



The Drug and Alcohol Court
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Submission in response to ‘A Drug and Alcohol Court for the ACT: Issues and draft proposals for consultation’.

Thank you for the opportunity to provide a submission in response to ‘A Drug and Alcohol Court for the ACT: Issues and draft proposals for consultation’ (‘the Consultation Paper’).

The ACT Human Rights Commission (‘the HR Commission’) welcomes the ACT Government’s commitment to establishing an ACT drug and alcohol court (DAC), noting that the existing research on DACs and the experience of other jurisdictions who have such courts indicates they are effective in reducing reoffending.¹ Given the HR Commission’s central objective of promoting the human rights and welfare of people in the ACT, we are eager to ensure that the DAC program is not only effective in reducing reoffending, but is also designed with adequate safeguards to protect the human rights of all people impacted by DAC processes.

The ACT Human Rights Commission

The HR Commission is an independent agency established by the *Human Rights Commission Act 2005* (ACT). The HR Commission includes:

- The President and Human Rights Commissioner;
- The Public Advocate;
- The Children and Young People Commissioner;
- The Disability and Community Services Commissioner;
- The Discrimination Commissioner;
- The Health Services Commissioner; and
- The Victims of Crime Commissioner.

Given the HR Commission’s statutory functions and roles across areas such as human rights, health services, disability services and victims of crime services, the development and operation of a DAC in the ACT is very relevant to the work we do and we are committed to engaging with and contributing to the discussion regarding the best model for an ACT DAC. Our comments below focus on identifying the features and safeguards of the currently proposed model – and some further features which have not yet been proposed – which will be important to ensure the program is consistent with human rights protected

¹ See, for eg, Emeritus Professor Arie Freiberg AM et al, ‘Queensland Drug and Specialist Courts Review Final Report’ (Report, Queensland Courts, November 2016) 188.

by the *Human Rights Act 2004* (ACT) ('HR Act'); is culturally appropriate for the ACT's Aboriginal and Torres Strait Islander population; delivers high-quality and individualised health services for DAC participants, and complies with the principles governing the treatment of victims of crime in the administration of justice under the *Victims of Crime Act 1994* (ACT).

Human rights implications of the proposed ACT drug and alcohol court program

Ensuring equal access to and participation in the drug and alcohol court

It is important that measures are put in place to ensure equal access to the DAC and that certain groups are not restricted in their knowledge of or access to the DAC. Section 8 of the HR Act provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. This right is complemented by the *Discrimination Act 1991* (ACT), which prohibits discrimination on the basis of a number of grounds (including, relevantly, race, disability, and age) in a number of areas of public life (including, relevantly, in the provision of goods and services).

1. Increased opportunities for Aboriginal and Torres Strait Islander applicants to access the program

One of the equality of access issues with the former Queensland Drug Court raised in the Queensland Drug and Specialist Courts Review Final Report² ('the Queensland Review report') was that the referral of Aboriginal and Torres Strait Islander offenders to participate in the program was lower than expected across all five of the courts.³ It will be important that procedures are put in place to ensure Aboriginal and Torres Strait Islander people, who are disproportionately represented in the ACT criminal justice system, have increased opportunities to access the DAC. This is particularly so given that demand for the program is likely to outweigh supply, with the current proposal being that only 10-15 offenders will have access to the program in first six months and then up to 30 thereafter. The Queensland Review report stated:

Taking this into consideration, the acknowledgment of culture, embedding of cultural protocols and the engagement of cultural advisory positions as part of the core drug court team may assist in the recruitment and retention and graduation of Aboriginal and Torres Strait Islander defendants to the Drug Court. Advice from the AODT Court Pilot in New Zealand suggests that the embedding of culture into the program has proved successful in a Drug Court context, attracting high numbers of Maori defendants equivalent to the level of representation of this group in the prison system.⁴

Further, the Drug Court of NSW has the following policy in place to actively increase opportunities for Aboriginal and Torres Strait Islander people to access the NSW program:

To increase the opportunity for ATSI identifying offenders to take part in a Drug court program, the Registrar and the Drug Court team will have regard to the number of ATSI identifying applicants when determining the number of program places available. The number of available places will be increased by one place in each gender for which there are ATSI identifying offenders.

The computer generated random selection will then allocate places. That selection will allocate a minimum of one place to an ATSI identifying offender in each gender for which there are ATSI identifying offenders.⁵

²Emeritus Professor Arie Freiberg AM et al, 'Queensland Drug and Specialist Courts Review Final Report' (Report, Queensland Courts, November 2016).

³ Ibid 178.

⁴ Ibid 271.

⁵ Drug Court of New South Wales, 'Policy 12: Selection of participants' (Policy document, June 2014) [3.1]-[3.3].

Careful consideration should be given as to what policies and processes for increasing opportunities for Aboriginal and Torres Strait Islander offenders to participate in the DAC program will be appropriate and effective in the ACT.

Further, it is currently proposed that the DAC program will be available both to persons who are ordinarily residents of the ACT or those who are able to reside in the ACT for the duration of the assessment process and Drug Treatment Order (DTO). At the ACT DAC Focus Group on 17 October 2017 ('the ACT Focus Group'), comments were made that maintaining the second part of this eligibility criterion was important to ensure that Aboriginal people who live transiently and who are only based in the ACT part of the time are not automatically excluded from the program. We strongly support that the current proposal to extend eligibility for the program to those who are able to reside in the ACT for the relevant period.

We also strongly support the current proposal to have an Aboriginal and Torres Strait Islander Advisor as part of the DAC team. Among other important roles that this advisor will fulfil, she or he will be able to monitor and advise the DAC team on how to resolve any further issues which might affect the ability of Aboriginal or Torres Strait Islander people to access the program.

2. Ensuring that people with mental illnesses and intellectual disabilities are not discriminated against in the assessment process

The Queensland Review report noted that, under the former Queensland Drug Court, offenders were excluded from accessing the program if they were "suffering from any mental condition that could prevent their active participation in a rehabilitation program".⁶ Automatically excluding people with disabilities, including intellectual disabilities and mental illness, from accessing the DAC on the basis of assumed lack of ability to comply with DTOs rather than making this assessment on an individual case-by-case basis would be inconsistent with the rights of people with such disabilities to equality under s 8 of the HR Act and may in some cases be inconsistent with the presumption of capacity⁷. It may also constitute unlawful discrimination under the *Discrimination Act 1991*. Accordingly, we strongly support the proposal in the Consultation Paper that, "mental illness or incapacity should not automatically exclude an offender from assessment for a [DTO] but the offender should be assessed for ability to comply with a DTO" and recommend that this assessment be a thorough and considered one, based on recent and relevant evidence. We further recommend that policies are put in place to ensure reasonable adjustments are made to DAC processes and DTO conditions as required to ensure the DAC program is as accessible as possible to people with disabilities.

3. Removing age-based restrictions on eligibility for the program

It is proposed that one of the eligibility criteria for the ACT DAC be that applicants are 18 years old or over. It is not clear from the Consultation Paper why this age-based restriction has been proposed. This proposal will limit the rights of offenders under the age of 18 years to equality before the law under s 8 of the HR Act and so should be justified in accordance with s 28 of the HR Act.

⁶ Emeritus Professor Arie Freiberg AM et al, 'Queensland Drug and Specialist Courts Review Final Report' (Report, Queensland Courts, November 2016) 210.

⁷ Which is recognised at common law and reinforced by s 30 of the HR Act: see *In the Matter of ER (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73 [44].

While the Queensland Review report acknowledges that the majority of evaluations of DACs have focused on the effectiveness of adult DACs rather than youth DACs, it also states:

A 2004 evaluation of the NSW Youth Drug Court Pilot Program reported that while it had “not been possible to state definitively that the Youth Drug Court program has been achieving outcomes superior than might have been gained through other forms of intervention”, the overall view of the evaluators was that the program was having “an important, positive impact on the lives of many of those participating” and also that the unit costs of achieving these impacts did not appear to be greater than involved in keeping these young people in custody (University of New South Wales Evaluation Consortium 2004, p. v).⁸

In our view, using a Gillick competence-based eligibility criterion rather than an age-based one would be more consistent with the right to equality under the HR Act and potentially more beneficial in terms of rehabilitating offenders at an early stage and reducing reoffending. We would appreciate the opportunity to discuss with the Justice and Community Safety Directorate and other members of the Supreme Court Working Group the rationale for excluding offenders under 18 years and the viability of a DAC model which includes youth.

Protecting rights to liberty during the assessment process and at the beginning of drug treatment orders

There are different approaches across the jurisdictions that already have DACs as to whether the assessment process for eligibility for the program can be conducted for applicants in the community or whether applicants are required to be detained in custody for the duration of the assessment process. In NSW, offenders are detained in custody while they are assessed for eligibility (a process that takes approximately two weeks in NSW) while Victorian applicants can be assessed for eligibility while either in custody on remand or in the community. The Consultation Paper does not appear to indicate which approach is proposed for the ACT program. Further, the Consultation Paper comments on “the possible merits of a short period in full-time custody at the beginning of a DAC order to allow for detoxification”.

In our view, making it a requirement that a DAC applicant be detained in custody to undergo assessment for eligibility for participation in the DAC program, or at the beginning of a DTO for the purposes of detoxification, would be unjustifiable limits on the applicant’s rights to liberty under s 18 of the HR Act. If evidence indicates that a period of detoxification before participation in the DAC program enhances the efficacy of the program, imprisonment would not be the least restrictive measure to achieve this purpose, and detoxification in a medical facility with the applicant’s consent and under the supervision of trained health professionals would be both a safer and more human rights consistent alternative.

The need for tailored approaches to treatment and compliance, including culturally-appropriate treatment for Aboriginal and Torres Strait Islander participants

The right to equality is also relevant to the design of the healthcare delivery and treatment model for the DAC, particularly in regard to the need to ensure that the treatments provided through the DAC program are culturally appropriate for Aboriginal and Torres Strait Islander participants. A proposal made by some participants at the ACT Focus Group, which we support, is that the agency which is assigned the clinical management role in the DAC program be provided specific funding to employ an Aboriginal professional to work on the DAC team. Implementing this suggestion would go some way towards ensuring that the DAC services are culturally appropriate for Aboriginal and Torres Strait Islander participants and would be consistent with the cultural rights of Aboriginal and Torres Strait Islander people protected by s 27(2) of the HR Act. There was also discussion at the Focus Group about the possibility of the new Ngunnawal Bush

⁸ Emeritus Professor Arie Freiberg AM et al, ‘Queensland Drug and Specialist Courts Review Final Report’ (Report, Queensland Courts, November 2016) 190.

Healing Farm providing rehabilitation programs for Aboriginal and Torres Strait Islander participants of the DAC program.

During the stakeholder consultations that were conducted during the Queensland Review, participants raised the issue that Aboriginal and Torres Strait Islander people may struggle to meet the requirements of an intensive DAC program because of the multiple and complex issues many experience in their everyday lives. The DAC team, guided by the Aboriginal and Torres Strait Islander Advisor, will also need to be mindful of issues affecting the ability of Aboriginal and Torres Strait Islander participants to comply with their DTOs, and consider culturally appropriate solutions to any problems that arise.

Protecting rights to privacy and the right not to be treated or punished in a cruel, inhuman or degrading way with respect to drug treatment and testing

The proposed eligibility requirement for participation in the DAC whereby the applicant be willing to be assessed for a DTO provides an important safeguard against people being compelled to undergo drug and alcohol testing and treatment against their will, which would be inconsistent with both the right to privacy under s 12 of the HR Act and the right not to be treated or punished in a cruel, inhuman or degrading way under s 10 of the HR Act. We strongly recommend that this proposed eligibility criterion be adopted and that measures be put in place to ensure that applicants are fully informed about what the program will entail before they are assessed as willing to participate. Some applicants may need special assistance in order to understand what will be required of them before they are able to give informed consent.

Support for groups who need assistance to understand and comply with their drug treatment orders

Protecting the right to equality of DAC participants may also require that assistance is provided to certain individuals or groups who require assistance to understand and comply with the conditions of their DTOs. Individuals who may require such assistance include people with intellectual disabilities, acquired brain injuries, some mental illnesses, or groups who might experience language or cultural barriers. The DAC may provide this assistance by having support workers experienced with communicating with people with disabilities (and other special needs groups) as part of the DAC team, or as part of a team of professionals that the DAC team is able to access for participants as required.

Rights to privacy and criminal proceedings rights in the context of the collaborative, information-sharing approach

Further, a concern raised by multiple participants in the ACT Focus Group was the need to achieve the right balance between the collaborative and information-sharing approach of the DAC and the rights to privacy and confidentiality of DAC participants. An addition to other legal protections of privacy and confidentiality, s 12 of the HR Act protects the right not to have one's privacy unlawfully or arbitrarily interfered with. It will be important that the DAC's information-sharing processes are well-established, clear and transparent and that applicants are fully informed of these processes before agreeing to participate in the program. It will also be necessary to ensure that any IT or other processes designed for information-sharing within the DAC program are secure. Furthermore, in light of the informal, collaborative processes of DACs, safeguards may be required to protect participants' rights in criminal proceedings, including the protection against self-incrimination in s 22(i) of the HR Act.⁹

⁹ Although it is proposed that the ACT DAC will be a post-sentencing model, there is still a risk participants may self-incriminate during the assessment process or in relation to any further offending.

Ensuring that the right to liberty is not unjustifiably limited in the implementation of the sanctions scheme

It is proposed that the ACT DAC program will have a demerit points scheme for rewards and sanctions, and that when a certain number of demerit points is accrued, the imposition of a short term of imprisonment will be an available sanction. According to the Consultation Paper, it is also proposed that, “more serious breaches would be able to be marked by immediate short periods of imprisonment.”

The use of imprisonment as a sanction for non-compliance with DTOs will limit rights to liberty under s 18 of the HR Act, and any use of custodial sanctions will need to be justified having regard to s 28 of the HR Act. We note that the Queensland Review report, citing research from 2011 and 2012, stated that: “[t]he severity of a sanction is likely to be the weakest contributor to behavioural change and there is relatively little evidence to suggest that the imposition of harsh sanctions in a drug court program improves individual- or court-level outcomes (Brown et al. 2011, McRee & Drapela 2012).”¹⁰ In relation to custodial sanctions specifically, the Queensland review report stated: “[w]e note the general view that imprisonment was overused as a sanction under the former [Queensland Drug Court] program and that this also added to the overall costs of the program. While flexibility should be maintained, we support the approach in Victoria of custodial sanctions being used sparingly and only being activated once a certain threshold has been met in relation to non-compliance with conditions.” If the use of imprisonment as a sanction is found to be justified having regard to s 28 of the HR Act, we recommend that it be used in the manner suggested in this extract from the Queensland Review report: that is, sparingly and only once a certain number of demerit points for non-compliance are accrued.

Criminal process rights where a Drug Treatment Order is terminated

In instances where DTOs are terminated due to repeated non-compliance, we support the current proposal in the Consultation Paper for an approach that would:

allow compliance to be reflected in any final term of imprisonment to be served but would also permit re-sentencing. Permitting re-sentencing allows for circumstances where the court considers serving a period of imprisonment is inappropriate. This could include circumstances where an offender has performed well on the DTO but breaches or withdraws consent close to the end of the DTO.

Such an approach, which would provide DAC participants the opportunity to defend or explain the alleged non-compliance and to make any submissions as to why activation of the suspended sentence is not the appropriate outcome in the case, will provide important safeguards for participants’ rights to a fair trial and rights in criminal proceedings under ss 21 and 22 of the HR Act.

Victim participation and keeping victims informed during the drug and alcohol court process

As was recognised in the Queensland Review report, it is important to ensure that under any DAC process, victims retain the same rights as other victims of offenders who are sentenced through mainstream court processes.¹¹ In the ACT, these rights include the ability to make a victim impact statement.¹² We also recommend that the legislative changes establishing and giving effect to the DAC include a power for the DAC team to ask any victims of DAC applicants’ offences to provide information relevant to the DAC assessment during the DAC team assessment process.¹³

¹⁰ Emeritus Professor Arie Freiberg AM et al, ‘Queensland Drug and Specialist Courts Review Final Report’ (Report, Queensland Courts, November 2016) 254.

¹¹ Ibid 252.

¹² *Crimes (Sentencing) Act 2005* (ACT) pt 4.3.

¹³ This power could be modelled on the power of assessors preparing pre-sentence reports to ask victims of offences to provide information under s 43(1)(vi) of the *Crimes (Sentencing) Act 2005* (ACT).

Furthermore, one of the statutory functions of the HR Commission's Victims of Crime Commissioner is to monitor and promote compliance with the governing principles under s 4 of the *Victims of Crime Act 1994* (ACT), which are to, as far as practicable, govern the treatment of victims in the administration of justice. Relevantly to the proposed DAC program, one of these principles is that a victim should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications. It will be important that the DAC team operates consistently with these principles, including by contacting any victims once DTOs are made and explaining the nature of the orders and the DAC program.

We look forward being kept informed of the development of the DAC and to commenting and contributing further as necessary.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please contact us on (02) 6205 2222.

Yours sincerely



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