

SECTION 27(4)

CRIMES UNDER INTERNATIONAL LAW

Section 27

- (4) Nothing in this section affects 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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(4)

Compared to many other rights in the Charter, s. 27(4) has a more clearly defined sphere of operation.

You will need to consider s. 27(4) if you are assessing legislation or developing a new policy that intends to create retrospective criminal offences.

If you are doing so, s. 27(4) will be relevant if the retrospective criminal offence is also a criminal offence in international law. It is these type of offences that can have a permissible retrospective operation. Criminal offences in international law include:

- crimes against humanity;
- war crimes;
- the crime of piracy;
- the crime of genocide.

Note that the following offences are regarded as war crimes in the Commonwealth *Criminal Code Act 1995*.

- wilful killing;
- torture;
- inhuman treatment;
- biological experiments;

- wilfully causing great suffering;
- taking hostages; and
- denying a fair trial.

This list is not exhaustive.

You should also consider s. 27(4) in a situation where legislation or policy expressly refers to international criminal law or international obligations in the creation of an offence.

DISCUSSION

Generally, retrospective criminal laws are not permitted in Victoria (see the discussion of s. 27(1) in these Charter Guidelines). However, s. 27(4) provides an exception to the prohibition on retrospective criminal offences in respect of acts or omissions that constitute an offence under international law.

Section 27(4) specifically allows for the trial of persons in respect of acts and omissions that were not criminal in Victoria at the time they were committed but at that time amounted to grave breaches of international humanitarian law (for example, war crimes and crimes against humanity, and also the crimes of piracy, and genocide). It allows for new Victorian offences to be created that authorise prosecution of these persons.

In the future, section 27(4) may also include international crimes that are yet to be created in international law.

For more information on what constitutes 'war crimes', 'crimes against humanity' and 'genocide', legal and policy officers should consult:

- Part 2 of the Rome Statute of the International Criminal Court (to which Australia is a party). A copy of this Statute is available at www.un.org/law/icc/statute/romefra.htm; and
- Schedule, Chapter 8, Division 268 of the Commonwealth Criminal Code Act.

Section 27(4) also has the effect of denying the benefits of s. 27(2) and s. 27(3) to any person charged with the commission of 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 SECTION 27(4)

Section 27(4) creates an express exception to s. 27(1), s. 27(2) and s. 27(3) of the Charter. As s. 27(4) does not protect a right, there is no need to examine the issue of reasonable limits on it.

KEY POINTS TO REMEMBER

- Generally, retrospective criminal laws are not permitted in Victoria under s. 27(1). However, the Charter establishes an exception to this prohibition in section 27(4) with respect to conduct which would have constituted offences under international law at the time they were committed.
- The prohibition on retrospectivity does not apply in respect of legislation or policy providing for the trial of persons for an offence under international law.

- Current international law offences covered by this section include:
 - crimes against humanity;
 - war crimes;
 - the crime of piracy; and
 - the crime of genocide.
- Further international crimes may be created in the future. If you have a policy in which you plan to create a retrospective criminal law offence, you should check whether the offence is also an offence in international law. If it is, it may fall within the scope of s. 27(4) and be permitted despite the general prohibition in the Charter on retrospective criminal offences.

MEASURES TO IMPROVE COMPLIANCE

If you are developing a policy or legislation that will establish a retrospective criminal offence you should check whether the act is an offence under international law. You may wish to rely on this exception on retrospective criminal laws. You should pay particular attention to the elements of the offences. Ensure that the elements of the offences are consistent with those that apply in respect of the international law counterpart offence. (Consult Part 2 of the Rome Statute of the International Criminal Court for the elements of offences.)

RELATED RIGHTS AND FREEDOMS

Section 27(4) is related to the other parts of s. 27.

HISTORY OF THE SECTION

This provision is modelled on article 15(2) of the ICCPR.

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