person's personal emails;
- regulates websites that provide for communication between people.

Right to reputation

To comply with a person's right not to have his or her reputation unlawfully attacked, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- affects the law relating to defamation or any defences to defamation or injurious falsehood. This is particularly so if it restricts access to, or limits, remedies for attacks on a person's reputation;
- affects the exemptions relating to disclosure of personal information in FOI legislation and legislation protecting confidential information.

These policy triggers are not comprehensive.

DISCUSSION

Section 13 confers a number of rights regarding privacy and reputation.

Specifically, a person has a right not to have his or her:

- privacy unlawfully or arbitrarily interfered with;
- family unlawfully or arbitrarily interfered with;
- home unlawfully or arbitrarily interfered with;
- correspondence unlawfully or arbitrarily interfered with; and
- reputation unlawfully attacked.

The scope of each of these rights is discussed below.

The right not to have his or her privacy unlawfully or arbitrarily interfered with

The meaning of 'privacy'

The meaning of privacy has not been defined in international human rights law.

'Privacy' is a difficult concept to define. Privacy is bound up with conceptions of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty – a 'private sphere' free from government intervention and from excessive unsolicited intervention by other individuals.

Privacy has both a physical or geographical aspect ('where is private') and an informational aspect ('what is private').

In practical terms 'privacy' is often categorised as:

- **Bodily privacy** – protection of our physical selves against invasive procedures;
- **Territorial privacy** – setting limits on permissible intrusion into our domestic and other environments, such as unwanted surveillance;
- **Communications privacy** – privacy of mail, phone and electronic communications;
- **Information privacy** – privacy of information about us.

The specific area of information privacy is currently regulated in a number of Victorian statutes including the Information Privacy Act and the Health Records Act. In practice, information privacy will overlap with other aspects of privacy and the Information Privacy Act and the Health Records Act may apply whenever identifiable information is recorded or held.

The breadth of the right to privacy under the Charter is in some senses broader than that which is protected under the Victorian information and health privacy laws. For instance, the right to privacy in the Charter will encompass activities that do not involve recorded information, such as 'strip-searches'. As the categories illustrate, privacy issues can arise in a number of areas. For example, in addition to the disclosure of private information, privacy issues are likely to arise in the context of the interception of correspondence, telephone tapping, search warrants and medical treatment and medical examination without consent. Whether an interference with privacy is permissible will depend on whether there is a reasonable expectation of privacy in the circumstances. For example, a person will have a greater expectation of privacy in relation to their home than in relation to their workplace.

Public authorities will need to consider s. 13 of the Charter when engaging in activities and when making decisions that might relevantly affect a person's privacy, whether or not those activities and decisions are permitted under current privacy-specific legislation as being authorised under law.

What is an 'unlawful or arbitrary interference' with privacy?

To comply with s. 13 you must ensure that any 'unlawful or arbitrary interference' with privacy is avoided.

'Unlawful'

'Unlawful' means that no interference with privacy can take place except if the law permits it. The UN Human Rights Committee has said that a law which authorises interference with privacy must be precise and circumscribed so that governments are not given broad discretions in authorising an interference with privacy.

This means:

- legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted; and
- a decision to interfere with privacy by a public authority in accordance with the law should be made on a case-by-case basis in accordance with the merits of each case.⁸⁹

'Arbitrary'

An 'arbitrary' interference is not the same as an unlawful interference. An interference with privacy may be arbitrary even though it is lawful.⁹⁰

The requirement that all interferences must not be arbitrary means that even interferences with privacy that are provided for by law should occur in accordance with the provisions, aims and objectives of the Charter and should be reasonable in the particular circumstances.⁹¹

For example, in a case against the Canadian Government, a prisoner complained about the censorship of his letters.⁹² The governing legislation had provided that every letter to or from a prisoner should be read by a warden (or delegated responsible officer) who could censor any letter or part of a letter on grounds that 'its contents were objectionable or that the letter was of excessive length'. Before the case reached the UN Human Rights Committee, the Canadian Government amended the legislation by inserting a new provision which circumscribed the reasons for censoring mail: a prisoner's mail could be censored if it posed a threat to staff or to the operation of the prison. The revised legislation had the effect of minimising the warden's power to censor mail. The UN Human Rights Committee found the terms of the pre-amended legislation to be too general but accepted that the amended legislation was sufficient to comply with the ICCPR.

'Interference'

The Charter does not define what is meant by the term 'interference' and there is no general meaning for this term in international human rights law.

An interference in the context of s. 13 probably means a disturbance or an unwanted involvement.

The right not to have his or her family and home unlawfully or arbitrarily interfered with

Section 13 protects not only privacy, but also the family and home by providing a person with rights not to have his or her family or home unlawfully or arbitrarily interfered with. This right closely relates to s. 17 of the Charter (protection of families and children) and you should consult the section of these Charter Guidelines on s. 17 for more guidance in an appropriate case.

89 *Human Rights Committee, General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [3], [8].

90 *Ibid.*

91 *Ibid* [4].

92 *Pinkney v. Canada*, Human Rights Committee, Communication No. 27/1977, UN Doc. CCPR/C/14/D/27/1977 (29 October 1981) [34].

These rights concerning the protection of a person's family and home are dealt with together in this section of these Charter Guidelines; however, note that they are independent rights. Legislation or policy will be affected by s. 13 if it raises an issue with respect to both family and home, or just family or home.

The meaning of 'family' and 'home'

The terms 'family' and 'home' are not defined in the Charter.

In international human rights law, the term 'family' is given a broad interpretation and includes a range of types of family.

The approach of the UN Human Rights Committee regarding 'family' is not to provide a definitive list of who is, or is not, included in the term, but to provide general guidance on the definition. Thus, the UN Human Rights Committee says:

'Regarding the term 'family', the objectives of the Covenant require that for purposes of article 17, this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.'⁹³

The meaning of 'family' in the ICCPR has evolved in the case law of the UN Human Rights Committee to reflect social developments that have occurred since the ICCPR commenced.⁹⁴ For example, the UN Committee has said that family is not confined by marriage.⁹⁵ A family may take various forms under this section and should be defined broadly.

The question under s. 13 of the Charter is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

Regarding the meaning of 'home', the UN Human Rights Committee has said that it means 'where a person resides or carries out his usual occupation.'⁹⁶ This is a liberal interpretation of 'home' which includes both where a person lives and where a person usually works. This interpretation may not necessarily be found to apply under the Charter.

What is an 'unlawful or arbitrary interference' with a person's family or home?

The Charter requires that a public authority must not unlawfully or arbitrarily interfere with a person's family or home. This means that any interventions by a public authority which may affect a person's family and/or home will need to be carefully considered to ensure that they are lawful and that they are not arbitrary.

The meaning of the terms 'unlawful', 'arbitrary' and 'interference' are discussed above. You should consult this discussion to understand more about the scope of these rights.

Interference with home has arisen in international cases in two contexts:

- entry into a person's home without consent, such as a forcible entry, search or arrest at home; and
- an interference directed at the home itself, such as a denial of a right of access to the home, requisition or compulsory occupation, compulsory acquisition, destruction or removal of the property, eviction or expulsion.

93 *Human Rights Committee, General Comment 16*, (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5].

94 *International Covenant on Civil and Political Rights*, opened for signature, ratification and accession (all ways in which a state can agree to be bound by a Convention in international law) on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

95 *Hendriks v. Netherlands*, Human Rights Committee, Communication No. 201/1985, UN Doc. CCPR/C/33/D/201/1985 (12 August 1988).

96 *Human Rights Committee, General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5].

The right not to have his or her correspondence unlawfully or arbitrarily interfered with

‘Correspondence’

The term ‘correspondence’ is not defined in the Charter. The UN Human Rights Committee has interpreted the term to refer to both written and verbal communications.⁹⁷

What is an ‘unlawful or arbitrary interference’ with a person’s correspondence?

The Charter requires that a public authority must not unlawfully or arbitrarily interfere with a person’s correspondence. The purpose behind this requirement is to protect the confidentiality of correspondence.

The meaning of the terms ‘unlawful’, ‘arbitrary’ and ‘interference’ are discussed above. You should consult this discussion to understand more about the scope of this right.

Some examples of situations in which this right has arisen in international cases are:

- checking, intercepting, censoring or stopping a person’s mail;
- preventing or monitoring correspondence between categories of people;
- tapping, bugging or metering a person’s telephone;
- placing a person under surveillance;
- threatening to sell private correspondence, that is in the hands of a trustee in bankruptcy.

This list is not exhaustive. You will need to consider s. 13 if any of the policy triggers above are present.

97 Ibid [8] which refers to the delivery, opening and reading of ‘correspondence’.

Detainee correspondence

A particular application of this right involves the right of a person detained in prison to private correspondence.

The UN Human Rights Committee has held that persons detained in prison should be allowed, under necessary supervision, to correspond with their families and reputable friends on a regular basis without interference.⁹⁸

The right not to have your reputation unlawfully attacked

Section 13(b) provides a person with a right not to have his or her reputation unlawfully attacked.

This provision was modelled on article 17(1) of the ICCPR. However, that instrument protects a person from unlawful attacks on a person’s ‘honour’ or ‘reputation’, whereas the Charter is confined to such attacks on a person’s reputation.

‘Reputation’

The term ‘reputation’ is not defined by the Charter and has not been defined by the UN Human Rights Committee. It refers to the beliefs or opinions that are generally held about someone.

‘Unlawfully attacked’

The Charter protects a person’s reputation from ‘unlawful attacks’. The right not to have your reputation unlawfully attacked is related to the right to freedom of expression protected by s.15 of the Charter. It is one of the bases for limiting a person’s right to freedom of expression under the Charter.⁹⁹

The expression ‘unlawfully attacked’ is not defined in the Charter. The approach of the UN has been to interpret it to mean an attack that is unlawful under domestic law. This may be pursuant to the common law or by statute.

98 *Angel Estrella v. Uruguay*, Human Rights Committee, Communication No. 74/1980, UN Doc. CCPR/C/18/D/74/1980 (23 March 1983).

99 There are other ways in which freedom of expression may be limited. You should refer to section 15 of these Guidelines for guidance on the right to freedom of expression.

Taking this approach, an unlawful attack for the purpose of s. 13(b) would include a public attack involving untrue statements that are intended to harm the reputation of a person. The word 'attack' suggests something more than just comment on a person.

Expressing an opinion about a person that does not involve untrue statements intended to harm the person's reputation is unlikely to be sufficient to trigger consideration of this right.

Note that unlike s. 13(a), s. 13(b) protects against attacks against a person's reputation solely on the basis that it is unlawful, and does not protect against arbitrary attacks on a person's reputation. This means that if there is lawful authority for a disclosure of information about someone else, s. 13(b) will not be breached, even if a particular attack may be unreasonable. For example, if the conduct is defensible under defamation law, the right will not be interfered with (see *Defamation Act 2005* (Vic.)).

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s. 13 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter.

For example, the right to be free from unlawful or arbitrary interference with a person's family and home may be reasonably limited by legislation that protects against child abuse. However, you will need to examine any proposed legislation, policy or program carefully to ensure that it meets the requirements for a reasonable limitation under the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

- Section 13 confers a number of rights regarding privacy and reputation.
- As with all of the human rights in the Charter, s. 13 is subject to reasonable limitations under s. 7.

Privacy

- Privacy issues arise in a broad range of contexts.
- While it is difficult to define privacy with precision, it is often categorised in the following terms: bodily privacy, territorial privacy, communications privacy and information privacy. These categories will often overlap.
- The right to privacy is generally regarded as imposing negative obligations on public authorities to refrain from interfering with privacy. The right has been interpreted broadly in international jurisprudence.
- An **unlawful interference** is one that does not take place in accordance with law. When authorising any interference with privacy, the law should specify in detail the precise circumstances in which an interference may be permitted.
- An **arbitrary interference** is one that is not in accordance with the provisions, aims and objectives of the Charter and is not reasonable. To ensure that an interference is not arbitrary, it must be more than lawful. The law should be drafted in accordance with the provisions, aims and objectives of the Charter and any interference with privacy should be reasonable in the particular circumstances.¹⁰⁰

¹⁰⁰ *Angel Estrella v. Uruguay*, Human Rights Committee, Communication No. 74/1980, UN Doc. CCPR/C/18/D/74/1980 (23 March 1983) [4].

Family and home

- The prohibition on an unlawful and arbitrary interference with family is related to the right to protection of the family in s. 17.
- In international human rights law, 'family' has a broad meaning and includes a range of types of family.
- The Charter also prohibits any unlawful or arbitrary interference with a person's home.
- In international law, 'home' means the place where a person resides and where a person works.
- Any intervention by a public authority that may affect a person's family and home should be carefully considered to ensure that it is lawful and it is not arbitrary.

Correspondence

- 'Correspondence' refers to both written and verbal communications.
- The confidentiality of correspondence should be protected in legislation, policy and programs by refraining from unlawfully or arbitrarily interfering with private correspondence.

Reputation

- The Charter protects a person from an unlawful attack on his or her reputation. An unlawful attack is a public attack that is intended to harm the reputation of the person and is based on untrue statements.

MEASURES TO IMPROVE COMPLIANCE

Privacy

- Consider privacy issues early in the policy process to avoid and mitigate unintended potentially adverse impacts on privacy and to ensure appropriate safeguards are in place.
- When vetting legislation or a policy or program involving powers of investigating officers, you will need to consider whether a particular power breaches s. 13. You need to ensure both that the authorising power is reasonable and that the power is exercised in a manner that is also reasonable.
- When preparing legislative proposals that would require or authorise acts and practices that may be an interference with privacy or may adversely affect the privacy of an individual, consult with the Victorian Privacy Commissioner. Note that the Privacy Commissioner has a statutory function to examine and assess legislative proposals for adverse privacy impact and to advise the Attorney-General of his or her view: s. 581, *Information Privacy Act* (Vic.).
- For policy proposals, consider legislative and non-legislative ways to avoid or mitigate adverse impacts upon privacy and encourage the early consideration and adoption of privacy-enhancing amendments or policy alterations.
- In relation to information privacy:
 - understand how the *Information Privacy Act* (Vic.) and the *Health Records Act* (Vic.) interact with the existing privacy laws and the Charter;
 - utilise checklists and other guidance prepared by the Office of the Victorian Privacy Commissioner and the Office of the Health Services Commissioner to help identify privacy concerns. Information is available by contacting those offices;
 - you may wish to consult directly with one of the specialist government bodies on privacy:
 - Office of the Victorian Privacy Commissioner;
 - Office of the Health Services Commissioner (if the policy or the legislation involves issues

relating to health privacy).

Family and home

- If you are vetting legislation or a policy or program and wish to know if a certain collection of persons is a 'family' for the purposes of s.13, ask:
 - Are they regarded as a family under Victorian law?
 - Are they regarded as a family under international and comparative case law?
- Where the policy or legislation involves children, ensure that it takes into account the best interests of the child.¹⁰¹
- Also refer to the measures to achieve compliance on s. 17 of these Charter Guidelines (Protection of families and children).

Correspondence

- If you are reviewing legislation or developing a new policy or program that provides for the censorship, monitoring or interception of correspondence, ensure that:
 - there is a legislative power to censor, monitor or intercept correspondence;
 - the scope of the power is limited to doing so in situations where it is necessary to do so;
 - the reasons for censoring, monitoring or intercepting correspondence in a specific case are considered; and
 - censoring, monitoring or intercepting correspondence will be effective to achieve the policy goal.
- If you are developing a new policy or program that provides restrictions and controls on a person's correspondence, ensure that the above considerations are taken into account.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy or legislation raises an issue under s. 13, you should also consider whether it raises an issue with respect to:

- freedom from discrimination (s. 8);
- freedom of movement (s. 12);
- the right to freedom of thought, conscience, religion and belief (s. 14);
- the right to freedom of expression (s. 15);
- freedom of assembly (s. 16);
- protection of families and children (s. 17);
- property rights (s. 20);
- the right to liberty and security (s. 21);
- the right to a fair hearing (s. 24);
- rights in criminal proceedings, in particular the right not to be compelled to testify against himself or herself or to confess guilt (s. 25).

If your policy, program or legislation relates to the possible censorship of a person's correspondence during detention, you should also refer to s. 22 (humane treatment when deprived of liberty).

As with all rights protected under the Charter, the general limitations clause in s. 7 of the Charter may also be relevant.

HISTORY OF THE SECTION

Section 13 was modelled on article 17(1) of the ICCPR. See also s. 12 of the *Human Rights Act 2004* (ACT).

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

¹⁰¹ The 'best interests of the child' principle derives from Article 3 of the *Convention on the Rights of the Child*, to which Australia is a party: *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990). See also section 17(2) regarding the right of a child to have such protection as is in his or her best interests.

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7. *Human Rights Committee, General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003).