Drug Legislation Amendment Bill 2005

Explanatory Notes

General Outline

Objectives of the Legislation

The objective of the Bill is to amend the *Drug Rehabilitation (Court Diversion) Act 2000* (DR Act) and the *Drugs Misuse Act 1986* (DMA).

The DR Act is amended to change the status of the Drug Court from pilot to permanent, and to introduce measures which will streamline the processes and procedures in the court and make the court available to a wider range of offenders.

The Bill amends the DMA to introduce measures that will reduce the amount of forensic testing that is required when a clandestine drug laboratory for the production of methylamphetamine is detected.

Reasons for the objectives and how they will be achieved

Drug Court

The Drug Court pilot program was established by the DR Act and commenced operation in 2000. The objects of the program as set out in the DR Act are to reduce:

1. the level of drug dependency in the community;
2. the level of criminal activity associated with drug dependency;
3. health risks to the community associated with drug dependency; and
4. pressure on resources in the Court and prison systems.

The DR Act sets out certain criteria for admission to the Drug Court. These include that:

1. the person is not a juvenile offender;
2. the person is drug dependent and that dependency contributed to the person committing the offence; and

3. it is likely that the person, if convicted of the offence, would be sentenced to imprisonment.

The DR Act also provides that an offender cannot be referred to the Drug Court if the offender is subject to a charge for an offence of a sexual nature or an offence involving violence (other than some minor assaults). If an offender meets the eligibility requirements of the DR Act, he or she may be granted an Intensive Drug Rehabilitation Order (IDRO). When an IDRO is granted the offender becomes a 'participant' in the Drug Court.

The Drug Court has been operating in South East Queensland in the Beenleigh, Ipswich and Southport Magistrates Courts (the SEQ Drug Courts) since the inception of the pilot. Drug Courts in Cairns and Townsville (the North Queensland Drug Courts) started operating in 2002. The Drug Court pilot is a whole of government program that includes the expertise and resources of Queensland Health, the Departments of Corrective Services, Communities, Housing, Premier and Cabinet, the Queensland Police Service (QPS) and Legal Aid Queensland (LAQ). The Department of Justice and Attorney-General (JAG) is lead agency for the program.

Prior to the commencement of the Drug Court, the criminal justice system did not offer an alternative to the cycle of drug dependence, offending, imprisonment, release and re-offending. Prison offered little or no opportunity for offenders to break the cycle of drug use and offending.

The Drug Court, through its intensive program of drug treatment, support to participants and indirectly, support to participants' families, offers participants a chance to change their lives and overcome their addiction. It gives them the promise of a drug free life that is also free of drug related offending. It also has flow on effects to the community, through families that are kept together and supported, crimes that are not committed and criminal justice and welfare system resources that are saved.

The aims of the Drug Court are consistent with the Government priority of improving health care by giving offenders access to health services to treat their addiction. The aim of strengthening families is achieved through Drug Court support to offenders and their families, particularly through the provision of supported housing. The priority of protecting children and enhancing community safety is met by addressing crime and the social and economic causes of crime.

The SEQ Drug Courts were evaluated by the Australian Institute of Criminology (AIC) in 2003. The Evaluation Report found that recidivism was significantly reduced for those who completed the Drug Court

program, and few graduates re-offended once they completed the program. The Evaluation Report found that where re-offending did occur, the average time to re-offending was longer than for comparison groups.

In the same year, the inaugural Drug Court Magistrate, John Costanzo, presented his Final Report on the South-east Queensland Drug Court Pilot. Some of the matters that were recommended in his report are included in the Bill.

In less than five years of operation, the Drug Court has produced over 165 graduates.

The AIC delivered its final report on North Queensland Drug Court in August 2005. The key findings of the Report regarding the outcomes of the North Queensland Drug Court were:

1. post entry re-offending is significantly reduced for those who successfully complete the Drug Court program;
2. of those successful participants who do re-offend, the time taken to re-offend is significantly longer; and
3. all participants recorded reductions in offending after admission to the Drug Court program, and reductions were greater amongst the graduates.

A review of the Drug Court was conducted by JAG. The review examined legislative issues relating to the Court and procedural matters. The review also considered the recommendations of Magistrate Costanzo's Final Report and the work undertaken by the AIC.

The major recommendations of the JAG review were that the pilot status of the Drug Court be removed, that the eligibility requirements for participation in the Drug Court program be made consistent between the SEQ and North Queensland Drug Courts, and that legislative changes should be made to provide more clarity and consistency in the Court's processes.

Drugs Misuse Act

The growth in the production of methylamphetamine (commonly known as "speed") is a national and international phenomenon. Within Australia, Queensland has the largest number of clandestine laboratory seizures in recent times. With the increase in detection of these laboratories, there has been a corresponding increase in the amount of forensic testing required to prepare prosecution cases for court.

In 2002 the Crime and Misconduct Commission noted that "over the last 10 years, Queensland has experienced a sharp rise in the detection of clandestine amphetamine labs. In 1994, 12 labs were detected by police. Most of these were large, professionally established, and able to produce high yields, hence their detection would have been a significant loss to organisers and financiers. In contrast, 162 clandestine labs were detected by police in 2002. These labs tended to be smaller and more portable and to …….provide all the equipment needed for methylamphetamine production in a box that can be placed into the boot of a car. Although small, these labs are capable of rapidly producing reasonable quantities of methylamphetamine and can be set up anywhere in the State."

The Ministerial Taskforce on the Role and Function of Forensic and Scientific Services (the Taskforce) in the Queensland Government was established in March 2005. Included in the Taskforce's review was the development of strategies to address the resulting increases in forensic testing produced by the increasing detection of clandestine laboratories.

The Taskforce presented a report in October 2005. The Taskforce found that there was a significant backlog of forensic testing that resulted from the large number of clandestine drug laboratories detected in Queensland. Clandestine drug laboratories that have been used for the production of methylamphetamine typically include a range of items such as glassware (often containing chemical residues), precursors (such as pseudoephedrine), reagents (such as phosphoric acid) and by-products of the production process. An "average" laboratory will contain between 30 and 50 of these items. In order to prove that these items have been used for the production of methylamphetamine, forensic scientists have been required to test a large number of the seized items to demonstrate production of methylamphetamine, with the intention of determining which illicit drug has been manufactured, the method by which it was made, and where possible the amount of the drug made. These tests take a substantial period of time and delays caused by the backlog of testing have resulted in delays in matters being finalised in court. The delays cause disadvantage to both prosecution and defence, and steps to reduce the delays will improve the delivery of justice in the criminal justice system in Queensland.

The way in which policy objectives are to be achieved by the Bill.

The policy objectives will be achieved through a range of provisions in the Bill.

Drug Court

The major initiative in the Bill is to change the status of the Drug Court program from pilot to permanent. As a result the name of the Act will be changed from the *Drug Rehabilitation (Court Diversion) Act* to the *Drug Court Act*.

Other initiatives in the Bill are:-

1. to change the eligibility requirements of the Act so that offenders facing a suspended sentence of up to 4 years imprisonment (up from the current 3 years) can be referred to the court if the prosecution and defence consent. This is to enable more offenders to undertake rehabilitation in the Drug Court;

2. to change the objects of the Act so that they more accurately reflect the work of the Drug Court in addressing the drug dependency of individual offenders;

3. provide limits to the amount of time that can be ordered for custodial sanctions for breach of an IDRO to 22 days per hearing. At present, the Court can order up to 14 days imprisonment per breach and these can be made cumulative. As custodial sanctions only need to be proved on the balance of probabilities, and because they do not count as time served against the offender's sentence, it is considered appropriate to place limitations on the length of the custodial sanctions that can be imposed;

4. the establishment of a formal procedure in the legislation for the provision of indicative health assessments and health assessments by Queensland Health following referral to the court;

5. to give the Drug Court authority to order up to 40 hours community service for breach of the participant's IDRO and up to 240 hours in total under the Order. This is to provide Drug Court Magistrates with the option of ordering participants to do more community service for breaches rather than being ordered to perform custodial sanctions;

6. to provide more flexibility in the Act when a participant is referred to prison for detoxification. At the moment this can only occur for 7 days at a time, and the participant may need to be returned to the Court when detoxification is not complete. The Act will now require the participant to be returned to the Court

when detoxification is complete, on application of the defence or at the end of 22 days, whatever is earlier;

7. making it clear in the Act that Drug Court team members are entitled to exchange information regarding participants in the Drug Court to assist in the case management of offenders through the court;

8. as part of the functions of the Drug Court, confidential information can be obtained such as medical reports and journals. The Bill makes it clear that copies of these documents cannot be obtained by members of the public except by order the court;

9. the Drug Court team members of Legal Aid Queensland, the Department of Corrective Services, the Queensland Police Service and Queensland Health provide expert advice to the Drug Court magistrate about matters such as the management of the offender on the IDRO, the health status of the person and compliance with the IDRO. The DR Act does not provide any obligation to the Drug Court magistrate to take into consideration the views of team members when making decisions under the Act. The Bill provides that the Drug Court must consider the views of the team when making decisions about the management of the participant;

10. the amending Bill also makes it clear that section 161 of the *Penalties and Sentences Act* applies to custody occurring during a Drug Court program (other than custodial sanctions), so that detention for re-assessments, termination hearings or reserved decisions counts as pre-sentence custody.

The Bill contains the following additional measures in relation to the DR Act:-

Offences of violence

Under section 7(1) of the DR Act, an offender cannot be referred to the Drug Court if a charge for a "disqualifying offence" is pending before a Court. The definition of disqualifying offence includes an indictable offence involving violence against another person (section 7(1)(b)). The Costanzo Report highlighted instances in which violent conduct could have occurred even though violence is not expressed to be an element of the offence.

The Costanzo Report also recommended that the provisions relating to violence should be broadened to include not only indictable but summary offences. The Report highlighted situations in which summary offences such as breach of a domestic violence order may include facts that involve violence and injury as or more serious than found in some offences of assault occasioning bodily harm (an indictable offence).

The Bill therefore amends section 7(1)(b) so that the provision applies to both indictable and summary offences. It also inserts examples into the section to provide more guidance to the court about when an offence is an offence "involving violent conduct" particularly when violence is not expressed as an element of the offence.

Minimum frequency of urine testing

All stakeholders agree that urine testing of Drug Court participants is a critical compliance tool in the Drug Court. This view is reinforced in the Australian Institute of Criminology (AIC) Evaluation of the North Queensland Drug Court.

The Bill therefore contains a provision that will allow a Regulation to impose minimum standards of drug testing in the Court.

Prohibit urine testing being used as a sanction

The Bill prohibits urine testing being used as a sanction. This is because urine testing performed for this purpose has no value as a compliance tool and can use up valuable Drug Court resources. Also, the Drug Court already has ample sanctions available, which include custodial sanctions, community service sanctions, journal writing, essays etc.

Increased testing as a sanction must be distinguished for testing as a compliance measure, which, as discussed above, is a critical part of the Drug Court program.

Review of initial sentence

The DR Act provides that when an IDRO is granted the Court must give an "initial sentence." When an IDRO is terminated due to non-compliance with, or completion of an IDRO, the Drug Court Magistrate must vacate the initial sentence and impose a final sentence. An appeal lies from the final sentence, but not the initial one. The Act also provides that the final sentence cannot be higher than the initial sentence (section 36(6)).

Feedback from consultation during the JAG review indicated that some stakeholders had concerns about the fact that there is no appeal from the initial sentence. Stakeholders recognised however, that there are problems

involved in allowing an appeal from the initial sentence, which include delaying entry to an IDRO while an appeal is being processed and appealing the magistrate who will be supervising the offender on the IDRO.

The Bill provides an avenue of review of the initial sentence by providing that section 188 of the *Penalties and Sentences Act 1992* applies to both an initial and final sentences in the Drug Court. Section 188 provides that if a Court has imposed a sentence that is not in accordance with the law, or failed to impose a sentence that the Court legally should have imposed, or imposed a sentence decided on a clear factual error of substance, the court, whether or not differently constituted, may re-open the proceeding.

Drugs Misuse Act

New offence of possession of relevant substances or things

The Bill introduces a new indictable offence for the possession of relevant substances or thing for the production of an illicit drug. This offence is aimed at the developing "market" for persons who supply illicit methylamphetamine manufacturers with chemicals and apparatus, but who do not personally engage in the manufacture of the final dangerous drug. The maximum penalty for this offence is 15 years imprisonment.

New offence of possession of a prohibited combination of items

When a clandestine laboratory is located that has been used to manufacture methylamphetamine, or is being prepared to commence production of methylamphetamine, the process of proving that production has occurred or could occur involves a significant amount of forensic testing and expert evidence. All items located, including chemicals, chemical residue, and glassware must be tested in order to prove the chemical processes involved in production have occurred or could occur. The forensic tests regularly detect the same sets of pre-cursors, chemical substances and apparatus in different clandestine laboratories.

The Bill introduces a new offence provision that makes it a crime to possess a prohibited combination of items for the production of a dangerous drug. The maximum penalty for the offence is 25 years imprisonment. The combinations of items that give rise to this offence will be prescribed by regulation, and will reflect that the possession of the combined items can only be for the purpose of production of a dangerous drug.

Removing need for testing sealed chemicals

The Bill provides an evidentiary aid to remove the requirement for scientific testing of sealed pharmaceuticals, unless challenged by the defence. New section 131A provides that in the absence of proof to the contrary, the court may accept that medicines, poisons and veterinary chemical products that are in labelled sealed containers with barriers to tampering, are what they are alleged to be unless the defence issue notice of a challenge.

Removing the need for the testing of equipment used to produce a dangerous drug.

As part of the scheme for reducing forensic testing if there is no challenge by the accused, the Bill introduces a new provision aimed at reducing the need for forensic testing of seized equipment if there is to be no contest that the equipment was used to produce a dangerous drug. The new provision allows the court to accept, in the absence of proof to the contrary, that seized equipment has been used in the production of a dangerous drug if there is no notice of challenge from the defence, and there is a reasonable basis for the police belief with respect to the equipment.

Notice provisions for challenging evidence.

The Bill introduces new section 131B that sets out the notice requirements for section 130 and the new sections 131 and 131A. If the prosecution is to rely on any of these provisions, the prosecution must issue a notice to the accused within 28 days of the originating step for a proceeding being taken. This notice informs the accused of the need to issue a challenge notice if the accused wishes to challenge the prosecution assertion about the contents of the labelled containers, or sealed pharmaceutical containers, or the use of equipment seized by police.

The defendant then has 28 days to serve a notice of challenge on the prosecution. If no challenge notice is received, it is open to the court to accept the police evidence regarding the contents of a sealed pharmaceutical container, the use of seized equipment, or the contents of labelled prescribed substances without receiving forensic test results. If the notice is received by the prosecution, the prosecution must prove their case in the usual way. If the defendant does not challenge the evidence, it is still open to the court to find that the evidence is not proved, as the court must be satisfied that the police have a reasonable basis for holding their belief with respect to the evidence.

Analyst's evidentiary certificate

Section 128 of the Act provides that a certificate from an analyst is evidence of the identity and quantity of the drug analysed. The Bill amends this provision so that it is clear that a certificate is admissible as evidence of the identity of the drug even if it does not contain the actual quantity of the dangerous drug analysed.

Increase in penalty

Section 13 of the Act allows for certain offences under the Act to be dealt with summarily, and provides the maximum penalty for dealing with such offences. Section 552H of the *Criminal Code* provides that the maximum penalty that a Magistrate can impose in sentencing a person for an indictable offence under the Code is 3 years imprisonment. The Bill amends section 13 of the Act to increase the available penalty in from two to three years imprisonment, to make it consistent with the *Criminal Code*.

Transitional provisions

The Bill contains provisions that apply to the transition of the amendments to the DMA. These provisions cause the evidentiary provisions contained in the new sections 131, 131A and 131B to apply to cases that are in existence before the courts when the legislation commences. These transition arrangements will enable a further reduction of the backlog of forensic testing for seized clandestine drug laboratories to occur by encouraging both prosecution and defence to distil the issues in each case at an early stage in the prosecution process, and reduce the delays for processing cases already before the courts.

Alternatives to the Bill

None

Administrative cost to Government of implementation

The Drug Court will be funded at $6.224million in 2006/07, 11.635 million in 2007/08 and from 2008/09 ongoing recurrent funding of $11.802. Capital funding will be to the amount of $0.255 million in 2006/07 and $0.045 million in 2008/09.

Consistency with Fundamental Legislative Principles

1. No. The transitional provisions introduced in new section 137 of the DM Act apply the evidentiary provisions retrospectively, i.e.

to matters already before the courts. This provision is considered justified as it will only apply to cases where evidence has not already been heard by the court, and which are not listed for evidence to be heard in the first 56 days after the legislation is introduced. It will only apply to cases where the police issue a prosecution notice, and will allow 28 days for the defendant to respond, and allow the court to extend the time allowed to respond if appropriate.

2. The evidentiary provisions introduced in new sections 131 and 131A partially reverse the onus of proof. These provisions are considered justified as the onus of proof is only reversed if the police issue a prosecution notice, if the defendant does not issue a challenge notice and if the court is satisfied that there is no proof to the contrary, and that a police officers belief is reasonably held. The cost to the prosecution of proving the matter by other means is considerable in terms of time and resources. The reduction in the amount of testing resulting from these provisions is necessary to reduce delays in provision of forensic and scientific services to the criminal justice system and maintain public confidence in the system

Consultation

Drug Court

Community

The Gold Coast Drug Council (Mirikai) – Burleigh Heads, Ozcare Residential Alcohol and Drug Treatment Service – Cairns, Stagpole Street Drug and Alcohol Rehabilitation Centre – Townsville and the Salvation Army Fairhaven Rehabilitation Service – Southport, were consulted as part of the JAG review into the Drug Court.

The Chief Magistrate was also consulted as part of the JAG review and in the course of the development of the Bill.

Government

Legal Aid Queensland, Queensland Health the Departments of Premier and Cabinet, Corrective Services, Housing and Communities, and the Queensland Police Service were consulted as part of the JAG review and in the development of the Bill.

Drugs Misuse Act

Community

The Taskforce consulted with key stakeholders throughout the process of reviewing the role and function of forensic services. Formal invitations for written submissions were sought from 47 key stakeholders across Australia and written submissions were received from 28 stakeholders. Advice was sought from the Institute of Environmental Sciences and Research, New Zealand, and the National Institute of Forensic Science, Melbourne.

Government

The Taskforce consulted with the following government agencies during the review process:

- Department of Health
- Director of Public Prosecutions
- Crime and Misconduct Commission
- Department of Corrective Services
- Legal Aid Queensland
- Queensland Police Service
- Department of Premier and Cabinet

Meetings were also held with the Chief Justice of the Supreme Court, the Chief Judge of the District Court, the Chief Magistrate and the State Coroner.

During the preparation of the Bill the following agencies were consulted:

- Queensland Police Service
- Legal Aid Queensland
- Director of Public Prosecutions
- Department of Premier and Cabinet
- Queensland Health
- Queensland Health Scientific Services
- Chief Magistrate
- Chief Judge of the District Court of Queensland
- Chief Justice of Queensland

Notes on Provisions

Part 1-Preliminary

Short title

Clause 1 Explains that this Act may be cited as the *Drug Legislation Amendment Act 2005.*

Clause 2 Provides that the Act commences on a dated to be fixed by proclamation.

Part 2– Amendment of Drug Rehabilitation (Court Diversion) Act 2000

Clause 3 Provides that Part 2 amends the *Drug Rehabilitation (Court Diversion) Act 2000*

Clause 4 Amends the long title of the Act to refect the change in status of the court from pilot to permanent.

Clause 5 This clause changes the name of the Act to the "*Drug Court Act*."

Clause 6 This clause amends the objects of the Act to reflect the practices of the Drug Court and to provide an increased focus on the needs of individual participants before the court. Section 3(2) of the Act currently outlines some of the processes by which the objects are achieved. As the objects of the Act have been widened and are now more comprehensive, some of the processes currently in section 3(2) are duplicated. These provisions are therefore removed from section 3(2). The change to section 3(2) also reflects the change of status of the court to permanent.

Clause 7 The amendment to section 4(1) reflects the change of status of the court to permanent.

Clause 8 The amendment to section 6(1) reflects the change of status of the court to permanent. The omission of section 6(5) reflects the change to the jurisdiction to the Cairns and Townsville Drug Courts by the *Drug Rehabilitation (Court Diversion) Regulation 2005*. Prior to the passage of

that Regulation, the Regulation had provided that offenders facing imprisonment of more than 1 year were unable to be dealt with by the Drug Court. The amendment Regulation made the eligibility requirements consistent between the North Queensland and South-east Queensland Drug Courts.

Clause 9 Amends section 7 of the Act so that summary offences involving violence cannot be referred to the court. Examples are also inserted into that section to assist in determining when an offence is an "offence involving violence." This is to assist the court when violence is not expressed as an element of the offence.

Clause 10 Section 7A is related to section 6(5) that is repealed in this Bill and is therefore redundant.

Clause 11 This renumbers present section 7B as section 7A.

Clause 12 Sections 7C and 7D are related to section 6(5) that is repealed in this Bill and are therefore redundant.

Part 3 – Drug Courts and Drug Court Magistrates

Clause 13 Omits the heading to Part 3 and inserts a new heading.

Clause 14 These amendments reflect the change of status of the court to permanent.

Clause 15 These amendments reflect the change of status of the court to permanent and update the title of the "Chief Magistrate" as provided for in the *Magistrates Act 1991.*

Clause 16 This amendment reflects the change of status of the court to permanent.

Clause 17 This amendment reflects the change of status of the court to permanent and updates the title of the "Chief Magistrate" as provided for in the *Magistrates Act 1991.*

Part 3A – Indicative Assessment of Drug Dependency

Clause 18 Inserts a new Part 3A – Indicative Assessment of drug dependency.

This Part formalises the practice of the South-east Queensland Drug Courts whereby, in order to conserve the resources of the Drug Court, offenders are referred for an indicative assessment of drug dependency by Queensland Health. This is process is to establish whether an offender is drug dependent so that the Drug Court can decide whether to refer him or her for a full assessment of drug dependency by Queensland Health and for a pre-sentence report by the Department of Corrective Services.

Clause 19 This amendment reflects the change of status of the court to permanent.

Clause 20This amendment reflects the change of status of the court to permanent.

Clause 21 This amendment reflects the change of status of the court to permanent.

Clause 22 The amendment to section 16(1), (2) and (4) reflects the change of status of the court to permanent. The amendments to section 16 and the new sections 16A and B, formalise in the legislation the present practice of Queensland Heath to provide health assessment reports regarding suitability to participate in the Drug Court program.

Clause 23 Just as the amendments in clause 18 formalise in the legislation the process to be followed in relation to indicative assessments of drug dependency, new sections 16A and B formalise the process that is currently being used by Queensland Health to provide health assessment reports of suitability for the Drug Court. This practice currently occurs in both the northern and southern Drug Courts.

Clause 24 This amendment reflects the change of status of the court to permanent.

Clause 25 These amendments reflect the change of status of the court to permanent.

Clause 26 The amendment to section 19 generally, reflects the change in status of the court from pilot to permanent. The amendment to s 19(e)(ii) reflects the DM Act amendments to increase the summary jurisdiction for

some DMA offences to 3 years. The amendment to section 19(i)(i) follows the formal inclusion of the practice of health assessments in the legislation.

Clause 27 This amendment reflects the change of status of the court to permanent and amends section 20 to allow offenders to be dealt with by the Drug Court if they are facing up to 4 years imprisonment provided that the prosecution and defence consent. Clause 28 These amendments reflect the change of status of the court to permanent and also correct an administrative problem that has occurred in the Drug Courts in relation to counting of days served in prison under the Act. Because of the part-time sitting days of the court, and because of different methods of counting days spent in prison under the *Corrective Services Act 2000*, the return dates for custodial sanctions and other orders may not coincide with sitting days of the court, which could cause administration difficulties. The amendment therefore aligns the practice of the Drug Court to the method of counting days to the *Corrective Services Act*.

Clause 29 These amendments make it clear that the matters contained in section 22 are core requirements of the Intensive Drug Rehabilitation Order. Under an amendment to section 25 in this Bill, the Act makes it clear that the Magistrate must explain or cause to be explained the core conditions and other requirements of the Order.

Clause 30 This section increases the maximum number of community services hours that can be performed under an IDRO to 240 and allows the court to order up to 40 hours per breach of an Order. The latter will allow community service to be used more frequently for breach of IDROs in place of custodial sanctions.

Clause 31 This amendment removes the present requirement that commitment to prison for detoxification can only be made for up to 7 days at a time. At present, a participant's detoxification can be interrupted by a requirement for the participant to be returned to the court. Under the amendment, the participant is returned to court when the detoxification is complete or 22 days have elapsed since the participant has been committed to prison for detoxification. The participant may also apply to the court for the committal to stop.

Clause 32 This amendment requires the Magistrate to "explain, or cause to be explained" the requirements of the order, including the core conditions. This amendment makes the language more consistent with that of section 95 of the *Penalties and Sentences Act* (probation orders) in relation to explaining orders.

Clause 33 This is a consequential amendment to the amendment to section 22 contained in clause 29 of this Bill and to make the language consistent with the change in status of the court from pilot to permanent.

Clause 34 This is a consequential amendment to the amendment to section 22 contained in clause 29 of this Bill and to make the language consistent with the change in status of the court from pilot to permanent.

Clause 35 The amendment to section 28(3) is to make the section consistent with the change of the term of imprisonment that that the Drug Court can order from 3 to 4 years and to reflect the change in status of the court to permanent.

Clause 36 This amendment reflects the change of status of the court to permanent.

Clause 37 This amendment reflects the change of status of the court to permanent.

Clause 38 This amendment reflects the change of status of the court to permanent.

Clause 39 This amendment reflects the change of status of the court to permanent.

The amendment also removes some of the subjectivity presently involved in determining whether a participant has complied with his or her IDRO, by removing the word "satisfactorily" from section 32(1). The amendment also expands the hours of community service that the court may order as a sanction to 40. As provided in the amendment to section 23 (clause 30 in this Bill), the total number of community service hours that may be ordered under an IDRO is 240 hours. The amendment is to give the court further options for sanctioning offenders, instead of imposing custodial sanctions.

When deciding whether to impose community service as a sanction, the amendment requires the court to consider the number of hours that the offender has under another order and whether the offender is in a residential rehabilitation facility and is able to complete the community service.

Clause 40 This amendment reflects the change of status of the court to permanent.

Clause 41 This amendment reflects the change of status of the court to permanent.

Clause 42 This amendment reflects the change of status of the court to permanent and makes the wording of the section consistent with the definition of "prosecuting authority" in the Dictionary.

Clause 43 This amendment reflects the change of status of the court to permanent.

Clause 44 This amendment makes section 36 consistent with section 19, so that the magistrate may impose a sentence of up to 4 years imprisonment. The amendment also makes it clear that any term of imprisonment imposed on an offender under the Act (other than for custodial sanctions) counts as imprisonment already served and that the court can expressly consider the number and length of custodial sanctions given to an offender.

Clause 45 This amendment inserts a new section 36A which provides that the court must consider the views of the drug court team members when making certain decisions about the offender.

Clause 46 These amendments reflect the change of status of the court to permanent.

Clause 47 This amendment inserts a new section 39A which makes it clear that Drug Court team members can disclose certain information to each other in relation to an offender before the court. The amendment makes it clear that the provision does not abrogate legal professional privilege between the offender and his or her legal adviser.

A new section 39B also reflects the fact that during an offender's participation in the Drug Court, personal information is provided to the court, such as medical reports and journals. It is important that this information can be obtained only by persons who would have a legitimate interest in obtaining it. The provision therefore states that this information can only be released to a person, other than the offender, if the person shows a sufficient interest in the document and the court orders that the person be given a copy of the document.

Clause 48 This provision makes it clear that the Drug Court may remand an offender who has been apprehended because of non-compliance with, or termination of an IDRO, so that the person can be assessed for further participation in the Drug Court program or a decision made regarding termination of an IDRO. An offender may be remanded for this purpose for a period of no more than 30 days and for further periods of up to 8 days at a time.

Clause 49 These amendments reflect the change of status of the court to permanent.

Clause 50 This amendment reflects the change of status of the court to permanent.

Clause 51 New section 42A removes any doubt that section 188 of the *Penalties and Sentences Act 1992* applies to both initial and final sentences made under the Act.

Clause 52 This amendment allows a regulation to be made to prescribe the minimum frequency of drug testing for offenders participating in the program.

Clause 53 These sections are now redundant as these reports have now been completed.

Clause 54 Inserts a new part and heading for the transitional provisions.

Clause 55 Inserts the transitional provisions for the change of status of the court to permanent.

Clause 56 As the court will become permanent, section 47 is redundant. The section also inserts transitional provisions.

Clause 57 Amends the dictionary.

Part 3 – Amendment of Drugs Misuse Act 1986

Clause 58 provides that this part amends the *Drugs Misuse Act 1986*.

Clause 59 inserts definitions for "challenge notice" and "prosecution information notice" into section 4.

Clause 60 inserts new section 9A. New section 9A creates an offence of possession of relevant substances or things with a maximum penalty of 15 years imprisonment. The substances and things are prescribed by reference to schedule 6 of the *Drug Misuse Regulation 1987* (DMR), schedule 8A and schedule 8B of the DMR.

Schedule 6 of the DMR contains a list of controlled substances. These are substances that are used to manufacture illicit drugs. These substances are contained in Category I of the National Code of Practice for Supply Diversion into Illicit Drug Manufacture. The National Code has been developed by the Inter-Government Committee on Drugs, and has the objective of establishing a common system of practice for Australian jurisdictions to enable scientific suppliers and chemical manufacturers, importers and distributors to protect against the diversion of chemicals into

the illicit production of drugs and enable cooperation with law enforcement agencies in this area. Schedule 6 will be expanded to include more of the substances contained in Category I of the National Code of Practice, and some of the substances listed in Category II of the National Code of Practice.

Schedule 8B of the DMR will contain apparatus, from Category II of the National Code of Practice, such as a pill press, used in the manufacture of illicit drugs.

Schedule 8A of the DMR will set out the quantities for schedule 6 substances that can be lawfully possessed.

The section is aimed at the unlawful possession of substances and pieces of apparatus that are used in the manufacture of illicit drugs. The new section 9A is not intended to apply to persons who have a legitimate purpose for possessing the substances or apparatus. The definition of "unlawfully" in section 4 of the Act excludes those with authorization, justification or excuse by law from the operation of the new section 9A. Schedule 8A provides quantities for those Schedule 6 substances that may be possessed for legitimate domestic or therapeutic purposes.

New section 9A(1)(a) and (b) refer to the gross weight of the relevant substance. The offence is made out when it is proven that the accused person is in possession of a quantity of a substance that contains a controlled substance, where the total weight of the substance exceeds the set limit. By way of example, if an accused person has possession of a number of tablets, and the tablets contain, as part of their preparation a controlled substance but also contain other substances, the offence will be proved if the total weight of the tablets exceeds the gross weight listed for the controlled substance, even though the tablets do not solely contain the controlled substance.

The provision also addresses the situation where the accused person has possession of a number of different substances that all contain the same controlled substance. An example of this situation is the possession of a number of different brands of cold and flu tablets, each of which contains pseudoephedrine which is a controlled substance. The fact that the different tablets contain different binding agents and other substances in addition to the pseudoephedrine does not prevent the total weight of all of the tablets being taken into account in determining whether this offence is made out.

The provision also envisages the situation where the chemical components of a controlled substance may be contained in more than one substance e.g.

the controlled substance may be made through combining two different chemicals. The possession of these two separate chemicals in an uncombined form in sufficient quantities would still breach this section.

Clause 61 inserts new section 10B. New section 10B creates an offence of possession of a prohibited combination of items, with a maximum penalty of 25 years imprisonment. The combinations of items will be prescribed by a schedule in the DMR and will be combinations of items that are used in the production of a dangerous drug.

It is not intended that new section 10B apply to persons who have legitimate reason for possession of the combinations of items that will be referred to in the Regulations, such as scientists, doctors, pharmacists or veterinarians. The definition of "unlawfully" in section 4 excludes those with authorization, justification or excuse by law from the operation of the new section 9A.

This section will enable the prosecution of persons who are in possession of the necessary items to produce dangerous drugs without requiring the prosecution to prove the production process and the requisite forensic testing that accompanies that proof. The penalty for the offence is the same as that for the offence of producing a Schedule 1 dangerous drug under section 8 of the Act, to reflect that this is an alternative to charging a person with the offence of production, and that it is a serious offence.

It is intended that this section apply to people who have possession of the prescribed items even if the items are not physically located together.

Clause 62 amends section 13 to increase the maximum penalty that a Magistrate may impose when dealing with an indictable matter by way of summary disposition from 2 years imprisonment to 3 years imprisonment. The purpose of this amendment is to ensure consistency with section 552H of the *Criminal Code*.

It also amends section 13 to include new section 9A, so that offences against this section may be dealt with summarily.

Clause 63 amends section 128 so that a certificate of analysis may state the identity of the drug analysed, without having to specify the quantity of the drug analysed. This section does not mean that the court cannot require a certificate stating both the identity and quantity of drug analysed, but creates certainty that the court may accept a certificate that simply gives evidence of the identity of a drug analysed if it is appropriate. This will normally only be appropriate when the total weight of the item or substance that contains the drug is less than the amount specified in schedule 3 of the DM Regulations.

Clause 64 amends section 130 so that it correctly reads "environmental health officer". It also amends section 130 to refer to the notice provisions set out in new section 131B.

Clause 65 replaces section 131 with new sections 131, 131A, and 131B . These sections are evidentiary provisions that allow the prosecution to serve an accused person with a notice stating that the prosecution are asserting that a piece of equipment has been used to produce a dangerous drug, or that a medicine, poison or veterinary chemical product in a sealed container is what it purports to be, or that a prescribed substance that is labelled is what it purports to be. These provisions allow the defendant to inform the prosecution early in the process whether the defendant is challenging the prosecution assertion.

New section 131 allows the court to accept, in the absence of proof to the contrary, that equipment that the police allege to have been used for the production of a dangerous drug has in fact been used for that purpose if a police officer gives evidence of the police officer's belief of that fact and the court considers that belief to be reasonably held by the police officer.

The dangerous drugs that this section applies to are to be defined in schedule 8D of the DMR.

In considering whether the police officer's belief is reasonably held it is expected that the court will have regard to the circumstances in which the equipment was found, the experience of the police officer in investigating cases involving the production of the dangerous drug, and other evidence presented by the prosecution.

New section 131A allows the court to accept, in the absence of proof to the contrary, that a substance is a medicine, poison or veterinary chemical product if there is evidence that it was in a sealed container that has a label indicating the contents, and an indicator or barrier to entry that has not been breached.

These medicines and poisons are restricted to those registered or exempt under the *Therapeutic Goods Act 1989* in order to avoid the problem of imported pharmaceutical products that are mislabeled. Veterinary chemical products are restricted to those registered under the *Agricultural and Veterinary Chemicals Code* for the same reason.

The determination of what is "proof to the contrary" is a question of fact for the court to determine.

These sections do not remove the requirement for the prosecution to prove its case. If the defendant issues a notice of challenge to the prosecution, the

prosecution is required to prove the evidence to the court in the normal way. The court in each case is the finder of fact, whether it is a magistrate, judge or jury.

New section 131B sets out the regime under which the defendant will be put on notice that section 130, 131, or 131A is going to be relied upon by the prosecution, and that allow the defendant to serve a notice of challenge on the prosecution. If the prosecution are to rely on any of these provsions the prosecution information notice must be served within 28 days of the originating step for a proceeding for an offence being taken. The defendant's challenge notice must be served on the prosecution within 28 days of the receipt of the prosecution information notice. The accused may apply to the Magistrate's court to extend the 28 day period for the challenge notice. The Magistrate's court may extend this period if it considers it appropriate in the circumstances of the case. Those circumstances could include the fact that the defendant has been attempting to obtain legal advice but has been unable to secure representation.

The benefit to a defendant in deciding not to issue a challenge notice is that, under general sentencing principles, cooperation with the administration of justice can lead to a reduction in sentencing.

Clause 66 amends section 134 to allow for the making of regulations and schedules to operate under new section 9A, new section 10B and new section 131.

Clause 67 inserts a new heading establishing Part 7 Division 1 to address the transitional provisions for the Drugs Misuse Amendment Act 1996 no 49.

Clause 68 inserts a new heading establishing Part 7 Division 2 to address the transitional provisions for the Drugs Misuse Amendment Act 2002 no 35.

Clause 69 Inserts a new heading establishing Part 7 Division 3 to address the transitional provisions for the Drug Rehabilitation (Courts Diversion) Amendment Act 2005 and section 137 which is a transitional provision that refers to the application of section 130 and new sections 131, 131A and 131B.

New section 137 allows for the application of those sections to cases that already exist at the time of the commencement of the legislation. The application of the section is restricted to those cases that have not yet been heard, and which are not listed for hearing within the first 56 days from the commencement of the legislation.

Clause 70 Makes consequential amendments to the Criminal Code following the increase in jurisdiction of the court from 3 to 4years imprisonment.

Clause 71 Makes a consequential amendment to the Residential Tenancies Regulation 2005 as a result of the change of name of the DR Act.