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CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES)
BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General

the Hon Lionel Bowen MP)

CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES)

BILL 1989

OUTLINE

The purpose of the Bill is to meet Commonwealth Government obligations under the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as part of the process of ratification of the Convention.

Most provisions of the Convention which fall within Commonwealth areas of responsibility are covered by existing legislation. The main function of this Bill is to extend Australia's extra-territorial jurisdiction in accordance with Article 4 of the Convention. Briefly the areas of extended jurisdiction are:

- . where an Australian national engages in conduct outside Australia which is an offence under the Convention, and the person is subsequently present in Australia;
- . where Australia declines to meet the request of another Party to the Convention to extradite an alleged offender (who is not an Australian national) in circumstances where the alleged offence against foreign law would also be an offence under Australian law. This jurisdiction would apply, for example, where Australia declines to surrender a person in a case where the requesting Party will not give satisfactory undertakings as to the non-imposition or non-execution of the death penalty.
- . where a person engages in conduct outside Australia with a view to the commission of a drug-related offence within Australia;

The Bill also contains provisions extending Commonwealth jurisdiction to drug offences committed on an Australian aircraft or, in certain circumstances, on board an Australian ship.

Another clause of the Bill creates a federal offence which has the effect of applying outside Australia State and Territory offences of conspiring or attempting, aiding, abetting, counselling or procuring the carrying out of conduct which is required to be prescribed by the Convention and which is an offence under State or Territory law.

FINANCIAL IMPACT STATEMENT

The proposal put forward in this Bill should have no impact on Government expenditure in the foreseeable future.

ABBREVIATIONS

The following abbreviations are used in this Explanatory Memorandum:

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|-------------------------------------|--|
| Bill: | Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989 |
| Convention: | United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances |
| Psychotropic Substances Convention: | Convention on Psychotropic Substances 1971 |
| Single Convention: | Single Convention on Narcotic Drugs 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1972. |

NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short Title

1. Formal

Clause 2: Commencement

2. This clause provides for commencement on a day to be fixed by Proclamation in such a way as to coincide with Australia's becoming a party to the Convention.

Clause 3: Interpretation

3. This clause provides definitions of significant expressions used in the Bill. It ensures that consistency of meaning is maintained between the Bill and the Convention, which in turn is consistent with meanings used in the Psychotropic Substances Convention and the Single Convention from which the latest Convention has developed.

Clause 4: Act extends to external Territories

4. This clause extends the operation of the legislation to all external Territories.

Clause 5: Effect of this Act on other laws

5. Sub-clause 5(1) makes it clear that the Bill is not intended to affect in any way the operation of other Commonwealth, State or Territory laws.
6. Sub-clause 5(2) is intended to prevent a particular kind of double-jeopardy which is not covered by the provisions of the Crimes Act 1914. That is, it ensures that a person is not liable to be convicted of an offence in Australia because of conduct for which he or she has already been convicted in another country.

Clause 6: Meaning of "dealing in drugs"

7. This clause establishes a shorthand description of a variety of forms of conduct - designated as "dealing in drugs". The expression "dealing in drugs" is neutral, in that this clause does not create offences.

8. The forms of conduct defined as a "dealing in drugs" reflect activities set out in Article 3(1) of the Convention which are required to be made criminal offences by Parties to the Convention. Most of these activities are already subject to criminal sanction under existing State or Commonwealth laws. This Bill seeks to create several new offences and to extend jurisdiction over the range of such activities in particular circumstances. The adoption of the expression "dealing in drugs" is a device to simplify reference to these activities in later provisions.

9. Sub-clause 6(1) sets out those activities such as cultivation, manufacture, sale or supply, importation or exportation, which are directly related to dealing in narcotic drugs or psychotropic substances.

10. Sub-clause 6(2) designates as dealings in drugs also conduct which is less directly related to the drugs or substances themselves. This includes such conduct as a conspiracy or attempt to engage in conduct which is a dealing in drugs under sub-clause 6(1); aiding, abetting, counselling procuring or inciting, urging or encouraging such conduct.

Clause 7: Meaning of "flight" in relation to aircraft

11. The definition adopted in this clause is consistent with that used in other Commonwealth legislation such as the Crimes (Hijacking of Aircraft) Act 1972. It specifies the duration of a flight to assist in determining the applicability of clause 10.

Clause 8: Meaning of "ship at sea"

12. This clause defines "ship at sea" in such a way as to ensure that State law will continue to apply to conduct on board a ship within areas of existing State jurisdiction. Thus, for example, supply of a narcotic drug on board a ship sailing down Sydney Harbour would still be a matter of NSW jurisdiction. The definition also ensures that existing foreign jurisdiction will not be excluded.

Clause 9: Possession of equipment etc.

13. This clause makes it an offence to possess in Australia a substance listed in Table I or II in the Annex to the Convention, or any equipment or materials, knowing that they are being used or are to be used for such things as cultivating opium poppy or cannabis to produce narcotic drugs, or manufacturing or preparing narcotic drugs or psychotropic substances in contravention of Commonwealth, State or Territory laws or of a law of a foreign country. Thus, for example, it will be an offence against this provision if a person in Australia possesses equipment which he or she knows is to be used to manufacture narcotic drugs in a foreign country where such a manufacture is an offence.

Clause 10: Dealing in drugs on board an Australian aircraft

14. This clause creates an offence of engaging in conduct that is a dealing in drugs (as defined) on board an Australian aircraft in flight, whether in or outside Australia. To come within the section the conduct must also be conduct which would be an offence against the law in force in a State or Territory if it were engaged in by the person in that State or Territory.

15. This provision fills a gap in the existing law, as the Crimes (Aircraft) Act 1963 does not cover offences relating to drugs.

16. Sub-clause 10(2) preserves the operation of State law with respect to intra-State flights and of Territory law with respect to intra-Territory flights.

Clause 11: Dealing in drugs on board an Australian ship

17. This clause makes it an offence to engage in conduct that is a dealing in drugs on board an Australian ship at sea, if that conduct would constitute an offence against Commonwealth law if engaged in in a State or Territory.

18. The Crimes at Sea Act 1979 applies State and Territory criminal laws to acts committed on board Australian ships as if those acts were committed in the relevant State or Territory. This has the effect of excluding from its operation certain types of conduct which are offences against Commonwealth law. This clause fills the gap in relation to drug-related conduct which is an offence against Commonwealth law.

Clause 12: Dealing in drugs outside Australia

19. This clause extends Australian jurisdiction in two situations. The first applies to Australian nationals who, outside Australia, engage in conduct that is a dealing in drugs, which is an offence against the law of a foreign country and which would also be an offence against the law in force in a State or Territory if were engaged in by the person in that State or Territory. If the person is subsequently present in Australia, he or she is liable to be charged with an offence under this provision. Thus, for example, an Australian who engaged in drug trafficking between Thailand and Malaysia and who subsequently entered Australia would be liable to prosecution under this provision.

20. If a non-Australian national has engaged in the type of conduct described above and is subsequently present in Australia, he or she will be charged with an offence in two situations. The first is if there has been no extradition request for the person by the foreign country whose law has been contravened.

21. The other is where an extradition request has been made, but the person has not been surrendered under the Extradition Act 1988. Circumstances in which this might occur would be, for example, where the Attorney-General determines that the person should not be surrendered because the requesting country refused to give satisfactory undertakings as to the non-imposition or non-execution of the death penalty. This provision will have similar effect to section 45 of the Extradition Act which applies to Australians whose extradition has been refused by the Attorney-General.

Clause 13: Dealing in drugs outside Australia with a view to commission of offence in Australia etc.

22. This clause creates the offence of doing something outside Australia that is a dealing in drugs with a view to the carrying out in Australia, or on an Australia aircraft in flight or an Australian ship at sea, of another dealing in drugs that constitutes an offence against a law of the Commonwealth or of a State or Territory.

23. The normal extradition procedures will operate in respect of offences under this clause, so that it will be possible for Australia to seek the extradition of a person to Australia to be tried for such an offence.

24. Thus a person who, outside Australia, sold narcotic drugs to some other person with a view to their import into Australia by that person or by a third person could be charged with an offence under this clause.

Clause 14: Conspiracy etc outside Australia to commit offence inside Australia

25. State and Territory laws dealing with conspiracy, attempt, aiding and abetting etc do not have extra-territorial effect. This clause overcomes that problem as regards offences against the Convention by the creation of a Commonwealth offence in cases where a person, outside Australia, conspires or attempts, aids, abets, counsels or procures or is in any way directly or indirectly knowingly concerned in, or party to, the carrying out in a State or Territory of a dealing in drugs which is an offence against a law of that State or Territory.

Clause 15: Penalties for offences against sections 10 to 13

26. This clause sets out the range of penalties applicable to the various offences under the Bill. The penalties vary according to the nature of the dealing in drugs involved in the commission of the offence, and also according to such factors as whether the quantity of the drug or substance involved is a trafficable or a commercial quantity. Another factor affecting the level of penalty is the nature of the drug or substance involved in the conduct which constitutes a dealing in drugs. This is determined by reference to Schedules 2 and 3. Schedule 2 lists narcotic drugs with the minimum weights constituting trafficable and commercial quantities in each case. Schedule 3, Part 1 makes similar provision with respect to psychotropic substances. Part 2 of Schedule 3 lists those psychotropic substances which are legally available for certain purposes and for which, therefore, there are not trafficable and commercial quantities. Offences involving substances in Part 2 carry lower penalties.

27. The Bill prescribes maximum penalties only. Lesser penalties are within the province of the courts and in determining the appropriate penalty courts will, of course, take account of the provisions of s.17A of the Crimes Act 1914.

Clause 16: Prosecutions

28. Sub-clause 16(1) requires the consent in writing of the Attorney-General to be obtained before proceedings for an offence against the Act can take place.

29. Notwithstanding sub-clause (1), the effect of sub-clause (2) is to allow preliminary steps to be taken before the giving of consent by the Attorney-General to a prosecution under sub-clause (1).

Clause 17: Presumption that traffickable quantity etc. of narcotic drug etc. is for sale or supply

30. This clause, consistent with the Customs Act 1901 and comparable State and Territory legislation, provides that where a person has in his or her possession, or imports into or exports from Australia, or has in his or her possession for the purpose of importation into or exportation from Australia a traffickable or a commercial quantity of a drug or substance, there is a rebuttable presumption that the possession, importation or exportation, or intended importation or exportation is for the purpose of sale or supply.

Clause 18: Venue where offence committed on aircraft

31. This clause provides that where an offence is committed on an aircraft in flight (where it may be difficult for the prosecution to prove exactly where the act occurred) there is a presumption that the offence was not committed in another State of Australia. The purpose of the clause is to ensure that uncertainty about the State in which an indictment should be brought in order to comply with section 80 of the Constitution (which requires that the trial on indictment of any offence shall occur in the State where it was committed) does not create an impediment to the prosecution.

Clause 19: Change of venue

32. This clause spells out the steps to be taken where the defendant rebuts the presumption established by virtue of clause 18 and satisfies the judge that the offence, if committed at all, was committed in another State of Australia and should be tried there.

33. In such a case, the court must order that the proceedings be discontinued and set a date within the next 28 days on which the defendant must reappear in court to be dealt with according to this clause. If, during that period, the Attorney-General or the Director of Public Prosecutions notifies the court that he or she does not intend to proceed against the defendant in a court somewhere else in Australia, the court must make an order discharging the defendant from the obligation to appear at the time specified and directing that the defendant be released, if held in custody, or that the recognizances upon which he or she was admitted to bail be discharged.

34. If, however, before the date specified, the Attorney-General or the Director of Public Prosecutions notifies the court that he or she has filed an indictment against the defendant in a court somewhere else in Australia, the first court must make an order directing that the defendant be taken as soon as practicable to that other part of Australia to be delivered into custody.

Clause 20: Evidence of certain matters

35. This clause provides that the Attorney-General may certify that the Convention entered into force at a particular time and remains in force. The certificate will be prima facie evidence of the status of the Convention in relation to Australia.

Clause 21: Section 38 of Judiciary Act

36. This clause excludes the operation of section 38 of the Judiciary Act 1903 in relation to matters arising under this Bill, including any questions of interpretation of the Convention. The effect of the provision, therefore, is to remove any impediment to the exercise of jurisdiction under the Bill by State and Territory courts by overcoming any argument that the High Court has exclusive jurisdiction under that section.

Schedule 1

37. Schedule 1 sets out the text of the Convention.

Schedule 2

38. Schedule 2 sets out traffickable and commercial quantities in relation to narcotic drugs.

Schedule 3

39. Schedule 3 sets out traffickable and commercial quantities in relation to psychotropic substances.

