DRUG DIVERSION AMENDMENT BILL 2002

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The *Drug Diversion Amendment Bill 2002* (the Bill) amends the *Penalties and Sentences Act 1992* and the *Juvenile Justice Act 1992* to facilitate the provision of drug assessment and education sessions to eligible offenders appearing before particular drug diversion courts.

The opportunity to attend a drug assessment and education session will be available to both juveniles and adults. If an eligible offender attends the court ordered drug assessment and education session no further action will be taken with respect to the offence and no conviction will be recorded.

Failure to attend a drug assessment and education session will result in offenders being returned to court and sentenced for the original offence.

Reasons for the objectives and how they will be achieved

The primary objective of the Federal Government's Illicit Drug Diversion Initiative is to increase incentives for drug users to identify and treat their illicit drug use early. All States of Australia, in partnership with the Commonwealth Government, have developed initiatives to divert offenders into treatment to try and stop them using drugs and reduce the likelihood of their being caught up in the criminal justice system.

The Queensland Illicit Drug Diversion Initiative presently includes the Police Diversion Program for cannabis provided for under section 211 of the *Police Powers and Responsibilities Act 2000*. Under the Police Diversion Program, people who are found in possession of 50 grams or less of cannabis, and meet the strict eligibility criteria, are offered the opportunity to be diverted from the criminal justice system to attend a Drug Diversion Assessment Program (DDAP) rather than being charged for the offence.

People identified as dependent on cannabis during the assessment are, upon completion of the DDAP, offered a referral to the closest available agency with programs in place to address cannabis dependence. Where appropriate referrals to other drug and alcohol and/or other services are also made. It is important to note that participation in further treatment is voluntary and is not a requirement for expiation of the charge under section 211 of the *Police Powers and Responsibilities Act 2000*.

The Police Diversion Program commenced on 24 June 2001. As of August 2002, over 6000 people had been diverted under the program. The program has a high compliance rate.

This Bill complements the Police Diversion Program by ensuring users of illicit drugs other than cannabis have access to education and treatment at an early stage. It is clinically proven that if drug users are exposed to treatment before their addiction becomes full-blown there is an improved chance of stopping drug use. Diversion also aims to decrease the social impact of illicit drug use within Queensland and to prevent a new generation of drug users committing drug-related crime from emerging, therefore leading to safer communities and a better quality of life for all Queenslanders.

Diverting people caught with a small amount of illicit drugs also gives them an incentive to address their drug use problem, in many cases before incurring a criminal conviction.

This Bill will permit a Drug Diversion Court to order a willing offender to attend a drug assessment and education session. As this diversion initiative is a trial program not all courts will be Drug Diversion Courts. The Bill incorporates a number of safeguards to ensure that the diversion initiative is not abused by drug sellers to achieve a 'softer' sentence outcome than they deserve.

Before the magistrate can sentence the offender to attend a drug assessment and education session, the offender must meet the eligibility criteria. These eligibility criteria (new sections 15C of the *Penalties and Sentences Act 1992* and section 119H of the *Juvenile Justice Act 1992)* require:

(a) The offender or child pleads guilty to an "eligible drug offence". Eligible drug offence is defined to mean (in new section 119H of the *Juvenile Justice Act 1992* and new section 15D of the *Penalties and Sentences Act 1992*) an offence against *Drugs Misuse Act 1986*, section 9 (Possessing dangerous drug) or section 10 (Possessing things) if the drug and the quantity of the

drug and another substance is not more than the amount prescribed in a regulation of the *Penalties and Sentences Act 1992*. The magistrate must also be satisfied that the person possessed the drug for their personal use.

(b) An offender or child is not an "eligible drug offender" if the person is, or has at any time been charged with or convicted of a "disqualifying offence". "Disqualifying offence" is defined to mean:

(i) an offence of a sexual nature;

(ii) an offence against the *Drugs Misuse Act 198*6, sections 5, 6, 8 or 9[1], other than an offence that was dealt with, or is to be dealt with, summarily;

(iii) an indictable offence involving violence against another person, other than an offence charged under any of the following provisions of the Criminal Code—

- section 335 (Common assault),
- section 340(a) and section 340(b) of the Criminal Code, but only if the offence is the assault of another with intent to resist or prevent the lawful arrest or detention of the person or of any other person, or

(c) The offender or child will not be eligible for the diversion if they have had two previous diversions that were either successfully or unsuccessfully completed.

(d) A disqualifying offence will not affect eligibility if the conviction is one that the offender would be legally able to deny pursuant to the *Criminal Law (Rehabilitation of Offenders) Act 1986*.

It is planned that the diversion initiative is to be trialed for up to 12 months in the Brisbane Central Magistrates Court and the Brisbane Childrens Court. These two courts will be prescribed drug diversion courts. At the end of the trial an evaluation will permit assessment of the extent that the diversion initiative assisted eligible offenders and decreased unlawful criminal activity.

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1 Section 5 (Trafficking in dangerous drugs), section 6 (Supplying dangerous drugs), section 8 (Producing dangerous drugs) or section 9 (Possessing dangerous drugs).

An offer to attend a Drug Assessment and Education Session is not automatic even if the offender fits the eligibility criteria and is in possession of quantity of drugs less than the prescribed quantity. The court determines every case on the facts of that case. Even if an offender meets all eligibility criteria, the magistrate retains a sentencing discretion to determine if referral is appropriate in the circumstances of a particular case.

Additionally, in every case the prosecution (officers from the Queensland Police Service or lawyers from the Office of the Director of Public Prosecutions) will have the opportunity to elect for a magistrate not to deal with the case. Section 13 of the *Drugs Misuse Act 1986* (Qld) permits summary proceedings for possession of dangerous drugs only upon the election of the prosecution.

Providers approved by the Chief Executive Officer of the Department of Health will conduct Drug Assessment and Education Sessions. Providers are chosen after an open tender process and the design of the sessions are based on research in the alcohol and other drug fields, where brief interventions, including motivational interviewing, have been shown to be effective in helping people to modify their drug use and reduce associated problems. Illicit drug interventions being implemented in other jurisdictions as components of the Federal Government's Illicit Drug Diversion Initiative will also inform the development of the Queensland sessions.

Failure to attend a session will have a similar consequence for both juveniles and adult offenders. The offender is returned to court and the sentence for the original drug offence proceeds.

Administrative cost to Government of implementation

The total estimated expenditure for the trial is $0.735M. The funding for this diversion initiative is provided for by the Commonwealth with a State contribution (in the order of $30,000) that will assist in meeting the assessment costs of the Program.

Consistency with Fundamental Legislative Principles

Does the Bill have sufficient regard to the institution of Parliament?

The court can make an order under section 19 of the *Penalties and Sentences Act 1992* requiring an offender to attend a Drug Assessment and Education Session if the offender is an eligible drug offender. Similar provisions in the *Juvenile Justice Act 1992* will permit a court to adjourn

proceedings for an eligible child to attend a Drug Assessment and Education Session.

An eligible drug offence will be defined in both the *Juvenile Justice Act 1992* and the *Penalties and Sentence Act 1992* to mean an offence of possession of a dangerous drug where the dangerous drug is a thing prescribed by regulation for the paragraph and for each dangerous drug mentioned in the charge the quantity of the substances, preparations, solutions or admixtures containing the dangerous drug is not more than the quantity prescribed by regulation.

The Scrutiny of Legislation Committee may view such a section as a "Henry VIII" clause. However, it is submitted the use of regulation is justified in these circumstances because of the need to be able to adjust urgently the scheduling of drugs to capture new designer drugs that emerge onto the market. In addition, certain drugs not included in the schedules may need to be added if there is a significant increase in the use of those drugs.

To ensure that Parliament is fully informed as to the type of drugs to be included in the diversion initiative, the draft regulation (including the schedule of quantity and type of dangerous drug) will be tabled at the time of the introduction of the Bill.

CONSULTATION

Consultation on the proposed diversion initiative has taken place through the Queensland Drug Coordinating Committee and the Queensland Illicit Drug Diversion Initiative Reference Group. The Queensland Illicit Drug Diversion Reference Group (the Reference Group) will report to the QDCC. The Department of the Premier and Cabinet chair the Reference Group. Members of the Reference Group include representatives from the Queensland Police Service, Queensland Health, the Department of Families, the Crime and Misconduct Commission, the Commonwealth Department of Health and Ageing and a representative from the Australian National Council on Drugs (ANCD).

There has also been consultation with the Department of Families – Youth Justice Program, the Department of Corrective Services, the Chief Magistrate and the Childrens Court Magistrate and Legal Aid Queensland. The Queensland Police Service has been consulted as to appropriate type and quantities of illicit drugs to be included in the regulation.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act as the *Drug Diversion Amendment Bill 2002*

PART 2—AMENDMENT OF JUVENILE JUSTICE ACT 1992

Clause 2 provides that this part amends the *Juvenile Justice Act 1992.*

Clause 3 amends section 5 (Definitions) by inserting a number of definitions relevant to the new Division 1B-Court referred drug assessment and education sessions before sentencing. The definitions refer to more comprehensive definitions contained in the new Division 1B.

Clause 4 inserts a new Division 1B – Court referred drug assessment and education sessions before sentencing. The division will permit a magistrate to adjourn proceedings for an eligible drug offence and refer an eligible child to a drug assessment and education session. If the child attends the session the proceedings end with a finding of guilt made with no conviction being recorded.

New section 119F inserts definitions into the Act including defining the meaning of "eligible child", the meaning of "drug assessment and education session", "drug diversion court", "eligible drug offence", the meaning of "disqualifying offence" and the meaning of "approved provider".

Note that at this time there is no section 119E in the *Juvenile Justice Act 1992*. However, a further amending Act, the *Juvenile Justice Amendment Act 2002* does contain such a section. Consequently, these provisions have been numbered to incorporate the changes to be made by the amending Act.

New section section 119G (Meaning of eligible child) defines an eligible child as a child charged with an eligible drug offence who has pleaded guilty to the offence. Section 5 of the *Juvenile Justice Act 1992* defines a

child as a person who has not turned 17 years of age. "Eligible drug offence" is defined in the new section 119H.

Section 119G also provides that a child is not an eligible child if a charge for a disqualifying offence is pending in court or if the child has ever been convicted of a disqualifying offence. Disqualifying offence is defined in new section 119I. A child is also not an eligible child if twice previously they have received an "diversion alternative".

A "diversion alternative" for a child is either a reference to drug assessment and education session by the court (new section 119K), an agreement to attend a drug diversion assessment program made in accordance with section 211 (Additional case when arrest for minor drugs offence may be discontinued) of the *Police Powers and Responsibilities Act 1992* or a prescribed diversion alternative under a law of another State or Commonwealth. Guidance is given in new section 119G(4)(b) for counting the number of diversions given.

A disqualifying conviction will not make a child ineligible for an offence if it is a conviction for which the rehabilitation periods in the *Criminal Law (Rehabitation of Offenders) Act 1986* apply. Section 5 of that Act provides that the rehabilitation period (that only applies when no custody or a period of less than 30 months imprisonment) for a child is 5 years.

New section 119H (Meaning of eligible drug offence) defines an eligible drug offence as an offence against the *Drugs Misuse Act 1986*, section 9 (Possessing dangerous drug) or section 10(2) (Possessing things) if the dangerous drug is prescribed by regulation for the *Penalties and Sentences Act 199*2 and the total quantity of the substances, preparations, solutions or admixtures containing the drug is not more than the quantity prescribed for the thing by regulation. An example is given to assist in working out the quantities when there is a mixture of drugs in substances.

Before an offence is an eligible drug offence the court must also be satisfied that that the dangerous drug or drugs were for the personal use of the child.

New section 119I defines disqualifying offence as an offence of a sexual nature (section 119I(1)(a)), an offence against the *Drugs Misuse Act 1986* section 5 (Trafficking in dangerous drugs), section 6 (Supplying dangerous drugs), section 8 (Producing dangerous drugs) or section 9 (Possessing dangerous drugs) (section 119I(1)(b)) except where the charge is dealt with summarily or an indictable offence involving violence against another person (section 119I(1)(c)) excepting where the offence is against section 335 (Common assault) or section 340 (a) and (b) of the Criminal Code.

Indictable offences dealt with summarily are included in the reference to indictable offences.

With respect to section 119I(1)(b) offences of trafficking in a dangerous drug (schedule 1 or 2) or supplying or producing a Schedule 1 dangerous drug cannot be dealt with summarily.

Section 119I(2) provides that the references to offences in section 119I(1) includes reference to corresponding provisions in the laws of other States or the Commonwealth.

"Offences of a sexual nature" is defined to mean a serious of sexual offences in the Criminal Code: Sections 208 (Unlawful sodomy), 209 (Attempted sodomy), 210 (Indecent treatment of children under 16 years), 213 (Owner etc. permitting abuse of children on premises), 215 (Carnal knowledge with or of children under 16), 216 (Abuse of intellectually impaired persons), 217 (Procuring young person etc. for carnal knowledge), 218 (Procuring sexual acts by coercion etc.), 219 (Taking child for immoral purposes), 221 (Conspiracy to defile), 222 (Incest), 227 (Indecent acts), 228 (Obscene publications and exhibitions), 229B (Maintaining a sexual relationship with a child), 323A (Female genital mutilation), 323B (Removal of child from State for female genital mutilation), 363A (Abduction of child under 16) or chapter 32 (Rape and sexual assaults).

New section 119J defines an approved provider as an entity approved by the chief executive officer (health) as an approved entity. Approval is done by gazettal of a notice.

The new subdivision 2 (References and Consequences) permits a Drug Diversion Court, after making a finding of guilt for an eligible drug offence, to refer an eligible child to a drug assessment and education session (new section 119K). Upon directing the child to attend a drug assessment and education session by a stated date the court adjourns proceedings for the offence.

New section 119L (If the child attends drug assessment and education session) provides that if the child attends the session by the stated date the approved provider gives notice to the court that the child has attended the session. The giving of the notice brings the proceedings to an end and the child is not liable for further prosecution. The giving of the notice also is a formal finding of guilt with no conviction recorded.

Attend is defined in newsection 119F of the Act to mean attend all of the session.

New section 119M (If the child fails to attend drug assessment and education session) provides that if the child fails to attend the agreed session by the agreed date the courts proper officer may take no action or bring the charge back on for the sentence proceeding to continue.

PART 3—AMENDMENT OF PENALTIES AND SENTENCES ACT 1992

Clause 5 provides that this part amends the *Penalties and Sentences Act 1992*.

Clause 6 amends section 4 (Definitions) of the Act by inserting a number of definitions relevant to the making of a recognisance with the condition that the offender attend a drug education and assessment session. These short definitions refer the reader to part 3, division 1 of the Act.

Clause 7 inserts a new subdivision 1(Interpretation) in Part 3 (Releases, Restitution and Compensation), Division 1 (Orders to release certain offenders) containing further new definitions.

New section 15C (Meaning of eligible drug offender) defines an eligible drug offender as a person charged with an eligible drug offence who has pleaded guilty to the offence. "Eligible drug offence" is defined in the new section 15D.

Section 15C also provides that a person is not an eligible drug offender if a charge for a disqualifying offence is pending in court or if the person has ever been convicted of a disqualifying offence. Disqualifying offence is defined in new section 15D. A person is not an eligible drug offender if if twice previously they have received an "diversion alternative".

An "diversion alternative" is either a reference to an order made under section 19 (1)(b) that includes a “drug conversion condition”—(defined in section 15B to mean an order under section 19(1)(b) that imposes drug diversion condition), an agreement to attend a drug diversion assessment program made in accordance with section 211 (Additional case when arrest for minor drugs offence may be discontinued) of the *Police Powers and Responsibilities Act 1992* or a prescribed diversion alternative made under the law of another State or Commonwealth. Assistance with counting diversions is included in section 15C(4)(b).

"Drug diversion condiction" is defined in section 19(2A) to mean when the court imposes a condition that the offender must attend a drug assessment and education session.

A conviction for a disqualifying offence will not make a person ineligible if it is a conviction for which the rehabilitation periods in the *Criminal Law (Rehabitation of Offenders) Act 1986* apply. Section 5 of that Act provides that the rehabilitation period (that only applies when no custody or a period of less than 30 months imprisonment is ordered) for an adult convicted upon indictment is 10 years. The period for other offences is 5 years.

New section 15D (Meaning of eligible drug offence) defines an eligible drug offence as an offence against the *Drugs Misuse Act 1986*, section 9 (Possessing dangerous drug) or section 10(2) (Possessing things) if the dangerous drug is prescribed by regulation for the *Penalties and Sentences Act 199*2 and the total quantity of the substances, preparations, solutions or admixtures containing the dangerous drug is not more than the quantity prescribed for the thing by regulation. Again, an example is given to provide assistance in calculating mixtures.

Before an offence is an eligible drug offence the court must also be satisfied that the dangerous drug or drugs were for the personal use of the person.

Section 15E defines disqualifying offence as an offence of a sexual nature, an offence against the *Drugs Misuse Act 1986* section 5 (Trafficking in dangerous drugs), section 6 (Supplying dangerous drugs), section 8 (Producing dangerous drugs) or section 9 (Possessing dangerous drugs) (section 5C(1)(b)) except where the charge is, or is to be, dealt with summarily or an offence involving violence against another person excepting where the offence is against section 335 (Common assault), or section 340 (a) and (b) of the Criminal Code.

With respect to section 15E(1)(b) offences of trafficking in a dangerous drug (schedule 1 or 2) or supplying or producing a Schedule 1 dangerous drug cannot be dealt with summarily.

"Offences of a sexual nature" is defined to mean a serious of sexual offences in the Criminal Code: Sections 208 (Unlawful sodomy), 209 (Attempted sodomy), 210 (Indecent treatment of children under 16 years), 213 (Owner etc. permitting abuse of children on premises), 215 (Carnal knowledge with or of children under 16), 216 (Abuse of intellectually impaired persons), 217 (Procuring young person etc. for carnal knowledge), 218 (Procuring sexual acts by coercion etc.), 219 (Taking

child for immoral purposes), 221 (Conspiracy to defile), 222 (Incest), 227 (Indecent acts), 228 (Obscene publications and exhibitions), 229B (Maintaining a sexual relationship with a child), 323A (Female genital mutilation), 323B (Removal of child from State for female genital mutilation), 363A (Abduction of child under 16) or chapter 32 (Rape and sexual assaults).

Section 15E(2) provides that the references to offences in section 15C(1) includes reference to corresponding provisions in the laws of other States or the Commonwealth.

Section 15F defines an approved provider as an entity approved by the chief executive officer (health) as an approved entity. Approval is done by gazettal of a notice.

Clause 8 Amends section 17 (Making of an order) to provide that despite section 17(1) an order may be made under section 17 if the matters in section 19(2A) are satisfied. Consequently, the considerations for making an order in section 17(1) do not apply for a drug diversion order. The present considerations in section 17 are that the court may make an order under section 19 only if it is appropriate that no punishment or only a nominal punishment be imposed.

Clause 9 amends section 19 (Order of court) by providing that a court may impose a drug diversion condition if the court is a drug diversion court, the offender is an eligible drug offender and the offender consents to attending a drug assessment and education session.