

OPEN JUSTICE, THE MEDIA AND REPORTING ON PREVENTIVE SUPERVISION AND DETENTION ORDERS IMPOSED ON SERIOUS SEX OFFENDERS IN VICTORIA

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This article is concerned with the extent to which the media should be able to report judicial proceedings in which Victorian courts are asked to make supervision or detention orders in respect of sex offenders who have completed their custodial sentence, but who are regarded as posing an unacceptable risk of re-offending. After describing the nature and purpose of the supervision and detention regimes, the article critically examines the reporting provisions that were contained in the Serious Sex Offenders Monitoring Act 2005 (Vic), which first introduced the notion of preventive supervision in Victoria, and compares them with the reporting provisions that are contained in the recently enacted Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic). Particular regard is paid to the principle of open justice, which ordinarily entitles the media to publish information about judicial proceedings, including names. The article also identifies several procedural hurdles which confront media organisations that wish to challenge suppression orders made under the scheme. Finally, the article makes some tentative observations about whether these publication regimes are compatible with Victoria's Charter of Human Rights and Responsibilities.

I INTRODUCTION

On 26 May 2005, the *Serious Sex Offenders Monitoring Act 2005* (Vic) ('*Monitoring Act*') commenced operation in Victoria. The *Monitoring Act* vested courts with the power to make extended supervision orders which impose ongoing supervisory controls on serious sex offenders after they have served their custodial sentence, if they are found to pose a high risk of re-offending.¹ On 1 January 2010, the *Monitoring Act* was repealed and replaced by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('*Detention and Supervision Act*'). The *Detention and Supervision Act* contains a similar regime

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1 New South Wales, Queensland and Western Australia also have legislative schemes that provide for the continuing detention or extended supervision of certain types of sex offenders: *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA). New Zealand has a similar scheme: *Parole Act 2002* (NZ), as do many overseas jurisdictions. For a review of schemes in France, Germany and The Netherlands see: New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2009) Volume 3, Appendix D.

to that established by the *Monitoring Act*,² but in addition, vests the courts with power to make detention orders which operate to keep serious sex offenders incarcerated even after they have served their term of imprisonment for sex crimes they have already committed.

These laws, particularly the power to detain a person in prison after they have served their sentence, are, for obvious reasons, highly controversial. However, it is not the purpose of this article to discuss the merits of such laws,³ whether they are constitutionally valid,⁴ the human rights implications⁵ and whether they are successful in achieving their aims.⁶ Rather, the purpose of this article is to focus on the extent to which proceedings in which a supervision or detention order is sought can be reported in the media. Is the public entitled to be informed about the identity and location of serious sex offenders, the terms of any supervision or detention orders made by the courts and the expert assessment reports on which those orders were based, or are there compelling reasons why these matters should remain secret? The resolution of this issue has serious implications for open justice, and any derogation from this principle is always felt most keenly by the media. The question is particularly pertinent in view of the fact that the *Detention and Supervision Act* takes an even more secretive approach to this issue than its 2005 predecessor. The issue came to the forefront of public attention in early 2010 when a serious sex offender who was subject to a supervision order left

- 2 The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('*Detention and Supervision Act*') calls these orders 'supervision orders', not 'extended supervision orders'. Throughout this article they are referred to as supervision orders irrespective of which Act is being discussed.
- 3 For a discussion of the merits of preventive detention, including supervision and detention laws, see Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention — Final Report* (2007); Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (2009); Justice Mark Weinberg, 'The Move Towards Preemption In The Criminal Law', (Speech delivered at the Law Summer School program under the auspices of the Law Society of Western Australia and the University of Western Australia, Perth, 20 February 2009) <<http://www.austlii.edu.au/au/journals/VicJSchol/2009/1.pdf>>.
- 4 The constitutional validity of Queensland's continuing detention scheme contained in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) survived a challenge in *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*'). The challenge centred on whether the exercise of such a power by the Queensland Supreme Court was repugnant to, or incompatible with, the Court's position under the *Constitution*, 'as a potential repository of the federal judicial powers': Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention — Final Report* (2007) [2.4.3]. The High Court, by majority, held that the *Act* did not confer on the Supreme Court a function that impaired its institutional integrity or was incompatible with its role as a repository of the judicial power of the Commonwealth. In reaching this conclusion, the High Court distinguished its earlier decision in *Kable v DPP (NSW)* (1996) 189 CLR 51. For a criticism of the *Fardon* decision see Patrick Keyzer, Cathy Pereira and Stephen Southwood, 'Pre-Emptive Imprisonment for Dangerousness in Queensland Under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues' (2004) 11 *Psychiatry, Psychology and Law* 244; Oscar Roos, 'Baker v The Queen & Fardon v Attorney General for the State of Queensland' (2005) 10 *Deakin Law Review* 271; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 101.
- 5 In Victoria, it is also necessary to consider whether a scheme that permits continuing supervision and detention of dangerous sex offenders runs counter to the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 6 It has been argued that preventive detention is costly and fails to re-integrate sex offenders into the community: 'Let Sex Offenders Out: Legal Experts', *Monash Journal* (online) 9 December 2009 <<http://www.monashjournal.com.au/news/local/news/general/let-sex-offenders-out-legal-experts/1697953.aspx>>.

a secure facility in Ararat in breach of the order, but was unable to be identified by the media due to the existence of an order suppressing his identity. This state of affairs had potential repercussions for public safety and for the ability of the police to harness public assistance in locating the offender. It provided media organisations and journalists with a timely opportunity to denounce the existing laws and to demand reform, which they did with great gusto.⁷ A similar situation occurred in March 2010 when a serious sex offender left a cafe he was visiting in the company of a corrections officer en route to his secure accommodation in Ararat following a hospital appointment in Melbourne. His whereabouts was unknown for 30 hours, when he was apprehended in Sydney.

This article will explore the issue in five parts. Part II will briefly describe the nature and purpose of a supervision order and a detention order. It will do so primarily by reference to the *Detention and Supervision Act*, since the *Monitoring Act* has been repealed.⁸ Part III will examine the statutory provisions pertaining to publication that were contained in the *Monitoring Act* and critically analyse the cases in which these provisions have been considered by the courts. Part IV will describe the publication regime that is currently in place under the *Detention and Supervision Act*, compare the two regimes and draw some conclusions as to which approach is to be preferred, having particular regard to the principle of open justice. It should be noted that the equivalent statutory regimes in force in New South Wales, Queensland and Western Australia do not contain any specific provisions that address the issue of publication, and it appears that offenders in these regimes are generally named in judgments dealing with their detention or supervision. Part V will identify some of the procedural hurdles which confront media organisations that wish to challenge suppression orders made under the scheme, and thereby fulfil their role as the fourth estate. Finally, the article will make some tentative observations about whether these two publication regimes are compatible with Victoria's *Charter of Human Rights and Responsibilities* which is enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

II THE NATURE AND PURPOSE OF SUPERVISION AND DETENTION ORDERS

The *Detention and Supervision Act* has two stated purposes. Its first and main purpose is to 'enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who present an unacceptable risk of harm to the community to be subject to ongoing detention or supervision'.⁹ Its secondary purpose is to facilitate the treatment and rehabilitation of such offenders.¹⁰ The *Monitoring Act* had only one stated

7 The *Herald Sun* and 3AW presenter Derryn Hinch were the most outspoken, as both have run a long campaign against sex offender secrecy.

8 Any significant discrepancies between the two Acts will be highlighted in the footnotes.

9 *Detention and Supervision Act* s 1(1).

10 *Ibid* s 1(2).

purpose, which was similar in its terms to the first purpose of the *Detention and Supervision Act*.

Supervision and detention orders can be made only in respect of ‘eligible offenders’. An eligible offender is one who is at least 18 years of age and who is serving a custodial sentence for a ‘relevant offence’.¹¹ An extensive list of what constitutes a relevant offence is contained in Schedule One of the *Detention and Supervision Act*. Suffice it to say that it covers a wide range of serious sexual offences against both adults and children.¹²

A Supervision Orders

The Secretary to the Department of Justice can apply to a court for a supervision order in respect of an eligible offender if he or she is satisfied that an application should be made.¹³ If the offender was sentenced for the relevant offence by the County Court or the Supreme Court, the application for a supervision order must be made to that court.¹⁴ If the offender was sentenced for the relevant offence by the Magistrates’ Court, the application must be made to the County Court.¹⁵ The application must be accompanied by at least one assessment report which must be made by a medical expert¹⁶ after a personal examination of an offender.¹⁷

An assessment report must address a number of matters. They include: whether or not the offender has a propensity to commit relevant offences in the future; the pattern or progression to date of any sexual offending behaviour and an indication of the nature of any likely future sexual offending behaviour on the offender’s part; efforts made by the offender to address the causes of his or her sexual offending behaviour (including whether he/she has actively participated in any rehabilitation or treatment programs and whether this participation has yielded a positive effect); the relevant background of the offender (including developmental and social factors and other offending behaviour); and factors that might increase or decrease any identified risks.¹⁸ The report must state the medical expert’s assessment of the risk that the offender will commit another relevant offence if

11 Ibid s 4. Section 5 makes it clear that an offender is still serving a sentence when released on parole in respect of that sentence.

12 A ‘relevant offence’ under the *Serious Sex Offenders Monitoring Act 2005* (Vic) (*Monitoring Act*) was initially confined to sex offences committed against children, but was subsequently amended to include sex offences committed against adults: *Justice Legislation Amendment Act 2008* (Vic) s 24(1).

13 *Detention and Supervision Act* s 7(2). In making a decision, the Secretary must have regard to an assessment report in relation to the offender and any other relevant information, matter or report: at s 104.

14 Ibid s 7(3)(a). The Adult Parole Board’s Annual Report for 2008–09 indicates that almost all supervision orders under the *Monitoring Act* were made by the County Court: Adult Parole Board of Victoria, *2008 – 2009 Annual Report* (2009) 25.

15 *Detention and Supervision Act* s 7(3)(b).

16 A medical expert is a psychiatrist, a psychologist or other prescribed health service provider: *ibid* s 3.

17 Ibid s 8.

18 Ibid s 109(1).

released in the community and not made subject to a detention order or supervision order.¹⁹ The Secretary or the offender may dispute an assessment report.²⁰

A court can make a supervision order only if it is satisfied that the offender poses ‘an unacceptable risk of committing a relevant offence’ if he or she is released into the community unsupervised.²¹ The court must be satisfied by means of acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify its decision to accede to an application.²² The onus of proof is borne by the Secretary.²³ In assessing the risk, the court must take into account an assessment or progress report filed in court, any other report or evidence, and anything else the court considers appropriate.²⁴ However, it is not permitted to consider the means of managing the risk or the likely impact of a supervision order on the offender.²⁵ The court is entitled to determine that an offender poses an unacceptable risk ‘even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not’.²⁶ This effectively means that a small risk of re-offending might still be regarded as an unacceptable risk. Conversely, even if the court is satisfied that an offender poses an unacceptable risk, it has the discretion to make no order.²⁷

A supervision order must have a commencement date and must be expressed to be in force for a specified period, which cannot exceed 15 years.²⁸ The Secretary is required to apply to the court for a review of the order no later than 3 years after it was first made or any earlier first review date specified in the order, and, after that, at intervals of no more than 3 years or any shorter intervals specified in the order. In addition to these mandatory, automatic reviews, an offender can apply to the court for leave to apply for a review at any time. Leave may be granted if the court is satisfied that there are new facts or circumstances which would justify a review of the order, or that a review would be in the interests of

19 Ibid s 109(2).

20 Ibid s 113.

21 Ibid s 9(1).

22 Ibid s 9(2).

23 Ibid s 9(6).

24 Ibid s 9(3).

25 Ibid s 9(4).

26 Ibid s 9(5).

27 Ibid s 9(7). The test was different under the *Monitoring Act*. Under that *Act*, a court could make a supervision order only if satisfied, to a high degree of probability, that the offender was likely to commit a relevant offence if released unsupervised into the community upon completion of a custodial sentence: s 11. In *RJE v Secretary, Department of Justice* (2008) 21 VR 526 (*RJE*) the Court of Appeal departed from its earlier decision in *TSL v Secretary, Department of Justice* (2006) 14 VR 109 in which it had held that a less than 50 per cent chance might suffice for the purpose of the term ‘likely’. In *RJE*, the Court of Appeal, by majority, held that ‘likely’ means more likely than not, and therefore does not admit of a less than 50 per cent chance that the person will commit a relevant offence if released unsupervised. In response to this decision, s 11 of the *Monitoring Act* was amended by the *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) to provide that an offender was likely to commit a relevant offence if there was a ‘real and ongoing’ risk of the offender committing such an offence which could not ‘sensibly be ignored having regard to the nature and gravity of the possible offending’. A determination that an offender was likely to commit a relevant offence could be made on the basis of ‘a lower threshold than a threshold of more likely than not’.

28 *Detention and Supervision Act* s 12.

justice having regard to the purposes of the order and the manner and effect of its implementation.²⁹ The purpose of a review is to ascertain whether the supervision order should continue or be revoked and, if revoked, whether it should be replaced with a different supervision order or with a detention order.³⁰

A supervision order is subject to the conditions imposed by the court.³¹ Their primary purpose is to reduce the risk of re-offending by the offender, and in order to do so they may promote the offender's rehabilitation and treatment.³² Their secondary purpose is to provide for the reasonable concerns of the offender's victim(s) regarding their own safety and welfare.³³ The *Act*:

- imposes eight core conditions to which a supervision order must be made subject.³⁴ They are designed (inter alia) to secure the offender's continued presence in Victoria during the period of the order, and to ensure that the offender undergoes the assessments and oversight required by the *Act* and submits to the authority of bodies charged with administering the conditions or the residential facilities in which an offender might be required to reside;
- provides a lengthy list of suggested conditions that a court must consider imposing.³⁵ They relate to matters such as: where the offender can reside (including whether he/she should reside at a residential facility); curfews; the conditions under which an offender may leave his or her place of residence and the places or areas that the offender must not visit or may only visit at certain times; treatment or rehabilitation programs or activities that the offender must attend and participate in; conditions pertaining to the consumption of alcohol and the use of drugs; types of employment, behaviour or community activities that the offender must not engage in; persons or classes of persons with whom the offender must not have contact, such as children or former victims of the offender and their families; and forms of monitoring (including electronic monitoring) of compliance with the supervision order to which the offender must submit. The Secretary, offender and victim may make submissions to the court regarding the conditions to be imposed.³⁶
- allows the court to impose any other conditions it considers appropriate to reduce the risk of re-offending and to address the reasonable concerns of the victim(s) in relation to their safety and welfare;³⁷ and

29 Ibid s 68.

30 Ibid s 71.

31 Ibid s 15(1). Under the *Monitoring Act*, the conditions were imposed by the statute and were supplemented by instructions and directions given by the Adult Parole Board: at ss 15, 16.

32 *Detention and Supervision Act* s 15(3), (5).

33 Ibid s 15(4).

34 Ibid s 16.

35 Ibid s 17.

36 Ibid ss 21, 23.

37 Ibid s 19. Possible conditions listed as examples in the notes to s 19 include a condition prohibiting internet access and a condition requiring the offender to comply with the directions of the Adult Parole Board in relation to appropriate internet access or drug or alcohol use.

- allows the court to impose a condition authorising the Adult Parole Board to give directions to the offender regarding the operation of any condition, or to impose a condition authorising or prohibiting the Board from giving a direction that an offender is to reside at a residential facility.³⁸

The court must ensure that any conditions, other than the core conditions, constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary to ensure the purposes of the conditions, and are reasonably related to the gravity of the risk of the offender re-offending.³⁹

The vast majority of offenders are subject to a curfew and are monitored electronically by means of an ankle bracelet. While some offenders reside in independent accommodation out in the community,⁴⁰ about half of the offenders who are currently subject to supervision orders are confined within Corella Place, a purpose built residential housing facility which is within the precinct of Ararat prison, but outside the prison wall.⁴¹

There are provisions that govern the expiry⁴² and renewal⁴³ of supervision orders, the making of interim supervision orders for a period of up to four months,⁴⁴ appeals relating to supervision orders⁴⁵ and transitional issues between the two Acts.⁴⁶ Part 10 of the *Act* deals with the management of offenders on supervision orders. This is largely left to the Adult Parole Board, although responsibility for the day to day management and good order of residential facilities rests with the Commissioner of Corrections.⁴⁷

Failure to comply with a condition of a supervision order, without reasonable excuse, is an indictable offence which renders the offender liable to a term of

38 Ibid s 20.

39 Ibid s 15(6).

40 It is very difficult for notorious sex offenders to find safe and suitable accommodation in the community. Dennis Ferguson is a prime example. See ABC Television, 'Facing Dennis Ferguson', *Four Corners*, 2 November 2009 (Liz Jackson) <www.abc.net.au/4corners/content/2009/s2731054.htm>.

41 'Corella Place an Australian First', *The Ararat Advertiser* (online), 26 March 2010 <<http://www.araratadvertiser.com.au/news/local/news/general/corella-place-an-australian-first/1787091.aspx>>.

42 *Detention and Supervision Act* ss 25–7.

43 Ibid ss 28–32.

44 Ibid pt 4. A court can make an interim supervision order if it is satisfied (inter alia) that the Secretary has applied for a supervision order or for the renewal of an existing supervision order, that the application will not be determined before the offender is due to be released into the community without supervision and that an interim order is in the public interest: at s 53.

45 Ibid pt 7.

46 Ibid sch 2. Basically, offenders who are subject to supervision orders made under the *Monitoring Act* remain subject to that *Act*, despite its repeal, until the order is revoked, quashed or set aside, or a supervision or detention order is made under the *Detention and Supervision Act*. Supervision orders made under the *Monitoring Act* are reviewed as if they had been made under the new *Act*. If the court confirms a supervision order on review, it must make a supervision order under the new *Act* in respect of the offender, which would replace the order made under the *Monitoring Act*. Some of the complexities of applying the *Detention and Supervision Act* to supervision orders made under the *Monitoring Act* are identified in *Secretary, Department of Justice v Fletcher* [2010] VSC 170 (30 April 2010) [15]–[43].

47 The Commissioner is required to give effect to the conditions of a supervision order and any directions given by the Adult Parole Board pursuant to that order: *Detention and Supervision Act* s 134.

imprisonment.⁴⁸ However, a breach may be dealt with in other ways, such as by a review of conditions or by an application for a detention order.⁴⁹

B Detention Orders

The Director of Public Prosecutions ('DPP') can apply to the Supreme Court for a detention order in respect of an eligible offender which commits the offender to detention in a prison for the period of the order.⁵⁰ The application must be accompanied by at least one assessment report or, if the offender is subject to a supervision order, by a progress report and the last assessment report in respect of the offender.⁵¹ The Supreme Court can make the order only if it is satisfied that the offender poses an unacceptable risk of committing a relevant offence if a detention or supervision order is not made and the offender is in the community.⁵² The DPP bears the burden of proving this risk.⁵³ In determining whether an offender is likely to commit a relevant offence in such circumstances, the Supreme Court must have regard to: any assessment or progress report filed in the court (whether filed by or on behalf of the DPP or the offender); any other report or evidence; and anything else the court considers appropriate.⁵⁴ However, the Court is not permitted to consider the means of managing the risk or the likely impact of a detention or supervision order on the offender.⁵⁵ The Court is entitled to make a finding that the offender poses an unacceptable risk even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not.⁵⁶

Even if the Court is satisfied that an unacceptable risk exists, it cannot proceed to make a detention order unless it is satisfied that the risk of the offender committing a relevant offence would be unacceptable unless a detention order were made.⁵⁷ If it is so satisfied it can make the detention order.⁵⁸ If it is not so satisfied, the

48 Ibid s 160.

49 Ibid s 163.

50 Ibid ss 33(2), 42. The process of applying for a detention order actually originates with the Secretary to the Department of Justice, as it is the Secretary who decides whether a matter should be referred to the DPP for determination as to whether an application for a detention order should be made: at s 104. In considering the issue, the Secretary must have regard to an assessment report relating to the offender and any other relevant information, matter or report: at s 104. If the Secretary decides that an application should be made and refers the matter to the DPP, the DPP must consider the assessment report provided by the Secretary and may have regard to any other report, information or matter it considers relevant. If the DPP decides not to apply for a detention order, the Secretary is entitled to proceed with an application for a supervision order: at s 105(7).

51 Ibid s 34.

52 Ibid s 35(1).

53 Ibid s 35(5).

54 Ibid s 35(2).

55 Ibid s 35(3).

56 Ibid s 35(4).

57 Ibid s 36(1). As is the case with supervision orders, the Court is expressly permitted to make a determination even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not: at s 36(2).

58 Ibid s 36(3).

court may make a supervision order instead.⁵⁹ However, it is equally open to the Court to make no order, even where it has the power to make a detention or supervision order.⁶⁰ The Court may be duly satisfied about unacceptable risk only by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify its decision.⁶¹

A detention order must have a commencement date and must be expressed to be in force for a certain period, being no more than 3 years.⁶² Provision is also made for interim detention orders to be made for a period of up to 4 months.⁶³ The DPP may apply to the Court at any time while a detention order is in force for an order that the detention order be renewed.⁶⁴ The Court is required to make the same ‘unacceptable risk’ assessment as when the order was initially made. Detention orders must be periodically reviewed.⁶⁵ The purpose of a review is to determine whether the detention order should remain in operation or be revoked, and, if revoked, whether it should be replaced with a supervision order. The *Act* also permits the DPP or the offender to apply to the court for leave to have the order reviewed.⁶⁶

C Media Interest

Many aspects of the supervision and detention regimes might attract the interest of the media. Publishers may also have an interest in comparing the Victorian scheme with the sex offender regimes that operate in other jurisdictions, as there are significant variations between the regimes both in terms of law and practice. Some of the variations between Victoria and New Zealand, for example, were described by Vess and Eccleston⁶⁷ and pertain to matters such as:

- which sex offenders are selected for an assessment;
- the risk assessment measures and psychometric tools used to assess offenders and their degree of predictive accuracy;
- variations in the manner in which the risk assessment findings are communicated to the courts and the impact on judicial decision making;

59 Ibid s 36(4).

60 Ibid s 36(5).

61 Ibid s 37.

62 Ibid s 40.

63 Ibid ss 54, 55(1). A court can make an interim detention order only if satisfied (inter alia) that the DPP has applied for a detention order or for the renewal of an existing detention order, that the application will not be determined before the offender is due to be released and that an interim order is in the public interest.

64 Ibid s 45.

65 Ibid s 66.

66 Ibid s 68.

67 James Vess and Lynne Eccleston, ‘Extended Supervision of Sexual Offenders in Australia and New Zealand: Differences in Implementation Across Jurisdictions’ (2009) 16 *Psychiatry, Psychology and Law* 271.

- the relationship between the risk assessments and the legal tests laid down in the legislation;
- the role of expert risk assessors, in particular, whether they are partisan participants who are there to assist counsel to get a desired result or whether their function is to provide independent advice and opinion to the court;
- the conditions that can be imposed on offenders as part of an order; and
- the impact of human rights instruments on the validity and operation of the scheme.

In light of the fact that these factors can produce different outcomes for an offender, and therefore for public safety,⁶⁸ it could be argued that open reporting of applications made to the court, and the material on which they are based, would facilitate critical review of the scheme and may lead to the development of best practice. The extent to which publication is permitted is the subject of the next two sections.

III THE PUBLICATION REGIME UNDER THE *SERIOUS SEXUAL OFFENDERS MONITORING ACT 2005*

A *The Nature of a Proceeding for a Supervision Order*

Except as otherwise provided, proceedings on an application for a supervision order under the *Monitoring Act* are criminal in nature.⁶⁹ There is no provision in the *Act* which stipulates that proceedings for a supervision order must be conducted in open court, but neither is the court invested with power to exclude the public and sit in camera. Presumably a court hearing an application for a supervision order could exercise the general powers conferred on it by its establishing Act to sit in camera or exclude certain persons.⁷⁰ However, it is understood that applications for supervision orders and suppression orders are heard in open court where the media and members of the public are entitled to be present and to hear the submissions and the reasons handed down by the court.⁷¹

68 The article by Vess and Eccleston revealed a huge discrepancy between the number of supervision orders imposed by New Zealand courts compared with Victorian courts, with the former far exceeding the latter despite both jurisdictions having comparable legislative regimes and populations: *ibid*.

69 *Monitoring Act* s 26.

70 See *County Court Act 1958* (Vic) ss 80, 80AA; *Supreme Court Act 1986* (Vic) ss 18, 19.

71 See, eg, *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [25] citing [56] of Millane J's judgment in the case of GT.

B Statutory Provisions Governing the Publication of Information

As far as publication of information about a proceeding for a supervision order is concerned, the basic stance adopted in the *Monitoring Act* is that publication is permitted as a normal incident of the principle of open justice, subject to the court ordering otherwise pursuant to the powers conferred on it by s 42. Section 42 empowers the court, in ‘any proceeding before a court under this Act’, to order that all or any of three things must not be published except in the manner and to the extent (if any) specified in the order. They are:

- any evidence given in the proceeding;
- the content of any report or other document put before the court in the proceeding (this would include the assessment reports described in Part II); or
- any information that might enable an offender or another person who has appeared or given evidence in the proceeding to be identified.

An order under this section may be made on the application of a party or on the court's own initiative.⁷² However, an order can be made only if the court is satisfied that suppression of all or any of the aforementioned information is in the public interest. Cummins J described the power in s 42 as having a different standard and scope than the suppression power in ss 18 and 19 of the *Supreme Court Act 1986*, because s 19(1)(b), which would ordinarily be relied upon for this sort of application, permits a suppression order to be made only if it is necessary in order not to prejudice the administration of justice.⁷³ Section 42 is broader in so far as it discards the strict test of necessity in favour of one based on the public interest.

A person must not publish material in contravention of an order under s 42.⁷⁴ The penalties for a breach are substantial.⁷⁵ The *Monitoring Act* does not define what it means to publish material. In light of the advent of communications technologies such as the internet, Facebook and Twitter and the rise of the citizen publisher, a definition of ‘publish’ would indicate how wide the Victorian Parliament intended to cast the net. As it stands, it is left to the courts to phrase their suppression orders so as to make clear the extent to which publication is prohibited.⁷⁶

⁷² *Monitoring Act* s 42(2).

⁷³ The same power is conferred on the County Court: *County Court Act 1958* (Vic) s 80AA(b).

⁷⁴ *Monitoring Act* s 42(3).

⁷⁵ The penalty is 500 penalty units in the case of a body corporate and 120 penalty units or imprisonment for 1 year or both in any other case: *ibid.*

⁷⁶ For example, in *ARM v Secretary, Department of Justice* [2008] VSCA 266 (18 December 2008) [37] (*‘ARM’*) the Court of Appeal prohibited publication ‘by print, radio, television, electronic means or any other means whatsoever’.

C Judicial Interpretation of s 42

It is not possible to present a complete picture of how the courts have interpreted the concept of the public interest in s 42, since not all the judgments that have dealt with this issue are reported.⁷⁷ However, it would appear that offenders routinely apply to have their identities suppressed, and that more often than not, their applications are successful.⁷⁸ It is reported that the Department of Justice is usually amenable to orders suppressing identity,⁷⁹ and to orders suppressing reports and evidence. Indeed, on all but one occasion under the *Monitoring Act*, courts ordered that these reports be suppressed.⁸⁰ However, a recent case in which Cummins J permitted child sex offender Robin Fletcher to be publicly named goes against the grain. This case may have heralded a change in attitude on the part of the courts. However, any liberating effect was short lived as the *Monitoring Act* was repealed a few weeks after Cummins J's decision was handed down and replaced with a different set of publication restrictions under the *Detention and Supervision Act*.

1 Cases That Have Ordered Suppression in the Public Interest

There are three main decisions that have explored the concept of the public interest in s 42 and found that it favours the suppression of information.⁸¹ They are: *ARM*,⁸² two unreported judgments of County Court judge Millane J in respect of an offender known as GT⁸³ and *Hinch v County Court of Victoria*.⁸⁴ The latter two cases are linked. In *Hinch v Country Court of Victoria*, radio presenter Derryn Hinch was charged with several counts of publishing material in breach of the suppression orders made by Millane J in respect of GT, as well as suppression

77 A court might suppress its decision and reasons for making or refusing to make a supervision order, or a decision may be handed down *ex tempore* and be ascertainable only through a perusal of the transcript. The latter is likely to be the case when interim supervision orders are sought.

78 It is reported that 'the identities of two thirds of the 49 Victorian sex offenders released from prison under supervision are protected by suppression orders', and that 25 of these offenders are living in the community (in Melbourne and country towns) while 24 are living in a residential facility outside the Ararat prison: Geoff Wilkinson, 'Perverts Get Freedom in Secret: Sex Beasts Anonymous', *Herald Sun* (Melbourne), 30 January 2010, 6.

79 In a radio interview on 3AW, media lawyer Justin Quill stated that, in his experience, the Department of Justice had almost never opposed an order suppressing the identity of an offender subject to a supervision order: 3AW Radio, *Drive Program*, 29 January 2010 (Derryn Hinch). The Department has been castigated in the Victorian Parliament for its acquiescent attitude to suppression applications: Victoria, *Parliamentary Debates*, Legislative Assembly, 2 February 2010, 32 (Kenneth Smith).

80 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 4034, 4036 (Bob Cameron, Minister for Corrections).

81 There is another reported case in which a suppression order was issued, *RJE*, but the order was not discussed in the judgment, which focused entirely on whether the trial judge should have made the supervision order.

82 [2008] VSCA 266 (18 December 2008).

83 These judgments, which were handed down on 17 December 2007 and 20 December 2007, are not available on the County Court website or on Austlii, but they are extensively reproduced and analysed by Osborn J in *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009). I have relied on the extracts of the judgments as reproduced in the *Hinch* case.

84 [2009] VSC 548 (3 December 2009).

orders made by County Court judge Hannan J in respect of another offender known as MJ.⁸⁵ Hinch issued proceedings in the Supreme Court seeking to challenge the validity of the orders which formed the basis for the charges against him.⁸⁶ Since the challenges to the orders were issued out of time, the immediate question for the Supreme Court was whether Hinch had demonstrated the existence of special circumstances which would allow him to mount the challenge out of time.⁸⁷ It was ultimately held that he had not. However, in the process of reaching his decision on this matter, Osborn J made extensive comments as to the likely success of the application had it been allowed to proceed. It is these comments that shed light on the meaning of ‘public interest’ in s 42.

There are at least four principles that can be distilled from these three judgments regarding the operation of s 42. The first is that s 42 must be strictly construed, since it derogates from the fundamental principle of open justice.⁸⁸

Secondly, the concept of public interest referred to in s 42 must be viewed ‘through the prism of the Act’ and in the context of the purposes of the *Act*.⁸⁹ The stated purpose of the *Monitoring Act* is to ‘enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who are a serious danger to the community to be subject to ongoing supervision while in the community’.⁹⁰ This purpose is achieved through the processes established by the *Act*; namely, by an application to the court for a supervision order which is supported by an assessment report, and by the proper administration of the supervisory scheme (with particular emphasis on the offender’s location and residence). This reasoning led Millane J to conclude that a suppression order should be made if a court is satisfied that observing the principle of open justice would or could frustrate the purpose of the *Act*.⁹¹

Thirdly, each of these cases has grappled with the nature of the relationship between the rehabilitation of the offender and the public interest. While media organisations that seek to resist suppression orders frequently portray these two concepts as being at odds with each other, the courts in these cases have tended to interpret the notion of public interest as embracing the rehabilitation of the

85 Hinch was charged with posting the names of GT and MJ on his website and with disclosing MJ’s name at a public protest rally on 1 June 2008.

86 If Hinch could show that the suppression orders were invalidly made, the charges against him for breaching the orders would have to be dropped.

87 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r 56.02(3) permits the Court to extend the time in special circumstances.

88 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [25] citing [51] of the judgment of Millane J. This is simply an application of the established principle of statutory interpretation that Parliament is presumed not to intend to abrogate or curtail fundamental common law rights. The presumption is rebuttable, but the onus is on Parliament to ensure that any intention to invade such rights is made clearly manifest by using unmistakable and unambiguous language: *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514; *Plenty v Dillon* (1991) 171 CLR 635; *Coco v The Queen* (1994) 179 CLR 427; *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 221 CLR 309.

89 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [24] citing [31] of the judgment of Millane J.

90 *Monitoring Act* s 1.

91 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [24] citing [31] of the judgment of Millane J.

offender. Viewed this way, the public interest and the interests of the offender are perceived as aligned, not opposed.

The relevance of rehabilitation was most thoroughly explored in the case of GT. The Herald and Weekly Times Pty Ltd ('HWT') had argued that it was in the public interest that GT should be identified because this would diminish his opportunity to establish relationships of trust with potential victims and their families.⁹² However, Millane J held that the public interest was in GT's rehabilitation and that this would be compromised if GT's identity were to be made known. In reaching this decision, Millane J relied on unequivocal expert evidence to the effect that GT had made such significant progress in his rehabilitation that the risk that he would re-offend had not just been contained but had diminished, and that this rehabilitation had been achieved by a combination of factors such as stability in his living environment, his limited but appropriate social network, his clinical management and therapy, and his established relapse prevention plan and support and surveillance group.⁹³ While acknowledging the public interest in open justice,⁹⁴ Millane J concluded that on this occasion it was outweighed by the public interest in not jeopardising GT's rehabilitation by exposing him to harassment, protests and possibly vigilantism.⁹⁵ She reached a similar conclusion regarding the documents that had been filed in the proceeding. In that context, she noted that both the *Act* itself, and often the supervision orders made under it, contemplate regular review and evaluation of the offender, and held that it was important that the professional relationships established between the offender and the medical profession, and any future co-operation between them, should not be compromised by publication of the reports.⁹⁶ Since the oral evidence in the case had discussed the reviews, it too was suppressed. It is unclear whether her Honour would have reached the same conclusion had GT not established good therapeutic relationships or acted in a co-operative manner.

Hinch sought to challenge this order on the basis that Millane J had failed to apply the public interest test laid down in the *Monitoring Act*. The nub of Hinch's argument was that Millane J had applied a test of whether publication presented a risk to the offender's rehabilitation, and that this was not to be equated with the public interest.⁹⁷ Osborn J found that this complaint was 'manifestly baseless'.⁹⁸ His Honour held that just because a matter or circumstance relates to the offender does not mean that it does not raise an issue of public interest.⁹⁹ In particular,

92 Ibid [28] citing [13] of the judgment of Millane J.

93 Ibid [27] citing [7] of the judgment of Millane J.

94 Millane J cited the classic statement from *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476–7 that the fundamental rule of the common law is that justice must take place in open court and that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.

95 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [28] citing [15] of the judgment of Millane J.

96 Ibid [29] citing [22] of the judgment of Millane J.

97 Ibid [9], [31].

98 Ibid [21].

99 Ibid [32].

Osborn J stated that rehabilitation of the offender was not irrelevant to the public interest.¹⁰⁰

In *ARM*,¹⁰¹ the Court of Appeal approached the issue of whether it should exercise its power to make an order under s 42 bearing in mind that a supervision order is not intended as a punishment and is an extraordinary statutory encroachment on the freedom and liberty of a person who has served their sentence. In a joint judgment, Maxwell P, Nettle and Weinberg JJA took the view that while Parliament has deemed it to be in the public interest that the police and correctional authorities should know the identity and whereabouts of an offender who is subject to a supervision order — indeed, the Court understood this to be the principal justification for the profound intrusion upon the liberty of the subject for which the legislation provides — Parliament has made it the responsibility of the Court to be satisfied that there is a public interest in any further disclosures. The Court of Appeal proceeded to hold that the psychiatrist's expert evidence at the initial hearing as to the likely destabilising effects on ARM of the disclosure of his identity or whereabouts was sufficient to warrant suppression of his identity, evidence and assessment reports. The Court was also influenced by the research literature cited by the expert, which was to the effect that there is a likelihood that disclosing the identity of sex offenders reduces compliance with treatment, makes them more likely to seek to evade orders and escalates the risk of re-offending.¹⁰²

Fourthly, in the case of GT, Millane J stated that the public's legitimate interest in open justice — which entails being informed that an application for a supervision order has been made and in its outcome, in being able to scrutinise the reasons for any suppression, and in being made aware that the *Monitoring Act* is being employed as intended — can be met through the publication of appropriately worded material.¹⁰³ However, she surmised that, once stripped of its prurient detail and of the means of identifying the offender, the material may not be regarded as sufficiently newsworthy to warrant publication.¹⁰⁴

2 Cases That Have Favoured Disclosure in the Public Interest

In 2006, Gillard J imposed a supervision order on Robin Fletcher for a period of five years. In 2008, Fletcher obtained leave to have the order reviewed.¹⁰⁵ In October 2009, as part of his application for release from the supervision order, Fletcher applied for a suppression order pursuant to s 42. He sought a wide order to cover the entire proceeding and the evidence therein, or, failing that, a more limited order in relation to his identity. He argued that both orders were justified

100 Sentencing courts have repeatedly recognised that rehabilitation is in the interests of both the offender and the public: *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [34].

101 [2008] VSCA 266 (18 December 2008) [36].

102 *Ibid* [33].

103 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [25] citing [54]–[55] of the judgment of Millane J.

104 *Ibid* [25] citing [55] of the judgment of Millane J.

105 *Secretary, Department of Justice v Fletcher [No 3]* [2008] VSC 217 (23 June 2008). The Court granted Fletcher leave to have the order reviewed, and Fletcher duly made an application for a review.

in the public interest. The evidence of a distinguished psychiatrist was led in support of the order. It was to the effect that the consequence of publicity on sex offender patients, including Fletcher, can involve antipathetic consequences such as distress, anxiety and paranoia, which in turn can lead to the potential for re-offending, an occurrence that would not be in the public interest. As explained earlier, arguments and evidence to this effect had formed the *raison d'être* for suppression orders in previous decisions. The HWT opposed the making of the orders.¹⁰⁶

While Cummins J professed respect for the psychiatrist's evidence and acknowledged the centrality and importance of therapy and treatment for sex offenders, he refused to make any suppression order, holding that there is a fundamental interest in the public having serious proceedings open for public scrutiny and in knowing what the courts are doing in relation to offenders. He stated:

In my view, that interest of the public is overwhelming and it is proper that the media, as effectively the window of the public into the Court, be entitled to publish the proceedings and the name of Mr Fletcher. In my view, that is a corollary of the need for proceedings such as these properly to be known by the community.¹⁰⁷

Cummins J did, however, order the suppression of the names of the assessors in the media.¹⁰⁸

The HWT hailed the case as a victory for the public's right to know that a sex offender had moved into their neighbourhood, and foreshadowed that it would use the case as a precedent to challenge the practice of allowing offenders on supervision orders to remain anonymous.¹⁰⁹ The HWT proceeded to achieve similar success in relation to the publication of details of the supervision order regarding Brian Keith Jones, the infamous 'Mr Baldy'.¹¹⁰

D Reconciling the Various Public Interests in s 42

The preceding discussion demonstrates that how s 42 is employed depends on what the court perceives as being in the public interest. The public interest is a malleable concept, although as Millane J noted, it must be interpreted through the prism of the *Act*. In this context, it is clear that it is not confined to the due administration of justice.¹¹¹ At least four public interests can be said to bear on the interpretation and application of s 42: the public interest in open justice; the

106 The HWT is not listed as having appeared in the case, nor is it mentioned in Cummins J's reasons for decision. However, the newspaper's reports indicate that it did appear and make submissions: Editorial, 'We Can Name Sex Monster', *Herald Sun* (Melbourne), 20 October 2009, 22.

107 *Secretary, Department of Justice v Fletcher (Ruling No 1)* [2009] VSC 501 (19 October 2009) [5].

108 *Secretary, Department of Justice v Fletcher (Ruling No 2)* [2009] VSC 502 (19 October 2009).

109 Editorial, 'We Can Name Sex Monster', *The Herald Sun* (Melbourne), 20 October 2009, 22.

110 Elissa Hunt, 'Mr Baldy's bid for Freedom', *The Herald Sun* (Melbourne), 21 October 2009, 5.

111 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [54].

public interest in protecting the community from high risk sex offenders (which is the stated purpose of the *Monitoring Act*); the public interest in securing the treatment and rehabilitation of such offenders;¹¹² and the public interest in preventing harassment and retributive action against these offenders.¹¹³ The first two public interests are promoted by the publication of information about an offender.¹¹⁴ Conversely, expert evidence in the aforementioned cases suggests that the public interest in an offender's rehabilitation is not advanced by the publication of identifying information. Since vigilante activity can occur only if an offender's location and identity is made known,¹¹⁵ this public interest is also furthered by suppression. Technically, a court hearing an application under s 42 is only directed to consider the public interest in suppression, as the *Act* proceeds on the basis that material can be published unless and until a court orders otherwise. But in reality, the courts' task is to determine which public interest should prevail in any given case.

1 Offender Rehabilitation versus Community Safety

As explained earlier, the focus of media organisations is inevitably on the public interest in open justice and the community's protection; an offender's rehabilitation and safety are not portrayed as aspects of the public interest. This has produced a perception that the offender's interests are inevitably at odds with the public interest. If accepted, this bifurcation has the advantage of making the task of the court easy: if the rehabilitation and safety of an offender are not relevant to the public interest, they need not be taken into account in applying

112 Rehabilitation of the offender is an express purpose of the *Detention and Supervision Act*. Although not enunciated as a purpose of the *Monitoring Act*, it is clear from the preceding discussion that courts grappling with s 42 have regarded it as relevant to the public interest. Indeed, it was evidence that publicity would interfere with the offender's prospects for rehabilitation that led the judges in *ARM* and in the case of *GT* to conclude that a suppression order should be made.

113 In one sense this is simply an aspect of the public interest in rehabilitation, as it is the risk of taunts, protests and retribution that is likely to jeopardise an offender's progress towards rehabilitation. However, vigilante activity is also a threat to law and order and to the authority of the institutions of the state as the repository of power to punish persons convicted of crimes. There is therefore a wider public interest in eliminating such behaviour.

114 It might be argued, however, that an offender who is identified and subsequently victimised might re-offend in the belief that no amount of progress or reform will ever quell the community's desire for revenge, and that this propensity to re-offend affects public safety. On the other hand, publicity may have a deterrent effect on the offender because he/she knows they are being watched by the public.

115 A case in point is that of Dennis Ferguson, who was released on 9 January 2003 after spending 14 years in prison for sex offences against children. Upon release, he was hounded and reviled in each Queensland town in which he tried to settle. He eventually relocated to New South Wales where he leased public housing in Ryde. However, the public outcry was so great that the NSW Parliament passed a special law giving itself power to terminate the lease of certain sex offenders who are tenants in public housing without the provision of compensation: *Housing Amendment (Registrable Persons) Act 2009* (NSW). See Tory Maguire, *What To Do with Australia's Least Wanted Man* (15 September 2009) *The Punch* <<http://www.thepunch.com.au/articles/what-to-do-with-australias-least-wanted-man-dennis-ferguson>>; ABC Television, 'Facing Dennis Ferguson', *Four Corners*, 2 November 2009 (Liz Jackson) <www.abc.net.au/4corners/content/2009/s2731054.htm>. Some saw this NSW law as a win for vigilantism: see 'Paedophile Dennis Ferguson Evicted', *ABC News* (online), 25 September 2009 <<http://www.abc.net.au/news/stories/2009/09/24/2695726.htm>>.

s 42. Once eliminated, the court is left with public interests that incline towards publication.

However, it is argued that the matter is not adequately resolved by consigning the interests of the offender to the other side of the ledger. Indeed, the very existence of s 42 contemplates that the public interest might favour suppression, and the rehabilitation and safety of the offender are two obvious reasons why this might be the case. Recognising that an offender's rehabilitation and safety are also matters of public interest places the court in the difficult position of having to reconcile competing public interests that pull in different directions. By what means does a court resolve the tension and arrive at a decision as to whether to suppress information or not? One method is to decide whether the situation is best assessed from a short-term or a long-term perspective. To regard the rehabilitation of an offender as being of greater weight than public safety is to take a long-term view of the situation. The offender, by definition, is a serious sex offender who poses an unacceptable risk of re-offending.¹¹⁶ In light of this assessment, it is unlikely that any rehabilitation is going to be achieved quickly, especially since the offender is an adult not a child, thus their personality is not as malleable because the process of maturity is largely complete. By contrast, to take a short term view of the situation is to base one's judgment about what is in the public interest on the offender's present condition — he/she is a person who has already committed serious sex crimes and who has been adjudged by experts as being at risk of doing so again — rather than on the basis of what the offender might hopefully become in the future, namely, a reformed person who no longer has a propensity to commit sex crimes. This view postulates that the offender is a person who presents a danger to the public, ergo, the public have a right to know who he/she is so that they can take precautionary measures to protect themselves and their children from this person.

The limited case law suggests that the courts have tended to take a long-term view. In fact, courts have paid surprisingly little attention to the public interest in community safety in the context of considering applications under s 42, despite the fact that this is the public interest most likely to be pressed by media organisations.¹¹⁷ The reasons for this are unclear. Perhaps courts are suspicious that what really motivates media organisations to resist suppression orders is their quest to publish sensational stories. However, while it is undeniable that media organisations exist to make a profit and are therefore drawn to stories that will attract a large readership or audience, it is equally true that the *Act* is premised on the fact that these offenders pose a danger to the community. This danger cannot be shrugged off simply because it happens to coincide with the media's own publication agenda. Or perhaps the courts consider that concerns about community safety are adequately addressed through the imposition of stringent conditions on offenders, such as requiring them to reside in a secure facility and/or to wear ankle bracelets or comply with curfews. Or perhaps the courts take the

116 If this were not the case, the offender could not have been subjected to a detention or supervision order.

117 Even Cummins J, who allowed Robin Fletcher to be identified, did not explicitly mention public safety in his judgment.

view that those who administer the *Act* can be entrusted to protect the community and that it is sufficient that these people are aware of the name and location of the offender. If so, there is cause for concern that the courts' faith in the government's ability to protect the public is misplaced.¹¹⁸

The following example illustrates the potential danger to community safety of suppressing identity. An offender who had been placed on an interim supervision order and ordered to live in a residential facility at the Ararat prison with an electronic monitoring bracelet on his ankle left the facility at 1:50 am on 27 January 2010 in breach of his conditions. Within minutes, the police and prison authorities began searching for the offender, but since his electronic bracelet was not connected to a GPS system, he could not be located. The Minister for Police and Corrections was notified of the offender's disappearance sometime in the afternoon of 27 January. At around 7 pm on Thursday 28 January, the HWT began to make inquiries about the offender. Shortly after, the police issued a media alert in which they named the offender, presumably to warn members of the public and to seek their assistance in finding him. It fell to the HWT to inform the police that a County Court suppression order issued in September 2009 under s 42 of the *Monitoring Act* prohibited the publication of any information that would identify the offender. The media alert was withdrawn 30 minutes after its issue. As a result of the suppression order, the public could not be informed of the offender's identity, even though his actions in leaving the facility were in breach of his supervision order. On 29 January, the story made front page news in the *Herald Sun*. Much emphasis was placed on the fact that the newspaper was legally prevented from informing the public of the offender's name. The Department of Justice thereupon made an urgent application to the County Court to have the suppression order lifted. Pullen J acceded to the application shortly after 9 am, and the offender's name and image were quickly published on the radio and on various websites. The offender was recaptured by police shortly after 11 am. He was remanded in custody and brought before the County Court and charged with breaching his supervision order. During his court appearance, the offender's lawyer sought to have the suppression order reinstated on the basis that, since the offender was now in custody, there was no need for his identity to continue to be reported. The Department of Justice did not oppose the application and it was granted by Pullen J at 4:15 pm.¹¹⁹ At 5 pm the HWT was granted leave to appeal

118 Three examples will suffice. In 2005, Brian Jones was initially placed by the Department of Justice near schools: Justin Quill, 'Secret Justice Offends Us All', *The Herald Sun* (Melbourne), 16 January 2010, 30. Jones was subsequently fitted with an electronic ankle bracelet and ordered to live in a residential facility. However, in late 2008, he was not monitored for a period of 15 days after he knocked the power plug to his monitoring unit out of the wall: Geoff Wilkinson, 'Sex Beast Off Radar', *The Herald Sun* (Melbourne), 1 February 2010, 3. Another offender attacked women in daylight: Mark Butler, 'Sex Creep's Rampage: Tagged Pervert Accused of Eight New Attacks While under Watch', *The Herald Sun* (Melbourne), 21 December 2009, 1, 12. It was recently reported that an offender living in a residential facility had been able to make hundreds of dollars worth of phone calls to sex chat lines because the phones were unmonitored: Editorial, 'Hang Up On Sex Offenders', *The Herald Sun* (Melbourne), 4 February 2010, 34; Geoff Wilkinson, 'You Pay For Rapist's Phone Sex Bills', *The Herald Sun*, (Melbourne), 4 February 2010, 3.

119 This produced the odd situation that in an interview being conducted by Hinch on 3AW, the offender could be lawfully named at the start of the interview but not by the end of it.

the order. Somewhat surprisingly, in view of the fact that it had acquiesced in the offender's application to have the suppression order re-instated, the Department of Justice announced that it would join with the HWT in contesting the order on the basis that the person had already been identified. However, the bid to have the order lifted was unsuccessful. Pullen J held that suppression was in the public interest, citing as relevant the fact that the offender had been returned to custody and that the application to place him on a supervision order had not been heard. (The offender was only on an interim supervision order).¹²⁰ While this incident does not negate any of the public interests that are advanced by suppression, it casts doubt over whether the Department of Justice can be entrusted to look after the community's safety. Neither the Minister nor the Department of Justice acted quickly in seeking to have the suppression order lifted when public safety was compromised when the offender left the Ararat facility. Indeed one wonders whether an application to lift the order would have been made at all if the media had not reported the offender's actions and brought pressure to bear on the Department. Moreover, the fact that the Department belatedly sought to have the order lifted, then acceded to the offender's request that it be re-instated, and then, hours later, announced that it would join with the HWT in seeking to have it lifted again, betrays a lack of a principled approach to the whole suppression issue.

While both the long-term and the short-term perspectives are logical and persuasive, it is argued that it is the short-term perspective that should be given priority. That is, public safety, and especially the safety of vulnerable children, should take precedence. The stakes are too high to do otherwise. This view is backed up by the purposes of the *Act*, which, as Millane J said, is the prism through which the public interest must be judged. The stated purpose of the *Monitoring Act* is to enhance the protection of the community by requiring seriously dangerous offenders who have served custodial sentences for certain sexual offences to be subject to ongoing supervision while in the community. Since the *Act* itself claims a pre-occupation with public safety — indeed the whole scheme is premised on that — so should the courts when it comes to the issue of publicity. The position is made even clearer by the *Detention and Supervision Act* which prioritises its two enunciated purposes, public safety being described as the main purpose, and treatment and rehabilitation of the offender as being secondary. Courts should take their cues from this ranking.

This is not to suggest that suppression orders should be refused as a matter of course, as s 42 clearly contemplates that there will be occasions where suppression is in the public interest. However, a greater onus should be placed on an offender who seeks a suppression order to demonstrate that he/she has made significant

120 This information was compiled from a number of articles that appeared in the Herald Sun: Norrie Ross, 'High Farce Ends in Backflip', *The Herald Sun* (Melbourne), 30 January 2010, 7; Geoff Wilkinson, 'Sex Beasts Anonymous', *The Herald Sun* (Melbourne), 30 January 2010, 6; Editorial, 'Time to Sack Bungler Bob', *The Herald Sun* (Melbourne), 30 January 2010, 34; Stephen McMahon, 'Cameron Runs for Cover Again', *The Herald Sun* (Melbourne), 30 January 2010, 7; Norrie Ross, 'Child Rapist's ID Stays a Secret', *The Herald Sun* (Melbourne), 2 February 2010, 2; Norrie Ross, 'Name the Sex Fiend', *The Herald Sun* (Melbourne), 2 February 2010, 4; Editorial, 'Name These Sex Monsters', *The Herald Sun* (Melbourne), 3 February 2010, 30.

progress with their treatment, and to outline how and why this progress would be jeopardised by the publication of their identity or assessment reports. The matter was convincingly put by the trial judge in the *ARM* case when she refused to suppress the offender's name and whereabouts on the basis that:

to justify suppression of this information there needs to be cogent evidence of negative impact either in the administration of the scheme or on the respondent to a degree that satisfies the court that publication is not in the public interest because it is likely to frustrate the purposes of the Act. In this instance I have not been satisfied from the material and evidence available to me that it is presently in the public interest to suppress information that might enable the respondent or his current whereabouts to be identified.

With respect, the judge was correct to be more concerned with evidence that bears directly on the likely effect of disclosure on the offender than with general evidence about the effects which disclosure may have had on other offenders in the past.

2 Vigilantism

As far as vigilantism is concerned, one of the purposes of a residential facility is to provide for the safe accommodation of offenders, so this is clearly an option if an offender's safety is at risk.¹²¹ Moreover, the threat of vigilantism might be assuaged if a court's refusal to make a suppression order is accompanied by a stern warning to members of the public who might be inclined to take the law into their own hands that any retributive action can be prosecuted and punished.¹²² Responsible reporting by the media should convey this message to the public, rather than manipulate the public by inciting a lynch mob mentality. However, it is conceded that the prospect of vigilantism cannot be eliminated if an offender is identified.

3 Open Justice

The public interest in the principle of open justice is said to be at the heart of any contest over suppressed evidence, documents or information.¹²³ This public interest carried great weight with Cummins J, who was adamant that the public have a right to scrutinise serious proceedings and to know what the courts are doing with sex offenders. Unlike the public interest in securing community safety, which favours publication for its ability to equip members of the community with information which they can use to protect themselves and their children from an offender, the principle of open justice has never demanded that information about a judicial proceeding must serve some tangible purpose or have direct consequences for the public, such as allowing them to avoid a certain

121 *Detention and Supervision Act* s 133(5)(b).

122 It would also be open to an offender to take out a restraining order against a member of the public.

123 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [24] citing [24] of the judgment of Millane J.

person or to take some specific, self protective action. Rather, it proceeds on the assumption that publicity enhances the quality of justice by augmenting judicial performance, increasing the likelihood that witnesses will testify truthfully, and boosting public confidence in the courts.¹²⁴ In proceedings under the *Monitoring Act*, open justice allows the public to assess whether a supervision order was correctly made or justifiably refused. This is especially important in this context, since the *Act* vests courts with the power to impose huge constraints on people for crimes they have not committed and, indeed, may never commit. If any power demands accountability, this power does. Both the offender and the public have a legitimate interest knowing how the courts are using this controversial power.

While the principle of open justice generally allows names to be reported, it might be argued that it can be duly served by anonymising the name of the offender but otherwise allowing reports of the proceeding to be published. This argument proceeds on the basis that what really matters are the legal issues raised in a proceeding, and these can be understood and debated on the basis of an anonymised report.¹²⁵ However, this practice, though widespread, was heavily criticised in *Guardian News and Media Ltd: Re HM Treasury v Ahmed*,¹²⁶ in which the United Kingdom Supreme Court paid considerable deference to the merits of allowing the media to report names:

What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected ...¹²⁷

The Court went on to maintain that this is not just a matter of deference to editorial independence. Rather:

The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

Lord Steyn put the point succinctly in *Re S*¹²⁸ when he stressed the importance of bearing in mind that

124 See, eg, *Russell v Russell* (1976) 134 CLR 495, 520; *A-G v Leveller Magazine Ltd* [1979] AC 440, 450; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 300; *Herald & Weekly Times Ltd v Magistrates Court of Victoria* [1999] 3 VR 231, 248; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 525 [60].

125 *Guardian News and Media Ltd: Re HM Treasury v Ahmed* [2010] UKSC 1 (27 January 2010) [67].

126 *Ibid.* The case was dealing with the naming of terrorism suspects, not sex offenders.

127 *Ibid* [63].

128 [2005] 1 AC 593, 608 [34].

from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer¹²⁹

The same point could be made about reporting supervision orders.

IV THE PUBLICATION REGIME UNDER THE *SERIOUS SEX OFFENDERS (DETENTION AND SUPERVISION) ACT 2009*

A *The Nature of a Proceeding for a Supervision or Detention Order*

Unlike proceedings under the *Monitoring Act*, which were criminal in nature, proceedings under the *Detention and Supervision Act* are declared to be civil in nature.¹³⁰ There is no provision in the *Act* that specifically states that proceedings must be conducted in open court, but neither is any specific power conferred on the court to exclude the public and sit in camera. Presumably a court hearing the application for a supervision or detention order is free to exercise the general powers conferred on it by its establishing Act to sit in camera or exclude certain members of the public.¹³¹

B *The Statutory Provisions regarding Publication of Information*

Division 1 of pt 13 deals with the publication of information about court hearings. The approach is quite different to that taken in the *Monitoring Act*.

1 *Persons and Information Other than the Identification and Location of Offenders*

(a) *The Prohibition on Publishing Certain Information*

Section 182(1) makes it an offence for a person to publish the following material, or cause it to be published, unless the court authorises publication:

- any evidence given in a proceeding before a court under this Act;
- the content of any report or other document put before the court in the proceeding;

¹²⁹ Ibid [63], [64].

¹³⁰ *Detention and Supervision Act* s 79. This embraces proceedings for a supervision order, a detention order, interim orders and reviews of orders and conditions.

¹³¹ These powers are outlined in *ibid*, note 70.

- any information that is submitted to the court that might enable a person (other than the offender) who has attended or given evidence in the proceeding to be identified; or
- any information that might enable a victim of a relevant offence committed by the offender to be identified.¹³²

Whereas the *Monitoring Act* permitted publication, but invested the court with power to make a suppression order in the public interest, s 182 reverses this process by prohibiting the publication of this information, but empowering the court to allow publication to occur. As is the case with the *Monitoring Act*, the *Detention and Supervision Act* does not define what is meant by ‘publication’. The extent of the prohibition is therefore unclear.

The prohibition on the publication of evidence, assessment reports and other documents put before the court in the proceeding means that details of offenders’ past sexual offending, the factors contributing to their offending behaviour and expert opinions on their risk of reoffending are not open to public scrutiny unless a court orders otherwise.¹³³ This means that the public is denied access to important information about serious sex offenders that might assist them to protect themselves and their children,¹³⁴ and is put in the position of having to trust the authorities to protect them.¹³⁵ The Second Reading Speech to the Serious Sex Offenders (Detention and Supervision) Bill 2009 advances two justifications for these restrictions: it protects victims; and it ensures the high quality necessary for such assessments. The former justification appears to rest on an assumption that to permit graphic reports of the nature of the offences to be released into the public arena would cause further trauma to victims.¹³⁶ However, victims’ rights groups have spoken out against suppression.¹³⁷ The latter justification appears to assume that medical experts might not be as frank in their assessment reports if they know their reports are liable to be published.

The prohibition on the publication of any information submitted to the court that might enable a person (other than the offender) who has attended or given evidence in the proceeding to be identified appears to be aimed primarily at the medical experts who give evidence for or against a supervision or detention order. In *Secretary to the Department of Justice v Fletcher (Ruling No 2)*,¹³⁸ Cummins J acceded to requests that the names of these people be suppressed in view of submissions concerning ‘the ongoing calling and utilisation of such persons’.¹³⁹

132 The penalty for breach of this restriction is 600 penalty units in the case of a body corporate and 120 penalty units or imprisonment for 1 year or both in any other case: *ibid* s 186.

133 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 4034 (Bob Cameron, Minister for Corrections).

134 Elissa Hunt and Norrie Ross, ‘Privacy Laws for Sex Fiends’, *The Herald Sun* (Melbourne), 15 January 2010, 17. Hunt and Ross point out that the following information is missing from the public record: where a sex offender lives, whether they remain a danger, whether they have tried to contact victims and whether they are remorseful for their crimes.

135 Justin Quill, ‘Secret Justice Offends Us All’, *The Herald Sun* (Melbourne), 16 January 2010, 30.

136 Hunt and Ross, above n 133, citing an unnamed government spokesman.

137 See, eg, Noel McNamara, *First Class Scumbags* (26 October 2009) Crime Victims Support Association, <<http://www.cvsa.com.au/?p=554>>; People against Lenient Sentences <<http://palsforjustice.com/>>.

138 [2009] VSC 502 (19 October 2009).

139 *Ibid*. This judgment consists of three lines. No elaboration is given.

The prohibition on identifying victims complements s 4 of the *Judicial Proceedings Reports Act 1958* (Vic) (*JPRA*), which prohibits the publication of the identities of victims of sex offences. However, unlike the *JPRA*, s 182(1) makes no provision for a victim to consent to being identified.¹⁴⁰ Victims who wish to be identified should not be denied this opportunity, at least if they are adults.¹⁴¹ For some, telling their story may be part of the healing process.

(b) The Exception

A limited exception to s 182 exists that allows members of the police force to publish the identity and location of an offender to the CrimTrac Agency for entry on the Australian National Child Offender Register, or in the course of law enforcement functions, or in the execution of a warrant pursuant to s 172 or the arrest or apprehension of an offender under ss 171 or 172.¹⁴² Moreover, a media organisation is permitted to publish the identity and location of an offender if the information is published at the request of a member of the police force that disclosed that information and for law enforcement purposes or for purposes relating to the execution of a warrant. The location and content of this exception is curious. It is included in s 182, which does not deal with the identity or location of offenders. Moreover, s 184, which *does* deal with the identity and location of offenders, permits publication unless the court orders otherwise in the public interest. Division 2 of pt 13 also makes provision for information sharing among government agencies.

(c) Court's Power to Make a Publication Order

The prohibitions on publication in s 182 are not immutable. Section 183 empowers a court to authorise the publication of any of the aforementioned information in any proceedings before it under this *Act*, if the court is satisfied that exceptional circumstances exist.¹⁴³ In making a decision, s 185 requires the court to have regard to whether the publication would endanger the safety of any person; the interests of any victims of the offender; and whether the publication would enhance or compromise the purposes of the *Act*.¹⁴⁴

It is argued that the stance adopted in s 182 is misconceived, and that the *prima facie* position should be the same as that adopted in the *Monitoring Act*, namely, that publication of these matters should be permitted unless a court orders otherwise. The one exception is the prohibition on identifying victims,

140 The *JPRA* allows a victim to consent only if the proceedings are no longer pending: s 4(1B)(b)(ii). If proceedings are pending, only a court can consent to the publication of a victim's identity: s 4(1C).

141 Child victims may not be able to appreciate the consequences of losing their anonymity and therefore may not be able to make an informed decision about publication. For a discussion of whether a child victim can consent to being identified see *Hinch v DPP* [1996] 1 VR 683.

142 *Detention and Supervision Act* s 182(2). A member of the police force is empowered to arrest an offender who is reasonably suspected of breaching a condition of a supervision order.

143 The prohibitions in s 182 do not prevent a court from publishing its reasons for a decision allowing publication under s 183: *ibid* s 183(2).

144 It has already been explained that the purposes of the *Detention and Supervision Act* are to enhance the protection of the community and to facilitate the treatment and rehabilitation of offenders.

which should remain but should be amended to achieve parity with the *JPRA* by allowing victims to consent to being identified. While the practical outcome may not be much different from that which prevails under the *Monitoring Act*,¹⁴⁵ there are two main reasons why the prima facie position should be in favour of publication. The first is out of deference to community safety and to the principle of open justice. The second is because, in practical terms, s 182 puts the onus on media organisations to seek an order permitting publication. However, the media might not realise that a detention or supervision order is being sought, as they are not parties to such applications. Since a court can only make an order permitting publication ‘in any proceedings before a court under this Act’,¹⁴⁶ what follows if the proceeding has concluded before the media discover that it has taken place? Presumably the media would have to use the formal appeal process and hope that it is regarded as a ‘person directly affected by a decision of the court’.¹⁴⁷ It would be more appropriate to permit publication, but allow the offender or the Department of Justice to seek suppression.

Finally, it is argued that a test based on public interest is preferable to one based on ‘exceptional circumstances’, as this phrase suggests that an order permitting publication will be a rarity, whereas a test based on the public interest does not. It is difficult to envisage when the circumstances of a case would be ‘exceptional’ enough to cause a court to permit publication. One situation might be where an offender who is subject to a supervision or detention order has escaped the confines of a secure facility or cannot otherwise be located. However, in this situation the media are more likely to be interested in publishing the offender’s name and image, not assessment reports or court documents. It is also hard to see how the concept of open justice fits in to this test. While it is clearly an aspect of the public interest, under what conditions would the demands of open justice be regarded as an exceptional circumstance that would justify publication?

B The Identification and Location of Offenders

Separate rules govern the name and location of an offender. Section 184(1) provides that:

In any proceedings before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order that any information that might enable an offender or his or her whereabouts to be identified must not be published except in the manner and to the extent (if any) specified in the order.¹⁴⁸

145 It has already been explained that although the *Monitoring Act* permits publication unless a court orders otherwise, courts on all but one occasion have suppressed the publication of assessment reports.

146 *Detention and Supervision Act* s 182(1)(a).

147 The appeal process is discussed below.

148 *Detention and Supervision Act* s 184(1).

‘An order to this effect may be made on the application of the offender or on the court’s own initiative’.¹⁴⁹ Unless and until a court prohibits publication, it seems that the name and whereabouts of an offender can be published.¹⁵⁰ This is similar to the position that prevails under the *Monitoring Act* and it has already been argued that it is preferable to the position taken in s 182(1). In deciding whether it is in the public interest to prohibit the publication of identifying material, the court must have regard to the same three factors to which it must have regard in deciding whether to allow publication of the information listed in s 182. It is unclear whether these are the sole factors to which a court may have regard.

It has been argued that the position should be that publication of all information is permitted unless a court orders otherwise. This gives effect to the principle of open justice being the norm rather than the exception, and it puts the offender and the Department in the position of having to argue the case for suppression, rather than leaving it to a media organisation to intervene and seek an order permitting publication. Moreover, the public interest is the measure that should be adopted in relation to all material. The nature of the public interest and how it should be interpreted by courts in the context of supervision and detention orders was discussed at length in Part III of this article.

V THE PROCESS OF CHALLENGING SUPPRESSION ORDERS

As explained above, offenders tend to seek suppression orders under s 42 of the *Monitoring Act* as a matter of course. Realistically, no one other than a media organisation is likely to have the incentive and the financial resources to appear before a court to argue against suppression.¹⁵¹ Irrespective of the media’s motives in challenging suppression orders,¹⁵² it is undeniable that it is in the public interest that such arguments be put to the court, and the media perform a valuable role in doing so. However, media organisations face a number of obstacles in their quest to challenge suppression orders made under s 42 of the *Monitoring Act*. These obstacles will be outlined in this Part. While some have been addressed by the *Detention and Supervision Act*, others persist.

149 Ibid s 184(2).

150 The fact that s 184 makes separate provision for naming offenders would seem to counter any argument that an offender’s name constitutes ‘evidence’ that is barred from being published under s 182(1)(a).

151 Experience suggests that the Department of Justice is not likely to do so.

152 Media organisations have a financial stake in the outcome of these challenges, as suppression orders affect their ability to publish newsworthy stories that will sell copy or attract audiences.

A Challenging Suppression Orders under the Monitoring Act

The first challenge is that media organisations are not always aware that an offender is applying for a suppression order under s 42;¹⁵³ consequently, they will not always be present in court to argue against it. If a media organisation is aware of an application and wishes to mount a challenge, it will usually be regarded as having the requisite standing to do so, given that the conduct of its business is affected by such orders.¹⁵⁴ Depending on the circumstances, it may be difficult for a media organisation to obtain the information it needs to be able to effectively challenge a suppression order. This will be the case if the order itself or the reasons for it are suppressed and/or if providing a media organisation with a copy of the transcript of the relevant proceeding would breach the order.¹⁵⁵

If a suppression order under s 42 has already been made, the media are free to seek a variation of the order from the judge who made it.¹⁵⁶ However, if a media organisation wishes to challenge the order in a superior court, it must work out the process by which it can do so. This can be quite complex. The problem under the *Monitoring Act* was that a right of appeal to the Court of Appeal was conferred only on offenders and on the Secretary to the Department of Justice, and then only against a court's decision to make (or not make), renew (or not renew) or revoke (or not revoke) a supervision order.¹⁵⁷ Since an order under s 42 is not a decision of this nature, there was no right of appeal under these provisions against a suppression order or refusal to make a suppression order.¹⁵⁸ Moreover, in *ARM* the Court of Appeal held that s 74 of the *County Court Act 1958* (Vic), which provides for appeals to the Court of Appeal, was not applicable, as it is limited to orders made to 'any party to a civil proceeding' and, although a suppression order as such is in the nature of a civil order, the *Monitoring Act* provides that proceedings on an

153 It is possible that a media organisation may not even be aware that proceedings for a supervision order are on foot, let alone that an application for suppression is being made as part of that proceeding.

154 Accordingly, an argument by Hinch that he did not have the requisite interest in making an application to quash the suppression orders until such time as he was charged with their breach was rejected by the court. Osborn J held that Hinch was affected by the order over and above the rest of the public as one who was in the business of making regular media publications in his own name utilising a website: *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [72]–[73]. See also *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1; *Herald and Weekly Times Ltd v Gregory D Williams* (2003) 130 FCR 435.

155 Two examples illustrate this point. In *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009), Hinch's solicitor deposed to the fact that unsuccessful attempts had been made to obtain copies of the transcript and reasons for decision of Millane J and that Hinch's lawyers had eventually had to request the transcripts in redacted form: at [70]. In *Secretary, Department of Justice v DW* [2007] VCC 470 (18 May 2007), the HWT sought access to an assessment report in order to determine if it should apply for the revocation of suppression orders that had been made at the outset of a hearing for a supervision order. Sexton J refused the application in light of the fact that she had refused the Secretary's application for a supervision order.

156 This is what the HWT did before Millane J in the case of GT and before Hannan J in the case of MJ.

157 *Monitoring Act* ss 36–7.

158 *ARM* [2008] VSCA 266 (18 December 2008) [8]. See also *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [12].

application for a supervision order are criminal in nature.¹⁵⁹ This position has been reversed by the *Detention and Supervision Act*.

If a media organisation wishes to challenge a suppression order in a superior court it has two means of doing so. First, if an offender or the Secretary to the Department of Justice lodges an appeal to the Court of Appeal in respect of a supervision order, it is open to the Court of Appeal to make its own suppression order under s 42.¹⁶⁰ This is because s 42 applies in its terms to ‘any proceeding before a court under this Act’, and there is no reason to doubt that an appeal to the Court of Appeal is such a proceeding. A media organisation could seek to make submissions to the Court of Appeal regarding the exercise of this power.

Second, a media organisation can make its own application to the Supreme Court for judicial review of a decision to grant a suppression order. The relief would be in the nature of certiorari.¹⁶¹ Certiorari is not an appellate procedure that enables a superior court to review the order or decision of the inferior court or tribunal or to substitute its own order or decision for that which was made. Rather, the High Court of Australia has described it as a process by which a superior court, in the exercise of its original jurisdiction, supervises the acts of an inferior court or other tribunal:

Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement or procedural fairness, fraud and ‘error of law on the face of the record’.¹⁶²

One hindrance that might confront a media organisation that seeks judicial review of a suppression order is that the order may have been made without reasons, particularly if it is an interim order. This situation arose in *Hinch v County Court*. Hinch sought judicial review of a suppression order made by a County Court judge, Hannan J, in respect of an offender called MJ. The order of Hannan J was made in respect of MJ at a directions hearing held in open court on 21 April 2008 in the process of dealing with an application for a supervision order. The suppression order related to the identification of MJ and the content of any assessment reports, and was expressed to persist until further order. No reasons were given for the order but it was sought by consent and was made in conjunction with an order listing the matter for hearing in July. When the matter came back to her Honour on 26 May 2008 for the purpose of a bail order, the HWT made an application for a variation of the order to enable it to identify MJ. The HWT had not been present at the directions hearing on 21 April, but it relied on the transcript of that hearing

159 *ARM* [2008] VSCA 266 (18 December 2008) [8].

160 This occurred in *ibid* [35]. The trial judge had refused to make an order prohibiting publication of ARM’s identity and whereabouts, but since the *Monitoring Act* did not confer a right of appeal against a refusal to make a suppression order, the Court of Appeal refused to assess the validity of the trial judge’s reasons for refusing to make the order. However, the court held that it had its own power to impose a suppression order under s 42.

161 *Ibid* [9]; *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [12].

162 *Craig v South Australia* (1995) 184 CLR 163, 175–6.

to argue that there was no material before Hannan J on that date, nor were any submissions made on that date that would enable her Honour to form a conclusion that the public interest favoured the making of the order. Hannan J responded to this argument by stating that the court did not need to base its view on viva voce evidence, and that the court may have formed the view it did based on matters known to it as a result of certain material to which the HWT was not privy, and about which she could not comment further.¹⁶³ The HWT was given formal leave to intervene and argue the merits of the suppression order, but this was adjourned for further hearing.¹⁶⁴

Hinch was subsequently charged with having identified MJ on his website on 5 May 2008 and at a public protest rally on 1 June 2008, while the interim orders made by Hannan J were still on foot. He sought judicial review of the orders in an attempt to escape prosecution for a breach. He advanced two arguments. Firstly, he argued that Hannan J had failed to consider whether it was in the public interest to make the order; that she failed to give any or sufficient weight to the principle of open justice and that she took into account an irrelevant consideration, namely, that the parties before her had consented to the order. Secondly, he alleged that her Honour's failure to state any reasons for making the order was, in itself, a jurisdictional error or an error on the face of the record that vitiated the order.

Osborn J began by characterising the nature of the suppression orders made by Hannan J as being interlocutory in nature, notwithstanding that they were not expressed to be interim orders only for a fixed period of time, as it was clear that Hannan J understood that the ultimate merits would be resolved at a further hearing. This finding was relevant, since superior courts are reluctant to interfere with interlocutory orders made in criminal proceedings.¹⁶⁵ Since the orders were interlocutory in nature and the matter was returning to the Court for a decision on the merits, Osborn J held that Hannan J did not err in taking into account the fact that the orders were sought by consent.¹⁶⁶ Moreover, Osborn J held that there was nothing to suggest that Hannan J did not have material on file to justify the making of the orders. Thus it could not be inferred that she did not have regard to the public interest, including the public interest in open justice, before making the order she did. The mere fact that she failed to mention the public interest did not mean an inference should be drawn that she did not consider it.¹⁶⁷ She simply made an interim order pending a final hearing.

163 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [41] citing the judgment of Hannan J.

164 The supervision order and the hearing in relation to suppression were ultimately determined by Rizkalla J on 3 and 4 July 2008: *ibid* [44].

165 In fact, Osborn J opined that if the HWT had made an application to the Supreme Court to quash the order prior to the resolution of its appropriateness upon a full hearing by another judge, the application would have been refused on a discretionary basis: *ibid* [47].

166 *Ibid* [49]. But one might note the warning issued by Sir Christopher Staunton in 1998 about orders made by consent, when he said: '[w]hen both sides agreed that information should be kept from the public, that was when the court had to be most vigilant'. Sir Christopher Staunton, 'Ministerial Powers Better Remedy: Ex Parte P', *The Times* (London), 31 March 1998, 35, cited in *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966, 977 [4]; *Guardian News and Media Ltd: Re HM Treasury v Ahmed* [2010] UKSC 1, [2].

167 The very fact that she did not purport to give reasons made it impossible to draw the inference.

Osborn J also dismissed Hinch's second argument, holding that Hannan J had not committed a jurisdictional error, nor an error of law on the face of the record, in failing to give reasons for her suppression orders.¹⁶⁸ Firstly, Osborn J noted that neither the parties who consented to the order, nor the HWT to whom Hannan J subsequently gave leave to challenge the orders, had requested her Honour to give reasons for her decision. Secondly, there is no absolute requirement that a judicial order must be accompanied by reasons. Indeed, in the case of interim orders, it may be that little purpose is served by doing so when the matter is shortly due to come on for a proper hearing. Thirdly, the failure to give reasons did not frustrate any rights of appeal, since none were conferred by the *Monitoring Act*. Fourthly, reasons are not necessarily required to be given to facilitate the exercise of the right to bring proceedings for judicial review. Finally, because the orders were only interlocutory, the court remained open to an application for a variation. While no error was found in the decision of Hannan J, the case demonstrates how difficult it can be for media organisations to challenge orders.

B Procedural Issues under the Detention and Supervision Act

Because the *Monitoring Act* permits publication unless a court orders otherwise, the media do not need to seek an order to publish. They only become involved in a proceeding in the event that a suppression order is sought and/or obtained by an offender or by the Department of Justice and they wish to challenge it. The position appears to be the same under the *Detention and Supervision Act* in relation to the identity and location of an offender. However, in relation to the material covered by s 182, which is automatically prohibited from being published, the onus is on media organisations to take the initiative and apply for an order permitting publication. It has already been noted that the media may or may not be aware that a proceeding for a supervision order is on foot.

Unlike the *Monitoring Act*, the *Detention and Supervision Act* gives any person who is directly affected by a publication decision of a court under div 1 of pt 13 a right to appeal to the Court of Appeal against that decision, and the Court of Appeal is empowered to make any order that a court could make under the Division.¹⁶⁹ Presumably a media organisation would be regarded as a person directly affected by a publication decision.¹⁷⁰ If so, the media do not need to seek judicial review. Although the *Act* only obliges courts to give reasons for decisions about supervision and detention orders,¹⁷¹ the fact that rights of appeal are conferred may mean that it is incumbent on judges to give reasons for decisions regarding suppression orders, since a lack of reasons may amount to an error of law where it would frustrate a right of appeal.¹⁷² Thus the media may be in a stronger position under the new Act in this respect.

168 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [63].

169 *Detention and Supervision Act* s 103.

170 *The Interpretation of Legislation Act 1984* (Vic) provides that 'person' includes a body politic or corporate as well as an individual: s 38.

171 *Detention and Supervision Act* s 90.

172 *Hinch v County Court of Victoria* [2009] VSC 548 (3 December 2009) [66].

VI THE IMPACT OF THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

Given the potential impact of supervision and detention orders on the rights and freedoms of sex offenders, there is much that could be said about whether the very concept of pre-emptive detention and supervision runs counter to the Victorian *Charter of Human Rights and Responsibilities 2006* ('*Charter*').¹⁷³ It is at least arguable that the scheme violates the *Charter* in so far as it infringes a person's right not to be punished more than once,¹⁷⁴ is retrospective in operation,¹⁷⁵ and may restrict freedom of movement,¹⁷⁶ freedom of association,¹⁷⁷ the right to liberty,¹⁷⁸ the right not to be subjected to arbitrary detention,¹⁷⁹ the right to humane treatment when deprived of liberty¹⁸⁰ and the right to privacy.¹⁸¹ However, this article will only consider whether the publication restrictions in the two Acts are compatible with *Charter* rights.

173 Similar arguments could be made in respect of international human rights instruments such as the *International Covenant on Civil and Political Rights*: see Patrick Keyzer, 'The "Preventive Detention" of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions' (2009) 16 *Psychiatry, Psychology and Law* 262.

174 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26 ('*Charter*'). Whether this *Charter* right is engaged depends on whether the scheme is regarded as punitive or whether it is considered to be protective and preventive.

175 *Ibid* s 27.

176 *Ibid* s 12.

177 *Ibid* s 16.

178 *Ibid* s 21(1).

179 *Ibid* s 21(2). In April 2010, the United Nations Human Rights Committee upheld a complaint by a convicted sex offender concerning the New South Wales legislation in so far as it permits sex offenders to be detained after their sentences expire. The Committee ruled that the NSW law amounts to arbitrary detention, thereby violating art 9 of the *International Covenant on Civil and Political Rights*: Human Rights Committee, *Communication No. 1635/2007: Tillman v Australia*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010). The UN Committee upheld a similar complaint lodged by Queensland sex offender Robert Fardon: Human Rights Committee, *Communication No. 1629/2007: Fardon v Australia*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010).

180 *Charter* s 22.

181 *Ibid* s 13. For a general discussion of the relationship between the scheme and the *Charter* see, eg, Phillip Lynch, Human Rights Law Resource Centre, Submission to the Sentencing Advisory Council, *Discussion and Options Paper: High-Risk Offenders — Post-Sentence Supervision and Detention*, 13 February 2007; *RJE* (2008) 21 VR 526, 554–8 (Nettle J). These issues may take some time to come before the courts, given that the *Charter* has been held to have no application to proceedings in respect of supervision orders that were first issued prior to 2007, including all future reviews of those orders: *Secretary, Department of Justice v Fletcher (Ruling No 3)* [2009] VSC 503 (22 October 2009). However, *Charter* issues were directly raised and considered in *Secretary, Department of Justice v AB* [2009] VCC 1132 (28 September 2009) ('*AB*'). In that case, Ross J concluded that, on its proper construction, s 11 of the *Monitoring Act* — which laid down the circumstances in which a court could make a supervision order — was not compatible with the human rights specified in the *Charter*. However, as a County Court judge he had no power to make a declaration of inconsistent interpretation. Consequently he had to apply 'the construction of s 11 which flowed from the application of standard statutory construction principles, notwithstanding his view that such a construction was incompatible with human rights': Jonathan Kelp, *Interpretation and Limitation of Rights in Relation to Extended Supervision of Sex Offenders* (2009) Human Rights Law Resource Centre <<http://www.hrlrc.org.au/year/2009/secretary-to-the-department-of-justice-v-ab-2009-vcc-1132-28-august-2009/>>. Note that the *RJE* and *AB* cases now have to be read in light of the decision in *R v Momcilovic* (2010) 265 ALR 751 ('*Momcilovic*').

The *Charter* sets out a list of civil and political human rights which are possessed by all persons. However, these human rights are not absolute. In some cases, specific rights are qualified in the same provision in which they are recognised.¹⁸² Moreover, the *Charter* contains an overriding provision in s 7(2), which provides that the human rights enumerated in the *Charter* may be subject under law ‘to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’, taking into account all relevant factors including: the nature of the right; the importance of the purposes of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purposes that the limitation seeks to achieve.¹⁸³

The *Charter* seeks to protect and promote human rights in three principal ways: through the scrutiny of new legislation, through the interpretation of legislation and by requiring public authorities to act consistently with human rights.

A Scrutiny of New Legislation

A Member of Parliament who proposes to introduce a Bill into Parliament must cause a Statement of Compatibility to be prepared and tabled, which is designed to inform Parliament as to whether, and if so how, the member believes the proposed new laws meet the standards set by the *Charter*.¹⁸⁴ In the event that the member introducing the Bill believes that any part of the Bill is incompatible with human rights, the Statement of Compatibility must describe the nature and extent of any perceived incompatibility.¹⁸⁵ A Statement of Compatibility is not binding on courts and tribunals.¹⁸⁶ In view of the fact that the *Monitoring Act* was already in force when the *Charter* was enacted, no Statement of Compatibility was prepared in respect of that *Act*. The Statement of Compatibility that accompanied the Serious Sex Offenders (Detention and Supervision) Bill 2009 concluded that the Bill as introduced was compatible with the human rights protected by the *Charter*.¹⁸⁷ The Minister’s Statement only alluded to the publication provisions very briefly, in the context of considering whether the *Detention and Supervision Act* infringed the right to privacy. However, the comments appear to be directed only at the provisions in div 2 of pt 13, which deal with the sharing of information about sex offenders between government departments and agencies tasked with responsibility for these offenders.¹⁸⁸

182 For example, the right to freedom of expression conferred in s 15(1) is qualified in s 15(3) and the right to a public hearing conferred in s 24(1) is qualified in s 24(2). These rights are regarded as having inherent limitations.

183 *Charter* s 7(2).

184 *Ibid* s 28.

185 *Ibid* s 28(3).

186 *Ibid* s 28(4). The Scrutiny of Acts and Regulations Committee is also required to consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights: at s 30.

187 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 4027 (Bob Cameron, Minister for Corrections).

188 *Ibid* 4030.

Parliament has reserved to itself the power to expressly declare in an Act, that the Act or a provision of that Act or another Act has effect despite being incompatible with one or more of the human rights set out in the *Charter*.¹⁸⁹ If an override declaration is made, the *Charter* has no application to the provision in respect of which it is made. In light of the government's view that the Act is compatible with the *Charter* rights, no override declaration was made in respect of the *Detention and Supervision Act*.

B Interpreting Legislative Provisions

Section 32(1) of the *Charter* provides that:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

This applies to all statutory provisions, irrespective of when they were enacted.¹⁹⁰ Until recently, it was unclear how s 32 should be interpreted. However, in *R v Momcilovic*¹⁹¹ the Victorian Court of Appeal, consisting of Maxwell P, Ashley and Neave JJA, laid down the correct methodology for the court to apply when faced with an argument that a statutory provision infringes a human right recognised by the *Charter*.¹⁹²

The Court of Appeal held that the first task of the court is to decide what the statutory provision in question means. This is a question of statutory interpretation.¹⁹³ A key question for the Court of Appeal was to determine at what point in time s 32 comes into play and what it actually permits the court to do. It was argued that recourse to s 32 is only necessary *if* and *after* the court has interpreted the meaning of the provision, found that it limits a *Charter* right and decided that the limit cannot be justified under s 7(2). At this juncture, s 32 requires the court, so far as possible, to re-interpret the statute in such a way as to render it compatible with the *Charter*.¹⁹⁴ If this view is correct, it would mean that s 32(1) obliges a court, where possible, to give the provision in question a meaning different from that which the court has assigned to it through the application of the ordinary principles of statutory interpretation,¹⁹⁵ where this is necessary to

189 *Charter* s 31. It is Parliament's intention that an override declaration will only be made in exceptional circumstances: at s 31(4).

190 *Ibid* s 1(2)(b).

191 (2010) 265 ALR 751.

192 It is understood that Vera Momcilovic has applied to the High Court for special leave to appeal the Court's decision: Human Rights Law Resource Centre, *HRLRC Bulletin vol 49 — May 2010: Special Leave to Appeal to High Court Sought in Landmark Charter Case* (2010) Human Rights Law Resource Centre <<http://www.hrlrc.org.au/content/publications-resources/hrlrc-e-bulletin/current-issue/hrlrc-bulletin-vol-49-may-2010/>>. If the High Court grants leave to appeal, the decision of the Court of Appeal will not be the final word on this matter.

193 *Momcilovic* (2010) 265 ALR 751, 759.

194 *Ibid*.

195 Since s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) directs courts to prefer a construction that would promote the purpose or object underlying an Act over a construction that would not, such a construction of s 32 would mean that it authorises, indeed requires, courts to assign to a provision a meaning that is different to that which was intended by Parliament.

achieve human rights compatibility. This is how s 3(1) of the *Human Rights Act 1998* (UK) — which is the UK counterpart to s 32 — has been interpreted by the House of Lords.¹⁹⁶

However, the Court of Appeal rejected the argument that Parliament is to be taken to have intended s 32 ‘only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right’.¹⁹⁷ Instead, it held that s 32 was not intended to, and does not, create a special rule of statutory interpretation along the lines of s 3(1) of the *Human Rights Act*. Rather, it ‘forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question’.¹⁹⁸ This was made clear, the Court said, both by the language of s 32(1) — particularly the use of the word ‘interpreted’¹⁹⁹ — and by the debates in the Victorian Parliament on the *Charter* Bill. According to the Court of Appeal, the court must ascertain the meaning of the provision in question by applying s 32 in conjunction with the ordinary common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic) from the very outset:

Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is ‘possible’ is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.²⁰⁰

Read this way, s 32 is really just a codification of this common law presumption.²⁰¹ The courts’ interpretive role under the *Charter* is not fundamentally different from their role under standard principles of interpretation. The upshot is that the *Charter* does not bring about any transfer of power from the Parliament to the judiciary.

Having interpreted the provision in question, the court must then determine whether it infringes a human right protected by the *Charter*. If a human right

196 In the UK, the power in s 3(1) to re-interpret the provision to circumvent the infringement is regarded by courts as the ‘prime remedial measure’ in respect of a provision which has been found to infringe a human right: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 575 [46]. By contrast, a declaration of inconsistency is regarded as a last resort: at 575 [46]; *Sheldrake v DPP; A-G’s Reference (No 4 of 2002)* [2005] 1 AC 264, 303–4 [28]. The most plausible explanation for this approach is that UK decisions that uphold laws which infringe a citizen’s rights can be taken to the European Court of Human Rights, which can remedy the breach. Since it is in the interests of the UK to have their own courts resolve rights issues, it is not surprising that the courts have readily interpreted s 3(1) as giving them a wide scope to bring about a Convention compliant result.

197 *Momcilovic* (2010) 265 ALR 751, 780.

198 *Ibid* 760.

199 ‘Interpretation’ is what courts have traditionally done. This is to be compared with s 3(1) of the *Human Rights Act 2004* (UK) which uses the phrase ‘must be read and given effect to’, although it is qualified by the words ‘so far as it is possible to do so’. Section 3(1) means that UK courts are required to interpret legislation in a new manner. Whereas the courts’ traditional role has been to ascertain the intention of Parliament, their role under s 3(1) is to settle on an interpretation that is Convention compliant. UK courts have openly conceded that such a result may not be able to be achieved by resorting to standard principles of statutory interpretation: *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

200 *Momcilovic* (2010) 265 ALR 751, 779.

201 *Ibid* 780.

is infringed by the provision in question, the court must decide whether the infringement is justifiable in a free and democratic society, applying the test laid down in s 7(2). The Court of Appeal made it quite clear that s 7(2) is a ‘distinct and later enquiry’²⁰² which is only undertaken if it has not been possible for the court to interpret the provision compatibly with a *Charter* right through employing the interpretive process laid down in *Momcilovic*.²⁰³ Moreover, any such infringement must be demonstrably justified by clear, cogent and persuasive evidence.²⁰⁴ Rarely will it be self evident that there is a justification for interfering with human rights.²⁰⁵ Rather, the government will be ordinarily put to the proof that the public interest is served by the rights infringing provision.²⁰⁶

Finally, it is necessary to consider what follows if a court is unable to interpret a provision compatibly with a *Charter* right, and finds that the infringement of the right cannot be justified under s 7(2). The first point to note is that the validity of the Act or provision is not affected by such a finding.²⁰⁷ The only thing that can be done — and only the Supreme Court is empowered to do it²⁰⁸ — is to make a declaration of inconsistent interpretation in accordance with s 36. Such a declaration does not affect the validity, operation or enforcement of the statutory provisions in question or create in any person a legal right or give rise to any civil cause of action.²⁰⁹ However, it obliges the relevant Minister to table the declaration in Parliament, together with a written response, within six months. This means that Parliament is not able to simply ignore a judicial finding that there is an intractable inconsistency with human rights. Rather, it is forced to decide whether it will retain the offending law or change it so that it no longer infringes a human right. The approach and outcome of the *Momcilovic* case exemplifies the dialogue model for human rights envisaged by the *Charter*.²¹⁰ According to the Court of Appeal, the avowed purpose of Parliament was to retain for itself the final say over legislation. A declaration of inconsistent interpretation ensures that the ultimate solution to any inconsistency is a political one, rather than a judicial one.²¹¹

Courts are yet to consider whether the publication provisions of the *Monitoring Act* and/or the *Detention and Supervision Act* are compatible with the human

202 Ibid 781.

203 Ibid 779.

204 This phrase was used by Dickson CJ in the Canadian decision of *R v Oakes* [1986] 1 SCR 103 in respect of s 1 of the Canadian *Charter of Rights and Freedoms*, on which s 7(2) is modelled.

205 *Momcilovic* (2010) 265 ALR 751, 790.

206 Ibid.

207 *Charter* s 32(3)(a). In some jurisdictions, a finding of incompatibility may lead to the statutory provision in question being struck down as invalid, but this is not the case in Victoria: *Momcilovic* (2010) 265 ALR 751, 768.

208 The *Charter* provides for a referral process to the Supreme Court: *Charter* s 33.

209 Ibid s 36(5).

210 *Momcilovic* (2010) 265 ALR 751, 777.

211 Jeremy Gans, *The New Charter: Charterblog* (14 May 2010) Charterblog <<http://charterblog.wordpress.com/2010/03/19/the-new-charter/>>.

rights conferred by the *Charter*,²¹² and no declaration of inconsistency has been made in respect of any aspect of the supervision regime.

C Conduct of Public Authorities

Thirdly, the *Charter* requires public authorities to act in a way that is compatible with human rights or, in making a decision, to give proper consideration to a relevant human right.²¹³ However, this conduct requirement does not apply ‘if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision’.²¹⁴ An example is where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.²¹⁵ The *Charter* defines a public authority to mean, inter alia, a public official within the meaning of the *Public Administration Act 2004* (Vic).²¹⁶ This includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice).²¹⁷ It would also include the Director of Public Prosecutions, who has responsibilities under the sex offender regime. The definition would ordinarily catch the Adult Parole Board. However, the *Charter of Human Rights and Responsibilities (Public Authorities) Interim Regulations 2007* declared that the Adult Parole Board is not a ‘public authority’ for the purposes of the *Charter*,²¹⁸ and that exemption has been extended until 27 December 2013.²¹⁹ In *RJE v Secretary to the Department of Justice*, Nettle JA deduced that this exemption was conferred so that the Board ‘could act lawfully in ways that are not demonstrably justified in a free and democratic society having regard to the criteria delineated in s 7 of the Charter’.²²⁰

D Might the Publication Provisions Infringe Charter Rights?

As explained earlier, Victorian courts are yet to consider whether the publication provisions dealt with in this article are compatible with the *Charter*. Until there is a ruling on this issue, one can only anticipate what arguments might be made and how a court might respond to them. Arguments based on the *Charter* might emanate from two sources: serious sex offenders and the media.

212 A passing reference to the issue was made in *ARM* [2008] VSCA 266 (18 December 2008) [36] and is discussed below.

213 *Charter* s 38(1).

214 *Ibid* s 38(2).

215 See *ibid*, note to s 38(2).

216 *Ibid* s 4.

217 See *ibid*, note to s 4(1)(a).

218 *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* (Vic) reg 5(a).

219 *Ibid* reg 6.

220 *RJE* (2008) 21 VR 526, 555. It is unclear how s 7(2) applies to the conduct provision in light of the *Momcilovic* case.

For their part, serious sex offenders are most likely to object to s 42 of the *Monitoring Act* and s 184 of the *Detention and Supervision Act*, as these provisions permit the publication of information unless the court orders otherwise.²²¹ Three *Charter* rights are potentially relevant to the publication of information about serious sex offenders who are subject to supervision or detention orders. The first is s 13, which confers on a person a right not to have his or her privacy unlawfully or arbitrarily interfered with.²²² It is conceivable that an offender might argue that the publication of his or her identity, location and/or of the evidence and assessment reports presented in a proceeding is an infringement of this right. Is this argument likely to succeed? One problem is that s 13 only protects a person against ‘unlawful and arbitrary’ interferences with privacy. The *Charter of Human Rights and Responsibilities, Guidelines for Legislation and Policy Officers in Victoria* (‘Guidelines’) regards ‘unlawful’ as meaning that no interference with privacy can take place except if the law permits it.²²³ At first blush this appears to render the protection meaningless, as it would mean that if legislation allowed publication to occur, the interference with privacy would be lawful. However, the Guidelines cite with approval General Comment 16 of the United Nations Human Rights Committee, which states that:

The term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.²²⁴

According to the Guidelines, this means that:

legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted and a decision to interfere with privacy by a public authority in accordance with the law should be made on a case-by-case basis in accordance with the merits of each case.²²⁵

The fact that publication decisions under s 42 of the *Monitoring Act* and s 184 of the *Detention and Supervision Act* are allied to the public interest indicates that the discretion is guided not unbridled.

Conflicting meanings have been ascribed to the word ‘arbitrary’ in s 13, although there appears to be consensus that an interference with privacy can be arbitrary

221 Offenders are less likely to object to s 182, since it prohibits publication unless a court orders otherwise, which it can do only in exceptional circumstances.

222 Section 13 is based on art 17 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

223 Victorian Government Solicitor’s Office, *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2007) <<https://humanrights.vgso.vic.gov.au/charter/bysection/section13/Section13-WhattheRightmeans.aspx>>.

224 Human Rights Committee, *General Comment 16*, 23rd sess, 1988, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (12 May 2003) 142 [3]. These comments were made in the context of interpreting art 17 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

225 Victorian Government Solicitor’s Office, above n 222.

even though it is lawful. In *Nolan v MBF Investments Pty Ltd*,²²⁶ Vickery J, when interpreting art 17 of the *International Covenant on Civil and Political Rights*, relied upon an opinion given by the United Nations Human Rights Commission that ‘arbitrariness’ should be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability.²²⁷ The same approach is taken in the Guidelines.²²⁸ Subsequently, in *WBM v Chief Commissioner of Police*,²²⁹ Kaye J held that to define the concept in this way invites courts to indulge in a degree of judicial value judgment and policy making that is ‘not warranted by the Charter’ and which is ‘inconsistent with the established role of the judiciary in [Victoria]’,²³⁰ since it would allow the court to be the arbiter of what is ‘appropriate’, ‘reasonable in the circumstances’ or ‘proportionate to the end sought to be achieved’.²³¹ According to Kaye J, the word ‘arbitrary’ should be given its ordinary, dictionary meaning, which denotes an interference with privacy that is capricious, random and not based on any identifiable criteria.²³² This interpretation of s 13 is a narrow one. If challenged, Kaye J may be held to have ignored the direction of the Court of Appeal in *Momcilovic* to consider all possible interpretations and adopt that which least infringes *Charter* rights,²³³ and to have bypassed the invitation in s 32(2) of the *Charter* to consider international law and the judgments of domestic, foreign and international courts and tribunals when interpreting a statutory provision.

If Kaye J is correct, publication provisions will not constitute an arbitrary interference with privacy provided they are based on identifiable criteria and are not capricious. By contrast, if Vickery J’s interpretation is correct, the publication provisions will stand or fall according to whether their interference with an offender’s privacy is reasonable or proportionate to the ends sought to be achieved. This gives an offender scope to argue that it is sufficient if the relevant authorities know his or her name and location etc and that it is not reasonable that the public be so appraised. In *ARM*, the Court of Appeal hinted that this might be the case:

A supervision order is not and is not intended to be a punishment. An offender such as the appellant who has served all the sentence of imprisonment imposed on him for his offending is taken to have discharged his debt to society. Subject to extraordinary statutory exceptions of the kind constituted by the Act, he is as free as any other member of society

226 [2009] VSC 244 (18 June 2009).

227 Ibid [168]–[169]. See Human Rights Committee, *Hugo van Alphen v The Netherlands: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (15 August 1990). The Committee’s opinion was given in the context of considering when arrest and detention are ‘arbitrary’. See also Human Rights Committee, *General Comment 16*, 23rd sess, 1988, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (12 May 2003) 142 [4].

228 Victorian Government Solicitor’s Office, above n 222.

229 [2010] VSC 219 (28 May 2010).

230 Ibid [53].

231 Ibid [52].

232 Ibid [57].

233 *Momcilovic* (2010) 265 ALR 751, 779.

to live lawfully without unwanted publicity or intrusions upon his or her privacy. Evidently, it is in the public interest that police and correctional authorities be aware of the identity and whereabouts of an offender the subject of an extended supervision order. That is the principal justification for the profound intrusion upon the liberty of the subject for which the legislation provides. But, as at present advised, it appears to us to be less clear that there is any public interest in further unwanted disclosures of an offender's identity or whereabouts. In this case, we consider that the likely effects of such disclosures on the applicant are sufficient in themselves to warrant suppression. In other cases it may be necessary to consider the right to privacy and reputation conferred by s 13 of the *Charter of Human Rights and Responsibilities* and, along with it, the effect of s 32 of the *Charter* on the interpretation of s 42 of the Act.²³⁴

On the other hand, in light of the fact that the scheme is designed to enhance community safety, it is at least arguable that if naming an offender would advance this objective, the interference with privacy is not arbitrary. It is also unlikely that such a fundamental and well-entrenched principle as open justice would be regarded as an unlawful or arbitrary interference with privacy, since privacy has historically played second fiddle to open justice.²³⁵ To allow s 13 to override open justice would be a considerable reversal of principle.²³⁶ However, an offender might argue that he or she is in a different position to an ordinary litigant because they are being subjected to a form of control in circumstances where no crime has been committed; accordingly, their claim to privacy is stronger.

The second *Charter* right that might be engaged is s 24, which confers on a person charged with a criminal offence or a party to a civil proceeding the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and *public* hearing.²³⁷ The provision does not overtly deal with the ability of the media to report, but since this is an ordinary adjunct of the right to be present at a judicial proceeding, it is bound up in s 24. Section 24 proceeds on the assumption that a public hearing is in the best interests of an offender, since it is recognised as a human right. However, in this context, an offender is likely to be seeking suppression of their identity and assessment

234 *ARM* [2008] VSCA 266 (18 December 2008) [36].

235 *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131; *J v L & A Services Pty Ltd [No 2]* [1995] 2 Qd R 10; *Herald & Weekly Times Ltd v Gregory Williams (formerly identified as VAI)* (2003) 130 FCR 435.

236 Where courts have used their power under s 42 of the *Monitoring Act* to suppress information they have not articulated the offender's privacy per se as a reason for doing so. As explained above, courts have usually made suppression orders in the belief that *not* to make such an order would prejudice an offender's rehabilitation.

237 *Charter* s 24. The provision tracks art 14(1) of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

reports; it is the media who would be clamouring for publicity.²³⁸ An offender is more likely to seek to rely on s 24(2), which qualifies s 24(1) by empowering a court to exclude ‘members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter’.²³⁹ This qualification is a concession to Parliament’s right to determine that under certain circumstances, open justice can operate to the detriment of the administration of justice, or must give way to other pressing interests. However, s 24(2) does not explicitly confer a right to have the press or the public excluded from all or part of a proceeding. Rather, it is framed as a qualification on the right to a public hearing.

Third, a serious sex offender may rely on s 9 of the *Charter*, which confers a right to life and a right not to be arbitrarily deprived of life, and/or on s 21(a) which confers a right to liberty and security. An offender might argue that provisions, which permit his or her name or whereabouts to be published, would expose him or her to the possibility of vigilante activity which is incompatible with these rights.

If a court decided that the publication provisions were incompatible with any of these *Charter* rights, it would then need to consider the reasonable limits test in s 7(2). Clear and cogent evidence would need to be adduced that the public interest is served by permitting publication of information about the offender to the wider public.

The situation also needs to be considered from the perspective of the media. Can media organisations invoke *Charter* rights in response to legislation that inhibits their right to publish? This issue is most likely to arise under s 182 of the *Detention and Supervision Act*, which prohibits the publication of certain information unless a court orders otherwise. Since the *Charter* only confers rights on human beings, not on corporations,²⁴⁰ such rights could be claimed only by individual journalists, not by media organisations. A journalist who wants to publish information about proceedings relating to serious sex offenders could not claim rights under s 24, as this section only confers a right to a public hearing on persons who are charged with a criminal offence or who are parties to a civil proceeding. Journalists are more likely to invoke the *Charter* right of freedom of expression, which is defined to include the freedom to seek, receive and impart information and ideas of all kinds.²⁴¹ The *Charter* recognises that special duties and responsibilities are attached to this right and that it may be subject to lawful restrictions that are reasonably necessary to the respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality.²⁴²

238 In other contexts, offenders might seek to rely on s 24. For example, in *AB* [2009] VCC 1132 (28 September 2009), the offender sought to rely on s 24 to argue that his right to a fair hearing would be impaired unless there was good evidence as to the likely conditions to be imposed on him under a supervision order. However, Ross J found that s 24 was not enlivened, as AB had not been charged with a criminal offence, nor was he a party to a civil proceeding, since the *Monitoring Act* expressly provided that proceedings on an application for a supervision order are criminal in nature: at [250]. The position is otherwise under the *Detention and Supervision Act*, which provides that proceedings under the *Act* are civil in nature: at s 79.

239 *Charter* s 24(2).

240 *Ibid* s 6(1).

241 *Ibid* s 15(2).

242 *Ibid* s 15(3).

But a journalist might equally argue that public safety demands that he or she be able to publish identifying information about a sex offender.

VII CONCLUSION

This article has considered the publication restrictions that apply to proceedings in which courts must decide whether serious sex offenders should be subjected to supervision or detention orders. It has been argued that in deference to community safety and the principle of open justice, the legislation should permit publication of an offender's identity and reports, but the courts should be vested with a discretion to suppress publication in the public interest. In other words, the stance taken in s 42 of the *Monitoring Act* is to be preferred to that taken in s 182 of the *Detention and Supervision Act*, which prohibits publication of certain information unless a court orders otherwise. However, while it is argued that the test in s 42 is correct, in applying the test, courts have placed too much emphasis on the long term public interest in securing an offender's rehabilitation, and not enough emphasis on the immediate need to protect community safety. Giving primacy to community safety accords with the priorities adopted in s 1 of the *Detention and Supervision Act*. This article has also emphasised the need for the public to be able to scrutinise the courts, especially when they are exercising unusual and invasive powers against persons on the basis of crimes they are likely to commit, rather than crimes they have actually committed. The article has foreshadowed the possibility that offenders and/or journalists may argue that the publication regime infringes certain human rights that are protected by the Victorian *Charter of Human Rights and Responsibilities*. However, until the courts have ruled on this issue, it is not possible to draw any firm conclusions about whether the publication regimes are *Charter* compliant.

Other aspects of the sex offender publication regime, not considered in this article, are set to be tested in the High Court. On 30 July 2010, Derryn Hinch successfully argued that constitutional aspects of his pending charges for breach of suppression orders made by Millane and Hannan JJ under s 42 should be removed from the Magistrates' Court to the High Court.²⁴³ Three bases for the constitutional challenge to s 42 were foreshadowed in Hinch's application for removal.

The first basis for challenge is the doctrine in *Kable v Director of Public Prosecutions*.²⁴⁴ That case established the proposition that Chapter III of the *Australian Constitution*, particularly s 71, purports to vest federal judicial power in the state courts and that, as a result, state legislation cannot vest in a state court any powers that are repugnant to, or incompatible with the exercise of, the judicial power of the Commonwealth. In particular, state courts cannot validly confer non-judicial functions on state courts that are incompatible with Chapter III.²⁴⁵ While there was no elaboration of this argument before the High Court, it presumably links with the second argument, which will seek to draw an

243 Having lost his Supreme Court challenge to the validity of the orders, Hinch was due to face charges for their breach in the Magistrates' Court.

244 (1996) 189 CLR 51.

245 For a discussion of this decision see Rohan Hardcastle, 'A Chapter III Implication for State Courts: *Kable v Director of Public Prosecutions*' (1998) 3 *Newcastle Law Review* 13.

implication from Chapter III that open justice is an essential attribute of a court, and that a state cannot legislatively limit the requirement that courts deliver open justice except where this is necessary for the administration of justice. That is, parliaments are 'restricted to using the rubric of the common law principle'.²⁴⁶ If correct, it follows that the public interest test enshrined in s 42 is an invalid test.

Thirdly, Hinch will argue that s 42 infringes the freedom of political communication which has been found to inhere in the Australian *Constitution*. When asked to indicate how not being able to identify a sex offender might burden discussion of government or political matters, counsel for Hinch made a twofold response. First, it would prevent the media from being able to investigate the criminal antecedents of a person convicted of a serious sex offence. The media might wish to do this for a number of purposes: to criticise the prosecution for not referring to the antecedents or for not referring to some aggravated or mitigating factor in one of the antecedents; to direct arguments about the failure of rehabilitation; and to criticise the sentence in light of the antecedents. Second, it might be necessary for the media to name particular sex offenders in order to bolster a campaign to have the legislation repealed.

If s 42 is found to be unconstitutional, the High Court ruling will have significant ramifications, not only for the validity of s 42, but for the publication provisions in the *Detention and Supervision Act*, which curtail open justice to an even greater extent than s 42, and for the circumstances in which courts can validly sit in camera and issue non-publication orders outside the serious sex offenders context.

POSTSCRIPT

Since this article was written in 2010, there have been two developments of relevance to the naming of sex offenders. Firstly, the High Court has handed down its decision in *Hogan v Hinch*,²⁴⁷ in which Hinch sought a ruling from the High Court that s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) was unconstitutional. All seven members of the High Court upheld the validity of s 42, French CJ in a separate judgment and Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ in a joint judgment.

Before grappling with Hinch's constitutional arguments, the Court discussed the proper construction of s 42. It emphasised that a court's power to make a non-publication order of the type referred to in s 42 is enlivened only if the court is satisfied that it is in the public interest to do so. The Court found that the concept of public interest imports a judgment that must be made by reference to the subject, scope and purpose of the *Act*.²⁴⁸ However, an additional dimension to the concept is supplied by s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'), which requires an Act to be interpreted in a way that is compatible with *Charter* rights, so far as it is possible to do so consistently with

246 Transcript of Proceedings, *Hinch v Detective Senior Constable Hogan* [2010] HCATrans 184 (30 July 2010).

247 [2011] HCA 4.

248 *Ibid* [69]. The main purpose of the *Act* is stated in s 1(1).

its purpose. Relevant *Charter* rights in this context include the right to freedom of expression, the right of children to be protected, the right to participate in public life and the right not to have one's privacy arbitrarily interfered with. The Court also held that a person must know of an order made under s 42 before that person can be found guilty of an offence under s 42(3), rejecting Hinch's argument that it was an offence of strict liability. The Court stated that such a finding accommodates s 15(3) of the *Charter*, which requires that restrictions on freedom of expression be reasonably necessary to respect the rights and reputation of other persons.

The three submissions made by Hinch as to why s 42 was unconstitutional, and therefore invalid, were unanimously rejected by all seven judges. As explained earlier, the first two grounds were based on implications sought to be drawn from Chapter III of the *Constitution*. First, Hinch argued that the power conferred by s 42 and exercised by the County Court in making the orders in question 'impermissibly diminishes the institutional integrity of the court of Victoria'.²⁴⁹ It was held that the criteria for the exercise of power in s 42 — namely, that the court is satisfied that a suppression order is in the public interest — ensured that the power was 'not so indefinite as to be insusceptible of strictly judicial application' and 'not such as to impair impermissibly the character of the State courts as independent and impartial tribunals and thus to render them inappropriate repositories of federal jurisdiction'.²⁵⁰

Second, it was put to the Court that the prohibitions imposed by the County Court orders were contrary to an implication derived from Chapter III of the *Constitution* that 'all State and federal courts must be open to the public and carry out their activities in public'.²⁵¹ In dealing with this argument the court narrowed the question down to one which turns on the competence of the Victorian Parliament to confer upon Victorian courts the power provided in s 42.²⁵² Following the reasoning in *Russell v Russell*,²⁵³ the majority concluded that a federal law in terms of s 42 would not deny an essential characteristic of a court exercising federal jurisdiction since it did not invariably require the court to derogate from open justice. Accordingly, as a state law, s 42 did not attack the institutional integrity of the state courts.

Third, Hinch argued that the statutory prohibition upon publication imposed by s 42 is at odds with the implied freedom of political communication laid down by the High Court in *Lange v Australian Broadcasting Corporation*²⁵⁴ on the basis that it inhibits the ability of members of the public to criticise the *Act* and to seek legislative changes by means of public protest and dissemination of factual data about court proceedings.²⁵⁵ The Court outlined the two-pronged test adopted in *Lange* and held that although s 42(3) had the capacity to burden freedom of communication about government or political matters, properly construed, it was

249 Ibid [61].

250 Ibid [80].

251 Ibid [62].

252 Ibid [88].

253 (1976) 134 CLR 495.

254 (1997) 189 CLR 520.

255 *Hogan v Hinch* [2011] HCA 4, [2].

reasonably and appropriately adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.²⁵⁶

The Court gave no indication as to whether div 1 of pt 13 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) is open to attack on constitutional grounds. The matter was returned to the Magistrates' Court, where Hinch ultimately pleaded not guilty to breaching the orders on the basis that he did not identify the sex offenders merely by naming them. This argument was rejected and Hinch was found guilty and ordered to serve five months' home detention with conditions.

The second development is that a Bill is currently before the Victorian Parliament which, if enacted, will alter the current position regarding the naming of sex offenders.²⁵⁷ First, whenever a court reviews a supervision order, it will also be required to review any order made under s 184 restricting the publication of information that enables identification of the offender or his or her whereabouts. In determining whether such an order should continue, the court must have regard to the factors listed in s 185. This amendment is intended to ensure that anonymity orders are not indefinite.²⁵⁸

Second, a definition of 'publish' will be inserted into s 182. 'Publish' will be defined broadly to mean: insert in a newspaper or other periodical publication; disseminate by broadcast, telecast or cinematograph; or otherwise disseminate to the public by any means.

Most significantly, the circumstances to which the court must have regard when making a decision under ss 183 or 184 to authorise publication of material or to suppress an offender's identity and whereabouts will be altered. The current requirement that the court must have regard to whether the publication would enhance or compromise the purposes of the *Act* will be removed. Instead, the court will be required to have regard to: the protection of children, families and the community; the offender's compliance with any order made under this *Act*; and where the offender is residing. These factors are likely to make it more difficult for an offender to obtain an anonymity order.²⁵⁹

256 Ibid [50], [97]–[99]. The majority refused to consider whether there was an insufficient connection with any federal issue to attract the implied freedom: at [99]. French CJ was inclined to take a broad view of this issue: at [48]–[50].

257 Serious Sex Offenders (Detention and Supervision) Amendment Bill 2012 (Vic).

258 Explanatory Memorandum to the Serious Sex Offenders (Detention and Supervision) Amendment Bill 2012 (Vic) cl 7.

259 The amendments are a response to general community concern and the Inquiry Panel, 'Report of the Protecting Victoria's Vulnerable Children Inquiry' (Report, Victorian Government, January 2012).