

DECRIMINALISATION of CANNABIS

CLEAR BREACH of AUSTRALIA'S OBLIGATIONS UNDER 1988 CONVENTIONS

by

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In my opinion, the international drug Conventions 1961-88 stand in the way of all the proposals made in Australia for the legalisation of supply or use or for the decriminalisation of the use of any of the schedule drugs (which include cannabis). This includes the substitution of out of court civil fines not involving the criminal process, which is decriminalisation of use and is generally so accepted.

This legal reality has been variously sought to be met by ignoring the Convention requirements, or by liberal or evasive type arguments, (which are wrong) or by passing the matter off by saying there are differences of opinion.

The recent 1994 Report of the National Task Force on Cannabis will be seen from its "Conclusion" as favouring (a "good case") the decriminalisation of the use of cannabis by removing criminal penalties. In relation to this and its recommendations, no reference was made in the Report itself to the Conventions. Of the 4 supporting documents, the lawyers one, "Legislative Options for Cannabis in Australia" used a combination of all three approaches. In particular, although it favoured the decriminalisation option, eventually favoured in the Report, it expressed no view, one way, or the other concerning the most critical Convention, the latest, that of 1988, ratified by the Hawke Government in 1992.

The result is that what is being seen as the green light around Australia to decriminalise the use of cannabis does not deal, mention or find whether or not it is a breach of Australia's treaty obligations in a most important area of international co-operation. It is worse than that. For reasons I will give, the terms of the 1988 Convention show clearly that the legislative change will be in breach of at least that Convention.

In my view the same applies to the 1961 Convention. However, for present purposes, I will go to the terms of the 1988 Convention. "established as a criminal offence" under relevant

Australian local laws.

Neither of the two provisos can annul or lessen the requirement to establish the user conduct as a criminal offence, so far as Australia is concerned. For Australia there can be no constitutional impediment. Under our constitutional power concerning external affairs, the Australian Government has power to enter into the Convention and its Parliament to legislate to implement its provisions and, in so doing, to override any inconsistent State legislation. Each of the States and Territories has the constitutional power to make criminal this use etc. of cannabis and have already done so.

As to the second proviso, a consideration of its exact terms and purpose is necessary i.e. "the basic concepts" and 'of the legal system". The Convention was agreed to by over 100 nations, many of them third world countries, some with legal systems, especially in the area of crime, prohibition and punishment, which are primitive compared with the system of law of Western nations. There is nothing in the Australian legal "system" and certainly in any "basic concept" of it (or, indeed, in any Western world nation) which would stand in the way of making the use etc of cannabis or heroin, a criminal offence. The proof is that our law already so provides.

The reference at the end of Art. 3(2) to the 1961 Convention, serves to confirm, that the requirement of criminality for possession for personal use of a schedule drug existed under that Convention. This disposes of the entire earlier arguments, anyhow invalid, that when the 1961 Convention, referred to possession, although not limited in terms to traffickers, it should be read down to to refer only to possession for trafficking and so as to exclude possession for personal use.

Art 3(2), therefore, by its terms, disposes of any argument that decriminalisation of the use of cannabis in Australia is not in breach of the 1988 Convention unless there is some other provision in that Convention which would permit it.

Art 3 4 (d): This article does not do so. This sub-paragraph of Article 3 is referring to the provision a party nation may make in respect of an "offender", where the "offence" "has been" established under Art 3(2). This can only mean when such an offence has been established under the criminal law. By no stretch of a legal imagination, can this be taken to annul or to provide a power to annul the obligation of a party nation to provide legislation which establishes such conduct as a criminal offence. It is clear that all this provision does and is intended to do, is to authorise a party nation (or

The 1988 Convention, while continuing the operation of the 1961 Convention, principally does two things. Firstly, it deals separately with the trafficking offences and makes provision for offenders to be dealt with more severity. Secondly, it deals separately with user offences. While still requiring the criminal sanction and process to be

retained in order to deter use, it empowers party nations to provide judicial discretions to enable, in appropriate cases, for users to be dealt with as victims, to be aided by remedial measures in lieu of or in addition to conviction or punishment. Of course, those provisions apply to schedule drugs generally and hence to heroin in addition to cannabis. These judicial discretions are also open to be applied to traffickers, who are also drug abusers (Article 3(4)(c)).

I quote Three provisions in the 1988 Convention which, as applied to Australia, can only mean that an amendment of the law to decriminalise the use of cannabis (or any other schedule drug) will be in breach of, at least, this Convention. They are:

Art. 3(2): "Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption, contrary to the provision of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention."

Art. 3(4)(d): "The parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment for an offence established under paragraph 2 of this Article, measures for the treatment, education, aftercare, rehabilitation or social integration of the offender"

Art. 3(6) "The parties will endeavour to ensure that any discretionary legal powers under the domestic law relating to the prosecution of persons for offences, established in accordance with this article, are exercised to maximise the effectiveness of law enforcement measures in respect of these offences and with due regard to the need to deter the commission of such offences."

I discuss each separately:

Art 3(2): Subject to two matters, to which I will soon refer, this clause imposes a positive requirement ("shall adopt") that "possession, purchase and cultivation" for personal use shall be.

A provision in an on the spot civil fine system, which gives an option to persons given a ticket to have the matter in some way, dealt with by a court, does not prevent the legislative amendment being in breach of the 1988 Convention. Art. 3(2) requires that all cases eg of possession for personal use, shall be prosecuted as criminal offences. Anyhow, the essence of the proposal and the basis for it is the removal of the use of cannabis from the criminal law and for it being dealt with as a civil matter. The basis of the Convention is that all use must be dealt with by the criminal process, in order to deter use.

GENERAL:

The express terms of the 1988 Convention in relation to personal use and their inescapable meaning, leave no room for a speculation that the Convention should be taken to mean other than what it in fact provides, such as some speculation as to how the provision concerning personal use came to be agreed upon. The legal options paper, at some length, explored such a speculation (p30) as providing some support for an extraordinary view that it was arguable that the Convention did not really require possession for personal use to be established as a criminal offence, because the Convention was really a "trafficking convention" (p32) and that was its main thrust (p30), and that the provision made about personal use was because of some compromise between the producer and user nations (p30). To even regard this as an arguable basis to treat what the Convention provides as inoperative surely is legal nonsense. The obligations of the party nations depends on the meaning of the terms to which, in fact, they agreed. In any event, if reasons for the provision that use be made a criminal offence in order to deter use as well as an equivalent provision concerning supply were relevant, a better speculation would be the realisation that drug organised crime will not be defeated by an attack alone on supply under the criminal law, but that supplementary help was needed to attack the market of organised crime by deterring, by the criminal law, purchases and use.

So far as the 1988 Convention is concerned, the legal options paper went no further than referring to a few possible arguments. In comments in favour of the decriminalisation of cannabis use option, it did state a conclusion (I believe a wrong conclusion) that the 1961 Convention did not prevent it (p51), but, in this connection, noticeably omitted any reference to the 1988 Convention or any conclusion concerning it. The significance of this is referred to at the outset of what I have said.

perhaps encourage it to do) by legislation to discretions, to provide, in a 'cases considered' appropriate, remedial measures in lieu of or in addition to conviction or punishment, when the criminal offence has been established in accordance with legal process. Of course, without criminal process and sanction and a judicial discretion, there is no way of requiring that the remedial measures be undertaken effectively by the many reluctant users.

Art 3(6): This sub-clause serves an important purpose, additional to its ultimate requirement. This is that it demonstrates the ambit and meaning of Art 3(2) and An 3(4)(d) and that it is as stated above. It acknowledges that what Art 3(4)(d) does is to empower the grant of "discretionary legal powers" and that they are for exercise in connection with the "prosecution" for the "criminal offence" required by

Art 3(2). There is neither prosecution nor a criminal offence, if they are abolished in favour of a fixed, civil, out of court fine. What only is intended by Art 3(4)(d) is that party nations are empowered to make procedural reforms to the criminal prosecution process, required by Art 3(2), so that, on proof of the criminal offence, there shall be discretionary judicial powers, appropriate to the particular case, directed to remedial measures.

Having re-inforced how Art 3(2) and Art 3 (4)(d) are intended to operate, Art 3(6) requires that the exercise of the judicial discretions aid and do not diminish the overriding purpose of Art 3(2) to deter use by the criminal sanction. Art 3(6) destroys any possibility of an argument that Art 3(4)(d) can be construed to authorise a party nation to disregard Art 3(2) or under Art 3(4)(d) to pass legislation, not to provide judicial discretions, but directly in absolute terms and for all cases to remove the usual essential characteristics of a prosecution for a criminal offence.

There is an additional reason why, in the case of the out of court fine system; Art 3(4)(d) cannot on any view, provide an escape from the requirements of Art 3(2) that possession etc for personal use be established as a criminal offence. The terms of Art 3(4)(d) make it clear that a departure from the conviction and punishments incidents of the requirements that use be dealt with as a criminal offence; is permitted and provideö for only where .in their place ("in lieu") remedial measures are resorted to. The fixed on-the-spot fine system, is not such a substitution of remedial measures. It has the opposite effect, by treating them as irrelevant. It also does the very opposite to the obligation to comply with the injunction of Art 3(b) to "maximise the effectiveness of law enforcement measures," which under Art 3(2) is that use be established as a criminal offence to "deter" use.

ACTION NOW NECESSARY CONCERNING 1988 CONVENTION

Quite apart of the merits of the contentious issue, whether the decriminalisation of use of cannabis should be implemented, favoured by the National Task Force, surely it is essential that that national body indicate whether to do so will or will not be in breach of this nation's treaty obligations, undertaken less than 3 years ago.

Treaties involving interlocking obligations are entered into with international good faith, requiring that good faith and not evasion in their interpretation and observance.

What obviously is required is that several senior lawyers of known standing and accepted independence with no brief to find a way to avoid what is provided, express opinions on the true construction of the 1988 Convention, in particular on the decriminalisation of use proposals. It is difficult to see why the construction and application of Art 3(2), 3(4)(d),

and 3(6) should not determine the question. If there ever has been a legal opinion that, on some analysis of these three provisions, concludes that decriminalisation of cannabis is not in breach of this Convention, I have not seen it. I would offer publicly to debate such a view.

If the proposal will breach the Convention, which in my opinion it will, surely this nation will not implement the proposal so long as it is bound by the Convention. The Australian nation cannot and ought not seek to escape from what it finally agreed upon in 1992, by reliance on what has happened in other small places, particularly before that crystal clear 1988 Convention. The last of some decriminalisation of cannabis use changes of the law were made in a few US states was in 1978. This nation, Australia, should not do so because of some legal changes in small regions in Australia before 1992.

The alternative would be first to withdraw from the Convention. Having regard to the interlocking and complementary nature of the Convention obligations and benefits, including the international co-operation on drug organised crime, now international in operation, it is inconceivable that Australia (one of over 100 nations) would withdraw from the Convention or seek somehow to do so in part.

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Illegal drug trafficking and drug organised crime in Australia is very greatly dependent on smuggling which with the long Australian coastline is near impossible to detect and prevent by action just at the point of entry. Nearly all its major successes have depended on international co-operation and intelligence, which has its basis in the drug conventions.

This is clear from many explicit statements made by the NCA and other law enforcement agencies. It should be realised that it is the enormous wealth of drug organised crime, which provides the finance, power and organisation of organised crime generally in Australia. It always has been so, back to the days of my Royal Commission. It is the ultimate source of corruption in Australia, not only in the police force but at other levels.

We cannot afford not to have the fullest co-operation at the international level. Co-operation is a two way affair. It extends to attack on organised crime on all fronts. This includes, perhaps the most effective of all, the attack on its markets, by deterring all use in the ways internationally agreed upon.

For these and other reasons, any move to withdraw in whole or on part from the Conventions would be political suicide and is fantasy in a real world.

With debate so current on matters of legalisation and decriminalisation, particularly of the use of cannabis, our treaty

obligations under the 1988 Convention must be put up front and faced up to by this nation.



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NSW Supreme Court Judge - 24 years:

President of NSW Court of Appeal - 10 years:

(This is one of the highest positions in Law in our country - a very prestigious position/

Royal Commissioner-(Infiltration of Organised Crime into Australia- 1973-4): *(This is a very powerful position requiring a superior level of investigative skills. Such commissioners report to government and may make appropriate recommendations for change).*

Since retirement (1984), author and commentator on organised crime, corruption and drug questions:

Author of "A Quarter to Midnight" (1985 - on Organised Crime):

Currently co-author of "Drug Precipice" - (in course of writing) on illicit drug issues.