



INTERNATIONAL COMMISSION FOR THE PREVENTION
OF ALCOHOLISM AND DRUG DEPENDENCY

WORLD CONGRESS FOR PREVENTION
NICE, FRANCE, 3 SEPTEMBER 1986

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THE TEN COMMANDMENTS OF DRUG LAW 1986

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The Hon. Justice M.D. Kirby, CMG*
(Australia)

LAW REFORM IN AUSTRALIA AND BEYOND

We live in an age of unprecedented social and technological change. Law making institutions tend to move slowly. In times like ours, they need the assistance and stimulus of bodies established to design, in an orderly way, new legal rules and social policies. Throughout the English speaking world, permanent law reforming institutions have been created, as an institutional response to a time of change. In Australia, each State and Territory now has a law reform body. There is also a federal commission. I was the chairman of that Commission until recently, for nearly ten years.

The range of tasks upon which these bodies report is extremely wide. One of the first reports of the Federal Commission, commissioned by the Attorney General of Australia, related to Alcohol, Drugs and Driving¹. The report proposed changes in the laws on this topic in the Australian Capital Territory, a Federal responsibility. The proposals were substantially adopted and have passed into law. A number of the changes proposed have also been adopted in the States of Australia. The Commission did not have a general mandate to suggest more wide-ranging changes of the

law to respond to alcohol, tobacco and other drug dependency. As in many other like countries, there have been numerous official and semi-official enquiries in Australia on this topic² most of which have related to narcotics and have put forward proposals for law reform to "combat" what is described as the "drug menace". Although there have been some exceptions, many of these reports have proposed an ever-increasing crescendo of punitive, intrusive, even Draconian laws, especially aimed at trafficking in narcotic drugs. I have listened carefully to the papers presented to this conference. I regret to say that some of the solutions put forward - insofar as they depend on legal responses - strike me as unrealistic or even undesirable, at least in a country such as my own.

Just as physical and psychological intoxication by drugs is dangerous, so too is intoxication by sincere enthusiasm leading to unrealistic demands on the legal system. Laws which are not respected by our citizens and are widely disobeyed, poison our system of justice. They may save a few souls from drugs. But in the process, if they undermine respect for the Rule of law, lead to oppression, and result in corruption of officials and widespread cynicism, they achieve their success at too high a price.

I have organised this simple thesis in the form of 10 Commandments for new laws on drugs. They are slightly more long winded than Moses' ten. No doubt they will be somewhat less permanent and equally honoured in the breach rather than the observance.

THE TEN COMMANDMENTS OF DRUG LAW

1 Define clearly the object to be attained

For some, the object to be attained will be a totally drug free environment. But given the enormous variety and popularity of many drugs (and the great range of their potential harmfulness) that I consider this to be clearly a pipe dream. I must admit that I like a cup of tea. So do millions of others. On present evidence, the damage to my health from drinking tea is negligible. The damage to others, including public health costs, arising from my tea habit is virtually nil. No one would suggest legal controls on tea drinking. But, as one looks at other drugs, with greater potential to cause physical harm to the individual, damage to his neighbours and cost to the community, the legitimacy of social responses is increased.

Just the same, in considering the price which even alcohol, tobacco and narcotic drugs inflict on society, care must be taken to balance any off-setting benefits that may accrue. Aldous Huxley, in appealing for a better substitute recreational drug than alcohol, suggested that some drugs were necessary to provide an expression for the frustrations that arise in modern life. He claimed that they provided an outlet for primitive drives coming from the lower centres of the brain which developed earlier in the evolutionary process than the higher centres, such as the cerebral cortex. Upon this theory, if drugs were entirely removed, we would delete an outlet and a safety valve, possibly at a disproportionate price in mental illness and anti-social behaviour. The fact that so many millions of our fellow human beings regularly turn to drugs

requires pundits like ourselves to define precisely the sort of society we ultimately want to achieve. Unless we do so, our legislative and social policy on drugs will be thrashing around in a vacuum. We must constantly ask ourselves whether, contrary to the long established and widespread resort to drugs, we can possibly design policies which will divert people from such pursuits. More fundamentally, we have to ask by what principle we have the right to prevent the majority of our fellow citizens from enjoying various drugs as most of them have done for centuries. To be acceptable that principle must surely be founded in the limited right of the state to intervene in individual choice (including even the limited choice of self destruction). Measures of intervention must be proportionate to the established harm done and the consequential right of the organised community to step in to protect itself, the subject's neighbours and (to a more limited extent) the individual principally affected.

2 Avoid hypocrisy in drug laws.

The second requirement is to avoid hypocrisy in drug laws and policies. One speaker at a recent science congress in Australia contrasted the high civil honours given to captains of the Australian wine industry with the heavy punishments handed out to narcotic drug offenders. The last mentioned consideration was highlighted recently by the execution in Malaysia of two Australians convicted of drug offences.

The avoidance of hypocrisy requires constant reminders of the real sources of the proportionate damage to individuals in

the community, caused by drugs of dependence. Last year, in Australia, some 20,000 citizens died from drug related causes. Four fifths of the deaths were directly attributable to tobacco addiction. Sixteen per cent were attributed to alcohol. Barbiturates and opiates accounted for only one per cent. Although deaths from drug use overall has dropped by thirty per cent in the last decade, deaths from tobacco use has dropped by only ten per cent³. Reflection on these figures, which are replicated in most countries, demonstrate the gross disproportion in attention to present drug problems by the law and by the media. A panoply of legislation has been enacted, including unprecedented powers of telephone interception or search and seizure rights and the like, to combat the feared spread of narcotic drugs. But many of these laws have been proposed and enacted by people who enjoy, and defend the use of, "their" drugs: alcohol and tobacco. It is little wonder that young people - whose heroes include Boy George - regard such attitudes as wickedly hypocritical. Yet a series of reports in Australia, and elsewhere, which have called attention to this hypocrisy and proposed the softening of laws on cannabis and attention to the problem as one of public health rather than law and order, have been swept aside in a scramble by unthinking legislators to outdo each other in boasting the "toughest" and most repressive laws in the land. All too often these increasingly ineffective laws have pandered to the fears generated in society by extravagant media headlines or by the despair produced on the predicament of young drug addicts who in my own country have included the children of national leaders -

including, as courageously revealed, even the daughter of the Prime Minister himself. Fortunately, thoughtful observers are now beginning to wake up⁴. I hope nobody in this audience is so naive as to think that the answer to the prevalence of narcotic and other drugs amongst the young in our societies today is higher and higher punishments or more and more prisons and a never ceasing web of police powers and privacy invasions.

3 Consider the basic causes

In tackling drug dependence whether upon alcohol, tobacco or other drugs, the third commandment is to consider the basic causes. I never smoked. I was fortunate in parental example and educational reinforcement. But the figures in Australia show that the majority of boys, and nearly half the girls, in high school have tried smoking by the age of 12. Over one third of children admit to having smoked ten or more cigarettes by the age of 14⁵. Smoking may be declining amongst older middle class people in developed societies. But it is increasing in the developing world at an alarming rate. It is reported that China, Brazil, India, Pakistan and Zimbabwe are actually stepping up the production of tobacco. More than one billion people now smoke almost 3 trillion cigarettes a year. The result is an estimated 2.5 million deaths a year. This is a statistic that should galvanize a caring world to effective action. Yet the distinguished representative of the Secretary-General of the United Nations never mentioned smoking once in her address to this conference.

In developed countries, cigarette smoking is increasing amongst the young, especially young women. Why is this so? Why are young people also turning to alcohol? Why are they turning to narcotic drugs? Unless we can get a profile of the target audience, we will not be able to direct legislation and policy effectively. Unless we can get into their minds and understand their motivation, our efforts, by law, towards changing such personal and even private activities, are likely to enjoy little success.

So far as smoking is concerned, recent reports in Britain and Australia suggest that highly intelligent people are less likely to smoke than the rest of the population⁶. This may explain the difficulty, whatever the education and propaganda programmes used, of changing the smoking and drinking habits of middle aged men in the lower socio-economic sector of society. For them it may be too late. But what of the young? Why is an increasing number turning to narcotic drugs? For the answer and the long run solution to this problem, it is necessary to look at the economic conditions in the world today. Speeches by national leaders urging a healthy lifestyle, and photographs of clean-faced children of the advantaged middle class, will leave the young unemployed poor quite unmoved. They watch the television. They see paraded before them advertisements for marvellous products to which, condemned to long term unemployment, they can never hope to aspire. In these circumstances, drugs are a means of escape. To solve the drug problem, we must solve the causes of despair, boredom, lack of love, and low self image which (more than just peer pressure

and rebellion) explain the spread of drug dependence in the young, at least in developed countries.

4 Look to science and technology as an aid

In a remarkable time of scientific advance, we should look, fourthly, to science and technology to aid us in combating the unacceptable face of drug dependence. This point was made in the Australian Law Reform Commission's report⁷. It called attention to the use of the breathalyser and other modern means of testing the presence of drugs in drivers. Technology could, in this way, reduce the area of controversy and thereby reinforce the social policy of preventing or discouraging drug affected persons from driving dangerous motor vehicles. The report went further. It called attention to the need for better road design to prevent accidents. It also mentioned a device, now being developed, to prevent an intoxicated driver from starting his or her motor vehicle. Such devices detect any impairment on the part of the driver by requiring the completion of specified tasks involving reaction time, judgment and so on, or by analysing the driver's breath before the vehicle will start. We should not laugh at such ideas. We should be looking to the way in which technology, in a technological age, can be used to reduce the anti social consequences of drug use. Although this conference is about prevention, it is appropriate also to mention the possibility that science, with the remarkable advances in bio-technology, will be able to develop means of treating drug dependence by the use of genetic engineering. Narcotic antagonists have so far been primitive⁸. I am sure that we can look, in the future, to more sophisticated agents of cure.

Likewise we can use the modern science of communications more effectively to educate and inform the community. Radio, television and the other mass media of communications can be used to promote knowledge about the dangers of drug abuse, just as they have been so skilfully manipulated to promote social pressure in support of such use. Legal measures and social policy to promote the beneficial use of technology need to be considered.

5 Recognise the role of imaginative propaganda

This leads naturally to the 5th Commandment. Laws on such a personal activity as alcohol, tobacco and other drug use, have a necessary but limited place. Every country has laws of some kind dealing with the age, limit of users and the place and time for the sale of legal drugs. All too often, such laws descend into tax raising measures, producing a position that the state itself becomes dependent on drugs. In these circumstances community education may sometimes be a more effective social antidote than law. I will never forget the impact on me of my teacher in primary school. Some religious orders claim that you should get the children when they are young and impressionable. They were right. In making drugs unfashionable, undesirable and above all unnecessary, there is much to be said for starting in the kindergarten. Outstanding teaching aids are now available in many forms⁹. But somehow it is necessary to make this instruction more "sexy" and more convincing to the young. In Australia, a particularly successful advertisement was that shown in public transport and other public places. It declared "Kiss a non-smoker and enjoy the difference". I once saw this

advertisement in the office of a professor in the Middle East. I am not sure whether he was promoting tobacco abstinence or giving his visitors a hint! Those who enter the lists of propaganda must be as imaginative as their competitors. They must make the refusal of drugs not only socially acceptable but positively desirable. This involves getting a long way from a neo Prohibition, straight-laced approach which will leave the user of today, especially the young, quite cold. The skills of Maddison Avenue are needed to promote the sexiness of drug abstinence

6 Neutralise the economic forces.

The rising appreciation of the social and opportunity costs of drug dependence (particularly of tobacco and alcohol), produces increasing moves toward laws and policies to reduce drug intake in order to save society from wasted lives and squandered public health costs. In Australia, a recent concerted campaign to stop people smoking, though it cost \$1.5 million dollars was estimated to have saved the community \$120 million dollars in the long run. By diverting a significant number, particularly of young females, from smoking, the long term social benefits secured and health costs saved were enormous¹⁰. Moreover, where a life is saved or extended, opportunity costs are saved, particularly having regard to the fact that the educational and other public investment in every citizen, is large indeed. When the economics of alcohol and tobacco dependence, in particular, are understood, there is a growing social realisation of the legitimacy of public

responses, including legal responses to reduce the economic toll. Society, burdened with high public health costs in hard times, has a legitimate right to attempt to minimise those costs, or at least to reduce them. This provides a justification for legislation which, forbids advertising of tobacco products on the electronic media. This is a subject of federal regulation¹¹. It also explains the new and more stringent tests introduced by the Australian Broadcasting Tribunal on alcohol advertising could go on¹². This was something to which the Law Reform Commission called attention¹³. New proposals are now being formulated in the Australian Parliament to remove the tax deductibility of advertising by tobacco companies. In this way, it is said, the community will cease to subsidise the promotion of these obviously dangerous products¹⁴. But given the major national investments in tobacco and alcohol production, which explain the disinclination of many countries to shift from a tolerance of these products, a sensible social policy will encourage subsidies and other facilities to shift, particularly small tobacco growers from their present crop to others less socially harmful. Such policies need world wide co-operation and integrated international programmes to succeed. Otherwise the short fall in one country will quickly be made up in others.

It is the realisation, and constant repetition, of the social costs, particularly of tobacco, but also of other drugs of dependence, that propels legislative proposals for social responses. It is one thing for the individual to insist upon his or her right to smoke or drink alcohol. But where that right

imposes a heavy burden on public health and other costs of the community, the community's voice has a legitimate right to be heard. In Western Australia, one legislator recently proposed a law to impose on the alcohol industry the costs caused by alcohol related accidents¹⁵. Whilst this proposal has not attracted support, there is a growing appreciation in Australia of the legitimate right of the community to look to those who increase social costs, to foot the bill.

7 Avoid ineffective legal measures

I have seen many proposals for stringent legal measures about drugs which I could never support because they offend the 7th Commandment. Legal measures which are likely to be ineffective or inefficient should be avoided. For example, rules which increase the legal age for smoking or drinking are, in modern social conditions, likely to be flouted. This will cause widespread breaches of the law, failure to enforce the law the growth of a black market, a promotion of official corruption, and growing cynicism and disrespect for the law. Such developments undermine the law's effective operation. Even those who, like myself, abhor marijuana, and regret the spread of yet another drug in society, question whether laws punishing its use, however well intentioned, do not attract these undesirable consequences in a way disproportionate to any good done by them. So it is also with alcohol and tobacco control. So it is with narcotic drug laws. Although ineffective law may make legislators feel better and anxious middle class electors content that something is being done, the mindless pursuit of more and more punishment is manifestly

unsuccessful as a response to the modern and intensely personal issues of drug dependence. A moment's reflection teaches this. It is especially true as we now face the new problems of synthetically produced "designer" drugs which can produce in a home laboratory overnight the equivalent of millions of doses of pure heroin. It is just inconceivable that law enforcement and the courts can stop this new wave at the supply side. Prevention at the demand stage is the only hope against this unparalleled threat to public health. But it is a lesson that must be told by law reformers to legislators anxious to provide popular, easy laws to pander, superficially, to community anxieties.

8 Remember the Politics of Drugs

Then there is the 8th Commandment, that the politics of drug laws must be kept steadily in mind. At one level this requires attention to be paid to the extent to which the legal drug industries support political parties and individual politicians. Figures have been published, especially in the United States, concerning the extent to which alcohol and other drug companies support politicians¹⁶. A measure of insulation from such insidious pressure is provided by law reform, such as giving political parties public funds. In Australia, a proposal has recently been suggested to outlaw, by Federal legislation, the giving of funds to political parties or candidates by drug companies¹⁷. Certainly, the alcohol lobby has been extremely successful in my country in delaying the ban on alcohol products on television which is now in place in respect of tobacco products. Alcohol industries are frequently handsome supporters of political parties, in many countries. Severing this bond, particularly in hard times, will not be easy.

On another level, international politics which have linked a number of countries to the United States law and order approach to drug enforcement, are now coming under question, at least in Australia¹⁸. Whether a public health response would be more successful, in the case of narcotic drugs, as is now accepted for public drunkenness, remains to be seen. Although it is often said that the British experiment in this regard failed, we now know much more about the way in which narcotic drugs operate¹⁹. Sadly, we also know a whole lot more about the costs which our communities are paying for the current approach by unbridled law enforcement which is only partially successful. Without a significant demonstration that the approach is succeeding, we are, as communities, extending the powers of officialdom, catching a number of small fry, but creating a huge black market and multiplying the opportunities for official corruption and the wave of petty and not so petty crime. Whenever I hear news of a drug haul worth so many millions of dollars, street value, the question that comes into my mind is: who are these decent and apparently law abiding fellow citizens who are paying all this money to so many people for all these drugs and why do they do it? Until we know the answers to those questions, we plunge on with an apparently failing battle strategy that currently motivates the drug laws, at least of most Western countries, including my own.

9. Retain your Scepticism

That brings me to the 9th Commandment which requires that we should retain our scepticism about the very role of the law in dealing with drug dependency in all its forms. I do not say

that the law has no role, for clearly it has. A smoker may insist that, as an adult, he or she has the right to smoke in private. So far as tobacco is concerned, our communities typically allow that right. But where that activity becomes "other regarding", to use J.S. Mill's test, others have their rights. Thus, increasingly, laws and policies are being adopted which forbid smoking in restaurants, in places of work, on public transport and other public places. This is being done in defence of the rights of others. There is also now an increasing appreciation of the dangers of passive smoking²⁰.

Likewise there are dangers in driving lethal motor vehicles whilst under the influence of alcohol or other drugs. It may be the "right" of adults to enjoy a social drink. But that "right" does not extend into "other regarding" activity which exposes their neighbours to lethal danger on the roads. The same goes for marijuana intoxication or for any other drug which endangers others. This, then provides the basic test which justifies social and legal intervention. It is not to save the individual from himself or herself. Most of our societies no longer bury the suicide at the crossroads. Punishment for attempted suicide (where it has failed) has, for the most part, been struck from the criminal law. Laws on so called victimless crimes are gradually being removed as representing the overreach of the criminal law. Respect for individual integrity, normally includes nowadays even respect for the right of the adult, if fully informed, to terminate his or her own life, and to conduct himself or herself as they choose, so long as they do not harm others. But you will note the qualifications. The subject must

be "adult", for the immature may not have enough experience to make the necessary decisions. Similarly, the adult must be "fully informed", otherwise the choice may be irrational or ill-considered. Legislating for morality has never been very successful. Even where partly successful, the cost (as was demonstrated in Prohibition, and is demonstrated in so many other modern laws) outweighs any advantages procured. You might save a few people from alcohol, tobacco and other drugs by banning them. But the black market would soon flourish. The big bosses would soon feed that market. They would corrupt officials and degrade society. In combating them, more oppressive measures will then be introduced. The price is simply not worth it. That is why it is desirable to anchor the responses we offer in our laws about alcohol, tobacco and other drug addictions, in the respect which most modern states offer to individual choice and the privacy of adult citizens. Our societies have a right to protect other citizens from harm done or costs imposed by the choice of those individuals. But trying to make people moral or to save them from themselves by law is fraught with danger and usually promises failure, often at great cost. If we cannot persuade and educate people to that self esteem which will divert them from alcohol, tobacco and other drug abuse, Draconian laws are not likely to be successful. On the contrary, the price they impose is likely to be disproportionately high. Unless we win the minds of young people to the imperative desirability of guarding their health against the consequences of drug abuse (and provide a society and economy conducive to that end) we will not have the slightest

prospect by laws and police powers to turn the tide in the new age of synthetic designer drugs.

10 Beware of Over-Reaction

And that brings me to the 10th and last Commandment. We should beware of over-reaction in laws against drug dependency. By unthinking talk of so called "war on drugs" and by enacting laws that match this "macho" approach, the experience of this century suggests we will not succeed. In the process of failing, we may dismantle the precious liberties of our citizens. It is often forgotten that in the United States and some other countries a constitutional Bill of Rights protects citizens against excessively Draconian laws and police procedures. In many other countries, including my own, there is no such Bill of Rights. In some, although there is a Bill of Rights, it may be ineffective against Draconian drug laws. The danger, then, exists of legal over-reaction and legislative over-reach. It is the message of my contribution that we should be wary about attitudes of legislative arrogance or over-confidence in drug control. A much more imaginative response to the critical problem before us is needed. This should not be beyond our collective talent.

It is also my conviction that, in matters so personal and intimate to the individual human being as decisions on drug intake, the law has only a limited and supportive role to play. Education, persuasion and public health measures are more likely to succeed in affecting the personal decisions that are involved. More time and attention should be paid, including by research, into the kind of society we want to reach, the basic

nature of the human species and the reasons that drive it to drugs of various kinds, the profile of the drug taker, and the potential of technology, education, economic pressure and political change to influence the decisions made. A sober approach of this kind is more likely to bear fruit (and is less likely to damage our liberties) than the enactment of selective punitive laws and the imposition of the death penalty on some drug merchants whilst others are covered with civil honours and become millionaires. Our watchwords must be an end to hypocrisy. Our goals must be measures that will work - especially amongst the young.

TO RECAPITULATE, IN DRUG LAWS:

1. Define clearly and realistically the object to be obtained.
2. Avoid hypocrisy and double standards in drug laws.
3. Consider and tackle the basic causes, don't just attack symptoms.
4. Facilitate the use of science and technology to combat drug abuse and its consequences.
5. Mobilize the role of effective propaganda - often more effective than laws.
6. Move to neutralize the economic forces by taxing those who cause public costs.
7. Beware of ineffective legal measures.
8. Be alert to the politics of drugs.
9. Retain your scepticism about the capacity of the over worked legal system to deliver the goods; and at all times
10. Beware of legislative overreaction and legal overreach, lest you undermine constitutionality and respect for the Rule of Law which is the cement of peaceful society.

FOOTNOTES

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Patron of The Australian National Committee for the Prevention of Alcoholism and Drug Dependency. (1985-):
Commissioner of International Commission of Jurists (1983-). The views expressed are personal views.
1. Australia, The Law Reform Commission, Alcohol Drugs and Driving (ALRC4), 1976.
 2. See eg. Australia, Royal Commission of Inquiry into Drug Trafficking (Commissioner, Justice G.D. Stewart) Report, 1983; and Interim Report No.2, Passports, 1982; Royal Commission of Inquiry into Drugs (Commissioner, Justice E.S. Williams), Report, 1980. cf Canada, Report of the Commission of Inquiry into the Non-Medical Use of Drugs (Justice G. Le Dain, Chairman), 1972.
 3. These figures were quoted on the Australian Broadcasting Corporation, National News, 6 April 1986, 12.30p.m. See also The Bulletin, 12 March 1985; National Times 16 May 1982.
 4. See eg. the editorial "The Drug Problem" in [1986] 10 Criminal Law Journal (Aust) 117.
 5. Australia, New South Wales Cancer Council, Survey reported in the Sydney Morning Herald, 7 June 1986, 1.

6. Reported in Social Science and Medicine cited Sydney Morning Herald 12 June 1986, 1.
7. ALRC4, 154.
8. Canada, Report of the Commission of Inquiry into the Non Medical Use of Drugs: (Justice G. Le Dain, Chairman) Treatment, 17.
9. See eg. (1986) 32 Alert No. 4, 21.
10. As reported in the Sydney Morning Herald, 1 March 1986, 1.
11. Broadcasting and Television Act 1942 (Aust), s 100(5A).
12. Australian Broadcasting Tribunal, Fortnightly Newsletter, 20 March 1986, vol 4 No. 17, 1.
13. ALRC 4, op cit n1, 154.
14. This proposal has been made by the Australian Democrats, announced 27 July 1986.
15. Reported in (1986) 32 Alert, No.2, 26.
16. ICPA, Quarterly, vol XXV11, No. 4 (Oct-Dec 1985) No. 4.
17. This policy was announced by the Australian Democrats, 27 July 1986.
18. (1986) 10 Criminal Law Journal (Aust) 117.
19. This point is made in the Canadian report, op cit n 8, 18ff.
20. See eg. F.Walker, "Anti-smoke case gathers strength" in The National Times, 31 January 1986, 40. See also W.A. Crawford, letter ibid, 14 February 1986, 45 referring to the comments of the United States Surgeon General (1982) and the British Royal College of Physicians (1983) on passive smoking. See also the paper presented to the conference in Nice on 2 September 1986 on epidemiological research in Japan by Dr. A. Hirayama.