

**2023**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**SENTENCING (DRUG AND ALCOHOL TREATMENT ORDERS) LEGISLATION  
AMENDMENT BILL 2023**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004*, s 37)**

**Presented by  
Shane Rattenbury MLA  
Attorney-General**

## **SENTENCING (DRUG AND ALCOHOL TREATMENT ORDERS) LEGISLATION AMENDMENT BILL 2023**

This Explanatory Statement relates to the *Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023* (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Bill is a Significant Bill. Significant Bills are Bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

The Statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

### **OVERVIEW OF THE BILL**

The Bill will amend the *Crimes (Sentencing) Act 2005* (Sentencing Act) to modify various provisions relating to the Drug and Alcohol Treatment Order scheme. This Bill makes consequential amendments to the *Crimes (Sentence Administration) Act 2005* (Sentence Administration Act).

The policy objective of the Bill is to improve the legislative framework for the administration of Drug and Alcohol Treatment orders (treatment orders) and the operation of the Drug and Alcohol Sentencing List (DASL).

### **OVERVIEW OF AMENDMENTS**

The Bill proposes the following amendments to the Sentencing Act and Sentence Administration Act:

- a. Allow treatment orders to be available to offenders who have sentences of imprisonment totalling one to four years, where no individual sentence meets the threshold;
- b. Allow backdating of treatment orders to take into account time served in pre-sentence custody;
- c. Clarify what happens when the treatment and supervision part of a treatment order ends before the custodial part;
- d. Make submitting to alcohol and drug testing a core condition of treatment orders;
- e. Expand the orders that can be made where an offender breaches their treatment order other than by the commission of an offence;

- f. Allow the court to extend the provisional cancellation period where offender breaches their treatment order other than by the commission of an offence;
- g. Clarify the operation of section 80ZB(3) of the Sentencing Act;
- h. Clarify that section 80ZD of the Sentencing Act only applies to offences committed during the treatment order;
- i. Allow the court discretion to cancel a treatment order and resentence the offender for each offence; and
- j. Clarify the inconsistency between sections 80ZD and 12A(1)(c) and (9) of the Sentencing Act with respect to terminology for sentencing orders.

**Allow treatment orders to be available to offenders who have sentences of imprisonment totalling one to four years, where no individual sentence meets the threshold**

An offender may be eligible for a treatment order if they plead guilty to an eligible offence attracting a sentence of imprisonment of at least one year but not more than four years. However, this eligibility criteria excludes offenders who are convicted of multiple eligible offences that cumulatively attract a total sentence of imprisonment of one to four years, but where none of the sentences individually meet the one-year threshold. Under this construction, many offenders that may benefit from the DASL may be inadvertently excluded from participation.

This Bill amends sections 12A (3) and 80W (1) (a) of the Sentencing Act to allow offenders convicted of multiple eligible offences attracting sentences of imprisonment that cumulatively amount to a period of at least 1 year but not more than 4 years to be eligible for a treatment order, even if none of the sentences individually meet the 1-year threshold.

**Allow backdating of treatment orders to take into account time served in pre-sentence custody**

Section 63 (3) (c) of the Sentencing Act provides that a sentence of imprisonment that is fully suspended cannot be backdated. As section 12A (2) provides that a treatment order must fully suspend a sentence of imprisonment, offenders subject to a treatment order cannot have their sentences backdated or have time served in pre-sentence custody taken into account when sentencing.

This Bill amends section 12A to allow the court to take the sentence of imprisonment under a treatment order to have started on a day before the treatment order is imposed, and suspend the remaining part of the sentence beginning on the day the treatment order is imposed. The effect of this amendment is to allow the partial suspension of a sentence of imprisonment under a treatment order, which allows the court to backdate the treatment order pursuant to section 63 (3) (d).

### **Clarify what happens when the treatment and supervision part of a treatment order ends before the custodial part**

Section 80X (2) (b) (ii) of the Sentencing Act is ambiguous on when the treatment and supervision part of a treatment order ends. This Bill clarifies that the treatment and supervision part of a treatment order ends on a day stated by the court; or on the day of cancellation, if the court earlier cancels the order or the treatment and supervision part of the order.

### **Make submitting to alcohol and drug testing a core condition of treatment orders**

An offender subject to a treatment order is required to comply with core conditions, which automatically attach to the treatment order, and treatment program conditions, which may be ordered by the court. This Bill makes submitting to alcohol and drug testing when directed by a member of the treatment and supervision team for the treatment order a core condition.

### **Expand the orders that can be made where an offender breaches their treatment order other than by commission of an offence**

When an offender breaches their treatment order other than by the commission of an offence, this Bill empowers the court to compel an offender to undergo assessment for admission to, and if found suitable, participate in a residential rehabilitation facility. It also allows the court to impose any other condition considered appropriate by the court that is not inconsistent with the Sentencing Act or Sentence Administration Act.

### **Allow the court to extend the provisional cancellation period where an offender breaches their treatment order other than by commission of an offence**

Where an offender has breached their treatment order other than by the commission of an offence, section 80ZB (1) (e) of the Sentencing Act allows the court to provisionally cancel the suspension of the sentence of imprisonment for a period of at least 3 days but not more than 14 days. This provision operates as a sanction to offenders who breach their treatment orders, and also provides the treatment and supervision team of the treatment order with an opportunity to explore alternative options for the offender while they are on remand.

However, as discussed in *R v Tonna (No 2)*,<sup>1</sup> the 14-day limit has sometimes resulted in the cancellation of treatment orders where no appropriate residential rehabilitation facility or alternative treatment option was available to the offender within the 14-day period. The court observed in *Tonna* that amendment to this provision would be “sensible”, to meet the objects of treatment orders in section 80O of the Sentencing Act and prevent the early cancellation of treatment orders where resourcing was limited.<sup>2</sup>

This Bill inserts the new subsection (2A) to section 80ZB, to allow the court to make an order under subsection (1) (e) for a period longer than 14 days if the court is satisfied that the longer

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<sup>1</sup> [2020] ACTSC 262.

<sup>2</sup> Ibid [39] (Refshauge AJ).

period is necessary until treatment becomes available to the offender, if the court considers that treatment appropriate to achieve the objects of the treatment order.

### **Clarify the operation of section 80ZB(3) of the Sentencing Act**

Section 80ZB (1) provides that where an offender has breached a condition of their treatment order other than by the commission of an offence, the court may require the offender to comply with 1 or more of the conditions listed at subsection (1) (d).

This Bill amends section 80ZB (3) to clarify that if an offender who is subject to a condition under subsection (1) (d) breaches that condition, the court must confirm or amend the order or cancel the order and make another order under subsection (1).

### **Clarify that section 80ZD of the Sentencing Act only applies to offences committed during the treatment order**

Section 80ZD of the Sentencing Act applies to breaches of treatment orders by conviction for a further offence that is punishable by imprisonment.

In *R v Subasic*,<sup>3</sup> the Court considered that it was “possible” that section 80ZD only applies to offences committed after the treatment order, but that it was “by no means clear”.<sup>4</sup>

This Bill amends section 80ZD (1) to clarify that, for this section, a ‘further offence’ includes only offences committed during the treatment order, and does not include any offences committed prior to the making of the treatment order.

By clarifying that section 80ZD applies only to offences committed during the treatment order, this clause excludes historical offences from the application of section 80ZD.

### **Allow the court discretion to cancel a treatment order and resentence the offender for each offence**

Sections 80ZD (2) and (3) of the Sentencing Act empower the court to cancel an offender’s treatment order if an offender has breached their treatment order by conviction for an offence punishable by imprisonment.

This Bill inserts the new subsection (3A) to section 80ZD to increase the flexibility of the court when cancelling a treatment order under subsection (2) or (3). This Bill provides that where the court cancels the treatment order under subsection (2) or (3), the court may either impose the sentence of imprisonment that was suspended under the custodial part of the treatment order; or if the court considers it appropriate in the circumstances, resentence the offender for each offence under the treatment order in any way in which the court could deal with the offender if it had convicted the offender of each offence at the time of resentencing.

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<sup>3</sup> [2020] ACTSC 380.

<sup>4</sup> Ibid [59]-[60] (Refshauge AJ).

## **Clarify the inconsistency between sections 80ZD and 12A(1)(c) and (9) of the Sentencing Act with respect to terminology for sentencing orders**

This Bill amends section 80ZD of the Sentencing Act to replace the term ‘sentence of imprisonment’ with ‘sentencing order’ as defined in section 12A (9), to increase consistency within the Sentencing Act.

## **CONSULTATION ON THE PROPOSED APPROACH**

The amendments proposed in the Bill were informed by proposals for legislative reform in the Australian National University’s *ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report* (the ANU Report), and proposals made to the Justice and Community Safety Directorate (JACS) by The Honourable Justice Richard Refshauge SC, the DASL Judge at the time of presentation.

The amendments have been developed in consultation with members of the DASL Working Group, which include the ACT Director of Public Prosecutions, the ACT Legal Aid Commission, the Aboriginal and Torres Strait Islander Elected Body, ACT Courts and Tribunal, ACT Health Directorate, ACT Community Services Directorate, Canberra Health Services, and ACT Policing. The ACT Law Society, ACT Bar Association, Aboriginal Legal Services ACT/NSW, and the ACT Human Rights Commission have also been consulted during the drafting of the Bill.

The input and feedback from all stakeholders on the proposed amendments and the consultation draft Bill have been used to inform the amendments proposed in this Bill.

## **CONSISTENCY WITH HUMAN RIGHTS**

The amendments in the Bill balance the rights and interests of the community and offenders within the Territory’s *Human Rights Act 2004* (HR Act).

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society.

Section 28(2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights. Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate.

Proportionality can be understood and assessed as explained in *R v Oakes*,<sup>5</sup> in which it was held that the measures must achieve the objective in question, be rationally connected to the objective, the means to achieve the objective must impair the right or freedom as little as

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<sup>5</sup> [1986] 1 S.C.R. 103.

possible, the limitation of the right must be proportionate, and the objective must have been identified to be of “sufficient importance”.<sup>6</sup>

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of providing an alternative sentencing option that aims to rehabilitate certain offenders while also protecting the community as a whole.

## **RIGHTS ENGAGED**

The Bill engages the following rights under the HR Act:

- Section 9 – Right to life (*promoted*)
- Section 10 – Right to protection from torture and cruel, inhuman or degrading treatment (*limited*)
- Section 12 – Right to privacy and reputation (*limited*)
- Section 13 – Freedom of movement (*promoted*)
- Section 18 – Right to liberty and security of person (*promoted* and *limited*)

## **RIGHTS PROMOTED**

### **Section 9 – Right to life**

Allow treatment orders to be available to offenders who have sentences of imprisonment totalling one to four years, where no individual sentence meets the threshold

The Bill expands the eligibility criteria for an offender to enter a treatment order, by allowing offenders subject to multiple sentences amounting to a cumulative total of 1 to 4 years’ imprisonment to be eligible for a treatment order, even where no sentence individually meets the 1-year threshold. This amendment promotes the right to life by enabling a wider range of offenders to undergo treatment for alcohol and drug dependency, which may assist with the reduction of alcohol and drug-related harms including overdose, HIV, infections, and other injuries associated with alcohol and drug use.

Make submitting to alcohol and drug testing a core condition of treatment orders

The Bill makes submitting to alcohol and drug testing a core condition of a treatment order, which promotes the right to life by supporting the ability of the treatment and supervision team to monitor and track an offender’s rehabilitation and recovery under the treatment order.

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<sup>6</sup> *R v Oakes* [1986] 1 S.C.R. 10

Expand the orders that can be made where an offender breaches their treatment order other than by commission of an offence

The Bill allows the court to order an offender to undergo an assessment for admission to, and if found suitable, participate in a residential rehabilitation facility, if the offender breaches their treatment order other than by commission of an offence. This amendment supports the right to life by facilitating the ability of the court to require an offender to enter a residential rehabilitation facility, which may support the abstinence of the offender from alcohol or drug use and support the recovery of the offender.

Allow the court to extend the provisional cancellation period where an offender breaches their treatment order other than by commission of offence

The Bill allows the court to extend the provisional cancellation of the suspended sentence of imprisonment under the treatment order to allow the treatment and supervision team to secure a placement in a residential rehabilitation facility or other further treatment, in circumstances where the offender has breached their treatment order other than by commission of an offence. This amendment supports the right to life in such circumstances, as it supports the ability of the offender to receive rehabilitative treatment under their treatment order.

**Section 18 – Right to liberty and security of person**

Allow treatment orders to be available to offenders who have sentences of imprisonment totalling one to four years, where no individual sentence meets the threshold

The Bill expands the eligibility criteria of treatment orders, which enable a wider range of offenders to access treatment orders as an alternative to imprisonment. Treatment orders support the right to liberty and security of person, as an offender who is subject to a treatment order has their sentence of imprisonment suspended to be served in the community, limiting the time spent in detention by that offender.

Allow the court to extend the provisional cancellation period where an offender breaches their treatment order other than by commission of offence

The Bill allows the court to extend the provisional cancellation of the suspended sentence of imprisonment under the treatment order to allow the treatment and supervision team to secure a placement in a residential rehabilitation facility or other further treatment, in circumstances where the offender has breached their treatment order other than by commission of an offence.

In *Tonna*,<sup>7</sup> no residential rehabilitation facility was able to accommodate the defendant within the 14-day provisional cancellation period. As the court was unwilling to release the defendant into the community, the court was required to cancel the defendant's treatment order, resulting in the defendant returning to full-time imprisonment for the remainder of their sentence.<sup>8</sup>

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<sup>7</sup> *R v Tonna (No 2)* [2020] ACTSC 262.

<sup>8</sup> *Ibid* [75]-[76] (Refshauge AJ).



By allowing the court to extend the length of the provisional cancellation period, the treatment and supervision team may be provided with more time to seek rehabilitative options for an offender. In circumstances where no appropriate rehabilitative option is available within the existing 14-day period, this amendment supports the right to liberty and security of person by providing an alternative to cancellation of the treatment order, which would require the offender to serve the sentence of imprisonment suspended by the treatment order.

### **Section 13 – Freedom of movement**

#### Allow backdating of treatment orders to take into account time served in pre-sentence custody

The Bill empowers the court to backdate treatment orders to take into account time spent in pre-sentence custody. This promotes the right to freedom of movement by reducing the time spent by an offender under a treatment order, which requires that offenders must not stay outside the Australian Capital Territory without the permission of the court for a continuous period of more than 24 hours as a core condition.

## **RIGHTS LIMITED**

### **Section 10 – Right to protection from torture and cruel, inhuman or degrading treatment etc**

#### Expand the orders that can be made where an offender breaches their treatment order other than by commission of an offence

##### *1. Nature of the right and the limitation (s 28 (a) and (c))*

Section 10 (2) of the HR Act states that ‘no one may be subjected to medical or scientific experimentation or treatment without his or her free consent.’ This right incorporates two distinct rights protected in international law.

The right not to be subjected to medical or scientific experimentation without free consent is drawn from Article 7 of the *International Covenant on Civil and Political Rights* and is considered to be an absolute right under international law, which cannot be subject to limitations.

The right not to be subjected to medical treatment without free consent is recognised as an aspect of the right to health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*. This right was considered in the *CESCR General Comment No. 14: the Right to the Highest Attainable Standard of Health (Art. 12)* (2000) to include the right to be free from interference such as the right to be free from non-consensual medical treatment. This aspect of the right is also fundamental to human dignity and autonomy. Nevertheless, it is recognised that this right may be subject to limitations where necessary to achieve a legitimate objective, and where the limitation is reasonable and demonstrably justified. Such limitations must be proportionate and least restrictive of the right.

The Bill allows the court to require an offender to undergo assessment for admission to, and if found suitable, participate in a residential rehabilitation facility, if the offender has breached their treatment order other than by commission of an offence.

This may limit the right because if the offender does not consent to the assessment for admission to and participation in a residential rehabilitation facility, their treatment order may be cancelled and they may have to return to full-time custody. The threat of returning to custody may be seen as coercive.

At the commencement of the program, an offender consents to the broad terms of a treatment order, however the court has discretion to order the treatment required to be undertaken by the offender under the treatment order.

## *2. Legitimate purpose (s 28 (b))*

The purpose of requiring an offender to undergo an assessment for admission to, and if found suitable, participate in a residential rehabilitation facility is to achieve the objects of treatment orders of providing eligible offenders with the opportunity to undergo rehabilitation, reduce their dependency on alcohol or a controlled drug, and be successfully re-integrated into the community. These objects promote the right to life, by reducing the harms associated with alcohol and drug abuse and promoting the ability of offenders to positively engage with the community.

## *3. Relationship between the limitation and the purpose (s 28 (d))*

Participation in a residential rehabilitation facility is a component of the DASL program that is often critical to the effectiveness of an offender's progress under a treatment order.<sup>9</sup>

Of the 56 DASL status reports analysed for the ANU Report, 24 out of 56 participants required residential rehabilitation during the reference period, with 20 participants requiring residential rehabilitation during Phase 1 of the DASL program, and 0 participants requiring residential rehabilitation during Phase 3.<sup>10</sup> Additionally, participants of the DASL surveyed for the ANU Report indicated that their stays in residential rehabilitation facilities and frequent urinalysis were two of the most helpful components of the program in supporting recovery and limiting re-offending.<sup>11</sup>

This data illustrates that participation in a residential rehabilitation facility is a key feature of the DASL program that can support the rehabilitation of an offender and reduce their alcohol or drug dependency.

## *4. Proportionality (s 28 (e))*

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<sup>9</sup> Professor Meredith Rossner and Professor Lorana Bartels et al., *ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report* (Final Report, June 2022) ('ANU Report') 71.

<sup>10</sup> Ibid 135.

<sup>11</sup> Ibid 119-120.

There are sufficient safeguards in place to ensure that the limitation of the right is proportionate achieving the purpose of the amendment.

Allowing the court to require an offender to undergo an assessment for admission to, and if found suitable, participate in a residential rehabilitation facility is necessary to improve an offender's likelihood of success within the DASL program, as it supports the rehabilitation and abstinence of the offender from alcohol and drug use.

At the commencement of the program, section 12 (2) (c) of the Sentencing Act allows a treatment order to be made where the offender agrees to complete a treatment program. The offender's consent must be informed by a clear explanation of the treatment order, which must contain sufficient information to enable the offender to make a balanced judgment about whether to serve the sentence under the treatment order.

The restriction of this right is enlivened only when an offender breaches their treatment order other than by the commission of an offence. If the offender does not agree to the treatment, then they will not be forced to undergo treatment, but may be at risk of having their treatment order cancelled due to breach of a treatment order condition. Given these safeguards, this is the least restrictive means available given the vulnerability of the cohort to achieve the objects of providing offenders with the opportunity to undergo rehabilitation and reduce their alcohol and drug dependency.

## **Section 12 – Right to privacy and reputation**

### **Make submitting to alcohol and drug testing a core condition of treatment orders**

#### *1. Nature of the right and the limitation (s 28 (a) and (c))*

The Bill makes submitting to alcohol and drug testing a core condition, which automatically applies to a treatment order. Submitting to alcohol and drug testing was previously listed as a treatment order condition that could be ordered at the court's discretion.

The requirement to submit to alcohol and drug testing limits the right to privacy and reputation, as alcohol and drug testing may require recipients to undergo urinalysis and divulge private information to the treatment and supervision team.

#### *2. Legitimate purpose (s 28 (b))*

The purpose of this limitation is to facilitate the effective operation of the treatment order. This power will support the ability of the treatment and supervision team to monitor the offender's progress and compliance within the treatment program.

#### *3. Relationship between the limitation and the purpose (s 28 (d))*

The treatment and supervision team is required to monitor an offender's alcohol and/or drug use to facilitate their progress within the DASL program. The information collected from alcohol and drug testing provides the treatment and supervision team with an opportunity to

adjust the treatment as required, facilitate discussions about progress, increase engagement between the participant and the treatment and supervision team, and assist the court with decisions about progress throughout the phases of the treatment order.

#### *4. Proportionality (s 28 (e))*

The scope of the power is limited as only a member of the treatment and supervision team may direct the offender to submit to an alcohol and drug test. It is not a requirement that an offender return a negative alcohol and drug test, only that the offender submit to testing.

The limitation on this right is balanced by the informed consent to the requirements of the treatment order provided by the offender when entering the treatment order, and the opportunity to receive the health and social benefits of the treatment received while serving a suspended sentence. This limitation is the least restrictive means possible in the circumstances, and proportionate to the aim of facilitating the rehabilitation of offenders.

### **Section 18 – Right to liberty and security of person**

Allow the court to extend the provisional cancellation period where offender breaches their treatment order other than by commission of offence

#### *1. Nature of the right and the limitation (s 28 (a) and (c))*

The Bill allows the court to extend the provisional cancellation of the suspended sentence of imprisonment under the treatment order to allow the treatment and supervision team to secure a placement in a residential rehabilitation facility or other further treatment, in circumstances where the offender has breached their treatment order other than by commission of an offence.

This limits the right to liberty and security of person, as it requires the offender to remain in full-time imprisonment for an extended period while awaiting a placement in a residential rehabilitation facility or other further treatment.

#### *2. Legitimate purpose (s 28 (b))*

The purpose of the limitation is to provide the treatment and supervision team with additional time to find alternative treatment or residential rehabilitation options for an offender that has breached their treatment order other than by commission of an offence.

This issue was examined in *Tonna*,<sup>12</sup> in which the court was required to cancel the defendant's treatment order as no suitable residential rehabilitation options were available. The court observed that the legislation did not allow for the offender to be remanded until a placement becomes available, and that "this may be a weakness in the legislation which requires attention."<sup>13</sup>

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<sup>12</sup> *R v Tonna (No 2)* [2020] ACTSC 262.

<sup>13</sup> *Ibid* [69] (Refshauge AJ).

### *3. Relationship between the limitation and the purpose (s 28 (d))*

Extending the period in which an offender may be held in custody is likely to achieve the purpose of providing the treatment and supervision team with sufficient time to find an alternative solution to imprisonment. Additionally, the extension of time is likely to reduce the likelihood that an offender's treatment order is cancelled, which would require the offender to serve the remainder of their sentence in prison. While extending the provisional cancellation period limits the right to liberty and security of person in the short-term, it promotes the right to liberty and security of person in the long-term.

### *4. Proportionality (s 28 (e))*

The limitation of this right is reasonable and proportionate as the additional time spent in custody is likely to reduce the likelihood of the treatment order being cancelled, thus promoting the right to liberty and security of person overall. The limitation of this right is the least restrictive means of achieving the legitimate purpose, as the court must be satisfied that it is necessary for the offender to stay at a residential rehabilitation facility, and that the suspension can only be cancelled for only as long as necessary to allow the treatment and supervision team to secure a placement in a residential rehabilitation facility or other further treatment.

While this right may be limited by an increase in the time spent in custody, it also provides the treatment and supervision team with more opportunities to find alternative treatment options, limiting the circumstances in which an offender's treatment order may need to be cancelled due to the limited availability of treatment resources. The cancellation of the treatment order will result in the imposition of the sentence of imprisonment suspended under the treatment order, which would limit the right to liberty and security of person to a greater extent.

Accordingly, the Bill balances the limitation and promotion of the right to liberty and security of person and is the least restrictive means possible to ensure that an offender that breaches their treatment order may continue to receive the health and social benefits from rehabilitative treatment, while serving a suspended sentence.

**SENTENCING (DRUG AND ALCOHOL TREATMENT ORDERS) LEGISLATION  
AMENDMENT BILL 2023**

*Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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**Shane Rattenbury MLA**  
**Attorney-General**

# **Sentencing (Drug and Alcohol Treatment Order) Legislation Amendment Bill 2023**

## **Detail**

### **Part 1 Preliminary**

#### **Clause 1 Name of Act**

This clause provides that the name of this Act is the *Sentencing (Drug and Alcohol) Treatment Orders Legislation Amendment Act 2023*.

#### **Clause 2 Commencement**

This clause provides for the commencement of the Act. The Act commences on the day after its notification day.

#### **Clause 3 Legislation Amended**

This clause identifies the legislation that will be amended is the *Crimes (Sentence Administration) Act 2005* and the *Crimes (Sentencing) Act 2005*.

### **Part 2 Crimes (Sentence Administration) Act 2005**

#### **Clause 4 Section 82B (b)**

This clause makes a consequential amendment to section 82B (b) to give effect to the amendments to section 80ZD of the Sentencing Act.

#### **Clause 5 Section 82B (c)**

This clause makes a consequential amendment to section 82B (c) to give effect to the amendments to section 80ZD of the Sentencing Act.

### **Part 3 Crimes (Sentencing) Act 2005**

#### **Clause 6 Section 12A (1) (b)**

This clause clarifies that the court may make a treatment order for 1 or more eligible offences that result in a term of imprisonment of a total period of at least 1 year but not more than 4 years. This clause expands the eligibility criteria for a treatment order, which enables more offenders that may benefit from drug and alcohol treatment to be eligible for the DASL.

This clause is intended to operate with reference to the total period that a person will spend imprisoned under the imposed sentence(s), including sentences served concurrently and

consecutively. For example, an offender sentenced to the following would be eligible for a treatment order pursuant to subsection (1) (b) (ii):

- 2 periods of imprisonment for 9 months and 3 months to be served *consecutively*, resulting in a total period of 12 months imprisonment.
- 2 periods of imprisonment for 3 years and 2 years to be served *concurrently*, resulting in a total period of 3 years imprisonment. While each period taken individually would add up to 5 years imprisonment, the concurrent serving of the sentences amounts to a total effective period of 3 years imprisonment. Accordingly, the offender would still be eligible for a treatment order, as the total period of imprisonment to be served does not exceed 4 years.

**Clause 7      Section 12A (2)**

This clause omits the term ‘fully’ in section 12A (2) as a consequential amendment to give effect to the amendment to section 12A (3) of the Sentencing Act.

**Clause 8      Section 12A (3)**

This clause substitutes section 12A (3) to clarify that if a sentence is taken to have started on a day before the day the sentence is imposed, the court must suspend the remaining part of the sentence beginning on the day the sentence is imposed.

**Clause 9      Sections 12 (4) (a) and (b)**

This clause substitutes section 12 (4) (a) and (b) to clarify that an offender must only be subject to 1 treatment order at any particular time and that a treatment order may apply to more than 1 eligible offence when dealt with in the same sentencing proceeding.

**Clause 10      Section 12A (4) (c)**

This clause omits the reference to ‘subsection (3)’ and replaces it with a reference to ‘subsection (1) (b)’ to give effect to the amendment to section 12A (1) (b) of the Sentencing Act.

**Clause 11      Section 12A (9)**

This clause omits the definition of an ‘associated offence’ in section 12A (9).

**Clause 12      Section 12A (9)**

This clause inserts a new definition of ‘treatment program’ into section 12A (9).

**Clause 13      Section 80T**

This clause omits the note in section 80T (1).



**Clause 14      Section 80W (1) (a)**

This clause omits ‘at least 1 year but not more than 4 years’ and substitutes ‘a term mentioned in section 12A (1) (b)’ in section 80W (1) (a) as a consequential amendment to give effect to the amendment to section 12A (1) (b) of the Sentencing Act.

**Clause 15      Section 80W (1) (b)**

This clause omits ‘fully suspends the sentence of imprisonment’ and substitutes ‘suspends the sentence of imprisonment as mentioned in section 12A (3)’ to give effect to the amendment to section 12A (3) of the Sentencing Act.

**Clause 16      Section 80X (2) (b) (ii)**

This clause substitutes ‘if the court earlier cancels the order, or the treatment and supervision part of the order – on the day of cancellation’ in section 80X (2) (b) (ii) to clarify that the treatment and supervision part of a treatment order may end on the day of cancellation, if the court earlier cancels the treatment order or the treatment and supervision part of the order.

**Clause 17      Section 80Y (1) (da)**

This clause inserts subsection (1) (da) to section 80Y, which provides that an offender ‘must submit to alcohol and drug testing under the *Corrections Management Act 2007*, when directed by a member of the treatment and supervision team for the treatment order.’

This clause makes submitting to alcohol and drug testing a core condition under section 80Y. The condition of submitting to alcohol and drug testing was previously a treatment order condition under section 80Z (2) (f). The effect of this clause is that submitting to alcohol and drug testing becomes an automatic requirement under a treatment order.

The intention of making submitting to alcohol and drug testing a core condition of a treatment order is to support the object of facilitating the rehabilitation of an offender, as outlined in section 80O of the Sentencing Act. The information collected from alcohol and drug testing provides the treatment and supervision team with an opportunity to adjust the treatment as required, facilitate discussions about progress, increase engagement between the participant and the treatment and supervision team, and assist the court with decisions about progress throughout the phases of the treatment order.

**Clause 18      Section 80Z (2) (f)**

This clause omits subsection (2) (f) from section 80Z as a consequential amendment to give effect to the new section 80Y (1) (da) of the Sentencing Act.

**Clause 19      Section 80Z (2) (g)**

This clause omits ‘under alcohol or drug testing’ and substitutes ‘for alcohol or a drug’ in section 80Z (2) (g) to give effect to the new section 80Y (1) (da) of the Sentencing Act.

Although submitting to alcohol and drug testing is made a core condition by the new section 80Y (1) (da) of the Sentencing Act, returning a positive test sample for alcohol or a drug remains a treatment order condition under section 80Z (2) (g).

#### **Clause 20      Division 5.4A.7**

This clause substitutes ‘Drug and alcohol treatment orders – breaches etc’ as the heading of Division 5.4A.7.

#### **Clause 21      Section 80ZB (1) (d) (vii) and (viii)**

This clause inserts subsections (1) (d) (vii) and (viii) in section 80ZB to expand the orders a court can make if satisfied on the balance of probabilities that an offender subject to a treatment order breaches a condition of the treatment order other than by the commission of an offence.

Subsection (1) (d) (vii) allows the court to require the offender to undergo an assessment for admission to a residential rehabilitation program, and if found suitable, participate in the program.

Subsection (1) (d) (viii) allows the court to require the offender to comply with any other condition, not inconsistent with the Sentencing Act or the Sentence Administration Act that the court considers appropriate.

This clause supports the object of facilitating the rehabilitation of offenders as outlined in section 80O of the Sentencing Act, by providing a judicially supervised, therapeutically oriented and integrated treatment regime.

#### **Clause 22      Section 80ZB (2A)**

This clause inserts the new subsection (2A) to section 80ZB to allow the court to make an order under subsection (1) (e) for a period longer than 14 days, if the court is satisfied that treatment appropriate to achieve the objects of the treatment order will only become available to the offender at the end of the longer period.

In *Tonna*,<sup>14</sup> the court had detained the defendant in custody for 14 days under section 80ZB (1) (e) after the defendant had breached a condition of his treatment order. As the court was not prepared to reinstate the suspension of the sentence of imprisonment at the end of the 14-day period, and no suitable rehabilitation program was available to admit the defendant in the circumstances, the court was required to cancel the defendant’s treatment order.

This clause addresses the issue in *Tonna* by allowing the court to extend the provisional cancellation of the suspension of imprisonment beyond 14 days, if the court is satisfied that requiring the offender to undergo treatment is appropriate to achieve the objects of the treatment order, and that the treatment will only become available to the offender at the end of the longer period.

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<sup>14</sup> [2020] ACTSC 362.

By allowing the extension of the provisional cancellation, this clause limits the risk that an offender will have their treatment order cancelled if no appropriate treatment is available within the 14-day period provided in section 80ZB (1) (e). This clause will act as a safeguard against the cancellation of treatment orders on this basis, and support the objects of facilitating the rehabilitation of offenders, reducing the offender's dependency on alcohol or drugs, and reducing the health risks associated with dependency on alcohol or drugs.

#### **Clause 23      Section 80ZB (3)**

This clause omits 'an order made under subsection (1) has breached the order' and substitutes 'a condition of an order made under subsection (1) (d) has breached the condition,' to clarify the interaction between subsections (1) and (3) of section 80ZB.

This clause clarifies that the conditions in section 80ZB (1) (d) are part of the remedial order(s) made under section 80ZB (1), which the court must make if satisfied on the balance of probabilities that an offender subject to a treatment order has breached a condition of the treatment order, other than by the commission of an offence. Breach of the conditions in subsection (1) (d) would result in action taken by the court under section 80ZB (3).

#### **Clause 24      Section 80ZD (1)**

This clause amends section 80ZD (1) to clarify that the section applies if an offender who is subject to a treatment order is convicted of an offence against a law in force in Australia or elsewhere while subject to the treatment order (a *further offence*), and the further offence is punishable by imprisonment.

This clause addresses the issue discussed in *R v Subasic*,<sup>15</sup> in which the Court was requested to make a treatment order for the defendant, but the defendant was awaiting sentencing for two summary offences that could not be heard by the Supreme Court. If a treatment order was made, the defendant would be at risk of having his treatment order cancelled if he was later sentenced to imprisonment for the two summary offences pursuant to section 80ZD (3) of the Sentencing Act. The Court considered that it was "possible" that section 80ZD only applies to offences committed after the treatment order, but that it was "by no means clear".<sup>16</sup>

By clarifying that section 80ZD applies only to offences committed during the treatment order, this clause excludes historical offences from the application of section 80ZD.

#### **Clause 25      Section 80ZD (2)**

This clause omits 'sentence imposed on the offender for the further offence is not a sentence of imprisonment,' and substitutes 'offender is not subject to a sentencing order for a further offence,'.

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<sup>15</sup> [2020] ACTSC 380.

<sup>16</sup> Ibid [59]-[60] (Refshauge AJ).

This clause improves consistency between the provisions relating to treatment orders within the Sentencing Act, as it replaces the phrase ‘sentence of imprisonment’ with ‘sentencing order’. Clause 37 provides a definition for ‘sentencing order’ with reference to section 12A (9).

A risk associated with this clause is that a ‘deferred sentence order’ is listed as a ‘sentencing order’ under section 12A (9), which may impact a specific cohort of offenders who receive a deferred sentence order in another jurisdiction.

In the ACT, a deferred sentence order cannot be imposed on an individual that is already liable to a sentence of imprisonment, which means that an offender subject to a treatment order cannot also be subject to a deferred sentencing order for a further offence. Accordingly, there is no conflict between this clause and the existing operation of section 80ZD within the ACT.

However, there is a risk that a deferred sentence order may be imposed on an offender who is subject to a treatment order in another State or Territory. If a deferred sentence order is imposed in another jurisdiction, the offender may be at risk of having their treatment order cancelled under section 80ZD (3).

#### **Clause 26      Section 80ZD (2) (d)**

This clause substitutes ‘make an order cancelling the treatment order.’ in subsection (2) (d) of section 80ZD, to give effect to the new section 80ZD (3A) of the Sentencing Act.

#### **Clause 27      Section 80ZD (3) and note**

This clause substitutes subsection (3) of section 80ZD to provide that if the offender is subject to a sentencing order for a further offence, the court must cancel the treatment order.

This clause also inserts a new subsection (3A) to section 80ZD to provide that if the court cancels a treatment order under subsection (2) (d) or (3), the court must either impose the sentence of imprisonment that was suspended under the custodial part of the treatment order; or resentence the offender for each offence in relation to which the treatment order was made and in any way the court could deal with the offender if it had convicted the offender of each offence at the time of resentencing, if the court considers it appropriate in the circumstances.

The new subsection (3A) provides the court with the option to resentence the offender instead of automatically imposing the sentence of imprisonment suspended under the treatment order, increasing the range of orders the court may make other than a sentence of imprisonment.

#### **Clause 28      New section 80ZD (8)**

This clause inserts subsection (8), which defines sentencing order with reference to section 12A (9), to improve consistency between the provisions relating to treatment orders in the Sentencing Act.

**Clause 29      Section 80ZH (4) (b)**

This clause omits ‘section 80ZD (2) (d) (i)’ and substitutes ‘section 80ZD (3A) (a)’ to give effect to the amendment to section 80ZD of the Sentencing Act.

**Clause 30      Section 80ZH (4) (c)**

This clause omits ‘section 80ZD (2) (d) (ii)’ and substitutes ‘section 80ZD (3A) (b)’ to give effect to the amendment to section 80ZD of the Sentencing Act.

**Clause 31      Section 81 (c)**

This clause substitutes ‘the sentence of imprisonment is not – (i) fully suspended; or (ii) suspended under the custodial part of a drug and alcohol treatment order’ to give effect to the amendment to section 12A of the Sentencing Act.