Drugs Misuse Amendment Bill 2007

Explanatory Notes

Short Title

The short title of the Bill is the *Drugs Misuse Amendment Bill 2007*

Objectives of the Legislation

The primary objective of the Bill is to amend the *Drugs Misuse Act 1986* (DMA) and the *Drugs Misuse Regulation 1987* (DMR) specifically with regard to the classification of a range of drugs.

The Bill aims to recognize the dynamic nature of the drug industry by extending the definition of *dangerous drug* and creating new offences for the supply and production of precursor substances and items. The Bill also aims to assist law enforcement authorities by prescribing a system of preparing and filing end-user declarations for transactions of controlled substances or specific things.

Reasons for the Bill

Following an amendment in 2001 to relocate amphetamine and methylamphetamine to schedule 1 of the DMR, the Queensland Government undertook a review of the scheduling of dangerous drugs in the DMR, with a view to identifying whether this legislation adequately reflected the dangerousness of drugs to the individual person and society and whether it was keeping pace with the dynamic nature of the drug industry. As a result, a number of key areas in the *DMA and DMR* have been identified for amendment to achieve these goals.

A dangerous drug is currently defined to include a salt, derivative or stereo-isomer of the substance. This definition does not capture chemicals where the molecular structure of existing illicit drugs is altered slightly to create new so-called "designer drugs". The definition of a dangerous drug in section 4 of the DMA will be amended to capture drugs not presently listed but which are structurally similar and have a similar pharmacological effect to drugs listed in the DMR.

Consistent with the policy of ensuring that schedule 1 of the DMR is reserved for the most serious drugs, PMA (Paramethoxyamphetamine or "death") and MDMA (3,4-Methylenedioxymethamphetamine or "ecstasy") will be reclassified as schedule 1 drugs. These additions are justified given the potential for PMA to cause fatal harm and the increasing prevalence of MDMA.

PMA is an amphetamine type drug that is both a stimulant and hallucinogen. In very small doses it affects the body in similar ways to MDMA, however larger doses of the drug can cause sudden, large and potentially fatal rises in blood temperature, body temperature and blood pressure. PMA affects the user's central nervous system, and users may experience hallucinations, restlessness, agitation, muscle contractions, rigidity, sweating, high fever, vomiting, seizures, coma and even death. The slow onset of the effects of PMA may cause users to believe they have taken poor quality ecstasy and increases the likelihood of them taking a second tablet resulting in a potentially fatal overdose.

The drug MDMA is a drug that is generally used in a social context having always been associated with the rave and dance party scene. This has led to the drug being characterised as a "party drug". However such a characterisation sends a dangerous message to young people: that some drugs are acceptable and less dangerous in certain social settings. The term fails to recognise the dire consequences that can result from taking the substance. Evidence suggests that MDMA is not physically addictive, although heavy users of MDMA report building up a tolerance to the drug and increase their consumption to compensate. Research findings indicate that chronic use of MDMA may produce long-lasting, perhaps permanent, damage to neurons that release serotonin, and consequent memory impairment.

A major health risk of MDMA is that it may contain contaminants such as PMA. Given that PMA has the potential to kill and is to be elevated to schedule 1 it is also appropriate on this basis to include MDMA in schedule 1 to deter use and protect the community from harm.

Thirty-six benzodiazepines (e.g. diazepam marketed as Valium and oxazepam marketed as Serapax) will be included into schedule 2 of the DMR, thereby making them dangerous drugs under the DMA. These drugs are highly marketable in the illicit drug market and are misused by injecting drug users, particularly those persons taking methylamphetamine in various forms. They are linked to aggressive behaviours, intravenous use can cause physical and emotional harm and there is an increased risk of overdose.

The practical effect of including these drugs in schedule 2 is that it will be a criminal offence under the DMA to unlawfully possess, supply, produce or traffick in these drugs. However it will still be lawful to possess these drugs if they have been obtained by prescription and are being used for that purpose.

Schedule 2A was introduced to the DMA and DMR shortly before the Sydney Olympic Games were held in 2000, to address possible increases in the trafficking, supply and possession of performance and image enhancing drugs. Since that time it has become apparent that the illicit use of these substances is usually linked to other illicit drug use, and involves similar levels of criminal activity in the supply, trafficking and use of the substances. The Queensland Police Service (QPS) report that significant seizures of the substances in schedule 2A continue to be made, including a recent seizure where the value of the schedule 2A substances seized was in excess of $1 million. The person charged with those offences was also charged with possession of amphetamines and possession of firearms.

Figures released by the Australian Crime Commission in the *Illicit Drug Data Report 2004-05* show that while the national levels of anabolic steroids being seized at border points and domestically have decreased steadily over the last couple of years, they are still being detected at rates similar to those occurring at the time offences of possessing these substances were introduced. The reduction in the numbers of seizures is attributed to the effectiveness of the National Supply Reduction Strategy. In the year 2004 – 05 Queensland had the highest number of arrests and the largest seizure rate of "other drugs" which include the substances listed in schedule 2A, when compared to the other states and territories.

Given the nature of the substances contained in schedule 2A, the fact that many cause harm to the user when not used under prescription, and the fact that the level of criminal activity involved in the supply and trafficking of these substances does not differ from that involved in offences relating to substances in schedule 2, there is no longer a basis for maintaining a distinction between schedule 2A and schedule 2.

Controlled substances, defined by schedule 6 DMR, are currently subject to a recording regime under Part 5A DMA. This regime requires that all relevant transactions (i.e. the supply of a controlled substance to another person in the ordinary course of a person's business) are recorded in a register maintained by the business, and that copies of identification documentation are obtained from the person purchasing the controlled substance. The register can be inspected at any time by an environmental health officer, but there is no requirement that the details kept on the

register be provided to or lodged with any central agency. In practice, the industry that manufactures and sells these substances does provide copies of relevant transactions, including identity documentation, to the QPS, on a voluntary basis.

This voluntary practise will now be formalised in legislation so that for each relevant transaction the purchaser will be required to show photo identification and complete a form stating their name and address and the purpose for purchasing the substance. These forms will then be sent by the seller of the controlled substances to a central registry maintained by the QPS.

It is an offence to possess *relevant substances* listed in schedule 6 DMR in regulated quantities or to possess items listed in schedule 8B DMR. These substances and items are all used in the manufacture of dangerous drugs, predominantly amphetamine or methylamphetamine based dangerous drugs. Information provided by the QPS indicates that there are offenders involved in the production of dangerous drugs who evade the law by simply producing one substance or item that is used in the production process. An example is the person who simply extracts pseudoephedrine from cold and flu medication and on sells that to a person who then uses the pseudoephedrine in the production of methamphetamine.

Given that it is currently an offence to possess these substances and items used to produce the drugs, to properly allow for the policing of the production of dangerous drugs, it will also be an offence to supply or produce these substances and items.

Generally speaking it is not unlawful for a person to possess a dangerous drug if it has been prescribed to them for medical purposes and they are using it for that purpose.

Schedule 5 of the DMR lists some of the prescription drugs in schedule 2 that are considered to have legitimate use for pain relief (e.g. codeine, morphine and pethidine), have anaesthetic properties (e.g. ketamine), or are used to treat heroin addiction (e.g. methadone).

Section 124 of the DMA recognises that there may be some occasions when a person will give a small amount of their prescription drug to a friend, neighbour or relative who they think may be suffering from the same type of medical condition. The section provides a defence to a charge of supplying a dangerous drug listed in schedule 5, where the person proves that the drug was prescribed to them for a medical condition they were suffering at the time; the person gave it to another person whom they reasonably believed was suffering from the same condition; they gave only

a single dosage; and the other person immediately consumed it. Section 124 also provides a defence for a charge of possession of a dangerous drug to the person who receives the prescription drug, provided similar criteria to the above are met. The Government identified this section as one that has potential for abuse.

Achievement of the Objective

The policy objectives will be achieved through a range of core provisions in the DMA and DMR:

Definition of Dangerous Drug

The definition of *dangerous drug* in section 4 has been amended so as to include a chemical that is an analogue of a dangerous drug (i.e: a drug that is structurally similar and has a similar pharmacological effect to a dangerous drug listed in the DMR). The purpose of this amendment is to target underground chemists who make slight changes to the molecular structure of existing illicit drugs to create new drugs not covered by the law.

Reclassification of Drugs

MDMA ('ecstasy') and PMA ('death') have been upgraded to schedule 1 dangerous drugs.

The distinction between schedule 2 and 2A has been abandoned with all schedule 2A drugs being upgraded to schedule 2 drugs. Additionally 36 new benzodiazepines are also included on schedule 2.

New Offences

The Bill creates new offences of supplying a relevant substance or thing and producing a relevant substance or thing with the intent that they will later be used in the production of dangerous drugs. The maximum penalty provided for each of these new offences is 15 years imprisonment.

End-User Declarations

Part 5A of the DMA is amended so that for each relevant transaction (i.e. supply of precursor drugs (Schedule 6) or equipment (Schedule 8B)) the supplier will be required to obtain from the purchaser photographic proof of identity, and the completion of an end user declaration (EUD).

An EUD will be a prescribed form that will be completed at the time of a relevant transaction and will specify the details of the purchaser together with the intended use of the controlled substance specified in schedule 6 DMR or thing specified in schedule 8B DMR. Businesses that sell controlled substances or controlled things will be required to obtain a

completed EUD for each relevant transaction (as already defined in Part 5A) and keep those documents and provide a copy of each EUD to the Commissioner of Police.

The information gathered from these EUDs will assist law enforcement authorities in identifying criminal behaviour associated with the manufacture of dangerous drugs but will be strictly limited for this purpose.

Section 124

The Bill amends section 124 to ensure that the defence to a charge of supplying a dangerous drug can only be used for a true one-off supply situation. Additionally schedule 5 is to be amended to better define the drugs to which the defence can apply. Drugs such as buprenorphine (subutex), methadone, morphine, pethidine, ketamine have been removed from schedule 5. All of the benzodiazepines newly added to schedule 2 have been included in schedule 5.

Estimated Cost for Government Implementation

Nil.

Consistency with Fundamental Legislation Principles

The effect of rescheduling schedule 2A drugs into schedule 2 will be to significantly increase penalties for offences involving these drugs. For example when they were classified as schedule 2A drugs, the maximum penalty for trafficking these substances was five years imprisonment. Under the proposed amendments, the increased maximum penalties for the same offence involving these drugs will be 20 years imprisonment.

Whilst it could be said that these amendments will affect the rights and liberties of individuals by increasing penalties it should be noted that the penalties are maximum penalties, not mandatory penalties and will not have retrospective effect.

The elevation of these substance to schedule 2, thus attracting the higher penalties, is justified given the nature of these substances, the fact that many cause harm to the user when not used under prescription, and the fact that the level of criminal activity involved in supply and trafficking of these substances does not differ from that involved in offences relating to substances in schedule 2.

The Bill effectively narrows the application of the legal defence in section 124 of the DMA by qualifying the circumstances in which it can be

invoked, and by restricting the drugs to which the defence can attach. The defence is qualified so that it can only be applied to a true one-off supply/ possession situation. While this has always been the policy intent, the current drafting leaves the defence open to abuse. For example, a person who is continually medicating another person with single doses of a drug could escape the action of the law by relying on the defence on every occasion he or she supplied the drug.

While the Bill restricts the class of drugs to which the defence can apply, it does so in order to strike a better balance between individual and community interests. The Bill removes drugs such as methadone, morphine, ketamine and pethidine from schedule 5 where it would be reasonably expected that an ordinary member of the community would not be likely to be providing a dose to somebody else. On the other hand the Bill adds certain drugs that are being included into schedule 2 such as diazepam (marketed as Valium) and oxazepam (marketed as Serapax) where it would be reasonably expected that an ordinary member of the community might provide a dose to a friend, relative or neighbour without criminal intent.

The Bill rectifies a fundamental legislative principle (FLP) issue in relation to an existing provision in the DMA.

Section 134 of the DMA sets out the powers to make regulations under the DMA. Section 134(2)(b) empowers the Governor in Council to make provision "*for anything about the supply of a controlled substance under a relevant transaction for which Part 5A does not make provision or adequate provision*". During the course of drafting the Bill this power was identified as objectionable given that it offends FLPs.

The Bill rectifies this existing FLP issue by deleting the regulation-making power in section 134(2)(b).

Consultation

The Bill has been developed in consultation with the Department of Premier and Cabinet, the Queensland Police Service, Queensland Health and Queensland Treasury. The Director of Public Prosecutions has also been consulted regarding the Bill. Legal Aid Queensland, the Queensland Law Society, the Bar Association of Queensland, the Judiciary, the Pharmacy Guild, the Pharmaceutical Society of Australia, the Australian Medical Association, the Plastics and Chemicals Industries Association, and the Science Industry Australia were also consulted during the development of the Bill.

Notes on Provisions

Part 1 Preliminary

Clause 1 provides that the short title is the *Drugs Misuse Amendment Act 2007*.

Clause 2 provides for the commencement of the Act.

Part 2 Amendment of Drugs Misuse Act 1986

Clause 3 provides that Part 2 of the Act amends the *Drugs Misuse Act 1986*.

Clause 4 amends section 4 of the DMA by omitting the definitions of *authorised health officer* and *prescribed substance*. Reference to these terms has also been removed from other definitions in section 4. These terms no longer have any relevance given the abolition of schedule 2A of the DMR.

The definition of *dangerous drug* in section 4 is also amended to remove reference to Schedule 2A.

Additionally a new paragraph (c) is inserted in section 4 to capture in the definition of *dangerous drug* a chemical that is an analogue of a dangerous drug. This means that a drug with a chemical structure which is substantially similar to the chemical structure of a scheduled drug and which has a substantially similar pharmacological effect is a dangerous drug for the purpose of the Act.

Clause 5 consequentially amends section 4A to delete reference to Schedule 2A.

Clause 6 gives Part 2 a new heading of *Drug Offences* which more accurately describes the contents of that part of the act.

Clauses 7 through 12 are amendments to the offence provisions contained in sections 5, 6, 7, 8, 8A and 9 of the DMA. These amendments are

consequential to the abolition of schedule 2A and delete reference to penalties for offences involving Schedule 2A drugs.

Clause 13 inserts two new offence provisions.

The new section 9B makes it a crime to unlawfully supply a relevant substance or thing to another person, whether or not the other person is in Queensland, for use in connection with the production of a dangerous drug.

The new section 9C makes it a crime to unlawfully produce a relevant substance or thing for use in the connection with the production of a dangerous drug. A *relevant substance or thing* is defined in section 9A.

Clauses 14 and 15 are amendments to the offence provisions contained in sections 10 and 11 of the DMA that are consequential to the abolition of schedule 2A. These amendments delete reference to penalties for offences involving Schedule 2A drugs.

Clause 16 amends section 13 to include the new offences created by sections 9B and 9C of the Act in section 13(1) of the DMA. The effect of this amendment is to enable these two new offences to be dealt with summarily.

Clause 17 deletes Part 3 *(Enforcement powers of authorised health officers)* of the DMA. This amendment is a consequence of the abolition of Schedule 2A.

Clause 18 gives Part 5A a new heading of *Information requirements for controlled substances and controlled things*. This new heading more accurately reflects the contents of that part of the act.

Clause 19 inserts into section 43A a definition of *controlled thing*. A *controlled thing* is an item specified in Schedule 8B of the Regulation.

Clause 20 amends section 43B to the effect that the information requirements under Part 5A of the Act apply to transactions involving *controlled things.*

Clause 21 consequentially amends section 43C by inserting reference to a *controlled thing*.

Clause 22(1) & (2) amend section 43D by inserting reference to a *controlled thing* in addition to a *controlled substance*.

Clause 22(3) corrects a grammatical error in section 43D(1).

Clause 22(4) inserts an additional sub section (d) into section 43D(1). This new sub section requires that a person who supplies a controlled substance or controlled thing provide as required by regulation the documents

referred to in paragraph (a) or (b) of that section to the commissioner of the police service.

Clauses 23 through 26 consequentially amend sections 43E, 43F, 43G and 43I by inserting references to a *controlled thing* or *thing*.

Clause 27 inserts a new section 43U into Part 5A. This provision makes it an offence to directly or indirectly disclose information obtained under section 43D to another person. The offence is punishable by a fine of 20 penalty units. Subsection (2) provides that it is not an offence to disclosure this information in the following circumstances:

- if it is disclosed for the purposes of the DMA or another act; or
- if the disclosure of information is to a police officer to enable the police officer to perform a function as a police officer; or
- if the disclosure of information is in compliance with a lawful process requiring production of documents or giving of evidence before a court or tribunal; or
- if the disclosure is in such a way so as to conceal the identity of a person to whom or for whom a controlled substance or controlled thing is supplied.

This provision is designed to ensure that the information gathered under this Part is used only for a limited purpose.

Clause 28 amends section 124 to limit the application of the defence set out in the section. Currently the section 124 defence could be invoked by a person on every distinct occasion that he or she provides a single dose of a particular drug to another person. This could conceivably mean that a person who is continually medicating another person with single doses of a drug would escape the action of the law. The Bill amends section 124 to ensure that the defence cannot be used in that situation and that it is instead reserved for a true one-off supply situation. The new subsection (1A) ensures that where a person provides a single dosage of the same drug on more than one occasion to the same person, they cannot attract the defence for every supply subsequent to the initial supply. Similarly, subsection (2A) has been added to clarify that the recipient of the drug cannot attract the defence for every possession subsequent to the initial possession. Paragraph (3) makes it clear that where there are more than one charges (as set out in paragraphs (1A) and (2A), it does not matter which of the charges occur first in time.

Clause 29 amends section 130 to delete the reference to a *prescribed substance* in favour of the term *controlled substance*. Additionally the term

authorised health officer is omitted from this section. These amendments are consequential to the abolition of schedule 2A.

Clause 30 deletes the regulation-making power in section 134(2)(b). This power purports to enable the Governor in Council to make provision for anything about the supply of a controlled substance under a relevant transaction for which Part 5A does not make provision or adequate provision. During the course of drafting the Bill this power was identified as objectionable given that it offends fundamental legislative principles.

Clause 31 inserts a new section 134A setting out the criteria that must be considered by the Minister before making a decision concerning the inclusion or reclassification of a dangerous drug in the *Drugs Misuse Regulation 1987*. The criteria are intended to provide guidance and ensure consistency in considering the addition or reclassification of a substance to Schedules 1 to 5 of the DMR.

Clause 32 inserts a new transitional provision at section 139. This provision makes clear that the new penalties for offences as a consequence of the rescheduling of Schedule 2A drugs will not apply to offenders sentenced after the commencement of the new provisions if the offences were committed before the commencement. The provision clarifies that in those circumstances, the previous penalties will apply.

A new section 140 is inserted to make clear that the amendment of the Regulation by the Bill will not affect the ability of the Governor in Council to further amend the regulation.

Part 3 Amendment of Drugs Misuse Regulation 1987

Clause 33 provides that the Act amends the *Drugs Misuse Regulation 1987.*

Clause 34 corrects a typographical error in section 4 of the DMR.

Clause 35 amends section 6 to include a *controlled thing*. The section also inserts a new subsection (2) that sets out the information that must be sourced by a person before supplying a controlled substance or thing. The information forms the basis of a document referred to as an *end user declaration*.

Clause 36 inserts a new section 6A in the DMR. This new provision requires that a person who has obtained an end user declaration pursuant to section 6(2) supply a copy of that declaration to the Commissioner for Police as soon as practicable.

Clause 37 (1) – (3) consequentially amend section 7 by inserting references to a controlled thing. *Clause 37(4)* also amends a typographical error in section 7(1) (d)(ii).

Clause 38 consequentially amends section 8 by inserting references to a *controlled thing*.

Clause 39(1) corrects a typographical error in section 9(1). *Clauses 39(2) & (3)* consequentially amend section 8 by inserting references to a *controlled thing*.

Clause 40 amends Schedule 1 of the Regulation by adding sections 4A, 7, 10 and 11 to the authorising sections. This clause also adds the drugs 3,4 Methylenedioxymethamphetamine or MDMA (otherwise known as 'ecstasy') and Paramethoxyamphetamine or PMA (otherwise known as 'death') to schedule 1 of the DMR.

Clause 41 replaces Schedule 2 with a new Schedule. This schedule also includes previous Schedule 2A substances, in addition to 36 new benzodiazepines.

Clause 42 repeals schedule 2A of the DMR.

Clause 43 amends Schedule 3 of the Regulation by adding sections 4A to the authorising sections.

Clause 44 amends schedule 4 of the Regulation by deleting reference to section 4 in the authorising sections.

Clause 45 replaces schedule 5 of the DMR with a new version of that schedule. This new version not only omits some of the existing drugs but also contains many new drugs.

Section 124 of the DMA provides a legal defence to a charge of supply if a person prescribed a drug defined in schedule 5, supplies a single dose of the drug to another person who the defendant believes is suffering a similar medical condition. This defence also applies to the recipient of a single dose (in the circumstance described above) who has been charged with possessing a dangerous drug. Several existing drugs, all categorised under schedule 8 of the Standard for the Uniform Scheduling of Drugs and Poisons as controlled drugs, have been removed from schedule 5 of the DMR. The omitted drugs include methadone, pethidine and morphine.

These drugs are substances which have potential for abuse, misuse and physical or psychological dependence. The consequence of the removal of these substances is that people supplying or possessing the drug can no longer attract the legal defence afforded by section 124 of the DMA.

The new schedule 5 includes all 36 new benzodiazepines that have been added to schedule 2. The proposed inclusion of the new benzodiazepines (which include drugs known as valium and serapax) into schedule 2 creates a risk that an ordinary person who shares a single dose of prescription medication such as Valium without necessarily any criminal intent could face criminal prosecution. On that basis their addition to schedule 5 is warranted to ensure that access to the legal defence in section 124 is retained.

Clause 46 inserts reference to the two new offence provisions created by the bill (sections 9B and 9C) to the title and authorising sections of schedule 8A.

Clause 47 inserts reference to the two new offence provisions created by the bill (sections 9B and 9C) to the title and authorising sections of schedule 8B.