



Crimes Amendment (Royal Flying Doctor Service) Bill 2010

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Law and Bills Digest Section

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Crimes Amendment (Royal Flying Doctor Service) Bill 2010

Date introduced: 2 June 2010

House: House of Representatives

Portfolio: Home Affairs

Commencement: The Act will commence upon Royal Assent.

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Crimes Amendment (Royal Flying Doctor Service) Bill 2010 (the Bill) is firstly to replace the offence of causing ‘prescribed narcotic substances’ to be carried by post contained in subsection 85W(1) of the *Crimes Act 1914* (the Crimes Act) with an offence of causing a ‘controlled drug’ or a ‘controlled plant’ to be carried by post (as defined by the Criminal Code Act 1995 (the Criminal Code)). Secondly, the Bill will create an express exemption to the offence for the ‘medical chest’ service of the Royal Flying Doctor Service (RFDS). This exemption will cover both Australia Post employees and RFDS employees, contractors and subcontractors.

Background

The Royal Flying Doctor Service ‘medical chest’ service

The RFDS has provided invaluable health services to rural, remote and regional Australia for over 80 years. Since the 1940s RFDS first aid kits or ‘medical chests’ and their contents have been standardized. This has meant that precious time is not wasted in establishing what medicines are available before treatment can be administered by or on behalf of a registered RFDS doctor. Medical chests enable the RFDS to administer medical treatment to people ‘on-site’ but also to provide remote treatment to those that require emergency evacuation. An example of how the service works in practice is provided on the RFDS website:

A worker on a cattle station or exploration camp has an eye infection. It isn't serious enough for an evacuation flight but it needs treatment. The station is 200 km from the nearest doctor or nursing post so a long road trip would be required to have it seen to.

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If there is a medical chest at their location, the worker can call the RFDS on our medical advice line and ask for medical assistance. The call would then be transferred to an RFDS doctor, who will speak to the patient and diagnose the condition over the phone. The doctor will then prescribe a drug from the chest, for example, number "134" antibiotic eye drops, and give the patient instructions on what to do.

At the end of the phone consultation, the doctor will also provide the patient with a consult number which is needed to re-order the drug once it has been used.

This scenario is also applicable to emergency situations. In the event of something serious like an amputation, crush injury or severe burn, medical chest custodians have access to RFDS doctors who will assess the situation via phone, prescribe appropriate pain relief and/or other medication, and arrange for an aeromedical evacuation if necessary.¹

According to the RFDS website, medical chests contain a range of non-pharmaceutical and pharmaceutical items and a large number of the latter are 'prescription only' items. The use of prescription only items is subject to direct consultation with a RFDS doctor and it is the doctor's responsibility to correctly diagnose and prescribe.² Only authorized, registered custodians are permitted to manage medical chests and they are encouraged to have completed a Senior First Aid Certificate.³ The RFDS emphasises that extreme care is taken to prevent illicit access to the medical chest and in some circumstances, medical chests can be forfeited.⁴

The RFDS receives Commonwealth funding to replenish chest items free of charge to remote locations where there is a duty of care to the public, such as outback schools, stations, nursing posts, indigenous communities and roadhouses.⁵ The RFDS is responsible for over 3000 medical chests throughout Australia.⁶ The chests were, up until the beginning of this year, replenished through delivery by Australia Post because 'many

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1. Royal Flying Doctor Service (RFDS), 'Medical chests', RFDS website, viewed 7 June 2010, <http://www.flyingdoctor.org.au/Health-Services/Remote-Services/Medical-Chests/>
 2. RFDS, 'Frequently Asked Questions FAQs', RFDS website, viewed 8 June 2010, <http://www.flyingdoctor.org.au/Health-Services/Remote-Services/Medical-Chests/MC-WO/Frequently-Asked-Questions-FAQs/>
 3. RFDS, 'Obligations', RFDS website, viewed 8 June 2010, <http://www.flyingdoctor.org.au/Health-Services/Remote-Services/Medical-Chests/MC-WO/Obligations/>
 4. RFDS, 'Frequently Asked Questions FAQs', op. cit.
 5. 'Non-subsidized chestholders are generally commercial operators who have exclusive use of their chests, such as mining companies and charter vessels. These organizations pay for the replenishment of chest contents': RFDS, 'Frequently Asked Questions FAQs', op. cit.
 6. RFDS, 'Medical chests', op. cit.

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of the locations were too remote to be serviced by couriers or other transport networks'.⁷ As a result of the cessation of delivery, some medical chests have been left without essential supplies.⁸

Are pharmaceutical products 'prescribed narcotic substances'?

According to the second reading speech, delivery of pharmaceuticals utilising Australia Post for the medical chest service ceased following the discovery in early 2010 that this practice *contravenes* section 85 of the Crimes Act.⁹ However, the Explanatory Memorandum takes a more cautious approach. It simply states that there is *uncertainty* surrounding the interpretation of the offence in its current form.¹⁰

Existing subsection 85W(1) of the Crimes Act makes it an offence punishable by a maximum two years imprisonment to 'intentionally cause to be carried by post an article that consists of, encloses or contains a prescribed narcotic substance within the meaning of the *Customs Act 1901*' (the Customs Act).

The definition of 'prescribed narcotic substance' in the Customs Act was repealed in 1990 by the *Customs and Excise Legislation Amendment Act 1990*.¹¹ Prior to it being repealed it defined 'prescribed narcotic substance' as:

...a narcotic substance the name of which is specified in Column 1 of Schedule VIII or any other narcotic substance for the time being declared by the regulations to be a prescribed narcotic substance.

Immediately prior to the *Customs and Excise Legislation Amendment Act 1990* coming into force, there were only nine substances listed in Schedule VIII of the Crimes Act and only one (morphine) was potentially of use in a medical context. The other eight remaining illicit substances included:

- Cannabis, Cannabis resin and Tetrahydrocannabinols
- Cocaine
- Heroin

7. M Davis, 'Flying Doctor broke law for 20 years', *Sydney Morning Herald*, 5 June 2010.

8. Ibid.

9. B O'Connor (Minister for Home Affairs), 'Second reading speech: Crimes Amendment (Royal Flying Doctor Service) Bill 2010', House of Representatives, *Debates*, 2 June 2010, p. 7.

10. Explanatory Memorandum, Crimes Amendment (Royal Flying Doctor Service) Bill 2010, p. 4.

11. Section 4 of the *Customs and Excise Legislation Amendment Act 1990*, Austlii website, viewed 10 June 2010, http://www.austlii.edu.au/au/legis/cth/num_act/caelaa1990391/

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- Lysergic Acid and Lysergide, and
- Opium

Thus prior to 1990 it was not an offence under the Crimes Act to send medicines (other than more than 1.5 kilograms of morphine) through the mail.¹² When the definition of ‘prescribed narcotic substance’ was repealed from the Customs Act in 1990 the offence of causing narcotic substances to be carried by post effectively became what can perhaps best be described as *frustrated* because it was no longer clear what substances could and could not legally be sent through the Post. The *Acts Interpretation Act 1901* makes it clear that when a provision is repealed, unless a contrary intention appears, the repeal cannot revive anything existing at the time at which the repeal takes effect.¹³ It is not at all surprising that there have been no prosecutions under section 85W in the last twenty years.

Notwithstanding the uncertainty surrounding the offence contained in section 85W, Australia Post has interestingly maintained in its terms and conditions of service (which are made pursuant to section 32(1)(b) of the *Australian Postal Corporation Act 1989*) that ‘a poison, drug or medicine¹⁴ which is a narcotic substance shall not be lodged for carriage by post nor carried by post’.¹⁵ In doing so, they appear to have replaced the repealed definition of ‘prescribed narcotic substance’ with the existing definition of ‘narcotic substance’ in the Customs Act which is more expansively defined as (amongst other things) a ‘border controlled drug’ which currently includes some 155 listed drugs in the Criminal Code.¹⁶

What was the original policy intention behind the creation of the offence?

The Explanatory Memorandum notes that the amendment proposed by **item 1** (that is, replacing the definition of ‘prescribed narcotic substance’ with ‘controlled drug’ or

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12. RFDS medical chests allegedly only contain 10mg/1ml/1ml of Morphine Sulphate Ampoules according to an unofficial online source: Biting the dust, ‘medical chest contents list 2009 update, viewed 11 June 2010, http://bitethedust.com.au/bitingthedust/wp-content/uploads/2009/09/RFDS_Chest_2009.pdf
 13. Sections 8 and 8C of the *Acts Interpretation Act 1901*.
 14. ‘Poison, drug or medicine’ is defined as ‘a substance which is specified in any of the schedules of the current Standard for the Uniform Scheduling of Drugs and Poisons issued by the National Health and Medical Research Council’: Australia Post, ‘Australia Post Terms & Conditions’, Australia Post website, viewed 11 June 2010, <http://auspost.com.au/statutorydocuments/generalpostalservices/frame.htm>
 15. Paragraph 63 Australia Post Terms & Conditions, op. cit.
 16. Paragraph 314.4 of the Criminal Code.

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‘controlled plant’ as defined in the Criminal Code gives effect as closely as possible to the original policy intention behind the offence in section 85W’.¹⁷

Section 85W was inserted into the Crimes Act by the *Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Act 1989*. It was one of a number of provisions which comprised Part VIIA of the Crimes Act (offences relating to postal services). The second reading speech clarifies that the offences to be inserted (including section 85W), though revised to take into account developments since 1975, covered the same ground as in the existing legislation. The offence of sending without lawful authority, by post or courier service a postal article that encloses or contains a prescribed narcotic substance within the meaning of the Customs Act was inserted into the now repealed *Postal Services Act 1975* in 1986.¹⁸ The then Attorney-General, Lionel Bowen explained that the original policy intention behind the insertion of section 85W was to create an offence of sending *illicit* drugs through the mail:

The Special Premiers Conference on Drugs agreed on 2 April 1985 that the Commonwealth should create an offence of sending illicit drugs through the mail...This amendment will provide another weapon in the Government's fight against drug trafficking.¹⁹

The amendment proposed by **item 1** would make it an offence to cause a controlled drug or plant to be carried by post. The 15 controlled drugs currently listed in the Criminal Code include:

- Amphetamine
- Cannabis (in any form, including flowering or fruiting tops, leaves, seeds or stalks, but not including Cannabis resin or Cannabis fibre), Cannabis resin
- Cocaine
- Gammabutyrolactone (GBL)
- Hydroxybutanoic acid (GHB)
- Heroin (diacetylmorphine)
- Lysergide (LSD)
- Methamphetamine
- Methylenedioxyamphetamine (MDA)
- Methylenedioxymethamphetamine (MDMA)

17. Explanatory Memorandum, op. cit., p. 4.

18. *Statute Law (Miscellaneous Provisions) Act (No. 2) 1986*.

19. L. Bowen, ‘Second reading speech: Statute Law (Miscellaneous Provisions) Bill (No. 2) 1986’, House of Representatives, *Debates*, 15 October 1986, p. 2066.

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- Opium
- Psilocine
- Psilocybine, and
- Tetrahydrocannabinol (THC)²⁰

Interestingly, morphine, the only narcotic substance of potential use in a medical context to have been originally prescribed has been left off this list, as has pethidine which, as the second reading speech notes, is also used by the RFDS.²¹ In the time available, it has not been possible to ascertain the reason for this.

Financial implications

The Explanatory Memorandum notes that the amendments proposed in this Bill will have no financial impact on Government revenue.²²

Main provisions

Item 1 amends existing subsection 85W(1) of the Crimes Act by replacing the words ‘prescribed narcotic substance within the meaning of the *Customs Act 1901*’ with the words ‘controlled drug or a controlled plant, within the meaning of Part 9.1 of the Criminal Code’. The definitions of these terms are explained above in key issues. This amendment ties the offence of causing narcotic substances to be carried by post to the prescribed list of drugs contained in the Criminal Code instead of the Customs Act.

Item 2 inserts **proposed subsection 85W(3)** into the Crimes Act which creates an express exception for conduct which is engaged in, and in accordance with, the medical chest program. This exception to the offence contained in subsection 85W(1) covers a person acting in the course of their duties, powers and functions as an employee of Australia Post or an employee or contractor of the RFDS. As existing section 85W uses the words ‘cause to be carried by post’ which are defined as ‘carried by or through Australia Post’ in existing section 85E, the offence is said to ‘apply uniquely to persons arranging for the delivery of these articles by Australia Post’.²³

Proposed subsection 85W(4) defines ‘Medical Chest Program’ to be the program that supplies packages of pharmaceutical products and medical supplies to remote locations across Australia administered by the RFDS. The Explanatory Memorandum notes that this

20. Paragraphs 314.1 and 314.2 of the Criminal Code.

21. B O’Connor, second reading speech, op. cit., p. 7.

22. Ibid., p. 2.

23. B O’Connor, second reading speech, op. cit., p. 7.

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precise definition will ‘provide very clear parameters around the scope of the proposed exception and ensure that there are no unintended consequences for the operation of the offence in subsection 85W(1)’.²⁴ The terms ‘RFDSA employee or contractor’ and ‘Royal Flying Doctor Service of Australia’ are also exhaustively defined. The latter is to account for the various independent entities that comprise the RFDS.²⁵

Item 3 clarifies that the proposed amendment contained in **item 1** will have prospective effect (that is, it will apply once the Act has received Royal Assent). The Explanatory Memorandum acknowledges that this item will not have retrospective effect because there is uncertainty surrounding the interpretation of existing section 85W(1).²⁶

In contrast, the proposed amendment contained in **item 2** will have retrospective effect (that is, it will apply to conduct engaged in by a person before, on or after commencement).

Concluding comments

Medical chests provide what the RFDS describe as a ‘mini pharmacy’ to many remote locations throughout Australia. These chests undeniably provide an invaluable service. They contain medication which is used in emergency situations to provide immediate treatment while awaiting aeromedical evacuation, if necessary. They are also used in non-emergency situations which prevent people from travelling excessive distances for treatment or the RFDS from making unnecessary flights. Overall, the RFDS medical chest service clearly provides enormous comfort to those living in remote locations. RFDS medical chests have not been replenished for six months due to what has been described as an inadvertent contravention of section 85W of the Crimes Act which has only recently come to light. However, as this section was expressly drafted to prevent *illicit* drugs from being trafficked, rather than small quantities of pharmaceutical products being sent through the post, it is not entirely clear that the RFDS has been contravening the Crimes Act or would do so under the new proposed definition of ‘controlled drug’ which does not include morphine or pethidine. The materials accompanying the Bill do not adequately address these issues. Accordingly, it is difficult to clearly ascertain the need for an express exemption for the RFDS medical chest program. Arguably, if the exemption *is* necessary, it should be drafted in broader terms to protect other people or organisations sending or carrying by post pharmaceutical products and medical supplies that may also be inadvertently caught by the operation of the amended provision.

24. Explanatory Memorandum, op. cit., p. 5.

25. Ibid., p. 6.

26. Ibid., p. 4.

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