SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v DS* [2019] QSC 288
PARTIES:	**R** **v** **DS** (Defendant)
FILE NO/S:	BS No 1741 of 2019; BS No 1737 of 2019
DIVISION:	Trial Division
PROCEEDING:	Sentence
DELIVERED ON:	22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2019
JUDGE:	Bowskill J
ORDER:	**Sentence imposed in accordance with paragraph [85]**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – INTERPRETATION OF SENTENCING PROVISIONS – consideration of the proper construction of the "minimum penalty" provision in s 50B(1)(e) of the *Weapons Act* 1990 (Qld) *Acts Interpretation Act* 1954 (Qld) s 14A, s 14B, s 41, schedule 1 *Weapons Act* 1990 (Qld) s 3, s 50B, schedule 2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 *Broederlow v Commissioner of Police* [2019] QDC 228 *Campbell v Galea* [2019] QDC 53 *Doig v The Commissioner of Police* [2016] QDC 320 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 *Magaming v The Queen* (2013) 252 CLR 381 *R v Dendic* (1987) 34 A Crim R 40 *R v Ham* [2016] QDC 255 *The Queen v A2* [2019] HCA 35 *The Queen v Lewis* (Unreported sentencing decision, Supreme Court of Queensland, Brown J, 9 March 2018)
COUNSEL:	R A Swanick for the Crown D Caruana for the Defendant
SOLICITORS:	Office of the Director of Public Prosecutions for the Crown Cridland & Hua Lawyers for the defendant

[1] The defendant is to be sentenced for the following offences:

1. On the indictment presented on 20 November 2019:[1]

Count 1 Trafficking in the dangerous drugs methylamphetamine and cannabis (s 5(1) of the *Drugs Misuse Act* 1986 (Qld)).

Count 2 Unlawfully supplying a category H weapon to a person, being a short firearm, and having no reasonable excuse for doing so (s 50B(1)(c)(i) and (e) of the *Weapons Act* 1990 (Qld)).

Count 3 Using a carriage service to make a threat to kill a person, intending that person to fear that the threat will be carried out (s 474.15 of the *Criminal Code* 1995 (Cth)).

Count 4 Unlawful possession of the dangerous drug cannabis.

Count 5 Possession of a mobile phone used in connection with the commission of the crime of trafficking in a dangerous drug.

2. Summary charges referred to on bench charge sheets, before this court pursuant to s 651 of the *Criminal Code*, namely:

(a) two charges of possessing dangerous drugs (methylamphetamine and diazepam);

(b) three charges of possessing a pipe for use, or used, in connection with smoking a dangerous drug;

(c) a charge of threatening violence, with intent to alarm, by threatening to shoot a person in the head (s 75(1)(b) of the *Criminal Code)* (this involved the same complainant as the Commonwealth offence referred to above);

(d) a further charge of threatening violence, with intent to alarm, by threatening to kill another person, a police officer; and

(e) a charge of possessing a knife in a public place.

[2] The defendant pleaded guilty to each of those charges on 20 November 2019. It is appropriate to accept that the pleas were entered at an early stage. Although there was a trial listing, I accept that was only to be in respect of count 2 on the previous indictment 931/19, which charged the defendant with unlawfully trafficking in weapons. The Crown has not proceeded on that indictment. Count 2 on the new

[1] Replacing indictment 931 of 2019.

indictment charges the defendant with "unlawful supply of a category H weapon" instead.

[3] I take into account the defendant's pleas of guilty as indicating that he has taken responsibility for his actions, and as indicating his willingness to facilitate the course of justice.[2] The defendant also made some admissions to police, while they were searching his home on 18 September 2018. For reasons that will be explained, the extent to which the discretion to reduce the sentence that would otherwise be imposed may be exercised in this case, having regard to the pleas of guilty, is hampered by operation of s 50B of the *Weapons Act* 1990.

[4] The defendant is 36 years of age; he was aged 34-35 at the time the offences were committed.

[5] He had no criminal history prior to the offences. He has subsequently been convicted of possessing dangerous drugs on 11 April 2019.

[6] The court was informed that the defendant "did hold down work consistently … until his troubles with methylamphetamine began some three or four years ago". He is said to have worked for many years as a handyman, before becoming a taxi driver in 2015. He lost his job as a taxi driver in 2017, due to his methylamphetamine use.

[7] The factual circumstances of the offending are set out in an agreed "statement of facts" (exhibit 3).

[8] In terms of the trafficking offence (count 1), the defendant carried on the business of unlawfully trafficking in (mostly) methylamphetamine, but also cannabis, for about three and a half months, from 31 May to 19 September 2018.

[9] His offending came to the attention of the police in the following way. The defendant was renting a house in Annerley. He was behind in paying the rent. On 10 September 2018, the owner of the house sought the assistance of Mr W, a real estate agent, to recover the outstanding rent. As a result, Mr W sent a text message to the defendant's phone number. According to the statement of facts:

> "The defendant replied later that day. He told the complainant [Mr W] to 'fuck off and leave me alone if u don't want tourvke do u understand threat me will have u shot in the fucking skull you pig headed cunt'. The defendant sent a further message minutes later stating 'that's no threat on my part tho that's just my guarantee. I don't play games and I don't fuck around so don't think fucking wutb me is a good idea if u like to keep ya life in tac do u understand that and make it also clear.'"

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[2] See s 13 of the *Penalties and Sentences Act* 1992 (Qld).

[10] Mr W did not respond. He was fearful for his safety as he had provided his name and business name in the text message he had sent. On 17 September 2018 Mr W went to the police station and made a complaint. This is the conduct giving rise to count 3 on the indictment (using a carriage service to make a threat to kill) and one of the summary charges of threatening violence.

[11] The following day, on 18 September 2018, the police contacted the defendant to come to the police station in relation to those matters. The defendant attended and was arrested. When he was searched, he was found to have a flick knife on him (one of the summary charges). The police then took him back to his home at Annerley and executed a search warrant.

[12] During the search, the police located various things, including some cannabis seeds (count 4), some pipes (summary offence) and a mobile phone (count 5). The defendant became aggressive and was resistant to the police. He threatened to kill one of the police officers (resulting in the second summary charge of threatening violence).

[13] Analysis of the defendant's mobile phone revealed messages on "wikr" and Facebook, which demonstrated that the defendant had been trafficking in methylamphetamine and cannabis over a three and a half month period. It is said in the statement of facts that "[t]he messages are only a snapshot and not demonstrative of the whole business given that he conducted almost all transactions on 'wickr', which deletes messages after 6 days".

[14] The messages on the defendant's phone revealed the following. He called himself the "Kingpin", and sent customers a "menu" which set out the type of dangerous drugs and weapons he supplied with weights and corresponding prices. This was sent to over 50 customers on the "wikr" application. On one particular day, 26 July 2018, he sent his customers a message advertising a "red hot special 5-day sale", listing various "packages" (that is, combinations of drugs) for various prices, one of which was described as "the big party pack of a lifetime", which he said had a cost of $3,000 but he would mark it down to $2,000. The defendant told police he sent this to customers "every 3-4 days … I'm a business person what do you expect" and "that how you get people to buy off you". Somewhat unusually for this kind of business, the defendant registered his business name, "The Kingpins Playground".

[15] The defendant primarily trafficked in methylamphetamine (or ice). He was contacted by customers on either Facebook or "wickr". He usually sold in half grams, grams or "balls", although at times would sell points. On that basis, the prosecution described his business as dealing in "upper street level" quantities. During some parts of the trafficking period, the intensity of his business was quite significant. In one four day period, he is said to have sold 17.5 grams of methylamphetamine, having an estimated street value of about $6,000. On one occasion a customer tried to source an ounce of methylamphetamine from the defendant; he said the price would be $5,000; but the sale did not go through because that was too expensive. In other messages, he referred to

the need to "reload" (which I infer means obtain more drugs to sell) within 1.5 or up to 4 days, giving some indication of the regularity of his activity.

[16] The defendant bragged to his customers about how much he was "moving". On the basis of one of these bragging messages, it is said that the defendant, on his own admissions, sold 21 grams of methylamphetamine, having an approximate street value of $7,000, in a few days. On another occasion, he sent a photo of a large sum of cash with the message "8 hrs work man".

[17] The defendant sourced drugs from various people, and also referred to plans to purchase the product from overseas. He contacted suppliers asking them if they wanted him to deal for them. He also discussed starting a partnership with another person, offering to help build their drug business. In the last few weeks leading up to his arrest, he was apparently "ripped off" by one supplier, who supplied him salt instead of "ice". After that, he struggled to source methylamphetamine, although tried to do so by engaging with various suppliers.

[18] According to the statement of facts, "[t]he defendant also threatened violence to customers and/or suppliers. When he was ridiculed by one customer for his prices he stated 'people who piss off kingpin doesn't live thru it'. He also sent pictures of handguns, as a scare tactic, and had the apparent ability to make out those threats."

[19] The defendant's trafficking business also involved cannabis, which similarly was referred to in the set "menu" which he sent to customers; although this was not as extensive as his methylamphetamine business.

[20] It is accepted that the defendant was also using drugs himself during the trafficking period.

[21] It is said in the statement of facts that:

> "The messages extracted from his phone are only a 'snapshot' of his long-lasting and widespread business of trafficking in methylamphetamine and cannabis. In an exchange to an unknown person he claimed he has supplied drugs for '23 yrs if my life'. He also stated to Police that 'I sell every day" and sold 'enough to put me behind bars for the rest of my life'."

[22] Whilst I accept it may be fair to say that the messages are only a snapshot of the defendant's trafficking business, I do not place any weight on the latter comments attributed to the defendant in the passage above, in terms of determining the appropriate penalty in this case.

[23] The defendant's conduct is appropriately characterised as "brazen" by the Crown, given the manner in which he advertised his business. Counsel for the defendant described it as also being "bizarre" (referring, for example, to registration of a business name and an additional matter referred to in the QP9, but not the statement of facts, that when the

defendant was first apprehended for the offending, he had attended at the police station to report an unpaid drug debt). Counsel for the defendant submitted the defendant's behaviour ought to be factored into account, in drawing inferences from the extracted messages, as not necessarily accurately (or literally) indicating the extent of his trafficking operation. He does not, however, cavil with the characterisation of the trafficking as involving supplies at street level, or "upper street level", and sometimes higher. Counsel for the defendant also emphasises that the defendant was clearly using drugs himself; when his home was searched, what was found was consistent with personal use only; there is no unexplained wealth; and he was not living a lavish lifestyle (in fact, he was behind in paying his rent), from which it may be inferred he did not profit to any particular extent from the trafficking.

[24] The facts giving rise to count 2 on the indictment (unlawful supply of a category H weapon) are as follows:

> "The defendant used wickr to send the following message to 224 other wickr users: '9mm + 10mgs + 9 gum $17,000 brand new with 100 rounds each'. The Crown proceeds on the basis that the message was an offer to sell a short firearm, category H weapon. There were also offers to sell drugs included in that message."

[25] The defendant is not said to have been found in possession of any firearm(s). In submissions on his behalf it is said that "he is not to be sentenced on the basis that he had an actual firearm, or that he intended to supply an actual firearm. Rather, the basis for the defendant's plea is that he offered to supply a firearm, intending for the recipient of the offer to believe he was genuinely offering to supply a firearm". Reference is made in that regard to *R v Dendic* (1987) 34 A Crim R 40 at 44-45, in which it was held, in relation to the similar extended definition of supply in the context of a drug offence that "[t]he relevant intention or mens rea that must be proved where there is a charge of supply involving an offer to supply is the intention inherent in the making of the offer. It must be a genuine, intended making of an offer with the intention that it is to be regarded as genuine by the offeree" and "does not involve any intention of ultimate supply". On that basis, counsel for the defendant described the offence as "low level". The Crown did not contend otherwise.

[26] The summary charges otherwise include some unrelated offences, from 8 August 2018 (being found in possession of a small quantity of methylamphetamine and a pipe) and 12 August 2018 (being found in possession of a pipe and 20 diazepam pills).

[27] The defendant was remanded in custody following the search on 18 September 2018. He served just over six months in custody, to 26 March 2019, before being released on bail. That is a total of 190 days, which is declarable as time served under s 159A of the *Penalties and Sentences Act* 1992 (Qld).

[28] There is before the court a "Mental Health and Fitness for Trial Assessment Court Liaison Service Report" dated 17 December 2018 (exhibit 7). That records that the defendant was referred for an assessment of whether he was fit for trial by his legal representative. At the time of the referral and assessment, he was in custody on remand. Counsel for the defendant submits that the contents of this report may go some way to explaining what otherwise is unusual behaviour, and supports his earlier submission that the court would not accept the content of the extracted messages as accurately indicating the extent of the defendant's trafficking operation.

[29] By way of background, the report records that the defendant's first contact with mental health services was in 2002, and that he has had periods of treatment both as a voluntary and involuntary client. He is recorded as having a current diagnosis of "paranoid schizophrenia", as well as a previous diagnosis of "emotionally unstable personality disorder – borderline type". He is said to have "a history of the use of illicits in the form of Marijuana and Methylamphetamine – ICE". He has been treated with several medications. The report notes that the defendant "is currently subject to a Treatment Authority Mental Health Act 2016 – and is receiving follow up care from the Prison Mental Health Service. The Treatment Authority is reviewed by the Mental Health Review Tribunal on a regular basis, with the last review being 22nd October 2018". He was said (then) to be receiving an injection of an anti-psychotic medication every three weeks, and to be in contact with the prison service mental health clinicians.

[30] The report concludes that the defendant is fit for trial, observing that:

> "[The defendant's] mental illness is currently well treated and he is of normal intelligence. He was able to meet all the Presser criteria. There was no evidence of psychotic, mood or significant anxiety symptoms that would have had an effect on his fitness for trial."

[31] The exercise of the sentencing discretion in this case is complicated by a legal issue, concerning the proper construction of s 50B of the *Weapons Act*. It was for this reason that I reserved my decision on the sentence, and have prepared written reasons. I propose to deal with that issue first, as it has an impact on the overall decision to be made in relation to the appropriate sentence.

Section 50B of the Weapons Act

[32] The defendant has been convicted, on his plea of guilty, of the offence charged in count 2 on the indictment, namely unlawful supply of a category H weapon. That is an offence under s 50B(1)(c)(i) of the *Weapons Act*.

[33] Section 50B of the *Weapons Act* provides:

> "**50B Unlawful supply of weapons**
>
> (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.

Minimum penalty –

(d) for an offence, committed by an adult, to which paragraph (a) applies, if at least 1 of the weapons unlawfully supplied is a short firearm and the person does not have a reasonable excuse for unlawfully supplying the weapons – 3 years imprisonment served wholly in a corrective services facility; or

(e) for an offence, committed by an adult, to which paragraph (c)(i) applies, if the weapon is a short firearm and the person does not have a reasonable excuse for unlawfully supplying the weapon – 2½ years imprisonment served wholly in a corrective services facility.

(1A) For the purpose of subsection (1), penalty, paragraph (d) or (e), but without limiting those provisions, it is a reasonable excuse to unlawfully supply the weapon if –

(a) a licence was in force within the 12 months immediately before the day the person committed the offence but is no longer in force at the time of the offence; and

(b) the person would have been authorised under this Act to supply the weapon at the time of the offence if the licence was still in force at that time; and

(c) it was not a reason for the licence being no longer in force that the licence had been surrendered, suspended or revoked under this Act.

(2) A person does not contravene subsection (1) if the person to whom the weapon is supplied –

(a) is authorised under a licence to possess weapons of the same category as the weapon supplied; or

(b) is authorised to possess the weapon under section 52, 53, 54(2), 55, 55A, 70 or 116.

Note –

If subsection (1) does not apply because subsection (2)(a) applies, the person disposing of the weapon may contravene section 36 (sale or disposal of weapons).

(3) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.[3]

(4) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer."

[34] In the dictionary in schedule 2 to the *Weapons Act*:

1. "unlawful" is defined to mean without lawful justification or excuse;

2. "supply" is defined to include:

(a) give, distribute, sell, administer or transport; and

(b) offer to supply; and

(c) do an act preparatory to, or to further, or for the purpose of, supply;

and

3. "weapon" is defined to mean, among other things, a firearm (which in turn is defined to mean, among other things, a gun).

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[3] Section 161Q of the *Penalties and Sentences Act* provides for a "serious organised crime circumstance of aggravation", which is not relevant here.

[35] Section 50B was inserted into the *Weapons Act* in 2003.[4] At that time, s 50B(1) did not include the "minimum penalty" provisions.

[36] The "minimum penalty" provisions which now form part of s 50B(1) were inserted in 2012, by the *Weapons and Other Legislation Amendment Act* 2012. Section 50B(1A) was also inserted by this Act.

[37] The *Weapons and Other Legislation Amendment Act* 2012 also made amendments to the *Corrective Services Act* 2006, to insert a new s 185B, which provided that:

> "**185B Parole eligibility date for prisoner serving term of imprisonment for an offence against *Weapons Act 1990,* section 50, 50B or 65**
>
> (1) This section applies if –
>
> (a) a prisoner is serving a term of imprisonment for an offence against the *Weapons Act 1990*, section 50, 50B or 65; and
>
> (b) a minimum penalty applies to the offence under the following provisions of that Act –
>
> (i) section 50(1), penalty, paragraph (d) or (e);
>
> (ii) section 50B(1), penalty, paragraph (d) or (e);
>
> (iii) section 65(1), penalty, paragraph (c) or (d); and
>
> (c) apart from this section, the prisoner would be eligible for parole under this subdivision before the prisoner has served a term of imprisonment that is the minimum penalty for the offence.
>
> (2) The prisoner's parole eligibility date is the day after the day on which the prisoner has served a term of imprisonment that is the minimum penalty for the offence."

[38] Section 185B(1) and (2) of the *Corrective Services Act* remain in that form today; there has been a subsequent amendment to add a s 185B(3), dealing with the serious organised crime circumstance of aggravation, which is of no relevance here.

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[4] *Weapons (Handguns and Trafficking) Amendment Act* 2003.

[39] The defendant, who is an adult, has been convicted of an offence to which paragraph (c)(i) of s 50B(1) applies: that is, unlawfully supplying [in the sense of offering to sell] a category H weapon,[5] being a short firearm, and he has no reasonable excuse for doing so. The preconditions in s 50B(1)(e) are therefore satisfied.

[40] In considering the penalty to be imposed for this offence, the issue is whether, on the proper construction of s 50B(1) of the *Weapons Act*, s 50B(1)(e) prescribes a mandatory minimum penalty of 2½ years imprisonment served wholly in a corrective services facility; or whether it is open to the sentencing court to impose some other penalty, for example probation.

[41] This issue (either in this context, or an analogous one) has been addressed in decisions of the District Court, with differing views being expressed. It has also been referred to in the sentencing remarks of Brown J in one matter in this court, albeit in circumstances where her Honour found probation would not have been appropriate in any event.

[42] The task in construing a statute is to ascertain the intended meaning of the words used, a process which must be undertaken having regard to the context for the provision.[6] In *The Queen v A2* [2019] HCA 35 at [33], Kiefel CJ and Keane J said, at [33]:

> "Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is to remedy. 'Mischief' is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve."[7]

[43] This reflects the statement by the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47], which remains authoritative:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes

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5 See the *Weapons Categories Regulation* 1997*,* section 7.
6 *The Queen v A2* [2019] HCA 35 at [32]-[33] and [36] per Kiefel CJ and Keane J.
7 References omitted.

> the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[8]

[44] Section 14A(1) of the *Acts Interpretation Act* 1954 (Qld) instructs that:

> "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose[9] of the Act is to be preferred to any other interpretation."

[45] Section 14B enables consideration to be given to extrinsic material capable of assisting in the interpretation of a provision of an Act, in the circumstances set out in s 14B(1). This includes, in sub-s (a), if the provision is ambiguous, to provide an interpretation of it; and, in sub-s (c), to confirm the interpretation conveyed by the ordinary meaning of the provision. As defined in s 14B(3), "ordinary meaning" means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act.

[46] As the plurality said in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44]:

> "The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."

[47] The general purpose of the *Weapons Act*, as informed by the long title to the Act, is "to consolidate and amend the laws regulating or prohibiting the purchase, possession, use, carrying and sale of certain weapons and articles and to provide for the prevention of the misuse of weapons and for related purposes". The principles and object of the Act are set out in s 3 (enacted in 1996), as follows:

> "**3 Principles and object of Act**
>
> (1) The principles underlying this Act are as follows –
>
> (a) weapon possession and use are subordinate to the need to ensure public and individual safety;
>
> (b) public and individual safety is improved by imposing strict controls on the possession of weapons and requiring the safe and secure storage and carriage of weapons.

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8 References omitted. See also *The Queen v A2* [2019] HCA 35 at [32]-[37] per Kiefel CJ and Keane J.

9 Defined as including "policy objective" (see schedule 1 to the *Acts Interpretation Act*).

(2) The object of this Act is to prevent the misuse of weapons."

[48] As noted above, the provision of a "minimum penalty" in s 50B was inserted in 2012 by the *Weapons and Other Legislation Amendment Act*. At the same time, a "minimum penalty" provision was inserted into s 50, which deals with the offence of unlawful *possession* of weapons, and s 65, which deals with the offence of unlawful *trafficking* in weapons.

[49] The explanatory notes to the Bill which became the 2012 Amendment Act include the following:

"**Policy objectives and the reasons for them**

The objective of the Bill is to amend the *Weapons Act 1990* (the Act), the *Corrective Services Act 2006* (CSA) and the *Penalties and Sentences Act 1992* (PSA) to impose mandatory minimum periods of imprisonment where the offences of unlawful possession (s 50), unlawful supply (s 50B) and unlawful trafficking (s 65) of weapons are committed in certain circumstances.

The mandatory penalties imposed by the Bill will apply to adults who unlawfully:

- carry on the business of trafficking in weapons without a reasonable excuse, where at least one of the weapons is a firearm;
- supply weapons without a reasonable excuse, where at least one of the weapons is a short firearm;
- possess a firearm where the firearm is used in the commission of an indictable offence;
- possess a firearm where the possession of the firearm is for the purpose of committing or facilitating an indictable offence; and
- possess a short firearm in a public place without reasonable excuse.

On 30 April 2012, the Premier announced the Government's intention to introduce mandatory minimum penalties for weapons offences in an effort to address the unlawful use of firearms. That announcement was made in the context of growing concern about criminal activity involving the use of firearms both in Queensland and nationally.

The possession and use of firearms by persons engaged in criminal activity poses a risk to community safety. The Bill addresses that risk by ensuring

that the penalties imposed meet community expectations and provide adequate deterrence against such conduct.

Furthermore, where a person is convicted of an offence in circumstances attracting a mandatory period of imprisonment, any date for parole release or eligibility that is imposed under the PSA and any parole eligibility date under the CSA does not fall before the expiry of the applicable mandatory minimum term of imprisonment.

…

Achievement of policy objectives

The new penalty regime aims to reduce the current rate at which firearms are being unlawfully possessed and used by creating a greater deterrence through the imposition of mandatory periods of imprisonment.

The Bill removes the discretion of sentencing courts to partly or wholly suspend the mandatory minimum period required to be imposed. The Bill will not however, alter the current operation of s 159A of the PSA with respect to the declaration of time spent in pre-sentence custody.

Similarly, the Bill amends the CSA to ensure that a person sentenced under the new regime will not be eligible for parole until the minimum sentence has been completed. The Bill does not however, prevent the making of an exceptional circumstances parole order[10] prior to the completion of a mandatory minimum period. …"[11]

[50] The ascertainment of legislative intention must also have regard to the rules of construction, common law and statutory, which are known to parliamentary drafters.[12] In the present context, this includes s 41 of the *Acts Interpretation Act* 1954 (Qld), which provides:

"**41 Penalty at end of provision**

In an Act, a penalty specified at the end of –

(a) a section (whether or not the section is divided into subsections); or

(b) a subsection (but not at the end of a section); or

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[10] See ss 176-177 of the *Corrective Services Act,* which enables a prisoner to apply, to the parole board, for an exceptional circumstances parole order.

[11] Underlining added.

[12] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44].

> (c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;
>
> indicates that an offence mentioned in the section, subsection or part is punishable on conviction (whether or not a conviction is recorded) or, if no offence is mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) –
>
> (d) if a minimum as well as a maximum penalty is specified – by a penalty not less than the minimum and not more than the maximum; or
>
> (e) in any other case – by a penalty not more than the specified penalty."[13]

[51] It also includes the principle of legality; "the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities".[14]

[52] The language used in s 50B(1) is clear and unequivocal.

[53] Section 50B(1) identifies the offence: a person must not unlawfully supply a weapon to another person.

[54] Provision is then made, in s 50B(1)(a), (b) and (c), for a maximum penalty which applies in various circumstances. Consistently with s 41 of the *Acts Interpretation Act*, that is to be construed to mean that, on conviction, depending on whether the circumstances in (a), (b) or (c) apply, the offence is punishable by a penalty not more than the maximum.[15]

[55] Provision is also made, in s 50B(1)(d) and (e), for a minimum penalty. Again, consistently with s 41 of the *Acts Interpretation Act*, that is to be construed to mean that, on conviction, depending on whether the circumstances in (a) and (d), or (c)(i) and (e) apply, the offence is punishable by a penalty not less than the minimum.

[56] The purpose, or policy objective, of the minimum penalty provisions in s 50B is expressly articulated in the explanatory notes – namely, to address the unlawful use of firearms, in the context of growing concern about criminal activity involving the use of firearms in Queensland and nationally, by providing for mandatory minimum penalties,

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[13] Underlining added.

[14] *Lacey v Attorney-General* (2011) 242 CLR 573 at [43]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384; *Coco v The Queen* (1994) 179 CLR 427 at 437.

[15] See also s 180A of the *Penalties and Sentences Act*, as to the meaning of a sentencing provision such as the "maximum penalty" provision in s 50B(1)(b) and (c), which provides that the maximum penalty may be a fine or imprisonment.

of actual terms of imprisonment, as a means of deterring the use of firearms by persons engaged in criminal activity and in so doing, protect the community.

[57] It is appropriate to have regard to those explanatory notes, to inform part of the context in which the provision is to be construed; relevantly, the purpose and policy of the provision.

[58] Construing the clear words used in s 50B, by reference to the object and purpose of the minimum penalty provisions, leads inexorably to the conclusion that, where an adult person is convicted of an offence in the circumstances referred to in s 50B(1)(d) or (e), the offence is punishable by a penalty not less than that which is specified.

[59] In the present case, where s 50B(1)(e) applies, that means a penalty not less than 2½ years imprisonment, served wholly in a corrective services facility.

[60] Counsel for the defendant submits that this minimum penalty only applies where a term of imprisonment is imposed and, since the provision does not expressly exclude the operation of s 91 of the *Penalties and Sentences Act* 1992, it is open to a sentencing court, in imposing punishment for an offence to which s 50B(1)(e) applies, to make an order for probation instead.

[61] In making this submission, reliance is placed upon decisions of Chowdhury DCJ of the District Court in which this argument has been accepted: *R v Ham* [2016] QDC 255 (in relation to s 50B of the *Weapons Act*) and *Broederlow v Commissioner of Police* [2019] QDC 228 (in relation to the equivalent provision in s 50 of the *Weapons Act*). Reliance is also placed on a decision of Long SC DCJ in *Campbell v Galea* [2019] QDC 53 (in relation to the offence of failing to stop under s 754(2) of the *Police Powers and Responsibilities Act* 2000 (Qld), which contains a "minimum penalty" of 50 penalty units or 50 days imprisonment served wholly in a corrective services facility).

[62] The reasoning in *R v Ham;* and expanded upon in *Broederlow* (by reference to *Campbell v Galea*) is as follows:

1. There is no ambiguity in the section; therefore no need for any resort to extrinsic materials (such as the explanatory notes).

2. The "minimum penalty" provision in s 50B (and s 50) does not expressly exclude the operation of s 91 of the *Penalties and Sentences Act*.[16]

3. Accordingly, since the offence under s 50B (and s 50) is an "offence punishable by imprisonment", the discretion available to the sentencing court under s 91 of the *Penalties and Sentences Act* to make a probation order is unaffected, and remains a sentencing option.

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[16] The reasoning also extends to s 101 of the *Penalties and Sentences Act*, which confers a discretion on the court to make a community service order, where the court convicts an offender of an offence punishable by imprisonment.

4. The "minimum penalty" provided for in s 50B (and s 50) only applies where the punishment imposed is a sentence of imprisonment.

5. Where the sentencing court exercises its discretion under s 91 to make a probation order, the "minimum penalty" provision does not apply.

[63] Similar reasoning is adopted in *Campbell v Galea*; with Long SC DCJ also holding, further to points 2 and 4, that since references to a maximum penalty are not construed as limiting the sentencing options available to a court only to the types of penalty specified (for example, a fine or imprisonment), nor should a reference to a minimum penalty be so construed. Rather, reference to a minimum penalty ought to be construed only as the minimum for the particular type of penalty which is specified, and not as implicitly excluding other sentencing options (at [37]).

[64] A contrary view as to the proper construction of s 50B of the *Weapons Act* was expressed by Brown J in an unreported sentencing decision in the matter of *The Queen v Lewis* (9 March 2018). In that decision, Brown J said:

> "My job is to apply the law and not to circumvent what Parliament has decided. With all due respect to the submissions made by your Counsel and the decision of Judge Chowdhury [in *Re v Ham*], it appears to me that, on the basis of the wording in the section and the specific provision for a minimum penalty of two and a half years imprisonment served wholly in a Corrective Services facility, particularly when regard is had to section 41 of the *Acts Interpretation Act* 1954, the section does constrain the Court to impose a minimum sentence of two and a half years imprisonment to be served wholly in a Corrective Services facility, notwithstanding that I note the terms of the maximum penalty that is provided for in section 50B(1)(c)(i).
>
> The wording in subsections (d) and (e), which are the provisions directed to the question of minimum penalty only apply in confined circumstances. They provide specifically for the minimum penalty not applying where the person has a reasonable excuse, which is provided for in the section. Some further support for this construction is also given by section 185B of the *Corrective Services Act* 2006 (Qld), which applies to the provision where a minimum penalty [applies] including an offence under section 50B, amongst other sections."

[65] Her Honour went on to say that she was not satisfied an order for probation would be appropriate in any event, given the circumstances of the offending.

[66] In my respectful view, the conclusion reached as to the construction of the minimum penalty provision in s 50B (and s 50) of the *Weapons Act* in *R v Ham* and *Broederlow* is incorrect. Similarly, I disagree that the reasoning in *Campbell v Galea* at [37] supports

such a construction. In my view, the construction articulated by Brown J in *The Queen v Lewis* is correct.

[67] The provision must be construed according to the words used, having regard to the context, which includes the purpose and policy objective of the provision. The policy objective was, quite clearly, to impose a mandatory minimum punishment, in the form of a specified period of time in actual custody, to meet the objectives of community protection and deterrence. A construction of the "minimum penalty" provisions of s 50B which avoids the operation of those provisions does not achieve the purpose of the legislation. It is not to the point to say that the provision is not ambiguous, therefore reference may not be made to extrinsic materials. Those extrinsic materials, in particular the explanatory notes, inform the purpose (policy objective) of the provision, and it is necessary and appropriate to have regard to them, as part of the context in which the provision is to be construed; and also to confirm what appears to be the ordinary meaning of the provision.[17] What is not permissible is to rely upon extrinsic materials to alter the otherwise clear meaning of a statutory provision; but that is not the issue here.[18]

[68] Further, whilst it is the case that the "minimum penalty" provision in s 50B does not expressly exclude the operation of s 91 (probation) (or s 101, community service); that is the clear intent, and effect, of the words that are used. To expressly provide, in the circumstances of s 50B(1)(e), that the minimum penalty is 2½ years imprisonment, served wholly in a corrective services facility, is plainly inconsistent with the exercise of a discretion to instead impose a punishment by way of a probation order or a community service order. By virtue of s 41 of the *Acts Interpretation Act*, the meaning of "minimum penalty" is that the offence, upon conviction, is punishable by a penalty no less than that "minimum penalty".

[69] It may readily be concluded that an order for probation, or community service, is clearly "less than" a penalty of actual imprisonment for 2½ years. In saying that, I acknowledge the observations by Devereaux SC DCJ in *Doig v The Commissioner of Police* [2016] QDC 320 (in relation to s 754 of the *Police Powers and Responsibilities Act*) as to the difficulties inherent in determining a hierarchy of the sentencing options otherwise available under the *Penalties and Sentences Act*, at least in so far as probation, community service and fines are concerned (at [39]-[47]).[19] I also agree with the conclusion reached by his Honour at [50], as to the proper construction of s 754; although that is not a matter presently before me for determination.[20]

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[17] In this regard, I respectfully disagree with *Campbell v Galea* at [2019] QDC 53 at [27]-[29], in so far as it is suggested in those paragraphs that reference should not be made to the explanatory notes in the process of construing the provision.

[18] Cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

[19] Cf also *Commissioner of the Police Service (Qld) v Magistrate Spencer* [2014] 2 Qd R 23 at [17] per Henry J, in relation to an earlier version of s 754(2) of the *Police Powers and Responsibilities Act*.

[20] Cf *Campbell v Galea* [2019] QDC 53, in which Long SC DCJ reached a different conclusion.

[70] Further, in my respectful view, the analysis undertaken in *Broederlow*, of identifying statutory provisions which expressly exclude the operation of ss 23 and/or 24 of the *Criminal Code* does not support the construction argument contended for, and accepted in that case. Those are exculpatory (defence) provisions affecting a person's criminal responsibility for their acts or omissions. The provisions cited in appendix A to *Broederlow* reflect a policy in respect of particular offence provisions that those exculpatory provisions are not to apply. They are not examples of provisions in which Parliament, having prescribed a mandatory minimum penalty, makes express provision excluding the operation of other penalty provisions.

[71] Both s 91 and s 101 of the *Penalties and Sentences Act* are general provisions, conferring a discretionary power on a sentencing court, which convicts an offender of an offence punishable by imprisonment, to make a probation order, or a community service order, respectively. That discretionary power may only be exercised according to law. In the case of s 50B of the *Weapons Act*, although that is an offence punishable by imprisonment, the discretion otherwise available to a sentencing court, not only in terms of the statutory powers conferred by provisions such as s 91 and s 101 of the *Penalties and Sentences Act*, but more broadly, by reference to the relevant sentencing guidelines in s 9 of the *Penalties and Sentences Act*, has been expressly curtailed by the specific statutory prescription of a mandatory minimum penalty in s 50B.

[72] In my view, as a matter of law, on the proper construction of s 50B, where the circumstances giving rise to the imposition of the minimum penalty specified in s 50B(1)(d) or (e) are present, it is not open to a sentencing court to ignore that "minimum penalty" provision, and instead make an order for probation (or community service).

[73] In that regard, I refer to *Magaming v The Queen* (2013) 252 CLR 381 in which French CJ, Hayne, Crennan, Kiefel and Bell JJ (with whom Keane J agreed, at [100]) said at [26]-[27]:

> "26 … The court must determine the punishment to be imposed in respect of the offence of which the accused has been convicted and the court must determine that punishment according to law.
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> 27 It may be that, as Barwick CJ said[21] in *Palling v Corfield*:
>
> > 'It is both unusual and in general … undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.'

[21] (1970) 123 CLR 52 at 58.

> Whether or not that is so, as Barwick CJ also said,[22] '[i]f Parliament chooses to deny the court such a discretion, and to impose … a duty [to impose specific punishment] … the court must obey the statute in this respect assuming its validity in other respects'."

[74] In separate reasons, Keane J, in rejecting the appellant's reliance in that case on the principle of proportionality in sentencing to attack the validity of a mandatory minimum penalty, said at [103]-[106]:

> "103 The discussion of proportionality in sentencing in the decisions cited[23] affords no support for the appellant's argument. The discussion of proportionality in sentencing in those cases proceeds by reference to legislated yardsticks. Each yardstick fixed by the legislature provides a necessary datum point from which the discussion of proportionality in sentencing may proceed. As was said in *Markarian v The Queen*[24] by Gleeson CJ, Gummow, Hayne and Callinan JJ: 'Judges need sentencing yardsticks.' The provision of those yardsticks is the province of the Parliament.
>
> 104 None of the decisions cited by the appellant offers any support for the notion that it is any part of the judicial function to ensure that the yardsticks legislated for various kinds of misconduct are 'appropriately' calibrated to some assumed range of moral culpability in offenders. The work of the legislature in laying down norms of conduct and attaching sanctions to breaches of those norms is anterior to the function of the judiciary. As was said in the Supreme Court of Canada in *R v McDonnell*[25]:
>
> > '[I]t is not for judges to create criminal offences, but rather for the legislature to enact such offences.'
>
> 105 The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth

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22 (1970) 123 CLR 52 at 58.

23 Relevantly, *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472, 486, 490-491; *Wong v The Queen* (2001) 207 CLR 584 at 609-610 [71], 612-613 [77]-[78]; *Muldrock v The Queen* (2011) 244 CLR 120 at 140-141 [60]; and *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31], 379-380 [55]-[56], 383-384 [65], 385-386 [69].

24 (2005) 228 CLR 357 at 372 [30].

25 [1997] 1 SCR 948 at 974 [33].

> and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.
>
> 106 In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be."

The sentences to be imposed

[75] In relation to the unlawful supply of a weapon offence (count 2), as a consequence of the operation of the "minimum penalty" provision in s 50B(1)(e) of the *Weapons Act*, I am bound as a matter of law to impose a penalty no less than 2½ years imprisonment served wholly in a corrective services facility. There is no basis in this case to impose any more than that mandatory minimum penalty. That is an extremely harsh penalty, taking into account the particular circumstances in which the offence has been committed, and the personal circumstances of the defendant. It is not the penalty I would have imposed, if I retained a discretion.

[76] In relation to the trafficking offence (count 1), having regard to the authorities referred to by the parties,[26] I consider an appropriate penalty would have been in the order of four years' imprisonment. I take into account the factual circumstances, involving a business of trafficking in methylamphetamine and, to a lesser extent, cannabis for three and a half months, involving the sale of "upper street level" amounts, but on some occasions larger quantities, by a mature offender, who is a drug user, with no prior criminal history. I accept that the defendant's offending is objectively less serious than that which has attracted penalties of five years' imprisonment.

[77] The authorities would also support the exercise of the discretion, taking into account the defendant's plea of guilty, lack of criminal history, and mental health challenges, by providing for his release, either by a recommendation for parole, or by way of a suspended sentence, earlier than the usual one-third which can be expected on a guilty plea. The submission made on the defendant's behalf was for the sentence to be suspended after a total of 12 months in actual custody (he has already served about 6 months). That was in the context of a submission that the appropriate penalty in respect of count 2 was an order for probation,[27] so that the defendant would have the benefit of supervision, following his release from custody. But for the effect of s 50B of the

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[26] Including *R v Scott* [2006] QCA 76; *R v Borowicz* [2016] QCA 211; *R v Blumke* [2015] QCA 264; *R v C'Ward* [2014] QCA 15; *R v Saggers* [2016] QCA 344; and *R v Bull* [2017] QCA 293.

[27] See *R v Hood* [2005] 2 Qd R 54 at [48], in relation to combining a suspended term of imprisonment on one offence and a probation order on another.

Weapons Act, I would have considered the defendant's submissions in this respect to be reasonable.

[78] However, that sentencing structure is not available, in the exercise of the court's discretion, having regard to the mandatory minimum penalty under s 50B of the *Weapons Act.*

[79] Having regard to the requirement to impose a sentence that is just in all the circumstances (s 9(1)(a) of the *Penalties and Sentences Act*), because the defendant must serve a period of 2½ years imprisonment wholly in a correctional services facility in respect of count 2 on the indictment, and because I cannot reflect a reduction for his guilty plea by an earlier release, I consider it appropriate to reduce the period of imprisonment to be imposed in respect of count 1 to a period of three years' imprisonment, to be served concurrently.

[80] Taking into account the time already served, from 18 September 2018 to 26 March 2019 (190 days), and the further 2 days from 20 to 22 November 2019 (making a total of 192 days), I will fix the date that the defendant be released on parole at the point at which he has served overall 2½ years in custody, which on my calculations will be 11 November 2021. I arrive at that date because the total of 192 days is about 10 days more than ½ a year; therefore I calculate two years from today, and then reduce that by 10 days.

[81] That will mean that he only has six months on parole; but it is to be hoped that he will receive support whilst in custody for his mental health challenges, and receive support in the lead up to, and in the period immediately after his release from custody, which will hopefully facilitate his rehabilitation and reintegration into the community.

[82] In my view, a longer period of supervision in the community, following a shorter period in actual custody, would have been a preferable outcome, balancing the need to impose a sentence that is just in all the circumstances, together with the need for deterrence, denunciation, community protection and, importantly, rehabilitation. The prescription of a mandatory penalty hampers the ability of a sentencing court to balance each of the purposes in s 9(1) of the *Penalties and Sentences Act*, and reflect them in a just and appropriate penalty, having regard to the particular circumstances of the case. But "the court must obey the statute".

[83] The Commonwealth offence the subject of count 3, using a carriage service to make a threat to kill, carries a maximum penalty of 10 years' imprisonment; the related State offence (threatening violence) carries a maximum penalty of 2 years' imprisonment. A table of comparative sentences imposed for the Commonwealth offence (exhibit 5) reveals a fairly broad range of penalties, including recognisance orders, good behaviour bonds and probation, as well as periods of imprisonment in the more serious cases. If I was dealing with this offence alone, I would likely have made a recognisance order or a good behaviour bond, but having regard to the time in custody already served, and to be

served, I consider the most appropriate course is to sentence the defendant to three months' imprisonment on count 3, to be served concurrently.

[84] I propose to record the convictions, but not impose any further punishment, in respect of counts 4 and 5 on the indictment, and each of the summary charges, having regard to the penalties otherwise imposed.

[85] The defendant is therefore sentenced as follows:

1. On count 1 on the indictment, the defendant is sentenced to 3 years' imprisonment.

2. On count 2 on the indictment, the defendant is sentenced to 2½ years' imprisonment to be served wholly in a correctional facility.

3. On count 3 on the indictment he is sentenced to 3 months' imprisonment.

4. Each of the terms of imprisonment are to be served concurrently.

5. I make a declaration that the time has served, between 18 September 2018 and 26 March 2019, which is 190 days, and between 20 and 22 November 2019, which is 2 days, making a total of 192 days, is time served under the sentences just imposed.

6. I fix the date that the defendant is to be released on parole at 11 November 2021.

7. In relation to counts 4 and 5, and the summary charges, the defendant is convicted but not further punished.

8. I will sign the serious drug offence certificate handed up by the Crown, which is appropriate as the conviction of the offence of trafficking is a conviction of a serious drug offence: s 161G of the *Penalties and Sentences Act.*

9. I also make an order, in terms of the draft, for forfeiture of the various items specified in that draft order.