Justice across Borders: Sentence Transfer in Europe and Australia

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ABSTRACT

In light of the completion of the Implementation of Sentence Transfer in European Probation (ISTEP) project and the final conference in Lithuania in May 2013 it is appropriate to consider wider issues of sentence transfer and how this complex process might be carried out. ISTEP supported Framework Decision (FD) 947 which allows for the transfer of sentenced probationers in Europe. This article compares the European process, under Framework decision 947, with the Australian process in the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) region under the Cross-Border Justice Scheme. It suggests that although there are significant differences in the two regimes they both provide insight into how sentence transfer might successfully be carried out.

INTRODUCTION

Framework decision 947, which facilitates the transfer of sentenced probationers in the member states of the European Union, was enacted in December 2011 and the Implementation of Sentence Transfer in European Probation (ISTEP) project, which supports this FD, reached completion in 2013 with a final conference in Lithuania. The full title of the Framework Decision is "Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions" and it will be referred to as FD 947 throughout this paper. The Framework decision and the ISTEP project have made considerable progress towards facilitating the transfer of probation orders across European borders but, as the project reaches completion, it is worth acknowledging that Europe is not the only place in the world where criminal justice systems have to take steps to deal with jurisdictional borders. This article will compare and contrast the work concerning the Framework Decision with the Cross-Border Justice Scheme, in Australia, which introduced a collaborative system of justice in the border regions of Western Australia, South Australia and the Northern Territory. It will consider the very different background, scope and implementation of each initiative and make suggestions about possible learning from the different approaches to working across jurisdictional borders.

BACKGROUND

The increased mobility of citizens across Europe combined with the absence of an efficient mechanism between European member states as to the transfer of non-custodial sentences led to a situation where courts felt unable to impose non-custodial sentences on some offenders, from other European countries, leaving those offenders at risk of custody (McNally and Burke, 2012). Courts felt that they could not impose a sentence where they lacked confidence in the implementation and enforcement of that sentence and where the offender might be returning to a country which took an entirely different approach to criminal justice. A previous attempt to rectify this problem, through the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (CETS 51)4 in 1964, had received little application and no real practical impact (McNally and Burke, 2012; De Wree et al,. 2009). FD 947 was implemented on 6th December 2011 and has the purpose of providing a framework amongst European Union Member States for the mutual recognition and supervision of community sentences. It enables the transfer between jurisdictions of a judgement or probation decision where a sentenced person in another European country wishes to return to the country where they ordinarily would reside. FD 947 is part of a wide-ranging process aimed at greater integration in the criminal law (Mitsilegas, 2009). Its stated aim is to enhance the rehabilitation of the sentenced person by allowing the preservation of their family, linguistic and cultural ties. The objective of rehabilitation and reintegration is discussed further below but there has been scepticism expressed about whether this is the sole aim of the agreements, or whether the true goal is to alleviate the pressure on prisons in some member states, for both financial and political reasons (Mitsilegas, 2009; Morgenstern, 2009). This context makes it easier to explain why the measures to transfer offenders supervised in the community have been implemented more slowly than the transfer of prisoners; there is less political incentive for member states in implementing F D947. O'Donovan (2009) argues that the fact that FD 947 followed on from FD 909, related to prisoners, negatively affected the drafting of 947 as it was written by those with prison experience who might have underestimated the relative complexity of transferring a community sentence:

> "Transferring prisoners in custody essentially means changing from one cell to another, while for probation, transfer to another jurisdiction involves having to deal with issues such as accommodation, employment, family and interpersonal relationships, and appropriate leisure pursuits." (O' Donovan, 2009: 85)

The background to the Cross-Border Justice Scheme was very different. In Australia there is no single criminal justice system, each state or territory has autonomous law-making powers and has its own system of courts, police, prisons and community interventions. Although the states and territories comprise one nation, each jurisdiction does guard its own power and autonomy, so cooperation across borders is often harder to achieve than might be anticipated from the outside. Similarly to approaches in Europe, cross-border cooperation often relies on the good practice of practitioners on the ground (Hufnagel, 2009). A significant difference, however, is that there are strong legislative, practice and cultural similarities between the Australian jurisdictions, making cooperation easier to achieve. The Cross-Border Justice Scheme was initiated by the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC) who had been operating for many years with the Anangu and Yarnangu peoples (NPYWC, 2012) in the NPY region. The NPY region is a desert area, covering 450,000

square kilometres, roughly the size of Sweden[ii]. The people groups residing live on land that stretched across the states of Western Australia and South Australia and the territory of Northern Territory; the Cross-Border Justice Scheme covers the Ananga Pitjantjatjara Yankunytjatjara (APY) Lands in South Australia, the Ngaanyatjarra Lands of Western Australia and the four southern NPY Northern Territory communities, it also takes in other lands in the central west and southern Northern Territory, such as Kintore, Papunya and Areyonga (NPYWC, 2012:2). The NPYWC's Domestic Violence service was operating in an important area of public safety, where both traditional police services and aboriginal police services had had little impact, but were finding that the different police forces and legal systems were impeding their work. Legal restrictions could lead to offenders going unpunished as well as health and safety risks to criminal justice practitioners (Jamieson, 2009). These difficulties were exacerbated by the geography of the NPY region and the limited road and track network; Jamieson (2009) relates examples where police have had to drive an offender out of a state and then back into it again, driving past police stations on the way, as that was the only way to travel by road from the location of an offence to a police station in the same state. The NPYWC initially responded to this by organising cross-border meetings with senior police and legal officials and this led to the development of protocols, guidelines and then to Memorandums of Understanding. The final stage before the enactment of the legislation was the coordination of an NPY Lands Tri-jurisdictional Justice Initiative Round Table and it was this group that eventually gave rise to a working group and, ultimately, the Cross Border Justice Amendment Bill (2009) (NPYWC, 2012).

SCOPE

EU Framework decision 947 states that offenders who have been sentenced to a supervised non-custodial measure in a country other than where they live can serve the sentence in their home country. The FD set a deadline of December 2011 for implementation but very few countries met that target and the FD still remains to be implemented in many jurisdictions. It was adopted on the same day as Framework decision 909 allowing the similar transfer of sentenced prisoners who have been sentenced to custody and deprived of their liberty, forming a coherent body of legislation (Kucynska, 2009). The key purposes of FD 947 are to facilitate the return of the sentenced offender to his home country and to ensure the proper implementation of the sentence provisions. The stated aims of these Framework Decisions are to aid rehabilitation of offenders by supporting community and cultural links, and to improve public protection, including the protection of victims and facilitate the application of sentences and measures. FD 947 should not only promote the transfer of sentenced prisoners but should also promote the use of probation as a sentencing option in all Member States (McNally and Burke, 2012). It will raise the profile of the European Union as a participant in probation debates and contribute to the creation of European consensus on the purposes of probation and of alternatives to custody (McNeill, 2013). The scope of framework decision 947 is expressed widely; it encompasses some suspended sentences (those where probation measures are also imposed), conditional sentences, conditional releases and all alternative sanctions other than a custodial sentence so could apply to measures including probation orders, community service and even electronic monitoring. However, this scope does not go as far as some would wish, FD 947 does not deal with assessments or appraisals and only briefly mentions probation reports (O'Donovan, 2009) The drafting of FD 947 is necessarily complex because of all the jurisdictions and criminal justice systems involved but the principles of cooperation and mutual recognition are clear (O' Donovan, 2009).

Interestingly, although the European agreements do not have the same all-encompassing scope as the CBJA in Australia, the ambition to create one criminal procedural area in Europe is still present and this regime is being put in place piece by piece:

> "On the territory of the European Union, we are experiencing a gradual introduction of the mutual recognition principle. We cannot forget about the fragmentary character of existing legislation though, which results in serious gaps in cooperation."
>
> (Kuczynska, 2009: 48).

This desire for mutual recognition and greater cooperation, however, operates in tension with competing forces seeking to protect state sovereignty with the necessary mutual trust often being 'rarely more than a fiction' (Morgenstern, 2009: 137) .

The enactment of the Cross-Border Justice Amendment Bill 2009 required legislation to be passed in the three affected jurisdictions of Western Australia, South Australia and the Northern Territory. This legislation enables police, corrections and magistrates in each of the three jurisdictions to deal with an offence committed in any of the jurisdictions, applying the law from the state where the offence was alleged to have been committed. The legislation requires each jurisdiction to enact legislation in each of three aspects of the criminal justice system – exercise of police powers, courts of summary jurisdiction (that deal with less serious matters) and enforcement of sentences and orders (Jamieson, 2009). The NPYWC (2012) set out the main provisions of the legislation:

- Cross-border magistrates can deal with offences committed in any of the three jurisdictions;
- Police are able to take an offender to whichever jurisdiction they choose, to facilitate the prompt involvement of a magistrate;
- Police from any of the three states can make arrests and carry out investigations in the cross-border region;
- Correctional service officers can supervise and enforce orders in any of the three jurisdictions;
- Prisoners are able to serve sentences in any of the three jurisdictions

For the Cross-Border Justice Scheme to apply, the alleged offender must have a connection with the cross-border region by committing the offence there, being arrested there or normally residing there (Jamieson, 2009). This connection is ultimately determined by the court, unlike under FD 947 where an offender must agree to be transferred, there is no requirement that an alleged offender should consent to being dealt with under the Cross-Border scheme. This connection with the area is an intriguing difference with the European regime in that the legislation does not apply equally to all citizens of the three jurisdictions, it depends on the individual's connection with the cross-border region and this connection is quite broadly defined (Charles, 2009). However, this cooperative approach, currently confined to border regions, could lead to greater cooperation between the affected states and territories in all aspects of the management of criminal justice (Hufnagel, 2009).

IMPLEMENTATION

The crucial aspect of successful implementation of FD 947 is not just greater knowledge and sharing of information but the building of mutual trust, based around a human rights framework (Morgenstern, 2009; Snacken and McNeill, 2010). Implementation of FD 947 will contribute to the development of a consensus, at a European level, that probation interventions will require an emphasis on fostering the social inclusion and rehabilitation of offenders in the community (Snacken and McNeill, 2010). European countries are at different stages in the implementation of FD 947 but two countries that have made some progress towards implementation are Ireland and the Netherlands. In Ireland, the implementation group found that close cooperation and good communication between criminal justice partners, policy makers and organisations responsible for day-to-day management of community sanctions contributed to successful implementation. They also promoted links with international partners where there was likely to be movement of offenders, particularly building on already existing excellent working relations with the Probation Board for Northern Ireland. Similarly, the Dutch prepared for FD 947 in advance of its implementation and worked with experts to design new working processes, promote cooperation both within the Netherlands and internationally and stimulated the greater use of non-custodial sentences for non-Dutch offenders living in the Netherlands (Tigges, 2010). The Dutch approach to transposing FD 947 into national legislation is, by some distance, the most sophisticated of all EU member states. The Dutch Ministry of Justice and Security hired consultancy companies to support the implementation of FD 947 and FD 909, which were transposed into a single law. These companies carried out an impact analysis and made recommendations regarding the necessary new procedures required to transpose the FDs into national Dutch legislation. Knowledge of the sanctions available in other jurisdictions and the way in which these sanctions were executed was also crucial to successful implementation. To that end, the European Commission funded the Belgian Ministry of Justice to create a database to be made available online, allowing information about sanctions in the various European jurisdictions to be easily shared (Belgian Ministry of Justice, 2013). Other countries are also taking steps to consider the implications of FD 947 for transfers into and out of their jurisdiction, see, for example, Rusu's (2010) consideration of the implications for Romania. The effective working of a Framework decision requires commitment from legal practitioners and policy makers, as well as raising issues for offenders (Paterson and Vermeulen, 2010) so it is perhaps unsurprising that there has been a range of responses from states – from great commitment in some cases to seeming lack of engagement in others.

Jamieson (2009) used the metaphor of hats to describe how she anticipated that the Cross-Border Justice Scheme would be implemented, suggesting that police officers, magistrates and corrections officers would be able to wear three hats at the same time, operating simultaneously as officers of Western Australia, South Australia and the Northern Territory. A magistrate could consecutively deal with cases from the three jurisdictions in the same hearing, for example when warrants came to light from other jurisdictions when one case was being dealt with (Charles, 2009). Although the Cross-Border Justice Scheme has been widely welcomed the Aboriginal Legal Rights Movement did express some concerns and these include (Charles, 2009):

- There is a risk that police or prosecutors might engage in 'forum shopping' by bringing a case to a court that best suits their needs;

- Complex legislation may stretch the already limited resources of those legal services that provide support to Aboriginal clients;

- There is considerable scope for discretion in the interpretation of terms such as 'residence' and 'connection to the region' and this could lead to discrepancies in approach across the regions;

- The new legislation raises human rights issues including that it can operate retrospectively, it reverses the burden of proof with regard to residence, it could lead to some individuals being held in custody a long way from home and it singles out one group of people for differential treatment. Legislation that was introduced with positive intentions, to acknowledge the different way that state borders are perceived by Aboriginal groups, could end up having a discriminatory impact as one group within society is treated differently than other groups.

In addition to these specific concerns, Hufnagel (2009) also raises the general concern that practices cooperation across jurisdictions could lead to the adoption of the lowest common denominator, particularly in relation to the protection of human rights. She goes on to argue that the more formal, advanced harmonisation strategies offer greater opportunity for best practice, in the form of the highest common denominator, to be adopted.

DISCUSSION

Although there has been increasing interest in comparative criminology much of this interest has focussed on police and prisons, with little attention given to different approaches to supervising offenders in the community (McNeill, 2013). Consideration of transfer approaches within Europe and between Australian states does allow some focus to be given to the transfer of community supervision. The material discussed above can be summarised by way of a table:

	Europe: FD 947	**Australia: Cross-Border Justice**
Direction of Approach	'Top – down' initiated by legislators	'Bottom-up' initiated by community advocates
Motivation for initiating cooperation	Too many foreign prisoners in jails	Evasion of justice by some offenders
Stated aims	Promotion of human rights and rehabilitation, improving protection of victims and general public, facilitating application of suitable measures and sanctions	Access to justice
Attitude to borders	No intention to challenge national sovereignty	Diminishing the impact of modern, artificial borders
Geographical focus	Universal, across the 28 EU member states	Focus on border regions
Application	Just to 'alternatives to custody' but linked to other FDs	Broadly, across criminal justice system, to magistrates, police and correctional services
Success of implementation	At this stage, variable across European states and the legal implementation process is delayed. To date, FD 947 has not been used.	Fully enacted and applied by all three jurisdictions
Research and support	Significant support provided by the ISTEP project which completed in 2013. Other projects providing support included the Belgian project (Belgian Ministry of Justice, 2013).	Evaluation due for completion in 2013
Culture, structure and history	Significant differences between jurisdictions	Strong similarities between jurisdictions
Concerns expressed	Not widely publicised and, to date, not yet used	Complex legislation with disproportionate impact on some groups

Both these regimes of sentence transfer have been introduced relatively recently and it is too early to say definitely whether they have been successful in meeting objectives. It is notable, however, that the Australian framework, which started as a community initiative with a clear objective of a problem that needed to be solved has been used in a number of instances, in contrast to the European scheme that has been yet to be used at all. The fact that there are strong similarities between the criminal justice regimes in the Australian states has aided the implementation process as have the high profile of the Act and the support offered at all levels of the criminal justice system. However, the Australian initiative remains in its early stages and some of the concerns expressed about it are real and valid, such as that it treats different population groups differently and that it has the potential to be abused as police and prosecutors seek the lowest common denominator in the protection of offender rights. Early evaluations of the Cross Border Justice Scheme will be published in the next few months and it will be important to give consideration to these issues of the protection of rights alongside the evaluation of how often it is used and its effectiveness in making the administration of justice more straightforward. As populations become more mobile there is an increasing need for criminal justice systems to operate across state and national borders. It is important that the needs of offenders supervised in the community play a part in this debate and that lessons are learned from international experiences.

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[i] I am very grateful to Dr Emma Rowden, University of Technology, Sydney, both for suggesting the idea of this article and for her comments on an earlier draft. I would also like to thank the journal editors and the two anonymous reviewers for their helpful and constructive comments on this paper.
[ii] A map of the area can be seen on the website of the NPY Women's Council: http://www.npywc.org.au/about-npywc/history/ [accessed 1st December 2013]