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AUSTRALIAN FOUNDATION ON ALCOHOLISM AND DRUG DEPENDENCE

NATIONAL DRUG INSTITUTE

BRISBANE, 19 MAY 1983

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

DRUGS AND LAW REFORM

Fifty years ago, when he wrote a Brave New World, Aldous Huxley predicted a number of remarkable developments with surprising accuracy. He predicted much of the paraphernalia of the bureaucratic state. He predicted test tube fertilisation of man. And he predicted the pervading use of a drug 'less damaging than alcohol' that would keep large sections of the community in the brave new world, passive and contented, despite the hopelessness of their position.

It does not require reports from Senate Committees, newspaper editorials or pundit-like observations by me to establish that Australia has a problem with drugs. By drugs I mean the so-called 'legal' as well as illegal drugs. I mean alcohol, tobacco, caffeine and the vast market in pills and prescription drugs on which our society is so heavily dependent. It is trite to say that a great deal of attention of the community, its media and courts is focused on illegal drugs, whilst we continue largely to overlook and shrug off the problems of socially accepted drugs, particularly nicotine and alcohol.

I am a non-smoker and virtual non-drinker. It would be easy for me to devote my speech to an arid denunciation of drugs, drug pushers and drug takers. But Huxley's Brave New World stands as a warning. We must ask ourselves where our society is failing if we are to give just a little attention to the causes that lead people, particularly young people, to resort to the escapism of drugs. Perhaps life is so awful for some that escape into the comforting world of drugs, legal and illegal, is, for them, rational and justifiable. Stupour, excitement and hallucination may be comforting to people who have lost hope and faith in our system to deliver work, opportunities and human fulfilment.

There are other warnings against self-righteousness. In the Melbourne Age of 9 February 1983, the following report appeared from London:

> The son of the self-appointed guardian of public morals, Mrs Mary Whitehouse, has been arrested in a police drugs raid. Police said Christopher Whitehouse, 37, was arrested but later released on bail when they entered a house ... armed with warrants under the Misuse of Drugs Act ... A spokesman for the Staffordshire Police said last night 'proceedings may follow against some or all of the people arrested'. Christopher Whitehouse is a former journalist and one-time member of a pop group. Mrs Whitehouse said later : 'He is our much-loved son and we are standing by him'.[1]

Standing by people is the proper province of a family. But it is also the proper concern of a civilised, kindly and forgiving community. People concerned about the predicament of drugs must learn the lesson that few, in a modern community, are totally immune. All stand the risk that they, or their families, may get caught up in the web of illegality. Self-righteous denunciation is not the order of the day, as Mrs Whitehouse has learned. Instead, we should be questioning, particularly if we subscribe to the Judeo-Christian ethic:

* the root causes of resort to drugs that have antisocial consequences;
* the limited function of the criminal law to effect public policy on drugs, particularly where there is little evidence of serious antisocial consequences; and
* the reform of the law, including to allow people, otherwise good citizens, to live down drug and other offences.

The Australian Law Reform Commission is a Federal body. The Federal concern in the law on drugs in Australia is a limited one. It arises, largely, from the customs power by which Federal officials seek to protect the country against the importation of illegal drugs. Most drug laws, indeed most criminal laws, are State laws. The Australian Law Reform Commission is limited in its work to the reform of Federal laws. Furthermore, it is limited to working on tasks specifically assigned to it by the Federal Attorney-General.

In 1976, the Commission delivered a report on Alcohol, Drugs & Driving.[2] That report contained recommendations on Breathalyzer and like laws for the Australian Capital Territory. It called attention to the growing use of drugs other than alcohol to which the Breathalyzer was not specific. The law based on the Commission's report is in operation in the Territory.

The Commission is also examining two other subjects that are germane to this conference. The first is an examination of the punishment of Federal offenders. Many Federal offenders are convicted of drug importation offences. A major concern of the Commission has been the establishment of institutions and rules to ensure that such offenders are treated in roughly the same way, wherever they are sentenced in Australia. A report, Sentencing of Federal Offenders[3] proposed a number of reforms, some of which were adopted by the Fraser Government and others are promised for adoption by the Hawke Government. A recent study by the Australian Institute of Criminology suggests that disparities in the sentencing of Federal drug offenders in different parts of the country may not be as great as was previously thought.[4] The Law Reform report delivered on this topic was an interim one. The Law Reform Commission hopes to revive the project on Sentencing later this year.

Another subject of examination and report relates to privacy protection. One of the chief challenges to privacy in our time is posed by the growing computerisation of personal records. Among the records being computerised are records of past criminal convictions. The capacity of the computer to store infinite amounts of information, to retrieve it speedily and never to forget, is substituted for the inefficiency of manual files. That inefficiency was itself, sometimes, a protection for privacy. It often meant that old convictions, long since forgotten, were lost in Government archives. In the world of the computer, there will be no such happy administrative amnesia. Unless we adopt new laws and principles, the computer will not forget and living it down will be impossible.

The Law Reform Commission's report on privacy protection in the Federal sphere will be delivered to the Government later this year. It will cover many topics. In the context of personal information, the Commission has had regard to basic principles of privacy protection established by the Council of the Organisation for Economic Co-operation and Development (OECD) of which Australia is a Member. One of those principles relates to 'data quality':

> 8. Personal data should be relevant to the purposes for which they are to be used and, to the extent necessary for those purposes, should be accurate, complete and kept up to date.[5]

Another principle of the OECD Guidelines is that the individual should have the right to challenge data relating to him and if the challenge is successful, to have the data 'erased, rectified, completed or amended'.[6] The purpose of these principles is to ensure that in a world in which increasing numbers of decisions are made on the basis of a computer profile, the individual retains some control over how his image is projected to others.

DRUGS LAW REFORM

It will appear from what I have said that the Australian Law Reform Commission has not been specifically involved in reform of the law on drugs. There have been a number of inquiries on this topic, including a joint Federal/State Royal Commission headed by Sir Edward Williams of the Supreme Court of Queensland. A Royal Commission was also conducted in New South Wales by Mr Justice Philip Woodward and in South Australia by Professor Ronald Sackville. The Stewart and Costigan Royal Commissions which are still current are related, directly or indirectly, to the illegal drugs problem.

My sole venture in the field was in the capacity of a citizen. It arose out of a meeting organised by the Australian Foundation for Alcoholism and Drug Dependence. That meeting brought together a number of observers including ex-Police Commissioner Ray Whitrod, Professor of Community Medicine Norelle Lickiss, newspaper editor Ian Mathews and former Commonwealth Director-General of Health, Sir William Refshauge. The former Dean of Brisbane, Archdeacon Ian George, also took part.

A discussion paper was prepared which drew attention to the need for law reforms including:

* a more consistent application of Federal policies to discourage alcohol and tobacco use; and
* a further inquiry into patterns of heroin addiction in Australia.

The proposal in the discussion paper which attracted most public attention suggested change in the Australian law on personal use of marijuana. The paper suggested that possession and use of home-grown marijuana should no longer be criminally punishable. It suggested that the price being paid by Australian society for the suppression of marijuana was, quite simply, not 'worth it'. Amongst considerations mentioned were:

* the established existence of large numbers of the population, particularly young Australians, becoming involved in criminal conduct because of anti-marijuana laws;
* the alienation of otherwise good citizens from law-abiding behaviour and the encouragement of cynicism about the criminal process;
* the absence of complaining victims which gave rise to many opportunities for corruption of public officials;
* growing evidence of involvement of criminal syndicates to service the large demand, placing young people especially, in contact with peddlars of hard drugs;
* the diffusion of the anti-drug effort into concentration on marijuana rather than on more harmful drugs of addiction;

* the increasing demand for enhanced police powers, such as telephone tapping, with consequential erosion of civil liberties;
* the unreasonable stress placed on dutiful law enforcement officers, enforcing laws disapproved by a large section of the community;
* the apparent enforcement of double standards by the criminal punishment of some drug use whilst others were socially condoned and even promoted by advertising and by association with sporting contests.

The discussion paper attracted comments ranging from the serious and thoughtful to the frankly hysterical. The West Australian said that the paper had come as a bombshell:

> There are sound arguments for decriminalising marijuana. One of the most compelling is that it would deliver a blow to the criminal element that is steadily strengthening its hold on the marijuana market. ... Decriminalisation would also end the distasteful practice of conferring criminal status on those using the drug. It is at least questionable that people should be saddled with a criminal record and at times gaoled for what is basically a victimless crime.[7]

The Australian urged a sober debate:

> The [AFADD paper] does not suggest that the use of marijuana is desirable or that its consequences are insignificant. AFADD has concluded that the use of marijuana is so widespread despite existing legal prohibitions that there is a need for a better means of regulating what has become a fact of life. Its proposals are responsible and well reasoned and deserve careful study.[8]

But other banner headlines 'Government Pot Farms' and the absence of serious debate, especially on the part of our political leaders, convinced me that it is specially difficult in Australia to get a thoughtful and rational discussion of this topic. Some may say that where young people are concerned, the subject is not apt for unemotional discussion.

Proof that the debate continues to be fraught with difficulties can be seen in the reaction to the very cautious statement made by Mr Keith Wright, Leader of the Opposition in Queensland[9]; by the Chief Magistrate of New South Wales who suggested 'infringement notices for some marijuana offences'[10] and by the Federal Minister of Health, Dr Blewett. Dr Blewett urged that private cultivation and use of marijuana should be legalised so that legislation could separate marijuana from harder drugs

a... 'the criminal element'.[11] The Federal Opposition Spokesman on Health Matters, Mr Jim Carlton, denounced the proposal as 'irresponsible' urging that it had 'weakened the capacity of parents to counsel their children sensibly on drugs'.[12]

Little progress seems to have been made. Virtually no public discussion has involved a thoughtful consideration of a fundamental issue : the proper function and limits of the criminal law to uphold perceived public policy against drugs. Meanwhile, large numbers of young Australians are thrown into contact with criminal activity. A significant number secure criminal convictions in the result.

This fact brings me to the subject of this conference. One of the specific grounds cited by the AFADD discussion paper for reform of the law on marijuana was the fact that the current laws are stigmatising a large number of people, especially young people, with criminal records. These criminal records can prevent or inhibit their gaining employment. This is specially true in the public sector. It is a specially serious disability in times of widespread and apparently long-lasting unemployment. The suggestion was made that such an enduring punishment was out of all proportion to the wrong done.

Perhaps this is a topic on which opponents and supporters of marijuana law reform can come together. Even those who oppose any change in the present law must surely recognise that, like Mrs Whitehouse, they or members of their family or friends may themselves or through their children become caught up in the web of the criminal law. They may agree that it is unjust to blight such people with a permanent stigmatising criminal conviction. Yet that will be the position in Australia unless law reform is achieved. In most parts of Austrtalia there is absolutely no provision for the deletion, modification or limitation in the use of spent criminal convictions. They remain a millstone round the neck of the person convicted. Many years later they may return to haunt the person and to frustrate legitimate and worthy objectives in life. What should we do about this?

There will be some, hard of heart, who will say : We are against drugs. We must hold the line. They should have thought about this at the time. It is unfortunate but just too bad. I am afraid one must acknowledge that there is a small but vocal group in our community who take this uncharitable stand.

But there are others who believe that people should be able to live it down. Their justification for this view is partly that kindly attribute of the Christian tradition which preaches forgiveness and reconciliation. But it is also a practical concern that people should be given a motivation to good social conduct, so that they can have the legitimate ambition to overcome past convictions and to be released, by law-abiding behaviour, from them.

Let us hope that the concern about living it down, that is specially significant in the drug area and particularly for minor marijuana offences, should direct the attention of our community to the subject of rehabilitation of offenders. This is a subject long the topic of pious platitudes but not often reinforced by practical laws and policies. Please do not think that living it down is a problem confined to the area of drug taking. Please do not think it is a problem confined to young people. Only last week, in conjunction with the Law Reform Commission's new community law reform program, I received a letter from a dignified and respectable middle-age businessman in New South Wales. He had applied for a licence as an auctioneer. His application was opposed and rejected because in 1960 — 23 years ago — he had committed a minor offence as a juvenile. He had a conviction. His 23 years of blameless good citizenry meant nothing. The record was there and, as he had feared over every one of the 23 years that passed, it returned to confront and haunt him. What can be done about this? What should be done?

REHABILITATION OF OFFENDERS LEGISLATION

The English Act. Young Mr Whitehouse, if he is convicted, will be in a better situation than our New South Wales would-be auctioneer. In 1974 the United Kingdom Parliament enacted the Rehabilitation of Offenders Act of that year. It grew out of a public debate that followed the report of a committee set up by Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders. The report was titled 'Living it Down : The Problem of Old Convictions'. The legislation which followed has been much criticised for its complexity, poor drafting and incompleteness.[14] It may not be a perfect statute. But it is a whole lot better than our position in Australia. It is not so much concerned with rehabilitation, which implies the restoration of rights, privileges or reputation as with public perceptions of reputation. All member countries of the Council of Europe, save Britain, had procedures under which criminal convictions could be 'officially' lived down by subsequent good behaviour over a sufficient length of time. In countries which had an official record for all citizens, the conviction was simply erased from that record. A different course was taken in the British reforms reasons explained by Paul Sieghart:

> No such easy strategy is available for Great Britain, where we do not believe that an event which has once happened can be made to 'unhappen' by retrospective administrative action. Nor do we believe that people do things, or omit to do things, merely because the law tells them so. Accordingly, the only strategy which a British Act of Parliament can pursue is to stipulate the legal consequences of acts and omissions and leave the citizen to regulate his activities with these consequences in mind.[15]

It was for these reasons that the Rehabilitation of Offenders Act adopted the central strategy of fixing a sliding scale after which a person without more convictions should become 'rehabilitated' and enacting that a person who has become rehabilitated is to be treated 'for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction'.[16]

Thus the strategy was not erasion or totally wiping clean the record. It was simply removing the legal consequences : including prohibition of admission of evidence in judicial proceedings, the prohibition of questions in such proceedings and the prohibition of disclosure by officials. Furthermore, the Act specifically provided for questions asked out of court. Subsection 4(2) provides that where a person seeks information with respect to a person's conviction, a rehabilitated person may treat the question as not relating to spent convictions and may answer accordingly. He is not to be subjected to any liability or prejudice for doing so, so long as the conviction is spent.[17]

The legislation was complicated because of the varying periods of the rehabilitation scale. Basically the Act only applies to persons who have been sentenced for an offence to a term of imprisonment less than 30 months. Sentences of life imprisonment, of preventative detention and during the Queen's Pleasure, are excluded. Otherwise the type of offence committed is irrelevant. Obviously the scope of the application of the Act is modest but designed to be non-controversial. In that design it, at first, failed. There was much initial opposition to the legislation. However, within a year the critics were reported to have 'calmed down' and become 'reconciled to it as amended'.[18]

Numerous criticisms continue to be voiced about the English Act:

> The Act is too complex; parts of it defy the comprehension of lawyers let alone laymen, but the Home Office has produced a simplified explanation for public consumption. It has been suggested that the rehabilitation period should have been based on the nature of the offence and not the length of the sentence. In many cases it is going to be very difficult to find out whether or not a conviction has become a spent conviction. It has been argued that the Act is unclear in operation since it affords protection to the person who has lived down a conviction, but not a person who has been involved in criminal proceedings, but was not convicted.[19]

Nevertheless, the Home Office estimated that, as a consequence of the Act, as many as a million people in Britain became rehabilitated persons in July 1975 when it came into force. Living it down was important and useful for relationships as different as employment in the public sector, securing credit, acceptance for insurance and even membership of some trade unions. Important in the Home Office's thinking were statistics that proved that people in England and Wales who had one serious conviction followed by ten years or more free from further convictions were significantly less likely to offend again than persons in the unconvicted population. In other words, the popular maxim 'once a crook, always a crook' was wrong. More closely corresponding with the statistics would be the maxim 'once gone straight, always straight -- and a bit straighter than if you had never been a crook'.[20] I suspect that despite our convict origins, the same would be found to be the case in Australia.

New South Wales Proposals. In 1976, the Privacy Committee of New South Wales urged the introduction of legislation in that State on rehabilitation of offenders.[21] It proposed that a person convicted of an offence should be rehabilitated after five years for an offence for which no gaol sentence was served and after ten years for an offence where a gaol sentence of two years or less was served. The only requirement is that, in the interval, no subsequent offence should have been committed. Where a gaol sentence of more than two years was served, rehabilitation stated should only be granted on successful application to a special tribunal.

Although ministerial statements have been made favouring rehabilitation legislation, so far no such legislation has ensued. The matter remains one of serious and legitimate concern for a criminal justice system that boasts as one of its objects the aim of reform of the offender.

Persisting Problems. I do not wish to understate the problems that arise in designing rehabilitation of offenders legislation. They include:

(a) Expungement : the question of whether actual destruction of a record should be required as the only real safeguard against abuse and psychological fear. Or whether this would distort criminological research, diminish legitimate police intelligence work, reduce the perspective of courts and authorities scrutinising people for specially sensitive positions and distort history.

(b) Arbitrariness : the arbitrary nature of any sliding scale. For example, in Britain a person who gets a sentence of 31 months falls completely outside the system. A person with a sentence of 30 months qualifies. Any system which adopts qualifying and disqualifying factors, whether by relation to a period of imprisonment or for the nature of an offence, will inevitably do injustice at the margins. Yet a system that was entirely discretionary, relying on individual judgments for individual cases, would import the oppression of large administrative discretions and an expensive bureaucracy with significant power.

(c) The exceptions : In Britain exceptions are provided in the Act from the beneficial operation of rehabilitation. These too are matters of controversy. Should the professions such as medicine, the law, accountancy, nursing and so on be outside these protective provisions as the price of their statutory monopolies? Should people in specially sensitive jobs, those involved in firearms and explosives or national security, be on the same footing as butchers and bakers where an old offence may be less significant?

(d) Defamation : a major controversy arose in the United Kingdom about the law of defamation. If truth is to be a defence for defamation proceedings, how will that defence stand against disclosing the offence of a rehabilitated person? The English approach is to provide that the defence would fail if the plaintiff proves that the publication was made with malice. This suggestion has been criticised[22] but does not appear to have caused any major problem.

(e) Computers : as more and more records become computerised, provision can be readily made for offences to 'drop out' or to be put somewhere else. Yet I understand that in the Australian Capital Territory at least, the computer printout of previous convictions include even acquittals and failures to answer bail, for whatever reason. Obviously great care will be need in programming criminal computers so that important public policies are not frustrated by mechanical or electronic convenience.

(f) Federalism : a further special problem, as acknowledged by the New South Wales Privacy Committee, is the position of interstate convictions. Should the law of one State, say New South Wales, provide for the rehabilitation and extinction of 'spent offences' in another State? Should the New South Wales Police inform interstate police of a New South Wales offence which is regarded as 'spent' in New South Wales but not in the other State? The Committee observed that 'a uniform approach to both rehabilitation and expungement by all States and the Australian Government seems highly desirable'.[23] But the record of achieving uniformity in such matters is sorry indeed and not such as would give encouragement.

CONCLUSIONS

This talk began as a review of the work of the Law Reform Commission relevant to drug offenders. It then outlined my own sobering experience in a minor personal venture into an AFADD project designed to question our approach to drug laws, especially on marijuana use. A still more recent experience in Australia on this issue has been no more encouraging.

But I have suggested that most Australians of goodwill would agree that minor drug offences at least, such as the personal use of marijuana, should not blight the citizen's career for ever. No families or individuals in the community are immune from the problem of drugs : few are entirely exempt from the problem of illegal drugs, as Mrs Whitehouse's experience in Britain demonstrates. We are all concerned. In a time of unemployment, we should be specially concerned that we do not unduly blight a person's career and do disproportionate damage. At present, criminal convictions remain as the 'skeleton in the cupboard' for large numbers of fellow citizens. Though very many return to good citizenship, there are few present means by which they can legally 'live it down'. The advent of computerised records makes it likely that, unless we act, living it down will become harder, not easier.

In Britain, legislation has been enacted in the Rehabilitation of Offenders Act 1974. As a piece of legislation it has many defects. This much was admitted to me when I called on the Home Office a couple of years ago. I was told the legislation had to be hastily prepared and bore the marks of that preparation. But at least the British have taken the step. It is a modest and cautious step. We in Australia would do well to give attention to the British lead. And the problem transcends drug offences. It is a general problem of the limits of criminal punishment.

In the Federal sphere, the Law Reform Commission will be examining this issue specifically, in the case of Federal offenders, when we later this year revive our project on that topic. For many offenders the punishment remains behind, year after year, as a practical and psychological burden. Sober reflection on criminal wrongs is desirable. But an inability to escape the web of the criminal law, no matter how good a citizen one becomes, is plainly unjust. We will have rehabilitation of offenders laws in Australia. The question is when. In the Federal sphere, the Law Reform Commission will make its proposals. But the States should initiate their inquiries so that compatible laws and practices can be developed throughout the country. This is not a matter of excessive tenderness to antisocial people. It is a matter of ensuring that the punishment does fit the crime and does not endure forever to blight and discourage a full return to good citizenship. I congratulate this National Drug Institute for focusing its attention on such important and timely concerns.

FOOTNOTES

1. The Age, 9 February 1983, 6.

2. Australian Law Reform Commission, Alcohol, Drugs & Driving (ALRC 4) 1976.

3. Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15) 1980, Interim.

4. I Potas, Sentencing the Federal Drug Offender, Australian Institute of Criminology, mimeo, 1983.

5. Organisation for Economic Co-operation and Development, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1981, 10.

6. ibid, 11.

7. West Australian, 6 March 1982.

8. The Australian, 6-7 March 1982. See also [1982] Reform 58 and [1982] Reform 95.

9. The Australian, 11 April 1983.

10. Sunday Telegraph, 10 April 1983. Cf L Brereton, Minister of Health, Canberra Times, 9 April 1983, 17 ('Legalisation of marijuana for personal use has already been rejected by the State Cabinet').

11. The Australian, 9-10 April 1983, 7.

12. ibid.

13. Justice, Living it Down : The Problem of Old Convictions, London, Stevens & Sons, 1972.

14. S J Sauvain, Rehabilitation of Offenders Act 1974, in Solicitors Journal, Vol 119, 1975, 242.

15. P Sieghart, The Rehabilitation of Offenders Act 1974, in (1975) 125 New Law Journal, 760.

16. Rehabilitation of Offenders Act 1974 (GB), s.4(1).

17. ibid, s.4(2).

18. G Dworkin, Rehabilitation of Offenders Act 1974, in (1975) 38 Modern Law Review 429, 435.

19. ibid, 435.

20. Sieghart, 760.

21. New South Wales, Privacy Committee, Background Paper No 10, Rehabilitation of Offenders, 1976, mimeo.

22. Dworkin, 434, citing The Faulkes Report.

23. New South Wales, Privacy Committee, n.21, 23.