

# FOLEY'S | LIST

## BREACHING SUPERVISION ORDERS:

Restrictive conditions and mandatory minimums

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# **Breaching Supervision Orders: Restrictive conditions and mandatory minimums**

**Emily Clark, November 2016**

## Introduction

1. Supervision orders imposed on sex offenders are governed by Part 2 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSODSA). The purpose of the supervision order scheme and SSODSA more generally is to enhance the protection of the community by requiring some sexual offenders to be subject to ongoing supervision after their custodial sentences expire. In 2015, the Victorian government commissioned the Harper Review<sup>1</sup> of SSODSA following the murder of 17-year-old Masa Vukotic by Sean Price. He was subject to a supervision order imposed in the County Court in May 2012 when he committed the murder of Ms Vukotic and other offences.
  
2. On 1 June 2016 a number of legislative changes came into operation<sup>2</sup>, which were in part a response to the Harper Review. The most significant of these changes to the supervision order scheme were:
  - i. the introduction of new core conditions;
  - ii. the introduction of restrictive core conditions;
  - iii. the ability for the court to impose other restrictive conditions; and
  - iv. the introduction of mandatory minimum sentences for breach of restrictive conditions.

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<sup>1</sup> *Complex Adult Victim Sex Offender Management Review Panel, Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), November 2015.*

<sup>2</sup> The *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* was the Amending Act. It introduced amendments to SSODSA, *Sentencing Act 1991*, *Sex Offenders Registration Act 2004* and *Corrections Act 1986*.

3. Prior to the legislative amendments, breaches of conditions of supervision orders under SSODSA were punishable by a maximum of Level 6 (5 years) imprisonment with no mandatory minimum term applicable. Offenders now face a mandatory minimum of 12 months for breaching a restrictive condition. The maximum term has remained the same.
4. Practitioners acting for respondents in applications brought under SSODSA will need to be prepared to identify and argue against the imposition of restrictive conditions. And offenders subject to restrictive conditions will need to be given careful advice regarding their obligations and the possible consequences for breach.

#### What is a core condition?

5. Core conditions are those specified in subsection 16(2) SSODSA; they set out actions or conduct an offender must/must not engage in during the period of the order. Any supervision order must be made subject to all of the core conditions. The court has no power to add, remove or vary any core condition.

#### What is a restrictive condition?

6. A restrictive condition is any one of the four conditions specified in s. 16(2)(a)-(ad) SSODSA as well as any other declared by the court under s. 24A. The substantive difference between restrictive and non-restrictive conditions is that breach of a restrictive condition triggers the imposition of a mandatory minimum term of 12-months imprisonment unless the court is satisfied that a 'special reason' exists.<sup>3</sup>

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<sup>3</sup> *Sentencing Act* 1991, s. 10AB.

### New core conditions

7. The legislative amendments brought into operation five new core conditions and substituted and amended two existing conditions.<sup>4</sup> The most significant addition is a condition not to commit a violent offence in Victoria or elsewhere.<sup>5</sup> This is in addition to the existing condition not to commit a relevant offence, being a sexual offence.<sup>6</sup> ‘Violent offences’ are defined in the newly inserted Schedule 1A SSODSA. Offences in Schedule 1A include murder, manslaughter, serious injury offences, burglary, assaults (s. 31 *Crimes Act*), threats to kill, criminal damage, contravening an intervention order, bomb hoaxes and numerous other offences.
8. The new core conditions will form part of any new order made and will be incorporated into existing supervision orders upon review or renewal of an order, or following an application to review conditions. They are not automatically applicable to existing supervision orders; a current order must be varied by the court which imposed it.
9. The legislative changes also provide the court with power to impose new discretionary conditions related to violent offences and conduct.<sup>7</sup> These conditions are not able to be declared restrictive conditions.

### How are restrictive conditions imposed?

10. In addition to being included in new supervision orders, restrictive conditions may be imposed by the court upon review or renewal, or following an application to review conditions. A condition can only be declared restrictive on application of the Secretary and if the court is satisfied on reasonable grounds that the declaration is necessary to

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<sup>4</sup> See *Serious Sex Offenders (Detention and Supervision) Act 2009*, ss. 16(2)(ab), (ac), (ad), (g), (h) and (i); and Appendix A.

<sup>5</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 16(2)(ab).

<sup>6</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, Schedule 1 defines a ‘relevant offence’.

<sup>7</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 19.

address the risk of harm (including sexual harm or violence or both) to the community presented by the offender.<sup>8</sup> In considering whether to make a declaration the court must have regard to the antecedents of the offender, including any previous breaches of a supervision order.<sup>9</sup>

11. All supervision orders must contain the standard core conditions set out in s.16 SSODSA and may include other conditions imposed by the court. Conditions other than core conditions must constitute the minimum interference with the offender's liberty, privacy and freedom of movement necessary to ensure the purposes of the conditions. They must also be reasonably related to the gravity of risk of reoffending.<sup>10</sup>

12. The following core conditions set out in s. 16(2)(a)-(i) SSODSA are restrictive conditions:

- (a) not commit a relevant offence in Victoria or elsewhere;
- (ab) not commit a violent offence in Victoria or elsewhere;
- (ac) if the court requires an offender to reside at a residential facility, not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility;
- (ad) not engage in conduct that threatens the safety of any person, including the offender.

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<sup>8</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 24A(3).

<sup>9</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 24A(4).

<sup>10</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 15(6).

13. The conditions set out in s. 24A(1)(a)-(g) SSODSA which may be declared restrictive are as follows:

- (a) that the offender must not consume alcohol;
- (b) that the offender must not use prohibited drugs, obtain drugs unlawfully or abuse drugs of any kind;
- (c) that the offender must reside at a specified place (including whether the offender is to reside at a residential facility);
- (d) that the offender must be at the offender's place of residence between specified times;
- (e) that the offender may only leave the offender's place of residence in accordance with specified conditions;
- (f) that the offender must not visit a specified place or area or may only visit the place or area at specified times;
- (g) that the offender must not have contact with a specified person or class of person.<sup>11</sup>

14. If the court makes a declaration that a particular discretionary condition is a restrictive condition, that decision can be appealed to the Court of Appeal.

#### Breach and the mandatory minimum term

15. Section 160 SSODSA creates an offence for breaching a supervision order. The section provides that an 'offender must not, without reasonable excuse, fail to comply with a condition of a supervision order' other than a condition to comply with medical treatment.<sup>12</sup> The section sets out the maximum penalty of Level 6 imprisonment (5 years) imprisonment. If a breach is in relation to a restrictive condition, then s. 10AB *Sentencing Act* applies. That section states that for an intentional or reckless failure to comply with a

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<sup>11</sup> All of these conditions reflect suggested conditions contained in *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 17.

<sup>12</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009*, s160(1)-(2).

restrictive condition of a supervision order<sup>13</sup>, the court must impose a term of imprisonment of not less than 12 months unless the court is satisfied that a special reason exists.<sup>14</sup>

16. The 'special reason' test is not to simply be equated with 'exceptional circumstances' and s. 10A(2) *Sentencing Act* sets out the following circumstances in which the court may make a finding that a special reason exists:

- a. The offender has assisted, or given an undertaking to assist, authorities;
- b. The offender is aged 18-21 and can prove psychosocial immaturity resulting in a substantially diminished ability to regulate his or her behaviour;
- c. The offender can prove impaired mental functioning<sup>15</sup> causally linked to the offence or that would create significant burden or risk should imprisonment be imposed;
- d. The court proposes to make a Court Secure Treatment Order or a residential treatment order; or
- e. There are substantial and compelling circumstances that justify doing so.

17. It should be noted that s. 10A(2) applies not only to supervision order breach offences but to other provisions within the *Sentencing Act* that provide for mandatory minimum terms of imprisonment where a 'special reason' exception exists. The onus is on the offender to establish any of the above matters and, where a burden of proof applies, the standard is on the balance of probabilities.

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<sup>13</sup> *Sentencing Act* 1991, s10AB(2).

<sup>14</sup> *Sentencing Act* 1991, s10AB(1).

<sup>15</sup> *Sentencing Act* 1991, s10A(1) defines 'impaired mental functioning'.

18. The Court of Appeal recently considered the meaning of ‘special reason’ in relation to a charge of intentionally causing serious injury in circumstances of gross violence, stating that it was “plainly the intention of Parliament that the burden imposed upon an offender who sought to escape the operation of s 10 should be a heavy one, and not capable of being lightly discharged.”<sup>16</sup>
19. Although the circumstances set out in s. 10A(2) is an exhaustive list, one of the ways in which the court’s discretion is enlivened is if there are ‘substantial and compelling circumstances that justify doing so’.<sup>17</sup> This appears to be a broad category of special reason however the Court of Appeal has made clear that “the word ‘compelling’ connotes powerful circumstances of a kind wholly outside what might be described as ‘run of the mill’ factors”.<sup>18</sup>
20. In determining whether there are substantial and compelling circumstances under subsection 10A(2)(e), the court must have regard to the matters set out in s. 10A(3)(aa)-(b). Those matters include Parliament’s intention for mandatory minimum periods to be fixed for offences such as gross violence or single punch manslaughter<sup>19</sup>, causing serious injury in circumstances of gross violence<sup>20</sup> and certain offences against emergency workers and custodial officers<sup>21</sup>. The court must also have regard to whether the cumulative impact of the circumstances of the case would justify a departure from the 12-month mandatory minimum period that should ordinarily be imposed. It is clear that offenders facing a mandatory minimum sentence will face extreme difficulty in setting aside the presumption of serving that term.

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<sup>16</sup> *DPP (Vic) v Hudgson* [2016] VSCA 254, Weinberg, Whelan and Priest JJA at [111].

<sup>17</sup> *Sentencing Act* 1991, s10A(2)(e).

<sup>18</sup> *DPP (Vic) v Hudgson* [2016] VSCA 254, Weinberg, Whelan and Priest JJA at [112].

<sup>19</sup> *Sentencing Act* 1991, s. 9A and 9B.

<sup>20</sup> *Sentencing Act* 1991, s. 10.

<sup>21</sup> *Sentencing Act* 1991, s. 10AA.

## Conclusion

21. The legislative amendments introduced in June 2016 also inserted new s. 6A into SSODSA, which requires a person or body making a decision under the Act to give paramount consideration to the safety and protection of the community. This is a matter the court is therefore required to take into account when determining whether to make a declaration that a condition is restrictive. Coupled with the requirement to take previous breaches into account, it seems a likely group of offenders to be subject to restrictive conditions will be those who have repeatedly breached conditions not to use drugs or alcohol, and/or curfew conditions.

22. The long term consequences of the restrictive condition provisions are yet to be seen however there is a very real risk that offenders committing seemingly minor breaches (compared with those who commit relevant or violent offences) could end up in an ongoing cycle of breaching and serving the mandatory minimum or longer. The wider implication is then the prospect of remaining on a supervision order indefinitely because it will be impossible to demonstrate a reduction on risk in the face of long term incarceration for breach offences.

## APPENDIX A: CORE CONDITIONS

The table below sets out all core conditions and whether they were introduced by the Amending Act in 2016 and whether they are deemed to be restrictive under s. 16(2)(a)-(i) SSODSA

Core Condition	New	Restrictive
(a) not commit a relevant offence in Victoria or elsewhere	No	Yes
(ab) not commit a violent offence in Victoria or elsewhere <sup>22</sup>	Yes	Yes
(ac) if the court requires an offender to reside at a residential facility, not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility	Yes	Yes
(ad) not engage in conduct that threatens the safety of any person, including the offender	Yes	Yes
(b) attend at any place as directed by the Adult Parole Board for the purpose of administering the conditions of the order	No	No
(c) attend at any place directed by the Adult Parole Board for the purpose of making assessments required by the court, the Secretary or the Director of Public Prosecutions for the purposes of this Act (including a personal examination by a medical expert for the purpose of providing the court with a report to assist it to determine the need for, or form of, any of the conditions of the order)	No	No
(d) report to, and receive visits from, the Secretary or any person nominated by the Secretary for the purposes of this paragraph	No	No
(e) notify the Adult Parole Board of any change of employment or new employment (whether paid or unpaid) at least 2 clear days before the date of commencing the new or changed employment	No	No
(f) not leave Victoria except with the permission of the Adult Parole Board granted either generally or in relation to the particular case	No	No
(g) if the court requires an offender to reside at a residential facility, obey all instructions given by a supervision officer or a specified officer under section 137	Yes (substituted)	No
(h) comply with any directions given by the Adult Parole Board under the emergency power in section 120	Yes (amended)	No
(i) obey all instructions given by a community corrections officer or a specified officer under section 151	Yes	No

<sup>22</sup> Violent offence means an offence listed in Schedule 1A.

## APPENDIX B: RELEVANT LEGISLATION

The table below sets out the key provisions relevant to decision making, core conditions, discretionary conditions, restrictive conditions, breach of restrictive conditions and the matters relevant to sentence.

Act	Section	Provision overview
<i>Serious Sex Offenders (Detention and Supervision) Act</i> 2009	1	The main purpose of this Act is to enhance the protection of the community. The secondary purpose is to facilitate the treatment and rehabilitation of offenders.
	6A	A person/body making a decision under the Act must give paramount consideration to the safety and protection of the community.
	6B	If not already registered, the court must make an order that the offender be subject to the <i>Sex Offenders Registration Act</i> 2004 when a supervision order is made, confirmed or renewed.
	9	The court may make a supervision order only if the court is satisfied that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made.
	15	A supervision order is subject to conditions imposed by the court. The primary purpose of conditions is to reduce the risk of re-offending.
	16	This section sets out the core condition that must be included in any supervision order.
	17	This section sets out suggested conditions a court must consider imposing.
	18	In considering imposing a residential condition under s. 17(1)(a), the court must consider whether the offender should reside in a residential facility.
	19	The court may impose other discretionary conditions to reduce the risk of re-offending; or to provide for the reasonable concerns of the victim(s); or to promote the treatment and rehabilitation of the offender.
	24A	This section sets out discretionary conditions that the court may declare as restrictive conditions.
	160	Creates an offence to contravene a condition of a supervision order.
	Schedule 1	Set out what is a 'relevant offence' for the purpose of the core condition in s. 16(2)(a).
	Schedule 1A	Set out what is a 'violent offence' for the purpose of the core condition in s. 16(2)(ab).
<i>Sentencing Act</i> 1991	10AB	A court must impose a term of imprisonment of not less than 12 months unless a special reason exists.
	10A(2)	Circumstances constituting 'special reasons' set out.