



Right to Freedom of Expression (s.16)

Section 16 of the *Human Rights Act 2004* says that:

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

This factsheet is not intended to be a substitute for legal advice.

Scope of the Right

The right to freedom of expression protects the right of people to hold an opinion and to seek, receive and impart information and ideas. The right to freedom of expression comes with responsibilities. The Government can lawfully restrict this right if the restriction is necessary to protect the rights of others or to protect public order, public health, public morality or national security.

The right to hold an opinion

Section 16 of the *Human Rights Act* says that every person has a right to hold an opinion without interference. The UN Human Rights Committee has clarified that this means that no person should be subject to discrimination or victimisation because of any actual or perceived opinions that she or he holds.

In addition, no one should be coerced into holding or abandoning an opinion. The Committee has also declared that under international law, the right to hold an opinion is a non-derogable right. This means that the government cannot suspend this right for any reason, including in public emergencies.

Under international law, the right to hold an opinion is an absolute right, not subject to any limitations.

The right to freedom of expression

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 the ACT.

Expression is a broad concept that has been held by courts to encompass 'every form of subjective idea and opinion capable of transmission to others' and 'any act which is capable of conveying some kind of meaning'. This includes political, cultural and artistic expression; news and information; commercial expression and advertising; audio-visual, electronic and internet-based modes of expression, as well as spoken, written and sign language. Examples include news, posters, pamphlets, banners, books, dress, legal submissions, teaching, religious discourse and human rights discussion.

The right to freedom of expression protects almost all mediums of expression, provided the expression conveys or attempts to convey a meaning. Whether an act conveys a meaning is judged by its impact on reasonable members of the public who are exposed to it, without reference to the purpose of the person who expressed it. However not all forms of expression are protected. Expressive conduct delivered in the form of criminal damage to third party's property is not protected expression. Violence is also not a

protected expression. This means that while the concept of expression is a very broad one, the way people can exercise the freedom of expression can be limited.

Hate speech and pornography may constitute expression, as even 'repugnant' expression is still expression. However, such expression may not be protected under the *HRA* because under section 12(b) the right to freedom of expression may be limited if it is necessary to protect the rights and reputation of others.

Communication of a commercial nature may be considered 'expression', although the right is conferred on human beings and not corporations. Commercial expression has been found to be less important than social or political expression, and limitations on it have been more easily justified.

The right to seek and receive information

The right to freedom of expression also incorporates a right to freedom of information. In particular, it includes a positive right to access government-held information. However, the right to receive information is not absolute, and may be subject to objective, proportionate and reasonable limitations.

Example: Restrictions on hate speech and vilification – *Daniel Emlyn-Jones and Federal Capital Press* [2009] ACTDT 2 (31 July 2009)

This appeal concerned a complaint about comments posted by individuals on the Canberra Times website under an article on the proposed Civil Unions Bill. The comments denigrated gays and lesbians, including linking homosexuality and pedophilia and suggesting that gays and lesbians should be treated in mental health institutions. The President of the Discrimination Tribunal held that the Canberra Times had unlawfully vilified homosexuals as a group (but not the complainant in particular) but that it was not liable as the publications were made reasonably and honestly for purposes in the public interest.

The President held that the right to freedom of expression places restrictions on the right to reputation. The particular statutory provisions enlivened created a defence allowing publication for purposes of public interest and 'discussion or debate about and presentations of any matter'. Significantly, however, if the Canberra Times had vilified the complainant in particular the defence would have failed.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 16 could be engaged by activities that:

- Regulate the manner, content and format of any public expression (for example, the contents of a speech, publication, broadcast, display or promotion). Examples could include requiring prior approval for public protest or restricting where protest activity can take place;
- Censor materials or require that they be reviewed or approved before being published;
- Compel someone to provide information (for example, a subpoena);
- Impose a dress code;
- Regulate or restrict an individual's access to information (including access to material on the internet);
- Attach criminal or civil liability to publications of opinions or information.



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