

PRESENTATION OUTLINE

From Rights to Justice: a human rights approach to federal criminal justice reform

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Abstract

Human rights principles are most readily identified as those established at international law. However these international principles are increasingly being imported into domestic law as countries attempt to reconcile the need for human rights compliance with the challenges of social and criminal justice.

In Australia, a rights-based approach to federal criminal justice would take place in the context of the varying approaches to human rights by states and territories. That context compounds other challenges such as ensuring federal criminal justice reform works in harmony rather than contradiction with state-based policies ranging from policing, criminal procedure and offender management to victim's rights. The challenge for federal reform is to establish a consistently high standard of criminal justice domestically, as well as by international comparison.

While a human rights approach to the administration of criminal justice creates particular challenges, it can also provide answers to key questions. For instance, victim's rights can only be realised through the framework of human rights; attempts to responsibilise offenders depend upon protecting their human rights; and the rule of law, the pillar of both judicial and executive administration, is enshrined in international human rights principles. Drawing on the speakers' international experience in criminal justice policy, research and practice throughout the Commonwealth, this paper will explore the potential opportunities and challenges for a human rights approach to the federal government's engagement with criminal justice reform.

Outline

The federal government has signalled a review of Australia's human rights framework domestically, and has increased engagement with human rights mechanisms internationally. Moreover, the establishment of the *HRA* in the ACT, and the Victorian Charter of Human Rights both affect jurisdictions in which federal suspects can be tried, convicted and detained. Thus it is important to anticipate the impact of human rights on federal criminal justice reform.

My current work at the London School of Economics involves establishing a large scale project to examine the effect of human rights on law, the executive and civil society, since the introduction of the *Human Rights Act 1998* in the UK. The paper I am speaking from is available

on our website¹, and explores the distinction that has emerged between organisations that seek to promote and protect human rights *per se*, and organisations that seek to introduce a human rights-based approach as a method or instrument, for instance in addressing poverty or improving the provision of aged care. Today I want to explore some of the ways that a human rights framework might be brought to bear on federal criminal justice reform, including both the challenges and opportunities that are raised. I will take a policy focus in this presentation, but there is much greater detail and context in the full paper.

One point, learned from the lessons of the UK, is that, once human rights are enshrined in domestic law, we cannot underestimate the extent to which that framework will be called upon at any and every opportunity. A second point is that the framework of human rights is not just about legislation and lawyers. It is also about systems and people. Courts and tribunals, detention facilities and sites of community sanctions, practitioners, offenders and victims are all effected by the scope of application and potential impact of human rights. While so many of the day-to-day decisions in criminal justice rely on the exercise of discretion, human rights laws overseas are having a significant impact in limiting the scope of that discretion.

The main point I want to make is that human rights raise some challenges for the policies and administration of criminal justice, but they also provide answers to some of the most pressing questions. In pointing to some of these challenges and solutions, my objective is not to advocate for a rights-based approach to criminal justice reform. The relevance and application of human rights to criminal justice policy is already a reality internationally, and increasingly so in our domestic context. Rather, my objective is to make sure that, as we work towards criminal justice policy reform, we acknowledge and engage with the opportunities and challenges that stem from human rights.

SOME OF THE CHALLENGES

i. Balancing the rights of individuals, particularly offenders, against other interests is not just a simple matter of prioritisation.

Offenders have human rights in criminal procedure regardless of how heinous their crime, and irrespective of other interests. Much has been made of the challenge to human rights in the contemporary context of countering terrorism, a topic I reported on to the Commonwealth Heads of Government Meeting in Uganda last year. The point is that even the interests of national security do not eradicate the rights of offenders, and the balancing required by the standards of human rights does not come down to merely prioritising one over the other. And that can be a difficult message to accept, particularly with the contemporary preoccupation with countering terrorism.

¹ <http://www.lse.ac.uk/collections/humanRights/research/LawAndCulture.htm>

- ii. We should be wary about placing so much responsibility on civil society, that we widen the gap between policy objectives and implementation.**

A strong civil society is essential to furthering democratic values, and to improving the position of minorities and disadvantaged communities. In the criminal justice system we see that in relation to the interests of both offenders and their families, and victims. But the constant expansion of non-government public actors into service delivery can enlarge the gap between the provision of government resources, on the one hand, and the objectives, efficiency and accountability with which those resources are distributed, on the other hand.

That's another lesson from the UK, where the vast growth of the non-government sector in the provision of social services - including those allied to criminal and juvenile justice – has attracted criticism about the gap between government policy and service provision; and about reduced transparency and accountability of those services.

SOME OF THE SOLUTIONS

- iii. The notion of victims having 'rights' in the criminal justice system relies upon human rights principles.**
- iv. Human rights allow us to address the needs of both victims and offenders without constructing them as oppositional, or undermining the interests of one through the realisation of the other.**

There is an extensive body of research contesting the idea that the interests of victims and offenders are oppositional. Yet, in our adversarial criminal justice system, concern that victim involvement in criminal procedure will prejudice its objectivity is a major bone of contention when it comes to victim-related criminal justice policy. But policy operates within the world of public opinion, media sensationalism and varying levels of political power across different aspects of the community. While we know that punitive sentiment does not reflect the aims of many victims involved in criminal justice, there is a constant risk that it may become a dominant stream in public discourses and hence influence policy unduly.

The framework of human rights enables an acknowledgement of the interests of victims that does not require the derogation of offender's rights. For example, the right to information can be used to inform victims to a degree not accorded the general public (or witnesses in a case). And in the area of my own research on mentally disordered offenders, that provision of information can operate alongside the right to medical confidentiality that protects information about diagnosis or treatment, such as for offenders receiving compulsory psychiatric care.

Victims are often seeking some acknowledgment of moral rights in accordance with their suffering (Doak 2008). On that basis, the framework of human rights offers an 'international consensus' on the recognition of victims experiences and a conception of the rights they ought to have (*ibid*), without undermining the rights afforded to suspects and offenders in trial process, detention and release.

REFERENCES

Doak, J (2008) Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties, Oxford, Hart Publishing.