

SECTION 16

PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION

Section 16

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 16?

You will need to consider s. 16 if you are assessing legislation, a policy or a program that:

- limits the ability of a person or group of persons to exercise the right to peacefully protest (for example, regulating picketing in an employment setting, or regulating public demonstrations);
- limits the ability of a person or group of people to hold or participate in a public or private gathering or to come together for a common purpose (for example, restricting the areas where, or times at which, a demonstration, picket or public event can take place);
- treats people differently on the basis of their membership of a group or association;
- prohibits or creates disincentives for membership in a group or association (including in a criminal justice context);
- requires a person to disclose membership in a group or association;
- compels a person to belong to a professional body or workplace association;
- confers preferences on a person belonging to a group or association.

These policy triggers are not comprehensive.

DISCUSSION

Section 16 provides for the two separate but related rights of freedom of peaceful assembly and freedom of association.

Right to peaceful assembly

The right to peaceful assembly protects the right of individuals and groups to meet in order to exchange ideas and information, to express their views publicly and to hold a peaceful protest.

The ICCPR jurisprudence on the content of this right is very limited compared to the jurisprudence on many other rights in the Covenant.

It is clear that this right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful. However, the right is not engaged when those who organise or participate in a demonstration have violent intentions that result in public disorder.

The right to peaceful assembly creates a positive duty. There is some international jurisprudence to support the view that this right requires public authorities to take reasonable and appropriate positive measures to ensure that the right can be exercised, for example, by protecting demonstrators from physical violence by counter-demonstrators¹³⁰ or setting up areas for people to assemble peacefully.

130 *Plattform 'Arzte für das Leben' v. Austria* (1988) 126 Eur Court HR (ser A); (1991) 13 EHRR 204.

Right to freedom of association

When does it apply?

The right to freedom of association protects the right of all persons voluntarily to group together for a common goal and to form and join an association. It applies to all forms of associations including trade unions.

As for the right to peaceful assembly, the ICCPR jurisprudence on the scope of this right is quite limited.

To what extent does the right to freedom of association encompass a right not to associate?

The Universal Declaration on Human Rights provides:

Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

Neither the ICCPR nor the Charter expressly includes an equivalent right to article 20(2) of the Universal Declaration on Human Rights. However, the right to freedom of association has been interpreted by the European Court of Human Rights as also encompassing a negative right – the right not to join associations, including trade unions.¹³¹ In international human rights law, association rights generally tend to have both a positive and a negative aspect; that is, a person cannot be stopped from joining and cannot be forced to join.

Another issue that may arise is the extent to which the right to associate applies to professional bodies. In international case law, a requirement for compulsory membership of a professional body has not generally violated this right, particularly if the association is responsible for professional regulation.¹³²

What is the scope of the right?

The scope of the right to freedom of association is unsettled in international human rights law, particularly the extent to which it protects the activities of the association.

The United Nations Human Rights Committee has been divided on the issue. A majority of the Committee has taken the view that the equivalent ICCPR right (article 22) does not protect the right to strike. However, a strong dissent of the same committee said that 'the exercise of the right requires that some measure of concerted activities be allowed; otherwise it could not serve its purpose.'¹³³

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights to peaceful assembly and freedom of association 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.

For example, in respect of the right to peaceful assembly, public nuisance laws may impose reasonably justified limits on this right. Laws restricting a person's right to engage in a non-violent assembly that is likely to create public disorder may also be justified. In both cases you will need to carefully examine the relevant legislation or policy in light of s. 7.

131 *Young, James and Webster v. United Kingdom* (1981) 44 Eur Court HR (ser A) [51]–[55]; (1982) 4 EHRR 38 [55–56] (a closed shop agreement that required British rail employees to belong to one of three unions as a condition of employment violated art. 11 of the European Convention on Human Rights. The court, however, did not decide whether this negative right has the same status as the positive right of freedom of association.) See also *Sigurdur A. Sigurjónsson v. Iceland* (1993) 264 Eur Court HR (ser A) [35]; (1993) 16 EHRR 462 [35]; *Gustafsson v. Sweden* (1996) II Eur Court HR 637 [42]–[44]; (1996) 22 EHRR 409 [45].

132 See Lester Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (2nd edn, Butterworths, 2004) 383 and accompanying notes; *Le Compte, Van Leuven and De Meyere v. Belgium* (1981) 43 Eur Court HR (ser A); (1983) 5 EHRR 183.

133 *JB v. Canada*, Human Rights Committee, Communication No 118/1982, UN Doc. CCPR/C/28/D/118/1982 (18 July 1986).

KEY POINTS TO REMEMBER

Right to peaceful assembly

- This right protects individuals and groups to meet for non-violent purposes.
- The right imposes both a positive and negative obligation on public authorities.
- The right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful, but not to violent gatherings.

Right to freedom of association

- The right to freedom of association means that all persons have a right to voluntarily group together for a common goal.
- Forming and joining a trade union is one example of the application of this right.
- The right most likely also protects the right *not* to associate with others.
- A requirement for compulsory membership of a professional body has not generally violated the right to freedom of association, particularly where the body is responsible for professional regulation.
- The scope of the right is unsettled in international human rights law, particularly the extent to which it protects the activities of the association.

MEASURES TO IMPROVE COMPLIANCE

Right to peaceful assembly

- If your policy, program or legislation restricts the right to peaceful assembly, ensure that any restrictions:
 - serve a legitimate interest;
 - are no more than what is necessary to protect that interest; and
 - clearly contemplate the person's right to continue to assemble peacefully where possible.

It is advisable that you state the reasons for any restrictions in your policy, program or legislation.

Right to freedom of association

- Although professional associations may be exempt from the right to freedom of association (and the negative aspect of the right – the right not to join an association), if you are establishing a framework supporting a new professional body or association, consider creating exemptions for people who do not wish to be members of that particular organisation or association.
- Ask yourself:
 - is membership required in order to achieve the objectives of the policy?
 - is the criteria for allowing an exemption practicable?
 - will those persons obtaining exemption be significantly disadvantaged by not being a member of the organisation?¹³⁴

If you are developing a policy that offers inducements to persons who associate with certain bodies, ensure that the inducements are not so great as to effectively compel persons to join that body. If the same benefits are obtainable elsewhere, the inducements would probably fall out of this category and an issue under section 16 would be unlikely to be raised.

RELATED RIGHTS AND FREEDOMS

These rights are closely related to the following additional rights protected in the Charter:

- right to freedom of expression (s. 15);
- right to freedom of thought, conscience, religion and belief (s. 14);
- right to freedom of movement (s. 12).

¹³⁴ This is the approach adopted in New Zealand's *Guidelines to the Bill of Rights Act 1990*. (New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990* (2004) <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>).

HISTORY OF THE SECTION

Paragraph (1) of s. 16 is modelled on article 21 of the ICCPR. Paragraph (2) of s. 16 is modelled on article 22 of the ICCPR. Articles 21 and 22 of the ICCPR include specific limitations that have not been reflected in s. 16.

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

BIBLIOGRAPHY

Books and reports

1. Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (2nd edn, Butterworths, 2004).
2. *The Guidelines on the New Zealand Bill of Rights Act 1990*. See New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990* (2004) <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>.

Case Law

3. *Gustafsson v. Sweden* (1996) II Eur Court HR 637.
4. *Le Compte, Van Leuven and De Meyere v. Belgium* (1981) 43 Eur Court HR (ser A).
5. *Plattform 'Ärzte für das Leben' v. Austria* (1988) 126 Eur Court HR (ser A).
6. *Sigurdur A. Sigurjónsson v. Iceland* (1993) 264 Eur Court HR (ser A).
7. *Young, James and Webster v. United Kingdom* (1981) 44 Eur Court HR (ser A).

United Nations Human Rights Committee Jurisprudence

8. *JB v. Canada*, Human Rights Committee, Communication No. 118/1982, UN Doc. CCPR/C/28/D/118/1982 (18 July 1986).