

Criminal Law Duty Lawyer Handbook

6TH EDITION 2014

Criminal Law Duty Lawyer Handbook

Published by Legal Aid Queensland

1st edition 1987 Updated in 1988

2nd edition 1993 Updated in 1995

3rd edition 1998 Updated in 2001

4th edition 2004

5th edition 2012 Updated in April 2014 (Chapter 2—Bail)

6th edition 2014 Updated in August & December 2014 (Chapter 11—Youth Justice)

The contents of this volume are copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the *Copyright Act 1968* (Cth), no part may be reproduced by any process without the authors' written permission. Direct all inquiries to Legal Aid Queensland.

While Legal Aid Queensland has taken the utmost care in preparing this volume, it accepts no responsibility whatsoever for any errors, omissions or inaccuracies.

This volume is not intended for, nor is it suitable for, use by members of the public.

Published by Legal Aid Queensland, Brisbane.

© Legal Aid Queensland 1987–2014

National Library of Australia
card numbers and ISBN

ISBN 978-0-646-58200-9
(Legal Aid Queensland)

Foreword

Legal Aid Queensland is responsible for updating and distributing the *Criminal Law Duty Lawyer Handbook*, and for duty lawyer accreditation throughout Queensland.

This is the fifth edition of the handbook. As such, I acknowledge the Legal Aid Queensland officers who researched and revised the text to provide an up-to-date and concise publication.

We have produced the handbook in ebook and online formats to improve access and updates to content.

I also acknowledge the Communication and Community Legal Education team, who project managed, designed and formatted the handbook and Kylee Bristow of Lexi Corporate Publishing, who edited it.

Since the Criminal Law Duty Lawyer Program was introduced in Queensland in 1974, practitioners appearing in the magistrates or childrens court have seen the various complex and difficult issues that confront the duty lawyer.

The *Criminal Law Duty Lawyer Handbook* is a succinct theoretical and practical guide for these practitioners, particularly those less experienced in this jurisdiction. It highlights most of the issues they are likely to encounter. However, it does not attempt to resolve all these issues or solve all the problems that a duty lawyer will encounter.

Legal Aid Queensland believes that the handbook helps ensure the Criminal Law Duty Lawyer Program's successful operation. All duty lawyers should thoroughly familiarise themselves with the topics and procedures outlined in the handbook. This will not only assist duty lawyers, but maintain the high standard that the Criminal Law Duty Lawyer Program has achieved throughout Queensland.



Anthony Reilly
Chief executive officer
Legal Aid Queensland

Preface

The production of this fifth edition of the *Criminal Law Duty Lawyer Handbook* was necessary due to substantial legislative changes and case law developments.

Legal Aid Queensland commissioned Legal Aid Queensland's in-house counsel and lawyers to revise the text.

Several Legal Aid Queensland staff contributed to the text, including Kylie Bell, Joseph Briggs, Nadia Bromley, Darin Clearwater, Amber Crowley, Claudia Davies, John Dean, Tracey de Simone, Peter Delibaltas, Mark Dixon, Sue Ganasan, Len Handley, Nicholas Hanly, David Law, Jakub Lodziak, Craig May, Justin O'May, Howard Posner, Laura Reece, Laura Rouse, Leigh Smith, Rachel Smith, Susan Stockwell, David Thompson, Kate Volk, Robyn Wilkinson and Penny Williams.

Their efforts have ensured that the *Criminal Law Duty Lawyer Handbook* will remain an essential tool for duty lawyers.

Unless otherwise stated, this edition reflects the law as it applied at December 2012.

Legal Aid Queensland is responsible for Queensland criminal law duty lawyer accreditation. Please direct all queries about the *Criminal Law Duty Lawyer Handbook* and the accreditation process to Legal Aid Queensland.

Priorities

Legal Aid Queensland has determined the following priorities regarding the provision of duty lawyer services.

No person charged with a criminal or serious simple offence should, through ignorance, lack of financial resources or other disadvantage, be denied legal advice and representation before the court at either the initial appearance or a subsequent remand.

Within its financial constraints, one of Legal Aid Queensland's long-term priorities is to provide a free duty lawyer service to all defendants appearing unrepresented before magistrates courts and childrens courts in Queensland.

Legal Aid Queensland will establish duty lawyer schemes, using the services of salaried lawyers of Legal Aid Queensland and private practitioners, to provide legal advice and legal representation on pleas of guilty or applications for remand and bail.

Legal Aid Queensland

Contents

Foreword.....	3
Preface.....	4
Priorities.....	4
Chapter 1—Introduction.....	19
A. Purpose of handbook.....	19
1-1 Handbook as a guide.....	19
B. History and aims of Criminal Law Duty Lawyer Program.....	19
1-2 History.....	19
1-3 Aims.....	19
C. Duty lawyer guidelines.....	19
1-4 Duty lawyer guidelines.....	19
D. Practical requirements of Criminal Law Duty Lawyer Program.....	20
1-5 Criminal law duty lawyer form.....	20
1-6 Duty lawyer session report form.....	21
E. Responsibilities of duty lawyers.....	21
1-7 Duty as if to private client.....	21
1-8 No obligation to appear.....	21
1-9 Appearing as a ‘friend of the court’.....	21
1-10 Primary duty to defendants.....	21
1-11 Consciousness of time.....	22
F. Practical hints for duty lawyers.....	22
1-12 Practical hints only.....	22
1-13 Be early.....	22
1-14 Speak to the police prosecutor or court staff.....	22
1-15 Try to plan time.....	22
1-16 Taking instructions—working out the issue.....	23
1-17 Do not rush.....	23
1-18 Obtain further information from prosecutor if necessary.....	23
1-19 Deal only with the prosecutor.....	23
1-20 Organise appearances.....	23
1-21 Follow-up advice.....	24
1-22 Remands for further advice.....	24
G. Referrals from duty lawyers.....	24
1-23 Referring defendants for further legal advice or assistance where necessary.....	24
1-24 Prisoners.....	24
1-25 Criminal charges against Aboriginal and Torres Strait Islander people in all jurisdictions.....	24
1-26 Legal advice and assistance.....	24
Chapter 2—Bail.....	26
A. Basic principles.....	26
2-1 Principles contained in the <i>Bail Act 1980</i> (Qld).....	26
2-2 When the court will refuse bail.....	26
2-3 Where a magistrates court cannot grant bail.....	26
2-4 Supreme Court bail.....	26

B. Grants of bail—general.	27
2-5 Power of a police officer to grant bail	27
2-6 Power of magistrates court to grant bail	27
2-7 Consideration of options by court or police officer	27
2-8 Special conditions.	27
2-9 Restriction on publication	28
2-10 Cash bail	28
2-11 Effect of <i>Penalties and Sentences Act 1992</i> (Qld)	28
2-12 Release of a person with an impairment of the mind.	28
C. Procedures on bail applications	29
2-13 Procedures.	29
2-14 Facts in dispute	29
2-15 Remand in custody	29
2-16 Assessing unacceptable risk	29
2-17 Onus on defendant to ‘show cause’	30
2-18 Further applications for bail.	31
2-19 Undertakings as to bail	31
2-20 Sureties	31
D. Breaches of the Bail Act, including failure to appear.	31
2-21 Failure to appear	31
2-22 Surrender by the defendant into custody after failing to appear	32
2-23 Breaches of the Bail Act	32
2-24 Arrest on warrant for failure to appear or breach of bail condition.	32
2-25 Failure to appear in the Supreme or district court	33
2-26 Penalty for breach.	33
2-27 Bail granted for the substantive offence.	33
E. Conduct of bail applications.	33
2-28 Defendant in custody	33
2-29 Instructions	33
2-30 Confirm information with prosecutor	34
2-31 Ascertaining whether onus of proof is on defendant.	34
2-32 Where bail is opposed and defendant is not in a show cause situation	34
2-33 Duties of the court.	34
2-34 Order of address	35
2-35 Special conditions.	35
2-36 Being as concise as possible	35
2-37 Relevant submissions.	35
2-38 Caution when making admissions.	36
2-39 Previous convictions.	36
2-40 Where the defendant is legally represented.	37
2-41 Applying to the Supreme Court if bail is refused	37
F. Appeal of bail	37
2-42 Appeal of bail	37
Chapter 3—Magistrates courts and the <i>Justices Act 1886</i> (Qld)	39
A. Overview	39
3-1 Justices Act	39
3-2 Justices Regulation	39
3-3 Relevant parts for duty lawyers	39
B. General procedures.	40
3-4 General procedures.	40

C. Proceedings in case of indictable offences	41
3-5 Proceedings in case of indictable offences	41
D. Proceedings in case of simple offences and breaches of duty	41
3-6 Proceedings in case of simple offences and breaches of duty	41
3-7 Defendant to be asked to plead	42
3-8 Court can re-open proceedings	42
E. Appeals	42
3-9 Offences dealt with summarily	42
3-10 Bail	43
3-11 Duty lawyer obligations	43
Chapter 4—Indictable offences that can be dealt with summarily	45
A. Introduction	45
4-1 What is an indictable offence?	45
4-2 Who can elect summary jurisdiction?	45
4-3 Summary jurisdiction—time	45
B. The defendant’s election	45
4-4 Defendant’s election under the Criminal Code	45
4-5 Magistrate to advise as to right of election	45
4-6 Determining value where there are multiple charges	46
C. The prosecutor’s election	46
4-7 Prosecutor’s election under the Criminal Code	46
D. Matters for which there are no elections	46
4-8 Matters for which there are no elections	46
E. When Magistrates Court must abstain from jurisdiction	46
4-9 Adequate punishment	46
4-10 Defence application in exceptional circumstances	46
F. Appellate jurisdiction	47
4-11 Appellate jurisdiction	47
Chapter 5—Specific offences under the Criminal Code more commonly dealt with and defences	49
A. Assaults	49
5-1 Definition of assault	49
5-2 Assault is an offence	49
5-3 Common assault	49
5-4 Aggravated assault	50
5-5 Assault occasioning bodily harm	50
5-6 Serious assaults	50
5-7 Defences to assault	51
5-8 Provocation defined	51
5-9 Defence of provocation	51
5-10 Provocation is a defence only if assault is element of offence	51
5-11 Questions of fact for court	51
5-12 Self-defence against unprovoked assault	51
5-13 Self-defence against provoked assault	52
5-14 Aiding in self-defence	52
B. Sexual offences	52
5-15 Sexual offences that may be dealt with summarily	52
5-16 Offences where absence of consent is not an element	52

5-17	Offences where absence of consent is an element	52
5-18	Sexual offences that must proceed on indictment.	52
5-19	Mistaken belief about age of complainant	52
C.	Offences of dishonesty	53
5-20	Offences more commonly encountered.	53
5-21	Stealing defined	53
5-22	Things capable of being stolen	53
5-23	Intention.	53
5-24	Bona fide claim of right	54
5-25	Mistake of fact.	54
5-26	Abandoned property.	54
5-27	Receiving stolen property.	54
5-28	Mental element—receiving.	54
5-29	Breaking and entering offences.	54
5-30	Mental element	55
5-31	Breaking and entering defined.	55
5-32	Premises defined	55
5-33	Fraud	55
5-34	Passing valueless cheques	56
5-35	Computer hacking and misuse.	56
D.	Property damage	56
5-36	Wilful and unlawful damage.	56
5-37	‘Wilfully’ defined.	56
5-38	Unauthorised damage to property under Regulatory Offences Act	57
E.	Defences generally	57
5-39	Defences available under Chapter 5 of the Criminal Code.	57
Chapter 6—	Commonwealth offences	59
A.	Introduction	59
6-1	Overview	59
B.	Jurisdiction	60
6-2	Dealing with offences—summarily or on indictment	60
6-3	Time for commencing prosecutions.	60
6-4	Party offences	60
6-5	Defences	60
C.	Common offences index	61
6-6	Common offences a duty lawyer may encounter	61
6-7	Defences	63
D.	Sentencing	63
6-8	Introduction.	63
6-9	Taking other offences into account	64
6-10	Sentencing options	64
6-11	Fine option orders.	66
6-12	Reparation (restitution)	67
E.	Appeals	67
6-13	State law applying to appeals	67
Chapter 7—	Extradition, migration detention and deportation	69
A.	Extradition interstate	69
7-1	<i>Service and Execution of Process Act 1992</i> (Cth)	69

7-2	Apprehension under warrant	70
7-3	Procedure after apprehension	70
7-4	Additional provisions if person is under restraint	70
7-5	Review	71
B.	Extradition overseas	71
7-6	Summary	71
7-7	Legislation	71
7-8	Remand	72
7-9	Bail	72
7-10	Special provisions for extradition to New Zealand.	73
C.	Non-payment of interstate fines	73
7-11	Effect of amendment to Service and Execution of Process Act.	73
7-12	Effect of registration (s 114).	73
D.	Migration detention	74
7-13	Legislation	74
7-14	Bail	74
7-15	Legal representation.	74
Chapter 8—Drug offences.		76
A.	Introduction	76
8-1	<i>Drugs Misuse Act 1986</i> (Qld)	76
8-2	Dangerous drugs	76
8-3	Summary jurisdiction for drug offences	77
8-4	Bail for drug offences	78
B.	Possession of dangerous drugs.	78
8-5	Unlawfully in possession of dangerous drugs	78
8-6	Possession defined.	78
8-7	Actual possession.	78
8-8	Deemed possession	79
8-9	Possession of minute quantities	80
8-10	Possession—momentary control.	80
8-11	Possession—applicability of s 24 of the Criminal Code.	80
8-12	Possessing relevant substances or things	81
C.	Possession of things for use in connection with drug offences	81
8-13	Possession of things for use in connection with drug offences	81
8-14	General comments	81
8-15	Possession of a prohibited combination of items	82
D.	Possession of things for use in connection with administration/consumption/smoking dangerous drugs	82
8-16	Possession of things for use in connection with administration/consumption/smoking dangerous drugs	82
8-17	Elements of offence	82
8-18	Offences involving possession of hypodermic syringes	82
8-19	Possessing suspected property.	83
8-20	Reasonable suspicion.	83
E.	Producing dangerous drugs	83
8-21	Producing dangerous drugs	83
8-22	Publishing or possessing instructions for producing dangerous drugs.	83
8-23	General comment	83
8-24	Definitions	84
8-25	Possession of instructions for producing dangerous drugs	85

8-26	Supplying or producing relevant substances or things for use in connection with producing dangerous drugs	85
F.	Supplying dangerous drugs	85
8-27	Unlawful supply	85
8-28	Supplying dangerous drugs	85
8-29	Definitions	85
8-30	Supply	86
G.	Other offences	87
8-31	Possession of property from drug offence	87
8-32	General comment	87
H.	Occupier/manager permitting place to be used for commission of drug offences	87
8-33	Permitting use of place	87
8-34	Definition of place	87
8-35	Permit	87
8-36	Occupier—person concerned in management/control	88
I.	Certificates and forfeiture	88
8-37	Certificates	88
8-38	Necessity for certificate	88
8-39	Forfeiture/restraining orders	89
Chapter 9—	Motor vehicle offences	91
A.	Overview	91
9-1	Introduction	91
B.	Vehicle offences involving liquor or other drugs	91
9-2	Drink driving offences	91
9-3	Definitions	92
9-4	Defences	93
C.	Unlicensed, disqualified and suspended driving	93
9-5	Unlicensed driving where the defendant is not under disqualification	93
9-6	Disqualified driving	93
9-7	Driving while suspended	93
9-8	Driving with accumulated demerit points	93
9-9	Mandatory disqualification periods	94
D.	Dangerous operation of vehicle	94
9-10	Dangerous operation of vehicle	94
E.	Driving without due care and attention	94
9-11	Driving without due care and attention	94
F.	Restricted (provisional) licence	94
9-12	Who may apply for a provisional licence?	94
9-13	Who may not apply for a provisional licence?	94
9-14	What factors will satisfy the court?	95
9-15	How does a person apply for a restricted licence?	95
9-16	What evidence is required at the hearing?	95
G.	Removing absolute disqualification under section 131	95
9-17	Who may apply?	95
9-18	When can a person apply?	95
9-19	Where should they file?	95

Chapter 10—Miscellaneous	97
A. Regulatory Offences Act 1985 (Qld)	97
10-1 Regulatory offence	97
10-2 New offences created	97
10-3 Unauthorised dealing with shop goods	97
10-4 Exclusion of general criminal law defences	98
10-5 Effect of exclusion of general criminal law defences	98
10-6 Leaving restaurant, hotel etc. without payment	98
10-7 When a person will be charged under s 6	99
10-8 Defences	99
10-9 Unauthorised damage to property	99
10-10 Effect of this section	99
10-11 Further power to fine	99
10-12 Regulatory offences to be heard summarily	99
10-13 Effect of conviction for regulatory offence	99
10-14 Penalties	100
B. Weapons Act 1990 (Qld)	100
10-15 Criminal Law Duty Lawyer Handbook not a complete guide	100
10-16 Weapons Act	100
10-17 Offences	101
10-18 Criminal Code to be read and construed with the Weapons Act	104
10-19 Summary proceedings	104
10-20 Time for commencement of proceedings	104
10-21 Disqualification by a court	104
10-22 Schedule of weapons	104
C. Invasion of Privacy Act 1971 (Qld)	107
10-23 Introduction	107
10-24 Entering a dwelling house without consent	108
10-25 Entering a dwelling house by force or other means	108
10-26 Defences	108
10-27 A person without lawful excuse in a dwelling house or yard	108
10-28 Definitions	108
10-29 Method of proceeding under this Act	108
10-30 Invasion of Privacy Act provisions in addition to the Criminal Code	109
D. Summary Offences Act 2005 (Qld)	109
10-31 Summary offences duty lawyers will likely face	109
10-32 Penalties	109
10-33 Possession of implement	110
E. Police Powers and Responsibilities Act 2000 (Qld)	112
10-34 Purposes of the Police Powers and Responsibilities Act	112
10-35 Summary of police powers under the PPRA	113
F. Breach of probation/community service	118
10-36 Specific offences	118
10-37 Institution of proceedings	118
10-38 Appropriate court to deal with breach	118
10-39 Procedure on issue of warrant	118
10-40 Penalty for breach of community-based orders	118
10-41 Consulting with prosecuting corrections officer	119
10-42 Taking full instructions on the breach and original offence	119
10-43 Legal assistance for breaches of probation/community service	119

G. Corrective Services Act 2006 (Qld)	119
10-44 Introduction	119
10-45 Unlawful assembly, riot and mutiny	119
10-46 Summary jurisdiction	120
H. Disclosure of criminal convictions—<i>Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)</i>	123
10-47 Introduction	123
10-48 Application of the Act	123
10-49 Non-disclosure of convictions once rehabilitation period expires	123
10-50 Lawful to deny certain convictions	123
10-51 Exception to the non-disclosure provisions for certain professions or occupations	123
I. Restrictions on publication and attendance at court	124
10-52 Publication of names	124
10-53 Bail applications	124
10-54 General provisions	124
10-55 Sexual offences— <i>Criminal Law (Sexual Offences) Act 1978 (Qld)</i>	124
10-56 Childrens court proceedings	124
J. Domestic violence orders	125
10-57 What is domestic violence and when can a court make an order?	125
10-58 Relevant relationships	125
10-59 Court may include name of relative or associate	126
10-60 Protection orders to include standard conditions	126
10-61 Court may make a temporary protection order	126
10-62 Court may make domestic violence order	126
10-63 Weapons Act	126
10-64 Registration of interstate order	127
10-65 Police protection notice	127
10-66 Closed court	127
10-67 Prohibition on publication of certain information	127
10-68 Police investigatory function	128
10-69 When police officer may apply for temporary protection order	128
10-70 Power to take a person into custody	128
10-71 Breaching an order	128
10-72 Plea of not guilty	129
10-73 Plea of guilty	129
10-74 Summary prosecution	129
10-75 Arrest of certain offenders	129
K. Prostitution	130
10-76 Introduction	130
10-77 Summary proceedings	130
10-78 Definitions under the Criminal Code	130
10-79 Offences under the Criminal Code	130
10-80 Prostitution Act offences	132
10-81 Advertising prostitution	134
L. Casino offences—<i>Casino Control Act 1982 (Qld)</i>	134
10-82 Excluded people	134
10-83 Cheating	135
10-84 Proceedings for offences	135
Chapter 11—Youth justice	137
A. Introduction to youth justice in Queensland	137
11-1 The principles of the <i>Childrens Court Act 1992 (Qld)</i> and the Youth Justice Act	137

11-2	Principles of youth justice	138
11-3	The childrens court	139
11-4	Youth Justice Act to apply to children in all courts	140
11-5	Who may be present at court?	140
11-6	Who is a child?	141
11-7	Publication of identifying material	142
11-8	Dealing with children	143
11-9	Dealing with Aboriginal children	144
11-10	Criminal responsibility—doli incapax	144
B. Prior to commencing proceedings		145
11-11	Police questioning	145
11-12	Identifying particulars when child is not arrested	145
11-13	Admissibility of statements or identifying particulars	146
11-14	The support person	146
11-15	Diversions—pre-court proceedings and as a sentence option	147
11-16	Taking no action	147
11-17	Cautioning	147
11-18	Administering cautions	148
11-19	Applications to dismiss a charge where a caution should have been administered	148
11-20	Youth justice conferences	148
11-21	Drug diversion	149
C. Starting a proceeding		149
11-22	Starting a proceeding	149
11-23	Notice to appear	149
11-24	Complaint and summons	150
11-25	Simple offences	150
11-26	Arrest	150
D. Bail		151
11-27	Arrested child	151
11-28	Court bail	152
11-29	‘Show cause’	152
11-30	Breach of bail	152
11-31	Bail programs	152
11-32	Bail applications to the Childrens Court of Queensland and Supreme Court	153
11-33	Remand in custody	153
E. After proceedings have commenced		153
11-34	Right of election—which court?	153
11-35	Mental Health Act 2000 (Qld)	156
11-36	Pre-sentence reports	157
F. Sentencing		158
11-37	Sentencing scheme	158
11-38	Sentence orders	159
11-39	Reprimand (s 175(1)(a))	159
11-40	Good behaviour order (ss 175(1)(b), 188, 189)	159
11-41	Fines (ss 175(1)(c), 190–192)	159
11-42	Probation (ss 175(1)(d), 193–194)	160
11-43	Graffiti removal orders (ss 176A and 194A–194L)	161
11-44	Community service orders (ss 175(1)(e), 195–202)	161
11-45	Intensive supervision orders (s 175(1)(f) and division 9, ss 203–206)	162
11-46	Conditional release orders (s 175(3), s 221)	163

11-47	Boot camp orders (ss 175(3)(b) and 226A–226D)	163
11-48	Mandatory Boot camp orders (ss 175(3)(b), 206A and 206B)	164
11-49	Detention (s 175(1)(g), s 176)	164
11-50	Remand time to be treated as detention on sentence	164
11-51	Combination of orders	165
11-52	Restitution and compensation	165
11-53	Recording convictions	165
11-54	Criminal history	166
11-55	Variation and contraventions of orders	166
11-56	Breach of a good behaviour order	166
11-57	Commencing proceedings for breach of community-based orders	167
11-58	General options available to magistrate on the breach application	167
11-59	Breach by re-offending	167
11-60	A court's power to act on breaches of probation, community service and intensive supervision order	167
11-61	A court's power to act on breach of conditional release order and supervised release orders	168
G.	Variation of community-based orders	169
11-62	Variation in the interests of justice	169
11-63	Variation by consent	169
H.	Miscellaneous court powers	169
11-64	Delegation of sentencing power	169
11-65	Reference of case to a childrens court judge for sentence	170
11-66	Correction of errors—childrens court magistrate	170
11-67	Court may order identifying particulars taken in addition to sentence	170
11-68	Orders under the <i>Transport Operations (Road Use Management) Act 1995</i> (Qld)	171
11-69	Orders against parents	171
11-70	Transfers from detention centre to prison	171
I.	Appeals and sentence reviews	171
11-71	Appeals	171
J.	The Department of Justice and Attorney-General (Youth Justice Services)	172
11-72	Responsibility of the Department of Justice and Attorney-General (Youth Justice Services)	172
11-73	Role of the Department of Justice and Attorney-General (Youth Justice Services) at court	172
11-74	The departmental officer at court as prosecutor	173
11-75	Bail programs	173
11-76	Other programs available	174
K.	Legal aid	174
11-77	Legal aid for children	174
	Appendix A—Table of court sentence options	175
Chapter 12—Conduct of pleas of guilty		177
A.	No diminished duty	177
12-1	No diminished duty	177
B.	Familiarity with legislation	177
12-2	Familiarity with legislation	177
C.	Deciding whether an offence can be dealt with summarily	178
12-3	Deciding whether an offence can be dealt with summarily	178
D.	Explaining court procedures	178
12-4	Explaining court procedures	178
E.	Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time	...

178		
12-5	Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time	178
F. Fines—time to pay		179
12-6	Fines—time to pay.	179
12-7	Offender levies imposed under s 179C.	180
G. Multiple charges—defended and undefended		180
12-8	Multiple charges—defended and undefended	180
H. Appearing for co-accused.		180
12-9	Appearing for co-accused.	180
I. Ensuring instructions fit the charge		180
12-10	Ensuring instructions fit the charge	180
12-11	Changing plea from not guilty to guilty	181
J. Previous convictions		181
12-12	Previous convictions.	181
K. No duty to disclose previous convictions		181
12-13	No duty to disclose previous convictions	181
L. When adjournment may be advisable		181
12-14	When adjournment may be advisable	181
M. Explaining effect of conviction		182
12-15	Explaining effect of conviction.	182
12-16	Effects of conviction on applicants and employees.	182
N. Explaining options for court on sentencing		182
12-17	Explaining options for court on sentencing	182
12-18	Restitution	182
O. Obtaining full instructions.		183
12-19	Obtaining full instructions	183
P. Facts on sentence		183
12-20	Facts on sentence	183
Q. Penalties and Sentences Act sentencing guidelines.		183
12-21	Penalties and Sentences Act sentencing guidelines	183
R. Being as concise as possible		183
12-22	Being as concise as possible	183
S. Suggesting available options		183
12-23	Suggesting available options.	183
12-24	Drivers licence disqualification as additional punishment.	184
T. Procedures after court.		184
12-25	Procedures after court	184
Chapter 13—Sentencing options		186
A. Sentencing options and relevant legislation		186
13-1	Overview	186
B. Discharge		187
13-2	Where a court may discharge	187
C. Orders under s 190 of the Penalties and Sentences Act		187
13-3	Section 190 orders	187

D. Good behaviour bonds, including drug diversion	187
13-4 Types of bonds	187
13-5 Bonds under s 19	187
13-6 Bonds for property-related offences	188
13-7 Bonds under ss 30, 31 and 32	188
E. Fines	189
13-8 How fines can be imposed	189
13-9 Amount of fine	189
13-10 Time to pay	189
13-11 Default of payment	189
F. Fine option orders	190
13-12 When a court may make a fine option order	190
G. Community service orders	191
13-13 When a court may make a community service order	191
H. Probation	192
13-14 When a court may order probation	192
13-15 Programs on probation	193
13-16 Offices	193
I. Intensive correction orders	194
13-17 When a court may impose an intensive correction order	194
J. Imprisonment	195
13-18 When a court may order imprisonment	195
13-19 Concurrent versus cumulative sentences	195
13-20 Wholly or partially suspended sentences	195
13-21 Pre-sentence custody	196
13-22 Parole	196
K. Other orders	199
13-23 Restitution and compensation	199
13-24 Non-contact orders	199
13-25 Banning orders under Part 3B of the Penalties and Sentences Act	199
L. Drug Court	200
13-26 Eligibility and referral	200
Appendix A	
Sentencing principles—Penalties and Sentences Act	201
Chapter 14—Mental health and capacity	208
A. Introduction	208
14-1 Situations facing lawyers	208
14-2 What is a mental illness?	208
14-3 What is an intellectual disability?	208
14-4 What is a cognitive impairment?	209
B. Obtaining instructions	209
14-5 Advice on obtaining instructions	209
14-6 Considerations when assessing defendants’ capacity to provide instructions	209
14-7 Applying the <i>Presser</i> test	210
14-8 Defence of unsoundness of mind, partial defence of diminished responsibility and fitness for trial ..	211
C. Representing clients with capacity issues in the magistrates court	212
14-9 Representing clients with capacity issues in the magistrates court	212

D. The Mental Health Court	213
14-10 Mental Health Court	213
14-11 Unsoundness of mind	213
14-12 Fitness for trial	213
14-13 Diminished responsibility	214
E. Defendants charged with an offence who are on an involuntary treatment order or a forensic order	214
14-14 If a defendant is on an involuntary treatment order or forensic order	214
F. Defendants charged with an offence who are not subject to an involuntary treatment order or a forensic order.	215
14-15 If a defendant is not on an involuntary treatment order or forensic order	215
G. Outcomes in the Mental Health Court	215
14-16 Unsound mind or not of unsound mind but permanently unfit for trial	215
14-17 Unsound mind or not of unsound mind but permanently unfit for trial	215
14-18 Not of unsound mind and temporarily unfit for trial	216
14-19 Diminished responsibility	216
14-20 Dispute of fact	216
14-21 Right to argue defence and right to trial	216
H. After a finding of unsound mind or unfit for trial	216
14-22 Neither of unsound mind nor permanently unfit for trial	216
14-23 Of unsound mind or permanently unfit for trial	217
I. The Mental Health Review Tribunal	217
14-24 Consequences of findings of the MHRT	217
J. General matters, classified patients and Commonwealth offences	217
14-25 Issues of mental illness or natural mental infirmity	217
14-26 Classified patients	218
14-27 Becoming a classified patient	218
14-28 Ceasing to be a classified patient	219
14-29 When classified patient status ceases	220
14-30 Applying for bail for a classified patient	221
14-31 Commonwealth offences	221
Chapter 15—<i>Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)</i>	223
A. Introduction	223
15-1 <i>Dangerous Prisoners (Sexual Offenders) Act 2003</i> (Qld)	223
15-2 Applications under the <i>Dangerous Prisoners (Sexual Offenders) Act</i>	223
15-3 Types of orders under the <i>Dangerous Prisoners (Sexual Offenders) Act</i>	223
15-4 Contravention proceedings	224
15-5 Contravention charges	224
B. The duty lawyer’s role	225
15-6 When the Act impacts on a duty lawyer session	225
15-7 When a client, subject to an order, faces fresh offences before the magistrates court	225
15-8 When a client is charged with a contravention offence under s 43AA	225
C. Availability of legal aid funding	225
15-9 When a client is eligible for legal aid funding	225
Statutes	226
Case citations	265
Resources	268

Chapter 1

Introduction

Chapter 1—Introduction

A. Purpose of handbook	(1-1)
B. History and aims of Criminal Law Duty Lawyer Program	(1-2–1-3)
C. Duty lawyer guidelines	(1-4)
D. Practical requirements of Criminal Law Duty Lawyer Program	(1-5–1-6)
E. Responsibilities of duty lawyers	(1-7–1-11)
F. Practical hints for duty lawyers	(1-12–1-22)
G. Referrals from duty lawyers	(1-23–1-26)

A. Purpose of handbook

1-1 Handbook as a guide

This handbook is a guide for practitioners appearing as duty lawyers in magistrates and childrens courts in Queensland. As a practitioner, you should read this before you appear in court. If used correctly, the handbook will help you with problems that may arise while at court. The comprehensive index provides a quick reference so you can use the handbook as a useful tool during the little time at your disposal at court.

B. History and aims of Criminal Law Duty Lawyer Program

1-2 History

The Criminal Law Duty Lawyer Program in Queensland was initiated by the then Legal Assistance Committee of Queensland and subsequently taken over by the Queensland Law Society. Following this, Legal Aid Queensland took over responsibility for managing the program. Criminal law duty lawyer services are provided by Legal Aid Queensland in-house lawyers and authorised private lawyers who deliver services under roster or tender arrangements.

1-3 Aims

The Criminal Law Duty Lawyer Program provides advice and representation to any unrepresented defendant who seeks the assistance of a duty lawyer in a childrens or magistrates courts in Queensland.

C. Duty lawyer guidelines

1-4 Duty lawyer guidelines

Duty lawyer services are not limited to defendants in custody or a person's first court appearance.

Duty lawyer guidelines state that duty lawyer services will be provided, without a grant of legal aid being made, for:

- guilty pleas for summary matters:
 - includes indictable offences that are dealt with summarily where the defendant does not meet the summary plea guidelines for a grant of legal aid, and

- includes traffic offences where the defendant is at risk of imprisonment and does not meet the summary plea guidelines for a grant of legal aid
- community-based order breaches
- bail breaches
- first appearance on extradition proceedings
- adjournments (remands)
- bail applications
- disqualified driving charges
- traffic offences where mandatory imprisonment must be imposed as part or all of the punishment.

No appearance will be made for:

- civil matters
- traffic and main roads offences where there is no risk of imprisonment unless:
- the defendant is the subject of other charges being heard at the same time where a conviction may result in the defendant being sentenced to a term of imprisonment. In these cases, an appearance is required
- summary trials
- committal proceedings
- interlocutory applications for summary trials and committal proceedings
- matters with a current grant of aid, as these appearances are the legally-aided lawyer's responsibility. If a specific request is made by a private or Legal Aid Queensland lawyer acting for a defendant with a current grant of aid for criminal proceedings, an agency appearance by a duty lawyer can be made on a callover date to:
 - extend bail
 - get a remand, or
 - get a hearing
- a defendant who has arranged to be privately represented.

Legal Aid Queensland provides free guides dealing with applications for restricted work licences. They are available online at www.legalaid.qld.gov.au, from Legal Aid Queensland offices or magistrates courts.

Where possible, you are encouraged to engage in case conferencing with prosecution representatives to help dispose of matters early. Case conferences should be confined to straightforward issues, such as amending, substituting or withdrawing charges, or reaching a common agreement on the factual basis for a plea.

You are not to attempt case conferencing requiring complex and lengthy negotiations. Instead, adjourn these matters and advise defendants to apply for legal aid or, if legal aid is refused, get private legal representation.

A guide entitled '[Have you been charged with an offence?](#)' is available from Legal Aid Queensland. This guide has been published to assist defendants who do not qualify for legal aid and are due to appear in the magistrates court. This guide is available online at www.legalaid.qld.gov.au, from Legal Aid Queensland offices or magistrates courts.

D. Practical requirements of Criminal Law Duty Lawyer Program

1-5 Criminal law duty lawyer form

[Criminal law duty lawyer forms](#) are provided in all courts for duty lawyers to use. It is important that you use these forms. You must keep these forms as a record of a defendant's instructions and any advice you give. Instructions and advice must be legible, so print if necessary.

If a defendant appeals against the severity of a sentence, you may be asked to swear an affidavit as to matters you have mentioned in the court on the defendant's behalf on the plea of guilty. Therefore, you should keep a complete and accurate record of the proceedings.

This has become more important since the amendment to appeal provisions (see [3-9](#) to 3-11).

The criminal law duty lawyer form includes a tear-off slip on the bottom of the front page to hand to defendants whose matters have been remanded. This slip tells defendants the date, place and time of their next appearance and whether it is for mention or hearing. The reverse side of the slip lists the addresses and phone numbers of all the Legal Aid Queensland offices.

1-6 Duty lawyer session report form

You must complete a duty lawyer session report at the conclusion of your appearances on a particular day. You must complete all parts of the duty lawyer session report. Except where special arrangements exist, private practitioners will be paid on the basis of this report.

E. Responsibilities of duty lawyers

1-7 Duty as if to private client

Although, as a duty lawyer, you are not acting for a defendant on a continuing basis, you have the same duties towards that defendant as to a private client under the normal solicitor–client relationship. You should be as vigorous advocating on behalf of the defendant as if the defendant was a private client. For instance, this may extend to contacting relatives or possible sureties about a bail application, or making any other enquiries that helps you represent the defendant in court.

You have no more or less duty to the court than a solicitor appearing in a private capacity.

1-8 No obligation to appear

You have no obligation to appear for every defendant who seeks representation. If you believe that an ethical problem exists and wish to seek further information before acting for a defendant, you should not proceed at that time. You are under no obligation to tell the court why you are not appearing, except perhaps to advise that there is an ethical problem. Of course, you should fully explain the situation to the defendant and advise the defendant about appearing in court unrepresented.

1-9 Appearing as a ‘friend of the court’

In some situations, the magistrate may ask you to appear as a ‘friend of the court’ or you may seek leave to do so. For example, you may not be able to obtain instructions from a defendant who appears to be suffering from a mental illness. However, you may still feel it proper to appear, explain the situation to the court and assist as required to the extent that it is ethically possible to do so.

1-10 Primary duty to defendants

You are not at court purely for the court's or police prosecutor's convenience; although, if performing the role properly, both the court and prosecutor should benefit. You are there primarily to assist defendants.

1-11 Consciousness of time

You should always be conscious of time constraints and not keep the court waiting unnecessarily. If a problem with a particular defendant arises, you should be prepared to advise the court of any likely delay so the magistrate can better organise the matters before the court that day. Alternatively, if a matter requires further investigation, advise the defendant to seek an adjournment to enable you to obtain further legal advice. If appropriate (see guidelines for plea of guilty), you should advise the defendant to apply for legal aid to allow the matter to be further prepared before the next court date.

F. Practical hints for duty lawyers

1-12 Practical hints only

The following practical hints may help you manage what can often be a very difficult task in a busy court.

1-13 Be early

You must be clear about when the court commences and be at court in good time (at least 30 minutes) before proceedings commence. You need to allow time before you attend court as you may need to see defendants in custody (watch-house) before going to court.

1-14 Speak to the police prosecutor or court staff

If possible, first contact the police prosecutor or court staff to obtain information about the number of people before the court and the number likely to need your assistance. At times, the prosecutor will arrive just before proceedings commence. If you are able to speak with the prosecutor on arrival at court, seek copies of charge sheets (QP9s), as many defendants will not know the actual charges that have brought them before the court. Of course, it is also very important that you have this information. Ask also for details of defendants in custody and the prosecutor's attitude towards bail. In most cases, police will not object to bail and finding out the prosecutor's attitude beforehand will save unnecessary instruction taking.

In some courts, you will receive a list showing the defendants appearing that day, which is of great assistance. However, if no list is provided, you should, if possible, obtain the defendants' names and details of charges from the prosecutor.

Some courts have volunteer court assistance workers who liaise with the public and ask those who wish to see the duty lawyer to fill in their personal details on the duty lawyer form, which can save you valuable time. If this service is not available, ensure that defendants' personal details are entered on the duty lawyer form.

1-15 Try to plan time

Try to plan the order of taking instructions and appearing in court. In some courts, defendants in custody are dealt with first, so you should see defendants in custody first followed by defendants bailed to appear or on notices to appear. However, the order of proceedings will depend on a court's practice notes. Instructions from those in custody tend to be more complicated, especially if a bail application is to be made.

You must see as many defendants as possible before court commences because the magistrate may wish you to commence appearances early in the day if there are few other defendants with private representation or representing themselves. Furthermore, once the court commences hearing, if you are prepared to proceed in all matters you are involved in, you will be able to complete duties at court with little delay. As a courtesy to the court, advise the

magistrate or clerk before court commences if you have not been able to take all instructions before the scheduled commencement time.

Before interviewing people, ask those waiting at the court to assess the number who are intending to seek assistance and gauge what sort of assistance they require.

You may be able to establish quickly that several defendants are seeking straightforward adjournments, so you can take their instructions without delay. Some may be able to seek such a remand themselves, leaving you time to undertake more complex matters.

1-16 Taking instructions—working out the issue

When taking instructions, attempt to work out the nature of the defendant's appearance as quickly as possible. Does the defendant simply want an adjournment? Is it a matter that will have to be adjourned for hearing (e.g. an indictable offence that can not be dealt with summarily)? Will there be a plea of guilty with some complications? Is bail in issue? If the matter is simply to be adjourned for further mention, or must be set down for hearing and bail is not in issue, do not spend too much time taking instructions.

1-17 Do not rush

Do not rush through the process of taking instructions but attempt to do so as efficiently as possible. While keeping time to the necessary minimum is important, it is equally important to obtain all relevant details for two reasons:

- to assess what advice you will give to the defendant (in relation to a plea etc)
- to ensure that all relevant information is put to the court if you are applying for bail or entering a plea of guilty.

Where possible, it may help to take instructions from a defendant in private, as the presence of friends and relatives can often delay the procedure.

1-18 Obtain further information from prosecutor if necessary

If the defendant cannot provide all relevant information regarding the charge or previous convictions etc, you should not hesitate to again consult with the prosecutor to seek further information. Approaches to the prosecutor should be courteous at all times. If bail is in issue, it is particularly important to obtain the prosecutor's attitude to bail. An initial opposition to bail may be overturned if certain conditions are put in place. There is little point taking detailed instructions from a defendant regarding bail if it is not opposed, though you should always take brief details of relevant facts.

You should also find out why a particular defendant is in custody. The defendant may have been arrested shortly before the court commenced and, therefore, bail is not in issue. Alternatively, the court could be holding the defendant on a warrant relating to a separate matter to their appearance before the court that day.

1-19 Deal only with the prosecutor

Deal only with the prosecutor when seeking information about a particular defendant. While arresting officers will often be at court and may be able to assist with matters such as attitude to bail or unclear aspects about warrants, it is best to check with the prosecutor. While the prosecutor will act on instructions from an arresting officer, the prosecutor will have the final say about what position they will take in court.

1-20 Organise appearances

Once you have seen all defendants requiring assistance, organise for adjournments and short appearances to be dealt with first and more complex ones left until later.

1-21 Follow-up advice

If follow-up advice is necessary due to the court appearance result, it will often be difficult for you to give that advice if you have further matters in court. In this situation, ask the client to wait outside the court so you can give proper advice as required.

1-22 Remands for further advice

If you do not have enough time to obtain detailed instructions because of the nature of the charges, seek a remand. In such cases, it is imperative that you instruct the client to seek legal advice before the remand date. The client's failure to seek such advice in the interim only transfers the problem to the next duty lawyer and creates a backlog in the court.

G. Referrals from duty lawyers

1-23 Referring defendants for further legal advice or assistance where necessary

Throughout this handbook, it has been stressed that, when in doubt, you should obtain a remand and refer the defendant on for more detailed investigation, advice or assistance than you can reasonably give in a short interview.

If you, as a duty lawyer, are approached to provide ongoing legal representation (after your appearance as duty lawyer has concluded), you must give the person requiring further representation the names of three law firms, one of which can be your own firm or, if you are appearing on behalf of a consortium, a firm of the consortium.

1-24 Prisoners

Legal Aid Queensland conducts regular duty lawyer services to all prisons in Queensland. If you consider that a defendant or other person (e.g. prohibited non-citizen) held in custody at a prison requires further advice or legal assistance that you have been unable to give due to time constraints or lack of information, contact the Legal Aid Queensland office nearest that prison and request that a prison duty lawyer visit the detainee. You should also tell the prisoner to ask the superintendent about seeing a prison duty lawyer.

1-25 Criminal charges against Aboriginal and Torres Strait Islander people in all jurisdictions

All such applications for legal assistance, which would normally be referred to Legal Aid Queensland, should instead be directed to the nearest office of the Aboriginal and Torres Strait Islanders Corporation for Legal Services.

If the defendant is eligible for aid in prescribed criminal matters, the defendant may, instead of attending the nearest office of the Aboriginal and Torres Strait Islanders Corporation for Legal Services, apply directly to Legal Aid Queensland. The Aboriginal and Torres Strait Islanders Corporation will not act if there is a conflict, e.g. the victim of the alleged offence is also an Aboriginal or a Torres Strait Islander.

1-26 Legal advice and assistance

Advice on legal matters may be obtained from any Legal Aid Queensland office. If Legal Aid Queensland is unable to provide advice because of a conflict of interest, the applicant will be referred to a private solicitor on the Legal Aid Queensland panel for that advice.

Chapter 2

Bail

Chapter 2—Bail

A. Basic principles	(2-1-2-4)
B. Grants of bail—general	(2-5-2-12)
C. Procedures on bail applications	(2-13-2-20)
D. Breaches of the Bail Act, including failure to appear	(2-21-2-27)
E. Conduct of bail applications	(2-28-2-41)
F. Appeal of bail	(2-42)

A. Basic principles

2-1 Principles contained in the *Bail Act 1980* (Qld)

The *Bail Act 1980* (Qld) contains the basic principles relating to bail. Ultimately, the court has discretion about granting bail. However, the starting point is where a defendant is ‘held in custody on a charge of an offence of which the person has not been convicted’ and that defendant appears before a court ‘in relation to that offence, the court shall, subject to this Act, grant bail to that person or enlarge or vary bail already granted to the person’ (s 9). This means that, except in certain situations expressly outlined in the Bail Act, the court has a duty to grant the defendant bail.

2-2 When the court will refuse bail

The court will refuse to grant bail to the defendant if ‘there is an unacceptable risk that the defendant if released on bail —

- (i) would fail to appear and surrender into custody; or
- (ii) would while released on bail—
 - (A) commit an offence; or
 - (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else’s safety or welfare; or
 - (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else’ (s 16).

The court shall also refuse bail if it believes ‘that the defendant should remain in custody for the defendant’s own protection’.

2-3 Where a magistrates court cannot grant bail

A magistrates court cannot grant bail to a defendant charged with an offence for which the penalty is ‘imprisonment for life, which cannot be mitigated or varied under the Criminal Code or any other law’.

2-4 Supreme Court bail

The Supreme Court has the power to make an order granting bail to any defendant who has been charged with an offence at any stage of the proceedings (s 10). This power includes granting bail to defendants who have previously had bail refused or revoked by lower courts.

One exception is where the defendant is before a trial judge and jury, where the judge’s decision on bail is final (s 10(3)).

B. Grants of bail—general

2-5 Power of a police officer to grant bail

The Bail Act empowers a police officer—either an officer-in-charge or watch-house manager—to grant a defendant bail prior to them appearing in court, except where the Act states otherwise (s 7).

Section 382 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) allows a police officer to issue and serve a notice to appear on an adult who has committed an offence, or they reasonably suspect has committed an offence. A notice to appear has the same effect as a complaint and summons under s 53 of the *Justices Act 1886* (Qld) (PPRA, s 388).

Issuing a notice to appear is the most common way to require a defendant to appear before a court without the defendant spending unnecessary time in custody. This method is also preferable to issuing a complaint and summons due to the delays associated with that process.

Although there are no steadfast rules for issuing a notice to appear, as a duty lawyer, you will observe that, for some offences (e.g. breach of domestic violence order), police prefer not to adopt the convenience of the notice to appear.

2-6 Power of magistrates court to grant bail

The magistrates court has the power to grant bail to a defendant held in custody on a charge and may enlarge, vary or revoke any bail that has been granted (s 8).

2-7 Consideration of options by court or police officer

A court or police officer authorised by the Bail Act to grant bail shall consider the release of a defendant on bail in the following sequence:

- bail on own undertaking
- bail on own undertaking with a deposit of money or other security
- bail on own undertaking with a surety or sureties
- bail on own undertaking with a deposit of money or other security and with a surety or sureties (s 11(1)).

When acting under this subsection, the court or police officer ‘shall not make the conditions of a grant of bail more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest’.

2-8 Special conditions

The court or police officer can impose special conditions on any bail grant if they believe that the conditions are necessary to ensure that the defendant:

- (a) ‘appears in accordance with the person’s bail and surrenders into custody; or
- (b) while released on bail does not —
 - (i) commit an offence; or
 - (ii) endanger the safety or welfare of members of the public; or
 - (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to the person or another person’ (s 11(2)).

The ‘court or police officer shall impose such conditions as [they think] fit for any or all such purposes’.

The same qualifications regarding onerous conditions apply as referred to in 2-7 above. The power under this section is a wide one and can include imposing reporting conditions, conditions requiring the defendant to reside at a certain place, or conditions restraining the defendant's contact with the complainant or other Crown witnesses.

2-9 Restriction on publication

The court can restrict the publication of information or evidence given in a bail application (s 12). If a bail application is opposed in the magistrates court, the prosecutor may lead certain information that could prejudice the determination of the matter. This can occur particularly when a matter is highly publicised or likely to be highly publicised. In these circumstances, an application should be made under s 12.

2-10 Cash bail

A police officer or court can release a defendant on bail after they make a deposit of money as security for appearing in court (ss 14 and 14A) if the charge is not indictable or a scheduled offence. The defendant and duty lawyer should view this form of bail as the same as other forms of bail. The deposit of money is security for the defendant's appearance before a court on the day, and at a time and place, provided to the defendant.

Although, historically, the view has been that a defendant's failure to appear when cash bail has been granted merely renders the deposit forfeited with no further punishment, you should neither encourage nor offer this as advice. The court can still issue warrants if a cash bail is granted and a defendant fails to appear (s 14(10)). Always advise a defendant to adhere to the cash bail conditions—namely, to surrender themselves to court at the time and place outlined in the notice.

2-11 Effect of *Penalties and Sentences Act 1992* (Qld)

Under the [Penalties and Sentences Act 1992](#) (Qld), if an offender has breached a suspended sentence, the Bail Act applies if that offender is not dealt with immediately. For example, under s 146(4) of the Penalties and Sentences Act, if a defendant commits an offence during the operational period of a suspended sentence and appears before the magistrates court, if a higher court imposed the suspended sentence, the magistrate must remand the matter to that higher court and may commit the offender to custody or grant the offender bail.

2-12 Release of a person with an impairment of the mind

Section 11A(7) defines an 'intellectually impaired defendant' as a defendant 'who has a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
 - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
 - (ii) the person needing support.

Section 11A of the Bail Act applies if a police officer or court 'considers—

- (a) a person held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and
- (b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under section 20; and
- (c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail'.

The police officer or court may then release the defendant 'without bail by—

- (a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or
- (b) permitting the person to go at large'.

The defendant is then given a notice under s 11B, which is similar to a notice to appear. Under this notice, the defendant must surrender to the court at the time and place stated in the notice (s 11A(3)). If the defendant appears in line with the notice, the court may similarly release them (s 11A(4)). A court may revoke such a release notice (s 11A(5)). If the defendant is released into the care of another, the carer must be given a copy of the notice (s 11B(4)).

You must consider your obligations under [Chapter 14](#) of the *Criminal Law Duty Lawyer Handbook* regarding obtaining instructions from a defendant with an impairment of the mind. If you make a submission to the court that bail be granted under s 11A, the court may ask you how you obtained signed instructions if there is doubt about the defendant's mental state. You may appear as *amicus curiae* or 'friend of the court' if you cannot obtain signed instructions and suggest that the court consider bail under s 11A of the Bail Act.

C. Procedures on bail applications

2-13 Procedures

When dealing with the bail application, the court may make investigations of and about the defendant—on oath or otherwise—as it sees fit, as long as the defendant is not examined or cross-examined by the court or any other person about the actual offence.

The prosecutor may lead evidence by affidavit, or otherwise:

- (i) 'to prove that the defendant—
 - (A) has been convicted previously of an indictable offence; and
 - (B) has been charged with and is awaiting trial on an indictable offence; and
 - (C) has failed previously to appear in accordance with the defendant's undertaking and surrender into custody' (s 15(1)).

In demonstrating that a defendant has been charged with and is awaiting trial on an indictable offence, prosecutors will often tender 'not for production' criminal histories. Usually, in a sentence hearing, these would be objected to; however, on a bail application, the court is entitled to receive these documents.

Evidence can be offered to show the circumstances of the offence, particularly as they relate to the probability of convicting the defendant. The court can also consider relevant matters agreed on by the prosecution and defence. The court may receive and consider any evidence that it considers credible or trustworthy in the circumstances (s 15(e)).

2-14 Facts in dispute

If any of the matters referred to in s 15 are in dispute, the court needs to take evidence and make a decision about that fact, (e.g. a dispute regarding an alleged previous conviction). The court can take such matters into account without evidence only if the prosecution and defence agree about the fact.

2-15 Remand in custody

If there has not been enough time to obtain sufficient information to make a decision about any of the matters in s 16(1), the court shall remand the defendant in custody to obtain the required information (s 16(1A)). It is not uncommon for a court to remand a defendant until later in the day or even the following day.

2-16 Assessing unacceptable risk

In assessing whether there is an unacceptable risk under s 16(1), the court will consider all matters it considers relevant, including:

- the offence's nature and seriousness
- the defendant's character, antecedents, associations, home environment, employment, background and place of residence
- the history of any previous bail grants to the defendant
- the strength of the evidence against the defendant.

It is often helpful to read the decision of *Williamson v Director of Public Prosecutions (Queensland)* [2001] 1 Qd R 99; [1999] QCA 356, particularly the observations of Thomas JA at paragraph 21, where his Honour said:

'No grant of bail is risk-free. The grant of bail however is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so-called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk.'

2-17 Onus on defendant to 'show cause'

'Where the defendant is charged—

- with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; or
- an offence to which section 13 applies; or
- with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance; or
- with an offence against this Act; or
- with an offence against the *Criminal Organisation Act 2009*, section 24 or 38; or
- with an offence against the Criminal Code, section 359 with a circumstance of aggravation mentioned in section 359(2);

the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified' (s 16(3)).

You should be familiar with the provisions of s 16, particularly ss 16(1) and (3). Clarify whether a 'show cause' situation exists with the prosecutor prior to court and obtain full instructions for the bail application beforehand.

Section 16(3A) of the Bail Act sets out a new show cause category:

'(3A) If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a participant in a criminal organisation, the court or police officer must—

- refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified; and
- if bail is granted or the defendant is released under section 11A—
 - require the defendant to surrender the defendant's current passport; and
 - include in the order a statement of the reasons for granting bail or releasing the defendant.'

A different court and evidentiary process applies to this 'show cause' category because of '[Magistrates Court Practice Direction No. 21 of 2013](#)'.

Legal Aid Queensland's [Show cause bail application procedure](#) contains details of the requirements of the practice direction.

2-18 Further applications for bail

A defendant does have the right to apply further to a court to grant bail or vary a condition of bail (s 19). They can bring a matter on again before a magistrates court by arrangement even earlier than the date to which the defendant has been remanded.

Magistrates do not sit as ‘Courts of Appeal’ on their fellow magistrates and a relevant change in circumstances would have to have occurred since the previous application for the court to entertain such an application (e.g. a surety may not have been available when the matter was previously raised at court but may be available now). The defendant still has a right of application to the Supreme Court under s 10.

2-19 Undertakings as to bail

An officer of the court, who takes the undertaking, usually explains these matters to a defendant. However, you should clearly and comprehensively explain to any client who has been granted bail the importance of honouring the undertaking and consequences of a bail breach.

2-20 Sureties

Section 21 of the Bail Act contains provisions regarding sureties. Magistrates regularly impose sureties, particularly when they doubt whether the defendant will appear. Before any person can act as a surety, the justice of the peace taking the surety must consider the person’s financial resources, character and antecedents, and proximity to the defendant (i.e. kinship, place of residence or otherwise) (s 21(3)).

‘Every surety to an undertaking must be a person who—

- (a) has attained the age of 18 years; and
- (b) has not been convicted of an indictable offence; and
- (c) is not—
 - (i) an involuntary patient under the *Mental Health Act 2000* who is, or is liable to be, detained in an authorised mental health service under that Act; or
 - (ii) a forensic disability client within the meaning of the *Forensic Disability Act 2011*; or
 - (iii) a person for whom a guardian or administrator has been appointed under the *Guardianship and Administration Act 2000*; and
- (d) is not an insolvent under administration; and
- (e) has not been, and is not likely to be, charged; and
- (f) is worth not less than the amount of bail in real or personal property’ (s 21(1)).

Some doubt exists as to whether the surety amount should be deposited with the court or keeper of the prison. Some justices believe that the monies must be deposited, while others, once satisfied as to the surety’s financial position, will accept a person as surety without any deposit. If any doubt exists as to what is required in a particular case, check with the officer responsible at the appropriate court or the prison.

It is an offence for any person to indemnify a surety (s 26). This means that any defendant who undertakes to refund monies to another person who acts as surety is committing an offence.

D. Breaches of the Bail Act, including failure to appear

2-21 Failure to appear

If a defendant fails to appear in line with a notice to appear, the court has power, under the PPRA, s 389, to either decide the complaint in the defendant’s absence or issue a warrant under the PPRA.

If a defendant fails to appear in line with an undertaking, the court can issue a warrant to apprehend the defendant (s 28A(1)).

If it is possible that the defendant has a genuine excuse for failing to appear (e.g. sickness or transport delays), the court may remand the charge, and order that the warrant lie in the court registry and not be sent to the police for execution unless the defendant fails to appear at the next remand date.

If the defendant fails to appear but a friend or relative with information about the defendant's non-appearance wishes to address the court, you may seek leave to appear as 'friend of the court' to help that person provide the information they possess to the court. You will then help arrange for the matter to be stood down or adjourned pending the defendant's appearance or receipt of medical certificates etc.

2-22 Surrender by the defendant into custody after failing to appear

If the defendant has failed to appear and a warrant has been issued but not been executed, the defendant may surrender into the court's custody as soon as practicable after the time specified for appearance. If the defendant surrenders before the warrant for apprehension is executed and can satisfy the court that they had reasonable cause for failing to appear, the court can withdraw and cancel the warrant (s 28A(2)).

This procedure is convenient when a genuine delay has occurred and saves the defendant being arrested and processed through the watch-house for a subsequent court appearance. It can also avoid a conviction for breach of the Bail Act. If the defendant shows reasonable cause, the matter ends as far as any breach of the Bail Act is concerned. The court can then grant the defendant bail for the original offence. However, if the defendant cannot 'show cause', the magistrate must order that the warrant remain in force and the defendant be brought before the court under s 33 (see 2-23 below).

2-23 Breaches of the Bail Act

'A defendant who—

- (a) fails to surrender into custody in accordance with the defendant's undertaking; and
- (b) is apprehended under a warrant issued pursuant to section 28 or 28A(1)(a), (b), (c) or (e);
- (c) commits an offence against [the Bail] Act' (s 33(1)).

Under s 33(4), if a court imposes an imprisonment term, the jail term is cumulative to any other jail term to which the defendant is subject, and cumulative to any imprisonment term that a court may impose on the defendant after the commitment for breaching the Act.

2-24 Arrest on warrant for failure to appear or breach of bail condition

If a defendant has been arrested on a warrant for failing to appear and/or honour an undertaking regarding bail, they will be brought before a magistrates court in the magistrates court district where the defendant was apprehended under the warrant.

If the warrant was issued under the PPRA, the defendant has not committed any offence—the warrant was simply a means to bring the defendant before a court. The issue for you is whether the defendant wants the court to deal with the charge/s on a plea of guilty or apply for a remand and bail.

If the warrant was issued under the Bail Act, the court will charge the defendant from the bench for failing to appear and ask the defendant to plead to the charge.

Note: Under s 33(3A), 'the court shall then and there call on the defendant to prove why the defendant should not be convicted of an offence against this section'.

Section 33(2) states that it 'is a defence to [the] offence...if the defendant satisfies the court that the defendant had reasonable cause—

- (a) for failing to surrender into custody in accordance with the defendant's undertaking; and
- (b) for failing to appear before the court specified in the defendant's undertaking and surrender into custody as soon after the time for the time being appointed for the defendant to do so as is reasonably practicable'.

If the defendant pleads not guilty, the magistrate may set the matter for hearing or remand the defendant for hearing at the court from which the warrant was issued.

The magistrate would then again consider an application for bail; although, under s 16(3), the defendant is in a 'show cause' situation in relation to the bail application.

2-25 Failure to appear in the Supreme or district court

If a defendant fails to appear in the Supreme or district court, a warrant of apprehension may be issued under ss 28 (form 15 of the Bail Regulations), 30(3) (form 19) or 30(4) (form 20).

Note: Under s 33, it is an offence for a defendant to fail to surrender into custody if they are apprehended under a warrant issued under ss28 or 28A(1)(a). Therefore, a warrant issued under any other section cannot result in a defendant being charged with breach of bail.

If a defendant is brought before a magistrates court on a warrant issued by a higher court, the matter is usually remanded to the court that issued the warrant (s 33B).

2-26 Penalty for breach

Proceedings are taken summarily and may be commenced notwithstanding that one year has elapsed since the offence was committed. If convicted, a defendant is liable to a fine of 40 penalty units or two years' imprisonment (s 35), and any imprisonment period is to be served cumulatively on any existing or subsequent imprisonment term (s 33(4)).

2-27 Bail granted for the substantive offence

Bail can still be granted for the substantive offence even if the defendant is convicted for breach of bail.

E. Conduct of bail applications

2-28 Defendant in custody

This chapter relates to situations where the defendant is in custody prior to their appearance. If the defendant has previously been granted bail, it is highly unlikely that there would be problems in having that bail enlarged. However, it does occasionally occur. If unprepared, you should request that the matter be stood down so you can obtain further instructions.

2-29 Instructions

At the first interview at the watch-house, you should, in the brief time available, obtain as much of the following information as possible from the defendant:

- full name and address
- length of residence at that address, details of other residents and defendant's relationship to them (if any), and rent paid
- if from interstate or elsewhere, length of residence in Queensland

- family situation (parents, spouse, children, etc), particulars of dependants, and health of client or family if relevant
- employment; period of time in current employment or, if unemployed, employment prospects; ability to report if required; and type and amount of benefit received
- medical illnesses, prescribed medicines, treating doctor/s and whether defendant is on an involuntary treatment order
- property and financial interests in Queensland (e.g. real estate owned or being purchased, business owned/operated etc)
- previous convictions
- whether the defendant has previously failed to honour bail and brief details of the reasons for any failure
- particulars of the charge and circumstances giving rise to the charge (without going into too much detail)
- whether the defendant is currently on bail for an indictable offence
- availability and details of any surety or sureties
- whether the defendant has an alcohol and/or drug addiction or other medical problem and, if so, whether arrangements be made for rehabilitation or treatment
- any other matters that the duty lawyer may consider relevant.

2-30 Confirm information with prosecutor

It is inadvisable to accept without question all a defendant's instructions. Often, they do not include important matters in the instructions, such as previous convictions. Before actually appearing for the defendant, check the prosecutor's attitude to bail. If they oppose bail, clarify all relevant matters with the prosecutor such as previous convictions. Usually, if the prosecutor indicates that they will not object to bail on the defendant's undertaking, you do not need to obtain any further detailed instructions.

However, bail is still a matter for the court to consider and you should have at least basic instructions available in case the court raises any matter.

If a magistrate asks a question about issues not discussed during your initial conference with the defendant, ask that the matter be stood down so you can obtain those instructions. Never assume the answers.

2-31 Ascertaining whether onus of proof is on defendant

In clarifying the prosecutor's attitude to the application, ascertain whether the prosecutor is opposing bail or will indicate to the court that, for whatever reason, a 'show cause' situation exists under s 16(3). You can then obtain the defendant's instructions to prepare for the 'show cause' submission.

2-32 Where bail is opposed and defendant is not in a show cause situation

If a 'show cause' situation does not exist and the prosecution is opposing bail on the basis of 'unacceptable risk' under s 16(1), establish the prosecutor's basis for the claim of unacceptable risk prior to the appearance. For example, if they allege that the defendant would fail to honour any undertaking, try to ascertain the prosecutor's basis for alleging this and obtain full instructions prior to the court appearance. Be prepared to request that the matter be stood down if your instructions are not sufficient so you can obtain further instructions.

2-33 Duties of the court

In considering an application for bail, the court first has a duty to grant bail (s 9). The court must then consider a grant of bail in the order of priorities as set out in s 11 (see [2-7](#)). The court must then consider whether there is an 'unacceptable risk', as set out in s 16(1). Of course, if a 'show cause' situation applies, the onus is reversed.

2-34 Order of address

If the prosecutor has already indicated that they intend to oppose bail, you should be aware of the procedures that apply in the court. First, the magistrate asks the legal representative about the situation regarding bail. If a bail application is being made, you should seek bail on the defendant's undertaking. The court then asks the prosecutor's attitude. If opposing bail, the prosecutor usually sets out the reasons why they are opposing bail or indicates that a 'show cause' situation exists. When the magistrate makes this initial inquiry, do not proceed in detail with your application; instead, wait until the prosecutor has outlined their objections in detail, so you can direct your address specifically to those objections.

2-35 Special conditions

If bail is opposed and you, as duty lawyer, doubt whether bail will be granted, consider suggesting possible special conditions to the bail grant. Some common special conditions include:

- **Sureties**

These are common in the magistrates court, particularly where the defendant has a bad record or previous convictions for failing to appear, or the offence is a serious one. In such cases, obtain full instructions about possible sureties beforehand

- **Reporting conditions**

Some magistrates rely greatly on reporting conditions. You should obtain instructions about whether the defendant is able to report daily to a local police station if necessary

- **Non-contact with witnesses**

In cases of assault or sexual offences, obtain detailed instructions regarding the possibility of future contact between the defendant and the complainant or any Crown witnesses. If such contact is unlikely and the defendant is prepared to refrain from such contact as a condition of bail, this may assist the bail application

- **Alcohol/drug-related offences**

If alcohol and/or drugs have contributed to the defendant committing the offence, obtain instructions regarding the defendant's willingness to participate in a drug and/or alcohol rehabilitation program as a condition of bail

- **Curfew**

If the defendant is young and the offences are alleged to have occurred at night or in the early hours of the morning, obtain instructions regarding the defendant's willingness to abide by a curfew.

2-36 Being as concise as possible

When you apply for bail, it is invariably in a mention court. The magistrate is anxious to dispose of mention matters quickly. Therefore, when you make an application, direct the address solely to the relevant matters. Any duty lawyer who wastes time referring to matters that are not relevant is not assisting the client.

When placing the client's instructions before the court through submissions, avoid using generalities; for example, if there are instructions relating to future employment, it is not helpful to say, "The defendant has a job to go to next week". It would be more helpful and precise to say something such as, "The defendant is commencing a permanent position as a truck driver with a company at Rocklea on Monday", if those are the instructions.

At all times, try not to use the phrase 'my instructions are that Mrs Smith is employed' or 'I am instructed that Mr Smith has three children'. This may give the magistrate the impression that you do not believe what you are instructed. Instead, say 'Mrs Smith is employed' or 'Mr Smith has three children'.

2-37 Relevant submissions

Advise the court if the defendant denies the accusations and of any circumstances that might make it inappropriate for the defendant to spend a lengthy period in custody. Examples of relevant submissions include:

- age (either extremely young and likely to be adversely influenced by prison, or extremely old)

- state of health (including any medical treatment both recent past and near future, together with any current medical conditions)
- length of time defendant is likely to spend in custody (especially as this relates to the likely penalty, such as the likelihood that the sentencing court may seriously consider a probation order)
- indications that no further offences are likely to be committed
- anything relevant to the actual offences (e.g. a defendant on bail for break and enter who is charged with possession of a dangerous drug poses no real risk of damage, loss or injury to the community, is on an entirely different charge, was not aware of the significance and seriousness of the latter charge and/or the offence relates to behaviour before the previous grant of bail).

The above are examples only. As the defendant's liberty is at stake, you should explore all possibilities to obtain bail for them.

2-38 Caution when making admissions

As the magistrate must consider the strength of the evidence against the defendant (i.e. the likelihood of conviction) and will, therefore, be aware the police allegations specifically regarding the offence, you must consider what (if anything) to say in relation to the actual offence.

Remain conscious of speaking for the defendant and not make admissions that would subsequently prejudice the defendant on the hearing of the matter. You need to consider the situation where the defendant intends to deny the charge and the allegations, and to explain existing evidence that suggests guilt. The defendant could be outlining a defence to the court that may prejudice the subsequent trial. If you are going to make submissions for the purpose of a bail application that effectively place a defence before the court, obtain signed instructions indicating that the defendant is aware of the risks and possible detriment to any further defences raised if they are inconsistent with, or vary from, the initial instructions.

Often, the defendant has actually brought their part in the offence to the notice of police or has made full admissions, has accepted the facts as outlined by the prosecution and wishes to have charges against them 'cleared up'. In this case, there is no difficulty and a magistrate may be told that the defendant has cooperated fully with the police—making admissions and bringing further matters to their attention—and desires to have all outstanding matters disposed of. You can suggest that the defendant is, therefore, unlikely to abscond if granted bail. Generally, though, the question is a difficult one and you should be very careful when making admissions or outlining a defence.

Of course, you can say that the defendant vehemently denies any involvement in relation to the offence and has consistently denied the same to the police, or that they acknowledge the facts as outlined but state that the requisite intent was absent at the time.

There is no easy answer to this question and you need to consider each case on its merits. Usually, it is best not to discuss the police allegations at great length unless they are superficially damaging and certain matters (which, if accepted, would make bail unlikely) that can be explained by the defendant. However, where possible, do this in generalisations and without making admissions.

2-39 Previous convictions

The question of any previous convictions is often very relevant to a bail application. It is important to study the previous convictions to see whether any trend has developed. For example, a defendant may have had numerous convictions for dishonesty but be appearing before the court on a relatively minor drug matter. The prosecutor may oppose bail on the basis of an unacceptable risk that the defendant may commit an offence while on bail. In these circumstances, you could greatly rely on the fact that:

- the defendant has no previous convictions for drug matters
- there is no suggestion that the defendant is likely to commit any further offences for drug matters, and
- in the circumstances, the unacceptable risk does not exist.

Alternatively, a defendant's criminal history may have numerous entries but also lengthy periods with no entries. In this scenario, detailed instructions may show that rehabilitation has occurred, which may bolster the chances of bail being granted.

2-40 Where the defendant is legally represented

You may appear for defendants on bail with other legal representatives who have instructed you to appear on behalf of their client(s). Section 20(3AA) states that, unless otherwise ordered by the court, 'the defendant need not surrender into custody or appear personally if the defendant is represented'.

2-41 Applying to the Supreme Court if bail is refused

If bail is refused or the bail conditions are so onerous that the defendant cannot comply (e.g. a substantial surety has been imposed and the defendant has no prospects of raising it), advise the defendant of their right to apply to the Supreme Court for bail. The defendant may be eligible for legal assistance through Legal Aid Queensland. Application forms for legal aid are available at any court house and prison, and should be forwarded to Legal Aid Queensland.

F. Appeal of bail

2-42 Appeal of bail

An application for bail pending an appeal to the Supreme Court or Court of Appeal should be made to the Supreme Court.

If a magistrates court convicts a defendant of a summary offence, the defendant can appeal under s 222 of the Justices Act to the district court, and the magistrates court can hear an application for bail (s 8(1)(a)(i)). They should file a notice of appeal with the relevant district court registry before making such an application.

If a magistrates court convicts a defendant of an indictable offence, they must apply for bail pending a s 222 appeal to the Supreme Court (see [3-9](#)).

Chapter 3
Magistrates courts and
the *Justices Act 1886* (Qld)

Chapter 3—Magistrates courts and the *Justices Act 1886* (Qld)

A. Overview	(3-1-3-3)
B. General procedures	(3-4)
C. Proceedings in case of indictable offences	(3-5)
D. Proceedings in case of simple offences and breaches of duty	(3-6-3-8)
E. Appeals	(3-9-3-11)

A. Overview

3-1 Justices Act

The [Justices Act 1886](#) (Qld) provides the machinery for the establishment of magistrates courts and procedures to follow. The Act is divided into the following 12 parts:

- Part 1—Preliminary
- Part 2 (repealed)
- Part 3—Jurisdiction (constitution of magistrates courts and powers of justices of the peace to hear matters)
- Part 4—General procedure (complaints, summonses, warrants, arrest, taking evidence and disclosure directions)
- Part 5—Proceedings in case of indictable offences (including committal proceedings, private complaints and registry committals)
- Part 6—Proceedings in case of simple offences and breaches of duty (hearings, costs, enforcement, and ex parte sentencing)
- Part 6A—Use of video link facilities
- Part 7—Reciprocal enforcement of fines against bodies corporate
- Part 8 (repealed)
- Part 9—Appeals from the decisions of justices (s 222 appeals to a district court judge)
- Part 10—Miscellaneous (forms [available online] and regulations)
- Part 11—Validations, savings and transitional

3-2 Justices Regulation

The [Justices Regulation 2004](#) (Qld) contains details of the procedures and information in warrants and bench charge sheets, and sets out the schedule of costs. The forms can be found on the Queensland Courts website.

3-3 Relevant parts for duty lawyers

The parts of the Justices Act that are most relevant for you as a duty lawyer are 4, 5 and 6, as well as Part 9, Division 1, regarding appeals. These are discussed in more detail below.

B. General procedures

3-4 General procedures

Under Part 4 of the Justices Act, all proceedings must be commenced in writing except where the defendant is arrested without warrant. When the defendant appears, further charge sheets can be handed up, with consent (s 42). Each complaint may contain only one matter (s 43). The complaint must contain sufficient description of the offence and be served on the defendant (s 47). Complaints can be amended (s 48).

With regard to simple offences and breaches of duty, a ‘complaint must be made within 1 year from the time when the matter of complaint arose’. However, if the indictable offences are discontinued and substituted with summary offences, the limitation period is two years (s 52).

Division 5 deals with summonses, particularly their content and service. For you, these will arise most often in relation to proceedings instituted by either the Department of Corrective Services for breaches of community-based orders or the Commonwealth Director of Public Prosecutions for Centrelink prosecutions.

Divisions 6 and 6A deal with warrants and computer warrants. For you, the most relevant section is s 59 ‘Warrant in the first instance’, which is used when the police or prosecuting authority wish to initiate proceedings but cannot find the person to serve or arrest them. It enables the prosecuting authority to obtain a warrant of first instance, ordering police to apprehend the person and take them into custody.

Under s 65, when a person is arrested without warrant and taken into custody, they must be brought before a court ‘to be dealt with according to law as soon as practicable after the person is taken into custody’. In *Williams v R* (1986) 161 CLR 278; [1986] HCA 88, it was held that, while police were allowed to question a person in custody, it was unlawful to delay their appearance before a court for the purpose of questioning, as they had not detained the person for the purpose of bringing the suspect before a court as soon as practicable.

See also s 552 of the [Criminal Code Act 1899](#) (Qld), which states that ‘[i]t is the duty of a person who has arrested another upon a charge of an offence to take the person forthwith before a justice to be dealt with according to law’. In *Michaels v R* (1995) 184 CLR 117; [1995] HCA 8, it was held that it was unlawful for a police officer to delay taking an arrested person before a justice to question the person or make further enquiries.

Division 7 of the Justices Act allows courts to be closed proceedings or exclude people, if appropriate, and prohibits people taking photographs etc in the courtroom.

Divisions 8, 9 and 10 permit legal representatives to appear. They describe the way evidence is taken, and the summoning and calling of witnesses.

Division 10A is an important division regarding seeking disclosure of material from prosecutors, and includes provision for listing matters for a directions hearing (s 83A) to obtain orders for disclosure and other matters.

Division 11 permits remands and adjournments, including verbally.

The court has a general power to remand any person charged with an indictable offence due to the absence of witnesses or any other reasonable cause, but cannot remand the defendant in custody for more than eight days at any one time without the defendant’s consent (s 84).

The court also has the power to adjourn the hearing of any simple offence or breach of duty to a particular time and place if it gives the parties to the complaint reasonable notice of the hearing’s time and place (s 88(1)).

The court may remand the defendant in custody or admit them to bail, or allow the defendant to go at large (s 88(2)). The court may make any order in relation to the adjournment costs that it believes just (s 88(3)).

C. Proceedings in case of indictable offences

3-5 Proceedings in case of indictable offences

Part 5 of the Justices Act covers proceedings in the case of indictable offences.

Division 2—Private complaints

Duty lawyers do not act in these matters.

Division 3—Committals

Duty lawyers do not act in committal proceedings, even for a full hand-up committal.

D. Proceedings in case of simple offences and breaches of duty

3-6 Proceedings in case of simple offences and breaches of duty

The divisions in Part 6 of the Justices Act are important for and relevant to you as a duty lawyer.

Generally, ‘a complaint of a simple offence or breach of duty shall be heard or determined at a place appointed for holding Magistrates Courts within the district within which the offence or breach of duty was committed’ (s 139(1)(a)). Such complaint can also be heard ‘at a place appointed for holding Magistrates Courts within the district within 35km of the boundary of [the Magistrates Court district in] which the offence or breach of duty was committed’ (s 139(1)(b)).

There are exceptions regarding offences involving vehicles, vessels or aircraft in the course of the journey (s 139(1)(c) and (d)). However, the court can adjourn the hearing to any other place in Queensland if it would be more convenient (s 139(2)). If there are two or more places within a magistrates court district appointed for holding magistrates courts, the court may adjourn the hearing to one of these places if more convenient (s 140(1)).

Division 2 deals with ex parte sentences. (Note: Duty lawyers do not appear on these.) These situations arise when a complainant or defendant fails to appear on a complaint, or simple offence or breach of duty. If the complainant does not appear, the complaint can be dismissed (s 141). If the defendant does not appear, the court can:

- hear the matter in their absence (ex parte)
- issue a warrant
- sentence in their absence if they have sent written notice to the court of a guilty plea to be entered if s 146A has been complied with, or
- adjourn the matter (s 142(1)).

A court cannot disqualify a person’s driver licence or imprison them in their absence (s 142(2)). Section 142A further clarifies the procedures for sentencing a person in their absence. The court must be satisfied that the defendant was properly aware of the court date; was properly served with a notice to appear; or signed a bail undertaking to that effect.

These sections are subject to s 146A, which prevents ex parte sentences on:

- (a) ‘an offence that is also triable on indictment; or
- (b) an offence prescribed by regulation for the purposes of this paragraph; or

an offence in relation to which another Act requires the court or justices to proceed in a way different from that provided by this section’.

3-7 Defendant to be asked to plead

The court is required to ask the defendant to plead to a complaint and, if they plead guilty, the court must then enter a conviction and deal with the defendant according to law (s 145). Some magistrates follow this procedure strictly and ask the defendant personally, rather than the duty lawyer, for their plea. You should tell the defendant this before they appear in court. You are required to allow defendants to enter their own plea. All proceedings should be recorded electronically, which prevents difficulties later regarding whether the defendant's plea was voluntary. See *Brown v Qld Police Service* [2011] QDC 301 for authority that the charges must be read to the defendant and that they must enter their own pleas.

3-8 Court can re-open proceedings

If a court convicts a defendant and imposes a penalty contrary to law; fails to impose a penalty that conforms with the law; or imposes a sentence decided on a clear factual error of substance, the court may re-open the proceedings either of its own motion or on a party's application. After allowing the parties to be heard, the court may amend the order made on the complaint and impose a penalty that conforms with the law or accounts for the factual error (*Penalties and Sentences Act 1992* (Qld), s 188).

If a court convicts or makes an order based on or containing an error of fact, the court may set aside the conviction, or vacate or vary the order, to conform with the facts (s 147A(2). This can include setting aside, or vacating or varying, an order if the court is 'satisfied that—

- (a) the conviction or order has been recorded or made against the wrong person; or
- (b) the summons issued upon the complaint...did not come to the knowledge of the defendant; or
- (c) the defendant...has previously been convicted of the offence, the subject of the complaint' (s 147A(3)).

However, this subsection does not limit the court's power under s 147A(2) of the Justices Act. Any application under s 188 of the Penalties and Sentences Act or s 147A(2) of the Justices Act must be made within 28 days after the conviction or order date, or at such time as the court may allow (*Penalties and Sentences Act*, s 188(5), and *Justices Act*, s 147A(5)).

E. Appeals

Under Part 9, Division 1 of the Justices Act, if you believe that a sentence is 'manifestly excessive', you can file an appeal against the sentence and apply for appeal bail, particularly where you can do this in the same day.

3-9 Offences dealt with summarily

Under s 222 of the Justices Act, a person convicted of an offence in the magistrates court (whether summary or indictable) has a right of appeal to the district court. They must bring appeals to the district court within one month (s 222(1)).

However, a defendant cannot appeal against conviction if they pleaded guilty or admitted the truth of a complaint, including under s 651 of the Criminal Code, 'Plea of guilty' (s 222(2)).

'To start the appeal, the appellant must file a notice of appeal in a District Court registry in the district in which the appeal must be heard' (s 222(3)).

'For this section, an appellant is taken to have filed the notice of appeal in the District Court registry—

- (a) if the District Court registry is more than 50km from the place where the order was made; and
- (b) the appellant gives the notice of appeal to the relevant clerk of the court' (s 222(4)).

Note: If the appellant is in custody and subject to s 116(2) and (3) of the *District Court of Queensland Act 1967* (Qld), 'the appeal must be heard in the District Court district where the appellant is in custody' (s 222(9)). Under

s 222, an appellant in custody in prison ‘is taken to have filed the notice of appeal in the District Court registry if the appellant...gives the notice of appeal to the prison’s general manager’ (s 222(5)).

3-10 Bail

Both the magistrates and district courts have jurisdiction to grant bail pending an appeal ([Bail Act 1980](#) (Qld), s 8). However, for indictable offences dealt with summarily, only the Supreme Court has jurisdiction over bail pending an appeal (see also [Chapter 2—Bail](#)).

3-11 Duty lawyer obligations

If you identify a matter with potential merit for appeal and the defendant is in custody, you will give the relevant Legal Aid Queensland office a copy of any relevant documents, including the duty lawyer form. You will ask the Legal Aid Queensland office to contact the defendant for advice and, if instructed, the appeal documents.

If the defendant is not in custody, advise them to contact a Legal Aid Queensland office as soon as possible for further advice and give them any relevant documentation, if practical.

Chapter 4
Indictable offences
that can be dealt
with summarily

Chapter 4—Indictable offences that can be dealt with summarily

A. Introduction	(4-1-4-3)
B. The defendant's election	(4-4-4-6)
C. The prosecutor's election	(4-7)
D. Matters for which there are no elections	(4-8)
E. Overriding discretion of magistrates	(4-9-4-10)
F. Appellate jurisdiction	(4-11)

A. Introduction

4-1 What is an indictable offence?

Under the [Criminal Code Act 1899](#) (Qld), there are criminal offences and regulatory offences. Criminal offences are crimes, misdemeanours and simple offences (s 3). Crimes and misdemeanours are indictable offences and cannot be dealt with summarily unless expressly stated in s 552 of the Criminal Code. A simple offence can be dealt with summarily.

Regulatory offences can only be dealt with summarily.

4-2 Who can elect summary jurisdiction?

Sections 552A and 552B of the Criminal Code set out the indictable offences that can be dealt with summarily.

There are no matters that can be dealt with summarily at the magistrate's election.

The [Drugs Misuse Act 1986](#) (Qld) sets out the matters that can be dealt with summarily at the prosecutor's election.

4-3 Summary jurisdiction—time

There are no time limits on when prosecution for an indictable offence must commence for it to be dealt with summarily.

B. The defendant's election

4-4 Defendant's election under the Criminal Code

Section 552B of the Criminal Code refers to indictable offences that must be heard and decided summarily unless the defendant elects for jury trial. Your client will be able to choose whether to have a trial before a magistrate, or be committed for trial to the higher courts. All specific sections are listed.

4-5 Magistrate to advise as to right of election

Section 552I of the Criminal Code applies to all offences under s 552B. If the defendant is not legally represented, the magistrate must state the substance of the charge, and explain to the defendant that they are entitled to be tried

by a jury and not obliged to make any defence in the magistrates court. The magistrate must then ask whether the defendant wishes the charge to be dealt with summarily.

Magistrates follow this procedure strictly. If the defendant does elect summary jurisdiction, this should be fully explained to the defendant before they appear in court so they are prepared when the magistrate questions them.

4-6 Determining value where there are multiple charges

For jurisdictional purposes, the value of property under which charges can be dealt with summarily relates to the value of property associated with each individual charge. It does not relate to the total value of all property referred to in several charges being heard at one hearing.

C. The prosecutor's election

4-7 Prosecutor's election under the Criminal Code

Section 552A of the Criminal Code refers to indictable offences that must be heard and decided summarily on the prosecution's election. You can use this section to determine whether a prosecutor has the power to keep a charge in the magistrates court. All such specific sections are listed.

The right of election exists under the Drugs Misuse Act (ss 13(1) and (2)). The election applies only for certain offences listed under this section.

D. Matters for which there are no elections

4-8 Matters for which there are no elections

Section 552BA of the Criminal Code refers to indictable offences that must be heard and decided summarily. You can use this section to determine whether an indictable offence must be finalised in the magistrates court.

Note that s 552BA is subject to the excluded offences listed in s 552BB of the Criminal Code.

E. When Magistrates Court must abstain from jurisdiction

4-9 Adequate punishment

The above provisions are subject to s 552D of the Criminal Code, which states that a 'Magistrates Court must abstain from dealing summarily with [any indictable offence] if satisfied, at any stage...[that] the defendant, if convicted, may not be adequately punished on summary conviction'. If the court abstains from jurisdiction, the charge must be committed to a higher court.

4-10 Defence application in exceptional circumstances

Where there are 'exceptional circumstances' the defence may apply to have a charge dealt with on indictment. Exceptional circumstances could include a sufficient connection between the charges; an important issue of law; or public interest.

F. Appellate jurisdiction

4-11 Appellate jurisdiction

If a defendant is convicted summarily of an indictable offence, the right of appeal is to a District Court under s 222 of the [Justices Act 1886](#) (Qld).

Chapter 5
Specific offences
under the Criminal Code
more commonly
dealt with and defences

Chapter 5—Specific offences under the Criminal Code more commonly dealt with and defences

A. Assaults	(5-1-5-14)
B. Sexual offences	(5-15-5-19)
C. Offences of dishonesty	(5-20-5-35)
D. Property damage	(5-36-5-38)
E. Defences generally	(5-39)

A. Assaults

5-1 Definition of assault

Under s 245(1) of the *Criminal Code Act 1899* (Qld), '[a] person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault'.

The term 'applies force includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort' (s 245(2)).

The word 'assault' has been held to have a very wide definition. If a person presents an unloaded gun or imitation firearm at another person, this could be held to be an assault. However, words not accompanied by some bodily act or gesture indicating an intention to assault would not be held as assault.

5-2 Assault is an offence

Under s 246:

- (1) 'An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.
- (2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person'.

Normally, consent is relevant (e.g. a boxing match) but not where the consent is obtained by fraud or the complainant is not legally allowed to consent (e.g. in certain sexual offences where age is relevant).

5-3 Common assault

'Any person who unlawfully assaults another is guilty of a misdemeanour, and is liable, if no greater punishment is provided, to imprisonment for 3 years' (s 335).

5-4 Aggravated assault

While there is no specific offence of aggravated assault, the Criminal Code has previously provided, in certain circumstances of aggravation, increased penalties on summary conviction for assault. The penalty for common assault was increased from one to three years' imprisonment from 1 July 1997. This gives the court greater scope for variation in sentencing, depending on the nature of the assault and any alleged circumstances of aggravation.

Circumstances of aggravation have previously included where the:

- assault was of a sexual nature
- person assaulted was a child under 16
- person assaulted was a female
- person assaulted was a male child under the age of 14 years.

5-5 Assault occasioning bodily harm

Under s 339:

- (1) 'Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime, and is liable to imprisonment for 7 years.
- (3) If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with 1 or more other person or persons, the offender is liable to imprisonment for 10 years'.

'Bodily harm' is defined as 'any bodily injury which interferes with health or comfort' (s 1).

The sensation of pain without 'bodily injury' is not sufficient to constitute bodily harm (see *R v Scatchard* (1987) 27 A Crim R 136). However, if the bodily injury results in:

- (a) 'the loss of a distinct part or organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available', it comes under the definition of 'grievous bodily harm' (s 1).

5-6 Serious assaults

Section 340 of the Criminal Code provides examples of assaults that are deemed to be serious assaults. These include when a person:

- a. assaults...with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; or
- b. assaults, resists or wilfully obstructs a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; or
- c. unlawfully assaults any person while the person is performing a duty imposed on the person by law; or
- d. assaults any person because the person has performed a duty imposed on the person by law; or...
- g. unlawfully assaults any person who is 60 years or more; or
- h. unlawfully assaults any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device' (s 340).

If convicted of a serious assault, an offender is liable to seven years' imprisonment. A charge of serious assault must be dealt with summarily if the prosecutor elects (s 552A(a)).

5-7 Defences to assault

The defences most frequently relied on are provocation and self-defence. These are discussed further below.

5-8 Provocation defined

Section 268 defines ‘provocation’ as ‘any wrongful act or insult of such a nature as to be likely, when done to an ordinary person’ or to people in a special relationship to the person (see s 268(1) for the relationships covered by the definition), ‘to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered’ (s 268). ‘A lawful act is not provocation to any person for an assault’ (s 268(3)).

5-9 Defence of provocation

Under s 269, ‘[a] person is not criminally responsible for an assault committed’ in response to such provocation if:

- the person is deprived of self-control
- ‘the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm’
- the person acts upon the provocation ‘on the sudden and before there is time for the person’s passion to cool’ (s 269).

5-10 Provocation is a defence only if assault is element of offence

Provocation can be raised as a defence only if assault is an element of the original offence (*Kapronovski v R* (1973) 133 CLR 209; [\[1973\] HCA 35](#)). Therefore, this may apply in relation to offences of assault, common assault or assault occasioning bodily harm, but not to unlawful wounding or unlawful grievous bodily harm, as assault is not specifically an element of those offences.

5-11 Questions of fact for court

‘Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self control, and whether any force used is or is not disproportionate to the provocation, are questions of fact’ (s 269(2)). Where provocation is open on the evidence, the onus is on the prosecution to disprove provocation beyond a reasonable doubt (*Stingel v R* (1990) 171 CLR 312; [\[1990\] HCA 61](#)).

5-12 Self-defence against unprovoked assault

‘When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm’ (s 271(1)).

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm’ (s 271(2)).

5-13 Self-defence against provoked assault

Self-defence can be available when, after ‘a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person’s preservation from death or grievous bodily harm to use force in self-defence...although such force may cause death or grievous bodily harm’ (s 272(1)).

This protection does not apply if ‘the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person’ (s 272).

5-14 Aiding in self-defence

‘In any case in which it is lawful for any person to use force...for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person’s aid to use a like degree of force for the purpose of defending the first person’ (s 273). It is a question of fact for the court and, where the question of self-defence arises, the prosecution must negative self-defence beyond a reasonable doubt.

B. Sexual offences

5-15 Sexual offences that may be dealt with summarily

In some circumstances, several sexual offences can be dealt with summarily if the defendant elects this option. Section s 552B(1) sets out these offences.

5-16 Offences where absence of consent is not an element

For offences under ss 210 (‘Indecent treatment of children under 16’) and 215 (‘Carnal knowledge with or of children under 16’), the prosecution does not have to establish the absence of consent. The acts constituting these offences become unlawful because the child is under the age of 16. However, the question of consent may be relevant on sentencing, depending on the complainant’s age and maturity.

5-17 Offences where absence of consent is an element

For certain offences, such as rape, the absence of consent is clearly an element. If a defence is raised on the basis that either the complainant consented or the accused had an honest and reasonable but mistaken belief about consent, the Crown must negative consent beyond reasonable doubt.

5-18 Sexual offences that must proceed on indictment

Most sexual offences under the Criminal Code are contained in ss 208–229B and 347–352. Except for the offences referred to in 5-15, these offences must proceed on indictment. Sections 208–229B deal with offences against morality, including sodomy, indecent treatment of children under 16, carnal knowledge with or of children under 16, procurement of sexual acts, incest, child exploitation material offences and sexual relationships with a child. Sections 347–352 deal with rape, attempts to commit rape, assault with intent to commit rape and sexual assaults.

5-19 Mistaken belief about age of complainant

When dealing with any offence under Chapter 22 (ss 208–229B) of the Criminal Code, you should be aware of s 229, which states that, ‘[e]xcept as otherwise expressly stated, it is immaterial, in the case of any [offence in Chapter 22]

committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age'. Some sections allow for a specific defence regarding mistaken belief about age.

Under ss 210 ('Indecent treatment of children under 16') and 215 ('Carnal knowledge with or of children under 16'), an accused person can raise a defence if the child is above the age of 12 and they can prove that they reasonably believed that the child was of or above the age of 16. The onus of proof is reversed in this case—the defence must not only raise a defence but also establish the defence on the balance of probabilities. If the child is under the age of 12, there seems to be no defence, and belief about the child's age is irrelevant and immaterial.

C. Offences of dishonesty

5-20 Offences more commonly encountered

The dishonesty offences you are more likely to encounter as a duty lawyer include stealing, receiving, breaking and entering, burglary and fraud.

5-21 Stealing defined

Under s 391:

- '(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
- (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if the person does so with any of the following intents, that is to say—
- an intent to permanently deprive the owner of the thing of it;
 - an intent to permanently deprive any person who has any special property in the thing of such property;
 - an intent to use the thing as a pledge or security;
 - and intent to part with it on a condition as to its return which the person taking it or converting it may be unable to perform;
 - an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - in the case of money—an intent to use it at the will of the person who takes or converts it, although the person may intend to afterwards repay the amount to the owner'.

See s 391(2) for the definition of 'stealing'.

5-22 Things capable of being stolen

'Anything that is the property of any person is capable of being stolen if it is moveable or capable of being made moveable, even if it is made moveable in order to steal it' (s 390).

5-23 Intention

You need to obtain clear instructions regarding intention. Often, people wish to plead guilty to finalise the matter quickly but their instructions do not indicate an intention to permanently deprive. For example, a person who, through an oversight, failed to pay for an item upon leaving a shop may still feel that they have done something wrong and wish to plead guilty. Obviously, this person would not be guilty of any offence under the Criminal Code, though, arguably, they could be guilty of an offence under s 5 of the [Regulatory Offences Act 1985](#) (Qld), if so charged.

5-24 Bona fide claim of right

While ignorance of the law does not usually afford any excuse ‘unless knowledge of the law by the offender is expressly declared to be an element of the offence...a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done...in the exercise of an honest claim of right and without intention to defraud’ (s 22). When this defence is raised on the evidence, the prosecution must negative it beyond reasonable doubt. The defendant does not have the onus of proof. This section has had very wide application. The usual application has been where a person has done some act relating to property, while honestly but mistakenly believing that they own it.

5-25 Mistake of fact

‘A person who does or omits to do any act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist’ (s 24(1)). When this defence is raised on the evidence, the prosecution has the onus of proof to exclude it beyond reasonable doubt.

5-26 Abandoned property

The Criminal Code specifically provides for situations where property ‘has been lost by the owner and found by the person who converts it...[T]he conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes, on reasonable grounds, that the owner can not be discovered’ (s 391(5)).

The prosecution has the onus of negating the application of s 391(5). If this question arises, it must prove on the evidence that the defendant either knew at the relevant time where the owner was or did not believe on reasonable grounds that the owner was undiscoverable (*Dolby v Stanta* [1996] 1 Qd R 138; [\[1995\] QCA 434](#)).

5-27 Receiving stolen property

‘A person who receives tainted property, and has reason to believe it is tainted property, commits a crime’ (s 433). To constitute receiving, ‘it is sufficient to show that the accused person has, either alone or jointly with some other person, had the thing in his or her possession, or has aided in concealing it or disposing of it’ (s 433(2)).

The Criminal Code provides far more substantial penalties for receiving than stealing. A person who steals (if no other punishment is provided) is subject to a maximum of five years’ jail, while a person convicted of receiving stolen property can be subject to a maximum of seven or fourteen years’ jail (s 433).

5-28 Mental element—receiving

The defendant must have the mental element of the offence, namely the guilty knowledge, at the time of receiving and not acquire it subsequently (*R v Patterson* [1906] QWN 32). Proof of possession is essential, while mere knowledge is insufficient (*R v Watson* [1916] 2 KB 385).

5-29 Breaking and entering offences

Sections 419 and 421 set out the various offences of breaking and entering. The penalties vary from 10 years’ jail to life. Section 419 relates to entering or breaking and entering dwellings, while s 421 relates to entering or breaking and entering premises. A ‘dwelling’ can include a caravan or motel unit.

5-30 Mental element

The mental element in all offences of breaking and entering is an intention to commit an indictable offence. A person who breaks into a house intending to steal or assault someone clearly does so with the intention of committing an indictable offence.

However, a person who breaks into a house merely to retrieve their own property would not be guilty of the offence of breaking, entering and stealing, or breaking and entering with the intention of committing an indictable offence. However, they could be guilty of an offence under s 48A of the [Invasion of Privacy Act 1971](#) (Qld).

You should take care when obtaining full instructions about the mental element of the offence, particularly when a summary plea of guilty is being considered. Sometimes charges are laid when there is no evidence of the mental element.

5-31 Breaking and entering defined

Under s 418:

- (1) A person who breaks any part, whether external or internal, of a dwelling or any premises, or opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar, flap or other thing intended to close or cover an opening in a dwelling or any premises, or an opening giving passage from one part of a dwelling or any premises to another, is said to break the dwelling or premises.
- (2) A person is said to enter a dwelling or premises as soon as any part of the person's body or any part of any instrument used by the person is within the dwelling or premises.
- (3) A person who obtains entrance into a dwelling or premises by means of any threat or artifice used for that purpose, or by collusion with any person in the dwelling or premises, or who enters any chimney or other aperture of the of the dwelling or premises permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the dwelling or premises'.

5-32 Premises defined

In relation to burglary, housebreaking and other similar offences contained in Chapter 39 of the Criminal Code, the term 'premises' includes a building or structure, or part thereof, other than a dwelling, and also a tent, caravan, vehicle and any similar place (s 418(4)).

5-33 Fraud

Under s 408C:

- (1) A person who dishonestly—
- (a) applies to his or her own use or to the use of any person—
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
 - (b) obtains property from any person; or
 - (c) induces any person to deliver property to any person; or
 - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
 - (e) causes a detriment, pecuniary or otherwise, to any person; or
 - (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
 - (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
 - (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;
- commits the crime of fraud' (s 408C(1)).

'Property' includes 'credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations (s 408C(3))', as well as:

- (a) every thing animate or inanimate that is capable of being the subject of ownership; and
- (b) money; and
- (c) electrical or other energy, gas and water; and
- (d) a plant; and
- (e) an animal [defined in s 1]; and
- (f) a thing produced by an animal [defined in s 1]; and
- (g) any other property real or personal, legal or equitable, including things in action and other intangible property' (s 1).

The sole basis for criminality is proof of dishonesty. The question of intention is paramount, so you should question the defendant at length about whether any fraudulent intention existed, particularly if the defendant's instructions are to plead guilty summarily.

5-34 Passing valueless cheques

The offence of passing valueless cheques is contained in s 427A. Under s 427A(2), it is a defence that the accused person reasonably believed that the cheque would be paid in full on presentation and had no intention to defraud. The accused person must establish the defence on the balance of probabilities (*R v Carr-Briant* [1943] KB 607).

5-35 Computer hacking and misuse

Under s 408E:

- '(1) A person who uses a restricted computer without the consent of the computer's controller commits an offence'. This offence must be dealt with summarily and carries a maximum penalty of two years' imprisonment.
- (2) If the person causes or intends to cause detriment or damage, or gains or intends to gain a benefit, the person commits a crime and is liable to imprisonment for 5 years.
- (3) If the person causes a detriment or damage or obtains a benefit for any person to the value of more than \$5000, or intends to commit an indictable offence, the person commits a crime and is liable to imprisonment for 10 years.
- (4) It is a defence to a charge under this section to prove that the use of the restricted computer was authorised, justified or excused by law'.

D. Property damage

5-36 Wilful and unlawful damage

It is an offence for any person to wilfully and unlawfully destroy or damage any property (s 469). The maximum penalty is five years' jail. There is no longer any distinction between whether the offence is committed during the day or night, but this may be reflected in any penalty imposed.

5-37 'Wilfully' defined

It has been held that the Crown does not need to prove beyond reasonable doubt, as an element of the offence, an intention to destroy or damage the actual property that was destroyed or damaged. The Crown must merely prove that the accused person either:

- actually intended to do the particular kind of harm that they did
- deliberately did an act (i.e. a willed act), aware at the time that the resulting charge was a likely consequence of the act and that they recklessly did the act regardless of the risk (*R v Lockwood; ex parte Attorney-General* [1981] Qd R 209).

For example, if a person throws a bottle at another person, intending to injure them, but misses and shatters a window, they could be successfully prosecuted under this section even though they had no intention of breaking the window at any stage.

5-38 Unauthorised damage to property under Regulatory Offences Act

A similar offence of unauthorised damage to property where the loss caused is \$250 or less may be brought under s 7 of the Regulatory Offences Act. If the charge is brought under the Regulatory Offences Act, the matter must be dealt with summarily.

If the charge you are considering as duty lawyer would, upon conviction, breach a suspended sentence and is charged as wilful damage under the Criminal Code but the value of the loss is \$250 or less, you should consider seeking that the charge be substituted with the Regulatory Offences Act ‘unauthorised damage to property’ charge (where the maximum penalty is a fine and not an imprisonment term).

E. Defences generally

5-39 Defences available under Chapter 5 of the Criminal Code

Unless specifically excluded by the particular statute, the defences available under Chapter 5 of the Criminal Code apply to all statute law in Queensland (s 36). The most common defences are:

- bona fide claim of right (s 22)
- acts that occur ‘independently of the exercise of a person’s will’ (s 23(1)(a)) or by ‘an event that the person does not intend or foresee as a possible consequence and an ordinary person would not reasonably foresee as a possible consequence’ (s 23(1)(b)). However, if an event occurs by an event that the person does not intend or foresee as a possible consequence (and an ordinary person would not reasonable foresee as a possible consequence), ‘the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality’ (s 23(1A))
- mistake of fact (s 24)
- insanity (s 27)
- intoxication (s 28).

You should be familiar with the various defences under Chapter 5 of the Criminal Code.

Chapter 6

Commonwealth offences

Chapter 6—Commonwealth offences

A. Introduction	(6-1)
B. Jurisdiction	(6-2–6-5)
C. Common offences index	(6-6–6-7)
D. Sentencing	(6-8–6-12)
E. Appeals	(6-13)

A. Introduction

6-1 Overview

As a duty lawyer, you should be aware of the following matters in relation to Commonwealth offences.

State courts exercise Commonwealth jurisdiction. State courts have the power to deal with people charged with Commonwealth offences ([Judiciary Act 1903](#) (Cth), s 58). The state laws regarding procedure and evidence, remand time and bail generally apply (Judiciary Act, ss 68 and 79).

The [Bail Act 1980](#) (Qld) applies if a person is charged with a Commonwealth offence (Judiciary Act, s 68(1)).

Section 15 of the [Crimes Act 1914](#) (Cth) gives a court of summary jurisdiction power to remand the defendant in custody or release them on bail on a recognisance if it becomes necessary or advisable to defer a case’s hearing.

The Crimes Act (Cth) and the [Criminal Code Act 1995](#) (Cth) are the main pieces of legislation introducing procedural and offence provisions of general application. These provisions have been added to over the years.

The Commonwealth Director of Public Prosecutions conducts most Commonwealth prosecutions.

Many matters of evidence and procedure are dealt with directly by Commonwealth law to the exclusion of state law. One example is the [Evidence Act 1995](#) (Cth).

Sentencing under the Commonwealth jurisdiction normally occurs under ss 16–22A of the Crimes Act. Generally, a sentence under Commonwealth legislation leads to a conviction being recorded. The exception is where it can be argued that s 19B of the Crimes Act applies. You should be familiar with s 19B provisions and the leading case, *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568 [2001] NSWCCA 332, also discussed in *CEO Customs v Odesnik* [2010] QMC 3.

If a court of summary jurisdiction (Crimes Act, s 4J) deals with an offence, the court may:

- deal with the matter if the offence relates to property, where the value does not exceed \$5000
- impose a prison sentence for a maximum of 12 months or a maximum fine of 60 penalty units, or both – this applies where the offence is punishable by imprisonment for 5 years or less
- impose a prison sentence for a maximum of 2 years or a maximum fine of 120 penalty units, or both – this applies where the offence is punishable by imprisonment for more than 5 years but no more than 10 years.

If a person is convicted of two or more Commonwealth offences against the same provision of a Commonwealth law, the court can impose one penalty for both or all the offences.

Usually, Commonwealth offences can be dealt with summarily only if they attract a maximum of 10 years, and both prosecutor and defendant agree to have the matters dealt with summarily.

In one exceptional case of possessing a controlled drug under s 308(1) of the Criminal Code (Cth), ‘the person may be tried, punished or otherwise dealt with as if the offence were an offence against the law of the State’ so that state sentencing options, such as drug diversion, are available.

A separate Commonwealth callover is held for Commonwealth criminal matters. ‘[Practice Direction No. 22 of 2011](#)’ deals with the procedure for Commonwealth criminal matters in the magistrates court.

Defences under the [Criminal Code Act 1899](#) (Qld) are not available in Commonwealth matters.

The [Mental Health Act 2000](#) (Qld) does not apply to Commonwealth offences. Sections 20BS–BY of the Crimes Act (Part 1B, Division 9) provide special sentencing alternatives for persons suffering from mental illness or intellectual disability. Such matters are likely to require more representation than you, as the duty lawyer, can provide.

There is no concept of parole release dates in Commonwealth matters. There are only imprisonment sentences that can be suspended immediately (Crimes Act, s 20(1)(b)) or after an imprisonment period has been served (Crimes Act, ss 19AC–AF).

B. Jurisdiction

6-2 Dealing with offences—summarily or on indictment

Generally, Commonwealth offences can be dealt with summarily only:

- if they attract a maximum of 10 years (and no contrary intention is expressed or implied), and
- both prosecutor and defendant agree to dispose of the matters summarily.

Indictable offences are offences that are punishable by imprisonment for more than 12 months. Such matters can still be dealt with summarily if prosecutor and defendant agree.

Summary offences are offences that are either punishable by imprisonment for 12 months or less, or not punishable by imprisonment (Crimes Act, ss 4G, 4H and 4J).

6-3 Time for commencing prosecutions

Prosecutions for offences against Commonwealth laws may be commenced within the following timeframes:

- no time limitation for offences where the maximum imprisonment for a first offence exceeds six months
- one year after the offence was committed for offences where the maximum imprisonment is six months or less
- one year also for offences where punishment is a pecuniary penalty and no imprisonment (Crimes Act, s 15B).

6-4 Party offences

‘Any person who receives or assists another person, who is, to his knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him or her to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence’ (Crimes Act, s 6).

6-5 Defences

‘Where a provision of a law of the Commonwealth provides a defence to a particular offence, the provision does not, unless the contrary intention appears, prevent the use of any defence that is otherwise available’ (Crimes Act, s 4L).

C. Common offences index

6-6 Common offences a duty lawyer may encounter

If a matter is proceeding by way of a guilty plea, you will need to know the sentencing provisions under the Crimes Act. In many cases, the Commonwealth Director of Public Prosecutions may provide a schedule of comparative cases that indicates the range of sentences that you could seek.

Centrelink fraud

You would normally deal with these matters in a duty lawyer session unless:

- there is a dispute with the statement of facts
- the amount of fraud involves the prospect of imprisonment
- the client requires or seeks an order for no conviction to be recorded under s 19B of the Crimes Act.

In these situations, you should seek an adjournment to obtain evidence to support the case.

Prosecutions for Centrelink fraud fall under s 135.2 of the Criminal Code (Cth).

People smuggling matters under ss 232–233 of the *Migration Act 1958* (Cth)

You are unlikely to deal with these matters except in bail matters, or while obtaining separate representation or acting as agent on a mention for the lawyer briefed in the matter.

There may be cases of utilising or presenting false documents under ss 234, 235 or 236 of the [Migration Act 1958](#) (Cth). Here, you must assess whether the complexity of these matters requires an adjournment for separate representation.

Aviation offences or ‘Carrying weapons or prohibited goods on an aircraft or through a screening point before boarding the aircraft’

Prohibited goods can include fireworks, gas canisters or rechargeable batteries. Items are deemed prohibited goods under the [Aviation Transport Security Act 2004](#) (Cth) and [Aviation Transport Security Regulations 2005](#) (Cth).

Note: The Aviation Transport Regulations also cover situations such as jokes about bombs in luggage. Such matters are deemed complex, as they amount to threats to aviation and may involve prosecution submissions of actual imprisonment. You should have such charges adjourned for separate representation.

Telecommunication offences relating to carriage services

These offences are dealt with under Part 10.6 Subdivision C of the Criminal Code (Cth) (ss 474.14–474.18). They involve matters such as ‘Improper use of carriage services’ (s 474.17):

‘A person is guilty of an offence if:

- (a) the person uses a carriage service; and
- (b) the person does so in a way (whether by the method of use or the content of the communication or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’.

The penalty for an offence against s 474.17 is three years imprisonment.

Telecommunication offences involving pornography or child pornography are likely to require separate representation, and may involve only bail and remand issues for the duty lawyer.

Australia Post offences

Major offences involving Australia Post are now dealt with under either ss 471.1–471.15 of the Criminal Code (Cth) or ss 85E–85ZA of the Crimes Act. The Australian Federal Police usually investigate these offences in conjunction with Australia Post officers.

As a duty lawyer, you can assess whether to deal with or remand the matter, depending on the facts and amounts involved. You should obtain the schedule of comparative sentences that the Commonwealth prosecutor is seeking to rely on if you intend to deal with the matter by way of a guilty plea. Sentencing falls under the Crimes Act.

Commonwealth drug offences

Generally, you would deal with matters under s 308.1 of the Criminal Code (Cth) (i.e. possession of a controlled drug) only where ‘a person may be tried punished or otherwise dealt with as if the offence were an offence against the law of the State’ so that state sentencing options such as drug diversion are available. The meaning of ‘possession’ is similar to that under the [Drugs Misuse Act 1986](#) (Qld).

Most Commonwealth drug offences under the Criminal Code (Cth) are listed as ‘serious’ drug offences and beyond the duty lawyer’s scope. The schedules of controlled, border controlled, marketable, commercial and trafficable amounts of the relevant drugs are listed in Chapter 9, Part 9.1 of the Criminal Code (Cth). These include importing or exporting narcotic drugs and related offences, such as possessing narcotic drugs that have been imported.

You are unlikely to deal with any of these charges except to consider issues of bail, secure longer term representation for the client or act as agent for a lawyer briefed in the matter.

Crimes Act offences

These include destroying or damaging Commonwealth property, forgery, uttering false pretences and false representations (imposition).

The types of offences that you may commonly encounter include offences of trespass under s 89 of the Crimes Act. This states that any ‘person who, without lawful excuse..., trespasses or goes upon any prohibited Commonwealth land shall be guilty of an offence’. The penalty is 10 penalty units.

Another offence could be wilful damage under s 29 of the Crimes Act, which states that ‘[a]ny person who intentionally destroys or damages any property...belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence’. The penalty is 10 years’ imprisonment.

Note s 17B of the Crimes Act, which restricts prison sentences on certain minor offences, for which s 29 of the Crimes Act is specifically mentioned.

Failing to lodge return form offences under the Bankruptcy Act, insolvency and trustee legislation or corporations law

As a duty lawyer, you can usually deal with these matters, depending on their complexity. The sentences normally sought are hefty fines with the recording of a conviction.

Note: Failure to lodge tax returns is dealt with separately under specific callovers for the Australian Tax Office.

Breach proceedings under ss 20A and 20AC of the Crimes Act

These breach proceedings are for failure to comply with:

- probation conditions under ss 19B(1)(d)(iii) or 20(1)(a)(iv) of the Crimes Act
- community service conditions under s 20AB(1) of the Crimes Act, or
- recognisance proceedings conditions under any part of ss 19B(1)(d), 20(1)(a) or 20(1)(b) of the Crimes Act.

You should be aware that because breaches, particularly of s 20(1)(b) orders, involve the breaching of a prison term that was suspended, actual imprisonment is a possible outcome. You should adjourn such matters for separate representation.

Customs Act offences

The Australian Customs Service has an investigative arm that investigates breaches of criminal law in the regulation of the import of items into Australia and duty payment. Customs may now prosecute these matters separately from the Commonwealth callover. Sentences sought would be hefty fines and the recording of a conviction.

6-7 Defences

You should be aware that a defence under the common law may be open to a defendant charged with an offence under any Commonwealth Act. This will be in addition to any statutory defence.

Section 4L of the Crimes Act states that '[w]here a provision of a law of the Commonwealth provides a defence to a particular offence, the provision does not, unless the contrary intention appears, prevent the use of any defence that is otherwise available'.

D. Sentencing

6-8 Introduction

Part 1B of the Crimes Act (ss 16–22A) now deals with sentencing. The general sentencing principles are contained in ss 16 and 17A.

Following are matters that a court will consider when passing sentence.

Section 16A of the Crimes Act states:

- '(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
- (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
- (a) the nature and circumstances of the offence;
 - (b) other offences (if any) that are required or permitted to be taken into account;
 - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
 - (d) the personal circumstances of any victim of the offence;
 - (e) any injury, loss or damage resulting from the offence;
 - (f) the degree to which the person has shown contrition for the offence;
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;...
 - (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
 - (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
 - (j) the deterrent effect that any sentence or order under consideration may have on the person;
 - (k) the need to ensure that the person is adequately punished for the offence;
 - (m) the character, antecedents, age, means and physical or mental condition of the person;
 - (n) the prospect of rehabilitation of the person;
 - (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.
- '(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a

federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order’.

Section 17A states that a ‘court shall not pass a sentence of imprisonment on any person...unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case’.

Apart from various sentencing options, Part 1B also deals with matters such as parole, unfitness for trial, acquittal because of mental illness, and other provisions for people suffering from mental illness or intellectual disability.

6-9 Taking other offences into account

Section 16BA provides for a procedure under which a court, when passing sentence for a federal offence or federal offences, can, with the prosecutor’s and defendant’s consent, take into account other offences that the defendant is believed to have committed and admits guilt of.

For example, the prosecution may have evidence of a large number of similar offences by a defendant (e.g. a series of fraudulent Centrelink claims resulting in several debts of overpayment prior to the court matters). In this case, the prosecution might elect to proceed on one charge only but give the defendant a list of others under s 16BA. The defendant might plead guilty to that one offence but, under that section, ask the court to take the others into account in passing sentence.

Where necessary, you should consult s 16BA for the precise requirements of the section.

An offence taken into account under this section must not be regarded as an offence of which the person has been convicted. However, the fact that the court has taken it into account can be referred to and proved, subject to the precise terms of s 16BA, in the same manner as the related conviction.

6-10 Sentencing options

The sentencing options that may be available under the Crimes Act are:

- dismissal of charge without any conviction and with no conditions attached (s 19B(1)(c))
- discharge without conviction on certain conditions (s 19B(1)(d))
- conviction and release on certain conditions (s 20(1)(a))
- imprisonment with order for release on certain conditions, either immediately or after serving a specified part of imprisonment term (known as a recognisance release order) (s 20(1)(b))
- probation, as one of the conditions of an order under either ss 19B(1)(d), or 20(1)(a) or (b)
- community service (s 20AB)
- fines
- imprisonment, including, in some cases, the setting of a non-parole period
- fine option orders (s 15A)
- reparation (i.e. restitution) (s 21B)
- hospital orders for people suffering from mental illness (s 20BS)
- psychiatric probation orders for people suffering from mental illness (s 20BV)
- program probation order for people suffering from intellectual disability (s 20BY)
- summary disposition of people suffering from mental illness or intellectual disability (ss 20BU and 20BV).

Below are sentence options that may be relevant to a duty lawyer session. You should conduct more research for a more detailed analysis of sentencing options.

Dismissal of charge without conviction and with no conditions attached; discharge without conviction on certain conditions; probation as one of the conditions

It is convenient to deal with the alternative orders that can be made under s 19B of the Crimes Act together. The criteria for each are the same and, whatever alternative is chosen, there is no conviction.

Section 19B(1)(b) sets out the following criteria:

- (b) ‘the court is satisfied...that the charge is proved, but is of the opinion, having regard to:
- (i) the character, antecedents, [cultural background,] age, health or mental condition of the person;
 - (ii) the extent (if any) to which the offence is of a trivial nature; or
 - (iii) the extent (if any) to which the offence was committed under extenuating circumstances;

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation’.

If the court is so satisfied, it may:

- dismiss the charge. Note that this is a dismissal of the charge where the charge has been proved in contrast to where a charge is dismissed because it has not been proved. Also note that this is similar to an unconditional discharge under s 19 of the Penalties and Sentences Act, though the criteria are not identical
- discharge the person on certain conditions under s 19B(1)(d), which is similar to a conditional discharge under s 19 of the Penalties and Sentences Act. A conditional discharge will be for a fixed period of up to three years and one condition will be that the person demonstrate good behaviour for that period
- make a probation order. This is done by discharging the person on conditions, as described above, including a condition that the person will, during a specified period, be subject to the supervision of an appointed probation officer and obey all their reasonable directions. The period specified must not exceed two years.

You should be familiar with the cases that examine s 19B, i.e. *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568 [\[2001\] NSWCCA 332](#), also discussed in *CEO Customs v Odesnik* [\[2010\] QMC 3](#).

Contrast with s 19 of the Penalties and Sentences Act

There is one important difference between s 19B of the Crimes Act and s 19 of the [Penalties and Sentences Act 1992](#) (Qld). The use of the word ‘or’ at the end of paragraph (ii) of s 19B(1)(b) means that the criteria in (i), (ii) and (iii) (above) are alternatives only. It is not necessary for all three to be satisfied before the court can apply the section. This is reinforced by the use of the words ‘(if any)’ in (ii) and (iii).

Section 19 of the Penalties and Sentences Act lists similar criteria but they are not alternatives and each criterion must be satisfied.

The most important effect of this is that offences do not necessarily have to be trivial for s 19B of the Crimes Act to apply (whereas they do for s 19 of the Penalties and Sentences Act).

Conditional release after conviction; recognisance release order; probation as a condition

Section 20 of the Crimes Act empowers a court to convict an offender and then:

- release the person on certain conditions without passing sentence (s 20(1)(a)), or
- sentence the person to an imprisonment term but order that the person be released on certain conditions either immediately or after serving a specified part of the term (s 20(1)(b)). This is known elsewhere in the Act as a recognisance release order, or
- make a probation order. This is done by discharging the person on conditions, including that the person will, during a specified period, be supervised by a probation officer appointed under the order and obey all their reasonable directions. The specified period must not exceed two years.

Section 19AC of the Crimes Act sets out circumstances in which a court must make a recognisance release order—when it imposes a sentence or sentences not exceeding three years’ imprisonment in total and where the offender is not undergoing a federal imprisonment term. This is subject to s 19AE, which states that a court is not required ‘to do

so if, having regard to the nature and circumstances...and to the antecedents of the person, the court is satisfied that such an order is not appropriate’.

Note also that a court is not required to make a recognisance release order if the sentence or sentences imposed do not exceed six months imprisonment (s 19AE(3)).

The effect of s 19AC is that (subject to s 19AE), whenever the court imposes a sentence that does not exceed three years, it must order that the person be released under s 20(1)(b) on conditions either immediately or after serving a specified imprisonment period.

Community service

Under s 20AB, a court may, after conviction, make a community service order for a federal offence (s 20AB(3)). State laws regarding community service orders will apply.

Imprisonment

As with fines, the actual legislation under which a person is charged will generally set out a maximum term of imprisonment that a court can impose for the particular offence. Unless a term of imprisonment is set out, either in the offence section itself or elsewhere in the legislation, a court cannot directly impose imprisonment (though s 15A of the Crimes Act allows imprisonment in default of payment of fines according to state law).

Where an indictable offence is dealt with summarily, the maximum term of imprisonment (and maximum fine) that may be imposed is as set out in s 4J of the Crimes Act.

Section 17A of the Crimes Act states that ‘[a] court shall not pass a sentence of imprisonment on any person for a federal offence...unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case’.

Section 17B(1) states that, if a person (who has not previously been sentenced to imprisonment for any federal, State or Territory offence) ‘is convicted of one or more [federal offences]...relating to property, money or both, whose total value is not more than \$2000’, the court must not impose imprisonment ‘unless, in the opinion of the court, there are exceptional circumstances that warrant it’.

Section 17A applies subject to any contrary intention in the law creating the offence (s 17A(4)). In determining whether the \$2000 limit referred to above has been reached, other offences taken into account in sentencing under s 16BA should also be considered.

Note that ss 16E–19AA of the Crimes Act cover other aspects of imprisonment sentences, including when sentences are to commence; cumulative, partly cumulative, or concurrent sentences; and remissions.

Fines

The maximum fines for particular offences are set out under the individual offences. Maximum fines are generally set out in the particular legislation under which a person is charged.

If an indictable offence is dealt with summarily, the maximum fine (and maximum imprisonment term) is as set out in s 4J of the Crimes Act.

6-11 Fine option orders

Under s 15A of the Crimes Act, a court, in dealing with Commonwealth offences, can make a fine option order in lieu of fine payment if the defendant applies under Queensland law (see the discussion of [fine option orders](#) in Chapter 13 of this handbook; in particular, the criteria for making a fine option order).

6-12 Reparation (restitution)

Under s 21B of the Crimes Act, a court can make an order for a defendant to make reparation to the Commonwealth, by way of money payment or otherwise, for any loss suffered or any expense incurred by the Commonwealth (or Commonwealth authority) due the offence.

Alternatively, the court can order the offender to make reparation to any person, by way of money payment or otherwise, 'in respect of any loss suffered by the person as a direct result of the offence'.

A person must not be imprisoned for failing to pay an amount so ordered (s 21B(2)).

The court may make reparation a condition of a discharge under s 19B, a condition of a release under s 20, and in addition to a community service order under s 20AB.

Sentencing alternatives for persons suffering from mental illness or intellectual disability

If you see that there are mental health or disability issues, have the case adjourned and matters considered under s 20BS–20BY of the Crimes Act if the matter is to proceed as a guilty plea.

E. Appeals

6-13 State law applying to appeals

Under s 68(1) of the Judiciary Act, state laws regarding the procedure for hearing and determining appeals apply where Commonwealth offences are dealt with by a state court.

You should consider an appeal on sentence if the court of summary jurisdiction has imposed:

- a prison sentence for a period exceeding the maximum period that could have been imposed if the offence had been tried on indictment
- a fine exceeding the maximum fine that could have been imposed if the offence had been tried
- both a prison sentence and a fine, but the offence is punishable on trial for indictment by a prison sentence or a fine (all matters contained in s 4J(6) of the Crimes Act).

Chapter 7

Extradition, migration detention and deportation

Chapter 7—Extradition, migration detention and deportation

A. Extradition interstate	(7-1–7-5)
B. Extradition overseas	(7-6–7-10)
C. Non-payment of interstate fines	(7-11–7-12)
D. Migration detention	(7-13–7-15)

As a duty lawyer, you may have to represent people who the prosecution seeks to have extradited from Queensland either interstate or overseas. The two categories are distinct and operate under different legislation. As such, this chapter deals with them separately.

You may also have to appear for a person who has had an interstate fine registered for payment in Queensland or been detained under migration legislation as a non-Australian citizen.

A. Extradition interstate

7-1 *Service and Execution of Process Act 1992 (Cth)*

This is the most common form of extradition that you are likely to encounter as a duty lawyer. It involves having people who have been charged with offences in one Australian state returned to that state if they are apprehended in another state.

You may be asked to represent people who are facing extradition from Queensland to another state or territory. The [Service and Execution of Process Act 1992](#) (Cth) contains the procedure for interstate extradition.

Summary

Your role is limited when a person is brought before a court on an interstate warrant. There are few grounds to challenge such extradition if the necessary warrants are valid and can be produced. First ascertain whether your client wishes to challenge the warrant. If they do, you should ascertain whether:

- the name on the warrant is correct
- whether the client accepts that they are that person
- all preconditions for the issue of the warrant have been complied with (*R v Lavelle* (1995) 82 A Crim R 187)
- the person was properly apprehended and brought before the court as soon as practical.

If the warrant is not for your client, or the warrant's preconditions have not been complied with, the warrant can be challenged as being invalid and your client discharged. If the warrant is valid, the magistrate can adjourn the matter for a further hearing or order the person to appear in the original jurisdiction. In either case, bail is possible. See below for bail issues.

Also note that, if your client is a 'person under restraint', the magistrate must adjourn the matter (see [7-4](#)).

After the magistrate has made a decision, advise the person of their right to seek an urgent review of the decision in the Supreme Court. If you believe that the person is eligible, they should apply for legal aid.

7-2 Apprehension under warrant

The person will have been apprehended and brought before the magistrates court under a warrant under s 82 of the Service and Execution of Process Act.

The person making the arrest does not need to produce the warrant at the time of apprehension (s 82(4)).

Only a police officer (state or federal), sheriff or sheriff's officer can apprehend the person (s 82(3)).

A person can be re-arrested under a warrant and released because of a failure to produce the warrant in court (see below and s 83(5)).

7-3 Procedure after apprehension

As soon as practical after being apprehended, the person must be brought before a magistrate. The warrant or a copy of it must be produced for the court appearance.

If the warrant or a copy is not produced, ss 83(3)–83(7) enable the magistrate to adjourn for up to five days if there is a reasonable cause for the delay. If the magistrate does adjourn, the person can be remanded in custody or on bail. At the end of the five days, the court must release the person if the warrant or a copy has not been produced. Even if this occurs, the person can be re-arrested later under the same warrant and should be advised of this.

If the warrant or a copy is produced but is invalid, the magistrate must order that the person be released (s 83(10)).

If the warrant or a copy is produced and the warrant is valid, the magistrate must order one of the following:

- 'that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies' (s 83(8)(a))
- 'that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant' (s 83(8)(b)). The magistrate can make this order and then suspend it for a specified period, granting the person bail or remanding them in custody (s 83(12))
- that the proceedings be adjourned and the person remanded in custody or on bail (s 83(14)(a)).

A magistrate is not bound by the rules of evidence in proceedings under s 83 (s 83(14)(b)). If granted, bail must comply with s 85, which sets out that the magistrate must prepare the bail instrument. The instrument must be signed by the person and the magistrate, and a copy given to the court that the person has been bailed to appear before.

The law of Queensland applies to bail applications—the state in which the person has been apprehended (s 88).

7-4 Additional provisions if person is under restraint

Before dealing with the matter, a magistrate must make reasonable enquiries about whether the person is under restraint and, if so, in which state or states (s 84(1)).

If the person is under restraint, s 84(2)–(10) apply. They do not apply if the person is not under restraint or is under restraint only in the state that they are being extradited to.

Section 3 defines 'person under restraint' as being on bail, probation, parole or other court order. The additional provisions prevent a situation where a person would be contravening other existing orders by complying with the order the magistrate makes.

If the person under restraint is not on bail, the magistrate must adjourn for up to seven days and remand the person either on bail or in custody. As soon as practical after adjournment, the magistrate must give cause notice of the person's apprehension to the person in charge of the correction service in the state where the person is under restraint. When proceedings resume, the person so informed and a supervisor of the person under restraint may make submissions to the magistrate (s 84(4)).

If the magistrate adjourns proceedings, they can remand the person under restraint in custody or on bail.

If the person under restraint is on bail and informs the magistrate of this, the magistrate must, before dealing with the matter, reasonably enquire about any reporting requirements. If the person fails to answer, or gives false or misleading answers to any of those enquiries, the penalty is \$3000 (s 84(2) and (3)).

Upon application by a police officer or the person under restraint, the magistrate may adjourn the proceedings for no more than seven days (s 84(5)). If they do adjourn, they must remand the person under restraint on bail or in custody.

If the person is required to report to an officer of a state corrections service or the police in a state other than the state where apprehended, the magistrate must, as soon as practical after adjournment, give cause notice of the person's apprehension to the person in charge of that corrections service or a police officer where the person is required to report (s 84(6)(a)).

When proceedings resume, the person's supervisor, any officer of the police force of any state and any member of the Australian Federal Police may make submissions to the magistrate (s 84(6)(b)).

7-5 Review

If a Queensland magistrate has made an order under s 83, the person may apply to the Supreme Court of Queensland for a review of the order. The person should be advised that this avenue of appeal exists. Legal aid would be granted for a review only if there was a reasonable prospect of success.

The person must apply within seven days of the magistrate making the order. The respondent must be the Commissioner of Queensland Police or, if the person applying is the same person to whom the warrant was directed, the apprehended person (s 86(1)–(3)).

Pending its review, the Supreme Court may stay the order's execution and order the person to be remanded on bail or in custody. The review is by way of a re-hearing. The Supreme Court may confirm, vary, suspend or revoke the order. If the Supreme Court revokes the order, it may make a new order (s 86(5)–(10)).

The Supreme Court of the state is not bound by the rules of evidence during review proceedings (s 86(14)).

B. Extradition overseas

7-6 Summary

The issues involved in extradition overseas are complex. Your role should be limited to advising the person of their legal options and right to legal representation, exploring bail issues and, if the person is eligible, taking a legal aid application.

7-7 Legislation

The relevant legislation is the [Extradition Act 1988](#) (Cth). An extraditable person is a person who has a warrant out for their arrest in relation to an offence they:

- are alleged to have committed in a foreign country
- have been convicted of in a foreign country but not yet fully punished for (s 6).

An extradition order can be objected to under s 7, which lists the following five categories of potential objection:

- (a) 'the extradition offence' is a political offence in relation to the extradition country;
- (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;

- (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
- (d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia; or
- (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence’.

Under s 12, a magistrate can issue a warrant once satisfied that the person is extraditable.

Once a person has been arrested under such a warrant, the magistrate can, under s 15, adjourn the matter so that proceedings can be conducted under s 18 (voluntary consent by the person to surrender to the extradition country) or s 19 (determination of eligibility to be extradited). You should seek an adjournment even if the person wishes to voluntarily surrender so they can get specialist legal advice.

7-8 Remand

Under s 15:

- ‘(1) A person who is arrested under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.
- (2) The person shall be remanded by a magistrate in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.
- (3) If a person is remanded in custody after making an application for bail, the person cannot make another application for bail during that remand unless there is evidence of a change of circumstances that might justify bail being granted.
- (4) At any time before proceedings under section 18 or 19 commence in relation to a person (in this section called the transferee) who is on remand under subsection (2), the Attorney General may, by warrant in the statutory form:
 - (a) where the transferee is in custody—direct a magistrate to order the release of the transferee into the custody of a specified police officer and authorise that police officer to take the transferee in custody to appear before a magistrate in a specified State or Territory; or
 - (b) where the transferee has been granted bail—direct a magistrate to order the discharge of the recognizances on which bail was granted and authorise a specified police officer to take the transferee in custody to appear before a magistrate in a specified State or Territory.
- (5) The transferee shall be remanded by a magistrate in the specified State or Territory in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.
- (6) A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand’.

7-9 Bail

If the matter is adjourned under s 15, which it will be in almost all first mentions involving a duty lawyer, the magistrate can remand in custody or grant bail. However, s 15(6) makes obtaining bail more difficult than in other situations, as it mandates that a magistrate cannot remand a person on bail unless special circumstances justify it. Satisfying the criteria in the [Bail Act 1980](#) (Qld) will not be enough unless special circumstances also exist. The Act does not define ‘special circumstances’.

The leading case on bail in overseas extradition cases is *United Mexican States v Cabal* (2001) 209 CLR 165; [\[2001\] HCA 60](#). In this case, it was held that that bail should be granted in extradition cases only when two conditions were fulfilled:

- the case's circumstances were special, i.e. different from those that people facing extradition would ordinarily endure when considering the nature and extent of the extradition charges, and
- there was no real flight risk, considered independently of the effect of the proposed bail.

7-10 Special provisions for extradition to New Zealand

Part 3 of the Extradition Act covers extradition to New Zealand and is designed to streamline procedures for extradition. Warrants issued by New Zealand courts can have an 'indorsement' made by an Australian magistrate (s 28).

Bail is covered by s 32 rather than s 15, but the same restriction on granting bail applies. Additionally, the court is likely to use the two-part test outlined above in *United Mexican States v Cabal* (2001) 209 CLR 165; [\[2001\] HCA 60](#).

The result of s 15(6) is that, to succeed in a bail application, you must persuade the court that there are special circumstances.

C. Non-payment of interstate fines

7-11 Effect of amendment to Service and Execution of Process Act

The Service and Execution of Process Act was amended in 2010 and a new regime for enforcing interstate fines was brought in (ss 112–122). The practical result for you as the duty lawyer is that an interstate fine can be enforced in Queensland if it has been registered as payable in Queensland under s 113. The fine then becomes enforceable as if it were a Queensland fine.

If the fine has not been registered in Queensland, it cannot be enforced here.

7-12 Effect of registration (s 114)

Effect

- '(1) Subject to this section, a registered fine:
- (a) has the same force and effect; and
 - (b) may give rise to the same actions by way of enforcement;

as if the fine had been imposed on the offender by a court of the registering State.'

Enforcement only by registering State

- '(2) A registered fine cannot be enforced in the originating State for the fine.'

Note: This subsection does not prevent voluntary payment of the fine in the originating State—see sections 115 and 116.'

Fine capable of enforcement

- '(3) A registered fine is capable of being enforced in or by the registering State only if, and to the extent that, when the action for enforcement is or is to be taken, the fine could, but for subsection (2), be enforced in the originating State.'

No imprisonment

- '(4) Despite anything in the laws of the registering State, a registered fine cannot be enforced by the imposition of a sentence of imprisonment on the offender.'

The effect of s 14 is that the fine can be enforced as if it were a Queensland fine, subject to the ‘no imprisonment’ clause in s 114(4). There seems to be no reason why such a fine could not be referred to the State Penalties Enforcement Registry (SPER), though, as at March 2012, SPER were denying that they were managing the payment of any interstate fines.

Any challenge to the fine’s validity must be made in the originating state, though the fine cannot be enforced in Queensland until that challenge has been determined (s 120(3)).

D. Migration detention

7-13 Legislation

Migration detention is authorised under the [Migration Act 1958](#) (Cth). As a duty lawyer, you may need to appear for people who have been detained as unlawful non-citizens under s 189, usually because they have been charged with other substantive criminal law offences, bringing them before the court, and they have been separately detained under the Migration Act.

The Migration Act, which governs their detention, has been heavily litigated; is the subject of many amendments (and will probably continue to be regularly amended); and requires specialist knowledge. It is not the same as a remand in custody, though its effect on the person is similar.

7-14 Bail

Migration detention under the Migration Act does not preclude a person from being granted bail on criminal law charges before a court. You must be aware that migration detention is a separate issue from remand in custody and you will not be able to change migration detention status. It may still be worth seeking bail on the criminal charges but a grant of bail will not affect migration detention status.

You should explain this to the defendant when deciding whether to seek bail. If bail is granted but the defendant remains in migration custody, they are not free but none of their time in custody will be counted as time served if they are eventually convicted.

7-15 Legal representation

A person detained under the Migration Act should seek legal representation but legal aid is not usually available for migration matters. You should get legal advice on migration detention matters.

Chapter 8

Drug offences

Chapter 8—Drug offences

A. Introduction	(8-1-8-4)
B. Possession of dangerous drugs	(8-5-8-12)
C. Possession of things for use in connection with drug offences	(8-13-8-15)
D. Possession of things for use in connection with administration/consumption/smoking dangerous drugs ...	(8-16-8-20)
E. Producing dangerous drugs	(8-21-8-26)
F. Supplying dangerous drugs	(8-27-8-30)
G. Other offences	(8-31-8-32)
H. Occupier/manager permitting place to be used for commission of drug offences	(8-33-8-36)
I. Certificates and forfeiture	(8-37-8-39)

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) [Ecstasy]

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 NSW 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 *Taber v R* (2005) 225 CLR 418; [2005] HCA 59, where a parcel containing drugs addressed to 'Mr Tabler' was delivered to a post office. Taber 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 *Taber 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

Section 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)).

Chapter 9

Motor vehicle offences

Chapter 9—Motor vehicle offences

A. Overview	(9-1)
B. Vehicle offences involving liquor or other drugs	(9-2–9-4)
C. Unlicensed, disqualified and suspended driving	(9-5–9-9)
D. Dangerous operation of vehicle	(9-10)
E. Driving without due care and attention	(9-11)
F. Restricted (provisional) licence	(9-12–9-16)
G. Removing absolute disqualification under section 131	(9-17–9-19)

A. Overview

9-1 Introduction

As a duty lawyer, you should not represent first and second offenders in relation to drink driving offences unless there is a risk of imprisonment. You can act in relation to any traffic matter where there is a risk of imprisonment and disqualified driving offences.

The sections of legislation discussed in this chapter relate to the [Transport Operations \(Road Use Management\) Act 1995](#) (Qld).

B. Vehicle offences involving liquor or other drugs

9-2 Drink driving offences

Driving under the influence

Under s 79(1), there is a maximum penalty of 28 penalty units or 9 months' imprisonment for driving under the influence of liquor or a drug.

However, if the defendant has had other convictions under s 79(1) in the previous five years, then:

- s 79(1A) orders a maximum penalty of 60 penalty units or 18 months' imprisonment if they have had one previous conviction
- s 79(1C) orders that 'imprisonment must be imposed as the whole or part of the punishment' if they have had:
 - two or more previous convictions
 - a previous charge dealt with on indictment relating to a motor vehicle, or
 - a previous conviction under s 328A.

Driving over the middle limit but not over the high limit

Section 79(1F) orders a maximum penalty of 20 penalty units or 6 months' imprisonment for driving over the middle alcohol limit (0.10) but under the high alcohol limit (0.15).

Driving over the general limit but not over the middle limit

Section 79(2) orders a maximum penalty of 14 penalty units or 3 months' imprisonment for driving over the general alcohol limit (0.05) but under the middle alcohol limit (0.10).

Driving over the no alcohol limit but not over the general limit

Section 79(2A), (2B) and (2D) all relate to particular types of licence or vehicle. This section orders a maximum penalty of 14 penalty units or 3 months' imprisonment for driving over the no alcohol limit (0.00) but under the general alcohol limit (0.05).

However, if the defendant has had previous convictions under s 79 (1F), (2), (2AA), (2A), (2B) or (2D) in the previous five years, then:

- s 79(2F) orders a maximum penalty of 20 penalty units or 6 months' imprisonment if they have had one previous conviction
- s 79(2G) orders a maximum penalty of 28 penalty units or 9 months' imprisonment if they have had two or more previous convictions
- s 79(2H) orders a maximum penalty or 30 penalty units or 1 year's imprisonment if they have had a previous:
 - charge dealt with on indictment relating to a motor vehicle
 - conviction under s 328A, or
 - conviction under s 79(1).

Driving with a relevant drug present

Section 79(2AA) orders a maximum penalty of 14 penalty units or 3 months' imprisonment for driving with a relevant drug present in saliva.

Immediate suspension

Section 79B provides for immediate suspension if a defendant has been charged under ss 79(1), 79(F) or 80(11), unless a court authorises them to drive under s 79E and they obtain a replacement licence under s 79(F).

Failing to provide specimen of breath

Section 80(5A) orders a maximum penalty of 40 penalty units or 6 months' imprisonment for failing to provide a breath specimen where police suspect an offence within the previous three hours.

Failing to provide specimen of breath, saliva or blood

Section 80 also orders a maximum penalty of 28 penalty units or 9 months' imprisonment for failing to provide a specimen of breath, saliva or blood—the same penalty as a high reading under s 79(1).

9-3 Definitions

Definition of 'on a road' or 'elsewhere'

The offences referred to above may be committed upon a road or elsewhere (s 79(11)). Schedule 4 of the Transport Operations (Road Use Management) Act defines a road and 'elsewhere' has been judicially defined to mean 'any place other than a road'.

Definition of 'motor vehicle'

A motor vehicle is defined in Schedule 4 of the Act. Note that it may still be considered a 'motor vehicle' even if it is in a condition in which it is impossible to drive.

Definition of 'driving'

Causing a vehicle to move by the force of gravity down a road, and controlling the handlebars and brakes, is defined as 'driving'. A vehicle under tow is not being driven (*McNaughtan v Garland; ex parte McNaughtan* [1979] Qd R 240 and *Wallace v Major* [1946] KB 473).

Pushing a vehicle with one hand on the steering wheel is not considered driving.

9-4 Defences

The following are acceptable defences under the Act:

- The breath analysis was not carried out within three hours of driving or being in charge of a motor vehicle.
- The drawing of the blood specimen did not take place within three hours of the driving or being in charge of a motor vehicle

The suspect was not driving the motor vehicle at the material time.

- The suspect was not in charge of the motor vehicle at the material time.
- The blood specimen was not dealt with in line with all of the requirements of s 80.

The defence under s 24 of the *Criminal Code Act 1899* (Qld) (mistake of fact) is not available for offences under s 79 of the Transport Operations (Road Use Management) Act, as it is statutorily excluded under s 79(12).

If the person ceased driving before consuming alcohol, they have committed no offence.

Defences to failure to provide charges

Under s 80(11A), the person has not committed an offence of failing to supply if they can satisfy the court that:

- ‘the requisition to provide the specimen was not lawfully made, or
- the person was, because of the events that occurred, incapable of providing the specimen, or that
- there was some other reason of a substantial character for the person’s failure to provide the specimen other than a desire to avoid providing information that might be used in evidence’.

C. Unlicensed, disqualified and suspended driving

9-5 Unlicensed driving where the defendant is not under disqualification

Any person who drives a motor vehicle without a driver licence commits an offence (s 78(1)). The maximum penalty is 40 penalty units or 1 year’s imprisonment. As a first offence, this normally attracts a fine.

9-6 Disqualified driving

Under s 78, if a person drives a motor vehicle after being disqualified by a court order, they are committing a very serious offence with a maximum penalty of 60 penalty units or 18 months’ imprisonment. Generally, magistrates will consider jailing a disqualified driver caught driving in the first half of the disqualification period but imprisonment is not automatic. Additionally, a person convicted of driving while disqualified by a court order will be disqualified from holding or obtaining a driver licence for at least two years.

9-7 Driving while suspended

If a person is breathalysed and issued a certificate showing a reading of 0.05% or more, their driver licence is suspended for 24 hours from the time of the reading. The police officer concerned must give the person charged a notice under s 79D.

9-8 Driving with accumulated demerit points

When the holder of an open or provisional licence, or learners permit, has accumulated more demerit points than are allowed under their licence, they are unable to drive. It is an offence to drive with accumulated demerit points.

9-9 Mandatory disqualification periods

Section 78(3) outlines when a court must disqualify a person from holding or obtaining a Queensland driver licence. These are:

- at least one month for driving under the influence
- 2–5 years if disqualified by a court
- six months if disqualified due to allocation of demerit points
- six months if their interstate licence is suspended due to allocation of demerit points
- six months if convicted of driving more than 40 km over the speed limit
- 1–6 months if the SPER has suspended the licence
- 1–6 months if they are a repeat unlicensed driver, i.e. convicted under s 78 within the previous five years
- 2–5 years if convicted under s 79B in addition to any of the above.

D. Dangerous operation of vehicle

9-10 Dangerous operation of vehicle

The charge of dangerous operation comes under s 328A of the Criminal Code. There are three possible charges:

- dangerous operation (to be dealt with summarily) (s 328A(1))
- dangerous operation causing grievous bodily harm
- dangerous operation causing death (to be dealt with on indictment).

E. Driving without due care and attention

9-11 Driving without due care and attention

Under s 83 of the Transport Operations (Road Use Management) Act, it is an offence for any person to drive ‘a motor vehicle on a road or elsewhere without due care and attention or without reasonable consideration for other persons using the road or place’.

No mandatory licence disqualification is set out in relation to this offence. However, the court does have the power to disqualify under s 187 of the [Penalties and Sentences Act 1992](#) (Qld). You will need to put as much material as possible before the court about the defendant’s need for and use of their licence, and the consequences of disqualification.

F. Restricted (provisional) licence

9-12 Who may apply for a provisional licence?

Under s 87, a person convicted under s 79 may apply for a provisional licence (i.e. a restricted licence), which restricts them to driving a motor vehicle for the purpose of earning their living.

9-13 Who may not apply for a provisional licence?

Under s 87(5), a person may not apply for a provisional licence if they:

- have had their driver licence suspended or cancelled, or been disqualified from holding or obtaining a driver licence, within the last five years

- have been convicted under s 79 or of dangerous driving within the last five years
- do not hold a Queensland driver licence (not being a learners permit) when they apply.

9-14 What factors will satisfy the court?

The applicant must satisfy the court on the balance of probabilities that:

- ‘(i) the applicant is a fit and proper person to hold a restricted licence, having regard to the safety of other road users and the public generally; and
- (ii) a refusal of the application would cause extreme hardship to the applicant or the applicant’s family by depriving the applicant of the applicant’s means of earning the applicant’s livelihood’ (s 87(5)(a)).

9-15 How does a person apply for a restricted licence?

The applicant should obtain and file a written application available at the magistrates court. Most courts request that an applicant file this application on the day that the matter is adjourned from the mention court to a date for the hearing. However, they can file it, by leave, on the day of the hearing.

9-16 What evidence is required at the hearing?

The applicant must be prepared to personally give evidence and be cross-examined by the police prosecutor.

The applicant will require evidence from their employer about both the terms and conditions of employment and the effect of the loss of licence on that employment.

Affidavits and references concerning the applicant’s character are useful but may be admitted only by consent.

G. Removing absolute disqualification under section 131

9-17 Who may apply?

Any person who has been disqualified from holding or obtaining a driver licence, either absolutely or for at least two years, under the Transport Operations (Road Use Management) Act or any other Act may apply to have their disqualification removed.

9-18 When can a person apply?

An applicant may apply for the removal of their disqualification order at any time from two years after the date of the previous disqualification order.

9-19 Where should they file?

An applicant may file the application in the magistrates court in Queensland where they live if the disqualification order was made by a magistrate or justice. The application should refer to all disqualifications, in excess of two years, that the applicant wishes to have removed.

If the disqualification order was made in the Supreme Court or a district court, the applicant should file the application in the court that made the order.

Chapter 10

Miscellaneous

Chapter 10—Miscellaneous

A. Regulatory Offences Act 1985 (Qld)	(10-1–10-14)
B. Weapons Act 1990 (Qld)	(10-15–10-22)
C. Invasion of Privacy Act 1971 (Qld)	(10-23–10-30)
D. Summary Offences Act 2005 (Qld)	(10-31–10-33)
E. Police Powers and Responsibilities Act 2000 (Qld)	(10-34–10-35)
F. Breach of probation/community service	(10-36–10-43)
G. Corrective Services Act 2006 (Qld)	(10-44–10-46)
H. Disclosure of criminal convictions-Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)	(10-47–10-51)
I. Restrictions on publication and attendance at court	(10-52–10-56)
J. Domestic violence orders	(10-57–10-75)
K. Prostitution	(10-76–10-81)
L. Casino offences-Casino Control Act 1982 (Qld)	(10-82–10-84)

A. Regulatory Offences Act 1985 (Qld)

10-1 Regulatory offence

The [Regulatory Offences Act 1985](#) (Qld) (which commenced operation on 29 April 1985) created a new category of offence previously unknown to the law—a ‘regulatory offence’. Section 3 of the [Criminal Code Act 1899](#) (Qld) was repealed and a fresh section inserted, which defined offences as being ‘of 2 kinds, namely, criminal offences and regulatory offences’ (Criminal Code, s 3(1)).

The amendment stated that ‘[c]riminal offences comprise crimes, misdemeanours and simple offences’. Also, ‘[C]rimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment’ (Criminal Code, ss 3(2) and (3)). However, ‘a person guilty of a regulatory offence or a simple offence may [only] be summarily convicted by a Magistrates Court’ (Criminal Code, s 3(4)).

10-2 New offences created

The Regulatory Offences Act created three new offences categorised as regulatory offences. They are:

- unauthorised dealing with shop goods (s 5)
- leaving restaurant, hotel etc. without payment (s 6)
- unauthorised damage to property (s 7).

Each offence is examined in more detail below.

10-3 Unauthorised dealing with shop goods

Section 5 of the Regulatory Offences Act reads:

‘(1) Any person who, with respect to goods in a shop of a value of \$150 or less—

- (a) consumes them without the consent, express or implied, of the person in lawful possession of them; or

- (b) deliberately alters, removes, defaces or otherwise renders indistinguishable a price shown on them, without the consent, express or implied, of the person in lawful possession of them; or
- (c) whether or not the property in the goods has passed to the person, takes them away without discharging, or attempting honestly, or making proper arrangements, to discharge his or her lawful indebtedness therefor; is guilty of a regulatory offence and, subject to section 9, is liable to a fine of 6 penalty units.

(1a) Without limiting subsection (1)(b), a price may be shown on goods by a bar code or a similar device.

(2) It is a defence to a charge of an offence defined in subsection 1(c) to prove the taking away of the goods was not dishonest'.

This section relates to all types of shoplifting and related offences, and makes it a regulatory offence to take away, consume, alter or deal with the price markings on shop articles. The section is limited by the condition that the goods must be valued at \$150 or less. Although the section purports to cover shoplifting offences in general, the police will usually bring the charge against only first offenders. If a defendant has previous convictions for dishonesty, the police will usually prefer a charge of stealing under the Criminal Code.

10-4 Exclusion of general criminal law defences

Duty lawyers should particularly note s 36(2) of the Criminal Code, which excludes most of the general criminal law defences, with respect to regulatory offences, in the Criminal Code. Section 36(2) precludes the defendant from pleading intoxication, insanity, honest claim of right, extraordinary emergency and, most importantly, honest and reasonable but mistaken belief of fact and absence of intent.

The only defences allowed under the Criminal Code, where a person is deemed not criminally responsible, are the following:

- A person is not criminally responsible if they do or omit an act that contravenes a statutory instrument of which that person was unaware and which had not been published (s 22(3)).
- A person under 10 is not criminally responsible for any act and, if under 14, is not responsible unless the prosecution prove that the person had the capacity to know the act was illegal (s 29).
- A person who acts 'in execution of the law', 'in obedience to an order of a competent authority' or 'when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person', or when the act is done to save himself, herself or another person from the immediate threat of death or grievous bodily harm (s 31).

10-5 Effect of exclusion of general criminal law defences

The effect of the exclusions referred to in 10-4 is that the prosecution does not need to establish that the defendant intended to steal the goods or take them away. The 1989 amendment to s 5(2) of the Regulatory Offences Act does state that it 'is a defence to the charge...[for the defendant] to prove the taking away of the goods was not dishonest'. Proof on the balance of probabilities will be sufficient to establish the defence.

Before accepting instructions to plead guilty, duty lawyers should discuss this issue with the client. Instructions that the client merely forgot to pay for the goods may be sufficient to establish the defence.

10-6 Leaving restaurant, hotel etc. without payment

Section 6 of the Regulatory Offences Act reads:

- '(1) Any person who, with respect to food, drink, accommodation, or like goods and services, of the value of \$150 or less obtained from any restaurant or hotel, motel, boarding house or like premises—
- (a) leaves such premises without discharging, or attempting honestly, or making proper arrangements, to discharge, his or her lawful indebtedness therefor; or

- (b) purports to pay for them with a cheque that is not met on presentation or a credit card or similar document the person is not authorised to use;
is guilty of a regulatory offence and, subject to section 9, is liable to a fine of \$300.
- (2) It is a defence to a charge of an offence defined in subsection 1(b) to prove the defendant believed on reasonable grounds the cheque would be paid in full on presentation or the defendant was authorised to use the credit card or similar document’.

Under s 9(1) of this Act, the court can, after convicting an offender, ‘also order the offender to pay by way of fine an amount not exceeding the costs of bringing the charge, including the costs of all reasonable investigations relating thereto, the costs of court and the cost of compensating any person injured thereby’.

10-7 When a person will be charged under s 6

The police will usually prefer a charge under s 6 only in the case of a first offender. If a person has previous convictions of a similar nature, police will usually prefer a charge of fraud or another equally appropriate criminal offence.

10-8 Defences

The general criminal law defences referred to in 10-5 are excluded, but you should see whether the defendant can rely on the defence provided in s 6(2).

10-9 Unauthorised damage to property

Section 7 reads:

‘Any person who wilfully destroys or damages the property of another and without the consent, express or implied, of the person in lawful possession thereof and thereby causes loss of \$250 or less is guilty of a regulatory offence and, subject to section 9, is liable to a fine of \$500’.

10-10 Effect of this section

Section 7 provides an alternative charge to the criminal offence of wilful damage or wilful destruction. Prosecution under this section is uncommon and, in most cases, the prosecution will prefer a charge under the Criminal Code. As with the other offences, most of the general criminal law defences are again excluded.

10-11 Further power to fine

Under s 9, the magistrate can, in addition to a fine, order that a convicted person pay the costs of the charge’s investigation, court and compensation for any person injured thereby.

10-12 Regulatory offences to be heard summarily

All regulatory offences are determined by a magistrate and there is no right to a jury trial (Criminal Code, s 3(4)). However, the defendant still has the normal avenues of appeal against the magistrate’s decision (i.e. an appeal to the district court under s 222 of the [Justices Act 1886](#) (Qld)).

10-13 Effect of conviction for regulatory offence

Although a conviction under the Regulatory Offences Act is not a criminal conviction and does not burden an offender with a criminal record, you should be cautious when advising defendants of the likely effects of such a conviction. A defendant convicted of a regulatory offence can, in all honesty, declare that they have no criminal convictions when applying for employment.

However, if an employment application asks specifically for details about convictions for other offences, they would be obliged to include all regulatory offences (but see also 10-46 to 10-50 regarding disclosure of criminal convictions). A conviction under the Regulatory Offences Act is still a conviction for dishonesty, which may still prejudice them in future employment.

Some Commonwealth government departments, such as the Department of Foreign Affairs, may not employ people who have been convicted of this type of offence. Some private institutions, such as banks, may also refuse to employ someone with such a conviction. It may even prevent someone being employed in the Queensland Public Service.

10-14 Penalties

The Regulatory Offences Act states that any penalties imposed shall be by way of a fine. This means that probation and community service orders are a sentencing option, as, under the Penalties and Sentences Act, these are now available for regulatory offences as well as offences where a magistrate can impose a custodial sentence as punishment ([Penalties and Sentences Act 1992](#) (Qld), ss 91 and 101).

Under s 31 of the Penalties and Sentences Act, a good behaviour bond is also an option, as it applies to summary offences. A defendant can also apply for a discharge without conviction under s 19 of the Penalties and Sentences Act. You should always consider requesting a discharge under this section where appropriate. For instance, a charge under s 5 will invariably involve goods of minimal value and, arguably, the offence will be trivial, particularly if it can be shown that taking the goods was negligent. (For more on s 19, see the section on [discharge](#) in Chapter 13).

If the defendant cannot pay the fine and/or restitution and compensation (imposed by way of a fine under s 9), the defendant can apply for a fine option order to convert the fine into community service (see the section on [community service orders](#) in Chapter 13).

B. Weapons Act 1990 (Qld)

10-15 Criminal Law Duty Lawyer Handbook not a complete guide

The [Weapons Act 1990](#) (Qld) was assented to on 19 September 1990. This handbook is not a complete guide to this Act but deals only with matters that the duty lawyer is likely to face. If you are in doubt about any section, you should refer to the Act.

10-16 Weapons Act

Generally, the Weapons Act allows for the licensing of people to possess weapons and firearms. Under Schedule 2, a weapon:

- ‘(a) means—
 - (i) a firearm; or
 - (ii) another thing prescribed under a regulation to be a weapon or within a category of weapon; or
 - (iii) a thing that would be a weapon mentioned in subparagraph (i) or (ii), if it were not temporarily inoperable or incomplete; and
- (b) does not include a public monument’.

Schedule 2 also defines a firearm as:

- ‘(a) a gun or other thing ordinarily described as a firearm; or
- (b) a thing ordinarily described as a weapon that, if used in the way for which it was designed or adapted, is capable of being aimed at a target and causing death or injury by discharging—
 - (i) a projectile; or
 - (ii) noxious, corrosive or irritant liquid, powder, gas, chemical or other substance; or

- (c) a thing that would be a firearm mentioned in paragraph (a) or (b), if it were not temporarily inoperable or incomplete; or
 - (d) a major component of a firearm;
- but does not include—
- (e) an antique firearm, explosive tool, captive bolt humane killer, spear gun, longbow or crossbow; or
 - (f) a replica of a spear gun, longbow or crossbow; or
 - (g) a slingshot, shanghai or sword; or
 - (h) a public monument’.

10-17 Offences

The magistrates court deals with offences summarily under the Weapons Act, unless it is an offence under s 65 of unlawfully trafficking in weapons (s 161). If a defendant is charged with an offence under this Act and also faces an indictable offence arising from the same facts (e.g. armed robbery), the magistrate should not deal with the summary offence until the superior court has dealt with the indictable offence (see [12-5](#) and *Byrne v Gibbons; ex parte Gibbons* (1966) QWN 2).

There is no longer any division or categorisation of offences, and the offences that duty lawyers are more likely to see are listed below.

Section 50(1):

‘1. A person must not unlawfully possess a weapon.

Maximum penalty—

- (a) if the person unlawfully possesses 10 or more weapons at least 5 of which are category D, E, H or R weapons—13 years imprisonment; or;
- (b) if paragraph (a) does not apply and the person unlawfully possesses 10 or more weapons—500 penalty units or 10 years imprisonment; or
- (c) if paragraphs (a) and (b) do not apply—
 - (i) for a category D, H or R weapon—300 penalty units or 7 years imprisonment; or
 - (ii) for a category C or E weapon—200 penalty units or 4 years imprisonment; or
 - (iii) for a category A, B or M weapon—100 penalty units or 2 years imprisonment’.

See [10-22](#) for weapons listed in the various categories.

Section 50A:

‘(1) A licensee must not possess an unregistered firearm.

Maximum penalty—120 penalty units’.

Section 50B:

‘(1) A person must not unlawfully supply a weapon to another person.

Maximum penalty—

- (a) if the person unlawfully supplies 5 or more weapons at least 1 of which is a category D, E, H or R weapon—13 years imprisonment; or
- (b) if paragraph (a) does not apply and the person unlawfully supplies 5 or more weapons—500 penalty units or 10 years imprisonment; or
- (c) if paragraphs (a) and (b) do not apply—
 - (i) for a category D, H or R weapon—500 penalty units or 10 years imprisonment; or
 - (ii) for a category C or E weapon—300 penalty units or 7 years imprisonment; or
 - (iii) for a category A, B or M weapon—200 penalty units or 4 years imprisonment’.

Section 51:

- ‘(1) A person must not physically possess a knife in a public place or a school, unless the person has a reasonable excuse.
Maximum penalty—40 penalty units or 1 year’s imprisonment.
- (2) It is a reasonable excuse for subsection (1) to physically possess a knife—
- (a) to perform a lawful activity, duty or employment; or
 - (b) to participate in a lawful entertainment, recreation or sport; or
 - (c) for lawfully exhibiting the knife; or
 - (d) for use for a lawful purpose’.
- ‘(3) However, it is not a reasonable excuse to physically possess a knife in a public place or a school for self-defence purposes.’
- ‘(4) Also, it is a reasonable excuse for subsection (1), to the extent that the subsection relates to a public place, to physically possess a knife for genuine religious purposes.’
- ‘(5) However, it is not a reasonable excuse to physically possess a knife in a school for genuine religious purposes.
- (6) In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.
- (7) In this section—
knife includes a thing with a sharpened point or blade that is reasonably capable of—
- (a) being held in 1 or both hands; and
 - (b) being used to wound or threaten to wound anyone when held in 1 or both hands.’

Section 56:

- ‘(1) In this section—
owner of private land includes the occupier of the land.
private land means land that is not a public place.
weapon includes an antique firearm, spear gun, longbow and slingshot.
- (2) A person must not, without reasonable excuse, discharge a weapon on or across private land without the express consent of the owner.
Maximum penalty—40 penalty units or 6 months imprisonment’.

Section 57:

- ‘(1) In this section—
weapon includes—
- (a) an antique firearm, spear gun, longbow or sword; and
 - (b) a replica of a weapon; and
 - (c) a replica of a thing mentioned in paragraph (a); and
 - (d) a slingshot or shanghai.
- (2) A person must not, without reasonable excuse, carry a weapon exposed to view in a public place.
Maximum penalty—40 penalty units or 6 months imprisonment.
- (3) A person must not without, reasonable excuse, carry in a public place a loaded firearm or a weapon capable of being discharged.
Maximum penalty—120 penalty units or 2 years imprisonment.
- (4) A person must not, without reasonable excuse, discharge a weapon in, into, towards, over or through a public place.
Maximum penalty—200 penalty units or 4 years imprisonment’.

Section 58:

‘(1) In this section—

weapon includes:

- (a) an antique firearm, explosive tool, captive bolt humane killer, spear gun, longbow, or sword; and
- (b) a replica of a weapon; and
- (c) a replica of a thing mentioned in paragraph (a); and
- (d) an explosive; and,
- (e) a slingshot or shanghai; and
- (f) a laser pointer.

(2) A person must not—

- (a) without reasonable excuse; and
- (b) by the physical possession or use of a weapon; engage in conduct, alone or with another, likely to cause—
- (c) death or injury to a person; or
- (d) unlawful destruction or damage to property; or
- (e) alarm to another person.

Maximum penalty—200 penalty units or 4 years imprisonment’.

Section 59:

‘(2) A person must not have physical possession of or use a weapon if the person is under the influence of liquor or a drug.

Maximum penalty—40 penalty units’.

Section 60:

‘(1) A licensee who has control of a weapon at a place must keep the weapon in secure storage facilities at the place when a person is not in physical possession of the weapon.

Maximum penalty—100 penalty units or 2 years imprisonment’.

The prescribed method of storage differs between licence classes (see [Weapons Regulation 1996](#) (Qld)).

Regulation 30 of the Weapons Regulation states that ‘[a] weapon possessed under an armourer’s, dealer’s or theatrical ordnance supplier’s licence that is not in the licensee’s physical possession may only be stored unloaded in a locked gun rack, safe or vault.

Regulations 31-38 specify the requirements of the floors, walls, ceiling, external doors, window and door grilles, burglar alarms, vaults and safes, and gun racks of the premises where weapons are stored under such a licence.

Regulation 39 states that:

‘(1) A weapon possessed under a collector’s licence (weapons) that is not in the licensee’s physical possession must be stored unloaded—

- (a) in a locked container, or locked gun rack, in a locked room (the storeroom) complying with this part; or
- (b) in a locked vault complying with this part’.

This requirement applies if more than 30 weapons are possessed under that licence.

Regulations 40 to 43 specify the requirements of vaults, storerooms, gun racks and containers in such cases.

Regulation 60 applies in all other cases. The weapon must be stored ‘unloaded in a locked container with the bolt removed or the action broken’ if not in the person’s physical possession.

Section 67:

‘(1) A person must not, without reasonable excuse, possess or acquire:

- (a) handcuffs, thumbcuffs or any similar restraints;

- (b) nunchaku or kung fu sticks or any similar device...;
- (c) a billy club, a baton or any device constructed or designed as a telescopic baton...;
- (d) any studded glove which if used offensively against a person is capable of causing bodily harm;
- (e) a laser pointer' (see [Weapons Categories Regulations 1997](#) (Qld), reg. 9).

The maximum penalty is 10 penalty units.

10-18 Criminal Code to be read and construed with the Weapons Act

Section 159 of the Weapons Act notes that the Criminal Code is to be read and construed with the Weapons Act. This has two effects:

- some offences are duplicated in the Criminal Code and Weapons Act. Police can use discretion in relation to the charge
- the Criminal Code's defence provisions (ss 22–36) apply to offences under the Weapons Act.

10-19 Summary proceedings

Under s 161(1), all offences under the Weapons Act may be prosecuted summarily except:

- s 65—unlawful trafficking in weapons
- s 50(1)(a)—unlawful possession of '10 or more weapons at least 5 of which are category D, E, H or R weapons'
- s 50B(1)(a)—unlawful supply of '5 or more weapons at least 1 of which is a category D, E, H or R weapon'.

Section 161(8) states that 'the maximum penalty that may be imposed on a summary conviction of an indictable offence is 150 penalty units or 3 years imprisonment'.

10-20 Time for commencement of proceedings

Section 161(1) states that proceedings must be commenced within 1 year of the offence being committed or within '1 year after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence'.

10-21 Disqualification by a court

When a person is convicted of any offence, the court may, in addition to any other penalty it imposes, revoke a person's licence, disqualify them from holding or obtaining a licence, and/or order that any weapon etc that they own or possess be forfeited to the Crown (s 155).

You should be prepared to make submissions about the order to be made under this section.

10-22 Schedule of weapons

Schedule 1 – Categories of weapons (see Weapons Categories Regulation)

Category A weapons

- (1) Each of the following is a category A weapon if it has not been rendered permanently inoperable—
- (a) a miniature cannon under 120cm in barrel length that is a black powder and muzzle loading cannon, depicting a scale model of an historical artillery piece or naval gun;
 - (b) an air rifle;
 - (c) a blank-fire firearm at least 75 cm in length;
 - (d) a rimfire rifle (other than a self-loading rimfire rifle);
 - (e) a single or double barrel shotgun;
 - (f) a powerhead.
- (2) A conversion unit is also a category A weapon.

(3) In this section—

conversion unit means a unit or device or barrel that is capable of being used for converting a category A weapon that is a firearm from one calibre to another calibre’.

Category B weapons

‘(1) Each of the following is a category B weapon if it has not been rendered permanently inoperable—

- (a) a muzzle-loading firearm;
- (b) a single shot centre fire rifle;
- (c) a double barrel centre fire rifle;
- (d) a repeating centre fire rifle;
- (e) a break action shotgun and rifle combination.

(2) A conversion unit is also a category B weapon.

(3) In this section—

conversion unit means a unit or device or barrel that is capable of being used for converting a category B weapon that is a firearm from one calibre to another calibre’.

Category C weapons

‘Each of the following is a category C weapon if it has not been rendered permanently inoperable—

- (a) a semiautomatic rimfire rifle with a magazine capacity no greater than 10 rounds;
- (b) a semiautomatic shotgun with a magazine capacity no greater than 5 rounds;
- (c) a pump action shotgun with a magazine capacity no greater than 5 rounds’.

Category D weapons

(1) ‘Each of the following is a category D weapon—

- (a) a self-loading centre fire rifle designed or adapted for military purposes or a firearm that substantially duplicates a rifle of that type in design, function or appearance;
- (b) a non-military style self-loading centre fire rifle with either an integral or detachable magazine;
- (c) a self-loading shotgun with either an integral or detachable magazine with a capacity of more than 5 rounds and a pump action shotgun with a capacity of more than 5 rounds;
- (d) a self-loading rimfire rifle with a magazine capacity of more than 10 rounds’.

Category E weapons

‘(1) A bulletproof vest or protective body vest or body armour designed to prevent the penetration of small arms projectiles is a category E weapon’.

Category H weapons

‘(1) A firearm, including an air pistol and a blank-fire firearm, under 75cm in length, other than a powerhead, is a category H weapon, regardless of whether it has been rendered permanently inoperable.

(2) A conversion unit is also a category H weapon.

(3) This section does not apply to a powerhead or category C, D or R weapon.

(4) In this section—

conversion unit means a unit or device or barrel that is capable of being used for converting a category H weapon that is a firearm from one calibre to another calibre’.

Category H weapon classes

‘For Schedule 2 of the Act, each of the following comprises a class of category H weapon—

- (a) an air pistol;
- (b) a centre-fire pistol with a calibre of not more than .38 inch or a black-powder pistol;
- (c) a centre-fire pistol with a calibre of more than .38 inch but not more than .45 inch;
- (d) a rim-fire pistol’.

Category M weapons

‘Each of the following is a category M weapon—

- (a) any clothing, apparel, adornment, accessory or other thing—
 - (i) designed to disguise any weapon or other cutting or piercing instrument capable of causing bodily harm; or
 - (ii) designed for use as a weapon or a cutting or piercing instrument capable of causing bodily harm;
- (b) any knife so designed or constructed so as to be used as a weapon that while the knife is held in 1 hand, the blade may be released by that hand;
- (c) a ballistic knife that propels or releases a knife-like blade of any material by any means other than an explosive;
- (d) a butterfly knife, a knife known as a “balisong”, a pantographic knife, or a similar device that consists of a single-edged or multi-edged blade or spike that fits within 2 handles attached to the blade or spike by transverse pivot pins or pantographic linkage and is capable of being opened by gravity or centrifugal force;
- (e) a flick knife, or a similar device of any material that has a blade folded or recessed into the handle that opens automatically by gravity or centrifugal force or if pressure is applied to a button, spring or device in or attached to the handle of the device;
- (f) a push knife, or a similar device designed as a weapon that consists of a single-edged or multi-edged blade or spike and allows the blade or spike to be supported by the palm of the hand so that stabbing blows or slashes can be inflicted by a punching or pushing action;
- (g) a sheath knife, or a similar device of any material that has a sheath which withdraws into its handle by gravity or centrifugal force or if pressure is applied to a button, spring or device attached to or forming part of the sheath, handle or blade of the device;
- (h) a star knife, or a similar device that consists of at least 2 angular points, blades or spikes, of any material, disposed outwardly about a central axis point and that are designed to spin around the central axis point in flight when thrown at a target;
- (i) a trench knife, or a similar device that consists of a single-edged or multi-edged blade or spike of any material that is fitted with a handle made of any hard substance that is designed to be fitted over the knuckles of the hand of the user to protect the knuckles and increase the effect of a punch or blow;
- (j) a riding crop that contains, conceals or disguises a knife, stiletto or any other single-edged or multi-edged blade or spike of any length or of any material;
- (k) a walking stick or cane that contains, conceals or disguises a sword or any other single-edged or multi-edged blade, knife or spike of any length or of any material;
- (l) any incendiary or inflammable device containing any substance capable of causing bodily harm or damage to property that is primarily designed for vegetation management;
- (m) any pistol crossbow designed to be discharged by the use of 1 hand (that is not a toy pistol crossbow) that when discharged is capable of causing damage or injury to property or capable of causing bodily harm;
- (n) any crossbow designed to be discharged by the use of 2 hands that, when discharged, is capable of causing damage or injury to property or capable of causing bodily harm;
- (o) a Chinese throwing iron that is a hard non-flexible plate having 3 or more radiating points with 1 or more sharp edges in the shape of a polygon, trefoil, cross, star, diamond or geometric shape and constructed or designed to be thrown as a weapon;
- (p) a flail or similar device constructed and designed as a weapon consisting of in part a striking head and which, if used offensively against a person, is capable of causing bodily harm;
- (q) a device known as a ‘manrikiguisari’ or ‘kusari’, consisting of a length of rope, cord, wire or chain fastened at each end to a geometrically shaped weight or handgrip and constructed or designed for use as a weapon;
- (r) a device known as a knuckleduster or any device made or adapted for use as a knuckleduster and which, if used offensively against a person, is capable of causing bodily harm;
- (s) a weighted glove designed or constructed to be used as a weapon;
- (t) a mace or any similar article (other than a ceremonial mace made for and used solely as a symbol of authority on ceremonial occasions);

- (u) any device, not a toy, constructed or designed as a telescopic baton, the extension of which is actuated by the operation of a mechanical trigger’.

Category R weapons

‘(1) Each of the following is a category R weapon—

- (a) a machine gun or submachine gun that is fully automatic in its operation and actuated by energy developed when it is being fired or has multiple revolving barrels, and any replica or facsimile of a machine gun or submachine gun that is not a toy;
- (b) a unit or device that is capable of being used for converting any firearm to a weapon mentioned in paragraph (a);
- (c) a firearm capable of firing 50 calibre BMG cartridge ammunition;
- (d) an antipersonnel gas, and an antipersonnel substance, of a corrosive, noxious or irritant nature or that is capable of causing bodily harm, and any weapon capable of discharging the gas or substance by any means, other than a gas or substance and any weapon capable of discharging the gas or substance that is primarily designed for the control of native or feral animals;
- (e) an acoustical antipersonnel device of an intensity that is capable of causing bodily harm;
- (f) an electrical antipersonnel device of an intensity that is capable of causing bodily harm;
- (g) a hand grenade, other than an inert hand grenade, and an antipersonnel mine;
- (h) a silencer or other device or contrivance made or used, or capable of being used or intended to be used, for reducing the sound caused by discharging a firearm;
- (i) a rocket launcher, recoilless rifle, antitank rifle, a bazooka or a rocket propelled grenade type launcher;
- (j) a mortar, all artillery and any incendiary or inflammable device containing any substance capable of causing bodily harm or damage to property, other than an incendiary or inflammable device primarily designed for vegetation management’.

Restricted items

‘The following items are restricted items for section 67 of the Act—

- (a) handcuffs, thumbcuffs or other similar restraints;
- (b) nunchaku or kung-fu sticks or any similar device which consists of 2 hard non-flexible sticks, clubs, pipes or rods connected by a length of rope, cord, wire or chain constructed or designed to be used in connection with the practice of a system of self-defence and which if used offensively against a person is or are capable of causing bodily harm;
- (c) a billy club, a baton or any device constructed or designed as a telescopic baton, not being a toy or a category M weapon, that if used is capable of causing bodily harm;
- (d) any studded glove which if used offensively against a person is capable of causing bodily harm;
- (e) a laser pointer’.

C. Invasion of Privacy Act 1971 (Qld)

10-23 Introduction

The [Invasion of Privacy Act 1971](#) (Qld) was amended in 1976 with the addition of s 48A. This amendment created several offences that approximate to breaking and entering but are summary offences, which means they can be dealt with only in the magistrates court.

Police may elect to charge under this Act where there is no intent or no intent can be proved. Section 48A contains its own definitions, provisions for means of prosecution, provisions for arrest and dealing with arrested people, and a complicated scheme of offences and possible defences.

10-24 Entering a dwelling house without consent

Section 48A(1) creates the first and basic prohibition, namely, that ‘any person who enters a dwelling house without the consent of the person in lawful occupation or, where there is not a person in lawful occupation, without the consent of the owner is guilty of an offence’. The maximum penalty is 20 penalty units or 1 year’s imprisonment.

The penalty and elements of the offence are almost identical to the offence of trespass under the [Summary Offences Act 2005](#) (Qld).

10-25 Entering a dwelling house by force or other means

This section creates a series of alternative offences by providing alternatives to the element of lack of consent referred to in s 48A(1A). The section states that ‘[i]f the offender gains entry to the dwelling house—

- (a) by force; or
- (b) by threats or intimidation of any kind; or
- (c) by deceit; or
- (d) by any fraudulent trick or advice; or
- (e) by false and fraudulent representations as to the reason for entry;

the offender is guilty of an offence whether or not the offender has the consent of the person in lawful occupation or the owner’. The maximum penalty is 30 penalty units or 18 months’ imprisonment.

10-26 Defences

A person is not guilty under s 48A(1) or (1A) if they show that their entry was:

- authorised, justified or excused by law
- to protect or succour any person inside, or
- to preserve or protect the dwelling house.

10-27 A person without lawful excuse in a dwelling house or yard

Section 48A states that ‘any person who without lawful excuse...is found in a dwelling house or the yard of a dwelling house is guilty of an offence’. The person charged is responsible for proving a lawful excuse. The maximum penalty is 20 penalty units or 1 year’s imprisonment.

10-28 Definitions

- ‘Dwelling house’ (s 48A(12)) is defined as having ‘the meaning it has from time to time in the Criminal Code’.
- ‘Entry of a dwelling house’ in (s 48A(13)) is defined as occurring ‘as soon as any part of the person’s body or any part of any instrument used by the person is within the dwelling house’.
- ‘Yard’ (s 48A(3A)) is defined as ‘any path, garden, curtilage, courtyard, enclosure, lawn or other ground or area within the precincts of or appurtenant to or under the dwelling house in question’.

10-29 Method of proceeding under this Act

Section 48A(4) of the Invasion of Privacy Act indicates that any person who finds another committing any offences referred to in s 48A may arrest that person without warrant. Section 48A(5) provides power to proceed alternatively by way of a complaint and summons under the Justices Act and, presumably, a notice to appear.

10-30 Invasion of Privacy Act provisions in addition to the Criminal Code

Section 48A(11) notes that the section's provisions are in addition to provisions under the Criminal Code or any other Act and that, accordingly, the police in any given situation would choose whether to proceed under this Act or the Criminal Code, or another Act that may apply.

D. Summary Offences Act 2005 (Qld)

10-31 Summary offences duty lawyers will likely face

As a duty lawyer, you will often face offences under this Act. As the name suggests, all charges under the Summary Offences Act are dealt with summarily regardless of the plea entered.

Some of these offences are similar to those in other Acts, such as the unlawful use of a motor vehicle in s 408A of the Criminal Code and trespass, which can also appear as a charge under s 48A of the Invasion of Privacy Act.

10-32 Penalties

Sections 19, 22 and 31 of the Penalties and Sentences Act all apply to offences under this Act.

Public nuisance

'(1) A person must not commit a public nuisance offence.

Maximum penalty—10 penalty units or 6 months imprisonment.

(2) A person commits a public nuisance offence if—

(a) the person behaves in—

(i) a disorderly way; or

(ii) an offensive way; or

(iii) a threatening way; or

(iv) a violent way; and

(b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

(3) Without limiting subsection (2)—

(a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and

(b) a person behaves in a threatening way if the person uses threatening language' (s 6).

Urinating in a public place

'(1) A person must not urinate in a public place.

Maximum penalty—2 penalty units' (s 7).

Begging in a public place

'(1) A person must not—

(a) beg for money or goods in a public place; or

(b) cause, procure or encourage a child to beg for money or goods in a public place; or

(c) solicit donations of money or goods in a public place.

Maximum penalty—10 penalty units or 6 months imprisonment' (s 8).

The section does not apply to individuals authorised by a registered charity or authorised buskers.

Wilful exposure

Under s 9, a person who is in a public place or so near a public place that they may be seen from the public place, must not wilfully expose their genitals unless the person has a reasonable excuse.

Maximum penalty is 2 penalty units or, if the offence involves aggravated circumstance, 40 penalty units or 1 year's imprisonment.

A circumstance of aggravation is defined as 'to wilfully expose his or her genitals so as to offend or embarrass another person' (s 9(3)).

If a defendant is charged under s 9(1)(b) or s 9(2)(b), you should consider whether a charge under s 7 would be more appropriate, given the differences in penalty.

Being drunk in a public place

Section 10 states that 'a person must not be drunk in a public place'. The maximum penalty is 2 penalty units.

For the purposes of the above sections, 'public place—

- (a) means a place that is open to or used by the public, whether or not on payment of a fee; and
- (b) without limiting paragraph (a), in part 3 includes the following—
 - (i) land declared to be busway land under the *Transport Infrastructure Act 1994*, chapter 9;
 - (ii) land that is rail corridor land under the *Transport Infrastructure Act 1994*'.

Trespass

Under s 11, a person must not unlawfully enter, or remain in, a dwelling, the yard of a dwelling, or a place or yard used for a business purpose. Maximum penalty is 20 penalty units or 1 year's imprisonment.

Unregulated high-risk activities

'(1) A person must not unlawfully do any of the following:

- (a) parachute or hang-glide onto a building or structure;
- (b) BASE-jump or hang-glide from a building or structure;
- (c) climb up or down the outside of a building or a structure;
- (d) abseil from a building or structure.

Maximum penalty—20 penalty units or 1 year's imprisonment' (s 14).

In addition to any penalty the court may impose, it can also order the defendant to pay the costs incurred by any person associated with any rescue or attempts to rescue.

10-33 Possession of implement

'(1) A person must not possess an implement that is being, or is to be, used [or has been used]—

- (a) for burglary of a dwelling; or
- (b) for unlawfully entering a place; or
- (c) for entering a vehicle with intent to commit an indictable offence; or
- (d) to steal or unlawfully use a vehicle; or
- (e) to unlawfully injure a person; or
- (f) to unlawfully damage property.

Maximum penalty—20 penalty units or 1 year's imprisonment' (s 15).

If the charge is that the implement has been used, the onus is on the defence to 'prove that the person's possession of the implement was not connected to any involvement by the person in the preparation of the offence or in any criminal responsibility in relation to the offence' (s 15(3)).

See also ‘possession of things used in connection with unlawful entry’ of a dwelling or premises, or housebreaking instruments, under s 425 of the Criminal Code.

Unlawful possession of suspected stolen property

Under s 16, a ‘person must not unlawfully possess a things that is reasonably suspected of having been stolen or unlawfully obtained. Maximum penalty—20 penalty units or 1 year’s imprisonment’.

The prosecution need only establish that the circumstances in which the property was found gave the police officer reasonable suspicion that the property was stolen or unlawfully obtained (s 48(2)).

The defendant must satisfy the court that the property was legitimately obtained.

Graffiti instrument

‘(1) A person must not possess a graffiti instrument—

- (a) that is reasonably suspected of having been used for graffiti; or
- (b) is being used for graffiti; or
- (c) is reasonably suspected of being about to be used for graffiti.

Maximum penalty—20 penalty units or 1 year’s imprisonment’ (s 7).

For the definition of ‘graffiti’, Schedule 2 refers to s 469 of the Criminal Code (wilful damage/punishment in special cases, paragraph 9):

‘(1) If the property in question is in a public place, or is visible from a public place, and the destruction or damage is caused by—

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or
- (b) scratching or etching;

the offender commits a crime and is liable to imprisonment for 5 years’.

In Schedule 2, ‘graffiti instrument’, includes—

- ‘(a) a container from which paint or another marking substance may be forced by pressure, suction or in another way; or
- (b) an etching instrument’.

In addition to any penalty it may impose, the court can also order the defendant to perform community service or pay compensation under the Penalties and Sentences Act.

If a person is charged with possessing an instrument reasonably suspected of having been used for graffiti, they can raise the defence that the instrument was not connected to any involvement by them in preparing the offence or any criminal responsibility relating to the offence.

If a court finds a person guilty of an offence against ss 15, 16 or 17, the court may order the instrument to which the offence relates to be forfeited to the state (s 47).

Body piercing and tattooing of minors

Section 18 prohibits the body piercing of nipples and genitalia of minors. It is not a defence that the parent or guardian of the minor gave consent. The maximum penalty is 40 penalty units or 6 months’ imprisonment; however, if the minor has an intellectual impairment, or their decision making is impaired due to alcohol or a drug, the maximum penalty is 80 penalty units or 1 year’s imprisonment.

Section 19 prohibits the tattooing of minors. Maximum penalty is 40 penalty units or 6 months’ imprisonment.

Imposition

Under s 22, a ‘person must not impose or attempt to impose on another person to obtain money or an advantage. Maximum penalty—20 penalty units or 1 year’s imprisonment’.

Sale of spray paint to minors

Section 23B prohibits the sale of spray paint to minors, with a maximum penalty of 140 penalty units for a first offence, 280 penalty units for a second offence and 420 penalty units for a third offence.

If a court finds a person guilty of an offence against s 23B, it may order the thing to which the offence relates to be forfeited to the state (s 47).

Unlawful entry or use of vehicles

'A person must not—

- (a) unlawfully enter or use a vehicle without the consent of the person in lawful possession of the vehicle; or
- (b) have a vehicle in the person's possession without the consent of the person in lawful possession of it (the other person) with intent to temporarily or permanently deprive the other person of the use or possession of it of the vehicle.

Maximum penalty—20 penalty units or 1 year's imprisonment' (s 25).

See also the offence of 'unlawful use or possession of a motor vehicle' under s 408A and 'unlawful entry of a motor vehicle' under s 427 of the Criminal Code.

Endangering safe use of vehicles by throwing an object

(1) 'A person must not unlawfully—

- (a) throw an object at a vehicle that is in the course of travelling; or
 - (b) place an object in or near to the path a vehicle is using or may use in travelling; or
 - (c) direct a beam of light from a laser at or near a vehicle that is in the course of travelling;
- in a way that endangers or is likely to endanger the safe use of the vehicle.

Maximum penalty—2 years imprisonment' (s 19).

It does not matter what the offender's intention is in throwing the object, whether they make contact with a vehicle, whether a vehicle is moving or stationary in the course of travel, or whether a vehicle is in the offender's sight when they throw the object.

In Schedule 2, 'vehicle' includes a motor vehicle, bicycle and boat.

Under s 26A, it is an offence to interfere with graves, war memorials or things fixed at a place of religious worship. The maximum penalty is 1 year's imprisonment.

E. *Police Powers and Responsibilities Act 2000 (Qld)*

10-34 Purposes of the Police Powers and Responsibilities Act

Under s 5 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA), the purposes of the Act are:

- '(a) to consolidate and rationalise the powers and responsibilities police officers have for investigating offences and enforcing the law;
- (b) to provide powers necessary for effective modern policing and law enforcement;
- (c) to provide consistency in the nature and extent of the powers and responsibilities of police officers;
- (d) to standardise the way the powers and responsibilities of police officers are to be exercised;
- (e) to ensure fairness to, and protect rights of, persons against whom police officers exercise powers under this Act;
- (f) to enable the public to better understand the nature and extent of the powers and responsibilities of police officers'.

If any inconsistency occurs between the PPRA and any other Act regarding police powers, the PPRA takes precedence (s 11).

As the PPRA is voluminous (852 pages as at May 2012), the summary below is a guide only. You may need to refer to the PPRA to provide detailed advice to a client on a specific issue.

10-35 Summary of police powers under the PPRA

Power	PPRA	Notes
Power to enter and stay at a place for a reasonable time	s 19	For what constitutes a reasonable time, see s 20.
	s 19(5)	'[I]f the place contains a dwelling, the only part of the place a police officer may enter without the consent of the occupier is the part of the place that is not a dwelling'.
	s 19(6)	'[T]he police officer may only use minimal force to enter the place'.
Power to stop and search a person without a warrant if a 'prescribed circumstance'	s 29	Prescribed circumstances are very wide— see s 30
Power to search a vehicle without a warrant in a 'prescribed circumstance'	s 31	Prescribed circumstances are very wide—see s 32
Power to enter, search, dig up, open locked areas etc in a public place	s 33	
Power to require name and address	s 40	Prescribed circumstances are very wide—see s 41
Power to require age	s 42	Section 42 relates to a requirement to provide a date of birth when a person is engaged in certain activities (e.g. smoking). The relevant offence provision is s 791 (Offence to contravene direction or requirement of police officer). Maximum penalty is 40 penalty units.
Move-on powers	s 48	Police 'may give a person or group of persons doing a relevant act any direction that is reasonable in the circumstances' (s 48(1)). This allows police to move on people who have been causing anxiety, interrupting trade, disturbing the peace etc. (See s 46 for detailed list.) It applies to any public area or prescribed area. Schedule 6 defines a 'prescribed place' as: (a) a shop; or (b) a child-care; or (c) a pre-school centre; or (d) a primary, secondary or special school; or (e) premises licensed under the <i>Liquor Act 1992</i> ; or (f) railway station and any railway land around it; or (g) a mall; or (h) the part of the corporation area under the <i>South Bank Corporation Act 1989</i> declared to be the site under that Act; or (i) a licensed venue under the <i>Racing Act 2002</i> ; or (j) an automatic teller machine; or, (k) a war memorial'. The relevant offence provision is s 791 (Offence to contravene direction or requirement of police officer). Maximum penalty is 40 penalty units.

Power to take steps to prevent a riot	s 51	'It is lawful for a police officer to take the steps the police officer reasonably believes are necessary to suppress a riot'.
Power to take steps to prevent an offence being committed	s 52	'It is lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent the commission, continuation or repetition of an offence'.
Prevention of particular offences relating to liquor	s 53	Power to seize and empty containers
Powers relating to vehicles and traffic	s 55	Power to require people to provide information about vehicles, ownership, etc.
	s 58	Production of driver licence: '(1) This section applies if a police officer— (a) finds a person committing an offence against the Road Use Management Act; or (b) reasonably suspects a person has committed an offence against the Road Use Management Act; or (c) is making inquiries or investigations for establishing whether or not a person has committed an offence against the Road Use Management Act; or (d) reasonably suspects a person who was present at the scene of a relevant vehicle incident may be able to give information or evidence about the incident; or (e) reasonably considers it is necessary for enforcing the Road Use Management Act in relation to a heavy vehicle'.
Impounding vehicles	s 74	Police officers can impound vehicles for various offences if they include a speed trial, race between motor vehicles, or burn out. Police officers can impound vehicles for other offences where the driver has previously been charged with various traffic offences (s 69A(2))
Forfeiture orders for vehicles	ss 90, 90A, 91	These sections set out powers and procedures for orders (see s 102—power of court to order community service (up to 240 hours) instead of impounding or forfeiting).
Search warrants	s 151	To obtain a search warrant from a justice, magistrate or Supreme Court judge under s 151, a police officer must satisfy the issuer that 'there are reasonable grounds for suspecting the evidence' of an offence 'is at the place; or is likely to be taken to the place within the next 72 hours'.
	ss 156, 157	Section 156 sets out what a search warrant must state and s 157 specifies a police officer's wide powers under a search warrant.
Emergent searches	s 159	This power is available only with respect to (a) an indictable offence; (b) an offence involving gaming or betting; (c) an offence against any of the following Acts— • Confiscation Act • <i>Explosives Act 1999</i> • <i>Nature Conservation Act 1992</i> • <i>Weapons Act 1990</i> ; (d) an offence against the <i>Liquor Act 1992</i> , section 168B or 168C'.

	s 160	<p>If a police officer reasonably suspects that evidence at a place ‘may be concealed or destroyed unless the place is immediately entered and searched’, they may enter the place and exercise search warrant powers</p> <p>The police officer cannot structurally damage a building in exercising these powers. They may exercise the same powers in relation to a transport vehicle.</p>
	s 161	‘As soon as reasonably practicable after exercising powers under section 160, the police officer must apply to a magistrate in writing for an order approving the search’.
Arrest without warrant	s 365	<p>A police officer may arrest an adult without warrant—</p> <ul style="list-style-type: none"> (a) to prevent the continuation or repetition of an offence or the commission of another offence; (b) to make inquiries to establish the person’s identity; (c) to ensure the person’s appearance before a court; (d) to obtain or preserve evidence relating to the offence; (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence; (f) to prevent the fabrication of evidence; (g) to preserve the safety or welfare of any person, including the person arrested; (h) to prevent a person fleeing from a police officer or the location of an offence; (i) because the offence is an offence against section 790 or 791; (j) because the offence is an offence against the <i>Domestic and Family Violence Protection Act 1989</i>, section 80; (k) because of the nature and seriousness of the offence; (l) because the offence is— <ul style="list-style-type: none"> (i) an offence against the <i>Corrective Services Act 2006</i>, section 135(4); or (ii) an offence to which the <i>Corrective Services Act 2006</i>, section 136 applies’.
Detention for investigation or questioning	s 403	<p>This allows a police officer to ‘detain a person for a reasonable time to investigate or question’ about an indictable offence for which they have been arrested or are suspected to have committed.</p> <p>‘However, the person must not be detained...for more than 8 hours, unless the detention period is extended’ (s 403(2)). During the 8 hours, ‘the person may be questioned for not more than 4 hours’ (s 403(4)).</p>
	s 405	<p>This allows a police officer to apply to a magistrate or justice of the peace (magistrates court) for an order to extend the detention period. If either is unavailable, they can apply to any justice of the peace except a commissioner for declarations. However, they must apply to a magistrate if the extended period will be more than 12 hours.</p>

	s 406	An order extending the detention period cannot be for more than 8 hours and the person in custody must be able to make submissions about the application.
Safeguards ensuring rights of and fairness to persons questioned for indictable offences	s 418	‘Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person that’ they have the right to contact a friend, relative or lawyer and ask that they be present during any questioning (see 420—special procedures for ATSI interviewees; 422—impaired capacity; and 423—intoxicated interviewees).
Searching people in custody	s 443	This allows police to search and re-search a person lawfully arrested, in custody or detained. Police may retain any evidence found in the search, and anything that may endanger anyone’s safety or be used to escape while that person is in custody.
Identifying particulars notice	s 470	This allows a police officer to require a person by way of an ‘identifying particulars notice’ to report to a stated police station, between stated hours and within 7 days, so that identifying particulars can be taken. The notice must state that ‘it is an offence to fail to comply with the notice’ and that identification is required on reporting. The notice must be given to the person with a notice to appear and be signed by the police officer serving the notice. The police officer must further warn the person that it is an offence to contravene a requirement of the notice. A court can order the taking of identifying particulars under s 471. Section 474 allows a defendant to have their identifying particulars destroyed in the presence of a justice on acquittal or if there are no longer proceedings for the offence.
DNA	ss 481–488A	These sections involve provisions relating to the taking of DNA. Under s 484, a court may make an order in a proceeding against an adult for an indictable offence if it ‘is satisfied it is reasonably necessary, having regard to the rights and liberties of the person and the public interest, to take a DNA sample for DNA analysis from the person’. In all cases, approval for taking a DNA sample, whether by a commissioned officer or a court, must be given after considering the rights and liberties of the person and the public interest. However, under s 485, an exception is where a court finds an adult guilty of an indictable offence. Here, the court does not need to consider the person’s rights and liberties in making an order.
Taking blood and urine samples	s 540	A police officer may apply to take samples if a person is accused of committing certain offences (i.e. Chapter 18 offences, such as rape, incest, etc).
	s 542	A disease test order may be made.
Powers relating to noise	s 577	A police officer must investigate a noise complaint ‘unless the officer believes the complaint is frivolous or vexatious’.

	s 581	A police officer may make a ‘noise abatement direction’ by entering the place from which the noise is being emitted, without a warrant, and direct the occupier or other persons causing or permitting the noise ‘to immediately abate the excessive noise’.
	s 582	A person who either receives a noise abatement direction or knows of such a direction for the place must immediately comply for 12 hours after it is given. If not, they are committing an offence with a maximum penalty of 10 penalty units.
	s 583	If s 582 is contravened, ‘[a] police officer may— (a) without warrant, enter the place from which the noise is being emitted; and (b) in relation to property that is or was being used to produce or contribute to the production of the noise— (i) lock, seal or otherwise deal with it in a way to prevent its further use; or (ii) seize it and remove it from the place; or (iii) make it inoperable by removing any part or parts and seize and remove the part or parts from the place’.
Assault/obstruct police	s 790	<p>‘A person must not assault or obstruct a police officer in the performance of the officer’s duties. Maximum penalty—40 penalty units or 6 months imprisonment’ (s 790(1)).</p> <p>A person is taken to obstruct a police officer if they obstruct ‘a police dog or police horse under the control of a police officer in the performance of the police officer’s duties’ (s 790(2)).</p> <p>‘Assault’ is defined by s 245 of the <i>Criminal Code</i>. Police can choose whether a charge of assault should proceed under either s 790 of the PPRA or the <i>Criminal Code</i>. The police will usually proceed under s 790 if the assault is relatively minor.</p> <p>‘Obstruct’ is defined as including ‘hinder, resist, and attempt to obstruct’.</p>
Contravene direction or requirement	s 791	<p>Unless otherwise provided, a person is liable to a penalty of 40 penalty units if they contravene a requirement or direction given by a police officer under the PPRA without reasonable excuse.</p> <p>Unless otherwise provided, a reasonable excuse under s 791(4) would be if the information directed or required would incriminate the person.</p>

F. Breach of probation/community service

10-36 Specific offences

Proceedings for breaches of probation and community service orders are brought against the defendant under the Penalties and Sentences Act (see ss 90–110 and 120–142).

Breach for contravening requirement of community-based order

Breaches under these circumstances can include failing to report to a probation officer, failing to notify of a change of address, leaving Queensland without a probation officer's approval, failing to pay restitution as ordered and breaching due to a subsequent conviction. The breaching conduct need not have occurred in Queensland (s 123).

10-37 Institution of proceedings

Proceedings for probation breaches are instituted by the Probation and Parole Office and, if the offender's whereabouts are known, usually commenced with a summons (s 128(1)—single community-based order; s 129(1)—multiple orders).

If the offender cannot be located, proceedings for breach of a community-based order are commenced with a warrant ordering all police officers to arrest the offender and bring them before the court (ss 128(2) and 129(2)).

If a summons is issued, the offender is summonsed to appear before the court.

Proceedings for breaching an order may be commenced after the end of the order (s 132).

10-38 Appropriate court to deal with breach

Any magistrates court can deal with proceedings for an offence against s 123(1) (s 124). If the Supreme Court or a district court made the original community-based order, the magistrate may, instead of dealing with the breach, commit the offender into custody or grant the offender bail to be brought before the original higher sentencing court (see s 125(4)(b)).

10-39 Procedure on issue of warrant

If a warrant is issued, and the defendant is arrested and taken before the nearest magistrates court, the magistrates court may either commit the defendant to custody or grant bail to appear before the next sittings of the appropriate court to be dealt with for the breach.

10-40 Penalty for breach of community-based orders

In imposing penalties, the magistrates court can choose to:

- impose a fine not exceeding 10 penalty units (s 125)
- in addition to or instead of the above, admonish and discharge the offender or make one of the following orders:
 - order the payment of unpaid restitution or compensation and make further orders for enforcement
 - with the offender's consent, increase the number of community service hours
 - extend the period of one year allowed for the offender to perform community service
 - if the community-based order was made by the magistrates court, deal with the offender for the original offence as if the offender had just been convicted of that offence
 - if the community-based order was made by the Supreme Court or a district court, commit the offender into custody or grant the offender bail to appear before the original sentencing court.

The same options apply to the district court and Supreme Court under s 126 of the Penalties and Sentences Act.

If a disqualification period was imposed for the original offence, the court dealing with the breach cannot change or revoke the disqualification period (s 126A)

10-41 Consulting with prosecuting corrections officer

An officer of the Probation and Parole Office deals with breaches of probation and community service orders. As the duty lawyer, you should consult that officer and ask for their recommendation to the magistrate in dealing with the person charged.

10-42 Taking full instructions on the breach and original offence

If the magistrates court is the appropriate court, the magistrate can not only punish for the breach, but also for the original offence, as if the offender had just been convicted of that offence. In such circumstances, you must obtain full instructions on both the breach and original offence.

Depending on the circumstances of the breach and original offence, and the amount of mitigating material, you could advise the offender to seek a remand, obtain legal advice and obtain legal representation at the next appearance. Such advice is especially appropriate if the prosecuting probation officer has indicated that they will recommend that the offender be dealt with for the original offence.

10-43 Legal assistance for breaches of probation/community service

Legal Aid Queensland may provide legal assistance for probation breaches in the magistrates court, and the district court and Supreme Court.

G. Corrective Services Act 2006 (Qld)

10-44 Introduction

The [Corrective Services Act 2006](#) (Qld) contains various offences that may be committed either by prisoners or people coming into contact with prisoners. These offences are contained in ss 122 ('Unlawful assembly, riot and mutiny'), 123 ('Prohibited things'), 124 ('Other prisoner offences') and 126–137.

Breaches of discipline are dealt with within the corrective services system. The offences listed above are dealt with in the court process. Note that, in relation to prisoner offences, a person may be convicted of an offence but no longer be a prisoner when proceedings relating to the offence are commenced or heard. This handbook deals briefly with the offences that you are more likely to face as a duty lawyer.

10-45 Unlawful assembly, riot and mutiny

Offences under s 122 are crimes and cannot be dealt with summarily. Those offences are as follows:

- (1) A prisoner must not take part in an unlawful assembly.
Maximum penalty—3 years imprisonment.
- (2) A prisoner must not take part in a riot or mutiny.
Maximum penalty—
 - (a) if, during the riot or mutiny, the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, property that is part of a corrective services facility and the security of the facility is endangered by the act—life imprisonment; or
 - (b) if, during the riot or mutiny, the prisoner demands something be done or not be done with threats of injury or detriment to any person or property—14 years imprisonment; or

- (c) if, during the riot or mutiny, the prisoner escapes or attempts to escape from lawful custody, or helps another prisoner to escape or attempt to escape from lawful custody—14 years imprisonment; or
- (d) if, during the riot or mutiny, the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, any property—10 years imprisonment; or
- (e) otherwise—6 years imprisonment’.

10-46 Summary jurisdiction

Under s 350, all offences under this Act are to be dealt with summarily except offences under s 122. The ‘proceeding must start—

- (a) within 1 year after the offence was committed; or
- (b) within 6 months after the offence comes to the complainant’s knowledge, but within 2 years after the offence was committed’.

The only exception is for proceedings for an offence under s 28F(1) or (5) (offences regarding holding prisoner’s artwork), which ‘may start at any time but, if started more than 1 year after the commission of the offence, must start within 6 months after the offence comes to the complainant’s knowledge’.

Dealing with prohibited thing

Under s 123(2):

‘(2) A prisoner in a corrective services facility must not deal, or attempt to deal, with—

- (a) a prohibited thing; or
- (b) something intended to be used by a prisoner to make a prohibited thing.

Maximum penalty—2 years imprisonment.

(3) However, subsection (2) does not apply to—

- (a) making or attempting to make a thing if the prisoner has the chief executive’s written approval to make it; or
- (b) possession of a thing if the prisoner has the chief executive’s written approval to possess it.

(4) The finding of a prohibited thing in a prisoner’s room that is not shared with another prisoner, or on the person of a prisoner, in a corrective services facility is evidence the thing was in the prisoner’s possession when it was found.

(5) In this section—

deal with, a thing, means make, possess, conceal or knowingly consume the thing’.

The [Corrective Services Regulation 2006](#) (Qld) (regulation 20) prescribes what constitutes a prohibited thing for the purposes of this section. The list is extensive:

- ‘(a) a weapon, replica of a weapon or other replica under the *Weapons Act 1990*;
- (b) an explosive or ammunition under the *Explosives Act 1999*;
- (c) a flammable substance;
- (d) anything capable of being used to scale a fence, wall, door or gate;
- (e) anything capable of cutting or spreading metal bars;
- (f) anything capable of damaging or destroying a fitting or fixture designed to detain prisoners;
- (g) a key, card, or other device capable of opening a mechanical or electronic lock;
- (h) soap or another substance containing an impression of a prohibited thing, including, for example, a key;
- (i) a knife, a saw, scissors or another cutting implement;
- (j) kitchen utensils or equipment or tools;
- (k) a spirituous or fermented fluid or substance of an intoxicating nature;
- (l) a drug or medicine;
- (m) a syringe or other device capable of administering a drug;
- (n) cash, a credit card, debit card, cheque or money order or another negotiable instrument;
- (o) a document containing a person’s credit card or debit card details;

- (p) a form of identification, including, for example, false identification;
- (q) anything capable of being used to alter a prisoner's appearance so that it significantly differs from the prisoner's appearance described in the record kept under section 10 of the Act;
- (r) a communication device;
- (s) a device capable of enabling a prisoner to access information that could be a risk to the security of a corrective services facility;
- (t) an objectionable computer game under the *Classification of Computer Games and Images Act 1995*;
- (u) a film classified as an "R" film under the *Classification of Films Act 1991*, an objectionable film under that Act, or a film that, if it were classified under that Act, would be classified as an "R" film or an objectionable film;
- (v) a prohibited publication under the *Classification of Publications Act 1991*;
- (w) anything modified from its usual form to enable something to be concealed in it;
- (x) anything that poses a risk to the security or good order of a corrective services facility, including, for example, a drawing, plan or photo of the facility;
- (y) any part of a thing mentioned in paragraphs (a) to (x)'.

Other offences

Under s 124:

'A prisoner must not—

- (a) prepare to escape from lawful custody; or
- Note—See the Criminal Code, section 142 for the offence of escaping from lawful custody.
- (b) assault or obstruct a staff member who is performing a function or exercising a power under this Act or is in a corrective services facility; or
 - (c) disobey a lawful direction of the proper officer of a court or a person assisting the proper officer of a court; or
 - (d) organise, attempt to organise or take part in any opposition to authority under this Act, whether inside or outside a corrective services facility; or
 - (e) threaten to do grievous bodily harm to someone else; or
 - (f) unlawfully kill or injure, or attempt to unlawfully kill or injure, a corrective services dog; or
 - (g) obstruct a corrective services dog working under the control of a corrective services officer who is performing duties under this Act; or
 - (h) assume another identity, or disguise himself or herself, in order to commit an offence against this Act; or
 - (i) wilfully and unlawfully destroy, damage, remove or otherwise interfere with any part of a corrective services facility or any property in the facility; or
 - (j) without lawful authority, abstract or remove information from, copy or destroy information in, or make a false entry in, a record kept under this Act; or
 - (k) without reasonable excuse, be unlawfully at large.

Maximum penalty—2 years imprisonment'.

It is also important to note the following sections of the Penalties and Sentences Act and their relationship with the Corrective Services Act:

Cumulative order of imprisonment must be made in particular circumstances

Under s 156A of the Penalties and Sentences Act:

'(1) This section applies if an offender—

- (a) is convicted of an offence—
 - (i) against a provision mentioned in schedule 1 [i.e. s 122(2) ('Unlawful assembly, riot and mutiny) and s 124(a) ('Other offences')]; or
 - (ii) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1; and

- (b) committed the offence while—
 - (i) a prisoner serving a term of imprisonment; or
 - (ii) released on post-prison community based release under the *Corrective Services Act 2000* or released on parole under the *Corrective Services Act 2006*; or
 - (iii) on leave of absence, from a term of imprisonment, granted under the *Corrective Services Act 2000* or the *Corrective Services Act 2006*; or
 - (iv) at large after escaping from lawful custody under a sentence of imprisonment.
- (2) A sentence of imprisonment imposed for the offence must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve’.

Parole

Sections 160–160H of the Penalties and Sentences Act govern these orders. As a duty lawyer appearing or giving advice on sentence to prisoners, you will often need to consider the relationship between the Corrective Services Act and these provisions.

This is not an exhaustive examination of the relationship between the two Acts. You should closely scrutinise the provisions as they relate to each particular case.

Note, in particular, s 160B of the Penalties and Sentences Act—‘Sentence of 3 years or less and not a serious violent offence or sexual offence’:

- ‘(1) This section applies if neither section 160C nor 160D applies.
- (2) If the offender has had a court ordered parole order cancelled under the *Corrective Services Act 2006*, section 205 or 209 during the offender’s period of imprisonment, the court must fix the date the offender is eligible for parole.
- (3) If subsection (2) does not apply, the court must fix a date for the offender to be released on parole.
- (4) If the offender had a current parole eligibility date or current parole release date, a date fixed under subsection (2) or (3) must not be earlier than the current parole eligibility date or current parole release date’.

Section 205 of the Corrective Services Act allows the parole board to amend, suspend or cancel a parole in certain circumstances.

Section 209 of the Corrective Services Act states:

- ‘(1) A prisoner’s parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.
- (2) Subsection (1) applies even if the period of the parole order has expired.
- (3) However, subsection (1) does not apply if—
 - (a) the prisoner is required to serve the period of imprisonment mentioned in the subsection in default of—
 - (i) paying a fine or another amount required to be paid under a court order; or
 - (ii) making restitution required to be made under a court order; or
 - (b) the period of imprisonment mentioned in the subsection—
 - (i) is required to be served under an intensive correction order; or
 - (ii) is wholly suspended under the *Penalties and Sentences Act 1992*, part 8; or
 - (iii) is wholly suspended because of an order, under the *Drug Court Act 2000*, section 20(1)(a), contained in an intensive drug rehabilitation order; or
 - (iv) is required to be served until the court rises’.

H. Disclosure of criminal convictions—*Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)*

10-47 Introduction

The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) came into force on 1 November 1986. It was introduced to allow people to avoid disclosure of previous convictions in certain circumstances.

The Act's provisions apply to both the person with the conviction and the body responsible for collecting and distributing the details of a person's criminal convictions (the Queensland Police Service).

10-48 Application of the Act

The Act applies to convictions only where the offender is not ordered to serve a period in custody or, if the offender is so ordered, whether through default or otherwise, the period does not exceed 30 months (s 3(2)).

The 'rehabilitation period', after which a person can claim the protection of this Act, is 10 years for a conviction upon indictment recorded as an adult or 5 years for a conviction recorded as a child, unless those convictions are 'revived' under s 11 (s 3). Note, if the magistrate makes any order regarding the conviction (e.g. fine or restitution), the person or child does not benefit from the Act's provisions until the order is satisfied (i.e. they pay the fine or restitution) (s 3).

A conviction is revived if, after incurring a conviction to which a rehabilitation period applies, the person is convicted of another offence. If this occurs, the rehabilitation period starts again from the date of the fresh conviction.

However, a conviction for a simple or regulatory offence does not revive a previous conviction to which a rehabilitation period applies unless the court specifically orders that it should (s 11(2)).

10-49 Non-disclosure of convictions once rehabilitation period expires

Once the rehabilitation period has expired, if it has not been revived, no person can disclose the conviction unless:

- the person who was convicted wishes to disclose it (s 6(a))
- a person who knows about the conviction either is authorised to disclose it by a permit authorised by the attorney-general (ss 6(b) and 10) or discloses it under s 9.

Section 9 covers people who are required by law to disclose their criminal history if they have an application to be assessed for a profession, occupation or calling (ss 6(c), and 9(1)(a), (b) and (c)) or application to the Parole Board (ss 6(c) and 9(2)).

10-50 Lawful to deny certain convictions

Once a person's rehabilitation period has expired and not been revived, they can lawfully claim, on oath or otherwise, that they have not incurred a conviction unless a rule of practice or provision of law requires disclosure (s 8).

10-51 Exception to the non-disclosure provisions for certain professions or occupations

This Act notes that when certain people (including police officers, prison officers, justices of the peace and registered teachers) apply for specified positions, they must disclose some or all previous convictions. Section 9A contains a comprehensive table that sets out the conditions for each employment category.

I. Restrictions on publication and attendance at court

10-52 Publication of names

Defendants or unrepresented witnesses may approach you, as the duty lawyer, to establish whether the publication of their names or other information presented in court may be restricted and whether there are restrictions on who may be present in court during all or part of the proceedings.

You should be prepared to make the relevant applications, where appropriate, on a defendant's instructions.

10-53 Bail applications

The court can restrict the information that may be published about a bail application (see [Bail Act 1980](#) (Qld), s 12). This includes submissions, reasons for decision etc.

The maximum penalty for breaching a court order made under s 12 is 10 penalty units or 6 months' imprisonment.

10-54 General provisions

Magistrates Court proceedings

The magistrate may, in the interests of public morality, exclude anyone from the court (Justices Act, s 70).

Committal proceedings

The magistrate may exclude people from committal proceedings only if 'it appears to them that the ends of justice require them to do so' (Justices Act, s 71).

10-55 Sexual offences—*Criminal Law (Sexual Offences) Act 1978* (Qld)

Section 5 of the [Criminal Law \(Sexual Offences\) Act 1978](#) (Qld) requires a court to exclude the public from the court when a complainant is giving evidence in any examination of witnesses or trial. The section provides a list of people who cannot be excluded, including defence lawyer, crown officers, support people and parents of young complainants.

Section 6 provides that any report relating to the examination of witnesses or a trial about a sexual offence cannot reveal a complainant's name, address, school, place of employment or any other particular likely to identify the complainant, unless a court order permits it.

Section 7 contains a similar provision to prevent the disclosure of the same information about a defendant. Section 7 applies only to prescribed offences, which s 3 defines as:

- (b) attempt to commit rape;
- (c) assault with intent to commit rape;
- (d) a sexual assault defined in the Criminal Code, section 352' (including indecent assault, and procurement of a person to commit or witness an act of gross indecency, including by threats or while armed).

The information referred to in s 7 may be published after a defendant is committed for trial, as long as the report does not reveal information about any other defendant who has not been committed for trial (s 8).

10-56 Childrens court proceedings

Childrens court proceedings are governed by the [Childrens Court Act 1992](#) (Qld), which has specific provisions about the people who may be present at court proceedings (Childrens Court Act, s 20).

J. Domestic violence orders

The [Domestic and Family Violence Protection Act 2012](#) (Qld) sets out the civil regime for preventing domestic violence through domestic violence orders. Once an order has been breached it becomes a criminal matter and a duty lawyer may have to represent a respondent in court. An overview is contained below.

The civil process

10-57 What is domestic violence and when can a court make an order?

Duty lawyers do not represent respondents in the civil proceedings in which the court considers whether to make a domestic violence order. Section 37 of the Domestic and Family Violence Protection Act outlines when a court can make a domestic violence order, that is, if the court is satisfied that:

- (a) a relevant relationship exists between the aggrieved and the respondent; and
- (b) the respondent has committed domestic violence against the aggrieved; and
- (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.

Domestic violence is defined in the Domestic and Family Violence Protection Act (s 8) as being where there is behaviour by one person towards another person in a “relevant relationship” that –

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or
- (f) in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else.

Examples include:

- threatening or causing personal injury;
- coercing a person to engage to sexual activity;
- damaging property;
- depriving liberty;
- threatening a person with death or injury;
- threatening to commit suicide or self harm so as to frighten the person;
- unlawful stalking; or
- unauthorised surveillance of a person.

10-58 Relevant relationships

Section 13 explains what a “relevant relationship” is for the purposes of the Domestic and Family Violence Protection Act. These are:

- (a) an intimate personal relationship; or
- (b) a family relationship; or
- (c) an informal care relationship.

Section 14 defines an intimate personal relationship to include a spouse (see ss 36 and 32DA of the *Acts Interpretation Act 1954*), a former spouse, a parent or former parent of a child of the person, a fiancé, or a couple relationship (also see ss 15–18).

Section 19 defines a ‘family relationship’ as existing between relatives. ‘Relatives’ are defined as people who are connected by blood or marriage, or regard themselves as relatives culturally or religiously.

Section 20 defines an ‘informal care relationship’ as existing when one person is dependent on another person who helps them in an activity of daily living.

10-59 Court may include name of relative or associate

Section 52 allows a court to name a relative or associate of the person applying for a domestic violence order (aggrieved) if the court is satisfied that it is necessary or desirable to protect the relative or associate from associated domestic violence.

Section 53 allows a court to name a child of the aggrieved (or child who usually lives with the aggrieved) if the court is satisfied that the naming of the child is necessary or desirable to protect the child from associated domestic violence or being exposed to domestic violence.

“Being exposed to domestic violence” is defined in s 10 to mean if the child sees or hears domestic violence or otherwise experiences the effects of domestic violence. (See s 10 for examples of being exposed to domestic violence such as seeing or hearing assaults, comforting a person who has been physically abused, observing bruising or other injuries or cleaning up a site after property has been damaged).

10-60 Protection orders to include standard conditions

Section 56 outlines the standard conditions on a domestic violence order. The court must impose a condition that the respondent—

- (a) be of good behaviour towards the aggrieved and not commit domestic violence; and
- (b) if a named person or child is specified in the order—be of good behaviour towards the named person and/or child and not commit an act of associated domestic violence against the person and/or child.

10-61 Court may make a temporary protection order

Section 44 of the Domestic and Family Violence Protection Act sets out when a court can make a temporary protection order, such as when it adjourns the hearing of an application for a domestic violence order. Section 45 outlines the matters that the court must be satisfied of to make a temporary protection order, that is that a relevant relationship exists and that the respondent has committed domestic violence.

A domestic violence order takes effect on the day it is made or at the end of a previous existing order (s 34). It can continue for up to two years, or longer if the court believes there are special reasons for it (s 34A).

10-62 Court may make domestic violence order

A court may, on its own initiative, make a domestic violence order against a person who pleads guilty to, or is found guilty of, an offence that involves domestic violence (s 42).

The court must give the offender reasonable opportunity to present evidence and make submissions.

10-63 Weapons Act

Sections 79–83 of the Domestic and Family Violence Protection Act relate to weapons.

The Weapons Act applies to professional people who may hold a weapon’s licence and who are responding to a domestic violence order application (despite s 2 of the Weapons Act which exempts its application to defence forces and police etc).

A domestic violence order must include information about weapons on the order (s 82).

The court must consider matters relating to weapons before making a domestic violence order (s 80). It can include information on the domestic violence order if it is reasonable (such as information about a weapon or a weapon used due to the respondent's employment).

10-64 Registration of interstate order

Sections 170–176 relate to the ability of a person to register an interstate order. A person may apply to a magistrates court for the registration of an interstate order (s 170). A registered interstate order has the same effect as a domestic violence order; and may be enforced against a person as if it were a domestic violence order that had been personally served on the person as a respondent (s 174).

10-65 Police protection notice

Sections 101–114 outline the circumstances where a police officer may issue a police protection notice under the Domestic and Family Violence Protection Act. A police protection order is like an “on-the-spot” version of a domestic violence order. A police officer has to be present at the same location as the respondent and reasonably believe that –

- the respondent has committed domestic violence
- a current domestic violence order has not been made
- a current police protection order has not been issued
- a police protection notice is necessary or desirable to protect the aggrieved from domestic violence
- the respondent should not be taken into custody,

and they have obtained approval from a supervising police officer to issue the notice.

The police protection notice must include a condition that the respondent be of good behaviour towards the aggrieved (s 106).

It may include other conditions such as a cool down condition that prohibits the respondent from entering or approaching or contacting the aggrieved (s 107).

The police officer issuing the police protection notice must personally serve it on the respondent and give a copy of the notice to the aggrieved. The notice takes effect when the notice is served on the respondent (s 109).

Once a police protection notice is issued, a copy of the notice is filed with the local magistrates court for the respondent and will be taken to be an application for a domestic violence order (s 111–112).

A police protection notice continues in force until the hearing of the application for the domestic violence order.

10-66 Closed court

Applications under the Domestic and Family Violence Protection Act are made in a closed court.

However, the court may open the proceedings or part of the proceedings to the public or specific persons. (For example, where the court is hearing another proceeding that concerns the same events or where the court considers that it is in the public interest to hear the proceeding in an open court).

An aggrieved is entitled to have an adult with the aggrieved throughout the proceedings to provide support and other help (s 158).

10-67 Prohibition on publication of certain information

It is an offence to publish information given in evidence in a proceeding under the Domestic and Family Violence Protection Act or information that identifies or is likely to lead to identification of a person who is a party, witness or child in a proceeding under the Domestic and Family Violence Protection Act.

The maximum penalty is 100 penalty units or two years imprisonment for an individual or 1000 penalty units for a corporation. There are certain exemptions such as where a court expressly authorises the publication or it is for the purposes of law reporting research or permitted under law (see s 159).

10-68 Police investigatory function

Section 100 of the Domestic and Family Violence Protection Act states that if a police officer reasonably suspects that domestic violence has been committed, the police officer must investigate or cause to be investigated the complaint, report, or circumstances on which the officer's reasonable suspicion is based.

If, after the police officer has investigated the domestic violence and they reasonably believe that it has been committed, they can do any of the following –

- Apply for a protection order
- Apply to vary a protection order
- Issue a police protection notice
- Take the respondent into custody
- Apply to a magistrate for a temporary protection order
- Take any other action appropriate in the circumstances.

The section does not limit the responsibility of the police officer to investigate whether a criminal offence has been committed (s 100(5)).

10-69 When police officer may apply for temporary protection order

Section 129 states that a police officer may apply for a temporary protection order against a person if – an application for a protection order against the person has been prepared and they reasonably believe that the application will not be decided quickly enough by a court to protect the aggrieved from domestic violence and they reasonably believe that a temporary protection order is necessary or desirable to protect the aggrieved.

Section 130 allows the application to be made to a magistrate by way of telephone, fax, radio, email or other similar facility. The section requires the police officer to inform the magistrate of the particulars of the application for the protection order. The magistrate is entitled to presume that the person making the application for the temporary protection order is a police officer and that an application for a protection order has been prepared. The magistrate is required to make a record in writing of the application (s 130).

10-70 Power to take a person into custody

The Domestic and Family Violence Protection Act gives a investigating police officer power to take a person into custody if they reasonably suspect that the person has committed domestic violence and that another person is in danger of personal injury or property is in danger (s 116).

The police officer must prepare an application for a domestic violence order as soon as reasonably practicable after taking the person into custody (s 118).

Section 119 sets out how long a person can be held in custody but it can be up to eight hours. A police officer can apply to extend the detention period (s 121) to a magistrate before the detention period ends.

The criminal process

10-71 Breaching an order

As a duty lawyer, you may be asked to represent a respondent charged with breaching a domestic violence order.

A person can only be charged with breaching a domestic violence order if they were present in court when the order was made, or have been served with a copy of the order, or have been told by a police officer about the existence of the order (s 177).

A respondent who contravenes an order commits an offence and is liable to a fine of 60 penalty units or two years imprisonment.

However, if a respondent has committed an offence under s 177 within five years of previously being convicted of an offence under that part of the Domestic and Family Violence Protection Act, then they are liable to a fine of 120 penalty units or three years imprisonment (s 177(a)). (See s 177 for details about offences and the onus of proof.)

A respondent must not contravene a police protection notice and if they do, they are liable to a maximum penalty of 60 penalty units or two years imprisonment (s 178).

Note that for the purposes of s 7 of the Criminal Code Act 1899, an aggrieved or named person on a domestic violence order cannot be found to have committed an offence by encouraging the commission of an offence under the Domestic and Family Violence Protection Act and is not punishable as a principal offender (see s 180).

10-72 Plea of not guilty

When a person pleads not guilty to breaching a domestic violence order, a hearing date is generally set and the question of bail arises. Invariably, bail will contain a condition that the defendant have no contact with the complainant. As a duty lawyer, you may need to take instructions about any difficulties the person may have in complying with this condition, such as:

- spending time with their children
- whether contact with the complainant will be needed for an ongoing family law dispute and how that could occur
- gaining access to a home to obtain clothing and other necessary belongings.

10-73 Plea of guilty

When entering a plea of guilty to breaching a domestic violence order, you should be cautious about whether there have been any previous breaches. Depending on the seriousness of the breach or the frequency of breaches, the court may impose a term of imprisonment. See [10-71](#).

10-74 Summary prosecution

A prosecution for an offence under the Domestic and Family Violence Protection Act must be taken in a summary way under the Justices Act 1886. A complaint for an offence must be laid by a police officer (s 181).

10-75 Arrest of certain offenders

Section 116 outlines the conditions where a police officer may take a person into custody. It references s 615 of the Police Powers and Responsibilities Act 2000 which gives police the power to use force against individuals.

Section 126 provides particular safeguards for the detention of a child.

Section 127 gives guidance about when a person may be taken to a place for treatment (such as a hospital or medical practice) and s 128 gives guidance about when an intoxicated person may be taken to a place of safety.

K. Prostitution

10-76 Introduction

The laws regarding prostitution and associated offences were substantially amended by the [Prostitution Amendment Act 2001](#) (Qld) and the [Prostitution Act 1999](#) (Qld). Further amendments and offence provisions were introduced by the [Prostitution and Other Amendments Act 2010](#) (Qld).

The Prostitution Act and Chapter 22A of the Criminal Code (inserted in 2001) both regulate prostitution. This legislation contains numerous offences that are categorised as crimes. This chapter overviews the prostitution laws and how they are likely to affect you as a duty lawyer.

In particular, the chapter provides a summary of the offence provisions you are most likely to encounter. Note that some of the offence provisions have specific exceptions in circumstances where the alleged activity took place in a legal brothel.

10-77 Summary proceedings

Under s 552B of the Criminal Code, all offences under Chapter 22A that carry maximum penalties of more than three years' imprisonment must be dealt with summarily unless the defendant elects for jury trial. Of course, this provision is subject to the overriding discretion of the magistrate under s 552D.

Sections 127–128 of the Prostitution Act govern the issue of elections for proceedings under that Act. Offences against the Act are summary offences except ss 77, 78(1), 79(1), 81(1) and 82, which are indictable. The defendant has the election in these matters unless 'the magistrate considers that the charge should be prosecuted on indictment' (s 128(2)).

10-78 Definitions under the Criminal Code

Many of these provisions refer to 'persons with an impairment of the mind', which s 1 of the Criminal Code defines as 'a person with a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
 - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
 - (ii) the person needing support'.

An 'adult' is defined as 'a person of or above the age of 18 years'.

Section 229F of the Criminal Code defines 'carry on a business' as a situation where 'a person must at least—

- (a) provide finance for the business; and
- (b) either—
 - (i) take part in the management of the business; or
 - (ii) control the business'.

10-79 Offences under the Criminal Code

Obtaining prostitution from a person who is not an adult

Under s 229FA:

'(1) A person (a client) who obtains prostitution from a person who is not an adult and who the client knows, or ought reasonably to know, is not an adult, commits a crime.

Maximum penalty—imprisonment for 7 years

- (2) If the person who provides the prostitution is under 16 years, the offender is liable to a maximum penalty of 14 years imprisonment’.

Procuring engagement in prostitution

Under s 229G:

- (1) ‘A person who—
- (a) procures another person to engage in prostitution [defined in s 229E], either in Queensland or elsewhere; or
 - (b) procures another person—
 - (i) to leave Queensland for the purpose of engaging in prostitution elsewhere; or
 - (ii) to come to Queensland for the purpose of engaging in prostitution; or
 - (iii) to leave the other person’s usual place of residence in Queensland for the purpose of engaging in prostitution, either in Queensland or elsewhere;
- commits a crime.
- Maximum penalty—imprisonment for 7 years.
- (2) If the procured person is not an adult or is a person with an impairment of the mind, the offender is liable to a maximum penalty of 14 years imprisonment’.

For this section, ‘procure’ includes to ‘knowingly entice or recruit for the purposes of sexual exploitation’ (s 229G(5)).

Knowingly participating in provision of prostitution

Under s 229H:

- ‘(1) A person who knowingly participates, directly or indirectly, in the provision of prostitution by another person commits a crime.
- Maximum penalty—
- (a) for a first offence—imprisonment for 3 years; or
 - (b) for a second offence—imprisonment for 5 years; or
 - (c) for a third or subsequent offence—imprisonment for 7 years’.

If the person engaged in the provision of the prostitution is not an adult or is a person with an impairment of the mind, the offender is liable to a maximum penalty of 14 years’ imprisonment.

Examples of this offence include:

- providing financial resources to establish premises
- franchising prostitution
- driving any motor vehicle or providing any transport for prostitutes or clients
- receiving, directing or redirecting telephone calls or messages in connection with another person’s engaging of prostitution.

Section 229HA sets out the circumstances in which s 229H does not apply to a person (e.g. bodyguards or drivers).

Carrying on business of providing unlawful prostitution

Section 229HB(1) states that a ‘person who knowingly carries on the business of providing unlawful prostitution’ is liable to a maximum penalty of 7 years’ imprisonment, which is increased to 14 years if ‘a person who is not an adult or is a person with an impairment of the mind is, to the offender’s knowledge, engaged in the provision of prostitution’ (s 229HB(2)).

Persons engaging in or obtaining prostitution through unlawful prostitution business

Under s 229HC, a ‘person who engages in prostitution through a business suspected on reasonable grounds of providing unlawful prostitution’ is liable to the following penalties:

- first offence—three years’ imprisonment

- second offence—five years' imprisonment
- third offence—seven years' imprisonment.

Section 229HC(2) also criminalises the actions of 'a person who, without reasonable excuse, obtains prostitution through a business suspected on reasonable grounds of providing unlawful prostitution'. The penalties are the same as those for s 229HC(1).

Section 229J provides a procedure by which a defendant charged under this section can apply for a certificate of discharge. On applying, the defendant must give evidence and be cross-examined about the offence, including the involvement of other parties.

'If the court is satisfied that the evidence is a full and true disclosure by the defendant of all material particulars within the defendant's knowledge...the court must immediately give the defendant a certificate' of discharge. An order can be sought prohibiting the publication of any details that would identify the defendant.

People found in places reasonably suspected of being used for prostitution

Under s 229I, a 'person who, without reasonable excuse, is found in, or leaving after having been in, a place suspected on reasonable grounds of being used for the purposes of prostitution by 2 or more prostitutes commits a crime.

Maximum penalty—

- (a) for a first offence—imprisonment for 3 years; or
- (b) for a second offence—imprisonment for 5 years; or
- (c) for a third or subsequent offence—imprisonment for 7 years'.

Section 229I(2) states that 'if a person who is not an adult or is a person with an impairment of the mind is, to the offender's knowledge, in the place at the time of the offence, the maximum penalty is increased to 14 years' imprisonment'.

Section 229I(3) states that 'the court may, in mitigation of sentence, have regard to evidence of an appropriate sexual health check undergone by the offender [prostitute or client] within 3 months before the offence'.

People charged under this section may apply for a certificate of discharge under s 229J. This procedure is outlined above.

Having an interest in premises used for the purposes of prostitution

Under s 229K(2):

'(2) A person who—

- (a) is an interested person in relation to premises; and
- (b) knowingly allows the premises to be used for the purposes of prostitution by 2 or more prostitutes; commits a crime'.

Maximum penalties are the same as for s 229I above (14 years if non-adult or person with an impairment of the mind).

Permitting a young person etc to be at place used for prostitution

Under s 229L, '[a] person who knowingly causes or permits a person who is not an adult or is a person with an impairment of the mind to be at a place used for the purposes of prostitution by 2 or more prostitutes' is liable to a maximum penalty of 14 years' imprisonment.

10-80 Prostitution Act offences

Public soliciting for the purposes of prostitution

Under s 73 of the Prostitution Act:

- (1) 'A person must not publicly solicit for prostitution.

Maximum penalty—

- (a) for a first offence—15 penalty units; or
- (b) for a second offence—25 penalty units; or
- (c) for a third or subsequent offence—30 penalty units or 6 months imprisonment’.

To constitute soliciting by a prostitute, there must be an active approach from the alleged prostitute (see *Newman v Paties; ex parte Newman* [1979] Qd R 402). This offence applies to the conduct of men and women, prostitutes and their clients and other persons involved in the provision of prostitution. Section 73(4) specifically states that soliciting includes both:

- (a) ‘offer to provide prostitution;
- (b) accept an offer to provide prostitution’.

Under s 73(2):

‘(2) A person publicly solicits for the prostitution if, for that purpose, the person—

- (a) solicits a person who is in a public place; or
- (b) solicits a person at a place within the view or hearing of a person who is in a public place; or
- (c) loiters in or near a public place; or
- (d) loiters in a place that can be viewed from a public place’.

Nuisances connected with prostitution

Under s 76, this offence criminalises the behaviour of those suspected of engaging in prostitution and seems to be a cover-all provision for when police do not have evidence implicating individuals in any of the other prostitution offences. As such, you, as a duty lawyer, should treat it with some caution. However, note that it does rely upon the behaviour in question impacting on a third party.

‘(1) This section applies to conduct—

- (a) that happens in ‘vicinity of a place that is reasonably suspected of being used for prostitution; and
- (b) that, to a significant extent, is caused by the presence, or suspected presence, of prostitution at the place’.

Under s 76(2):

‘(2) A person must not—

- (a) cause unreasonable annoyance to another person; or
- (b) cause unreasonable disruption to the privacy of another person.

Maximum penalties for subsection (2)—

- (a) for a first or second offence—15 penalty units; or
- (b) for a third or subsequent offence—25 penalty units’.

Duress

Under s 77:

‘A person must not do any of the following acts, either directly or indirectly, to make another person continue to provide prostitution—

- (a) cause or threaten wilful injury to the person or any one else;
- (b) cause or threaten wilful damage to property of the person or any one else;
- (c) intimidate or harass the person or any one else;
- (d) make a false representation or use any false pretence or other fraudulent means.

Maximum penalty—200 penalty units or 7 years imprisonment’.

Sexual intercourse not to be provided without use of a prophylactic (condom)

Under s 77A(1) and (2), a prostitute must not provide or offer to provide prostitution involving sexual intercourse or oral sex unless a prophylactic is used. Maximum penalty is 100 penalty units.

Under s 77A(3), a person must not ask a prostitute to or accept an offer from a prostitute to provide sexual intercourse or oral sex without a prophylactic being used. Maximum penalty is 100 penalty units.

Under s 77A(4), a person obtaining prostitution involving sexual intercourse or oral sex must not interfere with the efficacy of the prophylactic or use, or continue to use a prophylactic that the person knows, or could reasonably be expected to know, is damaged. Maximum penalty is 100 penalty units.

Further provisions (s 77A(5) and (6)), requiring licensees or approved managers of a licensed brothel to take reasonable steps to ensure the use of prophylactics and not discourage their use, carry maximum penalties of 120 penalty units.

Possessing liquor in a licensed brothel

Under s 83, '[a] person must not possess liquor at a licensed brothel. Maximum penalty—40 penalty units'.

Person to state age

Under s 85, if a police officer reasonably suspects that a person in a licensed brothel is a minor, they may require the person to give their age. If the officer does so, they 'must warn the person that it is an offence—

- (a) to fail, without reasonable excuse, to comply with the requirement; or
- (b) to give false particulars or evidence'.

This section states that it is an offence to, 'without reasonable excuse—

- (a) fail to comply with a requirement made under subsection (2) or (3); or
- (b) give false particulars of the person's age; or
- (c) give false evidence about the person's age.

Maximum penalty for [this offence]—20 penalty units'.

10-81 Advertising prostitution

Under s 93, a 'person must not publish an advertisement for prostitution that describes the services offered', 'is not in the approved form', or is 'through radio or television or by film or video recording'.

The maximum penalty for offences under this section is 70 penalty units unless the publication is via the internet, in which case s 93(3)(a) and (b) apply.

L. Casino offences—*Casino Control Act 1982* (Qld)

Duty lawyers in certain areas of Queensland require some knowledge of offences under the [Casino Control Act 1982](#) (Qld).

10-82 Excluded people

It is an offence for a person who is prohibited from entering or remaining in a casino under a self-exclusion order (ss 91N and 91A), an exclusion direction or a written direction from a casino operator or manager (ss 92 or 94) to enter or remain in the casino. The maximum penalty is 40 penalty units (s 100).

Counselling

Under s 100A, if a court 'finds a person guilty of, or accepts a person's guilty plea for, an offence against section 100...the court may, if satisfied the defendant is a problem gambler, postpone its decision on penalty on condition the defendant agrees to attend counselling on a basis decided by the court'.

The agreement for counselling cannot be for more than 12 months and must allow the counsellor to report to the court any failure to attend. If the court postpones the decision on penalty for counselling, it must decide on penalty as soon as practical after:

- the end of the counselling period
- receiving advice that the defendant does not wish to continue with counselling, or
- receiving a report that the defendant has failed to attend or participate satisfactorily in the counselling.

People under 18

A person under 18 years is not permitted in a casino and is liable to a maximum penalty of 25 penalty units on breach (s 102).

‘An adult must not aid or enable a person under 18 years to enter or remain in a casino. Maximum penalty—20 penalty units’ (s 102(3B)).

10-83 Cheating

Under s 103:

‘Any person who in a casino—

- (a) by any fraudulent trick, device, sleight of hand or representation; or
- (b) by any fraudulent act, practice or scheme; or
- (c) by the fraudulent use of any machine, equipment or other thing; or
- (d) by the fraudulent use of any instrument or article of a type normally used in connection with gaming or appearing to be of a type normally used in connection with gaming;

obtains for himself or herself or another person or induces any person to deliver, give or credit to the person or another person any money, chips, benefit, advantage, valuable consideration or security...is guilty of an offence’.

If the benefit is not more than \$50,000 in value, the maximum penalty is 200 penalty units or 2 years’ imprisonment. If the benefit is more than \$50,000 in value, the maximum penalty is 500 penalty units or 5 years’ imprisonment.

Under s 104:

‘Any person who in a casino uses or has in the person’s possession—

- (a) any chips that the person knows are bogus or counterfeit chips; or
- (b) any cards, dice or coins that the person knows have been marked, loaded or tampered with; or
- (c) for the purpose of cheating or stealing, any equipment, device or thing that permits or facilitates cheating or stealing;

is guilty of an offence.

Maximum penalty—200 penalty units or 2 years imprisonment’.

10-84 Proceedings for offences

Offences are prosecuted summarily unless otherwise stated (s 120(1)). An offence of cheating under s 103 and offences under ss 109 (cheating by casino operator), 110 (forgery) and 111 (bribery of officers) can be dealt with either summarily or by way of indictment if the defendant elects.

The defendant’s election depends on the court believing that it should not deal with the matter summarily (s 120(4)).

Chapter 11

Youth justice

Chapter 11—Youth justice

A. Introduction to youth justice in Queensland	(11-10)
B. Prior to commencing proceedings	(11-11–11-21)
C. Starting a proceeding	(11-22–11-26)
D. Bail	(11-27–11-33)
E. After proceedings have commenced	(11-34–11-36)
F. Sentencing	(11-37–11-61)
G. Variation of community-based orders	(11-62–11-63)
H. Miscellaneous court powers	(11-64–11-70)
I. Appeals and sentence reviews	(11-71)
J. The Department of CommunitiesThe Department of Justice and Attorney-General (Youth Justice Services)	(11-72–11-76)
K. Legal aid	(11-77)
Appendix A—Table of court sentence options	

This chapter relates to the legislation and system of youth justice operating in Queensland. If a section is cited without an Act being specified, the section refers to the [Youth Justice Act 1992](#) (Qld) (Youth Justice Act). The Department of Justice (Youth Justice Services) (previously the Department of Communities) will often be referred to as ‘the department’.

A. Introduction to youth justice in Queensland

11-1 The principles of the *Childrens Court Act 1992* (Qld) and the Youth Justice Act

The Youth Justice Act and [Childrens Court Act 1992](#) (Qld) both came into effect on 1 September 1993. These Acts substantially reframed the Queensland youth justice system. The new legislation was significantly different from the welfare orientation of the previous legislation, the *Childrens Services Act 1965* (Qld).

In 1996, the Youth Justice Act was amended to:

- emphasise the role and responsibility of parents in youth justice matters
- allow for victim and community participation in some youth justice matters
- increase court and police powers to deal with young offenders
- introduce methods of dealing with young offenders (e.g. conferencing) as alternatives to formal court involvement.

In 2002, the [Juvenile Justice Amendment Act 2002](#) (Qld) substantially amended the Youth Justice Act. Some of the amendments dealing with publication and confidential information commenced on 16 December 2002, while the remainder commenced on 1 July 2003.

Some major amendments included:

- removing the right of election to the district court, which made the Childrens Court of Queensland the predominant higher court for youth justice matters
- encouraging the increased use of diversionary options by police and the courts, such as cautioning and conferencing, and making these options more culturally appropriate
- enshrining most of the provisions regarding bail into the Youth Justice Act from the [Bail Act 1980](#) (Qld) and removing the ‘show cause’ provisions

- creating a new sentence order called an intensive supervision order for ‘at-risk’ children between 10 and 13 years, and renaming other sentence orders
- consolidating all breach provisions for community-based orders
- clarifying the child/adult interface, i.e. when children are dealt with as adults under the Youth Justice Act.

In 2010, the Youth Justice Act was amended again. The most obvious amendment was that the Act’s name changed from Juvenile Justice Act to Youth Justice Act.

Other major amendments included:

- ensuring that a court accounts for the eventual sentence outcome when considering bail and clarifying when a child can be remanded for their own safety
- allowing a mechanism for children to be forced to appear in court when an indefinite referral to a Youth Justice Conference has been unsuccessful and the matter must be returned to court
- allowing the childrens court to deal with breaches of a judge’s supervised release orders
- allowing the court to set the date that a child will be transferred to adult custody if the court sentences the child to detention.

In 2010, the Act was again amended to remove youth justice conferencing as a sentencing outcome and to introduce boot camp orders as a sentencing option for those prescribed areas in which a boot camp program was available.

In 2014, the most extensive amendments since the introduction of the Youth Justice Act in 1992 were introduced. Amendments included:

- removing detention as a sentence of last resort
- allowing the identifying particulars of repeat offenders to be published
- opening the childrens court to the public for repeat offenders
- childhood findings of guilt became admissible in adult sentencing proceedings despite convictions having not been recorded
- automatically transferring 17-year-olds who have more than six months remaining on their sentence to adult imprisonment
- mandatory sentencing for children convicted of a second motor vehicle offence in prescribed areas (regions where a boot camp operates)
- allowing children who have absconded from boot camps to be arrested and brought to court without first being given a warning
- abolishing sentence reviews.

The Youth Justice Act provides a justice system for children who appear before the courts in relation to offending behaviour. Its basic premise is that children who commit offences should be brought to account in a way that recognises that children are prone to impulsive acts and at a vulnerable point in their development. Most youth offending is opportunistic and transitory, i.e. unplanned and not repeated.

11-2 Principles of youth justice

The principles of youth justice are now enshrined in the ‘Charter of Youth Justice Principles’ in Schedule 1 of the Youth Justice Act. These principles underlie the operation of the Act. Some of the main principles are as follows:

Vulnerability of children

Children are vulnerable in dealings with people in authority. Therefore, the Act provides protections over and above those of an adult. These protections should operate during an investigation or proceeding that relates to an offence. The legal practitioner’s duty is to adequately guard these rights throughout the legal process.

As the duty lawyer, you must ensure that a matter is heard in the correct jurisdiction. If a young person is charged with an offence that occurred when they were 16 years old or younger, and will be dealt with in court before they are 18 years old, the childrens court must hear the matter.

Accountability of children

Children have a sense of right and wrong, and justice; they expect that illegal acts will have consequences. However, at the same time, due to a child's age, they may have a limited, though developing, understanding of the nature or consequences of their actions. The legislation accounts for this developing awareness.

Diversion

A child should be diverted from the criminal justice system wherever possible, unless the offence's nature and seriousness, and the child's criminal history, indicate that a proceeding should begin. Diversionary options under the Youth Justice Act include cautioning, conferencing and referral to drug diversion programs. A court can order a young person to be diverted from the court system.

Fair and participatory proceedings

Proceedings commenced against children should be fair and just. Further, the child should have the opportunity to participate in and understand the proceeding. Therefore, courts that deal with children need procedures and rules that children and their parents can easily understand.

Sentencing

A court's sentence should be:

- appropriate considering the young offender's age and/or maturity
- in proportion to the offence's seriousness
- specific and determinate, so the child will know what is required of them and when a sentence will end.

As well as being a consequence of an offence, punishment should have a clear preventative and rehabilitative purpose. Sentences should not be made on the basis of a child's need for care or welfare support. Meeting a child's welfare needs should be separate from the sentencing process.

Welfare assistance is more likely to be effective if it is a voluntary agreement rather than a punishment. The Department of Justice and Attorney-General (Youth Justice Services) will address any inquiries about welfare issues.

Although a sentence of detention is no longer a last resort, the Act acknowledges a sentence to be served in the community is better for the child's reintegration into the community.

Impact of offending behaviour on victim

When sentencing a child, a court must consider the offence's impact on the victim, as well as the community surrounding both the victim and child offender. The Youth Justice Act allows the victim to seek restitution and compensation from the offender only if the child offender is able to pay it. The Act also allows an order to be made against a parent if the court deems their parenting (or lack thereof) contributed to the offending and subsequent loss to the victim. Duty lawyers cannot act for parents in these circumstances. Parents should be advised to seek their own independent legal advice.

11-3 The childrens court

The Childrens Court of Queensland was established by the Childrens Court Act. The forum was specifically developed to deal with child offenders. The child's general right to elect to be dealt with by a higher court other than the childrens court was abolished by the 2002 amendments to the [District Court of Queensland Act 1967](#) (Qld) (see s 61A of that Act).

However, the district court can still try or sentence a child on indictment if either the child is also charged as an adult for an offence or proceedings have been removed to a district court under the Act; for example, if a child is co-accused with an adult (Youth Justice Act, ss 107–113).

Therefore, if a child who is charged with an indictable offence (other than a Supreme Court offence) elects to be dealt with by a higher court, the childrens court must generally deal with the charge, constituted by a childrens court judge. However, the court can be constituted by a district court judge if no childrens court judge is available (Childrens Court Act, s 5(2)).

If the childrens court is hearing a child's charge, that child has the right to a trial by jury.

The Childrens Court Act allows the appointment of a district court judge as childrens court judge. His Honour Judge Shanahan is currently President of the Childrens Court of Queensland. The president must provide an annual report of the childrens court's administration and operation to the attorney-general. The president may also issue general directions regarding the court's procedures. These procedural directions apply specifically to the childrens court and magistrates courts sitting as childrens courts.

The Department of Justice and Attorney-General (Youth Justice Services) has a statutory role in the courts dealing with children.

A departmental officer must be present in a court whenever a child appears. Officers from this department have a right to be heard regarding particular issues (Youth Justice Act, s 74).

A childrens court will be constituted by a childrens court magistrate, a magistrate, or two justices of the peace (Childrens Court Act, s 5). However, s 29 of the [Justices of the Peace and Commissioners for Declarations Act 1991](#) (Qld) limits the power of two justices to dealing with a procedural action or a guilty plea on a simple offence. The justices cannot order detention or conditional release. One justice cannot comprise a childrens court and, therefore, cannot deal with a child alleged to have committed an offence.

A child who is arrested on an offence must be brought promptly before a childrens court (Youth Justice Act, s 49).

11-4 Youth Justice Act to apply to children in all courts

The Youth Justice Act provides an exclusive code for sentencing children (s 149). It ensures that all courts deal with children according to the Youth Justice Act's objectives and principles (Charter of Juvenile Justice Principles, Schedule 1, and s 3).

11-5 Who may be present at court?

Childrens court proceedings

Section 21C of the Childrens Court Act states proceedings for a child who is not a first time offender is to be held in open court.

A first time offender means a child who at any time during proceedings has not been found guilty of an offence.

Section 21D allows a relevant person, the chief executive (child protection) or the child's guardian to make an application to close the court.

Section 21E states the court must close the court when a complainant in a sexual offence is giving evidence. The section allows a list of people who do not have to be excluded.

Sections 20(1) and 20(2) of the Childrens Court Act outline who may be present at court. This section does not apply to a court constituted by a judge (i.e. the Childrens Court of Queensland) hearing a charge on indictment (s 20(5)).

For first time offenders, the following people can be present:

- the child
- the parents or another adult member of the child's family
- a witness giving evidence
- a support person to a complainant giving evidence about a sexual offence

- a person representing a party in the proceeding
- a representative of the department's chief executive
- a representative of the mass media
- other person who, in the court's opinion, will assist the court
- a person who has a proper interest in the proceedings and their presence would not be prejudicial to the child.

A children's court will be closed to the general public to protect the child who is a first time offender. Therefore, brothers, sisters, cousins and other family members are not permitted unless the court believes they can assist the court. Where relevant, special provisions can be made for Aboriginal or Torres Strait Islander welfare organisations or community justice groups, when making submissions under Children's Court Act to be present in addition to the child's family (s 20(1)(g)).

An investigating police officer or other person in charge of the case against the child is entitled to be present. Other people, such as other police witnesses, regardless of their interest in the matter, are generally not entitled to remain in court. In situations where several people are present in court, you, as duty lawyer, should clarify their authority to be present. The child may be intimidated by the sight of many people in court.

Supreme Court and district court proceedings (including the Children's Court of Queensland)

Proceedings in the Supreme Court and district courts are not children's court proceedings. While these courts are subject to the Youth Justice Act's sentencing provisions, the Children's Court Act does not apply to the district court or Supreme Court. Therefore, Supreme Court or district court proceedings involving child offenders are open to the general public.

11-6 Who is a child?

The Youth Justice Act defines a child as 'a person who has not turned 17 years' (Youth Justice Act, Schedule 4). Section 6 gives the governor in council the power to extend the definition of a child to include people under 18 years. (This power has not been exercised to date.)

Note: It is relevant to consider the age of the person at the time of the alleged offence. If the person is alleged to have committed the offence after they turned 17 years, the law governing adult offending applies.

Over 17 years—jurisdiction

A person will be treated as a child if they committed an offence as a child (person who has not turned 17 years) and the proceedings were finalised before they turned 18 years (s 140). If the person committed an offence as a child and proceedings first began after the person turned 18 years, the offender must be dealt with as an adult (s 140(1)).

If a child offender has turned 18 years, any continuing proceeding must proceed on the basis that the offender will be sentenced as an adult (s 140(2)). However, note the effect of s 140(4)—'(a) an offender must not be treated as an adult under this section if the court is satisfied that there was undue delay on the part of the prosecution in starting or completing the proceeding'.

If, after finding a child guilty, the court cannot sentence the child because the child has escaped, failed to appear without reasonable excuse or failed to return from a leave of absence during a detention sentence, and has since turned 18 years, the court must sentence the offender as an adult (s 140(3)).

Section 141 gives the court discretion in treating an offender as a child or adult if the offender has also been dealt with in the adult court system and turned 18 years. If found guilty, the court must sentence the offender as an adult.

However, note s 144(2), which indicates that, notwithstanding the person being sentenced as an adult, the sentencing court must consider that the person was a child at the time of the offence and not give a harsher sentence than the person would have received as a child.

Section 144 applies in circumstances where the person:

- is proceeded against as a child
- turns 18 years before the case is completed, and
- has been proceeded against as an adult or sentenced as an adult.

Over 17 years—the effect of orders

Under the Youth Justice Act, the court may make an order against a child even when that child will be an adult before the order's effect has ceased. The order will continue to apply as if the person was a child. Generally, any other proceedings arising from the order, including breaches of the order as an adult, must proceed as if the person was still a child (s 142).

Section 143 gives a court a discretion, when dealing with a proceeding under an order made as a child, to convert a child order to a corresponding adult order. Order conversion can occur only if the person:

- is 18 years when the proceeding arises out of the childhood order, or
- has committed an offence as an adult (over 17 years), which is being proceeded against, or a sentence order has been made regarding the offence.

A conversion will occur only in the case of probation or community service orders. They will be converted to adult probation and adult community service orders. If this occurs, the person will be subject to all the terms and conditions of that adult order. Order administration will then transfer from the Department of Justice and Attorney-General (Youth Justice Services) to the Department of Corrective Services.

You should obtain clear instructions about your client's attitude to having their order converted to an adult order. A conversion may mean that they deal with only one government agency for order administration. However, if the conversion occurs due to an order breach, the order will be converted to the adult order for the remainder of the breach proceedings.

Be aware that the [Penalties and Sentences Act 1992](#) (Qld) requires a conviction to be recorded upon breach of an adult order (s 143(6)). Additionally, you should advise clients that, while the breach of a child supervised order is not an offence in itself, the breach of an adult order is a separate offence.

11-7 Publication of identifying material

'A person must not publish identifying information about a child who is a first time offender (Youth Justice Act, s 301).

'Identifying information' is 'information that identifies the child, or is likely to lead to the identification of the child, as a child who is being, or has been, dealt with under this Act' (Youth Justice Act, Schedule 4). An amendment to s 20 of the Childrens Court Act now defines any representative of the mass media as a person who may be permitted to be present at a childrens court. Although they can publish details of the case and sentence, identifying the child in any manner is an offence punishable by 1000 penalty units for a body corporate, or 200 penalty units or two years' imprisonment for an individual.

Information is able to be published if the child is not a first time offender, unless an application is made under s 299A of the Youth Justice Act to prohibit publication.

In deciding an application under s 299A (a publication prohibition order), the court must consider:

- the number of the child's previous findings of guilt
- the seriousness of the offence
- the period between the proceeding and any previous offence committed by the child
- the need to protect the community
- the effect of publication on the child's safety or rehabilitation
- the effect of publication on the safety or wellbeing of the person other than the child
- any other relevant matter.

11-8 Dealing with children

Practitioner relationship with a young client

As a duty lawyer, you will have different considerations when appearing for children than when appearing for adults. However, as always, you are there to obtain the best result for the client in the circumstances.

Your personal views about what would benefit the child should not influence submissions you make to the court; for example, ‘a probation order might provide an opportunity to address family problems’. Ensure that all submissions you make to the court are directed towards obtaining the best result for the client based on the Youth Justice Act’s principles.

Taking instructions

You should take great care to obtain proper instructions from a child client. As well as being confused about court processes, children often have difficulties with court terminology. Carefully ensure that the client understands their options.

Under the Youth Justice Act, you are obligated to explain the plea processes and right of election where applicable. The court is likely to inquire whether you have explained these options to the child. Section 72 outlines the court’s duty to ensure that the child and their parents understand the nature of the allegations and the court processes. The court may delegate this duty to the child’s legal practitioner.

You should also take instructions about whether the child wants an application to close the court and/or seek a publication prohibition order made if they are not a first time offender. Failure to do so may amount to professional misconduct.

Family involvement

A child may be unduly influenced by friends or relatives. The family must understand that it is the child who is being represented.

Instructions should be sought from the child as to whether they want to have their parent or guardian present in the interview.

If a child changes instructions after consulting with a parent, you should clarify the child’s instructions with them alone. If the child is overly influenced by friends or family, they may give you conflicting instructions. In such cases, it may be prudent for you to withdraw from the matter.

In contrast, sometimes the presence of a parent can help identify the difficulties involved in a child’s case. Assess the benefit and appropriateness, or otherwise, of a parent’s presence in the interview.

During proceedings, the court may seek the views of the parents. These may conflict with the child’s instructions, so it is useful to obtain details of their views prior to court.

Parent required to be at court

A parent’s presence is generally required in court when a child appears. To ensure that the parents can attend, a court may recommend that the department provide money to assist the parents (s 69(2)). The court has discretion to adjourn proceedings to allow the parents to attend court. You should be aware of this practice, as a child may be disadvantaged if extended remands occur to ensure that parents attend (s 70). Obtain clear instructions from the child about why the parents are not in court and whether the child desires them to be present.

In some cases, the court may actually order a parent to appear before it. A notice will then be issued and served on the parent. If the parent fails to comply with the order, they may be liable to prosecution for noncompliance. Be aware that the child’s instructions may conflict with information provided by the parent. Accordingly, if asked to act for the parent, you should consider whether a conflict of interest will arise.

11-9 Dealing with Aboriginal children

When dealing with Aboriginal clients, you need to be aware of the communication styles of some Aboriginal people. An adversarial system is alien to Aboriginal culture. Therefore, the process of asking direct questions and expecting direct answers may not be the most effective way to obtain proper instructions from an Aboriginal client.

Some hints for duty lawyers:

- Respect your client's silence and pauses, as they do not usually indicate a lack of cooperation. Ask your question and then wait for your answer.
- Exchange reciprocal personal details to maintain a real dialogue with your client. This is standard protocol in the Aboriginal community. Letting your client see you as a real person with a personal life can breach some communication barriers.
- Be aware that, if a child is intimidated or confused about a situation, they will often respond with 'gratuitous concurrence'. This means they will give answers that they think you want to hear, generally to try to escape a stressful situation as soon as possible. Many cases of gratuitous concurrence have occurred during police interviews with Aboriginal suspects. Therefore, with Aboriginal clients, it is particularly important to obtain clear instructions from your client regarding any admissions they have made to police.
- Do not try to speak 'Aboriginal English' if you are not an Aboriginal person.
- Take your client through the police evidence, explaining clearly that this is what the police say happened. Wait for agreement or disagreement about each element of the evidence.
- Ensure that your client understands that they choose whether to plead guilty or not guilty.
- Ask one question at a time. Double-barrelled questions often confuse clients.
- Be sensitive. An Aboriginal child may not wish to discuss certain cultural issues. In some cases, it may be helpful to have a general discussion with a relative regarding background information. While this information may not be included as part of your client's instructions, it may enhance your understanding of the issues.
- Be aware that some young Aboriginal people feel that looking into the eyes of an authority figure is disrespectful. Avoiding eye contact with you may be a way of showing respect.

Recommended reading—Eades, D. *Aboriginal English and the Law*, Continuing Legal Education Department of the Queensland Law Society Inc., 1992.

There is a Youth Murri Court in some parts of Queensland that allows the sentencing of young Aboriginal and Torres Strait Islander offenders with input by community elders.

11-10 Criminal responsibility—*doli incapax*

This is an important defence that can be easily overlooked but has a large impact on children charged with criminal offences.

Under s 29 of the [Criminal Code Act 1899](#) (Qld), a child under 10 years of age cannot be held criminally responsible.

A child under 14 years of age is presumed not to be criminally responsible. (On 1 July 1997, the [Criminal Law Amendment Act 1997](#) (Qld) amended s 29 to reduce the age from 15 to 14 years.)

The prosecution must prove beyond reasonable doubt that, at the time of the offence, the accused child had the capacity to know that they should not do the act.

The prosecution can rebut the presumption of the lack of capacity to know they should not do the act only by calling proper admissible evidence. A Court of Appeal reference, *R v F; ex parte Attorney-General* [1998] QCA 97, discusses the issues and evidential requirements. In the initial police interview, police will often address this issue by trying to establish by admission that the child knew their conduct was 'wrong'.

You should ensure that you satisfactorily support s 29 with admissible evidence, and bear in mind both the offence for which the child was charged and the necessary capacity for the offence that must be proved. For example, if a child is charged with being a party to an offence, the court has accepted that acting as a 'lookout' requires proof that the child had the capacity to know that this, not the primary offence (i.e. 'the act done by the child'), was wrong. See the decision of His Honour Judge McGuire in *R v J* (Unreported, Childrens Court of Queensland, No 75 of 1996, 20 June 1996).

B. Prior to commencing proceedings

11-11 Police questioning

The *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) regulates police conduct during questioning. Section 5 of the PPRA makes it clear that Parliament intends for police to comply with the Act's provisions.

Sections 245–268 of the PPRA govern police procedure when interviewing a person charged with an indictable offence. These provisions require the police to allow the person to:

- communicate with a friend or relative
- contact a lawyer and arrange for them to attend the interview.

Specifically, when questioning children, the police must not question a child unless:

- before questioning has started, the child has had the opportunity to speak to a support person, and
- the support person is present during questioning.

11-12 Identifying particulars when child is not arrested

The Youth Justice Act permits police to apply to a childrens court magistrate (after a child has been charged with an offence) to take identifying particulars for a particular range of offences.

'The applicant must give notice of the application to—

- (a) the child; and
- (b) a parent of the child, unless a parent can not be found after reasonable inquiry; and
- (c) the chief executive—Department of Justice and Attorney-General (Youth Justice Services)' (s 25).

The child has a right to legal representation (s 79). However, a court can determine the application in the child's absence if it believes that the application has been served correctly (s 25(4)).

Under s 25(6), a 'court may order the identifying particulars to be taken if it is satisfied, on the balance of probabilities' that:

- someone has committed the charged offence and there is reasonable suspicion that the child is the offender
- forensic evidence of identifying particulars is available from the crime scene that are the same particulars as those sought
- the order must be made for proper investigation.

If the court does make an order, the child must submit to having the identifying particulars taken with a support person present. If they do not comply within seven days (if they are not in custody), they can be further charged under s 25(9).

If the investigation for which the identifying particulars were taken does not result in a sentence against the child, the person who applied for the particulars must destroy them (s 27(1)). If they fail to do so without reasonable excuse, they will be liable to breach of discipline action under s 27(4).

11-13 Admissibility of statements or identifying particulars

'In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement, [usually a recorded interview], made or given to a police officer by the defendant when a child, unless the court is satisfied a support person was present with the child at the time and place the statement was made or given' (s 29).

If a support person was not present either during any statement the child made for an indictable offence or at the time identifying particulars were taken (s 26), the evidence is prima facie inadmissible unless:

- (a) 'the prosecution satisfies the court there was proper and sufficient reason for the absence of a support person when the particulars were taken; [for example, their presence may have resulted in an accomplice avoiding apprehension or the support person is excluded under the PPRA,] and
- (b) the court considers that, in the particular circumstances, the particulars should be admitted into evidence'.

However, despite the presence of one of these people, the statement still may not be admissible. In *R v C* (Unreported, Queensland Court of Appeal, CA 437 of 1996, Fitzgerald P, McPherson JA and Helman J, 22 April 1997), the Court of Appeal ruled that, despite the presence of a justice of the peace, which satisfied the requirements of s 9E(2) (the previous equivalent to s 29(2)), the child's statement was ruled inadmissible by way of the court's discretion as legislated under s 9E(5). The justice of the peace did not understand the child interviewee's rights; was described as an unreliable witness; and was in a poor physical state.

The Court of Appeal has further ruled that s 9E (now s 29) applies to statements made to police officers, not statements made to people acting under the direction of police officers (see *R v T and M; ex parte Attorney-General* [1999] 2 Qd R 424).

Note: Section 29 does not apply to simple or regulatory offences, or any statement made by a child defendant after the child has turned 17.

11-14 The support person

Generally, children require special protection because of their immaturity and lack of understanding about their legal rights. Section 29 refers to a support person for police questioning and section 26 refers to a support person for obtaining identifying particulars.

According to Schedule 6 of the PPRA, the support person must be:

- (b) 'for a child—
 - (i) a parent or guardian of the child; or
 - (ii) a lawyer acting for the child; or
 - (iii) a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
 - (iv) an adult relative or friend of the child who is acceptable to the child; or
 - (v) if the child is Aboriginal or Torres Strait Islander and no-one mentioned in subparagraphs (i) to (iv) is available—a person whose name is included in the list of support persons and interpreters; or
 - (vi) if no-one mentioned in subparagraphs (i) to (v) is available—a justice of the peace, other than a justice of the peace who is a member of the Queensland Police Service or a justice of the peace (commissioner for declarations)'.

However, police officers are not required to permit or cause people to be present if the officers suspect them, on reasonable grounds, of being an accomplice or complainant of the offence being investigated, or being likely to become an accessory.

11-15 Diversions—pre-court proceedings and as a sentence option

The fifth principle of the ‘Charter of Youth Justice Principles’ in Schedule 1 indicates that, where appropriate, children who offend should be diverted from the criminal justice system, as this is an effective way of responding to youth crime. The 2002 amendments have further encouraged the use of diversion.

Therefore, you should stay vigilant for ways to use these options for clients. The legislation introduces three methods:

- cautioning
- conferencing
- drug diversion.

Police must consider whether these options would be appropriate rather than commencing proceedings in all cases, except in serious offences (s 11). However, police can still use these options for serious offences (s 11(7)).

In considering diversion, police should consider:

- the circumstances of the offence
- the child’s previous history
- any previous cautions (s 11(5)).

Police may consider the options of taking no action, cautioning and conferencing more than once, or after other proceedings have started or ended. If necessary, a police officer should delay starting proceedings to consider the alternatives to proceeding against a child.

11-16 Taking no action

Police must consider taking no action. This would occur only for a first or minor offence and would amount to informally cautioning the child.

11-17 Cautioning

A caution is a warning given to a child by police regarding an offence they have committed. If police administer a caution, the child is not liable to be prosecuted for the offence. Cautions are generally applied in relatively minor offences, such as shoplifting. However, cautions have been administered for serious offences and this is specifically allowed under s 11(7).

You should advise your client of the full consequences of agreeing to be cautioned. The caution is an admission of guilt by the child. A caution is no longer part of the child’s criminal history and so, generally, not admissible in court proceedings, including regarding bail.

Some courts have allowed evidence of cautions to form part of a child’s criminal history. You should ensure that cautions are not presented to the court (unless an application under s 21 is occurring, as discussed below). However, you should advise the client about the full consequences of being cautioned, i.e. a court may consider a caution (and a conference agreement, as discussed below) in determining capacity (s 147).

11-18 Administering cautions

The cautioning process is outlined in ss 16–20 of the Youth Justice Act. These are the important areas to note in this process:

- the child must admit guilt to police (s 16(1)(a))
- the child must consent to being cautioned (s 16(1)(b))
- the child must be given a notice certifying that they have been cautioned (s 20)
- the process may involve an apology to the victim (s 19)
- if practical, the police must arrange for a parent, an adult chosen by the child or a person chosen by the parent to be present during the cautioning process
- if a child is a member of the Aboriginal and Islander community, police must establish whether a responsible person from that community is available and willing to administer the caution, and, if so, request that they do so.

11-19 Applications to dismiss a charge where a caution should have been administered

If you believe that a police officer should have given a child a caution rather than initiating court proceedings, you can apply to have the charge dismissed (s 21). These applications are more likely to be successful in proceedings either for minor offences or against first offenders.

The court may dismiss the charge if it is satisfied that, instead of being charged, the child should have been cautioned or no action taken. The court may then administer the caution itself or direct that a caution be administered to the child (s 21(3)).

Section 21(2) specifically allows the court to consider any other cautions administered or conference agreements made where an application has been made to dismiss a charge. The information relating to previous cautions can be released only after the s 21 application has been made. Before making an application under s 21, approach the police prosecutor for available details of previous cautions, conferences and court appearances. Presenting such information to the court may affect the application's success.

11-20 Youth justice conferences

For the police to refer a matter to a youth justice conference a child must admit to the police they committed the offence. A conference may then be arranged. The parties affected by the offending behaviour (i.e. child, victim, parents of the offending child, police officer) are called to a conference conducted by a qualified convenor. Various other support people are also entitled to be present (s 34).

During the conference, the parties can discuss how the offending behaviour affected them and attempt to agree on how the child can make amends.

A victim does not have to consent to the conference. Legal aid is available for practitioners to attend a youth justice conference with their client.

Section 37 outlines the agreement's form and content, which must be signed by the child and various other participants (s 37(2)).

Note: Section 37(7) states that 'the agreement may not provide for the child to be treated more severely for the offence than if the child were sentenced by a court or in a way contravening the sentencing principles in section 150'. This is particularly relevant in relation to:

- restitution, when the child has limited capacity to pay
- community service, where the child is ineligible or limited to a particular number of hours under s 175.

The agreement is not part of the child's criminal history but, as mentioned earlier, may be used as evidence of capacity under s 147 or when a court is considering referring the matter to conference (s 161(4)).

On police referral, if the child contravenes the agreement, police may consider options under s 24(3), i.e. taking no action, cautioning the child, referring to another conference or starting proceedings.

11-21 Drug diversion

Two methods of drug diversion are possible—through the police diversion program or through court diversion (Youth Justice Act, ss 167–174). To be eligible, a child must be charged under either:

- s 9 of the [Drugs Misuse Act 1986](#) (Qld) with possession of a particular drug less than a prescribed quantity ([Penalties and Sentences Regulation 2005](#) (Qld) s 5(b) and the relevant schedule) for their personal use
- s 10(2) of the Drugs Misuse Act with possession of a thing.

The child must both:

- admit guilt to the offence
- not have been previously convicted, or be facing charges of a sexual nature or a drug offence dealt with on indictment.

Diversion may be offered twice (including diversion through police and court). A child may still be eligible for court diversion even if they have refused police diversion or have unsuccessfully completed police diversion.

The magistrate may adjourn the hearing to enable the child to attend a drug assessment and education session. If the child attends, the order is satisfied and no conviction recorded. If not, the court must sentence the offender for the original offence.

C. Starting a proceeding

11-22 Starting a proceeding

The preferred method for starting proceedings against a child is by way of notice to appear or complaint and summons (s 12).

11-23 Notice to appear

Note that children no longer receive attendance notices but are subject to notices to appear under the PPRA. If police suspect that a child has committed or is committing an offence, they may serve a notice to appear on the child (PPRA, s 382).

The notice must contain certain information, including the particulars of the offence that the child is alleged to have committed (s 384). The police must serve this notice on the child discreetly (i.e. not at or near the child's place of employment or school (s 383)). Police must also promptly advise the child's parent (unless, after reasonable enquiry, they cannot be found) and the Department of Justice and Attorney-General (Youth Justice Services) (s 392).

Note: The definition of parent includes someone who is apparently the parent of the child.

Under the [Justices Act 1886](#) (Qld), a notice to appear is treated as equivalent to a complaint and summons (s 388). If, after the correct service of the notice to appear, the child fails to appear in court, the court may issue a warrant for their arrest (a PPRA warrant) (s 389).

This is different to the previous position where the court adjourned for an affidavit for evidence for a warrant. However, the court has discretion to delay issuing or executing a warrant to give a child the opportunity to appear (s 389(5)). Further, the bail and custody provisions of the Youth Justice Act apply to a child arrested on a warrant under this section.

If a court is not satisfied that the child was served as required, the court must strike out the notice to appear (s 390). However, this does not prevent another proceeding being started against the child.

11-24 Complaint and summons

A complaint and summons should be discreetly served on a child to require them to appear before the court to answer the complaint of an offence (s 43). The complaint must also be served on their parent and the Department of Justice and Attorney-General (Youth Justice Services) (s 43) similar to the notice to appear.

11-25 Simple offences

A court may hear and determine a proceeding instituted by complaint and summons against a child for a simple offence in the absence of the child (Youth Justice Act, 46(1)). In this case, the court can make an order only imposing a fine on the child and only if the child has advised the court in writing of their capacity to pay a fine of the amount ordered or larger (s 46(2)).

11-26 Arrest

A child should be detained in custody (whether on arrest or sentence) only:

- as a last resort
- in a facility suitable for children, and
- for the least time that is justified (Charter of Youth Justice Principles, Schedule 1, Principles 17 and 18).

Generally, a proceeding against a child must be started by complaint and summons or notice to appear, as mentioned above. However, this does not affect the police's power to arrest a child in line with s 365 of the PPRA without a warrant if the offence is serious or for other offences, such as:

- if the police officer believes, on reasonable grounds, that it is necessary to prevent the child repeating or continuing the offence, or committing another offence
- to obtain or prevent the loss or destruction of evidence
- to prevent the fabrication of evidence
- to ensure that the child appears before the court (s 13(1)(a)).

Police also continue to have the power to arrest for questioning under s 403 of the PPRA and if there is a warrant issued under the Bail Act.

If a child is placed under arrest, the police must notify the Department of Justice and Attorney-General (Youth Justice Services) and the child's parents as mentioned above (PPRA, s 392).

D. Bail

The provisions of the Bail Act apply to children. You should make every effort in the first instance to obtain bail for your client.

11-27 Arrested child

An arrested child must be brought promptly before the children's court (s 49) unless the child is being detained for questioning or breath testing, or has been arrested under a warrant requiring them to be brought before another body.

A child who has been arrested and is in custody must be either granted bail or released from custody unless the officer is required by the Youth Justice Act or another Act to keep the child in custody (s 48(4)).

In granting bail or considering what conditions should be attached to the bail, the following must be considered:

- whether the child will surrender into custody
- whether they will commit an offence
- whether they will endanger others' safety or welfare, or interfere with a witness or otherwise obstruct the course of justice
- the nature and seriousness of the offence
- the child's character
- the child's criminal history
- the child's home environment and other background information
- the history of previous bail grants
- the strength of evidence against the child relating to the offence among any other relevant matters (s 48(2) and (3)).

In 2010, the Youth Justice Act was amended to compel a court making a decision about bail to consider the likely sentencing outcome if the child pleads or is found guilty (s 48(3A)).

Further, under s 48(7), an officer must keep the child in custody if they believe that the child's safety would be endangered if they were released and there was no other reasonably practical way of ensuring their safety. The Youth Justice Act was amended to clarify the use of this discretion.

A child should be remanded only if their safety is endangered because of the offence and there is no reasonably practical way to keep them safe other than remanding them in custody. You should be careful that children are not remanded in custody for their safety merely because they are addicted to drugs or have a history of self harm. These are welfare issues distinct from the proper considerations for youth justice.

Police authorised to grant bail to a child in line with the Youth Justice Act may instead release the child into the custody of the child's parents or permit them to go at large without bail (s 51(2)).

If granted bail, it is now possible for deposits and sureties to be attached to the bail of children (s 52(3)). However, bail should be on the child's own undertaking without sureties and deposit of money or other security, unless the officer believes it would be appropriate in the circumstances (s 52(2)).

Further, police can impose other conditions to address the risk of the child re-offending, endangering the safety or welfare of others, or interfering with witnesses. However, these must not be more onerous than necessary and must be supported by written reasons apart from residential or reporting conditions (s 52(4–6)).

If the child has been released without entering into a formal undertaking, a warrant can still be issued if the child fails to attend court (ss 51(2)(f) and 57).

11-28 Court bail

The court has the power to grant or extend bail in line with the Bail Act. The court also has the same powers as the police to release the child into the custody of a parent or allow them to go at large (s 55) and must consider the same matters (s 48). Children can be released at large for indictable offences. This release is subject to the condition that the child surrender into the court's custody at the child's next court appearance and that a warrant can be issued if the child fails to appear. However, if a child is released at large without bail and fails to appear, this is not an offence against the Bail Act.

A court can now grant bail by audiovisual or audio link if the child agrees and the court is satisfied that the child has had an opportunity to obtain independent legal advice (s 53).

11-29 'Show cause'

Section 16 of the Bail Act no longer applies to children. However, the rest of the section is embodied in s 48 of the Youth Justice Act and has been mentioned above. The most important aspect is that children are no longer subject to the 'show cause' provisions of the Bail Act and that the prosecution is responsible for showing that the child poses an unacceptable risk.

11-30 Breach of bail

Under s 29(2) of the Bail Act, in effect, a child does not commit an offence if they breach a condition of their bail (other than failing to appear). A child can be charged with an offence against the Bail Act only if they fail to appear in line with a bail undertaking. However, this situation does not apply to adults who breach a condition of bail granted for childhood offences. An adult on bail for childhood offences will be dealt with as an adult under the Bail Act for both breaching bail conditions and failing to appear.

If a child has been released on bail with certain conditions and fails to comply, they may be apprehended and brought before the court under s 367 of the PPRA. Before arresting a child for breach of bail, police must first consider whether it is appropriate to apply to the court to revoke the child's bail without arresting the child. If the child is brought before the court, the court may choose to review the original conditions or revoke bail on the substantive charges, but the breach of the bail condition is not an offence and should not be reduced to a bench charge sheet.

The 2014 amendments introduced an offence for breaching bail by committing a further offence while subject to a bail undertaking (s 59A). This offence is unusual in that the offence is deemed to have occurred when the applicant pleads guilty before a court to the offences which were committed while the child was subject to another bail undertaking. The offence is proven when a copy of the bail undertaking is handed to the court by the prosecutor. The deemed offence is neither summary nor indictable. The duty lawyer must ensure any penalty for an offence under s 59(A) cannot amount to double punishment.

11-31 Bail programs

A bail application can be adjourned pending the preparation of a Conditional Bail Program. The Department of Justice and Attorney-General (Youth Justice Services) is responsible for developing a program that focuses on the child's offending risk factors. These programs are not mentioned in the Youth Justice Act—they have been created by the department.

11-32 Bail applications to the Childrens Court of Queensland and Supreme Court

A childrens court judge may grant, enlarge, vary or revoke bail for a child's offence at any time, whether or not the child has appeared before the childrens court judge previously. A childrens court judge may grant bail after a magistrate has refused bail. A childrens court judge has jurisdiction to grant bail for all indictable offences, including murder (s 59).

Youth Legal Aid offers a service that conducts 'stand-alone' bail applications in the Childrens Court of Queensland or Supreme Court on behalf of children referred to them by legal practitioners. Contact 1300 65 11 88 or laqyouth@legalaid.qld.gov.au.

11-33 Remand in custody

If remanded in custody, children must be remanded to the custody of the Department of Justice and Attorney-General (Youth Justice Services) (s 56). After being remanded, the child will be placed in a youth detention centre managed by the department, such as Brisbane Youth Detention Centre or Cleveland Youth Detention Centre. After remanding a child in custody, the court must order the police to deliver the child into the care of the department as soon as practical.

If a child is serving a period of detention and is remanded in custody for other charges, s 218 of the Youth Justice Act does not apply. A child is not entitled to credit for time spent in custody on remand while serving a detention order.

E. After proceedings have commenced

You should be aware that, under the Youth Justice Act, the category of offence determines which courts have jurisdiction to hear a matter.

The Youth Justice Act divides offences into four categories:

- Supreme Court offences
- indictable offences
- 'serious' indictable offences
- simple or regulatory offences.

11-34 Right of election—which court?

Supreme Court offences

Schedule 4 defines a Supreme Court offence as 'an offence for which the District Court does not have jurisdiction to try an adult because of the District Court of Queensland Act, section 61' (namely where the maximum term of imprisonment that can be imposed exceeds 20 years, but the offence is not one of those exempted under s 61(2)). Examples are murder, attempted murder and drug charges that are not dealt with before a magistrate.

A childrens court magistrate has no jurisdiction to deal with these matters except by way of committal proceeding.

All Supreme Court offences are committed for trial (or sentence) to the Supreme Court (s 95).

Indictable offences

From 1 July 2003, any indictable offences (other than Supreme Court offences) dealt with on indictment proceed to a childrens court (District Court of Queensland Act, s 61A). An exception may be where a child has an adult co-accused or other adult offence in the district court.

Previously, a childrens court judge could hear only charges of non-serious offences where the child was also facing trial or sentence for a serious offence. As a result of amendments in 2002, the Youth Justice Act now allows a

children's court judge jurisdiction over all indictable offences, whether for trial or sentence, regardless of where the offences were committed (except for Supreme Court offences) (s 99).

Note: The child can elect to have a trial with or without a jury in the children's court (as long as the child is represented).

'Serious' indictable offences

Any matter involving a serious offence must proceed to the higher court by way of either a committal hearing before a children's court magistrate (s 81(2)) or an ex-officio indictment.

A magistrate does not have the power to determine a serious indictable offence.

Section 8 of the Youth Justice Act defines a serious offence as:

- (a) 'a life offence; or
- (b) an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more'.

An offence is not serious if:

- (a) 'it is a relevant offence under the Criminal Code, section 552BA; or'
- (b) 'it is an offence that is the subject of a charge to which the Criminal Code, section 552A or 552B applies; or'
- (c) 'under the *Drugs Misuse Act 1986*, section 13, proceedings for a charge for the offence may be taken summarily; or'
- (d) 'under the *Drugs Misuse Act 1986*, section 14, proceedings for a charge for the offence may be taken summarily'.

The Youth Justice Act distinguishes between children who are legally represented and those who are not. (The relevant sections are ss 82–96.)

Children who are legally represented

Before committal proceedings commence, the child must elect one of the following:

- the proceedings will be held as a committal hearing
- the matter will proceed as a summary trial to be heard by a magistrate (s 83)
- the proceedings will be heard as a summary plea of guilty (s 90).

For indictable offences, the child has the right of election, despite the provisions of any other Act regarding any right of election that may be conferred on any person (s 78). As a result, a child still has the right to elect indictment on charges that adults no longer have due to the amendment to s 552 following the Moynihan reforms.

A court must refrain from the inappropriate summary hearing of an indictable offence; that is, the court must be 'satisfied that the charge can be adequately dealt with summarily by the court' (s 77).

If, during the proceedings, the court decides that the matter cannot be adequately dealt with summarily, the matter must continue as a committal hearing.

The court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty. If they do not give consent, the matter must proceed as a committal hearing.

Children who are not legally represented

Sections 85–86 of the Youth Justice Act as amended deal with children who are not legally represented. If a child charged with an indictable offence other than a serious offence appears unrepresented before a court, the proceedings must be conducted as a committal proceeding.

After the prosecution has put forward all evidence, the child can elect to have the proceedings continue as a committal proceeding or have the matter heard and determined summarily.

Again, the court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty.

Once the committal proceedings have been completed, whether for serious or non-serious indictable offences, the magistrate will ask the child to enter a plea to the charge.

If the child enters a guilty plea:

- if the offence is a serious offence, the child will be committed for sentence to a childrens court judge (s 92)
- if the offence is a non-serious offence, the child may elect to be
 - committed for sentence by a childrens court judge (including a district court judge sitting as a childrens court judge)
 - sentenced by the childrens court magistrate (s 93). The child must consent to being sentenced by the childrens court magistrate.

Note: A child can withdraw a guilty plea entered at the conclusion of a committal hearing before a childrens court judge (Youth Justice Act, s 106).

If the child does not enter a guilty plea (i.e. enters a plea of not guilty or no plea), they will be committed for trial to a court of competent jurisdiction (s 96).

Under s 98, if the child is committed for trial before a childrens court judge and is legally represented, the child may elect to be committed for trial to a childrens court judge sitting either with or without a jury.

If the child is not legally represented, the court will commit the child to trial to a childrens court judge sitting with a jury (s 98(5)).

In all relevant cases, the court must explain to the child and any parent who is present the child's right to elect whether their matter will be heard by a childrens court judge sitting with or without a jury. You must also explain to the child the nature of the election and the differences between the options, and obtain instructions outlining the child's understanding of the matter and the child's election.

When advising clients on which option to elect, you should consider who would be the appropriate arbiter of fact in the case. Trial by jury should not be put aside lightly and the child should elect to be dealt with by a judge sitting without a jury only after careful consideration.

The child will have an opportunity to change their election to be tried by jury or by judge alone once the matter is before the childrens court (Youth Justice Act, s 103). They must do this before they enter a plea.

Children must be present in the childrens court for arraignment.

Simple offences

A childrens court magistrate has jurisdiction to hear all simple offences involving children, whether for summary hearing or sentence. The procedure is similar to that in the magistrates court.

Right of child to withdraw election or change plea

In some circumstances, the Youth Justice Act allows a child (as discussed above) to withdraw their election to have their matter heard by a childrens court judge with or without a jury.

A child who appears before a childrens court judge after being committed for sentence may enter a plea of not guilty. Evidence that the child entered a plea of guilty at committal is not admissible in the trial following the change of plea (s 106).

Co-accused/joint proceedings

In a committal proceeding, a magistrate may act as both a childrens court magistrate, in relation to charges brought against a child, and a justice, in relation to charges brought against an adult co-offender. This will occur only in cases where, if the child concerned were an adult, the committal proceedings against each accused would have been conducted at the same time (s 107).

The prosecution may apply for a child to be committed to a district court or the Supreme Court so that a joint trial can be held with an adult co-accused (s 108).

Ex-officio indictment power preserved

Sections 10(b) and 42(3)(c) preserve the Crown's power to present an ex-officio indictment. With this power, the Crown may add or delete offences from an indictment, or proceed against a person despite the magistrate discharging that person at committal hearing.

A request can be made to the Crown for a matter to proceed by way of an ex-officio indictment. For further information, contact the Office of the Director of Public Prosecutions.

Transmission of summary charges to a higher court

Since 1 July 1997, with the introduction of s 651 of the Criminal Code, a person charged with a criminal offence has been able to transmit a summary charge to the district court or Supreme Court for sentence. A person may use this mechanism to have a large number of 'connected' summary offences dealt with at the time of the higher court sentence. The 2002 amendments to the Youth Justice Act clarify that this mechanism is available when a child is to be sentenced by a childrens court judge (s 100).

If you intend to utilise this mechanism, note the 'Supreme Court Practice Direction No. 5' of 2002 and 'District Court Practice Direction No. 3' of 2002.

Section 651 requires the child to enter, or intend to enter, a plea of guilty in the childrens court and the Crown must consent to the court dealing with the matter in the higher court.

Indictable charges, including all offences listed in the Criminal Code, cannot be transmitted via s 651 due to the child's right of election in relation to all charges that are not summary or regulatory in nature.

If a child subsequently enters a plea of not guilty or states that they intend to enter a plea of not guilty, the court must direct that the charge be heard by a magistrates court, which includes a childrens court (s 651(6)).

11-35 *Mental Health Act 2000 (Qld)*

The [Mental Health Act 2000](#) (Qld) applies to a child as it does an adult (s 61). Chapter 7 of this Act relates to people suffering from mental illness who are involved in criminal proceedings.

Note: If a child is charged with a simple offence, they cannot be referred to the Mental Health Court unless they are also charged with an indictable offence.

(See [Chapter 14](#) of this handbook.)

11-36 Pre-sentence reports

When pre-sentence reports are mandatory

Pre-sentence reports are mandatory before the court can make:

- a detention order (s 207)
- a conditional release order (s 223)
- an intensive supervision order (for 10 to 13-year-old children only) (s 203).
- a boot camp order (226B).

When a report may be ordered

The court, at its discretion, may also order a pre-sentence report only after a child has pleaded or has been found guilty of an offence (s 151). To save court time, you should avoid making submissions on sentence until you have determined whether a pre-sentence report is to be ordered. Make submissions at the same time that the court considers the pre-sentence report itself.

Pre-sentence reports are prepared by the Department of Justice and Attorney-General (Youth Justice Services) and must be presented promptly to the court in document form. However, they need not be provided in fewer than 15 days.

You may consider it appropriate to argue against ordering a pre-sentence report. The court will adjourn the matter while the report is being prepared. This means that a child can be remanded in custody during the preparation. If you do not believe a period of custody is appropriate, argue vigorously either that the child be placed on bail during the preparation or that a pre-sentence report is not appropriate in the circumstances.

The court must provide a copy of the report to you and the prosecution as soon as practical (s 153(1)). This enables you to obtain instructions about the report's contents and highlight relevant matters in sentence mitigation. The court may give directions about the report's distribution and disclosure. If the disclosure of the report's details could harm the client, you may make submissions to the court to limit such disclosure (s 153(3)).

What a pre-sentence report contains

The department has guidelines about what information should be included in a pre-sentence report. The guidelines are consistent with the [Youth Justice Regulation 2003](#) (Qld), s 6(1).

This Regulation states that the report must contain all of the following information:

- (a) 'the child's full name, address, date of birth and occupation;
- (b) the source of the information on which the report is based;
- (c) the circumstances of the offence to which the report relates;
- (d) the child's placement between the start of the proceeding and the date of the report;
- (e) details of all community based orders or detention orders made against or for the child;
- (f) if the chief executive is aware of a corresponding order made against or for the child—details of the corresponding order;
- (g) an assessment of factors the chief executive considers may have contributed to the child committing the offence;
- (h) the child's attitude to the offence and to the victim of the offence;
- (i) if the chief executive is aware of any consequences that have happened to the child as a result of the act or omission that constitutes the offence—details of the consequences;...
- (j) information about sentencing options.'

In the case of conditional release or intensive supervision orders, the pre-sentence report must outline the child's suitability for the order and whether an appropriate program is available for the child.

This Regulation does not require the Department of Justice and Attorney-General (Youth Justice Services) to make a recommendation regarding sentence. However, the report will canvass a range of sentencing options and discuss their appropriateness.

Note: The department does not act as an advocate for the child. Therefore, you must not rely too heavily on the pre-sentence report's contents when making submissions on sentence.

Section 151(3) of the Youth Justice Act states that '[t]he court may request that the report contain specified information, assessments and reports relating to the child or the child's family or other matters'.

Common requests include psychiatric, psychological and/or medical assessments. Agencies other than the department prepare these reports and delays of several months usually result. Consequently, you should carefully consider the appropriateness of such reports.

Section 151(4) specifically prohibits a pre-sentence report containing the department's opinion of what impact publishing identifying information about a child under s 234 may have on the child (which allows the sentencing court to make an order allowing the publication of identifying information about a child in cases of serious offences of violence).

Arguably, other information that should also not go into the report include any matters on which the child may currently be on remand and details of previous cautions.

You should note s 151(9), which indicates that, if a pre-sentence report is required, the department may just give the court further material to consider with a report prepared for another sentencing on the same day. This avoids having to order an additional pre-sentence report about additional offences that are ready to be dealt with on the sentencing date of previously listed matters. Also note s 7 of the Youth Justice Regulation.

When a client disagrees with the content of the pre-sentence report

If your client disputes any content of the pre-sentence report, you may request an order under s 152 of the Youth Justice Act, requiring the presence of the report's author. If the court grants the order, the report's author may be required to give evidence on oath and you will require instructions accordingly.

F. Sentencing

11-37 Sentencing scheme

The Youth Justice Act is a code for all dealings with children (s 2(b)).

In particular, it is a code for sentencing (s 149). Any court that sentences a child must do so under Part 7 of the Youth Justice Act despite any other Act or law.

Section 150 contains the sentencing principles for children. Important principles include the following:

- The Youth Justice Act contains general sentencing principles for children. (Note: The Court of Appeal has ruled that this does not mean that the Penalties and Sentences Act 1992 applies to children; rather, it refers to general sentencing principles that existed prior to the Penalties and Sentences Act (*R v W; ex parte Attorney-General* [2000] 1 Qd R 460; [\[1998\] QCA 281](#)).
- The court must have regard for the youth justice principles outlined in the charter in Schedule 1 (s 150(1)(b)).
- The child's age is a mitigating factor (s 150(2)(a)).
- A 'non-custodial sentence is better than detention in promoting a child's ability to reintegrate into the community' (s 150(2)(b)).
- A child who lacks family support, education or employment should not receive a more severe sentence because of this (s 150(2)(d)).

- If the child is indigenous, any submissions that the local community justice group makes may be considered (s 150(1)(g)).

The court must disregard a requirement under any Act that an amount of money or imprisonment term must be the:

- minimum penalty for an offence
- only penalty for an offence (s 155).

11-38 Sentence orders

Section 175 of the Youth Justice Act outlines the sentence orders available to the court. Section 176 outlines the penalties that the court may impose on a child if found guilty of a ‘serious offence’.

11-39 Reprimand (s 175(1)(a))

A reprimand has its ordinary meaning and means a ‘severe reproof, especially a formal one by a person in authority’. *Macquarie Dictionary*.

A reprimand is administered by the court to the child and forms part of a child’s criminal history. The Department of Justice and Attorney-General (Youth Justice Services) has no role in this order’s administration.

No conviction can be recorded when a child is reprimanded.

The court generally uses this option if it is the child’s first court offence or the offence is relatively minor. The court is not precluded from ordering reprimands for indictable offences as opposed to summary offences.

11-40 Good behaviour order (ss 175(1)(b), 188, 189)

A good behaviour order is an order that the child demonstrate good behaviour (i.e. abstain from further violating the law) for the order’s duration (s 188). The order can be made for no longer than one year. The Department of Justice and Attorney-General (Youth Justice Services) has no role in the supervision of this type of order.

If a child re-offends during the period of the good behaviour order, the court that deals with the subsequent finding of guilt may consider the order breach when imposing a penalty for the new offence. However, the initial order cannot be disturbed (s 189).

No conviction can be recorded with this order.

11-41 Fines (ss 175(1)(c), 190–192)

A court can make a fine order only if it believes that the child (not the child’s parents) has the capacity to pay a fine (s 190).

A court has discretion to impose a conviction when ordering a fine (s 183).

If the court considers a fine order and considers ordering the child to pay compensation or restitution, the court must examine the resources available to the child. If it decides that the child has insufficient funds to pay both, the court must give preference to ordering the child to pay only the compensatory order (s 156).

A court can order the child to pay the fine over a period of time. It can also specify that they pay the fine in specific instalments to a proper officer of the court (s 191).

A child can apply to a proper officer of the court to have the payment period extended. The officer can grant an extension subject to any conditions that they consider just (s 309).

If the proper officer is the registrar, sheriff, deputy sheriff, or under sheriff or clerk of the court, the powers may be delegated to a public service officer employed in the registry of the court concerned (s 313).

Any unpaid fines or restitution against a child can be recovered through civil action with the state as the plaintiff. The order can then be enforced through the civil courts (s 310). A court cannot order a default period of imprisonment for failure to pay the fine. If a child fails to pay the fine, a proper officer of the court can apply to cancel the fine order and ask the court to make a community service order against the child (s 192).

A court may convert the fine to community service hours using the formula in s 192(2)—unpaid amount of fine x 8 ÷ 1 penalty unit.)

If, after applying the formula, the court finds that the community service hours are fewer than 20 hours, it cannot convert the fine (s 192(7)).

If the hours are more than the number allowed for sentence under ss 175 or 200, the court must reduce the number of hours to the maximum hours available.

A court may make a community service order only if the:

- child is willing to comply with the order
- court considers that the child is suitable for such an order, and
- court is satisfied that suitable community service can be provided (s 195).

Although the Department of Justice and Attorney-General (Youth Justice Services) has no role in the administration or contravention of a fine order, it must present a report about the availability and suitability of a community service program.

11-42 Probation (ss 175(1)(d), 193–194)

Probation is a community-based supervision order administered by the Department of Justice and Attorney-General (Youth Justice Services). Before a probation order is made, the child must indicate that they are willing to comply with the order's terms.

Note: A probation order can be made only if the legislative penalty for the offence includes a period of imprisonment (s 175(2)). Therefore, for example, if a child is convicted of the regulatory offence of shoplifting, the court has no power to order probation.

The court has discretion to record a conviction, whether or not it is for a serious offence (s 183).

The maximum probation period varies according to the court that is making the order and the type of offence. (You should also note the maximum limits applying to combined orders.)

A magistrate can make a probation order for a period of up to one year.

After finding a child guilty of an offence, if the magistrate considers that a probation period of greater than one year would be appropriate, they may commit the matter to the children's court judge for sentencing (s 186).

A judge can make an order for a period of up to two years if the offence is not classified as serious.

If it is a serious offence, a judge can make a probation order for a period of up to three years.

A probation order may also contain special conditions. The court can make these if it believes this will prevent the child repeating the offence or committing further offences. The court must relate these conditions to the offence for which the order was made and support the conditions with written reasons (s 193(4)). For example, a condition that a child attend drug counselling may be appropriate if the commission of the offence was directly related to the child's drug habit.

You should ensure that there is sufficient nexus with the offence and special conditions imposed. For example, if de facto parenting conditions are included, such as a requirement to do household chores, you may advocate against that inclusion. Conditions such as drug and alcohol rehabilitation, family counselling or curfews may also not satisfy the requirements of the Youth Justice Act if there is insufficient nexus with the offence before the court.

You should ensure that any special conditions directed at addressing re-offending behaviour are realistic, and work with departmental officers to provide realistic and workable options.

The department monitors most special conditions. The court can now order a child to perform a probation condition in another state.

11-43 Graffiti removal orders (ss 176A and 194A–194L)

The Youth Justice Act includes mandatory graffiti removal orders for children who commit a graffiti offence.

The court must make an order unless the court is satisfied the child is not capable of complying with the order because of the child's mental or physical capacity.

When deciding on the number of hours the court must take into account the age, maturity and abilities of the child against who an order is being made.

The child must be at least 12 before an order can be made.

The maximum number of hours are:

- if the child has not yet attained 13 years – 5 hours
- if the child is 13 years or older but has not attained 15 years – 10 hours
- if the child is 15 years or older – 20 hours.

A child who is found guilty of two or more graffiti offences may be sentenced to multiple graffiti removal orders however, the total number of hours cannot be more than the maximum allowed for a single graffiti removal order (s 194F).

The orders are to be performed cumulatively unless otherwise ordered. If a child is subject to community service and graffiti removal orders, and the total number of unpaid hours exceeds the maximum allowable (100 hours if the child has not attained 15 years, 200 hours in all other cases), the order for the hours in excess of the maximum will have no effect.

11-44 Community service orders (ss 175(1)(e), 195–202)

The court can order a child to perform unpaid community service in certain circumstances.

However, the court cannot order a child who has not reached the age of 13 at the time of sentencing to perform community service (s 175(1)(e)).

A community service order can be made only if the legislative penalty for the offence includes a period of imprisonment (s 175(2)).

Before making such an order, the court must be satisfied that the child is suitable for, and willing to perform, community service and that the department can provide community service that is suitable for the child (s 195).

When making a community service order, the court has discretion to record or not record a conviction (s 183).

The court may make two or more community service orders if the child has two or more offences, and may also make a community service order against a child who is already subject to an existing community service order (s 199).

The number of hours the court can order depends on both the child's age at the time of sentencing (s 175(1)(e)) and whether there are outstanding community service orders (s 200). The result is that:

- if the child is 13 or 14 years, the total maximum number of hours (including any outstanding hours) that the child can be ordered to perform is 100
- if the child is 15 years or over, the total maximum number of hours (including any outstanding hours) is 200
- in both cases, the minimum number of total hours must not be fewer than 20 (s 200).

These maximums are the maximum number of hours a child can be subject to at any one time. Any hours ordered in excess of the maximum are of no effect (s 200(4)).

The child must perform the community service within 12 months of the order date (s 198(a)).

During the order period, the child must perform community service as directed by the department in a satisfactory way and must not violate the law (s 196). The child must complete the community service within one year of the order being made unless the court or proper officer of the court extends the order (s 198).

The community service order ends when:

- the child performs the number of hours specified in the order
- the order is discharged upon contravention action, or
- the period within which the order must be performed expires.

11-45 Intensive supervision orders (s 175(1)(f) and division 9, ss 203–206)

An intensive supervision order addresses the offending behaviour of a child who is at risk of progressing further into the criminal justice system through an early intervention framework. If a child has not reached 13 years at the time of sentencing, the court may make an intensive supervision order for a period of up to six months. This additional sentence order was introduced by the 2002 amendments (s 175(1)(f)).

‘A court may make an intensive supervision order for a child only if—

- (a) the child expresses willingness to comply with the order; and
- (b) the court has ordered a pre-sentence report and considered the report; and
- (c) the court considers the child, unless subject to an intensive period of supervision and support in the community, is likely to commit further offences having regard to the following—
 - (i) the number of offences committed by the child, including the child’s criminal history;
 - (ii) the circumstances of the offences;
 - (iii) the circumstances of the child;
 - (iv) whether other sentence orders have not or are unlikely to stop the child from committing further offences’ (s 203(1)).

The pre-sentence report provided by the department and considered by a court before it makes an intensive supervision order ‘must include comments—

- (a) outlining the potential suitability of the child for an intensive supervision order; and
- (b) advising whether an appropriate intensive supervision program is available for the child’ (s 203(2)).

The legislation’s intention suggests that this order would be appropriate only if the child has failed to respond to a probation order and continued to offend. Unless the circumstances are exceptional, a child should be given the opportunity to comply with the probation conditions before this intensive sentencing option is undertaken.

An intensive supervision order must require the child to participate in an ‘intensive supervision program’ for the ‘program period’ as directed by the department and, during the period of the order:

- abstain from violating the law
- comply with every reasonable direction of the department
- report and receive visits as directed by the department (s 204).

The court can impose any further conditions in the intensive supervision order that it considers necessary to prevent the child re-offending. However, the requirement to comply with the condition must relate to the offence for which the order was made and be supported by written reasons.

11-46 Conditional release orders (s 175(3), s 221)

A conditional release order (which replaces the previous immediate release order or IRO) is similar to an adult intensive correction order. The court makes a detention order against a child, and then immediately suspends the order and makes an order that the child be released from custody immediately (s 220).

The conditional release order requires the child to participate in an intensive, structured program (the ‘conditional release program’) for up to three months (s 221). This program is organised by the department. Once the child has completed the program period, they are no longer liable to serve any of the detention period (s 224).

The court cannot order a conditional release order without ordering a pre-sentence report (s 207).

A conditional release order is an order of detention and, for that reason, may be imposed only as a last resort (*R v C & M* [2000] 1 Qd R 636; [\[1998\] QCA 252](#)).

The pre-sentence report provided by the Department of Justice and Attorney-General (Youth Justice Services) and ‘considered by a court before making the relevant detention order must include comments—

- (a) outlining the potential suitability of the child for release from detention under a conditional release order; and
- (b) advising whether an appropriate conditional release program is available on the child’s release under the order’ (s 223).

The pre-sentence report should provide detail about the program, as discussed by the Court of Appeal in *R v F & P* [\[1997\] QCA 98](#).

The conditions of a conditional release order include that the child must participate in a program as directed by the Department of Justice and Attorney-General (Youth Justice Services) and abstain from violating the law (s 201). The court may also specify conditions and requirements that it considers necessary to prevent further offending behaviour of any kind. Again, these conditions must relate to the offence for which the order was made and be supported by written reasons (s 221(4)).

The child must indicate that they are willing to comply with the order’s terms (s 222). If the child does not abide by the terms of the conditional release order, they may be liable to serve the detention period for which the conditional release order was made. The child must fully understand the gravity of contravening the conditional release order before they indicate their willingness to participate.

A conditional release order can be varied or revoked in the interests of justice.

Any fresh offences that the child commits during a conditional release order are a breach of the conditional release order.

11-47 Boot camp orders (ss 175(3)(b) and 226A–226D)

The purpose of a boot camp is to provide an alternative to the detention of a child by allowing a court to immediately release a child to a boot camp.

To be eligible, the child must consent to the order, be at least 13 years and usually reside in an area prescribed by regulation.

A child is ineligible if the child:

- is being sentenced for a disqualifying offence
- has previously been found guilty of a disqualifying offence
- has a charge pending for a disqualifying offence
- is serving a period of detention in a detention centre for another offence.

The court must also consider whether the child is an unacceptable risk of causing harm to other children residing at the boot camp or the boot camp provider's employees.

The boot camp order must be for at least three months and no more than six months.

11-48 Mandatory Boot camp orders (ss 175(3)(b), 206A and 206B)

In certain circumstances, a court must order that a child be sentenced to a boot camp order for a second motor vehicle offence. This section only applies to children who reside in an area prescribed by regulation (currently Townsville). The child must be at least 13 years at the time of sentence.

A recidivist vehicle offender is a child who has previously been convicted of an offence against s 408A of the Criminal Code or an attempt to commit an offence under s 408A.

The ineligibility criteria for standard boot camp orders apply. A child does not necessarily need to consent to the order before they are sentenced as the court has no discretion to impose another sentence unless a term of actual detention is appropriate.

11-49 Detention (s 175(1)(g), s 176)

A fundamental principle of youth justice is that a child should be detained in custody only as a last resort and for the least amount of time justified in the circumstances (s 150(2)(a) and Article 17, Charter of Youth Justice Principles, Schedule 1). A court may make a detention order only if it believes that detention is the only appropriate order after considering all other available sentences and the desirability of not holding a child in detention (s 208). Further, a court that imposes detention must give written reasons for making the detention order (s 209).

A court can make a detention order in relation to an offence only after requesting and considering a pre-sentence report (s 207).

Unless the court orders otherwise, a child will not be released until they have served 70 per cent of the detention sentence. The court may order that the child be released from detention after serving 50 per cent or more but less than 70 per cent of the detention ordered under special circumstances. This is an order, not a recommendation. After they have served the relevant portion of the sentence, the child must be released on a supervised release order (s 227).^Æ

The maximum period of detention depends on the sentencing court's jurisdiction and the offence's classification. If the court is not constituted by a judge, the maximum detention period that can be ordered is one year (s 175(1)(g)(i)). Note also that a magistrate can request a delegation of sentencing power or refer a case for sentencing to a childrens court judge (s 186)

A child must serve a sentence of detention concurrently with any other sentence unless the court orders otherwise under s 213 (s 212). Note also the limitations on cumulative orders in s 214.

Further, due to the 2003 amendments, a detention order imposed on a child for failing to appear under the Bail Act is not automatically cumulative (as it is for adults) because s 33(4) of the Bail Act no longer applies to children (s 33(5)).

11-50 Remand time to be treated as detention on sentence

Section 218 requires that any time a child spends in custody on remand be counted as part of any detention period ordered in relation to the offence. This includes any detention ordered due to a re-sentencing arising from a contravention. However, if a child is simultaneously being held in custody serving a sentence, the child will not be entitled to remand credit.

Section 218 does not require the court to state or record the remand period to be taken into account on sentence. The department automatically accounts for such time when determining the child's release date under a supervised release order.

When a child offender is dealt with for multiple offences in the same sentencing exercise, the child is not to be deprived of the total credit for pre-sentence detention for any of the offences that the court deals with on that day. The Court of Appeal has determined that, when a child is to be sentenced for multiple offences and has undergone pre-sentence detention for one or more of the offences, s 218 entitles the child to credit for that detention for all offences (*R v CDR* (No. 2) [1996] 1 Qd R 69).

Note: The time spent in custody must be time spent 'pending the proceeding' for the offence or offences that are for sentence. For example, any pre-sentence custody before a community-based order is made cannot be credited towards new offences that breach that order (*R v GT* [1997] 2 Qd R 183).

11-51 Combination of orders

A court may make more than one type of order for an offence (s 177). The combination is at the discretion of the sentencing court but there are guidelines for certain combinations.

Section 178 refers to the combination of probation and community service orders for one single offence. The court must make these as separate orders and cannot make one conditional on another. If the child contravenes either order and re-sentencing for the original offence occurs, both orders will be discharged.

Section 179 indicates that the combination of an intensive supervision order with detention or probation is prohibited for a single offence.

Section 180 allows for the combination of probation and detention for a single offence. In this case, the maximum detention period allowed is six months. No conditional release order can be made if the court wishes to combine these orders. The probation order can be effected only after release from detention and cannot operate for longer than one year after that time.

11-52 Restitution and compensation

The Youth Justice Act contains no provision that allows a court to make a condition of a community-based order that the child must pay restitution or compensation.

Rather, the court may make an additional (but separate) order that the child pay either:

- compensation for property loss to an amount no greater than that equal to 20 penalty units
- restitution or compensation for injury suffered by any other person to any amount (s 235(2)).

Note: The court should make the order only if satisfied that the child has the capacity to pay the amount (s 235(5)). If a child indicates that they have a capacity to pay and becomes the subject of such an order, the order remains in force until the child complies with it, even if they are unable to pay.

A court has no power to order a default imprisonment period for non-payment of restitution or compensation. The restitution or compensation amount can be recovered through civil action. The plaintiff is the person to whom the compensation is payable (s 310).

11-53 Recording convictions

Section 183 clearly indicates that a court cannot record a conviction against a child except where the penalty is a fine, community-based order or detention (s 183(2) and (3)).

Before recording a conviction, the court must consider the matters included in s 184—the nature of the offence, the child’s age and previous criminal history, and the impact that a conviction will have on the child’s rehabilitation generally, or finding or retaining employment.

Defence practitioners should always make submissions resisting the recording of a conviction against a client, as it may significantly harm the child’s current or future employment and rehabilitation prospects. This is one of the most important principles in the Youth Justice Act.

For a discussion of the principles to be applied when determining whether or not to record a conviction, see the judgement of Robertson DCJ in the matters of DRH, BES and TKL (Unreported, Childrens Court of Queensland, CSM No 16 of 2000, Robertson J, 13 April 2000). See also *R v SEEM* [2011] QChC 032.

If a court makes an order under s 176(1), (2) and (3) (penalties for serious offences), the court has discretion in deciding whether or not to record a conviction (s 183(3)).

Note: The recording of a conviction falls within the definition of sentence order and, as such, can be subject to an appeal to a childrens court judge.

11-54 Criminal history

Practitioners should be aware of the effect of any findings of guilt in a client’s criminal history, both in the childrens court and adult court proceedings.

A court’s finding of guilt against a child is part of that child’s criminal history, whether or not a conviction was recorded (s 154). This includes where a child was sentenced to an indefinite referral to a Youth Justice Conference (*R v BBX* [2011] QCA 008).

All findings of guilty, whether convictions are recorded or not, are now disclosable on a sentencing proceeding for an adult offender. Further, ‘if a person is found guilty as a child of an offence, the person is not taken to have been found guilty as an adult of the offence merely because of the making of a declaration under s 143(4)’ (s 148(4)). That section allows a court to declare a childhood sentence order to be a corresponding adult order and make all necessary changes to make it a corresponding adult order.

A court that subsequently sentences a child for any offence as a child may consider the child’s previous offending history (ss 150 and 154). Any person with a duty to consider whether a child should be remanded in custody pending court proceedings may consider the child’s criminal history.

If a child has been acquitted of a charge or the Crown has chosen not to prosecute a matter, the child may apply to the Commissioner of Police to have all identifying particulars (defined in s 4), destroyed (s 27).

11-55 Variation and contraventions of orders

The Youth Justice Act allows contravention action and variation upon application of community-based orders, such as probation, community service, intensive supervision and conditional release orders. The relevant sections of the Youth Justice Act that apply are given under Division 12 for contraventions and variations (ss 236–252). Breaches are not defined as separate offences for a child.

11-56 Breach of a good behaviour order

A court that deals with a person for an offence committed during the period of a good behaviour order may consider the breach when determining sentence (s 189(1)). However, a court must not take any action in relation to a breach of a good behaviour order (s 189(2)).

11-57 Commencing proceedings for breach of community-based orders

If a child is subject to a current community-based order and the department believes that the child has contravened the order, the department must warn the child of the consequences of further contravention, including possible breach proceedings (s 237). This warning is not required if the department does not know where the child is and cannot reasonably find out (s 237(3)).

If the department believes that a child has continued to contravene the community-based order, it may apply to the children's court magistrate for a finding that a breach has occurred (s 238). 'The application may only be made during the period of the order' (s 238(3)).

The application is generally commenced by serving a complaint and summons on the child (s 238(2)). If the child's whereabouts are unknown or there is reason to believe the child would not comply with a complaint and summons, an application can be made for a justice to issue a warrant for the child's arrest (s 238(6)).

11-58 General options available to magistrate on the breach application

Generally, all breach applications commence before a magistrate.

Section 240 indicates that the magistrate may take action and make orders in line with s 245 (for breaches of probation, community service and intensive supervision orders) or s 246 (for breaches of a conditional release order). This applies even if a higher court made the community-based order s 240(3)(b) for breaches of probation, community service and intensive supervision orders or subs(c) for breaches of a conditional release order.

The magistrate may order the child to appear before the higher court if, considering the circumstances, they believe that the order should be discharged (s 240(3)(a)).

Section 241 applies if a higher court is to deal with a breach matter, and the same action can be taken and orders made under ss 245 or 246.

11-59 Breach by re-offending

If a child is found guilty of an indictable offence they committed while subject to a community-based order, s 242 allows any court to deal with a breach in the same way as if the breach was commenced by a complaint and summons as above.

A higher court can re-sentence on any community-based order made by a children's court magistrate in dealing with the breach (s 243).

11-60 A court's power to act on breaches of probation, community service and intensive supervision order

Section 245 applies here and indicates that a court must consider any period of compliance (s 245(4)). Section 249 also indicates that, if a court discharges a community-based order of probation, community service or intensive supervision order and re-sentences a child, the court must consider the reasons that the original community-based order was made and anything the child has done to comply with that order (s 249).

For breach matters, a court may make an order under s 245 even though, at the time it is made, the community-based order is no longer in force because its duration period has ended (s 245(5)). Therefore, for this purpose, the community-based order is taken to be continuing in force until a proceeding on the breach is determined (s 245(6)).

Section 245 allows a court to take action on any breach as follows:

- probation

- extend the period of the order, as long as the extended period is longer than the period for which the order could have originally been made under s 175 or s 176
- vary the requirements of the order
- discharge the order and re-sentence the child for the original offence
- take no further action on the undertaking of the child to comply with the order
- community service
 - increase the number of hours, as long as the total is more than the number allowed under s 175
 - extend the community service period for up to one year more
 - vary the requirements of the order
 - discharge the order and re-sentence the child for the original offence
 - take no further action on the undertaking of the child to comply with the order
- intensive supervision order
 - extend the period for up to six months
 - vary the requirements of the order
 - discharge the order and re-sentence the child for the original offence
 - take no further action on the undertaking of the child to comply with the order.

11-61 A court’s power to act on breach of conditional release order and supervised release orders

Section 246 applies here and indicates that a court must consider any period of compliance (s 246(4)) when deciding to extend the program period (see below).

The court may make an order for the breach under s 246 even though, at the time it is made, the conditional release order is no longer in force because its duration period has ended (s 246(5)).

Therefore, for this purpose, the conditional release order is taken to be continuing in force until a proceeding on the breach is determined (s 246(6)).

Section 246 allows a court to take action on any breach as follows:

- conditional release order
 - revoke the conditional release order and order the child to serve the sentenced period of detention. (The court must reduce the detention period by a period that the court considers just after considering everything the child has done to conform with the conditional release order (s 248))
 - give the child further opportunity to satisfy the order requirements by either
- varying the order
- extending the program period for up to three months.

Division 12A indicates that, if the unexpired portion of a supervised released order is under 12 months, the matter can be brought before the magistrate, notwithstanding that the original sentence was made by a judge. The magistrate can give the child further opportunity to comply with the order or return them to detention.

If the period is more than 12 months, the magistrate may order the child to appear before the original sentencing court.

G. Variation of community-based orders

11-62 Variation in the interests of justice

Either the child or Department of Justice and Attorney-General (Youth Justice Services) may apply to the court to vary the order in the interests of justice. They must apply to a court of the same jurisdiction as the court that made the original order (s 247).

The court may grant the application if the court considers it in the interests of justice, after considering the circumstances that have arisen or become known since the order was made.

Evidence by affidavit is admissible in proceedings for applications for variation (s 250). The court can determine the application on evidence by affidavit alone. If a court varies the order in this way, it must provide written notice to the child, department and any other lower or higher court that made the original order.

11-63 Variation by consent

Either the child or Department of Justice and Attorney-General (Youth Justice Services) can apply to a proper officer of the court to vary any community-based order but not a conditional release order. The child or department must send the application to the officer of the court with a supporting affidavit deposing to the fact that both child and department consent to varying the order's terms (s 252).

Schedule 4 defines the 'proper officer' as:

- (a) 'for the Supreme Court, a District Court or a Childrens Court judge—the registrar or a sheriff, deputy sheriff [or under sheriff] of the court; and
- (b) for a Magistrates Court or a Childrens Court magistrate—the clerk of the court'.

Section 252 prohibits the following amendments:

- the requirement that the child abstain from violating the law
- the period of the order (except for a community service order)
- an increase in the number of community service hours
- a reduction in the period that community service must be performed
- an amendment prohibited by the community-based order.

H. Miscellaneous court powers

11-64 Delegation of sentencing power

This power enables childrens court magistrates who believe that they do not have sufficient scope in the sentencing options available to them to informally request a delegation of sentencing power from a childrens court judge (s 185).

If the child is not represented by a legal practitioner, a magistrate must make this request for delegation before any evidence is heard, plea entered or election made by the child (s 185(4)).

If the child is legally represented, they must still consent to such a delegation being made at a later time. If they do not consent, the magistrate may refer the case to a childrens court judge for sentencing (s 186).

A sentence ordered through this power would still be reviewable in line with the sentence review procedure discussed below.

11-65 Reference of case to a childrens court judge for sentence

Under s 186, a magistrate may commit simple offences, or indictable offences that can be dealt with summarily before the childrens court magistrate, for sentence to the childrens court judge if they consider ‘that the circumstances require the making of a sentence order—

- (a) beyond the jurisdiction of a Childrens Court magistrate; but
- (b) within the jurisdiction of a Childrens Court judge’ (s 186).

If the above prerequisites to s 186 apply, you may submit to the childrens court magistrate that the s 186 procedure be used to allow all matters to come before a childrens court judge.

If a simple offence is committed for sentence to the childrens court judge, a child cannot change their plea to not guilty. A child’s right to change a plea on a committal for sentence to the childrens court judge is limited to indictable offences (s 106).

11-66 Correction of errors—childrens court magistrate

Under s 128, a court may reopen a proceeding if ‘a court has—

- (a) made a finding or order in relation to a child that is not in accordance with the law; or
- (b) failed to make a finding or order in relation to a child that the court legally should have made; or
- (c) made a finding or order in relation to a child decided on a clear factual error of substance’.

The court may amend any relevant finding or order as necessary to take into account (a), (b) and (c) above.

An application can be made to the court (within 28 days or by leave allowed by the court (s128(4)(b)), whether or not differently constituted, to reopen the proceeding or the court may reopen proceedings on its own initiative at any time.

A ‘proceeding’ is defined as ‘a proceeding for the hearing and determination of a charge of an offence’ (s127).

The court has the power to reopen proceedings regarding an original finding and order. ‘Finding or order’ is defined as ‘a finding of guilt, conviction, sentence or other finding or order that may be made in relation to a person charged with or found guilty of an offence’ (s128(7)).

11-67 Court may order identifying particulars taken in addition to sentence

A court has the power, on application by the prosecution, to order that a child’s fingerprints and palm prints be taken after finding them guilty for any indictable offence or under the prescribed legislation listed below where the offence is an ‘arrest offence’ (s255)—

- (a) ‘the *Criminal Code*;
- (b) the *Drugs Misuse Act 1986*;
- (c) the *Police Service Administration Act 1990*;
- (d) the *Regulatory Offences Act 1985*;
- (e) *Summary Offences Act 2005*;
- (f) the *Weapons Act 1990*’.

If the child is not placed into detention under the sentence order, the order must require the child to report at a stated police station between stated hours within seven days so police can obtain identifying particulars (s 255(3)).

If a child contravenes the order, a maximum penalty of 10 penalty units applies (s 255(4)).

A practitioner should argue the appropriateness of the order’s use, particularly in light of the availability of s 25 of the Youth Justice Act or the powers available in the Police Powers and Responsibilities Act for children in custody.

11-68 Orders under the *Transport Operations (Road Use Management) Act 1995 (Qld)*

In addition to general sentencing powers under ss 175–180 of the Youth Justice Act, a childrens court magistrate has discretion under s 181 to make an order under division 13 of the Youth Justice Act (s 253).

This discretion includes disqualifying a child from holding or obtaining a driver licence.

Under s 254(2), if a child is found guilty of an offence under the Criminal Code, *Transport Operations (Road Use Management) Act 1995* (Qld) or other Act, and they would be liable to be disqualified on conviction if they were an adult, the child is also liable to be disqualified on conviction to the same extent.

Further, under s 254(3) if a child is found guilty of an offence as above and a conviction is recorded, and the child would be subject to mandatory disqualification if they were an adult, the child is also disqualified to the same extent.

Basically, if the court finds the child guilty, the court has discretion under s 181 to order the child to be disqualified from holding or obtaining a driver licence for the same period as prescribed for adults.

11-69 Orders against parents

Apart from ordering a parent to attend the hearing of a matter (s 70), the court can make certain orders against the parents of a child who has been found guilty of an offence (Division 16, ss 257–260).

If a court believes any of the following, it may ask the parent to ‘show cause’ why that parent should not pay the compensation:

- compensation should be paid to any person for loss or injury
- the parent may have contributed to the offence by not adequately supervising the child
- the parent should be ordered to pay.

Section 259 sets out the characteristics and requirements of the ‘show cause’ hearing.

You should not act for the parent as well as the child in case a conflict of interest arises. Instead, advise the parent to seek independent legal advice.

11-70 Transfers from detention centre to prison

There is no longer any discretion for a court to set a date on which the child is eligible to be transferred to adult detention. Any child who is, or will turn 17 and has, or will have six months remaining on their sentence will be transferred to adult custody. Any remaining period of detention will convert into a period of imprisonment and be administered under the Corrective Services Act.

I. Appeals and sentence reviews

11-71 Appeals

If a child is dealt with summarily and a sentence order made, the aggrieved person may appeal to a childrens court judge using the mechanism provided by Part 9, division 1 of the Justices Act (s 117(2)).

In Division 1, all relevant references to a district court judge are taken to be references to a childrens court judge (Justices Act, s 117(3)).

A district court judge does not have jurisdiction to hear and decide an appeal (Justices Act, s 117(4)).

Section 222(1) of the Justices Act allows for appeals to a single judge of orders made by any justices or justice in a summary manner, whether upon conviction or sentence.

A complainant can appeal indictable offences dealt with summarily to the childrens court judge only on the basis of appealing the sentence order (Justices Act, s 222(1)).

A complainant can appeal the conviction of indictable matters dealt with summarily only to the Court of Appeal (Criminal Code, s 668D).

A decision of the childrens court judge is appealable to the Court of Appeal (Justices Act, s 116).

Indictable offences dealt with in higher courts

All appeals from the childrens court, Supreme Court and district court go to the Court of Appeal. Appeals can be made against conviction and sentence (Criminal Code, Chapter 67).

As with appeals against sentences involving adults, children who are appealing against a sentence must show that the sentence was manifestly excessive.

Legal Aid Queensland's Youth Legal Aid team conducts appeals assessed as having merit on behalf of children referred by practitioners. Please contact 1300 65 11 88 or ylalaq@legalaid.qld.gov.au if you wish to make a referral or an inquiry.

J. The Department of Justice and Attorney-General (Youth Justice Services)

11-72 Responsibility of the Department of Justice and Attorney-General (Youth Justice Services)

The Department of Justice and Attorney-General (Youth Justice Services) is responsible for administering any community-based or detention orders made under the Youth Justice Act (s 302). In this role, the department:

- provides programs and support for young offenders to reduce the likelihood of their re-offending
- provides programs to help young offenders reintegrate into their communities
- ensures that sufficient agencies are available to provide appropriate activities for community service orders in all areas of Queensland
- helps young people and their families understand the youth justice system
- reduces the level of over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system.

The department has a legislative right to appear in the childrens court and other specific functions (such as preparing pre-sentence reports) in relation to sentencing (s 74). Further, the department is responsible for supervising a child released from detention on a supervised release order.

When bringing applications for breach of community-based orders, the department acts in the role of prosecutor. The department is also responsible for providing and administering detention centres.

11-73 Role of the Department of Justice and Attorney-General (Youth Justice Services) at court

The departmental officer attending court is responsible for gathering and collating information about the child for presentation in court. The officer liaises with the youth justice system, the child and their family.

If a matter is to proceed as a sentence, the departmental officer seeks to conduct a pre-court interview with the child. This enables the officer to assess the child and identify factors that contribute to the child's offending behaviour. The

officer also has information about the child's previous contact with the department (including both youth justice and child protection matters).

The officer will make submissions to the court regarding the charge(s), the child's suitability for various orders and future departmental involvement with the child. The department's policy is not to interview a child regarding the details of an offence until the child indicates, through their legal representative, that they are pleading guilty.

11-74 The departmental officer at court as prosecutor

The department is required to act as prosecutor in the following circumstances:

- breaches of probation, community service, intensive supervision and conditional release orders
- applications in the interests of justice to vary, discharge or re-sentence concerning probation, community service and intensive supervision orders
- applications in the interests of justice to vary or revoke conditional release orders
- applications to revoke supervised release orders
- applications to vary by consent probation, community service and intensive supervision orders.

11-75 Bail programs

When applying for bail, you should be aware of assistance that the department provides.

Various bail accommodation services exist across the state. These services provide short-term, supervised accommodation and support to children charged with an offence. They target children who may otherwise be refused bail because of a lack of supervised accommodation. They aim to reduce the number of children held in detention on remand. You should approach the relevant departmental area office or court officer to access these services.

The department can assist further by preparing a conditional bail program. Conditional bail programs focus on children who would not otherwise be granted bail, or are highly likely to fail to comply with bail conditions or re-offend without substantial intervention.

While such a program places more onerous conditions on the child, this program may be the only avenue that enables the child to be granted bail. A conditional bail program should be tailored to suit the child and address the issues underlying their offending behaviour (such as personal development activities to help the child reintegrate into their community). It may include involvement in an existing group project or activity (such as a job skills development course).

You should discuss the child's circumstances with the departmental court officer prior to court. The availability of a conditional bail program will generally depend on the child's suitability for such a program and the resources available to the departmental area office that will supervise the child.

The conditional bail program must be included as a condition of the child's bail. If it is not, the child will not be obligated to comply with the program. The program maximises a child's opportunities for bail and effectively supervises the child in the community while they are on bail. Conditional bail does not provide secure custody of the child.

If a child has no permanent accommodation when applying for bail, approach the departmental court officer prior to court to ascertain whether the department can help find alternative accommodation. In certain cases, it may be appropriate to request that the child reside 'as directed by the Department of Justice and Attorney-General (Youth Justice Services)' for bail purposes if it appears that the child will be highly mobile and reliant on short-term accommodation facilities. Higher courts will generally require more specific residential information before granting bail.

11-76 Other programs available

The Youth Justice Conferencing sector of the Department of Justice and Attorney-General (Youth Justice Services) coordinates and administers police-referred conferences and compliance with the agreement terms.

To find out more about the specific programs offered to children, contact the Department of Justice and Attorney-General (Youth Justice Services). Each region has its own network of community agencies and programs available.

K. Legal aid

11-77 Legal aid for children

Legal aid is automatically available to children charged with indictable offences.

A ‘merit test’ is applied to applications involving summary and regulatory offences, as well as for bail in the childrens court and appeals under s 222 of the Justices Act, to determine whether to approve a grant of aid. When processing an application for aid for a child, Legal Aid Queensland has a policy of not taking their parents’ assets into account.

As a duty lawyer, you should always ascertain whether a child has representation. If a child is not legally represented, they should apply for legal aid. If the child is remanded in detention, they should apply for legal aid so they can receive continuous representation. You should follow up the matter and confirm that the application has been processed.

Appendix A—Table of court sentence options

Order	Section	Max (magistrate)	Max (judge)	Recording of convictions
Caution	s 20 application	–	–	No
Youth justice conference	s 161 in general s 163 indefinite referral s 165 pre-sentence	–	–	No
Reprimand	s 175(1)(a)	–	–	No; s 183
Good behaviour order	ss 175(1)(b), 188 & 189	12 months	12 months	No; s 183
Fine	ss 175(1)(c), 190, 191 & 309	Only if child has capacity to pay	Only if child has capacity to pay	Discretionary; s 183
Probation	s 175(1)(d) & s 176 for serious offences; ss 178, 179 & 180 for combination orders; Division 12 for contraventions & variations (ss 236–252)	12 months; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Two years unless serious offence, then three years under s 176; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Discretionary; s 183 Note the previous provision that a conviction ‘is taken to be recorded’ for a three-year probation order has been removed by the amendments
Community service (for 13 years and over only)	s 175(1)(e); s 178 combination with probation; Division 12 for contraventions & variations (ss 236–252)	If 13-15 years old, 100 hours; if over 15 years, 200 hours; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	If 13-15 years old, 100 hours; if over 15 years, 200 hours; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Discretionary; s 183
Intensive supervision order (for under 13 years only)	s 175(1)(f); s 176 cannot combine for single offence; Division 12 for contraventions & variations (ss 236–252)	Period of six months	Period of six months	Discretionary; s 183
Boot camp order (for 13 years and over only)	s 175(3)(b) & ss 226A–226D	Period of three to six months	Period of three to six months	Discretionary; s 183
Conditional release order	ss 175(3) & 220	Period of detention limited to one year; Division 12 for contraventions & variations (ss 236–252)	Period of detention limited to five years or half the statutory maximum; OR, if sentenced under s 176 serious offence, seven years, ten years or life; Division 12 for contraventions & variations (ss 236–252)	Discretionary; s 183
Detention	ss 175(g) & 176; ss 179 & 180 combinations	One year	Five years of half statutory max, whichever is less; OR, if under s 176 serious offence, seven years, ten years or life	Discretionary; s 183
Compensation, restitution	ss 181 & 235	20 penalty units for property compensation; child must have capacity to pay	20 penalty units for property compensation; child must have capacity to pay	Not applicable

Chapter 12

Conduct of pleas of guilty

Chapter 12—Conduct of pleas of guilty

A. No diminished duty	(12-1)
B. Familiarity with legislation	(12-2)
C. Deciding whether an offence can be dealt with summarily	(12-3)
D. Explaining court procedures	(12-4)
E. Ensuring indictable offences proceeding summarily & simple offences are dealt with at appropriate time	(12-5)
F. Fines—time to pay	(12-6–12-7)
G. Multiple charges—defended and undefended	(12-8)
H. Appearing for co-accused	(12-9)
I. Ensuring instructions fit the charge	(12-10–12-11)
J. Previous convictions	(12-12)
K. No duty to disclose previous convictions	(12-13)
L. When adjournment may be advisable	(12-14)
M. Explaining effect of conviction	(12-15–12-16)
N. Explaining options for court on sentencing	(12-17–12-18)
O. Obtaining full instructions	(12-19)
P. Facts on sentence	(12-20)
Q. Penalties and Sentences Act sentencing guidelines	(12-21)
R. Being as concise as possible	(12-22)
S. Suggesting available options	(12-23–12-24)
T. Procedures after court	(12-25)

A. No diminished duty

12-1 No diminished duty

As a legal practitioner performing the role of a duty lawyer, you should remember that nothing diminishes the duties that you owe to the court and the client when performing that function.

B. Familiarity with legislation

12-2 Familiarity with legislation

As a duty lawyer, you need to be familiar with the [Criminal Code Act 1899](#) (Qld) provisions that you are more likely to encounter, and the [Penalties and Sentences Act 1992](#) (Qld). This chapter does not set out any specific provisions of the Code but does refer to them throughout the handbook, where relevant.

You also need a basic knowledge of the [Bail Act 1980](#) (Qld), [Youth Justice Act 1992](#) (Qld) and [Corrective Services Act 2000](#) (Qld). The relevant sections of these various Acts are contained in Carter’s Criminal Code. You should always have a copy of Carter available when appearing in court.

You should also be familiar with the [Drugs Misuse Act 1986](#) (Qld), [Summary Offences Act 2005](#) (Qld), [Justices Act 1886](#) (Qld), [Regulatory Offences Act 1985](#) (Qld), [Police Powers and Responsibilities Act 2000](#) (Qld), [Transport Operations \(Road Use Management\) Act 1995](#) (Qld), [Weapons Act 1990](#) (Qld), and Commonwealth statutes dealing with the criminal law, such as the [Criminal Code Act 1995](#) (Cth) and [Crimes Act 1914](#) (Cth).

C. Deciding whether an offence can be dealt with summarily

12-3 Deciding whether an offence can be dealt with summarily

When a defendant instructs you to enter a guilty plea for an indictable offence, you must first ascertain whether the matter can be dealt with summarily. The question of a defence or prosecution election may also arise. The circumstances in which matters can be dealt with summarily are set out in [Chapter 3-Magistrates courts and the Justices Act 1886 \(Qld\)](#).

When the question does arise, advise the client of the consequences of each election, such as time delays with the presentation of indictments and the committal process.

D. Explaining court procedures

12-4 Explaining court procedures

After the substance of the charge or complaint has been read to the defendant, they must enter a plea of guilty to a charge of either an indictable offence to be dealt with summarily or a summary offence (Criminal Code, s 552I, and Justice Act, s 145).

In some magistrates courts, the personal entering of a plea is truncated, i.e. the duty lawyer indicates a plea and the magistrate confirms the plea with the defendant to prevent the later suggestion that the plea entered constitutes a miscarriage of justice (*Commissioner of Police v Warcon* [\[2011\] QDC 28](#)). As duty lawyer, you should insist that the defendant enter their own plea to comply with the procedural provisions.

E. Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time

12-5 Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time

A magistrate should not deal summarily with matters brought before the magistrates court until contemporaneous offences are dealt with on indictment in the higher courts. This way, as nearly as possible, any sentences received in the magistrates court will be served concurrently with sentences received in the higher court.

Leniency in a higher court can be a powerful submission for a more favourable sentence when a defendant pleads to contemporaneous charges in the magistrates court.

If a defendant has matters proceeding in both the magistrates court and higher courts, they can, once dealt with in the higher court, request of the court and police prosecutor that outstanding magistrates court matters be ‘brought

on' for an earlier date, so they may be dealt with either by pleading guilty or requesting a date for hearing on a plea of not guilty.

Section 651 of the Criminal Code allows a district court or Supreme Court to hear and decide a summary offence if an indictment has been presented in that court. However, under s 651(2), '[t]he court must not hear and decide the summary offence unless—

- a. the [district court or Supreme Court] considers it appropriate to do so; and
- b. the accused person is represented by a legal practitioner; and
- c. the Crown and the accused consent to the court so doing; and
- d. the accused person states his or her intention of entering a plea of guilty to the charge; and
- e. the complaint or bench charge sheet for the offence, or a copy, is before the court, whether or not returnable before another court'.

If the defendant wishes to have a summary offence dealt with under s 651, they must apply in writing to the clerk of the magistrates court, declaring that they intend to plead guilty (s 652). Once the summary offence has been transmitted, they will no longer be required to appear in the magistrates court.

Both the 'Supreme Court Practice Direction No. 5 of 2002' and 'District Court Practice Direction No. 3 of 2002' set out the specific details. In particular, the Director of Public Prosecutions must provide written consent and be satisfied that the summary charge has some connection to the indictable charge.

In *R v Tootoo* (2000) 115 A Crim R 90; [2000] QCA 312, the Court of Appeal confirmed that the only process available for a superior court to take summary matters into account on sentence is under s 651 of the Criminal Code (or s 189 of the Penalties and Sentences Act).

Under s 189 of the Penalties and Sentences Act, in a proper case, if a defendant is represented, pleads guilty and asks the court to take into account a list of offences, the court may take those offences into account in imposing a penalty. The prosecution must consent to those offences being proceeded with under this section.

If the defendant wants unrelated summary matters taken into account on sentence in a superior court, and those summary matters are unrelated to matters on an indictment, they may be able to apply to the Office of the Director of Public Prosecutions to have a 's 189 of the *Penalties and Sentences Act* schedule' prepared that contains those summary offences.

F. Fines—time to pay

12-6 Fines—time to pay

If a court imposes a fine, the defendant (and duty lawyer) will have to consider the question of seeking time to pay the fine. The defendant's personal circumstances will be relevant in fixing this period.

If a defendant is already serving or about to commence a jail term (e.g. on a contemporaneous plea), you must carefully consider the question of seeking time to pay. Under s 182A of the Penalties and Sentences Act, a court can order a person to serve up to 14 days' imprisonment for non-payment of each penalty unit or part thereof.

Section 182A of the Penalties and Sentences Act permits the court to determine the length of custody by reference to the 'cut-out rate', as defined in the [State Penalties Enforcement Act 1999](#) (Qld). The offender must serve this term cumulatively with any term they are already serving or have been sentenced to serve, unless the court orders otherwise.

You can apply for a default period to be served concurrently but the court is unlikely to grant it. The defendant may prefer to serve a default period at the end of their sentence rather than be released and possibly re-arrested for not paying the fine.

12-7 Offender levies imposed under s 179C

The offender levy is an administrative fee which is applied to any offender (other than a child) sentenced in the Supreme Court, district court or magistrates court whether or not a conviction is recorded.

The levy applies to all offences except an offence under the Bail Act, ss 29 or 33.

The prescribed amount is—

- (a) if the sentence is imposed by the Supreme Court or district court—\$300; or
- (b) if the sentence is imposed by a magistrates court—\$100.

The court can not take the levy into account in relation to the sentence it imposes: s 9 (7A) of the Penalties and Sentences Act.

The levy can be registered with State Penalties Enforcement Register: s 179E.

G. Multiple charges—defended and undefended

12-8 Multiple charges—defended and undefended

If a defendant has multiple charges, and intends to plead guilty to some charges and proceed to trial on others, they should ensure that the charges on which guilty pleas are being entered are remanded for mention at the end of any trial relating to the other offences. This will preserve an argument for concurrent sentences.

H. Appearing for co-accused

12-9 Appearing for co-accused

You should read the prosecution material before seeing any defendants who are co-accused. Assess whether you are likely to receive conflicting instructions.

It is possible for you to appear for more than one co-accused if their instructions do not conflict. If you take instructions from more than one co-accused and find that their instructions conflict, you cannot ethically continue to act for any co-accused.

If conflict is a possibility but you have already taken instructions from one co-accused, you may continue to act for that co-accused.

If you are concerned about your ability to continue to act for any co-accused, consult the rules relating to ethical conduct under the [Legal Profession Act 2007](#) (Qld).

I. Ensuring instructions fit the charge

12-10 Ensuring instructions fit the charge

Many people who appear on the first date before a criminal court wish to plead guilty, to 'get the matter over and done with'. In many cases, while they wish to plead guilty, they deny committing the offence. In these circumstances, you may continue to act but should advise the defendant of the consequences, including the loss of right to appeal against conviction and that submissions in mitigation will be made on the basis that they are guilty.

You should receive written instructions from the defendant before proceeding. These should include the advice that you have given and confirmation that the defendant is pleading guilty to the facts as alleged by the prosecution.

If a defendant disputes certain factual issues or you believe that a lesser charge should be substituted based on what the defendant has advised, you should engage in a case conference with the prosecution to resolve those issues. Note: If you agree on a charge substitution, an adjournment is likely.

12-11 Changing plea from not guilty to guilty

Sometimes a defendant who has previously denied the charges will change their instructions from not guilty to guilty. You are not required to withdraw or refuse to act further for the defendant in this case. However, to be prudent, you should obtain written authorisation, signed by the defendant, for you to enter the guilty plea. Preferably, you should allow the defendant to enter their own plea before the court. You may then continue to act by making appropriate submissions on the evidence as may be relevant to the question of penalty.

J. Previous convictions

12-12 Previous convictions

A defendant's criminal history will usually be disclosed among the prosecution material. You must take instructions about the accuracy of the history disclosed.

If they are not admitted, the prosecution must then prove the convictions. This could result in the prosecution applying for adjournment.

K. No duty to disclose previous convictions

12-13 No duty to disclose previous convictions

Previously, if a defendant told a duty lawyer about convictions that were not alleged by the prosecutor, neither defendant nor duty lawyer was obligated to tell the court about these additional convictions.

However, the Australian Solicitors Conduct Rules state: 'A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact'.

You must be careful that you do not fall short of this rule if the prosecution does not allege a criminal history where one exists if the failure amounts to an *obvious error* by the prosecution. An example would be where the officer appearing for the prosecution does not locate a history hidden on a file.

Note: Contrast this situation to where there the parties have an agreement not to admit evidence of criminal history.

L. When adjournment may be advisable

12-14 When adjournment may be advisable

In certain circumstances, even though the defendant is entering a guilty plea of guilty, you should still seek to adjourn the matter to when the court has more time to hear the matter. You should advise the court if a plea will be lengthy or complicated so the magistrate can decide whether to adjourn the matter to another court.

In Brisbane Courts 1 and 3, if a matter is estimated to take 20 minutes or more, it is adjourned to Court 20.

In Brisbane, care should be taken when adjourning matters to courts where no duty lawyer appears. If the magistrate refuses to deal with the matter and adjourns it for a lengthy plea in a court not serviced by a duty lawyer, advise the defendant to obtain legal representation or apply for legal aid to ensure they continue to be represented.

M. Explaining effect of conviction

12-15 Explaining effect of conviction

If a defendant with no previous criminal convictions informs you that they wish to plead guilty to an offence, explain to them that this course of action may, by the end of the proceedings, result in a criminal conviction against their name. This conviction could affect future employment prospects or restrict travel to certain countries. The defendant must understand the consequences of a conviction recording.

12-16 Effects of conviction on applicants and employees

If a defendant is employed and at risk of having a conviction recorded, advise them that this could occur and that they could seek an adjournment to obtain further advice from an employee group, union or employer about the consequences of a conviction recording. It is not possible to set out any rule relating to all employers.

N. Explaining options for court on sentencing

12-17 Explaining options for court on sentencing

If a defendant is pleading guilty, you should explain the options that are open to the court on sentence. An experienced solicitor can usually assess reasonably accurately the type of sentence to be expected but the defendant should be fully aware of what could happen.

If an imprisonment term is highly likely, advise the defendant accordingly. If a submission is to be put to the court or a particular type of sentence, obtain full instructions beforehand, particularly where the consent of the defendant is required, e.g. probation or community service.

Similarly, explain to the defendant that, if a fine is imposed, they can apply for a fine option order or the fine may be referred to the State Penalty Enforcement Registry for collection.

12-18 Restitution

In any offence where damage has been occasioned, you should ask the prosecutor for details of the restitution sought before court, and obtain the defendant's detailed instructions about the amount of restitution sought and their capacity to pay. The magistrate may impose a default provision, resulting in the defendant being jailed if they cannot pay the restitution within the time allowed. The court can refer the collection of restitution to the State Penalty Enforcement Registry. A fine option order is not available on orders to pay restitution, and default imprisonment periods for non-payment of restitution are cumulative with any other sentence, unless the court orders otherwise.

O. Obtaining full instructions

12-19 Obtaining full instructions

Although, as a duty lawyer, you are faced with time constraints, you must obtain instructions that are as detailed as possible in the circumstances. Always obtain instructions about the defendant's age, background, antecedents, employment history and prospects. Also, always obtain instructions about the commission of the offence and look carefully for any mitigating factors.

P. Facts on sentence

12-20 Facts on sentence

Under s 132C of the [Evidence Act 1977](#) (Qld), the court may act upon an allegation of fact that is admitted or not challenged. However, if a particular allegation of fact is not admitted or is challenged, the court may act upon the allegation of fact if satisfied that the allegation is true.

This applies to any sentencing proceeding, and applies equally to allegations of fact raised by both the prosecution and defence.

If an allegation of fact that is contested is advanced in favour of a defendant, the court may need to adjourn to call evidence supporting the allegation of fact.

Q. Penalties and Sentences Act sentencing guidelines

12-21 Penalties and Sentences Act sentencing guidelines

You should be familiar with the sentencing guidelines in s 9 of the Penalties and Sentences Act (see [Chapter 15](#)).

R. Being as concise as possible

12-22 Being as concise as possible

When making a submission in the magistrates court, you should always be as concise as possible. Magistrates invariably have many matters to deal with and are conscious of the limited time they have to hear matters. Make your points quickly and precisely. A repetitious duty lawyer may do a defendant a disservice.

S. Suggesting available options

12-23 Suggesting available options

As duty lawyer, you should venture a submission on penalty. For example, the defendant may, through age and antecedents, be a candidate for probation. In these circumstances, you should suggest probation to the court as a possible sentencing option.

Note: Section 9(2)(a)(i) of the Penalties and Sentences Act states that imprisonment should be imposed only as a last resort.

12-24 Drivers licence disqualification as additional punishment

Be aware that, apart from the mandatory disqualification provisions in the Transport Operations (Road Use Management) Act (s 86), if an offender is convicted of an offence in connection with or arising out of them driving a motor vehicle, the court may order that the licence be disqualified absolutely or for a period after considering the nature of the offence and the circumstances in which it was committed (Penalties and Sentences Act, s 187).

T. Procedures after court

12-25 Procedures after court

If a defendant is sentenced in a way that results in error or is manifestly excessive, you should contact them after court and advise them of their rights to appeal to the district court under s 222 of the Justices Act.

In appropriate cases consideration should be given to making an application for appeal bail. Instructions from the client should also be sought.

Chapter 13

Sentencing options

Chapter 13—Sentencing options

A. Sentencing options and relevant legislation	(13-1)
B. Discharge	(13-2)
C. Orders under s 190 of the Penalties and Sentences Act	(13-3)
D. Good behaviour bonds, including drug diversion	(13-4–13-7)
E. Fines	(13-8–13-11)
F. Fine option orders	(13-12)
G. Community service orders	(13-13)
H. Probation	(13-14–13-16)
I. Intensive correction orders	(13-17)
J. Imprisonment	(13-18–13-22)
K. Other orders	(13-23–13-25)
L. Drug Court	(13-26)
Appendix A—Sentencing principles—Penalties and Sentences Act 1992	

A. Sentencing options and relevant legislation

13-1 Overview

Below is a summary of sentencing options and the legislation they fall under. These options are discussed in more details throughout this chapter.

Sentencing option	Relevant legislation
Discharge	s 19 Penalties and Sentences Act 1992 (Qld) (PSA)
s 190 orders	s 190 PSA
Good behaviour bonds, including drug diversion	Drug diversion—s 15B–15F, ss 16–19, ss 20–21 PSA Property offences—ss 22–28 PSA Other bonds—ss 29–33 PSA
Fines/fine option orders	ss 44–51, 52–89, 185 PSA ss 65, 79, 63, 104, 119 State Penalties Enforcement Act 1999 (Qld) (SPEA)
Community service orders	ss 100–109 PSA
Probation	ss 90–99 PSA
Intensive correction orders	ss 111–119 PSA
Imprisonment	ss 152–160H PSA ss 205, 209, 213 Corrective Services Act 2006 (Qld) (CSA)
Other orders	
Restitution and compensation	ss 34–43 PSA
Non-contact orders	ss 43A–43F PSA

B. Discharge

13-2 Where a court may discharge

If a defendant is convicted of a trivial offence or there is some other extenuating circumstance, under s 19 of the Penalties and Sentences Act, the court may discharge the defendant absolutely or place them on a good behaviour bond for up to three years without recording a conviction.

The court will do this if it considers it appropriate to impose only a nominal punishment.

In minor stealing matters where the defendant has spent some time in custody, absolute discharge may still be appropriate (see *Thirty v Stuart* [1995] QCA 509).

C. Orders under s 190 of the Penalties and Sentences Act

13-3 Section 190 orders

If a magistrates court convicts someone of an offence relating to property, it may release the person without imposing any sentence if the defendant pays an amount ordered by the court. This amount is to be for damages and may include costs (Penalties and Sentences Act, s 190). The order is a sentence and an act that gives right to appeal (s 191).

D. Good behaviour bonds, including drug diversion

13-4 Types of bonds

There are three kinds of bonds under the Penalties and Sentences Act:

- s 19 bond as described above
- ss 30, 31 or 32 bond
- s 24 bond for property-related offences.

These three bonds are discussed further below.

13-5 Bonds under s 19

These bonds can be given in relation to indictable or summary offences under any Act. No conviction is recorded.

Section 19 bonds are also given for drug diversion. Drug diversion involves entering into a recognisance with a condition to attend a drug education session (s 19(2A)).

Drug diversion is available for people charged with:

- possession of a dangerous drug in quantity not exceeding the schedule amount (i.e. a quantity which would have to be dealt with in the Supreme Court) s 9
- possessing things used in relation to administration of a drug s 10(2)
- failing to take care with a syringe s 10(4)
- failing to dispose of a syringe s 10(4A).

Drug Diversion is not available for people who have current proceedings or convictions for the following offences:

- offences of a sexual nature
- trafficking, supply, producing or possessing dangerous drugs dealt with, or to be dealt with, in the Supreme Court

- indictable offences including violence other than common assault and serious assault (340(1)(a) or (1)(b)).

If a defendant appears suitable for Drug Diversion, they will be assessed by a Court Diversion Officer at court. The officer will complete an assessment form which may include details of the drug education appointment. This form will be provided to the court by the assessing officer.

Court diversions can be offered on no more than two occasions (s 15C(2)(c)). This includes a diversion under the Police Diversion Program and the Court Diversion Program.

13-6 Bonds for property-related offences

When a defendant is convicted of an offence relating to property, they may be placed on a s 24 bond. The court adjourns the sentencing to a date within six months and releases the defendant on a recognisance. The recognisance will require the defendant to return for sentence if called and may also require them to restore property, reinstate property, or pay compensation for damage caused to property.

13-7 Bonds under ss 30, 31 and 32

Section 30 bonds are available for indictable offences.

Section 31 bonds are available for summary offences. These bonds cannot be for more than one year, and contain the condition that the defendant must keep the peace and be of good behaviour.

Section 32 bonds are available instead of any other penalty.

If an order is made for compensation as part of a s 19 bond, check that it complies with the provisions of s 35.

Example case 1

In the case of *R v Ferrari* [1997] 2 Qd R 472; [1997] QCA 73, an order was made under s 19(3) for the payment of compensation. The appellate court held that the condition could not stand because the magistrate could not be satisfied, on the evidence before the court, that the offender participated with a co-offender to cause the damage for which the order for compensation had been made.

Example case 2

In rare cases, s 19 orders may be available for stealing offences, such as *Thirty v Stuart (supra)*, where the applicant took the complainant's bag from the steps of a church. A witness saw and contacted the police. The applicant left the bag, including about \$100 cash, in a place where it could easily be found. When he saw police in the area, he approached them and volunteered that he was the person who had taken the bag. He said that he had taken the bag because he wanted to buy dinner. The bag was returned to the owner before she realised it had been taken.

The magistrate imposed a sentence of 30 days imprisonment. The applicant was aged 20 years and had no previous convictions. The appellate court found that the circumstances of this case took it out of the ordinary. The court noted that most stealing offences will not be appropriately dealt with under s 19(1). However, the court found that the offence and its surrounding circumstances, including the two days spent in custody pre-sentence, were such that, by the time the magistrate heard the matter, a nominal penalty was appropriate. The court released the applicant absolutely under s 19.

E. Fines

13-8 How fines can be imposed

Fines can be imposed with or without recording a conviction. One fine may be imposed for multiple offences (Penalties and Sentences Act, s 49).

13-9 Amount of fine

Maximum fines where the Act does not prescribe limits:

	Magistrates court	District court	Supreme Court
Individual	165 penalty units	4175 penalty units	No limit
Corporation	835 penalty units	No limit	No limit

See s 5 for the definition of ‘penalty units’ (\$100 as at time of printing).

In determining the amount of the fine, the court must take into account the offender’s financial circumstances and the burden that paying the fine will place on the offender (s 48).

13-10 Time to pay

A court has three options when imposing a fine:

- allow time to pay (s 51)
- order the fine be paid by instalments (s 50)
- refer the fine to the State Penalties Enforcement Registry (SPER) for registration (s 51).

If a client cannot pay the fine in the time the court allows, they can apply to the clerk of the court for an extension of time. The application must be in writing and is normally granted only when the offender has made a reasonable effort to pay in the time allowed and the application is made within the time allowed.

If the court refers the matter to the SPER, the defendant will not have to pay the administration fee incurred when a fine is referred to the SPER during or after time allowed to pay.

If the fine is not paid in the time allowed by the court or court registrar, the registrar will refer the fine to the SPER (State Penalties Enforcement Act, s 34, and Penalties and Sentences Act, s 185A).

The SPER is then responsible for collecting the outstanding fine. They will send a letter to the defendant and give them 28 days to decide whether to:

- pay the amount in full
- apply to pay by instalments
- apply for a financial assessment to determine whether they are eligible for a fine option order.

If the defendant does not respond, they may have to pay additional fees and are potentially liable to a number of actions, including having their drivers licence suspended, property seized and sold or wages paid directly by employer to SPER, or a warrant issued for their arrest and imprisonment.

13-11 Default of payment

When imposing a fine, a court may make an order for either imprisonment or execution against property in default of payment. These orders are most commonly known as ‘default days’ or ‘levy and distress’.

Under s 185 of the Penalties and Sentences Act, a person who does not pay a penalty as required may be imprisoned. The maximum period of imprisonment is 14 days per penalty unit. Default days must be served cumulatively with any other period of imprisonment unless the court orders otherwise (s 185(2b)).

Example case 1

Dart v Jacklin & Ingerson [2007] QDC 371—excessive fines reduced

Ms Dart was dealt with in the magistrates court on 21 February 2007 for five charges: one charge of public nuisance, three charges of stealing and common assault. The magistrate fined her \$600 for the public nuisance, in default 24 days with no time to pay, and \$1200 for the other offences with 48 days in default with no time to pay.

The first charge related to her causing a disturbance at the Department of Child Safety when Ms Dart was not allowed to see her child.

The other offences all occurred on 12 December and related to her stealing a DVD player valued at \$149 from Woolworths, underwear from Big W valued at \$89.40, and four DVDs, three chap sticks, six hair bands, a packet of girls underwear and a packet of chocolates from Supa IGA valued at \$120.28.

The common assault involved her throwing a cigarette butt at the security officer of Supa IGA, who had stopped her on suspicion of stealing.

Ms Dart had a criminal history with relatively minor charges where no prison sentence had been involved and only one previous occasion involving stealing—on 6 April 2006 when she was convicted and placed on probation for two years.

The District Court found the learned magistrate's sentencing discretion miscarried in relation to each of the penalties he had imposed. The court found they were manifestly excessive and should be set aside. The offences in question did not warrant such penalties.

The District Court imposed a recognisance of \$200 for 12 months for the first offence and a fine of \$450 to be referred to SPER in default.

Example case 2

R v Stephens [2006] QCA 123—fine halved, court compared amount of fine to total assets

On 10 November 2005 Barry Stephens pleaded guilty to a count on an indictment charging that on 25 May 2002 at Brisbane he had attempted to obtain dishonestly a sum of money from NRMA Insurance Ltd, and that the intended benefit to him from the dishonesty was \$23,000.

On 11 November 2005, he was sentenced to 12 months' imprisonment, wholly suspended for an operational period of three years, and fined \$20,000. That fine was to be paid on or before 11 November 2006 in default of six months' imprisonment.

The Court of Appeal found that the \$20,000 fine was manifestly excessive, considering Mr Stephens' age (65 at time of offence), lack of prior convictions, his limited assets and his status as a pensioner, coupled with the lack of any benefit to him from his attempted fraud.

The fine was approximately 10 per cent of all his assets; the court reduced the fine to \$10,000.

F. Fine option orders

13-12 When a court may make a fine option order

A court may order that a fine be converted into a fine option order. This involves a person agreeing to perform community service in lieu of paying their fine. There is a maximum of five hours of community service per penalty unit (s 69).

A court will make such an order when they are satisfied that the person either:

- is unable to pay the fine
- would suffer economic hardship and is a suitable person to perform community service.

A fine option order is structured similarly to a community service order. It includes the requirements to report to corrective services, perform community services as required, notify of changes of address and employment, and not leave Queensland without permission (s 67).

The person must complete the community service hours within one year, unless the court provides another time period in the order.

If the person does not apply for a fine option order on the day of sentence, provided they are given a fixed time to pay the fine, they may apply for an order any time before the end of the fixed period (s 55).

There is no limit on the total number of hours under a fine option order compared with a community service order.

Example case 1

Sprenger v Sanderson [1992] 1 Qd R 580

A magistrate sentenced the applicant on 22 charges of receiving stolen goods and false pretences. The court imposed fines totalling \$2850 but made cumulative fine option orders for each totalling 448 hours of community service.

The appeal was made on the basis that, under the Corrective Services Act, the limit on community service was a total of 240 hours.

The court held that there was no prescribed limit on the number of hours. The amount of community service was at the court's discretion. (Note: s 238 of the Corrective Services Act is essentially the same as the current provision under s 69 of the Penalties and Sentences Act.)

G. Community service orders

13-13 When a court may make a community service order

A community service order (CSO) can be made when a defendant is convicted of a regulatory offence or any offence punishable by a term of imprisonment and consents to the order being made (Penalties and Sentences Act, ss 101 and 106).

The order requires the defendant to perform 40–240 hours of community service in one year, unless otherwise stated by the court.

The court can make an order for community service and probation (s 109).

Section 103 sets out the requirements of a CSO, including that the defendant:

- not commit another offence during the order
- report and receive visits as required
- perform community service in a satisfactory way
- notify corrective services or changes of residence or employment within two business days
- not leave Queensland without permission.

Some magistrates will require defendants to be assessed by a probation and parole officer to confirm whether they are suitable for a community-based order. For magistrates courts other than the Brisbane Magistrates Court at Roma Street, this may require the registry to contact a probation and parole district office to arrange for an officer to attend the court.

Example case 1

R v Marsden [2003] QCA 473—appeal from three years’ probation and 240 hours CSO for common assault—new sentence 120 hours CSO

Mr Marsden was 37 years old with no previous convictions. He pleaded guilty in the district court to common assault of his wife.

He was placed on probation for three years and ordered to do 240 hours’ community service with special conditions that he undertake an anger management course and have no contact with the complainant. A conviction was also recorded.

The assault involved an argument with his wife, during which he threw a can of baby food at her but missed. He then walked towards her and hit her with his fist or forearm four or five times to the head. At the time, she had one of the children on her hip. She fell to the floor, got up and was slapped across the face by the applicant.

When interviewed, Mr Marsden told the police that he did not dispute his wife’s version of events and that he had ‘lost it’. There was a full hand-up committal and a timely plea of guilty.

The court found that probation would be of little assistance to Mr Marsden because of his age and other personal circumstances.

The sentence was set aside and a new sentence of 120 hours’ community service was imposed. No conviction was recorded.

Example case 2

R v Vincent; ex parte Attorney-General [2001] 2 Qd R 327; [2000] QCA 250—court makes a CSO and imposes a wholly suspended sentence for different offences

At [13] ‘The present combination will be invalid only if the imposition of a community service order is inconsistent with concurrent imposition of a suspended imprisonment order. In our view there is no inconsistency between such orders. If, prior to completing the community service, the offender committed another offence and was required by the court to serve the suspended term or part of it, there is no reason why the balance of the community service could not be performed after the offender’s release. Section 103(2)(b) requires that the necessary number of hours must be performed “within one year of the making of the order or another time allowed by the court” (our emphasis). This gives the court jurisdiction to extend the time for performance of the community service order to such time as might be thought reasonable having regard to the interruption brought about by the activation of the suspended sentence. We see no necessary inconsistency or conflict of the kind identified in *R v M ex parte Attorney-General*. It is neither necessary nor desirable to extend the restrictive effect of *R v Hughes* into the present sentencing options’.

H. Probation

13-14 When a court may order probation

Under the Penalties and Sentences Act, probation can be ordered when a person is convicted of any offence punishable by a term of imprisonment or regulatory offence other than in default of fine payment (s 92). A defendant must consent to the court making a probation order (s 96).

Probation orders can be made for periods of not less than six months or more than three years (s 92). The court has discretion about whether to record a conviction.

Prison and probation can be ordered if the imprisonment period does not exceed one year and the probation is between nine months and three years in duration (s 92(2)). A conviction must be recorded with this kind of order.

Under s 93, the mandatory conditions of a probation order include ‘requirements that the offender—

- (a) must not commit another offence during the period of the order; and
- (b) must report to an authorised corrective services officer at the place, and within the time, stated in the order; and
- (c) must report to, and receive visits from, an authorised corrective services officer as directed by the officer; and
- (d) must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order; and
- (e) must notify an authorised corrective services officer of every change of the offender’s place of residence or employment within 2 business days after the change happens; and
- (f) must not leave or stay out of Queensland without the permission of an authorised corrective services officer; and
- (g) must comply with every reasonable direction of an authorised corrective services officer’.

Section 94 sets out additional requirements that a court can add to an order, including submitting to medical treatment and making compensation.

13-15 Programs on probation

Corrective Services offer a range of programs for people on probation. Reference to the availability of specific programs can form part of your submission about why probation is an appropriate order.

These programs include:

- Turning Point: Preparatory Program—which helps people prepare to change their offending behaviour. This program helps people weigh up the pros and cons of changing their behaviour and helps them become more confident about their ability to make positive changes in their lives.
- Getting SMART—a moderate-intensity substance abuse program which teaches people to use cognitive behavioural therapy principles, theories, tools and techniques to abstain from any type of addictive behaviour.
- Making Choices program—which addresses general offending behaviour and helps participants examine how they came to offend, while also helping them recognise points where different choices could be made. Different versions of this program have been developed for male and female offenders.
- Cognitive Self-Change program—high-intensity cognitive behavioural intervention specifically for high-risk adult prisoners for whom the repeated use of violence is part of a general pattern of antisocial behaviour and criminality.
- Ending Family Violence program—which tackles violence within Indigenous families and develops culturally appropriate solutions to protect adults and children from the effects of domestic violence.
- Ending Offending program—which meets the needs of Aboriginal and Torres Strait Islander offenders in a culturally appropriate manner. The overall aim is to modify the drinking and offending behaviour of Indigenous offenders.

13-16 Offices

Defendants given probation (or parole) are required to report to a probation and parole office within a specified period of their sentence. It may be useful to consider which is their closest office:

Beenleigh	Emerald	Mackay	Rockhampton
Brisbane Central—Spring Hill	Gladstone	Mareeba	Toowoomba
Brisbane North—Chermside	Gympie	Maroochydore	Roma
Brisbane South—Buranda	Hervey Bay	Mt Gravatt	Southport
Bundaberg	Inala	Mt Isa	Thuringowa
Burleigh Heads	Innisfail	Noosa Heads	Thursday Island
Caboolture	Ipswich	Pine Rivers	Townsville
Cairns	Kingaroy	Redcliffe	Wynnum
Cleveland	Logan City		

Example case 1

R v Holmes [2008] QCA 259—ICO sentence appealed, replaced with probation order

Mr Holmes pleaded guilty to one count of possession of a dangerous drug, three counts of supplying a dangerous drug and one count of possession of money suspected to be the proceeds of selling a dangerous drug. The original sentence was 12 months' imprisonment to be served via an intensive correction order.

Mr Holmes was found with four tablets and admitted in a record of interview to selling four tablets. He sold the tablets for the same amount he paid for them.

The matter proceeded by way of full-hand up with a plea entered at committal.

Mr Holmes was 19 at the time of the offence and 20 at sentence. He was an apprentice electrician. References, a psychologist's report and a letter from Mr Holmes were tendered at sentence.

The court held that insufficient weight had been placed on Mr Holmes' cooperation. The court substituted a sentence of two years' probation without recording a conviction.

Example case 2

Kylie-Maree Corkill v Steven L Wilson [2009] QDC 13—appropriate additional conditions for probation

Ms Corkill was convicted of one count of assault occasioning bodily harm and sentenced to 12 months probation, with special conditions, and ordered to pay \$750 compensation to the victim.

The special conditions were that she not consume any alcohol or enter licensed premises.

The court found that the additional conditions were draconian and that the magistrate had not explained why he felt they were necessary for her rehabilitation.

The conditions were removed from the order.

The court also set aside the order for compensation, as it held that the magistrate merely adopted a figure from another statutory regime *Criminal Offence Victims Act 1995* (COVA) arbitrarily without weighing up other considerations.

I. Intensive correction orders

13-17 When a court may impose an intensive correction order

If a court sentences a defendant to an imprisonment term of one year or less, the court may make an intensive correction order (ICO) as an alternative to actual imprisonment.

The effect of the order is that the defendant serves the imprisonment sentence by way of intensive correction in the community rather than a prison.

While, practically, it is a term of imprisonment, it is similar to a combination of probation and community service with stringent conditions and severe consequences for breach.

The orders contain the same provisions as probation. However, they also prescribe that the defendant visit or receive visits from corrective services at least twice a week, reside in a community residential facility if required and perform community service.

A conviction must be recorded when a court makes an ICO.

An ICO is the final option before the imposition of an actual custodial sentence (see *R v Tran; ex parte Attorney-General* (2002) 128 A Crim R 1; [2002] QCA 21).

J. Imprisonment

13-18 When a court may order imprisonment

Generally, imprisonment is a sentence of last resort (Penalties and Sentences Act, s 9(2)).

This principle does not apply to offences that:

- involve the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person
- result in physical harm to another person
- are of a sexual nature, committed in relation to a child under 16 years
- relate to possessing child abuse games, films, or photographs
- involve possessing, making or distributing child exploitation material.

There are some offences for which imprisonment is mandatory, including:

- murder
- driving under the influence where there have been two prior convictions in the last five years for the same offence, dangerous operation, or on indictment for any offence in connection with or arising out of the driving of a motor vehicle.

13-19 Concurrent versus cumulative sentences

Generally, an imprisonment sentence must be served concurrently with all other imprisonment terms (s 155). All sentences may be ordered to be served cumulatively, but must be cumulative if the offence is:

- listed in the Serious Violent Offence Schedule
- committed while serving a term of imprisonment
- committed on parole, or other leave from prison
- committed whilst unlawfully at large, or
- an offence under s 33(1) of the Bail Act.

As discussed above, imprisonment ordered as a period in default of payment for fines will be serviced cumulatively with any other sentence of imprisonment unless the court orders otherwise (s 185(2)(b)).

13-20 Wholly or partially suspended sentences

A court may order that an imprisonment sentence be suspended where a court sentences a defendant to imprisonment for five years or less (s 144(1)).

The court can order that the sentence be wholly or partially suspended. The court must set an operational period, which must be at least the same period as the imprisonment, and less than five years.

The defendant must not commit another offence punishable by imprisonment during the term of the suspended sentence or the court must deal with them under s 147.

Section 147(2) requires a court to order the defendant to serve all the suspended sentence unless it believes it would be unjust to do so.

The court will consider the following factors to determine whether it is unjust to order the defendant to serve the whole term:

- the nature and circumstances of the subsequent offence
- the proportion between culpability for the subsequent offence and consequences of activating the whole of the suspended imprisonment

- antecedents, including previous similar offences
- attempts at rehabilitation
- the seriousness of the original offence
- any special circumstances that would make it unjust to impose the whole term.

If satisfied that it is unjust to order the defendant to serve the whole term, the court may either:

- extend the operational period of the suspended sentence for no more than one year from the date of the original order
- order the defendant to serve part of the imprisonment.

The ordinary rules relating to parole apply to the activation of a suspended sentence.

13-21 Pre-sentence custody

Time spent in custody for an offence or group of offences and for no other reason ordinarily must be declared as time already served under a sentence (s 159A).

Time cannot be declared if a person is serving a sentence or on remand for other offences. It may be taken into account.

However, if a person is charged with several offences committed on different occasions and has been in custody on those charges alone, the time starts when first arrested, even if the person is not convicted of the first offence/s with which they were charged (s 159A(4))

To assist the court, the prosecuting authority must give the court a pre-sentence custody certificate (s 159(4A)).

13-22 Parole

Due to the 2006 changes to the legislation, there are now only two kinds of release from prison: court-ordered parole and board-ordered parole.

This means a court has two options at sentence: order either a parole release date or parole eligibility date.

Sections 160A–E ensure that there is only ever one release or eligibility date for an offender, no matter how many times they have been sentenced (s 160F)

Court-ordered parole (parole release date) (s 160B(3))

A court can set a parole release date where:

- the sentence is three years or less
- the offence is not a serious violent offence (see Schedule)
- the offence is not a sexual offence
- the person has not had parole cancelled under ss 205 or 209 of the Corrective Services Act.
- Board-ordered parole (parole eligibility date) (ss 160B(2), 160C, 160D, 213)
- A court can order the date after which a person will be eligible to apply for board-ordered parole if the sentence is more than three years.

The court may make an order for a parole eligibility date whether or not the offence is a serious violent offence or sexual offence.

If a person already has a parole release date or a parole eligibility date, the court must order a new parole eligibility date. The new date must not be earlier than the previous date.

Transitional provisions—post-prison, community-based release

A date recommended under former s 157 as the date that a defendant can be eligible for post-prison, community-based release is taken to be the parole eligibility date fixed for the defendant (s 213)

Release on parole

The court can fix any day as a parole release date (s 160G).

If the release date is the last day of the sentence, they do not have to report and a court-ordered parole order does not have to be issued (s 160G(2)).

When released on parole, a person is required to report to a probation and parole office usually within 24 hours or on the next business day. Failing to do so makes them unlawfully at large under the Corrective Services Act (Penalties and Sentences Act, s 160G(4)).

When parole is cancelled

Under s 209 of the Corrective Services Act, a prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment during the period of the order.

Under s 209(3)(b) of the Corrective Services Act, there are some exceptions where the relevant imprisonment period:

- '(i) is required to be served under an intensive correction order; or
- (ii) is wholly suspended under the *Penalties and Sentences Act 1992*, part 8; or
- (iii) is wholly suspended because of an order, under the *Drug Court Act 2000*, section 20(1)(a), contained in an intensive drug rehabilitation order'.

When parole is suspended

The chief executive can suspend parole if they believe a person:

- failed to comply with the parole order
- poses a serious and immediate risk of harm to another
- poses an unacceptable risk of committing an offence
- is preparing to leave Queensland, other than under a written order granting leave.

A parole order can be amended if a person is believed to pose a serious and immediate risk of harm to themselves.

An order made by the chief executive to amend or suspend parole has effect for a maximum of 28 days (Corrective Services Act, s 201).

A parole board can amend, suspend or cancel parole for the same reasons listed above. That decision (subject to appeal) is final (Corrective Services Act, s 205).

Example case 1

R v Kitson [2008] QCA 86—if an unusual parole release date is to be ordered, the court ought to give reason and allow submissions

Mr Kitson was convicted of one count of unlawful possession of the dangerous drug methylamphetamine, one count of unlawful possession of the dangerous drug methadone and one count of possession of a mobile phone for use in connection with committing the crime of supplying a dangerous drug.

He was sentenced to 12 months on each count, with an order that he be released on parole on 29 August 2008.

The appeal was on the grounds that the sentence was manifestly excessive, particularly the specification of a parole release date after three-quarters of the sentence would have been served.

The appeal was successful. The court held that, for a release date after the halfway point of the head sentence, the court ought to give reasons and the parties should have been given an opportunity to be heard on the issue. The court substituted a sentence of 15 months' imprisonment with a parole release date fixed after six months on 29 May 2008.

Example case 2

R v Leu; R v Togia (2008) 186 A Crim R 240; [\[2008\] QCA 201](#)—parole dates past halfway

In this case, the head sentence for the co-accused was five years' imprisonment with a parole eligibility date after three years. The court did not give reasons for setting the date past the halfway mark and the appellate court found there were none. The sentences were reduced and the parole eligibility dates brought forward.

Example case 3

Sobieralski v Commissioner of Police [\[2009\] QCA 90](#)—imprisonment and fines

This case discussed the appropriateness of combining imprisonment with substantial monetary penalties. The court noted that it is important to consider whether the fines will be paid or are likely to lead to a cumulative sentence of imprisonment. The court held that, in such a case, it is important to consider whether the effective sentence imposed offends against the totality principle referred to by the High Court in *Mill v The Queen* (1988) 166 CLR 59; [\[1988\] HCA 70](#).

Example case 4

Moore v Lewis [\[2008\] QDC 105](#)—imprisonment for animal cruelty set aside; 18 months probation confirmed

Mr Moore was sentenced by the magistrates court at Caboolture on one count of animal cruelty. He was sentenced to one month's imprisonment and an 18 month probation order. He was granted bail after five days in custody.

Mr Moore was 17 years old at the time of the offence and 18 at sentence. He had a minor history (public nuisance, fare evasion, police obstruction). For this offence, he had kicked a kitten twice in a park. The kitten was later found dead.

The appellate court held that s 9(2) still applied. Imprisonment was a last resort and the need for a deterrent did not justify a custodial sentence. The order for imprisonment was set aside.

Example case 5

R v Coutts [\[2008\] QCA 380](#)—imprisonment set aside; probation ordered

Ms Coutts pleaded guilty in the Toowoomba District Court to assault occasioning bodily harm (AOBH). She was sentenced to three months' imprisonment with a parole release date set at the end of that period.

Ms Coutts had a criminal history for various street offences and was on probation for another AOBH at the time of sentence.

The relevant offence related to a fight in a nightclub where Ms Coutts had pushed the complainant over and, when the complainant had given her 'the finger', dragged her several metres by her hair.

Ms Coutts was 19 years old at the time of the offence and 21 at sentence. Her personal circumstances were very unfortunate—she had a very young child, issues with drug addiction and previous experience of domestic violence.

The original sentencing court received a report from the probation office that was not favourable for Ms Coutts.

The appellate court took into account the fact that Ms Coutts had made very significant efforts at rehabilitation. She had completed the 100 hours community service order for the prior conviction after being granted bail. She had also met her bail conditions.

The order for imprisonment was set aside and a new order made for two years and three months of probation.

K. Other orders

13-23 Restitution and compensation

A court can make an order for restitution or compensation under s 35 of the Penalties and Sentences Act. The order can include a number of conditions, including how much is to be paid, who will be paid and the timeframe for payment.

Restitution or compensation payments may be ordered for offences taken into account under s 189. Compensation may be ordered in favour of a person even if they are not the victim of the specific offence.

The court can make an order whether or not it records a conviction (s 34). The payment of restitution and compensation can be referred to the SPER (s 36(c)).

The court can also set default days for non-payment, though the maximum imprisonment term it can order is:

- ‘(a) if the order is made on indictment—1 year; or
- (b) if the order is made on summary conviction—6 months’ (s 37).

13-24 Non-contact orders

When a court convicts someone of a personal offence (an indictable offence committed against the person of someone), it has the power to make a non-contact order.

The court can only make the order if they are satisfied that there is an unacceptable risk that the person will injure, threaten, harass or damage the property of the victim (s 43C(3)).

The order can require a person to not contact named people, or go to a place or within a certain distance of a place.

The maximum length of a non-contact order is two years. (However, under s 43C(2)(a), if the person has been sentenced to imprisonment, the two years does not start until they are released from prison.)

It is an offence to contravene a non-contact order. The maximum penalty is 20 penalty units or one year’s imprisonment (s 43F).

13-25 Banning orders under Part 3B of the Penalties and Sentences Act

A banning order is an order that prohibits an offender from entering or remaining in stated licensed premises or a stated area near licensed premises.

A court can make a banning order if a person is convicted of offence that involves the use, threatened use or attempted use of unlawful violence to a person or property, whether or not a conviction was recorded.

Banning orders run for a maximum of one year (or one year after the end of the term of imprisonment or operational period of suspended imprisonment if either of these penalties are imposed for the offence): s 43I(2).

An order may only be imposed if a court is satisfied that the offender poses an unacceptable risk to the good order of licensed premises or safety and welfare of others: s 43J.

A banning order must be explained to an offender: s 43K. An offender must be given a copy but a failure to do so will not invalidate the order: s 43M.

An application can be brought to amend or revoke an order under s 43L.

It is an offence to contravene a banning order without reasonable excuse: s 43O. The maximum penalty is 40 penalty units or one year’s imprisonment.

L. Drug Court

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.

13-26 Eligibility and referral

The drug court offers some drug-dependent offenders an intensive drug rehabilitation order (IDRO) as an alternative to prison. Drug courts operate in the Beenleigh, Southport, Ipswich, Townsville and Cairns magistrates courts.

Drug court is available to people who are drug dependent and wish to plead guilty to drug-related offences. They must be likely to be sentenced to imprisonment and not have any outstanding charges for sexual offences or offences involving violence (except common assault, serious assault on police or assault with intent to steal).

'Practice Direction No. 3 of 2006' outlines how referrals are made. Basically, once a defendant has indicated a desire to have their matter transferred to the drug court, the referring court will contact the drug court coordinator to ensure that a vacancy exists. If there is a vacancy, the matter will then be adjourned to the magistrates court where the drug court is based.

The Drug Court Act requires people to be residing in certain postcodes to be eligible for referral. All of the correctional centres' postcodes are eligible.

People residing in the following postcodes are eligible:

Drug court	Postcodes
Beenleigh	4059, 4108, 4109, 4110, 4112, 4113, 4114, 4115, 4116, 4117, 4118, 4119, 4123, 4124, 4125, 4127, 4128, 4129, 4130, 4131, 4132, 4133, 4156, 4157, 4163, 4164, 4165, 4184, 4205, 4207, 4208, 4209, 4270, 4280
Cairns	4865, 4868, 4869, 4870, 4878, 4879
Ipswich	4059, 4069, 4070, 4073, 4074, 4075, 4076, 4077, 4078, 4106, 4108, 4110, 4124, 4163, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4340, 4346
Southport	4059, 4163, 4209, 4210, 4211, 4212, 4213, 4214, 4215, 4216, 4217, 4218, 4219, 4220, 4221, 4223, 4224, 4225, 4226, 4227, 4228, 4229, 4271, 4272
Townsville	4810, 4811, 4812, 4813, 4814, 4815, 4817, 4818, 4819

Drug court	Postcodes
Other eligible postcodes	4000, 4006, 4007, 4008, 4009, 4010, 4011, 4012, 4017, 4018, 4030, 4031, 4034, 4035, 4036, 4037, 4051, 4052, 4053, 4054, 4055, 4060, 4061, 4064, 4065, 4066, 4068, 4101, 4102, 4103, 4104, 4105, 4106, 4107, 4111, 4120, 4121, 4122, 4151, 4152, 4153, 4154, 4155, 4158, 4159, 4160, 4161, 4169, 4170, 4171, 4172, 4173, 4174, 4178, 4179, 4275, 4285, 4500, 4501, 4520, 4860, 4861, 4877, 4880, 4881, 4882, 4883, 4884, 4885
	4871, 4872, 4873 (if the person's place of residence is within a 100 km radius of the magistrates court at Cairns)

Appendix A

Sentencing principles—Penalties and Sentences Act

Part 2 (Governing Principles) of the *Penalties and Sentences Act 1992* (Qld) provides:

9 Sentencing guidelines

- (1) The only purposes for which sentences may be imposed on an offender are—
 - (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
 - (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
 - (c) to deter the offender or other persons from committing the same or a similar offence; or
 - (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or,
 - (e) to protect the Queensland community from the offender; or
 - (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).
- (2) In sentencing an offender, a court must have regard to—
 - (a) principles that—
 - (i) a sentence of imprisonment should only be imposed as a last resort; and
 - (ii) a sentence that allows the offender to stay in the community is preferable; and
 - (b) the maximum and any minimum penalty prescribed for the offence; and
 - (c) the nature of the offence and how serious the offence was, including—
 - (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under the *Victims of Crime Assistance Act 2009*, section 15; and
 - (ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence; and
 - (d) the extent to which the offender is to blame for the offence; and
 - (e) any damage, injury or loss caused by the offender; and
 - (f) the offender's character, age and intellectual capacity; and
 - (g) the presence of any aggravating or mitigating factor concerning the offender; and
 - (h) the prevalence of the offence; and
 - (i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and
 - (j) time spent in custody by the offender for the offence before being sentenced; and
 - (k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and
 - (l) sentences already imposed on the offender that have not been served; and
 - (m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender; and

- (n) if the offender is the subject of a community based order—the offender’s compliance with the order as disclosed in an oral or written report given by an authorised corrective services officer; and
 - (o) if the offender is on bail and is required under the offender’s undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender’s successful completion of the program or course; and
 - (p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender’s community that are relevant to sentencing the offender, including, for example—
 - (i) the offender’s relationship to the offender’s community; or
 - (ii) any cultural considerations; or
 - (iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and
 - (q) anything else prescribed by this Act to which the court must have regard; and
 - (r) any other relevant circumstance.
- (3) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—
- (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
 - (b) that resulted in physical harm to another person.
- (4) In sentencing an offender to whom subsection (3) applies, the court must have regard primarily to the following—
- (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
 - (b) the need to protect any members of the community from that risk;
 - (c) the personal circumstances of any victim of the offence;
 - (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
 - (e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;
 - (f) any disregard by the offender for the interests of public safety;
 - (g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;
 - (h) the antecedents, age and character of the offender;
 - (i) any remorse or lack of remorse of the offender;
 - (j) any medical, psychiatric, prison or other relevant report in relation to the offender;
 - (k) anything else about the safety of members of the community that the sentencing court considers relevant.
- (5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
- (a) the principles mentioned in subsection (2)(a) do not apply; and
 - (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.
- (5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.
- (6) In sentencing an offender to whom subsection (5) applies, the court must have regard primarily to—
- (a) the effect of the offence on the child;
 - (b) the age of the child;
 - (c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and
 - (d) the need to protect the child, or other children, from the risk of the offender re-offending;
 - (e) the need to deter similar behaviour by other offenders to protect children; and
 - (f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
 - (g) the offender’s antecedents, age and character; and

- (h) any remorse or lack of remorse of the offender; and
 - (i) any medical, psychiatric, prison or other relevant report relating to the offender; and
 - (j) anything else about the safety of children under 16 the sentencing court considers relevant.
- (6A) Also, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for the following offences—
- (a) an offence against the *Classification of Computer Games and Images Act 1995*, section 28 if the objectionable computer game is a child abuse computer game under the Act;
 - (b) an offence against any of the following provisions of the *Classification of Films Act 1991*—
 - (i) section 41(3) or 42(3) or (4);
 - (ii) section 43, if the offence involves a child abuse film under the Act;
 - (c) an offence against any of the following provisions of the *Classification of Publications Act 1991*—
 - (i) section 14;
 - (ii) section 12, 13, 15, 16 or 17 if the offence involves a child abuse publication or child abuse photograph under the Act;
 - (d) an offence against the Criminal Code, section 228A, 228B, 228C or 228D.
- (6B) In sentencing an offender to whom subsection (6A) applies, the court must have regard primarily to—
- (a) the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown; and
 - (b) the need to deter similar behaviour by other offenders to protect children; and
 - (c) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
 - (d) the offender's antecedents, age and character; and
 - (e) any remorse or lack of remorse of the offender; and
 - (f) any medical, psychiatric, prison or other relevant report relating to the offender; and
 - (g) anything else about the safety of children under 16 the sentencing court considers relevant.
- (7) If required by the court for subsection (2)(p), the representative must advise the court whether—
- (a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or
 - (b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the offender or victim.
- (7A) In sentencing an offender, a court must not have regard to the offender levy imposed under section 179C.
- (7B) In sentencing an offender, a court must not have regard to whether or not the offender—
- (a) may become, or is, the subject of a dangerous prisoners application; or
 - (b) may become subject to an order because of a dangerous prisoners application.
- (8) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—
- (a) the nature of the previous conviction and its relevance to the current offence; and
 - (b) the time that has elapsed since the conviction.
- (9) Despite subsection (8), the sentence imposed must not be disproportionate to the gravity of the current offence.
- (10) In this section—
- actual term of imprisonment* means a term of imprisonment served wholly or partly in a corrective services facility.

10 Court's reasons to be stated and recorded

- (1) If a court imposes a sentence of imprisonment, including a suspended sentence of imprisonment, it must—
- (a) state in open court its reasons for the sentence; and
 - (b) cause the reasons to be—
 - (i) recorded in the transcript that is to be kept in the registry with the indictment; or
 - (ii) recorded in writing and kept in the office of the clerk of the court with the charge sheet; and

- (c) cause a copy of the reasons to be forwarded to the chief executive (corrective services).
- (2) A sentence is not invalid merely because of the failure of the court to state its reasons as required by subsection (1)(a), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

11 Matters to be considered in determining offender's character

In determining the character of an offender, a court may consider—

- (a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and
- (b) any significant contributions made to the community by the offender; and
- (c) such other matters as the court considers are relevant.

12 Court to consider whether or not to record conviction

- (1) A court may exercise a discretion to record or not record a conviction as provided by this Act.
- (2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including—
 - (a) the nature of the offence; and
 - (b) the offender's character and age; and
 - (c) the impact that recording a conviction will have on the offender's—
 - (i) economic or social wellbeing; or
 - (ii) chances of finding employment.
- (3) Except as otherwise expressly provided by this or another Act—
 - (a) a conviction without recording the conviction is taken not to be a conviction for any purpose; and
 - (b) the conviction must not be entered in any records except—
 - (i) in the records of the court before which the offender was convicted; and
 - (ii) in the offender's criminal history but only for the purposes of subsection (4)(b).
- (3A) Despite subsection (3)(b), the conviction may be entered in a record kept by a department, a prosecuting authority or the offender's legal representative if it is necessary for the legitimate performance of the functions of the department, prosecuting authority or legal representative.
- (4) A conviction without the recording of a conviction—
 - (a) does not stop a court from making any other order that it may make under this or another Act because of the conviction; and
 - (b) has the same result as if a conviction had been recorded for the purposes of—
 - (i) appeals against sentence; and
 - (ii) proceedings for variation or contravention of sentence; and
 - (iii) proceedings against the offender for a subsequent offence; and
 - (iv) subsequent proceedings against the offender for the same offence.
- (5) If the offender is convicted of a subsequent offence, the court sentencing the offender may disregard a conviction that was ordered not to be recorded but which, under subsection (3)(b)(ii), is entered in the offender's criminal history.
- (6) If—
 - (a) a court—
 - (i) convicts an offender of an offence; and
 - (ii) does not record a conviction; and
 - (iii) makes a probation order or community service order for the offender; and
 - (b) the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence;the conviction for the offence must be recorded by the second court.
- (7) Despite subsection (6), the second court is not required to record the conviction for the offence if—
 - (a) the offender is the subject of a community service order or probation order; and

- (b) the reason the court is dealing with the offender for the same offence is because the offender has applied for a revocation of the community service order or probation order; and
- (c) the offender has not breached the community service order or probation order.

13 Guilty plea to be taken into account

- (1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—
 - (a) must take the guilty plea into account; and
 - (b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.
- (2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—
 - (a) pleaded guilty; or
 - (b) informed the relevant law enforcement agency of his or her intention to plead guilty.
- (3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.
- (4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—
 - (a) that fact; and
 - (b) its reasons for not reducing the sentence.
- (5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

13A Cooperation with law enforcement authorities to be taken into account

- (1) This section applies for a sentence that is to be reduced by the sentencing court because the offender has undertaken to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding.
- (2) Before the sentencing proceeding starts, a party to the proceeding—
 - (a) must advise the relevant officer—
 - (i) that the offender has undertaken to cooperate with law enforcement agencies; and
 - (ii) that written or oral submissions or evidence will be made or brought before the court relevant on that account to the reduction of sentence; and
 - (b) may give to the relevant officer copies of any proposed written submissions mentioned in paragraph (a)(ii).
- (3) After the offender is invited to address the court—
 - (a) the offender's written undertaking to cooperate with law enforcement agencies must be handed up to the court; and
 - (b) any party may hand up to the court written submissions relevant to the reduction of sentence.
- (4) The undertaking must be in an unsealed envelope addressed to the sentencing judge or magistrate.
- (5) If oral submissions are to be made to, or evidence is to be brought before, the court relevant to the reduction of sentence, the court must be closed for that purpose.
- (6) The penalty imposed on the offender must be stated in open court.
- (7) After the imposition of the penalty, the sentencing judge or magistrate must—
 - (a) close the court; and
 - (b) state in closed court—
 - (i) that the sentence is being reduced under this section; and
 - (ii) the sentence it would otherwise have imposed; and
 - (c) cause the following to be sealed and placed on the court file with an order that it may be opened only by an order of the court, including on an application to reopen the sentencing proceedings under section 188(2)—
 - (i) the written undertaking;
 - (ii) a record of evidence or submissions made relevant to the reduction of sentence and the sentencing remarks made under paragraph (b).

- (8) The sentencing judge or magistrate may make an order prohibiting publication of all or part of the proceeding or the name and address of any witness on his or her own initiative or on application.
- (9) In deciding whether to make an order under subsection (8), the judge or magistrate may have regard to—
- (a) the safety of any person; and
 - (b) the extent to which the detection of offences of a similar nature may be affected; and
 - (c) the need to guarantee the confidentiality of information given by an informer.
- (10) A person who contravenes an order made under subsection (8) commits an offence.
- Maximum penalty—
- (a) for an order made by a judge—5 years imprisonment; or
 - (b) for an order made by a magistrate—3 years imprisonment.
- (11) In this section—
- relevant officer means—
- (a) for a proceeding before the Supreme or District Court—the sentencing judge’s associate; or
 - (b) for a proceeding before a Magistrates Court—the relevant clerk of the court.

14 Preference must be given to compensation for victims

If a court considers—

- (a) that it is appropriate—
 - (i) to make an order for compensation (whether under this or another Act); and
 - (ii) to impose a fine or make another order for payment of an amount of money; and
 - (b) that the offender can not pay both the compensation and the fine or amount;
- the court must give preference to making an order for compensation, but may also impose a sentence other than that of imprisonment.

15 Information on sentence

- (1) In imposing a sentence on an offender, a court may receive any information, including a report mentioned in the *Corrective Services Act 2006*, section 344, that it considers appropriate to enable it to impose the proper sentence.
- (2) An authorised corrective services officer must not, in any information or report, recommend that a fine option order or community based order should not be made for an offender merely because of—
 - (a) any physical, intellectual or psychiatric disability of the offender; or
 - (b) the offender’s sex, educational level or religious beliefs.

15A Audiovisual link or audio link may be used to sentence

- (1) The court may allow anything that must or may be done in relation to the sentencing of an offender to be done over an audiovisual link or audio link, if the prosecutor and the offender agree to the use of the link.
- (2) For sections 10(1) and 13(3) or (4), anything done, for an offender’s sentencing, over an audiovisual link or audio link between the offender and the court sitting in open court is taken to be done in open court.
- (3) The provisions of the *Evidence Act 1977* relating to the use of an audiovisual link or audio link in criminal proceedings apply for, and are not limited by, subsection (1).

Chapter 14
Mental health
and capacity

Chapter 14—Mental health and capacity

A. Introduction	(14-1–14-4)
B. Obtaining instructions	(14-5–14-8)
C. Representing clients with capacity issues in the magistrates court	(14-9)
D. The mental health court	(14-10–14-13)
E. Defendants charged with an offence who are on an involuntary treatment order or a forensic order	(14-14)
F. Defendants charged with an offence who are not subject to an involuntary treatment order or a forensic order	(14-15)
G. Outcomes in the mental health court	(14-16–14-21)
H. After a finding of unsound mind or unfit for trial	(14-22–14-23)
I. The Mental Health Review Tribunal	(14-24)
J. General matters, classified patients and Commonwealth offences	(14-25–14-31)

A. Introduction

14-1 Situations facing lawyers

As a duty lawyer, you will probably have to deal with a defendant who:

- appears to be mentally ill or intellectually disabled
- may have been mentally ill at the time of an alleged offence
- may be both.

This chapter addresses what you should do in such situations. You may be alerted to the possibility of these situations by the:

- defendant’s behaviour at interview
- defendant’s apparent inability to give coherent or rational instructions
- defendant giving a history of psychiatric treatment
- defendant giving a history of institutional care for intellectual disability
- facts of the alleged offence itself.

14-2 What is a mental illness?

The [Mental Health Act 2000](#) (Qld) (MHA) defines mental illness as a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.

14-3 What is an intellectual disability?

A person with an intellectual disability has significantly below average intellectual functioning with onset before age 18 years and concurrent deficits or impairments in adaptive functioning ([DSM-IV-TR Diagnostic and Statistical Manual of Mental Disorders \(2000\)](#)). Adaptive behaviour refers to the effectiveness with which a person meets the demands of daily living (such as eating and dressing, communication, locomotion, socialisation and responsibility).

14-4 What is a cognitive impairment?

Cognitive impairment is a broad term to describe a wide variety of impaired brain function relating to the ability of a person to think, concentrate, reaction to emotions, formulate ideas, problem solve, reason and remember. It is distinct from a learning disability insofar as it may have been acquired later in life as a result of an accident or illness.

B. Obtaining instructions

14-5 Advice on obtaining instructions

The main issue for you, as the duty lawyer, is to obtain the defendant's instructions. If you can obtain coherent and rational instructions, you should act on them. However, you need to be cautious and alert before accepting instructions. If you have any doubt about the defendant's fitness to plead, do not enter any plea; instead, seek an adjournment to enable the defendant to seek more extensive legal advice. Although you may have doubts about the defendant's fitness to plead, you may still act to obtain a remand or apply for bail.

If you cannot obtain coherent or rational instructions, this means no solicitor–client relationship has been established. You then have a duty to inform the court that you cannot obtain instructions due to concerns about the defendant's fitness for trial or to plead. This will alert the court and enable it to take appropriate steps to determine the defendant's fitness. In this situation, the court could consider a court-ordered assessment (as discussed in [14-15](#)).

Your duty lawyer obligations are the same whether you believe the defendant has a mental illness, intellectual disability or cognitive impairment.

14-6 Considerations when assessing defendants' capacity to provide instructions

Common symptoms and characteristics of mental illness or intellectual disability or cognitive impairment, which may alert you to the possibility that your client may have a mental illness or intellectual disability or cognitive impairment, include:

- avoidance of eye contact
- difficulty understanding the motivation, perspectives or feelings of others
- difficulty coping with changes
- decreased ability to learn new skills
- coordination problems.

When assessing the defendant's fitness to plead, you should consider whether or not the defendant can:

- read
- write
- manage money
- tell the time
- cook
- communicate clearly with other people, and
- look after their personal care.

Can the defendant recall significant things about:

- themselves (e.g. birthday)
- where they live, and
- what you have said to them?

Has the defendant:

- attended a special school or a class within a mainstream school

- attended court with a carer
- lived in an institution or mental health unit/intellectual disability service?

Has an Adult Guardian been appointed under the [Guardianship and Administration Act 2000](#) (Qld)?

If the client is subject to an order under the Guardian and Administration Act making the Office of the Adult Guardian decision maker for his/her legal affairs you should take steps to ensure the Office of the Adult Guardian is informed about the defendant's attendance before the court. It is unethical to proceed to deal with a person the subject of such an order without making every reasonable effort to gain the involvement of the guardian. The guardian may provide instructions about how the case is to proceed, which you are bound to follow, even if they conflict with the client's instructions and your own view.

Has the defendant been subject to an Involuntary Treatment Order?

If the client is subject to an involuntary treatment order or forensic order under Chapter Seven, Part Two of the MHA, the case cannot proceed until certain measures have been formally undertaken pursuant to the MHA (refer to Chapter Seven, Part Two MHA). However, you can apply for bail for the client.

14-7 Applying the *Presser* test

If you suspect your client is mentally impaired and you have ascertained that he/she is not subject to a guardianship order or an Involuntary Treatment Order, you must determine if the client's impairment restricts your capacity to take instructions.

Ask the client simple, non-leading questions to determine if he/she appreciates the circumstances which led to the charge. The guide to determining a person's level of capacity is the test established in *R v Presser* [1958] VR 45. You will need to take the client through each of the criteria outlined in that case and satisfy yourself that the client satisfies each criterion before moving on to the next. You will need to do this by asking the defendant simple, non-leading questions and giving him/her time to explain their position.

The *Presser* criteria are:

1. Ability to understand the charge — this involves a basic understanding of the essential facts of the charge and the elements of the offence.
2. Ability to plead to the charge and to exercise the right of challenge — the client must understand that a plea of guilty is an acceptance that the essential facts and elements of the offence are established.
3. An understanding of the nature of the proceedings, namely, that it is an inquiry as to whether he/she committed the offence charged — the client must understand that he/she is involved in a formal process inquiring into his/her responsibility for the matter alleged and be aware of the potential consequences of that process.
4. Ability to follow the course of proceedings so as to understand what is happening in court in a general sense, though not necessarily understand the purpose of all the various court formalities — this involves following the proceedings and understanding the roles of the various participants.
5. Ability to understand the substantial effect of the evidence that may be given — the client must have an awareness of the implications of the prosecution evidence.
6. Ability to make a defence or answer to the charge — the client must be able to give the court a basic version of the facts as he/she claims them to be, if necessary through his/her lawyer, by entering the witnesses box and responding to questions in evidence-in-chief and cross-examination.¹

Fitness for trial is further defined by the MHA to include the ability to endure a trial without serious adverse consequences to the defendant's mental condition becoming likely. If the defendant is likely to become unfit at some point in the trial due to his/her impairment, then he/she is considered to be unfit.

¹ See Briggs, J. [Ethical considerations for duty lawyers representing mentally impaired persons](#), presentation to Legal Aid Queensland Duty Lawyer Training, March 2011, for a more detailed discussion of the way to take defendants through the *Presser* criteria.

Each of the above criteria needs to be met for the client to be fit for trial. However, a client may be fit to plead guilty and take part in sentence proceedings but be unfit to plead not guilty and stand trial on the charge, i.e. failure to meet *Presser* criteria number 6 does not make the client unfit to plead guilty.

If you have any doubt as to whether or not the defendant has a mental illness, intellectual disability or cognitive impairment, do not enter any plea; instead seek an adjournment to obtain a psychiatrist or psychologist report (depending on the more extensive legal advice).

A client may appear to be unfit to plead based on an assessment of the above criteria but insist on pleading guilty for one or more of a number of reasons, for example, he or she may wish to have the matter disposed of immediately or may not wish to have the issue of his or her mental condition or disability the subject of court proceedings. However, where a lawyer has a real and substantial doubt about a client's fitness to plead, the lawyer cannot conduct a plea of guilty on the client's behalf. (Barristers' conduct rules 2011, number 5; Miles AJ. [Inquiry under s 475 of the Crimes Act 1900 into the matter of fitness to plead of David Harold Eastman](#) (6 October 2005).) If such a client insists on pleading guilty, contrary to the lawyer's advice, the lawyer should withdraw from the case, explaining the reason why the lawyer must withdraw to the client and inform the prosecutor and the court of the lawyer's views and concerns.

Not all impaired people are necessarily unfit to plead or have a defence of insanity. A client may have an intellectual disability or cognitive impairment (IDCI) that appears significant or severe, but still have legal capacity and be fit to plead to a charge or to be tried. It is the lawyer's responsibility to form a view based on the client's response to the questions posed above.

It is also important to respect the right of people with mental illness or IDCI to take responsibility for themselves. An impaired person's disability should not limit his or her fundamental human rights. An impaired person has the same fundamental right as non-impaired people to be treated as 'a person' in court, and not merely a patient or an individual under care. Unless there has been a formal decision that an impaired person lacks capacity to deal with his or her legal affairs, he/she has the same rights as others to make fundamental decisions, especially in relation to legal matters.² To bring a person into the mental health system or have their rights limited under a guardianship order can have significant impacts on their rights as an individual and to make personal decisions.

It is essential that your written instructions deal thoroughly with the issue of your client's capacity. Some of the important issues in relation to capacity that your instructions should address are:

- why you believed the client may be impaired
- how you inquired about whether the client had a statutory decision maker or was subject to an involuntary treatment order or forensic order
- each of your *Presser* assessments
- that the client understands that you were mindful that his or her fitness may be an issue, and that you investigated that matter with him.

If it appears from the prosecution brief and the client's instructions that the client may have a defence of unsoundness of mind, the lawyer should advise the client accordingly. However, again the client may wish to plead guilty. If the client is fit for sentence, you may enter a plea of guilty on his/her behalf. However, you should advise the client of the advantages and disadvantages of both courses and note this in your written instructions to enter a plea of guilty.

14-8 Defence of unsoundness of mind, partial defence of diminished responsibility and fitness for trial

Every duty lawyer should be aware of provisions in the MHA and [Criminal Code Act 1889](#) (Qld) relating to the defence of unsoundness of mind, the partial defence of diminished responsibility (only applicable if the charge is murder) and

² See United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (1991); United Nations *Convention on the Rights of Persons with Disabilities* (2006).

fitness for trial. Be aware that the role of the Mental Health Court (MHC) is to determine these issues if you are able to refer the defendant to that court.

Having a general understanding of these issues and the role of the MHC will give you more skills to deal with mentally ill or intellectually disabled defendants.

A person is deemed not to be responsible in law for an alleged offence if they were of unsound mind at the time of the alleged offence, and a defendant cannot be tried for an offence if they are unfit for trial.

C. Representing clients with capacity issues in the magistrates court

14-9 Representing clients with capacity issues in the magistrates court

Where a client is charged with an indictable offence, and there is a question about the defendant's

- fitness to plead
- fitness to be tried, or
- whether he or she was of unsound mind at the time of committing the offence,

either the defence or the prosecution may refer the matter to the MHC for determination under the provisions of the MHA.

There is no comparable procedure available where the client is charged only with a simple offence.

In *R v AAM; ex parte Attorney-General of Queensland* [2010] QCA 305, the Court of Appeal observed:

It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.

Further, under s 613 of the Criminal Code, if, when a person is called upon to plead to an indictment, it appears the person is incapable of understanding the proceedings or making a proper defence, a jury may be empanelled to decide the issue of capability. If the jury finds the person is capable, the trial must proceed. However, if the jury finds that the person is not capable, the accused must either be discharged or kept in custody until they can be dealt with according to law.

Again, there is no comparable procedure available when a person is charged with a simple offence. In the absence of a statutory procedure, the common law applies. If a defendant charged with a simple offence is found not fit to plead, the magistrate must discharge the defendant but does not have any power to order that the defendant be kept in custody or undergo treatment or participate in a program.

The experience of LAQ duty lawyers is that some magistrates are unaware of the applicability of the common law in these cases or are reluctant to apply it and discharge defendants. In some cases, magistrates insist the matter is to proceed and the defendant is to enter a plea, despite submissions from the duty lawyer that they are unable to obtain instructions.

Duty lawyers should remain firm that they do not hold instructions in the matter, and cannot appear on any plea. A duty lawyer can assist as friend of the court to advise the court about things such as mental health diagnosis, agency support in the community and accommodation which may assist the client to get bail. However, it should be clear to the court that the duty lawyer does not hold written instructions to act due to a lack of capacity. If the magistrate continues to hear the plea with a self represented person, then the duty lawyer should withdraw and accept the magistrates decision to continue without them.

D. The Mental Health Court

14-10 Mental Health Court

The MHA established the MHC to determine criminal responsibility and fitness for trial where a person has been charged with at least one indictable offence and has had, or currently has, a mental illness or a natural mental infirmity. The MHC comprises a Supreme Court justice assisted by two psychiatrists. Those psychiatrists do not decide the ultimate issues; rather, they offer clinical advice to the judge, who then decides the issues.

The MHC has jurisdiction over state indictable offences and simple offences if they are accompanied by an indictable offence. The defendant must have at least one indictable offence to have their case referred to the MHC. The MHC does not have jurisdiction over Commonwealth offences.

14-11 Unsoundness of mind

Schedule 2 of the MHA states that ‘unsoundness of mind’ is ‘the state of mental disease or natural mental infirmity as described in the Criminal Code, section 27, but does not include a state of mind resulting, to any extent, from intentional intoxication or stupefaction alone or in combination with some other agent at or about the time of the alleged offence’.

Section 27 of the Criminal Code states that ‘[a] person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person’s actions, or of capacity to know that the person ought not to do the act or make the omission’.

The effect of those provisions is that, if a defendant is deprived of a relevant capacity by a mental illness or natural mental infirmity alone (i.e. intoxication at or about the time of the offence did not contribute to the state of deprivation of capacity), the defendant is not criminally responsible and is entitled to the qualified acquittal of unsoundness of mind. The acquittal is qualified by the state’s right to detain the defendant under a forensic order, with or without granting limited community treatment.

14-12 Fitness for trial

Schedule 2 of the MHA defines ‘fitness for trial’ as ‘fit to plead at the person’s trial and to instruct counsel and endure the person’s trial, with serious adverse consequences to the person’s mental condition unlikely’. The MHC has, essentially, adopted the *R v Presser* [1958] VR 45 test for fitness for trial (known as the Presser test), which is expressed as follows:

‘He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel, he needs to be able to do this through his counsel by giving any

necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.’

Note that the Presser test covers the first two limbs in the statutory definition of fitness but not the third. The third limb does not commonly apply but is invoked when a defendant’s mental condition is likely to deteriorate over the course of the trial or sentence proceeding to the extent that their mental condition will suffer serious adverse consequences. The first two limbs may be apparent at the first interview but the third may not be.

In *R v AAM; ex parte Attorney-General of Queensland* [2010] QCA 305, the Attorney General referred this petition for pardon to the Court of Appeal under the Criminal Code s 672A. The Court of Appeal were asked to revisit numerous previous convictions for simple offences in the magistrates court following a finding in the MHC that the appellant was permanently unfit due to her intellectual impairment. The Court of Appeal found that the appellant was unfit to plead at the times she had been convicted in the magistrates court and thus it would be a miscarriage to allow those convictions to stand.

14-13 Diminished responsibility

This is a partial defence to a charge of murder. If invoked, it reduces the charge to manslaughter.

Section 267 of the MHA requires the MHC to determine whether a person was of diminished responsibility at the time of an alleged murder. Section 304A of the Criminal Code states that:

‘[w]hen a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person’s capacity to understand what the person is doing, or the person’s capacity to control the person’s actions, or the person’s capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only’.

Unsoundness of mind and diminished responsibility concern the person’s state of mental health at the time of an alleged offence. Fitness for trial concerns the person’s current state of mental health. It is not uncommon for a person to be charged with offences that occurred some time well in the past. Sometimes, although there is no clear evidence that the defendant was suffering any mental illness or natural mental infirmity at the time of the alleged offences, there is evidence that the defendant has since become mentally ill or suffered a brain injury, or perhaps developed a dementia, and so is now unfit for trial.

E. Defendants charged with an offence who are on an involuntary treatment order or a forensic order

14-14 If a defendant is on an involuntary treatment order or forensic order

If a person is subject to an involuntary treatment order (ITO) or forensic order under the MHA and charged with a simple or an indictable offence, Chapter 7, Part 2 of the MHA applies. The Director of Mental Health (DMH) must commission a report by a psychiatrist under s 238 that addresses the issues of unsoundness of mind, diminished responsibility (if the charge is one of murder) and fitness for trial. The court proceedings relating to the charges are automatically suspended at this stage, but the court may still grant bail, remand a person in custody, adjourn the proceedings to a later date, or, discontinue proceedings (MHA, ss 243 and 244). Once the report is received, the DMH can refer the matter to the Director of Public Prosecutions (DPP) if the charge is for a simple offence only or an indictable offence that is not of a serious nature, depending on any damage, injury or loss. The DMH may also refer

serious indictable offences to the DPP to continue the proceedings if the psychiatric assessment indicates that the defendant was not of unsound mind and is fit for trial (MHA, s 240).

The DPP can order that the proceedings continue according to law, order that the proceedings be discontinued or refer the matter to the MHC if the charge relates to an indictable offence. If one or more of the charges is serious and the defendant appears to have been of unsound mind or is unfit for trial, the DMH then refers the matter to the MHC.

F. Defendants charged with an offence who are not subject to an involuntary treatment order or a forensic order

14-15 If a defendant is not on an involuntary treatment order or forensic order

If a defendant is not subject to an ITO or a forensic order, the defendant has no status under the MHA. In this case, under ss 256 and 257, if there is reasonable cause to believe that the defendant was mentally ill or of natural mental infirmity either at the time of an alleged offence or at present, to a degree that the MHC should consider issues of unsoundness of mind, diminished responsibility and fitness for trial, then the defendant, defendant's legal representative, Attorney-General, DPP or, if the defendant is a voluntary patient receiving treatment for a mental illness, the DMH with the defendant's consent can refer the matter to the MHC.

If the defendant wishes to rely on a defence of unsoundness of mind or argue that they are unfit for trial, they must provide evidence of this to the MHC. The evidence will usually be an expert's report provided to the MHC (s 258). The MHC may either determine the matter on the evidence provided or, as it often does, seek a second opinion by way of a court-ordered assessment. Sections 61–63 provide a mechanism for a Supreme Court or district court judge to refer a person's matter to the MHC. The magistrates court has no power to refer matters to the MHC. Once a matter is referred to the MHC, proceedings on the charges are suspended, but the court may still grant bail, remand a person in custody, adjourn the proceedings to a later date, or discontinue proceedings (ss 259 and 260). If the magistrates court does not discontinue proceedings, the proceedings remain suspended until the MHC determines the reference.

G. Outcomes in the Mental Health Court

14-16 Unsound mind or not of unsound mind but permanently unfit for trial

If the MHC finds that the defendant was of unsound mind, or was not of unsound mind but is not fit for trial and the unfitness is permanent, the proceedings are discontinued and notices of the decision are sent to the defendant and the defendant's legal representative, the Director of Mental Health, the Director of Public Prosecutions and the Attorney-General.

The MHC may make a forensic order, which detains the defendant to either an authorised mental health service (AMHS) for treatment as an inpatient or in the community, or to the Forensic Disability Service for care (s 288). In those cases, a notice of the decision is also sent to those authorities. For the purpose of this handbook, an AMHS is a public psychiatric hospital or psychiatric ward of a public hospital. However, about six private hospitals have wards that have been gazetted as AMHSs.

14-17 Unsound mind or not of unsound mind but permanently unfit for trial

If the MHC finds that the defendant was of unsound mind, or was not of unsound mind but is not fit for trial and the unfitness is permanent, the proceedings are discontinued and notices to that effect are sent to the trial court and prosecutor.

The MHC may make a forensic order, which detains the defendant to either an authorised mental health service (AMHS) for treatment as an inpatient or in the community, or to the Forensic Disability Service for care (s 288). For the purpose of this handbook, an AMHS is a public psychiatric hospital or psychiatric ward of a public hospital. However, about six private hospitals have wards that have been gazetted as AMHSs.

14-18 Not of unsound mind and temporarily unfit for trial

If the MHC finds that the defendant was not of unsound mind but is not fit for trial, and the unfitness is not permanent, the proceedings remain suspended. The MHC makes a forensic order and the Mental Health Review Tribunal (MHRT) reviews the defendant's fitness for trial at regular intervals to determine whether the defendant has become fit for trial. Again, notices to that effect are sent to the trial court.

14-19 Diminished responsibility

If the MHC finds that the defendant was of diminished responsibility, proceedings for the offence of murder are discontinued, but may be continued for another offence constituted by the act or omission that gave rise to the charge of murder (s 282). No forensic order is made.

14-20 Dispute of fact

The MHC may also find that there is a dispute of fact. Sections 268 and 269 of the MHA refer to different kinds of dispute of fact. Section 268 concerns a dispute of fact that would create reasonable doubt that any offence was committed. Section 269 concerns facts that are substantially relevant to an expert's opinion and so in dispute that it would be unsafe for the MHC to make a decision on unsoundness of mind or diminished responsibility.

If the MHC finds that there is a dispute under ss 268 or 269, the court must not make a finding of unsoundness of mind or diminished responsibility, but must still consider whether the defendant is fit for trial.

If, on a review, the Mental Health Review Tribunal (MHRT) finds that the defendant has become fit for trial, the proceedings are ordered to continue according to law. If the defendant does not become fit for trial within the applicable time period, the proceedings are discontinued. Again, appropriate notices are sent to the court.

14-21 Right to argue defence and right to trial

While trials do not directly concern you as the duty lawyer, you should note that the MHA does not affect the defendant's right to raise the defence of unsoundness of mind or partial defence of diminished responsibility at their trial, even after the MHC finds that the defendant was not of unsound mind or diminished responsibility. The MHC's decision is not admissible at the trial (s 317).

Conversely, note that, if a defendant is found of unsound mind with respect to an offence, they may still elect to be brought to trial for that offence. A notice of election in an approved form must be given to the attorney-general within 28 days of the defendant receiving written notice of the MHC's decision (s 311).

Be aware that considerable time may elapse before the MHC determines a matter because matters referred to the MHC are more complex than most other matters.

H. After a finding of unsound mind or unfit for trial

14-22 Neither of unsound mind nor permanently unfit for trial

If the defendant is found not to have been of unsound mind, or there is a dispute of fact and the person is not fit for trial and the unfitness is not permanent, the MHC must make a forensic order (s 288). This order requires

the defendant to accept treatment or care and enables further assessment of their unfitness so the MHRT can periodically review it. The defendant may be detained in a mental health service for treatment or receive treatment in the community.

14-23 Of unsound mind or permanently unfit for trial

If the defendant is found to have been of unsound mind or permanently unfit for trial, or there is a dispute of fact and the defendant is permanently unfit for trial, the MHC may make a forensic order. When considering whether to make such order, the court must consider the seriousness of the offence, defendant's treatment needs and community's protection (s 288). If the defendant is found to be of unsound mind or permanently unfit for trial, the proceedings are ordered to be discontinued by the MHC and must be discontinued at the next mention of the charges in the criminal court.

I. The Mental Health Review Tribunal

14-24 Consequences of findings of the MHRT

The Mental Health Review Tribunal (MHRT) performs various review functions. Of relevance to duty lawyers, if the defendant has been found unfit for trial but not permanently unfit, the MHRT must review the defendant's fitness for trial at least every three months for the first year after the finding and every six months thereafter.

If the MHRT finds that the defendant has become fit for trial, it sends a notice of decision to the court to continue proceedings. If the MHRT finds that the person is still unfit, the proceedings remain suspended. The attorney-general, DPP or complainant can discontinue the proceedings at any time (s 217).

If the offence for which the defendant is not fit for trial carries a life sentence, the defendant's fitness must be reviewed for seven years from the date of the MHC's determination. For any other offence, the reviews continue for three years. Proceedings are discontinued after the seven or three year period if the defendant has not become fit for trial and proceedings on the charges have not been otherwise discontinued.

J. General matters, classified patients and Commonwealth offences

14-25 Issues of mental illness or natural mental infirmity

The previous paragraphs provided a brief overview of unsoundness of mind, fitness for trial, diminished responsibility and the MHC's operation. In practice, these issues and the way the MHC conducts cases are often intricate and complex. In most cases, if you are facing issues of mental illness or natural mental infirmity, you should seek an adjournment so the defendant can get more extensive legal advice. Legal Aid Queensland has a mental health section specialising in this area of law. If the defendant is remanded in custody, they can obtain advice from the prison duty lawyer service.

In some magistrates courts, Queensland Health (of which the office of the Director of Mental Health forms a part) provides mental health liaison officers who help the court and duty lawyers provide information on whether a person is subject to any current orders under the MHA (involuntary treatment orders or forensic orders) or the defendant has a history of contact with mental health services.

Sometimes the liaison officer helps prepare and provide reports to the court and the duty lawyer. If a liaison officer is not available, you can contact the Mental Health Unit at Legal Aid Queensland to find out whether a person is subject to any current orders under the MHA.

As the issues relating to unsoundness of mind and fitness for trial can be complex, you should not take any steps, apart from seeking bail or applying for an adjournment of proceedings, without first obtaining a psychiatric assessment of the defendant.

14-26 Classified patients

As a duty lawyer, you should be aware of the provisions relating to classified patients in Chapter 3 of the MHA. A classified patient is a person admitted to an AMHS from court or custody for a mental health assessment to ascertain whether the defendant requires treatment at the AMHS because their treatment requirements cannot be met in custody. The AMHS also ascertains whether the defendant needs involuntary treatment.

Your role is to act on the defendant's instructions. Unless the defendant seeks your assistance in arranging admission for assessment as a classified patient, avoid taking any steps that may result in the defendant's detention to an AMHS.

Arranging the detention of a defendant in an AMHS as a classified patient is not your role; it is the role of health practitioners authorised to take the appropriate steps under the MHA. If a defendant asks for assistance with this, inform the court so that it and health professionals can take the appropriate steps (outlined below).

If available, a court mental health liaison officer will initiate the necessary steps for a court assessment order. If this service is not available, a court may ask a government medical officer for assistance, though s 50 notes that any doctor or authorised mental health practitioner can make a recommendation for assessment. Court mental health liaison officers must be authorised mental health practitioners so that they can complete the recommendation for assessment.

14-27 Becoming a classified patient

The classified patient provisions exist to meet the treatment needs of people in custody while maintaining secure management. They apply when a person's treatment needs cannot be met in the custodial facility but can only be met at an AMHS. These provisions do not address how charges are determined.

They apply to defendants detained in a watch-house, correctional facility (on remand or serving a sentence, or both) or youth detention centre. They apply to defendants before a court on any charge, whether for simple, indictable or Commonwealth offences. They also apply to people who are being held in lawful custody, or lawfully detained without charge under a state or Commonwealth Act, prescribed by regulation (s 64).

The following three documents are necessary to detain a defendant at an AMHS:

- the recommendation for assessment. A doctor or an authorised mental health practitioner who has examined the person within the preceding three days may complete this document (s 50)
- the agreement for assessment, which is provided by the AMHS administrator (s 53)
- the court assessment order (s 58) if the defendant is before the court or a custodian's assessment authority if the defendant is actually in custody, whether in a watch-house, correctional centre or detention centre (ss 64–66).

After making a court assessment order, the court must adjourn proceedings and remand the defendant in custody (s 58(3)). However, if the court does not make an assessment order, but believes that the defendant can be assessed other than as an AMHS inpatient, it can either remand the defendant in custody or grant bail and arrange for an assessment (s 59).

Once the documents are completed, the defendant is taken to an inpatient facility of an AMHS (s 68). After the staff at the AMHS have received the documents, the defendant becomes a classified patient (s 69). Note: The AMHS administrator produced a copy of the agreement for assessment to the court, and still holds the original, so they need to receive only the recommendation for assessment and either the court assessment order or custodian's assessment authority.

A police officer, corrective services officer or detention centre officer—depending whether the defendant is in the watch-house, correctional centre or detention centre—then takes the defendant to the AMHS. Those authorities may call on others to assist and use reasonable force.

A young person, defined in Schedule 2 as ‘an individual who is under 17 years’, or a person charged only with a simple offence may be detained as a classified patient to a high security unit only with DMH approval.

An authorised doctor must assess the defendant within three days of admission to decide whether the defendant has a mental illness that requires treatment as an inpatient of the AMHS, regardless of whether the defendant consents to treatment (s 71). The authorised doctor must regularly assess the defendant to decide whether they need to remain a classified patient. On the initial or regular assessments, the authorised doctor can make an ITO if the treatment criteria apply (ss 108 and 14). If they do so, the ITO must be inpatient category.

Although a defendant can become a classified patient if charged with any offence before a court, including a Commonwealth offence, proceedings are suspended only on state offences (s 75).

Once the court has made a court assessment order that detains the defendant to the AMHS, a classified patient is remanded in custody (s 58). Notwithstanding this, the authorised doctor may authorise limited community treatment with the DMH’s written approval (s 129(2)). This leave can range from short escorted outings to indefinite leave to reside in the community, though the latter is rare.

In giving written approval, the DMH must be satisfied there is no unacceptable risk that the patient would:

- not return to the AMHS when required
- commit an offence while away from the AMHS
- endanger the safety or welfare of the patient or others (s 129(3)).

Additionally, in approving limited community treatment, the DMH must consider the patient’s mental state and psychiatric history, the offence leading to the classified patient status, the patient’s social circumstances, and their response to treatment and willingness to continue treatment (s 129(4)).

14-28 Ceasing to be a classified patient

When proceedings are suspended, a court may still grant bail, remand a defendant in custody or adjourn the proceedings to a later date. Additionally, the complainant or DPP may discontinue proceedings. If the defendant is remanded in custody, the place of custody will be the AMHS.

A patient ceases to be a classified patient if any of the following occur:

- on an initial or regular assessment, the authorised doctor decides that the person does not need to be detained as a classified patient
- the DPP or MHC make a decision on the charges
- for any offence (state or Commonwealth), bail is granted or proceedings are discontinued
- for Commonwealth offences, proceedings are decided according to law (see below for how Commonwealth offences may be dealt with)
- after the initial assessment, an involuntary treatment order is not made and the person asks that they no longer be detained at the AMHS
- the person’s sentence of imprisonment expires or they are granted parole.

However the person will remain a classified patient if still in lawful custody or lawfully detained without charge under a state or Commonwealth Act prescribed by regulation, or still serving a sentence of imprisonment or detention (ss 78 and 253).

If a person is not charged with any offence or serving a sentence but is held in lawful custody or lawfully detained without charge under a state or Commonwealth Act, prescribed by regulation, the person ceases to be a classified patient when their lawful custody or detention ends (s 100C).

If a person who is the subject of a reference to the MHC is a classified patient, they cease to be classified once the MHC makes a decision on the reference, unless they are still:

- in lawful custody or lawfully detained without charge under a state or Commonwealth Act prescribed by regulation
- serving a sentence of imprisonment or detention
- have charges for Commonwealth offences to be dealt with (s 287).

14-29 When classified patient status ceases

The question of what happens when a classified patient status ceases depends on why it ceased.

If the defendant is granted bail and was not put on an ITO while classified, either the defendant must be released from the AMHS or arrangements may be made for their admission to an AMHS (s 81).

If granted bail and subject to an ITO, the defendant may either, depending on treatment requirements, be detained under the ITO as an inpatient or treated in the community.

If the DPP orders that the proceedings on the charges be discontinued, the defendant must be released to the community if they are not on an ITO. However, if they are subject to an ITO, they may be detained as an inpatient or treated in the community, depending on treatment requirements.

If the MHC finds a defendant of unsound mind or unfit for trial, their classified patient status ceases. The forensic provisions subsequent to one of those findings determines what then happens to the defendant.

If any of the following occur, the defendant is returned to court or custody, depending whether the defendant became classified under a court-ordered assessment or a custodian's assessment authority:

- the defendant faces charges before a court
- the DPP or the MHC orders proceedings to continue according to law
- no ITO is made and the defendant asks that they no longer be detained at the AMHS
- the authorised doctor decides that the defendant does not need to be detained as a classified patient.

However, the DMH may return to court a defendant who became a classified patient as a result of a custodian's assessment authority if the DMH decides it is in the defendant's best treatment interest, and it is proper and expedient to do so (s 89).

When a classified patient's term of imprisonment or detention ends, or they are granted parole, their classified patient status ends if they have no outstanding charges, and are not in lawful custody or being lawfully detained without charge under a state or Commonwealth Act prescribed by regulation.

If a classified patient is also on an ITO, the ceased classified patient status has no effect on the ITO. Involuntary treatment orders come in two categories: inpatient and community. An ITO made while a defendant is a classified patient is an inpatient category order. When the classified patient status ends, it can be changed to community category by the authorised doctor if treatment in the community is appropriate.

If an ITO is made while a defendant is a classified patient, Chapter 7, Part 2 of the MHA takes effect—the patient is assessed in relation to any outstanding charges on issues of unsoundness of mind, fitness for trial and future management, to refer the charges to the DPP or the MHC. Proceedings on the charges are suspended under that chapter as well.

Note: An assessment of a classified patient is only for treatment purposes; it does not relate to assessment of the issues of unsoundness of mind or fitness for trial. Assessment of these issues for a classified patient occurs only if the authorised doctor makes an ITO, bringing the patient under Chapter 7, Part 2 of the MHA, or the patient's lawyer arranges that assessment.

14-30 Applying for bail for a classified patient

If you are instructed to apply for bail for a classified patient, you should obtain a letter of support from the patient's treating doctor. The letter should outline the patient's current mental health state, suitability to reside in the community, and the follow-up arrangements for continuing management and care in the community.

Occasionally, the AMHS may request a bail application be made for a classified patient on an ITO. The reason given is that, while the patient is not ready for limited community treatment, the patient would remain on an ITO if they had bail. In these circumstances, the treating doctor does not need to obtain the DMH's written approval for limited community treatment. Additionally, the treating doctor has the authority to change the ITO from inpatient to community category without DMH approval.

In these situations, you should ask for bail on the patient's own undertaking. If the magistrate requires a residential condition, the following is suitable: 'That the defendant comply with every reasonable direction of the treating team and/or treating staff at the [insert name of AMHS] with respect to matters of accommodation'.

An alternative might be '...with respect to matters of medication and accommodation' but, under the ITO, the patient is obliged to accept medication if it is given. However, some magistrates may be comforted by the latter wording.

14-31 Commonwealth offences

The references in this chapter to the MHA and the Criminal Code of Queensland are not relevant to charges of offences against Commonwealth law. With such charges, the relevant law is the common law of the Commonwealth (under which a defence of insanity can be raised) and certain provisions of the [Crimes Act 1914](#) (Cth).

Sections 20B–20BH of the Crimes Act deal with 'unfitness to be tried'.

Sections 20BJ–20BP deal with 'acquittal because of mental illness', where a person has been charged with a Commonwealth offence on indictment and is acquitted because of mental illness at the time of the offence. In such a case, s 20BJ of the Crimes Act states that 'the court must order that the person be detained in safe custody in prison or in a hospital' unless the court believes that it should order the person's release from custody either absolutely or subject to conditions. Note that the charge must be on indictment.

The Crimes Act also provides procedures for when a person suffering from a mental illness is charged with a Commonwealth offence before a court of summary jurisdiction. In this situation, the court may, for example, dismiss the charge and discharge the person if it considers that action more appropriate than dealing with the person otherwise by law (Crimes Act, s 20BQ).

Further, the Crimes Act provides sentencing alternatives for people suffering from mental illness or intellectual disability (ss 20BS–20BY). For further details, see [Chapter 6](#) in this handbook, which deals with Commonwealth offences.

As with state offences, if you face issues of mental illness for a defendant charged with Commonwealth offences, you should seek a remand so they can obtain further legal advice.

Chapter 15
Dangerous Prisoners
(Sexual Offenders)
Act 2003 (Qld)

Chapter 15—*Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*

A. Introduction	(15-1–15-5)
B. The duty lawyer’s role	(15-6–15-8)
C. Availability of legal aid funding	(15-9)

A. Introduction

15-1 *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*

This chapter relates to the [Dangerous Prisoners \(Sexual Offenders\) Act 2003](#) (Qld). Any section that is cited without reference to an Act is referring to this Act.

The Dangerous Prisoners (Sexual Offenders) Act was introduced in 2003. Under s 3, ‘[t]he objects of the Act are—

- to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
- to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation’.

Under s 8, the making of a Division 3 order can achieve these objects.

15-2 Applications under the Dangerous Prisoners (Sexual Offenders) Act

Division 3 applications are brought by the attorney-general and heard in the Supreme Court of Queensland.

For such an application to be successful, the court must believe that, without a Division 3 order, the prisoner would be a ‘serious danger to the community’ (s 13(1)).

The court will consider a prisoner a serious danger to the community ‘if there is an unacceptable risk that the prisoner will commit a serious sexual offence—

- if the prisoner is released from custody; or
- if the prisoner is released from custody without a supervision order being made’ (s 13 (2)).

Note: The Schedule defines ‘serious sexual offence’ as ‘an offence of a sexual nature, whether committed in Queensland or outside Queensland—

- involving violence; or
- against children’.

Section 13(3) makes it clear that the court can be satisfied as required under s 13(2) ‘only if it is satisfied—

- by acceptable, cogent evidence; and
- to a high degree of probability;

that the evidence is of sufficient weight to justify the decision’.

15-3 Types of orders under the Dangerous Prisoners (Sexual Offenders) Act

Once the court is satisfied as described under s 13(3), the court must then decide whether to make a continuing detention order under s 13(5)(a) or a supervision order under s 13(5)(b).

The names given to the orders in the legislation are relatively self-explanatory; however, for completeness, it should be noted that a continuing detention order requires a prisoner to remain detained in custody for control, care or treatment. These orders are subject to review two years after the first order and annually thereafter.

A supervision order allows the conditional release of the prisoner from custody.

Under s 13(6), in determining the appropriate order:

- ‘(a) the paramount consideration is to be the need to ensure adequate protection of the community; and
- (b) the court must consider whether—
 - (i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and
 - (ii) requirements under section 16 of the Act can be reasonably and practicably managed by corrective services officers’.

Section 16 establishes the requirements and minimum conditions for supervised release.

15-4 Contravention proceedings

Contravention proceedings are brought under Division 5 of the Dangerous Prisoners (Sexual Offenders) Act.

Under s 20(1) and (2), ‘if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner’s supervision order or interim supervision order’, the officer may make complaint to a magistrate. A magistrate can then issue a warrant for the released prisoner to be brought before the Supreme Court to be dealt with according to law.

If contravention proceedings are also underway, the client will need to go before the Supreme Court to answer to the warrant.

It is very rare for a prisoner to be released pending the final decision in a contravention proceeding. Section 21(4) contains the test for release. In summary, the prisoner must show, ‘on the balance of probabilities, that his or her detention in custody pending the final decision is not justified because exceptional circumstances exist’.

The reference to a final decision means a decision under s 22 of the Act. In summary, this is a decision made in light of the order contravention to order:

- continuing detention
- release onto an order containing the same conditions as previously, or
- release onto an amended order.

15-5 Contravention charges

Under s 43AA, it is a separate offence for individuals subject to a Dangerous Prisoners (Sexual Offenders) Act order to contravene the conditions of their order.

Contraventions are charged under Part 4A of this Act. The most common charge is brought under s 43AA, which states that ‘[a] released prisoner must not contravene the relevant order without reasonable excuse’. The maximum penalty for this offence is two years’ imprisonment.

A specific offence has also been created in relation to applying for a change of name without permission (s 43AB). In effect, before a released prisoner to whom this Act applies can apply to change their name, they must seek written permission from the chief executive. The maximum penalty for this offence is six months’ imprisonment.

Section 43AC clarifies that proceedings for offences against the Dangerous Prisoners (Sexual Offenders) Act are to be taken summarily.

B. The duty lawyer's role

15-6 When the Act impacts on a duty lawyer session

In only two circumstances should the Act impact on the conduct of a duty lawyer session—when a client:

- subject to a Division 3 order, faces fresh offences before the magistrates court
- is charged with a contravention offence under s 43AA.

15-7 When a client, subject to an order, faces fresh offences before the magistrates court

In these circumstances, you must establish whether the client is also subject to contravention proceedings under s 20.

If no contravention proceedings are underway, the matter can progress as if the individual was not on an order. After taking appropriate instructions, you can apply for bail, conduct a plea of guilty or have the matter remanded to a later date without a bail application.

If s 20 contravention proceedings are under way, you have more to consider, as, in many cases, the client is extremely unlikely to be granted exceptional circumstances release pending the finalising of the s 20 contravention proceedings.

In these circumstances, you should adjourn the fresh charges pending any application for exceptional circumstances release under s 21(4). The issue of bail on any fresh charges will be considered, more appropriately, after a decision on exceptional circumstances release has been made.

The reasons for this are that:

- any decision to release a prisoner in the Supreme Court due to exceptional circumstances will be particularly persuasive in a subsequent application for magistrates court bail
- a Dangerous Prisoners (Sexual Offenders) Act order contravention will almost always attract legal aid funding for representation relating to the contravention proceedings, and the consideration and preparation of an exceptional circumstances release application. The material and information identified and required for any exceptional circumstances release application will be invaluable in a subsequent magistrates court bail application.

15-8 When a client is charged with a contravention offence under s 43AA

In these circumstances, you must decide on a case-by-case basis whether to apply for bail and advise the client to seek further legal advice or enter a plea of guilty to the offence.

In relation to bail, the same considerations will apply as discussed in [15-7](#), i.e. if s 20 contravention proceedings are underway, you would usually delay a bail application until the Supreme Court considers the issue of exceptional circumstances release.

The penalty for an offence will depend on the nature of the conduct alleged to constitute the breach and whether the client has breached the order previously.

C. Availability of legal aid funding

15-9 When a client is eligible for legal aid funding

If the client meets the relevant means test criteria, they will be eligible for legal aid funding in relation to an alleged contravention of their dangerous prisoner order, which has resulted in the application under s 20.

Contravention offences charged under s 43AA are subject to the standard legal aid merit and means tests that apply to aid grant applications for either a summary plea or summary trial, depending how the individual case is to proceed.

Statutes

Acts Interpretation Act 1954

s 32DA	10-58
s 36	10-58

Aviation Transport Security Act 2004 (Cth)

Generally	6-6
---------------------	-----

Aviation Transport Security Regulations 2004 (Cth)

Generally	6-6
---------------------	-----

Bankruptcy Act 1966 (Cth)

Generally	6-6
---------------------	-----

Bail Act 1980 (Qld)

Generally	2-1, 2-11, 6-1, 7-9, 11-26, 11-28, 12-2
s 7	2-5, 8-4
s 8	2-6, 3-10, 8-4
s 8(1)(a)(i)	2-42
s 9	2-1, 2-33
s 10	2-4, 2-18
s 10(3)	2-4
s 11	2-33
s 11(1)	2-7
s 11(2)	2-8
s 11(4)	13-1
s 11A	2-12
s 11A(3)	2-12
s 11A(4)	2-12
s 11A(5)	2-12
s 11A(7)	2-12
s 11B	2-12
s 11B(4)	2-12
s 12	2-9, 10-53
s 13	2-17
s 14	2-10
s 14(10)	2-10
s 14A	2-10
s 15	2-14
s 15(1)	2-13
s 15(e)	2-13
s 16	2-2, 2-17, 11-30
s 16(1)	2-15, 2-16, 2-17, 2-31, 2-32, 2-33
s 16(1A)	2-15
s 16(3)	2-17, 2-24, 2-31
s 19	2-18
s 20(3AA)	2-40
s 21	2-20
s 21(1)	2-20
s 21(3)	2-20

s 26	2-20
s 28	2-23, 2-25
s 28A(1)	2-21
s 28A(1)(a)	2-23, 2-25
s 28A(1)(b)	2-23
s 28A(1)(c)	2-23
s 28A(1)(e)	2-23
s 28A(2)	2-22
s 29	12-7
s 29(2)	11-30
s 30(3)	2-25
s 30(4)	2-25
s 33	2-22, 12-7
s 33(1)	2-23, 13-19
s 33(2)	2-24
s 33(3A)	2-24
s 33(4)	2-23, 2-26, 11-46
s 33(5)	11-46
s 33B	2-25
s 35	2-26

Bail (Prescribed Programs) Regulation 2006 (Qld)

Generally	13-1
-----------	------

Casino Control Act 1982 (Qld)

s 91A	10-85
s 91N	10-85
s 92	10-85
s 94	10-85
s 100	10-85
s 100A	10-85
s 102	10-85
s 102(3B)	10-85
s 103	10-86, 10-87
s 103(a)	10-86
s 103(b)	10-86
s 103(c)	10-86
s 103(d)	10-86
s 104	10-86
s 104(a)	10-86
s 104(b)	10-86
s 104(c)	10-86
s 109	10-87
s 110	10-87
s 111	10-87
s 120(1)	10-87
s 120(4)	10-87

Childrens Court Act 1992 (Qld)

Generally	11-1, 11-2, 11-3
s 5	11-3
s 5(2)	11-3
s 20	10-56, 11-7

s 20(1)	11-5
s 20(1)(g)	11-5
s 20(2)	11-5
s 20(5)	11-5
 <i>Classification of Computer Games and Images Act 1995</i> (Qld)	
Generally	10-46
 <i>Classification of Films Act 1991</i> (Qld)	
Generally	10-46
 <i>Classification of Publications Act 1991</i> (Qld)	
Generally	10-46
 <i>Corrective Services Act 2000</i> (Qld)	
Generally	10-46
 <i>Corrective Services Act 2006</i> (Qld)	
Generally	10-35, 10-44, 10-45, 12-2, 13-11, 13-22
s 10	10-46
s 28F(1)	10-46
s 28F(5)	10-46
s 122	10-44, 10-45, 10-46
s 122(1)	10-44
s 122(2)	10-44
s 122(2)(a)	10-44
s 122(2)(b)	10-44
s 122(2)(c)	10-44
s 122(2)(d)	10-44
s 122(2)(e)	10-44
s 123	10-44
s 123(2)(a)	10-46
s 123(2)(b)	10-46
s 123(3)(a)	10-46
s 123(3)(b)	10-46
s 123(4)	10-46
s 123(5)	10-46
s 124	10-44
s 124(a)	10-46
s 124(b)	10-46
s 124(c)	10-46
s 124(d)	10-46
s 124(e)	10-46
s 124(f)	10-46
s 124(g)	10-46
s 124(h)	10-46
s 124(i)	10-46
s 124(j)	10-46
s 124(k)	10-46
s 126	10-44
s 127	10-44
s 128	10-44
s 129	10-44

s 130	10-44
s 131	10-44
s 132	10-44
s 133	10-44
s 134	10-44
s 135	10-44
s 136	10-44
s 137	10-44
s 135(4)	10-35
s 136	10-35, 10-45
s 205	10-46, 13-1, 13-22
s 209	10-46, 13-1, 13-22
s 209(1)	10-46
s 209(2)	10-46
s 209(3)(a)	10-46
s 209(3)(a)(i)	10-46
s 209(3)(a)(ii)	10-46
s 209(3)(b)	10-46, 13-22
s 209(3)(b)(i)	10-46
s 209(3)(b)(ii)	10-46
s 209(3)(b)(iii)	10-46
s 209(3)(b)(iv)	10-46
s 213	13-1
s 350	10-46
s 350(2)(a)	10-46
s 350(2)(b)	10-46

Corrective Services Regulation 2006 (Qld)

Generally	10-46
reg 20(a)	10-46
reg 20(b)	10-46
reg 20(c)	10-46
reg 20(d)	10-46
reg 20(e)	10-46
reg 20(f)	10-46
reg 20(g)	10-46
reg 20(h)	10-46
reg 20(i)	10-46
reg 20(j)	10-46
reg 20(k)	10-46
reg 20(l)	10-46
reg 20(m)	10-46
reg 20(n)	10-46
reg 20(o)	10-46
reg 20(p)	10-46
reg 20(q)	10-46
reg 20(r)	10-46
reg 20(s)	10-46
reg 20(t)	10-46
reg 20(u)	10-46
reg 20(v)	10-46
reg 20(w)	10-46

reg 20(x)	10-46
reg 20(y)	10-46

Crimes Act 1914 (Cth)

Generally	6-1, 6-6, 14-31
s 4	6-10
s 4G	6-2
s 4H	6-2
s 4J	6-1, 6-2, 6-10
s 4J(6)	6-13
s 4L	6-5, 6-7
s 6	6-4
s 15	6-1
s 15A	6-10, 6-11
s 15B	6-2, 6-3
s 16	6-8
s 16A	6-8
s 16A(1)	6-8
s 16A(2)	6-8
s 16A(2)(a)	6-8
s 16A(2)(b)	6-8
s 16A(2)(c)	6-8
s 16A(2)(d)	6-8
s 16A(2)(e)	6-8
s 16A(2)(f)	6-8
s 16A(2)(f)(i)	6-8
s 16A(2)(f)(ii)	6-8
s 16A(2)(g)	6-8
s 16A(2)(h)	6-8
s 16A(2)(j)	6-8
s 16A(2)(k)	6-8
s 16A(2)(m)	6-8
s 16A(2)(n)	6-8
s 16A(2)(p)	6-8
s 16A(3)	6-8
s 16BA	6-9, 6-10
s 16E	6-10
s 16F	6-10
s 17A	6-6, 6-8, 6-10
s 17A(4)	6-10
s 17B	6-6, 6-10
s 17B(1)	6-10
s 18	6-10
s 19	6-10
s 19A	6-10
s 19AA	6-10
s 19AC	6-1, 6-10
s 19AD	6-1
s 19AE	6-1, 6-10
s 19AE(3)	6-10
s 19AF	6-1
s 19B	6-1, 6-6, 6-10, 6-12

s 19B(1)	6-8
s 19B(1)(b)	6-10
s 19B(1)(b)(i)	6-10
s 19B(1)(b)(ii)	6-10
s 19B(1)(b)(iii)	6-10
s 19B(1)(c)	6-10
s 19B(1)(d)	6-6, 6-10
s 19B(1)(d)(iii)	6-6
s 20	6-10, 6-12
s 20(1)	6-8
s 20(1)(a)	6-6, 6-10
s 20(1)(a)(iv)	6-6
s 20(1)(b)	6-1, 6-6, 6-10
s 20A	6-6
s 20AB	6-10, 6-12
s 20AB(1)	6-6, 6-8
s 20AB(3)	6-10
s 20AC	6-6
s 20B	14-31
s 20BA	14-31
s 20BB	14-31
s 20BC	14-31
s 20BD	14-31
s 20BE	14-31
s 20BF	14-31
s 20BG	14-31
s 20BH	14-31
s 20BJ	14-31
s 20BK	14-31
s 20BL	14-31
s 20BM	14-31
s 20BN	14-31
s 20BP	14-31
s 20BQ	14-31
s 20BS	6-1, 6-10, 6-12, 14-31
s 20BT	6-1, 6-12, 14-31
s 20BU	6-10
s 20BV	6-10
s 20BW	6-1, 6-12, 14-31
s 20BX	6-1, 6-12, 14-31
s 20BY	6-1, 6-10, 6-12, 14-31
s 21B	6-10, 6-12
s 21B(2)	6-10, 6-12
s 29	6-6
s 85E	6-6
s 85F	6-6
s 85G	6-6
s 85H	6-6
s 85N	6-6
s 85Q	6-6
s 85R	6-6
s 85T	6-6

s 85U	6-6
s 85V	6-6
s 85W	6-6
s 85Z	6-6
s 85ZA	6-6
s 89	6-6

Criminal Code Act 1899 (Qld)

Generally	5-4, 5-23, 6-1, 8-6, 10-3, 10-10, 10-18, 10-28, 10-30, 11-1, 11-64, 11-65, 12-2, 14-8, 14-30
s 1	5-5, 5-33, 10-81
s 3	4-1, 10-1
s 3(1)	10-1
s 3(2)	10-1
s 3(3)	10-1
s 3(4)	10-1, 10-12
s 7	10-71
s 22	5-24, 5-39, 10-18
s 22(3)	10-4
s 22A	10-80
s 23	10-18
s 23(1)(a)	5-39
s 23(1)(b)	5-39
s 23(1A)	5-39
s 24	5-39, 8-6, 8-11, 9-4, 10-18
s 24(1)	5-25
s 25	10-18
s 26	10-18
s 27	5-39, 10-18, 14-11
s 27(1)	14-5
s 28	5-39, 10-18
s 29	10-4, 10-18, 11-10
s 30	10-18
s 31	10-4, 10-18
s 34	10-18
s 36	5-39, 10-18
s 36(2)	10-4
s 142	10-46
s 208	5-18, 5-19
s 210	5-16, 5-18, 5-19
s 211	5-18, 5-19
s 213	5-18, 5-19
s 215	5-16, 5-18, 5-19
s 216	5-18, 5-19
s 217	5-18, 5-19
s 218	5-18, 5-19
s 218A	5-18, 5-19
s 219	5-18, 5-19
s 221	5-18, 5-19
s 222	5-18, 5-19
s 224	5-18, 5-19
s 225	5-18, 5-19
s 226	5-18, 5-19

s 227	5-18, 5-19
s 227A	5-18, 5-19
s 227B	5-18, 5-19
s 227C	5-18, 5-19
s 228	5-18, 5-19
s 228A	5-18, 5-19
s 228B	5-18, 5-19
s 228C	5-18, 5-19
s 228D	5-18, 5-19
s 228E	5-18, 5-19
s 228F	5-18, 5-19
s 228G	5-18, 5-19
s 229	5-18, 5-19
s 229B	5-18, 5-19
s 229F	10-81
s 229F(a)	10-81
s 229F(b)	10-81
s 229F(b)(i)	10-81
s 229F(b)(ii)	10-81
s 229FA	10-82
s 229FA(1)	10-82
s 229FA(2)	10-82
s 229G	10-82
s 229G(1)	10-82
s 229G(1)	10-82
s 229G(1)(a)	10-82
s 229G(1)(b)	10-82
s 229G(1)(b)(i)	10-82
s 229G(1)(b)(ii)	10-82
s 229G(1)(b)(iii)	10-82
s 229G(2)	10-82
s 229G(5)	10-82
s 229H	10-82
s 229HA	10-82
s 229HB(1)	10-82
s 229HB(2)	10-82
s 229HC	10-82
s 229HC(1)	10-82
s 229HC(2)	10-82
s 299I	10-82
s 299I(1)	10-82
s 299I(1)(a)	10-82
s 299I(1)(b)	10-82
s 299I(1)(c)	10-82
s 229I(2)	10-82
s 229I(3)	10-82
s 229J	10-82
s 229K(2)	10-82
s 229K(2)(a)	10-82
s 229K(2)(b)	10-82
s 229L	10-82
s 245	10-35

s 245(1)	5-1
s 245(2)	5-1
s 246	5-2
s 246(1)	5-2
s 246(2)	5-2
s 268	5-8
s 268(1)	5-8
s 268(3)	5-8
s 269	5-9
s 269(2)	5-11
s 271(1)	5-12
s 271(2)	5-12
s 272	5-13
s 272(1)	5-13
s 273	5-14
s 304A	14-13
s 328A	9-2, 9-10
s 328A(1)	9-10
s 335	5-3
s 339	5-5
s 339(1)	5-5
s 339(3)	5-5
s 340	5-6
s 347	5-18
s 348	5-18
s 349	5-18
s 350	5-18
s 351	5-18
s 352	5-18, 10-55
s 359	2-17
s 359(2)	2-17
s 390	5-22
s 391	5-21
s 391(2)	5-21
s 391(5)	5-26
s 408A	10-31, 10-33
s 408C	5-33
s 408C(1)	5-33
s 408C(3)	5-33
s 408E	5-35
s 418	5-31
s 418(4)	5-32
s 419	5-29
s 421	5-29
s 425	10-33
s 427	10-33
s 427A	5-34
s 427A(2)	5-34
s 433	5-27
s 433(2)	5-27
s 469	5-36, 10-33
s 552	3-4, 4-1

s 552A ...	4-2, 4-7
s 552A(1)(a) ...	5-6
s 552B ...	4-2, 4-4, 4-5, 10-80
s 552B(1) ...	5-15
s 552BA ...	4-4, 4-8
s 552BB ...	4-8
s 552D ...	4-9, 10-80
s 552I ...	4-5, 12-4
s 613 ...	14-8
s 651 ...	3-9, 11-34, 12-5
s 651(2) ...	12-5
s 651(2)(a) ...	12-5
s 651(2)(b) ...	12-5
s 651(2)(c) ...	12-5
s 651(2)(d) ...	12-5
s 651(2)(e) ...	12-5
s 651(6) ...	11-34
s 652 ...	12-5
s 668D ...	11-68
s 672A ...	14-12
Chapter 67 ...	11-68
Schedule 1 ...	8-6

Criminal Code Act 1995 (Cth)

Generally ...	6-1
s 135.2 ...	6-6
s 308.1 ...	6-1, 6-6
parts 9.1–9.3 ...	6-6
ss 471.1–471.15 ...	6-6
ss 474.14–474.18 ...	6-6
s 474.17 ...	6-6

Criminal Law Amendment Act 1997 (Qld)

Generally ...	11-10
---------------	-------

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)

Generally ...	10-47
s 3 ...	10-48, 10-55
s 3(2) ...	10-48
s 6(a) ...	10-49
s 6(b) ...	10-49
s 6(c) ...	10-49
s 8 ...	10-50
s 9 ...	10-49
s 9A ...	10-51
s 9(1)(a) ...	10-49
s 9(1)(b) ...	10-49
s 9(1)(c) ...	10-49
s 9(2) ...	10-49
s 10 ...	10-49
s 11 ...	10-48
s 11(2) ...	10-48

<u><i>Criminal Law (Sexual Offences) Act 1978</i></u> (Qld)	
s 5	10-55
s 6	10-55
s 7	10-55
s 8	10-55
<u><i>Criminal Organisation Act 2009</i></u> (Qld)	
s 24	2-17
s 38	2-17
<u><i>Criminal Proceeds Confiscation Act 2002</i></u> (Qld)	
Generally	10-35
<u><i>Customs Act 1901</i></u> (Cth)	
Generally	6-6
<u><i>Dangerous Prisoners (Sexual Offenders) Act 2003</i></u> (Qld)	
Generally	15-1, 15-7
s 3	15-1
s 3(a)	15-1
s 3(b)	15-1
s 8	15-1
s 12(2)	15-2
s 13(1)	15-2
s 13(2)(a)	15-2
s 13(2)(b)	15-2
s 13(3)	15-2, 15-3
s 13(3)(a)	15-2
s 13(3)(b)	15-2
s 13(5)	15-3
s 13(5)(a)	15-3
s 13(5)(b)	15-3
s 13(6)	15-3
s 13(6)(a)	15-3
s 13(6)(b)	15-3
s 13(6)(b)(i)	15-3
s 13(6)(b)(ii)	15-3
s 16	15-3
s 20	15-7, 15-8, 15-9
s 20(1)	15-4
s 20(2)	15-4
s 21(4)	15-4, 15-7
s 22	15-4
s 43AA	15-5, 15-6, 15-9
s 43AB	15-5
s 43AC	15-5
Schedule—Dictionary	15-2
<u><i>District Court of Queensland Act 1967</i></u> (Qld)	
s 61	11-34
s 61(2)	11-34
s 61A	11-3, 11-34
s 116(2)	3-9

s 116(3)	3-9
--------------------	-----

Domestic and Family Violence Protection Act 2012 (Qld)

Generally	10-57, 10-66, 10-67
s 8	10-57
s 8(a)	10-57
s 8(b)	10-57
s 8(c)	10-57
s 8(d)	10-57
s 8(e)	10-57
s 8(f)	10-57
s 10	10-59
s 13	10-58
s 13(a)	10-58
s 13(b)	10-58
s 13(c)	10-58
s 14	10-58
s 15	10-58
s 16	10-58
s 17	10-58
s 18	10-58
s 19	10-58
s 20	10-58
s 34	10-61
s 34A	10-61
s 37	10-57
s 37(a)	10-57
s 37(b)	10-57
s 37(c)	10-57
s 42	10-62
s 44	10-61
s 45	10-61
s 52	10-59
s 53	10-59
s 56	10-60
s 56(a)	10-60
s 56(b)	10-60
s 79	10-63
s 80	10-63
s 81	10-63
s 82	10-63
s 83	10-63
s 100	10-68
s 100(5)	10-68
s 101	10-65
s 102	10-65
s 103	10-65
s 104	10-65
s 105	10-65
s 106	10-65
s 107	10-65
s 108	10-65

s 109	10-65
s 110	10-65
s 111	10-65
s 112	10-65
s 113	10-65
s 114	10-65
s 116	10-70, 10-75
s 118	10-70
s 119	10-70
s 121	10-70
s 126	10-75
s 127	10-75
s 128	10-75
s 129	10-69
s 130	10-69
s 158	10-66
s 159	10-67
s 170	10-64
s 171	10-64
s 172	10-64
s 173	10-64
s 174	10-64
s 175	10-64
s 176	10-64
s 177	10-71
s 177(a)	10-71
s 178	10-71
s 180	10-71
s 181	10-74

Drug Court Act 2000 (Qld)

Generally	13-1, 13-26
s 20(1)(a)	13-22

Drug Court Regulation 2006 (Qld)

Generally	13-1
-----------	------

Drugs Misuse Act 1986 (Qld)

Generally	4-2, 6-6, 8-4, 11-64, 12-2
s 4	8-2, 8-17, 8-24, 8-29, 8-34
s 5	8-1, 8-31
s 6	8-1, 8-3, 8-27, 8-29, 8-31
s 6(1)	8-28
s 6(2)	8-28
s 7	8-1, 8-3, 8-32
s 7(1)	8-31
s 7(1)(a)	8-31
s 7(1)(b)	8-31
s 7(2)	8-31
s 7(3)	8-31
s 8	8-1, 8-3, 8-15, 8-21, 8-23, 8-26
s 8A	8-1, 8-3, 8-22
s 9	8-1, 8-3, 8-5, 11-21

s 9A	8-1, 8-3, 8-12
s 9A(2)	8-12, 8-26
s 9B	8-1, 8-3, 8-26
s 9C	8-1, 8-3, 8-26
s 10	8-1
s 10(1)	8-3, 8-13
s 10(1)(a)	8-13
s 10(1)(b)	8-13
s 10(2)	8-16, 11-21
s 10(2)(a)	8-16, 8-17
s 10(2)(b)	8-16
s 10(3)	8-18
s 10(4)	8-18
s 10(4A)	8-18
s 10A	8-1, 8-19
s 10A(1)(a)	8-19
s 10A(1)(b)	8-19
s 10A(1)(c)	8-19
s 10A(1)(d)	8-19
s 10A(1)(e)	8-19
s 10A(1)(f)	8-19
s 10B(1)	8-15
s 10B(2)	8-15
s 11	8-1, 8-3, 8-33, 8-35
s 12	8-1, 8-3
s 13	8-3
s 13(1)	4-7, 8-3, 8-28
s 13(2)	4-7, 8-3, 8-32
s 14	8-3
s 30	8-39
s 31	8-39
s 32	8-39
s 33	8-39
s 33(1)	8-39
s 33(1)(a)	8-39
s 33(1)(b)	8-39
s 33(1)(c)	8-39
s 33(1)(d)	8-39
s 33(1)(e)	8-39
s 33(1)(f)	8-39
s 34	8-39
s 35	8-39
s 36	8-39
s 37	8-39
s 38	8-39
s 39	8-39
s 40	8-39
s 41	8-39
s 41(3)	8-39
s 41(4)	8-39
s 42	8-39
s 43	8-39

s 43(2)	8-39
s 116	8-6
s 118	8-28
s 118(2)	8-3
s 118(4)	8-3
s 118(5)	8-3
s 128(1)	8-37
s 128(1)(a)	8-37
s 128(1)(b)	8-37
s 128(1)(c)	8-37
s 129(1)(c)	8-8, 8-14, 8-17
s 129(1)(d)	8-11
Part 2	8-14, 8-39
Part 5	8-14, 8-39
Part 6	8-39

Drugs Misuse Regulation 1987 (Qld)

Schedule 1	8-2, 8-3, 8-22
Schedule 2	8-2, 8-3, 8-22, 8-28, 8-32
Schedule 3	8-3, 8-38
Schedule 4	8-3
Schedule 8A	8-12
Schedule 8B	8-12
Schedule 8C	8-15

Evidence Act 1977 (Qld)

s 132C	12-20
------------------	-------

Evidence Act 1995 (Cth)

Generally	6-1
---------------------	-----

Explosives Act 1999 (Qld)

Generally	10-46, 10-35
---------------------	--------------

Extradition Act 1988 (Cth)

Generally	7-7
s 6	7-7
s 7	7-7
s 7(a)	7-7
s 7(b)	7-7
s 7(c)	7-7
s 7(d)	7-7
s 7(e)	7-7
s 12	7-7
s 15	7-7, 7-8, 7-9, 7-10
s 15(1)	7-8
s 15(2)	7-8
s 15(3)	7-8
s 15(4)	7-8
s 15(4)(a)	7-8
s 15(4)(b)	7-8
s 15(5)	7-8
s 15(6)	7-8, 7-9, 7-10

s 18	7-7, 7-8
s 19	7-7, 7-8
s 28	7-10
s 32	7-10
 <i>Forensic Disability Act 2011</i> (Qld)	
Generally	2-20
 <i>Guardianship and Administration Act 2000</i> (Qld)	
Generally	2-20, 14-6
 <i>Health Act 1937</i> (Qld)	
s 130(2)(c) (now repealed)	8-29, 8-35
s 130(2)(e) (now repealed)	8-35
 <i>Invasion of Privacy Act 1971</i> (Qld)	
s 48A	5-30, 10-31, 10-23, 10-27, 10-28
s 48A(1)	10-24, 10-25, 10-26
s 48A(1A)	10-25, 10-26
s 48A(1A)(a)	10-25
s 48A(1A)(b)	10-25
s 48A(1A)(c)	10-25
s 48A(3A)	10-28
s 48A(4)	10-29
s 48A(5)	10-29
s 48A(11)	10-30
s 48A(12)	10-28
s 48A(13)	10-28
 <i>Judiciary Act 1903</i> (Cth)	
s 58	6-1
s 68	6-1
s 68(1)	6-1, 6-13
s 79	6-1
 <i>Justices Act 1886</i> (Qld)	
Generally	3-1, 10-74, 12-2
s 42	3-4
s 43	3-4
s 47	3-4
s 48	3-4
s 52	3-4
s 53	2-5
s 59	3-4
s 65	3-4
s 70	10-54
s 71	10-54
s 83A	3-4
s 84	3-4
s 88(1)	3-4
s 88(2)	3-4
s 88(3)	3-4
s 139(1)(a)	3-6

s 139(1)(b)	3-6
s 139(1)(c)	3-6
s 139(1)(d)	3-6
s 139(2)	3-6
s 140(1)	3-6
s 141	3-6
s 142(1)	3-6
s 142(2)	3-6
s 142A	3-6
s 145	3-7, 12-4
s 146A	3-6
s 147A(2)	3-8
s 147A(3)	3-8
s 147A(5)	3-8
s 222	2-42, 3-1, 3-9, 4-10, 10-12, 11-75, 12-25
s 222(1)	3-9, 11-68
s 222(1A)	11-68
s 222(2)	3-9
s 222(3)	3-9
s 222(4)	3-9
s 222(4)(a)	3-9
s 222(4)(b)	3-9
s 222(5)	3-9
s 222(9)	3-9
 <i><u>Justices Regulation 2004</u></i> (Qld)	
Generally	3-2
 <i><u>Justices of the Peace and Commissioners for Declarations Act 1991</u></i> (Qld)	
s 29	11-3
 <i><u>Juvenile Justice Amendment Act 2002</u></i> (Qld)	
Generally	11-1
 <i><u>Juvenile Justice Act 1992</u></i> (Qld)	
Generally	11-1
 <i><u>Legal Profession Act 2007</u></i> (Qld)	
Generally	12-9
 <i><u>Liquor Act 1992</u></i> (Qld)	
Generally	10-35
s 168B	10-35
s 168C	10-35
 <i><u>Mental Health Act 2000</u></i> (Qld)	
Generally	2-20, 6-1, 11-35, 14-2, 14-8, 14-10, 14-24, 14-30
s 14	14-27
s 50	14-26, 14-27
s 53	14-27
s 58	14-27
s 58(3)	14-27
s 59	14-27

s 61	14-15
s 62	14-15
s 63	14-15
s 64	14-27
s 65	14-27
s 66	14-27
s 68	14-27
s 69	14-27
s 71	14-27
s 75	14-27
s 78	14-28
s 81	14-29
s 89	14-29
s 100C	14-28
s 108	14-27
s 129(2)	14-27
s 129(3)	14-27
s 129(4)	14-27
s 204	14-8
s 217	14-24
s 228	14-11
s 238	14-14
s 240	14-14
s 243	14-14
s 244	14-14
s 253	14-28
s 256	14-15
s 257	14-15
s 258	14-15
s 259	14-15
s 260	14-15
s 267	14-13
s 268	14-20
s 269	14-20
s 282	14-19
s 287	14-28
s 288	14-16, 14-17, 14-22, 14-23
s 311	14-21
s 317	14-21
Chapter 3	14-26
Chapter 7	11-35, 14-6, 14-14, 14-29
Schedule—Dictionary	14-11, 14-12, 14-27

Migration Act 1958 (Cth)

Generally	7-13, 7-14, 7-15
s 189	7-13
s 232	6-6
s 233A	6-6
s 233B	6-6
s 233C	6-6
s 233D	6-6
s 233E	6-6

s 234	6-6
s 235	6-6
s 236	6-6
<u>Misuse of Drugs Act 1975</u> (New Zealand)	
Generally	8-36
<u>Misuse of Drugs Act 1971</u> (United Kingdom)	
Generally	8-36
<u>Nature Conservation Act 1992</u> (Qld)	
Generally	10-35
<u>Penalties and Sentences Act 1992</u> (Qld)	
Generally	10-14, 10-33, 11-37, 12-2, 12-21
s 5	6-10, 10-14, 13-9
s 9	12-21
s 9(2)	13-18, 13-22
s 9(2)(a)(i)	13-18, 13-22
s 9(7A)	12-7
s 10(2)	13-5
s 10(4)	13-5
s 10(4)(a)	13-5
s 15B	13-1
s 15C	13-1
s 15D	13-1
s 15E	13-1
s 15F	13-1
s 16	13-1
s 17	13-1
s 18	13-1
s 19	6-10, 10-14, 10-32, 13-1, 13-2, 13-4, 13-5, 13-7
s 19(1)	13-7
s 19(2A)	13-5
s 19(3)	13-7
s 20	13-1
s 21	13-1
s 22	10-32, 13-1
s 23	13-1
s 24	13-1, 13-4, 13-6
s 25	13-1
s 26	13-1
s 27	13-1
s 28	13-1
s 29	13-1
s 30	13-1, 13-4, 13-7
s 31	10-14, 10-32, 13-1, 13-4, 13-7
s 32	13-1, 13-4, 13-7
s 33	13-1
s 34	13-1, 13-23
s 35	13-1, 13-7, 13-23
s 36	13-1
s 37	13-1, 13-23

s 38	13-1
s 39	13-1
s 39A	13-1
s 40	13-1
s 41	13-1
s 42	13-1
s 43	13-1
s 43A	13-1
s 43B	13-1
s 43C	13-1
s 43C(2)(a)	13-24
s 43C(3)	13-24
s 43D	13-1
s 43E	13-1
s 43F	13-1, 13-24
s 43I(2)	13-25
s 43J	13-25
s 43K	13-25
s 43L	13-25
s 43M	13-25
s 43O	13-25
s 44	13-1
s 45	13-1
s 46	13-1
s 47	10-33, 13-1
s 48	10-33, 13-1, 13-9
s 49	13-1, 13-8
s 50	13-1, 13-10
s 51	13-1, 13-10
s 52	13-1
s 53	13-1
s 54	13-1
s 55	13-1, 13-12
s 56A	13-1
s 57	13-1
s 58	13-1
s 59	13-1
s 60	13-1
s 61	13-1
s 62	13-1
s 63	13-1
s 64	13-1
s 65	13-1
s 66	13-1
s 67	13-1, 13-12
s 68	13-1
s 69	13-1, 13-12
s 70	13-1
s 71	13-1
s 72	13-1
s 73	13-1
s 74	13-1

s 76	13-1
s 78	13-1
s 79	13-1
s 80	13-1
s 81	13-1
s 82	13-1
s 83	13-1
s 84	13-1
s 85	13-1
s 86	13-1
s 87	13-1
s 88	13-1
s 89	13-1
s 90	10-36, 13-1
s 91	10-14, 10-36, 13-1
s 92	10-36, 13-1, 13-14
s 92(2)	13-14
s 93	10-36, 13-1, 13-14
s 93(a)	13-14
s 93(b)	13-14
s 93(c)	13-14
s 93(d)	13-14
s 93(e)	13-14
s 93(f)	13-14
s 93(g)	13-14
s 94	10-36, 13-1, 13-14
s 95	10-36, 13-1
s 96	10-36, 13-1, 13-14
s 97	10-36, 13-1
s 98	10-36, 13-1
s 99	10-36, 13-1
s 100	10-36, 13-1
s 101	10-14, 10-36, 13-1, 13-13
s 102	10-36, 13-1
s 103	10-36, 13-1, 13-13
s 103(2)(b)	13-13
s 105	10-36, 13-1
s 106	10-36, 13-1, 13-13
s 107	10-36, 13-1
s 108	10-36, 13-1
s 109	10-36, 13-1, 13-13
s 110	10-36
s 111	13-1
s 112	13-1
s 113	13-1
s 114	13-1
s 115	13-1
s 116	13-1
s 117	13-1
s 118	13-1
s 119	13-1
s 120	10-36

s 121	10-36
s 122	10-36
s 122(2)	10-46
s 123	10-36
s 123(1)	10-38
s 124	10-36, 10-38, 10-46
s 125	10-36, 10-40
s 125(4)(b)	10-38
s 126	10-36, 10-40
s 126A	10-36, 10-40
s 127	10-36
s 128	10-36
s 128(1)	10-37
s 128(2)	10-37
s 129	10-36
s 129(1)	10-37
s 129(2)	10-37
s 130	10-36
s 131	10-36
s 132	10-36, 10-37
s 133	10-36
s 134	10-36
s 135	10-36
s 136	10-36
s 137	10-36
s 138	10-36
s 139	10-36
s 140	10-36
s 141	10-36
s 142	10-36
s 144(1)	13-20
s 146(4)	2-11
s 147	13-20
s 147(2)	13-20
s 152	13-1
s 152A	13-1
s 153	13-1
s 153A	13-1
s 154	13-1
s 155	13-1, 13-19
s 156	13-1
s 156A	10-46, 13-1
s 156A(1)	10-46
s 156A(1)(a)	10-46
s 156A(1)(a)(i)	10-46
s 156A(1)(a)(ii)	10-46
s 156A(1)(b)(i)	10-46
s 156A(1)(b)(ii)	10-46
s 156A(1)(b)(iii)	10-46
s 156A(1)(b)(iv)	10-46
s 156A(2)	10-46
s 157	13-22

s 158A	13-1
s 159	13-1
s 159A	13-1, 13-21
s 159A(4)	13-21
s 159(4A)	13-21
s 160	10-46, 13-1
s 160A	10-46, 13-1, 13-22
s 160B	10-46, 13-1, 13-22
s 160B(1)	10-46, 13-22
s 160B(2)	10-46, 13-22
s 160B(3)	10-46, 13-22
s 160B(4)	10-46
s 160C	10-46, 13-1, 13-22
s 160D	10-46, 13-1, 13-22
s 160E	10-46 13-1, 13-22
s 160F	10-46, 13-1
s 160G	10-46, 13-1, 13-22
s 160G(2)	13-22
s 160G(4)	10-46, 13-22
s 160H	10-46, 13-1
s 179C	12-7
s 179E	12-7
s 182A	12-6
s 185	13-1, 13-11
S 185(2)(b)	13-11, 13-19
s 185A	13-10
s 187	9-11
s 188	3-8
s 188(5)	3-8
s 189	12-5
s 190	13-1, 13-3
s 191	13-3
s 213	13-22

Penalties and Sentences Regulation 2005 (Qld)

s 5(b)	11-21
--------	-------

Police Powers and Responsibilities Act 2000 (Qld)

Generally	10-34, 11-64, 12-2
s 5	10-34
s 5(a)	10-34
s 5(b)	10-34
s 5(c)	10-34
s 5(d)	10-34
s 5(e)	10-34
s 5(f)	10-34
s 11	10-34
s 19	10-35
s 19(5)	10-35
s 19(6)	10-35
s 20	10-35
s 29	10-35

s 30	10-35
s 31	10-35
s 32	10-35
s 33	10-35
s 40	10-35
s 41	10-35
s 42	10-35
s 46	10-35
s 48	10-35
s 48(1)	10-35
s 51	10-35
s 52	10-35
s 53	10-35
s 55	10-35
s 58	10-35
s 58(1)(a)	10-35
s 58(1)(b)	10-35
s 58(1)(c)	10-35
s 58(1)(d)	10-35
s 58(1)(e)	10-35
s 69A(2)	10-35
s 74	10-35
s 90	10-35
s 90A	10-35
s 91	10-35
s 102	10-35
s 151	10-35
s 156	10-35
s 157	10-35
s 159	10-35
s 159(a)	10-35
s 159(b)	10-35
s 159(c)	10-35
s 160	10-35
s 161	10-35
s 187	12-24
s 198(2)	11-26
s 198(3)	11-26
s 223	11-26
s 245	11-11
s 246	11-11
s 247	11-11
s 248	11-11
s 249	11-11
s 250	11-11
s 251	11-11
s 252	11-11
s 253	11-11
s 254	11-11
s 255	11-11
s 256	11-11
s 257	11-11

s 258	11-11
s 259	11-11
s 260	11-11
s 261	11-11
s 262	11-11
s 263	11-11
s 264	11-11
s 265	11-11
s 266	11-11
s 267	11-11
s 268	11-11
s 365	10-35
s 365(1)(a)	10-35
s 365(1)(b)	10-35
s 365(1)(c)	10-35
s 365(1)(d)	10-35
s 365(1)(e)	10-35
s 365(1)(f)	10-35
s 365(1)(g)	10-35
s 365(1)(h)	10-35
s 365(1)(i)	10-35
s 365(1)(j)	10-35
s 365(1)(k)	10-35
s 365(1)(l)	10-35
s 365(1)(l)(i)	10-35
s 365(1)(l)(ii)	10-35
s 367	11-30
s 382	2-5, 11-23
s 383	11-23
s 384	11-23
s 388	2-5, 11-23
s 389	2-21, 11-23
s 389(5)	11-23
s 390	11-23
s 392	11-23
s 403	10-35
s 403(2)	10-35
s 403(4)	10-35
s 405	10-35
s 406	10-35
s 418	10-35
s 420	10-35
s 422	10-35
s 423	10-35
s 443	10-35
s 470	10-35
s 471	10-35
s 474	10-35
s 481	10-35
s 482	10-35
s 483	10-35
s 484	10-35

s 485	10-35
s 486	10-35
s 487	10-35
s 488	10-35
s 488A	10-35
s 540	10-35
s 542	10-35
s 577	10-35
s 581	10-35
s 582	10-35
s 583	10-35
s 583(2)(a)	10-35
s 583(2)(b)	10-35
s 583(2)(b)(i)	10-35
s 583(2)(b)(ii)	10-35
s 583(2)(b)(iii)	10-35
s 615	10-75
s 790	10-35
s 790(1)	10-35
s 790(2)	10-35
s 791	10-35
s 791(4)	10-35
Schedule 6—Dictionary	10-35, 11-14

Police Service Administration Act 1990 (Qld)

Generally	11-64
-----------	-------

Prostitution Act 1999 (Qld)

Generally	10-79
s 72	10-83
s 73(1)(a)	10-83
s 73(1)(b)	10-83
s 73(1)(c)	10-83
s 73(2)	10-83
s 73(2)(a)	10-83
s 73(2)(b)	10-83
s 73(2)(c)	10-83
s 73(2)(d)	10-83
s 73(4)	10-83
s 73(4)(a)	10-83
s 73(4)(b)	10-83
s 76	10-83
s 76(1)(a)	10-83
s 76(1)(b)	10-83
s 76(2)	10-83
s 76(2)(a)	10-83
s 76(2)(b)	10-83
s 77	10-80, 10-83
s 77(a)	10-83
s 77(b)	10-83
s 77(c)	10-83
s 77(d)	10-83

s 77A(1)	10-83
s 77A(2)	10-83
s 77A(3)	10-83
s 77A(4)	10-83
s 77A(5)	10-83
s 77A(6)	10-83
s 78(1)	10-80
s 79(1)	10-80
s 81(1)	10-80
s 82	10-80
s 83	10-83
s 85	10-83
s 85(a)	10-83
s 85(b)	10-83
s 85(c)	10-83
s 93	10-83
s 93(3)(a)	10-83
s 93(3)(b)	10-83
s 127	10-80
s 128	10-80
s 128(2)	10-80
 <i><u>Prostitution Amendment Act 2001</u></i> (Qld)	
Generally	10-79
 <i><u>Prostitution and Other Acts Amendment Act 2010</u></i> (Qld)	
Generally	10-79
 <i><u>Racing Act 2002</u></i> (Qld)	
Generally	10-35
 <i><u>Regulatory Offences Act 1985</u></i> (Qld)	
Generally	10-1, 10-13, 10-14, 11-64, 12-2
s 5	5-23, 10-2, 10-3
s 5(1)(a)	5-23, 10-3
s 5(1)(b)	10-3
s 5(1)(c)	10-3
s 5(1A)	10-3
s 5(2)	10-3, 10-5
s 6	10-2, 10-6, 10-7
s 6(1)(a)	10-6
s 6(1)(b)	10-6
s 6(2)	10-6, 10-8, 10-9
s 7	5-38, 10-2, 10-9, 10-10
s 9	10-11
s 9(1)	10-6
 <i><u>Service and Execution of Process Act 1992</u></i> (Cth)	
Generally	7-1
s 3	7-4
s 82	7-2
s 82(3)	7-2
s 82(4)	7-2

s 83	7-3, 7-5
s 83(3)	7-3
s 83(4)	7-3
s 83(5)	7-2, 7-3
s 83(6)	7-3
s 83(7)	7-3
s 83(8)(a)	7-3
s 83(8)(b)	7-3
s 83(10)	7-3
s 83(12)	7-3
s 83(14)(a)	7-3
s 83(14)(b)	7-3
s 84(1)	7-4
s 84(2)	7-4
s 84(3)	7-4
s 84(4)	7-4
s 84(5)	7-4
s 84(6)	7-4
s 84(6)(a)	7-4
s 84(6)(b)	7-4
s 84(7)	7-4
s 84(8)	7-4
s 84(9)	7-4
s 84(10)	7-4
s 85	7-3
s 86(1)	7-5
s 86(2)	7-5
s 86(3)	7-5
s 86(5)	7-5
s 86(6)	7-5
s 86(7)	7-5
s 86(8)	7-5
s 86(9)	7-5
s 86(10)	7-5
s 86(14)	7-5
s 88	7-3
s 112	7-11
s 113	7-11
s 114	7-11, 7-12
s 114(1)	7-12
s 114(1)(a)	7-12
s 114(1)(b)	7-12
s 114(2)	7-12
s 114(3)	7-12
s 114(4)	7-12
s 115	7-11, 7-12
s 116	7-11, 7-12
s 117	7-11
s 118	7-11
s 119	7-11
s 120	7-11
s 120(3)	7-12

s 121	7-11
s 122	7-11
 <u>South Bank Corporation Act 1989</u> (Qld)	
Generally	10-35
 <u>State Penalties Enforcement Act 1999</u> (Qld)	
Generally	12-6
s 34	13-10
s 63	13-1
s 65	13-1
s 79	13-1
s 104	13-1
s 119	13-1
 <u>Summary Offences Act 2005</u> (Qld)	
Generally	10-24, 10-31
s 6(1)	10-32
s 6(2)(a)(i)	10-32
s 6(2)(a)(ii)	10-32
s 6(2)(a)(iii)	10-32
s 6(2)(a)(iv)	10-32
s 6(2)(b)	10-32
s 6(3)(a)	10-32
s 6(3)(b)	10-32
s 7	10-32, 10-33, 11-64, 12-2
s 7(1)	10-32
s 8	10-32
s 8(1)(a)	10-32
s 8(1)(b)	10-32
s 8(1)(c)	10-32
s 9	10-32
s 9(1)(b)	10-32
s 9(2)(b)	10-32
s 9(3)	10-32
s 10	10-32
s 10(a)	10-32
s 10(b)(i)	10-32
s 10(b)(ii)	10-32
s 11	10-32
s 14	10-32
s 14(1)(a)	10-32
s 14(1)(b)	10-32
s 14(1)(c)	10-32
s 14(1)(d)	10-32
s 15	10-33
s 15(1)(a)	10-32
s 15(1)(b)	10-32
s 15(1)(c)	10-32
s 15(1)(d)	10-32
s 15(1)(e)	10-32
s 15(1)(f)	10-32
s 15(3)	10-33

s 16	10-33
s 17	10-33
s 18	10-33
s 19	10-32, 10-33
s 19(1)(a)	10-33
s 19(1)(b)	10-33
s 19(1)(c)	10-33
s 22	10-33
s 23B	10-33
s 25	10-33
s 25(a)	10-33
s 25(b)	10-33
s 26A	10-33
s 31	10-14, 10-32
s 47	10-33
s 48(2)	10-33
Schedule 2	10-33

Transport Infrastructure Act 1994 (Qld)

Generally	10-32
-----------	-------

Transport Operations (Road Use Management) Act 1995 (Qld)

Generally	9-1, 9-3, 9-17, 12-2
s 78	9-9, 9-6
s 78(1)	9-5
s 78(3)	9-9
s 79	9-4, 9-12, 9-13
s 79(1)	9-2
s 79(1A)	9-2
s 79(1C)	9-2
s 79 (1F)	9-2
s 79(B)	9-2, 9-9
s 79(D)	9-7
s 79(E)	9-2
s 79(F)	9-2
s 79(2)	9-2
s 79(2A)	9-2
s 79(2AA)	9-2
s 79 (2B)	9-2
s 79(2D)	9-2
s 79(2F)	9-2
s 79(2G)	9-2
s 79(2H)	9-2
s 79(11)	9-3
s 79(12)	9-4
s 80	9-2, 9-4
s 80(5A)	9-2
s 80(11)	9-2
s 80(11A)	9-4
s 83	9-11
s 86	12-24
s 87	9-12

s 87(5)	9-13
s 87(5)(a)	9-14
Schedule 4	9-3

Weapons Act 1990 (Qld)

Generally	10-15, 10-17, 10-35, 10-46, 10-63, 11-64, 12-2
s 2	10-63
s 50(1)	10-17
s 50(1)(a)	10-17, 10-19
s 50(1)(b)	10-17
s 50(1)(c)	10-17
s 50(1)(c)(i)	10-17
s 50(1)(c)(ii)	10-17
s 50(1)(c)(iii)	10-17
s 50A	10-17
s 50A(1)	10-17
s 50B	10-17
s 50B(1)(a)	10-17, 10-19
s 50B(1)(b)	10-17
s 50B(1)(c)	10-17
s 50B(1)(c)(i)	10-17
s 50B(1)(c)(ii)	10-17
s 50B(1)(c)(iii)	10-17
s 51	10-17
s 51(1)	10-17
s 51(2)	10-17
s 51(2)(a)	10-17
s 51(2)(b)	10-17
s 51(2)(c)	10-17
s 51(2)(d)	10-17
s 51(3)	10-17
s 51(4)	10-17
s 51(5)	10-17
s 51(6)	10-17
s 51(7)	10-17
s 51(7)(a)	10-17
s 51(7)(b)	10-17
s 56	10-17
s 56(1)	10-17
s 56(2)	10-17
s 57	10-17
s 57(1)	10-17
s 57(1)(a)	10-17
s 57(1)(b)	10-17
s 57(1)(c)	10-17
s 57(1)(d)	10-17
s 57(2)	10-17
s 57(3)	10-17
s 57(4)	10-17
s 58	10-17
s 58(1)	10-17
s 58(1)(a)	10-17

s 58(1)(b)	10-17
s 58(1)(c)	10-17
s 58(1)(d)	10-17
s 58(1)(e)	10-17
s 58(1)(f)	10-17
s 59	10-17
s 59(2)	10-17
s 60	10-17
s 60(1)	10-17
s 65	10-17, 10-19
s 67(1)	10-17
s 155	10-21
s 159	10-18
s 161	10-17
s 161(1)	10-19, 10-20
s 161(8)	10-19
Schedule 2—Dictionary	10-16

Weapons Categories Regulations 1997 (Qld)

7	10-17
9(a)	10-17
9(b)	10-17
9(c)	10-17
9(d)	10-17
9(e)	10-17
Schedule 1	10-22

Weapons Regulations 1996 (Qld)

reg 30	10-17
reg 31	10-17
reg 32	10-17
reg 33	10-17
reg 34	10-17
reg 35	10-17
reg 36	10-17
reg 37	10-17
reg 38	10-17
reg 39	10-17
reg 39(1)	10-17
reg 39(1)(a)	10-17
reg 39(1)(b)	10-17
reg 40	10-17
reg 41	10-17
reg 42	10-17
reg 43	10-17
reg 60	10-17
reg 67	10-17

Youth Justice Act 1992 (Qld)

Generally	11-1, 11-2, 11-5, 11-8, 11-D, 11-E, 12-2
s 2(b)	11-37
s 3	11-4
s 4	11-51

s 6	11-6
s 8	11-34
s 8(1)(a)	11-34
s 8(1)(b)	11-34
s 8(2)(a)	11-34
s 8(2)(b)	11-34
s 8(2)(c)	11-34
s 8(2)(d)	11-34
s 10(b)	11-34
s 11	11-15
s 11(5)	11-15
s 11(7)	11-15, 11-17
s 12	11-22
s 13(1)(a)	11-26
s 16	11-18
s 16(1)(a)	11-18
s 16(1)(b)	11-18
s 17	11-18
s 18	11-18
s 19	11-18
s 20	11-18
s 21	11-17, 11-19
s 21(2)	11-19
s 21(3)	11-19
s 22	11-20
s 24(3)	11-20
s 25	11-64
s 25(3)(a)	11-12
s 25(3)(b)	11-12
s 25(3)(c)	11-12
s 25(4)	11-12
s 25(6)	11-12
s 25(9)	11-12
s 26	11-13, 11-14
s 26(2)(a)	11-13
s 26(2)(b)	11-13
s 27	11-51
s 27(1)	11-12
s 27(4)	11-12
s 29 (previously 9E)	11-13, 11-14
s 29(2) (previously 9E(2))	11-13
s 34	11-20
s 37(2)	11-20
s 37(7)	11-20
s 42(3)(c)	11-34
s 43	11-24
s 46(1)	11-25
s 46(2)	11-25
s 48	11-28, 11-29
s 48(2)	11-27
s 48(3)	11-27
s 48(3A)	11-27

s 48(4)	11-27
s 48(7)	11-27
s 49	11-3, 11-27
s 51(1)	11-27
s 52(2)	11-27
s 52(2)(f)	11-27
s 52(3)	11-27
s 52(4)	11-27
s 52(5)	11-27
s 52(6)	11-27
s 53	11-28
s 55	11-28
s 56	11-33
s 57	11-27
s 59	11-32
s 61	11-35
s 69(2)	11-8
s 70	11-8, 11-66
s 72	11-8
s 74	11-3, 11-70
s 77	11-34
s 78	11-34
s 79	11-12
s 81(2)	11-34
s 82	11-34
s 83	11-34
s 84	11-34
s 85	11-34
s 86	11-34
s 87	11-34
s 88	11-34
s 89	11-34
s 90	11-34
s 91	11-34
s 92	11-34
s 93	11-34
s 94	11-34
s 95	11-34
s 96	11-34
s 98	11-34
s 98(5)	11-34
s 99	11-34
s 100	11-34
s 103	11-34
s 106	11-34, 11-62
s 107	11-3, 11-34
s 108	11-3, 11-34
s 109	11-3
s 110	11-3
s 111	11-3
s 112	11-3
s 113	11-3

s 116	11-68
s 117(2)	11-68
s 117(3)	11-68
s 117(4)	11-68
s 118	11-50, 11-69
s 119(1)(a)	11-69
s 119(1)(b)	11-69
s 119(2)(b)	11-69
s 121(1)	11-69
s 121(3)	11-69
s 121(4)	11-69
s 122(1)	11-69
s 123	11-69
s 124	11-69
s 127	11-63
s 128(1)(a)	11-63
s 128(1)(b)	11-63
s 128(1)(c)	11-63
s 128(4)(b)	11-63
s 128(7)	11-63
s 140	11-6
s 140(1)	11-6
s 140(2)	11-6
s 140(3)	11-6
s 140(4)	11-6
s 140(4)(a)	11-6
s 141	11-6
s 142	11-6
s 143	11-6
s 143(4)	11-51
s 143(6)	11-6
s 144	11-6
s 144(2)	11-6
s 147	11-17, 11-20
s 148	11-51
s 148(4)	11-51
s 149	11-4, 11-37
s 150	11-20, 11-37, 11-51
s 150(1)(b)	11-37
s 150(1)(g)	11-37
s 150(2)(a)	11-37, 11-46
s 150(2)(b)	11-37
s 150(2)(d)	11-37
s 150(2)(e)	11-37
s 151	11-36
s 151(3)	11-36
s 151(4)	11-36
s 151(9)	11-36
s 152	11-36
s 153(1)	11-36
s 153(3)	11-36
s 154	11-51

s 155	11-37
s 156	11-41
s 161	11-20
s 161(4)	11-20
s 164	11-20
s 165(2)	11-20
s 165(4)	11-20
s 165(5)	11-20
s 166	11-20
s 167	11-21
s 168	11-21
s 169	11-21
s 170	11-21
s 171	11-21
s 172	11-21
s 173	11-21
s 174	11-21
s 175	11-20, 11-38, 11-41, 11-57, 11-65
s 175(1)(a)	11-39
s 175(1)(b)	11-40
s 175(1)(c)	11-41
s 175(1)(d)	11-42
s 175(1)(e)	11-43
s 175(1)(f)	11-43, 11-44
s 175(1)(g)	11-46
s 175(1)(g)(i)	11-46
s 175(2)	11-42, 11-43
s 175(3)	11-45
s 176	11-38, 11-46, 11-57, 11-65
s 176(1)	11-50
s 176(2)	11-50
s 176(3)	11-50
s 177	11-48, 11-65
s 178	11-48, 11-65
s 179	11-48, 11-65
s 180	11-48, 11-65
s 181	11-65
s 183	11-41, 11-42, 11-43, 11-50
s 183(2)	11-50
s 183(3)	11-50
s 184	11-50
s 185	11-61
s 185(4)	11-61
s 186	11-42, 11-46, 11-61, 11-62
s 186(1)(a)	11-62
s 186(1)(b)	11-62
s 188	11-40
s 189	11-40
s 189(1)	11-53
s 189(2)	11-53
s 190	11-41
s 191	11-41

s 192	11-41
s 192(2)	11-41
s 192(7)	11-41
s 193	11-42
s 193(4)	11-42
s 194	11-42
s 195	11-41, 11-43
s 196	11-43
s 197	11-43
s 198	11-43
s 198(a)	11-43
s 199	11-43
s 200	11-41, 11-43
s 200(4)	11-43
s 201	11-45
s 203	11-36, 11-44
s 203(1)	11-44
s 203(1)(a)	11-44
s 203(1)(b)	11-44
s 203(1)(c)	11-44
s 203(1)(c)(i)	11-44
s 203(1)(c)(ii)	11-44
s 203(1)(c)(iii)	11-44
s 203(1)(c)(iv)	11-44
s 203(2)(a)	11-44
s 203(2)(b)	11-44
s 204	11-44
s 205	11-44
s 206	11-44
s 207	11-36, 11-45, 11-46
s 208	11-46
s 209	11-46, 11-69
s 212	11-46
s 213	11-46
s 214	11-46
s 218	11-33, 11-47
s 220	11-45
s 221	11-45
s 221(4)	11-45
s 222	11-45
s 223	11-36, 11-45
s 223(a)	11-36, 11-45
s 223(b)	11-36, 11-45
s 224	11-45
s 227	11-46
s 234	11-36
s 235(2)	11-49
s 235(5)	11-49
s 236	11-52
s 237	11-52, 11-54
s 237(3)	11-54
s 238	11-52, 11-54

s 238(2)	11-54
s 238(3)	11-54
s 238(6)	11-54
s 239	11-52
s 240	11-52, 11-55
s 240(3)(a)	11-55
s 240(3)(b)	11-55
s 241	11-52, 11-55
s 242	11-52, 11-56
s 243	11-52, 11-56
s 244	11-52
s 245	11-52, 11-55, 11-57
s 245(4)	11-57
s 245(5)	11-57
s 245(6)	11-57
s 246	11-52, 11-55, 11-58
s 246(4)	11-58
s 246(5)	11-58
s 246(6)	11-58
s 247	11-52, 11-59
s 248	11-52, 11-58
s 249	11-52, 11-57
s 250	11-52, 11-59
s 251	11-52
s 252	11-52, 11-60
s 253	11-65
s 254(2)	11-65
s 254(3)	11-65
s 255	11-64
s 255(1)(a)	11-64
s 255(1)(b)	11-64
s 255(1)(c)	11-64
s 255(1)(d)	11-64
s 255(1)(e)	11-64
s 255(1)(f)	11-64
s 255(3)	11-64
s 255(4)	11-64
s 257	11-66
s 258	11-66
s 259	11-66
s 260	11-66
s 276B	11-67
s 276C	11-67
s 276D	11-67
s 301	11-7
s 302	11-70
s 309	11-41
s 310	11-41, 11-49
s 313	11-41
Division 12A	11-58
Part 7	11-37
Schedule 1	11-2, 11-4, 11-15, 11-37, 11-46

Schedule 1, Principles 17 and 18	11-26
Schedule 4	11-6, 11-7, 11-34
Schedule 4(a)	11-60
Schedule 4(b)	11-60

Youth Justice Regulation 2003 (Qld)

s 6(1)	11-36
s 6(1)(a)	11-36
s 6(1)(b)	11-36
s 6(1)(c)	11-36
s 6(1)(d)	11-36
s 6(1)(e)	11-36
s 6(1)(f)	11-36
s 6(1)(g)	11-36
s 6(1)(h)	11-36
s 6(1)(i)	11-36
s 6(1)(j)	11-36
s 7	11-36

Case citations

<i>Andaloro v Wyong Cooperative Dairy Society Limited</i> (1965) 66 SR (NSW) 466	8-30
<i>Barlow v Dale</i> (Unreported, Queensland Court of Appeal, CA 406 of 1993, Fitzgerald P, McPherson JA and Williams J, 8 December 1993)	8-9
<i>Bourke v Reid</i> (1993) 67 A Crim R 518; [1993] QCA 83	8-8, 8-9
<i>Brown v Qld Police Service</i> [2011] QDC 301	3-7
<i>Byrne v Gibbons; ex parte Gibbons</i> [1966] QWN 2	10-17
<i>Calabria v R</i> (1983) 151 CLR 670; [1983] HCA 33	8-24
<i>CEO Customs v Odesnik</i> [2010] QMC 3	6-1, 6-10
<i>Christie v Strohfeltdt</i> (Unreported, Queensland District Court, CM No 5 of 2001, Britton J, 5 October 2000)	8-20
<i>Clare v R</i> (1994) 2 Qd R 619; [1993] QCA 558	8-6
<i>Commissioner of Police v Warcon</i> [2011] QDC 28	12-4
<i>Commissioner of Taxation v Baffsky</i> (2001) 122 A Crim R 568; [2001] NSWCCA 332	6-1, 6-10
<i>Commonwealth v Sterling Nicholas Duty Free</i> (1972) 126 CLR 297	8-30
<i>Dart v Jacklin & Ingerson</i> [2007] QDC 371	13-11
<i>Dolby v Stanta</i> [1996] 1 Qd R 138; [1995] QCA 434	5-26
<i>Donnelly v Rose</i> [1995] 1 Qd R 148; [1993] QCA 223	8-9
<i>DRH, BES and TKL</i> (Unreported, Childrens Court of Queensland, CSM No 16 of 2000, Robertson J, 13 April 2000)	11-49
<i>Duncan v Martyn</i> (Unreported, Queensland Court of Criminal Appeal, CA 14 of 1989, Kelly SPJ, Kneipp and Demack JJ, 18 April 1989)	8-6
<i>Federal Commissioner of Taxation v Jack Zinader Pty Ltd</i> (1949) 78 CLR 336	8-24
<i>Fisher v Bell</i> [1961] 1 QB 394	8-29
<i>Gauci v Driscoll</i> [1985] VR 428	8-29
<i>Gough v Braden</i> [1993] 1 Qd R 100	8-20
<i>Kaporonovski v R</i> (1973) 133 CLR 209; [1973] HCA 35	5-10
<i>Kylie-Maree Corkill v Steven L Wilson</i> [2009] QDC 13	13-16
<i>Lacey & Lacey v DPP</i> [2007] QSC 291	2-17
<i>Lacey & Lacey v DPP</i> [2007] QCA 413	2-17
<i>Lawler v Prideaux</i> [1995] 1 Qd R 186; [1993] QCA 395	8-8
<i>Lockyer v Gibb</i> [1967] 2 QB 243	8-6
<i>Maroney v R</i> (2003) 216 CLR 31; [2003] HCA 63	8-29
<i>McNaughtan v Garland; ex parte McNaughtan</i> [1979] Qd R 240	9-3
<i>McNicol v Pinch</i> [1906] 2 KB 352	8-24
<i>Michaels v R</i> (1995) 184 CLR 117; [1995] HCA 8	3-4
<i>Mill v The Queen</i> (1988) 166 CLR 59; [1988] HCA 70	13-22
<i>Moore v Lewis</i> [2008] QDC 105	13-22
<i>Newman v Paties; ex parte Newman</i> [1979] Qd R 402	10-83
<i>R v AAM; ex parte Attorney-General of Queensland</i> [2010] QCA 305	14-9, 14-12
<i>R v Armstrong</i> (Unreported, Queensland Court of Criminal Appeal, CA 191 of 1985, McPherson, Thomas and de Jersey JJ, 17 October 1985)	8-6
<i>R v BBX</i> [2011] QCA 008	11-50

<i>R v Bentham</i> [1973] 1 QB 357	8-7
<i>R v Boyesen</i> [1982] AC 768	8-6
<i>R v Brauer</i> [1990] 1 Qd R 332	8-8, 8-36
<i>R v Bridges</i> [1986] 2 Qd R 391	8-6, 8-7
<i>R v C & M</i> [2000] 1 Qd R 636; [1998] QCA 252	11-44
<i>R v C</i> (Unreported, Queensland Court of Appeal, CA 437 of 1996, Fitzgerald P, McPherson JA and Helman J, 22 April 1997)	11-13
<i>R v Cameron</i> (Unreported, Queensland Court of Criminal Appeal, CA 108 of 1975, Dunn, Wanstall and Matthews JJ, 11 December 1975)	8-29
<i>R v Carr-Briant</i> [1943] KB 607	5-34
<i>R v CDR</i> (No 2) [1996] 1 Qd R 69	11-44
<i>R v Coles</i> [1984] 1 NSWLR 726	8-30
<i>R v Coutts</i> [2008] QCA 380	13-22
<i>R v Dillon</i> [1983] 2 Qd R 627	8-38
<i>R v EEM</i> [2011] QChC 032	11-49
<i>R v Ellames</i> [1974] 3 All ER 130	8-14
<i>R v F & P</i> [1997] QCA 98	11-44
<i>R v F; ex parte Attorney-General</i> [1998] QCA 97	11-10
<i>R v Ferrari</i> [1997] 2 Qd R 472; [1997] QCA 73	13-7
<i>R v Fox</i> [1986] 2 Qd R 402	8-8, 8-36
<i>R v Giorgi and Romeo</i> (1982) 31 SASR 299	8-24
<i>R v GT</i> [1997] 2 Qd R 183	11-44
<i>R v Holmes</i> [2008] QCA 259	13-16
<i>R v Ibrahimof</i> [1980] ACL 799	8-24
<i>R v J</i> , (Unreported, Childrens Court of Queensland, No 75 of 1996, McGuire J, 20 June 1996)	11-10
<i>R v Josephs</i> (1977) 65 Cr App R 253	8-36
<i>R v Keskic</i> [1979] Qd R 348	8-11
<i>R v Kirkwood</i> [1982] Qd R 158	8-24
<i>R v Kitson</i> [2008] QCA 86	13-22
<i>R v Knibb</i> (Unreported, Queensland Court of Criminal Appeal, CA 303 of 1981, Campbell, Sheahan and Connelly JJ, 9 March 1982)	8-14
<i>R v Lavelle</i> (1995) 82 A Crim R 187	7-1
<i>R v Leu; R v Togia</i> (2008) 186 A Crim R 240; [2008] QCA 201	13-22
<i>R v Lockwood; ex parte Attorney-General</i> [1981] Qd R 209	5-37
<i>R v Maroney</i> [2002] 1 Qd R 285; [2000] QCA 310	8-29
<i>R v Marsden</i> [2003] QCA 473	13-13
<i>R v Miller</i> [1990] 2 Qd R 566	8-14
<i>R v Mogford</i> [1970] 1 WLR 988	8-36
<i>R v O'Dempsey</i> [1982] Qd R 174	8-24
<i>R v Patterson</i> [1906] QWN 32	5-28
<i>R v Presser</i> [1958] VR 45	14-7, 14-12
<i>R v Roberts</i> (Unreported, Queensland Court of Criminal Appeal, CA 353 of 1987, Kelly SPJ, Macrossan and Derrington JJ, 23 February 1988)	8-30
<i>R v Sanewski</i> [1987] 1 Qd R 374	8-35

<i>R v Scatchard</i> (1987) 27 A Crim R 136	5-5
<i>R v Shattock</i> [1980] 2 NZLR 486	8-24
<i>R v Shivpuri</i> [1985] QB 1029	8-29
<i>R v Solway</i> [1984] 2 Qd R 75	8-6, 8-7
<i>R v Stephens</i> [2006] QCA 123	13-11
<i>R v Stratford and McDonald</i> [1985] 1 Qd R 361	8-24
<i>R v Sweeney</i> [1982] 2 NZLR 229	8-36
<i>R v T and M; ex parte Attorney-General</i> [1999] 2 Qd R 424	11-13
<i>R v Tao</i> [1977] QB 141	8-36
<i>R v Thomas</i> (1976) 63 Cr App R 65	8-36
<i>R v Thomas</i> (1981) 6 A Crim R 66	8-10
<i>R v Todd</i> (1977) 6 A Crim R 105	8-10
<i>R v Tootoo</i> (2000) 115 A Crim R 90; [2000] QCA 312	12-5
<i>R v Tran; ex parte Attorney-General</i> (2002) 128 A Crim R 1; [2002] QCA 21	13-17
<i>R v Vincent; ex parte Attorney-General</i> [2001] 2 Qd R 327; [2000] QCA 250	13-13
<i>R v W; ex parte Attorney-General</i> [2000] 1 Qd R 460; [1998] QCA 281	11-36
<i>R v Ward, Marles & Graham</i> [1989] 1 Qd R 194	8-39
<i>R v Warneminde</i> [1978] Qd R 371	8-6, 8-7
<i>R v Waterhouse</i> (1911) 11 SR (NSW) 217	8-29
<i>R v Watson</i> [1916] 2 KB 385	5-28
<i>R v Williams</i> [1967] 2 NSW 594	8-7
<i>Re an application pursuant to the Drugs Misuse Act 1986</i> [1988] 2 Qd R 506	8-39
<i>Sobieralski v Commissioner of Police</i> [2009] QCA 90	13-22
<i>Sprenger v Sanderson</i> [1992] 1 Qd R 580	13-12
<i>Stingel v R</i> (1990) 171 CLR 312; [1990] HCA 61	5-11
<i>Symes v Lawler</i> [1995] 1 Qd R 226; [1993] QCA 394	8-8
<i>Taber v R</i> (2005) 225 CLR 418; [2005] HCA 59	8-8, 8-11
<i>Thirty v Stuart</i> [1995] QCA 509	13-2, 13-7
<i>Thow v Campbell</i> [1997] 2 Qd R 324; [1996] QCA 522	8-8
<i>United Mexican States v Cabal</i> (2001) 209 CLR 165; [2001] HCA 60	7-9, 7-10
<i>Wallace v Major</i> [1946] KB 473	9-3
<i>Warner v The Metropolitan Police Commissioner</i> [1969] 2 AC 256	8-7
<i>Williams v R</i> (1978) 140 CLR 591	8-9
<i>Williams v R</i> (1986) 161 CLR 278; [1986] HCA 88	3-4
<i>Williamson v Director of Public Prosecutions (Queensland)</i> [2001] 1 Qd R 99; [1999] QCA 356	2-16

Resources

[Queensland Police Traffic Manual](#)

[Queensland Police Service Operational Procedures Manual](#) (Internal only)

[Queensland Courts](#)

Legal Aid Queensland

[Case Management Standards—Criminal Law](#)

[Criminal Law Duty Lawyer Form \(PDF, 118 KB\)](#) – sample

[Practice Management Standards](#)

[Show cause bail application procedure \(PDF, 850 KB\)](#) and [Section 16\(3A\) bail form \(DOC, 152 KB\)](#)

[How to apply for legal aid](#)

Publications related to Moynihan changes

[Flow chart of Magistrates Court process following Moynihan reforms](#) (Internal only – presented by Kimberly Everton Moore as part of the Legal Aid Queensland CPD session on 26 October 2010: *Moynihan: the form guide*)

Magistrates court practice directions (Moynihan reforms)

2010/08 – [Jurisdiction determination \(PDF, 34.4 KB\)](#)

2010/09 – [Case conference and callovers \(PDF, 39.2 KB\)](#)

2010/10 – [Times and procedures for callovers \(PDF, 36.9 KB\)](#)

2010/11 – [Continuity and applicability of existing practice directions \(PDF, 24.2 KB\)](#)

2010/12 – [Witnesses giving Evidence in Committal Proceedings \(PDF, 27.7 KB\)](#)

2010/13A – [Disclosure—Annexures A and B \(PDF, 23.9 KB\)](#)

2010/13 – [Disclosure \(PDF, 32.0 KB\)](#)

2010/14A – [Registry committals—Annexures A and B \(PDF, 43.0 KB\)](#)

2010/14 – [Registry committals \(PDF, 31.1 KB\)](#)

2010/15 – [Ex officio indictments \(PDF, 30.9 KB\)](#)

2010/16 – [Referral to alternative dispute resolution or directions conferences \(PDF, 26.2 KB\)](#)

2010/17 – [Consent orders of the Registrar—amended \(PDF, 25.7 KB\)](#)

2010/18 – [Fixed costs or costs to be assessed \(PDF, 26.0 KB\)](#)

2010/19 – [Judicial Registrars—Power concerning prescribed applications and matters—amended \(PDF, 20.9 KB\)](#)