

SECTION 11

FREEDOM FROM FORCED WORK

Section 11

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of sub-section (2) 'forced or compulsory labour' does not include—
 - (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
 - (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or
 - (c) work or service that forms part of normal civil obligations.
- (4) In this section 'court order' includes an order made by a court of another jurisdiction.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 11?

You will need to consider s. 11 in assessing legislation, a policy or a program where it:

- compels the provision of any labour or the performance of any service under threat of a penalty;
- gives a minister or public authority the power to employ or direct people to perform work in a vital industry or during a state of emergency.

These policy triggers are not comprehensive.

DISCUSSION

Rights to be free from slavery, servitude and forced work are important rights in international human rights law. These rights were included in the ICCPR in part as a response to the aftermath of the Second World War during which forced labour was widespread. Thus, the particular premise behind protecting these rights is that persons should not be subject to conditions that violate individual dignity and exploit human productivity.

Slavery and servitude

Slavery is defined in article 1 of the Slavery Convention 1926 to mean 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

This definition encompasses the notion of effective ownership of a person by someone else, as if the person were a piece of property.

Servitude is not ownership despite the fact that a person under servitude may be directed where to live and may be unable to leave. The prohibition on servitude has been considered in the following cases:

- An applicant who was placed 'at the disposal of the state' for 10 years following the completion of a prison sentence was not held in servitude, nor did his situation violate the right to liberty and security of the person.⁷³
- Obliging a soldier to serve out a minimum enlistment period in the armed forces, contrary to his wishes, did not constitute slavery or servitude.⁷⁴

⁷³ *Van Droogenbroeck v. Belgium* (1982) 50 Eur Court HR (ser A).

⁷⁴ *W, X, Y and Z v. United Kingdom* 11 YB 562 (1968), E Com HR.

Forced or compulsory labour

The UN Human Rights Committee recently considered the meaning of the expression ‘forced or compulsory labour’ in a case against Australia. It said:

“... forced or compulsory labour” covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed.⁷⁵

Forced or compulsory labour refers to work exacted from a person under the threat of a penalty, which he or she has not voluntarily offered to do.⁷⁶ The expression ‘forced labour’ suggests physical or mental constraint.

An example of a penalty might be a threat of punishment if the person does not perform the work. ‘Work’ is to be given a broad meaning and can cover all kinds of work or service, not just physical work.

Forced labour typically has two characteristics: (a) involuntariness; and (b) injustice, oppression or avoidable hardship.⁷⁷ In relation to the second requirement, in other jurisdictions with a comparable prohibition, the following factors have been relevant:

- the threat of a penalty;
- the nature of the work required; for example, whether the work is required in the general interest of the community; and

- whether the burden on the applicant is a proportionate one.⁷⁸

If work required by law was ‘for a short period, provided favourable remuneration and did not involve any discriminatory, arbitrary or punitive application’ it may not contravene this provision.⁷⁹

Similarly, an arrangement which, in practice, means that a person is prevented from working in his or her chosen environment, or continuing a preferred vocation, is unlikely without more to violate this section.⁸⁰

REASONABLE LIMITS ON SECTION 11

As with all of the human rights protected in the Charter, the rights in s. 11 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 from forced or compulsory labour is also subject to a number of permissible exceptions outlined in s. 11(3).

Detainee labour

Any work required to be done by a person who is under detention because of a lawful court order, or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community, is exempt from the prohibition on forced labour. This provision applies to prisoners, including prisoners on remand, who are detained because of a lawful court order. It also applies to other persons who are detained under a lawful court order.

The position is not altered by a subsequent quashing of a conviction.

⁷⁵ *Faure v. Australia*, Human Rights Committee, Communication No. 1036/2001, UN Doc. CCPR/C/85/D/1036/2001 (23 November 2005), [7.5].

⁷⁶ *Convention concerning Forced or Compulsory Labour*, adopted 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

⁷⁷ *Van der Mussele v. Belgium* (1983) 70 Eur Court HR (ser A) [37]; (1984) 6 EHRR 63 [37].

⁷⁸ *Reitmayr v. Austria* (1995) 20 EHRR CD 89.

⁷⁹ *Iverson v. Norway* (1963) 6 YbK 278.

⁸⁰ See for example, *X v. Netherlands* (1983) 32 Eur Comm HR 180; *Talman v. Netherlands* [1997] EHRLR 448.

Note also:

- If the conditions for detention specified in the provision are not met (for example, the detention was not lawful and court-ordered), forced detainee labour may not be permitted.⁸¹
- The qualification pertaining to detainees may cover forced work performed by prisoners on behalf of private firms under contracts concluded with the prison administration.⁸²

Paragraph (4) of s. 13 clarifies that the reference to 'court order' in sub-clause (3)(a) includes an order made by a court of another jurisdiction. This ensures that the exception would cover the interstate transfer of prisoners to Victoria.

Emergencies

Work or service required because of an emergency threatening the Victorian community or a part of the Victorian community is exempt from the prohibition on forced labour. A similarly worded exception appears in Article 8(3)(c)(iii) of the ICCPR.

'Work or service that forms part of normal civil obligations'

Work or service forming part of normal civil obligations is exempt from the prohibition on forced labour.

The expression 'work or service that forms part of normal civil obligations' is not specifically defined in the Charter. The UN Human Rights Committee has said that it should be interpreted against the backdrop of the minimum standards contained in ILO Convention No. 29.⁸³ That Convention, in article 2, paragraph 2(e) excludes from the definition of the term "forced or compulsory labour":

'...minor communal services of a kind which, being performed by the members of the community in the direct interests of the said community, can therefore be considered as normal civic obligations incumbent on members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

... In the Committee's view, to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant.¹⁸⁴

Examples of normal civil obligations may be:

- jury service;
- a lessor's obligation to maintain his or her building;
- both compulsory fire service and a financial contribution in lieu of such service;
- performing community labour pursuant to a 'Work for the Dole' program.⁸⁵

81 *De Wilde, Ooms and Versyp v. Belgium* (1972) 14 Eur Court HR (ser A); (1979–80) 1 EHRR 438.

82 *Twenty one Detained Persons v. Federal Republic of Germany* (1968) 11 YbK 528.

83 *Faure v. Australia*, Human Rights Committee, Communication No. 1036/2001, UN Doc. CCPR/C/85/D/1036/2001 (23 November 2005) [4.11].

84 *Ibid* [7.5].

85 *Ibid*. The 'Work for the Dole' program is a Commonwealth, rather than Victorian, scheme.

KEY POINTS TO REMEMBER

- Slavery means effective ownership of a person by someone else, as if the person were a piece of property.
- Servitude is not ownership, despite the fact that a person under servitude may be directed where to live and may be unable to leave.
- Forced or compulsory labour is work exacted from a person under the threat of a penalty which he or she has not voluntarily offered to do.
- 'Work' has a broad meaning covering all kinds of work or service, not just physical work.
- Prison labour is exempt from the prohibition on forced labour. However, if the conditions for the exception for lawful detention are not met (for example, the detention was not court-ordered), forced detainee labour may not be permitted.
- Work required to meet conditions of a community correctional order is also exempt.
- Also exempt from the prohibition on forced labour is work or service required because of an emergency threatening the Victorian community or a part of the Victorian community, and work or labour forming part of 'normal civil obligations'.
- The term 'normal civil obligations' encompasses work such as jury and fire service.

MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 11(2):

- Ensure that any policy, program or piece of legislation does not compel work or service from a person under the threat of what might be construed as a 'penalty'. If it does, ensure that he or she has voluntarily offered to do the work or perform the service. This measure will be unnecessary if the work or service falls within one of the exceptions in s. 11(3).

- If your policy, program or legislation requires work to be done by persons who are currently detained, ensure that they are being detained pursuant to a 'lawful court order'. Also pay particular attention to ensuring that the conditions of detention required by the Charter are met. You should refer to ss. 21 and 22 in particular.
- If your policy, program or legislation involves work that you consider to amount to 'normal civil obligations', consider whether it is of the type considered to be 'normal civil obligations' under the ICCPR. Examples are discussed above.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy proposal or practice might give rise to an issue under s. 11, you should also consider the following additional rights and freedoms:

- recognition and equality before the law (s. 8);
- right to liberty and security (s. 21).

HISTORY OF THE SECTION

Section 11 is modelled on article 8 of the ICCPR Covenant. The Charter omits article 8(3)(c)(ii), which provides an exception to the right to be free from forced or compulsory labour for military service or national service that is required to be performed by conscientious objectors, as these are considered matters within the Commonwealth's jurisdiction.

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

BIBLIOGRAPHY

Case Law

1. *De Wilde, Ooms and Versyp v. Belgium* (1972) 14 Eur Court HR (ser A).
2. *Iverson v. Norway* (1963) 6 YbK 278.
3. *Reitmayr v. Austria* (1995) 20 EHRR CD 89.
4. *Talman v. Netherlands* [1997] EHRLR 448.
5. *Twenty one Detained Persons v. Federal Republic of Germany* (1968) 11 YbK 528.
6. *Van der Mussele v. Belgium* (1983) 70 Eur Court HR (ser A).
7. *Van Droogenbroeck v. Belgium* (1982) 50 Eur Court HR (ser A).
8. *W, X, Y and Z v. United Kingdom* 11 YB 562 (1968), E Com HR.
9. *X v. Netherlands* (1983) 32 Eur Comm HR 180.

Treaties

10. *Convention Concerning Forced or Compulsory Labour*, adopted 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

United Nations Human Rights Committee Jurisprudence

11. *Faure v. Australia*, Human Rights Committee, Communication No. 1036/2001, UN Doc. CCPR/C/85/D/1036/2001 (23 November 2005).