



New South Wales

Crimes Legislation Amendment Act 2018 No 83

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Crimes Legislation Amendment Act 2018 No 83

Act No 83, 2018

An Act to make miscellaneous amendments to various Acts with respect to the making, duration and variation of apprehended domestic violence orders, eligibility for victims support and a further indictable offence of choking, suffocating or strangulation. [Assented to 28 November 2018]

See also the *Crimes (Domestic and Personal Violence) Amendment Act 2018*, the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018* and the *Victims Rights and Support Amendment (Motor Vehicles) Act 2018*.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes Legislation Amendment Act 2018*.

2 Commencement

- (1) Except as provided by this section, this Act commences on a day or days to be appointed by proclamation.
- (2) Schedule 2 [2] commences on the date of commencement of Schedule 1 [3] to the *Victims Rights and Support Amendment (Statutory Review) Act 2018*, or on the date of assent to this Act, whichever occurs later.
- (3) Schedule 3 commences on 1 December 2018, or on the date of assent to this Act, whichever occurs later.

Schedule 1 Amendment of Crimes (Domestic and Personal Violence) Act 2007 No 80

[1] Section 39 Final order to be made on guilty plea or guilt finding for serious offence

Insert after section 39 (2):

- (2A) In the case of an apprehended domestic violence order, the period of the order is to be determined in accordance with section 79C.

[2] Section 49AA

Insert after section 49:

49AA Period for which apprehended domestic violence order sought

- (1) The *default period* for an apprehended domestic violence order is as follows:
 - (a) if the order relates to a defendant who is 18 years of age or older—2 years,
 - (b) if the order relates to a defendant who is under 18 years of age—1 year.
- (2) An application for an apprehended domestic violence order is taken to include a request that the order remain in force for the default period.
- (3) Despite subsection (2), an applicant may request a period that is different to the default period.
- (4) If the defendant is 18 years of age or older the applicant may request an indefinite period.
- (5) An applicant may request a period that is longer than the default period if the defendant:
 - (a) has been convicted of a domestic violence offence (whether in relation to the protected person, or any other person), or
 - (b) has been convicted of a contravention of an apprehended domestic violence order (whether that order was made in relation to the protected person or any other person), or
 - (c) is alleged to have engaged in conduct that, in the opinion of the applicant, means that a longer period than 2 years is warranted to ensure the safety and protection of the protected person, or
 - (d) is alleged to have committed a domestic violence offence and the nature of the alleged offence warrants, in the opinion of the applicant, a longer period than 2 years, or
 - (e) has been sentenced to, or is serving, a term of imprisonment in relation to a domestic violence offence committed against the protected person in which case the period must be determined in accordance with section 79C and may include a period of more than 2 years after the end of the defendant's sentence for that offence.
- (6) An applicant who requests a period that is longer than the default period must specify the reasons for seeking that longer period.
- (7) If, after an application is made, the applicant becomes aware that the defendant has been sentenced to, or is serving, a term of imprisonment in relation to a domestic violence offence committed against the protected person, the applicant may make an oral submission to the court to vary the period sought, having regard to section 79C.

[3] Section 73A

Insert after section 73:

73A Variation of interim or final apprehended domestic violence order by police

- (1) The conditions of an apprehended domestic violence order or an interim apprehended domestic violence order (the *existing order*) relating to a defendant who is aged 16 years or older may be varied by a police officer (a *police variation*).
- (2) A police officer may make a police variation only if there has been a change in circumstances since the existing order was made, resulting in an increased risk to the safety of the protected person that requires an urgent response, and the officer is of the opinion that:
 - (a) the increased risk cannot be addressed under the existing order, and
 - (b) there are reasonable grounds for the urgent making of the police variation (including, but not limited to, that the increased risk cannot be addressed by an immediate application to an appropriate court for variation of the existing order), and
 - (c) the variation is appropriate to address the increased risk.
- (3) A police officer must not make a police variation in relation to an existing order unless the police officer has had regard to each of the following to the extent that the police officer has knowledge of those matters:
 - (a) any views expressed by or on behalf of the protected person, and
 - (b) the circumstances of the defendant.
- (4) A police officer must not make a police variation to an existing order if doing so decreases the protection afforded to the protected person.
- (5) A police variation is of no effect unless it has been made or approved by a senior police officer.
- (6) A police variation takes effect when notice of the police variation is served on the defendant.
- (7) For the purposes of this Part, a police variation is taken to be an application to the appropriate court for a variation of the conditions of the existing order.
- (8) Notice of the police variation served on the defendant is to contain a direction for the appearance of the defendant at a hearing of the application on a day specified in the notice, being a day that is not more than 28 days after the day on which the police variation takes effect.
- (9) The day specified in the notice must be the earliest date on which the matter can be listed at the appropriate court.
- (10) Despite subsection (9), the matter is to be listed on a domestic violence list at the appropriate court if it is possible to do so within 28 days after the police variation takes effect, even if the matter could have been listed on an earlier day on another list.
- (11) An appropriate court, when hearing the application, may determine to:
 - (a) vary the conditions of the existing order in accordance with the police variation, or
 - (b) vary the conditions of the existing order in some other way to address the increased risk, or
 - (c) not vary the conditions of the existing order.

- (12) The police variation, including any variation to the existing order, is revoked:
 - (a) when the court makes a determination under subsection (11), or
 - (b) if the court does not make a determination within 28 days after the police variation takes effect—28 days after the police variation takes effect.
- (13) If a court makes a determination under subsection (11) with respect to a police variation, a subsequent police variation cannot be made under this section in relation to the same risk to the safety of the protected person that gave rise to the earlier police variation.

[4] Section 79 Duration of apprehended personal violence orders

Omit “final apprehended violence order” from section 79 (1).

Insert instead “apprehended personal violence order”.

[5] Sections 79A–79C

Insert after section 79:

79A Duration of apprehended domestic violence orders

- (1) The *default period* for an apprehended domestic violence order is as follows:
 - (a) if the order relates to a defendant who is 18 years of age or older—2 years,
 - (b) if the order relates to a defendant who is under 18 years of age—1 year.
- (2) An apprehended domestic violence order remains in force for the default period unless a different period is specified by the court.
- (3) The court may specify a different period if it is of the opinion that the different period is sufficient to ensure the safety and protection of the protected person.
- (4) In making its decision about whether to specify a different period for an order to remain in force, the court may have regard to the following:
 - (a) the period sought by the applicant under section 49AA,
 - (b) the nature of the domestic violence,
 - (c) the history of the domestic violence, including whether the defendant has previously contravened an apprehended domestic violence order or been found guilty of a domestic violence offence,
 - (d) the seriousness and frequency of the domestic violence,
 - (e) the extent to which the length of the period of the order is likely to have an impact on the safety and protection of:
 - (i) the protected person, and
 - (ii) any child with whom the protected person has a domestic relationship,
 - (f) the views of the protected person in relation to the length of the period, and any other factors relevant to the protected person,
 - (g) whether the defendant is under the age of 18 years and, if so, the likely impact of an order of more than 12 months duration,
 - (h) any relevant circumstances of the defendant,
 - (i) any other matter the court considers relevant.
- (5) A court may, but is not required to, have regard to the matters set out in subsection (4) if:

- (a) the defendant consents to the period sought by the applicant under section 49AA, or
 - (b) the period for which the order is sought is not more than the default period.
- (6) The court is not to specify a period that is more than the default period unless the court is satisfied that the defendant has been given a reasonable opportunity to be heard.
- (7) This section is subject to sections 73, 73A and 79C.

79B Apprehended domestic violence orders may be of indefinite duration

- (1) A court, when determining the period of an apprehended domestic violence order under section 79A, may determine that the order remain in force for an indefinite period (an *indefinite order*) if the court is satisfied that:
- (a) the applicant has sought an indefinite order, and
 - (b) the order relates to a defendant who is 18 years of age or older, and
 - (c) there are circumstances giving rise to a significant and ongoing risk of death or serious physical or psychological harm to the protected person or any dependants of the protected person, and
 - (d) that risk cannot be adequately mitigated by an order of limited duration.
- (2) In determining whether there are circumstances giving rise to a significant and ongoing risk of death or serious physical or psychological harm to the protected person or any dependants of the protected person, the court must have regard to:
- (a) any prior conviction of the defendant for a domestic violence offence, including for a contravention of any other apprehended domestic violence order in relation to the protected person or any other person who was the protected person under that order, and
 - (b) the conduct of the defendant in respect of the protected person that is relevant to the risk of death or serious physical or psychological harm, such as assaults, stalking, threats to kill or use of weapons, and
 - (c) the nature, number and timing of the incidents involved in the conduct referred to in paragraphs (a) and (b).
- (3) If a court makes an indefinite order, the order remains in force until varied, revoked or set aside on appeal.
- (4) A person against whom an indefinite order is made may make an application for the variation or revocation of the order only by leave of the court.
- (5) The court may grant leave to make an application referred to in subsection (4) only if the court is satisfied that there has been a significant change in circumstances since the relevant order was made.

79C Duration of apprehended domestic violence order if defendant is in prison

- (1) An apprehended domestic violence order made against a person who is 18 years of age or older who has been sentenced to, or is serving, a term of imprisonment for a domestic violence offence against the protected person (the *relevant domestic violence offence*) remains in force for:
- (a) the duration of that person's sentence for the relevant domestic violence offence (the *head sentence*), and
 - (b) an additional 2 years after the head sentence ends.

- (2) A court may vary the period under subsection (1) (b) if, after having regard to the matters specified in section 79A (4), the court is satisfied that it is appropriate to do so.
- (3) For the purposes of subsection (1), the date on which the apprehended domestic violence order comes into force may be a day that is before the day on which the person starts serving the person's term of imprisonment.
- (4) Subsection (1) does not apply to an apprehended domestic violence order that is specified as being of indefinite duration.

[6] Schedule 1 Savings, transitional and other provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Crimes Legislation Amendment Act 2018

Definition

In this Part:

amending Act means the *Crimes Legislation Amendment Act 2018*.

Application of amendment about content of applications

Section 49AA, as inserted by the amending Act, applies only to an application for an apprehended domestic violence order made after the commencement of the section.

Amendment about variations of orders extends to variation of existing orders

Section 73A, as inserted by the amending Act, extends to the variation of a final apprehended domestic violence order or an interim apprehended domestic violence order that was in force immediately before the commencement of the section.

Amendments about duration of orders do not apply to current applications or orders

- (1) An application for an apprehended domestic violence order made but not finally determined before the commencement of sections 79A–79C, as inserted by the amending Act, is to be dealt with as if those sections had not commenced.
- (2) Sections 79A–79C, as inserted by the amending Act, apply only to apprehended domestic violence orders made after the commencement of those sections.

Schedule 2 Amendment of Victims Rights and Support Act 2013 No 37

[1] Section 25 Persons not eligible for support

Insert before section 25 (3):

(2B) Exception to ineligibility for motor vehicle accidents

Despite subsection (2), a primary victim and a family victim are eligible to receive victims support in respect of an act of violence that was a terrorist act within the meaning of the *Terrorism (Police Powers) Act 2002*.

[2] Section 39 Documentary evidence

Insert after section 39 (4):

(5) In this section:

agency includes a non-government agency funded by the Commonwealth to provide support services to victims of crime.

[3] Schedule 2 Savings, transitional and other provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provision consequent on enactment of Crimes Legislation Amendment Act 2018

Application of amendments about eligibility for motor vehicle accidents

Section 25 (2B), as inserted by the *Crimes Legislation Amendment Act 2018*, does not apply to an application for victims support relating to an act of violence that occurred before the commencement of the subsection.

Schedule 3 Amendments relating to offence of strangulation

3.1 Crimes Act 1900 No 40

Section 37 Choking, suffocation and strangulation

Insert before section 37 (1):

- (1A) A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.
Maximum penalty: imprisonment for 5 years.

3.2 Criminal Procedure Act 1986 No 209

Schedule 1 Indictable offences triable summarily

Insert “, 37 (1A)” after “35A (1)” in clause 2 of Table 1.

[Second reading speech made in—

Legislative Assembly on 17 October 2018

Legislative Council on 21 November 2018]