The Charter of Human Rights and Responsibilities

> Section 27 – Right to protection from retrospective criminal laws

**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 27(1) of the Charter 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 27(2) and 27(3) of the Charter are concerned with penalties that may be imposed for criminal offences. These sections only apply where the ‘penalty’ imposed has a punitive objective (for example as opposed to a community safety objective).

**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 Charter.

Section 27(4) of the Charter contains an exception to the protection against retrospective criminal laws. It explicitly allows for the trial or punishment of an act which is a criminal offence under international law (such as genocide or a crime against humanity), even if the act committed may not have been a criminal offence under Australian domestic law at the time it was committed. The Explanatory Memorandum to the Charter states that the rationale behind this limitation is ‘to ensure that a person may still be tried and punished for crimes under international law, as long as the offences existed under international law at the time they were committed or omitted.’

**Case examples**

**Changes to maximum penalties – R v AMP [2010]**

VSCA 48 (16 March 2010)

In this case, the Applicant wished to appeal against his sentence. When the Applicant committed count 1 in 1957, the maximum penalty was 10 years’ imprisonment. The maximum penalty for the offending behaviour covered by count 1 was reduced to 5 years’ imprisonment in 1967 but it was returned to 10 years’ imprisonment in 1991. The Applicant submitted that he should have been sentenced on the basis that the later reduction of the maximum penalty for equivalent offences to 5 years’ imprisonment should apply.

The Court relied, in part, on section 27(2) of the Charter and found that the sentencing judge was not required to sentence the Applicant based on the five-year maximum penalty that existed between 1967 and 1991. Since the maximum penalty at the time the offence was committed was 10 years, it was appropriate for the sentencing judge to impose a sentence reflecting that maximum.

This highlights that the right under section 27(2) of the Charter is only concerned with the penalty that may be imposed at the time the offence was committed and the possible penalty that may be imposed when the offender is being sentenced. Consideration does not need to be given to differences in maximum penalties during the period between committing the act and sentencing if there were amendments during that time.
Penalties must be punitive in nature – ARS v Canada (UN Human Rights Committee, Communication No 91/1981)

A prisoner claimed that the introduction of mandatory supervision requirements during parole constituted a heavier penalty in breach of Article 15 of the International Covenant on Civil and Political Rights (the international law equivalent of section 27), since the requirements did not exist at the time the prisoner was convicted and sentenced. The Human Rights Committee stated that the mandatory supervision requirements were not a ‘penalty’ within the meaning of Article 15 as they were intended to provide for the rehabilitation of the convicted person in his own interest.

Similarly in Victoria a ‘penalty’ for the purposes of sections 27(2) and 27(3) of the Charter will likely have to be punitive in nature.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 27 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.

Section 27 of the Charter of Human Rights and Responsibilities Act 2006 says that:

(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.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(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.

The protection from retrospective criminal laws in the Charter is modelled on Article 15 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

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