Chapter 8
Drug offences

Chapter 8—Drug offences

Referrals to Drug Court closed

On Friday 16 November 2012, the Queensland Government released the amendments to the Drug Court Regulations, which effectively stop any further referrals to the drug court.

Accordingly, if you have enquiries from clients or their families or other solicitors about the possibility of going to drug court, this sentencing option now no longer exists.

The drug court will still operate for the next few months, so it hasn't shut completely, but it will operate only to enable the current participants to continue treatment and be transitioned from the court to alternative sentencing options eventually, and deal with any participants on drug court warrants who surrender or are arrested.

If you have any questions please call the Drug Court Team on 3238 3496.

A. Introduction

8-1 *Drugs Misuse Act 1986* (Qld)

The laws covering drug offences in Queensland are contained in the *Drugs Misuse Act 1986* (Qld), which came into effect on 27 October 1986. The substantive drug offences are set out in ss 5–12 of the Drugs Misuse Act.

8-2 Dangerous drugs

Section 4 defines a 'dangerous drug' as 'a thing specified in the *Drugs Misuse Regulation 1987* (Qld), schedule 1 or 2 or' any part of any specified plant or (in effect) any of the chemical derivative of any defined drug.

Schedule 1 contains the most serious substances and offences associated with these drugs attract the most significant penalties. Schedule 1 drugs are:

'Amphetamine
Cocaine
Heroin
Lysergide [LSD]
Methylamphetamine
3,4-Methylenedioxymethamphetamine (MDMA) [Ecstacy]

Paramethoxyamphetamine
Phencyclidine'.

Schedule 2 includes all other illicit drugs, including those commonly found in the community. In particular, the schedule includes:

Cannabis
Methadone
Morphine
Gamma hydroxybutyric acid (GHB)
Diazepam (Valium)
Temazepam
Synthetic cannabinoids (several variations of JWH-)

(Note: This list is not exhaustive. If in doubt, refer to the complete schedule.)

Schedule 2 covers all anabolic and androgenic steroidal agents.

8-3 Summary jurisdiction for drug offences

Under ss 13(1) and (2), if a person is charged with committing a crime under ss 6, 7, 8, 9, 9A, 9B, 9C, 10(1), 11 or 12 and would be liable upon conviction to jail for 15 years, proceedings may be taken summarily, in which case the person is liable to three years' imprisonment upon conviction.

The Act also now includes s 14, which indicates that, if a person is charged under s 9 (possession of a dangerous drug), proceedings may not be taken summarily if the prosecution alleges that the possession was for a commercial purpose. If no commercial purpose is alleged and proceedings are dealt with summarily, the maximum penalty is three years' imprisonment.

The following offences can be dealt with summarily at the election of the prosecutor (ss 13, 14, 118(2)):

- supplying Schedule 2 drugs without circumstances of aggravation
- producing Schedule 2 drugs of less than Schedule 3 quantity
- possessing Schedule 1 or 2 drugs
- possessing things for use in connection with the commission of a crime under the Drugs Misuse Act or that have been so used by the accused
- permitting places to be used for committing crimes under the Drugs Misuse Act
- publishing or possessing instructions for producing Schedule 1 or 2 drugs (s 8A).
- Schedules 3 and 4 specify quantities (weight) for each defined dangerous drug. Generally, for powdered Schedule 1 and 2 drugs, the quantity is 2 grams; for cannabis, 500 grams or 100 plants. In all instances, you should refer to the schedules, as charges and penalties can vary according to weight.

If the presiding magistrate decides that the offence should be prosecuted on indictment, they must not determine the charge summarily, but deal with the proceedings as committal proceedings for trial or sentence (s 118(4)). Any plea entered by the defendant at the beginning of the summary proceedings is then disregarded (s 118(5)) and the defendant must be addressed in line with the committal procedure.

Offences which proceed on indictment proceed in the district court where the maximum penalty is 20 years or less, and the Supreme Court for all other offences.

8-4 Bail for drug offences

Under ss 7 and 8 of the *Bail Act 1980* (Qld), either the court or a police officer (watch-house keeper) may grant bail to a person charged with an offence under the Drugs Misuse Act. There are no special provisions relating to bail for drug offences.

If watch-house bail is granted to a defendant, the prosecutor would probably elect to have the matter dealt with summarily. However, the magistrate may still abstain from dealing with the matter.

B. Possession of dangerous drugs

8-5 Unlawfully in possession of dangerous drugs

'A person who unlawfully has possession of a dangerous drug is guilty of a crime' (s 9).

8-6 Possession defined

Although 'possession' is not defined in the Drugs Misuse Act, s 116 states that '[t]he Criminal Code shall, with all necessary adaptations, be read and construed with this Act'.

Schedule 1 of the *Criminal Code Act 1899* (Qld) states that the term 'possession' includes 'having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question'.

However, this definition is inclusive and not exhaustive (see *R v Warneminde* [1978] Qd R 371).

In *R v Solway* [1984] 2 Qd R 75, the court expressed the view that,

> '... before a person can be said to be in possession of any object he must not only know of its existence, but he must have laid a claim to it (*Warneminde*), or exercised some control over it (*Thomas and Todd*)'.

The knowledge to be proved is the knowledge of the substance, not the nature of the substance. Actual possession without knowledge is not possession for the purposes of these offences (see *Lockyer v Gibb* [1967] 2 QB 243, 248; *R v Boyesen* [1982] AC 768, 773–4).

In *Clare v R* (1994) 2 Qd R 619; [1993] QCA 558, it was held that the prosecution was not required to prove that the accused knew the powder in his custody was heroin when he thought it was perfume base. The onus was on him to raise the defence of 'honest and reasonable mistake' under s 24 of the Criminal Code.

However, for a conviction to be sustained, knowledge must be proved beyond reasonable doubt. Such proof may be based on an inference drawn from all the circumstances (see *R v Armstrong* (Unreported, Queensland Court of Criminal Appeal, CA 191 of 1985, McPherson, Thomas and de Jersey JJ , 17 October 1985) and *Duncan v Martyn* (Unreported, Queensland Court of Criminal Appeal, CA 14 of 1989, Kelly SPJ, Kneipp and Demack JJ , 18 April 1989)) but the inference of guilty knowledge must be the only rational inference that can be drawn from the evidence (see *R v Bridges* [1986] 2 Qd R 391).

8-7 Actual possession

Physical possession

In *Warner v The Metropolitan Police Commissioner* [1969] 2 AC 256, 305, Pearce LJ said '(b)y physical possession or control I include things in his pocket, in his car, in his room and so forth. That seems to me to accord with the general popular wide meaning of the word "possession" and to be in accordance with the intention of the Act'.

Non-physical possession

As long as the elements of knowledge and control can be established, it is not necessary to show physical possession. In *R v Warneminde (supra)*, the defendant was held to be in possession of a package held at a freight depot, which he had ordered and paid for, as it was necessary for the defendant only to sign the delivery receipt to gain control of the package.

A defendant who had a pistol locked in a car to which they alone had the key was held to be in possession of that pistol (see *R v Williams* [1967] 2 NSWR 594).

However, mere knowledge of the existence of a drug, coupled with a future intention to exercise control, is not enough (*R v Solway (supra)*). In Solway, cannabis was found in the defendant's bathroom cabinet. He admitted that he knew what it was and that it had been left there after a party. He had no particular intention to do anything with the substance. His appeal against his conviction for possession of the cannabis was allowed.

Joint possession

It is possible for more than one person to be in possession of a particular item at any one time. Of course, there must be knowledge of the item and what it is, together with consent or intention to possess. For instance, when three defendants were apprehended in a house where a number of firearms and ammunition were hidden, all three were held to be in possession of all the firearms and ammunition (see *R v Bentham* [1973] 1 QB 357). Another typical situation is where several people are seated in a room and all are smoking the same cannabis joint. Depending on the evidence, they may all be in joint possession of the cannabis being smoked and/or any utensil being used to smoke it.

It is possible to have possession of goods even when they are in another person's custody. The element of control is the important factor (see *R v Bridges (supra),* 395). For example, if a person leaves an item with a cloakroom attendant, the owner of the item retains possession, even though the cloakroom attendant has actual physical custody.

8-8 Deemed possession

The evidentiary provision in s 129(1)(c) of the Act states that:

> '[p]roof that a dangerous drug was at the material time in or on a place of which [the person charged] was the occupier or concerned in the management or control of, is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect a drug was in or on that place'.

This section places criminal responsibility on those people who fall within the definition of either 'occupier' or 'one concerned in the management or control' of a place unless they can discharge the reversed onus of proof (i.e. that they neither knew nor had reason to suspect that drugs, the subject of a particular charge, were on the premises under their control). The reversed onus of proof must be discharged on the balance of probabilities (see *R v Fox* [1986] 2 Qd R 402, 405; *R v Brauer* [1990] 1 Qd R 332; *Lawler v Prideaux* [1995] 1 Qd R 186; [1993] QCA 395; and *Symes v Lawler* [1995] 1 Qd R 226; [1993] QCA 394).

See also *Tabe v R* (2005) 225 CLR 418; [2005] HCA 59, where a parcel containing drugs addressed to 'Mr Tabler' was delivered to a post office. Tabe and a female friend went to the post office, where his friend collected a substitute parcel. Both were then arrested. It was clear that the female friend never obtained possession of the drugs. Section 129(1)(c) applies only where no actual possession can be established (*Lawler v Prideaux*). If, for example, the owner of a premises is at those premises with a guest who is found in physical possession of drugs, i.e. in his hand, the occupier is not deemed to be in possession.

Presence alone does not constitute 'occupation'. There needs to be proof that the person had or purported to have a right to exclude others from the place (*Thow v Campbell* [1997] 2 Qd R 324; [1996] QCA 522). Although not given in evidence by the accused, 'evidence as to what the appellant said when questioned at the time of the search might, in the absence of any reason for doubting its accuracy, be thought to be capable of discharging the burden of proof

resting on the appellant under s.57(c) (the then equivalent of the current s129(1)(c) of the DMA)' (*Bourke v Reid* (1993) 67 A Crim R 518; [1993] QCA 83).

8-9 Possession of minute quantities

In a case where the quantity of the drug alleged to be in the defendant's possession was so minute that it could not be seen with the naked eye, a conviction for possession did not stand. In *Williams v R,* Gibbs and Mason JJ held that possession, to be guilty of an offence, must not be 'of a minute quantity of a drug incapable of discernment by the naked eye and detectable only by a scientific means'; rather, for the offence of possession to be made out it must be of 'such a quantity of the drug as makes it reasonable to say as a matter of common sense and reality that it is the drug of which the person is in possession' (*Williams v R* (1978) 140 CLR 591, 598-599).

In the same case, Aickin J. held that the critical question was not whether a small quantity of the substance is scientifically identifiable or usable but whether the accused person has sufficient knowledge of the presence of the substance to be in possession of it (see *Williams v R (supra)*, 613, followed in *Bourke (supra)*).

Although a person may possess only a very small quantity, the circumstances of the case may allow a court to infer that the person possesses a larger quantity. In *Barlow v Dale* (Unreported, Queensland Court of Appeal, CA 406 of 1993, Fitzgerald P, McPherson JA and Williams J, 8 December 1993), the accused was found in her house with a bowl of green leafed material. She threw the contents out the window. Traces of leaf remained in the bowl and, although minute, were analysed as cannabis. Her conviction was upheld.

In *Donnelly v Rose* [1995] 1 Qd R 148; [1993] QCA 223 the court of appeal held that where the prosecution proved no more than that the quantity of heroin was so small that the analyst could not determine the quantity of it, the evidence was plainly not enough to sustain a conviction.

8-10 Possession—momentary control

In a case where a defendant was aware that a bag on a table contained cannabis and, when police entered the room, placed the bag under a newspaper, it was held that the defendant had exerted physical control sufficient to demonstrate an intention to exclude physical possession of the bag from anybody else (see *R v Todd* (1977) 6 A Crim R 105).

Similarly, in a case where a defendant was sitting on a verandah beside some Buddha sticks that belonged to someone else, which the defendant threw over the edge of the verandah when told the police were coming, it was held that the defendant demonstrated enough assertion of the right to control to constitute possession (*R v Thomas* (1981) 6 A Crim R 66).

8-11 Possession—applicability of s 24 of the Criminal Code

Section 129(1)(d) of the Drugs Misuse Act states that 'the operation of the Criminal Code, section 24 is excluded unless [the person charged] shows an honest and reasonable belief in the existence of any state of things material to the charge'.

In essence, if the prosecution can prove beyond reasonable doubt both possession (whether actual or constructive) and knowledge, the defendant must then show honest and reasonable belief in the existence of any state of things which might give the defendant a defence (see *R v Keskic* [1979] Qd R 348, 355). In *Tabe v R (supra)*, Callinan and Heydon JJ held at [145] section 57(d) (now 129(1)(d) qualifies the operation of s 24 of the Code.

Its practical effect is that the defendant must show, on the balance of probabilities only, that they are entitled to be acquitted on the basis of an honest and reasonable belief in the existence of any state of things material to the charge, rather than that which the Criminal Code would otherwise require—that the prosecution negative such a belief beyond reasonable doubt.

8-12 Possessing relevant substances or things

Sections 9A states that '[a] person who unlawfully possesses a relevant substance or thing [as defined under s 9A(2)] commits a crime'. The maximum penalty is 15 years' imprisonment. Section 9A(2) defines a 'relevant substance' as 'a substance that is, [or are] or contains, a controlled substance and the gross weight of the relevant substance is of, or exceeds, the gross weight specified in the *Drugs Misuse Regulation 1987*, schedule 8A'. Substances and their gross weights include pseudoephedrine (50 g or 1 L) and hypophosphorous acid (0.1 g). A 'relevant thing' is defined as 'a thing specified in the *Drugs Misuse Regulation 1987*, schedule 8B', and includes a condenser, distillation head and reaction vessel.

C. Possession of things for use in connection with drug offences

8-13 Possession of things for use in connection with drug offences

'(1) A person who has in his or her possession of anything—

(a) for use in connection with the commission of a crime defined in this part ; or

(b) that the person has used in connection with such a purpose;

is guilty of a crime.

Maximum penalty—15 years imprisonment' (s 10(1)).

8-14 General comments

For a discussion of the concept of possession, see 8-27–8-32 of this chapter. However, note that s 129(1)(c) (referred to in 8-33) applies only to 'dangerous drugs' and not 'things', and, therefore, does not apply to charges under this section. The offence in this section does not require that the thing be in a person's possession unlawfully; rather, it is either to be used or has been used in connection with committing a crime defined in Part 2 of the Act.

Therefore, a person could be charged with possession of a motor vehicle, wheelbarrow or any item that they have used or intend to use if the required connection can be made to either the past use or intended use of the item to commit a crime under Part 2 of the Act. Consequently, the thing used could be forfeited to the Crown (Drugs Misuse Act, Part 5) and be subject to a restraining order pending a decision on forfeiture (see 8-39).

As duty lawyer, you should pay special attention to the elements of this offence. To succeed, the prosecution must establish either past use of the item by the defendant (usually through an admission) or intention to use (admitted or inferred).

Note: It is not an offence under the Act to possess things 'which have been used' by someone other than the defendant. The words 'for use' require proof of intention associated with the items (*R v Miller* [1990] 2 Qd R 566). It may be sufficient that the intended use was to be by someone other than the defendant (see *R v Ellames* [1974] 3 All ER 130, 136).

In a previous case, a person possessed a small plastic bottle that had been used for smoking cannabis, though not by the defendant or with the defendant's knowledge. The defendant did not admit possessing the bottle to use it to smoke cannabis and a plea of guilty entered was quashed on appeal (see *R v Knibb* (Unreported, Queensland Court of Criminal Appeal, CA 303 of 1981, Campbell, Sheahan and Connelly JJ, 9 March 1982)).

8-15 Possession of a prohibited combination of items

'A person who unlawfully possesses a prohibited combination of items commits a crime' (s 10B(1)), 'even if the items are separate or at different places' (s 10B(2)). Schedule 8C of the Drugs Misuse Regulation defines prohibited combinations of items, listing three combinations of chemicals.

Pseudoephedrine or its salts is the common chemical that must be present in any of the three combinations for the charge to be made out. This offence typically accompanies a 'producing dangerous drugs' charge (s 8), where several chemical substances are located with other items, with three of the chemicals making up one of the combinations. This charge cannot be dealt with summarily and the maximum penalty is 25 years' imprisonment.

D. Possession of things for use in connection with administration/consumption/smoking dangerous drugs

8-16 Possession of things for use in connection with administration/consumption/smoking dangerous drugs

'(2) A person who unlawfully has in his or her possession anything (not being a hypodermic syringe or needle)—

(a) for use in connection with the administration, consumption or smoking of a dangerous drug; or

(b) that the person has used in connection with such a purpose;

commits an offence' and is liable for two years' imprisonment (s 10(2)).

8-17 Elements of offence

Under this section, the following must be shown:

- there was possession of a thing (see 8-5–8-7 of this chapter regarding possession). However, note that s 129(1)(c) (referred to in 8-8) applies only to 'dangerous drugs' and not 'things', and, therefore, does not apply to charges under this section
- the possession was unlawful (defined in s 4(1) as 'without authorisation, justification or excuse by law')
- the thing was in possession for use (i.e. intended use) or had actually been used in connection with one of the purposes set out in s 10(2)(a) (see 8-16).

8-18 Offences involving possession of hypodermic syringes

Under s 10(3), '[a] person (other than a medical practitioner, pharmacist or person or member of a class of persons authorised to do so by the Minister…[for Health on recommendation of the Director-General of Health and Medical Services]) who supplies a hypodermic syringe or needle to another, whether or not such other person is in Queensland, for use in connection with the administration of a dangerous drug commits an offence'.

Under s 10(4), '[a] person who has in his or her possession a thing being a hypodermic syringe or needle who fails to use all reasonable care and take all reasonable precautions in respect of such thing so as to avoid danger to the life, safety or health of another commits an offence'. The maximum penalty is two years' imprisonment.

Under 10(4A), '[a] person who has in his or her possession a hypodermic syringe or needle that has been used in connection with the administration of a dangerous drug who fails to dispose of such hypodermic syringe or needle in accordance with the procedures prescribed by regulation commits an offence'. The maximum penalty is two years' imprisonment.

These offences with respect to hypodermic syringes may be dealt with summarily.

8-19 Possessing suspected property

Section 10A(1) of the Drugs Misuse Act states that '[a] person who has in his or her possession any property (other than a dangerous drug, hypodermic syringe or needle) reasonably suspected of—

(a) having been acquired for the purpose of committing an offence defined in this part; or
(b) having been used in connection with the commission of such an offence; or
(c) having been furnished or intended to be furnished for the purpose of committing such an offence; or
(d) being the proceeds of such an offence; or
(e) having been acquired with the proceeds of such an offence; or
(f) being property into which the proceeds of such an offence have, in some other manner, been converted;

who does not give an account satisfactory to the court of how the person lawfully came by or had such property in the person's possession commits an offence against this Act.

Maximum penalty—2 years imprisonment'.

8-20 Reasonable suspicion

'Reasonable suspicion' is the suspicion of a reasonable person but something short of proof (*Gough v Braden* [1993] 1 Qd R 100). The onus is first on the Crown to establish reasonable suspicion beyond reasonable doubt; however, the onus then shifts to the defendant to satisfactorily explain how they lawfully obtained this property.

The suspicion must be reasonably held when the defendant is found in possession of the property and not at some later time (*Christie v Strohfeldt* (Unreported, Queensland District Court, CM No 5 of 2001, Britton J, 5 October 2000)).

E. Producing dangerous drugs

8-21 Producing dangerous drugs

'A person who unlawfully produces a dangerous drug is guilty of a crime' (s 8).

8-22 Publishing or possessing instructions for producing dangerous drugs

Publishing or possessing instructions for producing dangerous drugs is a crime under s 8A. The maximum penalty is 25 years' imprisonment if the dangerous drug is specified in Schedule 1 of the Drugs Misuse Regulation and 20 year' imprisonment if the dangerous drug is specified in Schedule 2.

Under this section, 'document' includes anything designed to enable electronic access specifically to the instructions (e.g. 'a document containing a computer password specifically designed to give access through a computer').

Also under this section, 'publish' includes 'publish to any person and supply, exhibit and display to any person, whether the publication is made orally or in written, electronic or another form'.

8-23 General comment

Section 8 targets all the acts involved in producing a dangerous drug, which, in the framework of this Act, includes cultivating cannabis among other things.

8-24 Definitions

Produce

Section 4 defines 'produce' as:

'(a) prepare, manufacture, cultivate, package or produce;

(b) offering to do any act specified in paragraph (a);

(c) doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a).

Unlawfully

Section 4 defines 'unlawfully' as 'without authorisation, justification or excuse by law'.

Prepare

The *Macquarie Dictionary* defines 'prepare' as 'to make ready, or put in due condition, for something' and 'to manufacture, compound or compose'. In *Calabria v R* (1983) 151 CLR 670; [1983] HCA 33, 675, it was held that 'a person who dries out Indian Hemp in order to make it fit for use "prepares" it'. In *R v Ibrahimof* [1980] ACL 799 (a Victorian County Court decision), it was held that 'a person who prepares buddha sticks for smoking is guilty of an offence. It does not matter that the substance of the drug is not altered, only the form'.

Manufacture

The *Macquarie Dictionary* defines 'manufacture' as 'the making of goods or wares by manual labour or by machinery, especially on a large scale'. In *Federal Commissioner of Taxation v Jack Zinader Pty Ltd* (1949) 78 CLR 336, 351, it was stated that '... to work up...material into a new form suitable for use...is manufacture within the ordinary meaning of the word'. This case also approved the statement in *McNicol v Pinch* [1906] 2 KB 352, 361 that 'the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made'.

Cultivate

This concept has received much attention from the courts in recent years. When you take instructions, you must ask about the number of seeds and plants, and the height of the plants. Under this Act, if either the plants' aggregate weight is equal to or more than 500 grams, or the aggregate weight is less than 500 grams but the number of plants is more than 100, the matter cannot be dealt with summarily and must proceed by way of indictment.

To prove cultivation, the defendant must have taken some positive act, such as watering the plants (*R v O'Dempsey* [1982] Qd R 174). Such positive acts constitute cultivation even if the plants were planted by another person (*R v Kirkwood* [1982] Qd R 158).

Cultivation has been interpreted widely, covering acts from 'the first step that might be taken to grow a plant from the seed itself, including the growing of the seed' (*R v Shattock* [1980] 2 NZLR 486) up to harvesting (*R v Stratford and McDonald* [1985] 1 Qd R 361) and the ancillary activities associated with harvesting, such as drying and stacking (*R v Giorgi and Romeo* (1982) 31 SASR 299, 303).

Package

The *Macquarie Dictionary* defines 'package' as 'a bundle or parcel'.

Produce

The *Macquarie Dictionary* defines 'produce' as 'bring into existence; give rise to; cause: *to produce steam*', 'to bring into being by mental or physical labour, as a work of literature or art'.

The word 'produce' is not itself defined in the Act. It seems to overlap with some of the concepts previously referred to, such as 'prepare' and 'manufacture'.

Sentencing for production can vary greatly. Some factors influencing sentence range (in addition to the usual, i.e. age, early plea, admissions and previous convictions) are:

- whether the production was for commercial gain or personal use
- the sophistication of the lab/project
- the period the defendant was engaged in the activity
- the quantity (and purity if applicable) of dangerous drug located.

Non-custodial sentences (including where no conviction is recorded) have been considered appropriate.

8-25 Possession of instructions for producing dangerous drugs

It is a crime to publish or possess a document containing instructions about how to produce a dangerous drug. As yet, this provision has had little judicial consideration. Arguably, to fall within the provision, the 'instructions' must enable a person to produce a dangerous drug if followed—a point that, as yet, seems to have not been argued.

8-26 Supplying or producing relevant substances or things for use in connection with producing dangerous drugs

A person who unlawfully supplies (s 9B) or produces (s 9C) a relevant substance or thing, as defined under s 9A(2), for use in connection with committing a crime under s 8 ('Producing dangerous drugs') commits a crime. See 8-12 for examples of relevant substances or things. Section 9B further indicates that the supply must be to another person, whether or not that person is in Queensland. The maximum penalty is 15 years' imprisonment.

F. Supplying dangerous drugs

8-27 Unlawful supply

Under s 6, '[a] person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime'.

8-28 Supplying dangerous drugs

Under this section, an offence of supplying dangerous drugs can be dealt with summarily (and then only at the prosecutor's election (ss 13(1) and 118)) only if the dangerous drug is specified in Schedule 2 and there are no allegations of aggravated supply.

The offence is one of aggravated supply if the offender is an adult and the person being supplied to is a minor, an intellectually handicapped citizen, within an educational institution or within a correctional institution, or they do not know they are being supplied with the thing (s 6(1) and (2)).

8-29 Definitions

Supply

Under s 4, 'supply' means:

'(i) give, distribute, sell, administer, transport or supply; or

(ii) offering to do any act specified in subparagraph (i); or

(iii) doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in subparagraph (1)'.

This definition is wide-ranging and examined further in 8-30 below.

Unlawfully

Section 4 defines 'unlawfully' as 'without authorisation, justification or excuse by law'.

Give

The meaning of the word 'give, which was used in s 130(2)(c) of the Health Act (now repealed) in a section very similar to s 6 of this Act, was dealt with in *R v Cameron* (Unreported, Queensland Court of Criminal Appeal, CA 108 of 1975, Dunn, Wanstall and Matthews JJ, 11 December 1975).

The court discussed the two possible definitions taken from the *Shorter Oxford English Dictionary*. The narrow meaning was 'to bestow gratuitously, to hand over as a present' and the wider meaning was 'to deliver, hand over'. The court held that the prohibition against 'giving' drugs covered deliveries, including (as in this case) a delivery to the owner of the goods.

Distribute

The *Macquarie Dictionary* defines 'distribute' as 'to divide and bestow in shares; deal out; allot'.

Sell

The ordinary law of contract seems to govern the meaning of the word 'sell' (though note that the definition of 'supply' under s 4(1) includes offering, doing or offering to do any act preparatory to, in furtherance of, or for the purpose of the particular act specified in paragraph (a) of the definition (see 8-31).

To constitute a sale, there must be an offer (as opposed to an invitation to treat) and an acceptance of that offer (*Fisher v Bell* [1961] 1 QB 394). The fact that possession of an item is illegal does not mean there is insufficient 'ownership' in the property to prevent it being 'sold' (*R v Waterhouse* (1911) 11 SR (NSW) 217).

Because of the extended definition of 'supply' in s 4, it is still an offence to offer to sell a substance that the person offering believes to be a dangerous drug but which, upon analysis, turns out not to be so. It would be enough that the person offering the goods for sale believed at the time that those goods were a dangerous drug (*Gauci v Driscoll* [1985] VR 428, 432; *R v Shivpuri* [1985] QB 1029).

Administer

The *Macquarie Dictionary* defines 'administer' as 'to manage (affairs, a government, etc.); have charge of the execution of: *to administer laws*'.

Transport

The *Macquarie Dictionary* defines 'transport' as 'to carry or convey from one place to another'. Arguably, such transportation would have to be in the context of the supply of drugs from one person to another (but see *R v Maroney* [2002] 1 Qd R 285; [2000] QCA 310). It was held by the majority that a person may be convicted of supplying drugs to themselves if they are a party to that supply. An appeal to the High Court was dismissed by the majority (*Maroney v R* (2003) 216 CLR 31; [2003] HCA 63; BC200306679).

8-30 Supply

While s 4 of the Act does define the word 'supply' (see definition above), that definition contains the word 'supply', which is not itself further defined. In *Commonwealth v Sterling Nicholas Duty Free* (1972) 126 CLR 297, 309, it was stated that 'the supply of goods does not necessitate a change in ownership of the goods supplied. In many cases the word "supply" is equivalent to "provide". A supplier...may be one who delivers'.

The word 'supply' was defined in *Andaloro v Wyong Cooperative Dairy Society Limited* (1965) 66 SR (NSW) 466, 479 as 'the furnishing or providing of [a] commodity by one person who has it to or for another person who requires it'. Therefore, a medical practitioner who systematically wrote prescriptions for drugs of addiction knowing that people

would present them to chemists to procure those drugs was held to have 'supplied' within the definition in the *Poisons and Therapeutic Goods Act 1966* (NSW) (*R v Coles* [1984] 1 NSWLR 726).

A person who offers to supply drugs with no intention of fulfilling the offer still 'supplies' within the definition in s 4, though it would not constitute an offence if it could be shown that the offer was not a 'genuine offer' (*R v Roberts* (Unreported, Queensland Court of Criminal Appeal, CA 353 of 1987, Kelly SPJ, Macrossan and Derrington JJ, 23 February 1988)).

G. Other offences

8-31 Possession of property from drug offence

'(1) A person who receives or possesses property, other than a dangerous drug, (offence property) obtained, directly or indirectly, from the commission of—

(a) an offence defined in section 5 or 6; or

(b) an act done at a place not in Queensland which if it had been done in Queensland would have constituted an offence defined in section 5 or, as the case may be, 6, and which is an offence under the laws in force in the place where it was done;

knowing or believing the property to have been so obtained, is guilty of a crime' (s 7(1)).

Section 7(2) states further that, in certain circumstances, where property obtained through committing s 5 or 6 offences (trafficking or supply) has been 'mortgaged, pledged or exchanged for other property' or 'converted into other property in any manner whatever', an offence is still committed. Concealing or disposing of any property referred to in s 7(1) or (2) is sufficient to establish 'receiving' that property (s 7(3)).

8-32 General comment

The effect of s 13(2) is that the offence of receiving money or property from the supply of any Schedule 2 drug can be dealt with summarily at the prosecutor's election if the person did not receive the money or property with the circumstances of aggravation. A further consequence of s 13(2) is that bail is available on charges under s 7 in the magistrates court if the prosecutor elects summary jurisdiction.

H. Occupier/manager permitting place to be used for commission of drug offences

8-33 Permitting use of place

Under s 11, '[a] person who, being the occupier or concerned in the management or control of a place, permits the place to be used for the commission of a crime defined in this part is guilty of a crime'.

8-34 Definition of place

Section 4 states that 'place' includes a vehicle.

8-35 Permit

The precursor to this provision in s 130(2)(e) of the Health Act (now repealed) stated that a person should not 'permit or suffer use of premises for smoking of a dangerous drug'. It has been held that the use of those two words showed there was some degree of difference—with 'suffer' being less positive than 'permit'.

The court held that 'suffer' was to be interpreted as passively or implicitly allowing the act to take place, as distinct from actively or expressly allowing it (*R v Sanewski* [1987] 1 Qd R 374). Section 11 of the Drugs Misuse Act deletes the word 'suffer', which could mean that, arguably, some degree of active involvement or approval is required to be convicted under the new Act (*R v Sanewski, supra*).

8-36 Occupier—person concerned in management/control

Courts in several jurisdictions have considered the question of whether a person is the occupier and/or concerned in management or control. In *R v Mogford* [1970] 1 WLR 988, it was held that the daughters of the house owner, left at home while their parents were on holiday, were not house occupiers in terms of the English drug legislation at that time (see 8-8).

In *R v Tao* [1977] QB 141, the defendant was a student at Cambridge who lived in a hostel room allocated by the college. When a person was found in the room in possession of cannabis, Mr Tao was charged with permitting the premises to be used for smoking cannabis. On appeal, it was held that 'the expression "occupier" cannot be limited to a person who had legal possession of the premises but included anyone who had a licence which entitled him to exclusive possession i.e. anyone who had the requisite degree of control over the premises to exclude from them those who might otherwise use them for a purpose forbidden by [the Misuse of Drugs Act]'.

In *R v Sweeney* [1982] 2 NZLR 229 (under a section of the *Misuse of Drugs Act* (NZ), similar to this Act), it was held that the prosecution had to show only that the defendant had control, or a share of control, over the premises and deliberately did not take action that they knew they could have reasonably taken to prevent the unlawful use.

Proof of knowledge is required. Although suspicion is not knowledge, knowledge may be inferred from a defendant shutting their eyes to suspicious circumstances (*R v Thomas* (1976) 63 Cr App R 65). Under the *Misuse of Drugs Act* (UK), it was held that the words 'concerned in the management of any premises' are wide enough to cover squatters or trespassers running a card school in the basement of a local authority house (*R v Josephs* (1977) 65 Cr App R 253). That case held that, although the people charged had no legal authority to be on the premises, they were exercising control over the premises and unlawful possession was irrelevant.

A person may be an 'occupier' even if they do not pay rent; are physically absent from the premises; and are one of a number of occupiers (*R v Fox* [1986] 2 Qd R 402 and *R v Brauer* [1990] 1 Qd R 332).

I. Certificates and forfeiture

8-37 Certificates

'(1) In any proceedings for an offence defined in this Act the production of a certificate purporting to be signed by an analyst with respect to an analysis or examination made by the analyst shall, without proof of the analyst's signature or that the analyst is an analyst, be evidence of any of the following stated in the certificate—

(a) the identity of the thing analysed or examined;

(b) the quantity of the thing;

(c) the result of the analysis or examination and of the matters relevant to the proceedings;

and, in the absence of evidence to the contrary, shall be conclusive such evidence' (s 128(1)).

8-38 Necessity for certificate

When a charge is made under this Act, the prosecution will normally need to obtain a certificate of analysis that both shows that the presumptive police test, indicating a dangerous drug or relevant substance, is correct and determines the precise weight (and purity of the drug if applicable).

However, the prosecution will not need to produce that certificate if the defendant can show the court that they have enough knowledge of and familiarity with the particular drug to identify it and make sufficiently persuasive admissions (*R v Dillon* [1983] 2 Qd R 627).

If a defendant wishes to enter a plea of guilty to a charge under the Act without a certificate, you should be satisfied that the defendant has enough knowledge and familiarity to identify the drug in the absence of a certificate. When you enter the guilty plea, indicate to the magistrate that, on instructions, the certificate can be waived. If you intend to make submissions for a discharge without conviction on the basis that the defendant is not a regular user of the drug, you should obviously obtain a certificate.

However, if a dangerous drug is alleged and the weight of such drug is just above the amount as defined in Schedule 3 of the Drugs Misuse Act, you should obtain a certificate to determine whether the charge is one that can be dealt with summarily.

8-39 Forfeiture/restraining orders

'(1) Property (other than a dangerous drug) is liable for forfeiture…if the property is—

(a) acquired for the purpose of committing an offence defined in Part 2; or

(b) used in connection with the commission of such an offence; or

(c) furnished or intended to be furnished for the purpose of committing such an offence; or

(d) the proceeds of such an offence; or

(e) acquired with the proceeds of such an offence; or

(f) property into which the proceeds of such an offence have, in some other manner, been converted' (s 33(1)).

Part 5 (ss 30–43) of the Act contains extensive provisions covering forfeiture of property involved in the committing of an offence as set out above. However, Carter J in *R v Ward, Marles & Graham* [1989] 1 Qd R 194 clearly stated that 'the mere fact that it is said that property is used in connection with the commission of a Part II offence does not necessarily mean that a forfeiture order should be made in respect of it' (p 4). Carter J noted that the court's powers were discretionary and, because of the penal nature of forfeiture orders, those powers should not be required to be exercised 'however tenuous the connection might be between the property and the offence' (p 6).

If the court is advised, upon application, that property may be liable to forfeiture, it can make a restraining order (s 41), which passes management of the property to a named manager (s 41(3)) who can deal with the property as if they were the absolute owner (s 41(4)).

Courts should make restraining orders only in exceptional circumstances and not as a matter of course. The prosecution would need to show that 'unless the restraining order is made, the exercise of the power of forfeiture might be later defeated or made nugatory' (see *Re an application pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd R 506).

It is possible to apply for the court to vary, revoke or discharge a restraining order (s 43) for any reason sufficient to the court (i.e. a court of like jurisdiction to the court that made the original order) (s 43(2)).