Introduction to Supervision Orders

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Introduction

1. The Serious Offenders Act 2018 ("the Act") establishes a civil, protective scheme under which offenders who have served custodial sentences for serious sex offences or serious violence offences, and who present an unacceptable risk of harm to the community, can be made subject to ongoing supervision or detention.

2. The primary legislative purpose of the Act is first, community protection and second, treatment and rehabilitation of serious offenders.[1]

Eligible offenders

3. An eligible offender is:
    a. At least 18 years old.[2]
    b. Has received a custodial sentence[3] from the Supreme or County Court of Victoria, or equivalent courts in another State or Territory, for a "serious sex offence" or a "serious violence offence" at any time (either before or after the commencement of the Act).
    c. At the time of the application, the offender is serving a custodial sentence in Victoria for a serious sex offence or a serious violence offence[4]

4. A person is also an eligible offender if:
    a. They are remanded or serving a custodial sentence for any offence, and at the time they were remanded or began serving the sentence, they were either the subject of a supervision, detention or emergency detention order;[5] or they were subject to an application for one.[6]
    b. They are subject to a supervision, interim supervision, detention, interim detention or emergency detention order, regardless of whether they are in custody.[7]

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[1] See sections 1 and 5 of the Act*; Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 ('Nigro'), [5], [27], [69].
[2] Section 8 of the Act.
[3] This includes Youth Justice Centre orders where part of the sentence is served in prison, excluding periods that are temporary transfers. See also *Carroll v Secretary to the Department of Justice* [2015] VSCA 156.
[4] Persons released on parole are still considered to be serving a custodial sentence for the purpose of the Act, see section 4.
[5] Including interim supervision and detention orders.
[6] Section 8(2) of the Act.
[7] *Section 8(3) of the Act.*

5. “Serious sex offence” and “serious violence offence” are defined in schedules 1 and 2 of the Act.

When a court may make a Supervision order: two step test

6. First, the Court must be satisfied that the offender poses, or after release from custody will pose, an “unacceptable risk” of committing a serious sex offence, a serious violence offence or both,[8] if a Supervision Order is not made and the offender is in the community.[9]

7. Second, if the Court is so satisfied, it may exercise its discretion to make a Supervision Order.[10]

8. The application is made by the Secretary to the Department of Justice and Community Safety.[11] The court in which the application is made is the court that sentenced the offender to the qualifying offence in the first place, or an equivalent court for offences committed in another State or Territory.[12]

Unacceptable Risk

9. The term “unacceptable risk” is not defined in the Act.

10. The leading authority that considered the meaning of unacceptable risk is Nigro Secretary to the Department of Justice (2013) 41 VR 359,18 where the court stated:

    a. “To prescribe what degrees of risk may or may not be unacceptable would remove the test of its necessary flexibility. The legislature has deliberately selected a threshold test that does not specify a particular degree of risk. Rather, the test requires an assessment of the risk and a consideration of the nature and gravity of the relevant offence and the magnitude of the harm that may result having regard to the manner in which the offender had previously committed such an offence. It is the combination of these factors that will determine whether the risk of occurrence is of a sufficient order to make the risk unacceptable.”[13]
    b. “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.”[14]
    c. “The concept of unacceptable risk is a flexible one which is calibrated to the nature and degree of the risk so that it can be adapted to the particular case. The variety of considerations which bear upon unacceptable risk will

[8] See Schedules 1 and 2 of the Act for the list of qualifying offences.
[9] Section 14(1) of the Act.
[10] Section 14(6) of the Act.
[11] Section 13 of the Act.
[12] Section 12 of the Act.
[13] At [117].
[14] At [113].

include the type of sexual offence that the person may commit, the likelihood of that occurring, and the nature and gravity of harm that it may cause."[15]

11. The offender's risk level may be unacceptable even if the likelihood of the offender committing a serious sex or violence offence (or both) is less than more likely than not.[16]

12. In assessing unacceptable risk for a supervision order or detention order, the court must not have regard to:[17]
    a. The means of managing the offender's risk; or
    b. The likely impact of the supervision order on the offender, including on their liberty.[18]

13. The Applicant for the order bears the burden of proving the offender poses or will pose an unacceptable risk.[19]

14. The court must be satisfied that the risk is "unacceptable" by acceptable, cogent evidence to a high degree of probability.[20] This is a standard well above the civil standard and approaching, though less than, the criminal standard of beyond reasonable doubt.[21]

Initial applications, interim orders, renewals and reviews

<u>Initial applications</u>

15. The Secretary commences an application by filing a notice of application, an assessment report and, if an intensive treatment and supervision condition is being sought, a treatment and supervision plan.[22] These documents are served on the offender.

16. The application is heard in the court that the offender was sentenced in for the index offending.

17. The application is subject to the two-step test set out in section 14 of the Act.

18. Section 16 sets out what a supervision order must contain (commencement, duration etc.)

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[15] At [165].
[16] Section 14(4) of the Act (supervision orders), Section 64(2) of the Act (detention orders).
[17] Section 14(2)(b) of the Act (supervision orders), Section 63(3) of the Act (detention orders).
[18] *Nigro* at [103].
[19] Section 14(5) of the Act (supervision orders), section 63(5) of the Act (detention orders).
[20] Section 14(3) of the Act (supervision orders), section 62(2) of the Act (detention orders).
[21] *Nigro* at [156], [162].
[22] Section 13 of the Act.

Interim orders

19. The Secretary can apply for an interim order in respect of an eligible offender who is the subject of an initial application under s13 or a renewal application under s22.[23]

20. The court can make an interim order if they are satisfied:
    a. The applicant has applied for a s13 or s22 order, but it has not been determined; AND
    b. The Respondent will no longer be serving a custodial sentence or remanded when application is determined OR the previous SO will expire; AND
    c. It appears to the court the documentation supporting the application would, if proved, justify the making of a supervision order; AND
    d. The court is satisfied it is in the public interest to make an interim supervision order – having regard to why the application was not, or will not be, determined before the offender is released from custody or before the expiration of the order and any other matter the court considers appropriate.[24]

21. The maximum term of an interim order is 4 months[25] unless the court extending the ISO is satisfied exceptional circumstances exist.[26]

Renewal applications

22. Prior to the expiration of an order, the Secretary can apply to renew the order.[27] The application is made by filing and serving a notice of application and accompanied by an assessment/progress report.

23. The two-step test and requirements of s14 apply to the determination of a renewal application.[28]

24. On an application for renewal the court may:[29]
    a. Renew the order;
    b. Revoke the order;
    c. Make no order;
    d. Vary, add or remove conditions; and/or
    e. Vary intervals between reviews.

[23] Section 46 of the Act.
[24] Section 47 of the Act.
[25] Section 54 of the Act.
[26] Section 57-58 of the Act.
[27] Section 22 of the Act.
[28] Section 24 of the Act.
[29] Section 24 of the Act.

Reviews

25. Most supervision orders are subject to a review period. If the court imposes a review period, the review period must not exceed three years.[30] If no review period is imposed but the order is made for a period exceeding three years, a review must take place within three years.[31]

26. The review is commenced by the Secretary filing an application and a progress report.[32]

27. The purpose of the review hearing is to determine whether the order should remain in operation or be revoked.[33]

28. The court must revoke the order unless it is satisfied that the offender still poses, or after release from custody will pose, an unacceptable risk of committing a serious sex offence, serious violence offence, or both if the offender is in the community and not subject to an order.[34] The two-step test set out in s14 applies to a review.

29. On review, the court may:[35]
    a. Confirm the order;
    b. Revoke the order;
    c. Vary, add or remove conditions; and
    d. Vary the maximum intervals between reviews.

Conditions

30. The court must impose all core conditions listed in section 31 of the Act.

31. Section 33 requires the court to consider imposing the conditions listed in section 34 and 35 of the Act.

32. The court may also impose discretionary conditions.

33. The imposition of all non-core conditions is subject to a consideration of the following:

    a. The primary purpose of imposing conditions is to reduce the risk of reoffending;
    b. The secondary purpose of conditions is to provide for the reasonable safety and welfare concerns of the offender's victim or victims;

[30] Section 99 of the Act.
[31] Section 99 of the Act.
[32] Sections 97 and 98 of the Act.
[33] Section 104 of the Act.
[34] Section 106(1) of the Act.
[35] Section 106 of the Act.

c. The capacity for conditions to promote rehabilitation and treatment of the offender, and address the types of behaviours that would otherwise increase the risk of reoffending;
d. Discretionary conditions 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 reoffending.[36]

Intensive treatment and supervision condition

34. An intensive treatment and supervision condition may be imposed if the court is satisfied that the condition is necessary to reduce the risk of the offender committing a serious sex or violence offence (or both) and less restrictive means of managing the risk have been tried or considered.[37] In determining whether to impose such a condition, the court may have regard to the means of managing the offender's risk, and the likely impact of the supervision order on the offender.[38]

35. The imposition of an intensive treatment and supervision condition requires the offender to reside at a residential treatment facility. At present, this would result in the offender residing at Rivergum Residential Treatment Facility.

36. The court must specify the duration of an intensive treatment and supervision condition, up to a maximum of 2 years with some options for extensions.[39]

Residence condition

37. A residence condition may be imposed on an offender who has served a custodial sentence for a serious sex offence.[40] The court can require an offender to reside at a residential facility[41] and can the times at which an offender must be present at the address and the circumstances under which they can leave.

38. The court in making such an order must be satisfied that no other suitable accommodation is available.[42]

Other conditions

39. Section 33 requires the court to consider imposing the conditions outlined in section 34 (residence) and 35. These section 35 conditions include exclusion

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[36] Section 27 of the Act; see also *Daniel (a pseudonym) v Secretary to Department of Justice* (2015) 45 VR 266 at [23]-[26].
[37] Section 32(1) of the Act.
[38] Section 32(2) of the Act.
[39] Section 32(5) of the Act.
[40] Section 34(2) of the Act.
[41] Defined in s3 of the Act as premises appointed under s178 of the Act. This includes Corella Place and Emu
Creek.
[42] Section 34(3)(b) of the Act.

zones, treatment and rehabilitation conditions, prohibition of consumption of drugs or alcohol, electronic monitoring and others.

40. Section 38 enables the court to impose any other condition that it considers appropriate, having regard to the purposes set out in section 27.

Restrictive conditions

41. Some core conditions are automatically restrictive conditions by operation of the Act.[43]

42. The Secretary can apply for some conditions other than core conditions to be restrictive and must give notice of the intention to make such an application.[44]

43. The court may make such a declaration if satisfied on reasonable grounds that the declaration is necessary to address the risk of the offender committing a serious sex or serious violent offence or an offence set out in Schedule 3.[45]

44. The Court must have regard to the prior convictions of an offender, including breaches of past and current supervision orders.[46]

45. A breach of a restrictive condition may result in the imposition of a mandatory 12-month term of imprisonment.[47]

Breaches

46. Contravening the conditions of a supervision order is a criminal offence punishable by up to 5 years imprisonment.[48]

47. The elements of the offence are as follows:

    a. The accused was subject to a supervision order containing a particular condition;
    b. The accused contravened the condition by an act or omission;
    c. The accused did not have a reasonable excuse for that contravention.[49]

48. Contravention proceedings can either be commenced by Victoria Police or the Secretary to the Department of Justice and Community Safety.[50]

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[43] Core conditions under section 31(2), (3), (4), (5), (7) and (9) are restrictive conditions.
[44] Section 40 & 41(1) of the Act.
[45] Section 41(3) of the Act.
[46] Section 41(4) of the Act.
[47] Section 10AB Sentencing Act 1991, unless a 'special reason' exists.
[48] Section 169 of the Act.
[49] *Secretary to the Department of Justice and Community Safety v SS (No 2)* [2020] VSC 734 at [57].
[50] Section 173 of the Act.

49. The Post Sentence Authority ("PSA") is empowered to investigate possible breaches. The Act gives the PSA a wide discretion to determine the appropriate response, including:[51]

    a. Taking no action;
    b. Giving a formal warning to the offender;
    c. Varying any directions it has given to the offender;
    d. Recommending that the Secretary apply for a review of the conditions of a supervision order;
    e. Recommending that the Secretary refer the matter to the Director of Public Prosecutions to consider applying for a detention order;
    f. Recommending that the Secretary bring contravention proceedings for the offence of breaching a supervision order.

50. The contravention proceedings must be heard by the court which imposed the order.[52]

51. Contravention charges may be heard and determined summarily (although they are still heard in the County Court), which has the effect of lowering the maximum penalty to 2 years imprisonment.[53] The majority of contravention proceedings are dealt with in this way.

"Reasonable excuse"

52. A reasonable excuse "is no more or less than an excuse which would be accepted by a reasonable person." The test is an objective one, depending on the circumstances of the individual case, as well as on the purpose of the provision to which the defence of "reasonable excuse" is an exception.[54]

53. Applying this test to contravention proceedings under the Act, Tinney J held:

    "the purpose of s 169 is to protect the community and facilitate the treatment and rehabilitation of offenders by compelling them to comply with conditions of supervision orders… …It is perfectly clear, to my mind, that what is required by the legislation is full compliance with the conditions of a SO, in order for the purposes of the overall scheme to be advanced.

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[51] Section 170 of the Act.
[52] Section 173(2) of the Act.
[53] Section 174 of the Act; Section 113 of the *Sentencing Act 1991*.
[54] *Secretary to the Department of Justice and Community Safety v SS (No 2)* [2020] VSC 734 at [64], citing with
approval *Taikato v The Queen* [1996] 186 CLR 454.

...the question of whether the accused had a reasonable excuse for any one of his contraventions is to be decided on the basis of a consideration of the entirety of the objective circumstances of the individual contravention."[55]

Breaches of restrictive conditions

54. Section 10AB of the Sentencing Act 1991 applies when a restrictive condition is breached. This requires the court to impose a minimum term of 12 months imprisonment if the court is satisfied beyond reasonable doubt that the breach was intentional or reckless, unless the court finds under section 10A that a special reason exists.[56]

55. This provision focuses on the mindset of an offender and involves consideration of their level of premeditation or malicious intent prior to or during the offending.[57]

56. In determining what constitutes a special reason, Judges of the County Court have referred to and adopted the test in DPP v Hudgson,[58] in consideration of the phrase "substantial and compelling" in section 10A.[59]

57. Also note that "substantial and compelling" circumstances are not confined to those arising since the making of the restrictive condition. There is no express provision to that effect in section 10AB.[60]

Sentencing considerations

58. Protection of the community, denunciation and deterrence are the primary sentencing factors in breach proceedings.[61] As stated in Acting Secretary to the Department of Justice v McKane:

"It is essential to the effectiveness of the statutory scheme that offenders subject to supervision orders be aware of the significance of their obligations under the conditions of those orders and the seriousness with which breaches will be viewed by the courts."[62]

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[55] Ibid at [73]-[74].
[56] Per section 10A of the Act, re special reason.
[57] *Director of Public Prosecutions v M* [2018] VCC 566 at [63], citing the Statement of compatibility, Hansard 23/3/16 starting at p1142.
[58] [2016] VSCA 254.
[59] See for example *Director of Public Prosecutions v M [2018] VCC 566, and Director of Public Prosecutions v Briggs* [2018] VCC 1805.
[60] *Director of Public Prosecutions v M* [2018] VCC 566 at [60].
[61] *See Heath (A Pseudonym) v The Queen* [2014] VSCA 319; 45 VR 154 at [25*]; Director of Public Prosecution v SM* [2019] VSC 466 at [11].
[62] [2012] VSC 459 at [21] per Williams J.

59. Rehabilitation also has a role to play, particularly in cases where a lengthy term of imprisonment may result in the offender losing their place at a residential facility, or where the offender is about to be moved to such a facility.[63]

60. Double punishment becomes a particular issue in breach proceedings where the breach involves criminal offending for which the offender is also to be sentenced. It is important to note:

    a. Convictions for both the fresh offending and the offence of breaching an order is not double punishment.[64]
    b. The existence of an order at the time fresh offending is committed bears directly on the gravity of that offence.[65]
    c. In sentencing an offender for a breach offence, the court can have regard to the order, as the order is an essential element of the offence.[66]

61. Be mindful of section 5(2BD) of the Sentencing Act 1991, which provides that in sentencing an offender, a court:
    a. must not have regard to the fact that the offender is subject to an order made under the Serious Offenders Act 2018 but, if relevant to the conditions of any sentence imposed by it, may have regard to the conditions (if any) imposed on that order and the terms of any current directions or instructions given by the Authority under Part 11 of that Act;
    b. must not have regard to any possibility or likelihood of an application being made under that Act for an order in respect of the offender.

62. For a discussion of the effect of section 5(2BD), see:
    a. *Price v The Queen (No 2)* [2019] VSCA 44; 277 A Crim R 304.
    b. *Heath (A Pseudonym) v The Queen* [2014] VSCA 319; 45 VR 154.
    c. *Carolan v The Queen (*2015) 48 VR 87.
    d. *Lecornu v The Queen* [2012] VSCA 137.

Non-publication Orders

63. Section 279 allows 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 .

64. 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 (s280):
    a. whether the publication would endanger the safety of any person;

[63] *See, for example, Secretary to the Department of Justice and Community Safety v SS (No 3) [2021] VSC 1; DPP v SJW (No 2)* [2021] VSC 55.
[64] *Lecornu v The Queen* (2012) 36 VR 382.
[65] *Ibid; Also see Price v The Queen (No 2)* [2019] VSCA 44; 277 A Crim R 304.
[66] *Price v The Queen (No 2)* [2019] VSCA 44; 277 A Crim R 304 at [48].

b. the interests of any victims of the offender;
c. the protection of children, families and the community;
d. the offender's compliance with any order made under this Act; and
e. the location of the residential address of the offender.

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