High Risk Offenders Bill 2019

Part 1 — Preliminary

1. Short title

This clause provides that this is the *High Risk Offenders Act 2019*.

2. Commencement

In paragraph (a), provides that Part 1 comes into operation when the Act receives the Royal Assent. In paragraph (b), provides that, except for Part 1, different provisions may come into operation on different days, through proclamation.

3. Terms used

This clause defines the terms used in this Bill.

Board means the High Risk (Sexual and Violent) Offenders Board established by clause 14.

CEO means the chief executive officer (Director General) of the Department of Justice.

Committing, in relation to a serious offence, has the meaning in clause 6.

Community has the meaning in clause 4.

Community corrections officer has the meaning in section 4(2) of the *Sentence Administration Act 2003*.

Continuing detention order means an order in the terms of clause 26(1).

Criminal record, in relation to a person, means the criminal record of that person kept by the Commissioner of Police.

Department means the department of the Public Service principally assisting the Minister in the administration of this Bill (which is the Department of Justice).

High risk offender has the meaning in clause 7.

Interim supervision order means an order under clause 58.

Offender means a serious offender under custodial sentence or a serious offender under restriction.

Preliminary hearing means the hearing referred to in clause 46.

Psychiatrist has the meaning given in section 4 of the *Mental Health Act 2014*.

Public sector body has the meaning given in section 3(1) of the *Public Sector Management Act 1994*.

Qualified expert means a psychiatrist or a qualified psychologist.

Qualified psychologist means a psychologist (as defined in section 4 of the *Mental Health Act 2014*) who holds a master's degree or higher in psychology.

Relevant agency means: the Department of Justice; the Department of Health; the Department of Communities, in its capacity in the administration of public housing; Police Force of Western Australia; and any other public sector body designated by the regulations as a relevant agency.

Restriction order means a continuing detention order or a supervision order.

Restriction order application means an application made under clause 35(1) or clause 36(1).

Serious offence has the meaning in clause 5.

Serious offender functions means functions that are concerned with the assessment or management of serious offenders under custodial sentence or serious offenders under restriction.

Serious offender under custodial sentence means a person who —

(a) is under a custodial sentence for a serious offence; or

(b) at all times since being discharged from a custodial sentence for a serious offence, has been under a custodial sentence for another offence (or offences).

Serious offender under restriction means a person who is subject to a restriction order or an interim supervision order.

Standard condition means a condition listed in clause 30(2) that must be included in a supervision order.

Supervision order means an order referred to in clause 27(1).

Supporting agency means: a relevant agency; the Department of Justice, in its capacity in the management of prisons; the Office of the Director of Public Prosecutions; the Prisoners Review Board; the Supervised Release Review Board; and any other public sector body designated by the regulations as a supporting agency.

Under a custodial sentence means under any of the following sentences, the term of which has not lapsed —

(a) a sentence of imprisonment imposed by a court of Western Australia (including an indefinite sentence imposed under section 98(1) of the *Sentencing Act 1995*) or an indeterminate sentence imposed under sections 661 or 662 of *The Criminal Code*;
(b) a sentence of imprisonment imposed under a law of the Commonwealth;
(c) a sentence of imprisonment that is deemed to have been imposed by a court of Western Australia under section 25(1) of the *Prisoners (Interstate Transfer) Act 1983*;
(d) a sentence of detention under the *Young Offenders Act 1994* for an offence committed after the young offender had reached 16 years of age.

Victim means a person upon whom a serious offence has been committed by a person who is, or has been, an offender.

Victim submission means a submission made under clause 60(1) or (2).

4. Term used: community

The term ‘community’ is a general term used to refer to people, whose protection is to be considered when the Supreme Court determines the level of risk an offender poses. The term is not bound, limited or restricted to Western Australia or Australia.

5. Term used: serious offence

A serious offence determines an offender’s eligibility to be considered for an order under this Bill and can be defined by one of a number of methods. The definition is intended to capture offences deemed serious for the purposes of this Bill, regardless of where they took place, and whether or not the offence has been repealed.

Any offence appearing in Schedule 1 Division 1 is a serious offence. Similarly, any offence appearing in Schedule 1 Division 2 is a serious offence, if committed in the circumstances outlined.

If an offence has been repealed, it is deemed to be a serious offence if the person’s actions, or failure to take actions, equate to an offence appearing in Schedule 1 Division 1 or in the circumstances outlined in Schedule 1 Division 2.

An offence of conspiracy, attempt or incitement to commit an offence outlined previously is also deemed to be a serious offence.

Similarly, if the person’s actions or failure to take actions constitute an offence against a law of the Commonwealth or of any place outside of Western Australia, provided it falls within the scope of a serious offence, as outlined previously, it is deemed to be a serious offence.

An offence against the law of the Commonwealth can also be a serious offence if: (a) the offence is of a sexual or violent nature; (b) the penalty is imprisonment of seven years or more; and (c) the offence is prescribed to be a serious offence.

Finally, a court may, at sentencing, declare an offence to be a serious offence for the purposes of this Bill in the terms outlined in section 97A of the *Sentencing Act 1995*.

6. Term used: committing a serious offence

This term is used as part of the test to determine if a person is a 'high risk offender', and therefore, able to be subject to an order under this Bill. It refers to the likelihood of a person doing acts, or their failure to take actions, that would constitute a serious offence. To aid in this assessment, no regard is to be given to whether or not the person would likely be: (a) charged; (b) if charged, found not mentally fit to stand trial; or (c) if tried, would be convicted.

7. Term used: high risk offender

Subclause (1) outlines the test to be applied by the Supreme Court in order to determine an offender to be a 'high risk offender', and therefore make a restriction order. In arriving at this decision, this subclause provides that the court must be satisfied by acceptable and cogent evidence and to a high degree of probability.

Subclause (2) provides that the State has the burden of satisfying the Supreme Court as required by subclause (1), with subclause (3) listing the matters that the court must have regard to in deciding if an offender is a 'high risk offender'.

The characterisation of a person as a 'serious danger to the community', which was the requisite standard under the *Dangerous Sexual Offenders Act 2006*, has been replaced by use of the term 'high risk offender' in order to expand the scope of this legislation to include serious violent offenders. The test is intended to be materially identical to the test under the *Dangerous Sexual Offenders Act* for whether the court makes a continuing detention order or a supervision order.

8. Objects of this Act

The objects of this Bill are to provide for the detention in custody or supervision of persons of a particular class to ensure adequate protection of the community and to provide for their continuing control, care or treatment.

9. Act binds Crown

This clause provides that this Bill is binding on the State and on the Crown insofar as State law permits.

10. Application of *Bail Act 1982*

This clause provides that the provisions of the *Bail Act 1982* do not apply to a person detained under this Bill, unless they are in custody and charged with contravening a supervision order or an offence associated with a community corrections officer enforcing an electronic monitoring or curfew requirement, including unlawfully interfering with an electronic monitoring device.

11. Proceedings under this Act

Subclause (1) provides that the Attorney General may make applications and take other proceedings under this Bill in the name of the State. In addition, subclauses (2) and (3) empower the Attorney General to authorise the Director of Public Prosecutions or the State Solicitor, respectively, to make applications and take other proceedings under this Bill in the name of the State.

If the Attorney General authorises the State Solicitor, as provided for in subclause (3), subclause (4)(a) makes it clear that the State Solicitor can appear in person or be represented by a legal practitioner. Subclause (4)(b) affords the State Solicitor independence in applications or proceedings made under this Bill, as if the State Solicitor was the Director of Public Prosecutions.

Subclause (5) ensures that any defect or error made by the Attorney General in authorising the Director of Public Prosecutions or the State Solicitor does not affect the validity of any applications made or proceedings taken under this Bill and extends to protect any order, finding or other decision made by a court.

For the sake of clarity, subclauses (6), (7) and (8) specify the applications that can be made under this Bill by the CEO, a police officer and a community corrections officer.

12. *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* Part 2 applies

This clause provides that Part 2 of the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* applies to this Bill. The effect of this is that where a document is in electronic form, or a process is performed electronically, it will be afforded the same legal status as anything in paper form or carried out using a paper-based process.

13. Application of *Freedom of Information Act 1992* limited

Clause 13 prevents access under the *Freedom of Information Act 1992* (WA) (FOI Act) to documents brought into existence, prepared, developed, made, received or obtained under, or for the purposes of, this Bill or any application or other proceedings under this Bill.

The correct operation of this clause is based on the principle that any document produced by the High Risk (Sexual and Violent) Offenders Board under Part 2, or any document shared under Part 3, is protected from the application of the FOI Act.

In the case of a document which is copied and shared for the purposes of Part 3, the exemption afforded by this clause only applies to the copy which was created for the purposes of this Bill; the exemption is not intended to apply to the original document, which will maintain its status under the FOI Act prior to its sharing.

Part 2 — High Risk (Sexual and Violent) Offenders Board

Division 1 — Establishment and functions

14. Board established

This clause establishes the High Risk (Sexual and Violent) Offenders Board.

15. Functions of Board

This clause specifies the functions of the High Risk (Sexual and Violent) Offenders Board. Subclause (1) lists these functions as:

(a) to develop and promote the development of knowledge, understanding, skills and expertise in all aspects of the assessment and management of offenders;
(b) to facilitate cooperation between and the coordination of relevant agencies in the performance of their serious offender functions;
(c) to facilitate information-sharing between relevant agencies in relation to the performance of their serious offender functions;
(d) to develop best practice standards and guidelines for the performance by relevant agencies of their serious offender functions; and
(e) to advise relevant agencies in relation to resourcing, service provision and training relevant to the performance of their serious offender functions.

Subclause (2) empowers the High Risk (Sexual and Violent) Offenders Board to do all things necessary or convenient to perform its functions.

Division 2 — Membership and meetings

16. Terms used

This clause defines the terms used in this Division.

Appointed member means a person employed within a relevant agency who is appointed by the chief executive officer, chief employee or the Chief Psychiatrist to sit on the High Risk (Sexual and Violent) Offenders Board.

Chief employee and **chief executive officer** have the respective meanings given in section 3(1) of the *Public Sector Management Act 1994* (WA).

Chief Psychiatrist has the meaning given in section 4 of the *Mental Health Act 2014* (WA).

Community member means a member of the community who is appointed by the Attorney General to sit on the High Risk (Sexual and Violent) Offenders Board in accordance with clause 18.

Official member means a member of the High Risk (Sexual and Violent) Offenders Board who is the chief executive officer or chief employee of a relevant agency, or who is the Chief Psychiatrist.

Member means a member of the High Risk (Sexual and Violent) Offenders Board.

17. Membership of Board

This clause defines the membership of the High Risk (Sexual and Violent) Offenders Board.

Subclause (1) provides that the High Risk (Sexual and Violent) Offenders Board is to consist of, for each relevant agency: the chief executive officer or the chief employee, or a member of staff of a relevant agency who is appointed by the chief executive officer or the chief employee, plus the Chief Psychiatrist, or a member of the Chief Psychiatrist's staff who is appointed by the Chief Psychiatrist. Community members appointed under clause 18 are also members of the High Risk (Sexual and Violent) Offenders Board.

Subclause (2) provides the ability for a chief executive officer or chief employee to appoint more than one representative to the High Risk (Sexual and Violent) Offenders Board if their agency is defined as a relevant agency in more than one context – for example, the department designated as the Police Service and the Police Force of Western Australia.

Subclause (3) confirms that the chairperson of the High Risk (Sexual and Violent) Offenders Board is the chief executive officer of the Department of Justice, or the member of staff appointed by the chief executive officer.

18. Community members of Board

Subclause (1) allows the Attorney General to appoint community members to be members of the High Risk (Sexual and Violent) Offenders Board, in a similar manner to the Prisoners Review Board. This clause has been included to ensure that issues affecting Aboriginal offenders are brought to attention of the High Risk (Sexual and

Violent) Offenders Board to assist in the discharge of its functions. In order to be appointed, a community member must have a knowledge and understanding of:

(a) Aboriginal culture local to this State;
(b) risk assessment and management frameworks that are appropriate for Aboriginal people;
(c) the criminal justice system; and
(d) issues that are relevant to the High Risk (Sexual and Violent) Offenders Board's functions, including employment, substance abuse, physical or mental illness or disability, housing, education and training.

Subclauses (2), (3) and (4) provide for a community member's basis of appointment (i.e. full-time, part-time or sessional), remuneration allowances and granting leaves of absence.

Subclauses (5) and (6) make the chairperson of the High Risk (Sexual and Violent) Offenders Board responsible for ensuring community members receive education, training and professional development to discharge their role, with the Attorney General required to make appropriate provision for such education, training and professional development.

19. Term of office

This clause sets out the terms of office for particular members of the High Risk (Sexual and Violent) Offenders Board.

Subclause (1) provides that those members who are the chief executive officer or a chief employee of a relevant agency, or the Chief Psychiatrist (collectively known as official members), are members until they no longer hold such positions in a relevant agency, or until the official member appoints another member of staff (known as an appointed member) to sit on the High Risk (Sexual and Violent) Offenders Board.

Subclause (2) provides that an appointed member is to remain an appointed member, until: (a) they cease to be a member of staff of a relevant agency; (b) they resign as

an appointed member; or (c) their appointment is cancelled by the official member who appointed them.

Subclause (3) accounts for situations where an appointed member ceases to be an appointed member, for reasons outlined in subclause (2). In such situations, subclause (3) provides that the official member immediately becomes a member of the High Risk (Sexual and Violent) Offenders Board, unless and until another appointed member is appointed.

Subclause (4) deals with the terms of office for community members. A community member is to remain a community member, until: (a) their term expires, which is, by default, five years, or any shorter period as stated in the instrument of appointment; (b) they resign; or (c) their appointment is terminated by the Attorney General.

Subclause (5) provides that a community member is eligible for reappointment upon expiry of their term, but not in the event they resign or their appointment is terminated.

20. Resignation

This clause deals with resignations of appointed members and community members.

Subclause (1) provides that an appointed member may resign by giving a signed letter of resignation to the official member who appointed them. Subclause (2) provides that a community member may resign by giving a signed letter of resignation to the Attorney General.

Subclause (3) sets out when a resignation takes effect, which is the date the letter of resignation is received by the official member or Attorney General (as the case may be), or at a later date specified in the letter of resignation.

21. Terminating and cancelling appointments

This clause deals with the termination and cancellation of appointments to the High Risk (Sexual and Violent) Offenders Board.

Subclause (1) sets out the grounds for which the Attorney General may terminate the appointment of a community member, and includes if the member:

(a) has been convicted of an indictable offence or an offence committed under the law of another place that would, if it had been committed in this State, be an indictable offence;
(b) is incapable of performing the functions of a member;
(c) has neglected without a reasonable cause to perform the functions of a member;
(d) has been negligent or careless in performing the functions of a member; or
(e) is unfit to be a member due to misconduct.

Subclause (2) provides the power for the Attorney General to terminate the appointment of a community member, if grounds exist to terminate the member.

Subclause (3) empowers an official member to cancel the appointment of an appointed member at any time and without giving reasons.

22. Meetings of Board

This clause sets out the particulars associated with a meeting of the High Risk (Sexual and Violent) Offenders Board.

Subclause (1) provides that the chairperson may decide when and where the High Risk (Sexual and Violent) Offenders Board meets. Subclause (2) outlines who is to preside at a meeting, the quorum of a meeting and how questions arising are to be determined, including how a tied vote is dealt with.

Subclause (3) provides for a meeting of the High Risk (Sexual and Violent) Offenders Board to take place where members participate by means other than in person, such as by telephone, with subclause (4) empowering the chairperson to determine the procedure for convening and conducting meetings.

23. Protection of information

This clause places a duty on members of the High Risk (Sexual and Violent) Offenders Board not to record, disclose or make use of any information obtained by virtue of their

membership, unless it is in the exercise of functions under this Bill, if ordered to do so by a court or a judge, or in circumstances approved by the Attorney General.

The failure to comply with the provisions of this clause is an offence, punishable by a fine of $2,500.

Part 3 — Cooperation and sharing of information between supporting agencies

24. Cooperation between supporting agencies

This clause facilitates cooperation between supporting agencies.

Subclause (1) makes it a requirement for supporting agencies to cooperate with other supporting agencies in the performance of duties associated with the assessment and management of serious offenders under custodial sentence or offenders who are subject to a continuing detention order or a supervision order.

Subclause (2) provides that the duty to cooperate includes a requirement to provide reasonable assistance and support to other supporting agencies, with subclause (3) providing examples of cooperation.

25. Disclosure of information between supporting agencies

For the purposes of cooperating under clause 24, if a supporting agency is in possession of information that may assist another supporting agency in the performance of their serious offender functions (i.e. the assessment and management of serious offenders under custodial sentence or offenders who are subject to a continuing detention order or a supervision order), it may disclose that information.

Subclause (2) provides that the disclosure of any information in good faith does not incur any civil or criminal liability and is not regarded as a breach of confidentiality, professional ethics or standards.

Subclause (3) confirms that a supporting agency which receives information is bound by any duty of confidentiality that applied to the supporting agency which provided the

information, with subclause (4) clarifying that such duty of confidentiality does not prevent the disclosure of such information to the court for an application or other proceedings under this Bill.

Part 4 — Restriction of offenders

Division 1 — Restriction orders

26. Continuing detention order

This clause provides that a continuing detention order is an order which requires the offender to be detained in custody for control, care or treatment, for an indefinite period, until rescinded by a further order.

27. Supervision order

Subclauses (1) and (2) provide that a supervision order is an order which requires the offender, when they are not in custody, to be subject to conditions stated in the order that the court considers appropriate, from a date stated in the order and for the period stated in the order.

Subclause (3) provides that, ordinarily, a supervision order cannot commence earlier than 21 days after the order is made. This is to allow for a range of factors to be considered, including the opportunity for the Commissioner of Police, under Part 5A of the *Community Protection (Offender Reporting) Act 2004*, to give the offender (who is deemed a reportable offender under that Act) the opportunity to make a submission as to why their photograph and locality should not be published on a website, as well as other matters to ensure the effective implementation of the supervision order (e.g. the installation of electronic monitoring devices or provision of suitable accommodation). However, nothing prevents the order commencing sooner, if the court is satisfied that the implementation of the order is practically feasible.

28. Court to give reasons for making restriction order

When making a restriction order, this clause requires the court to give detailed reasons for the making of the order.

29. Limitation on power to make or amend supervision order

This clause reverses the onus onto the offender to satisfy the court, on the balance of probabilities, that they will substantially comply with standard conditions, before a supervision order is made, confirmed or amended by the court.

Subclause (3) provides that this consideration does not apply to the making of an interim supervision order. This is because an interim supervision order is made to bridge the period of time until the court has made its decision in respect of a particular application.

30. Conditions of supervision order

One term is defined in this clause:

Make public means to provide to any representative of the media for publication or broadcast or to make publicly available through the internet.

A **standard condition** of a supervision order are those conditions listed in subclause (2) which must be included in every order, and includes:

(a) reporting to a community corrections officer;
(b) receiving visits from a community corrections officer;
(c) notifying a community corrections officer of any change of name, address or employment;
(d) being under the supervision of, and complying with any reasonable direction of, a community corrections officer;
(e) not leaving or staying out of Western Australia without the permission of a community corrections officer;
(f) not committing a serious offence (defined in clauses (3) and (5)); and
(g) being subject to electronic monitoring.

Subclause (3) provides for the inclusion of a requirement, at the court's discretion, that the person not make public any information or opinion in relation to a victim of a serious offences committed by the offender. In considering whether or not to impose such a requirement, subclause (4) requires the court to have regard to a number of factors, including: (a) the gravity and nature of the offences; (b) the likely impact on the victims if the offender provides or makes any statement or opinion; and (c) the public interest.

Subclause (5) provides that a supervision order may contain any other terms that the court thinks appropriate to adequately protect the community, to rehabilitate, care for, or treat the offender, or to adequately protect victims. In addition, subclause (6) provides that a supervision order also may include a curfew requirement (for a period specified) and that the photograph and locality of the offender not be published under Part 5A of the *Community Protection (Offender Reporting) Act 2004*.

31. Electronic monitoring

This clause provides for electronic monitoring as part of a supervision order.

Subclause (1) defines the term **approved** as meaning approved by the CEO.

Subclause (2) states the purpose of electronic monitoring, which is to enable the location of a person subject to a supervision order to be monitored.

Subclause (3) defines the powers of a community corrections officer in managing an offender subject to an electronic monitoring requirement. These powers include: (a) directing the offender to wear an approved electronic monitoring device; (b) directing the offender to permit the installation of an approved electronic monitoring device at their place of residence, or anywhere else specified; and (c) giving any other reasonable direction for the proper administration of electronic monitoring.

Subclause (4) provides that a community corrections officer may suspend electronic monitoring if satisfied that it is not practical or it is not necessary to subject the person to electronic monitoring.

32. Curfew

This clause provides for a curfew to be imposed as part of a supervision order.

Subclause (1) defines the term **specified** as meaning specified by a community corrections officer.

Subclause (2) states the purpose of curfew, which is to restrict the movements of an offender at times when there is a risk of committing a serious offence. Subclause (3) requires the offender to remain at the place specified by a community corrections officer, except for circumstances set out in subclause (5).

Subclause (4) specifies the allowable periods of curfew in any one day as being not less than two hours or any more than 12 hours. These provisions are consistent with orders contained in the *Sentencing Act 1995*, including pre-sentence orders, intensive supervision orders and conditional suspended imprisonment.

Subclause (5) sets out the circumstances under which an offender is permitted to leave a specified place during curfew. These circumstances include:

(a) to obtain urgent medical or dental treatment;
(b) averting or minimising a serious risk of death or injury to the offender or another person;
(c) where attendance elsewhere is required by order under a written law;
(d) for a purpose approved by a community corrections officer; or
(e) carrying out a direction of a community corrections officer.

Subclause (6) empowers a community corrections officer to give reasonable directions to the offender that are necessary for the proper administration of a curfew.

Where an offender is authorised under subclause (5) to leave the specified place during curfew, a community corrections officer is empowered by subclause (7) to give directions regulating:

(a) the time of departure;
(b) the period of leave;

(c) the time of return;
(d) the route and method of travel; and
(e) how the offender is to report their whereabouts.

The purpose of these restrictions is to make the offender accountable during the period of leave from a curfew and are consistent with the provisions of orders contained in the *Sentencing Act 1995*, including pre-sentence orders, intensive supervision orders and conditional suspended imprisonment.

33. Enforcement of electronic monitoring and curfew requirement

Subclause (1) defines the powers of a community corrections officer in relation to the retrieval of an electronic monitoring device. Firstly, the community corrections officer may direct the occupier of a place where the device is installed to give the device to a community corrections officer within a specified time; and secondly, the community corrections officer may enter the place to retrieve the device at any time.

Subclause (2) makes it an offence to fail to comply with the direction of a community corrections officer or hinder a community corrections officer for the purposes of subclause (1), punishable by a fine of $12,000 or imprisonment for 12 months.

Subclause (3) makes it an offence for a person to, without reasonable excuse, interfere with the operation of an electronic monitoring device, punishable by imprisonment for three years. For persons who commit this offence once they have reached 18 years of age, subclause (4) requires the court to impose a minimum penalty of imprisonment of at least 12 months, which cannot be suspended.

Subclause (5) defines the powers of a community corrections officer for the purpose of ascertaining an offender's compliance an electronic monitoring and curfew requirement. A community corrections officer may: (a) enter or telephone the place specified for the curfew; (b) enter and telephone the person's place of employment or any other place where the person is authorised or required to attend; and (c) question any person at any place referred to in (a) or (b).

Subclause (6) makes it an offence to hinder a community corrections officer, fail to answer a question put by a community corrections officer or knowingly giving an answer that is false or misleading for the purposes of subclause (5), punishable by a fine of $12,000 or imprisonment for 12 months.

Subclause (7) specifies how a person is to be charged when alleged to have committed an act or omission relating to electronic monitoring or curfew requirement in this clause, given that a person who is not subject to a supervision order could commit, and be charged, for such offences. If the person charged with the offence is the offender who is subject to a supervision order, subclause (7) requires that they be charged with the offence of contravening a supervision order (see clause 80). Whereas, if the person charged is not a person who is subject to a supervision order (e.g. occupier of a place where a device has been installed), they may be charged for an offence pursuant to this clause.

Division 2 — Applying for a restriction order

34. Terms used

Two terms are defined in this clause for the purposes of this Division:

Applying agency, in relation to a restriction order application, means —

(a) if the application is made by the Attorney General, the Department of Justice;
(b) if the application is made by the Director of Public Prosecutions, the Office of the Director of Public Prosecutions; and
(c) if the application is made by the State Solicitor, the State Solicitor's Office.

Evidentiary material, in relation to a restriction order application, means any of the following —

(a) a copy of every recorded statement, whether written or oral, by any person who may be able to give evidence that is relevant to the application, irrespective of whether or not it assists the case of the State or of the offender;

(b) a copy of every recording of evidence given by a person mentioned in paragraph (a), irrespective of whether or not it assists the case of the State or of the offender;

(c) if there is no statement or recording referred to in paragraph (a) or (b), a written summary of the evidence to be given by a person mentioned in paragraph (a);

(d) a copy of any document or object to which a statement or recording referred to in paragraph (a) refers;

(e) a copy of every other document or object that the State intends to tender in evidence at the hearing of the application; and

(f) a copy of every other document or object that may assist the offender's case.

35. Application for restriction order in relation to serious offender under custodial sentence

In respect of a serious offender under custodial sentence, who is not a serious offender under restriction (both terms are defined in clause (3)), subclause (1) provides that the State may apply to the Supreme Court for a restriction order.

Subclause (2) clarifies that an application under subclause (1) may be made regardless of when the custodial sentence was imposed. It also clarifies that the application continues whether or not the offender is in custody, in order to account for situations where the offender is released from custody prior to the application being determined.

Subclause (3) provides that an application under subclause (1) cannot be made unless there is a prospect of the offender being released from custody in the period of one year following the application. This may include a release to parole or the release at the end of the term of imprisonment.

Subclause (4) clarifies that the application made by the State to the Supreme Court need not specify what type of order is being sought.

36. Application for restriction order in relation to offender subject to supervision order

This clause deals with the situation where an offender is subject to a supervision order that is due to expire within one year, with subclause (1) providing that the State may apply to the Supreme Court for a restriction order in respect of the offender.

In this situation, subclause (2) requires the State to specify which type of restriction order is being sought, with subclause (3) providing that a restriction order granted under subclause (1) takes effect on the expiry of the current supervision order.

37. Provisions relating to restriction order applications

When the State makes an application to the Supreme Court for a restriction order, subclause (1) requires the application to be accompanied by any affidavits to be relied upon, with subclause (2) requiring the State to provide a copy of the application, plus any affidavits, to the offender, within seven days.

Subclauses (3) and (4) outline the mechanism by which the court can require the offender to appear before the Supreme Court – if the offender is not in custody, or may not be in custody at the time of the preliminary hearing, the State may apply for a summons or a warrant.

38. Application where offender discharged from sentence or supervision order

This clause provides that an application for a restriction order may proceed, despite the offender ceasing to be under a custodial sentence or subject to a supervision order.

39. State's duty of disclosure

This clause sets out the State's duty of disclosure. This duty falls upon the applying agency as defined in clause 34 and relates to evidentiary material, and any other prescribed document, that is in the possession of the applying agency.

Subclause (1) requires the State, as soon as practicable after the preliminary hearing, to give any prescribed document, or any evidentiary material (as defined in clause 34)

that is in the possession of the applicant that may be relevant to the application, to the offender.

Subclauses (2) and (3) require the State to give new evidentiary material that the applying agency under clause 11 receives or obtains after the preliminary hearing, but prior to the application for a restriction order being dealt with, as soon as practicable.

Subclause (4) clarifies that a requirement under this clause includes:

(a) giving a notice that describes the document or object, and where it can be inspected, if it is not practicable to copy the document or object referred to in paragraphs (d), (e) and (f) of clause 34;
(b) a copy of any statement or recording of a person that is inconsistent with a copy of a statement or recording of a person given previously;
(c) giving notice of the name and address (if known) of any person the applying agency thinks may be able to give evidence that may assist the offender's case, but from whom no statement or recording of the kind referred to in paragraph (a) or (b) of clause 34 has been obtained and a description of the evidence concerned.

Subclause (5) provides that the operation of this section is subject to:

(a) sections 19C and 106HB(3) of the *Evidence Act 1906*;
(b) any other written law that relates to the disclosure of specific information;
(c) the law on privilege; and
(d) the law on public interest immunity.

Subclause (6) provides that this section does not affect the operation of section 117 of the *Criminal Investigation Act 2006*.

40. Provision of evidentiary material to applying agency

Subclause (1) provides for an applying agency to request any evidentiary material that is in the possession of a supporting agency, any other person, body or agency, for the purpose of making an application for a restriction order. Subclause (2) requires a

supporting agency, any other person, body or agency to comply with a request from an applying agency.

Subclause (3) provides that the disclosure of any information in good faith does not incur any civil or criminal liability and is not regarded as a breach of confidentiality, professional ethics or standards.

Subclause (4) confirms that the applying agency is bound by any duty of confidentiality that applied to the supporting agency, other person, body or agency which provided the information, with subclause (5) clarifying that such duty of confidentiality does not prevent the disclosure of such information to the court for a restriction order application or to the offender.

41. Offender's duty of disclosure

One term is defined in this clause:

Expert evidence material means —

(a) a copy of every statement, recording or report the offender intends to adduce;
(b) written notice of the name and address (if known) of a person for whom the offender intends to call to give evidence; and
(c) a written description of the evidence the witness intends to give, at a hearing for an application.

Subclause (2) sets out the timeframe, which is at least 28 days before the day fixed by the court, for which the offender must lodge with the court, and give a copy to the State, any expert evidence material in relation to the application, plus written notice of any objection the offender has to evidence that may be adduced or given by a witness, including the grounds for the objection, prior to the date fixed for the hearing of a restriction order application.

Subclause (3) requires the offender, if further expert evidence material is obtained or received, to lodge it with the court and give a copy to the State as soon as practicable.

42. Orders as to disclosure requirements

One term is defined in this clause:

Disclosure requirement means a requirement under section 39 or 41 to disclose material.

Subclause (2) allows a court to make an order under subclause (3) on its own volition or upon an application by a party to the application that:

(a) dispenses with all or part of the requirement, if it is satisfied that there is a good reason to do so and that no miscarriage of justice will result;
(b) shortens or extends the time for obeying the requirement; or
(c) amends or cancels an order made previously under this section, whether by the court or some other court; or
(d) addresses any other matter that the court considers just.

Subclause (4) allows an application for an order under this section to be made without notice being given to the offender and that the court may deal with the application in the absence of the offender.

Subclause (5) requires that where an application for an order is made without giving notice to the offender, the application must not be dealt with in open court, and that only the applicant and other persons permitted by the court may be present.

Subclause (6) provides that if an order in the absence of an offender, the order must not be given or disclosed to the offender unless the court gives permission to do so.

43. Fixing day for preliminary hearing

Subclause (1) requires the court, upon an application for a restriction order, to set a day for a preliminary hearing, with subclause (2) requiring the State to give notice to the offender of the date fixed for the preliminary hearing within seven days, or within any other period specified by the court.

44. Offender may file affidavits in response

This clause provides the offender with the opportunity to lodge affidavits in their defence for the preliminary hearing. In doing so, copies must be provided to the State at least seven days prior to the preliminary hearing.

45. Contents of affidavit

This clause provides that the contents of any affidavits used in a preliminary hearing must be confined to evidence the person making it could give orally. The exception to this is where the affidavit contains statements based on belief, provided the source of the information and grounds for the belief are stated.

46. Preliminary hearing

Subclause (1) outlines the test that must be met at a preliminary hearing in order to proceed to have the matter set down for a hearing of the application for a restriction order – the test being that there are reasonable grounds for believing that the court might, in accordance with clause 7, find that the offender is a high risk offender.

Subclause (2) provides that if the court is satisfied as described in subclause (1), the court must fix a day for the hearing of the restriction order application. In addition, the court:

- must order that the offender undergo examination by a psychiatrist and a qualified psychologist for the purpose of preparing reports, indicating the level of risk that, without a restriction order, the offender will commit a serious offence, which are to be used in the hearing of the application for a restriction order; and
- upon an application made by the State or the offender, may order that the offender undergo examination by a person or body for the purpose of preparing a report, addressing questions or issues, as determined by the court, which is to be used in the hearing of the application for a restriction order.

Furthermore, if the offender may be released from custody before the application is finally decided, the court may order that the offender be detained in custody.

Conversely, if the offender is not in custody, the court may order that the offender be detained in custody.

Subclause (3) allows the court to either defer fixing a day for, or adjourn, the hearing of the restriction order application where the offender has been charged with another offence which has not been dealt with and that the court is of the opinion that the restriction order application should not be heard until the charge has been dealt with.

47. Discontinuing restriction order application

This clause provides the mechanism for discontinuing an application for a restriction order, which is by lodging a notice of discontinuance with the court and by giving a copy to the offender. In the event of a discontinuance, any order requiring the offender to be detained in custody is discharged when the court makes an order in the terms of the notice of discontinuance.

Division 3 — Making a restriction order

48. Restriction orders

This clause sets out the types of orders that the court must make if it finds that the offender is a high risk offender and that, in deciding which order to make, the adequate protection of the community is to be the paramount consideration. The orders the court may make are a continuing detention order or a supervision order.

Division 4 — Amending a supervision order

49. Application to amend conditions of supervision order

Subclause (1) provides that the offender subject to a supervision order or the CEO (with the Attorney General's consent) may make an application to the Supreme Court to amend a supervision order.

Subclauses (2) requires the offender to give notice of the application to the Attorney General and the CEO, while subclause (3) requires the CEO to give notice of the application to the offender.

50. Amendment of conditions of supervision order

Upon receipt of an application to amend the conditions of a supervision order, and provided the court is satisfied, on the balance of probabilities that the offender will substantially comply with the standard conditions, subclause (1) empowers the court to amend a supervision order. However, this power is not to be exercised unless the court is satisfied that the offender is not able to comply with a condition because of a change in circumstances or that an amendment is necessary for any other reason.

In addition, subclause (2) requires the court to be satisfied that any amended conditions must provide adequate protection of the community and be reasonable in all the circumstances.

Division 5 — Contravening a supervision order

51. Warrant because of contravention

Subclause (1) provides that a police officer or community corrections officer may apply to a magistrate for a warrant where there is a reasonable suspicion that the offender subject to a supervision order is likely to contravene, is contravening, or has contravened, a condition of the supervision order. Subclause (2) requires the police officer or community corrections officer applying to the court for a warrant to advise the State as soon as possible.

Subclause (3) provides that if the magistrate is satisfied that there are reasonable grounds for the suspicion in subclause (1), a warrant must be issued for the offender's arrest and that the offender be brought before the Supreme Court for consideration. The warrant, as required by subclause (4), must state, in general terms, the suspected or anticipated contravention, with subclause (5) providing that the magistrate may only issue a warrant if the application is supported by evidence on oath.

52. Order permitting publication of offender's photograph

Subclause (1) provides that if a magistrate issues a warrant for an offender's arrest because of a contravention of a supervision order, the magistrate may also order that

until the offender is arrested, or appears before the Supreme Court, a photograph of the offender may be published under section 85G of the *Community Protection (Offender Reporting) Act 2004*.

Subclause (2) provides that the powers exercised by a magistrate in subclause (1) apply despite any condition in a supervision order or any other order of a court which would otherwise prohibit the publication of the offender's photograph.

The power to make an order permitting the publication of the offender's photograph under subclause (1) can only be exercised where the magistrate considers it necessary in the interests of justice and for the adequate protection of the community.

53. State may seek orders

This clause allows the State to apply to the court for certain orders during contravention proceedings.

Subclause (1) provides that this clause applies to an offender who is:

(a) brought before the Supreme Court under a warrant issued because of a suspected or anticipated contravention of a supervision order;
(b) an offender who is released from court during contravention proceedings who is alleged to have further breached the supervision order; or
(c) an offender who is charged with contravening a supervision order.

During proceedings, subclause (2) provides that the State may apply to the court for an order for continuing detention, or to amend or extend the period of a supervision order. The State is also empowered to apply for an order which requires the offender to be detained in custody until the application is decided. Subclause (3) requires the State to specify what order is being sought.

54. Reports

To inform the court on whether or not to make an order in respect of the offender, paragraph (a) allows the court to order that the offender undergo examination by one or more qualified experts (i.e. a psychiatrist or a qualified psychologist) to prepare a

report indicating the level of risk that, without a restriction order, the offender will commit a serious offence, while paragraph (b), upon an application made by the State or the offender, allows the court to order that the offender undergo examination by a person or body engaged by the chief executive officer to examine the offender and prepare a report addressing questions or issues, as determined by the court.

55. Court to make orders in certain cases

Subclause (1) provides that if a court is satisfied, on the balance of probabilities, that the offender ***has*** contravened, or ***is*** contravening, the supervision order, it must either rescind the supervision order and make a continuing detention order, affirm the supervision order, or amend it, by altering its conditions and/or extending the period of time the supervision order is to be in place.

Subclause (2) is slightly different, by providing that if a court is satisfied, on the balance of probabilities, that the offender is ***likely to*** contravene the supervision order, it must either rescind the supervision order and make a continuing detention order, or amend it, by altering its conditions and/or extending the period of time the supervision order is to be in place.

Subclause (3) requires the court, in deciding which order to make, to have adequate protection of the community as the paramount consideration.

56. Orders made during contravention proceedings

This clause outlines the orders that the Supreme Court may make during proceedings in respect of an alleged breach of a supervision order.

Subclause (1) provides that this section applies during **pending proceedings** – i.e. where contravention proceedings have not yet been finalised.

Subclause (2) provides that, at any time during pending proceedings, the court may release the offender or detain them in custody.

Subclause (3) further provides that the court must not release the offender, unless it is satisfied, on the balance of probabilities, that releasing the offender is justified by

exceptional circumstances and that the offender will substantially comply with the standard conditions, or amended standard conditions, of the supervision order.

Subclause (4) places the burden of proof on the offender to demonstrate that they will substantially comply with the standard conditions of the supervision order.

Subclause (5) allows the court to satisfy itself, by any information put before it, that there are exceptional circumstances justify the offender's release.

Subclause (6) requires the court, in deciding whether to detain or release the offender, to give paramount consideration to the protection of the community.

Subclause (7) sets out the conditions that apply, and the actions that may be taken, if the court releases the offender during pending proceedings. If the court releases the offender, they remain subject to the supervision order, as well as any additional requirements contained in an interim order made by the court. In the event that the offender is alleged to have further breached the supervision order or interim order, the court may issue a warrant for his or her arrest.

Division 6 — Supervision order extended due to imprisonment

57. Extension of supervision order

This clause provides that if an offender who is subject to a supervision order is sentenced to a term of imprisonment for any offence, irrespective of when the offence was committed, the supervision order is extended by the period that the offender is in custody serving the sentence of imprisonment.

Division 7 — Interim supervision orders

58. Interim supervision order

This clause provides for the making of an interim supervision order in all circumstances where an application under this Bill is pending, and where the offender to whom the proceedings relate is not in custody, and where the court is satisfied that, to ensure adequate protection of the community, it is desirable to make such an order.

This provision accounts for situations like *State of Western Australia v Narkle [No 5] [2017] WASC 46*, where a further application against an offender under a supervision order was not yet disposed of, and the current supervision order was due to expire. An interim supervision order can now be sought to bridge the period pending the court's decision.

Subclause (1) defines the term **specified** as meaning specified by the court in an order made under this section.

Subclause (2) provides that this section applies to proceedings which have not yet been finalised, referred to as **pending proceedings**, where the offender is not in custody and the court is of the opinion that it is desirable to make a supervision order to ensure adequate protection of the community. Pending proceedings may include: (a) an application for a restriction order; (b) an application to amend a supervision order; and (c) contravention proceedings.

Subclause (3) applies to a situation where an offender is subject to a supervision order which may expire before the pending proceedings are finally determined. In these circumstances, the court is empowered to order that the supervision order is to continue until the pending proceedings are determined, or until another specific date.

Subclause (4) applies to a situation where an offender has been subject to a supervision order which has expired. In these circumstances, the court is empowered to order that the supervision order be reinstated, with effect from a specific date, and is to continue, until the pending proceedings are determined, or until another specific date.

Subclause (5) applies to a situation where an offender has never been subject to a supervision order. In these circumstances, the court is empowered to order that the offender is to be subject to conditions, consistent with a supervision order, with effect from a specific date, until the pending proceedings are determined, or until another specific date.

Subclause (6) confirms that provisions that govern a supervision order also apply to an interim supervision order.

Division 8 — Victim submissions

59. Terms used

Two terms are defined in this clause:

Make available means to provide access to an offender, or a person acting on behalf of, or representing, an offender.

Relevant application means an application for any of the following —

(a) a restriction order;
(b) an application to amend the conditions of a supervision order;
(c) an application for an order made as part of contravention proceedings; and
(d) an application for the review of an offender's continuing detention.

60. Making victim submissions

Subclause (1) provides that the victim of a serious offence may make a submission, which must be in writing, to comply with subclause (3), in respect of the need to ensure their adequate protection, to the court dealing with a relevant application.

Subclause (2) provides for a person, other than the victim, to make a submission on the victim's behalf, if the victim cannot do so for themselves, because of various factors, including age, disability or if the court is satisfied that it is appropriate.

61. Availability of victim submissions

This clause provides that a court must make available a copy of the victim submission to the offender, or a person acting on behalf of, or representing, the offender, if the victim consents to the submission being made available. The court must also give the victim the opportunity to amend or withdraw their submission.

62. Court can have regard to victim submissions

Subclause (1) provides that the court may have regard to any victim submission made, subject to subclauses (2) and (3).

Subclause (2) requires the court to disregard a victim submission if it has not been made available at the hearing of the application or if it has been withdrawn. If a victim has amended their submission, subclause (3) requires the court to only have regard to the amended submission.

Part 5 — Review of detention

63. Purpose of this Part

This clause states that the purpose of Part 5 is to ensure that the offender's continued detention is subject to regular reviews.

64. Review — periodic

This clause requires the State to apply to the Supreme Court, in the first instance, once the offender has been in continuing detention for one year. In respect of subsequent reviews, the State is required to apply to the Supreme Court two years after the most recent review, which may be a review initiated by the State or the offender.

The effect of subclause (3) is that any time the offender is serving under a term of imprisonment is not counted as part of the reckoning to trigger an application for a review.

65. Review — application by offender subject to order

This clause provides the ability for an offender who is subject to a continuing detention order, with approval of the court, and provided the court is satisfied that there are exceptional reasons, to the Supreme Court for a review of the detention.

However, an application may only be made by the offender once the period of one year has passed since the State made its most recent review under clause 64. A

consequence of a review made by the offender is that the next review by the State is not to be made for two years.

This clause also requires the Principal Registrar of the court to immediately give a copy of the application to the State.

66. Dealing with application

This clause requires the court to give directions for hearing an application for a review of detention made by the State or the offender. Subject to the court's power to adjourn the hearing of the application, the application must be heard, and the review carried out as soon as practicable.

67. Reports

Subclause (1) requires the CEO, unless otherwise ordered by the court, to engage one or more qualified experts (i.e. a psychiatrist or a qualified psychologist) to examine the offender and prepare a report indicating the level of risk that, without a restriction order, the offender will commit a serious offence.

Subclause (2), upon an application made by the State or the offender, allows the court to require the CEO to engage a person or body to examine the offender and prepare a report addressing questions or issues, as determined by the court.

68. Review of detention under continuing detention order

This clause sets out the options available to the court as part of the review. If the court does not find that the offender remains a high risk offender, it must rescind the continuing detention order. However, if the court finds that the offender remains a high risk offender, the court must either confirm the continuing detention order or rescind the continuing detention order and make a supervision order. However, in deciding whether to make a supervision order, the need for the adequate protection of the community is the paramount consideration.

Part 6 — Appeals

69. Appeals

Subclause (1) provides that the State or the offender may appeal to the Court of Appeal against a decision made under this Bill, with subclause (2) providing that unless otherwise ordered by the Court of Appeal, an appeal cannot be commenced more than 21 days after the date of decision made under this Bill.

Subclause (3) provides the following decisions do not give rise to an appeal:

(a) a decision on an order in respect of a disclosure requirement under clause 42(3);
(b) a decision on an order made at a preliminary hearing under clause 46(2);
(c) a decision on an order permitting publication of an offender's photograph under clause 52(1);
(d) a decision under section 19C of the *Evidence Act 1906* giving, or refusing, leave to disclose, or require disclosure of, a protected communication (as defined in section 19A of that Act) in or in connection with a restriction order application;
(e) a decision on an appeal under this Part.

70. Appeal does not stay decision

This clause provides that an appeal against a decision made under this Bill does not stay the operation of the decision, unless the Court of Appeal orders otherwise. It also provides that if the Court of Appeal's decision may result in the offender being detained in custody, it may order the offender be detained in custody until the appeal has been determined.

71. Dealing with appeal

This clause provides that an appeal is by way of a rehearing, with the Court of Appeal vested with the same powers as the court which made the decision. The Court of Appeal may also draw inferences of fact, consistent with the findings of the court making the original decision and that it may receive further evidence on special grounds.

Part 7 — Reports

72. Terms used

Three terms are defined in this clause:

Report means a report prepared by a qualified expert, person or body for a preliminary hearing, contravention proceedings or a review of continuing detention.

Reporter means a qualified expert under clause 74, or a person or body under clause 75, engaged for the purpose of preparing a report.

Subject means the offender in respect of whom a report is to be prepared under clause 74 or 75.

73. Authority to examine

This clause authorises a reporter to examine an offender and to provide a report in accordance with clause 74 or 75.

74. Preparation of report by qualified expert

This clause deals with the preparation of a report by a qualified expert (i.e. a psychiatrist or a qualified psychologist), who has been ordered or engaged, for the purpose of examining the offender and providing a report to the court to indicate the level of risk that, without a restriction order, the offender will commit a serious offence. This report must be prepared, regardless of the level of cooperation by the offender.

This clause also requires the qualified expert to have regard to any report or information provided by the CEO, including, but not limited to, any medical, psychiatric, prison or other relevant report that the chief executive officer has access to.

75. Preparation of other report

This clause deals with the preparation of a report by a person or body, who has been ordered or engaged, for the purpose of examining the offender and providing a report

to the court to address questions or issues, as determined by the court. This report must be prepared, regardless of the level of cooperation by the offender.

This clause also requires the person or body to have regard to any report or information provided by the CEO, including, but not limited to, any medical, psychiatric, prison or other relevant report that the CEO has access to, which may be relevant to the questions or issues to be addressed.

76. CEO to provide information

Subclause (1), for the purposes of a report prepared under clause 74, requires the CEO to provide the qualified expert with any report or information, including, but not limited to, any medical, psychiatric, prison or other relevant report that the CEO has access to.

Subclause (2), for the purposes of a report prepared under clause 75, requires the CEO to provide the person or body with any report or information, including, but not limited to, any medical, psychiatric, prison or other relevant report that the CEO has access to, which may be relevant to the questions or issues to be addressed.

Subclause (3) requires the CEO to redact particulars that may identify a person other than the offender, that do not relate to the offender or are not relevant to the questions or issues to be addressed under clause 75.

Subclause (4) requires the CEO to provide a copy of any document provided to a qualified expert, person or body, to the State.

77. CEO may seek information

For the purpose of providing information to a qualified expert, person or body under clause 76, this clause empowers the CEO to request, from a person in possession of, any medical, psychiatric, prison, other relevant report or information which may be relevant to questions or issues to be addressed.

Any person requested to provide such information is required to comply, despite any other written law or duty of confidentiality, and is exempt from any administrative, civil

or criminal liability. If a person refuses to provide such information, the CEO may apply to the court for an order requiring the release of such information.

78. Copies of report to State and subject

A qualified expert (under clause 74) or another person, at the request of the State or the offender (under clause 75), may be ordered by the Supreme Court to examine and provide a report to the court as part of a preliminary hearing, contravention proceedings or a review of continuing detention.

Subclause (1) requires a person who examines the offender to provide a copy of the report to the State within seven days after finalisation of the report and subclause (2) requires the State to provide a copy of the report to the offender within three days of receipt of such report.

Part 8 — General

79. Mentally unfit offender

This clause uses the term “found not mentally fit”, as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996*, and provides that a court may make an order under this Bill in respect of an offender who has been convicted of a serious offence and sentenced to a term of imprisonment, even if, at a later date, the offender has been found not mentally fit to stand trial or, if charged with a future offence, would be likely to be found not mentally fit to stand trial. A relevant case is *Director of Public Prosecutions (WA) v Pindan [2012] WASC 13*.

80. Offence of contravening supervision order

This clause outlines offence provisions with respect to a supervision order.

Subclause (1) creates the offence of contravening a requirement of a supervision order, punishable by imprisonment for 3 years.

Subclause (2) requires, if the contravention under subsection (1) is for unlawfully interfering with an electronic monitoring device, that the offender be sentenced to a

term of imprisonment of at least 12 months, and that this penalty is not to be suspended.

If a police officer suspects, on reasonable grounds, that an offender has contravened a requirement of a supervision order, subclause (3) empowers the police officer to arrest the offender, without the need for a warrant. If the offender is then charged with contravening a supervision order, subclause (4) requires the police officer to notify the State as soon as practicable.

81. Procedure on some charges of offences under s. 80

This clause sets out the procedure for dealing with charges for offences under clause 80.

Subclause (1) provides that a charge of contravening of supervision order is to be dealt as if it were a simple offence.

Despite subclause (1), subclause (2) provides that if proceedings have been commenced in the Supreme Court under Part 4 Division 5 (i.e. contravention proceedings) in relation to the same alleged contravention, the prosecution of a contravention of a supervision order may be commenced in the Supreme Court, rather than in the Magistrates Court, to avoid both courts having to determine the same facts.

Subclause (3) provides that only an authorised officer, as defined in the *Criminal Procedure Act 2004*, may commence a prosecution for the contravention of a supervision order in the Supreme Court. Such authorised officers include the Attorney General, the Solicitor General of Western Australia, the State Solicitor and authorised members of the State Solicitor's staff (as provided for by amendments contained in clause 98), and the Director of Public Prosecutions and authorised members of the Director of Public Prosecutions' staff.

In subclause (4), paragraph (a) provides for a charge of an offence of contravening a supervision order under clause 80 to be transferred to the Supreme Court, upon application by a police officer, if it commenced in the Magistrates Court. If the charge is transferred to the Supreme Court, paragraph (b) requires that the charge be

prosecuted by the State and must be dealt with summarily by a judge of the Supreme Court, with the exception that fees may not be charged or costs awarded, as outlined in paragraph (c).

Also in subclause (4), paragraphs (d) and (e) are concerned with ensuring that simultaneous proceedings under Part 4 Division 5 have consistent outcomes and do not result in unnecessary duplication of effort for the court, witnesses and other parties. It also ensures that there is no duplication of punishment for the offender. Paragraph (f) provides that the Supreme Court, if it imposes a fine on the offender for the contravention of a supervision order, may also order that the person is to be imprisoned, if the fine is not paid before a date set by the court, until the fine is discharged.

Subclauses (5), (6) and (7) set out the process for appealing against a decision of the Supreme Court in proceedings on a charge of contravening a supervision order under clause 80.

82. Proceedings to be criminal proceedings

Subclause (1) provides that proceedings under this Bill are to be taken to be criminal proceedings for all purposes, with subclause (2) clarifying that the standard of evidence is not to be higher than that required under clause 7(1).

83. Deciding certain matters on the papers

Subclause (1) defines the term **relevant proceeding** as a judicial proceeding for a serious offence or another offence that is considered relevant by the court, in the context to the matter for decision before the court.

Subclause (2) provides that this clause applies to the manner in which a court decides whether grounds are met at a preliminary hearing, for a hearing to consider an application for a continuing detention order or supervision order or the amendment of a supervision order.

Subclause (3) provides that the court may decide entirely or partly from a consideration of the documents filed, without the offender or witnesses appearing.

In deciding a matter on the papers, subclause (4) provides that a court may receive into evidence:

(a) any document relevant to the antecedents or criminal record of the offender;
(b) anything relevant in the official transcript of any judicial proceedings against the offender;
(c) any relevant material tendered, or informing the court, in a relevant proceeding against the offender; or
(d) any relevant material referred to in clause 7(3), for which the court must have regard to in finding the offender to be a high risk offender.

84. Evidence in certain hearings

Subclause (1) defines the term **relevant proceeding** as a judicial proceeding for a serious offence or another offence that is considered relevant by the court, in the context to the matter for decision before the court.

Subclause (2) provides that this clause applies to: (a) an application for a restriction order; (b) reviews of continuing detention; and (c) applications for orders as part of contravention proceedings.

Subclause (3) provides that the court must hear admissible evidence called by the State and the offender, if the offender chooses call or give evidence.

Subclause (4) provides that ordinary rules of evidence apply, with subclause (5) allowing the court to receive in evidence anything relevant to the offender's antecedents or criminal record, anything relevant contained in the official transcript or material tendered in relevant proceedings or other relevant material referred to in clause 7(3).

85. Court may give directions

This clause provides that the court may give directions in relation to evidence received, or to be received, or in relation to the conduct of a proceeding under this Bill.

86. Appearance at hearings

This clause confirms that an offender is entitled to appear at the hearing for a continuing detention order or supervision order and, in addition, may also appear at the review of a continuing detention order. Finally, this clause empowers the court to direct an offender appear by either audio or video link.

87. Warrant of commitment upon order for detention

This clause provides that if a court orders that an offender be detained in custody, it must issue a warrant for the offender's apprehension and, if necessary, detention in a prison under the *Prisons Act 1981*.

88. Protection from personal liability

This clause is designed to protect the persons listed in subclause (1) against any civil action for any act or omission done in good faith, while performing a function under this Bill.

89. Approved forms

This clause empowers the CEO to approve forms used for the purposes of this Bill.

90. Regulations

This clause provides for the Governor to make regulations to prescribe matters that are required or permitted by this Bill.

Part 9 — Consequential amendments to other Acts

Division 1 — *Community Protection (Offender Reporting) Act 2004* amended

The amendments in this Division provide for the publication of information about offenders who are deemed to be reportable offenders.

91. Act amended

This clause provides that this division amends the *Community Protection (Offender Reporting) Act 2004*.

92. Section 85A amended

Subclause (1) deletes the definition of "DSO supervision order", with subclause (2) replacing this reference with the equivalent order under this Bill, specifically "HRO supervision order".

Subclause (2) also inserts a new term:

Serious sexual offence which is defined by reference to the offences specified in Schedule 1, with the exception of the offences listed, as these are not sexual offences. The definition of serious sexual offence is expanded to also include:

(a) an offence that has been repealed, if the person's actions, or failure to take actions, equate to a serious sexual offence listed in Schedule 1 (excluding non-sexual offences);
(b) an offence of conspiracy, attempt or incitement to commit a serious sexual offence;
(c) if the person's actions, or failure to take actions, constitute an offence against a law of the Commonwealth or of any place outside of Western Australia, provided it falls within the scope of a serious sexual offence; or
(d) an offence against the law of the Commonwealth if the offence is of a sexual nature, the penalty for the offence is imprisonment for not less than seven years and the offence is prescribed to be a serious sexual offence.

93. Section 85G amended

Section 85G(2)(a) empowers the Commissioner of Police to publish the photograph and the locality of a person who is subject to a DSO supervision order.

This clause deletes section 85G(2)(a), including reference to “DSO supervision order”, and replaces it with the equivalent term under this Bill, namely “HRO supervision order”. The structure of proposed section 85G(2)(a) sets out the various conditions that must be met for the Commissioner of Police to publish the photograph and the locality of a person who is subject to an HRO supervision order, but does not otherwise alter the current drafting.

94. Section 85H amended

For the purpose of the Commissioner of Police removing the photograph and locality of a reportable offender from the website who ceases to be subject to such order, this clause replaces the term “DSO supervision order” with the equivalent term under this Bill, namely “HRO supervision order”, in section 85H(2)(b).

95. Section 85I amended

For the purpose of the Commissioner of Police deciding whether or not to publish, or remove, a reportable offender’s details from a website, this clause replaces the term “DSO supervision order” with the equivalent term under this Bill, namely “HRO supervision order”, in section 85I(2)(a)(iii).

Division 2 — *Criminal Procedure Act 2004* amended

96. Act amended

This clause provides that this division amends the *Criminal Procedure Act 2004*.

97. Section 51 amended

This clause amends section 51(5A), which requires the offender to appear in person or by video link or audio link, to replace the reference to the offence of contravention of a supervision order under section 40A of the *Dangerous Sexual Offenders Act 2006*

with the equivalent offence provision under this Bill, specifically "*High Risk Offenders Act 2019* section 80(1)".

98. Section 80 amended

This clause inserts a new paragraph (ca) into subsection 80(2) to empower a member of the State Solicitor's staff, appointed in writing by the State Solicitor, as an authorised officer, for the purpose of conducting prosecutions in a superior court, specifically, the Supreme Court.

Division 3 — *Freedom of Information Act 1992* amended

The consequential amendments contained in this Division complement the provisions contained in clause 13 to limit the application of the *Freedom of Information Act 1992* (FOI Act).

99. Act amended

This clause provides that this division amends the *Freedom of Information Act 1992*.

100. Schedule 2 amended

Section 10(1) of the FOI Act provides that "[a] person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act". The Glossary of the FOI Act defines an **exempt agency** as a person or body mentioned in Schedule 2 and includes staff under the control of the person or body.

Clause 100 amends Schedule 2 in order to make the High Risk (Sexual and Violent) Offenders Board an exempt agency and the State Solicitor an exempt agency, but only in the case of the State Solicitor in relation to documents originating with or received by the State Solicitor in connection with functions under the *High Risk Offenders Act 2019*.

101. The Glossary amended

Clause 101 amends the Glossary of the FOI Act for the purpose of making the State Solicitor an exempt agency.

Division 4 — *Sentence Administration Act 2003* amended

102. Act amended

This clause provides that this division amends the *Sentence Administration Act 2003*.

103. Section 50 amended

This clause amends section 50(ca) by replacing the current reference to a continuing detention order with the equivalent provision under this Bill. This has the effect of disqualifying an offender subject to a continuing detention order applying to the Prisoners Review Board for a re-entry release order.

104. Section 74A amended

This clause deletes the definition of “serious violent offender”, which is no longer relevant, given the expansion of Post Sentence Supervision Orders to include offenders convicted of certain sexual offences. This clause inserts two new terms, “serious offence” and “serious offender under restriction”, both of which are defined in clause 5 and clause 3, respectively.

Finally, the word “violent” is deleted from the definition of prisoner to reflect the expansion of the scope of offences away from only serious violent offences.

105. Section 74B amended

This clause restructures section 74B by creating a new subsection (1), which contains current considerations in paragraphs (a) to (h). The word “violent” is also deleted from paragraphs (a) and (f) to reflect the expansion of the scope of offences away from only serious violent offences.

Subsection (2) will be inserted to ensure that a Post Sentence Supervision Order cannot address any perceived inadequacy in a sentence imposed by a court, which would be an impermissible intrusion by the Executive into decisions made by a court.

This is achieved by inserting an explicit provision that states that punishment or deterrence of offences is not a consideration in making a Post Sentence Supervision Order.

106. Section 74D amended

Subsection (3) will be inserted to ensure that a Post Sentence Supervision Order cannot address any perceived inadequacy in a sentence imposed by a court, which would be an impermissible intrusion by the Executive into decisions made by a court.

This is achieved by requiring the Prisoners Review Board to make a Post Sentence Supervision Order if it considered necessary to protect the community from further offending by the offender.

This clause also inserts a new provision which prevents the Prisoners Review Board from making a Post Sentence Supervision Order if the offender is subject to a continuing detention order or supervision order. This is to prevent an offender becoming subject to two, potentially conflicting, orders.

107. Section 74E amended

This clause amends the current fixed period of two years that applies to a Post Sentence Supervision Order, by affording the Prisoners Review Board the flexibility to specify a period of not less than six months and not more than two years.

108. Section 74G amended

This clause deletes provisions to ensure that a Post Sentence Supervision Order cannot address any perceived inadequacy in a sentence imposed by a court, which would be an impermissible intrusion by the Executive into decisions made by a court.

This is achieved by removing provisions that may be considered punitive, specifically, requirements that the offender: (a) undertake community corrections activities; (b) seek or engage in gainful employment or in vocational training; or (c) engage in gratuitous work for an approved organisation.

109. Section 74J amended

In this clause, a new subsection (3) is inserted into section 74J to provide that if an offender who is subject to a Post Sentence Supervision Order becomes subject to a continuing detention order or supervision order, the Post Sentence Supervision Order is cancelled by operation of this new subsection. This is to prevent an offender becoming subject to two, potentially conflicting, orders.

As a result of the newly inserted subsection 74K(3), above, subsection (2) is amended to confine its context to subsection 74K(2), and not the entire section 74J.

110. Section 74K replaced

This clause deletes section 74K and replaces it with a more clearly worded section to clarify that if a Post Sentence Supervision Order is cancelled because an offender is sentenced to a term of imprisonment, a subsequent Post Sentence Supervision Order may be made. It also clarifies that the subsequent Post Sentence Supervision Order is not to be for a period longer than the period remaining on the cancelled Post Sentence Supervision Order. Finally, it clarifies that a Post Sentence Supervision Order cannot be imposed during the period for which an offender is released on parole.

111. Section 74L replaced

This clause removes the summary conviction penalty for a breach of a Post Sentence Supervision Order. The new penalty of imprisonment for three years makes this penalty consistent with the penalty for a contravention of a supervision order made by the Supreme Court.

112. Section 103 amended

This clause is intended to ensure that Post Sentence Supervision Orders, which are made by the Prisoners Review Board, are not made by a Board constituted by a judge vested with federal jurisdiction.

This clause requires the Chairperson of the Prisoners Review Board to be a person who has served, or is eligible to serve, as a judge of the District Court of Western Australia, the Supreme Court of Western Australia or another State or Territory, the High Court of Australia or the Federal Court of Australia.

In addition, this clause provides that if the person being nominated holds a judicial office, they must consent in writing to being nominated and, upon being nominated, must retire from that judicial office.

113. Section 119 amended

This provision allows the Prisoners Review Board to provide information in its capacity as a supporting agency to other supporting agencies, as well as to provide information to the State for the purposes of making an application or taking proceedings under this Bill.

114. Schedule 4 deleted

This clause deletes Schedule 4, as references to serious offences for the purposes of a Post Sentence Supervision Order are now contained in Schedule 1 of this Bill. This means that a person convicted of such offences may be considered for a restriction order under this Bill, as well as by the Prisoners Review Board for a Post Sentence Supervision Order. However, the effect of clause 106 means that a Post Sentence Supervision Order cannot be made in respect of an offender who is subject to a restriction order.

Division 5 — Other Acts amended

115. *Bail Act 1982* amended

This clause amends various references to, and definitions contained in, the *Dangerous Sexual Offenders Act 2006*, which are contained in the *Bail Act 1982*.

Firstly, Schedule 1 Part C clause 3D(1) is amended as follows:

(a) to delete the definition of "section 40A offence" and replace it with the equivalent offence provision under this Bill, specifically, an offence under section 80(1); and
(b) in the definition of victim, reference to the definition contained in section 3(1) of the *Dangerous Sexual Offenders Act 2006* is replaced by reference to the definition contained in section 3 of this Bill.

Secondly, in Schedule 1 Part C clauses 3D(2), (3) and (6), references to "section 40A offence" are replaced with the equivalent offence provision under this Bill, specifically, "section 80 offence".

Finally, the heading to Schedule 1 Part C clause 3D is amended to read "Bail in cases under *High Risk Offenders Act 2019* section 80".

116. *Director of Public Prosecutions Act 1991* amended

As the Attorney General may authorise the Director of Public Prosecutions, under subclause 11(2), to make applications or take proceedings under this Bill, this clause inserts a new section 15A into the *Director of Public Prosecutions Act 1991* to provide that it is a function of the Director to make such applications and take such proceedings in the name of the State.

117. *Prisons Act 1981* amended

This clause amends the definition of victim in section 113B(1)(ba) of the *Prisons Act 1981* by replacing the reference to "serious sexual offence", defined in the *Dangerous Sexual Offenders Act 2006*, which is to be repealed by this Bill, with a new term "serious offence", contained in clause 5 of this Bill.

118. *Sentencing Act 1995* amended

Subclause (2) amends the *Sentencing Act 1995* by replacing the reference to Schedule 4 of the *Sentence Administration Act 2003* with Schedule 1 to this Bill.

Subclause (3) replaces current subsections 97A(2) and (3) with new subsections that allow a court sentencing an offender to imprisonment for an indictable offence, which:

(a) involved the use of a firearm against another person; or
(b) involved serious violence against another person; or
(c) resulted in serious harm, including death, to another person,

to declare such an offence to be a serious offence for the purpose of being eligible to be considered for a continuing detention order, supervision order or Post Sentence Supervision Order.

119. Various references to *Dangerous Sexual Offenders Act 2006* replaced

The table in this clause identifies and replaces references to the *Dangerous Sexual Offenders Act 2006*, which will be repealed by this Bill, with the *High Risk Offenders Act 2019*.

Part 10 — Repeal and transitional provisions

120. Terms used

As the *Dangerous Sexual Offenders Act 2006* will be repealed by this Bill, the terms defined in this clause are used to assist in the interpretation of the transitional provisions.

121. Act repealed

This provision provides that the *Dangerous Sexual Offenders Act 2006* is repealed.

122. Completion of things commenced

This clause provides for the continuation of, and determination of, any application made, appeal lodged or other proceedings taken, irrespective of the applicant, as if it was made under a corresponding provision of this Bill, by or under the authority of the Attorney General, as provided for in clause 11.

123. Continuing effect of things done

This provision is intended to ensure continuity of any order made, direction given, or summons or warrant issued under the *Dangerous Sexual Offenders Act 2006*, as if it was made under a corresponding provision of this Bill.

Schedule 1 — Serious offences

This Schedule contains certain sexual offences and certain violent offences which attract a maximum penalty of imprisonment of not less than seven years. This is consistent with the threshold contained in the *Dangerous Sexual Offenders Act 2006* (repealed by clause 121 of this Bill) and the definition of 'serious sexual offence', as defined in the *Evidence Act 1906* and by reference to offences attracting the same penalty in Part B of Schedule 7 of *The Criminal Code*.

This same methodology has been used to identify violent offences and is based on those offences contained in Schedule 4 of the *Sentence Administration Act 2003* (deleted by clause 114 of this Bill), for the purposes of a Post Sentence Supervision Order.

This Schedule also contains some offences which fall short of the seven year threshold (for example, some child exploitation material offences and prostitution offences that relate to children), but are considered sufficiently serious in nature to include in the Schedule.

Division 1 — Offences that are serious offences in all circumstances

The offences listed in this Division are deemed to be serious offences for the purposes of clause 5.

Division 2 — Offences that are serious offences if committed in specified circumstances

The offences listed in this Division are deemed to be serious offences for the purposes of clause 5, but only if committed in the circumstances described. This is to distinguish between other offences which are not considered to be a serious offence because they do not relate to children (making the offence a serious offence) or because the maximum penalty does not justify the offence being deemed serious.