Judicial College of Victoria

Serious Offenders Act 2018

Overview of the Act

The *Serious Offenders Act 2018* ('the 2018 Act') creates a scheme for the continued supervision or detention of serious sexual and serious violent offenders beyond the term of their prison sentence who pose an unacceptable risk of re-offending if they were in the community unsupervised.

The 2018 Act expanded on the *Serious Sex Offenders (Detention and Supervision) Act 2009* ('the 2009 Act') by extending it to also cover serious violent offenders. The 2009 Act itself had expanded on the previous scheme under the *Serious Sex Offenders Monitoring Act 2005* by introducing detention orders and the ability to direct offenders to reside at a residential facility, and by providing for greater transparency and accountability in the management of serious sex offenders.

The primary purpose of the 2018 Act is to protect the community by requiring offenders who have served custodial sentences for certain sexual or violent offences, and who present an unacceptable risk of re-offending, to be subject to detention or supervision on the completion of their custodial sentence.

The Act also aims to facilitate the treatment and rehabilitation of such offenders.

Consistent with provisions introduced to the 2009 Act in 2015 and 2016, the 2018 Act requires that all persons and bodies making decisions under the Act must give paramount consideration to the safety and protection of the community.[1]

The Act:

- defines the class of offenders to whom it applies (serious sexual offenders and serious violent offenders who are serving or have served a custodial sentence);
- empowers the Supreme Court or the County Court to make a supervision order of up to 15 years, or an interim supervision order, in respect of an eligible offender on the application of the Secretary to the Department of Justice and Regulation ('the Secretary');
- empowers the Supreme Court to make a detention order of up to 3 years, or an interim detention order, in respect of an eligible offender on the application of the Director of Public Prosecutions;
- allows the Supreme Court to make an emergency detention order for up to seven days in the case of an offender who poses an escalating risk;
- provides for the review, renewal, expiry and revival of detention, supervision and interim orders;
- provides for the review of conditions of supervision and interim supervision orders;
- provides for appeals by offenders, the Director of Public Prosecutions or the Secretary; and
- provides for the management of offenders on supervision, detention and interim orders, For supervision orders, the Court must impose a set of mandatory core conditions and may also impose a number of suggested conditions, including conditions relating to where the offender may live, that the offender must participate in treatment and rehabilitation programs, activities the offender must not engage in, persons the offender must not contact and different forms of monitoring.

[1] *Serious Offenders Act 2018* s 5.

The Act provides for the offence of breaching a condition, which is punishable by up to five years' imprisonment. Breach of certain conditions known as 'restrictive conditions' is punishable by a mandatory minimum sentence of 12 months' imprisonment, unless special circumstances apply.

Eligible offenders

A court may only make detention or supervision orders in respect of 'eligible offenders', as defined in section 8. An eligible offender:

- is at least 18 years of age;
- has received a custodial sentence from the Supreme Court or County Court in Victoria or equivalent courts in another state for a 'serious sex offence' or a 'serious violence offence' at any time (either before or after the commencement of the Act); and
- at the time of the application, he or she is serving a custodial sentence in Victoria for a serious sex offence or a serious violence offence.[2]

'Serious sex offence' and 'serious violence offence' are defined in schedules 1 and 2.

'Custodial sentence' is defined in section 3 of the Act. A custodial sentence includes a court order sentencing an offender to be detained in a youth justice centre where it transpires that part of that sentence is served in prison, for example, under the direction of the Youth Parole Board, unless the part served in prison is temporary pending the offender's return to a youth justice centre.[3]

A person is taken to be still serving a custodial sentence while released on parole in respect of that sentence.[4]

A person is also an eligible offender if he or she is remanded or serving a custodial sentence for any offence, and, at the time the person was remanded in custody or began serving the custodial sentence, the person:

- was the subject of an application for a supervision, detention or emergency detention order; or
- was subject to a supervision, interim supervision, detention, interim detention or emergency detention order.[5]

A person who is subject to a supervision, interim supervision, detention, interim detention or emergency detention order is an eligible offender, regardless of whether the person is in custody.[6] This ensures that while a person is under one kind of order, a court can make a different kind of order under the Act.

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[2] *Serious Offenders Act 2018* s 8(1)(b) provides that a person is an eligible offender if they are serving in Victoria, (i) the custodial sentence for a serious sex or violence offence, even if that sentence is being served concurrently with or cumulatively on any other custodial sentence, (ii) a custodial sentence for another offence that was imposed cumulatively on the custodial sentence for the serious sex or violence offence that has already been served, or (iii) any other further custodial sentence for another offence that was imposed cumulatively on the custodial sentence for the sentence referred to in (ii) (the sentence that was imposed cumulatively on the sentence for a serious sex of violence offence). The effect of these provisions is that an offender remains eligible if they are serving a custodial sentence for any number of offences that are served concurrently with, or cumulatively on, the sentence for the serious sex or violence offence, irrespective of when, during that continuous period of being under sentence, the offender served the custodial sentence for the serious sex or violence offence.

[3] *Carroll v Secretary to the Department of Justice* [2015] VSCA 156 [21]-[23], see (c) of the definition of 'custodial sentence' in s 3.

[4] *Serious Offenders Act 2018* s 4.

[5] *Serious Offenders Act 2018* s 8(2).

[6] *Serious Offenders Act 2018* s 8(3).

A person ceases to be an eligible offender if the conviction for the qualifying offence is set aside, or if the sentence for the offence is altered so that he or she would not have been an eligible offender at the time of sentence.[7]

Supervision orders

Part 3 of the Act governs 'supervision orders'.

A supervision order imposes conditions on an offender that primarily aim to reduce the risk of re-offending in the form of serious sex offences, serious violence offences or certain additional offences listed in Schedule 3 of the 2018 Act.[8]

A supervision order involves core conditions, common to all supervision orders, and additional conditions, tailored to the needs of the individual.

Application

The Secretary of the Department of Justice and Regulation may apply for a supervision order to the Supreme Court or the County Court, depending on which court sentenced the offender.[9]

In the case of an offender sentenced by an interstate court, the Secretary may apply to the Victorian court which is the equivalent to the interstate court.[10]

The application must be made in the prescribed form and must be accompanied by at least one assessment report. In addition, if the Secretary seeks an intensive treatment and supervision condition, the application must include a treatment and supervision plan.[11]

Making supervision orders

The court may only make a supervision order if the court is satisfied that the offender poses or, after release from custody, will pose:

> an unacceptable risk of committing a serious sex offence or a serious violence offence or both if a supervision order is not made and the offender is in the community.[12]

[7] *Serious Offenders Act 2018* s 8(4).

[8] *Serious Offenders Act 2018* s 27(1).

[9] *Serious Offenders Act 2018* s 12(1). Where the custodial sentence is imposed on appeal, the application is brought to the original sentencing court:s 12(3).

[10] *Serious Offenders Act 2018* s 12(2).

[11] *Serious Offenders Act 2018* s 13.

[12] *Serious Offenders Act 2018* s 14(1).

In applying the unacceptable risk test, the court:

- must have regard to:
    - any assessment or progress reports regarding the offender;
    - any other reports and evidence given in relation to the application; and
    - any other matters the court considers appropriate;
- must not have regard to:
    - the means of managing the risk;
    - the likely impact of a supervision order on the offender;[13]
- must be satisfied:

  by acceptable, cogent evidence to a high degree of probability that the offender poses or will pose an unacceptable risk;[14]
- may find that an offender poses an unacceptable risk even if the court is not satisfied that the offender is more likely than not to commit a serious sex of violence offence.[15]

Standard of proof

The unacceptable risk test contains two distinct elements. The court must (1) be satisfied to a high degree of probability that (2) the offender poses an unacceptable risk of committing a serious sexual or violent offence if a supervision order is not made and the offender is in the community. It is important to keep these two distinct elements separate. The first part of the test, satisfaction to a high degree of probability, sets the standard of proof that the court must apply. The Act does not permit courts to merge the standard of proof with the matter that is to be proved. The test of 'unacceptable risk' must therefore be analysed separately from the standard of proof.[16]

In other words, the test does not require proof that there is a high degree of probability that the offender poses a risk of re-offending. Rather, the risk of re-offending must be 'unacceptable' (not necessarily 'more likely than not') and the court's finding to that effect must be to a high degree of probability.

The standard of 'a high degree of probability' is a standard which is greater than the civil standard of 'balance of probabilities' and lower than the criminal standard of 'beyond reasonable doubt'. In applying the standard of proof, the court must give effect to the matters in section 140(2) of the *Evidence Act 2008* which require the court to consider the nature of the subject-matter and the gravity of the matters alleged. Given the seriousness of the issues arising under the Act, acceptable and cogent evidence is required. The court must have regard to the fact that the proceedings concern the offender's liberty.[17]

The standard of 'high degree of probability' applies to the conclusion of 'unacceptable risk'. It does not apply to the intermediate findings of fact which provide the basis for that conclusion.[18]

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[13] *Serious Offenders Act 2018* s 14(2).

[14] *Serious Offenders Act 2018* s 14(3).

[15] *Serious Offenders Act 2018* s 14(4). This provision, which was also in the 2009 Act, reversed the effect of *RJE v Secretary of the Department of Justice* (2008) 21 VR 526.

[16] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[17] *NOM v DPP* [2012] VSCA 198; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[18] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

Unacceptable risk

The second part of the test concerns the subject-matter that must be proved to a high degree of probability. That is, the existence of an unacceptable risk. The Act makes it clear that a risk may be 'unacceptable', even if the probability of the risk coming to fruition is lower than 'more likely than not'.[19]

The Secretary has the burden of proving that the offender poses an unacceptable risk of committing a serious sexual or violent offence.[20]

The test of 'unacceptable risk' looks at both the probability of future offending and the nature and gravity of any potential future offending. It is not limited to an evaluation of the probability of future offending.[21]

In assessing the degree of risk, the Act does not require that there be no risk, or minimal risk. In *Nigro v Secretary to the Department of Justice* the Court of Appeal explained:

> It is clear that the Act contemplates that some level of risk is acceptable in a democratic society that values the rights of an individual to freedom and privacy. As we have said, it involves a balancing of the nature of the risk and the likelihood of its occurrence against the fundamental value which society accords to individual liberty. The risk must be of such an order and the consequences if it eventuates such as to require the individual's liberty to be constrained in derogation of the value which society places on individual liberty.22

However, the Court rejected an argument that the Act is confined to serious or exceptional risks of reoffending. It is not necessary to show that the offender is a high risk, or a higher than usual risk, of reoffending. The Court referred to the Second Reading speech of the 2009 Act, where the Attorney-General noted that in some cases, the gravity of the offences the offender is likely to commit may be so great that an offender is an unacceptable risk even if there is a small likelihood of reoffending. The Court also noted that the test of 'unacceptable risk' operates by reference to the risk to the community, and not the relative risk of recidivism in the class of sexual offenders.[23]

The Court of Appeal in *Nigro* also explained that it is not appropriate to attempt to place offences within a continuum of seriousness, as this detracts from the flexibility inherent in the test of 'unacceptable risk'. Rather, the court must look at the gravity of the consequences of the particular kinds of offences which the offender may commit. This requires a focus on the offender and his or her circumstances, rather than generalisations about offences or the usual range of sentences.[24]

In *Attorney-General (Qld) v Buckley*, concerning equivalent Queensland legislation, the judge explained that '[a]n unacceptable risk is a risk which does not ensure adequate protection of the community'.[25] It does not require complete elimination of any risk, which will inevitably be present when a person is released unsupervised in the community.

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[19] *Serious Offenders Act 2018* s 14(4).

[20] *Serious Offenders Act 2018* s 14(5).

[21] *Attorney-General (Qld) v SBD* [2010] QSC 104; *IK v Secretary to the Department of Justice* [2012] VSCA 12; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[22] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [113].

[23] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [116].

[24] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [117].

[25] *Attorney-General (Qld) v Buckby* [2010] QSC 174 [40].

Prohibition on considering means of managing risk and impact of order

When assessing whether the offender poses an 'unacceptable risk', the court must disregard 'the means of managing the risk' or 'the likely impact of a supervision order on the offender'.[26]

The test for a supervision order therefore depends only on the court's assessment of whether the offender is an unacceptable risk of reoffending, and does not consider the burden the supervision order would impose, or even whether the order would be effective.

The Act only prevents consideration of the means of managing the offender *under a supervision order*. It does not preclude consideration of steps that have been taken or will be taken by the offender to manage the risk of reoffending without any supervision order. Treatment, programs, therapy and other rehabilitative measures in which the offender might engage (including pursuant to a court order made under any other Act) that can affect the offender's present circumstances and bear on the risk of re-offending.[27]

Residual discretion

The court has a residual discretion to make no order, even if it is satisfied that the offender poses an unacceptable risk.[28] Despite section 14(2)(b), the court can consider the means of managing the risk and the likely impact of the supervision order in the exercise of this residual discretion, but not at the threshold level of whether the offender is an unacceptable risk of re-offending.

The matters which may be considered under the residual discretion include:

- the core conditions that must be imposed and their impact on the offender;
- any additional conditions that may be imposed and their impact on the offender;
- whether the core conditions that must be imposed infringe the offender's human rights beyond the extent necessary to give effect to the purposes of the Act.[29]

However, in *Nigro v Secretary to the Department of Justice,* the Court of Appeal rejected an argument that the residual discretion is subject to the limitation that a court must refuse to make a supervision order unless the core conditions are a reasonable and demonstrably justified limitation on the offender's human rights under the *Charter of Human Rights and Responsibilities Act 2006* s7(2). Instead, as part of the exercise of the discretion, a 'court must consider whether the limitations on the offender's human rights are necessary to protect the community from the risk that the offender poses'. While the core conditions need not constitute the minimum interference with the offender's human rights, any additional conditions imposed 'must constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary to ensure the purpose of the conditions; and are reasonable related to the gravity of the risk of the offender reoffending.'[30]

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[26] *Serious Offenders Act 2018* s 14(2)(b).

[27] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[28] *Serious Offenders Act 2018* s 14(6).

[29] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[30] See *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 and *Serious Offenders Act 2018* s 27(4).

Use of assessment reports

Courts have often noted that predicting future behaviour is inherently difficult. Under the Act, the court must assess the risk of the offender committing a serious sexual or violent offence if he or she is released into the community without being subject to a supervision order. Assessment reports by psychiatrists and other suitable experts use a variety of diagnostic tools to identify the risk of re-offending. This helps the expert provide an empirically guided clinical judgment.[31]

While a judge is not bound by the assessment report, the expert's assessment of risk is a highly important piece of evidence that the judge must take into consideration.[32] Given that predicting the risk of future behaviour requires expertise often outside the training of judicial officers, judges will generally adopt the recommendations in an assessment report unless there is a conflict of evidence or a conflict of experts. It will rarely be appropriate for a judge to depart from the expert's risk assessment where the facts are uncontested and the report is cogent and unchallenged.[33]

Contents of supervision orders

A supervision order must include the following:

- a statement that the court is satisfied that the offender poses an unacceptable risk of committing a:
    - serious sex offence;
    - serious violence offence; or
    - both a serious sex offence and serious violence offence;

  if the offender is in the community without a supervision order;
- the name of the offender subject to the order;
- the date the order was made;
- the commencement date of the order;
- the duration of the order;
- the conditions of the order;
- if the order contains an intensive treatment and supervision condition, the duration of that condition and the latest date by which the Secretary must apply for the first review of that condition;
- the latest date by which the Secretary must apply for the first review of the order and the maximum interval between subsequent reviews; and
- the name and signature of the judge who made the order.[34]

[31] See Assessment and Progress Reports, below.

[32] *Serious Offenders Act 2018* s 14(2)(a)(i).

[33] See *RJE v Secretary to the Department of Justice* (2008) 21 VR 526; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[34] *Serious Offenders Act 2018* s 16.

Commencement and duration of supervision order

Supervision orders usually commence on the day the offender completes his or her custodial sentence. However, if the offender is on remand or in immigration detention when the supervision order is made, the order takes effect when the offender is released. Otherwise, the order commences on a date specified by the court.[35]

When making the order, the court must specify the term of the order, up to a maximum of 15 years. If the accused is taken into custody on remand or serves a custodial sentence or is subject to an emergency detention order after the commencement of the order, that time is counted towards the duration of the order, though the offender is not subject to the conditions for that period. However, time spent in immigration detention does not count towards the duration of the supervision order.[36]

A supervision order ends:

- at the end of the term set by the court;
- when the court revokes the order;
- when the order is replaced by another supervision, detention or interim detention order;
- when the offender is deported or removed from Australia under the Migration Act 1958; or
- when the offender dies.[37]

Copy of order sent to Post Sentence Authority and Adult Parole Board

The Secretary must give a copy of a supervision order to the Post Sentence Authority and, if the offender is serving a custodial sentence, the Adult Parole Board, as soon as practicable after a court makes the order.[38]

Conditions of supervision orders

A supervision order contains both the 'core conditions', as a minimum, and any 'other conditions' imposed by the court.

Core conditions

The court must impose all the core conditions listed in section 31. These require that the offender must:

- not commit a serious sex offence in Victoria or elsewhere;
- not commit a serious violence offence in Victoria or elsewhere;
- not commit a Schedule 3 offence in Victoria or elsewhere;
- if the court requires an offender to reside at a residential facility, or if the Post Sentence Authority directs the offender to reside at a residential facility, not engage in conduct that poses a risk to the good order of the facility or the safety and welfare of offenders or staff at the facility or visitors to the facility;
- if the court requires the offender to reside at a residential facility, or if the Post Sentence Authority directs the offender to reside at a residential facility, obey instructions given by a supervision or specified officer under s 183;
- if the court requires the offender to reside at a residential treatment facility, must not engage in

[35] *Serious Offenders Act 2018* s 18.

[36] *Serious Offenders Act 2018* s 19.

[37] *Serious Offenders Act 2018* s 21.

[38] *Serious Offenders Act 2018* s 17.

conduct that poses a risk to the good order of the facility or the safety and welfare of offenders or staff at the facility or visitors to the facility;

- if the court requires the offender to reside at a residential treatment facility, must obey all instructions given by a supervision officer or a specified officer under s 183;
- not engage in behavior or conduct that threatens the safety of any person, including the offender;
- attend at any place directed by the Post Sentence Authority for the purpose of administering the conditions of the order;
- attend at any place directed by the Post Sentence Authority for the purpose of making assessments required by the court, the Secretary or the DPP for the purposes of the Act;
- report to and receive visits from the Secretary to the Department of Justice and Regulation or the Secretary's nominee;
- notify the Post Sentence Authority of any change of employment or new employment at least 2 days before commencing the new or changed employment;
- not leave Victoria except with the permission of the Post Sentence Authority;
- comply with all directions of the Post Sentence Authority under its emergency powers; and
- obey all instructions given by a community corrections officer or a specified officer under s 209.[39]

Discretionary conditions

The power to impose conditions is limited by:

- the primary purpose of conditions, which is to reduce the risk of re-offending by the offender whether by committing a serious sex offence, serious violence offence or a Schedule 3 offence;
- the secondary purpose of conditions, which is to provide for the reasonable safety and welfare concerns of the offender's victim or victims;
- conditions may promote the rehabilitation and treatment of the offender and address types of behavior that increase the risk of committing a serious sex offence or a serious violence offence or an offence referred to in Schedule 3, or behavior or conduct that threatens the safety of any person, including the offender;
- except for the core conditions, any conditions the court imposes must:
    - constitute the minimum interference with the offender's liberty, privacy or freedom of movement necessary in the circumstances to ensure the purposes of the conditions; and
    - be reasonably related to the gravity of the risk of re-offending.[40]

The court should take great care in formulating conditions so as to avoid ambiguities. Conditions must be sufficiently precise as to make the limits of the prohibited acts plain to the offender.[41]

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[39] *Serious Offenders Act 2018* s 31. The core condition requiring the offender to obey instructions from community corrections officers and specified officers was introduced into the 2009 Act to overcome the lacuna identified in *Heath v The Queen* (2014) 45 VR 154.

[40] *Serious Offenders Act 2018* s 27. See also *Daniel (a Pseudonym) v Secretary to Dept of Justice* (2015) 45 VR 266, [28]-[29].

[41] *Daniel (a Pseudonym) v Secretary to Dept of Justice* (2015) 45 VR 266 [23]-[26].

Conditions may not be imposed for a purpose other than those specified, such as for a purely administrative purpose. However, the Act provides that where the offender is residing at a residential facility in accordance with a supervision order, a supervision officer or a specified officer can give the offender any reasonable instructions necessary, for example, for the good order of a residential facility.[42]

In determining the conditions to impose, the court must have regard to any conditions the offender is subject to under the following orders:

- an interim accommodation order or family preservation order under the *Children, Youth and Families Act 2005*;
- a family violence intervention order or a recognized DVO under the *Family Violence Protection Act 2008*;
- a personal safety intervention order under the *Personal Safety Intervention Orders Act 2010*;
- certain orders made under the *Crimes (Family Violence) Act 1987*, as in force before its repeal;
- intervention order under the *Stalking Intervention Orders Act 2008*, as in force before its repeal.[43]

The court must not impose a condition (other than a core condition) inconsistent with a condition that applies under one of these orders unless satisfied that it is necessary:

> (a) to reduce the risk of the offender re offending by—
>
> > (i) committing a serious sex offence or a serious violence offence or both or an offence referred to in Schedule 3; or
> >
> > (ii) engaging in any behaviour or conduct that threatens the safety of any person (including the offender); or
>
> (b) to provide for the reasonable concern of a victim of the offender in relation to the safety and welfare of the victim.[44]

[42] *Serious Offenders Act 2018* s 183. See also *AS v The Queen* [2014] VSCA 83 [73]-[80].

[43] *Serious Offenders Act 2018* s 30(1).

[44] *Serious Offenders Act 2018* s 30(2).

Available resources

The Secretary to the Department of Justice and Regulation may provide the court with a 'certificate of available resources'. This certificate states whether or not there are facilities and services available for the accommodation, care, monitoring, rehabilitation or treatment of the offender. If there are no facilities or services available, the certificate may identify other options the Secretary considers appropriate for the court to consider in making the proposed order.[45]

The court must consider the certificate and must not impose a condition that is inconsistent with the certificate of available resources.[46] The court may require the Secretary to give evidence, or provide a further certificate, to clarify or expand on the matters in the certificate.[47]

Submissions on conditions

The Secretary and the offender have the right to make submissions on the conditions of a supervision order.[48]

A victim of the offender may also make a submission to the court in relation to an application for a supervision order.[49] The court must consider that submission before imposing any condition other than a core condition, and may give the victim's submission the weight it thinks fit.[50]

Residential conditions

A court must consider imposing conditions relating to the offender's residence, including:

- where the offender must reside (including whether the offender must reside at a residential facility);
- when the offender must be present at the place of residence; and
- when the offender may leave the place of residence.

A court may only require an offender to reside at a residential facility if the offender was convicted of a serious sex offence.[51]

When considering whether to require an offender to reside at a residential facility, the court must:

(a) consider whether or not the offender should reside at a residential facility; and

(b) be satisfied that no other suitable accommodation is available.[52]

Offenders required to reside at a residential facility may enter and leave the facility, subject to any conditions to the contrary. Visitors are also entitled to enter a residential facility at any time, subject to the order, a direction of the Post Sentence Authority, and any requirements relating to the good order of the facility. Visitors may be asked to provide information on the purpose of their visit, their identity, address, occupation and age, and their relationship to the offender the person wishes to visit.

At present, there are two residential facilities established in Victoria – Corella Place, Ararat, adjacent to Hopkins

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[45] *Serious Offenders Act 2018* s 344.

[46] *Serious Offenders Act 2018* s 29.

[47] *Serious Offenders Act 2018* s 344(4).

[48] *Serious Offenders Act 2018* s 28(1).

[49] *Serious Offenders Act 2018* s 134.

[50] *Serious Offenders Act 2018* s 28(2).

[51] *Serious Offenders Act 2018* s 34(1), (2).

[52] *Serious Offenders Act 2018* s 34(3).

Correctional Facility and Emu Creek adjoining Langi Kal Kal prison near Beaufort.

Under the *Serious Sex Offenders Monitoring Act 2005*, residence conditions were imposed by the Adult Parole Board without any court supervision. The 2009 Act placed the responsibility on the court to decide whether to allow a residence condition. This is continued under the 2018 Act.

Intensive treatment and supervision condition

A new condition, which was not present in the 2009 Act, is the intensive treatment and supervision condition. This condition requires an offender to reside at a residential treatment facility. As the Explanatory Memorandum states:

> Unlike a residential facility, a residential treatment facility is a secure facility, and an offender does not have a general entitlement to enter and leave the facility. A residential treatment facility is intended to provide a means of managing offenders who cannot be managed by less restrictive means, such as by a requirement that the offender reside in a residential facility.

The introduction of this condition reflects the Harper Review's recommendation that there is a need for "step-up" facilities from a residential facility, and "step-down" facilities from prison (including for offenders currently on detention orders, or offenders on supervision orders who are exiting prison).[53]

Section 196, titled "Purpose of residential treatment facility" states:

> The purpose of a residential treatment facility is to provide for one or more of the following—
>
> (a) the protection of the community from offenders on supervision orders or interim supervision orders;
>
> (b) the intensive treatment and supervision of offenders on supervision orders or interim supervision orders to reduce the risk of those offenders committing a serious sex offence or a serious violence offence;
>
> (c) the transition of offenders on supervision orders or interim supervision orders from the facility to the community;
>
> (d) the provision of intensive support and case management to offenders (in a therapeutic environment) to assist them in complying with the conditions of supervision orders or interim supervision orders;
>
> (e) the short-term and safe accommodation of offenders on supervision orders or interim supervision orders.[54]

Division 2 of Part 13 provides for the management of offenders at residential treatment facilities, and specifies:

- an offender cannot leave a residential treatment facility unless permitted to do so by the supervision order, the treatment and supervision plan, the Authority, a supervising officer or specified officer or Division 2 of Part 13 of the Act;[55]
- an offender's rights include the right to medical care and treatment, special care and treatment for any intellectual disability or mental illness, educational programs, visitors, to make complaints, to send and receive letters, to be provided with information about rights and responsibilities, access to food, to wear his or her own clothing and to practise a religion;[56] and
- the offender has the right to send letters and the Commissioner has a limited right to inspect letters;[57]

[53] Explanatory Memorandum, Serious Offenders Bill 2018, 20.

[54] *Serious Offenders Act 2018* s 196.

[55] *Serious Offenders Act 2018* s 199.

[56] *Serious Offenders Act 2018* s 200.

[57] *Serious Offenders Act 2018* ss 200 – 202.

When the court imposes this condition, the court must also impose the following conditions:

(a) the offender must attend and participate in the treatment or rehabilitation programs or activities set out in the treatment and supervision plan;

(b) the offender must not leave the residential treatment facility other than—

(i) with the permission of the Authority; or

(ii) in accordance with the treatment and supervision plan in respect of the offender; or

(iii) in accordance with an instruction given by a supervision officer or a specified officer under section 183;

(c) if the offender leaves the residential treatment facility, the offender must, unless otherwise directed by the Authority—

(i) be accompanied by a community corrections officer or a person approved by the Commissioner; and

(ii) submit to electronic monitoring;

(d) the offender must submit to electronic monitoring within the residential treatment facility;

(e) the offender must comply with any direction given by the Authority relating to the electronic monitoring;

(f) the offender must for 24 hours of each day be electronically monitored and wear an electronic monitoring device fitted to the offender at the direction of the Authority;

(g) the offender must ensure that the electronic monitoring device fitted to the offender remains operational (including being charged) at all times;

(h) the offender must not tamper with, damage, disable or remove any electronic monitoring device or equipment used for the electronic monitoring;

(i) the offender must accept any visit by the Secretary to the residential treatment facility, at any reasonable time and for any purpose, including to install, repair, fit or remove any electronic monitoring device or equipment used for the electronic monitoring.[58]

The court must specify the duration of the intensive treatment and supervision condition, up to a maximum of 2 years with limited options for extensions.[59]

A court may make an intensive treatment and supervision condition if:

- the Court has considered a treatment and supervision plan filed by the Secretary, and any other matters the court considers appropriate; and
- the court is satisfied that the condition is necessary to reduce the risk of the offender committing a serious sex or violence offence and that less restrictive means of managing that risk have been tried or considered.[60]

[58] *Serious Offenders Act 2018* s 32(4).

[59] *Serious Offenders Act 2018* s 32(5).

[60] *Serious Offenders Act 2018* ss 32(1), (3).

In deciding whether to impose this condition, the court may consider the means of managing the offender's risk and the likely impact of the supervision order on the offender.[61]

Other conditions

In addition to a general power to impose any condition it considers appropriate a judge *must* consider imposing the following 'suggested conditions':

(a) the places or areas that the offender must not visit or may visit only at specified times;

(b) the treatment or rehabilitation programs or activities in which the offender must attend and participate;

(c) a requirement that the offender must not consume alcohol;

(d) a requirement that the offender must not use prohibited drugs, obtain drugs unlawfully or abuse drugs of any kind;

(e) a requirement that the offender must submit, as required by the order, to breath testing, urinalysis or other test procedures (other than blood tests) approved by the Secretary or the Chief Commissioner of Police for detecting alcohol or drug use;

(f) the types of employment in which the offender must not engage;

(g) the types of behaviour or conduct that the offender must not engage in, if that behaviour or conduct—

(i) was preparatory to the offender's prior serious sex offence or serious violence offence; or

(ii) may increase the risk of the offender committing a serious sex offence or a serious violence offence or both or an offence referred to in Schedule 3; or

(iii) threatens the safety of any person;

(h) the community activities in which the offender must not engage;

(i) the persons or classes of persons with whom the offender must not have contact;

Examples

1 Persons under 18 years of age.

2 Victims of the offender and their families.

(j) the forms of monitoring (including electronic monitoring) of compliance with the supervision order to which the offender must submit;

(k) personal examinations by a medical expert which the offender must attend for the purpose of providing a report to the Authority to assist it in determining the need for, or form of, a direction it is permitted to give to the offender under the supervision order.[62]

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[61] *Serious Offenders Act 2018* s 32(2). This is an express exception to the usual rule in s 14(2)(b) that the Court cannot consider these matters when deciding whether to make a supervision under.

[62] *Serious Offenders Act 2018* s 35(1).

If electronic monitoring is imposed under (j) above, the court must also impose the following conditions:

> (a) the offender must comply with any direction given by the Authority relating to the electronic monitoring;
>
> (b) the offender must for 24 hours of each day be electronically monitored and wear an electronic monitoring device fitted to the offender at the direction of the Authority;
>
> (c) the offender must ensure that the electronic monitoring device fitted to the offender remains operational (including being charged) at all times;
>
> (d) the offender must not tamper with, damage, disable or remove any electronic monitoring device or equipment used for the electronic monitoring;
>
> (e) the offender must accept any visit by the Secretary to the place where the offender resides, at any reasonable time and for any purpose, including to install, repair, fit or remove any electronic monitoring device or equipment used for the electronic monitoring.[63]

The court must also consider imposing a condition that the offender not contravene the *Firearms Act 1996* or the *Control of Weapons Act 1990*.[64]

In addition to the requirement to consider imposing the residence and suggested conditions, the court has a discretion to impose any other condition it considers appropriate, having regard to the purposes of conditions. The Act provides the two examples:

- a condition prohibiting internet access;
- a condition requiring the offender to undergo treatment, or rehabilitation, or programs relating to violent behaviour, anger management, conflict resolution or the improvement of interpersonal relationships or interpersonal skills.[65]

The Act gives a court power, as part of making a supervision order, to cancel the offender's firearms authority and revoke a weapons approval held by the offender or an application for a weapons exemption. These cancelations and revocations cease to have effect when the supervision order expires, is cancelled or revoked.[66]

The court may impose a condition authorising the Post Sentence Authority to give directions relating to the operation of any condition of the order.[67] These may include:

- if the offender was sentenced to a custodial sentence for a serious sex offence, power to direct that the offender reside at a residential facility; or
- a condition prohibiting the Post Sentence Authority from directing the offender to reside at a residential facility.

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[63] *Serious Offenders Act 2018* s 35(2).

[64] *Serious Offenders Act 2018* s 37.

[65] *Serious Offenders Act 2018* s 38.

[66] *Serious Offenders Act 2018* s 39.

[67] *Serious Offenders Act 2018* s 36(1).

If the court authorises the Post Sentence Authority to require the offender to reside at a residential facility, the court may also authorise the Authority to give directions regarding:

- the times at which the offender must be at the facility;
- the circumstances in which the offender may leave the facility; and
- the monitoring (including electronic monitoring) of the offender's compliance with the direction that the offender reside at the facility.[68]

The court may not authorize the Post Sentence Authority to direct an offender to reside at a residential treatment facility.[69]

The Act gives five examples of directions that might be given by the Authority in response to an authorisation by the court:

1. A condition requiring the offender to comply with the directions of the Authority in relation to appropriate Internet access.
2. A condition requiring the offender to comply with the directions of the Authority in relation to drug or alcohol use.
3. A condition requiring the offender to comply with the directions of the Authority in relation to computers and other devices (within the meaning of section 232) in the possession of or under the control of the offender for the purpose of auditing by a supervision officer, a specified officer or a police officer.
4. A condition that the offender comply with all reasonable directions of the Authority in relation to the times at which the offender must be at the nominated place of residence in order to reduce any risk of contact with children.
5. A direction that the offender remain at the nominated place of residence between the hours of 7 a.m. and 10 a.m., Monday to Friday, unless otherwise directed by the Authority.[70]

In imposing these conditions, the court must, under section 27(4), ensure that the conditions –

- constitute the minimum interference with the offender's liberty, privacy or freedom of movement necessary in the circumstances to ensure the purposes of the conditions, and
- be reasonably related to the gravity of the risk of re-offending.

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[68] *Serious Offenders Act 2018* s 36(4). Under s 141, if the Authority gives a direction regarding electronic monitoring, the Authority must also give the following directions:

(a) the offender must comply with any direction given by the Authority relating to the electronic monitoring;

(b) the offender must for 24 hours of each day be electronically monitored and wear an electronic monitoring device fitted to the offender at the direction of the Authority;

(c) the offender must not tamper with, damage, disable or remove any electronic monitoring device or equipment used for the electronic monitoring;

(d) the offender must accept any visit by the Secretary to the residential facility, at any time that it is reasonably necessary and for any purpose including to install repair, fit or remove any electronic monitoring device or equipment used for the electronic monitoring of the offender's compliance with the direction that the offender reside at the residential facility.

[69] *Serious Offenders Act 2018* s 36(5).

[70] *Serious Offenders Act 2018* s 36.

Restrictive conditions

Under *Sentencing Act 1991* s.10AB, a mandatory minimum sentence of 12 months imprisonment applies if the offender intentionally or recklessly contravenes a supervision order by breaching a 'restrictive condition', unless a 'special reason' exists.[71]

The following conditions of a supervision order are 'restrictive conditions':

- the offender must not commit a serious sex offence in Victoria or elsewhere;
- the offender must not commit a serious violence offence in Victoria or elsewhere;
- the offender must not commit a Schedule 3 offence in Victoria or elsewhere;
- if the offender is required to reside at a residential facility or a residential treatment facility, the offender must not engage in conduct that poses a risk to the good order of the facility or the safety and welfare of staff, other offenders or visitors at the facility;
- the offender must not engage in any behaviour or conduct that threatens the safety of any person, including the offender; and
- any other condition declared by a court to be a restrictive conditions under s.41 of the *Serious Offenders Act 2018*.[72]

When the court makes, reviews or renews a supervision order, the Secretary may apply for an order that any of the following conditions, if imposed, are restrictive conditions:

- that the offender must not consume alcohol;
- that the offender must not use prohibited drugs, obtain drugs unlawfully or abuse drugs of any kind;
- that the offender must reside at a specified place (including a residential facility or residential treatment facility);
- that the offender must be at the offender's place of residence between specified times;
- that the offender may only leave the offender's place of residence in accordance with specified conditions;
- that the offender must not visit a specified place or area or may only visit the place or area at specified times;
- that the offender must not have contact with a specified person or class of persons;
- that the offender must not contravene the Firearms Act 1996 or the *Control of Weapons Act 1990*.[73]

A court may only declare that a condition is a restrictive condition if satisfied on reasonable grounds that the declaration is necessary to address the risk of the offender committing a serious sex or violence offence or an offence referred to in Schedule 3. In deciding whether to make the declaration, the court must consider the offender's antecedents, including any previous contraventions of a supervision order.[74]

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[71] See Note 1 to s 169 of the *Serious Offenders Act 2018.*

[72] See definition of restrictive condition, *Serious Offenders Act 2018* s 3.

[73] *Serious Offenders Act 2018* s 41(1).

[74] *Serious Offenders Act 2018* ss 41(3), (4).

Renewed supervision orders

Sections 22 to 25 gives the Secretary power to apply to a court to renew a supervision order at any time while that order is in force.

On an application to renew a supervision order, the court may renew the order, revoke the order or make no decision in relation to the application. Where the court renews an order, it may vary, add or remove conditions and can modify the review period.[75]

The provisions of the Act operate in the same manner for renewed supervision orders as they do to other supervision orders.[76]

Management of offenders on supervision orders

Under Division 1 of Part 20 of the Act, the Post Sentence Authority is responsible for managing an offender on a supervision order. The Authority's functions are:

a. to monitor compliance with and administer the conditions of supervision orders and interim supervision orders;

b. to give directions and instructions to an offender in accordance with any authorisation given to the Authority under a supervision order or an interim supervision order;

c. to make decisions to ensure the carrying into effect of the conditions of supervision orders and interim supervision orders;

d. to make recommendations to the Secretary in relation to applying to a court to review the conditions of supervision orders and interim supervision orders;

e. to review and monitor the progress of offenders on detention orders and interim detention orders;

f. to review and monitor the progress of offenders on emergency detention orders;

g. to review coordinated services plans for eligible offenders who are the subject of an application for a supervision order or a detention order;

h. to review coordinated services plans for offenders who are subject to a supervision order or an interim supervision order;

i. to review and monitor the progress of offenders on supervision orders and interim supervision orders;

j. to approve or disapprove change of name applications under section 260;

k. to report on the performance of functions and powers under this Act in its annual report under section 316.[77]

[75] *Serious Offenders Act 2018* s 24.

[76] *Serious Offenders Act 2018* s 25.

[77] *Serious Offenders Act 2018* s 291.

The Post Sentence Authority may give the offender instructions and directions in accordance with any authorisation conferred under the Act or the supervision order.

In giving directions, the Authority should aim to ensure that its directions:

a. constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary in the circumstances to ensure the purposes of the conditions; and

b. are reasonably related to the gravity of the risk of the offender re-offending, whether by committing a serious sex offence or a serious violence offence or both or an offence referred to in Schedule 3 or by engaging in any behaviour or conduct that threatens the safety of any person (including the offender).[78]

The Post Sentence Authority may give emergency directions that are inconsistent with, or not provided for by, the conditions of the order. These emergency directions cease to have effect after 72 hours. The Authority may only give an emergency direction if there is an imminent risk of harm to the offender or the community, or if accommodation specified as a condition of the order becomes unavailable, and the Authority believes on reasonable grounds that because of the urgency of the situation it is not practical to apply to a court for a variation of the supervision order or interim supervision order. The Authority cannot use an emergency direction to require an offender to reside at a residential treatment facility, or to require an offender who committed a serious violence offence to reside at a residential facility.[79]

After making an emergency direction, the Secretary must, within 5 working days, report to the court that made the order, setting out:

- details of the emergency situation;
- an explanation for why the offender could not be managed consistently with the conditions of the order;
- how the emergency power was exercised; and
- how the emergency situation was resolved.[80]

[78] *Serious Offenders Act 2018* s 139.

[79] *Serious Offenders Act 2018* s 142.

[80] *Serious Offenders Act 2018* s 144.

Internal review of directions

The offender may make written submissions to the Post Sentence Authority about a direction by the Authority, and may ask to attend a meeting of the Authority to make submissions in person. The Authority must consider the material provided by the offender and confirm or vary the direction and publish reasons for its decision as soon as practicable.[81]

The offender may also request reasons for any decision by the Authority, even where he or she has not made submissions on the decision.[82]

The Authority's reasons must set out the reasons for the decision and the findings on material questions of fact that formed the basis of the decision, referring to the evidence and other material on which those findings were based. The Authority does not need to provide reasons if the chairperson of the Authority considers that it is not in the public interest to do so, having regard to the evidence or information that would be revealed by giving reasons.[83]

Restriction on change of name

While an offender is under a supervision order or interim supervision order, Part 17 of the Act prohibits the offender from applying for a change of name unless he or she first obtains the written approval of the Post Sentence Authority.[84]

The Authority may only approve a change of name application if it is satisfied that the change is in all the circumstances necessary or reasonable. The Authority must not approve a change of name application if satisfied that the change would, if registered, be likely to be regarded as offensive by a victim of crime or an appreciable sector of the community, or be used to evade or hinder supervision of the offender during the period of the order.[85]

Supervision orders and presumption against bail

Under the *Bail Act 1977*, an indictable offence committed while on a supervision or interim supervision order and an indictable offence committed by a person who, during the proceeding with respect to bail, is on a supervision or interim supervision order, is a Schedule 2 offence (*Bail Act 1977* Schedule 2, clauses 28 and 29).

Under the *Bail Act 1977*, a person who is charged with a Schedule 2 offence cannot be granted bail unless the person can show that there is compelling reason that justifies the grant of bail.[86]

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[81] *Serious Offenders Act 2018* ss 147-150

[82] *Serious Offenders Act 2018* s 150(2).

[83] *Serious Offenders Act 2018* ss 150(5)-(7).

[84] *Serious Offenders Act 2018* s 259.

[85] *Serious Offenders Act 2018* s 260.

[86] *Bail Act 1977* s 4C.

Contravention of supervision order

Contravention of a condition of a supervision order without reasonable excuse is a criminal offence with a maximum penalty of 5 years imprisonment. This offence provision does not apply to contraventions of conditions relating to medical treatment or engaging in conduct that threatens the safety of the offender or causes harm to the offender.[87]

In the case of intentional or reckless failure to comply with a restrictive condition of a supervision order,[88] section 10AB of the *Sentencing Act 1991* requires that a term of imprisonment of not less than 12 months be imposed, unless the court finds that a special reason exists.

The Post Sentence Authority is empowered to investigate possible breaches. The Act gives the Authority a wide discretion to determine the appropriate response, including:

- take no action;
- give a formal warning to the offender;
- vary any directions it has given to the offender;
- recommend that the Secretary apply for a review of the conditions of a supervision order;
- recommend that the Secretary refer the matter to the Director of Public Prosecutions to consider applying for a detention order;
- recommend that the Secretary bring proceedings for the offence of breaching a supervision order.[89]

The Act also empowers police officers to use reasonable force to apprehend and detain an offender for up to 72 hours if there are reasonable grounds to suspect that there is an imminent risk that the offender will contravene a condition of a supervision order or interim supervision order. The police officer must inform the offender of his or her rights, including the right to communicate with a friend or relative and a legal practitioner. A police officer must also notify the Secretary immediately if an offender is detained. The Secretary must then notify the Post Sentence Authority as soon as practicable.[90]

Contravention proceedings

Proceedings for this offence may be brought by the Secretary or a police officer filing a charge-sheet in the Magistrates' Court, or by the DPP filing a direct indictment. The Magistrates' Court must then transfer the proceeding to the County Court or the Supreme Court, depending on which court made the supervision order.[91]

Where a charge of contravention of a supervision order is included on a charge-sheet along with other offences, the Court may need to separate the contravention charge from the other offences. The Magistrates Court must order the transfer of proceedings for all summary offences that are related to the offence for contravening a condition to that same court hearing the contravention offence. The Magistrates Court may however order that a related summary offence not be transferred if the offender and prosecutor agree.[92]

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[87] *Serious Offenders Act 2018* s 169.

[88] See Restrictive Conditions, above.

[89] *Serious Offenders Act 2018* s 170.

[90] *Serious Offenders Act 2018* ss 155 - 161.

[91] *Serious Offenders Act 2018* s 173.

[92] *Serious Offenders Act 2018* s 175.

Any remaining charges on the charge-sheet, after the related summary offences are transferred with the contravention offence, are dealt with in the Magistrates' Court in the usual manner.

The *Serious Offenders Act 2018* expressly permits the County Court and Supreme Court to hear and determine a contravention charge summarily. Sections 28 and 29 of the *Criminal Procedure Act 2009*, which regulate when a court may hear an indictable offence summarily, apply to the contravention charge. This means that the higher court may only use the summary process if the court considers it is appropriate to do so, and the accused consents.[93]

If the contravention charge is heard and determined summarily, Part 3.3 of the *Criminal Procedure Act 2009* applies to the hearing in the higher court. In addition, the 2 year maximum penalty that applies in the Magistrates' Court applies when the charge is determined summarily.[94]

If the higher court considers that the two year maximum is not sufficient, it may decline to conduct a summary hearing. The Director of Public Prosecutions may then file a direct indictment and the matter may be determined by a trial. If the charge is determined on indictment, then the full range of penalties up to the statutory maximum of five years imprisonment is available.[95]

Contravention of supervision order by further offending

Every supervision order contains a condition which prohibits a person from committing further offending. There is no prohibition on a person being charged and convicted of both a contravention offence and the substantive offence involved in the further offending, as there is separate and distinct criminality between the two offences.[96]

While there is distinct criminality between the two offences, a sentencing judge must not aggravate the sentence of each offence by reference to any common elements, as that would involve double punishment. Commonly, double punishment is avoided by taking into account as part of sentence for the substantive offence that it was committed while under a supervision order. The fact that the offender was under a supervision order is relevant to the need for specific deterrence, protection of the community and the offender's prospects of rehabilitation. [97] The court must then moderate the sentence for the contravention offending to the extent of the overlap in the conduct with the substantive offence.[98] However, a judge may take into account for the contravention offence, if it is the case, the fact that the contravening conduct is offending of the same kind as what led to the earlier supervision order.[99]

To minimise the risk of double punishment, the substantive offence and the contravention offence should be heard and sentenced by the same judge.[100]

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[93] *Serious Offenders Act 2018* s 174(1); *Criminal Procedure Act 2009* ss 28, 29.

[94] *Serious Offenders Act 2018* ss 174(2), (3); *Sentencing Act 1991* s 113.

[95] *Loader v The Queen* [2011] VSCA 292.

[96] *Loader v The Queen* [2011] VSCA 292; *Lecornu v The Queen* [2012] VSCA 137.

[97] *Loader v The Queen* [2011] VSCA 292; *Lecornu v The Queen* [2012] VSCA 137 [29]-[32], [69].

[98] *Price v The Queen [No. 2]* [2019] VSCA 44 [64]; *Lecornu v The Queen* [2012] VSCA 137 [54].

[99] *Price v The Queen [No. 2]* [2019] VSCA 44 [71].

[100] *Price v The Queen [No. 2]* [2019] VSCA 44 [67].

Sentencing Act 1991 s 5(2BD) prohibits a sentencing court from having regard to the fact that an offender is subject to an order under the *Serious Offenders Act 2018* or any possibility or likelihood of an application being made for an order. The court may, however, have regard to conditions of the order and the terms of any current directions or instructions, if that is relevant to the conditions of any sentence. This provision prohibits a court from taking into account an order operative at the time of sentence and any possible future order, subject to the exception for the purpose of any conditions of sentence. It does not prevent the court from taking into account the existence of the order at the time of as an aggravating factor for the substantive offence, or as an essential fact for the contravention offence.[101]

Sex offender registration under Sex Offenders Registration Act 2004

Whenever a court makes, confirms or varies a supervision order, or adds, removes or reviews the conditions of a supervision or interim order, it must also make a sex offender registration order under the *Sex Offenders Registration Act 2004* for a period of not less than 15 years in respect of the offender, if the offender is not already subject to that Act.[102]

Detention orders

The *Serious Offenders Act 2018* also provides for 'detention orders'. While supervision orders involve the release of an offender from prison and his or her supervision in the community, detention orders require an offender to re-enter prison to be held in preventative detention.

Application

The Director of Public Prosecutions may apply to the Supreme Court for a detention order in respect of an eligible offender. The application must be accompanied by at least one assessment report. If the offender is subject to a supervision order, the application must include a progress report and the last assessment report of the offender.[103]

Making detention orders

The Act imposes a two stage test for making a detention order.104 At the first stage, the court must decide whether it is satisfied that:

> the offender poses, or after release from custody, will pose, an unacceptable risk of committing a serious sex offence or a serious violence offence or both if a detention order or supervision order is not made and the offender is in the community.105

[101] *Heath v The Queen* (2014) 45 VR 154 [22]-[23]; *Price v The Queen [No. 2]* [2019] VSCA 44 [56]-[57].

[102] *Serious Offenders Act 2018* s 341.

[103] *Serious Offenders Act 2018* s 61.

[104] *Serious Offenders Act 2018* s 62.

[105] *Serious Offenders Act 2018* s 63(1).

At the second stage, the court must be satisfied that:

> the risk of the offender committing, or after release from custody committing, a serious sex offence or a serious violence offence or both would be unacceptable unless a detention order were made.[106]

If the court is satisfied of both the first and second stages, then it may make a detention order. If the court is only satisfied of the first stage test, it may make a supervision order.[107]

In applying the unacceptable risk test at the first stage, the court:

- must have regard to:
  - any assessment or progress reports regarding the offender;
  - any other reports and evidence given in relation to the application; and
  - any other matters the court considers appropriate;[108]
- must not have regard to:
  - the means of managing the risk;
  - the likely impact of a detention or supervision order on the offender;[109]
- must be satisfied:

  by acceptable, cogent evidence to a high degree of probability that the offender poses or will pose an unacceptable risk;[110]
- may find that an offender poses an unacceptable risk even if the court is not satisfied that the offender is more likely than not to commit a serious sex of violence offence.[111]

The DPP has the burden of proving that an offender poses or will pose an unacceptable risk.

These features also apply to the unacceptable risk test that applies to supervision orders.[112]

When applying the test at the second stage, the court:

- may find that an offender poses an unacceptable risk even if the court is not satisfied that the offender is more likely than not to commit a serious sex of violence offence;[113]
- may have regard to:
  - the means of managing the risk;
  - the likely impact of a detention order on the offender;[114]

The court also has a residual discretion to make no order, even if both tests are met.[115]

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[106] *Serious Offenders Act 2018* s 64(1)

[107] *Serious Offenders Act 2018* s 62(3).

[108] *Serious Offenders Act 2018* s 63(2)

[109] *Serious Offenders Act 2018* s 63(3).

[110] *Serious Offenders Act 2018* s 62(2).

[111] *Serious Offenders Act 2018* s 63(4). This provision, which was also in the 2009 Act, reversed the effect of *RJE v Secretary of the Department of Justice* (2008) 21 VR 526.

[112] See Making supervision orders, above.

[113] *Serious Offenders Act 2018* s 64(2).

[114] *Serious Offenders Act 2018* s 64(3).

[115] *Serious Offenders Act 2018* s 62(5).

The first stage test requires the court to assess the risk the offender would hypothetically pose should he or she be at large in the community with no supervision or detention order. In contrast, the second stage test requires a finding that the risk would be unacceptable unless a detention order was made. This means that the Court must be satisfied that a detention order is the only remedy available to negate the risk.

Both tests may be satisfied even where the offender is currently incapacitated from engaging in relevant criminal behaviour, for example, while on remand, because the second stage test allows the court to look at the risk the offender would pose after release from custody.

Another distinction between the two tests is that the first stage test prohibits a court from considering the impact of a detention order on the individual offender's rights when deciding whether an 'unacceptable risk' exists. This mirrors the prohibition relating to the 'unacceptable risk' test for making a supervision order. However, the second stage test expressly allows this factor to be considered. This means that 'consideration of the impact of a detention order on the offender forms a part of the evaluative task under [s 64]' so that the risk in question must be 'balance[d] … against the actual impact of a detention order on the offender and on his rights'.[116] This includes 'whether the limitation on the offender's human rights are necessary to protect the community'.[117]

Standard of proof

The court may only make the order if it is satisfied:

> by acceptable, cogent evidence to a high degree of probability that the offender poses or will pose an unacceptable risk.[118]

This is the same standard of proof that applies to the decision to make a supervision order. It is a standard which is greater than the civil standard of 'balance of probabilities' and lower than the criminal standard of 'beyond reasonable doubt'.[119]

Contents of detention order

A detention order must include the following:

- a statement that the Supreme Court is satisfied that the offender poses an unacceptable risk of committing a serious sex offence, a serious violence offence or both a serious sex offence and a serious violence offence if a detention order is not made and the offender is in the community;
- the name of the offender subject to the order;
- the date the order was made;
- the commencement date of the order;
- the duration of the order;
- the latest date by which the DPP must apply for the first review of the order and the maximum intervals between subsequent reviews;
- the name and signature of the judge who made the order.[120]

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[116] *DPP v JPH (No 2)* [2014] VSC 177, [32].

[117] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [196].

[118] *Serious Offenders Act 2018* s 62(2) (emphasis added).

[119] For more information, see Standard of Proof under Making Supervision Orders, above.

[120] *Serious Offenders Act 2018* s 65.

Commencement and duration of detention order

If the offender is serving a custodial sentence when the court makes a detention order, the order takes effect when the offender completes that sentence. However, if the offender is on remand or in immigration detention when the detention order is made, the order takes effect when the offender is released. Otherwise, the order takes effect on the date specified by the court.[121]

The court must also determine the duration of the order. Detention orders cannot be for longer than 3 years. If the offender commences a custodial sentence or is held on remand during the term of the detention order, that time is counted towards the duration of the detention order. However, time spent in immigration detention is not counted towards the duration of the order. Offenders sentenced to community based sentences, such as a community-based order or intensive corrections order, commence those sentences when the detention order expires.[122]

A detention order ends:

- at the end of the term set by the court;
- when a court revokes the order;
- when the order is replaced by another detention order or a supervision order
- when the offender is deported or removed from Australia under the *Migration Act 1958*;
- when the offender dies.[123]

Copy of order sent to Secretary, Post Sentence Authority and Adult Parole Board

If a detention order is made, the Director of Public Prosecutions must give a copy of the order to the Secretary to the Department of Justice and Regulation, the Post Sentence Authority and, if the offender is serving a custodial sentence, the Adult Parole Board, as soon as practicable.[124]

Renewed detention orders

The Director of Public Prosecutions may apply to the Supreme Court to renew a currently operational detention order.

A renewal application must contain:

- a notice in accordance with the rules of the court, if any;
- an assessment or progress report in relation to the offender.[125]

[121] *Serious Offenders Act 2018* s 68.

[122] *Serious Offenders Act 2018* s 69.

[123] *Serious Offenders Act 2018* s 70.

[124] *Serious Offenders Act 2018* s 67.

[125] *Serious Offenders Act 2018* s 71.

On an application to renew a detention order, the court may renew the order, revoke the order, substitute a supervision order, interim supervision order or interim detention order, or make no decision in relation to the application. There is no limit on the number of times an order may be renewed.[126]

On the renewal application, the two stage test for making a detention order applies.[127]

The Act provides that renewed detention orders operate in the same manner as original detention orders.[128]

Management of offenders on detention orders

The effect of a detention order is to commit the offender to detention in prison.[129]

While offenders on detention orders are detained in prison, the law recognises the importance of distinguishing between those detained on detention orders and those serving a custodial sentence. Corrections authorities must treat those on detention orders in a manner appropriate to their status as an unconvicted prisoner, subject to the need to maintain management, security and good order of the prison, and the safe custody and welfare of prisoners.[130]

An offender on a detention order must not be housed in the same area as prisoners serving custodial sentences unless –

- it is reasonably necessary to do so for the purpose of rehabilitation, treatment, work, education, socialisation or other group activities;
- it is necessary for the safe custody or welfare of the offender or other prisoners, or the security or good order of the prison; or
- the offender has elected to be accommodated or detained with custodial prisoners.[131]

Sex offender registration under Sex Offenders Registration Act 2004

Whenever a court makes or confirms a detention order, it must also make a sex offender registration order under the *Sex Offenders Registration Act 2004* for a period of not less than 15 years in respect of the offender, if the offender is not already subject to that Act.[132]

[126] *Serious Offenders Act 2018* s 73.

[127] *Serious Offenders Act 2018* s 73.

[128] *Serious Offenders Act 2018* s 74.

[129] *Serious Offenders Act 2018* s 66.

[130] *Serious Offenders Act 2018* s 255(1). See also the *Charter of Human Rights and Responsibilities Act 2006* s 22.

[131] *Serious Offenders Act 2018* ss 255(2), (3). See also the *Charter of Human Rights and Responsibilities Act 2006* s 22.

[132] *Serious Offenders Act 2018* s 341.

Emergency detention orders

Part 7 of the Act provides for 'emergency detention orders'. These were not part of the 2009 Act. Emergency detention orders were recommended by the Harper review as a way of intervening in circumstances of escalating risk. According to the Explanatory Memorandum:

> This Part provides the court with power, in certain circumstances, to make an order for the short term detention of an offender in prison. This is intended to provide time to contain an offender's imminent risk, allow for a threat or risk assessment to be conducted with a view to obtaining a report and to reviewing the existing management plan. It is also intended to provide time to make different arrangements to enable the offender to be supervised in accordance with the conditions of their existing order suitable to the offender's risk, to make an application to the court for a review of the conditions of the order, or, in extreme cases, to make an application to the court for a detention order.133

The effect of an emergency detention order is to detain the offender in prison for the duration of the order.[134] To give effect to the order, the Court, when making an order, may issue a warrant to detain in prison, if the offender was not present at the hearing and is not in custody. The warrant may be directed to a named police officer, all police officer or all prison officers. However, a warrant directed to a named officer may be executed by all police officers, and a warrant directed to police may be executed by all prison officers.[135]

Application

The process for an emergency detention order begins with an application by the Secretary to the Supreme Court. The application must contain:

- a notice in accordance with the rules of the court, if any, setting out:
    - the altered circumstances that provide the grounds for the application;
    - the reason why, because of those altered circumstances, the offender poses an imminent risk of committing a serious sex or violence offence, if an emergency detention order is not made;
    - the reason why there are no alternative practicable and available means to ensure the offender does not pose an imminent risk of committing a serious sex or violence offence;
- an assessment report or the latest progress report for the offender.[136]

The Supreme Court may hear and determine an application for an emergency detention order in the offender's absence. A note to the section authorising the matter to be determined in the offender's absence refers to the requirement in s 5 to give paramount consideration to the safety and protection of the community.[137]

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[133] Explanatory Memorandum, Serious Offenders Bill 2018, 52.

[134] *Serious Offenders Act 2018* s 94.

[135] *Serious Offenders Act 2018* s 95. See s 96 on the effects of a warrant to detain.

[136] *Serious Offenders Act 2018* s 87.

[137] *Serious Offenders Act 2018* s 88.

Making emergency detention orders

The Court may make an emergency detention order if:

> it appears to the court that the matters alleged in support of the application would, if proved, establish that because of altered circumstances the offender poses an imminent risk of committing a serious sex offence or a serious violence offence or both if the emergency detention order is not made.[138]

In deciding whether to make an emergency detention order, the Court:

- must have regard to:
    - any assessment reports or progress reports filed with the application;
    - any other report made or evidence given in relation to the application;
    - any other matter the court considers appropriate;
- may have regard to:
    - the means of managing the imminent risk;
    - the likely impact of an emergency detention order on the offender.[139]

As with applications for interim supervision or detention orders, the test is whether it 'appears' that the matters alleged would, if proved, justify making the order. In contrast, supervision and detention orders requires the court to be 'satisfied' that the test is established.

Like other orders under the Act, the court retains a discretion to make no order, even where the test for making the order is met.[140]

Contents of emergency detention order

An emergency detention order must include the following:

- a statement that it appears to the Supreme Court that the matters alleged in support of the application would, if proven, establish that because of altered circumstances the offender poses an imminent risk of committing a serious sex offence or a serious violence offence or both if an emergency detention order is not made;
- the name of the offender subject to the order;
- the date the order was made;
- the commencement date of the order;
- the duration of the order;
- the name and signature of the judge who made the order.[141]

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[138] *Serious Offenders Act 2018* s 89(1).

[139] *Serious Offenders Act 2018* ss 89(2), (3).

[140] *Serious Offenders Act 2018* s 89(4).

[141] *Serious Offenders Act 2018* s 90.

Commencement and duration of order

An emergency detention order either begins immediately, or on the date specified in the order.[142]

The order operates for the duration specified by the court, with a maximum duration of 168 hours (seven days). The Court must set the duration of the order as the time it believes is reasonably required to:

- ensure the offender is adequately supervised under the supervision or interim supervision order that applies to the offender;
- make an application for a detention and interim detention order; or
- take any other action under the Act.[143]

Interim orders

Parts 4 and 6 of the *Serious Offenders Act 2018* allow courts to make interim supervision orders and interim detention orders ("interim orders"), respectively.

The conditions for making these two types of orders are broadly similar:

- the relevant party has applied for an original order or a renewal of an existing order; and
- either:
    - if the application is for an original order, the court is satisfied that the offender is not or will not be remanded in custody or serving a custodial sentence when the application will be determined; or
    - if the application is for a renewal of an order, the court is satisfied that the order has expired or will have expired before the application can be determined;
- the documentation supporting the application for the order would, if proved, justify making the order sought; and
- the court is satisfied that it is in the public interest to make the interim order, having regard to why the application was not or will not be determined before the expiry of sentence or the earlier order.[144]

Where the Director applies for a detention order or the renewal of a detention order, if the court considers that an interim detention order is not justified, it may make an interim supervision order if satisfied that the supporting documentation would, if proved, justify making an interim supervision order and it is the public interest to make the order.[145]

When the court is evaluating the documentation after being satisfied that an interim detention order is not appropriate, the court looks at whether the supporting documentation would, if proved, justify making an *interim* supervision order. In all other cases, the court must consider whether the supporting documentation would justifying making a final order.

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[142] *Serious Offenders Act 2018* s 92.

[143] *Serious Offenders Act 2018* s 93.

[144] *Serious Offenders Act 2018* ss 47, 76(1).

[145] *Serious Offenders Act 2018* s 76(2).

Application

The Secretary may, having applied for a supervision order or a renewal of a supervision order, apply to the court that is considering that application for an interim supervision order.[146] Similarly, if the Director has applied for a detention order or a renewal of a detention order, the Director may apply to the Supreme Court for an interim detention order.[147]

Contents of an interim order

An interim supervision or detention order must include the following:

- a statement that the court is satisfied that the making of the order is justified and it is in the public interest to make the order;
- the name of the offender subject to the order;
- the date the order was made;
- the commencement date of the order;
- the duration of the order;
- the name and signature of the judge who made the order.[148]

In addition, where the court makes an interim supervision order, it must include conditions in the order as if it were a supervision order.[149] See Conditions of supervision order (above).

Commencement and duration of interim order

The commencement date of an interim order is based on whether the underlying application was for an original order or a renewal of an order. In the case of an application for an original order, the interim order generally commences when the offender completes his or her current custodial sentence. If the offender is on remand or in immigration detention, the order commences when the offender is released from custody or immigration detention, respectively. Otherwise, the order commences on a day specified by the court.[150]

If the application was for a renewed order, the interim order commences when the previous order expires, or on the date specified by the court if the previous order has already expired.[151]

The court must determine the duration of the interim order. The maximum duration of an interim order is 4 months. Interim orders can be extended, but unless the court considers that there are exceptional circumstances, the total duration of an interim order as extended cannot exceed 4 months.[152]

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[146] *Serious Offenders Act 2018* s 46.

[147] *Serious Offenders Act 2018* s 75.

[148] *Serious Offenders Act 2018* ss 48, 77.

[149] *Serious Offenders Act 2018* ss 48, 49.

[150] *Serious Offenders Act 2018* ss 53(1), 80(1).

[151] *Serious Offenders Act 2018* ss 53(2), 80(2).

[152] *Serious Offenders Act 2018* ss 54, 81.

Time spent on remand or serving a custodial sentence counts in calculating the duration, but time spent in immigration detention does not.[153] In the case of interim supervision orders, time spent in emergency detention is counted towards the duration of the interim order, and the interim order operates concurrently with any community correction order imposed on the offender.[154]

An interim order ends:

- at the end of its period of operation (including any extension);
- when the application for review or renewal of a supervision or detention order is finalised;
- when the offender is deported or removed from Australia under the *Migration Act 1958*;
- when the offender dies.[155]

Copy of order sent to Post Sentence Authority

When the court makes an interim order, the Secretary in the case of an interim supervision order, and the DPP in the case of an interim detention order must provide a copy to the Post Sentence Authority and, if the offender is serving a custodial sentence, the Adult Parole Board.[156]

Extension of interim orders

An any time before the expiry of an interim order, the applicant may apply to extend the order. The application to extend must be made to the court that made the earlier order.[157] When deciding whether to extend an interim order, the court applies the same tests as for making the original interim order.[158]

An extended order must include:

- a statement that the court is satisfied that the extension is justified and it is in the public interest to make the extension;
- the name of the offender;
- the date the extension order was made;
- the duration of the extension order;
- in the case of an extended interim supervision order, any changes to the conditions of the interim order; and
- the name and signature of the judge who made the order.[159]

[153] *Serious Offenders Act 2018* ss 54, 81

[154] *Serious Offenders Act 2018* ss 54(4), (6).

[155] *Serious Offenders Act 2018* ss 56, 82.

[156] *Serious Offenders Act 2018* s 52.

[157] *Serious Offenders Act 2018* ss 57, 83.

[158] *Serious Offenders Act 2018* ss 58, 84.

[159] *Serious Offenders Act 2018* ss 59, 85.

Review of orders

Part 8 of the Act governs the review of supervision and detention orders. A review determines whether a supervision order or a detention order should remain in operation, be revoked or replaced with a different order.[160]

The Secretary must apply for a review of a supervision order within 3 years after it was first made (or earlier if specified in the order). After the first review, the Secretary must continue to apply for reviews in intervals of not more than 3 years (or shorter period if specified in the order).[161]

Similarly, the Director of Public Prosecutions must apply for a review of a detention order within a year of when the order is made, and then in intervals of not more than a year (or shorter if specified in the order).[162]

The application for review of a supervision order or a detention order must be made to the court that made the order.[163]

On a review, the court will consider:

- a progress report regarding the offender;
- any other evidence from a medical expert;
- any report by the Secretary, the Director of Public Prosecutions or the Post Sentence Authority; and
- any submissions by the parties.[164]

The court may also consider any previous assessment reports or progress reports and anything else the court considers appropriate.[165]

The DPP, the offender and, in the case of a supervision order, the Secretary, may also seek leave to apply for a review at any time. The court may grant leave if satisfied that:

- there are new facts or circumstances that would justify a review of the order; or
- it would be in the interests of justice to review the order, having regard to the purposes of the order and the manner and effect of its implementation.[166]

Review of supervision orders

On a review of a supervision order, the court must revoke the order unless satisfied that the offender still poses an unacceptable risk of committing a serious sex offence, serious violence offence or both if a supervision order is not in effect and the offender is in the community.[167] This requires the court to revoke the order unless the test for making the order is still satisfied.

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[160] *Serious Offenders Act 2018* s 104.

[161] *Serious Offenders Act 2018* s 99.

[162] *Serious Offenders Act 2018* s 100.

[163] *Serious Offenders Act 2018* ss 99, 100.

[164] *Serious Offenders Act 2018* s 105(1).

[165] *Serious Offenders Act 2018* s 105(2).

[166] *Serious Offenders Act 2018* s 102.

[167] *Serious Offenders Act 2018* s 106.

The Act allows the Director, on a review of a supervision order, to apply to the Supreme Court for a detention order, either on the Director's own motion, or on the suggestion of the court.[168]

If the court confirms a supervision order, it may alter the period between applications for review and may vary, add or remove any conditions.[169] If the court exercises the power to make changes, it must ensure the new conditions are in accordance with the requirements of conditions in Division 3 of Part 3 of the Act.[170]

On a periodic review instituted by the Secretary, the court must also review any order suppressing the identity of the offender and determine whether that order should continue.[171]

Review of conditions of supervision order

The Secretary and the offender may, at any time, apply with leave of the court for a review of the conditions of a supervision order or interim supervision order, other than the core conditions. The application for review may be accompanied by a certificate of available resources or a progress report on the offender.[172]

The court may grant leave if:

- there are new facts or circumstances that would justify a review; or
- it would generally be in the interests of justice, having regard to the purposes of the conditions and the manner or effect of their implementation, to review the conditions.[173]

If the court grants leave, it must grant the offender, the Post Sentence Authority and the Secretary the opportunity to be heard, and must consider the submissions and any certificate of available resources. The court may vary, add, remove or confirm the conditions of the supervision order or may review the order. If the court exercises the power to make changes, it must ensure the new conditions are in accordance with the requirements of conditions in Divisions 3 and 4 of Part 3 of the Act.[174]

Review of core conditions

The Act also allows a party to apply to review the core conditions, without leave, if there has been an amendment to the Act which has modified the core conditions since the supervision order was imposed. On this application, the court must alter the conditions of the order to accord with the core conditions specified in s 31 as then in force. The court may deal with any matter that could be the subject of an application for leave to review a supervision order, if satisfied that there are new facts or circumstances justifying the review, or it would be in the interests of justice, having regard to the purposes of the order and the manner and effect of its implementation to review the order.[175]

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[168] *Serious Offenders Act 2018* s 107.

[169] *Serious Offenders Act 2018* s 106(5).

[170] *Serious Offenders Act 2018* s 106(6).

[171] *Serious Offenders Act 2018* s 99(4).

[172] *Serious Offenders Act 2018* ss 110(1), (2).

[173] *Serious Offenders Act 2018* s 110(3).

[174] *Serious Offenders Act 2018* s 111.

[175] *Serious Offenders Act 2018* s 112.

Review of intensive treatment and supervision condition

The Secretary must apply for a review of an intensive treatment and supervision condition within 12 months after it was imposed, and then at 12 monthly intervals while the condition remains in force. The Secretary must provide the offender's treatment and supervision plan and the offender's assessment report or latest progress report. This review is not necessary if, at the time for the review, the Secretary has applied for the extension of the condition, a review of the supervision order, or a review of the conditions of the order.[176] On this review, the court must revoke the intensive treatment and supervision condition unless satisfied that:

(a) the condition is necessary to reduce the risk of the offender committing a serious sex offence or a serious violence offence or both; and

(b) the risk cannot be reduced using a less restrictive means of supervision.[177]

This is an equivalent test to that which applies when imposing an intensive treatment and supervision condition. In applying this test, the court must consider:

(a) whether the treatment and services referred to in the treatment and supervision plan were offered to the offender; and

(b) the offender's engagement with or participation in the treatment and services; and

(c) whether any changes are required to the treatment and supervision plan.[178]

If the court is satisfied that the intensive treatment and supervision condition should continue, then it may confirm the condition or, in exceptional circumstances, extend the condition by up to 12 months.[179]

Review of detention orders

On review of a detention order, the court must revoke the order unless satisfied that the offender still poses, or after release from custody will pose, an unacceptable risk of committing a serious sex offence or a serious violence offence, if a detention order is not in effect and the offender is in the community.[180]

This operates in the same manner as the test that applies when considering whether or not to make a detention order initially.[181]

The Act also allows the court to replace a detention order with a supervision order, if satisfied that a detention order is not necessary to address the risk.[182]

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[176] *Serious Offenders Act 2018* s 113

[177] *Serious Offenders Act 2018* s 114(1).

[178] *Serious Offenders Act 2018* s 114(2).

[179] *Serious Offenders Act 2018* s 114(3).

[180] *Serious Offenders Act 2018* s 108.

[181] *Serious Offenders Act 2018* s 108(3).

[182] *Serious Offenders Act 2018* s 108(4).

Assessment and progress reports

Division 1 of Part 18 of the Act includes provisions on 'assessment reports' and 'progress reports'.

The Secretary may, for the purpose of allowing a medical expert to make an assessment or progress report, require an offender to attend a specified medical expert for a personal examination. Failure to comply is an offence punishable by up to 2 years imprisonment. These provisions do not require the offender to submit to a physical examination or actively cooperate in the conduct of a personal examination.[183]

A court that is hearing an application for a supervision or detention order, an interim order or an emergency detention order may also order the offender to attend a medical expert for personal examination to allow the expert to make a report or give evidence. As with directions from the Secretary, this does not permit the court to order that the offender submit to a physical examination or actively cooperate in the conduct of the personal examination.[184]

An assessor may make a report even if the offender does not co-operate, or co-operate fully, with the personal examination, or comply with the direction.[185]

An assessment report must address the following matters:

- whether the offender has a propensity to commit a serious sex offence, serious violence offence or both in the future;
- the pattern or progression of the offender's sexual or violent offending behavior, or both, and any indication of the nature of his or her likely future sexual or violent offending behavior;
- the offender's efforts to address the causes of his or her sexual or violent offending behaviour, or both, including whether he or she has actively participated in any rehabilitation or treatment programs;
- whether any participation in rehabilitation or treatment programs has had a positive effect on the offender;
- the relevant background information on the offender, including development and social factors and other offending behavior;
- factors that might increase or decrease any identified risks;
- the results of any additional assessment; and
- any other relevant matters.[186]

[183] *Serious Offenders Act 2018* s 266.

[184] *Serious Offenders Act 2018* s 127.

[185] *Serious Offenders Act 2018* s 267.

[186] *Serious Offenders Act 2018* s 269(1).

A progress report must address the following matters:

- whether the offender has a propensity to commit a serious sex offence or a serious violence offence in the future;
- the offender's efforts in the past 12 months or since the last review to address the causes of his or her sexual or violent offending behaviour, including whether the offender has actively participated in any rehabilitation or treatment programs;
- whether the participation in rehabilitation or treatment programs has had a positive effect on the offender;
- factors that might increase or decrease any identified risks;
- the results of any additional assessment; and
- any other relevant matters.[187]

Both assessment and progress reports must state the expert's assessment of the risk that the offender will commit another serious sex or violence offence, or both, if released in the community and not subject to a detention or supervision order and the reasons for that assessment.[188]

Disputed reports

Division 2 of Part 18 of the Act allows for the Secretary, the Director of Public Prosecutions or the offender to file with the court a notice of intention to dispute the whole or any part of an assessment report, a progress report or any other report filed with or given to the court on the hearing of an application.[189]

In proceedings for an interim supervision order, interim detention order or an emergency detention order, where a party files a notice of intention to dispute, the court may take the report into account and may, if it considers it appropriate, allow the party to lead evidence in dispute and to cross-examine the report's author. If no notice of intention is filed in interim or emergency detention order proceedings, the court must take the report into consideration and is not required to give any party the opportunity to lead evidence about the report, or to cross-examine the report's author.[190]

In proceedings for all other types of orders, when a party files a notice of intention to dispute, the court must not take the disputed part of the report into account, unless the party is given an opportunity to lead evidence on the disputed matters and cross-examine the report's author.[191]

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[187] *Serious Offenders Act 2018* s 270(1).

[188] *Serious Offenders Act 2018* ss 269(2)(a), 270(2)(a).

[189] *Serious Offenders Act 2018* ss 271-273.

[190] *Serious Offenders Act 2018* s 272.

[191] *Serious Offenders Act 2018* s 273.

Conduct of hearings

A court must not hear an application for a supervision order or detention order, or conduct a review hearing, until at least 25 working days have passed since the application was filed, or, if satisfied that it is in the interests of justice, any shorter period, and the court is satisfied the offender has had a reasonable opportunity to obtain an independent report.[192]

The Supreme Court may begin a hearing for an emergency detention order if satisfied it is in the interests of justice to do so and the offender has had a reasonable opportunity to obtain legal representation and an independent report. However, this requirement does not apply if the court decides to hear the application for the order in the offender's absence.[193]

The default position is that the offender must be present during a hearing for an order. The Act recognises several exceptions to this general rule:

- the court may order the offender be removed if he or she acts in a way that makes the hearing in the offender's presence impracticable;
- the court may proceed with a hearing in the offender's absence, where the absence is due to illness or for any other reason, provided the court is satisfied that doing so will not prejudice the interests of the offender and the interests of justice require that the hearing proceed in the offender's absence;
- the court may hear and determine an application for an emergency detention order in the offender's absence.[194]

An offender is entitled to a reasonable opportunity to obtain legal representation for the hearing of an application for an order under the Act.[195]

Rules of evidence

As a general rule, the rules of evidence apply to hearings under the Act. However, the court may receive as evidence:

- the offender's criminal record;
- material relied on in an assessment report or progress report regarding the offender;
- anything relevant to the issue before the court that was tendered in any medical, psychiatric, psychological or other report in any proceeding against the offender for a serious sex offence or serious violence offence;
- a submission from a victim of the offender regarding the victim's views about any conditions that should be included in a supervision order.[196]

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[192] *Serious Offenders Act 2018* s 125(1).

[193] *Serious Offenders Act 2018* ss 125(3), (4).

[194] *Serious Offenders Act 2018* ss 88, 128.

[195] *Serious Offenders Act 2018* s 130.

[196] *Serious Offenders Act 2018* ss 131, 134.

In addition to specific provisions for certain proceedings, the court may have regard to the following matters:

- the degree of co-operation of the offender in the preparation of an assessment report or progress report, including any examination for the purposes of an additional assessment;
- the offender's reasons for any non-co-operation;
- whether an assessment report or progress report was made without a personal examination of the offender.[197]

Reasons for decision

When a court determines an application for an order under the Act, it must state its reasons, enter a copy of those reasons in the record of the court and provide a copy of the reasons to the Secretary, the offender and, if the DPP is an applicant or respondent, the DPP.[198]

Publication and suppression orders

Division 1 of Part 19 restricts the ability of any person to publish information arising from proceedings under the Act.

A person must not publish or cause to be published any of the following material, unless the court specifically authorises the publication:

- any evidence given in a proceeding before a court under the Act;
- the content of any report or other document put before the court in a proceeding under the Act;
- any information that is submitted under the Act to a court that might enable a person who has attended or given evidence in the proceeding to be identified, other than the offender; and
- any information submitted under the Act to a court that might enable a victim of a serious sex offence or a serious violence offence committed by the offender to be identified.[199]

This prohibition does not apply to:

- a police officer who publishes the identity and location of an offender to the Australian Crime Commission for entry on the Australian National Child Offender Register, in the course of law enforcement activities or in the execution of a warrant, or the arrest or apprehension of an offender under the Act; or
- a journalist who publishes the identity and location of the offender at the request of a police officer who disclosed the information for the purpose of law enforcement activities or the execution of a warrant or the arrest or apprehension of an offender.[200]

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[197] *Serious Offenders Act 2018* s 132.

[198] *Serious Offenders Act 2018* s 133.

[199] *Serious Offenders Act 2018* s 277(1).

[200] *Serious Offenders Act 2018* ss 277(2), (3).

A court may permit the publication of any of this material if satisfied that exceptional circumstances exist.[201]

Unless the court makes an order permitting publication, a person cannot publish the court's reasons for judgment in relation to an application for a supervision or detention order, as that would involve publication of the evidence given in the proceeding. However, the Act does not restrict the court's capacity to publish its reasons to the parties.[202]

Section 279 allows a court to restrict publication of information that might enable a person to identify an offender or his or her whereabouts. The court may exercise this power if satisfied that it is in the public interest to do so.

When determining whether to permit information to be published, or prohibit publication of information about the offender, the court must have regard to the following matters:

- whether the publication would endanger the safety of any person;
- the interests of any victims of the offender;
- the protection of children, families and the community;
- the offender's compliance with any order made under this Act; and
- the location of the residential address of the offender.[203]

Publication of information when prohibited is an offence. The maximum penalty is a fine of 600 penalty units in the case of a body corporate or a fine of 120 penalty units and imprisonment for 1 year in any other case.[204]

A court which has made an order restricting information about an offender's identity or location must review that order whenever it conducts a periodic review of the offender's supervision order.[205] There is no equivalent requirement to review the order when reviewing a detention order.

While there is some evidence that undue publicity can harm the rehabilitation of sexual offenders, the court must balance concern for the offender with the public interest in an open court system.[206]

A person may appeal a decision about a suppression order to the Court of Appeal.[207]

Sharing of information

Division 2 of Part 19 of the Act permits the sharing of information concerning an offender between 'relevant persons', such as the police, the staff of various government organisations, and the Post Sentence Authority, to allow these stakeholders to carry out their functions under the Act, including the preparing assessment reports, managing offenders and reducing the risk of an offender committing a serious sex offence, a serious violence offence, a Schedule 3 offence or engaging in behavior or conduct that threatens the safety of any person, including the offender.[208]

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[201] *Serious Offenders Act 2018* s 278.

[202] *Heath v The Queen* (2014) 45 VR 154; *DPP v JPH* (No 3) [2014] VSC 242.

[203] *Serious Offenders Act 2018* s 280.

[204] *Serious Offenders Act 2018* s 281.

[205] *Serious Offenders Act 2018* s 99(4).

[206] *Secretary to the Department of Justice v Fletcher (Ruling No 1)* [2009] VSC 501.

[207] *Serious Offenders Act 2018* s 123.

[208] *Serious Offenders Act 2018* s 284.

It is an offence for a relevant person (or former relevant person) to disclose any information obtained in carrying out functions under the Act in a way that is not authorised.[209]

Information may also be disclosed to the offender's guardian or healthcare providers.[210]

Victim submissions

The offender's victims have the right to make submission to the court on proceedings for a supervision or detention order, an interim supervision or detention order or a review of an order. The Secretary or the Director of Public Prosecutions will notify the victim. Victims' submissions must be in writing and must address matters relating to the victim's views about any appropriate conditions for a supervision order or interim supervision order and include any prescribed matters.[211]

Victims' submissions are private. The court must not release a victim's submission to the offender unless:

- release of the submission is essential in the interests of fairness and justice; and
- before releasing the submission, the court has asked the victim whether he or she:
    - consents to the court releasing the submission to the offender;
    - wishes to amend the submission so it can be released; or
    - wishes to withdraw the submission.[212]

If the victim does not consent to releasing the submission, altering the submission so it can be released or withdrawing the submission, the court must not release the submission to the offender and may reduce the weight it would otherwise have given the submission if the person had agreed to the court releasing the submission to the offender.[213]

The court may release the substance of the submission to the offender or the offender's legal representative if satisfied that doing so would not reasonably lead to the identification of the victim who made the submission.[214]

Victim submissions and the Post Sentence Authority

Sections 153 and 154 contain similar provisions that allow a victim to make submissions to the Post Sentence Authority regarding any direction the Post Sentence Authority may issue.

[209] *Serious Offenders Act 2018* s 284(2).

[210] *Serious Offenders Act 2018* ss 286, 287.

[211] *Serious Offenders Act 2018* s 134.

[212] *Serious Offenders Act 2018* s 135(1)

[213] *Serious Offenders Act 2018* s 135 (2).

[214] *Serious Offenders Act 2018* s 135(3).

Appeals

Part 9 of the Act gives the offender, the Secretary and the Director of Public Prosecutions the right to appeal to the Court of Appeal against various decisions made under the Act. A party must commence an appeal within 28 days of the decision, though the Court of Appeal may extend the time for commencing an appeal, if it considers it is in the interests of justice to do so.[215]

On an appeal, the Court of Appeal may consider any new evidence that is relevant and may direct the Secretary to provide a new assessment report or progress report regarding the offender.[216]

Because the Act requires judges to weigh a range of matters where there is no uniquely right assessment, decisions under the Act are in the nature of discretionary decisions. Appeals are therefore subject to the usual restrictions on review of discretionary decisions. Appellants must show that there was an error in the original decision, such as demonstrating that the original judge acted on a wrong principle, took into account irrelevant matters or mistook the facts.[217]

In addition, a challenge to the decision that the offender was an "unacceptable risk" of reoffending will only be set aside if it is "plainly wrong or wholly erroneous".[218]

Transitional provisions

Schedule 4 sets out the transitional provisions. This Schedule has the following effects:

- orders under the 2009 Act continue in force under the 2009 Act until they expire or are revoked or set aside and replaced by a new order following a review or renewal in accordance with the 2018 Act;
- when an order under the 2009 Act is reviewed or renewed, the court must conduct the review or renewal in accordance with the 2018 Act. If the court confirms or renews the order, it must make a new order under the 2018 Act;[219]
- offenders who are subject to orders made under the 2009 Act who are no longer an 'eligible offender' under the 2018 Act will continue to be eligible for reviews and renewals in accordance with the 2018 Act until their supervision or detention order is discontinued;
- the 2009 Act continues to apply to any pending applications and appeals, but any order made in such proceedings must be made under the 2018 Act;[220]
- applications remitted on appeal must be treated as applications under the 2018 Act;
- victim submissions, warrants, and directions or instructions by the Authority continue in effect as if made under the 2018 Act;

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[215] *Serious Offenders Act 2018* s 118.

[216] *Serious Offenders Act 2018* s 119.

[217] See *House v The King* (1936) 55 CLR 499.

[218] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

[219] *DPP v Lyons* [2018] VSCA 247.

[220] *DPP v Lyons* [2018] VSCA 247.

- an offender detained in accordance with a holding power exercised under the 2009 Act due to an imminent risk of an offender contravening their order is taken to be detained in accordance with the 2018 Act;
- new charges for contraventions must be commenced under the 2018 Act, irrespective of whether the contravention occurred before the 2018 Act commenced, but any contravention proceedings already commenced must be decided under the 2009 Act as if it were still in force;
- appointment of residential facilities and approval of drug and alcohol test procedures under the 2009 Act are taken to be approvals under the 2018 Act;
- change of name applications under the 2009 Act which has not been approved lapsed when the 2018 Act commenced. Offenders may bring fresh applications under the 2018 Act;
- appointments to the Post Sentence Authority under the 2009 Act continue in accordance with the terms and conditions of appointment;
- notices to produce or attend at the Post Sentence Authority served under the 2009 Act are taken to be served under the 2018 Act;
- a panel established under the 2009 Act is taken to be a panel under the 2018 Act;
- a coordinated services plan agreed under the 2009 Act is taken, on and from commencement day of the 2018 Act to be a coordinated services plan under the 2018 Act.