



ACT
Government

Statutory Review Report

Drug and Alcohol Sentencing List Provisions

Justice and Community Safety Directorate

August 2023

1. EXECUTIVE SUMMARY

This is the Report on the statutory review (the Review) of the operation of various provisions establishing the Drug and Alcohol Sentencing List (DASL). The DASL provisions, including section 12A, Part 4.2B and Part 5.4A, were inserted into the *Crimes (Sentencing) Act 2005* (ACT) (CS Act) by the *Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Act 2019* (ACT) (Amendment Act) and commenced on 3 December 2019.

Section 12A outlines drug and alcohol treatment orders (DATOs) and the process in which they are granted to defendants. Section 12A grants the Supreme Court the ability to make a DATO that fully suspends a sentence of imprisonment for an eligible offence on the condition that the offender agrees to complete a treatment program.¹

Since the DASL commenced in December 2019, 147 people have been referred to DASL, 25 people have successfully completed their DATO, and 30 people are undertaking their DATO.²

The Amendment Act also introduced section 80ZQ to the CS Act. Section 80ZQ provided that the Minister must review the operation of the DASL provisions as soon as practicable 3 years after its commencement and must present a report of the review to the Legislative Assembly before the end of this section's 4th year of operation.³

In 2019, the ACT Government commissioned the Australian National University (ANU) to undertake an independent evaluation of DASL. The ANU published their findings in the *ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report* (the ANU Report),⁴ which was released on 9 August 2022.

The Process Evaluation (PE) considered the implementation operation of DASL, and the Outcome Evaluation (OE) considered the in-program, social integration, and recidivism outcomes. The ANU Report made 24 PE Recommendations and 15 OE Recommendations, including two recommendations specifically addressing the DASL legislative provisions. These were that:

- Consideration be given to expanding the range of Court-based treatment options for people who are not serving sentences of between one and four years, which would be of particular benefit to women, who typically serve shorter sentences (OE Recommendation 6); and
- The legislation be simplified, and the issues identified by the evaluation team addressed (OE Recommendation 12).

The *Government Response to the ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report* (the Government Response) was tabled in the Legislative Assembly on 9 November 2022. In the Government Response, the ACT Government agreed to OE Recommendation 6 and agreed in-principle to OE Recommendation 12, committing to consider the issues identified by the Report in the statutory review of the DASL provisions.

¹ *Crimes (Sentencing) Act 2005* (ACT) s 12A(2).

² ACT Courts and Tribunal, Drug and Alcohol Sentencing List Data (24 July 2023).

³ *Crimes (Sentencing) Act 2005* (ACT) s 80ZQ(1).

⁴ 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').

This Review was undertaken by the Justice and Community Safety Directorate (JACS) under the direction of the Attorney-General of the Australian Capital Territory (ACT). The Review began on 15 May 2023.

The aim of the Review was to examine the operation and effectiveness of the DASL provisions and consider the issues relating to the DASL provisions that were identified by the ANU Report, in accordance with the ACT Government's commitments in the Government Response. The Review was conducted concurrently with the development of the Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023 (the Bill), which contains amendments to improve the operation of the DASL provisions and implements some of the findings of the Review and recommendations of the ANU Report. The Bill will be introduced to the ACT Legislative Assembly alongside this Report.

The Review considered whether the DASL provisions are achieving the objects of DATOs articulated in section 800 of the CS Act, which include:

- Facilitating the rehabilitation of offenders by providing access to a judicially supervised, therapeutically oriented and integrated treatment regime;
- Supporting the reduction of offenders' dependency on alcohol or controlled drugs;
- Reducing the health risks associated with this dependency;
- Assisting with the integration of offenders into the community; and
- Promoting community safety by reducing the level of criminal activity caused by alcohol or drug dependence.

The Review also examined the following specific issues identified by the ANU Report as potentially requiring reform:

- Whether a DATO should be available to offenders subject to total sentences of 1-4 years, where no individual sentence meets this threshold;
- Whether DASL matters may be referred to and from the Magistrates Court;
- The definition of 'sentencing order' in the DASL provisions;
- Calculating pre-sentence custody when imposing a DATO;
- The powers of the Court to deal with breaches of DATOs and review a DATO prior to cancellation; and
- The ability of the Court to calculate pre-sentence custody for offences committed during a DATO.

The following stakeholders provided input on the Review:

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| 1. Aboriginal Legal Service ACT/NSW | 10. ACT Law Society |
| 2. ACT Bar Association | 11. ACT Legal Aid Commission (Legal Aid ACT) |
| 3. ACT Chief Minister, Treasury and Economic Development Directorate (CMTEDD) | 12. ACT Policing (ACTP) |
| 4. ACT Community Services Directorate (CSD) | 13. Alcohol Tobacco and Other Drug Association ACT (ATODA) |
| 5. ACT Corrective Services (ACTCS) | 14. Canberra Health Services (CHS) |
| 6. ACT Courts and Tribunals (ACTCT) | 15. JACS Human Rights and Social Policy Team (HRSP) |
| 7. ACT Director of Public Prosecutions (DPP) | 16. Winnunga Nimmityjah Aboriginal Health and Community Services |
| 8. ACT Health Directorate | |
| 9. ACT Human Rights Commission | |

Findings

Since the DASL provisions commenced, 147 people have been referred to DASL, 25 people have successfully completed their DATO, and 30 people are undertaking their DATO as of 24 July 2023.⁵

The Review considered the six specific proposals for legislative reform in the ANU Report and examined the effectiveness and operation of the DASL provisions more broadly. Stakeholders generally considered that the DASL provisions have been broadly effective in operation, with stakeholders raising that the investment into the DASL should be increased to meet its demands.

Following consultation with stakeholders, three of the proposals in the ANU Report are to be implemented in the Bill, namely, to allow DATOs to be available to offenders who have sentences of imprisonment of 1-4 years, where no individual sentence meets the threshold; to allow backdating of pre-sentence custody for offenders sentenced to a DATO; and to allow the extension of the period of custody the court may order if a participant breached their DATO.

Recommendations

Recommendation 1

The ACT Government should undertake further consultation and policy work on the range of Court-based treatment options for people who are not serving sentences between one and four years, with a view to further legislative reform as needed.

Recommendation 2

The ACT Government should undertake further consultation and policy work on the proposal to allow Drug and Alcohol Sentencing List (DASL) matters to be referred to and from the Magistrates Court, and other associated proposals to allow the Magistrates Court to hear and deal with DASL matters, with a view to further legislative reform as needed.

Recommendation 3

The ACT Government should consider undertaking further consultation and policy work on the proposal to amend the definition of 'sentencing orders' in section 12A(9) of the *Crimes (Sentencing) Act 2005* to include 'Griffiths remands' and good behaviour orders, with a view to further legislative reform as needed.

⁵ ACT Courts and Tribunal, Drug and Alcohol Sentencing List Data (24 July 2023).

2. INTRODUCTION

Statutory review of Drug and Alcohol Sentencing List (DASL) provisions

The Amendment Act commenced on 3 December 2019 and established the DASL by inserting section 12A, Part 4.2B and Part 5.4A into the CS Act.

Section 12A of the CS Act empowers the Supreme Court of the ACT to make a DATO that fully suspends the sentence of imprisonment for an eligible offence, on the condition that the offender agrees to complete a treatment program.⁶ Part 4.2B provides provisions relating to drug and alcohol treatment assessments. Part 5.4A provides provisions relating to DATOs.

The Amendment Act also inserted section 80ZQ into the CS Act. Section 80ZQ requires the Minister to undertake a review of the provisions of the Act relating to DATOs as soon as practicable at the end of 3 years after this section commences, being 3 December 2022.⁷ After completing the report, the Minister is required to present a report of the review to the Legislative Assembly before the end of the section's 4th year of operation on 3 December 2023.⁸

As the Attorney-General is the Minister responsible for the Crimes Act under the *Administrative Arrangements 2022 (No 2)*, the statutory review of the DASL provisions was conducted by JACS under the direction of the Attorney-General. The Review commenced on 15 May 2023.

Aim of the Review

The aim of the Review was to evaluate the operation and effectiveness of the DASL provisions to determine how the provisions are working in practice and if they are achieving their purpose. The Review was conducted by JACS and informed by consultation with key stakeholders. The Review was conducted concurrently with the development of the Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023 (the Bill), which contains amendments to improve the operation of the DASL provisions and implements some of the findings of the Review and recommendations of the Evaluation Report. The Bill will be introduced to the ACT Legislative Assembly alongside this Report.

Scope of Review

The Review considered whether the DASL provisions are achieving the objects of DATOs articulated in section 80O of the CS Act. Stakeholders were consulted on three broad consultation questions relating to the operation and effectiveness of the DASL model. The consultation questions were based on the objectives of DATOs as outlined in section 80O.⁹ whether the DASL provisions achieve the objectives of:

- Facilitating the rehabilitation of offenders by providing access to a judicially supervised, therapeutically oriented and integrated treatment regime;

⁶ *Crimes (Sentencing) Act 2005* (ACT) s 12A(2).

⁷ *Ibid* s 80ZQ(1)(a).

⁸ *Ibid* s 80ZQ(1)(b).

- Supporting the reduction of offenders' dependency on alcohol or controlled drugs, and reducing the health risks associated with this dependency; and
- Assisting with the integration of offenders into the community, and promoting community safety by reducing the level of criminal activity caused by alcohol or drug dependence.

In considering these issues, the Review also examined the specific issues identified by the ANU Report with regards to the DASL provisions:

- Whether a DATO should be available to offenders subject to total sentences of 1-4 years, where no individual sentence meets this threshold;
- Whether DASL matters may be referred to and from the Magistrates Court;
- The definition of 'sentencing order' in the DASL provisions;
- Calculating pre-sentence custody when imposing a DATO;
- The powers of the Court to deal with breaches of DATOs and review a DATO prior to cancellation; and
- The ability of the Court to calculate pre-sentence custody for offences committed during a DATO.

3. BACKGROUND

Establishment and Purpose of Drug and Alcohol Sentencing List (DASL)

In the Parliamentary Agreement for the 9th Legislative Assembly, the ACT Government committed to establishing DASL and other associated support programs, as part of the Government commitment to reduce recidivism by 25 percent by 2025. The DASL deals with offences relating to serious drug and alcohol use and provides an alternative response for high risk and high need offenders who have serious issues with drug and/or alcohol use, by imposing DATOs as an alternative to full-time imprisonment. The development of DASL aligns with Government policies focused on reducing recidivism and addressing rates of incarceration. It also aims to achieve long-term behavioural change by using a problem-solving approach and supporting the development of a pro-social lifestyle.

The DASL was developed with reference to the experience and success of drug courts in other jurisdictions and overseas. For example, the second evaluation of the NSW Drug Court in 2008 by the Bureau of Crime Statistics and Research concluded that those who successfully completed the drug court program were 37 percent less likely than offenders in the comparison group to be reconvicted of any offence at any point, and those who participated in the program (whether they completed the program to graduation or not) were 17 per cent less likely to be reconvicted for any offence.¹⁰ The most recent evaluation of the NSW Drug Court has found that the Drug Court appears to have long term beneficial effects on the total number of reconvictions.¹¹

The DASL commenced operation on 3 December 2019, with a total capacity of 35 participants at any given time. The COVID-19 pandemic impacted the numbers of referrals made to the DASL, as new referrals were not accepted between April to August 2020. However, since the relaxing of COVID-19 safety measures, the

¹⁰ Weatherburn et al, 'The NSW Drug Court: A re-evaluation of its effectiveness' *Crime and Justice Bulletin* 121 (September 2008) 8, 11.

¹¹ Weatherburn et al, *The Long-Term Effect of the NSW Drug Court on Recidivism* (NSW Bureau of Crime Statistics and Research, 2020).

DASL has been operating near or at total capacity. The total number of participants involved in DASL from its commencement on 3 December 2019 until 24 July 2023 is reflected in **Table 1**.

Table 1: Participants' progress in DASL program (2019-2023)¹²

Stage in program	Number of participants (2019-2023)
<i>Referral to DASL</i>	147
<i>Sent for suitability assessment for DATO</i>	128
<i>Sentenced to DATO</i>	84
<i>Completed DATO</i>	25
<i>Active cases (as of 24 July 2023)</i>	30

As part of the 2023-2024 Budget, the ACT Government announced that \$8.4 million has been allocated to the DASL in 2023-24 to facilitate its on-going delivery and expand the DASL's capacity by 20 percent, increasing the total number of participants from 35 to 42 at any given time.

Drug and Alcohol Treatment Orders (DATOs)

Eligibility and suitability for DASL participation

Section 12A of the CS Act outlines circumstances when the Supreme Court may make a DATO. For section 12A to apply, an offender must plead guilty to an eligible offence, the Supreme Court must convict the offender of the offence and impose a sentence of imprisonment of at least 1 year but not more than 4 years and the offender must not be subject to a sentencing order for another offence.¹³ An eligible offence does not include a serious violent offence or a sexual offence.¹⁴ The Court must be satisfied on the balance of probabilities that the offender is dependent on alcohol or a controlled drug, the offender's dependency substantially contributed to the commission of the offence, and the offender will live in the ACT for the term of the sentence.¹⁵

Before making the DATO, the Court must also consider the relevant sentencing considerations under section 33 that apply to the offender, any information given to the Court relating to the concerns of a victim about a victim's safety or welfare, and the matters set out in section 80O.¹⁶ The offender must give informed consent to the DATO being made only after being given a clear explanation of the DATO with sufficient information to make a balanced judgment and an opportunity to ask any questions about the DATO.¹⁷ An offender cannot be subject to more than 1 treatment order for all offences at any given time. DATOs may extend to an associated offence which is an offence with an imposed sentence of less than one year.¹⁸

Offenders are assessed for eligibility and suitability for DASL participation under sections 80S and 80T respectively. In assessing the eligibility of an offender, the Court must be satisfied that a DATO is suitable for

¹² ACT Courts and Tribunal, Drug and Alcohol Sentencing List Data (24 July 2023).

¹³ *Crimes (Sentencing) Act 2005* (ACT) s 12A(1).

¹⁴ *Ibid* s 12A(9).

¹⁵ *Ibid* s 12A(2)(a).

¹⁶ *Ibid* s 12A(2)(b).

¹⁷ *Ibid* s 12A(2)(c).

¹⁸ *Ibid* s 12A(4)(a)-(b).

an offender, it is appropriate for an offender to serve a suspended sentence, and appropriate arrangements for the administration of a DATO are practicable.¹⁹ If an offender is assessed as eligible, the offender will then be referred for a suitability assessment.²⁰

The suitability assessment is conducted by the treatment order team, which includes the DASL Judge, representatives from ACT Health Directorate, ACT Corrective Services, the ACT Legal Aid Commission, the Director of Public Prosecutions, ACT Policing, and others.²¹ The Court must consider a pre-sentence report and a drug and alcohol treatment assessment for the offender.²² In deciding whether to make a DATO, the Court must consider any recommendations in the drug and alcohol treatment assessment, any medical report about the offender given to the report, any evidence from the assessor who prepared the assessment, and any evidence given by a member of the treatment order team about the offender.²³ The outcome of the suitability assessment is the development of a proposed treatment plan to address relevant aspects of the participant's rehabilitation.

Operation of a DATO

The Court determines if a DATO is appropriate in the circumstances and must record the reasons for its decision.²⁴ A copy of the DATO and the treatment plan is provided to the participant. The treatment plan under the DASL program is typically divided into three phases – stabilisation (Phase 1), consolidation (Phase 2), and re-integration (Phase 3). Supervision of the participant while under the treatment plan is provided through case management by ACT Corrective Services and Canberra Health Services.²⁵

At Phase 1, the objective is to stabilise the participant's life and reduce substance use. This is achieved through intensive supervision, including urinalysis testing, and beginning to implement the treatment plan, with a focus on improving the health of the participant.²⁶ Phase 2 includes an increased emphasis on abstinence and addressing the risk factors for relapse, which may include time spent in a residential rehabilitation facility.²⁷ Finally, Phase 3 focuses on reintegration into a positive lifestyle, to build skills to prevent relapse and future offending. The goal is to promote abstinence from all illicit substances, to support access to stable and secure accommodation, and for the participant to enter employment or education.²⁸

Where a person is at in their DASL journey will be reflected in the obligations they face under the DATO. As described in the ANU Report, "the framework through which the DATO is administered and enforced is a behavioural contract, to which all participants agree. This provides a transparent structure of boundaries and accountability, where positive progress is rewarded (or 'incentivised') and negative behaviour is sanctioned".²⁹

¹⁹ Ibid s 80S.

²⁰ Ibid s 46J(5).

²¹ ANU Report (n 4) 5.

²² *Crimes (Sentencing) Act 2005* (ACT) s 80T(1).

²³ Ibid s 80T(2).

²⁴ Ibid s 80T(6).

²⁵ ANU Report (n 4) 5.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid 63.

A DATO must include a custodial part and a treatment and supervision part.³⁰ Currently, a DATO must include a custodial part that imposes a sentence of imprisonment of at least 1 year but not more than 4 years and fully suspends the sentence of imprisonment. The treatment and supervision part will include a set of core conditions and treatment program conditions, which must be complied with by the offender.³¹ The core conditions of a DATO include that an offender must not commit another offence against a law in force in Australia or elsewhere and if an offender is charged with an offence, they must tell the responsible director-general about the charge as soon as possible.³²

While the treatment and supervision part of the DATO is in force, an offender subject to the order must also complete a program of treatment in relation to the alcohol or drug dependency of the offender and comply with any other condition imposed by the Court as necessary to achieve the purpose of the treatment program.³³ The treatment program conditions that the Court may order include submitting to drug and alcohol testing, participation in counselling programs, or participating in medical, psychiatric or psychological treatment.³⁴ Support and supervision are provided by the treatment and supervision team, in collaboration with other service providers including alcohol and other drug services and residential rehabilitation facilities. The treatment and supervision team includes representatives from the Supreme Court, the Health Director-General, the Director-General responsible for the CS Act and an entity.³⁵

The DATO provisions provide for this supervision and support framework. An offender subject to a DATO must report to a member of the treatment order team at directed places and times and receive visits from a member of the treatment order team at directed times.³⁶ The offender must also comply with any other reasonable direction of the treatment order team.³⁷

³⁰ *Crimes (Sentencing) Act 2005 (ACT)* s 80V(d).

³¹ *Ibid* s 80X(1).

³² *Ibid* ss 80Y(1)(a) and (b).

³³ *Ibid* s 80Z(1).

³⁴ *Ibid* ss 80Z(2)(a), (c) and (g).

³⁵ *Ibid*.

³⁶ *Ibid* ss 80Y(1)(c) and (d).

³⁷ *Ibid* s 80Y(h)(i).

4. ISSUES

ANU Report Findings

In 2019, the ACT Government commissioned the ANU to undertake an independent evaluation of DASL.³⁸ The ANU's findings were published in the ANU Report and were publicly released on 9 August 2022.

The ANU Report evaluated participant and stakeholder experiences of the DASL and involved three elements conducted in stages between 2019 and 2022, including:

1. a review of internationally recognised best practice principles and procedures for the creation and implementation of a successful drug Court, submitted to the ACT Supreme Court in 2019;
2. a Process Evaluation (PE) of the fidelity to best practice standards during the implementation of the ACT DASL, submitted to the ACT Supreme Court in April 2021, with updates in April 2022; and
3. an Outcome Evaluation (OE), with initial outcomes explored in the 2021 process evaluation report and a full outcome evaluation report submitted to the ACT Supreme Court in April 2022.³⁹

Overall, the ANU Report found that the DASL was operating effectively on a day-to-day basis and was largely consistent with both best practice and the principles of therapeutic justice.⁴⁰ The OE found high participant satisfaction with the DASL Judge attracting a 95 percent satisfaction rate. The Report also found that participation in DASL may lead to positive outcomes across various domains of social integration, including improved health, improved relationships, quality of life, and increased employment. A preliminary economic assessment also found that DASL has resulted in up to \$14 million being saved through operation of the DASL due to avoided prison time.

Additionally, the ANU Report found that the proportion of Aboriginal and Torres Strait Islander DASL participants was approximately 30 percent, which was higher than the representation in the Alexander Maconochie Centre (27 percent in 2021) suggesting there is some evidence that the DASL is diverting Aboriginal and Torres Strait Islander people from custody.⁴¹ However, the ANU Report also found that younger participants and Aboriginal and Torres Strait Islander participants were disproportionately represented in cancelled cases compared to graduations.⁴²

Despite the findings that the DASL was operating effectively and supported positive outcomes for participants, the ANU Report also identified specific areas for legislative reform in the DASL provisions. The ANU Report proposed that the ACT Government consider the following legal issues:

- Whether a DATO should be available to offenders subject to total sentences of 1-4 years, where no individual sentence meets this threshold;
- Whether DASL matters may be referred to and from the Magistrates Court;
- The definition of 'sentencing order' in the DASL provisions;
- Calculating pre-sentence custody when imposing a DATO;

³⁸ ANU Report (n 4) xvi.

³⁹ Ibid xii.

⁴⁰ Ibid 34.

⁴¹ Ibid 20.

⁴² Ibid 111.

- The powers of the Court to deal with breaches of DATOs and review a DATO prior to cancellation; and
- The ability of the Court to calculate pre-sentence custody for offences committed during a DATO.⁴³

ANU Report Recommendations and the Government Response

The ANU Report made 24 PE Recommendations and 15 OE Recommendations. The PE Recommendations were addressed by the Supreme Court midway through the evaluation process. The OE Recommendations made proposals for supporting participants with additional needs, ensuring program fidelity and quality, monitoring and evaluation, and the broader social issues affecting DASL. Two OE Recommendations of the ANU Report related to potential areas requiring reform in the DASL legislation.

OE Recommendation 6

OE Recommendation 6 proposed that consideration be given to the expansion of Court-based treatment options for people who are not serving sentences between one and four years.⁴⁴ The threshold of 12 months' imprisonment was highlighted as an issue in the ANU Report as it has resulted in a potentially large population of people being overlooked.⁴⁵ Another argument for expanding the eligibility criteria is that it could enable more women to participate in the program,⁴⁶ as women across Australia are among the fastest growing prison population.⁴⁷

OE Recommendation 12

OE Recommendation 12 recommended simplifying the legislation and addressing the legislative issues identified by the evaluation team.

The *Government Response to the ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report* (the Government Response) was tabled in the Legislative Assembly on 9 November 2022. In the Government Response, the ACT Government agreed to OE Recommendation 6 and agreed in-principle to OE Recommendation 12, committing to consider the issues identified by the Report in the statutory review of the DASL provisions.

⁴³ Ibid xx-xxi.

⁴⁴ Ibid 201.

⁴⁵ Ibid 26.

⁴⁶ Ibid 28.

⁴⁷ Ibid 27.

5. CONSULTATION

Consultation for the Review was conducted concurrently with consultation for the Bill.

Given the overlapping nature of the issues identified for the Review and the Bill, many stakeholders elected only to provide feedback on the effectiveness and operation of the DASL provisions through consultation in the policy development stage of the Bill, rather than input specifically to the Review. As their feedback has nonetheless informed the evaluation of the issues discussed in the Review and the development of the Bill, JACS has incorporated all relevant feedback received into the Review.

The following 18 stakeholders were consulted for the Review:

1. Aboriginal Legal Service ACT/NSW
2. Aboriginal and Torres Strait Islander Elected Body
3. ACT Bar Association
4. ACT Chief Minister, Treasury and Economic Development Directorate (CMTEDD)
5. ACT Community Services Directorate (CSD)
6. ACT Corrective Services (ACTCS)
7. ACT Courts and Tribunals (ACTCT)
8. ACT Director of Public Prosecutions (DPP)
9. ACT Health Directorate
10. ACT Human Rights Commission
11. ACT Law Society
12. ACT Legal Aid Commission (Legal Aid ACT)
13. ACT Policing (ACTP)
14. Alcohol Tobacco and Other Drug Association ACT (ATODA)
15. Canberra Health Services (CHS)
16. JACS Human Rights and Social Policy Team (HRSP)
17. Yeddung Mura Good Pathways
18. Winnunga Nimmityjah Aboriginal Health and Community Services

Of the stakeholders consulted, input on the issues evaluated in the Review was received from 15 stakeholders.

6. FINDINGS

Issues requiring legislative reform

The ANU Report considered that “it is clear that the legislation is complex and urgently needs to be amended in several respects” and identified several issues with the DASL provisions while noting the complexity of the DASL framework.⁴⁸ Through consultation processes that have informed this Review stakeholders were asked to provide input on the legislative issues highlighted in the ANU Report. Their feedback on these issues, in addition to other reflections on whether the DASL provisions are achieving the objects of DATOs, informed both the findings of the Review and the development of amendments in the Bill.

⁴⁸ Ibid 186.

Whether DATO should be available for total sentences of 1-4 years, where no individual sentence meets the threshold

Stakeholder feedback to this Review, and commentary on the ANU report, canvassed issues related to the eligibility criteria for DASL, including the length of sentence threshold under s 12A of the CS Act.

Section 12A(1)(b) of the CS Act provides that an offender may be eligible for a DATO if they have been convicted by the Supreme Court of an eligible offence and receives a sentence of imprisonment of at least one year but no more than four years.⁴⁹ In *R v Massey (No 1)*,⁵⁰ the Court held at [46] that:

The natural interpretation [of section 12A(1)(b)] is that there is one primary offence that must attract a sentence of between one and four years. Other offences can be the subject of a sentence at the same time. These may attract individually a sentence of less than one year's imprisonment, but when cumulated with the sentence for the primary offence, must not result in a sentence of more than four years' imprisonment.⁵¹

Under this interpretation, the application of section 12A(1)(b) requires that at least one offence must attract a sentence that meets the one to four years' threshold. If none of the offences dealt with in the same sentencing proceeding attract a sentence of imprisonment for at least one year, then the offender will be precluded from entering a DATO. This resulted in the "curious position" of Mr Massey seeking a more severe sentence than the prosecution to be able to be considered for a DATO.⁵² Noting the Court's comments in *R v Massey (No 1)*, the ANU Report suggested that this issue be considered in light of the objects of DATOs articulated at section 80O of the CS Act.⁵³

All stakeholders consulted on this issue broadly supported an amendment to clarify that an offender subject to multiple sentences could be considered for a DATO, if the total cumulative term of the sentences did not exceed four years' imprisonment.

This issue is addressed in the Bill, which makes it clear that if an offender is convicted of more than one eligible offence, the eligibility criterion at section 12A(1)(b) will be met if the Supreme Court sentences the offender to a term of imprisonment for a total period of at least one year but no more than four years. This amendment permits offenders convicted of multiple offences to be considered for a DATO, even where no individual sentence meets the one to four years' threshold.

Some stakeholders have raised the potential benefit of changes to the scheme to facilitate eligibility for DASL for offenders convicted of less serious offences. For example, ATODA's submission to this Review submitted that options to expand the eligibility criteria of the DASL should be explored, including extending eligibility to offenders with sentences of less than one year, individuals with comorbidities, and increasing equitable access to the DASL for women. This issue was also considered in the ANU report, referring to submissions to their evaluation that indicated that the one year minimum may be too high.⁵⁴ The ANU Report noted that

⁴⁹ *Crimes (Sentencing) Act 2005* (ACT) s 12A(1)(b).

⁵⁰ [2020] ACTSC 256.

⁵¹ *Ibid* [46] (Refshauge AJ).

⁵² *Ibid* [23] (Refshauge AJ).

⁵³ ANU Report (n 4) 187.

⁵⁴ *Ibid* 26.

“it is possible that expanding the statutory minimum to less than one year would enable more people, especially women, to participate.”⁵⁵

Such a change would mark a significant shift in the policy and practice of DASL to date, raising legal, practice and resourcing issues. As the material referenced above highlights however there may be benefits of this approach for individual offenders and the community more broadly. These issues require more detailed policy consideration and consultation with stakeholders, which go beyond the remit of this Review.

FINDING

Section 12A(1)(b) of the CS Act has been interpreted by the Court as applying to a single, primary offence attracting a sentence of one to four years’ imprisonment. If an offender is subject to multiple offences, but none of the offences attract a sentence of at least one year, the offender will be prevented from entering a DATO. This issue is addressed in the Bill, which amends section 12A(1)(b) of the CS Act to make it clear that an offender who is convicted of more than one eligible offence may access a DATO if the sentences cumulatively amount to a total period of one to four years’ imprisonment.

Consideration of proposals to expand the DASL to lower-level sentences would mark a significant shift in policy and practice and require further consideration and consultation beyond the remit of this review.

Referring matters to and from the Magistrates Court

The ANU Report indicated that it would be desirable for the Supreme Court to be able to remit relevant matters from DASL to and from the Magistrates Court in appropriate circumstances. The ANU Report referred to *R v Kelly*,⁵⁶ in which the prosecution elected to have Mr Kelly’s charges disposed of summarily, resulting in the matter being heard in the Magistrates Court and therefore precluding Mr Kelly from being considered for a DATO. The effect of the prosecution election for summary disposal had the effect of “prevent[ing] a man with a severe drug dependency, especially an Indigenous man... from accessing the benefits [of a DATO]... which... has been able to assist many people in Australia to rehabilitate.”⁵⁷

The ANU Report also considered extending the jurisdiction of the Supreme Court to hear certain summary offences, to facilitate the making of DATOs. In *R v Subasic*,⁵⁸ the Court was unable to sentence Mr Subasic to a DATO because he had also been charged with summary offences relating to breach of bail that could not be heard by the Supreme Court. As those summary offences had not been dealt with at the time of sentencing, if Mr Subasic was later sentenced to imprisonment by the Magistrates Court for those bail offences during his DATO, the Court would be required to cancel the DATO.⁵⁹

There are divergent views amongst stakeholders on these matters, with some supporting greater flexibility for the Courts to respond to such issues, and others voicing concerns that increasing the interaction between the Supreme Court and Magistrates Court may negatively impact the DASL legislative framework.

In consultation for the Review and the Bill, stakeholders also examined whether the Magistrates Court should be able to deal with DASL matters in circumstances where the Supreme Court was unavailable, such as during

⁵⁵ Ibid 28.

⁵⁶ [2021] ACTSC 143.

⁵⁷ Ibid [20] (Refshauge AJ).

⁵⁸ [2020] ACTSC 380.

⁵⁹ Ibid [58]-[61] (Refshauge AJ).

weekends or the Christmas shutdown period. While such measures were supported by stakeholders as they would facilitate earlier access to Court, questions were raised as to the extent of the jurisdiction of the Magistrates Court to hear DASL matters.

Given the complexity of the various proposed interactions between the Supreme Court and Magistrates Court, and the likely implications beyond the DASL legislation, further policy work and consultation will be required to appropriately address the issues identified above.

FINDING

The ANU Report proposed greater flexibility between the Supreme Court and Magistrates Court in dealing with DASL matters, to enable relevant matters to be remitted to and from the Magistrates Court in appropriate circumstances. However, stakeholders were divided on this approach, and some voiced concerns that increasing the interaction between the Supreme Court and Magistrates Court may negatively impact the DASL legislative framework. Further policy work and consultation will be required to appropriately address the issues identified.

Defining a 'sentencing order'

Under section 12A(1)(c) of the CS Act, an offender who is subject to a 'sentencing order' for another offence will not be eligible for a DATO. The definition of 'sentencing order' is provided at section 12A(9), which defines 'sentencing order' as including an order of imprisonment by full-time definition, a suspended sentence order, an intensive correction order, a deferred sentence order, a parole order. In *R v Kelly*,⁶⁰ Refshauge AJ considered whether the definition of 'sentencing order' included a 'Griffiths remand', and observed that it was "odd" that the definition of 'sentencing order' did not include good behaviour orders.⁶¹ Based on these observations, the ANU Report recommended that the ACT Government consider whether to include 'Griffiths remands' and good behaviour orders under the definition of 'sentencing order' in section 12A(9) of the CS Act.

Stakeholders were divided as to whether 'Griffiths remands' and good behaviour orders should be included within the definition of 'sentencing order' at section 12A(9). Given the differing views of stakeholders on this issue, it is recommended that further work be undertaken to continue to explore these issues with stakeholders with a view to further legislative reform as needed.

FINDING

The ANU Report recommended that the ACT Government consider whether to include 'Griffiths remands' and good behaviour orders under the definition of 'sentencing order' in section 12A(9) of the CS Act. Given that consultation with stakeholders revealed divided views on this issue, no amendments have been made to section 12A(9) to include these orders in the definition of 'sentencing order'. Further consultation and policy work may be required to explore this issue, with a view to further legislative reform as needed.

Calculating pre-sentence custody when imposing a DATO

The ANU Report identified a ‘legislative anomaly’ that prevents the Court from backdating a DATO to reflect time served in pre-sentence custody.⁶² Section 12A(2) of the CS Act provides that when an offender enters a DATO, the sentence of imprisonment imposed on the offender will be fully suspended under the DATO.⁶³ Similarly, section 80W(1)(b) provides that the DATO must include a custodial part that fully suspends the sentence of imprisonment to be served by the offender.⁶⁴ The issue lies in the interaction between sections 12A(2) and 80W(1)(b) with section 63(3)(c), which prevents the court from taking into account time served in pre-sentence custody for fully suspended sentences of imprisonment.⁶⁵ The effect of this issue is that the Court cannot backdate a DATO to recognise time served in pre-sentence custody, which may result in unfairness to the offender.

This issue was discussed at length in *R v Parker*, *R v McCallum*, *R v Catanzariti*, and *R v Crawford (No 1)*⁶⁶ by various Justices of the Supreme Court, including Acting Justice Lorraine Walker, Chief Justice Helen Murrell, and Acting Justice Richard Refshauge.

Walker AJ and Refshauge AJ took the approach of interpreting section 63(3)(c) as meaning “fully suspended from the date of imposition”, as a way to take into account the time served in pre-sentence custody as time served before the suspended period. Walker AJ recognised in *R v Parker* the “potential unfairness”⁶⁷ that arises if time served in pre-sentence custody is not accounted, and interpreted section 63(3)(c) as meaning “fully suspended from the date of imposition of the sentence”⁶⁸ as the approach least productive of injustice, although Her Honour urged that “the matter should be considered by the legislature”.⁶⁹ Similarly, in *R v Crawford (No 1)* Refshauge AJ construed the terms in sections 12A, 80W, and 63(3)(c) as meaning “fully suspended”, not from the backdated date, but from the date of imposition”,⁷⁰ though not without “considerable hesitation”.

The Justices recognised that this issue could be navigated by imposing a lower actual sentence to informally recognise time already served, which was the approach taken by the Chief Justice in *R v McCallum*⁷¹ and *R v Catanzariti*.⁷² However, Her Honour noted that this approach was not preferable, as it “may give the impression that the Court is imposing sentences that are significantly more lenient than is the case”.⁷³

Stakeholders strongly supported the amendment of the relevant sections to effectively address the issue of backdating DATOs.

This issue has been addressed in the Bill. Section 12A is amended to permit the partial suspension of a sentence of imprisonment under a DATO, which enables the Court to backdate the DATO pursuant to section

⁶² ANU Report (n 4) 190.

⁶³ *Crimes (Sentencing) Act 2005* (ACT) s 12A(2).

⁶⁴ *Ibid* s 80W(1)(b).

⁶⁵ *Ibid* s 63(3)(c).

⁶⁶ [2020] ACTSC 38; [2020] ACTSC 15; [2020] ACTSC 326; and [2020] ACTSC 245.

⁶⁷ *R v Parker* [2020] ACTSC 38 at [26] (Walker AJ).

⁶⁸ *Ibid* [33] (Walker AJ).

⁶⁹ *Ibid*.

⁷⁰ *R v Crawford (No 1)* [2020] ACTSC 245 at [110] (Refshauge AJ).

⁷¹ *R v McCallum* [2020] ACTSC 15 at [81]-[82] (Murrell CJ).

⁷² *R v Catanzariti* [2020] ACTSC 326 at [72]-[75] (Murrell CJ).

⁷³ *R v McCallum* [2020] ACTSC 15 at [82] (Murrell CJ).

63(3)(d). Under this amendment, the non-suspended part is limited to the time served by the offender in pre-sentence custody, and the DATO must fully suspend the remaining part of the sentence from the day the DATO is imposed. Section 80W(1)(b) is amended to account for this approach.

FINDING

The ANU Report and case law identified a ‘legislative anomaly’ that prevents the Court from taking into account time served by an offender in pre-sentence custody and backdating a DATO. This anomaly arises because a DATO fully suspends a sentence of imprisonment, and fully suspended sentences cannot be backdated. This issue has been addressed by the Bill, which amends sections 12A and 80W of the CS Act to permit the partial suspension of the sentence of imprisonment under a DATO. This amendment, if passed, will allow the Court to take into account time served in pre-sentence custody as the non-suspended part of the DATO, which enables the Court to backdate the DATO.

Dealing with breaches of DATOs and reviewing a DATO prior to cancellation

The ANU Report suggested that there may be a need for more flexible powers for the Court to deal with breaches of DATOs. In particular, the ANU Report referred to case law discussing issues with section 80ZB(1)(e) of the CS Act, which provides that where an offender has breached a condition of their treatment order other than by commission of an offence, the court may provisionally cancel the suspension of the sentence of imprisonment to remand the offender in custody for a period of three to 14 days, and reinstate the suspension at the end of that period.⁷⁴ The ANU Report recommended that section 80ZB(1)(e) should be rectified by legislative amendment.⁷⁵

In *R v Tonna (No 2)*,⁷⁶ Refshauge AJ indicated that section 80ZB has caused difficulty for the Court when dealing with breaches of DATOs. Mr Tonna had breached his DATO, and the Court applied section 80ZB(1)(e) to remand him in custody for a 14-day period. During this time, the treatment and supervision team had attempted to seek a placement for Mr Tonna at a suitable residential rehabilitation facility, but none were available during that period. As the Court was unwilling to release Mr Tonna into the community based on his prior behaviour, the Court was required to cancel Mr Tonna’s DATO.⁷⁷ Refshauge AJ suggested that it may be a “weakness in the legislation which requires attention” that His Honour was unable to simply remand Mr Tonna further until a placement became available at a suitable residential rehabilitation facility.⁷⁸

Similarly, in *R v Pelecky (No 4)*,⁷⁹ the Court observed at [9] that:

The constraints in s 80ZB(1)(e) of the *Sentencing Act* did not permit the Court to detain Mr Pelecky in custody pending the availability of another placement at a drug residential rehabilitation facility... the cancellation of the Treatment Order may not have been required if there had been another

⁷⁴ *Crimes (Sentencing) Act 2005* (ACT) s 80ZB(1)(e).

⁷⁵ ANU Report (n 4) 192.

⁷⁶ [2020] ACTSC 362.

⁷⁷ *Ibid* [74]-[76] (Refshauge AJ).

⁷⁸ *Ibid* [69] (Refshauge AJ).

⁷⁹ [2021] ACTSC 343.

suitable placement available or Mr Pelecky could have been detained in custody pending such availability.⁸⁰

Consultation indicated that there was broad support among stakeholders for an amendment to give effect to this proposal. Stakeholders agreed that increasing the limit of 14 days could assist the treatment and supervision team with finding and implementing a suitable adjustment to the offender's DATO. Stakeholders also generally agreed that allowing the ability to extend in special and exceptional circumstances could prevent more participants from having their DATOs cancelled.

This issue is addressed in the Bill, which inserts the new section 80ZB(2A) to the CS Act to allow the Court to extend the period of remand beyond 14 days as necessary until treatment is available, if the Court considers that the treatment achieves the objects of the DATO.

FINDING

The ANU Report recommended that the ACT Government address the 14-day custody limit the Court may impose if an offender has breached their DATO other than by committing an offence. This issue is addressed in the Bill, which inserts the new section 80ZB(2A) to the CS Act to allow the Court to extend the period of remand beyond 14 days as necessary until treatment is available, if the Court considers that the treatment achieves the objects of the DATO.

Calculating pre-sentence custody for offences committed during DATO

The ANU Report suggested that section 80ZC(3) of the CS Act may require simplification or explication of the rationale behind this provision,⁸¹ based on the observations of the Court in *R v Lyons (No 2)*.⁸² In that case, Refshauge AJ noted that section 80ZC(3) was an "odd provision",⁸³ as it provides that time served by an offender on remand for an offence charged during the DATO would count towards the sentence imposed under the custodial part of the DATO.

Stakeholders suggested that it is unclear whether, if section 80ZC(3) reduces the period of the custodial part of the DATO below the period of the DATO itself, the DATO must then be cancelled. This would have the undesirable effect of limiting the benefit a participant may have from continued treatment under the DATO.

However, further discussion and consultation on this proposal indicated that section 80ZC(3) is currently operating as intended. As currently constructed, section 80ZC(3) does not reduce the length of the custodial part, but provides that the 'clock' for the custodial part of the DATO will continue to run while the offender is on remand for the further offence. Accordingly, section 80ZC(3) cannot reduce the period of the custodial part below the period of the DATO itself, although it may result in the reduction of the treatment and supervision part of the DATO. While the impact of section 80ZC(3) may have the undesirable impact of reducing the treatment and supervision part, this impact is balanced by the benefit of preventing time spent in remand from being added to the sentence.

⁸⁰ Ibid [9] (Refshauge AJ).

⁸¹ ANU Report (n 4) 192-193.

⁸² [2021] ACTSC 11.

⁸³ Ibid [36] (Refshauge AJ).

FINDING

The ANU Report suggested that section 80ZC(3) of the CS Act be amended to simplify the provision or provide an explanation of the rationale behind this provision. However, consultation with stakeholders indicated that this provision is operating as intended. The operation of section 80ZC(3) cannot reduce the length of the custodial part below the length of the DATO itself, and provides the benefit of preventing time spent in remand from being added to the sentence.

Effectiveness and operation of the provisions

OE Recommendation 12 of the ANU Report recommended simplifying the legislation, to ensure a more workable legislative framework.⁸⁴ However, stakeholders generally submitted that the DASL provisions were effective in achieving the objectives of section 800. Legal Aid and ATODA's submissions indicate that the provisions have facilitated the rehabilitation of offenders, reduced offender dependency on alcohol and controlled drugs, and improved community safety.

A common opinion among stakeholders was that increased investment into the DASL would improve its operation and effectiveness. The ACT Law Society acknowledged the increase in funding in the 2023-24 Budget, but suggested further investment is needed to continue to expand the operation of the DASL at the Supreme Court. ATODA also indicated that findings from the Drug and Alcohol Service Planning modelling (DASPM) indicate that up to 4,750 more people annually require treatment than those currently being treated by the services.

The ACT Government announced that \$8.4 million in funding would be allocated to the DASL to support its continuation and expansion. This allocation in funding has allowed for the creation of seven additional placements in the DASL program, increasing the total number of participants from 35 to 42.

FINDING

Stakeholders agreed that the DASL provisions have been broadly effective in operation. Submissions from Legal Aid and ATODA indicated that the provisions have been effective in facilitating rehabilitation of offenders, reducing dependency, improving community safety and pro-social behaviours. Stakeholders raised that the investment into the DASL should be increased to meet its demands.

⁸⁴ ANU Report (n 4) 186, 201.

7. OUTCOME AND IMPLEMENTATION

The consultation and findings for the Review and the Bill have informed the outcomes of this Report and the development of amendments in the Bill. Following consultation with stakeholders, some of the proposals for legislative reform made by the ANU Report have been addressed through amendments in the Bill.

Of the six proposals raised in the ANU Report, three have been implemented in the Bill. Three proposals have not resulted in amendments, as they either require further policy work and consultation, or consultation has revealed that no amendment is required. A summary of the implementation of the ANU Report proposals in the Bill is provided at **Table 2**.

Table 2: Implementation of ANU Report proposals in the Bill

ANU Report proposal	Implementation in the Bill
<i>Availability of DATO for total sentences of 1-4 years, where no individual sentence meets threshold</i>	Amendment to section 12A(1)(b) of the CS Act, to make it clear that an offender who is convicted of more than one eligible offence may access a DATO if the sentences cumulatively amount to a total period of one to four years' imprisonment.
<i>Referring matters to and from Magistrates Court</i>	No amendment made. The issues raised in the ANU Report will require further policy work and consultation, as there may be implications beyond the DASL provisions.
<i>Defining a 'sentencing order'</i>	No amendment made, as stakeholder views were divided on whether good behaviour orders and 'Griffiths remands' should be included in the definition of 'sentencing order'.
<i>Calculating pre-sentence custody when imposing DATO</i>	Amendment to section 12A(2) and 80W(1)(b) of the CS Act to allow the partial suspension of imprisonment under a DATO, which enables the Court to calculate pre-sentence custody and backdate the DATO.
<i>Dealing with breaches of DATO and reviewing DATO prior to cancellation</i>	Inserts the new section 80ZB(2A) to the CS Act to allow the Court to extend the period of remand beyond 14 days as necessary until treatment is available, if the Court considers that the treatment achieves the objects of the DATO.
<i>Calculating pre-sentence custody for offences committed during DATO</i>	No amendment made, as further consultation indicated that section 80ZC(3) of the CS Act is operating as intended to prevent time spent in remand from being added to the sentence.

8. RECOMMENDATIONS

The Review found that the DASL provisions are broadly effective in operation, although some issues require legislative reform. Alongside other amendments arising from consultation with stakeholders, the Bill implements some of the proposals for legislative reform made in the ANU Report to improve the operation and effectiveness of the DASL legislative framework.

However, there is room for further policy work, consultation, and investment in the DASL. OE Recommendation 6 of the ANU Report recommended that the ACT Government consider expanding the range of Court-based treatment options for people who are not serving sentences between one and four years.

While this issue was in part addressed through the amendment to enable offenders serving multiple sentences that amount to a total of one to four years to access a DATO, other aspects of this recommendation will continue to require further policy work. In particular, work will need to be done to determine whether the minimum threshold of 12 months' imprisonment has resulted in a potentially large population of people being overlooked, or whether this threshold has resulted in the disproportionate representation of women in the DASL program. In addition, the proposals to allow matters to be referred to and from the Magistrates Court and to amend the definition of 'sentencing order' were not implemented, as they raise issues that will require further policy work and consultation to be resolved.

Recommendation 1

The ACT Government should consider undertaking further consultation and policy work on expanding the range of Court-based treatment options for people who are not serving sentences between one and four years, with a view to further legislative reform as needed.

Recommendation 2

The ACT Government should consider undertaking further consultation and policy work on the proposal to allow Drug and Alcohol Sentencing List (DASL) matters to be referred to and from the Magistrates Court, and other associated proposals to allow the Magistrates Court to hear and deal with DASL matters, with a view to further legislative reform as needed.

Recommendation 3

The ACT Government should consider undertaking further consultation and policy work on the proposal to amend the definition of 'sentencing orders' in section 12A(9) of the *Crimes (Sentencing) Act 2005* to include 'Griffiths remands' and good behaviour orders, with a view to further legislative reform as needed.

9. CONCLUSION

The Review found that the DASL provisions are operating effectively, although some issues require legislative reform.

A Bill has been developed alongside the Review to implement some of the proposals for legislative reform made in the ANU Report, along with other amendments arising from consultation with stakeholders. The Bill will be introduced with this Report to the ACT Legislative Assembly.

Although the Bill addresses some of the areas identified as requiring reform, there remain issues that will require further policy work and consultation, with a view to further legislative reform as needed. These include expanding the range of Court-based treatment options for people who are not serving sentences between one and four years, allowing referrals to and from the Magistrates Court, and expanding the definition of 'sentencing orders' in section 12A(9) of the CS Act. These issues may be addressed through the Recommendations of this Report.

Stakeholders considered that an increased investment into the DASL would improve its operation and effectiveness. The 2023-2024 ACT Budget allocated \$8.4 million to DASL to facilitate an expansion of the program to accommodate 42 participants, an increase of 20 percent. Further investment in DASL will ensure that DASL continues to deliver positive health and wellbeing outcomes for participants and the community.