THE HISTORY OF AUSTRALIAN DRUG LAWS: COMMERCIALISM TO CONFUSION?

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INTRODUCTION

"Although much work has been done by historians on the historical antecedents of drug controls in the United States of America . . . relatively little serious attention appears to have been given to this subject in Australia."—Australian Royal Commission on Drugs.[1]

Appearances can be deceptive. Contrary to the above impression gained by the Australian Royal Commission of Inquiry on Drugs, Australia does have a body of material chronicling the development of drug laws in this country. The work of Haines, Lonie and, most recently, McCoy,[2] provides a more than useful foundation, but it is a fair comment to note that there is a dearth of material analysing that history from a legal perspective. Not that Australia is unique in this respect. The recent article by Green on the Canadian position redresses a similar imbalance in that jurisdiction.[3] If the complaint by the Royal Commissioner is that Australian lawyers have been remiss in failing to chart the legislative history of drug control measures in this country, then it is a point well taken. This article aims to overcome that neglect. The jurisdiction selected for the most detailed examination is Victoria, but the major developments in the other Australian states will be documented. Overseas influences from countries such as Britain and her former "Dominions" of New Zealand and Canada will also be traced.

1. The Early History of Drug Use

Drugs such as opium and marijuana have been used almost since the beginning of recorded history. The opium poppy is mentioned in the writings of the Sumerians who settled in Southern Mesopotamia from the uplands of Central Asia before 5000 B.C.[4] Assyrian medical remedies relied heavily

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1 *Australian Royal Commission of Inquiry into Drugs: Report* (1980) A.G.P.S. Book C. 149 [hereafter cited as *Australian Royal Commission on Drugs*].

2 G. Haines, *The Grains and Threepenn'orths of Pharmacy: Pharmacy in N.S.W. 1788-1976* (Kilmore, Lowden, 1976); J. Lonie, *A Social History of Drug Control in Australia* Research paper 8, Royal Commission into the Non-Medical Use of Drugs, South Australia (1979) S.A. Gov. Pr.; A. McCoy, *Drug Traffic: Narcotics and Organized Crime in Australia* (Artarmon, Harper and Row, 1980).

3 M. Green, "A History of Canadian Narcotics Control: The Formative Years" (1979) 37 *University of Toronto Faculty of Law Review* 42.

4 A. R. Neligan, *The Opium Question: With Special Reference to Persia* (London, John Bales & Sons and Danielsson, 1927) pp. 1-2.

on opium as far back as 700-900 years B.C.,[5] a therapeutic tradition carried forward to the nineteenth century A.D. via opiate-based "patent" remedies. The Greek writer Hippocrates documented the properties of "opium juice" (*opos megonos*) and the Greek word for juice ultimately evolved to the Greek *opion* and the Latin *opium*.[6] Opium spread to India (in 400-500 A.D.) and China (around 600 A.D.) as a result of Arab trade, since Arab medicine was heavily influenced by Greek learning. Cultivation was established in India by the thirteenth century, and in China by the fifteenth century. Late in the seventeenth century the custom of smoking tobacco mixed with opium filtered through from the Philippines to China, and opium smoking replaced opium eating in that country.[7] Chinese emigration to Australia, Canada and the United States in the mid-nineteenth century carried forward this tradition, while authors such as De Quincey popularized it in Britain.

Chinese and Indian sources refer to marijuana in mythological writings up to 2737 B.C.; while Assyrian writings in 650 B.C. (which copy earlier works), and Chinese and Indian texts at least 400-500 years B.C., also refer to marijuana.[8] A review of a wide range of material by Walton in 1938[9] concluded that marijuana was cultivated both for hemp and for psychotropic uses throughout Asia and the near East from earliest known times. Marijuana has been found with German relics from 500 B.C. but it did not acquire widespread popularity in Western societies until the mid-1960s.

The early legislative involvement with opium and marijuana was minimal. Although Persian writing around 903-1000 A.D. warned of the dangers of excessive consumption of opium, the first edict against opium was not promulgated in China until 1729.[10] Despite quite heavy consumption of opium by Chinese immigrants in Australia, New Zealand, Canada and the United States, Western societies did not regulate opium consumption until the first decade of the twentieth century.[11] Marijuana was the subject of a British Commission of Inquiry in India in 1894[12] but remained freely

5 C. E. Terry and N. Pellens, *The Opium Problem* (New York, The Hadden Craftsmen, 1928) pp. 54-5.
6 Neligan, op. cit. 3.
7 *Ibid.* 5.
8 E. M. Brecher et al. (ed.), *Licit and Illicit Drugs* (Boston, Little Brown, 1972) p. 397; see also *Drug Problems in Australia: an Intoxicated Society?* (1977) A.G.P.S. 127-9. [A report by the Senate Standing Committee on Social Welfare; hereafter cited as *Drug Problems in Australia.*]
9 R. P. Walton, *Marijuana, America's New Drug Problem* (Philadelphia, Lippencott, 1938).
10 Neligan, op. cit. 5-7.
11 Infra 185-191.
12 India, *Report of the Indian Hemp Drugs Commission 1893-1894* (1894) Government Central Printing Office, Simca India [reprinted with an introduction and glossary as J. Kaplan, *Marijuana: report of the Indian Hemp Drugs Commission 1893-1894* (Silver Springs, Maryland, Thos. Jefferson Publishing, 1969)].

available until the mid to late 1930s when various Western countries banned distribution and consumption of the drug.

Other drugs, particularly the synthetic preparations, were not known or used until the late nineteenth and early twentieth centuries but, as with the more entrenched substances, legal regulation was often long delayed. In Victoria, for example, cocaine was first used in 1885 as a local anaesthetic in eye operations, but, despite clear evidence from Europe and America regarding its habit-forming properties and increasing use by prostitutes, criminals, and fringe dwellers in the slums, legal controls were not imposed until 1913.[13] Similarly, heroin, the synthetic analogue of opium, was introduced in 1896 and was originally promoted as a cure for opiate addiction, but it was not controlled until the same year (1913). Barbiturates came into medical practice at the end of the nineteenth century and were restricted to prescription in Victoria in 1913, but their habit-forming potential was not appreciated until the 1960s and they were freely prescribed until 1967. The closely related bromureides came into use about the same time and remained freely available without prescription until 1971. Amphetamines, introduced as appetite suppressants in the 1930s, have followed a similar course[14] while Australia has led the world in analgesic abuse due (until recent times) to free availability over the counter.[15]

Expressed in terms of the duration of legal controls, the Western history of drug regulation discloses that public drunkenness has been an offence for just over 370 years. Drug laws of modern type did not originate until the first opium controls were introduced a little more than 70 years ago. Prohibitions on the use of marijuana are not yet 40 years old and effective controls on barbiturates and amphetamines are less than 20 years old. Next to public drunkenness, the legislative schemes providing voluntary and compulsory treatment for inebriates have the longest history, but that barely exceeds 100 years. In the context of around 4,000 years of historical usage of alcohol, opium or marijuana, public drunkenness laws account for less than ten per cent of the period, while criminal and civil programmes for inebriates and drug users account for around three per cent.

2. Social Pressures Shaping the Drug Laws

During this comparatively short historical span, drug control legislation has responded to a series of quite distinct social pressures. Australian drug

[13] Victoria, *Drug Dependence: the Scene in Victoria* (1974), Victorian Foundation of Alcoholism and Drug Dependence 16 [hereafter cited as Victoria, *Drug Dependence*]. Canada controlled cocaine and morphine in 1911, see *Opium and Drug Act* 1911 (Canada).

[14] Victoria, *Drug Dependence*, op. cit. 17-8.

[15] *Drug Problems in Australia*, op. cit. 107-26; P. Stolz, "Societal Action in Combatting Substance Abuse—an International Overview" (1978) unpublished mimeo, 28-30. The National Health and Medical Research Council recommended in 1977 that the sale of compound analgesics be restricted. Tighter controls (Qld. and

legislation has to date developed by a slow process of accretion, avoiding comprehensive "root and branch" review. The draft legislation appended to the reports of both the South Australian and the Australian Royal Commissions on Drugs[16] stands in stark contrast to the existing patchwork provisions. In no small part this state of affairs may be attributed to the penchant of the legislature to develop policies of drug control only when placed under overwhelming pressure (and to then rather hurriedly copy the legislation adopted elsewhere). Drug policies have been "reactive" responses rather than the product of political vision or leadership. More importantly perhaps, the policies have been conformist rather than innovative. Consistent with this passive, unimaginative role of the legislature, it remains to outline the main pressures to which the Parliaments were obliged to respond and to identify the original architects of, and rationale for, the legislative models so readily transplanted into an Australian environment.

At the outset, drug legislation was mainly concerned with responding to pressure from the public for protection against the misuse of poisons, and from the emerging pharmaceutical profession seeking to assert control over the retailing of these products. Racial bias against the Chinese population, coupled with the moral concern expressed by spokesmen for an influential Temperance movement (associated with a middle-class women's lobby), led to the enactment of the "Chinese opium laws" around the turn of the century. Soon afterwards, the retailing of patent medicines, many of which contained addictive substances, was brought to heel by the enactment of pure food legislation. Enactment of these controls[17] constituted a major victory by proponents of public health and safety against the commercial interests of the (largely overseas) firms responsible for the manufacture and promotion of these proprietary products. However, the commercial

N.S.W. require a prescription) have since been introduced (or are foreshadowed) in all jurisdictions: *Australian Royal Commission on Drugs*, op. cit. Book C. 171-2.

[16] *Final Report of the Royal Commission into the Non-Medical Use of Drugs* (1979) S.A. Gov. Pr. 377 [hereafter cited as *S.A. Royal Commission on Drugs*]; *Australian Royal Commission on Drugs*, op. cit. Book F.

[17] The controls were imposed at state level by way of prescribing "standards" to which certain foodstuffs and medicines were obliged to conform to avoid being designated as an "adulterated" or falsely described product: *Pure Food Act* 1905 (Vic.) ss. 24(c), 41(1). Victoria clamped down on patent medicines by precluding them from containing opium, cannabis, cocaine or heroin, and by requiring that the strength, quality and purity of drugs conform to the standards set out in the British Pharmacopoeia; *Regulations as to Drugs* 1906 (Victoria): *Government Gazette*, 5 September 1906, 3749, r. 2; *Regulations as to Infants Food . . . and other articles of food . . . and drugs* 1907 (Victoria); *Government Gazette* 13 February 1907, 1111-2, r. 19. Commonwealth controls were imposed by way of making accurate trade descriptions (including the "material or ingredients of which the goods are composed") a precondition to avoiding the designation of the goods as prohibited imports: *Commerce (Trade Descriptions) Act* 1905 (Cth.) ss. 3(e), 7(1), 15(b) [subject to some protection of "trade secrets" the disclosure of which was not necessary for protecting the "health or welfare of the public": s. 16].

clout of "organized quackery" successfully delayed passage of this legislation for several decades.

Less prosaic factors account for the other major developments of the drug laws in the twentieth century. Some account must be taken of public disquiet at the significant levels of abuse of drugs such as cocaine and heroin during the 1920s and late 1960s respectively. Although McCoy has demonstrated the effects on the timing of reforms and on the distribution of responsibility for the enforcement of the law,[18] the most important motive-force has been provided by way of obligations incurred under international treaties and conventions.[19] The sheer proliferation of new substances, synthetic substitutes or chemical analogues, also had an impact in that it encouraged the trend in favour of controls imposed by way of regulation or executive proclamations in place of pre-ordained statutory obligations.[20]

3. Changing Fashions in Drug Laws

The cumulative nature of the various amendments to the drug laws has already been indicated. Mention has also been made of the fact that successive additions to the statutory framework drew on a multitude of differing rationales. Conceptually, the drug control strategies implicit in these successive stages in the evolution of the present laws can best be presented in terms of the basic features of the market for illicit drugs. As with normal commercial transactions, there are vendors and purchasers, importers (or manufacturers), middle-men, retailers, consumers and so on. Initially, the law was concerned with drugs only in so far as they served as the "tools of crime" (such as in the stupefying of victims of theft or as an instrument of suicide) or as a source of tax revenue at the point where they crossed the customs barrier. The unique features of the "drug market" were entirely irrelevant at this point in history.

The next stages in the evolution of the drug laws tied in with the concern about accidental poisonings (and suicide) and with the emotive campaigns against the Chinese. The first concern was met initially by placing restrictions on the class of people authorized to sell the poisons in question and by imposing obligations on vendors to document key features of specified sales. It was assumed that the problems in question would be responsive to the removal of irresponsible or unqualified vendors; to the elimination of casual transactions (involving juvenile intermediaries or lacking in face-to-face contact); and to the introduction of a system allowing drug movements to be traced (and particular transactions reconstructed after the event). The Chinese opium provisions also initially focused on the trans-

[18] McCoy, op. cit. 87-93.
[19] *S.A. Royal Commission on Drugs*, op. cit. 223; *Australian Royal Commission on Drugs*, op. cit. Book C. 150; infra 194-7.
[20] Infra 197-9.

action of sale and sought to proscribe the activities of vendors. Eventually this legislation was modified to incorporate offences of possession and to concentrate on the activities of the purchaser or consumer. They were designed for, and in practice administered against, the racially distinctive Chinese segment of the drug consuming population.

Subsequent developments began to concentrate on the drug trade proper. The legal definitions of "sale" and of "possession" were expanded from simple factual descriptions of the physical actions of normal commercial vendors and ordinary purchasers in possession, to become abstract (and somewhat artificial) devices for establishing a sufficient nexus between the substance and the person to be charged with unlawful disposal or acquisition of it. Restrictions were placed on the generally unfettered (subject mainly to record keeping and personal sale obligations) rights of pharmacists to sell addictive drugs. This was achieved by way of a requirement that a prescription (or other authority) be first obtained from a medical practitioner and by limiting the number of "repeats" permitted of a single prescription.[21]

This "market" orientation soon became more stylized as artificial constructs supplanted common trading notions. Conduct by people remote from, or collateral to, the primary transactions of sale or possession was brought within the purview of the criminal law, and the offence of "possession" of drugs became pre-eminent over the "transactional" offences of manufacture, sale or consumption. These changes accommodated the practical needs of law enforcement agencies which lacked the resources and training necessary to successfully detect large numbers of isolated transactional offences. This perspective continued to influence developments of the drug laws, and accounts for measures placing the onus of proof of "legitimate" possession on the accused; the creation of offences of forging prescriptions; and for a series of extensions to police powers of arrest and search, as well as modifications of trial procedures.

The final phases in the evolution of the drug laws were marked by the bureaucratization of controls and by the massive escalation in the levels of penalties imposed by way of statutory maxima. Proliferation in the numbers of pharmaceutical products accounted for the growth in the proportion of controls imposed by way of executive action rather than direct statutory provision. Government by executive proclamation (or regulations) proved to be the only convenient way of providing a speedy and flexible set of

[21] In Victoria, prescriptions were insisted on as a prerequisite to the sale (or other delivery) of morphine, cocaine and heroin, pursuant to regulations made in June 1913. Limitations on the number of refills permitted (one in the absence of a specific directive for multiple dispensing, subject to a statutory maximum of four) and particularization of the content and form of a "prescription", were introduced from January 1923 by way of subsequent regulations: *Poisons Regulation* 1913: *Government Gazette* 9 July 1913, 3047; *Dangerous Drugs Regulations* 1922: *Government Gazette* 6 September 1922, 2410.

[22] *Australian Royal Commission on Drugs*, op. cit. Book C. 150.

controls capable of responding to the rapid changes to drug inventories and consumer preferences. International treaty obligations also contributed to this shift towards executive action.

The policy thread which has most recently achieved prominence is the criminal justice approach. Although this policy can be traced back to the original Chinese opium legislation, the last decade has seen a rapid intensification and consolidation of this model. This emphasis on the use of heavy criminal sanctions as a means of stamping-out the demand for drugs, and as a way of increasing the stakes for people involved in production and distribution, seems likely to continue. The South Australian Royal Commission proposed that offences involving simple possession and other "consumer crimes" be scaled-down and that emphasis be placed on controlling availability, and on strengthening alternative strategies to that of reliance on the criminal justice model.[23] However, these recommendations were not favourably received. The most recent policy pronouncements — those handed down in the report of the Australian Royal Commission on Drugs headed by Mr Justice Williams—propose that the criminal justice model be further intensified.[24]

This is not the place to evaluate alternative drug control strategies. Historical antecedents are, however, always instructive. Contemporary drug control strategies ought not to be formulated without first considering the historical record to be charted below.

THE PERIOD OF ENQUIRY

The history of Australian legislation for the control of the non-medical use of drugs commences with a provision of the vagrancy law. In Victoria, the oldest of these provisions is a clause in the *Vagrancy Act* of 1852 stating that "any person having on or about his person . . . any deleterious drug [is deemed to be] an idle and disorderly person."[25] This clause, which appears without amendment in the present *Vagrancy Act* 1966, carries a maximum penalty of 12 months imprisonment.[26] It was copied from British legislation which had evolved during the historical phase when vagrancy legislation was directed at authorizing preventive action against people thought to pose a greater than average risk of turning to crime.[27] Possession of deleterious drugs was thought to be one of the characteristics which marked the potential criminal. The rationale was not without some factual basis, since a common method of theft at this time involved the lacing of alcoholic beverages with substances which would stupefy the victim while the offence

[23] *S.A. Royal Commission on Drugs*, op. cit. Ch. 7.
[24] *Australian Royal Commission on Drugs*, op. cit. Book D. 9-15, 26-8; Book F passim.
[25] *Vagrancy Act* 1852 (Vic.) s. 2(7).
[26] *Vagrancy Act* 1966 (Vic.) s. 6(1)(f).
[27] W. S. Holdsworth, *A History of English Law* (London, Methuen and Co., 1924) pp. 388, 394.

was committed and the offender made good his escape. Hocussing,[28] as the practice was called, was reported to be quite common on the Australian gold fields in the early 1850s. Local exponents of the art reportedly expressed a measure of pride in the sophisticated techniques adopted.[29]

1. Vagrants, Hocussers and Children: Enquiry Without Action

Concern about the practice of hocussing, and the widespread use of opiate-based patent remedies for the home medication of children, led to action in the Victorian Parliament in 1857 to introduce controls over the manner in which pharmacists ("druggists") marketed preparations containing poisonous substances. A Bill to "regulate the safekeeping and sale of arsenic and other poisons" was introduced into the Legislative Council at the beginning of 1857 by Dr Tierney M.L.C.[30] The Bill was based on the English *Arsenic Act* of 1851[31] from which six of the twelve clauses were copied. It would have required people dealing with poisons to record details of sales in a special book and would have prohibited sales where the vendor did not personally know the purchaser or where the buyer was under twenty one.

The Bill came under strong criticism, particularly from wholesale druggists who petitioned Parliament opposing it.[32] Dr Tierney therefore moved that the Bill be examined by a Select Committee.[33] The Committee, chaired by Dr Tierney, took evidence from eight witnesses over four hearing days.[34] There was general agreement that tobacco, rather than opium (specifically laudanum, a tincture of opium) was relied on in the practice of hocussing, but witnesses played down the importance of this problem.[35] Instead, they concentrated on the misuse of patent remedies for treating children,[36] female suicides, and accidental poisoning[37]—in descending order

[28] "To stupefy with drugs, especially for criminal purposes; hence to drug (liquor)"; 1 *Shorter Oxford English Dictionary* (3rd ed. London, Oxford University Press, 1944) p. 908.

[29] Victoria, *Parliamentary Debates*, Legislative Council, 17 February 1857, 463, 464. Dr Tierney laid part of the blame at the door of "unprincipled persons following the profession (of druggists)": loc. cit.

[30] Victoria, *Parliamentary Debates*, Legislative Council, 20 and 29 January 1857, 297 and 370 [second reading 17 February 1857, 463, 464].

[31] *Arsenic Act* 1851 (U.K.) 14 and 15 Vic. c. 13, ss. 1, 2.

[32] Victoria, *Parliamentary Debates*, Legislative Council, 17 February 1857, 463.

[33] Consisting of the President (James Palmer M.L.C.) and Messrs Bennett, Hope, Hood, Fawkner, S. Henty and Dr Tierney.

[34] Dr W. Wilmot (Coroner), Dr D. Wilkie, Dr A. Berndt, Dr R. Youl, Dr G. Howitt, Mr D. Long (chemist), Dr W. McCrea (Chief Medical Officer) and Dr J. McCrea: Victoria, *Report of the Select Committee on the Sale and Keeping of Poisons 1857, Votes and Proceedings of Legislative Council 1856-57* paper D10 (pages not numbered) [hereafter cited as *Report 1857*].

[35] Only Dr James McCrea (who had practised on the diggings at Bendigo) lent any support: *Report 1857*, op. cit. minutes of evidence Q's 541, 542 (but even McCrea believed that "the reports have been magnified").

[36] A wide selection of these opiate-based patent remedies were freely available. Godfrey's Cordial, Dovers' Powder and the well known "laudanum" were the most popular, but there was a host of others including Dalby's Carminative, Ipecacuanha and Chlorodyne: *Report 1857*, op. cit. passim.

[37] Several cases of accidental poisoning were referred to in evidence: see *Report*

of importance. The misuse of patent remedies for children was regarded as particularly insidious because the opiate was a very effective tranquillizer which stopped children crying. The remedies were therefore extremely popular with the public. Children, however, were found to have a variable —and sometimes very low—level of toxicity to opium.[38] Numerous deaths were alleged to be attributable to the misuse of these remedies in Britain.[39] Against the weight of evidence on this issue, the Bill was not amended to include controls over these patent remedies, probably because the views expressed by the President of the Council, James Palmer (also a member of the Select Committee), carried the day when he contended that "it is an un-English thing to place restrictions upon a trade more than are necessary".[40] This remark ought not to be too hastily characterized as a callous endorsement of unfettered free trade principles because there was some evidence before the Committee that a system of voluntary self-regulation was adhered to by some druggists.[41] But it does attest to the strength of the patent medicine industry.

The Select Committee brought down its report in June and the attached draft Bill rapidly passed through to the committee stages.[42] Arsenic, strychinine, opium, morphia and laudanum were all covered by the Bill. It required that they be kept under lock and key,[43] securely packaged and labelled as poisons,[44] except when dispensed on prescription. Lodging-houses and hotels were precluded from administering these substances other than under the direction of a medical practitioner[45] and no one, other than a parent or guardian, or a person acting under medical direction, was to be

1857, op. cit. Appendix A (Dr Wilmot), Appendix B (Dr Youl); minutes of evidence Q. 411 (Mr Long).

38 Dr William McCrea, the Chief Medical Officer, quoted eight cases where children had died following small doses of opiates (ranging from 1/12 to 1/4 of a grain). Apparently 2 drops of laudanum (1/10 grain), 1/2 dram of Godfrey's Cordial and 4 grains of Dovers' Powder (1/2 grain) reached this dosage level: *Report 1857*, op. cit. minutes of evidence Q. 469.

39 *Report 1857*, op. cit. minutes of evidence A. 388 (Mr Long). Dr Youl referred to four local cases where mothers had given their children an overdose and Dr Howitt related the death of his niece which he claimed was due "entirely [to] the nurse drugging it with Godfrey's Cordial every night [for 3-4 months]". Ibid.: Q. 290 and Appendix B (Dr Youl); Q. 359 (Dr Howitt); cf. E. Lomax, "The Uses and Abuses of Opiates in Nineteenth Century England" (1973) 47 *Bulletin of Historical Medicine* 157.

40 *Report 1857*, op. cit. minutes of evidence Q. 404.

41 Long, who was the only chemist to give evidence, stated that the rule in his pharmacy was to insist that two people collect any order for laudanum in excess of a single dose. He also claimed that he had refused to sell Godfrey's Cordial during the 16 years he had spent in Melbourne. See *Report 1857*, op. cit. Q's. 388 and 376 respectively; McCoy is less charitable: see McCoy, op. cit. 52-70.

42 Victoria, *Parliamentary Debates*, Legislative Council, 30 June 1857, 873 (report); 8 July 1857, 920 (second reading); 9 July 1857, 928 (committee).

43 Clauses 1 and 2.

44 Clause 3.

45 Despite the general consensus by the witnesses that the provisions of the *Vagrancy Act* were adequate for this purpose, the Bill made provision for such control in clauses 4 and 5.

permitted to administer laudanum or other narcotics to children under the age of five years. With minor amendments, the Bill was passed by the Council on 14th July[46] and forwarded to the Assembly. There it received a first reading on 15th July and the second reading on 21st July. At this point the Bill was stopped in its tracks. On that day Dr Evans M.L.A. presented a petition opposing the Bill, signed by the hastily constituted "Council and members of the Pharmaceutical Society of Victoria and other Druggists."[47] The petitioners complained of the "indiscriminate injustices" of the Bill and requested that future legislation give due weight to their views.[48] In the face of such strong opposition the Bill lapsed and further action in Victoria was delayed for nineteen years until 1876. The successful Bill was passed in the same session that the *Pharmacy Act*[49] was enacted to protect the professional interests of chemists against less qualified people who dispensed drugs and poisons, particularly in remote areas of the state. The "injustice" complained of in the 1857 Bill favoured unqualified people in remote areas and threatened the long-term viability of an emerging profession heavily dependent on sales of patent remedies. It is perhaps unfortunate that this was not perceived at the time and a *Pharmacy Act* introduced to placate some of these fears.[50]

2. The Revenue and Customs Approach

Government control over the importation of opiates and other drugs for non-medical purposes was also slow to develop. The Victorian *Customs Act*, for example, was enacted in 1852, the year after Victoria separated from New South Wales, but it was in almost identical terms to the previous legislation.[51] Certain goods were specified to be prohibited imports and penalties were set down for a breach of these regulations, but drugs were not included within these controls until September 1857. Goods which were not within the category of prohibited imports might be subject to duty. Duties were imposed on tobacco, spirits, snuff, tea and coffee but all other goods, including drugs, were free of duty.[52] Not until 1857 did the Victorian Parliament enact "An Act for Granting a Duty of Customs on Opium" setting a duty of ten shillings per pound, retrospective to 26th May.[53] Much

[46] Victoria, *Parliamentary Debates*, Legislative Council, 14 July 1857, 951.
[47] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 July 1857, 966 (first reading), 21 July 1857, 985 (second reading and petition). The Society was established to oppose the Bill; see Haines, op. cit. 44.
[48] Victoria, *Votes and Proceedings of the Legislative Assembly* 1856-57, 379.
[49] *Pharmacy Act* 1876 (Vic.).
[50] In England the *Pharmacy Act* of 1852 preceded the Poisons legislation by 16 years and the initial system of registration of qualifications was expanded and made a precondition of authority to trade by the 1868 amendments which introduced the Poisons controls: *Sale of Poisons and Pharmacy Act Amendment Act* 1868 (U.K.). This interpretation is supported by Lonie, op. cit. 23.
[51] *Customs Act* 1852 (Vic.) 16 Vic. 23; cf. 9 Vic. 13.
[52] *Customs Act* 1853 (Vic.) 17 Vic. 6.
[53] *An Act for Granting a Duty of Customs on Opium* 1857 (Vic.) 21 Vic. 7, s. 1. In 1879 the duty was increased to £1 and this rate of duty was adopted in the

later, duties were placed on cannabis (1883)[54] and morphia (1889).[55]

When the legislation to impose a duty on the importation of opium was introduced in Victoria by the McCulloch government in 1857,[56] the Premier spelt out the major argument in favour, claiming "[i]t was . . . wrong that the Chinese should as a class enjoy without taxation a luxury of theirs equivalent to the Tobacco used by Europeans."[57] The opium trade itself was not insignificant. During the previous year, 49,129 pounds of opium, valued at £56,976, were imported. Opposition speakers to the Bill objected to the use of taxation to achieve moral ends[58] but there was no serious opposition to the measure which rapidly passed the Assembly and the Council without further debate.[59] In 1862 the Anderson government closed a loophole of which the Chinese importers were taking advantage by importing opium in a refined state weighing approximately half the raw weight, thus effectively halving the rate of duty. The duty on refined opium was therefore doubled.[60]

Five months after the enactment of the 1857 duty legislation, amendments to the *Customs Act* were introduced into the Victorian Parliament. A new category of "Absolutely Prohibited" imports was created[61] but then divided into two groups. The first list included goods such as "extracts and essences of coffee, tea and tobacco, obscene prints and infected cattle." These goods were unconditionally prohibited. By contrast, items in the second list, which included snuff, spirits, tobacco and opium, were deemed to be prohibited only when specified conditions were not met. These conditions required that the goods be transported in vessels of at least 50 tons burden. Snuff, tobacco and opium were, in addition, required to be packed in containers of a certain minimum weight (45 pounds net in the case of opium) and shipped to an approved port. Finally, these goods were required to be specially reported, and heavier than normal penalties

initial Commonwealth *Customs Tariff Act* 1901, but it was soon raised to 30/- in November 1901. The legislation was not finally repealed until 1934.

54 A duty of one penny a pound was set: 47 Vic. 769 (1883).

55 The duty was fixed at 1/6d per ounce: 53 Vic. 1019 (1889). In America, a 15% *ad valorem* tax was imposed in 1842 and increased to 100% for smoking-opium in 1860. Canada did not impose duties until 1879 when it was set at 20% for raw opium or $5 per pound for smoking-opium: British Columbia, *Drug Addiction in British Columbia: a research survey* (1956) Uni. British Columbia, Vancouver, Vol. II, 494-5 [hereafter cited as *Drug Addiction in British Columbia*].

56 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 1857, 656; 27 May 1857, 668; 28 May 1857, 683; 29 May 1857, 687; 2 June 1857, 710.

57 Ibid. 668.

58 Ibid. 669.

59 Victoria, *Parliamentary Debates*, Legislative Council, 3 June 1857, 711 (message from Assembly); 9 June 1857, 744 (first reading); 10 June 1857 (second reading); 16 June 1857, 802 (third reading); Lonie, op. cit. 1-3.

60 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 May 1862, 1101; 11 June 1862, 1302; 12 June 1862, 1316; 15 June 1862, 1324; 17 June 1862, 1336; Legislative Council, 17 June 1862, 1331 (passed 11:9). McCulloch, now in Opposition, did, however, exploit a minor scandal when £1,200 was lost to the revenue because importers obtained advance notice of the duty: ibid. 1334.

61 *Customs Act* 1857, (Vic.) 21 Vic. 13 s. 34. Cf. *Customs Act* 1901 (Cth.) s. 52 [repealed in 1952].

were imposed for evading the controls.[62] No justification was provided for this legislation.[63] On the face of it, it appears to have been introduced to facilitate the monitoring of imports with a view to reducing evasion of the new duty requirements, and to serve as a form of protection for the local retail drug packaging industry.

PUBLIC PRESSURE GROUPS: VOICES IN THE WILDERNESS

The early history of drug control legislation bears witness to the capacity of powerful social groupings both to accelerate and to delay the passage of legislation. Pharmacists and the advocates of the proprietary (or "patent") medicine industry managed to delay for several decades the imposition of controls over the distribution of remedies containing opiates and other addictive or harmful substances. However, the rather emotive campaign against the numerically small, but racially distinctive, Chinese population elicited a comparatively speedy response from the legislature.

1. The Chinese and the Opium Question

Opium use became a matter of public concern in Australia in the late 1860s, not directly, but indirectly, as attention was drawn to the allegedly dire consequences to the public which arose from the heavy consumption of opium by the Chinese. Thus in 1868 Mr McCombie, the member for South Gippsland in the Victorian Parliament, directed a question to the Chief Secretary, asking whether he was aware of the "dangerous and demoralizing effects of abuse of opium"[64] and drawing attention to a report by Rev. W. Young on the "Condition of the Chinese Population in Victoria", recently tabled in Parliament.[65]

The Young Report proved to be an influential document in Victoria, despite the speculative and possibly biased nature of some of the data (which was collected by government-employed Chinese interpreters).[66] A surprisingly high number of opium shops were reported, with over 90 shops for a population of 19,500 or one for every 220 members of the Chinese community. Prices were quoted at between £1.4.6d to £1.6.0d per six ounce tin.[67] Consumption was estimated at one ounce per day.[68]

Commenting on these findings, Young drew a comparison between moderate use of opium and moderate consumption of alcohol, suggesting

[62] *Customs Act* 1857 (Vic.) ss. 47, 179.
[63] The Parliamentary debates throw no light on this question: see Victoria, *Parliamentary Debates*, Legislative Assembly, 13 January 1857, 259, 260.
[64] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 1868, 908. Cf. Lonie, op. cit. 2.
[65] Victoria, *Report on the Condition of the Chinese Population in Victoria* (1868) Cmmd. 1271 [hereafter cited as *Chinese Report*].
[66] The interpreters were based at the gold fields in Ballarat, Castlemaine, Ararat, Maryborough, Daylesford, Avoca, Beechworth and Sandhurst.
[67] *Chinese Report*, op. cit. 27 (Maryborough and Sandhurst respectively).
[68] Ibid. 23.

that both "may predispose . . . [if not] directly excite" addiction. Confirmed smokers were described in more sensational terms:

> "*with opium* [the confirmed smoker] *is miserable and without it he can neither sleep eat or live.* He may drag on an existence for a few years longer but at last he perishes."[69]

Turning from the effect of opium on the individual to the social implications he wrote:

> "their influence upon society is equally injurious. In domestic economy they are the great source of poverty, wretchedness and discord; and their social and national effects are not less pernicious, since, in proportion as this habit prevails, the public morale will be corrupted, trade and commerce lessened, character and influence degenerated, crime perpetuated, pauperism produced, wealth dissipated, happiness ruined and population destroyed."[70]

Finally, he directed his attentions to the opium shops themselves, sowing the seeds of what was to become a very damaging reflection on the Chinese people. Young claimed that the opium shops were

> "dens of infamy and immorality. In these are found abandoned European women who sell themselves to do wickedly in order to obtain the wages of unrighteousness. They have also got into the habit of smoking the pernicious drug; and there is every reason to fear that in the course of time the practice will gradually spread among the European population . . ."[71]

This theme was taken up in Parliament five years later by the Victorian M.L.A. John Wood, who linked the moral issue with his overt contempt for and racial prejudice against the Chinese. Calling attention to the "*moral pestilence* which was being acclimatized in Victoria by the use of opium and the almost unchecked debauchery of the Chinese",[72] he went on record to the effect that:

> "[h]e did not wish to prohibit the Chinese [smoking opium] and he would not be utterly inconsolable if through opium, they suffered the fate which fell on the first born of Egypt because he considered the Chinese were not only aliens but a class of people who were never likely to mix beneficially with the general population."[73]

On this occasion, the government was largely unmoved by this emotional plea.[74] Not to be deterred, Wood raised the matter again the following year (1874) contending that there had been a "rapid increase of the use of opium amongst the white population, especially young girls" whom he

[69] Ibid. (emphasis added).
[70] Ibid.
[71] Ibid. 24.
[72] Victoria, *Parliamentary Debates*, Legislative Assembly, 31 July 1873, 903 (emphasis added).
[73] Ibid. 903.
[74] Ibid. 904. The Government did, however, concede that import duties were an ineffectual control and promised to implement more effective controls which might be suggested in the future.

alleged were "systematically decoyed into dens occupied by filthy Chinese."[75] He proposed that opium should only be available on prescription and dispensed by chemists; that opium ought to be abandoned as a source of state revenue; and that the Chinese should be segregated from the general population.[76] Once again Wood was rebuffed, this time with information countering his allegations of an opium wave or of corruption of white women.[77]

There the opium question rested for ten years until 1884. In that year Wood introduced a motion to prohibit the sale of opium unless directed by a doctor or a chemist. The same issues were canvassed in this debate, particularly the alleged spread of the habit into the white population,[78] but for the first time speakers began to question whether opium use caused immorality or vice versa,[79] and doubts were expressed as to the efficacy of legislation in influencing moral conduct.[80] Although action did not follow immediately,[81] it would seem that Wood had gathered some support in the intervening years, for in the following months quite a spate of petitions opposing the importation and use of opium was received from local electorates, religious groups and representatives of the Chinese community.[82] The lobbying then abated and the matter did not emerge again until the 1890s when questions were again raised in the Legislative Assembly. On this occasion William Anderson M.L.A., an elder in the Presbyterian Church who was very active in the Temperance movement, led the way.[83] Eventually, in 1891 the Temperance Premier, James Munroe, introduced a Bill to "Restrict and regulate the Sale and Use of Opium."[84] The major

75 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 September 1874, 1201.
76 Ibid. 1202.
77 Police reports of the time indicated that only two young men were known to have become habitual smokers of the drug in the last few years. Twenty "lower class prostitutes" were known to be associating with the Chinese but, while most smoked opium, "with one or two exceptions, not in excess": ibid.
78 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 June 1884, 288, 289; Lonie, op. cit. 2-3.
79 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 June 1884, 288, 290.
80 Ibid. 291. Similar heresies had been voiced by Dr Howitt in evidence to the 1857 Select Committee in Victoria. He lamented that "[t]he Thistle Law [of 1856] has not prevented the thistles coming close to the Parliament House": *Report 1857*, op. cit. Q. 318.
81 A few months later, Wood asked whether the Pharmacy Board (which was responsible for administering and enforcing the *Poisons Act* 1876) would prosecute people who were selling opium without permission. He was assured that funds would be provided for the purpose: Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 1884, 1322.
82 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 1884, 1322; 25 September 1884, 1521; 14 October 1885, 1745; 21 October 1884, 1857; 3 December 1884, 2384; Lonie, op. cit. 3-6.
83 The introduction of the Bill followed questions in the House in June and December of 1890 and three more in 1891; Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 1890, 397 (Anderson), 3 December 1890, 2374 (Gordon), 7 July 1891, 191 (Anderson), 8 July 1891, 257 (Anderson), 15 September 1891, 1376 (Gordon). For a brief outline of the involvement of the Temperance movement see Lonie, op. cit. 6.
84 Ibid. 2709 (26 November 1891). Speaking to the Bill, the Premier noted that in

provisions prohibited opium smoking or the cultivation of opium poppies, and created an offence of "unnecessarily prescribing opium".

The 1891 Bill had an easy passage through the Assembly but met strong opposition in the Council. Pressure from the eleven opium farmers,[85] mainly in the Bacchus Marsh area, together with a petition from the Chinese merchants of Little Bourke Street[86] in the Chinese section of Melbourne, carried the day. The Bill was successfully amended to alter the date of commencement from 1892 to 1894, whereupon the Bill lapsed.[87]

The Bill was reintroduced into the Assembly in July 1892 and given a first reading.[88] A favourable petition from the elders of the Presbyterian Church was read[89] but the second reading debate remained at the bottom of the notice paper. Shiels, the new Premier, pleaded pressure of time when questioned about the delay.[90] Following a reshuffle of the government in 1893 Patterson became Premier and in February the Bill was discharged from the paper with the promise that it would be introduced in the next session.[91] Patterson honoured that promise and the Bill received a first reading[92] plus favourable petitions[93] early in 1894, but the government fell in August of that year. The incoming government was formed by George Turner and the lapsed Bill was not revived. Two desultory petitions were received in December 1894[94] but by this time public interest, which had never been high, died away altogether, and the exponents of single-issue pressure-group politics had become disillusioned. Interest in the question did not revive again in Victoria until the latter part of 1905, with the result that Queensland, South Australia and New Zealand became the first of the local jurisdictions to enact legislation on this subject.

The position in other countries was not dissimilar, at least in those regions where rapid economic development such as that associated with the gold rush, and the associated disruption of social and economic relationships which this entailed, coincided with substantial immigration by particular ethnic groups such as the Chinese. As in Victoria, such conditions seem to have been a precondition to serious debate on the use of opium,

1885 there had been 27 successful prosecutions by the Pharmacy Board but in no case had the fine exceeded £1: ibid. 2791 (2 December 1891).

85 Ibid. 2977 (10 December 1891). One farmer had apparently been growing opium for the previous 19 years.
86 15 December 1891, signed by 22 merchants; Lonie, op. cit. 6.
87 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 December 1891, 3410.
88 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 July 1892, 444; 30 August 1892, 1268; 30 November 1892, 3112; 14 February 1893, 4070; 3 July 1894, 563.
89 Ibid. 1268.
90 Ibid. 3112.
91 Ibid. 4070 (14 February 1893).
92 Ibid. 563 (3 July 1894).
93 From David Gordon, convenor of the "State of Religion Committee" of the Presbyterian Assembly, residents of Collingwood, and the Leigh District.
94 From inhabitants of Bellarine and Portarlington; from residents of Queenscliff. See also Lonie, op. cit. 6.

even if they did not provide any guarantee that legislation would speedily follow. This was particularly so during the last quarter of the nineteenth century. However, following the turn of the century, other factors—such as international considerations—assumed a higher profile. This is borne out by a brief overview of the Canadian and North American position during this period.

Canada held a Royal Commission on Chinese immigration in 1885.[95] Although the now familiar allegations, including the luring of white women to moral destruction in opium dens, were canvassed as extensively as in the Victorian "Chinese Report", the Commission rejected the allegations and made no recommendations or adverse comments on opium.[96] In America, the economic dislocation and anti-Chinese sentiments associated with the gold rush in states such as California, led to isolated moves against opium in the 1870s.[97] But serious concern at the national level arose only when the Philippines Commission[98] recommended in 1904 that opium be banned in that territory from 1908. Importation was not barred until 1909 and consumption was not finally outlawed until the Harrison Act of 1914.[99]

2. The Patent Medicine Industry

Patent remedies were the subject of public concern in Australia from the early 1850s.[100] Attempts to impose controls were, however, frustrated by the variety of interests involved in the marketing of drugs. Pharmacists initially faced stiff commercial competition from retail grocers keen to preserve their rights to sell basic domestic drugs and poisons, together with the popular "quack" remedies marketed by various enterprising entrepreneurs. They also faced competition from dispensing conducted by medical practitioners (and long sought to preserve rights to prescribe as a counter to this "intrusion") and from "ready mixed" medicines which threatened the craft tradition of pharmacists "compounding" their own remedies.[101] Haines contends that the low professional status of pharmacy (due largely to the limited efficacy of early medicines) and the commercial imperative contributed to the absence of any unified campaign by chemists to control the quack remedies.[102] The public had fairly catholic tastes and the charlatans, the qualified, and commercial interests, all had a reasonable

95 Canada, *Proceedings of the Royal Commission on Chinese Immigration* (1885) Ottawa, 18, xii, *Sessional Papers* 1885, paper 54a.
96 *Drug Addiction in British Columbia*, op. cit. 492-4.
97 P. A. Morgan, "The Legislation of Drug Law: Economic Crisis and Social Control" (1978) 8 *Journal of Drug Issues* 53 [1895, California; 1881, San Francisco].
98 *Report of the Committee appointed by the Philippines Commission to investigate the use of Opium in the Far East*: 59th Congress, First Session 1905, Document 265.
99 See Terry and Pellens, op. cit. Ch. 2. Also see Lonie, op. cit. 39-46.
100 Supra fn. 37 and accompanying text; McCoy, op. cit. 52-64.
101 Haines, op. cit. chs. 3, 5, 8.
102 Ibid. 46, 52-3. See also Lonie, op. cit. 25, 31; McCoy, op. cit. 64.

chance of competing for business. In the prevailing *laissez-faire* business climate, there was little scope for, and no monetary incentive to mount, a campaign to eliminate the opiate and other addictive or harmful substances included in the popular quack remedies. Throughout the nineteenth century, the legislature refrained from bringing patent remedies within the ambit of the *Poisons Act* controls.[103]

When reforms were introduced, they took the form of controls imposed under Pure Foods legislation.[104] Several pressures seem to have converged to bring about reform. McCoy suggests that the reform was "[i]nspired in part by American reform movements"[105] while Lonie contends that bureaucratic initiatives and economic forces contributed.[106] Despite the strength of the case for the introduction of these restrictions on secret and patent remedies, it was given a rough passage when these moves finally came to fruition in 1905-6. Although the manufacturing interests were unable to duplicate their success in New Zealand in 1904—where opposition led to the rescinding of the new legislative controls—the vigorous and co-ordinated international campaign which was mounted in this and other countries, bears witness to the strength of the resistance faced by proponents of these measures.[107]

If the Chinese opium laws had to await the arrival of a community lobby of sufficient strength to give the measure the requisite Parliamentary momentum, the Pure Food controls had to await the discrediting and erosion of strength of the commercial opposition to reform. Both examples, however, illustrate the extent to which legislation is simply the reflection of the current balance between economic and political centres of power existing in the community at a particular point in history. The next section will detail the development of the main legislative models which were ultimately enacted.[108]

EARLY LEGISLATIVE MODELS

1. The Poisons Legislation: A Regulatory Model

South Australia became the first jurisdiction in Australia to enact legislation to regulate the sale and use of poisons, with the passage of a Bill in

103 Lonie, op. cit. 26, 31.
104 Supra fn. 17 and accompanying text.
105 McCoy, op. cit. 66.
106 Lonie documents the influence of Commonwealth and state public servants (and heads of state) working within the framework of inter-government consultative arrangements. He also points to the expansion of certain manufacturers and the economies of scale (and expertise) which allowed these firms to move out of "quack" remedies and begin to manufacture "ready made" proprietary competitors to the old compounded medicines: op. cit. 31, 32-4.
107 The activities of the "foreign drug firms" are graphically described by McCoy, op. cit. 67-9.
108 Developments in the pure food controls will not receive further attention in this article, since there have been few significant modifications to the original framework: *S.A. Royal Commission on Drugs*, op. cit. 227.

1862.[109] The controls were rudimentary, placing five poisons (not including opium) under the requirement that details of sales be recorded in a Poisons Book[110] and requiring that those five substances, together with opium or laudanum, be distinctly labelled with the name of the contents and the word "Poison".[111] Legislation along these lines in other jurisdictions was slow in coming, other than across the Tasman where New Zealand copied part of the South Australian model in 1866.[112] Victoria and New South Wales followed fourteen years later in 1876[113] while legislation was brought down in Western Australia in 1879, Tasmania in 1886 and finally, by Queensland in 1891.[114] South Australia very nearly set another precedent by placing opium under the Poisons Book controls. An amendment to that effect was carried in the Legislative Council (where the Bill originated) but it was rejected by the Assembly. The Council then gave ground on the matter.[115] New Zealand pioneered this added control in 1871.

The South Australian Act pioneered the Poisons Book model and the system of licensing of vendors then under discussion in Britain but not finally enacted there until 1868.[116] The requirement to label opium as a poison was also copied by the English legislation of 1868, but neither jurisdiction paid any further attention to the original legislation until 1908.[117] In that year, England placed opium, morphine and cocaine under Poisons Book controls[118] and South Australia transferred its controls to regulations —albeit regulations which were not promulgated until 1914.[119] Even then, only morphine and cocaine were placed under Poisons Book regulations, leaving opium or laudanum free to be sold by any licensed vendor, provided they were accurately labelled[120] and stored in a Poisons cupboard.[121]

The legislation enacted by Victoria and New South Wales in 1876 followed a similar pattern. The purpose of the Victorian Act was clearly set out in the preamble as the avoidance of fatal accidents and criminal

109 *An Act to Regulate the Sale of Certain Poisons* 1862 (S.A.); Lonie, op. cit. 24-5.
110 Ss. 1, 2 [arsenic, corrosive sublimate, prussic acid, essential oil of bitter almonds, strychnine].
111 S. 3.
112 *Sale of Poisons Act* 1866 (N.Z.). A system of registration of vendors did not come in until 1871: *Sale of Poisons Act* 1871 (N.Z.).
113 *Sale and Use of Poisons Act* 1876 (Vic.); *Sale and Use of Poisons Act* 1876 (N.S.W.); Lonie, op. cit. 25.
114 *Poisons Sale Act* 1879 (W.A.); *Sale and Use of Poisons Act* 1886 (Tas.); *Sale and Use of Poisons Act* 1891 (Qld.).
115 South Australia, *Parliamentary Debates*, Legislative Council, 29 May 1862, 149; Legislative Assembly, 10 June 1862, 241-2; Legislative Council, 24 June 1862, 303. Lonie, op. cit. 25.
116 *Pharmacy Act* 1868 (Eng.) ss. 1, 5, 15 [main elements of licensing system], 17 [Poisons Book], Schedule A Part I and Part II [classification of substances].
117 *Poisons and Pharmacy Act* 1908 (Eng.). *Food and Drugs Act* 1908 (S.A.) (repealing the 1862 legislation).
118 *Poisons and Pharmacy Act* 1908 (Eng.) Schedule A Part I.
119 *Food and Drugs Act (Poisons) Regulations* 1914: S.A., *Government Gazette* 10 December 1914, 1231.
120 Rr. 1, 2, 5.
121 R. 9.

poisoning.[122] This was to be achieved by limiting the class of people who could lawfully sell poisons. Three groups were specified: legally qualified medical practitioners; registered pharmaceutical chemists;[123] and people holding a certificate from the Pharmacy Board indicating that they were "fit and proper persons" to be entrusted with the sale of these dangerous substances.[124] Registered chemists were placed in a pre-eminent position by being granted a monopoly within a zone defined by a radius of four miles from their place of business. Outside those zones, any person who was able to obtain a certificate from a general practitioner and a magistrate that he was a "fit and proper person" was, on the payment of an annual fee of £1, entitled to be issued with a certificate recognizing him as a Dealer in Poisons.[125]

Poisons were listed in the First Schedule to the Act and were divided into two categories. Those in the Second Part of the schedule could lawfully be sold, without any additional restrictions or formalities, by any of the three categories of authorized vendors.[126] The only drugs properly so called which were listed were opium and laudanum. Both were listed in the Second Part of the schedule. So the only effect of the legislation on the drug trade was to place some minimal "licensing" requirements on the class of people entitled to sell opium and laudanum. By contrast, however, the New South Wales Act placed laudanum in Part One, bringing it under the tighter restriction of the Poisons Book. Other opiates were placed in Part Two, leaving them under the minimal licensing controls operating in Victoria.[127]

Consistent with the stated purpose of the legislation both in Victoria and New South Wales, "poisons" were more strictly controlled. They were placed in the First Part of the schedule and thus attracted a number of more onerous obligations. Arsenic, strychnine and nine other common poisons were listed in Part One of the schedule. Sales of these substances could only be made by one of the three groups of authorized vendors. In addition, the legislation insisted that the purchaser's name, address and occupation, together with a statement of the purpose for which the poison was bought, be recorded in a separate Poisons Book and be countersigned by both the vendor and the purchaser.[128] The sale of poisons to a person who was under eighteen years, or who was not known personally by the

[122] Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 1876, 1561 (Mr Johnson M.L.A., Geelong West, moving the second reading).
[123] Registered pursuant to *Pharmacy Act* 1876 (Vic.) ss. 18-21.
[124] *Sale and Use of Poisons Act* 1876 (Vic.) s. 3.
[125] S. 4. In Tasmania a similar concept was introduced, but the radius was 5 miles and the fee 5/-: *Poisons Act* 1916 (Tas.) s. 6.
[126] S. 3. The legislation exempted sales in accordance with a prescription and sales of patent or proprietary medicines: s. 13.
[127] S. 5. New Zealand and Western Australia also followed Victoria in this regard: *Sale of Poisons Act* 1866 (N.Z.); *The Poison Sale Act* 1879 (W.A.) Schedule A Part 2. New Zealand promoted opiates to the First Part in 1871: *Sale of Poisons Act* 1871 (N.Z.).
[128] S. 5.

vendor, was made an offence unless a witness who was prepared to attest the purchaser's age or identity also signed the book.[129]

Minor amendments were made to this Act from time to time but until 1914 these were only introduced in order to accommodate pastoral interests.[130] In 1907 heroin and cocaine were deemed by proclamation to be "poisons",[131] but up to 1914 there was no legislative authority to specify whether they were covered by the more stringent controls for poisons in Part One or the minimal control over the class of authorized vendors which applied to opium and laudanum in Part Two of the schedule.[132] The status of the proclamation was therefore rather ambiguous.[133] Similar patterns developed in the other states though, by 1891 when Queensland introduced legislation, opium and all its preparations had been promoted to the Part One Poisons Book limitations.[134]

The net effect of the early *Poisons Acts* ought not to be overstated. No doubt some improvement was made in preventing the more unscrupulous and less knowledgeable people in the community from retailing opiates, but individual approvals do not seem to have been difficult to obtain. Even the more rigorous obligations placed on the sale of poisons listed in the First Part of the schedule should not be over-emphasized. Their primary advantage was that they enabled the passage of poisons at the retail level of the distribution chain to be monitored (or "traced"). This facilitated the reconstruction of transactions which might later be alleged to be associated with an accidental or criminal poisoning. Neither the stated purpose nor the machinery of the *Poisons Acts* had much bearing on, or relevance to, modern drug problems; this only emerged when Parliament was moved to prohibit one or more of the transactions of importation, manufacture, distribution, possession and consumption of various substances. A social movement did emerge in Victoria in the late 1860s which pursued some of these objectives as part of a campaign to stamp-out the use of opium by the Chinese population, but success did not come until around the turn of the century. For over a third of a century after 1862, the Poisons legislation retained this exclusive focus on the licensing of vendors, the tracing of transactions and general regulation of sales of poisons.

129 S. 8. In each case the penalty for breach of the legislation was a maximum fine of £10 on summary conviction: s. 10.

130 Thus in 1896 the Shire Secretary (or Town Clerk) in every shire was deemed to be a "fit and proper person", automatically entitled to sell poisons for the destruction of vermin: *Poisons Act* 1896 (Vic.) s. 2. In 1909 sheep dips were exempted from the ordinary controls: *Poisons Act* 1909 (Vic.).

131 Victoria, *Government Gazette*, 19 June 1907, 2658.

132 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 August 1914, 804; Lonie, op. cit. 32-6.

133 This was not resolved until 1915: see infra fn. 214 and accompanying text.

134 *Sale and Use of Poisons Act* 1891 (Qld.) First Schedule, First Part. The 1894 legislation in Western Australia was in the same vein: *Pharmacy and Poisons Act* 1894 (W.A.) Fifth Schedule.

When legislation was finally introduced to prohibit some of the activities involving the importation, distribution or use of opium, most jurisdictions did so by way of separate legislation aimed at the Chinese. Within a few years, however, most jurisdictions had grafted these new provisions back on to the existing framework in the Poisons legislation. These engrafted provisions then became the nucleus and the model for later developments. Provisions prohibiting the non-medical use of other substances slowly accumulated around this basic core.

2. The First Opium Legislation: A Criminal Justice Model

(a) *Queensland and South Australia*

The states of Queensland and South Australia were the first in Australia to move to restrict the sale of opium, partly out of concern about the threat posed to the white population by the increasing consumption of opium by the Chinese and Aboriginal populations, but mainly from genuine humanitarian motives to protect the Aboriginal population from further exploitation at the hands of pastoralists, commercial salesmen, and the ubiquitous Chinese, all of whom were allegedly using opium as a means of payment for Aboriginal labour or sexual favours. Although Queensland was one of the last states to enact Poisons legislation, the Queensland Bill, which was finally passed in 1891, contained a clause based on an assessment of proposals then before the Victorian Parliament, making it an offence to "supply or permit to be supplied any opium to any aboriginal . . . except for medicinal purposes, proof of which shall be on the defendant."[135] The Victorian evidence was accepted at face-value despite the long-running saga of unsuccessful Bills before the Victorian Parliament, and this clause was accepted without debate.[136]

The Bill was, however, amended in the Legislative Assembly to provide that "no member of the Asiatic race" could be issued with a certificate as a Dealer in Poisons.[137] The result was that the Chinese became ineligible to sell opium or any preparation of opium, since this was listed as one of the substances which might only be sold by a Dealer, subject to compliance with Poisons Book requirements to record the name, address and age of the purchaser, and the quantity and purpose of the sale.[138]

135 *Sale and Use of Poisons Act* 1891 (Qld.) s. 13. For a first offender, the penalty was set at no more than £10 and not less than £2, with a fine of up to £20 and not less than £5 for second or subsequent offences; costs were also payable in every case. See also Lonie, op. cit. 7.

136 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 October 1891, 1735 (second reading speech), 2 November 1891, 1865 (passed without debate in committee as clause 14, later to become s. 13 due to deletion of an earlier clause by the Legislative Council).

137 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 November 1891, 1864 (amending clause 9 which was later to become s. 7, *Sale and Use of Poisons Act* 1891).

138 *Sale and Use of Poisons Act* 1891 (Qld.) ss. 4, 5, First Schedule, Part I.

Concern about the plight of Aborigines was also taken up in South Australia, which was then responsible for the area now known as the Northern Territory. Legislation was introduced in 1895 to combat what was described as a "growing evil" leading to the "degradation of the blacks." Figures on the government revenues collected from the duty on opium were cited during the debate. These disclosed that the Territory, with a comparatively much smaller population, consumed sixteen times as much opium as South Australia proper.[139]

The original Bill introduced in the Legislative Council sought to proscribe the sale, barter, exchange or gift of opium both to Aborigines and others, and to outlaw the act of improperly prescribing opium, or of keeping or resorting to any place where opium was consumed.[140] Most of these provisions were, however, rejected in the Lower House, mainly on the grounds that the evidence produced by the Report of the Opium Commission in Britain indicated that opium was no more harmful than tobacco or alcohol[141] and a view that the government was simply pandering to a women's pressure group.[142] The attenuated Bill, as finally enacted, simply outlawed the transaction of "sale, barter . . ." of opium to an Aborigine and attached a penalty of up to 12 months imprisonment.[143]

Neither piece of legislation proved to be at all effective. Amending legislation was therefore required to overcome the deficiencies. Again, Queensland was first off the mark with the enactment in 1897 of the *Aboriginals Protection and Restriction of the Sale of Opium Act*.[144] During debate on the Bill, some emotive speeches were delivered by members from both sides of the House, in which they sought to redeem some of the sins of past mistakes on this question.[145] The Home Secretary, Sir Horace Tozer, explained that controls over the class of authorized purchasers or over the group of people authorized to sell opium were ineffectual and required amendment

> "to overcome . . . the great difficulty in the past—to catch the offender. You can always find the people [i.e. the vendors] and the opium but you can never find them together."[146]

[139] South Australia, *Parliamentary Debates*, Legislative Assembly, 19 December 1895, 3043; Lonie, op. cit. 7-8.
[140] *Opium Bill* 1895 (S.A.) clauses 3 (prescribing opium), 4 (managing an opium den) and 5 (frequenting an opium den).
[141] South Australia, *Parliamentary Debates*, Legislative Assembly, 13 November 1895, 3025-6 (Mr Ash M.L.A.).
[142] Ibid. 3030. Evidence of the involvement of women's groups is cited by McCoy, op. cit. 79; and Lonie, op. cit. 11.
[143] *Opium Act* 1895 (S.A.) s. 3. A power to enter premises and apprehend a person without warrant where there were reasonable grounds for believing that there had been a breach of this section was also provided: s. 4.
[144] *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897-1901 (Qld.).
[145] Queensland, *Parliamentary Debates*, Legislative Assembly 1897, 1541.
[146] Ibid.

The government made it plain that it was not proposed "to allow people to obtain the assistance of these aborigines in working their properties and then pay them in large supplies of opium."[147]

In contrast to the later South Australian amendments, the Queensland legislation added controls over possession to the existing regulation of the categories of authorized sellers and purchasers and the restraints over the transaction of sale or exchange. Possession of opium[148] became an offence unless the person in possession could show that he was either a medical practitioner, a chemist, or a wholesale dealer issued with the requisite permit under the Act.[149] The innovation of focusing on the fact of possession was, however, largely negated by the actions of the Collector of Customs. Over the next few years he issued more than 200 permits to people other than doctors and chemists. Instead of confining the holder of a permit to conducting business as a wholesale dealer, the permits included conditions permitting opium to be retailed.[150] This was apparently sufficient to deter the police from initiating a prosecution against permit holders who held opium for the purpose of direct retailing to Aborigines. The Protector of Aborigines was incensed and sought to remedy the situation, but without success.[151] As a result, only the original 1891 prohibition on the sale of opium to Aborigines (re-enacted in the 1895 legislation as s. 20, with a penalty of up to £20 for a first offence), which had already been proved to be inadequate to the task, remained to control the problem.

South Australia amended its legislation in 1905,[152] mainly by writing in the clauses deleted from the 1895 Bill. Sale or supply of opium other than as a medicine, to any person whether an Aborigine or otherwise, was made an offence carrying a fine between £5 and £20 for a first offence or between £10 and £50 or 3 months imprisonment (or both) for subsequent offences.[153] In addition, "Asiatics" were made liable to deportation, and both the manufacture of smoking opium and the keeping of an "opium den" became an offence.[154] Possessory offences were not included, but these amendments were apparently much more effective than their Queensland counterparts. Meanwhile, across the Tasman, the New Zealand government

147 Ibid.

148 Opium was defined in wide terms to include the ash which resulted from burning opium because the Aborigines allegedly preferred to dissolve the ash in water and drink that, rather than smoke it in the Chinese and European manner: *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897-1901 (Qld.) s. 3.

149 Ss. 21, 22.

150 Australia, *Royal Commission on the Commonwealth Tariff* (1905); Cth. (1906) iv. *Parliamentary Papers*, pp. 690 ff. [hereafter cited as the *Commonwealth Tariff Royal Commission*].

151 Ibid. Minutes of Evidence, 434, 435 Q's 29521, 29556; Lonie, op. cit. 17.

152 *Opium Act Amendment Act* 1905 (S.A.); Lonie, op. cit. 13.

153 S. 3.

154 S. 5 (deportation), s. 6 (manufacture), s. 7 (opium dens). Deportation was, of course, now the exclusive concern of the national government, which alone had legislative power over immigration.

had enacted an *Opium Prohibition Act* in 1901[155] and this legislation became the model for most of the Australian legislation which followed.

(b) *New Zealand*

The New Zealand legislation was a hybrid mixture of the commercial and regulatory controls over imports and the provisions enabling dealings to be "traced"—which had long been a feature of the Poisons legislation—and new clauses which imposed criminal prohibitions on certain conduct. On the "regulatory" side, opium in a form fit for smoking was declared to be an unlawful import,[156] while opium capable of conversion to this form could be imported only under a permit from the Commissioner of Trade and Customs and subject to compliance with any special conditions attached to it.[157] No Chinese person could be issued with such a permit.[158] Permit holders were obliged to record information on opium transactions in a special book. Details of the amount of opium sold, the date, and the name, address and signature of the purchaser were to be recorded.[159]

The balance of the New Zealand Act had a stronger flavour of criminal prohibitions. Manufacture of opium suitable for smoking was banned.[160] Consumption (but not possession) of opium was made an offence by proscribing the act of smoking opium.[161] The Act also proscribed the permitting of another to smoke opium or abetting another person engaged in smoking opium.[162] In order to acquire evidence of this activity, the police were empowered to seek a warrant to search premises and seize any opium or opium pipes found there, provided there was reasonable cause to suspect that opium was being smoked. Premises occupied by Chinese were less sacrosanct for, in another piece of racial discrimination, the legislation enabled the police to search their premises without warrant.[163]

(c) *Victoria*

In October 1905 the Victorian government took up the lead given by New Zealand and made another attempt to control opium smoking. An amendment to the *Poisons Act* revision then before the House, moved by the Leader of the Opposition, Mr Prendergast, stirred the government. But debate on the Bill was a lacklustre affair.[164] In moving the second reading for the government, Mr Mackey M.L.A., referred "not merely . . . to the vice of opium smoking but to the vice of opium eating and injecting" and made lofty claims about "giving the other States a lead" by curing "certain

155 *Opium Prohibition Act* 1901 (N.Z.).
156 S. 2.
157 S. 3(1)(2). [Penalty £50: s. 3(4).]
158 S. 3(3).
159 S. 4(1)(b).
160 S. 6.
161 S. 7.
162 S. 9.
163 S. 8 and proviso.
164 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 1905, 2123.

defects where the [New Zealand] Act has apparently failed".[165] The Bill itself made reference only to smoking of opium, leaving the other drugs (such as morphia) and other methods of administering drugs (such as by injection) referred to in debate, entirely free of controls. Prendergast had a better grasp of the issues[166] and more zest for reform[167] but the debate soon petered out and the Bill went on to the Upper House where, after much prevarication, the Bill was amended to delay implementation by three months to enable the Chinese traders to dispose of stocks of opium already on hand.[168] The Bill was passed on 8th December 1905, nearly 48 years after Dr Tierney had first voiced concern about the abuse of opium when introducing his Poisons Bill. Legislation in the other states soon followed.[169]

The Victorian Act departed from the New Zealand model in several respects. No import restrictions were included because this had now become a matter within the legislative competence of the national Parliament. In place of controls over the act of importation, Victoria substituted a prohibition on the act of "possession".[170] Possession of opium in a form suitable for smoking was absolutely proscribed, and possession of opium capable of being converted into this form was made an offence unless a permit had been obtained.[171] People holding a permit to deal in opium not in a form suitable for smoking were placed under obligations to record details of the sales. This had been copied word for word from the New Zealand obligations cast on people holding a permit to import.[172] Prohibitions on smoking opium[173] and on the manufacture of opium for smoking[174] were copied verbatim from the New Zealand Act. But they were supplemented by new offences concerning the sale or trafficking in opium in this form.[175] For the first time, the full gamut of conduct ranging from manufacture through sale, trafficking, possession, and use of a drug had been proscribed.

A feature of this legislation was the wide, expansive language adopted to define "possession" and the extension of the primary offence to encompass

165 Ibid.
166 Ibid. 2123-4 (referring to his observation of opium dens in Sydney).
167 Both Prendergast and Mr Beard M.L.A. made a strong call for legislation "to deal with the use of morphia (morphine)" and to prevent other preparations of opium from being used: ibid. 2124 (Prendergast) 2125-6 (Beard).
168 Victoria, *Parliamentary Debates*, Legislative Council, 1 November 1905, 2397-9. The Assembly at first objected to this amendment but finally accepted it and the Bill was passed on 8th December: Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 1905, 3385; Lonie, op. cit. 14-15.
169 *Opium Smoking Prohibition Act* 1906 (Tas.); *Police Offences (Amendment) Act* 1908 (N.S.W.) Part VI; *Opium Smoking Prohibition Act* 1913 (W.A.); Lonie, op. cit. 15-16.
170 *Opium Smoking Prohibition Act* 1905 (Vic.) s. 6. Cf. *Opium Prohibition Act* 1901 (N.Z.) s. 3.
171 Ibid.
172 Ibid. s. 7. Cf. *Opium Prohibition Act* 1901 (N.Z.) s. 4.
173 S. 2 (Vic.). Cf. s. 7 (N.Z.).
174 S. 4 (Vic.). Cf. s. 6 (N.Z.).
175 Ss. 3, 4. There was no New Zealand equivalent.

people "aiding and abetting" or "privy to" the offence. The ordinary meaning of possession was extended to include opium which

> "remains or is upon any land or premises occupied by him or is used enjoyed or controlled by him in any place whatever unless it be shown that he had no knowledge thereof."[176]

With one inconsequential minor amendment, that definition has been carried forward over the intervening years and now provides the statutory definition of possession not only of opium, but any substance covered by the Part of the Victorian *Poisons Act* dealing with "drugs of addiction".[177] The other aspect of the legislation which survives to the present day in modified form, is the section attaching liability not only to the principal offender, but also any person "aiding or abetting" the offender.[178] Happily the obscure concept of being "privy"[179] to the principal offence has not survived.

Around the beginning of the First World War the concept of "sale" was modified to remove the original orientation towards sales conducted by authorized people at their ordinary place of business on normal commercial terms. The new definitions focused solely on transactions for the transfer of a substance, irrespective of the character of the vendor, the geographical location of the dealing, or the commercial elements of the transaction. At first, the shift was of minor dimensions, starting in 1914 with a definition of sale as "a delivery (with or without consideration) in any shop or store or premises appurtenant... by the keeper... his servant or agent."[180] This retained a geographical focus on the premises controlled by authorized dealers but eliminated the necessity for a commercial consideration or price. In 1925 the legislation was brought into more modern form by a definition making it an offence to "sell or offer for sale in any street or house to house . . . hawk or peddle or distribute a sample . . .".[181] The geographic element had now been attenuated and the transaction of transfer or disposal had begun to assume the dominant position it has since retained. The two decades from 1905 to 1925 had therefore set the pattern for three key elements of modern drug control legislation: possession assumed prominence; collateral

176 *Opium Smoking Prohibition Act* 1905 (Vic.) s. 8.

177 *Poisons Act* 1962 (Vic.) s. 28. The only amendment to the original draft was to delete the opening words "remains or" from the extract of the section quoted in the body of the text.

178 S. 34(5). Cf. *Opium Smoking Prohibition Act* 1905 (Vic.) s. 10.

179 This concept was analysed rather cursorily by Hodges J. in *Stapleton* v. *Davis* [1908] V.L.R. 114, 117. The accused was apprehended by police five minutes after entering a locked 10 ft. by 10 ft. room in which another man was found smoking opium. Hodges J. found "some difficulty" in giving a satisfactory meaning to this term but relied on a passage in *Thorne* v. *Heard* [1894] 1 Ch. 599, 608 (Kay L.J.) equating it with "moral complicity". The judgment is not very satisfactory because the other two members of the Bench in *Thorne*, a case involving the definition of equitable fraud, required evidence of "knowledge, participation and benefit" [1894] 1 Ch. 599, 606 (Lindley L.J.), 613 (A.L. Smith L.J.).

180 *Poisons Act* 1914 (Vic.) s. 3.

181 *Poisons Act* 1925 (Vic.) s. 4(1)(a) and (c), 4(2).

conduct was embraced; and abstract conceptual definitions replaced the common understanding of terms such as "sale" and "possession".

(d) *Canadian developments*

Despite an influx of Chinese labourers to work on the railway during the gold rush fever of the early 1850s, and severe anti-Chinese feeling in the early 1860s, Canada remained curiously insulated from North American developments. Although opium smoking was outlawed by a local ordinance in San Francisco in 1875 and generally throughout California in 1881,[183] the national Parliament in Canada, which had sole constitutional responsibility for this area, first became aware of the opium situation in 1907 when a prominent Minister—Mackenzie King—reported on property damage caused by anti-Chinese riots in British Columbia in September of that year.[184] Perhaps the isolation of British Columbia from the political centre of power at Ottawa, or the concentration of the Chinese population in a province without a strong religious lobby and far removed from the stronghold of the Temperance and religious movements in Ontario and Quebec, account for this slow response. Canada appears to have awaited the arrival of a politician in search of a cause. In Victoria, by contrast, the reverse occurred. There a strong religious lobby placed politicians under considerable pressure. Whatever the explanation, Canada did not move to control opium smoking until 1908 when the sale of opium suitable for smoking was outlawed and importation other than for medicinal purposes was barred.[185] The act of smoking opium, or possession of the drug, remained quite lawful until the legislation was amended in 1911. Cocaine and morphine were placed under identical controls at the same time.[186]

Mackenzie King was appointed by Parliament to investigate the losses sustained by the Chinese community in Vancouver, British Columbia, during the anti-Chinese riots of September 1907. As far back as the 1880s the city of Victoria had charged opium merchants a licence fee of $500 *per annum*, and in 1884, 60,000 pounds of opium had been imported to Canada (56,000 pounds of which went to British Columbia).[187] Yet despite this involvement, the opium trade did not become a matter for official concern until two Chinese merchants submitted claims to Mackenzie King

[182] *Drug Addiction in British Columbia*, op. cit. Vol. II, Ch. 26, 489-91 [mimeo copy at Addiction Research Foundation, Toronto]. The study reports that by 1862 Chinese would have been stoned and assaulted had they appeared in the fourth of July parade as had previously been their custom.

[183] Morgan, op. cit. 53-62.

[184] Canada, *Parliamentary Papers: Sessional Reports* (1908) Vol. XLII, No. 18, paper 74 f. Mackenzie King was Deputy Minister for Labour at this time. (He later became Prime Minister).

[185] *Opium Act* 1908 (Canada).

[186] *Opium and Drug Act* 1911 (Canada).

[187] British Columbia, *Drug Addiction in British Columbia*, op. cit. 495. By way of comparison, America imported 2000 tons of opium between 1860 and 1909; ibid. 494.

for $600 compensation to cover opium losses. This led to a detailed inquiry into the organization and consequences of the opium trade and ultimately to the recommendation for control.[188] The 1908 prohibition on the importation and sale of smoking-opium, and the 1911 bar on possession or consumption of opiates (including morphine) and cocaine, were followed in 1919 by a licensing system and in 1921 by provisions reversing the onus of proof in drug matters. Later, in 1922, the Parliament included whipping as a sanction for sale to minors, and deportation as a sanction for aliens. In the following year rights of appeal were abolished, and in 1927 whipping was extended to all offences under the Act. Heroin was made a prohibited import in 1955.[189] Otherwise, the Canadian legislation paralleled the Australian state developments outlined below.

DRUG LEGISLATION IN THE TWENTIETH CENTURY

1. The Federal Government Shift Towards a Criminal Justice Orientation

The development of drug legislation in Australia after the turn of the century became a fragmented and somewhat tedious business. It was fragmented because of the division of legislative powers between the central and the state governments and tedious because most of the changes involved the inclusion of new substances within the terms of the legislative controls, either in response to local pressure, or as a result of international treaty obligations.

The Commonwealth Government began to express a serious interest in the control of drugs following the results of a Royal Commission into the Tariff which reported in 1905.[190] Evidence was taken on the opium question during three sittings in Sydney and Brisbane.[191] The evidence did not break new ground but it did provide a public forum for Dr Walter Roth, the Queensland Protector of Aborigines. He seized the opportunity to air his grievances against the Queensland government for issuing unauthorized permits to sell opium.[192] Roth's evidence was apparently widely reported and attracted public support.[193] This had the desired impact on the government. Late in 1905, in anticipation of the recommendations of the Royal Commission, opium was declared to be a prohibited import unless it was

188 Canada, *Report by W.L. Mackenzie King on the Need for the Suppression of the Opium Traffic in Canada*, House of Commons, *Sessional Papers* Vol. XLII (1907-8) paper 36 b.

189 *Drug Addiction in British Columbia*, op. cit., Appendix G.

190 *Commonwealth Tariff Royal Commission*, op. cit., 251, 683 [Minutes of Evidence relating to "narcotic goods"]; Lonie, op. cit. 9-13.

191 *Commonwealth Tariff Royal Commission*, op. cit., Minutes of Evidence, 427-36.

192 Roth claimed that as a result of the two hundred permits improperly issued, the opium habit was "spreading all over the place in the North", and he told of "white scalpers . . . actually buying skins from the blacks and paying them in opium": ibid. 434-5 Q's 29521 and 29556.

193 See for example the discussion in the Victorian Parliament: Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 1905, 2123-4.

imported for medicinal purposes,[194] in which case it was subjected to the usual provisions requiring the compilation of records so that the distribution of the opium could be "traced" from importation to purchase by the consumer.[195]

Serious difficulties concerning these "tracing" obligations to keep records of transactions were created by a decision of the High Court in 1908 in the case of *Lyons* v. *Smart*.[196] The court held that possession of illegally imported goods by a person not connected with the original unlawful act of importation was not a matter which was incidental to the regulation of importation. It was therefore beyond the power of the Commonwealth Government to enact legislation on this topic, since this was not a matter falling within the "trade and commerce" power granted to the central government under the Constitution.[197]

In states such as Victoria, where there were already parallel provisions in state legislation requiring the vendor to record details of each sale of opium,[198] complementary arrangements could readily be established between the Australian Customs Department and the state authorities to minimize the difficulties created by this decision. Importers, however, were keen to avoid these requirements so that sales of opium in outback areas could be more readily conducted by post. Western Australia ultimately obliged the "mail order merchants", by rejecting a Bill introduced by the government in 1909[199] which would have enacted complementary state "tracing" controls modelled on those already in force in Victoria.

The abortive Western Australian Bill was considered by the (by now almost obligatory) Select Committee of the Legislative Council.[200] Both the evidence before this body, and the report by the Commonwealth Comptroller General of Customs in 1908,[201] raised a new and important issue. It was suggested that prohibitions would simply force up the value of opium on the illicit market, stimulate the ingenuity of smugglers and lead to a more organized approach to importation, which in turn would make the task of tracing transactions more difficult and generate a need for a

194 Australia, 64 *Government Gazette*, 30 December 1905, 1003 (effective from 1st January 1906). The power to issue such a proclamation had been provided by s. 52(g) of the *Customs Act* 1901 (Cth.). The Commonwealth action had been unanimously approved at the 1905 Premier's Conference: Lonie, op. cit. 12.

195 The proclamation was a close copy of the import sections of the New Zealand legislation: *Opium Prohibition Act* 1901 (N.Z.) ss. 2, 3, 4; Proclamation, clause 5.

196 (1908) 6 C.L.R. 143.

197 Ibid. 147 per Griffith C.J.

198 *Opium Smoking Prohibition Act* 1905 (Vic.) s. 7.

199 *Opium Smoking Bill* 1909 (W.A.).

200 Western Australia, *Report of the Select Committee of the Legislative Council on the Opium Smoking Bill 1909*: 1909, II *Parliamentary Papers*, Session II, paper A2 (pages not numbered) [hereafter cited as the *Western Australian Report*].

201 Australia, Comptroller General of Customs, *Opium Report*: 1908, II *Parliamentary Papers* 1907-8, 1917 [hereafter cited as *Commonwealth Opium Report*].

specialized police unit to enforce the law.[202] These arguments could not have been expected to lead to a reversal of the prohibition which had so recently been imposed but they do provide one of the earliest examples of a debate which continues to the present day about the advisability of prohibition as a drug control policy.

The report by the Comptroller of Customs made three recommendations for legislative improvements to the statutory framework of controls. Firstly, it was suggested that the Commonwealth should legislate to make simple possession of opium on the arrival of a person in Australia an offence. Secondly, it was proposed that state legislation be amended to introduce a provision to complement this possessory offence at the federal level. Finally, it was recommended, as a postscript to the report, that state legislation be enacted to prohibit the cultivation of opium poppies or the manufacture of opium.[203]

All of these suggestions were adopted in due course. In 1910, the Commonwealth Government tightened up the *Customs Act* 1901 (Cth.) provisions relating to the possession of prohibited imports, by creating a specific offence of being in possession of prohibited imports without reasonable excuse.[204] The burden of proof of a reasonable excuse was placed on the defendant. Possession of a number of the prohibited imports was made an offence, irrespective of who imported them. For these goods, it would not constitute a reasonable excuse to show that the person now in possession was not involved in the unlawful importation.[205] Opium was placed in this category by a proclamation issued in December 1910.[206] Attempts and complicity were also included in the 1910 legislation.[207]

2. The Impact of International Obligations

Developments after 1908 were increasingly influenced by international interest in narcotics control, stimulated by the thirteen power Opium Commission which convened at Shanghai in 1909 largely due to initiatives taken by the government of President Roosevelt.[208] The Commission adopted resolutions aimed at suppressing opium smoking and controlling the smuggling and manufacture of morphine. At this stage, the only outstanding

[202] *Western Australian Report*, op. cit., Minutes of Evidence, Q's. 211, 212, 272, 282, 283, 291, 292 (evidence by the Inspector of Police). *Commonwealth Opium Report*, op. cit. paras. 1, 9, 11 (commenting on the rapid escalation of the price of opium, a result which had apparently been forecast at the time: para. 1).

[203] *Commonwealth Opium Report*, op. cit. para. 18 and postscript.

[204] *Customs Act* 1901 (Cth.) s. 233(2) [inserted by Act No. 36 of 1910]. Previously s. 233 simply stated that "no person shall . . . unlawfully import . . . or have in his possession any goods".

[205] S. 233B(1)(c).

[206] Australia, 80 *Government Gazette* 31 December 1910, 1930.

[207] *Customs Act* 1901 (Cth.) s. 233(1)(b), (d), (e); Lonie, op. cit. 17-19.

[208] A fuller account of the international developments may be found in I. G. Waddell, "International Narcotics Control" (1970) 64 *American Journal of International Law* 310. See also Lonie, op. cit. 39-46.

obligation for Australia was to implement controls over morphine. The first International Convention on narcotics, signed at The Hague in 1912, covered opium, morphine and cocaine. Opium was to be phased-out and morphine and cocaine monitored within regular channels of distribution.[209]

Australia became a signatory to the Convention in 1913 and, while formal implementation was delayed until 1920, immediate action was taken in 1914 to tighten-up the original proclamation of opium.[210] Victoria reacted in 1913 by introducing regulations to restrict cocaine, heroin and morphine to people who had obtained a prescription.[211] In 1914, the Governor-in-Council was granted power to add or delete substances from the Poisons list or to alter the classification (and thus the degree of control over a substance).[212] The following year, opium was promoted from the minimal controls of Part Two of the schedule to Part One, thus placing it under the "tracing and records" controls for the first time. Cocaine, heroin and morphine were also placed in Part One,[213] clarifying and placing beyond doubt the earlier attempt to achieve this result through the proclamation of 1907.[214]

Following the ratification of the 1912 Convention, a Protocol to implement it was opened for signature in 1915. Britain's signature did not become effective until January 1920.[215] Meanwhile, the Charter of the newly established League of Nations entrusted the League with the general supervision of agreements for the control of opium and other dangerous drugs.[216] Stirred by the obligations under the 1912 Convention and the Charter signed in 1919, Britain brought in the *Dangerous Drugs Act* 1920.[217] This legislation, minus the sections imposing controls over imports and exports, became the model for amendments to the Victorian *Poisons Act* in 1920.[218] The new legislation brought in a separate Division covering

[209] Ibid. 312.

[210] Australia, 71 *Government Gazette* 12 September 1914, 2157. The new proclamation prohibited the importing of "medicinal opium, morphine, cocaine and heroine (*sic*)" except pursuant to a licence. Licences were available from State Collectors of Customs, but only to wholesale or manufacturing druggists, chemists and medical practitioners. Applicants for a licence were required to give an undertaking that they would make reasonable enquiries prior to making a sale to ensure that the drugs were used only for medicinal purposes: proclamation, clause 4.

[211] *Poisons Act Regulations* 1913 (Vic.): *Government Gazette* 2 and 9 July 1913, 2768 and 3047.

[212] *Poisons Act* 1914 (Vic.) s. 4. This was necessary to accommodate the rapidly expanding range of poisons and pharmaceuticals: Victoria, *Parliamentary Debates*, Legislative Assembly, 13 August 1914, 805.

[213] *Poisons Act* 1915 (Vic.) Schedule. An exception was made for drugs below a minimum concentration: 1% in the case of cocaine, opium and morphine, and 0.1% for heroin.

[214] Victoria, *Government Gazette* 19 June 1907, 2658. Victoria, *Parliamentary Debates*, Legislative Assembly, 13 August 1914, 805. For parallel developments elsewhere see Lonie, op. cit. 53, 70-6.

[215] (1922) 8 *League of Nations Treaty Series* 237.

[216] *Charter of the League of Nations* 1919, art. 23(c).

[217] *Dangerous Drugs Act* 1920 (Eng.).

[218] Victoria, *Parliamentary Debates*, Legislative Council, 14 December 1920, 671;

narcotic substances and empowered the enactment of regulations confining their manufacture to licensed premises and chemists.[219] It prohibited their sale or distribution by people other than doctors, chemists or dealers in poisons;[220] and regulated the issue of prescriptions and dispensing arrangements.[221] In addition, two new offences were created: forging a prescription; and obtaining a prescription "knowingly" by false representation.[222] Opium, morphine, heroin, cocaine and their various salts and solutions were covered by these new provisions, but only crude and medicinal opium were made the subject of statutory definitions, neither of which was very sophisticated.[223]

Over the next few years, steps were taken to expand and strengthen the framework of offences first provided in the 1905 opium legislation. In 1925, Victoria made it an offence for a person to "sell or offer for sale in any street or house to house . . . hawk peddle or distribute [drugs] as samples."[224] Drugs covered included cocaine, heroin, morphine and opium. Possession of these drugs was also extended to catch a person who had them "on or about his person or in his possession without lawful authority." Proof of a lawful authority was placed on the defendant.[225] Two years later, possession of coca leaves, crude cocaine, or Indian hemp, was made an offence.[226] At the same time, comprehensive definitions of morphine, cocaine and Indian hemp were added and regulations to control the "production, possession, sale and distribution of raw opium, coca leaves, crude cocaine and Indian hemp or its resins" were also authorized.[227] Procedural changes to permit charges to be tried on presentment or heard

see Lonie, op. cit. 47. New South Wales and South Australia were much slower to respond: ibid. 70-6.

219 *Poisons Act* 1920 (Vic.) s. 10(1)(a); *Dangerous Drugs Regulations* 1922 r. 2.

220 S. 10(1)(b); rules 3, 4.

221 S. 10(1)(c); rules 5, 6. Breach of these regulations carried a penalty of £100 or six months imprisonment: *Poisons Act* 1920 (Vic.) s. 12.

222 S. 16(1) and 16(2) respectively. The first sub-s. carried a penalty of five years imprisonment while the latter offence was subject to a maximum penalty of a £100 fine or one year imprisonment.

223 *Poisons Act* 1920 (Vic.) Schedule II. The two definitions were contained in s. 9 of the Act; see Lonie, op. cit. 67-70.

224 *Poisons Act* 1925 (Vic.) s. 4(1)(a), (c); 4(2).

225 S. 6.

226 *Poisons Act* 1927 (Vic.) s.24(3). Victoria was the first state to cover cannabis, followed by South Australia (1934) and New South Wales.

227 *Poisons Act* 1927 (Vic.) ss. 23, 24(1)(a), 24(2). Indian hemp was confined to the "dried flowering or fruiting tops" and the resins of that portion of the plant. The definition was not expanded until quite recently. Cannabis was controlled in California in 1907 and confined to medical use in 1915 (Cal. Stat. 1907 Ch. 102 ss. 1-10; Cal. Stat. 1915 Ch. 604 s. 2). Although cannabis was considered by the International Opium Conference at the Hague in 1912 (see *League of Nations Treaty Series* 1922, 213), no action was taken. However, in the preceding year, 1926, the Commonwealth extended the list of proclaimed substances to include cannabis: Australia, 115 *Government Gazette*, 25 November 1926, 2039. Following the 1927 legislation in Victoria, possession of cannabis, whether imported or locally-produced, became an offence.

summarily[228] and a power for justices to issue a search warrant were included,[229] and a comprehensive definition of "sale" was provided.[230] Meanwhile, at the national level, the only discernible movement, no doubt directly due to the adoption of the International Opium Convention in Geneva in 1925,[231] was the expansion in 1926 of the list of salts and derivatives of morphine and cocaine[232] and the ban placed on opium pipes and similar devices in 1927.[233]

In 1929 the Victorian consolidation of the *Poisons Act* tightened-up the abuse of doctors' prescriptions by making it an offence to "fraudulently alter or utter" a prescription or "cause or induce" by false representation, the issue of such a prescription.[234] Possession of a forged prescription also became an offence.[235] Then in 1930 the police acquired expanded powers to arrest without warrant any person found offending against specified provisions,[236] and the ultimate in comprehensive definitions of "sell" was introduced to include selling:

> "whether by wholesale or retail and barter or exchange . . . dealing in agreeing to sell or offering or exposing for sale or keeping or having in possession for sale or on sale or sending forwarding delivering or receiving for sale or authorizing directing causing suffering permitting or attempting any such acts or things."[237]

3. The Period of Stability and Government by Regulation

Following these rather tortuous developments up to 1930, there was a period of solid stability. At the state level, the legislation was not touched in any significant fashion for twenty three years. Then in 1953 the manufacture of heroin, other than for experimental purposes, was prohibited.[238] During that period, new drugs were added or placed under tighter control by means of proclamations[239] but the changes were not significant. A similar

228 *Poisons Act* 1927 (Vic.) s. 27(2)(a), (b).
229 S. 40(1).
230 S. 29.
231 81 *League of Nations Treaty Series* 317.
232 Australia, 115 *Government Gazette*, 25 November 1926, 2039.
233 Australia, 116 *Government Gazette*, 17 February 1927, 329.
234 *Poisons Act* 1929 (Vic.) s. 45(1), (2).
235 S. 45(2).
236 *Poisons Act* 1930 (Vic.) s. 8. An analogous but more limited power was provided by s. 199 of the *Police Offences Act* 1929 (Vic.). The new power covered the offences of hawking, breach of the controls over narcotic drugs and possession of a forged prescription, but it was confined to cases where the name and address of the suspect was unknown or believed to be false: s. 8.
237 S. 2(1). See also *Poisons Act* 1962 (Vic.) s. 3(1); and Lonie, op. cit. 67-70.
238 *Poisons (Heroin) Act* 1953 (Vic.) s. 2, which became s. 44 of the *Poisons Act* 1958 and is now s. 30 of the *Poisons Act* 1962. Two years previously, in 1951, the Act was amended to allow headache remedies to be sold by people other than pharmacists: *Poisons Act* 1951 (Vic.), removing item 9 from the Third Part of the Second Schedule to the 1929 Act.
239 Thus the controls over cocaine or synthetic cocaine were tightened in 1932 by being listed in the First Part of Schedule II (Australia, 180 *Government Gazette*, 23 November 1932, 2629) while cocaine followed in 1938 (Australia, 299 *Government Gazette*, 23 November 1938, 3820). The category of Schedule Six

position prevailed at the national level. In 1934, the unwieldy collection of proclamations was replaced by a comprehensive set of regulations placing goods under absolute or discretionary bars against import.[240] The associated schedules listing the goods in each category simply consolidated the existing proclamations, except for one rather peculiar addition to the category of goods absolutely prohibited—patent remedies for drunkenness or drug addiction. This latter appears to have been a somewhat belated response to the exploitation of people by the quack purveyors of the various "gold cures" for addiction.[241]

The drug "tracing" controls first contained in the 1914 proclamation were written into the regulations in 1939, and applied to all drugs listed in the "discretionary" Second Schedule. Importers were thus required to obtain a licence, obtain Ministerial consent and keep detailed records of the movement of drugs.[242] Hypodermic syringes of less than 20cc. capacity were added to the Second Schedule in 1943, with little effect on the illicit drug problem.[243] Soon after the end of the Second World War, opium and Indian hemp seeds were added.[244] But, as at the state level, the only change of real significance was the transfer of heroin to the First Schedule in 1953,[245] placing it under an absolute ban consistent with the terms of the first draft of the Single Convention on Narcotic Drugs. This draft was framed in 1948 but was subsequently adopted in 1961 without the earlier clause placing an outright ban on heroin.[246]

This pattern of development continued into the early sixties. The Commonwealth Government rationalized its regulations in 1956, in the course of which review a number of synthetic drugs such as pethidine and methadone were brought under control. Cannabis was reclassified as a totally prohibited import and remedies for drunkenness became available for

"restricted substances" was expanded to include desomorphine in 1941 (Australia, 71 *Government Gazette*, 12 March 1941, 1232) and pethidine in 1948 (Australia, 651 *Government Gazette*, 16 June 1948, 3976).

240 *Customs (Prohibited Imports) Regulations* 1934 (Cth.); 152 S.R. 1934.

241 First Schedule item 24: smoking opium and opium pipes, for example, were also included in this schedule while raw (or medicinal) opium, morphine, cocaine, Indian hemp and their various salts were included in the Second Schedule and made subject to Ministerial consent to importation or export: Lonie, op. cit. 55; McCoy, op. cit. 66 (noting that one remedy for drunkenness contained a lethal dose of strychnine responsible for the death of one unfortunate inebriate).

242 This effect was achieved by amendments to the Third Schedule which duplicated the list of drugs contained in the Second Schedule: *Customs (Prohibited Imports) Regulations* 1939 (Cth.), 9 S.R. 1939, Third Schedule item 4A.

243 *Customs (Prohibited Imports) Regulations* 1943 (Cth.), 11 S.R. 1943. Indeed, as late as 1971 Wells J. of the South Australian Supreme Court complained that syringes were still freely sold over the counter "like a pound of butter": *The Australian*, 13th December 1971, 9.

244 *Customs (Prohibited Imports) Regulations* 1947 and 1948 (Cth.), 81 S.R. 1947 (Item 15A Second Schedule); 145 S.R. 1948 item 13B.

245 *Customs (Prohibited Imports) Regulations* 1953 (Cth.), 10 S.R. 1953.

246 The Single Convention on Narcotic Drugs 1961: 520 *United Nations Treaty Series* 204. Waddell, op. cit. 320.

import, subject to the consent of the Minister.[247] Poppy straw was added to the Second Schedule in 1964 and the definition of cannabis expanded in 1965 as concern developed at the increasing use of this drug.[248]

In Victoria, the 1962 legislation reflected similar interests in cannabis and synthetic drugs, but it also increased penalties for possession.[249] The more wide-spread consumption of drugs with hallucinogenic properties caused them to be placed under the national "drug tracing" controls in 1966[250] and they were made subject to a separate Division of the Victorian *Poisons Act* in 1967. This legislation created two new offences involving possession, or manufacture, sale, dealing or trafficking in hallucinogenic drugs.[251] Authorized members of the Police Force also acquired extended powers to search motor vehicles (or boats) or conduct a search of a person while in a public place, without warrant, provided the officer had reasonable grounds for suspecting possession of drugs as defined. Such searches could be authorized by Ministerial directive either generally (the "open warrant") or for a particular case.[252]

4. Recent Developments

Over the last decade, the pace of legislative intervention has quickened, starting with the enactment by the Commonwealth Government of the *Narcotic Drugs Act* in 1967.[253] This placed the local manufacture and distribution of narcotic drugs under a strict system of licensing to monitor local drug movements[254] in fulfillment of international obligations under the Single Convention on Narcotic Drugs.[255] In the same year, the *Customs Act* was amended[256] to raise penalties under that Act for offences associated with unlawful importation[257] of drugs classified as narcotics where the prosecution

[247] *Customs (Prohibited Imports) Regulations* 1956 (Cth.), 90 S.R. 1956. The addition of synthetic drugs seems to have been a direct response to the Paris protocol of 1948: 44 *United Nations Treaty Series* 277.

[248] *Customs (Prohibited Imports) Regulations* 1964 (Cth.), 25 S.R. 1964 item 28, Second Schedule; *Customs (Prohibited Imports) Regulations* 1965 (Cth.) 135 S.R. 1965.

[249] *Poisons Act* 1962 (Vic.) ss. 3(1) (drug of addiction), 26(1) (cannabis), 34(2) (penalties for possession).

[250] Lysergide (L.S.D. 25), mescaline, psilocyin and psilocybin were added to the Fourth Schedule list of substances subject to the controls over recording of drug movements: *Customs (Prohibited Imports) Regulations* 1966 (Cth.), 95 S.R. 1966.

[251] *Poisons Act* 1962 (Vic.) Part II, s. 25A (special poisons). Possession carried a penalty of one year imprisonment or $500 or both, while the remainder carried ten years imprisonment or $4,000. Dimethyltryptamine, L.S.D., mescaline, psilocybin and psilocyin were listed in 1967 and lysergic acid *simpliciter* was listed in 1969.

[252] Ibid. sub-ss. 62A(1) and (2) respectively.

[253] *Narcotic Drugs Act* 1967 (Cth.).

[254] The scope of the legislation is defined in s. 4(1) to include any drug listed in the Single Convention and, in addition, power is conferred to add drugs by regulation: s. 8.

[255] The Single Convention on Narcotic Drugs 1961, op. cit. [reproduced in the First Schedule to the Act].

[256] *Customs Act* 1967 (Cth.).

[257] The offences included were: breach of a condition in a licence to import narcotics, s. 50(4); assemblies for the unlawful purpose of planning or implementing a

was by way of indictment rather than summary proceedings.[258] The penalty ceiling in these circumstances was raised from a maximum fine of $1,000 or two years imprisonment, to a fine of up to $4,000 or up to 10 years imprisonment.[259] Summary proceedings attracted penalties of $1,000 or two years imprisonment.[260] At the same time, a new substantive offence was created by s. 233B. This section, which carried the heavier penalties, made it an offence for a person to be in possession without reasonable excuse (proof of which was reversed and placed on the accused) of a narcotic drug on a ship or aircraft,[261] or to import, attempt to import,[262] procure or be "in any way knowingly concerned" with the importation of drugs, or subsequently be in possession[263] of imported drugs.

In 1971 this scheme of penalties was further refined in an attempt to tailor penalties to differentiate not only between narcotic and other drugs, but also between low-scale offences related to personal consumption and the larger-scale (and quantities) associated with trafficking for profit. The amendments sought to achieve this objective by confining the heavier penalties to those offences tried on indictment where, in addition, the quantity of the drug was in excess of the "trafficable quantity" proscribed in a schedule to the Act.[264] Offences involving lesser quantities, or cases involving trafficable quantities but prosecuted summarily, and cases prosecuted on indictment where the court was satisfied that the trafficable quantity was not possessed for any purpose related to sale or other commercial dealings[265]—all continued to attract the lower penalties of $2,000 or two years (or both).

On the other hand, the prosecution acquired for the first time the power to withhold consent to a summary hearing, thus forcing a trial in the superior

scheme of illegal importation, s.231(1); a master of a ship allowing his ship to be used for the illegal importation of narcotics, s. 233A(2); and offences under the new s. 233B. In each case the penalties in sub-ss. 235(1) and (2) were attracted.

258 S. 235(2).

259 In 1966 the penalties were converted to dollar equivalents and stood at $200 (master allowing ship to be used for importation), $1,000 (for breach of a licence condition) and two years imprisonment (unlawful assemblies): ss. 235A, 50(4) and 231(1) respectively. Prior to 1966 the offence of importing or smuggling contrary to the *Customs Act* carried a maximum penalty of £100: s. 233(1). In 1967 the penalty for this offence was raised to $4,000 or ten years imprisonment: s. 233(1A).

260 Sub-ss. 235(1) and 235(3) respectively. In 1971 the summary penalty was raised from a fine of $1,000 to $2,000, without alteration to the term of imprisonment: s. 235(3) (as amended).

261 S. 233B(1)(a).

262 S. 233B(1)(b).

263 S. 233B(1)(d).

264 *Customs Act* 1901-1971 (Cth.). A new definition of "trafficable quantities" was added to s. 4 and consequential amendments made to s. 235(1)(c) to adjust the penalties. The quantities were set out in a new Schedule Six.

265 Sub-ss. 235(1), 235(3) and 235(4) respectively.

courts (and attracting higher penalties on conviction).[266] Previously this was a matter for election by the accused person.[267] The broad language of the new s. 233B, introduced in 1967, was further extended beyond possession of drugs proved to have been imported, to encompass those "reasonably suspected of having been imported",[268] thus removing the need for the national authorities to pass cases (where the evidence of importation was not sufficiently strong) over to state authorities.[269]

Recently, the national Parliament enacted the *Psychotropic Substances Act* 1976 to institute export licence controls over international movements of psychotropic drugs in transit through Australia, as required by obligations under the 1971 Convention of the same name.[270] Action was also taken to further increase penalties under the *Customs Act* for convictions on indictment involving trafficable quantities of narcotic drugs. A maximum level of a $100,000 fine or 25 years imprisonment (or both)[271] was set and provision was made for the court to order the forfeiture of the proceeds of trafficking.[272]

The state legislatures have not been inactive during this period. Penalties have generally been brought into line with national levels, with parallel differentiation between trafficking and other transactions. The heavy penalties are reserved for narcotic drugs in excess of trafficable quantities, with lower penalties for summary convictions or quantities below the proscribed levels. The lowest penalties are reserved (in many jurisdictions) for simple possession. For example, in Victoria, the *Poisons Act* was amended in 1976 to lift the maximum penalties for preparing, distributing, selling or trafficking in cannabis resin or listed "narcotics" to $100,000 or 15 years imprisonment[273] and to $4,000 or 10 years imprisonment on conviction for these offences when the drug in question is cannabis below a specified strength.[274] Proof of "possession for the purpose of trafficking" is rendered easier to establish by the enactment of a statutory presumption that possession of a quantity in excess of the defined "trafficable quantities"[275] is deemed to be possession for that purpose unless the accused can rebut that presumption

266 S. 235(3) (requiring the consent of both the accused and the prosecution for an offence to be tried summarily).
267 The right of election was provided by an Opposition amendment to the 1967 Bill in the Senate (where the A.L.P. and D.L.P. senators combined): Australia, *Parliamentary Debates*, Senate, 11 May 1967, 1406 (amending s. 235(3) to require the defendant's consent to a summary trial).
268 S. 233B(1)(ca).
269 Australia, *Parliamentary Debates*, House of Representatives, 11-12 November 1971, 3419, 3421. The responsible Minister, Mr Chipp, quoted four cases dismissed by the courts, 13 withdrawn, and 50 cases where investigations had been referred to state authorities over the previous nine months.
270 *Psychotropic Substances Act* 1976 (Cth.).
271 *Customs Act* 1901 (Cth.) s. 235.
272 S. 229A.
273 *Poisons (Drugs of Addiction) Act* 1976 (Vic.) s. 32(2).
274 S. 32(1).
275 The trafficable quantities are specified in Schedule II.

by leading satisfactory evidence.[276] Possession *simpliciter*, however, once established, continues to carry a maximum penalty of a fine of $500 or one year imprisonment.[277] As a result, there is now a three-tier penalty structure prevailing in Victoria. Possession, or receipt of money which is the proceeds of the sale, supply, or manufacture, of drugs now raises a presumption deeming that person to have sold that drug[278] and provision has been made for the court to order forfeiture of the proceeds of drug transactions.[279] The definitions of cannabis have also been recast[280] to remove certain doubts which existed as a result of conflicting judicial decisions[281] prior to the High Court judgment in *Yager*.[282]

Finally, early in 1979, sub-ss. 235(c) and (d) of the *Customs Act* were amended to raise the maximum penalty to that of life imprisonment in two classes of case. The first involves offences where the amount of the narcotic exceeds "commercial quantities" (specified in a new schedule—for cannabis a minimum of 100 kg was set). The second covers people convicted of an offence where the quantity is in excess of the previously specified "trafficable" quantities *and* a court has previously found that the offender in question has committed an offence involving trafficable quantities. First offenders against the trafficking provisions would (unless prosecuted summarily or able to rebut the presumption of commercial motives) continue to attract penalties of $100,000 or up to 25 years (or $4,000 or up to 10 years in the case of cannabis) while all other situations would attract the $2,000 or two year penalty provisions.

CONCLUSION

The history of drug control legislation follows a tortuous path. Legislation for the control of drugs other than alcohol originated with a regulatory model designed to serve the commercial needs of pharmacists and people engaged in importing and exporting drugs. This regulatory or commercial phase emerged in Australia in the 1870s and remained quite influential until the early 1920s. It arose in response to pressure from pharmacists seeking to obtain a degree of monopoly over the dispensing and sale of drugs, but was associated with the imposition of rudimentary limitations aimed at reducing the risk of accidental poisoning and the use of drugs in

276 S. 32(5).
277 S. 34.
278 S. 18A.
279 Ss. 25A, 34, 62, 62A.
280 S. 26.
281 *Langoulant* v. *Mitchell* (1975) unreported judgment of the Full West Australian Supreme Court: 161/1975. Cf. *Carswell & Filed* v. *Wooley* (1974) unreported judgment of Green C.J. 23/1974 (ruling that cannabis at all stages of development should be included where the definition was ambiguous) with *Dimitriou* v. *Samuels* (1975) 10 S.A.S.R. 331 (conviction quashed in absence of evidence that "Indian hemp" was savita); see also *Boyd* v. *Torney* [1977] V.R. 479.
282 *Yager* v. *R.* (1977) 51 A.L.J.R. 367.

the commission of crimes. The commercial stamp is evident also in the form of the legislation, which relied heavily on controls placed on the activities of the seller, or over the retail transactions.

The second or "consumer regulation" strand of policy became most evident in Australia in the period between 1900 and 1930. It had its origins in an increasing recognition of the view that irresponsible (or "devious") consumers must share part of the blame for escalating drug use and involved a shift in focus away from an exclusive concern about the conduct of irresponsible vendors peddling their wares to an unsuspecting public. Initially, controls over the activities of consumers took the form of provisions turning on unlawful "possession" of drugs. Due to the complexities of the concept of possession, and the wiles of people seeking drugs, Parliament was forced to move beyond reliance on the wide (and rather abstract) definition of possession—which had emerged in the first decade of the century in most jurisdictions—to begin to encompass "instrumental" activities such as forgery of prescriptions. By the end of the 1920s, both the instrumental act itself and preparatory conduct such as aiding and abetting or inducing that act (such as forgery), had been added to the register of criminal offences.

Following the end of the First World War, a third approach became evident in Australia. Power to bring new substances under control, or to alter the intensity of restrictions, was transferred from Parliament to the executive, which acquired the power to make regulations (or issue proclamations) to this effect. This shift in the locus of power and activity enabled the statutory framework to more readily accommodate changes in preferences or patterns of consumption. The remaining component evolved more slowly and was based on the original customs orientation of this legislation. The early commercial policy created a receptive climate for such actions as the reversal of the normal rule regarding the onus of proof of a criminal offence to require the accused to disprove various elements. This change was wrought without much debate in both Australia (1910) and Canada (1921). It was followed by movements towards heavier sanctions (such as whipping in Canada) which culminated in the 1970s with provisions establishing "trafficable" quantities presumptions and a rapid intensification in the levels of penalty, particularly on the "supply" side of the market.

As it presently stands, the drug control legislation is an amalgam of several different control strategies which have emerged over the years. Commercial pressures shaped the first models, but then the dominant force became local economic and emotional forces generated by growing social antagonism towards the Chinese population around the turn of the century. The "opium" and Chinese questions took on a strong international flavour, with parallel developments on the Chinese in Australia, New Zealand, Canada and California. Structures set up at the international level to

accommodate opium later had a forceful impact on shaping international and domestic drug policies in the 1920s and down to the present day. Local community concern about such issues as the abuse of morphine after the American Civil War (where it was used to treat the "soldiers' disease" of dysentery) or cocaine in the 1920s, and marijuana and heroin in the 1960s and 1970s, has also made a contribution to shaping legislation. But the basic structures pre-dated most of these pressures and cannot be explained as primarily a response to those somewhat transitory waves of public concern about a particular drug.

The historical record helps to explain why Australian drug laws are presently such a patchwork. Recommendations contained in the recent reports of Commissions of Inquiry have properly attached high priority to the framing of new and comprehensive legislation with a consistent rationale. If these proposals come to fruition, they will establish a rare historical precedent for Australia. To date, *ad hoc* decisions and legislative eclecticism have been the standard responses; "muddling through" has proved to be more attractive than "root and branch" reform. It remains to be seen whether this historical legacy can easily be cast off.