

Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012

Explanatory Notes

Short Title

The short title is the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012

Policy objectives and the reasons for them

The primary objectives of the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (the Bill) are to:

1. Amend the Criminal Code to:
 - amend the definition of ‘child exploitation material’ in section 207A to ensure animated or virtual images of children are caught by the definition;
 - insert a new circumstance of aggravation in sections 208 (Unlawful sodomy), 210 (Indecent treatment of children under 16) and 215 (Carnal knowledge with or of children under 16) where the offence is committed against a child with an impairment of the mind;
 - provide a new offence of ‘grooming’, carrying a maximum penalty of five years imprisonment or 10 years if the child is under 12, to target adults who engage in any conduct in relation to a child under 16 years (or a person the adult believes is under the age of 16 years), with the intent to facilitate the procurement of the child to engage in a sexual act or expose the child to any indecent matter;
 - increase the maximum penalties for the child exploitation material offences: from five years to 14 years imprisonment for the offence of possession (section 228D); and 10 years to 14 years imprisonment for the offences of involving a child in the making of child exploitation material (section 228A), making child exploitation material (section 228B) and distributing child exploitation material (section 228C);
 - increase the maximum penalty for the offence of using the internet to procure children under 16 to engage in a sexual act (section 218A) from five years to 10 years imprisonment; increase the maximum penalty for the aggravated form of the offence (child under 12 years) from 10 years to 14 years imprisonment; and create a new circumstance of aggravation where the procuring conduct involves the offender meeting the child or travelling with the intention to meet the child;

- close a loophole under section 222 (Incest) that provides a defence to incest in cases where an adult engages in consensual sex with their de facto partner's child being over the age of consent (aged 16 or 17 years) but not yet an adult (18 years); and
 - amend section 568 (Cases in which several charges may be joined) to allow the 'joinder' of multiple offences relating to child exploitation material offences into a single count on an indictment.
2. Amend the *Drugs Misuse Act 1986* (DMA) to:
- create a new offence of trafficking in precursors (substances used to manufacture dangerous drugs);
 - amend the definition of 'dangerous drug' to overcome the evidentiary difficulties in proving an analogue has a substantially similar chemical structure and a substantially similar pharmacological effect to a scheduled dangerous drug (where the substance is new and has not been subjected to study);
 - provide the District Court with the power to make forfeiture orders upon conviction of an offence under the DMA in relation to drugs, precursor chemicals, drug paraphernalia and proceeds derived from drugs; and
 - clarify the meaning of section 10(4) which creates an offence of failure to take reasonable care and precaution with a hypodermic syringe or needle, to put beyond doubt that there is no requirement that the needle/syringe was used or intended to be used with respect to a dangerous drug.
3. Amend section 54 (Proof of identity of a person convicted) of the *Evidence Act 1977* to provide a rebuttable presumption as to a previous conviction where an expert opines to the identity of an offender and to recognise that police may take identifying particulars from a suspect other than fingerprints, for example, a DNA sample.
4. Amend the *Commission for Children and Young People and Child Guardian Act 2000* and the *Disability Services Act 2006* regarding offences relevant to the issue and management of the Blue and Yellow Card systems.

Achievement of Policy Objectives

The Queensland Government in its *Six Month Action Plan* pledged to amend laws to: "address synthetic drugs, penalties for child pornography and some child sex offences, including a new child grooming offence".

Child exploitation material offences are not victimless crimes. Children who are used in the production of exploitative material are often terribly abused and suffer severe trauma as a result. Those who seek to possess such material feed this exploitative market.

The Bill increases the maximum penalties to reflect the seriousness of these offences and to align with penalties for comparable Commonwealth offences. In increasing the penalties the current penalty distinction for the offence of possession is omitted.

While the criminal law generally regards the distribution of contraband as objectively more serious than mere possession, the commodity in question in the case of child exploitation material offences is a child who is the subject of appalling physical and sexual abuse. The market for such material must be targeted. This approach is consistent with the way in which the offence of receiving tainted property is dealt with under the Criminal Code. Receiving tainted property creates a market for criminal activity such as theft. In recognition of this factor; a higher maximum penalty is applied to the offence.

Removing the current penalty distinction also recognises the wide variety of circumstances in which child exploitation material offences can be committed and that there will be cases where the mere possession of material carries a greater criminality than the offence of distributing. For example, a person may possess hundreds of thousands of depraved images, depicting the penetration and torture of infants and toddlers; as opposed to a person who forwards an animated image depicting a child in a sexually explicit pose.

Commonwealth offences do not make a distinction in relation to these types of offences with all offences carrying a maximum penalty of 15 years imprisonment. In New South Wales and the Northern Territory, the offences of possession, production and distribution all carry a maximum penalty of 10 years imprisonment.

The creation of the new offence of 'grooming' will capture wide-ranging behaviour that is designed to facilitate the later procurement of a child for sexual activity. This allows for the potential for police to intervene before a sexual act or sex-related activity takes place.

The Bill creates a new circumstance of aggravation for the offences of sodomy, indecent treatment of children under 16 and unlawful carnal knowledge where the child is a child with a mental impairment. This recognises the increased vulnerability of children with a mental impairment to the predations of sex offenders and seeks to deter such offending conduct.

The Bill amends section 222(8) of the Criminal Code to close a loophole highlighted in the case of *R v Rose* [2009] QCA 83 where a de facto parent commenced a sexual relationship with his step-daughter upon her reaching the age of consent (16 years). The defence where the parties were married at the time will remain. The defence of entitlement to marriage will be amended to apply only in cases where both parties are adults.

There are difficulties in legislating to keep pace with emerging developments in the manufacture and supply of dangerous drugs. The Bill will amend the DMA to address the issue of 'analogue' drugs. Under the current definition of *dangerous drug*, to prove a substance is an analogue of a scheduled dangerous drug, the Crown must prove that the substance has a substantially similar chemical structure to the scheduled drug and has a substantially similar pharmacological effect. Proving the second limb is often problematic given that many seized substances are new and yet to be tested as to their effect. The definition will be amended to provide that the Crown need only prove one of the limbs.

The Bill creates a new offence of trafficking in precursor chemicals to address the issue of offenders who deal in such substances on such a scale that they are in effect carrying on the business of dealing in these substances.

The Bill further amends the DMA to provide the District Court with the power to make forfeiture orders on conviction for an offence under the DMA. The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* gave the District Court jurisdiction to determine charges of certain offences under the DMA. Currently only the Supreme and Magistrates Court have these powers.

This amendment will allow the District Court to make forfeiture orders in relation to drugs, precursor chemicals, drug paraphernalia and proceeds derived from drug offences. The Bill includes a validating provision for any orders made by the District Court prior to the commencement of these amendments.

The Bill amends section 54 (Proof of identity of a person convicted) of the *Evidence Act 1977* to provide a rebuttable presumption as to a prior conviction where an expert opines to the identity of an alleged offender. The amendment recognises that past convictions are generally beyond doubt and that the defendant is best placed to deny or accept an alleged past conviction.

Blue Cards are administered under the *Commission for Children and Young People and Child Guardian Act 2000* (CCYPCG Act) to determine a person's eligibility for working with children and young people in a regulated environment. Yellow Cards are administered under the *Disability Services Act 2006* (DSA) to determine a person's eligibility to work in a place where disability services are provided. Both the CCYPCG Act and the DSA contain schedules of serious and disqualifying offences for the Blue and Yellow Cards respectively, as well as schedules of offences that may form the basis of investigative information. These different categories of offences are considered as part of the decision making processes for the issue and management of Blue and Yellow Cards.

The Bill amends the offence schedules and makes transitional arrangements relevant to the Blue Card system in the CCYPCG Act to reflect changes made to the criminal law by the Commonwealth and to reflect the amendments in the Bill. Corresponding amendments and transitional provisions are made to the offence schedules for the Yellow Card system in the DSA.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives other than through amendment to existing legislation.

Estimated cost for government implementation

Any costs in relation to the amendments will be met from existing agency resources.

Consistency with fundamental legislative principles

The Bill potentially departs from fundamental legislative principles (FLPs) as outlined in section 4 of the *Legislative Standards Act 1992*. Any such departures occur in the context of balancing FLPs with a competing community expectation that members of the community should be protected from serious criminal activity.

The Bill introduces two new offences: a sexual offence of ‘grooming’ in the Criminal Code; and a drug offence of trafficking in precursors in the DMA.

The term ‘grooming’ refers to wide-ranging behaviour that is designed to facilitate, or make easier, the later procurement of a child for sexual activity (for example, an offender might build a relationship of trust with the child, and then seek to sexualise that relationship). A number of Australian jurisdictions, including the Commonwealth, provide an offence of ‘grooming’ to complement the procuring offences.

Section 217 of the Criminal Code provides the offence of procuring a child or a person with an impairment of the mind to engage in carnal knowledge. The offence carries a maximum penalty of 14 years imprisonment. Section 218A of the Criminal Code provides the offence of an adult using electronic communication with intent to procure a child under 16 (or a person the adult believes is under the age of 16) to engage in a sexual act; or expose, without legitimate reason, a child under 16 (or a person the adult believes is under the age of 16) to any indecent matter. The offence carries five years imprisonment or 10 years if the child is under 12.

For the purposes of the offences, the Criminal Code defines the term ‘procure’ to mean knowingly entice or recruit for the purposes of sexual exploitation. Introducing an offence of grooming allows police to potentially intervene before a sexual act or sex-related activity takes place. The introduction of this offence can be justified on the basis that the community expects that the police will be provided with appropriate powers to protect children from predators before any actual physical harm could occur.

Precursor chemicals are those chemicals that are used in the manufacture of dangerous drugs such as amphetamines. The production of amphetamine-based drugs involves unique manufacturing processes that rely on particular precursor chemicals. Over the past years there have been a growing number of cases involving persons involved in the wholesale distribution of precursor chemicals or apparatus to manufacturers of amphetamine-based drugs.

While such persons may be able to be charged with the existing possession, supply or production offences, in some cases these offences fall short of reflecting the true criminality of the conduct where the scale of supply reaches a very high level, such that the person can be said to be carrying on the business of dealing in such substances or things. In the absence of supply of significant amounts of chemicals, the production of large quantities of drugs would not be possible. Therefore, this type of conduct needs to be curbed through the introduction of appropriate penalties.

The Bill increases the maximum penalties for particular child sex-related offences to ensure the offences provide adequate protection and sanction and to align the Queensland penalties with the Commonwealth offences.

In particular, the justification behind the increases in the child exploitation material offences is discussed above. The increase in the maximum penalty for the offence of using the internet to procure children under 16 to engage in a sexual act (section 218A of the Criminal Code), accommodates the new offence of 'grooming', and recognises that the conduct captured in section 218A(1)(b) of the Criminal Code is transported into the new grooming offence and thereby will retain its current maximum penalty.

The new circumstance of aggravation in section 218A where the perpetrator meets the victim or travels with the intention of meeting the victim, recognises that such an overt act should attract a greater sanction.

Sections 208, 210 and 215 of the Criminal Code are amended to create a new circumstance of aggravation where the child has an impairment of the mind. Children with impairment of mind have a greater vulnerability to exploitation and therefore should be afforded greater protection.

The Bill amends section 222(8) of the Criminal Code to remove a loophole that provides a defence in cases where an adult engages in consensual sex with their defacto partner's child being over the age of consent (aged 16 or 17 years) but not yet an adult (18 years). The Bill amends section 222(8) of the Criminal Code to provide a defence to incest only in circumstances where both of the parties are adults and are lawfully entitled to be married.

While there may be genuine relationships involving a de facto parent and a step-child, it is considered that the removal of the defence of 'lawfully entitled to be married' can be justified on the basis that there is community expectation that vulnerable children will be protected from the predatory sexual advances of a de facto step-parent. The Bill does not remove the defence that the parties were married at the time.

The Bill amends section 568 of the Criminal Code to allow for the joinder in the one charge, of multiple child exploitation material offences. The amendment will allow the Crown to better reflect on the face of the indictment that the possession involved multiple acts of possession and the accumulation of the material over an extended timeframe. It will address evidentiary issues and ensure the indictment better reflects the nature of the offending behaviour.

In practice section 568 is used when the offender has indicated a willingness to plead guilty. In the case of a trial, the preferred practice would be to indict a separate count for each transaction as best as can be established on the evidence; to avoid duplicity in the charge and unfairness to the accused. On that basis the amendment will apply retrospectively to offences committed before commencement.

The Bill makes amendments to the CCYPCG Act and the DSA to prescribe new disqualifying and serious offences, as well as offences that may form the basis of investigative information. The Bill includes transitional provisions to deal with these new offences. The primary purpose of the Blue Card system is to promote and protect

the rights, interests and wellbeing of children in Queensland and the paramount consideration of the Yellow Card system is the right of people with a disability to live free from abuse, neglect and exploitation.

These proposed amendments reflect changes in Commonwealth legislation and adopt the new offences introduced by the Bill. It is unlikely that the amendments will result in any significant impact for individuals who require a Blue or Yellow Card for the purposes of their employment. However, it is possible that the eligibility of a small number of individuals to hold a Blue or Yellow Card may be affected and they may become ineligible to work with children and young people or to work in a place where disability services are provided, as a result of the amendments. This may be considered a breach of the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals.

This is justified as children and young people and people with a disability are particularly vulnerable and the community expects that the Blue and Yellow Card systems operate as effectively as possible to protect them. Updating the relevant schedules of offences to reflect changes in the criminal law is a necessary step to help ensure the efficient and effective operation of the Blue and Yellow Card systems.

The Bill amends section 54 of the *Evidence Act 1977* to provide that an expert's affidavit opining to the identity of the offender is proof, unless the contrary is proved, that the offender before the court is the person referred to as having the prior conviction. This in effect creates a rebuttable presumption.

The issue of proving a past conviction could lead to an unnecessary lengthening of the trial or sentence hearing process. The provision allows an alleged offender to challenge the expert's opinion as to the contents of an affidavit that purports to identify the alleged offender and any convictions that the alleged offender has against them.

The amendment is justified on the basis that the offender is best placed to deny or accept an alleged past conviction. Where the offender challenges the past conviction the offender will bear the onus, on the balance of probabilities, of proving they are not the person reflected in the criminal history.

Consultation

Consultation with the following government departments and agencies occurred: the Department of the Premier and Cabinet; Queensland Treasury and Trade; the Department of Community Safety; the Department of Communities, Child Safety and Disability Services; and the Queensland Police Service.

Consultation has also occurred with the Chief Justice of the Supreme Court, President of the Court of Appeal, Chief Judge of the District Court, Chief Magistrate, Bar Association of Queensland, Queensland Law Society, Director of Public Prosecutions, Legal Aid Queensland, Crime and Misconduct Commission, Women's Legal Services, Commission for Children and Young People and Child Guardian, Protect All Children Today; and Bravehearts.

Consistency with legislation of other jurisdictions

The Bill does not introduce uniform or complementary legislation.

Notes on Provisions

Part 1 – Preliminary

Clause 1 establishes the short title to the Act as the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012*.

Part 2 – Amendment of Commission for Children and Young People and Child Guardian Act 2000

Clause 2 provides that Part 2 amends the *Commission for Children and Young People and Child Guardian Act 2000*.

Clause 3 amends section 305 (Police commissioner may decide that information about a person is investigative information) to insert reference to new schedule 6A (Repealed or expired offences that may form basis of investigative information). This amendment enables the Police Commissioner to decide that information about a person is investigative information in relation to an offence which constitutes a schedule 6A offence.

Clause 4 inserts new chapter 11, part 16 (Transitional provisions for Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012) to provide for transitional arrangements for the amendments to the *Commission for Children and Young People and Child Guardian Act 2000*. A new section 510 prescribes definitions for new chapter 11, part 16. New sections 511 to 537 prescribe transitional arrangements to deal appropriately with the following matters under the *Commission for Children and Young People and Child Guardian Act 2000* on commencement of the amendments:

- eligibility declarations and applications for eligibility declarations;
- prescribed notices and applications for prescribed notices;
- exemption notices and applications for exemption notices;
- applications for cancellation or suspension of prescribed notices and exemption notices; and
- reviews and appeals.

New Division 7 (Miscellaneous), new sections 538 to 540 provide for transitional arrangements in relation to the following:

- to enable the Commissioner to continue acting on her own initiative under the amended Act if the Commission had started to act on her own initiative before the commencement;

- to enable a court to make a disqualification order after the commencement arising out of an act done or omission made before the commencement;
- to provide that it is immaterial when a new disqualifying offence was committed or when the person was convicted of the new disqualifying offence for the purpose of applying sections 169(1)(a) and 170(a) of the *Commission for Children and Young People and Child Guardian Act 2000*; and
- to provide that sections 240 and 298 of the *Commission for Children and Young People and Child Guardian Act 2000* apply even though a charge for a new disqualifying offence, or the acts or omissions constituting the alleged offence happened before the commencement of the amendments.

Clauses 5 to 10 amend schedule 2 (Current serious offences), schedule 3 (Repealed or expired serious offences), schedule 4 (Current disqualifying offences), schedule 5 (Repealed or expired disqualifying offences), schedule 6 (Offences that may form basis of investigative information) and insert new schedule 6A (Repealed or expired offences that may form basis of investigative information).

The amendments effectively update the offence schedules under the Blue Card system in line with changes made to Commonwealth and Queensland offences in order to maintain consistency with how offences of their nature are considered under the Blue Card system.

Clause 11 amends schedule 7 (Dictionary) to insert definitions for the terms ‘amended Act’, ‘new disqualified person’, ‘new disqualifying offence’, ‘new relevant disqualified person’ and ‘new serious offence’ and amends the definition of ‘commencement’.

Part 3 – Amendment of Criminal Code

Clause 12 provides that Part 3 amends the Criminal Code.

Clause 13 amends section 207A (Definitions for this chapter), in particular the definition of ‘child exploitation material’, by replacing the term ‘someone’ with the phrase ‘a person, or a representation of a person’. This amendment clarifies that the definition extends to animated, virtual or fictitious images.

Clause 14 amends section 208 (Unlawful sodomy) by the insertion of new subsection (2A) which creates a circumstance of aggravation, carrying life imprisonment, where a person sodomises a child or permits a male child to sodomise him/her and the child is a person with an impairment of mind.

New subsection (5) provides a defence to the aggravated offence provided in subsection (2A) where the accused can prove, on the balance of probabilities, that he/she reasonably believed that the child was not a person with an impairment of the mind.

Clause 15 amends section 210 (Indecent treatment of children under 16) by the insertion of new subsection (4A) that creates a circumstance of aggravation, carrying

life imprisonment, where the offence is committed against the child with an impairment of mind.

New subsection (5A) provides a defence to the aggravated offence provided in subsection (4A) where the accused can prove, on the balance of probabilities, that he/she reasonably believed that the child was not a person with an impairment of mind.

Clause 16 amends section 215 (Carnal knowledge with or of children under 16) by the insertion of new subsection (4A) which creates a circumstance of aggravation, carrying life imprisonment, where the offence is committed against a child with an impairment of mind.

New subsection (5A) provides a defence to the aggravated offence provided in subsection (4A) where the accused can prove, on the balance of probabilities, that he/she reasonably believed that the child was not a person with an impairment of mind.

Clause 17 amends section 216 (Abuse of persons with an impairment of mind) to clarify that the penalty provided in subsection (2) is subject to section (3A).

Clause 18 amends section 218A (Using Internet etc. to procure children under 16) to omit subsections (1) and (2) and inserts new subsections. The effect of new subsection (1) is to omit the existing second limb of the offences as provided for in subsection (1)(a) which prohibits using the internet to expose a child to any indecent matter. The second limb is omitted because it will form the second limb of new section 218B (Grooming children under 16). The maximum penalty for the simpliciter offence is increased from five years imprisonment to 10 years imprisonment.

Also, the maximum penalty for the existing aggravated offence provided in subsection (2) is increased from 10 years imprisonment to 14 years imprisonment and a new circumstance of aggravation created, if the offence involves the adult intentionally meeting with the person or going to a place with the intention of meeting the person. The term 'meeting' is defined to mean meeting in person. Therefore, an offender who travels with the intention of meeting the person will be caught by the circumstance of aggravation.

Subclause (3) redrafts the defence provided in existing subsection (9) to clearly articulate the defence to the simpliciter offence and the defence to the circumstance of aggravation.

Clause 19 inserts new section 218B to provide the offence of Grooming children under 16. The offence has two limbs. Subsection (1)(b) imports what was formerly the second limb of section 218A but removes the need for the offence to have been committed using the internet. Subsection (1)(a) makes it an offence for an adult to engage in any conduct with a person under the age of 16 years, or a person the adult believes is under the age of 16 years, with the intent to facilitate the procurement of the person for sexual activity. The offence applies where the intended procurement is imminent or in the future (see subsection (5)(c)). For example, the adult may seek to build a relationship of trust with the child, intending to sexualise that relationship at some point in time. The offence carries a maximum penalty of five years

imprisonment or 10 years if the person is under 12 years or the adult believes the person is under 12 years.

Subsections (3) to (10) largely mirror the subsections provided in existing section 218 A (Using internet etc to procure children under 16).

The effect of subsection (5)(a) is that for the purpose of proving that the adult intended to facilitate the procurement of the person for sexual activity, the prosecution is not required to point to a particular sex act but merely has to prove that the offender intended facilitating the procurement of some type of sexual activity.

Subsection (7) is an evidentiary aid. Evidence that the person was represented to the accused as being under the age of 16 years, or 12 years, as the case may be is proof that the adult believed the person was under that age, in the absence of evidence to the contrary. With regards to evidence to the contrary; the accused bears the evidentiary onus but the prosecution retains the onus of proof and would be required to negate any evidence raised by the accused beyond reasonable doubt.

Subsection (8) and (9) provide defences which may be raised on behalf of the accused who bears the onus of proof on the balance of probabilities.

Subsection (10) defines the term 'procure' consistently with the definition used in sections 217, 218 and 218A.

Clause 20 amends section 222 (Incest) to restrict the defence provided in subsection (8), that both persons are entitled to be lawfully married, to the circumstance where both persons are adults.

Clause 21 amends section 228A (Involving child in making child exploitation material) to increase the maximum penalty from 10 years imprisonment to 14 years imprisonment.

Clause 22 amends section 228B (Making child exploitation material) to increase the maximum penalty from 10 years imprisonment to 14 years imprisonment.

Clause 23 amends section 228C (Distributing child exploitation material) to increase the maximum penalty from 10 years imprisonment to 14 years imprisonment.

Clause 24 amends section 228D (Possessing child exploitation material) to increase the penalty from 5 years imprisonment to 14 years imprisonment.

Clause 25 amends section 228G (Forfeiture of child exploitation material) to include new section 218B and to rectify an omission by including section 210(1)(e).

Clause 26 amends section 568 (Cases in which several charges may be joined) to allow multiple offences of child exploitation material offences (section 228A, 228B, 228C or 228D) to be joined in the one charge on an indictment. That is, multiple offences against section 228A can be joined, multiple offences against section 228B can be joined etc.

Clause 27 inserts new Chapter 91 (Transitional provisions for Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012) and new section 730. New

section 730 deals with the transitional application of the amendment to section 568 to allow for the joinder of multiple charges of child exploitation material offences. Such charges may be joined whether the offences occurred before on or after the commencement of the amendment.

Part 4 – Amendment of *Disability Services Act 2006*

Clause 28 provides that Part 4 amends the *Disability Services Act 2006*.

Clause 29 amends section 109 (Police commissioner may decide that information about a person is investigative information) to insert a reference to new schedule 6B (Repealed or expired offences that may form the basis of investigative information). This amendment enables the Police Commissioner to decide that information about a person is investigative information in relation to an offence which constitutes a schedule 6B offence.

Clause 30 amends section 266 to clarify that a schedule 6A offence is an offence as in force before the commencement of the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012*.

Clause 31 inserts a new Part 16 Division 8 (Transitional provisions for Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012) to provide transitional arrangements for the amendments to the *Disability Services Act 2006*. New section 295 provides definitions for new Part 16 Division 8. New sections 296 to 324 prescribe transitional arrangements to deal appropriately with the following matters under the *Disability Services Act 2006* on commencement of the amendments:

- eligibility declaration and applications for eligibility declarations;
- prescribed notices and applications for prescribed notices;
- exemption notices and applications for exemption notices;
- applications for cancellation or suspension of prescribed notices and exemption notices; and
- reviews and appeals.

New Subdivision 7 (Miscellaneous) section 324 (Effect of conviction or charge for new disqualifying offence) provides that:

- it is immaterial when a new disqualifying offence was committed or when the person was convicted of the new disqualifying offence for the purpose of applying section 107D(1)(a) or schedule 7, definition of *relevant disqualified person*, paragraph (a) under the *Disability Services Act 2006*;
- sections 104 and 105A of the *Disability Services Act 2006* apply even though a charge for a new disqualifying offence, or the acts or omissions constituting the alleged offence happened before the commencement of the amendments.

Clauses 32 to 37 amend schedule 3 (Current serious offences), schedule 4 (Repealed or expired serious offences), schedule 5 (Current disqualifying offences), schedule 6 (Repealed or expired disqualifying offences), schedule 6A (Offences that may form

basis of investigation information) and inserts new schedule 6B (Repealed or expired offences that may form basis for investigative information).

The amendments effectively update the offence schedules under the Yellow Card system in line with changes made to Commonwealth and Queensland offences in order to maintain consistency with how offences are considered under the Yellow Card system.

Clause 38 amends schedule 7 (dictionary).

Part 5 – Amendment of *Drugs Misuse Act 1986*

Clause 39 provides that Part 5 amends the *Drugs Misuse Act 1986*.

Clause 40 amends section 4 (Definitions) to insert a new definition of ‘Australian Crime Commission’ and amends the existing definition of ‘dangerous drug’. The definition of ‘dangerous drug’ in section 4(c) is amended to provide that a dangerous drug is a thing that has a chemical structure that is substantially similar to the chemical structure of a thing referred to in paragraph (a) or (b) **or** that has a substantially similar pharmacological effect. This means that only one of the two limbs needs to be satisfied to come within the section 4(c) definition.

Clause 41 amends section 9A (Possessing relevant substances or things) by inserting a defence of ‘reasonable excuse’ with the onus of proof upon the accused.

Clause 42 inserts a new section 9D to provide for the offence of Trafficking in relevant substances or things as defined in section 9A(2) for use in connection with the commission of a crime punishable by up to 20 years imprisonment.

Clause 43 amends section 10 (Possessing things) to clarify that, for the offence provided in subsection (4) it is immaterial whether the hypodermic syringe or needle was for use or had been used in connection with the administration of a dangerous drug.

Clause 44 amends section 30 (Interpretation) to include ‘the District Court’ in the definition of ‘court’.

Clause 45 amends section 43U (Confidentiality of information) to insert a new subsection (2)(c) to allow disclosure of information to a member of staff of the Australian Crime Commission to enable the member to perform his or her functions as a member of staff of the Australian Crime Commission.

Clause 46 amends section 46 (Definitions for pt 5B) to include the new section 9D offence of trafficking in relevant substances or things in the definition of ‘serious offence’.

Clause 47 amends the heading of Part 7 heading (Transitional provisions) by inserting a new heading ‘Transitional and validating provisions’.

Clause 48 inserts a new Part 7, division 8 and new sections 143 and 144. New section 143 provides that an order made by the District Court under Part 5 is to be taken to be, and always to have been valid and effective even if made before commencement. New section 144 clarifies that the amendment to the *Drugs Misuse Regulation 1987* by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012* does not affect the power of the Governor in Council to further amend the regulation or repeal it.

Part 6 – Amendment of *Drugs Misuse Regulation 1987*

Clause 49 provides that Part 6 amends the *Drugs Misuse Regulation 1987*.

Clause 50 amends schedule 8A (Gross weight of relevant substances for sections 9A, 9B and 9C of Act) to insert a reference to new section 9D in the heading and authorising section.

Clause 51 amends schedule 8B (Things specified for sections 9A, 9B and 9C, and prescribed for s 134, of Act) to insert a reference to the new section 9D in the heading and authorising section.

Part 7 – Amendment of *Evidence Act 1977*

Clause 52 provides that Part 7 amends the *Evidence Act 1977*.

Clause 53 amends section 54 (Proof of identity of a person convicted) to omit section 54 and insert a new section 54. New section 54 is an evidentiary provision that provides that an expert's affidavit opining to the identity of the offender is proof, unless the contrary is proved, that the offender before the court is the person referred to as having the prior conviction. This creates a rebuttable presumption. Where the offender challenges the past conviction the offender will bear the onus on the balance of probabilities, of proving they are not the person reflected in the criminal history.

Subsection (2) provides that the expert's affidavit must exhibit a certificate of conviction for an offence for which the alleged offender is alleged to have been convicted. The affidavit must state the expert's field of expertise and the process and evidence used by the expert to determine the identity of the alleged offender based on available identifying records. The affidavit must point to any offence a police record states the alleged offender has been convicted of and the expert's belief that the alleged offender is identical to the person referred to in the police record.

Subsection (3) provides for the giving of notice of reliance on the affidavit. Subparagraph (a) provides that where a party to a proceedings intends to rely on an affidavit (the relying party), the party must, at least 10 business days before the hearing day, give a copy of the affidavit to each other party to the proceeding. Subparagraph (b) provides discretion to the court in particular circumstances, to shorten the period of giving the notice mentioned in subparagraph (a) before a later date allowed by the court.

Subsection (4) provides that if a party to the proceeding, other than the relying party, intends to challenge a matter stated in the affidavit, the party must, at least three

business days before the hearing day, give the relying party notice in writing of the matter to be challenged. However, if subsection 3(b) applies and, in particular circumstances, the court considers it is just to shorten the period mentioned in subparagraph (a), before a later date allowed by the court.

Subsection (5) defines terms for the purpose of section 54.

The term ‘certificate of conviction’ is defined for an offence, as a document purporting to be a certificate of conviction, or a certified copy of a certificate of conviction, for an offence.

The term ‘corresponding law’ is defined for the definition of *identifying records* in subparagraph (a), as a law of the Commonwealth or another State or Territory corresponding, or substantially corresponding, to the *Police Powers and Responsibilities Act 2000*, chapter 17, part 4. ‘Corresponding law’ is defined for the definition of *identifying records* in subparagraphs (b) and (c), as a law of the Commonwealth or another State or Territory corresponding, or substantially corresponding, to the *Police Powers and Responsibilities Act 2000*, Chapter 17, part 5.

The term ‘DNA sample’ is consistent with the definition contained in schedule 6 of the *Police Powers and Responsibilities Act 2000*.

The term ‘expert’ is defined as a person who is qualified to give opinion evidence as an expert witness in relation to the identity of a person based on the type of identifying records used by the expert to determine the identity of the alleged offender under subsection 2(c)(ii).

The term ‘hearing day’ is defined as a day fixed for the start of the hearing of the proceeding.

The term ‘identifying records’ for a person is defined as:

- (a) any identifying particulars of the person taken under the *Police Powers and Responsibilities Act 2000*, chapter 17 part 4 or a corresponding law; or
- (b) the results of a DNA analysis performed, under the *Police Powers and Responsibilities Act 2000*, chapter 17 part 5 or a corresponding law, on a DNA sample taken from the person under that part or a corresponding law; or
- (c) a DNA sample taken from the person under the *Police Powers and Responsibilities Act 2000*, chapter 17, part 5 or a corresponding law.

The term ‘identifying particulars’ is consistent with the definition contained in schedule 6 of the *Police Powers and Responsibilities Act 2000*.

The term ‘party’ to a proceeding, is defined as:

- (a) for a criminal proceeding, the prosecutor and each accused person; or
- (b) for a civil proceeding, each person who is a party to the proceeding; or
- (c) for another proceeding, each person who has been given leave to appear in the proceeding.

Part 6 – Minor and consequential amendments

Clause 54 provides for a schedule of minor and consequential amendments.