Contemporary Issues in Cannabis Policy

This comment is devoted to several of the papers initially presented at a recent Institute seminar "Cannabis: What Role for the Criminal Justice System?"

Drug policies are not a recent invention: around the tenth century Persian writers were warning of dangers of consumption of opium, and China promulgated its first edict against opium in 1729.[1] Western societies first became concerned about abuses of alcohol, at the beginning of the seventeenth century, when public drunkenness was made a criminal offence,[2] but laws about other substances began to emerge only 100 years ago.

The contemporary pre-eminence of a "crime control" model of drug laws is more recent still. At the beginning of the present century, opium "prohibition" laws were passed in Canada, Australia and California in response to (racially based) concerns about Chinese immigrants drawn by the lure of gold discoveries in those places.[3] Coverage of substances apart from opium originated with the revenue focus of late 19th century customs legislation.[4] This was supplemented, in the 1920s in particular, by expansion of measures to control accidental poisonings and the abuses associated with the highly popular "patent remedies" (this became symbolic of the struggle for professionalism by the emerging pharmacy industry).[5] The pattern of development in fact reflects many different influences.[6]

The papers in this issue of the journal mark a maturing of public debate on cannabis policy in Australia, which places it towards the forefront of international dialogue on the subject. They chart developments in research and applied policy which lead to some optimism that policy and practice — so often at cross purposes on such questions — are moving in harmony. Not least this is because there is a recognition that rational analysis is only one element in the debate: cannabis policy, in common with other contested public policy issues, involves a balancing of academic analysis with political judgment. This is a real strength in this collection.

Each of the papers, in its own way, recognises that a pure "crime control" model for responding to cannabis has now been shown to be less than the ideal choice. This is because it necessarily entails acceptance of artefactual consequences such as: high rates of property crime and violence (to purchase drugs on the black market and to protect supplies), an erosion of civil liberties (because drug use is quintessentially "private" activity), heavy burdens on the criminal justice system, and corruption.[7] This is not new of course; what is new is the prominence given in these papers to a consideration of the "citizenship" dimension: the appreciation that cannabis users are people first and foremost.

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1 Neligan, A, *The Opium Question: With Special Reference to Persia* (1927) at 5–7.

2 (1606) 4 Jac 1 c 5 (The Preamble referred to the "loathsome and odious sin of drunkenness" and its multifarious social consequences).

3 Generally: McCoy, A, *Drug Traffic: Narcotics and Organised Crime in Australia* (1980), ch 1.

4 Carney, T, "The History of Australian Drug Laws: From Commercialism to Confusion?" (1981) 7 *Mon U LR* 165 at 174–6.

5 Haines, G, *The Grains and Threepen'orths of Pharmacy: Pharmacy in NSW 1788–1976* (1976).

6 Manderson, D, *From Mr Sin to Mr Big* (1993).

7 Moore, M, "Legislative Change in the Australian Capital Territory", in this issue of *Curr Iss Crim Just.*

Although it is much more open to debate (with serious support for radical repeal options), there also appears to a growing consensus on the policy options with serious prospects of replacing the crime control (prohibition) model. Much energy is taken up in assessing the respective merits of two reform alternatives. First there are the advocates of "prohibition coupled with a minor civil penalty" (the so-called "expiation" model in South Australia and the Australian Capital Territory). Secondly there are the defenders of what may be called the "very soft prohibition" model: where the criminal offence remains as the basis for a court appearance, but the court is directed to impose a small fine without recording a conviction. The latter operates in Victoria and is proposed for Queensland.

Both of these reforms have attracted a pretty favourable political and research press. They meet the test of political viability, and they appear to deliver a (significant) net gain in terms of overall policy outcomes (the incidence of use appears little changed, and there is progress in reducing the "artefactual consequences" outlined earlier). But the two options are not identical. Expiation, which avoids resort to court (being a form of "diversion scheme"), must contend with evidence that it expands the number of people caught in a legal net (net-widening). This is one of Sarre's concerns.[8] And it can be argued that it is less "accountable" (or has lesser legitimacy) than is the case when courts are the auspice. Yet the alternative option appears more heavy handed (the stigma of a court *appearance* is maintained) and the economic and social costs of reliance on judicial processing remain.

The greatest cause for optimism about the maturity and responsiveness of Australian cannabis policy is that in a comparatively small federation, there are 3-4 jurisdictions which have developed a body of experience about the impact of moving away from outright reliance on the crime control model (despite their size, the two North American federations are a legal monoculture by contrast). As the papers in this collection demonstrate, Australia also has a good track record in evaluating outcomes of those policies,[9] and a real commitment to grounding policy in a firm empirical base.

Moreover, there is both a breadth of vision about the way in which the form of the criminal law connects with other policy arenas, and a recognition that policies have unintended effects — such as that expiation reforms are offset by (unnecessarily harsh) escalation of penalties on other allegedly more serious drug offences (such as low level trafficking) which in fact impacts predominantly on the user population.[10] Sound policy looks not to the warm inner glow sometimes conveyed by inspecting the "law on the books" but goes on to assess the working out of that law in all the areas affected. Criminal law cannot be viewed in isolation: its impact on public health goals, its effect on the status of people as citizens, and its "workability" at a practical level, must all be factored in.

The remaining of the main themes captured in this collection can in part be conveyed by way of (highly simplified) synopses. Hall's[11] paper, in the course of a very thorough review of the literature on the effects of cannabis, makes the important point that of course there are adverse effects of cannabis use, but these are not major when judged against other benchmarks. The paper by Sarre,[12] for its part, demonstrates that there are working

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8 Sarre, R, "The Partial Decriminalisation of Cannabis", in this issue of *Curr Iss Crim Just*.

9 Ibid.

10 Ibid.

11 Hall, W, "The Health and Psychological Effects of Cannabis Use" (1994), in this issue of *Curr Iss Crim Just*.

12 Above n8.

examples of alternative policies, and that these policies are attractive when compared with the criminal prohibition option. As Moore's contemporary comment[13] convincingly shows, there is political acceptability in the reform agenda. Finally, the findings of the Queensland Criminal Justice Commission[14] shows that there is a strong enough case for preferring the Victorian model of reform to that of South Australia and the Australian Capital Territory, for the policy choice to be a meaningful one.

The papers in this issue debate a concern which is of contemporary interest. Reform has been advocated by bodies as diverse as the organs of the legal profession, the Australian Medical Association, prominent citizens and a bipartisan drug reform coalition drawing on practising politicians from all parties and all levels of government. Debate in the past has been something of a dialogue of the deaf: propositions have been too abstract, too emotively cast or too widely divergent for the prospect of measured debate to be feasible. This collection marks a very welcome change in the tone of debate.

While critics will (rightly perhaps) charge that the present territory for debate is but a staging ground on the way to a more convincing final policy position, the answer which would be given here is that this is a choice between the achievable and the pipe dream. On that rather irreverent note I commend the papers for consideration.

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13 Above n7.

14 *Report on Cannabis and the Law in Queensland*, June 1994, Queensland Criminal Justice Commission.