



FACT SHEET:

Right to protection against retrospective criminal laws

Section 35 of the *Human Rights Act 2019*

Section 35 of the *Human Rights Act 2019* 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 Human Rights Act protects against retrospective criminal laws. It reflects the long recognised criminal law principle that there can be no crime and no punishment, other than as established by the law.

This right is modelled on Article 15 of the International Covenant on Civil and Political Rights. Australia ratified to this treaty in 1980.

Scope of the right

Subsection (1) states that a person must not be found guilty of an offence for conduct that was not an offence at the time it was engaged in. This prohibits retrospective criminal laws and also reflects the duty of states to ensure all criminal offences are defined precisely by law.

Subsection (4) clarifies that international criminal law offences, such as war crimes or crimes against humanity, which were not crimes under domestic law but were crimes against customary international law at the time they were committed, are still considered to be international criminal law offences. It also allows for new Queensland offences to be created that authorise prosecution of these people.

Section 35(2) and 35(3) of the Act are concerned with penalties that may be imposed for criminal offences. These sections only apply where the 'penalty' imposed is intended to be punitive (as opposed to a community safety objective).

Under the International Covenant on Civil and Political Rights, the right to protection against retrospective criminal laws does not prohibit retrospective changes to criminal procedures which do not form part of the penalty for an offender, such as changes in the law of evidence.

Like all rights in the Act, the right to protection against retrospective criminal laws can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The nature of the right is one factor that must be considered when determining if a limitation is justified. The right to protection against retrospective criminal laws cannot be limited under international law. This suggests that it would be unlikely that the right could be reasonably limited under the Act in Queensland.

Section 35(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 was not criminal in Queensland at the time, but was an offence under international law (such as war crimes, genocide or a crime against humanity).

When this right could be relevant

Section 35 could be relevant to laws, policies, acts or decisions 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;
- introduces new sentencing options to apply to acts done before the legislation was operative; or
- change parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

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