HUMAN RIGHTS & DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Factsheet

Right to Protection from Retrospective Criminal Laws (s.25)

Section 25 of the *Human Rights Act 2004* says that:

(1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.

(2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

This factsheet is not intended to be a substitute for legal advice.

Scope of the Right

The protection from retrospective criminal laws is a fundamental principle of our legal system and means that a person should be in a position to know in advance whether their conduct would be criminal or not. Section 25 of the *HR Act* prohibits both the creation of retroactive offences by legislation, and the retrospective application of criminal offences as developed by the common law, so as to encompass conduct not previously regarded as a crime.

The European Court of Human Rights has held that the protection from retrospective criminal laws "embodies, more generally, the principle that only the law can define a crime and prescribe a penalty...and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy": *Kokkinakis v Greece* (1993) 17 EHRR 397.

Section 25(1) of the *HR Act* does not prohibit the retrospective application of changes to criminal procedure, such as changes in the law of evidence or to the hearing of charges relating to events that occurred prior to the changes.

Section 25(2) is concerned with penalties that may be imposed for criminal offences. This section only applies where the 'penalty' imposed has a punitive objective (for example as opposed to a community safety objective).

Examples – No heavier penalty

The right to protection from retrospective criminal laws has been particularly difficult to interpret in relation to retrospective penalties. For instance, laws that have the effect of restricting a prisoner's access to parole beyond the right to parole available at the time of the offence may not engage this right, although there is conflicting international jurisprudence. In New Zealand under comparable (but not identical) legislation (section 25(g) of the *New Zealand Bill of Rights Act 1990*) parole is considered not part of the penalty but simply a matter of the administration of the court's sentence: *Palmer v Superintendant Auckland Prison* [1991] 3 NZLR 315.

This approach has been adopted by the ACT Supreme Court in *R v P M* [2009] ACTSC 24. Significantly though, the Court remains "bound to ensure that, not only should the sentence be the shortest appropriate but it should allow for rehabilitation to play a significant part in the administration of the sentence". In this case, Justice Refshauge held that the Court could satisfied this requirement by partly suspending the sentence.

This issue has also arisen under laws creating a register of sex offenders if pre existing offences are required to be registered. The Queensland Court of Appeal in *R v C* [2002] QCA 156 held that an order under Queensland law was not intended to impose a form of punishment but rather its purpose was protective of a vulnerable part of the community. In *Smith v Doe* 538 US 84 (2003), the United States Supreme Court has approached this issue by establishing a two part test. The first part involves establishing if the intention of the legislature was to impose a punishment. If it was, that ends the inquiry. If however, the intention of the law is to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether the scheme is so punitive either in purpose or effect so as to negate the legislature's intention to deem it civil.

When can the right be limited?

Under international law, the protection from retrospective criminal laws is a non-derogable right. This means that the government cannot suspend this right, even in a time of emergency.

The nature of the right is one factor that must be considered when determining if a limitation is justified. The fact that the right is non-derogable under international law is relevant, and suggests that it would be unlikely that the right could be reasonably limited under the *HR Act*.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 25 could be engaged by activities that:

- Seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken;
- Apply more severe penalties for conduct by a person than those that existed at the time the conduct was undertaken;
- Fail to apply less severe penalties for conduct by a person if penalties have decreased since the conduct was undertaken;
- Expand the range of activities that are covered by an existing criminal offence;
- Amend criminal law procedure that applies to trials for acts done before the legislation commences or introduces new sentencing options to apply to acts done before the legislation was operative;
- Change parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

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