



MONASH University

Law

# Policy transfer: Can we pick good ideas from bad?

Arie Freiberg

PSC/ANZSOG LEADERSHIP SEMINAR SERIES

30 May 2016

PERTH

# What is policy transfer/diffusion?

When one government's policy choices are influenced by choices made earlier by other governments (Shipan)



**THREE STRIKES AND YOU'RE OUT: IT'S JUST  
NOT CRICKET**

# Australia: a penal policy transfer

- Australia started as a colonial export
- Colonisation brought with it English statutory and common law
- Also borrowed from the USA in the 19<sup>th</sup> and 20<sup>th</sup> centuries
  - Probation system from the UK and US
  - Habitual criminal and indeterminate sentencing laws
  - Criminal appeals from UK 1907
  - Parole in Victoria from USA in 1950s
  - Community-based orders from USA and UK in 1960s and 1970s

# Good and bad transfers

**SOME GOOD POLICIES TRANSFER**

**SOME BAD POLICIES TRANSFER**

**SOME GOOD POLICIES DON'T  
TRANSFER**

**SOME BAD POLICIES DON'T  
TRANSFER**

# Criminal justice policy diffusion in Australia

- 1960s and 1970s: community based orders
- 1980s: consolidated sentencing laws
- 2000s: problem-oriented courts eg drug courts
- 2000s: sex offender registration/working with children checks
- 2004: dangerous sex offenders laws: Queensland; Fardon's case

# From whom?

- Other countries?
- In Australia: other states: a federal system allows for some degree of experimentation
- Culturally similar jurisdictions?
- Language? We tend to 'globalise' penal policy along Anglophone lines:
  - USA, UK, NZ; Canada
- But not
  - Nordic countries, Western Europe

# To whom?

- Australia > >>> HECS
- Case mix funding



# Transfer or zeitgeist?

- Policy changes as a result of socio-economic changes?
  - Neo-liberalism?
  - Privatisation
  - De-regulation?
  - Managerialism?
  - Actuarialism?
  - The risk society?
  - Small government?
  - Individual responsibility?
- Globalisation rather than transfer? Globalised information travels fast and wide

# How? Policy entrepreneurs

- Policy entrepreneurs: people who devote time, energy and political capital to pursue a specific policy goal
- Can be governmental, private individuals, academics, judges, ex-politicians
- They
  - Define and frame the problem
  - Build a team
  - Gather evidence
  - Develop wide range of supporters

# How? Policy entrepreneurs

- Social impact/benefit bonds: developed in UK in 2010 and brought to Australia and now spreading through a number of jurisdictions.
  - 2012 David Hutchison, Social Finance UK spoke in Australia about SIBs and the idea took hold
- Justice re-investment: An idea from early 2000s that has gradually developed in the US and taken up here by Dave Brown, UNSW and retired judge Harold Sperling
  - Ideas still being propounded and tested

# How? intellectual leaders

- The highly influential
  - Behavioural economics/nudge eg Kahneman, Sunstein, Halpern
  - Restorative justice (NZ) eg John Braithwaite
  - Responsive regulation eg John Braithwaite
  - Really responsive regulation eg Julia Black
  - Therapeutic jurisprudence eg Winick and Wexler
  - Drug courts eg Peggy Hora

# How? Policy networks

- Experts: academics, bureaucrats
  - Gather evidence
  - Publish papers
  - Conferences and seminars
- Diffusion of information through citations: citation analysis

# Institutions

- Think tanks:
  - Institute of Public Affairs Australia
  - Grattan Institute
  - The Australia Institute
- Advisory Councils
  - Victoria, Tasmanian, NSW Sentencing Advisory Councils
- Research bodies
  - Australian Institute of Criminology
- OECD
- USA – American Legislative Exchange Council (model legislation for conservative governments)
- Standards institutions eg International Standards Organisation

## How? other

- Politicians' fact finding tours
- Media: public and social
- Increased journal access/internet
- US hegemony (pervasive cultural, media, economic and linguistic dominance?)

# Good ideas or bad? WA

## Three strikes laws:

- WA an early adopter
- 1992 juvenile repeat offenders: indeterminate sentencing
- 1996 3 strikes for adults

'**matrix sentencing**' : 1999 (near) introduction of numerical guidelines along American model

**No prison sentence 6 months or less**



# Good ideas or bad?

- Truth in sentencing (US)
- Boot camps (US)
- Capital punishment
- Anti-social behaviour laws (UK)
- Confiscation of proceeds of crime (US)
- Preventive detention: detention and supervision orders
- Sex offender registration and notification
- Mandatory sentencing
- Compulsory treatment for sex offenders/castration
- War on drugs

## Good ideas or bad?

- Restorative justice (NZ)
- Problem-oriented courts eg drug courts; mental health courts; indigenous courts (US) > **WA**
- Therapeutic jurisprudence
- Neighbourhood justice centres (US)
- Justice re-investment
- Jury sentencing
- Private prisons
- Social impact bonds
- Broken windows/zero tolerance

# US(A) v them: general factors

Why borrow ideas from the country with the highest incarceration rate in the world whose laws are ineffective, expensive, inhumane and discriminatory????

- American exceptionalism vs American hegemony
- Global > national>local
- Populism vs professional expertise
- Attitudes to government

# Why do good ideas not travel?

- Cultural differences: why are we not more like the Nordic countries?
  - Demographics: social homogeneity; degree of inequality
  - Politics: corporatism vs adversarialism; welfarism vs individualism; centralised vs fragmented/federalised; strong vs weak states
  - Media: tabloid vs broadsheet
  - Degree of influence of religion
  - Historical determinism/path dependency

# Why do good ideas not travel?

- Ideas are too complex
- Lack of policy entrepreneurs
- Hard to measure/evaluate

NZ Synthetic Drugs legislation???

# Why do bad ideas travel well?

- Simplistic solutions to complex problems
- Emotion rather than evidence drives decision
- Policy-based evidence; emphasise the good, ignore the bad
- Short term fixes vs long term strategies
- Political imperatives: high salience problems
- Ignore local differences
- Over-generalise findings and applicability

# Think global: act local?

Learn but do not copy (Shipan).....

Imitation is the sincerest form of  
flattery but you lack my  
personality, talent,  
& creativity so just  
stop it before you  
hurt yourself.

Bless your heart.



# Think global: act local?

- Transfer but adapt
  - Legally appropriate
  - Culturally appropriate
- Costs and benefits
- Evidence of effectiveness
- Travel and see
- Learn languages other than English