

Understanding Section 16 of the Bill of Rights

Nondiscrimination

Discrimination means treating people in similar situations differently, without justification. This right would give you protection from discrimination, in relation to all other rights that the Bill of Rights would guarantee.

This means that, based on your sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth, or other status, you could not be treated differently in relation to these constitutional rights.

- Life
- Against torture and inhumane treatment
- Against slavery or forced or compulsory labour
- Personal liberty
- No punishment without law
- Private and family life
- Conscience and religion
- Expression
- Assembly and association
- Movement
- Marriage
- Property
- Nondiscrimination
- Protection as a child
- Protection of the environment
- Lawful administrative action
- Education



How does this right to nondiscrimination compare with the European Convention on Human Rights?

It mirrors the European Convention on Human Rights; in fact, it goes beyond the convention by adding age, as well as mental and physical disability, to the definition of discrimination.

The European Convention on Human Rights Article 14 states:

The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Section 16 of the proposed Bill of Rights states:

16(1) Subject to subsection (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this part of the constitution.

16(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, birth or other status.

What is the “freestanding right of nondiscrimination,” and what is protocol 12?

The freestanding right of nondiscrimination is new, and optional for member states of the European Convention on Human Rights. It protects an individual beyond the rights and freedoms set out in the convention’s article 14.

This right is found in the convention’s protocol 12, article 1, which came into force on 1 April 2005. According to the convention schedule, as of 9 March 2009, 17 member states had ratified protocol 12 and 30 had not.

The convention’s protocol 12, article 1 & 2 states:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association without a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

This right is intended to:

- (a) allow a person to enjoy any right that is specifically granted under national law;
- (b) allow a person to enjoy rights whenever a public authority, under national law, is obligated to behave in a particular manner;
- (c) protect a person from discrimination by a public authority, acting in its discretionary power (for example, granting certain subsidies);
- (d) protect a person from discrimination by any other act, or omission, by a public authority (for example, the behaviour of law enforcement officers when controlling a riot); and
- (e) obligate government to put in place measures that prevent discrimination, including discrimination between private persons (called the “indirect horizontal effect”).

If the freestanding right has these benefits, why have some member states not agreed to it?

Compared to article 14 (1950), protocol 12 is relatively new (2005). Therefore, there isn’t much case law that can help countries to understand the extent to which protocol 12 could affect their national laws.

Because of this some member states have not agreed to implement protocol 12. The UK Government, for example, has not. Instead, it has taken a cautious approach because of its belief that there are “unacceptable uncertainties” regarding the interpretation of freestanding nondiscrimination, when weighed against a country’s right to treat some groups differently – such as, to provide benefits to nationals, as a special group.

The UK’s formal objections are:

• the potential application of the protocol is too wide, since it covers any difference in treatment; and applies to all “rights set forth by law,” in both statute and common law. It could therefore lead to an “explosion of litigation.”

• Nondiscrimination “Rights set forth by law” could extend not just to national laws, but also to other international human rights instruments, to which the UK is a party.

• It’s unclear whether the protocol would *continue to allow a member state to defend its laws or policies which afford different treatment to persons under the existing legal principle of “objective, reasonable justification of difference in treatment. (This as a legal rule which lawfully allows a country to treat people differently to pursue a legitimate aim. This is an important exemption to the equality rule as it affects the sovereignty of nations and the rights of their elected representatives to put in place reasonable measures to protect their nationals)*

Similarly, the Danish government has expressed general scepticism regarding international human rights instruments. With protocol 12, its specific concern is the increasing transference of legislative powers from

national elected governments to international non-legislative bodies (international courts), which cannot be seen as democratically elected organs.

Although the framers of the protocol have said that the European Court of Human Rights would continue to interpret justifiable discrimination by a country, many member states continue to take a cautious approach to adopting it.

Are these concerns relevant to the Cayman Islands?

While it is recognised that free standing non discrimination as expressed in Protocol 12 has many obvious benefits, the jury is still out as to the extent to which the concerns by conservative countries are unfounded as the jurisprudence (judgements) of the courts on this issue is still emerging.

Before adoption of Protocol 12 can take place in the Cayman Islands the community ought to be fully informed of the following:

- (1) What are the benefits of Protocol 12 and what are the risks of Protocol 12
- (2) How will Protocol 12 either positively or negatively affect Caymanian Protection, laws, policies and subsidies if the free standing right against discrimination applies, to national laws, government policies, government subsidies and government acts or omissions;
- (3) The extent to which free standing non discrimination will create an “indirect horizontal effect” whereby the government will be required to implement local legislation to govern discrimination amongst private individuals

Can protocol 12 be adopted now?

It is unlikely. Before protocol 12 can be included as part of the Cayman Constitution it would have to be agreed by both the UK government and the Cayman Islands.

The referendum to be held on May 20, 2009 is to approve a new constitution for the Cayman Islands. It is not a vote for proposals to be discussed with the United Kingdom at a future date, as the public consultation period on constitution reform has already passed. What is now before us is an agreed draft constitution which either has to be accepted as a package or rejected as a package.

Although protocol 12 is not in the proposed constitution, can the Cayman Islands still enact some form of the freestanding right to nondiscrimination?

Yes. Countries that have not adopted protocol 12 have implemented local legislation in their own way to address specific areas of discrimination.

For example, since the UK’s Human Rights Act came into force in 2000, it has assessed and updated many of its antidiscrimination laws, while introducing others. For example, the Special Education Needs and Disability Act was introduced in 2001; the 1995 Disabilities Discrimination Act was revised in 2005; and various employment equality regulations were introduced between 2003 and 2006. It’s important to note that these and similar measures were taken by the UK based upon the society’s viewpoint on these issues.

Cayman may also require an ongoing assessment of antidiscrimination laws that may be introduced here. However, introducing a Bill of Rights, Freedoms and Responsibilities is usually a first step towards enhancing the rights in any country.

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