

SECTION 27(1)

NO RETROSPECTIVE CRIMINAL LAWS

Section 27

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(1)?

You will need to consider s. 27(1) in assessing legislation, a policy or a program where it:

- creates an offence for acts done before the legislation comes into force;
- seeks to expand or broaden an existing criminal offence by altering the range of activities to which it applies;
- amends criminal law procedure in a way that affects fairness of trial procedures.

These policy triggers are not comprehensive.

DISCUSSION

A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed. This flows from the general principle that a person must be able to predict any criminal culpability that attaches to his or her actions. Thus, the conduct of an accused is to be judged by the law at the time that he or she acted or failed to act. The criminal law should not apply retrospectively.

Section 27(1) requires the criminal law to be sufficiently accessible and precise to enable a person to know in advance whether his or her conduct is criminal.²⁷⁹

Scope of section 27(1)

The protection from the operation of retrospective criminal laws applies only to protection from the instigation of criminal proceedings which might result in a conviction or the imposition of a criminal penalty.

The right does not extend to prevent retrospective changes to procedures that do not form part of the penalty or punishment of an offender, or to changes in procedural law (for example, shifts in trial practice or changes to the rules of evidence). However, changes to criminal law procedure may infringe this right where they affect the basic elements of a fair trial.

²⁷⁹ *Handyside v. UK* (1976) 24 Eur Court HR (ser A); (1979–80) 1 EHRR 737; *Kokkinakis v. Greece* (1993) 260-A Eur Court HR (ser A); (1994) 17 EHRR 397.

When considering s. 27(1), you should also refer to the discussion on s. 27(4) of these Charter Guidelines. Section 27(4) expressly limits the rights in s. 27(1), s. 27(2) and s. 27(3) by providing that they do not affect ‘the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.’

REASONABLE LIMITS ON THE PROHIBITION ON RETROSPECTIVE CRIMINAL LAW

The right not to be found guilty of a retrospective criminal offence in s. 27(1) is qualified by s. 27(4).

As with all of the human rights protected in the Charter, the right under s. 27(1) may also 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.

KEY POINTS TO REMEMBER

- A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed.
- This section applies only to protection against the instigation of criminal proceedings which might result in a conviction or the imposition of a criminal penalty.
- The criminal law must be sufficiently accessible and precise to enable a person to know in advance whether his or her conduct is criminal.

MEASURES TO IMPROVE COMPLIANCE

- If you are amending offence provisions ensure that all elements of the offence are clearly defined.
- Avoid giving offence provisions retrospective effect.
- Include transitional provisions that will enable conduct to be dealt with under previous legislation if it occurred before the statute which creates the new offence came into force.

RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under s. 27(1), check whether it also raises an issue under the following rights and freedoms:

- the right to a fair trial (s. 24);
- rights in criminal proceedings (s. 25); and
- the rights relating to criminal penalties (s. 27(2) and s. 27(3)).

HISTORY OF THE SECTION

This provision is modelled on article 15(1) of the ICCPR.

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

BIBLIOGRAPHY

Case Law

1. *Handyside v. UK* (1976) 24 Eur Court HR (ser A).
2. *Kokkinakis v. Greece* (1993) 260-A Eur Court HR (ser A).