

Overview of Ministry of Justice's role in relation to criminal offences

Criminal Offences Gateway

A gateway established to prevent the proliferation of unnecessary new criminal offences.

EU/International negotiations

MoJ's Criminal Law and Legal Policy Unit advises departments negotiating EU or international measures which contain criminal provisions. CLLPU can also advise on resisting EU or international proposals to create new criminal liability.

Sentences

New or amended criminal penalties (including fixed penalty schemes) are considered by MoJ's Sentencing Policy and Penalties Unit.

Justice Impact Test

The justice impact of proposals to create or extend criminal offences or civil sanctions is considered by MoJ's Corporate Finance Unit by way of the Justice Impact Test, which is part of the impact assessment process. Justice Impact Tests are also required for new policies or legislation which do not create a new offence but impact on the justice system in other ways, such as a change of caseload volume.

Purpose and Context of the Criminal Offences Gateway

The Government has established the Criminal Offences Gateway within Ministry of Justice to scrutinise proposals to create new criminal offences across Whitehall in line with the Government's commitment to prevent a proliferation of unnecessary new offences.

The Criminal Offences Gateway considers the case for proposed new offences and whether they are sufficiently tightly drawn. New behaviour is not criminalised lightly.

Scope of the Gateway

You should seek Gateway clearance if you are proposing to do any of the following in legislation.¹

- create an entirely new offence;
- repeal and re-enact an existing offence;
- amend an existing offence;
- create an enabling power in primary legislation providing for the creation or extension of criminal offences in secondary legislation or byelaws.

Examples of amending an existing offence are as follows:

- amending an existing offence on its face to extend its scope (e.g. extending an offence of purchasing or hiring guns that applies to certain minors to apply it more generally – “*it is an offence for a person under the age of 18 to...*”);
- changing the mental element (*mens rea*) of an offence to lower the threshold for the offence (e.g. removing a requirement for behaviour to have been *intentional*);
- changing the conduct element (*actus reus*) to extend the behaviour that is covered (e.g. for an offence relating to exportation, adding importation);
- giving an existing offence some extra-territorial effect.

Amendments to legislation that have the effect of extending the scope of an existing offence will not require Gateway clearance if the offence itself remains unamended. Examples where Gateway clearance would not be required include:

- extending a list of controlled matters on which offences bite (e.g. adding to a list of proscribed drugs or notifiable diseases).

Exceptions

Gateway clearance is not required if your proposals fall within any of the following categories:

- changes to criminal penalties (e.g. increasing the maximum available penalty on conviction – the Sentencing Policy and Penalties Unit should be consulted, see ‘Sentences’ above) or to enforcement procedures (e.g. providing for appeal rights), where the changes do not affect the scope of the underlying offence;
- changes to civil sanctions or new civil sanction regimes that do not also contain criminal offences. However, Ministry of Justice does have a strong interest in civil sanctions within a regime that also contains offences (see ‘Civil sanctions’ below);
- offences which only have effect outside England and Wales (e.g. offences created by a devolved administration, offences applying only in the British Overseas Territories);
- Law Commission consolidations, which are subject to scrutiny by the Joint Committee on Consolidation Bills as to whether the consolidation accurately reproduces the existing law;

¹ The Criminal Offences Gateway applies to primary and secondary legislation, whether implementing domestic policy or EU or other international obligations. It also applies to Private Member's Bills.

- offences which only apply locally (although the Sentencing Policy and Penalties Unit should be consulted if it is proposed to include a penalty of imprisonment), e.g. offences created in byelaws, offences created in Transport and Works Act orders or Harbour orders, and offences contained in private bills (i.e. bills promoted by organisations such as local authorities or private companies which change the law in relation to specific individuals or organisations).

Formal Gateway clearance is not required for tax and defence-specific offences, which are subject to separate consultative arrangements agreed by Ministry of Justice with HM Revenue and Customs and Ministry of Defence respectively.

How will your proposals be assessed?

The Secretary of State for Justice will approve proposals to create or extend criminal offences only where he is satisfied that the proposed offences are necessary.

When considering your proposals, the Secretary of State will assess what you say (in the Criminal Offences Gateway form) about the following matters, within the particular context of your regime:

- whether enforcement mechanisms are needed at all;
- what effective alternatives to criminal offences are available (this will be considered generally and for each individual offence), for example judicial review in relation to a public body, withdrawal of permissions within a permitting regime (e.g. withdrawing licences), disciplinary sanctions, stand-alone civil sanctions (for more on civil sanctions, see 'Civil sanctions' below);
- where you are creating enforcement mechanisms for EU obligations, whether alternatives to criminal offences would constitute effective, proportionate and dissuasive sanctions in the particular circumstances concerned and, if not, why not (e.g. equivalence arguments);
- any particular drivers behind your proposals (e.g. strong public interest in change, ministerial commitments, case law, or practical drivers such as cross-border enforcement issues or resource implications that weigh in favour of criminal offences);
- whether the behaviour is sufficiently serious to merit the stigma associated with a criminal conviction;
- whether the behaviour is already caught by the existing criminal law (see the Gateway Form for examples of general offences to consider);
- the formulation of the individual offences proposed, in particular to consider whether they focus on the behaviour being targeted without criminalising behaviour more widely – this will require consideration of the individual elements of the offence (the conduct, any mental element and any defences);
- where you propose to repeal and re-enact or to replicate existing offences, whether they continue to be justified and proportionate – this is an opportunity to consider the offences afresh;
- where you propose to extend an existing regime, whether you have considered as an alternative creating a new enforcement regime that relies less heavily on criminal offences;
- where you have consulted on enforcement mechanisms, the views of interested parties, in particular whether business is supportive of your approach;
- whether the offences you propose sit within a broader enforcement regime;
- where you are creating a hierarchy of enforcement mechanisms, such as a system of informal advice, civil notices, other non-criminal sanctions and criminal offences, whether the offences will be a sanction of last resort and how that is achieved (for example, by restricting criminal offences to the most serious or persistent breaches, guidance for prosecutors);
- the wider context of the offences proposed, for example, whether and how they link to other legislation/proposals – please tell the Gateway team where the offences link to proposals that have previously been cleared through the Criminal Offences Gateway, confirming how closely they mirror the earlier proposals and whether the same arguments for relying on the criminal law apply;
- whether the offences are a 'stop-gap' pending a review of the area concerned;
- where you are targeting a time-limited issue, whether a sunset provision could be used.

As well as considering your case for the criminal offences you have proposed, the Secretary of State for Justice will also consider the maximum penalties you have attached to the proposed offences and the financial impact of your proposals on the justice system (see 'Sentences' and 'Justice Impact Test' above).

Ministry of Justice will also consider the number of new criminal offences you propose to create in line with our commitment to publish annual figures.

Civil sanctions

A wide range of civil sanctions might be employed to create a proportionate and targeted hierarchy of enforcement mechanisms, for example improvement or compliance notices served to secure compliance with particular obligations, voluntary undertakings or civil monetary penalties.

Civil sanctions do not themselves require Criminal Offences Gateway clearance, although they should be highlighted in the Gateway form as they are likely to be relevant to whether criminal offences in a particular enforcement regime are justified and proportionate. It is important to outline the whole of a proposed sanctions regime, including any civil and informal sanctions, so that the criminal offences can be assessed in context.

The Better Regulation Executive ('BRE') in the Department for Business, Innovation and Skills has an interest in civil sanctions that impose a burden on business and charities.

Timing: at what stage should Gateway clearance be sought?

You should allow four weeks for Gateway clearance. If a response is required more quickly, for example, you are subject to infraction proceedings in respect of EU obligations or have a particular legislative deadline, please record that clearly on the Criminal Offences Gateway Form.

Your proposal should be relatively well-developed before Criminal Offences Gateway clearance is sought so that the formulation of each offence can be considered. Gateway clearance should be obtained before collective Cabinet Committee clearance is sought.

You do not need Gateway clearance before publishing a consultation paper, although you may wish to take account of the Gateway principles when consulting on enforcement options. You should, however, seek Gateway clearance before publishing a Bill in draft.

What happens next?

Gateway clearance will usually be communicated at official level unless the issue has come up in the context of a Cabinet Committee write-round, and you will usually be notified about the Justice Impact Test separately. If the clearance is conditional, the Gateway team will be happy to provide assistance on how the concerns might be addressed. If clearance is refused, the Gateway team will be happy to advise on the viability of alternative options or on resubmitting the matter to the Secretary of State.

If the matter cannot be resolved bilaterally, the offence concerned may be referred by the relevant department for collective Cabinet consideration when policy clearance is sought. In such cases, a memo from the Ministry of Justice setting out the reasons for refusal will be provided to be annexed to the letter seeking clearance, which should be copied to the Secretary of State for Justice.

If your proposals change after Gateway clearance has been granted, please notify the Gateway team who will advise on whether further clearance is needed.

Contact Us

Criminal Offences Gateway

If you have any questions, or wish to submit a proposal for consideration, please contact the Criminal Offences Gateway team at: offencesgateway@justice.gsi.gov.uk

EU/International negotiations

If you are negotiating EU or international measures which contain criminal provisions, or would like advice on resisting EU or international proposals to create new criminal liability, please contact MoJ's Criminal Law and Legal Policy Unit. Contact: Dora Addei (dora.addei@justice.gsi.gov.uk; 020 3334 5175)

Sentences

MoJ's Sentencing Policy and Penalties Unit should be consulted direct about all proposals to create or amend penalties which fall outside the scope of the Criminal Offences Gateway. Contact: Helen Underwood (helen.underwood@justice.gsi.gov.uk; 020 3334 5048).

(Where proposals do fall within the gateway there is no need to submit them separately in respect of penalties; the Gateway Team will manage the process for you.)

Justice Impact Test

MoJ's Corporate Finance Unit will assess the Justice Impact Test with a view to agreeing how the financial impact of your proposals on the justice system will be met. Contact: justiceimpact@justice.gsi.gov.uk

Guidance: <http://www.justice.gov.uk/guidance/justice-impact-test.htm>

Other Useful Contacts

Powers of entry (Home Office)

The Home Office has overall responsibility for powers of entry and has set up its own separate Gateway to manage proposals to create or amend powers of entry. Contact: PofEGateway@homeoffice.gsi.gov.uk

Consent to prosecution (Attorney General's Office)

Any proposal to create an offence which requires consent by the Attorney General or the Director of Public Prosecutions before a prosecution may be brought must be notified to the Attorney General's Office.

Contact: The Director of Criminal Law, The Attorney General's Office, 20 Victoria Street, London, SW1H 0NF (consents@attorneygeneral.gsi.gov.uk; 020 7271 2492)