Drugs

CHAPTER CONTENTS

Introduction

The use of dangerous drugs in Queensland is regulated by:

- the *Criminal Code Act 1995* (Cth) (Cth Criminal Code)
- the *Drugs Misuse Act 1986* (Qld) (Drugs Misuse Act).

The main Commonwealth drug offences are contained in the Cth Criminal Code. Regulatory offences, such as importing or exporting prohibited narcotics in breach of a licence or permission, remain in the *Customs Act 1901* (Cth).

Many of the offences contained in the Cth Criminal Code are similar to those under state legislation, although some of the Commonwealth offences have different dimensions addressing federal issues such as importation and exportation crimes. The offence provisions in the Cth Criminal Code intend to complement existing state and territory laws, not override them.

Offences against the Commonwealth laws can be dealt with by state courts.

Commonwealth Drug Offences

Principal Commonwealth Drug Offences

Divisions 300 to 313 of the Cth Criminal Code deal with serious drug offences and offences relating to controlled drugs, plants and precursors.

'Controlled' drugs, plants and precursors are defined in ss 301.1 to 301.3 of the Cth Criminal Code and identified in regs 11 to 13 and sch 1 of the *Criminal Code Regulations 2019* (Cth) (Cth Regulations). The definition of 'controlled drug' includes drug analogues, which are synthetic drugs that mimic the effects of controlled drugs. The Minister for Home Affairs is responsible for the Australian Federal Police and may also determine a substance to be a controlled drug, plant or precursor by way of an emergency declaration.

Under the Cth Criminal Code, penalties for drug offences are affected by the type and quantity of the drug involved, particularly whether it is a commercial quantity, a marketable quantity or a traffickable quantity. The quantities for each category and each type of drug are set out in sch 1 of the Cth Regulations. Derivative forms of drugs are also addressed in the legislation.

Like the Drugs Misuse Act, the Cth Criminal Code contains evidentiary presumptions relating to some offence elements. In practical terms, this means that an accused person may bear the burden of proving, on the balance of probabilities, that the situation or their intention was otherwise than as presumed by the Cth Criminal Code.

Trafficking in controlled drugs

Division 302 of the Cth Criminal Code sets out the trafficking offences. Trafficking is defined broadly to include selling, preparing, transporting, guarding or concealing, and possessing a substance with the intent to sell. Higher penalties attach to commercial or marketable quantities of trafficked substances. The maximum penalties are:

- for trafficking in a commercial quantity of a controlled drug—up to life imprisonment and/or a fine of 7500 penalty units (currently $1 665 000)
- for trafficking in a marketable quantity of a controlled drug—up to 25 years imprisonment and/or a fine of 5000 penalty units (currently $1 110 000)
- for trafficking in controlled drugs in amounts below the commercial and marketable quantities—up to 10 years imprisonment and/or a fine of 2000 penalty units (currently $444 000).

Commercial cultivation and selling of controlled plants

The only controlled plant presently listed is cannabis. Division 303 of the Cth Criminal Code contains offences relating to the commercial cultivation of controlled plants. Cultivating a plant includes exercising control or direction over a plant, or providing finance for cultivation. The term 'cultivate' is broadly defined and includes:

- planting a seed or cutting
- transplanting a plant
- nurturing or growing a plant
- guarding or concealing a plant including against interference or discovery by humans or natural predators
- harvesting or picking a plant.

Division 304 of the Cth Criminal Code contains offences of selling controlled plants. Again, penalties depend on the quantity of cannabis involved.

Commercial manufacture of controlled drugs

The offences relating to the commercial manufacture of controlled drugs in commercial, marketable and traffickable quantities are set out in div 305 of the Cth Criminal Code.

Pre-trafficking in controlled precursors

Precursors are generally the raw ingredient chemicals (e.g. ephedrine, pseudoephedrine and lysergic acid) used to make certain controlled drugs. Pre-trafficking in these

substances is an offence (div 306 Cth Criminal Code). Pre-trafficking includes manufacturing the relevant substance with the intention of selling any of it to another person, believing that the person intends to use any of the substance to manufacture a controlled drug (s 306.1 Cth Criminal Code). The substances and amounts that are controlled precursor chemicals are defined in reg 13 of the Cth Regulations. New or additional substances can be added to this list quickly by interim regulations and emergency declarations.

Again, there are specific provisions about liability and evidentiary presumptions. For example, a person is deemed to be intending to act unlawfully if they sell, manufacture or possess a substance without the appropriate legal authorisation. These presumptions shift the burden of proof to the accused, who must prove on the balance of probabilities that their intention was otherwise.

Import and export offences of controlled substances

The offences for the importing, exporting and possession of border-controlled drugs, plants and precursors are contained in div 307 of the Cth Criminal Code.

The terms 'import' and 'export' include 'take from' or 'bring into' Australia. Again, the quantity of the substance involved can affect penalty. Importing or exporting a border-controlled drug or plant can attract the same penalties as for trafficking in controlled drugs.

Possession of controlled substances offences

Possession of a thing involves two elements:

- actual physical control of the thing
- knowledge of or intent to control the thing.

In prosecutions for possession of particular goods, the onus usually rests on the prosecution to prove beyond a reasonable doubt that, at the time an accused person had physical custody or control of the particular thing, they had knowledge of the existence and presence of the thing (see *He Kaw Teh v The Queen* (1985) 157 CLR 523). The offences for possessing controlled drugs, controlled precursors, plant material, equipment or instructions for the commercial cultivation of controlled plants and substances, equipment or instructions for the commercial manufacture of controlled drugs are contained in div 308 of the Cth Criminal Code.

An accused person can also be guilty if they are merely reckless rather than having direct knowledge that a substance in their possession is a controlled drug (s 308.2(2) Cth Criminal Code).

For some minor drug possession offences, relevant offenders can still be diverted from the criminal justice system into state-based diversionary programs run under state laws.

Drug offences involving children

These offences generally involve supplying children with drugs or procuring them for drug offences. All of the offences attract severe penalties of imprisonment from 15 years to life. A child is defined as an individual under 18 years of age.

Division 309 of the Cth Criminal Code deals with offences where children are victims, not offenders.

Division 310 of the Cth Criminal Code contains offences for endangering or harming a child under 14 years as a result of exposing them to the unlawful manufacture of a controlled drug or precursor. These offences can be committed by a person not involved in the unlawful manufacture, but who exposes a child to harm. Exposure includes exposing a child to a risk of catching any disease that may give rise to the danger of serious harm.

Other provisions of the Commonwealth Criminal Code

The Cth Criminal Code also includes provisions for:

- enabling a person to be prosecuted for more serious drug offences by aggregating dealings that involve smaller quantities of controlled drugs, plants or precursors (div 311)
- defences relating to conduct justified or excused by the laws of a state or territory, or another Commonwealth law (div 313)
- allowing for an alternative verdict if the accused is found not guilty of an alleged offence, but the trier of fact is satisfied that the defendant is guilty of another offence (e.g. importing only a marketable rather than a commercial quantity of a drug) (s 313.3).

The Cth Criminal Code has extraterritorial effect. Its drug offences apply beyond Australia, to all Australian citizens, corporations and residents anywhere in the world, unless a defence under foreign law also applies.

Which Court Will Hear Commonwealth Drug Offences

Less serious criminal offences can often be tried summarily in a Magistrates Court without a jury. Some more serious matters (i.e. indictable offences) can sometimes also be heard summarily by a magistrate, while other serious matters must proceed to higher courts for hearing before a judge and jury. Where there is a choice as to which court can try a matter, a right of election exists, exercisable either by the prosecution or the defendant. This right

of election can be important as it may have an impact on the maximum sentence that can be imposed, appeal rights, and the length and cost of the proceedings.

The *Crimes Act 1914* (Cth) (Crimes Act) contains provisions (ss 4G–4JA) that set out which offences are summary offences, which are indictable offences, and which indictable offences can be tried summarily.

As noted, the type and quantity of the controlled drug in issue determines the maximum penalty. The things that are controlled drugs, precursors or plants, and their traffickable, marketable and commercial quantities, can be found in sch 1 of the Regulations.

The sentencing, imprisonment and release of Commonwealth offenders are covered by pt 1B of the Crimes Act.

Federal Police Investigative Powers

Generally, the powers used to investigate suspected drug offences (e.g. obtaining search warrants, conducting controlled (i.e. covert) operations, powers of arrest and detention, and undertaking of forensic procedures) are contained within the Crimes Act or other Commonwealth Acts such as the *Surveillance Devices Act 2004* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth). The latter statutes enable law enforcement officers to engage in electronic eavesdropping by using listening devices to overhear and record private conversations, and to intercept and record telecommunications including telephone conversations.

Under the provisions relating to controlled (undercover) operations, authorised law enforcement officers investigating serious Commonwealth offences can themselves engage in conduct that could constitute an offence against Commonwealth or other state or territory laws (e.g. the possession or supply of drugs during a covert drug investigation).

Searches of premises

The issue of search warrants and the powers of arrest are provided for in pt 1AA of the Crimes Act. Section 3E of the Crimes Act provides when search warrants may be issued and s 3E(5) details what must be stated in the warrant. The conditions listed in s 3E(5) require the warrant to describe the premises to be searched and the evidence to be searched for.

Evidence gathering through use of technology

Mobile telephones, personal computers and social media communications are increasingly becoming fertile sources of evidence for the prosecution of drug and other offences. Police have ready access to software enabling them to download the entire data history of mobile

telephones including contact lists, call registers and text messages. Information about the location of a mobile telephone through its use at any point in time can also be obtained. People are increasingly being charged with drug supply and/or trafficking based on information obtained from their mobile telephones. Computers can also be seized by police to obtain records including email communications and the history of internet usage. Expert forensic analyses of these devices regularly enable police to recover deleted information.

Confiscation

There are other specific Commonwealth laws targeting the financial gains associated with illegal activities, which are often utilised in drug-related cases (see the *Proceeds of Crime Act 2002* (Cth)). Under this legislation, property can be restrained, seized and forfeited including in circumstances where a person is not actually convicted of a criminal offence in connection with the allegedly illegal activities.

State Drug offences

Categories of Dangerous Drugs in Queensland

In Queensland, illegal drugs are called 'dangerous drugs', and the law regulating those drugs is the Drugs Misuse Act. Dangerous drugs are defined (s 4 Drugs Misuse Act) as those drugs and plants listed in sch 1 and 2 of the *Drugs Misuse Regulation 1987* (Qld) (Regulation) and divided into two categories.

The first category (sch 1 Regulation), includes the so-called hard drugs:

- heroin
- cocaine
- LSD (acid)
- amphetamine
- methylamphetamine (speed)
- MDMA (ecstasy)
- phencyclidine (angel dust)

Offences relating to these drugs attract the most severe penalties; for example, a maximum penalty of 25 years imprisonment applies to the offence of trafficking in a sch 1 drug.

The second category of drugs (sch 2 Regulation), contains the remaining dangerous drugs. This category includes:

- cannabis

- methadone
- opium
- barbiturates
- benzodiazepines (e.g. valium and serepax).

Penalties for Drugs Misuse Act offences are dependent on the type (sch 1 or 2 Regulation) and amount of the pure drug involved, and (for some offences) whether or not the offender was drug dependent. Schedules 3 and 4 specify the amounts of dangerous drugs which determine jurisdiction and penalty. For instance, for an offence of producing or possessing a sch 1 drug, if the amount exceeds the amount specified in sch 4 (e.g. 200 grams), the highest penalty (25 years imprisonment) will apply. If the amount of the sch 1 drug is less than that specified in sch 4 but is more than is specified in sch 3 (e.g. more than 2 grams but less than 200 grams), the penalty may still be the highest possible unless the accused person can show that they are a drug-dependent person, in which case the maximum penalty is 20 years imprisonment.

Prescription drugs such as diazepam are listed in sch 5 of the Regulation. Section 124 of the Drugs Misuse Act states the limited circumstances under which it may be lawful to supply small quantities of those drugs.

Controlled substances (listed in sch 6 of the Regulation), such as ephedrine, can also be lawfully supplied in certain circumstances such as in the ordinary course of business to manufacture pharmaceutical products. The Regulation imposes requirements on businesses that sell controlled substances such as obtaining photographic proof of identity from purchasers and completion of a declaration about intended use (an end-user declaration).

The definition of a dangerous drug (s 4 Drugs Misuse Act) includes synthetic or analogue drugs that:

- have a chemical structure substantially similar to a drug in the schedules to the Regulation (or a salt, derivative or stereo-isomer thereof)
- have a pharmacological effect substantially similar to those drugs
- are intended to have a pharmacological effect that is substantially similar to those drugs.

Those who possess, package, market or supply synthetic drugs are therefore being prosecuted if the drug is intended to give the user a similar ‘high’ to an illegal drug.

Drug Offences and Penalties in Queensland

The most important offences related to dangerous drugs created by the Drugs Misuse Act are:

- trafficking in dangerous drugs (s 5)
- supplying dangerous drugs (s 6)
- receiving/possessing property obtained from trafficking or supplying dangerous drugs (s 7)
- producing dangerous drugs (s 8)
- publishing or possessing instructions for producing dangerous drugs (s 8A)
- possessing dangerous drugs (s 9)
- possessing, supplying and producing relevant substances or things such as chemicals and apparatus used to manufacture dangerous drugs (ss 9A–9C)
- possessing things used in connection with a crime involving dangerous drugs (s 10)
- possessing certain property reasonably suspected of having been used or involved in the commission of some drug-related offences (s 10A)
- possessing prohibited combinations of certain items (e.g. chemicals commonly used to manufacture dangerous drugs) (s 10B)
- permitting premises to be used for drug offences (s 11).

Trafficking in dangerous drugs

A person who unlawfully trafficks in dangerous drugs commits an offence punishable by up to 25 years imprisonment for sch 1 drugs and up to 20 years imprisonment for sch 2 drugs (s 5 Drugs Misuse Act).

Even a single sale of a quantity of a drug, together with some proof that a business was being carried on, constitutes trafficking. Evidence of dealings in another state may be admissible to show continuation of the same business in Queensland.

An 80% non-parole period applies to prisoners serving a term of imprisonment for the offence of drug trafficking if the court declares the offence to be a serious violent offence (SVO) (s *182 Corrective Services Act 2006* (Qld)). A trafficking offence punished by at least 10 years imprisonment is automatically declared to be an SVO. A trafficking offence punished by at least five years imprisonment but fewer than 10 years imprisonment may, in the court's discretion, be declared an SVO. In practice, SVO declarations for trafficking offences are frequently made. Accordingly, many people convicted of drug trafficking serve

substantial periods of actual imprisonment. The SVO regime applies also to supplying and producing dangerous drugs in specific circumstances.

Supplying dangerous drugs

The offence of supplying dangerous drugs (s 6 Drug Misuse Act) attracts a penalty of up to 25 years imprisonment if the drug supplied is a sch 1 drug, or 20 years if it is a sch 2 drug, and a circumstance of aggravation applies where the drug is supplied by an adult (a person 18 years or over) to:

- a minor (a person less than 18 years)
- a person with an intellectual impairment
- someone within an educational institution or jail
- a person who does not know they are being supplied with a dangerous drug.

Otherwise, supply of a sch 1 drug is punishable by a maximum penalty of 20 years imprisonment and supply of a sch 2 drug by a maximum of 15 years imprisonment.

What does 'supply' mean?

The definition of 'supply' is very broad and includes not only giving, selling, administering, transporting or distributing a drug, but offering to do such things or even doing anything preparatory to, in furtherance of or for the purpose of any of those acts (s 4 Drugs Misuse Act).

Offering to sell something that a person believes to be a dangerous drug, but on analysis is not a dangerous drug, is still an offence. Also, an offer may be made even though there is no evidence that the offeror intended to complete the offer, or actually could complete it.

Usually a 'supply' of a dangerous drug will be made by the supplier to another person, but not always. A person may supply a dangerous drug to oneself (s 7 *Criminal Code Act 1899* (Qld) (Qld Criminal Code)). The definition of 'supply' is broad enough to encompass the sharing of a marijuana cigarette.

Under s 6(2)(a) of the Drugs Misuse Act, severe penalties apply to the supply of dangerous drugs to children. There are two categories of children (or minors)—persons aged under 18 years of age and persons aged under 16 years of age. For the supply of drugs to children aged under 16 years, the maximum penalties are:

- aggravated supply of a sch 1 drug to a minor under 16 years—life imprisonment
- aggravated supply of a sch 2 drug to a minor under 16 years—25 years imprisonment.

The penalties applying to the supply of dangerous drugs to children aged between 16 and 18 years are:

- aggravated supply of a sch 1 drug to a minor aged 16 to 18 years—25 years imprisonment
- aggravated supply of a sch 2 drug to a minor aged 16 to 18 years—20 years imprisonment.

Property obtained from trafficking or supplying drugs

This offence (s 7 Drugs Misuse Act) covers receiving or possessing any property, other than dangerous drugs, that is directly or indirectly obtained from offences of trafficking or supplying, even where those acts are committed outside Queensland (s 7(1)(b) Drugs Misuse Act). It is punishable by imprisonment for a maximum of 20 years. The property is most often cash. The property in question can also be forfeited.

In addition, any other person who receives or possesses property by mortgage, pledge or exchange, and knows that the property was obtained by trafficking or supplying, is guilty of an offence. This offence also carries the same maximum penalties as outlined above.

Producing dangerous drugs

'Producing' is broadly defined and includes preparation, manufacture, cultivation, packaging, production or offering to do any of the above, or doing anything preparatory to, in furtherance of or for the purpose of such things (s 4 Drugs Misuse Act). Manufacturing includes pressing dangerous drugs (such as MDMA) into pills. Packaging includes putting saleable quantities of dangerous drugs (such as cocaine) into clip seal bags. Producing also encompasses the cultivation of cannabis.

Drying out cannabis is preparation and, therefore, producing.

Cultivation requires some positive act but can cover such actions as watering, growing the seed, harvesting and ancillary activities to harvesting such as drying and stacking. Again, the maximum penalties are determined according to the schedule for the drug and the quantity.

Possessing dangerous drugs

'Possession' is not defined in the Drugs Misuse Act, but the definition of possession in sch 1 s 1 of the Criminal Code applies (s 116 Drugs Misuse Act), and possession can include a situation where another person has actual custody of the thing concerned. This definition is not exhaustive, and previous court cases have mapped out what possession means.

The Drugs Misuse Act provides that an occupier or manager of a place is deemed to be in possession of drugs found on premises under their control, unless they can show they neither knew nor had reason to suspect that the drugs would be there (s 129(1)(c) Drugs

Misuse Act). This assists the prosecution greatly in proving possession against people who would otherwise be regarded as quite innocent for example parents who, although not aware of drugs on their premises, have reason to suspect their children may have drugs on the premises. The onus regarding the element of knowledge is reversed. It is for an accused to negate knowledge and reasonable suspicion on the balance of probabilities. Note that the deeming provision in s 129(1)(c) of the Drugs Misuse Act only applies to possession of drugs. It does not apply to possessing anything else, such as a thing used in connection with a drug offence (such as a bong).

Whether someone is an occupier is a question of fact. Some interest or personal involvement in control or management of the premises must be shown. A person who is able to exclude strangers from their premises is an occupier. An occupier need not be physically on the premises at the relevant time. One premises may have a number of occupiers.

Possession can be actual, constructive or joint. Actual possession can include physical possession (e.g. in one's pocket) or non-physical possession, which can occur when an item is under a person's control, even if not physically within their possession (e.g. a pistol in a locked car for which the defendant had the sole key). Constructive possession occurs when the goods are in the possession of one person, but another person has the right to obtain the goods (e.g. items left in a cloakroom remain in the possession of the owner even though the cloakroom attendant has actual physical custody). Joint possession occurs when more than one person has possession of an item at the same time (e.g. a marijuana cigarette passed around at a party may be in the joint possession of all persons smoking it).

Possession requires both knowledge of the item concerned and control of it. Both knowledge and control must be proved beyond reasonable doubt, but proof of knowledge can be based on an inference drawn from all the circumstances. It is also enough for the prosecution to prove that the defendant knowingly possessed a dangerous drug, with the onus then shifting to the defendant to prove that their possession of the drug was innocent (e.g. they were mistaken as to the nature of that substance).

It is no defence that a person has forgotten that they had the drugs concerned. Also, control over the drugs need only be momentary (e.g. in the course of concealment). However, knowledge with a future intention to control does not constitute possession.

The High Court held in *Williams v The Queen* (1978) 140 CLR 591 that it is not possible to possess minute quantities of a drug. However, the circumstances of a case may allow an inference of possession of a larger quantity of the drug.

Instructions for producing dangerous drugs

It is an offence to unlawfully publish or possess instructions for producing dangerous drugs (s 8A Drugs Misuse Act). The penalty depends on the relevant drugs and schedules to which the instructions relate (25 years for sch 1 drugs and 20 years for sch 2 drugs).

Possessing drug-related things

Pursuant to the Drugs Misuse Act, it is an offence punishable by a maximum penalty of 15 years imprisonment to possess things to be used or that have been used in connection with a drug offence (s 10(1) Drugs Misuse Act). This could cover anything involved in a drug offence, including the motor vehicle used to transport drugs and the hose used to water drugs. Such items can be forfeited to the Crown (pt 5 Drugs Misuse Act) and can be subject to a restraining order, pending forfeiture. When production is the crime in question, the Court of Appeal has held that it is sufficient if the person in possession intends another to use the item in connection with the production of a dangerous drug, even though no such production has occurred or is in contemplation by the other person.

It is also an offence to possess things (other than syringes or needles) for use in connection with the administration, consumption or smoking of a dangerous drug, or things that have been used for such purposes (s 10(2) Drugs Misuse Act). The penalty is a maximum of two years imprisonment, and the offence can only be dealt with summarily by a Magistrates Court. To establish this offence, it is necessary to prove either that the person charged used the thing in the past for the administration, consumption or smoking of a dangerous drug, or that they intended to use it in the future. It is not an offence to possess a utensil used by someone else in the past to smoke a dangerous drug if that person does not intend to use it in the future.

It is also an offence to possess property reasonably suspected of being used for or acquired from the commission of a drug offence, unless a satisfactory account of how the property was lawfully acquired is given to the court (s 10A Drugs Misuse Act). That account must be provided by the defendant and proven on the balance of probabilities. The penalty is a maximum of two years imprisonment.

Possession of precursor chemicals and drug laboratory equipment

Offences of possession, supply or producing precursor chemicals (substances used to manufacture dangerous drugs) or things (s 9A–9C Drugs Misuse Act) carry a maximum penalty of 15 years imprisonment. These offences are particularly aimed at those manufacturing drugs such as amphetamines. An offence of trafficking in precursors carries a maximum penalty of 20 years imprisonment (s 9D Drugs Misuse Act). Sections 9A to 9D

of the Drugs Misuse Act deal with 'relevant substances or things', which are defined in schs 8A and 8B of the Regulation to include precursor chemicals and things used in drug production such as condensers, distillation heads and heating mantles.

It is an offence to unlawfully possess a prohibited combination of items used for drug production (s 10B Drugs Misuse Act). This offence is punishable by a maximum of 25 years imprisonment. Again, the Regulation sets out what could amount to a prohibited combination of items.

Permitting use of a place

It is an offence punishable by up to 15 years imprisonment for a person to permit a place that they occupy, manage or control to be used for an offence under pt 2 of the Drugs Misuse Act. A place includes a vehicle.

Other drug offences

The Drugs Misuse Act contains other offence provisions such as those relating to the handling and regulation of controlled substances. For instance, someone who lawfully owns or possesses a substance (e.g. ephedrine) must report any loss or theft to police within two days, or they can commit an offence and be fined.

A number of offences are created by the *Health Act 1937* (Qld) and the Regulations made under it. These offences include offences relating to the possession, supply or dispensing of restricted drugs. Penalties are limited to fines, which vary in amount depending on the offence.

Power to fine drug offenders in Queensland

The courts have the power to impose fines for offences under the Drugs Misuse Act, instead of or in addition to imprisonment (s 126 Drugs Misuse Act). The maximum fines are:

- $689 250 (5000 penalty units; one penalty unit is currently $137.85) where the offence is tried on indictment
- $13 785 (100 penalty units) where the offence is tried summarily

Which Queensland Court Will Hear Drug offences

The Queensland Drug and Alcohol Court

The Drug and Alcohol Court started in Brisbane on 29 January 2018. The *Penalties and Sentences Act 1992* (Qld) now allows Queensland courts to make a drug and alcohol treatment order (a treatment order) for less serious drug offences. The purpose of a

treatment order is to facilitate the rehabilitation of offenders by providing a judicially supervised treatment regime aimed at reducing substance abuse, associated criminal activity and health risks, and integrating offenders into the community.

A treatment order involves a custodial part and a treatment part. The treatment part requires the court to sentence the offender to imprisonment and then suspend the sentence for an operational period of between two to five years. During this time, the offender must not commit an offence. If the offender does commit an offence during the operational period, the court may make a range of orders including revoking the treatment order—so that the offender has to serve the whole or part of the sentence of imprisonment—or extending the operational period of the treatment order. The rehabilitation part requires the offender to comply with a treatment program and reporting, visitation and other orders similar to a probation order. The treatment program may include participation in medical, psychiatric or psychological treatment, residential detoxification programs, wearing a drug and alcohol detection device and participation in counselling, educational or employment programs. The Drug and Alcohol Court closely supervises treatment orders through regular court dates. The Brisbane Drug and Alcohol Court will be reviewed in 2023, after which time expansion of the service to regional areas may be considered.

The Magistrates Court

Legal advice to determine whether the matter can be dealt with summarily in the Magistrates Court should be obtained by a person who is charged with a drug offence. It is preferable to have the matter dealt with by the Magistrates Court rather than the District or Supreme Court because, in the latter courts, the risk of custody is greater.

The following offences (or attempts to commit such offences) in the Drugs Misuse Act can be dealt with summarily in the Magistrates Court if the person, on conviction of the offence, is not liable to more than 15 years imprisonment (s 13 Drugs Misuse Act):

- supplying dangerous drugs (s 6)
- receiving or possessing property obtained from trafficking or supplying (in certain circumstances) (s 7)
- producing dangerous drugs (s 8)
- possessing dangerous drugs (s 9)
- possessing, supplying or producing relevant substances or things (ss 9A–9C)
- possessing things (s 10(1))
- permitting use of place (s 11)
- being party to offences committed outside Queensland (s 12).

In addition, a person charged with possessing a dangerous drug, who is liable on conviction to more than 15 years imprisonment, may still have the charge dealt with in the Magistrates Court if the prosecution does not allege that the possession of the drug was for a commercial purpose (s 14 Drugs Misuse Act).

Persons prosecuted summarily under these offence provisions are liable, on conviction, to not more than three years imprisonment (ss 13(4), 14(3) Drugs Misuse Act). Whether or not indictable charges are dealt with summarily is at the election of the prosecution (s 118(2) Drugs Misuse Act). A magistrate may decide not to try a charge (s 118(4) Drugs Misuse Act) if the magistrate considers that the charge is too serious and may require a sentence of longer than three years.

Trafficking offences can only be dealt with in the District or Supreme courts.

Parties to Drug Offences Committed Outside Queensland

When a person is a party to an act committed outside Queensland, which would be an offence under ss 5 to 11 of the Drugs Misuse Act and the act was an offence in the place where it is committed, the same penalty applies as if the act was committed in Queensland (s 12 Drugs Misuse Act).

Police Powers in Queensland

Police powers to search

Police have wide-ranging powers under the *Police Powers and Responsibilities Act 2000* (Qld) (PPR Act) to search a person, premises or a vehicle with or without a warrant, particularly in circumstances where the police officer reasonably believes that the person is in possession of drugs, or that drugs are located on the premises or in the vehicle. For a full discussion of these powers see ch 2, pt 2 of the PPR Act regarding searching persons, vehicles and places without a warrant. Also, police may use drug detection dogs in certain circumstances to carry out drug detection activities in relation to people and places without a warrant (ch 2 PPR Act).

Police covert evidence gathering powers

The powers of police officers to use covert evidence gathering techniques is primarily governed by chs 9 to 11 of the PPR Act, which allows police to seek authorisation to exercise powers such as using surveillance devices, conducting covert searches and undertaking controlled (undercover) operations. Police can therefore be authorised to enter a person's home or business, without their knowledge, and install audio and/or video

cameras as well as installing a tracking device in their vehicle. Undercover police can be allowed to participate in conduct that could amount to an offence, such as drug possession or supply, in order to gather evidence.

Almost every major drug investigation by police has involved tapping the telephones used by people suspected of dealing in drugs (Commonwealth telephone interception powers). This often produces recordings of hundreds or even thousands of conversations between networks of people over a period of months to be used as evidence before arrests are made.

Other law enforcement agencies, such as the Crime and Corruption Commission Queensland and the Australian Crime Commission, have similar investigative powers under the respective statutes that govern their operations.

Party and event powers

Police have powers to deal with out-of-control parties or events. 'Out of control' is defined to include an offence under the Drugs Misuse Act. Police have additional powers to stop a vehicle or enter a place without a warrant and can give directions at these events.

Police also have powers under the *Major Events Act 2014* (Qld) (Major Events Act), including giving directions to leave and not re-enter a major event area if a person appears to be adversely affected by a drug (s 26(1)(b) Major Events Act). The Major Events Act also includes an offence of 'appearing to be drunk or adversely affected by a drug' and entering a major event area (s 18(3) Major Events Act, maximum penalty 20 penalty units or $2757).

Forfeiture, restraining orders and confiscation

The Drugs Misuse Act (pt 5) has extensive provisions giving police and/or the Crown the right to apply for forfeiture of property involved in or acquired from drug offences.

Section 33 of the Drugs Misuse Act provides that property (other than drugs) will be liable for forfeiture if it:

- was acquired to commit or used to commit an offence (i.e. those offences set out above)
- is the proceeds of or acquired with the proceeds of a drug offence
- is property into which the proceeds of such offences have been converted. Property can be liable for forfeiture even when it is not specifically traceable to an offence.

Sections 41 to 43 of the Drugs Misuse Act give courts the power to make restraining orders when property may be liable to forfeiture, and proceedings have or are about to be commenced. A restraining order passes management of the property to a named manager and allows the manager to deal with the property as if they were the absolute owner.

The *Criminal Proceeds Confiscation Act 2002* (Qld) (CPC Act) also targets financial gains associated with allegedly illegal activity. Property can be confiscated (i.e. restrained and forfeited) under this legislation in relation to allegedly illegal drug-related activities, even without any formal criminal convictions.

The Serious Drug Offender Confiscation Order Scheme is contained in the CPC Act. Under the scheme, a court sentencing an offender for a serious drug offence must issue a certificate for each conviction of a serious drug offence (a serious drug offence certificate). A 'serious drug offence' is defined as a 'qualifying offence'. The CPC Act provides that the Supreme Court must make a serious drug offender confiscation order against a person if it is satisfied that:

- the person has been convicted of a qualifying offence for which a serious drug offence certificate has been issued, and
- the application for the order was made within six months after issue of the certificate.

The effect of a serious drug offender confiscation order is that it forfeits to the state all property of the person and all property that was gifted by the person in the six years before the person was charged. There is no requirement for the proposed confiscated assets to be linked to the commission of a specific offence. The CPC Act also allows the dependants of a person against whom such an order is made to apply to the Supreme Court for a hardship order with respect to 'special property'. The CPC Act reverses the onus of proof compelling the respondent to prove the lawful derivation of increased wealth. It also has retrospective application to criminal activity committed before commencement of the Serious Drug Offender Confiscation Order Scheme.

Drug Analysis Certificates

When drug charges are contested, the prosecution will normally obtain an analysis certificate to identify and prove the amount of the relevant drug. Section 128 of the Drugs Misuse Act states that an analysis certificate is conclusive evidence of the identity and quantity of the thing analysed, in the absence of any contrary evidence. However, a certificate can only be produced by the prosecution to prove facts disclosed on analysis or deducible from the results with the aid of an expert. The prosecution cannot use the certificate as a vehicle for introducing and admitting other evidence. The prosecution also often produces statements from experts about the process of drug production where persons are charged with drug production or possession of chemicals, or things alleged to have been used in drug production. These experts often provide their opinion on the amount of a dangerous drug (mostly amphetamines) that could have been produced from precursor chemicals seized by police.

Medicinal cannabis

Amendments were made to the *Health Act 1937* (Qld). These amendments mean that medical cannabis is dealt with in the same way as other prescription drugs.

Alternatives to Terms of Imprisonment

Police diversion program

This diversion program relates to persons arrested for or being questioned in relation to a minor drug offence involving cannabis (i.e. possession of a small amount of cannabis, not more than 50 grams, or an associated thing such as a bong). The diversion program offers people apprehended for minor drug offences access to professional health intervention, education about the wide-ranging effects and consequences of cannabis use, and assistance to stop using cannabis as an alternative to proceeding through the usual court processes. It is offered at all police stations in Queensland.

The diversion program is provided for in s 379 of the PPR Act. To be eligible, a person is required to admit to the offence in an electronically recorded interview. Children may also be eligible to attend the diversion program at the discretion of the police officer concerned. People with certain criminal history (e.g. convictions for offences of violence or those who have served prior imprisonment for drug offences) and those who have previously been offered the opportunity to attend and complete a police diversion program will not be eligible.

The person being questioned in relation to the offence has a right to speak with a lawyer, friend or relative before being questioned. At this time it is important for the legal representative to advise the person of the option of the diversionary program. Police officers are not entitled to discuss the diversion program until the person has made admissions, otherwise this may be seen to be an inducement to participate in the record of interview. Individuals who are facing minor cannabis-related offences, who are not seeking assistance from a lawyer and who admit their guilt can ask police about the use of this diversionary program.

Persons offered an opportunity to attend the program as an alternative to being charged with a drug offence and attending court are required to attend an assessment and education session of about two hours duration. If the person attends, they will not be charged with a criminal offence and will not have to attend court. If the person fails to attend, the police will be advised and will then determine if the person should be charged with an offence (i.e. contravening a direction or requirement of a police officer) under s 791 of the PPR Act. This offence has a maximum penalty of 40 penalty units or $5514.

A court hearing a matter where an eligible offender (under the PPR Act) is pleading guilty to a minor drug offence can also offer the defendant an opportunity to attend a drug diversion assessment program. The charge can then be adjourned and a report later provided to the court about the person's attendance. If the court is satisfied that the defendant attended and completed the assessment program, the charge will be struck out (s 122A Drugs Misuse Act).

Court diversion program for minor drug offences

The *Penalties and Sentences Act 1992* (Qld) also provides a court diversion program for eligible drug offenders. Under pt 3 div 1 of this Act, consenting offenders who meet the prescribed eligibility requirements can be discharged absolutely on condition that they attend a drug assessment and education session. The program is available in all Magistrates courts and is wider in its application than the police diversion program. Those who have already used up an opportunity for the police diversion program or who have committed minor possession offences involving harder drugs may be eligible.

Where the court has a court diversion officer, this person identifies and talks with eligible offenders about diversion. The matter is then heard in court, and if the magistrate deems the person suitable, they are placed on a recognizance order with a condition of attending a drug assessment and education session. Ordinarily, the order will involve a period of some months and a bond. Once the offender attends the assessment and education session (similar to the police diversion program above) with a nominated health service provider, the order ends and no conviction is recorded.

If the offender does not attend the required session in the allowed time, the recognizance order will have been breached, and the offender will be returned to court to be sentenced for the original offence, and their bond will be forfeited.

Diversion under this program may be offered twice.

The Q-MERIT program

People charged with some drug offences who appear in some regional Magistrates courts may be eligible to participate in another diversionary program.

At present, the Magistrates courts at Redcliffe and Maroochydore offer the Q-MERIT program (Queensland Magistrates Early Referral Into Treatment). Eligible adult offenders who have drug-use problems and who are appropriate for release on bail can be placed on a diversion program as part of their bail conditions. An assessment will be undertaken, and a supervised individual treatment plan will be drawn up. After the program is completed, a report will be provided to the court.

Court Link

Court Link is a therapeutic justice-based diversion process that aims to address the causes of offending behaviour by assisting defendants with problematic substance abuse (also mental health issues, impaired decision-making capacity and homelessness), who come into contact with the criminal justice system. Court Link is a 12-week bail-based program offering participants formal case management, together with referral to treatment and community support services. To be eligible for referral, a defendant must be charged with any criminal offence before the Magistrates Court, regardless of whether they will plead guilty or not guilty. Court Link operates from Court Room 32 at the Brisbane Magistrates Court every first and third Friday of the month.

The process for accessing this service includes the following steps:

- Court Link staff will work with individuals considered suitable for Court Link to develop a treatment plan.
- If the magistrate considers the individual suitable for the program, conditions of the treatment plan will be entered on the individual's bail register.
- The individual will appear at successive mentions of the matter to indicate their progress.
- At the final hearing of the matter, a report will be provided to the court and the magistrate may deal with the matter according to law.

Drug and Alcohol Assessment

Persons over 18 years of age, who are charged with identified offences (e.g. grievous bodily harm, wounding, common assault, assault occasioning bodily harm, serious assault or obstructing a police officer), must have as a condition of their bail that they attend a one-off drug and alcohol assessment and referral course to give them information about treatment and counselling.

The consequences of a drug conviction

A drug conviction may have wider repercussions than the penalty imposed by a court. It may affect the person's ability to seek or maintain employment and a person's ability to travel overseas. For discussion on the effect of criminal convictions see the chapter on *Sentencing*.

Legal Notices

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