

Prosecuting Mental Impairment Matters

This guide includes:

- Information about the court process when a mentally ill or cognitively impaired person is prosecuted for a serious offence
- A form for making a Victim or Family Member Report.



OFFICE of
PUBLIC PROSECUTIONS
VICTORIA

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About this guide

This guide is for:

- victims of crime
- family members of victims of crime
- family members of a Supervised Person (the person who committed the crime).

This guide explains:

- the court process when mentally ill or cognitively impaired people are prosecuted for serious crimes
- what a Victim or Family Member Report is and when you can make one.

At the back of this guide, there is a form to assist you to make a report. For more information, see page 8 and the attached form.

About the law

When people who are mentally ill or cognitively impaired are prosecuted for serious crimes, they are tried under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

This Act applies when the accused person:

- A.** is 'unfit to stand trial' because of a **current** mental illness or cognitive impairment; or
- B.** committed the crime but was suffering from a 'mental impairment' **at the time they committed the crime**.

'Mental impairment' is not defined in the Act. It has been defined by the courts and generally includes someone with a severe mental illness or disorder.

A. Being unfit to stand trial

The law states that a person is unfit to stand trial if their current mental state is so severely disordered that they cannot:

- understand what they have been charged with, or
- plead guilty or not guilty, or
- understand the trial process or what is happening in court, or
- understand the evidence, or
- instruct their lawyer.

Where the accused person, through their legal representative, states they are unfit to stand trial because of their current mental state, the court will conduct an investigation hearing in front of a jury to decide whether or not the person is fit to stand trial.

Evidence at the investigation hearing includes specialist medical evidence about the mental state of the accused person.

If the jury finds that the accused person is fit to stand trial – that is, capable of participating in a criminal trial – the case will proceed in the same way as any other criminal matter but before a different jury.¹

If the jury finds that the accused person is unfit to stand trial, the judge has to decide, on the basis of the specialist medical evidence, whether the accused person is likely to be fit to stand trial within the next 12 months.

If the judge decides that the accused person is likely to become fit to stand trial within the next 12 months, the matter will be adjourned for a period of up to 12 months. If, at the later hearing, the judge decides that they are fit to stand trial, a trial will be held in the same way as the trial of any other criminal matter.

If the judge decides that the accused person is not fit to stand trial, there will be a Special Hearing instead of a trial.

Special Hearing

The purpose of a Special Hearing is to determine whether the accused person committed the crime or is not guilty because of their mental impairment. A Special Hearing is like a trial before a jury in a criminal matter.

The jury will hear evidence about the offending. This may include specialist medical evidence about the mental state of the accused person.

Unlike a normal trial where the jury finds the accused person guilty or not guilty, in a Special Hearing the jury can find the accused person:

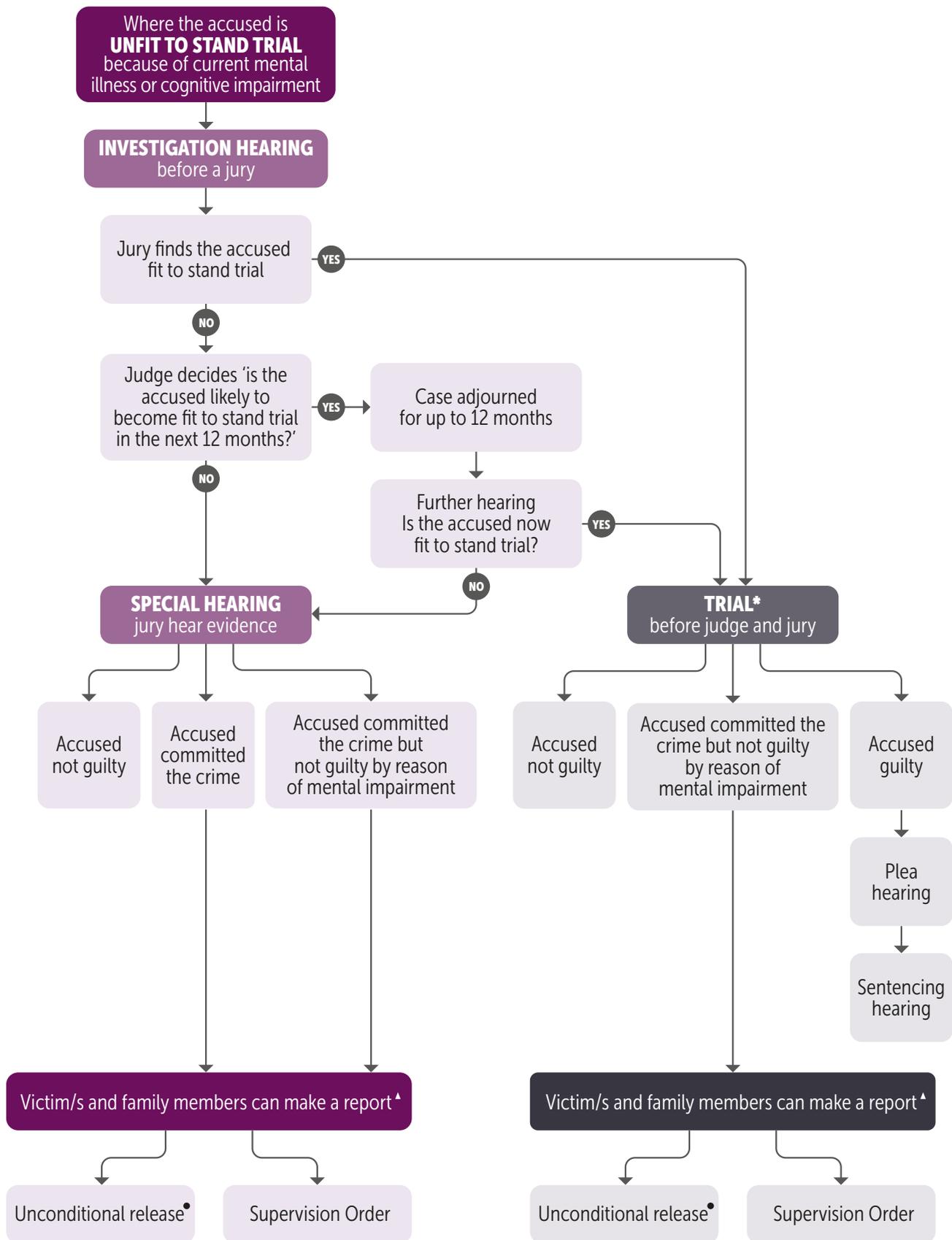
- not guilty of the crime
- has committed the crime (rather than being found guilty of the crime)
- has committed the crime but is not guilty because of their mental impairment.

Where an accused person is found not guilty, they are released from custody and the court process ends.

Where the accused person is found to have committed the crime, or is found to have committed the crime but is not guilty because of their mental impairment, the judge will generally place the person on a Supervision Order (see page 6). They are not sentenced in the same way as in any other criminal matter.

In rare cases, the judge may consider that an unconditional release is appropriate. This only happens in exceptional circumstances, where the court assesses, on the basis of specialist medical evidence, that the person who committed the crime is not a danger to themselves or other people in the community.

¹ For more information see the OPP publication 'Pathways to Justice: A Guide to the Victorian court system for victims and witnesses of serious crime.'



*Matter will proceed in the same way as any other criminal matter. (Refer to OPP publications Pathways to Justice or Taking the Next Step)

^ See Victim or Family Member Report form on page 19 of this guide.

• In rare cases the judge may consider that an unconditional release is appropriate.

B. Defence of mental impairment

During the court process, the accused person, through their legal representative, may state that they were suffering from a mental impairment at the time they committed the crime. This is called a defence of mental impairment.

They will be found to be suffering from a mental impairment, at the time they committed the crime, if they:

- did not understand what they were doing
- did not understand that what they were doing was wrong.

Where the mental state of the accused is agreed (Consent Mental Impairment Hearing)

If the prosecution and defence barristers agree, based on their assessment of specialist medical evidence, that the accused person was suffering from a mental impairment at the time they committed the crime, the matter will be heard by a judge without a jury. This is called a Consent Mental Impairment Hearing.

After hearing the specialist medical evidence the judge can:

- find the person not guilty because of their mental impairment, or
- direct that the accused person be tried in the same way as any other criminal matter – if not satisfied that the person has a mental impairment.²

Where there is no agreement about the mental state of the accused

If the prosecution and defence barristers do not agree that the accused person was suffering from a mental impairment at the time they committed the crime, there will be a trial before a jury.

The jury will hear evidence from witnesses and expert evidence about the accused person's mental state at the time of the crime.

The jury will then decide whether the accused person:

- is not guilty of the crime
- is guilty of the crime
- committed the crime but is not guilty because of their mental impairment.

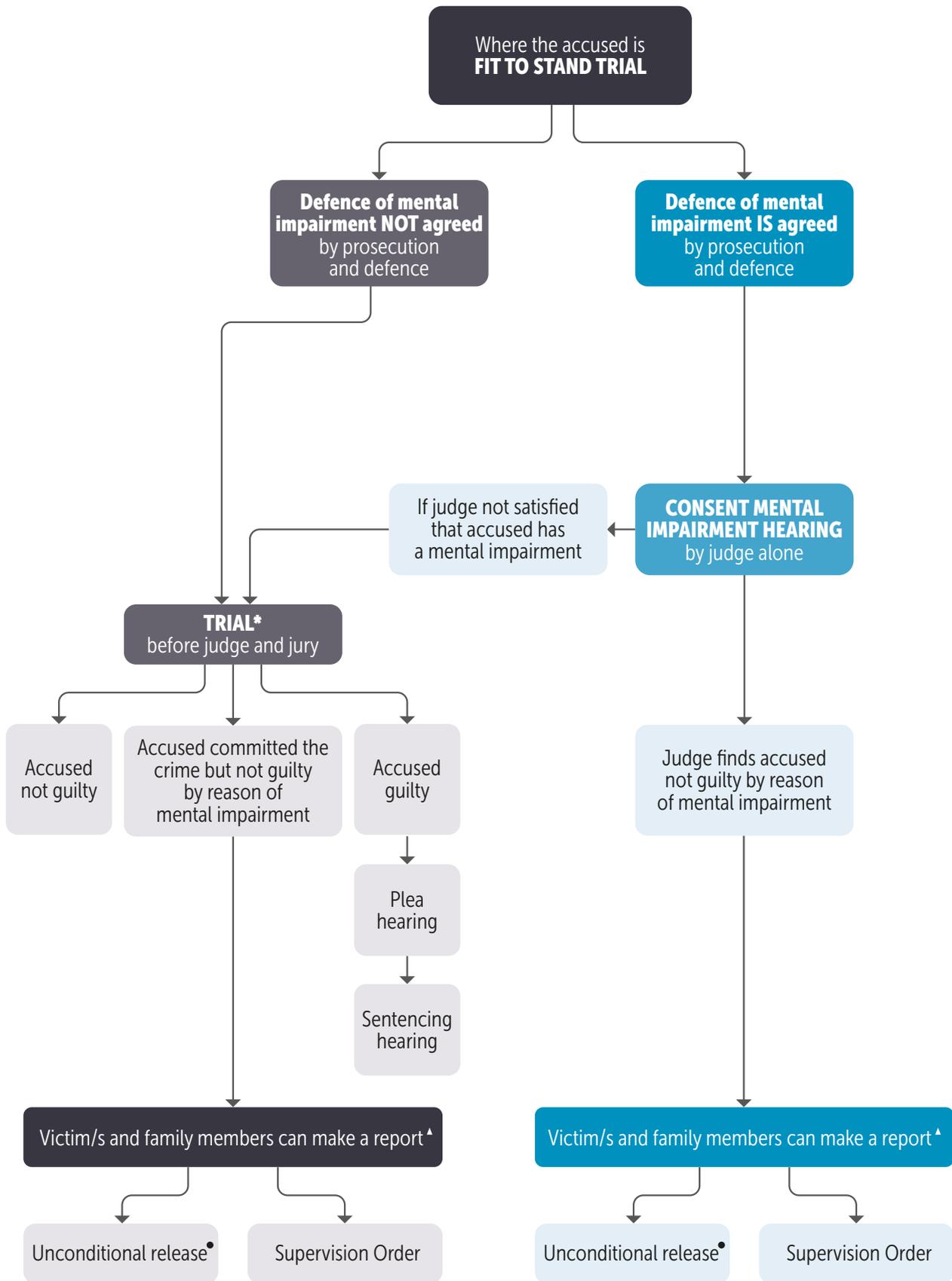
Where the accused person is found not guilty, they are released from custody, or discharged from bail, and the court process ends.

If the accused person is found guilty, the judge will sentence them in the same way as any other criminal matter.

Where the accused person is found to have committed the crime but is not guilty because of their mental impairment, the judge will generally place them on a Supervision Order.

In rare cases the judge may consider that an unconditional release is appropriate. This only happens in exceptional circumstances, where the court assesses, on the basis of specialist medical evidence, that the person who committed the crime is not a danger to themselves or other people in the community.

² For more information see the OPP publication 'Pathways to Justice: A Guide to the Victorian court system for victims and witnesses of serious crime.'



*Matter will proceed in the same way as any other criminal matter. (Refer to OPP publications Pathways to Justice or Taking the Next Step)

^ See Victim or Family Member Report form on page 19 of this guide.

• In rare cases the judge may consider that an unconditional release is appropriate.

Supervision Orders

A person will generally be placed on a Supervision Order when they are:

- unfit to stand trial on the basis of their current mental illness or cognitive impairment, but have been found to have committed the crime, or
- found to have committed the crime but are not guilty because of their mental impairment at the time they committed the crime.

A person on a Supervision Order is called a Supervised Person.

Supervision Orders allow the court to manage and monitor a Supervised Person by ensuring they are placed in appropriate care or receive appropriate services and treatment.

Supervision Orders can be custodial or non-custodial.

Custodial Supervision Orders commit the Supervised Person to custody in a mental health or residential treatment service, or prison, while the Order is in place.

Non-custodial Supervision Orders allow a Supervised Person to live in the community while they receive treatment. The Supervised Person is subject to strict conditions, such as:

- where they can live
- restrictions on where they can travel
- restrictions on alcohol consumption and drug use
- having to comply with medical treatment and testing
- attending appointments as required.

What does the court consider when making a Supervision Order?

The Court considers a number of aspects when making a Supervision Order. These include the nature of the Supervised Person's mental impairment, the type of crime they committed and whether they are a danger to themselves or others.

The Court must also consider any Victim or Family Member Reports that are made before deciding on the conditions of a Supervision Order (see page 8).

Appeal against a Supervision Order

A Supervised Person has the right to appeal against a Supervision Order to the Court of Appeal.

The Court of Appeal may set aside the Supervision Order, replace it with a different Supervision Order or leave the order unchanged.

The Director of Public Prosecutions has a right of appeal against an order for unconditional release, or against the type of Supervision Order made by the Court.

Reviewing a Supervision Order

Because a Supervision Order is an ongoing order without a specified end date, the Court will set a specific date to review the Order. For example, in murder cases this period is 25 years.

The purpose of a review hearing is to monitor and, if appropriate, change the level of supervision of the Supervised Person.

This review process may continue for many years after the original Supervision Order is made by the Court.

There may be a number of review hearings while the Supervision Order is in place.

A review hearing may be held at the request of the Court or by an application of the Supervised Person to change the Supervision Order.

A Supervised Person on a Custodial Supervision Order may apply to the Court to change the order to a Non-custodial Supervision Order.

A Supervised Person on a Non-custodial Supervision Order can apply to the Court to change or cancel their order.

There are a number of parties involved in a review hearing or application by the Supervised Person to change the Supervision Order. These include the Supervised Person, the Department of Health and Human Services (the supervising department), the Attorney General (who represents the community) and the Director of Public Prosecutions.

You have the right to make a Victim or Family Member Report, which will be considered by the Court before it reviews or makes any orders in relation to the Supervised Person.

Leave of absence from a Custodial Supervision Order

A Supervised Person on a Custodial Supervision Order can apply for a leave of absence from custody, for a specified time, during the term of their Supervision Order.

Leave of absence can be 'off ground' or extended leave. If a Supervised Person is responding to treatment, and is not likely to be a danger to themselves or others, they may be granted limited leave away from the facility where they are required to live. This is known as 'off ground' leave and will have strict conditions attached to it.

The decision to grant 'off ground' leave is made by the Forensic Leave Panel. Members of the Panel include Supreme and County Court judges and the Chief Psychiatrist. This is the

first step in the lead up to a person applying to the Court for extended leave.

Extended leave will only be granted by the court if it is satisfied that the Supervised Person is not likely to be a danger to themselves or others. Leave may be granted for up to 12 months and may be granted more than once.

There are strict conditions attached to any order for leave made by the Court (See page 6).

Keeping you informed about Supervision Orders

As a victim or family member you will be told by the Office of Public Prosecutions (OPP) whether the Supervision Order is custodial or non-custodial and any conditions of the order made by the Court.

You will also be told by the OPP about any reviews or applications to change or cancel a Supervision Order, heard by the Court, unless you have specifically told them not to contact you about this. It is important to advise the OPP of any changes to your contact details.

Because the 'crimes mental impairment' process is different to the criminal trial process, you are not eligible to apply to be on the Victims Register.

Breaching a Supervision Order

If the Supervised Person does not comply with, or breaches, the conditions of the Supervision Order, the Court may order them to go to court so that the terms of the order can be reviewed.

On review, the Court may confirm or vary the conditions of the original order. If the Supervised Person breaches the conditions of a non-custodial order, or extended leave, the Court may place them on a Custodial Supervision Order.

Victim or Family Member Reports

Victim or Family Member Reports provide you with an opportunity to express your views about what the Supervised Person has done and the impact of the crime on you.

Who can make a report?

Victim or Family Member Reports may be made by:

- victims of crime
- family members of victims of crime
- family members of a Supervised Person (the person who committed the crime).

These reports help the Court decide:

- what conditions to include in a Supervision Order
- whether or not to grant a Supervised Person 'extended leave' from custody during the term of their Supervision Order
- whether to change or cancel a Supervision Order.

In the report you can write about how you would feel if the Supervised Person was granted extended leave, or how you would feel if the conditions of their Supervision Order were changed.

You are not able to make a report in relation to 'off ground' leave. This decision is made by the Forensic Leave Panel, which is made up of people with specialist medical expertise (see page 7).

When can I make a report?

You will be given the opportunity to make a Victim or Family Member Report at various stages, including:

- before the Court makes a Supervision Order
- if an application is made to vary or cancel a Supervision Order
- if a Supervision Order is reviewed
- if an application is made for extended leave (where it could significantly reduce the degree of supervision of the Supervised Person).

If you make a report, the judge is required to consider it when making their decision about a Supervision Order.

A form attached at the back of this Guide will help you make a report (see page 19). Alternatively, you can use the online form at www.opp.vic.gov.au

Do I have to make a report?

You can choose whether or not to make a Victim or Family Member Report.

You can choose whether you want to be notified about any court hearings relating to the Supervised Person.

If you do not want to be notified, you need to advise the OPP in writing (see the sample letter on page 10) or by email to OPP.mentalimpairment@opp.vic.gov.au

You should state that you do not want to get notifications about the Supervised Person. You will need to give both your name and the name of the Supervised Person.

Do you have to use the attached form to make a report?

The attached form is a guide and does not have to be used.

You can write your Victim or Family Member Report in your own format but it must be written in the form of a statutory declaration, otherwise the Court may not accept it.

The Victim or Family Member Report form attached at the back of this guide is in the form of a statutory declaration (see page 19).

What is a statutory declaration?

A statutory declaration is a statement signed by you and declared to be true and correct in front of an authorised witness. By signing the statutory declaration, you agree that your report is true. You can be charged with perjury (making a false statement under oath) if you include information you know is not true.

An authorised witness must sign and witness your statutory declaration. An authorised witness can be a lawyer, police officer, doctor, dentist, pharmacist, veterinarian, bank manager or state school principal.

Further information about statutory declarations can be found at:
www.justice.vic.gov.au/home/justice+system/legal+assistance/statutory+declarations/

Can you get help to make a report?

Victims

Victims of crime are eligible for a range of support services. These services can assist you with making a report.

The Witness Assistance Service in the OPP has experienced social workers who support victims of crime, family members and witnesses involved in matters prosecuted by the Office.

You can contact the Witness Assistance Service on 1800 641 927 for support or assistance making a report.

The Victims Support Agency (VSA) has a dedicated Victims of Crime Helpline staffed by trained Victim Support Officers who offer advice and referral to local support services to assist victims to manage the effects of crime.

The VSA also funds a network of Victims Assistance Programs (VAPs) throughout Melbourne and regional Victoria. Eligible victims of crime are assigned a case manager and can receive practical assistance, outreach, court support and referral to other agencies. VAP workers can assist you to make a report.

For referral to your closest VAP, contact the **Victims of Crime Helpline** on **1800 819 817**.

Family members

If you are a family member of the Supervised Person, you can speak to the OPP about making a Family Member Report. You may also want to discuss your Family Member Report with the Supervised Person's solicitor.

For more information, you can contact the **Office of Public Prosecutions** on **03 9603 7666**.

Sample letter

This is a sample letter to the Office of Public Prosecutions advising that you do not want to be notified about any court hearings related to the Supervised Person.

Office of Public Prosecutions
PO Box 13085
MELBOURNE VIC 8010

Dear *(insert the name of the OPP solicitor, if known)*

Re: Supervised Person *(insert the name of the person)*

I advise that I, *(insert your name)* do not/no longer want to receive notifications about any hearings or applications in relation to the supervised person *(insert the name of the person)*.

Yours sincerely

(insert your name and signature)

What happens next?

You should send your completed report to the OPP.

A copy of your report, with your address deleted, will be provided to the Court and the solicitor for the Supervised Person.

Although rare, the Court may call you to give evidence on what you have written in your report. If you are concerned about this, you should contact the OPP.

Office of Public Prosecutions
PO Box 13085
Melbourne VIC 8010

T: 1800 641 927 (for victims and family members of victims)

T: 9603 7666 (for family members of the Supervised Person)

Financial assistance

As the victim of a serious crime, you may be entitled to financial assistance from the Victims of Crime Assistance Tribunal (VOCAT).

VOCAT can award financial assistance for:

- counselling, medical, safety-related and funeral expenses
- loss of earnings
- other expenses to assist you to recover from the crime.

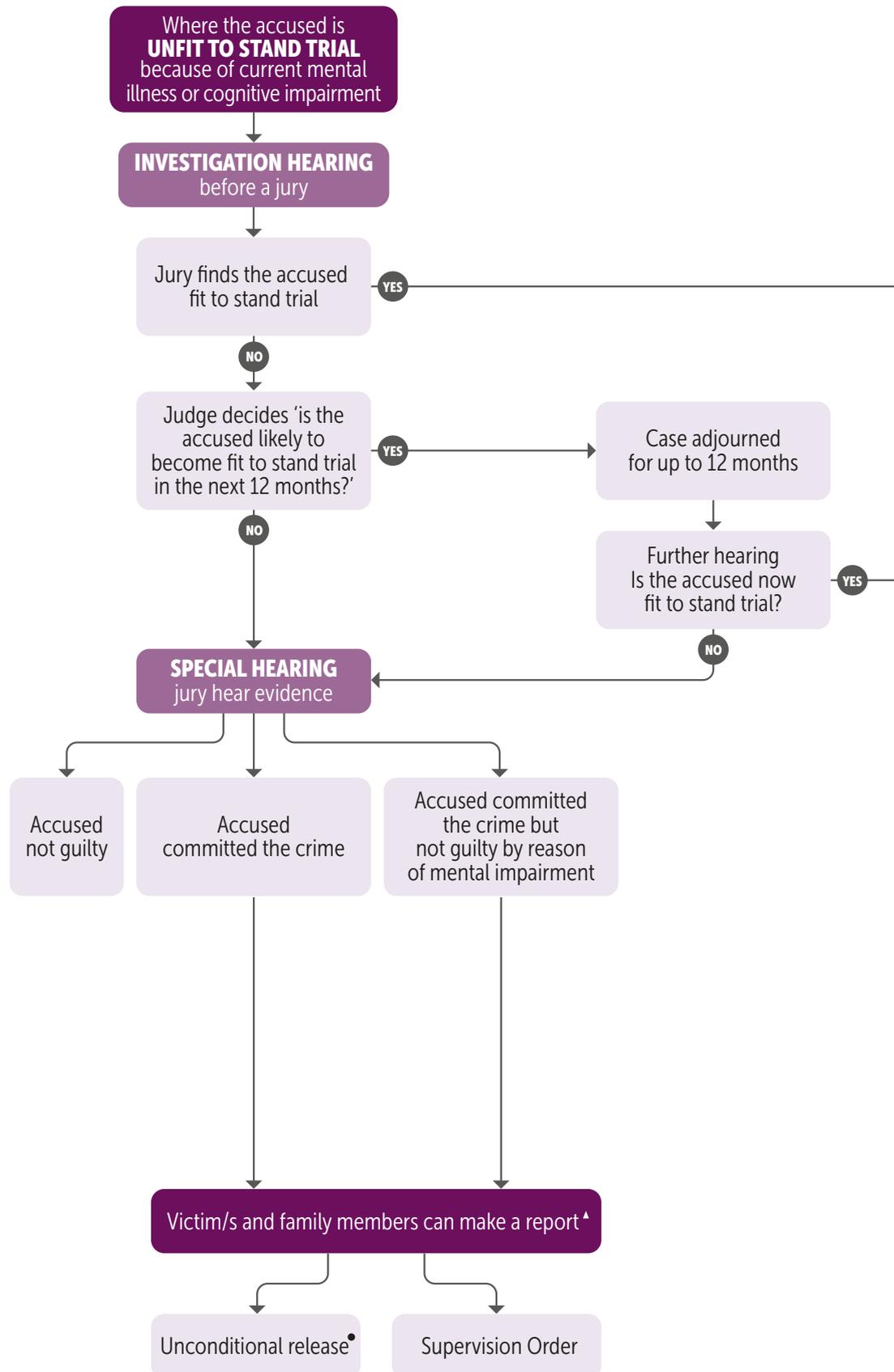
For more information about financial assistance or to make a claim, contact VOCAT.

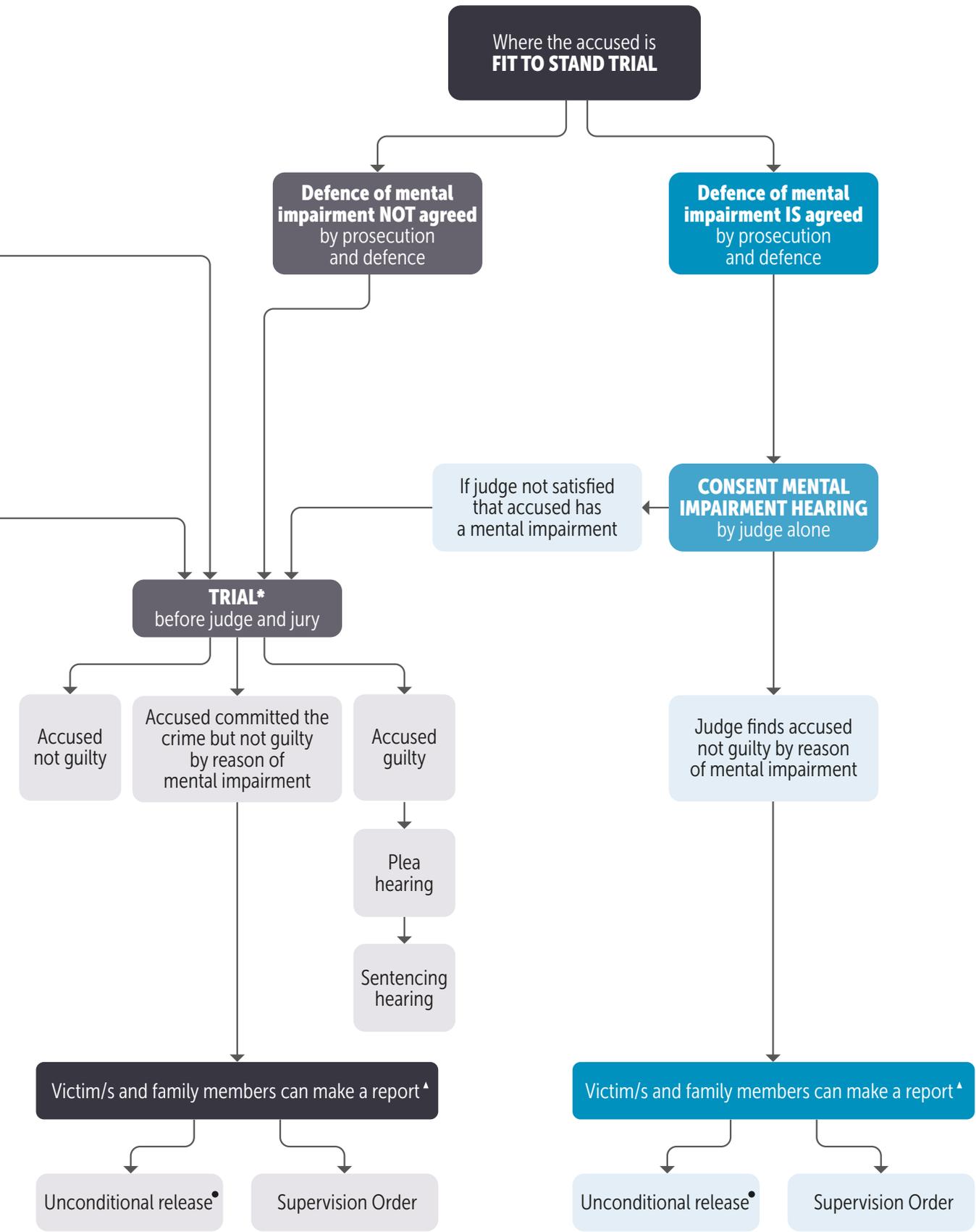
VOCAT

T: 03 9628 7855 or 1800 882 752

W: www.vocat.vic.gov.au

Court process for crimes involving mental impairment and unfitness to be tried





*Matter will proceed in the same way as any other criminal matter. (Refer to OPP publications Pathways to Justice or Taking the Next Step)

^ See Victim or Family Member Report form on page 19 of this guide.

• In rare cases the judge may consider that an unconditional release is appropriate.

Glossary of common legal terms

Accused	A person charged with a crime is called the accused person.
Adjournment	When a case is adjourned, it is postponed to a future date.
Bail	An agreement made by a person charged with a criminal offence to appear at court when required and to abide by any special conditions on what they can or cannot do while on bail.
Barrister	A lawyer who appears at court either as prosecutor or defence barrister.
Committal hearing	A court hearing in the Magistrates' Court before a magistrate sitting alone to establish whether there is enough evidence for a trial before a judge and jury.
Conviction	A person is convicted when they are found guilty by a jury or plead guilty before a judge or magistrate.
County Court	A judge presides over this court. It hears serious (indictable) cases and a jury decides the case.
Court Networker	A volunteer who helps people who go to court. Court Networkers help witnesses, victims of crime and their families or friends.
Cross-examination	Asking a witness questions about evidence he or she has given during the examination-in-chief. The defence barrister cross-examines prosecution witnesses and the prosecutor cross-examines defence witnesses.
Crown Prosecutor	A prosecutor who works solely for the Director of Public Prosecutions
Custodial Supervision Order	A Custodial Supervision Order means that the Supervised Person is committed to custody in a mental health or residential treatment service while the order is in place.
Defence	Arguments used by a person and his or her solicitor defending him or herself in court.
Defence of mental impairment	A person will be found to have a defence of mental impairment if they did not understand what they were doing when they committed the crime or did not understand that what they were doing was wrong.
Director of Public Prosecutions (DPP)	This is the person who is responsible for prosecuting serious (indictable) offences in the State of Victoria.
Evidence	The information given to the court to show what happened. Witnesses give evidence by telling the people in the court what they know. Sometimes items like clothing, photographs or letters are also shown to the court.
Examination-in-chief	Questions asked of a witness by the barrister who called the witness to give evidence.

Extended leave	Extended leave may be granted to a Supervised Person on a Custodial Supervision Order. It is only granted by the Court if it is satisfied that the Supervised Person is not likely to be a danger to themselves or others. Leave may be granted for up to 12 months and may be granted more than once. There are strict conditions attached to this type of leave.
Forensic Leave Panel	The Forensic Leave Panel includes members of the Supreme and County Court and the Chief Psychiatrist.
Guilty person	A person is guilty if he or she has been found guilty by a jury or pleaded guilty before a judge or magistrate.
Judge	A person who hears cases in the County Court or Supreme Court. The judge has the power to interpret the law and apply it, and to decide how a person should be punished if they have broken the law.
Judge's Associate	A person who helps the judge.
Jury	A group of 12 people who are chosen to decide who is guilty or not guilty in a County Court or Supreme Court trial.
Lawyer	A person who is trained in the law. A lawyer advises people about the law.
Mental impairment	Mental impairment generally describes someone with a severe mental illness or disorder.
Non-custodial Supervision Order	Being on a Non-custodial Supervision Order means that the Supervised Person can live in the community while they receive treatment, subject to certain conditions.
Off ground leave	Off ground leave may be granted to a Supervised Person on a Custodial Supervision Order. It involves limited time away from the facility where the Supervised Person is required to live. There are strict conditions attached to this type of leave.
Office of Public Prosecutions (OPP)	The office consisting of solicitors and support staff who prosecute matters on behalf of the Director of Public Prosecutions.
Police Informant	The police officer in charge of the investigation and the main contact between police and the victim of crime and/or their family.
Prosecutor	A barrister who acts for the Director of Public Prosecutions who calls witnesses and presents evidence in court to prove that a person is guilty.
Re-examination	Asking a witness questions which arise out of cross-examination.

Remote Witness Facility	A room separate from the courtroom where vulnerable witnesses can give their evidence which is relayed to the courtroom via closed-circuit television (CCTV).
Solicitor	A lawyer who prepares a case to go to court.
Special Hearing	A Special Hearing is similar to a trial before a jury.
Statutory declaration	A statement signed and declared to be true and correct in front of an authorised witness.
Subpoena	A document telling someone they must go to a court to give evidence as a witness in the County Court or Supreme Court.
Summons	A document telling someone they must go to a court to give evidence as a witness in a Magistrates' Court.
Supervised Person	A person on a Supervision Order is referred to as a 'Supervised Person'.
Supervision Order	A person will generally be placed on a Supervision Order when they are unfit to stand trial or have been found not guilty of the crime because of their mental impairment.
Supreme Court	This court hears the most serious cases. A judge presides over the court and a jury decides the case if a trial is held.
Tipstaff	An officer of the County and Supreme Courts who keeps order in a courtroom.
Trial	A hearing held in the County or Supreme Court before a judge and jury to find out whether an accused person is guilty or not guilty of a crime.
Unfit to stand trial	Being unfit to stand trial means that a person's mental state is so severely disordered that they cannot: <ul style="list-style-type: none"> • understand what they have been charged with, or • make a plea of guilty or not guilty, or • understand what the trial is about or what is happening in court, or • understand the evidence, or • instruct their lawyer.
Victim and Family Member Report	A Victim or Family Member Report can be made by victims of crime, their family members or family members of the Supervised Person (being the person who committed the crime).
Witness box	The place where people stand or sit when they are giving evidence in a court.
Witness	A person who appears in a court to tell what he or she knows about a crime or other event.
Witness Assistance Service (WAS)	A branch of the Office of Public Prosecutions staffed by experienced social workers to provide information and support to witnesses, victims of crime and family members going through the court system.

Useful contact details

Financial assistance and compensation

Victims of Crime Assistance Tribunal

Level 1, 233 William Street
Melbourne VIC 3000
T: 03 9628 7855
T: 1800 882 752 (toll free)
W: www.vocat.vic.gov.au

Transport Accident Commission

60 Brougham Street
Geelong VIC 3220
T: 1300 654 329 (local call)
T: 1800 332 556 (toll free)
W: www.tac.vic.gov.au

Legal services

Federation of Community Legal Centres

Level 3, 225 Bourke Street
Melbourne VIC 3000
T: 03 9652 1500
E: administration@fclc.org.au
W: www.communitylaw.org.au

Law Institute of Victoria Referral Service

470 Bourke Street
Melbourne VIC 3000
T: 03 9607 9311
E: referrals@liv.asn.au
W: www.liv.asn.au/Referral

Victorian Aboriginal Legal Service

273 High Street
Preston VIC 3072
T: 03 9418 5999
T: 1800 064 865 (toll free)
E: vals@vals.org.au
W: www.vals.org.au

Victoria Legal Aid

350 Queen Street
Melbourne VIC 3000
T: 03 9269 0120
T: 1300 792 387 (toll free)
W: www.legalaid.vic.gov.au

Youth Law

At Frontyard, 19 King Street
Melbourne VIC 3000
T: 03 9611 2412
E: info@youthlaw.asn.au
W: www.youthlaw.asn.au

Support services

Child Witness Service

T: 1300 790 540
E: childwitnessservice@justice.vic.gov.au

Coroners Court of Victoria

T: 1300 309 519 (toll free)
W: www.coronerscourt.vic.gov.au

Court Network

T: 1800 681 614 (toll free)
E: admin@courtnetwork.com.au
W: www.courtnetwork.com.au

Road Trauma Support Services

T: 03 8877 6900
T: 1300 367 797 (toll free)
W: www.rtssv.org.au

Victims of Crime Helpline

T: 1800 819 817 (toll free)
TTY: 133 677 (hearing impaired)
E: vsa@justice.vic.gov.au
W: www.justice.vic.gov.au/victimsofcrime

Witness Assistance Service

Office of Public Prosecutions

565 Lonsdale Street
Melbourne VIC 3000
T: 03 9603 7425
T: 1800 641 927 (toll free)
TTY: 133 677 (hearing impaired)
W: www.opp.vic.gov.au

Victim and Family Member Report Form

This form includes:

- sections to help you describe the effect of the crime on you and your views about the Supervision Order being made by the Court
- a Statutory Declaration, which makes the Victim or Family Member Report a legal document.

Section 1

Personal information (this section must be completed)

Your name:

Name of Supervised Person:

I am completing this report as a:

- victim of crime
- family member of a Supervised Person
- victim of crime and family member of a Supervised Person.

Section 2

The effect of the crime on you

Use this section to describe the effect of the crime on you.

You may refer to:

- the Supervised Person's past or current conduct towards you
- the Supervised Person's past or current conduct towards other people (e.g. members of the public, family members).

Please attach additional pages if required.

Section 5

Statutory Declaration (this section must be completed)

I do solemnly and sincerely declare that this declaration is true and correct, and I make it in the belief that a person who makes a false declaration is liable to the penalties of perjury.

Declared at in the State of Victoria,
on this day of 20

.....
Signature of person making this declaration
[to be signed in front of an authorised witness]

Before me,

.....
Signature of Authorised Witness

[The authorised witness must print or stamp his or her name, address and title under section 107A of the *Evidence (Miscellaneous Provisions) Act 1958* (as of 1 January 2010), (previously *Evidence Act 1958*), (e.g. Justice of the Peace, Pharmacist, Police Officer, Lawyer, Court Registrar, Bank Manager, Medical Practitioner, Dentist)]

Send your signed, completed form to:

Office of Public Prosecutions
PO Box 13085
Melbourne VIC 8010



OFFICE of
PUBLIC PROSECUTIONS
VICTORIA

