



Introducing or amending criminal offences or penalties

Guidance on introducing or amending criminal offences or penalties, and estimating and agreeing implications for the criminal justice system

This guidance is for officials who are considering creating new, or amending existing, criminal offences or penalties, including consolidations, repeals and re-enactments for England and Wales. It provides an overview of matters to consider before seeking Cabinet Committee clearance (also known as the write round process) for creating new or amending existing criminal offences or penalties and provides key contacts at the Ministry of Justice and other relevant government departments and bodies.

When considering whether it is appropriate to introduce a criminal offence rather than a civil sanction, we advise officials to first consult this guidance and any other relevant guidance material before discussing their proposals with Ministry of Justice policy officials.¹ Whether a behaviour should be a civil matter or criminal offence will depend in large part on the nature and seriousness of the potential harm.

Contents

| | |
|--|----------|
| Part One: Is a new criminal offence the right approach? | 2 |
| Proportionality | 2 |
| Necessity | 3 |
| Part Two: Guide to creating a criminal offence, amending an existing criminal offence, or amending penalties | 4 |
| Useful links | 8 |
| Key contacts | 8 |
| Annex A: Checklist of other issues for departments to consider when creating new criminal offences or amending existing offences or penalties | 9 |

¹ This 'Guidance on introducing or amending criminal offences or penalties' has replaced the previous 'Guidance on making new criminal offences' which was published in 2015.

Part One: Is a new criminal offence the right approach?

Officials might consider creating new or amending existing criminal offences² or penalties for the following reasons:

- a) To criminalise a behaviour which does not currently amount to a criminal offence, or decriminalise a behaviour;
- b) To extend an existing offence beyond its original boundaries, for example to account for changing technology or behaviours;
- c) To change the penalty, or punishment, that a criminal offence currently attracts;
- d) Because of a government commitment (e.g., a manifesto commitment);
- e) To respond to developments in case-law or an important court decision;
- f) Because of a requirement in an international treaty to which the UK is a party;
- g) To repeal an existing offence and replace it with a new criminal offence in order to modernise, clarify or consolidate it.

The government is committed to preventing the proliferation of unnecessary new offences and to ensuring that any new offences are fit for purpose.

The criminal law sets out what behaviour is so harmful and culpable that it should be criminalised. Therefore, it is the responsibility of individual departments to ensure that new offences are not created without careful consideration and that alternatives to criminal offences are used where other measures can fulfil the policy objective.

Therefore, before deciding to create new or amend existing criminal offences or penalties, officials should consider the following and determine that this course of action is both **proportionate** and **necessary**:

Proportionality

Questions to consider when assessing proportionality include:

For new or amended offences

- Is the consequence for the offender appropriate? Does their behaviour warrant a criminal sanction and criminal record?³
- Would civil action or sanctions be more appropriate, or adequately achieve the policy objective? It is also possible to introduce a hybrid measure – this is where there are civil sanctions (usually regulatory provisions) which are backed up by criminal offences/sanctions in case of breach.⁴
- Are there any other actions that could be taken to meet the policy objective?
- Is it in the public interest to criminalise this behaviour?
- Are there existing offences which already cover the targeted behaviour?

² A criminal offence is an act or omission that is unlawful and which is punishable by the State under the criminal law.

³ A criminal record is a record of a person's criminal convictions.

⁴ A civil sanction is the administrative penalty (often monetary) that results from the breach of non-criminal (civil) legislation.

- Is the proposed new offence simply for deterrent effect and, if so, is there any evidence to support this approach?
- Are there associated international obligations (e.g. through Council of Europe or UN Conventions) which make the creation of the criminal offence necessary (or inappropriate)?
- Does introducing a new criminal offence mean that existing offences need to be repealed or consolidated?

For new or amended penalties

- Are the penalties proposed for the offence in line with maximum penalties for existing offences which capture offending behaviour of comparable seriousness?
- Is the maximum penalty sufficient punishment for the worst imaginable behaviours covered by the offence?
- Are the penalties proposed for the offence proportionate to the level of potential harm caused by this behaviour?

Necessity

- If the behaviour in question is already covered by another offence or offences, or if the gap in the law is not significant enough to warrant primary legislation, the creation/ amendment of an offence/penalty may not be considered necessary. Creating duplicative offences can cause significant practical issues for prosecutors and is likely to have unintended consequences.
- Officials should only consider the introduction or amendment of a criminal offence if the behaviour is not already covered by existing offences, and there are no other measures available to achieve the policy objective.

This is not an exhaustive list. Ministry of Justice officials can provide further advice on appropriate considerations in specific circumstances. The views of other relevant criminal justice departments should also be sought in relation to proportionality or necessity (in particular the Home Office, Crown Prosecution Service and Attorney General's Office).

In addition, officials should be aware of the fact that the creation of a new criminal offence, or amending an existing criminal offence, usually requires primary legislation. They should therefore consider the parliamentary time required and how long it might take to deliver the policy. Public commitments must not be made to introduce or amend legislation to a specific timeframe without clearance from the Parliamentary Business and Legislation Committee. There is more detail about this in the Guide to Making Legislation which can be found here: [Guide to Making legislation](#).

Part Two: Guide to creating a criminal offence, amending an existing criminal offence, or amending penalties

The following provides guidance for those who have determined that a new offence or an amendment to an existing offence is the best approach to meet their policy objective.

1. Before introducing or amending a criminal offence, you must be clear about:

- The behaviour you intend to criminalise (the actus reus)⁵
- What you do not want to criminalise (e.g. are there any exceptions/defences to engaging in this behaviour?)
- The required mental state of the individual when they engage in that behaviour (the mens rea),⁶ e.g. does the individual need to have an intention to engage in the behaviour which you want to criminalise?

Worked example:

In this example, we look at a plan to criminalise concealment of a certain type of information. Before doing so, you will need to consider:

1. What is meant by 'conceal'?
 - a. Is this just, not showing? Or is an active hiding necessary?
 - b. Who are we concerned the information is being concealed from? An employer? A government department or agency? Police?
 - c. Is it a particular type of information that we are looking to target? How would we define and identify relevant information to be caught by the offence?
2. What behaviours or situations do you *not* want to criminalise?
 - a. Should any particular person or situation be exempt from the offence? For example, a person acting in a certain statutory role?
 - b. Is there a defence that might need to be available for example, if someone had a reasonable excuse to conceal e.g., they were subject to a statutory obligation not to share information.
 - c. Are there any unintended consequences of criminalising this behaviour?
3. What mental state is required for the act to become criminal?
 - a. Does the person need to *intend* to conceal the information? Or will it be sufficient if they conceal the information in a less deliberate way, for example by being reckless?

The above is a general guide on the elements of an offence to consider when creating or amending criminal offences. Government departments are advised to consult their own departmental lawyers for more guidance and information.

⁵ Actus reus is the act or omission that comprise the physical elements of a crime.

⁶ Mens rea is the mental element or state of mind of a person, which is necessary to establish that he/she is criminally responsible for committing the act or omission element of the offence.

2. Before introducing or amending a criminal offence, or amending a penalty, you must have made an assessment of the impacts of this measure on the criminal justice system and have completed a Justice Impact Test (JIT).

The impact (including costs) on the criminal justice system as a result of any new criminal offences, or amendments to existing offences or penalties and associated funding, must be agreed with the Ministry of Justice and relevant government departments in advance of seeking Cabinet Committee clearance.

Working in conjunction with their own analysts in the first instance, departments must quantify and cost the possible impact of their policy proposals on the criminal justice system. Ministry of Justice analysts can provide the departments with guidance on this if necessary.

Funding arrangements must also be considered and then agreed, and HM Treasury will also scrutinise cost implications and funding arrangements during the write round process. Departments must state in their write round letter if there will be any impact on the criminal justice system, particularly in the area of prison capacity.

Departments will need to consider the impact on all criminal justice agencies including:

- The police
- Crown Prosecution Service
- Courts
- Prisons and Probation services.

Where there is an impact on such agencies, they must be consulted.

A useful tool for assessing the impact of new criminal offences or amended offences on the criminal justice system is the Justice Impact Test (JIT).

Ideally, all departments must complete the JIT in advance of the Cabinet Committee clearance process. This form helps departments identify the costs and demand implications for each agency. Justice Impact Test Guidance can be found here: [Justice Impact Test Guidance](#).

Ministers should not expect to receive policy clearance until a JIT has been completed and agreed with the Ministry of Justice. Where a JIT has not been completed prior to the Cabinet Committee clearance process, this should be made clear in the write round letter seeking clearance for the new or amended offence. The department concerned must make a clear commitment in their write round letter to undertake the completion of a JIT as soon as possible.

For advice on the JIT, please contact justiceimpact@justice.gov.uk.

The JIT process takes around 8 weeks from the date the Justice Impact Team receives the JIT form, to allow sufficient time for the Ministry of Justice to properly consider the proposals. The department submitting the JIT will be responsible for informing the Justice

Impact Team in a timely way about any changes to the expected volumes after the impact has initially been agreed.

Once a new or amended criminal offence has been implemented through legislation, officials should continue to assess the costs of the new or amended offence and its impact on the criminal justice system. This will help reflect the actual pressures faced by the system and as such, officials should inform the Justice Impact Team by submitting an amended Justice Impact Test to reflect any changes.

3. Before introducing or amending a criminal offence, or amending a penalty, you must consult with the Ministry of Justice and relevant other government departments.

Consultation with Ministry of Justice policy teams

The Ministry of Justice should as a rule be consulted by other government departments, when they are considering new, or amending existing criminal offences or penalties, in all but the most exceptional of circumstances. In exceptional circumstances, this engagement may happen retrospectively.

Consultation with Ministry of Justice policy teams must happen as part of the JIT process.

Role of the Ministry of Justice's Criminal Law Policy team

- The Ministry of Justice has overall responsibility for the criminal law. It is responsible for upholding the “integrity of criminal law” and the government’s policy of avoiding creating unnecessary new offences. This includes ensuring that where new offences are created there is consistency, clarity and proportionality.
- The Ministry of Justice’s Criminal Law Policy (CLP) Team plays an **advisory role** to other government departments who are considering creating new or amending existing criminal offences or penalties in areas for which they have policy responsibility. This means that other government departments must take the lead on the development of the policy, completion of the JIT, drafting of policy and legal instructions and any new clauses. The CLP team can offer advice on processes and general principles of criminal law.
- The CLP team will advise MoJ Ministers on any proposals that have a high impact, are controversial, unusual, or unnecessary, as well as on proposals for devolved offences that are to apply only in Wales that depart from similar offences that apply in England. To note, criminal justice is devolved to the Scottish Parliament and Northern Ireland Assembly.

Role of the Ministry of Justice's Sentencing Policy team

- The Ministry of Justice’s Sentencing Team’s role is to provide guidance to other government departments and to ensure maximum penalties for new and amended offences are proportionate and align with existing offences which capture behaviour which is of comparable seriousness.
- The team also ensures that the mode of trial of the offence i.e., summary, triable either way, indictable reflects the seriousness of the offence, and permits an appropriate maximum penalty.

- The Sentencing Policy Team must be consulted on any proposed changes to the sentencing framework, including aggravating/mitigating factors and minimum sentences.

Consultation with other relevant departments

Depending on the nature of the criminal offence/penalty to be created/amended, consultation with other departments or agencies may be necessary.

| Issue | Department/body to consult |
|---|---|
| If the CPS will have to prosecute the offence | CPS |
| If there are issues around extraterritorial jurisdiction | CPS/MoJ CLP team |
| Application to the service justice system under the Armed Forces Act 2006 | MOD |
| To help determine the number of cases that will be covered by the new offence/penalty | CPS |
| If the offence will require consent from the AG or DPP to bring a prosecution. | AGO |
| If provisions will have retrospective application or require early commencement | AGO |
| Impact on the courts | HMCTS |
| Impact on Legal Aid | LAA |
| Impact on prisons or probation | MoJ's Prisons and Probation teams |
| If the offence raises powers of entry issues | Home Office |
| Implications for the police | Home Office |
| If the offence is proposed to extend to Scotland | Scotland Office, Scottish Government |
| If the offence is proposed to extend to Northern Ireland | Northern Ireland Office, Northern Ireland Executive |
| If the offence is proposed to apply in Wales | Wales Office, Welsh Government |
| If a regulatory body or local authority will be required to act in relation to the offence/penalty e.g., they are to prosecute the offence. | Relevant regulatory body or local authority |

The Devolved Governments themselves should be engaged as early as possible in the process, where a new/amended criminal offence/penalty will affect their jurisdictions. Other departments should speak to their own devolution teams, or to the Ministry of Justice's Devolution and Union Policy team who can provide further guidance.

However, it is imperative that departments should not commit to create or amend criminal offences/penalties or set out proposals to external organisations, particularly the Devolved

Governments, before ministers have collectively agreed a decision to create or amend such offences/penalties.

4. Introducing or amending a criminal offence, or amending a penalty, likely requires Cabinet Committee clearance.

Where a proposal seeks the creation of new offences, or amends existing offences and penalties, Cabinet Committee clearance is likely to be required. The Cabinet Secretariat should be consulted if you are unsure. The Cabinet Secretariat and the Ministry of Justice can also advise which other departments should be consulted ahead of seeking clearance. Clearance will not generally be given for new offences that are considered unnecessary or disproportionate, or where the cost implications have not been fully estimated and agreed. Before seeking clearance, a legislative vehicle for creating or amending the offence should ideally have been identified.

Ideally the JIT should be submitted and cleared before government departments write to Cabinet Committees for policy clearance.

Useful links

Justice Impact Test <http://www.justice.gov.uk/legislation/justice-impact-test>

[Justice Impact Test Guidance](#)

[Powers of entry - GOV.UK \(www.gov.uk\)](#) – Departments who are considering creating, amending or re-enacting powers of entry must have regard to the statutory Code of Practice and the Powers of Entry Guidance issued by the Home Office.

[Guide to making legislation](#)

[Common Legislative Solutions: a guide to tackling recurring policy issues in legislation](#)

Key contacts

- Attorney General's Office: Head of Criminal Casework, Attorney General's Office, 020 7271 2492 (correspondence@attorneygeneral.gov.uk and consents@attorneygeneral.gov.uk) – The Attorney General's Office must be notified of any proposal to create an offence which requires consent from the Attorney General or the Director of Public Prosecutions to bring a prosecution.
- Ministry of Justice
 - Justice Impact Team: JusticeImpact@justice.gov.uk
 - Capacity Options Taskforce Team: COT@justice.gov.uk – The team reviews all legislative measures sent to the Home and Economic Affairs Committee to consider the prison place impacts given current prison population pressures.

This guidance was updated in July 2025.

Annex A: Checklist of other issues for departments to consider when creating new criminal offences or amending existing offences or penalties

1. Whether the offence/penalty can be future proofed at all, so that it remains relevant and useful? For example, how might technological changes affect this offence/penalty in the future?
2. Is there clarity about the precise behaviour(s) you want to criminalise and who you intend should be captured by the offence?
3. Is there clarity about the behaviour(s) that you do not want to be an offence and who should not be captured by the offence?
4. What exemptions or proposed defences, to the behaviour in question may be necessary? Are there people who legitimately carry out the prohibited behaviour who should not be criminalised (e.g., doctors)?
5. Have you considered the mental element or state of mind that is required for someone to commit the offence?
6. Is the change necessary and proportionate?
7. What is the territorial extent?
8. The criminal law of England and Wales (and that of Scotland and Northern Ireland) does not ordinarily extend to conduct outside the UK. However, if the offence is to have extraterritorial effect (i.e., to capture offending behaviour outside the UK) what will be the justification for this and how will it be enforced? (Extraterritorial jurisdiction typically means where a UK national or a person ordinarily resident in the UK commits the offence outside the UK)
9. What penalties will attach to the offending behaviour (imprisonment or a fine or both)? Are the penalties proportionate and necessary?
10. Are the maximum penalties proposed for the offence in line with penalties for existing offences which capture behaviour of comparable seriousness?
11. How will the offence be categorised i.e., summary, triable either way, indictable and therefore what courts will try the case?
12. Will the offence be introduced through primary legislation, or are there enabling powers which allow for the creation/amendment of criminal offences/penalty through secondary legislation i.e., Regulations?
13. When will the new criminal offence/amended offence/penalty commence?

14. Will the new offence be clear to the public? Will it be clear to the police and prosecutors, who will need to use it? Will people understand exactly what is the scope of the offence?
15. Have you engaged with relevant stakeholders such as courts, police and prosecuting agencies regarding the new offence and how will you implement the provisions?
16. Are the police likely to be able to gather sufficient evidence to help CPS prove the elements of the offence to the criminal standard? Offences should not be created which are unlikely to be prosecutable. Doing so can create false expectations amongst victims as well as reputational risks for both the Government and CPS.
17. Will the evidence required to prove the offence be proportionate to the behaviour concerned and maximum penalty? (e.g. are you effectively requiring substantial expert evidence for a fine-only offence).
18. Have you consulted Devolved Governments?
19. Has the MoJ been consulted?
20. Have other relevant government departments/agencies been consulted?
21. Have you completed and submitted the Justice Impact Test form?
22. Will ancillary powers/orders need to be attached to the offence? Is it the type of offence where a person's name would need to be put on a register (e.g., a register prohibiting people from working with children)? Will the offence result in the convicted person being banned from doing something (e.g., driving)? Will property need to be confiscated?
23. Will the new/amended offence be compatible with the European convention on Human Rights?
24. Have you considered and agreed the impact (and particularly the costings and prison place impacts) the change will have on the criminal justice system?
25. How many cases per year will the new/amended offence/penalty give rise to? To estimate this, it may be useful to consider the following:
 - a. Looking at similar offences, and the number of cases that have arisen from them over a certain time period.
 - b. Looking at international comparisons.
 - c. Considering whether there is extraterritorial reach for the offence.
 - d. Whether there are defences that will reduce the number of cases which could arise from the offence.