

2019

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

**SENTENCING (DRUG AND ALCOHOL TREATMENT ORDERS) LEGISLATION
AMENDMENT BILL 2019**

Amendments to be moved by the Attorney-General

SUPPLEMENTARY EXPLANATORY STATEMENT

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**SENTENCING (DRUG AND ALCOHOL TREATMENT ORDERS) LEGISLATION
AMENDMENT BILL 2019 – GOVERNMENT AMENDMENTS**

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Introduction

The Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2019 (the Bill) amends the *Crimes (Sentencing) Act 2005* and other relevant legislation to establish processes for making a Drug and Alcohol Treatment Order (DATO) as an alternative sentence to imprisonment.

This Supplementary Explanatory Statement relates to Government amendments proposed by the Attorney-General (the amendments).

Purpose of the Amendments

The amendments are consistent with the underlying policy intent of the provisions of the Bill. They modify those provisions to create a mechanism allowing offenders, in respect of whom the Supreme Court has declined to make a DATO, to have their matters remitted to the Magistrates Court, in certain circumstances. The amendments also make other changes to the Bill to provide more detail about, and otherwise clarify, the operation of particular provisions of the Bill.

Outline

Background

The amendments will support the effectiveness of the Bill. The amendments:

- include a power for the Supreme Court to remit a proceeding back to the Magistrates Court, on application, if a DATO is not made;
- add DATOs to the definition of *community-based sentence* in section 264 of the *Crimes (Sentence Administration) Act 2005* (the Sentence Administration Act);
- adjust where within the Sentence Administration Act the *drug and alcohol treatment order* is defined;
- allow the modification of treatment program conditions (rather than just addition and removal);
- clarify that cancellation of a DATO when the offender has substantially complied with the DATO, and when the continuation of the DATO is no longer necessary to achieve the objects of the order, leads to a good behaviour order (GBO) being made;
- allow the court to amend a DATO in the absence of a breach;
- add additional offences to the definition of *relevant drug offence* for the purposes of immunity from criminal liability;

- move the requirement that an offender subject to a DATO ‘must not return a positive test sample under alcohol and drug testing’ from core conditions in section 80X (1) (e) to treatment program conditions in section 80Y (2);
- clarify how a DATO can be made in relation to multiple offences which are sentenced together;
- clarify that a DATO is not a suspended sentence order; and
- clarify that the court making a DATO can allow for the offender subject to the DATO to reside outside the ACT while on the DATO.

Human Rights Considerations

The amendments to the Bill balance the rights and interests of the community and offenders. The discussion of rights and interests here should be read in conjunction with the Explanatory Statement for the Bill.

The amendments to the Bill are consistent with the underlying policy intent of the Bill and clarify, through the inclusion of additional detail, the operation of provisions of the Bill. This will support the Supreme Court when dealing with offenders being sentenced and in respect of whom DATOs are made. These amendments will ensure that the court has the right tools to act fairly and reasonably.

The amendments to the Bill engage, and support, the following *Human Rights Act 2004* (HR Act) rights:

- Section 21 – Fair trial
- Section 22 – Rights in criminal proceedings (right not to be compelled to testify against himself or herself)
- Section 27 – Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

Amendment 15 adds offences in the *Medicines, Poisons and Therapeutic Goods Act 2008* and *Criminal Code 2002* to the definition of *relevant drug offence*, in section 80ZL of the Bill. This section provides offenders with immunity from criminal liability in relation to any admissions made during the preparation of a DATO assessment or when administering the DATO for the offender. It reflects the therapeutic nature of the DATO, and the need for an offender to be frank about any drug or alcohol use during the management of their program. This supports the right of a person not to be compelled to testify against himself or herself.

Amendment 7 provides that if the Supreme Court declines to make a DATO in relation to certain offenders, those offenders can apply to have their matter remitted back to the Magistrates Court for sentencing. In particular, this power will provide some Aboriginal or Torres Strait Islander offenders with the opportunity to return to be sentenced in the Galambany Court. This change supports cultural and other rights of Aboriginal and Torres Strait Islander peoples.

Clause notes

Amendment 1 — Clause 9

Proposed new section 82A

Page 6, line 11

This is a technical amendment removing a duplicated definition. The definition of *drug and alcohol treatment order* will be contained within the Dictionary of the Sentence Administration Act (see clause 10 of the Bill).

Amendment 2 — Proposed new clause 9A

Page 9, line 8

Section 264 of the Sentence Administration Act defines a *community-based sentence* and lists existing sentencing options, such as intensive corrections orders, as community-based orders.

This amendment includes a DATO within that definition.

This is required to ensure that provisions of Part 7.1 of the *Mental Health Act 2015* allowing the Director-General to apply for a forensic mental health order in relation to a person serving a community-based sentence, will apply to a person on a DATO.

Including a DATO in the definition of *community-based sentence* will also make it possible for offenders to apply to transfer to other jurisdictions. The usual transfer rules and procedures will apply.

Amendment 3 — Clause 10

Proposed new dictionary definition of *drug and alcohol treatment order*

Page 9, line 12

This is a technical amendment, with the result that the definition of ‘drug and alcohol treatment order’ will apply to the whole of the Sentence Administration Act, and not only Chapter 5A.

Amendment 4 — Clause 14
Proposed new section 12A (2) (iii)
Page 11, line 23

This amendment will allow for an offender on a DATO to reside interstate, provided this is part of their individual order as directed by the court. This will allow flexibility for an offender to participate in residential rehabilitation or access other services outside the ACT.

Amendment 5 — Clause 14
Proposed new section 12A (3) and (4)
Page 12, line 18

This amendment, together with amendment 6, clarifies the operation of the provisions to allow a DATO to apply in respect of multiple offences. In particular, it clarifies that a DATO can apply in respect of a primary offence, which must be an offence for which the sentence of imprisonment imposed was between one and four years, and other eligible offences dealt with in the same sentencing proceeding.

While the eligible offences to which a single DATO applies can be ones for which sentences are to be served consecutively or concurrently, the total period of imprisonment liable to be served for all sentences cannot be more than four years.

This amendment also clarifies that so long as one eligible offence carries an imprisonment period of between one and four years, the DATO for that offence can extend to an eligible offence for which the penalty of imprisonment is less than one year.

Amendment 6 — Clause 14
Proposed new section 12A (9), new definition of *associated offence*
Page 13, line 7

This amendment supports amendment 5, by providing a definition of *associated offence*.

Amendment 7 — Clause 19
Proposed new Part 5.4A, new section 80TA
Page 25, line 11

The Bill creates the DATO jurisdiction within the Supreme Court. The result of this is that offenders who may have elected to have their indictable matters heard summarily within the Magistrates Court will be required to elect to have their matter dealt with by the Supreme Court to be assessed for a DATO.

It is appropriate to make provision for an offender to choose to have their matter return to the Magistrates Court if the Supreme Court declines to make a DATO. This will include where an Aboriginal or Torres Strait Islander offender wishes to appear before the Galambany Court.

The amendment creates a power for the matter to be referred back to the Magistrates Court from the Supreme Court where an assessment has been undertaken and the judge has declined to make a DATO for the offender.

The power is enlivened on application of the offender or the Director of Public Prosecutions. It is anticipated that an application by the DPP may be made in circumstances where a defendant is not represented and consents to such an application being made.

Where the offender's purpose in being committed to the Supreme Court was to apply for the DATO, the judge must send the offender back to the Magistrates Court upon application. The amendment also provides a discretionary power for the Supreme Court to remit a matter where it is in the interests of justice to do so.

These amendments will support the right to a fair trial, as offenders will not be forced to be sentenced in a higher jurisdiction only because they have been considered for and refused a DATO.

Amendment 8 — Clause 19

Proposed new section 80U, new note

Page 25, line 24

This is a minor technical amendment to insert a note into section 80U to clarify that a reference to an offence is taken to also mean offences, by reference to section 145 (b) of the *Legislation Act 2001*.

Amendment 9 — Clause 19

Proposed new section 80X (1) (e)

Page 28, line 12

This amendment removes the requirement that an offender subject to a DATO 'must not return a positive test sample under alcohol and drug testing' from the core conditions for a DATO.

Given the nature and purposes of the DATO, this condition is more appropriately treated as a discretionary matter rather than obligatory. This will provide the judge and the DATO team with the necessary flexibility to appropriately tailor the offender's program. This also reflects the approach taken in drug and alcohol courts in Victoria, Queensland, and New South Wales.

The following amendment instead inserts this provision into 'treatment order conditions' in section 80Y (2).

Amendment 10 — Clause 19**Proposed new section 80Y (2) (fa)****Page 30, line 15**

As outlined above, this amendment inserts the requirement that the offender ‘must not return a positive test sample under alcohol and drug testing’ into this provision to ensure that the judge has sufficient flexibility to tailor the conditions of a DATO.

Amendment 11 — Clause 19**Proposed new section 80ZA (2)****Page 32, line 15**

Section 80ZA of the Bill sets out the powers of the court where an offender is in breach of their DATO. One of the powers given to the court is to ‘amend’ the order. Subsection (2) clarifies that an order can be amended by adding or removing a treatment program condition. This amendment further clarifies that treatment program conditions can be modified, as well as added or removed.

Amendment 12 — Clause 19**Proposed new section 80ZC (3), new note****Page 35, line 14**

As provided in new section 12 (7) in the Bill, a DATO is not a suspended sentence order. This amendment includes a note in section 80ZC reflecting this.

Amendment 13 — Clause 19**Proposed new section 80ZE (4), new note****Page 38, line 22**

Section 80ZE of the Bill sets out when the court may cancel a DATO in satisfactory circumstances. Cancelling the DATO will end the treatment and supervision part of the order.

This amendment directs readers of the legislation to section 80Z, which requires the court to make a Good Behaviour Order (GBO) for the offender when the treatment and supervision part of a DATO ends. It is intended that the court cancelling the DATO will then use the provisions of section 80Z to release the offender subject to a GBO.

Amendment 14 — Clause 19**Proposed new section 80ZG, new subsections (5A), (5B) and (5C)****Page 40, line 2**

Section 80ZG of the Bill provides the Court with the power to review a DATO at any time and for any reason if it is satisfied the review would be in the interests of justice. The amendment inserts new sections clarifying what actions can follow a review.

Subsection (5A) states that following a review, the Court can confirm or amend the DATO as appropriate. This allows the DATO to be tailored to personal circumstances of the offender even as these circumstances change over the course of the order.

Subsections (5B) and (5C) require that copies of any amended DATO be distributed, but provide that failure to do so will not invalidate the order.

Amendment 15 — Clause 19

Proposed new section 80ZL (4), definition of *relevant drug offence*

Page 43, line 2

One of the key elements to a DATO is to allow for the offender to communicate openly and honestly with the judge, so that the offender's treatment program can be tailored effectively to their circumstances. In order to encourage honesty, admissions of drug use and possession made as part of the DATO assessment process or to the court during the administration of the order cannot be used as evidence against the offender in bringing further charges. The police may still charge the offender based on other evidence.

This amendment adds further appropriate offences to the list of *relevant drug offences*, to provide immunity from prosecution arising from disclosures made in connection with a DATO assessment or completion.