

SECTION 15

FREEDOM OF EXPRESSION

Section 15

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

98

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 15?

You will need to consider s. 15 in assessing legislation, a policy or a program where it:

- regulates what anyone can say, write or communicate through their art or actions (for example, regulates the contents of any speech, publication, broadcast, display or promotion; regulates offensive speech);
- regulates the format of any expression (for example, restricts political leaflets to black-and-white printing);
- regulates the time, place or manner of any form of expression (for example, regulates the number of people who can participate in a street march; prohibits 'busking' in particular areas; restricts protesters' access to particular places);
- restricts or censors media coverage;
- requires a person to obtain prior approval before expression may lawfully occur (for example, street demonstrations);

- requires particular material to be reviewed or approved before it is published;
- attaches criminal or civil liability to the publication of ideas, opinions or information;¹¹⁹
- compels someone to express information (for example, a subpoena);
- regulates or restricts an individual's access to information (including access to material on the internet);
- penalises or disadvantages any person on the basis of their opinions;
- imposes a dress code (for example, a dress code that prohibits staff from wearing t-shirts with 'political messages').

Some specific and commonly encountered triggers for the right to freedom of expression are:

- reporting of judicial proceedings;
- censorship and classification;

¹¹⁹ *Lingens v. Austria* (1986) 103 Eur Court HR (ser A); (1986) 8 EHRR 407.

- busking;
- public disorderly conduct;
- commercial expression – advertising;
- public servants expressing political opinions;
- interception of prisoners' mail and monitoring of telephone calls;
- telephone interception.

These policy triggers are not comprehensive.

DISCUSSION

Section 15 establishes a number of rights relating to freedom of expression.

It protects:

- the right to hold an opinion without interference; and
- the right to seek, receive and impart both information and 'ideas of all kinds' whether within or outside of Victoria, and whether orally, in writing, in print, by way of art or in another medium.

The right to seek, receive and impart information and ideas is subject to limitations that come within either s. 15(3) or s. 7 (or both). Limitations on the right to freedom of expression are discussed below.

Why free speech?

There are many rationales advanced for why free speech is worthy of protection. A lengthy examination of the various rationales is outside the scope of these Charter Guidelines. They largely centre around the promotion of self-fulfilment of individuals in society, notions that 'truth' will be revealed when there is vigorous debate and the functioning of the democratic process. For example, one view taken by the UK courts is that:

'... freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse

of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.'¹²⁰

In other words, freedom of expression is an essential foundation of a democratic society.

The Charter establishes the right to freedom of expression in qualified terms. The scope of the right is discussed in the following section.

The right to hold an opinion without interference

The right to hold an opinion without interference protects a person's right to have an opinion free of interference by the state. It does not apply once a person manifests or communicates their opinion (in speech, writing or action). Manifesting or communicating one's opinion is governed by s. 15(2), that is, the right to freedom of expression.

An example of an activity that interferes with the right to hold an opinion without interference would be 'brainwashing' by a public authority; that is, compelling or coercing a person to change his or her opinion or adopt a particular belief.

For this right to be interfered with, a person's opinion must be somehow involuntarily influenced. It would not appear to be sufficient merely to seek to influence opinion, for example, by mass-media propaganda.¹²¹ By contrast, a legislative provision that penalises or disadvantages a person on the basis of his or her opinion may interfere with this right.

The right to freedom of expression

What expression?

Section 15 protects a right to freedom of political, artistic and commercial expression in any medium. Examples of expression covered by this section are:

- written and oral communications;
- television programs;
- commercial advertising;

¹²⁰ *R v. Secretary of State for the Home Department, ex p Simms* [1999] 3 All ER 400.

¹²¹ Sarah Joseph, Jenny Schultz, Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (OUP, 2nd edn, 2000) 518.

- broadcasting, film and video;
- pictures;
- sign language;
- dress; and
- images.

You should note that the right to freedom of expression:

- protects not only favourable information or ideas but also political protest or criticism¹²² and unpopular ideas, including those that 'offend, shock or disturb' because 'such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society';¹²³
- is not restricted to communicating one's own views and ideas – it simply refers to the right to communicate information and opinions whether or not these are personally held; and
- encompasses a freedom *not* to express (for example, to say nothing or not to say certain things).¹²⁴ For example, the right protects a person from saying things that may be repugnant to their personal beliefs.

What is protected?

Section 15 establishes the freedom to seek, receive and impart both information and ideas of all kinds.

'Impart'

An example of a case where freedom to impart information was breached involved the confiscation of leaflets and a subsequent fine pursuant to legislation which required all publishers of periodicals to include certain information in publications. The UN Human Rights Committee said (in a case against the Government of Belarus) that the applicant's freedom to impart information had been breached.¹²⁵

'Seek and receive'

An important manner in which the right to seek and receive information is realised is through legislation providing for freedom of information. However, s. 15 does not create a right to freedom of information.

For example, s. 15 may be interfered with by restrictions on access to public libraries or public internet terminals in libraries. There is no obligation to provide either under the Charter, but if they are provided there must be no restriction in relation to access to public libraries or public internet terminals in libraries that cannot be justified either under the special limitations to be found in s. 15(3) or under the general limitation of s. 7.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the right to freedom of expression 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.

The right to freedom of expression is also subject to a specific limitation in s. 15(3). The right to freedom of expression has a distinctive role within the Charter in that it is specifically recognised that there are special duties and responsibilities that attach to it.

122 *Hopkinson v. Police* [2004] 3 NZLR. 704, *Brooker v. Police* [2007] NZSC 30

123 *Handyside v. UK* (1976) 24 Eur Court HR (ser A); (1979–80) 1EHRR 737.

124 *National Bank of Canada v. Retail Clerks' Union* [1984] 1 SCR 269.

125 *Laptsevich v. Belarus*, Human Rights Committee, Communication No. 780/1997, UN Doc. CCPR/C/68/D/780/1997 (13 April 2000).

Section 15(3): specific limitation

The ICCPR recognises that the right of free expression in article 19(2) can be abused so as to undermine the rights of others. For this reason, it recognises in article 19(3) that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities' and establishes a means by which the right can be restricted.

The Charter models this approach by including s. 15(3), which contains a specific limitation on the right to freedom of expression. This invites consideration of particular matters that are identified as ones which, when satisfied, specifically justify a restriction on the right.

Section 15

- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
- (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

The application of s. 15(3) will involve satisfying a number of conditions. All of these conditions must be met for s. 15(3) to be satisfied.

First, the relevant restriction proposed on the right to freedom of expression must be 'lawful'.

Second, the relevant restriction must be imposed for a particular purpose, either:

- to respect the rights and reputation of other persons (for example, defamation law, or privacy exemptions under Freedom of Information legislation); or
- in order to protect national security, public order, public health, or public morality.

Third, the relevant restriction must be 'reasonably necessary' for one of these purposes.

1. Is the restriction 'lawful'?

The requirement for a restriction to be lawful means that the limitation is sufficiently provided by law (for example, in legislation).

2. What is the purpose of the restriction?

You must consider the purpose of the restriction and ensure that it is necessary either:

- to respect the rights and reputation of other persons; or
- for the protection of national security, public order, public health or public morality.

With the exception of 'person', these terms are not defined in the Charter. However, they have all been considered in international human rights law jurisprudence. Their meaning is discussed in the following paragraphs.

Person: The term 'person' in s. 15(3)(a) is defined in s. 3 of the Charter as a human being. It does not apply to corporations.

National security: The protection of national security is a well-established basis for restricting rights in international human rights law. It is invoked when the political independence or the territorial integrity of a country is at risk. Common national security restrictions on freedom of expression are the prohibition on the transmission of 'official secrets' and civil proceedings for breach of confidence in some circumstances. Both seek to limit expression by prior restraint. Note that the mere mention of national security will not mean that a restriction is permissible. It must still be reasonably necessary.

Public order: The term 'public order' may be defined as the sum of rules which ensure the peaceful and effective functioning of society. Common 'public order' limitations on the right to freedom of expression include prohibitions on speech that may incite crime, violence or mass panic.

Public health: The ‘public health’ limitation on the right to freedom of expression has not been the subject of any cases before the UN Human Rights Committee. A prohibition of misinformation about health-threatening activities and restrictions on the advertising of harmful substances such as tobacco are probably justified under this limitation. This was the stated intention of the inclusion of this aspect of the specific limitation by the Human Rights Consultation Committee in its Report.¹²⁶

Public morality: The UN Human Rights Committee has stated that there is no universally applicable common standard for what constitutes ‘public morality’.¹²⁷ A restriction on obscene or pornographic material is an example of a restriction of free expression on the ground of public morality.

3. Is the restriction ‘reasonably necessary’?

As stated above, the restriction must be necessary for one of the prescribed purposes. This requirement is often referred to as one of ‘proportionality’. In other words, the law must be appropriate and adapted to achieving one of the ends or purposes enumerated in s. 15(3).¹²⁸

This means that you must consider:

- whether the policy, program or legislation is effective to achieve one of the enumerated ends;
- whether it impinges on free expression more than is necessary to achieve that end given the seriousness of that end; and
- whether there are less restrictive means of achieving that end.

Examples of restrictions that may come within the scope of section 15(3):

- Imposing a ban on misinformation about the health effects of smoking may be considered reasonably necessary to protect public health.
- Prohibiting the sale of pornographic material may be considered reasonably necessary to protect public morality.
- Civil or criminal law restrictions on speech that incites racial violence and other violent conduct are also likely to be lawful restrictions for the purpose of both respecting the rights and reputation of others and protecting public order.¹²⁹

Section 7: General limitation

It is possible that the right protected by s. 15 may be limited even though none of the requirements of the specific limitation (s. 15(3)) are present. The right to freedom of expression may be restricted by a legislative provision, policy or program that meets the requirements of the general limitation under s. 7 of the Charter, even though it does not meet the particular requirements of the specific limitation under s. 15(3). You should refer to Part 2 of these Charter Guidelines for more information on s. 7.

126 Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 44.

127 *Hertzberg v. Finland*, Human Rights Committee, Communication No. 61/1979, UN Doc. CCPR/C/15/D/61/1979 (2 April 1982) [10.3].

128 *Faurisson v. France*, Human Rights Committee, Communication No. 550/934, UN Doc. CCPR/C/58/D/550/1993 (16 December 1996) [8].

129 In relation to violent expression, see *Irwin Toy Ltd v. Quebec* (1989) 1 SCR 927.

KEY POINTS TO REMEMBER

- The Charter establishes a right for all persons in Victoria to hold an opinion without interference and to express themselves by seeking, receiving and imparting both information and 'ideas of all kinds'.
- Expression may occur orally, in writing, in print, by way of art or in another medium (for example sign language).
- The right to freedom of expression applies to information and ideas sought, received and imparted in and outside Victoria.
- As with all of the rights in the Charter, freedom of expression may be reasonably limited. In relation to s. 15, limitations or restrictions on the right may be permissible either because they satisfy the specific requirements of s. 15(3) or the general requirements of s. 7. Both sections are central provisions that will need to be considered whenever the right to freedom of expression is raised.

MEASURES TO IMPROVE COMPLIANCE

- Examine whether your policy or legislation falls within any of the policy triggers listed above, that is, raises an issue under s. 15 of the Charter.
- If the answer is 'yes', in most cases your task will be to consider whether it is a justified restriction on the rights protected by s. 15.
- First, consider the nature of the harm that is being addressed.
 - Does it come within one of the following:
 - the protection of the rights and reputation of other persons?
 - national security?
 - public order?
 - public health?
 - public morality?

- If so
 - Is the policy or legislation likely to be effective in addressing that harm?
 - Is that restriction limited to what is necessary to prevent the harm?
 - How serious is the harm or potential harm?
 - What is the extent of the restriction on freedom of expression?
 - Whose expression is restricted?
Do they have realistic alternative avenues for communicating their message? Does the policy or legislation restrict more people than necessary?
 - What forms of expression are restricted?
Does the policy or legislation restrict more forms than necessary? Are alternative avenues of communication open?
 - What subject matters of expression are restricted?
- Is some alternative form of regulation possible that would result in a lesser restriction of freedom of expression?
 - Consider whether in your case an option would be to impose conditions on that form of speech to make it acceptable, rather than banning that form of speech altogether (for example, requiring product information and warnings rather than banning product advertising).
- If not, consider whether it is a reasonable and demonstrably justified limitation pursuant to s. 7.

RELATED RIGHTS AND FREEDOMS

The right to freedom of expression is very broad and intersects with a wide variety of rights.

It is expected that policy officers will frequently be required to balance s. 15 with other Charter rights, for example:

- right to freedom of thought, conscience, religion and belief, especially the right to manifest a person's religion or belief (s. 14);
- the right to peaceful assembly and freedom of association (s. 16);
- the right to take part in public life (s. 18);
- cultural rights, especially the right of persons with a particular religious background to declare or practice their religion and the right to persons with a particular linguistic background to use their language (s. 19);
- rights in criminal proceedings, especially a person's right not to be compelled to testify against himself or herself or to confess guilt (s. 25(2)(k)).

HISTORY OF THE SECTION

Section 15 was modelled on article 19 of the ICCPR.

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

BIBLIOGRAPHY

Books and reports

1. Sarah Joseph, Jenny Schultz, Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (OUP, 2nd edn, 2000).
2. Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005).

Case Law

3. *Brooker v. Police* [2007] 1 NZSC 30.
4. *Handyside v. UK* (1976) 24 Eur Court HR (ser A).
5. *Hopkinson v. Police* [2004] 3 NZLR 704.
6. *Irwin Toy Ltd v. Quebec* [1989] 1 SCR 927.
7. *Lingens v. Austria* (1986) 103 Eur Court HR (ser A).
8. *National Bank of Canada v. Retail Clerks' Union* [1984] 1 SCR 269.
9. *R v. Secretary of State for the Home Department, ex p Simms* [1999] 2 All ER 400.

United Nations Human Rights Committee Jurisprudence

10. *Faurisson v. France*, Human Rights Committee, Communication No. 550/934, UN Doc. CCPR/C/58/D/550/1993 (16 December 1996).
11. *Hertzberg v. Finland*, Human Rights Committee, Communication No. 61/1979, UN Doc. CCPR/C/15/D/61/1979 (2 April 1982).
12. *Laptsevich v. Belarus*, Human Rights Committee, Communication No. 780/1997, UN Doc. CCPR/C/68/D/780/1997 (13 April 2000).