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ST STEPHEN'S UNITING CHURCH, SYDNEY
5 OCTOBER 2022

HARRY HERBERT MEMORIAL ORATION

The Hon. Michael Kirby AC CMG

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*HARRY HERBERT: CHURCHMAN AND REFORMER***

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Harry Herbert 1934-2019

INTRODUCTION

It is an honour and a pleasure to be invited to deliver the inaugural memorial oration to honour the late Reverend Harry Herbert. He was an outstanding minister of the Uniting Church in Australia. He was also involved in many projects for his Church. He repeatedly demonstrated a commitment to love

* Derived from the author's Inaugural Oration delivered at St Stephen's Uniting Church, Sydney, 5 October 2022.

** Based on the author's Inaugural Oration. The assistance of officers of Uniting, with personal information on Revd Harry Herbert, is gratefully acknowledged.

*** Chairman of the Australian Law Reform Commission (1975-84); Justice of the High Court of Australia (1996-2009); Commissioner, UNDP Global Commission on HIV and the Law (2011-12).

of disadvantaged people: including First Nations People, the elderly and those in need for aged care and shelter and of Australians dependent on alcohol and other addictive or illegal drugs. In this respect, Harry Herbert exhibited love and support for people with troubles. Although faithful to his understanding of the theology of his Church, he was a churchman who put the lessons of Christianity at the centre of his life and work.

This is the first lecture in Harry Herbert's name. There is little purpose in establishing a named lecture for someone who recently died, after living amongst us, if the inaugural speaker, at least, does not survey the life of honorand. Only this will explain, for those who come later, the distinctive personality who is honoured by the oration. This is why a good part of my remarks involves a survey of the life and times of Harry Herbert, so that the wellsprings of his dedication will be recalled. That recollection will explain why, amongst many fine theologians and church leaders, Harry Herbert has been singled out for this oration, which is intended to become a regular event. In the future details of his life will not be so well known as they are today. So let them be recorded

HARRY HERBERT'S LIFE & TIMES

Harry Herbert grew up in the Christian Protestant tradition of Congregationalism. This was a denomination of English Protestantism that spread, in the 18th Century, to the American settlements of Great Britain, particularly New England. The birth of Congregationalism arose out of divisions amongst Christians, between those who favoured episcopal, traditional and ceremonial forms of worship derived from Catholicism and

Anglicanism. And those who adhered to a more people-centred theology and form of worship. These latter Faiths included the Presbyterians, Baptists and eventually Pentecostal adherents. But even these religions later split, in the United States, between the Southern Baptists and the Northern Baptists. So diversity was a feature of the Christian Faith. The Emperor Justinian famously observed that conflict between Christians was endemic and brutal.

Harry Herbert was raised as a Congregationalist. This was a denomination that specially rejected Episcopal forms of church government (Bishops, and 'bells and smells' etc). The Congregationalists spread in Australia from sources in the United States. Like the originals of that denomination, they embraced strong ideas of freedom, equality and social justice. They tended to be dedicated to ecumenism; a less rigid theology; and an early commitment to women's equality and suffrage. The source of the split that led to the formation of Congregationalists, and the growth of their adherents, was a strong resistance to the persistence and toleration of slavery in the United States and a deep commitment to social justice for all. These were a cause that came naturally to Harry Herbert in the church in which he was raised.

He was born on 2 August 1934 in the Southern suburbs in Sydney. When, in June 1977, the Uniting Church in Australia was founded he followed the decision of almost all of the numbers of the Congregational Union of Australia into the Uniting Church. By its amalgamations it became the third largest Christian denomination in Australia, after the Roman Catholic and Anglican Churches.

At the time the Congregationalists were gathering many Protestant adherents in the United States of America, many of them began to advocate a public policy of temperance, beginning in Maine. It was the first State of the United States to embrace a legally enforced prohibition on the sale and possession of alcohol and drugs. That law became known as the Maine Law. It became the model for total legal Prohibition against alcohol that quickly spread elsewhere in the nation and beyond.

Many Protestant Churches duly supported the law, and it eventually resulted in a federal enactment supported by Pietistic Protestants. The Congregationalists generally held back from this law. In Australia, after Federation, a law of similar terms was supported in 1911 by King O'Malley, federal Minister of Home Affairs and a Founder of the Commonwealth, in respect of the Federal Capital Territory. The law lasted there until repeal following a plebiscite in 1928. A few years later, Prohibition in the United States, under federal law, was also repealed. However, the legacy of the Maine Law lingered on in that country under the impetus of initiatives undertaken in the League of Nations and later in the United Nations. This legacy of thus became the progenitor of international forms of prohibition of the manufacture, sale and possession of designated drugs. The legacy persists into the modern era. However, by and large, the Congregationalists, did not support Prohibition in the United States. Harry Herbert was never convinced that it was an effective or just solution to the nuanced problems of drug use addiction and dependency.

Harry Herbert's life is worth memorialising, not only for his interests and his achievements. But also for the lessons that his life provides on

purposefulness. It teaches the way in which leaders can drive new ideas and law reform. Contrary to notable instances of religious people who propound notions of intolerance and immovability, Harry Herbert was a religious person who became a herald for tolerance, inclusion and change.

HARRY HERBERT'S EDUCATION & EXPERIENCE

Harry Herbert was admitted to Sydney Boys' High School, where he matriculated to the University of New South Wales and Sydney University before accepting a scholarship to Yale University in New Haven where early Congregationalism had flourished. In the 40 years after his Ordination as a Minister of the Congregational Church in 1972, Harry Herbert came to an ever stronger belief in justice and equality for all. This was reflected in his support for the rights of Australia's Indigenous People, including in respect of their land rights. These views were reinforced in Warrnambool, his first Church placement. Years later he explained his reasons for pursuing a vocation in the Church:

"It was a very strong call from God, confirmed by the Church, back in 1965... It was a very strong thing in my life that I wanted to serve as a Minister of the Church. Happily, I was accepted by the Congregational Church. I did my six years of training and was then ordained in 1972. [The call] was strong enough... that I can still feel it. I am pleased with that... I can still feel it... I am very pleased that [it has] lasted all this time."

After his placement, Harry Herbert served in a number of Congregational and later Uniting parishes. Eventually, he became General Secretary of the Uniting Church's Board of Social Responsibility. In that vocation he demonstrated a broad set of beliefs. They included an acceptance of homosexuality as a reality in society. He also eventually accepted that abortion was basically an issue to be decided between a pregnant woman, advised by her doctor. In the then Christian organisations, Harry Herbert found himself maintaining steadfastness in his beliefs – sometimes in the face of powerful opposition. Within Christian organisations, he found himself maintaining the positions he had embraced in his early life. He believed that his theological convictions, sources in his understandings of the Bible, provided him with a sure foundation from which to tackle the social issues of the time.

In a Christian context, Harry Herbert often found himself maintaining, with increasing vigour, a reformist path. He reminded himself and others of what he took to be the reformist position of Jesus:

“At one famous [or infamous] meeting of aged care chairpersons, after being addressed by a senior Commonwealth Government official, one Chairperson had risen to ask, “where the idea came from that Churches should look after the poor”!!! In a low but audible voice from the back, Harry suggested it came from Jesus Christ Himself”.

Even into his retirement, Harry Herbert maintained a liberal outlook in his theology. In December 2017, during a debate about the marriage equality voluntary survey, for LGBTIQ people, he adopted a posture in favour of the

‘Yes’ campaign. He and others in the United Church in Australia stood out from other Christian denominations because, unlike other Christians (and some other religions) Harry Herbert urged the affirmative vote that subsequently won a substantial plurality in the Australian electorate (61.9% of all persons voting in favour of legal and Church recognition of marriage equality).

His approach to moral questions expanded from Aboriginal rights, through women’s equality and recognition of homosexual equality to the many ethical issues raised by aged care. This was a major activity of the United Church. So his views and his expression of them became ever stronger and more influential. Even into his retirement, Harry Herbert maintained a liberal outlook on theology and Christian belief. On 6 December 2019, after Harry Herbert had died, the Moderator of the Uniting Church Synod of New South Wales and the Australian Capital Territory, Reverend Simon Hansford, said of Harry Herbert’s Christianity:

“His position was for justice, driven by the Gospel. His determination was a clear understanding of how to achieve the goals he set for himself and the Church. His capacity arose from his faith, first in Christ, then in the Church, and importantly in the call of God on his own life.”

HARRY HERBERT AND POLITICS

Harry Herbert’s religious views frequently intersected with his political leanings. His outspoken personality and expression on views about

controversial issues led to politicians coming to him for advice on political issues. He explained:

“I did join the Labor Party when I was 17, I think, pretty young. My parents were quite amazed that I had joined the Labor Party. They just thought it was unusual. That would have been in the early 1960s, just after I left high school. I belonged to the Monterey Branch [of the ALP], but I gave it up later, mainly because I realised you have to make a choice and I think a minister, who is in a political party, has got all sorts of problems”. (Religion and Ethics Report, 2012).

Reflecting off his attempt at separating his role as a minister of the Uniting Church from his political inclinations, Harry Herbert usually made a point of avoiding direct statements during to political campaigns.

”When the (1992) election campaign had begun in earnest, I had been contacted by the Deputy Prime Minister’s office, seeking that I put out a statement criticising the Opposition Leader, John Hewson’s planned changes to Medicare. ... I declined to act on the request on the grounds that I did not think it proper for Church groups to intervene directly once elections were underway. I suggested that they contact Rev. [Sir] Alan Walker who, as a retired minister of the Church, and an important public figure, had no such restraints. Later in the day Alan Walker phoned me and asked me to give him five points in regard to Medicare. I obliged and the next morning on the ABC’s AM program Alan Walker duly gave the five points. In the leaders’ debate that followed, Paul Keating made special mention of what Alan Walker had said. When

Keating was returned to office and John Hewson was defeated, I received an angry letter from a Liberal Party politician who laid the entire blame for the defeat of the Liberal Party at the feet of the Uniting Church!” (Harry Herbert, 2012).

Yet, despite his nuanced dalliances with explicit political campaigns, Harry Herbert deftly understood the role of the Uniting Church with respect to elected governments.

“I am enough of a political animal to understand that sometimes governments are in a position where they cannot change things”.

His involvement in the social and political spheres was not limited to the Uniting Church. As well as service on many Uniting Church and community sector boards, such as president of the NSW Council of Social Service, Harry Herbert sat on many NSW government committees including:

1. The Legal Aid Commission Board;
2. The ICAC Operations Review Committee;
3. The NSW Social Justice Reference Group; and
4. The Social Impact Committee for the 2000 Olympics.

He became an important and regular social face for the Uniting Church.

Perhaps Harry Herbert’s biggest political outing with a political issue was his involvement in the opening of the Medically Supervised Injection Centre in Sydney, outlined below.

HERBERT AND THE UNITING CHURCH

Harry Herbert clearly believed in pushing his theology into effective action. Inspired to combine service delivery, advocacy and research into the work of the United Church, he founded *UnitingCare*. He went on to serve as Executive Director of that body for 27 years. His vision and sound leadership have ensured that his legacy lives on in *UnitingCare*. It is one of the largest not-for-profit service providers and advocacy bodies in the State and nation. Never losing sight of his purpose, in his speech on his retirement, he noted *“I am all for strategic planning but in the end, you have still got to have the intuition of the Holy Spirit.”*

Following the retirement of Reverend Gordon Trickett in 1985, Harry Herbert was appointed General Secretary of the Board for Social Responsibility of the United Church, a role that he held until his retirement in 2012. When Harry Herbert took up the General Secretary’s Role, he was given *“a small and poorly housed unit grandly called ‘head office’. He was one of six staff working in the office. Formerly it had been a men’s shelter. One radiator only - allegedly to prevent the electrical system from being overloaded”*. Harry Herbert undoubtedly had his work cut out for him. Yet his strength as a leader is reflected by the transformation of his tiny space into a functioning unit for Uniting NSW.ACT.

One of the early things Harry Herbert achieved on the Board of Social Responsibility was addressing the *“\$6 million debt that had arisen in the aged care network [of the Uniting Church] from failed projects and un-financial*

projects". Harry Herbert organised things so that the non-working funds of each aged care centre had to be put into the Church's internal bank.

Further, early in his role as General Secretary, he became involved in the establishment of the Western Sydney Tenants' Service (WESTS). In 1988 the Minister for Housing defunded such tenancy advice services established by the previous government. The Minister claimed, in the face of protests, that Harry Herbert was involved. With regard to the defunding of these services, Harry Herbert claimed that the "*actual reason [for defunding] was that the services were staffed by enthusiastic activists who took up the cases of tenants, including those in public housing*". While protesting, Herbert met John Nicolades, who was convinced by Harry Herbert to apply for appointment as Community Services Manager on the Uniting Board. Together, Herbert and Nicolades proposed that the Board should fund a tenancy advice service to maintain the political relevancy of the issue. WESTS continued to be influential so that he felt that "*the fact I occasionally received threatening letters and phone calls from real estate agents, was proof to me [that] the staff were doing a good job*".

Harry Herbert justified his outspoken habits while representing his Church as being a modern version of the action of Christians in political situations. His advocacy, he considered, was consistent with higher Christian principles. However, it could not be directly derived from them. In this way, Church actions could be informed by more precise decisions, without getting into policy details. Harry Herbert felt that the Church's stances on social policy were "*guided by a combination of theological insight, empirical research and social liaison*".

In the weeks leading up to his retirement in 2012, a proposal was put before the Synod Standing Committee of the Uniting Church to dismiss the Board of *UnitingCare* and to abolish Harry Herbert's position. A significant effort was put by the *UnitingCare* community to resisting this move. Eventually the Standing Committee rejected the proposal. Writing wistfully about this, Harry Herbert said; "*If UnitingCare can have the same resolve in the future as it did on this occasion, its ongoing progress is assured.*" He maintained a strong faith, not only in his religious beliefs, but also in the *UnitingCare* organisation. His life was not a bed of roses.

HARRY HERBERT: THE INJECTION CENTRE

Origins of the Centre: Things got rockier for Harry Herbert during the 1999 NSW State election. The Premier of the State, Bob Carr, promised to establish a Drug Summit if elected. Following Bob Carr's election, the Summit was held. It was open to all members of the State Parliament as well as representatives from anti-drug and pro-drug groups. As a member of the NSW Social Justice Reference Group, Harry Herbert was invited to give a leading speech to the Summit. Lobbyists in favour of the establishment of an injecting room in the Kings Cross district of Sydney considered opening a room themselves to be located in the Wayside Chapel, the main Uniting Church Congregation in the area. This led the Reverend Fred Nile, a minister of the Uniting Church and Member of the Legislative Council, to call for the arrest of Reverend Ray Richmond, the Director of Wayside Chapel. This was even though both men, like Harry Herbert, were ministers in the same church at the time.

After the Summit, the NSW Government voted to implement a *Medically Supervised Injection Centre*. This was to be run by non-government organisations. Initially the Sisters of Charity were designated to be the operators of the centre. However, the Roman Catholic Archbishop of Sydney received word from the Vatican that a Catholic organisation could not be involved with this sort of centre. Following this message, Harry Herbert received a call from ABC Radio asking if the Board of Social Responsibility of the Uniting Church would take over as operator of the Centre. He said the Board would consider it. He was soon contacted by John Della Bosca, the State Minister in charge of implementing the Centre. Harry Herbert set about finding a location for the proposed centre. Eventually, this was found by Reverend Ray Richmond at 66 Darlinghurst Road, Kings Cross, in the middle of Sydney's red light district,. Although the owner of the proposed building, George Senes, had no personal objection to the establishment of the Centre, he ultimately rejected the proposition on the ground that "his colleagues in the Kings Cross Chamber of Commerce and Tourism were opposed". In 2012, Harry Herbert declared that; "*The Kings Cross Chamber of Commerce and Tourism was a strange organisation*" (Herbert, 2012).

Never one to take a backwards step, Harry Herbert attended a meeting of the Chamber at the suggestion of Senes. The latter was hoping to rely on the former's reputed skills of persuasion in order to overcome the negative response from the Chamber. Of the meeting, Harry Herbert wrote; "My sermonising skills did not cut much ice with the various brothel operators who probably feared that some of the sex workers might become influenced by Centre staff". Despite this, Senes ultimately agreed to sub-lease the building. The Chamber thereupon announced legal proceedings in the NSW

Supreme Court to prevent the opening of the Centre, arguing that the Uniting Church was not a suitable operator and it was against the law. The Court found against the Chamber, with costs. Its orders were subsequently pursued by Uniting who eventually obtained a Supreme Court Order for the winding up of the Chamber. This showed that Harry Herbert could sometimes display the elements of reputed unforgiving passion attributed to the ALP.

The Sydney Injecting Centre (MSIC) opened in May 2001 for an 18-month trial. This was subsequently extended to October 2007, extended thereafter. Harry Herbert described the opening as receiving “The minimum of fanfare”. However, he noted that reporters from the *Sydney Morning Herald* newspaper, had booked a hotel room across the road from the Centre and set up a large camera. The occupants of the hotel room were seen to be napping and watching football throughout the first day.

Impact of the Centre: As one former client of the Injecting Room said later; “Before the Injecting Room the conditions in Kings Cross were a bit like the ‘wild west’. There were a lot of overdoses. People were shooting up in parks, public toilets, in pubs, [and] stairwells of blocks of flats. Just anywhere you could get five minutes peace to actually have an injection.

Harry Herbert later described what happened;

“Although the Injecting Centre is only a small part of the work of Uniting, it has sent a strong message about Uniting’s willingness to undertake adventurous projects and to reach out to marginalised people, illicit

drug users are probably among the most marginalised people in modern society. They seem to have made their own choice and few people have any sympathy for them. This prejudice overlooks the complications of people's lives and the circumstances in which people become trapped in drug use”.

A study of community perceptions of the Centre indicated that “the proportion of nearby residents who had opposed a public injecting facility, within the last month, had declined from 33% in 2000, to 19% in 2005. Moreover the study found that 90% of residents surveyed could identify at least one advantage of having the Centre located in the area, reflecting the importance of the Centre not just for drug users, but also for the wider community.¹

After 21 years of the Centre from these times, and the significance of its coming of age, its progress was recognised by Clover Moore, Lord Mayor of Sydney. She handed over the keys to the city to the Centre. In those 21 years, over 11,000 overdoses were managed, with zero deaths in the Centre. People have been supported in their broader wellbeing though 20,000 referrals to health and welfare services.

Dr Marianne Jauncey, Director of the Centre, believed that it would not have opened without Harry Herbert's “vision, his unwavering steadfast commitment to doing what was right. He believed it was right because it was about reaching out to support and help people who had very little of that help in their life”.

¹ Salmon et. al., (2005).

When asked about Harry Herbert's involvement with those using or working at or near the Centre Dr Jauncey remarked that Harry Herbert "was not a warm and fuzzy type. ...

"He did not believe in unnecessary meetings or guff and twaddle and chit chat. He believed in getting it done. And that is why those of us who admired and respected him, did so with such gusto." The marked success of the Centre is a direct result of Herbert's drive to support the disadvantaged in society, a drive that lives on in those working at the Centre to this day."

The event celebrating the 21 years of the operation of the Centre described it as:

"It has become part of the fabric of the broader Kings Cross area. The celebratory event drew together hundreds of people from all sides of politics, Uniting NSW.ACT, the Churches, the wider community and people who have used the Centre or whose lives have been directly affected by drugs and overwhelmingly helped and supported by the Centre."

DECRIMINALISATION OF WIDER DRUG USE

Impact on Australian Law:

There are so many topics to address in the controversial and often inert areas of drug law reform within Australia that it is impossible to do more than

outline some of the main recent developments. So far as the situation of drug reform within Australia, the following may be noted:

- * According to serious investigations, using the presence of THC in the blood and saliva of a suspect as a measure of cannabis impairment is increasingly regarded as suspect;²
- * A notable feature of legislative programs throughout Australia has been the growing support for, and success of, legalisation on the decriminalisation of possession and use of small quantities of cannabis, initially for medical use, certified by a duly qualified medical practitioner;³
- * The rollout of the take home national NAL-Oxone preparation so as to address the national epidemic in overdoses of prescribed drugs needs and to ensure that they can to be evaluated scientifically . This phenomenon, which is second in the leading cases of death for all ages and genders (second only to suicide for those in their 30s) constitutes a huge cost burden upon the healthcare system; and a burden upon ambulance services; out-patient hospital resources; and human and family lives;⁴
- * The alleged inadequacy and slowness of the response of the New South Wales Government to the Special Commission of Inquiry into the Drug “Ice” (Crystallised methamphetamine) shows how much

² “THC in blood and saliva are poor measurements of cannabis impairment”, University of Sydney News, 2 December 2021; <https://www.sydney.edu.au/news-opinion/news/2021/12/02/thc-blood-saliva-poor-measures-cannabis-impairment-lambert-study.html>

³ “First comprehensive study reveals why Australians take medicinal cannabis”, University of Sydney, 10 May 2022, <https://www.sydney.edu.au/news-opinion/news/2022/05/10/why-australians-take-medicinal-cannabis-.html#:~:text=Since%20the%20beginning%20of%20the,for%20a%20medicinal%20cannabis%20prescription.>

⁴ “Take Home Naloxone Program, New South Wales Health website, <https://www.health.nsw.gov.au/aod/programs/Pages/naloxone.aspx#>

easier it is to establish an inquiry and how difficult it is, for some with power, to follow-up the informed recommendations that later emerge;⁵

- * The expression of medical and other access to cannabis (there have been more than 250,000 scripts written since 2016) appear to indicate that more substantial changes in the imposition of serious criminal punishments, need to be considered. Decriminalisation of the trafficking, sale, possession and use of illegal drugs are hard to reconcile with the international prohibitory statutes enacted by the Federal Parliament pursuant to Australia's participation in international conventions. These conventions suggest that use by the Federal Parliament of the external affairs power provide for abolition or modification of applicable international norms need to be considered if our increasingly disjointed approach towards prohibition and regulation is to be rendered effective and worthy of respect;⁶
- * Mobilising the rising recorded community support for the introduction for extensive decriminalisation of some drugs for personal use likewise needs to be considered afresh. The New South Wales Bar Association in 2022 issued a strong statement in the name of its President, Michael McHugh SC, urging substantial change. The Bar's voice is scarcely that of fire brand radicals;⁷

⁵ *Report by the Special Commission of Inquiry into Crystal Methamphetamine and other Amphetamine-type Stimulants*, 28 February 2020, International Drug Policy Consortium (IDPC); <https://idpc.net/publications/2020/02/report-by-the-special-commission-of-inquiry-into-crystal-methamphetamine-and-other-amphetamine-type-stimulants> . See also, Alex Wodak,, "NSW Cabinet responds to a Special Commission of Inquiry into the Drug Ice", *Pearls and Irritations, John Menadue's Public Policy Journal*, 7 December 2020, <https://johnmenadue.com/nsw-cabinet-responds-to-a-special-commission-of-inquiry-into-the-drug-ice/>

⁶ *Bulletin*, Penington Institute, June 2022; <https://bulletin.penington.org.au/issues/june-2022/drugs-and-the-2022-federal-election/> . Also see Joe Hinchliffe, "The Noosa Yacht Club member who led the Hemp Party to its best result yet in Queensland, *The Guardian*, 25 May 2022, <https://www.theguardian.com/australia-news/2022/may/25/the-noosa-yacht-club-member-who-led-the-hemp-party-to-its-best-result-yet-in-queensland>

⁷<https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c4439451/attachment/drug%20law%20op%20ed%2010.12.20.pdf> .

- * The increased use of diversion strategies rather than punishment for particular users, including juveniles, and the growing support for the “don’t punish campaign” needs to be evaluated. Already, political candidates favouring reform of drug laws have begun to gather respectable votes in Australia’s national and state elections; and⁸
- * Increased calls to support the availability of vaping as a more effective response to reducing its still substantial addiction to the use of tobacco, needs to be considered in the place of prohibition. A fair-minded review of the above evidence of significant changes in attitudes and policies (even laws) towards drug use indicates that the days of strict prohibition and criminalisation appear to be drawing to a close.⁹

International Legal Rules

At the international level, although not exhaustively, a number of further developments have occurred that deserve consideration:

- * To address the shocking levels of punishment in countries of our region upon conviction of people, including of Australian citizens (sometimes with the death penalty) in an apparently futile endeavour to deter people from drug related crimes needs to be considered. Since 30 March 2022, 10 prisoners have been executed by Singapore in what observers have described as a “killing spree”. At least one of those

⁸ Naomi Neilson, “NSW ‘long overdue’ on important criminal justice reforms”, *Lawyers Weekly*, 20 March 2022 ; <https://www.lawyersweekly.com.au/biglaw/33924-nsw-long-overdue-on-important-criminal-justice-reforms>. Also see Jarryd Bartle, “Legalise Cannabis Australia did well at the ballot box – but reform is most likely to come from a cautious approach” *The Conversation*, May 23, 2022; <https://theconversation.com/legalise-cannabis-australia-did-well-at-the-ballot-box-but-reform-is-most-likely-to-come-from-a-cautious-approach-183612>

⁹ Geoff Gallop, “Should we decriminalise drug use? The evidence is in”, *Pearls and Irritations*, November 12, 2021; <https://johnmenadue.com/should-we-decriminalise-drug-use-the-evidence-is-in/> .

who was convicted and executed in this time was a person who reportedly described as suffering a severe cognitive deficit. International pressure appears to have helped secure the long withheld promise of repeal of s377A of the *Singapore Penal Code*, providing for the criminalisation of LGBTIQ offences. To some degree the highly punitive and disproportionate approach to the punishment of drug offences goes hand in hand with the similar strategy, until now, used by countries like Singapore, to try to stamp out same sex activity although occurring in private, involving adults and affecting almost exclusively the users involved;

- * Action is required on the report of the Global Commission on Drug Policy: *Time to End Prohibition* and on the United Nations Development Programme's Global Commission on HIV and the Law: *Risks, Rights and Health*. Each of these reports, addressed to the international community by respected signatories, needs to be reconsidered, so as to advance a substantial overhaul of drug offences worldwide. Generally speaking those offences derive, through international treaties and policy, from the "Maine Statute" in the United States. They now face an increasing body of opposition, including in the United Nations itself;
- * Action is needed on recommendations of the World Health Organisation (WHO) and other UN agencies for a concerted move towards a new drug control framework based on evidence and principles of science, rationality and proportionality rather than the shaky reliance on deterrence, ironically pressed upon the world by the United States of America. It largely invented the modern Prohibitory policy of prohibition. When, in respect of alcohol, this policy was seen

to have failed (and to have had huge deleterious consequences in the United States) it was repealed in a rare further constitutional amendment in that country. Yet the global community, instead of adopting more rational strategies and more effective policies, continues to cling to the prohibitory model. Increasingly, this demands reconsideration, and national and international reform.

- * Important national reforms have been introduced in countries that hitherto were major supporters of the prohibitory - deterrence model for responding to drugs. These include new laws in Thailand in respect to personal cannabis use and in at least one Canadian Province in respect of defined quantities of cocaine, opioids and ecstasy. The changes in those countries (and others) provide the global community with effective comparators to be contrasted with the highly punitive model of responses to drug involvement that tend to fill prisons and impose huge costs when compared to new strategies now being gradually introduced;
- * On top of arguments based on rationality and proportionality, countless international and national investigations have demonstrated the utility of abolishing punitive approaches for the related necessity to reduce the spread of HIV and AIDS as well as other infectious diseases. If such diseases are driven underground by the imposition of extremely severe punishments enhanced by large social opprobrium, strong evidence demonstrates that the result is highly unfavourable to the containment of viruses which must look to different strategies.

Injecting Centre to New Society

Addressing any of the foregoing strategies, international and national is not easy or without serious political difficulties. However, such difficulties were confronted boldly by Harry Herbert and those brave few with whom he worked in setting up the medically supervised injecting Centre in Sydney. However, since the creation of that Centre, Australia's moves in the direction of further reform of drug laws and policies has substantially been "sluggish".

A good instance of the difficulty, sensitivity and uncertainty that attends drug use decriminalisation and law reform can be found in considering the way Australia treats the Foetal Alcohol Spectrum Disease (FASD). Recent articles in medical literature suggest that there is a direct relationship between the conduct of women who ingest alcohol during pregnancy and the development of FASD in their children. In fact, natal exposure of the foetus to alcohol is considered one of the main causes of preventable human birth disorders. FASD constitutes the main form of developmental delay and of secondary disabilities. There is also an established connection between the behaviour of significant numbers of children with FASD and early criminal behaviour. Over the past two decades, young women who are pregnant have been strongly warned by their doctors of the need to avoid consumption of alcohol during and before suspected or established pregnancy. The cost to the public health system of reversing support measures provided to the affected individuals and support for their family needs have to be weighed in a rational and proportionate manner by a society seeking to address the consequences of this drug use in a way that will work.

It is a truism that, as a drug, alcohol has very great health, social and other disadvantages. Yet it is widely available. It is enjoyable and even possibly beneficial, consumed in small quantities. What, therefore, is to be done by society and its laws to respond to FASD? Is this the ultimate illustration of the need for society to persist with a prohibitory response?

Some of the restrictions imposed by the so-called federal “Intervention” in the Northern Territory of Australia under the *Northern Territory National Emergency Response Act 2007* (Cth) and related laws was challenged before the High Court of Australia in 2008-9. The decision in that case was the last in which I participated in that Court. Judgment was delivered on the very day of my judicial retirement, on 2 February 2009.¹⁰

The justification advanced by the then federal government for the severe intrusions into the privacy, freedom and dignity of First Nations people in the Northern Territory were advanced by reference (amongst others) to the impact of alcohol consumption on their children; the increased consumption of other unhealthy foods; and the access to otherwise legal pornography in Aboriginal communities in the Territory. A basis for the challenge to the constitutionality of the Intervention rested on the alleged failure of the federal laws, purporting to enact what was done, to provide for “just compensation” to those affected and their property rights. This was expressed in monetary terms. However, as I pointed out, the requirement imposed on the Congress by the US Constitution for confiscation or disturbance of property rights is to provide “*just compensation*”. However, the Australian Constitution uses

¹⁰ *Wurridjal and others v The Commonwealth of Australia and Anor* (2009) 237 CLR 309.

different language. In Section 51 (xxxii) it obliges any such “acquisition of property” to be effected “on just terms” to be lawful. I concluded that “*just terms*” required proper consultation with the First Nations people affected by the Intervention. This was also the course recommended by an independent inquiry conducted prior to the Intervention. In fact, there was no relevant consultation. Accordingly, I concluded that the obligatory of affording “just terms” was not respected. The Intervention was therefore invalid and the Intervention unlawful.

The majority decision in that case demonstrates the probable lawfulness of intrusive conduct to prevent the harmful effects of drugs, so long as constitutional obligations are observed. However, what should be done in the case of young mothers, who are pregnant who ignore medical advice and school education concerning the serious dangers of FASD? Does the recent medical research now warrant invasive laws to protect the mother, child and community? Or would this amount to the reintroduction of a form of drug related Prohibition. A legal experiment that failed in the United States by reason of its excessive punishments and disproportionate burdens may be constitutionally permissible even though adopting a legal strategy repeatedly shown to be ineffective and counter-productive.

Complexity, Consultation and Courage

Harry Herbert appreciated the intense difficulties of achieving drug law reform in a country like Australia. But he also understood the injustice of doing nothing and the need for steady progress on the path to decriminalisation. For him, criminal prohibition was disproportionate and ineffective as well as wrong in principle. Courage on the part of Churches,

legal and political leaders, scientists and civil society is a requirement for a policy that “works”. In his election campaign, in 1995 Mr Carr promised that, if elected, he would convene a drug summit because standing still was not, in his view, a viable option. He offered speakers at that summit, including himself, strictly limited time to get their messages across. He offered Harry Herbert, only 15 minutes to address the participants. Yet Harry Herbert’s remarks contributed to the achievement of one of Australia’s most important, and early, successes (the Medically Supervised Injecting Centre) on what is otherwise a fairly discouraging landscape.¹¹

I have now enjoyed 3 or 4 times the allowance granted to Harry Herbert at the Drugs Summit in 2000. Yet important consequences flowed from his remarks. It is important for all of us to translate words and aspirations into action.

I hope that these words of mine will support the collection of further intelligence, rationality, proportionality and courage amongst citizens of influence. Harry Herbert had such qualities in abundance. We will do well to reflect on them, and to follow them in drug law reform and in other vexing quandaries that we face. Harry Herbert is certainly deserving of a memorial oration. His life is inspiring. We honour ourselves, by honouring him.¹²

¹¹ On 21 October 2022, after this Oration was given, the Legislative Assembly of the Australian Capital Territory voted to decriminalise possession of a range of commonly used illicit drugs such as cocaine, heroin, amphetamines and ecstasy. Polling in the ACT showed that nearly 80% of the ACT community supports health and welfare responses instead of criminal law and punishment. See *Uniting NSW ACT Medical Release*. See also Alex Wodak “The ACT legislated to decriminalise possession of personal quantities of illicit drugs”, *Pearls and Irritations*, November 10, 2022.

¹² M.D. Kirby “HIV and HCV Epidemics, Lessons for Lawyers and Policymakers” (2018) 26 *Journal of Law & Medicine* 1.