

# Alcohol and Drug Foundation

## “Drugs policy – restrictive or laissez faire? – a judicial perspective”

Winter School in the Sun Conference Dinner  
Carlton Crest Hotel  
Wednesday 4 July 2001  
6.30 for 7.00 pm

### **The Honourable Chief Justice Paul de Jersey AC**

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The period of my sixteen years’ judicial experience since 1985 has regrettably featured the proliferation of drug crime. This crime was not very evident in the courts of the early 80s, but is now dramatically so. Dealing effectively with drug offenders has involved very real new challenges for the courts. I doubt that any judge would, with confidence, contend that traditional approaches to punishment, when applied to much drug crime, have clearly produced, for example, the fundamentally important deterrent effect.

While the courts continue to take a stern approach to the production, importation and supply of dangerous drugs – and rightly so, there has been a discernable shift over the years in the court’s response to addicted users of drugs. There has been retreat from the goal of retributive punishment, with the crystallizing of a keener focus on the goal of rehabilitation.

The diversionary “drug court” innovation based on a US model, provides a Queensland example of that; though it must be said that natural compassion (alongside a conscientious assessment of what the community really needs) has for a long time now compelled Judges to try to help alleviate the problem of addiction rather than risk exacerbating it through exposure of the addict to a prison regime.

Another commendable recent initiative focussing on rehabilitation rather than punishment is the Police Diversion Programme, under the framework of s211 *Police Powers and Responsibilities Act 2000*: a person found in possession of not more than 50 grams of cannabis is given the opportunity to attend a “drug diversion assessment program” as an alternate to being charged.

It appears to me that persons are not invariably prosecuted for just the personal use of drugs – if that is all that occurs. One quite frequent complicating circumstance, however, is the involvement of a user in production or supply as part of the process of maintaining his or her own habit. It can be very difficult for a sentencing judge to craft a sentence appropriate to such a case, a sentence which

may help wean the offender away from the drug scene, while still sending a sufficiently salutary message to other potential offenders.

In short, sentencing drug offenders does uniquely challenge the courts of law, and that is essentially because the goal of rehabilitation can, with this crime, assume a prominence not present with other crime. As an obvious contrast, take a crime of violence, where the offender is moved, not by an addictive attraction to the misconduct, but by the passion of the moment.

These sorts of concerns have prompted me, over the last couple of years, to look at the drugs policy obtaining in other jurisdictions, particularly Switzerland last year, the Netherlands earlier this year, and most recently, the United Kingdom and Sweden. Court sentencing aside, I have been interested to look at their experiences in the context also of initiatives in our country in relation to heroin injecting rooms and the like.

Queensland has a major drug problem, but is certainly not alone in that. It is regrettably typical of many supposedly sophisticated western societies. While the responses of the courts of law may inhibit escalation of drug problems, it seems unlikely that we are effectively reducing them. The Swiss and the Dutch have dwelt much more radically than we have on the maintenance, and if possible rehabilitation of drug offenders, and their injection room and heroin prescription programs illustrate that; the English and the Swedes take a more conservative, restrictive line.

Perhaps surprisingly given their intriguing notoriety over many years, it was only this year that I personally first came to visit one of the multitude of the so-called “coffee shops” of Amsterdam. These are the cafes where the proprietor may sell any person over the age of 18 years up to five grams of what the Dutch regard as “soft drugs” – the cannabis derivatives marijuana and hashish. It may be used on the premises or taken away. I should at once vigorously assure you that I visited

this coffee shop, accompanied by a guide from an official drug agency, solely in order to gain some educative instruction as to their mode of operation!

This particular shop was fittingly named “Paradox”. While the use of drugs is not an offence under Dutch law, their production, importation, sale and possession are. And so paradoxically in the coffee shops, the official authorities turn a blind eye to drug transactions.

The approach is one of expediency. It is apparently based on these important assumptions: that cannabis is less harmful than tobacco and alcohol, that users of cannabis do not from that base progress to harder drugs, and that the activity of coffee shops will in fact be confined to the sale of cannabis – that is, that they will not be used as a front for dealing in harder drugs, as apparently does sometimes occur. Interestingly, the risks one might think inevitably would be associated with the culture of such coffee shops have led, in the Netherlands, to an official campaign to reduce their numbers; although I did read recently of a proposed “drive in” facility for such purchases at one Dutch centre. I personally felt the “coffee shops” were a blight on the otherwise lawfully seductive amenity of Amsterdam, and I sensed the local people found them something of an embarrassment.

The Dutch “coffee shop” phenomenon raises the issue, quite regularly mentioned here, whether criminalization of the possession and personal use of cannabis is an appropriate policy. Some people use this drug to alleviate pain – and that is the subject of clinical trials currently being undertaken by the British government.

Marijuana use, we are blandly assured, is generally wide spread in our own community. But it is I believe reasonably clear that the use of cannabis can be detrimental: it can reduce cognitive functioning and dull the senses, and so for example impair the ability to drive a motor vehicle, it can exacerbate mental health conditions, and involve cancer risks. It is not, in short, a benign drug, and there is a view that the studied development over the last 10-15 years of plants with a substantially higher THC content has rendered it even less so.

In my own judicial experience, I have seen many destructively serious drug users who “began” with the less serious marijuana, although I acknowledge that it may in many cases be difficult reliably to link that beginning with what may have followed: that is, to conclude that marihuana has been a “gateway” drug. I think it inevitable however that the sort of official sanction associated with the Dutch “coffee shop” phenomenon would tend to portray or “popularize” marijuana as a very usual part of ordinarily daily life. Would we want that here? The chords of substantial community response in this State do not, to my hearing, resonate with demands for such a thing. Most people would certainly always be concerned to see younger citizens who use marihuana being proceeded against in the criminal courts, even allowing for the courts’ wide discretion not to record convictions. And one must acknowledge that criminalising the use of cannabis will, to some, give it the flavour of “forbidden fruit”.

I deprecate, by the way, nomenclature which downgrades the harmful aspects of unlawful drugs. To speak of “soft” drugs, and the “recreational” use of drugs, will confuse some impressionable and vulnerable people. Recreation is supposed to be productive, beneficial. Such misuse of language is mischievous and unhelpful.

It does seem reasonably clear, from what all presently know, that cannabis sits towards the lower end of the scale of deleterious drugs. But that, and the apparent prevalence of its use in the community, and the other matters to which I have just referred, should not rationally necessitate or justify the decriminalization of its use. Neither, I believe, should the lawful availability of tobacco. Neither, again, should the circumstance that the misuse of alcohol can tragically lead to

crimes of violence, domestically especially. Many would also ask why this community condemns, with force of law, drugs like cannabis and opium which have for long been accepted features of in a way, less sophisticated though ancient, cultures. Local, current cultural considerations are important. The centrally relevant question to my mind, at the present time, is why add to the panoply of possibly harmful substances already lawfully available?

The Dutch experience did nothing to persuade me that we here should lower the bar. The lack of convincing proof, to the level of science, that substantial marijuana use is not potentially deleterious, and that exposure to marijuana is not likely to introduce the user to a culture where he or she may progress to the more pernicious substances, does in my own personal view warrant the retention of our present approach. I express only a personal view on this although I would hope it be accepted as objective and informed; the ultimate decision in these matters is for the community through its parliamentary representatives.

There is another related matter. For purposes of the *Drugs Misuse Act* 1986, there are included, in Schedule 1 to the *Drugs Misuse Regulation* 1987, four drugs, such that offences involving them attract the higher maximum penalty levels upon conviction. Those four drugs, undoubtedly demonic drugs, are cocaine, heroin, lysergide and phencyclidine. There is now a well-informed and widespread view that methylamphetamine, currently a Schedule 2 drug, should be reclassified into Schedule 1. There is no doubt methylamphetamine is a powerful drug of addiction, with possible consequences of psychosis, aggressive behaviour and suicide. The Queensland Crime Commission reported last November, after considerable research, that “amphetamine has overtaken heroin in terms of the level of risk it poses to the Queensland community”. On 11 May this year, the Far Northern Judge, the Hon Justice Jones, in the Supreme Court at Cairns, sentencing an offender for aggravated production of methylamphetamine, called for the legislature’s reconsideration of the classification of methylamphetamine. More recently, the Judge who manages the Brisbane criminal list, the Hon Justice Mackenzie, raised similar sentiments. I support their call. The Judges of the

Supreme Court have collegially invited executive reconsideration of this classification.

I turn now to radical aspects which the Dutch and Swiss approaches share: publicly facilitated premises where addicts may inject their own unlawful drugs, and publicly funded programs by which the State provides heroin to intractable heroin addicts. These are measures startlingly contradictory of our own traditional approaches to law and order. Interestingly also, they depend in those countries on police tolerance and cooperation. Police in our jurisdictions are sworn to uphold the law, not turn a blind eye to its contravention.

The injection rooms I visited in Amsterdam, Zurich and Berne all witnessed, daily, the commission of numerous criminal offences – being the possession and use of heroin. But those criminal offences are not the subject of prosecution. That is explained in part by a police acceptance in those countries that it is preferable for addicts to use drugs under supervision in hygienic circumstances, rather than unsupervised in parks and other public places where wider nuisance may result. The paradox reaches a zenith under the State heroin prescription programs, with the State itself acting as the “supplier”.

I delivered a paper at Bond University on 11 March last year in which I described in considerable detail the Swiss programs and the problems associated with their possible translation to Australia. That paper may be read on the Supreme Court’s webpage at [www.courts.qld.gov.au](http://www.courts.qld.gov.au). I will not tonight rehearse that detailed consideration.

The radical Swiss and Dutch initiatives should I believe be viewed in their particular historical context. They were borne of the internationally highly visible fiascoes of the 1980s needle parks of Zurich and Berne with a rampant drug problem including escalating overdosing deaths and related major crime, drastic problems which the Swiss realized warranted drastic responses.

The current initiatives in Switzerland especially, command apparently substantial public support – significant coming from the naturally conservative Swiss, and that is the result of widespread public acceptance that desperately intractable drug addiction demands a compassionate public response. Neither the Swiss nor the Dutch would see their drug approaches, with their toleration and radical innovation, as indicative of any open slather policy of broad band drug tolerance.

I have already suggested a personal view that there is not here a case for the decriminalization of presently unlawful drugs. I am certainly not persuaded that it would be good for our community to follow, in that regard, the experience of the Netherlands. I find the issue of the provision of what I have termed “radical” facilities for the intractably addicted – the so-called “safe” injection rooms and the State heroin prescription program, more difficult. There has in other parts of Europe been a tendency to follow the Swiss model. It is also under consideration elsewhere, for example, in Greece.

Whether the Swiss and the Dutch measures in those areas would translate effectively to Australia cannot I believe yet be answered. Significantly, the changes to drugs policy in those countries over the years have been the subject of referenda in Switzerland, and regular public survey in the Netherlands. In Australia we have not experienced the significant historical events to which I earlier referred, events which in a way prepared the Swiss to accept a need for dramatic responses.

We also here hold a generally conservative, traditional approach to law and order which may baulk at the permissive pragmatism and laissez-faire expediency which characterize the Swiss and Dutch programmes. These distinctions render it doubtful we would here achieve the public support for such approaches which has helped assure their acceptance and effectiveness in those parts of Europe.

But we should nevertheless remain vitally interested in such initiatives. We have, as I have said, our own sophisticated multi-streamed anti-drugs programs. We have had for years, and they have been monitored and refined. But as the

programs have remained, so has the problem. This in itself suggests that we should not be averse to considering creative and possibly even radical new measures.

The Swedes, I should say, would urge great caution. Their liberal drugs regime of three decades ago has since been transformed into one which is restrictive. There is a highly controlled methadone programme, but the Swedish authorities would

strongly reject any suggestion they should adopt more radical approaches. Some statistics suggest their restrictive policy – aimed at what they concede is the ideal of a “drugs free” society – is working. For example, *News Weekly* of 28 August 1999 reported likely lifetime prevalence of drug use in Sweden, based on present use, as 9% for 16 to 29 year olds, contrasting with as much as 52% for Australia’s 14 to 25 year olds. Sweden is commendably concerned that the tenor of any official message be one of unambiguous opposition to the use of unlawful drugs. That regime’s volte face against its own previous experience of liberality may be thought to lend its present restrictive approach some particular credibility.

In my address last year, I suggested that as we are faced with moves in the more radical European direction in other Australian States and Territories, and as we, desirably, continue to review the effectiveness of our own current programs, we should recognize a number of considerations as imperatives. These are my own views, I stress, but I respectfully offer them for your consideration.

First, abstinence must remain a prime goal of all drug therapy. While in many instances of hopeless addiction, perhaps most, it will not be achievable, as an ideal at least it should be upheld by way of encouragement to those who seek to change.

Second, it must be taken as given that our civilized community should be doing all it practicably can to help those intractably addicted to dangerous drugs. Theirs is primarily a health problem. If necessary, providing that assistance may involve resort to apparently radical strategies.



But where such strategies – as in Switzerland and the Netherlands, would contradict traditional community perceptions of basic law and order, they should not be embraced unless they have substantial community backing. Whether that could be assured would probably depend in large part on preceding comprehensive public education. I am concerned that any implementing of such initiatives should not be rushed: it should follow upon careful expert consideration

and measured public debate. Among other things, major changes to the law would be necessary. It may be that some community discomfort apparent in New South Wales in relation to its injection room experiment is consistent with this view: there may not yet there have been sufficient community consideration of the issue.

I revert now to the matter with which I began. Sentences of courts of law for drug crime may not have done much to reduce its extent, although they may well have inhibited its escalation. A major drug problem continues to plague our community. Some people say that current strategies are not working well enough. The answer in my view is not, however, as such people sometimes go on to advocate, the legalisation of currently unlawful drugs or decriminalisation of their use.

Those who urge such a course suggest that removing the criminality, “opening up” the matter, would have positive consequences: it would diminish the fascination for prospective users, lower levels of associated crime, would render continuing use more hygienic, with less consequent drain among other things on the public health system. These, I suggest rather beguiling points, whether or not well founded factually, ignore what I would suggest as the real point. That point has, simply enough, to be the matter of “drawing the line”. What extent of permissiveness is acceptable, on an informed basis, to the community?

Hence my own view that adopting radical measures, such as those of Switzerland and the Netherlands, were that to occur, could not be allowed to develop

insidiously into a foothold for the legalization or decriminalization of currently dangerous drugs. The bar should not be lowered.

The community must be careful especially not to be seen signaling any tolerant attitude towards the ultimately pernicious drugs, like the amphetamines, heroin and cocaine, but I do from my aspect extend that caution to the entire current battery of illicit substances.

The matters I have addressed tonight: the appropriateness of Court responses to drug offending, the classification of unlawful drugs, and meeting the plight of the intractably addicted, rationally fall subsequently to another prime issue: why do people turn to drugs? Address that question and the others become otiose. But the inability of experts to answer it comprehensively means I would waste my minute tonight even trying. We would all like not to conclude that society's fascination with pernicious drugs over the last 2 to 3 decades signifies vacuousness as its hallmark, such as will condemn it in decades to come. There is however, hope: the need to address unemployment, inspire our youth, recognise and uphold true heroes, bring traditional moral absolutes back into focus – these and the natural compassion of people like yourselves may help win the day against this relentless enemy. “Say not the struggle naught availeth ...”

These are all intensely emotive issues. Drug users, other victims of drug abuse, and the families and friends of all of them, would add varying tinctures to the canvas. Many have firm views one way or the other. Many will disagree, perhaps strongly, with some of the views I have expressed tonight. But that these are such emotive issues does not excuse our needing rationally to address them.

I applaud the determination of this Foundation to do its utmost to develop a responsibly enlightened public attitude towards these most serious difficulties. My sixteen years' judicial experience to date confirm to me that the drug problem is

this modern society’s most intractable problem – and it is a problem which pulsates.

“ Never send to know for whom the bell tolls”, warns John Donne, “it tolls for thee.” Probably more acutely than most, you, ladies and gentlemen, perceive this as a community problem. In my respectful view it will not be controlled, let alone resolved, by permissiveness.