THE CRIMINAL JUSTICE SYSTEM

international influences

Globetrotting criminals and the increasing importance of international human rights standards mean that those who work within Australia's criminal justice system cannot afford to be parochial argues **Sam Garkawe**.

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There is perhaps no other area of Australian law that is more affected by international influences than the criminal justice system. These influences evolve from two main interwoven sources.

The first source is the increasing amount of crime that transcends traditional State borders. This leads to greater pressure on all Australian governments to co-operate with international efforts to deter, control, prosecute and punish such crime. This has consequences for Australian criminal law, as well as the various agencies within our criminal justice system who need to adapt to the methods of, and co-operate with, their corresponding international equivalents.

The second interrelated source of international influences is the increasing importance of international human rights standards. There is a growing acceptance in Australia by both our legislatures and courts that international human rights standards are relevant and influential in the Australian criminal justice system.

Transnational crimes — no respect for international borders

An ever increasing variety of criminal offences are transnational in character, in that their cause and/or their effects may be traced to more than one country. Modern methods of transport, communications and transfer of moneys, together with a global economy, have enabled the internationalisation of crime.

The production and sale of addictive drugs is perhaps the most internationally integrated industry in the world. After the production and sale of armaments, it is the largest and the most profitable. The interrelated transnational crime of money laundering is also globally pervasive. These crimes are often carried out by international criminal organisations. Even certain governments have been implicated. Furthermore, perfectly legal and respectable multinational corporations may pollute the environment, sell defective products which may injure or cause illness, or engage in a variety of other activities which may be in breach of the criminal law of particular States.

A crime may be initially planned in one country, organised in another, brought to fruition in a third, and the proceeds spent or invested in a fourth. There may be a whole chain of perpetrators living in a variety of countries. Vital evidence or witnesses needed for the prosecution of offenders may also be in other countries. In order to deter, detect and punish such crimes, Australia needs the co-operation of, and must co-operate with, authorities within the criminal justice systems of other States.

Other types of transnational crimes are those that breach the rules of international criminal law. Perpetrators of these crimes become subject to what is known as 'universal' jurisdiction. This means that any State in the world has the right to bring such offenders to justice if they are found within that State's jurisdiction, regardless of

whether the crime, or any element of the crime, has been committed on the Territory of the prosecuting State, or against nationals of the prosecuting State. The 'universal' jurisdiction concept was considered necessary by the international community to aid mutual co-operation between States, and to act as a strong deterrent against individuals committing such crimes.

Important examples of international crimes are piracy; slave trading; crimes against peace, violations of the laws or customs of war, and crimes against humanity (as defined under Article VI of the *Charter of the International Military Tribunal*); Genocide; Apartheid; and grave breaches of the 1949 *Geneva Conventions*. Recent times have seen criminal activities relating to transnational terrorism, such as hijacking and hostage taking, also being regarded as international crimes.

As the frequency and geographical scope of terrorism has grown, the trend towards linkages of terrorist groups, trafficking in illegal drugs and organised crime have become more worrying for the international community. This makes international co-operation even more essential.

The effect of transnational crimes on Australia and the resources needed to prevent and combat such crime is obvious. Australia has played an active role in international efforts to deter, prosecute, punish, and generally co-operate in relation to these crimes.

International co-operation

In 1950, the United Nations took over all the functions and archives of the International Penal and Penitentiary Commission, previously the main body responsible for international co-operation in relation to transnational crime. Presently, two interconnected bodies within the United Nations structure are responsible for this role — the Committee on Crime Prevention and Control (a subsidiary body of the Economic and Social Council) and the Crime Prevention and Criminal Justice Branch (part of the Secretariat).

In 1988 the Crime Prevention and Criminal Justice Branch signed an agreement with the Australian Institute of Criminology. The Institute fulfils Australia's obligations and responsibilities in the international and regional arenas in relation to crime statistics and co-operation with respect to research regarding crime.

A particularly important way that the international community encourages mutual co-operation and assistance amongst nations is by drafting multilateral treaties in respect of transnational crimes. Significant examples that the United Nations helped initiate are the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988, the *Geneva Convention on the High Seas* 1958 (which covers the international crime of piracy), the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948, the *International Convention on the Suppression and Punishment of the Crime of Apartheid* 1973 and the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

Changes to Australian criminal law

Due to the importance Australia places on co-operation with other nations in the field of international crime, it has ratified many of the important international treaties in this area. These treaties obligate parties to carry out certain measures, some requesting that parties enact legislation making a particular international crime a criminal offence under their domestic law. Australia has thus enacted legislation such as the *War Crimes Act* 1945 (Cth) and the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth).

The treaties frequently require parties to exercise due diligence in preventing the particular crime, seize any alleged offenders, and try and punish them if domestic criminal jurisdiction is available. If domestic criminal jurisdiction is not available, the parties are normally obligated to extradite the alleged offender to an appropriate country. The *Extradition Act* 1988 (Cth) includes a number of provisions which are aimed at ensuring that Australia complies with its extradition obligations as found in many of the treaties it has ratified.

Another method by which Australia recognises the transnational character of particular criminal activities is when it decides to make such criminal activity an offence when committed *outside* Australia. Such legislation is enacted on the basis of the international legal principle of 'extra-territoriality', and the most recent example is the *Crimes (Child Sex Tourism) Amendment Act* 1994. This Act makes it an offence for any citizen or permanent resident of Australia to have sexual intercourse with any person under the age of 16 outside Australia, and criminalises the activities of those who promote, organise and profit from child sex tourism. Similarly, the

Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth) criminalises illicit drug dealings on board Australian aircraft in flight (see s 10), ships at sea (s 11) and (in some instances) anywhere overseas where the alleged offender is present in Australia (s 12).

Other effects of transnational crime

In addition to passing legislation that criminalises activities of a transnational character, the Federal government has enacted legislation which enables it to fully co-operate with international efforts to deter, control, detect and punish transnational crimes. Examples of such legislation are the *Mutual Assistance in Criminal Matters Act* 1987 (Cth), the *Foreign Evidence Act* 1994 (Cth), the recent *International War Crimes Tribunals Act* 1995 (Cth), and many provisions of the *Extradition Act* 1988 (Cth).

The need for international cooperation to combat transnational crime has had a large effect on many Australian criminal justice professionals and agencies who have had dealings and worked with their international counterparts. The work of the UN has fostered exchanges of information and facilitated conferences in relation to transnational crime.

The UN has also helped to draft a number of international instruments aimed at setting standards or guidelines for the various components of domestic criminal justice systems. For example, Law Enforcement agencies can be guided by the *Code of Conduct for Law Enforcement Officials* 1979 and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* 1990. Correctional administrators should take notice of the *Standard Minimum Rules for the Treatment of Prisoners* 1957 and the *Rules for the Protection of Juveniles Deprived of their Liberty* 1990. The judiciary will be influenced by the *Basic Principles on the Independence of the Judiciary* 1985; prosecutors by the *Guidelines on the Role of Prosecutors* 1990, and lawyers the *Basic Principles on the Role of Lawyers* 1990. Any criminal justice agencies that regularly come into contact with victims of crime will also be influenced by the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* 1985.

While none of these are legally binding on Australia, there is no doubt that the standards they set are increasingly influential on all Australian criminal justice agencies, and on the governments having responsibility for those agencies.

Effects of international human rights standards

The second related international influence on the Australian criminal justice system are international human rights standards. These standards are applicable to both transnational and traditional 'domestic' crimes.

As the criminal justice system is the most prominent and public means by which a state may deprive any person falling under its jurisdiction of their liberty, issues relating to the criminal justice process are intimately connected with human rights issues. For this reason, the incorporation of international human rights standards into domestic legal systems has had a major effect on many aspects of most domestic criminal justice systems. The Australian legal system has not escaped this trend despite the absence of a domestic Bill of Rights and the fact that our legal system does not provide for the direct incorporation of international law.

The ALRC is considering the international norms relating to the criminal justice system in the context of its forthcoming draft recommendations paper on Children and the Legal Process.
Editors note

There are numerous treaties and other international human rights instruments that set standards in many areas of the administration of criminal justice. For example, the *International Covenant on Civil and Political Rights* 1966 (the ICCPR), contains significant human rights protections applicable to criminal justice, such as obligations in regard to non-discrimination (Articles 2.1 and 26); the right to life (Article 6); treatment while in custody (Articles 7 and 10); rules regarding pre-trial protection (Article 9); rules regarding criminal trials (Article 14) and privacy protection (Article 17).

Australia has ratified most of the important international human rights treaties, and has agreed to the various mechanisms pursuant to these treaties that allow international scrutiny of its laws and practices. The ICCPR has the most influence on the Australian criminal justice system because it contains the most comprehensive set of standards in relation to the administration of criminal justice.

The acceptance by Australia in 1991 of the individual complaint mechanism found in the ICCPR's First Optional Protocol, means that individuals in Australia may make a communication to the United Nations Human Rights Committee (HRC) if they believe that any Australian government has violated one of the rights contained in the ICCPR. The HRC has received a number of communications from Australia in relation to questions of criminal justice. The first and most well known of these was the *Toonen* communication with respect to Tasmanian laws which outlawed homosexual activity between consenting adults in private. The potential influence of this procedure on the Australian criminal justice system was dramatically illustrated by the Federal government's decision to enact the *Human Rights (Sexual Conduct) Act* 1994 in response to the HRC's negative view of the Tasmanian Criminal Code.

Other international instruments relevant to criminal justice issues, such as the *Standard Minimum Rules for the Treatment of Prisoners* 1957 and the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* 1985 are not as influential as the ICCPR. This is primarily because they are not treaties creating binding international legal obligations. However, such instruments are often more detailed, up to date, and relevant to modern Australian society than the ICCPR. They will be of growing importance for those governments and criminal justice professionals who choose to use the standards elaborated in these instruments as a guide for their laws and practices.

Influence on Australian legislators

This section will only provide a small sample of Australian criminal justice legislation that is based upon international human rights standards. First, some laws have been enacted by the federal Parliament to bring into domestic effect parts of international human rights treaties that Australia has ratified. For example, the *Human Rights (Sexual Conduct) Act* 1994 incorporates the privacy guarantee found in Article 17 of the ICCPR. The *Crimes (Torture) Act* 1988 incorporates some of the provisions of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* 1984.

Furthermore, the Federal government has committed itself to ensuring that all Commonwealth criminal laws conform to the ICCPR. Paragraph (c) of the preamble to the Gibbs Committee's Terms of Reference for the Review of Commonwealth Criminal Law refers to: 'the commitment of the Australian Government to ensure that the criminal laws of the Commonwealth conform with the standards laid down in the ICCPR'. An example of the consequences is found in the Uniform Evidence legislation. s 138(3)(f) of the *Evidence Act* 1995 (Cth) which provides that a court is to take into account when deciding to exclude improperly obtained evidence: 'whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the [ICCPR]'.

Another method by which parliaments have incorporated international human rights norms is where legislation has specifically used words or phrases found in the articles of the main international human rights treaties. For example, s 23Q of the *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991 (Cth) provides that: 'A person who is under arrest must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment'. This latter expression is exactly the same as the phrase used in Article 7 of the ICCPR (and in many domestic Bills of Rights, such as the Eighth Amendment of the American Bill of Rights).

A final example of international standards being incorporated into the Australian criminal justice system is in relation to victims of crime. All State and

Territory governments have issued declarations or charters of victims' rights which are designed to secure fair treatment of victims by relevant agencies. These guidelines are strongly influenced by the principles laid down in the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* 1985. Some of these guidelines have recently or will shortly be enacted as part of legislation in relation to victims of crime — see the *Victims of Crimes Act* 1994 (ACT); *Victims of Crimes Act* 1994 (WA); *Criminal Offence Victims Act* 1995 (Qld) and the *Victims Rights Bill* 1996 (NSW).

Influence on Australian courts

Despite international human rights norms being only partially incorporated by legislation into Australian law, Australian courts are becoming more aware of their existence, and they are of increasing importance in judicial decisions. It is now well accepted that international legal norms are a source of the common law, even though they do not automatically form part of the common law.

Where there is legislation on a particular issue, if that legislation is in any way ambiguous, international law can be influential in the court's interpretation due to the rule that legislation is presumed not to violate the rules of international law. More importantly, there is now considerable authority that Australian courts are able to adopt international human rights norms whenever there is no contrary legislation, and there is an ambiguity or a gap in the common law.

Furthermore, even if the common law is 'settled', current international legal norms may show that this common law rule is 'manifestly unjust', and therefore should change. This is exactly what occurred in *Mabo*, where the High Court overturned longstanding judicial precedent concerning Australia being *terra nullius* on the basis of modern rules of customary international law.

This means that where it can be shown that there is no legislation on a particular issue, and the common law is silent, does not provide a clear answer, or is 'manifestly unjust', it is possible to argue that an appropriate international legal norm should apply. It is then up to the court whether to adopt that international law norm, and it does so as part of normal judicial decision making. This has powerful implications for criminal lawyers.

The most obviously applicable international legal norms are the procedural protections for accused persons found in Article 14 of the ICCPR which refers to criminal trials needing to be 'fair' trials, and enumerates specific guarantees as being the minimum content of a 'fair' trial.

The principle of a 'fair trial' has been highly influential in Australia. A number of High Court decisions in recent years, such as *Bunning* v *Cross* (1977) 141 CLR 54; *Barton* (1980) 147 CLR 75; *Williams* (1986) 161 CLR 278; *Jago* (1989) 168 CLR 23 and *Dietrich* (1992) 177 CLR 292, have reiterated that the right of an accused person to a fair trial is a fundamental common law right of accused persons within the Australian criminal justice system.

The lack of a fair trial could be related to an accused's lack of legal counsel (as in *Dietrich*), questionable use of confessional evidence (as in *Williams*), too much delay in bringing the trial to court (as in *Jago*) or a myriad of other procedural problems. The remedy for an unfair trial is for the court to be able to mould the procedures of the trial to avoid or minimise prejudice to the accused; but where

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this is not possible, the court does have the ultimate power to order a permanent stay.

It is open, then, for defence lawyers to argue that the principle of a 'fair trial', based on the guarantees set out in Article 14 of the ICCPR, should apply. Even though Australian courts will not directly apply the provisions of Article 14, they can be adopted by an Australian court based upon the principles outlined above. Defence lawyers ignorant of potential arguments based on international human rights norms will not be fully serving their client's interests.

Conclusion

International influences on Australia's criminal justice system, in the form of both transnational crimes and the imposition of international human rights standards, is already immense. There is every reason to believe that they will continue to grow in the future. In particular there are two future trends in Australian criminal justice where international influences will play a substantial role.

The first concerns the continuing trend towards greater uniformity in criminal laws across the various Australian jurisdictions [see **Reform #68**]. This is reflected in recent moves towards uniform evidence laws, as found in the *Evidence Act* 1995 (Cth), and the drafting of a model Australian Criminal Code, which has resulted in the enactment of the *Criminal Code Act* 1995 (Cth). The purpose of both these Acts is to establish a template which promotes harmonisation of the various State and Territory laws, given that the Federal government does not have the constitutional power to enact uniform criminal laws for all Australia.

In fact, it seems ludicrous to have nine differing criminal jurisdictions in a country with the population of Australia. England, Canada and New Zealand, countries whose legal systems are the most similar to Australia's, all have one set of criminal laws and procedures. The inefficiency of our federal system in this area is obvious. So is the basic unfairness of conduct carried out in one jurisdiction potentially amounting to a different crime or carrying a different penalty as exactly the same crime carried out in another jurisdiction.

International influences are likely to increase this trend towards uniformity. Just like much modern crime is transnational, an increasing amount of domestic crime does not respect Australian State and Territory boundaries. Standardisation of criminal laws and procedures will not only produce greater savings and simplicity, but will also be necessary in order to effectively detect, deter and prosecute crimes and criminals that do not respect internal Australian borders. Furthermore, international human rights standards apply equally to all States and Territory criminal laws and procedures, providing pressure on individual State and Territory governments to at least conform to these standards.

The second predicted trend is the internationalisation of many traditional 'domestic' crimes. A classic example is the recognition by many feminist scholars and activists that 'gender-based violence is nearly universal, affecting women of every class, race, ethnicity and social background in all the pursuits of life and at every phase of the life cycle' (R Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture', (1994) 25 *Columbia Human Rights LR* 291 at 291).

This recognition has led to the adoption by the United Nations General Assembly of the *Declaration on Violence against Women* 1993. This shows that in the future there will be a blurring of the boundaries between transnational crimes and traditional 'domestic' crimes. This will effectively mean that laws and procedures concerning 'domestic' crime will increasingly also be subject to international human rights standards and the same international influences that apply to transnational crimes.

In conclusion, all criminal justice professionals, no matter what field of criminal justice they are concerned with, cannot afford to ignore international influences.