

Drug Legalisation: Method or Mayhem?

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Introduction

In its Newsletter dated October 1993, the National Centre for Epidemiology and Population Health (NCEPH) at the Australian National University, Canberra announced that it was delaying its recommendation as to the feasibility of a trial in the Australian Capital Territory (ACT) for the controlled prescription of heroin and other opioids to dependent users.¹ Such a recommendation was to occur at the conclusion of Stage 2, the Research Stage of the project, to be followed by a small scale pilot study. If the outcome of the pilot was positive, then a full scale trial would be recommended.² In May 1994 NCEPH³ again delayed its recommendation for the commencement of Stage 3, citing as the reason unforeseen circumstances in the completion of certain research projects. It is not the purpose of this article to speculate as to all the possible reasons for these delays.⁴ Such delays, however, do highlight many of the issues that “bedevil” the drug legalisation debate.

In the meantime, the “legalisation” debate is not new,⁵ regularly aired as it is in “Western” drug control discourse.⁶ Why then is it appropriate to address again those issues that relate to it? First, the likely recommendation from NCEPH in Canberra that heroin be made available to dependent users could lead to a radical change in Australian drug laws as well as Australian drug policy. For this reason alone, the Canberra project is important internationally. It is also significant for its methodology towards the feasibility of heroin a trial. By adopting an incremental approach, the project team has sought to counter many of the arguments put forward by those who oppose and question any movement away from the continued prohibition of all illegal drugs.

Recent events in the United States have also led to consideration of the likelihood of reform to current US drug policy. Following the election of Bill Clinton as President, the “war on drugs” policy of the Reagan and Bush years was viewed by many as at least de-

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1 In 1991, NCEPH began the Project entitled “Feasibility Research into the Controlled Availability of Opioids”. Research Fellow and Coordinator is Dr Gabrielle Bammer, GPO Box 4, Canberra, ACT 2601.

2 The project is divided into four stages. Stage 1 entailed an examination of “in principle issues” and was completed in July 1991. Stage 2 (current) is the detailed research stage, Stage 3, the pilot test and Stage 4 the undertaking of the heroin maintenance trial.

3 See NCEPH Newsletter No 6, May 1994.

4 It is also not my purpose to critically analyse the operations of the project since it began in 1991.

5 Many of these issues were first addressed in Ward, P and Dobinson, I, “Heroin: A Considered Response” (1988) in Findlay, M and Hogg, R (eds), *Understanding Crime and Criminal Justice*.

6 In Australia the debate has been going on since the mid 1980s, reaching its height during the period 1988–91. See Hall, W, “The Australian Debate about the Legalisation of Heroin and Other Illicit Drugs, 1988–91” (1992) 22 (3) *J Drug Iss* 563–77.

emphasised, if not over. At the 1992 American Society of Criminology Conference,⁷ the mood was one of cautious pragmatism. The conclusions of one Plenary Roundtable, entitled "Assessing the Effectiveness of U.S. Drug Policies: What has toughness accomplished?"⁸ was that the change in administration was likely to bring about a reduction in the priority position of law enforcement in the control of illegal drugs.⁹

While not new, the debate is often confused and clouded by emotion and rhetoric. Some confusion arises from a general lack of reliable information and research to contextualise the effect of drug sanctions. This, however, is not surprising given the inherent difficulties in researching illicit drug use and associated behaviours.¹⁰ The debate is also complicated by the suggestion of different forms of "legalisation" for different drugs. There are those who would support the legalisation of marijuana, heroin and cocaine, making possession of small quantities of these drugs a minor infringement of regulatory laws, but continuing heavy criminal sanctions for the trafficking and supply of such drugs.¹¹ Others radically suggest a lifting of the prohibition on all illegal drugs making them available to any adult who wants them.¹²

Kleiman and Saiger¹³ suggest that such confusion is not surprising given the existence of what they believe to be two separate sides to the debate on legalisation. They contend that it is crucial to acknowledge the existence of these separate sides so as to properly understand not only all aspects of the legalisation debate, but more fundamentally, drug policy itself.

The debate which is most familiar involves argument between those who advocate legalisation and those who oppose it on the basis of the differing predictive results of alternative policies, and the different value weightings of such results. Kleiman and Saiger call this the "consequentialist debate".¹⁴ Further, "[l]egalisation is also urged, and deplored, for reasons of principle not directly reducible to results, by those who see themselves as guardians of liberty on the one hand and of virtue (or 'traditional values') on the other".¹⁵

They call the protagonists in this debate the "libertarians" and the "culture-conservatives". The fact that both debates are being waged simultaneously, in the same forums and sometimes by the same persons in combination serves to explain much of the confusion, and why the overall debate is often characterised by high emotion and fury. They therefore conclude that the first step in understanding and analysing the legalisation debate is to "disentangle" these two debates. While acknowledging the importance that both "libertarians"

7 44th Annual Meeting, The American Society of Criminology, New Orleans, November 4–7, 1992.

8 Chaired by Peter Reuter. Presenters were Mark Kleiman, Jerome Skolnick and Franklin Zimring.

9 Confirming this move away from the "war on drugs" representation, the Clinton administration appointed a new "drugs czar" (the Director of the Office of Drug Control Policy — ODCP). The title of "drug czar" was first given to William J Bennet, under the Reagan and Bush administrations. Bennet was one of the primary architects of the "war on drugs" and saw legalisation as utterly immoral and proponents of such policy being no better than the drug traffickers themselves. With his departure and the appointment of Lee Brown as the new Director of the ODCP under the Clinton administration, it is believed that there will be a better climate for change.

10 See discussions in Dobinson, I and Ward, P, *Drugs and Crime* (1985) at ch 1.

11 Above n6. See discussion at 568–71.

12 Kleiman, M and Saiger, A, "Drug Legalisation: The Importance of Asking the Right Questions" (1990) 18 *Hofstra LR* 527–65.

13 *Ibid.*

14 *Id* at 532.

15 *Id* at 533.

and, perhaps even more so, the “culture conservatives” have played in the development of the debate, Kleiman and Saiger appear to believe that any critique of the debate should concentrate on an analysis of “the selection of outcomes actually available by predicting the consequences of alternative policies”.¹⁶ This, they say, is all about “asking the right questions”.

By adopting a “consequentialist” approach in the present paper, the principal objective will be to analyse the current state of the illicit drug control debate, focusing on the legalisation controversy. I believe, as do Kleiman and Saiger, that a major stumbling block for reform to current drug control policies arises from this lack of proper analysis and therefore understanding of all facets of the “drug problem”.

This article begins with an analysis of the arguments and the “evidence” for and against drug legalisation, concluding with some general observations on the possible direction drug control policy is likely to take in the future.

It is accepted that the debate is often different for various drugs, for example, marijuana decriminalisation as compared to heroin maintenance. To avoid this confusion, and provide a comprehensive analysis in the space available, the article will concentrate on heroin. Such a selection is valid from a control perspective, as any major policy changes to the continued prohibition of this drug are likely to have flow-on implications for the control policies of all illicit drugs.

A Critique of the Drug Legalisation Debate

To begin, two main opposing camps or schools of thought can be identified as contributing to, and driving the debate. One favours deregulation and eventual legalisation of all drugs. The other appears to favour the current approach of prohibition with a possible increase in society’s punitive response. This, however, may be somewhat of an over-simplification, with these two camps more likely representing the possible extremities of the debate. In Australia, Hall¹⁷ rightly identifies a number of varying positions and proposals existing between these two poles.

It should be noted from the outset that prohibition, as a model for control of the supply and use of opiates, is a historically recent phenomenon. Although the use of these drugs is centuries old, it was not until the latter stages of the 19th and early 20th centuries that legislation was introduced in many countries to control the use and supply of opiates. Furthermore, the earliest legislative controls in countries such as the USA and Australia, dealt with the use and supply of opium, many years before the discovery of heroin.¹⁸ From a present day perspective, it also appears that heroin has always been illicit, its use and supply a criminal act and, further, there has always been a relationship between the use of heroin and crime. The more correct view is that both perspectives have resulted from very recent historical events.

Historical analyses¹⁹ of government responses to heroin use to date, however, appear to indicate that there has been a failure to appreciate the possible unwanted consequences

16 Above n6.

17 Above n5.

18 Ibid.

19 Ibid.

of legislative controls, whatever form they have taken. Neither camp would disagree with the conclusion that governments have failed to properly define and understand the problem of illicit drug use, but seeking simple and expedient solutions appears to have often only exacerbated the problem.²⁰ In some cases government policy appears to have transformed a problem rather than limiting it through legislative intervention.²¹ In commenting on morphine addiction in the USA at the beginning of the 20th century, Tieman,²² for example, states that the “majority of users were white, female, middle aged, middle class and continued to function in daily activities as long as they had a supply of morphine”. This is clearly not the case with use patterns today.

Davies suggests that there may indeed be no ultimate solution to the “drug problem”²³ and that whatever policies are adopted, the primary objective should be to ensure that no further problems are created. While it is difficult to argue against the need to create no further problems, it may be very politically unpalatable to many to conclude that there is no solution to the “drug problem”. Again, there may be some sense of unanimity between the two camps on such a consequentialist concern, but the proposed solutions to the drug problems both original and consequential, are significantly different. Proponents of the “war on drugs”²⁴ and those who support continued prohibition believe that such a war is winnable or that prohibition is the most effective approach. Anti-prohibitionists see eventual legalisation as the only viable solution.

For the anti-prohibitionists, the response is simple. Heroin maintenance programs or even legalisation (with government controls such as those on tobacco and alcohol) will dramatically reduce the financial cost to the user. This will subsequently reduce user/property crime and the involvement of organised criminal enterprises, the profits of which will largely evaporate. Users will be able to have access to medically controlled drugs and employ far healthier use behaviours, thus decreasing the risk of spreading infectious diseases such as AIDS. Such suggestions have been called “gormless and naive”²⁵ by their opponents. What are the merits of these quite disparate positions?

A. *The Legalisation Case*

Anti-prohibitionists find initial support in an historical analysis of the legislative response of governments against opiates and heroin. Much has been written on this²⁶ and no purpose is served by repeating such discussions here. It is clear from these historical narratives, however, that no country can claim that the motivation for early legislation to restrict opiate consumption was a simple or individual concern for the abuse of that drug. In the US, for example, initial regulatory legislation²⁷ appeared to be based on racist attitudes

20 Ibid.

21 Ibid.

22 See Tieman, C R, “From Victims to Criminals to Victims: A Review of the Issues” (1981) in Inciardi, J A (ed), *The Drugs and Crime Connection* as cited in Ward and Dobinson, above n5.

23 Davies, S, *Shooting Up* (1986) at 230.

24 The phrase “The War on Drugs” was first used during the Reagan Administration and was the cornerstone of that administration’s anti-drug policy.

25 Inciardi, J A and McBride, D C, “Legalising Drugs: A Gormless, Naive Idea” (1990) 15(5) *The Criminologist* 2-4.

26 Above n5. See for general discussion of the histories of the narcotic control policies of the USA, Britain and Australia.

27 The first opium laws in California, and consequently the United States, “were not the result of a moral crusade against the drug itself. Instead, it represented a coercive action directed against a vice that was

against a minority group (the Chinese) who were said to threaten the economic stability of the local, white work force, rather than on a concern for the personal and social problems associated with opium use.

Other early legislation, for example the US *Harrison Act* of 1914, only sought to regulate and licence the prescription of narcotics,²⁸ not the overall availability of these drugs. It is also contended²⁹ that other countries perhaps passed legislation not because of a domestic drug problem but in response to international, in particular American, pressure.

In order to control its domestic drug problem, the USA sought to export its policy of prohibition. A worldwide prohibition of opiates, it was believed, would assist in combating the supply of these drugs in the USA. It was also believed that if demand could be limited worldwide then this would naturally reduce overall supply. This in turn would further restrict overall use. The fact that this strategy has failed is obvious. Nadelmann also describes this imperial aspect of US drug policy (both past and present) as a "bad export".³⁰

Britain initially responded to the illicit use of opiates by allowing those addicted to be "treated" in line with established medical practices.³¹ By the end of the 1970s, Britain had almost totally abandoned its national heroin maintenance program in favour of Government operated methadone clinics. Commentators³² have questioned whether this shift was due to problems with the early treatment regime or rather as political responses to American pressure. Whatever the reason, others³³ have noted that this change in policy may be significant in understanding the major changes in Britain's "heroin problems" in the 1980s, which saw a major increase in the size of the heroin blackmarket as well as user-related crime.

Still others have also described many well documented "scandals" concerning US foreign policy, whereby this country's drug policy appears to have been abandoned in favour of other expedencies. Two of the most infamous of these events are, first, the use by the CIA of its airwing, "Air America" to transport opium from the Golden Triangle as a means of maintaining anti-communist sentiments amongst the hill tribes during the Vietnamese War and, second, the support of the Contra rebels in Nicaragua who were openly assisting Columbian cocaine traffickers to ship drugs to the US.³⁴ Other somewhat more legitimate encroachments into the affairs of other countries, such as crop substitution programs, have also resulted in abject failure.

Accordingly, the proponents of legalisation contend that governments have "created" the "drug problems" that currently exist and that we must now seek to reverse the processes of history by legislating to lift the prohibition on all illicit drugs. The anti-legalisation response to

merely an appendage of the real menace — the Chinese — and not the Chinese per se, but the labouring 'Chinaman' who threatened the economic security of the white working class". See Morgan, P A, "The Legislation of Drug Law" (1978) 8 *J Drug Iss* 59.

28 "It was initially passed as a revenue measure designed to make the entire process of drug distribution a matter of record." Above n5 at 132.

29 Above n23 and see also Trebach, A, *The Heroin Solution* (1982).

30 Nadelmann, E A, "U.S. Drug Policy: A Bad Export" (1988) 70 *Foreign Policy* 83–108.

31 The Departmental Committee on Morphine and Heroin Addiction convened in 1924 reported (the Rolleston Report) that addiction was a disease and a problem to be dealt with by legitimate medical practice.

32 See Trebach, above n29.

33 Above n5 at 138.

34 See Chambliss, W, "The Consequences of Prohibition: Crime, Corruption and International Narcotics Control" (1992) in Traver, H and Gaylord, M (eds), *Drugs, Law and the State*.

this will be discussed later, but it does appear to be an oversimplification of the issues. It is this sort of oversimplification that has often served to weaken the legalisation case.

Those who support legalisation also contend that a removal of the legislative prohibition on heroin and the criminal sanctions attendant on it, will solve the drugs/crime dilemma. Four separate categories of this relationship need to be identified. These are:

- i) crimes of use and supply;
- ii) income generating property crimes committed by users to support consumption;
- iii) crimes of corruption and violence relating to the maintenance of illegal markets by drug traffickers; and
- iv) violent crimes committed by individuals while under the influence of drugs.

For the anti-prohibitionists, the criminalisation of drug use is directly responsible for the high street prices charged for these substances. Given such high prices, users are unable to support consumption through legitimate means, leading to the trafficking in drugs and/or the commission of income generating property crimes such as robbery and burglary for the purpose of drugs. It is believed that policies of decriminalisation and the government controlled supply of drugs such as heroin would significantly reduce such street costs to users. While illicit supply would remain criminal, such an approach would effectively eliminate the criminalising effect of conviction for use, and significantly reduce (if not eliminate) the need for users to commit other crimes to support such use. The enormous profits currently generated by traffickers would thus evaporate. There would be no need to bribe law enforcement agents, politicians and other officials to facilitate the lucrative drug trade. There would be no need for violence to protect market share because such markets would simply not exist.

As to the commission of violent crimes by intoxicated heroin users, research has been equivocal.³⁵ What evidence exists suggests some relationship between violence and amphetamine based drugs, but even this is not conclusive. No such relationship exists between violence and heroin use. There is abundant evidence,³⁶ however, linking the use of alcohol to violent crime.

Comparisons³⁷ between the cost of anti-drug efforts and estimates of profits generated by the international heroin trade also appear to support the anti-prohibition position. US figures estimate the total cost of drug law enforcement at approximately \$US3 billion per annum. Other associated taxpayer costs, which, it is contended would be significantly reduced, include the costs of prosecuting and imprisoning thousands of drug offenders.

Anti-prohibitionists also argue that a government controlled supply approach would greatly reduce the spread of AIDS amongst intravenous drug users which in turn would reduce its spread to the wider community.³⁸ Health savings would be enormous and easily fund any increase in resourcing drug treatment programs. This possible increase in treatment costs as a result of a less restricted availability of drugs may reflect a greater investment

35 Above n10 at 86.

36 Id at 13.

37 For Australian references see Marks as cited in Hall, above n6. For a discussion on American research see Nadelmann, E, "The Case For Legalization" (1991) in Inciardi, J A, *The Drug Legalization Debate*.

38 See Wodak, A, as cited in Hall, above n6.

by governments in treatment to counteract a possible increase in use. A shift from an emphasis on law enforcement to treatment would easily fund not only any new treatment places, but also improve current treatment facilities which have been notoriously under-funded.

Such conclusions are very appealing to those who advocate decriminalisation or legalisation of heroin use (along with all other illicit drugs) as a means of breaking the drugs/crime nexus. There is an abundance of research³⁹ which demonstrates the correlation between crime and heroin abuse. It has been suggested that the major reason for this association is an economic one. It was found⁴⁰ amongst incarcerated heroin users that as consumption and expenditure increased, so did the amounts of income generated by property crime. The implication is, therefore, that a decrease in price may result in a decrease in property crime. This has added weight to the argument that deregulation would reduce the cost of heroin and hence the amount of drug related property crime.

This evidence certainly can be used to support arguments in favour of deregulation, but as Hall⁴¹ observes, a dilemma exists as to what form of deregulation should be adopted, and where do we start. In the legalisation debate in Australia, as elsewhere, there are those who would support a heroin maintenance approach.⁴² Others see this as only a "halfway" response, the final solution being the provision, through a government monopoly, of all illicit drugs to any adult who wants them.⁴³

According to Hall⁴⁴ this incremental approach has led, in Australia, to some degree of compromise amongst those who support legalisation. He believes that there is general agreement for the provision of injectable heroin by prescription, at least as being a first step in the legalisation process. This suggestion has also received support across a broad range of the political spectrum. In its Newsletter No 5 February 1994, the NCEPH project team reported that the Australian Parliamentary Group on Drug Law Reform had recently launched its "Charter for Drug Law Reform", stating in the preamble that "prohibition is a greater threat to personal and community health than a system of controlled availability".⁴⁵

B. The Anti-Legalisation Case

As mentioned above, the incomplete nature of the legalisation argument has served as effective ammunition for those⁴⁶ who oppose it. Even amongst those who favour deregulation, shortfalls are recognised in considering the full consequences of free availability. Kleiman and Saiger contend that the current legalisation arguments suffer from grave weaknesses.

First, they fail to specify crucial details of potential legal regimes. Second, they underestimate the role of prohibition in reducing the extent of drug abuse. Third, they fail to recognise or acknowledge many of the likely unwanted side effects of legalisation.⁴⁷

39 See eg, above n4; see also Dobinson, I and Ward, P, *Drugs and Crime — Phase Two* (1987) and Dobinson, I and Poletti, P, *Buying and Selling Heroin* (1989).

40 Above n5 at 51.

41 Above n6.

42 Id at 569.

43 Id at 571.

44 Id at 572.

45 Support for the heroin trial also came from the Council of the Law Society of New South Wales and at the 26th Annual Convention of the Young Liberal Movement of Australia. See Moore, M, "Legislative Change in the ACT" (1994) in this issue of *Curr Iss Crim Just*.

46 Above n25.

47 Above n12 at 539.

Taking these arguments in order, the authors firstly highlight the problems arising from the possible multitude of control regimes that may be necessary for different illicit drugs. At the level of cost comparisons between legalisation and continued prohibition, there is a need to consider the amount of regulatory apparatus and associated costs that might be incurred through controlling a newly "legal" drug.

Next, the benefits of prohibition are ignored or understated by the anti-prohibitionists. The proportion of the population using heroin in countries such as Australia is small. The cost of heroin on the blackmarket is many times more than it would cost if it were "legal". Kleiman and Saiger contend that the low level of demand and use is a direct result of the high price resulting from the drug's prohibition.⁴⁸ This argument is closely connected to the third, that is the "unwanted side effects of legalisation". What stands as a major stumbling block for the proponents of legalisation is the extent to which more people would use heroin if it were to become "legal". As Kleiman and Saiger point out, control policies which have sought to limit the availability of tobacco and alcohol to minors by comparison have been far from successful.⁴⁹

Those who oppose legalisation also rightly point out that the use of heroin is potentially dangerous to one's health. It is both dependency and addiction creating, with the possibility of death in overdose situations. It must be accepted that deregulation does pose a risk of increased use, maybe not resulting in dependency, but rather experimentation. Where the very young are concerned, this does create a possibility of resultant increased medical and social problems.

Others⁵⁰ are also pessimistic about the impact that deregulation (in the form of heroin maintenance, for example) would have on current user populations. Research⁵¹ suggests that there has been a "meshing" of what we might call the heroin-using and criminal subcultures. Such research has identified criminals who also use heroin, and heroin users who have become criminals. It is argued that deregulation, either in the form of legalisation or heroin maintenance will only affect one aspect of these individuals' makeup (that is their drug use) and that they may continue to commit crime regardless of the fact that heroin is no longer costly.

A British article published in 1986 analysed the predictive effects of reintroducing large scale heroin maintenance in Britain, concluding that the provision of free drugs would not necessarily stop individuals from committing crime.⁵² It is also unclear how current users would react to the introduction of large scale heroin maintenance, noting that such programs would require registration and therefore identification. Another possible negative aspect of heroin maintenance is the expansion of the illicit heroin blackmarket. It has been suggested⁵³ that with the increased volume of pharmaceutical heroin by way of a

48 Id at 542.

49 Id at 543.

50 See, for example, Weatherburn, D, "Crime and the Partial Legalisation of Heroin" (1992) 25 *ANZ J Crim* 11-26.

51 McBride, D C and McCoy, C B, "Crime and Drug Using Behaviour — An Areal Analysis" (1981) 19(2) *Criminology* 281-302.

52 Burr, A, "A British View of Prescribing Pharmaceutical Heroin to Opiate Addicts: A Critique of the Heroin solution with Special Reference to the Piccadilly and Kensington Market Drug Scenes in London" (1986) 21(1) *Int'l J Addictions* at 94.

53 Ibid.

maintenance scheme there may be an overflow into the blackmarket. As availability increases this may attract new users.

Weatherburn⁵⁴ suggests that this prescribed form of heroin, together with a certain amount of imported drug, would constitute the market source for the many recreational users of heroin. While such users do not account for the major proportion of overall consumption, they do constitute a larger population than regular heroin users. Accordingly, the heroin blackmarket might shrink but would not disappear. Crime related to use, supply and the maintenance of this market might also continue to occur.

The assumption that increased availability through deregulation may result in the increased use of drugs such as heroin is extremely contentious⁵⁵ and certainly speculative. Even so, it is a prediction that must be considered, and if possible, tested as part of any new policy initiatives towards deregulation of drug control.

As a counter to the risk of increased use, anti-prohibitionists have cited⁵⁶ the examples of marijuana decriminalisation in Holland and the USA. In both cases no significant increases in use occurred. The reasons for this may be due to the operation of market forces (where the drug was readily available anyway) and not due to previous non-users continuing to abstain, even though use is now legal. It should also be noted that the marijuana experience may not necessarily translate to other drugs such as heroin or cocaine.⁵⁷

Those opposed to legalisation argue that the greater availability of drugs such as heroin would be particularly damaging in light of recent surveys on drug use. The 1988 US high school surveys, for example, indicated a possible overall reduction in drug use amongst respondents over a designated survey period.⁵⁸ More recent high school surveys in Australia⁵⁹ also show downward trends, although for many illicit drugs, there has been an increase in use since 1989.⁶⁰

Regardless of the trends indicated in these surveys, it is necessary to consider what sort of message(s) deregulatory measures could send to young persons.

Despite a possible downward trend in drug use in the general population, estimates of regular heroin user populations⁶¹ do not support any major decrease in the numbers of those taking heroin. Other indicators of drug availability, such as price and purity suggest that for some markets there are quite stable demand and supply levels which have been maintained over considerable periods of time. In order to generalise with any degree of certainty, we would need to take into consideration the very different characteristics of heroin markets around the world, for example the USA and Australia. Even so, international demand and supply appear to be relatively stable. This is, as the anti-prohibitionists

54 Above n50 at 23.

55 See discussion in Hall, above n5 at 570.

56 See Nadelmann, above n37.

57 See Inciardi, J A and McBride, D C, "The Case Against Legalisation" (1991) in Inciardi, above n37.

58 Id at 59-62.

59 Cooney, A, Dobbinson, S and Flaherty, B, *Drug Use by NSW Secondary School Students: 1992 Survey* (1993) Drug and Alcohol Directorate, New South Wales.

60 Id at 29.

61 Although population estimates of the number of regular heroin users are extremely unreliable, they can indicate possible trends where the same measures are applied over a period of time (eg annually). Where this has been done, for example New South Wales, results have indicated a fairly stable population with the trend being very marginally downward (data provided by the New South Wales Drug and Alcohol Directorate).

would point out, despite all the efforts of drug law enforcement to influence both use and trade in heroin. Predictive economic research⁶² on the impact of large drug seizures on street prices for heroin has also concluded that law enforcement efforts are not particularly cost effective.

Even if we accept the possibility of increased use following "legalisation", some, like Nadelmann,⁶³ believe that it is a risk worth taking. But what about current users?

Critics of heroin maintenance⁶⁴ argue that current users will be "sacrificed" under such a scheme and that maintenance encourages continued dependency when drug abstinence through treatment should be the goal. The contrary view⁶⁵ is that regular heroin users are characteristically not well motivated to stop. Drug maintenance would also allow for users to be cared for through to their thirties when it is believed that the chances for drug rehabilitation are much better.

Inciardi and McBride⁶⁶ argue that legalisation could be used as a form of social control of the "underclass". They contend that it is now well established that in many major western cities there exists a permanent culture of poverty. This "concentration of poverty" features within established ghetto areas. A common behavioural aspect of the lifestyles of the inhabitants of such ghettos is the use of illicit drugs. Such use serves to undermine the social fabric of these areas. Legalisation would result in greater drug availability in these communities and therefore serve to further undermine them. While this argument may be particular to the USA, it does reflect Kleiman and Saiger's concerns for the "unwanted side effects of legalisation".⁶⁷

Finally, and of significant importance, is the fact that most people oppose legalisation. Some opinion polls demonstrate this very clearly.⁶⁸ Others are not so clear cut. For example, in a 1989 report⁶⁹ nearly one third of those questioned supported the use of prescribed heroin to dependent users as a means of combating the spread of AIDS. Whatever the merits of such opinion surveys, the fact that large numbers of respondents oppose legalisation necessarily introduces a political aspect to the debate. The question as to whether governments will be willing to support deregulation, particularly if there is no bipartisan backing for the reforms, must be considered as significantly influencing the potential of the overall debate.

This pragmatic consideration aside, those opposed to legalisation do highlight many of the shortcomings of the anti-prohibitionist position. It is easy, however, to be negative in relation to the untested propositions surrounding legalisation. Weatherburn may indeed be right in that "supporters of partial legalisation often seem both to overstate benefits of the policy and underplay its costs",⁷⁰ but the current problems arising from the prohibition of all illicit drugs must be addressed as a consequence of the construction of such policy. In

62 See Reuter, P and Kleiman, M, "Risks and Prices: An Economic Analysis of Drug Enforcement" (1986) in Tonry, M and Morris, N (eds), *Crime and Justice: An Annual Review of Research*, Vol 7 at 289-340.

63 Above n37.

64 Above n6 at 570.

65 See Wodak, A, as cited in Hall, above n6.

66 Above n37.

67 Above n12.

68 Above n37.

69 See Elvy and Burns as cited in Hall, above n6.

70 Above n50.

this regard, the legalisation debate in itself has been very positive. It has focused drug policy in an evaluative sense. Accordingly, both current and proposed drug policy has come under close scrutiny, not just by governments but also the community which appears to have become more aware of the issues through the exposure that the debate has received.

Future Directions

It should be noted that current arguments in support of the legalisation of heroin emphasise two facets of the problem more than any other. First, proposed reforms aim mainly to reduce the amount of crime generated by drug users to support their habits, and minimise the role of organised crime in the drug trade. Secondly, they aim to reduce the spread of AIDS resulting from the sharing by addicts of syringes during drug administration. They do not, however, appear to address the problem of use itself.

Further, many important questions, particularly the possibility of increased drug use as a result of policy change, remain unanswered. If this is accepted, is this an argument for maintaining the status quo in drug regulation, or perhaps even for strengthening the role of law enforcement? Should legalisation be rejected because it would not reduce supply and demand? This is extremely important given the claims made by those who support prohibition. As Kleiman and Saiger say,⁷¹ a major weakness of the legalisation case is its understating of the benefits of prohibition. Tonnes of drugs have been seized and many traffickers arrested and gaoled as a result of the criminal sanctions currently at work.

Apart from the deterrent effect, prohibition and law enforcement play another role. Research⁷² has also shown that law enforcement (for example arrests) is often the major catalyst for many heroin users in seeking treatment. Such "brushes with the law" and resultant periods in treatment have been found to be an important factor in a user "maturing out" of heroin use.⁷³ Many heroin users, however, do not mature out of heroin use and many treatment regimes are the subject of much criticism. Relapse figures give little cause for optimism.⁷⁴

Despite law enforcement successes and large numbers of users in treatment including methadone maintenance, heroin remains readily available around the world. Demand also appears quite stable.⁷⁵ It is interesting to note, however, that these findings can be used by both proponents and opponents of legalisation. Proponents would argue that prohibition has therefore failed; it has not "solved" the problem. The contrary view is that prohibition effectively controls supply and demand at levels which are tolerable. Legalisation, however, could result in increased use and accordingly make matters worse.

Regarding the current debate on legalisation, the problem that faces policy makers is to weigh all the costs of deregulation (for example the risk of increased use) against the costs of continued prohibition. These latter costs are known and at present governments seem

71 Above n12.

72 See Dobinson and Ward (1987) and Dobinson and Poletti (1989), above n39.

73 See Anglin, M, Brecht, M, Woodward, J and Bonnet, D, "An Empirical Study of Maturingout Conditional Factors" (1986) 21(2) *Int'l J Addictions* 233-46.

74 In Dobinson and Ward (1987), above n39, all those interviewed as part of a heroin treatment sample were found to have undergone at least one prior treatment episode and had subsequently returned to regular heroin use.

75 Above n61.

prepared to continue covering them. The associated costs of legalisation are not known and the dilemma for any government is that the costs of, for example, heroin maintenance, may simply be in addition to those that already exist.

In Australia, the drug control policies of both Federal and State governments focus on "harm reduction and harm minimisation". It is not an objective of this article to analyse in particular detail this policy approach, but it is important to note some recent comments on drug legalisation as it relates to this policy of harm minimisation.

The primary test must remain whether or not such a measure would do more harm than good. For this to occur the Government must receive specific and clearly formulated proposals, not just vague and ill defined notions devoid of empirical support and documented evidence. Such proposals must be presented in detail so they can be open to public scrutiny of their intended and possible unintended effects. To date, these detailed proposals have not been produced⁷⁶

Some, like Mugford,⁷⁷ believe that such conclusions, and the use by government and government agencies of words such as "gamble" and "too high a risk" are mere rhetoric, and a reliance on them little more than a device for achieving "political safety". Mugford would certainly agree with Nadelmann⁷⁸ that such risks are worth taking.

Others⁷⁹ suggest that the most appropriate regulatory policy response is a gradual approach to change. As Hall⁸⁰ comments, it is this approach, in Australia at least, that appears to have most support.

What should be the first step towards a more rational drug control policy? It could be argued that such first steps have already been taken, referring in particular to the decriminalisation of marijuana possession in South Australia,⁸¹ the wide use of methadone maintenance in certain Australian States and the provision of needle and syringe exchanges.

Further down the policy reform path, the proposed Australian Capital Territory (ACT) heroin maintenance program is an important watershed. While the proposal is directly relevant to Australian drug policy, it also has significant implications for the legalisation debate internationally. The project is currently in Stage 2 (research) of a four stage plan. Stage 1 commenced in May 1991. The current stage has sought to provide the empirical support and documented evidence referred to earlier⁸² as lacking from other deregulatory proposals. To date, the project team has undertaken research on initial matters such as the size and structure of the illicit drug market in the ACT. It has also attempted to predict the impact that a heroin maintenance trial will have not only on this market but on the community as a whole. In this regard, the team has sought to assess, for example, the possibility of increased drug use in the ACT and the likelihood of an influx of drug users to the ACT.⁸³

76 MacAvoy, M and Homel, P, "Drugs Policy in New South Wales", an invited address to ICTAB5, Sydney, 6 February 1990 at 4.

77 Mugford, S K, "Crime and the Partial Legalisation of Heroin: Comments and Caveats" (1992) 25 *ANZ J Crim* 27-40.

78 Above n37.

79 See eg, Galliher, J F, "Illegal Drugs: Where We Stand and What We Can Do" (1992) in Traver and Gaylord, above n34 at 153-63.

80 Above n6 at 572.

81 See Sarre, R, "The Partial 'Decriminalisation' of Cannabis — The South Australian Experience" (1994) in this issue of *Curr Iss Crim Just*.

82 Above n76.

83 Above n1. Copies of all research and working papers to date are obtainable from NCEPH.

As detailed in the introduction, a decision regarding the recommendation of a small scale pilot study, and consequently the provision of pharmaceutical heroin has been postponed. This raises further issues not just for the ACT heroin trial, but for drug legalisation generally. Before Stage 3 (a pilot testing of the heroin trial) can commence, the Australian government will have to amend legislation which currently prohibits heroin use. If Kleiman and Saiger's⁸⁴ "consequentialist" approach is to be adopted, politics should also be disentangled from the debate on legalisation, particularly as political change is often slow and conservative. If political support for deregulation plays such an integral role, then it may be impossible, and therefore "naive", to attempt to approach the issue of drug legalisation on a purely "consequentialist" level.⁸⁵ Governments must be convinced of the benefits of legalisation and that the costs of prohibition clearly outweigh those of deregulation. As mentioned earlier, it may be very difficult, therefore, for any legalisation proposal to proceed if it does not receive strong bipartisan political support.

In conclusion, it is noted that many of the costs of prohibition can be counted. These include the social costs of arrest, conviction and punishment of drug users, health costs resulting from the spread of diseases such as AIDS and hepatitis, material costs focusing on the loss of property due to crime committed by dependent users and the influence of illicit profits generated by those involved in the trafficking of illegal drugs. It is very difficult to measure those costs associated with legalisation. The most controversial relate to the possibility of increased drug use. The speculation on this point is extremely important as a balance over some of the predicted benefits of legalisation. Even some of these, such as a decrease in drug related crime, may also not be as certain to establish.

This article does not support either the case for or against legalisation, rather it aims to describe and analyse the drug legalisation debate and to attempt to put it on an objective footing. As stated before, the mere increase in the level and quality of the debate is a major step towards a rationalisation of control policy.

If there are any conclusions to be drawn on the future direction of drug control policies, proposals such as the trial heroin maintenance scheme in the ACT appear to offer a unique degree of political acceptability, and therefore are most likely to be implemented. It will be of great interest to observe how the Australian government responds to the final stages of the Canberra proposal.

84 Above n12

85 See Moore, M, "Legislative Change in the ACT" (1994) in this issue of *Curr Iss Crim Just*.