HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

DETECTIVE SENIOR CONSTABLE HOGAN INFORMANT

AND

DERRYN HINCH DEFENDANT

Hogan v Hinch [2011] HCA 4
10 March 2011
M105/2010

ORDER

Declare that s 42 of the Serious Sex Offenders Monitoring Act *2005 (Vic) is not invalid upon any of the grounds asserted in submissions to this Court.*

Representation

G J C Silbert SC with B L Sonnet and P D Herzfeld for the informant (instructed by Solicitor for Public Prosecutions Victoria)

D M J Bennett QC with G Slater for the defendant (instructed by HWL Ebsworth Lawyers)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with A M Dinelli intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell SC and A J Sefton intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor Western Australia)

R J Meadows QC, Solicitor-General for the State of Western Australia with S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

CATCHWORDS

Hogan v Hinch

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Institutional integrity of State courts vested with federal jurisdiction – Section 42(1) of *Serious Sex Offenders Monitoring Act* 2005 (Vic) ("Act") allowed court to make "suppression order" preventing publication of evidence given, contents of documents adduced or information that might enable identification of offender in proceedings under Act, if court satisfied it is "in the public interest" to make order – Section 42(3) made publishing material in contravention of suppression order an offence – Defendant charged with publishing material identifying offenders in proceedings subject to suppression orders – Whether power conferred by s 42(1) impermissibly diminishes institutional integrity of State courts – Whether and to what extent there exists implication derived from Ch III that State and federal courts must be open to public and carry out activities in public.

Constitutional law (Cth) – Implied freedom of political communication – Whether s 42 of Act impermissibly burdens implied freedom of political communication – Whether communication by defendant was communication about government or political matters – Whether implied freedom limited to communications about government or political matters at Commonwealth level – Whether s 42 reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government.

Statutory interpretation – Principle of legality – *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("Charter") – Interpretation of s 42 of Act in manner compatible with civil and political rights in Charter.

Words and phrases – "open justice", "political communication".

Constitution, Ch III.
Serious Sex Offenders Monitoring Act 2005 (Vic), s 42.

FRENCH CJ.

Introduction

1 Derryn Hinch is a radio broadcaster and is responsible for a website designated "HINCH.net". In September 2008 he was charged in the Magistrates' Court of Victoria with five counts of contravening suppression orders made under s 42 of the *Serious Sex Offenders Monitoring Act* 2005 (Vic) ("the Act") in the County Court at Melbourne. The suppression orders prohibited publication of any information that might enable the identification of certain persons, convicted of sex offences, who were the subject of post-custodial extended supervision orders under the Act. Mr Hinch's offences were said to have been committed when he named the persons on his website and at a public rally in Melbourne.

2 By way of defence to the charges, Mr Hinch raised a constitutional challenge to the validity of s 42 based, inter alia, upon the propositions that the section:

1. impermissibly confers upon the courts to which it applies a function which distorts their institutional integrity contrary to the implied requirements of Ch III of the Constitution;

2. is contrary to an implication in Ch III of the Constitution that all State and federal courts must be open to the public and carry out their activities in public; and

3. infringes the implied freedom of political communication by inhibiting the ability:

   (a) to criticise legislation and its application in the courts; and

   (b) to seek legislative and constitutional changes and changes in court practice by public assembly and protest, and the dissemination of factual data concerning court proceedings.

3 On 30 July 2010, Hayne, Crennan and Bell JJ ordered, pursuant to s 40(1) of the *Judiciary Act* 1903 (Cth), that so much of the cause pending in the Magistrates' Court of Victoria as concerned the validity of s 42 be removed into this Court.

4 In my opinion, for the reasons that follow, s 42 did not offend against any implication derived from Ch III of the Constitution. Nor did it infringe the implied freedom of political communication. The challenge to its validity must fail.

5 The first question in considering Mr Hinch's challenge is: What is the correct construction of s 42? It is only when that question is answered that validity can be determined. Construction begins with the words of the section[1]. It requires reference to their ordinary meaning, their context, the purpose of the Act and the purpose of the section. The principle of legality will favour a construction which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech[2]. The *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter") also imposes an interpretive requirement 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[3].

An outline of the Act

6 The Act, which was repealed with effect from 1 January 2010[4], authorised the Supreme Court and the County Court of Victoria to make extended supervision orders whereby persons convicted of certain sexual offences for which custodial sentences have been imposed could be subject to post-custodial supervision. Section 42 empowers those courts to make suppression orders in connection with proceedings under the Act.

7 The stated main purpose of the Act is[5]:

> "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."

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1 Section 42 is set out in the joint reasons at [67].

2 As to which see eg *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283; *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 328 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ; [1993] HCA 64; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 363 per Dawson J; [1994] HCA 44; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; [1997] HCA 25; *Coleman v Power* (2004) 220 CLR 1 at 97 [253] per Kirby J; [2004] HCA 39.

3 Charter, s 32(1).

4 Replaced by the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic). For ease of reference, the present tense is used throughout to describe the operation of the Act.

5 Act, s 1(1).

The purposes governing the conditions which can be attached to an extended supervision order are[6]:

> "(a) to ensure that the community is adequately protected by monitoring the offender;
>
> (b) to promote the rehabilitation, and the care and treatment, of the offender."

8 The Act empowers the Secretary to the Department of Justice to apply to a court for an extended supervision order in respect of an "eligible offender"[7]. An "eligible offender" is defined, inter alia, as any person who is serving a custodial sentence in respect of a "relevant offence"[8]. "Relevant offences" are those listed in the Schedule to the Act[9]. Applications for such orders can be made to the Supreme Court or to the County Court, depending on which of them was the original sentencing court[10]. At least one assessment report made by a psychologist, psychiatrist or other prescribed health service provider, after a personal examination of the offender, is required to accompany an application[11].

9 Section 11(1) provides that a court can only make an extended supervision order in respect of an offender if satisfied:

> "to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence that he or she is serving, or was serving at the time at which the application was made, and not made subject to an extended supervision order."

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6 Act, s 15(2).

7 Act, s 5(1).

8 Act, s 4(1). Section 4(2) provides that a person is not an eligible offender if, inter alia, the relevant conviction has been quashed or set aside.

9 Act, s 3(1).

10 Act, s 5(2). If the Magistrates' Court was the original sentencing court, the application is to be made to the County Court.

11 Act, ss 6 and 7.

In *RJE v Secretary to the Department of Justice*[12] it was held that "likely to commit" means "more likely than not to commit". The Act was amended in 2009 to provide that a court could be satisfied that an offender was "likely to commit" a relevant offence on the lower threshold of a risk which is "real and ongoing" and "cannot sensibly be ignored"[13].

10 The order commences when the offender has completed the service of his or her custodial sentence[14], including any period served on parole[15]. The nature and purpose of an extended supervision order suggests that an application for such an order will be made as the offender's custodial sentence draws to a close.

11 Mandatory conditions which attach to every extended supervision order[16] include requirements that the offender attend at any place as directed by the Secretary or the Adult Parole Board[17] for supervision, assessment or monitoring and not commit any relevant offence. The offender is required to give the Secretary prior notice of any proposed change of name or employment, and must not move to a new address without the prior written consent of the Secretary. Part 4A of the Act prohibits an offender from making a change of name application in Victoria or elsewhere in Australia without the prior written approval of the Adult Parole Board[18]. The offender cannot leave Victoria without the permission of the Secretary. The offender is required to obey all lawful instructions and directions of the Secretary and of the Adult Parole Board

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12 (2008) 21 VR 526 at 533 [21]. See also *ARM v Secretary to the Department of Justice* [2008] VSCA 266.

13 Act, s 11(2A) and (2B), inserted by *Serious Sex Offenders Monitoring Amendment Act* 2009 (Vic), which also provided (in s 6) that s 11 is to be taken always to have permitted a determination on the basis of the lower threshold.

14 Act, s 13(1) – "custodial sentence" is defined in s 3(1) as a court order sentencing an offender to be imprisoned or detained in respect of an offence. It covers a hospital security order under s 93A of the *Sentencing Act* 1991 (Vic).

15 Section 76 of the *Corrections Act* 1986 (Vic) provides that a sentenced prisoner is "to be regarded as being still under sentence" when serving parole. When the parole period expires, the prisoner is regarded as having served a prison sentence and "wholly discharged".

16 Act, s 15(3).

17 The Adult Parole Board is established by s 61 of the *Corrections Act*. Its functions, set out in s 69 of that Act, include the functions conferred on it by the Act.

18 Act, s 41C(2).

given pursuant to s 16 of the Act. Non-compliance by an offender with an extended supervision order, without reasonable excuse, is an indictable offence[19].

12 The court determining an application for an extended supervision order must state the reasons for its decision, cause them to be entered into the records of the court and cause a copy of the order to be served on the Secretary and on the offender[20]. The proceedings are "criminal in nature"[21].

13 An extended supervision order imposes significant restrictions upon the liberty and privacy of the offender. It is not one of its purposes to impose further punishment. Court-ordered restrictions upon liberty are not invariably imposed as a punishment[22]. The fact that an adjudication of guilt and punishment is a condition of the power to make a post-punishment order does not make the post-punishment order punitive. The nature and purpose of an extended supervision order is protective, not punitive[23]. That characterisation informs the range of purposes for which a suppression order may be made in connection with an extended supervision order. A suppression order is made in aid of the statutory purpose. It is not a mitigation of punishment.

The orders

14 The suppression orders said to have been contravened by Mr Hinch were made on 20 December 2007, 21 April 2008 and 4 July 2008. The offences with which he has been charged were said to have been committed on 5 and 21 May 2008, 1 June 2008 (two counts) and 7 July 2008.

15 The first order in issue was made on 20 December 2007 by her Honour Judge Millane in the County Court at Melbourne as part of an extended supervision order. Paragraph 4 of the extended supervision order provided, in part:

> "4 Until the issue of any further order, pursuant to section 42 of the *Serious Sex Offenders Monitoring Act 2005* the Court orders that:

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19 Act, s 40(1).

20 Act, s 35.

21 Act, s 26.

22 *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18] per Gleeson CJ; [2007] HCA 33.

23 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34] per McHugh J, 610 [73] per Gummow J, 658 [234] per Callinan and Heydon JJ; [2004] HCA 46.

> 4.1 Except where deemed by the Secretary necessary to promote the care, treatment and rehabilitation of the Respondent and in the manner and to the extent specified in 4.2 and 4.3, any information that might enable the Respondent or his whereabouts to be identified must not be published."

Judge Millane also prohibited the publication of testimonial and documentary evidence received in the proceeding and the content of the application.

16 Paragraphs 4.2, 4.3 and 4.4 authorised publication of information about the order by the Secretary to the Chief Commissioner of Police and by the Chief Commissioner to CrimTrac for entry on the Australian National Child Offender Register[24]. The Chief Commissioner was also authorised to use the information in the course of law enforcement functions and in monitoring the offender's compliance with the Act. The term of the extended supervision order, including the suppression order, was specified as 15 years.

17 On 21 April 2008, her Honour Judge Hannan made an interim suppression order which commenced:

> "5. Until the issue of any further order, pursuant to section 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), the Court orders:
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> 5.1 Except in the manner and to the extent specified in 5.2, 5.3 and 5.4 no information that might enable the respondent to be identified is to be published."

Paragraphs 5.2, 5.3 and 5.4 authorised publication by the Secretary and by the Chief Commissioner of Victoria Police.

18 On 4 July 2008, her Honour Judge Rizkalla made an extended supervision order under the Act, including a suppression order in terms very similar to those set out in the order made by Judge Hannan. There were qualifications similar to those in the orders made by Judge Hannan and Judge Millane and a non-publication order in respect of testimonial and documentary evidence given at the hearing of the application and the content of the application.

19 The orders, so far as they related to identification of offenders, were expressed as broadly as s 42(1)(c) itself. That is the only form of order, in relation to an offender, that is authorised by s 42(1)(c), albeit there is provision

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24 The Register is administered by the CrimTrac Agency, a body set up under the Intergovernmental Agreement: CrimTrac Agency (made 1 July 2000) between the Commonwealth, State and Territory governments to enhance Australian law enforcement with an emphasis on "information-based policing".

for a carve out of permitted publication "in the manner and to the extent (if any) specified in the order." The orders made therefore unavoidably presented the problems of construction raised by the section. They purported to bind the world at large. An injunction between private parties is required to speak in "clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction."[25] The time at which contempt proceedings are brought is not the time to resolve difficult questions of construction[26]. A fortiori, a court order addressed to the world at large, contravention of which is a criminal offence, should not have to be the subject of a significant constructional debate on a prosecution for its contravention. The orders represented an infringement upon the open-court principle and it is in part on that basis that their validity and that of s 42 is attacked. It is necessary, therefore, to consider the nature and scope of the open-court principle.

The open-court principle

20 An essential characteristic of courts is that they sit in public[27]. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny[28]. It is also critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard[29]. However, it is not absolute[30].

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25 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259 per Lockhart J, Gummow J agreeing at 263, French J agreeing at 268.

26 (1992) 38 FCR 248 at 259 per Lockhart J.

27 *Daubney v Cooper* (1829) 10 B & C 237 at 240 [109 ER 438 at 440]; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; [1976] HCA 23.

28 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.

29 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64], 81 [78] per Gummow, Hayne and Crennan JJ; [2006] HCA 44.

30 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9, adopting the remarks of Gaudron J in *Harris v Caladine* (1991) 172 CLR 84 at 150; [1991] HCA 9, referring to "limited exceptions" to the open and public inquiry involved in the exercise of judicial power.

21 It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers[31]. This may be done where it is necessary to secure the proper administration of justice[32]. In a proceeding involving a secret technical process, a public hearing of evidence of the secret process could "cause an entire destruction of the whole matter in dispute"[33]. Similar considerations inform restrictions on the disclosure in open court of evidence in an action for injunctive relief against an anticipated breach of confidence. In the prosecution of a blackmailer, the name of the blackmailer's victim, called as a prosecution witness, may be suppressed because of the "keen public interest in getting blackmailers convicted and sentenced" and the difficulties that may be encountered in getting complainants to come forward "unless they are given this kind of protection."[34] So too, in particular circumstances, may the name of a police informant or the identity of an undercover police officer[35]. The categories of case are not closed, although they

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31 Inferior courts lack the "inherent jurisdiction" of superior courts, but have analogous implied powers: *Grassby v The Queen* (1989) 168 CLR 1 at 15-17 per Dawson J; [1989] HCA 45; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at 354 [28] per Spigelman CJ, Handley JA and M W Campbell A-JA agreeing at 368. In federal courts created by statute implied incidental powers also take the place of "inherent jurisdiction": *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 17; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618-619 per Wilson and Dawson JJ, 623-624 per Deane J, Mason CJ agreeing at 616, 630-631 per Toohey J; [1987] HCA 23.

32 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-477 per McHugh JA, Glass JA agreeing at 467.

33 *Andrew v Raeburn* (1874) LR 9 Ch 522 at 523. See also *Nagle-Gillman v Christopher* (1876) 4 Ch D 173 at 174 per Jessel MR; *Mellor v Thompson* (1885) 31 Ch D 55; *Scott v Scott* [1913] AC 417 at 436-437 per Viscount Haldane LC, 443 per Earl of Halsbury, 445 per Earl Loreburn, 450-451 per Lord Atkinson, 482-483 per Lord Shaw of Dunfermline.

34 *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] QB 637 at 644 per Lord Widgery CJ, Milmo and Ackner JJ agreeing at 653, referred to with apparent approval in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 452 per Lord Diplock, 458 per Viscount Dilhorne, 471 per Lord Scarman. See also *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 141 per Kirby P.

35 *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 246 per McHugh JA; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 472 per Mahoney JA,

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will not lightly be extended[36]. Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified[37]. The character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle. The jurisdiction of courts in relation to wards of the State and mentally ill people was historically an exception to the general rule that proceedings should be held in public because the jurisdiction exercised in such cases was "parental and administrative, and the disposal of controverted questions … an incident only in the jurisdiction."[38] Proceedings not "in the ordinary course of litigation", such as applications for leave to appeal, can also be determined without a public hearing[39].

22 It is a common law corollary of the open-court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings[40].

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480 per McHugh JA, Glass JA agreeing at 467; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 141 per Kirby P, 159 per Mahoney JA, Hope A-JA agreeing at 169; *Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267 at 293 [85]; *R v Lodhi* (2006) 65 NSWLR 573 at 584 [25]-[26] per McClellan CJ at CL.

36 *R v Kwok* (2005) 64 NSWLR 335 at 340-341 [12]-[14] per Hodgson JA, 343-344 [29]-[31] per Howie J, 345-346 [38]-[39] per Rothman J; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 at 648 [32]-[38] per Mason P, Ipp JA agreeing at 657, 658 [90]-[91] per Basten J; *P v D1 [No 3]* [2010] NSWSC 644 at [11]-[20].

37 *A v Hayden* (1984) 156 CLR 532 at 599 per Deane J; [1984] HCA 67; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 141 per Kirby P; *R v Lodhi* (2006) 65 NSWLR 573 at 584-585 [26] per McClellan CJ at CL; *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254 at 271-272 per Viscount Reading CJ; *Taylor v Attorney-General* [1975] 2 NZLR 675.

38 *Scott v Scott* [1913] AC 417 at 437 per Viscount Haldane LC. See also *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at 723 [165] per Meagher JA.

39 *Coulter v The Queen* (1988) 164 CLR 350 at 356 per Mason CJ, Wilson and Brennan JJ; [1988] HCA 3.

40 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450 per Lord Diplock, 459 per Lord Edmund-Davies, 469 per Lord Scarman; *Raybos Australia Pty Ltd v*

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23 The existence and nature of the common law or implied power in a court to make orders restricting the publication of proceedings in open court has been the subject of considerable judicial exegesis. The question whether the power extends to orders purporting to bind the world at large is contentious. As the Law Reform Commission of New South Wales said in 2000[41]:

> "the common law regarding suppression orders is relatively unclear and unsettled."

However unsettled it may be, a consideration of the common law position with respect to suppression orders is relevant to the question whether s 42 confers a function on courts of the State of Victoria which is inconsistent with the essential characteristics of a court.

24 On one view courts have no general authority to make orders binding non-parties in their conduct outside the courtroom[42]. It has nevertheless been accepted that conduct outside the courtroom deliberately frustrating the effect of an order made to enable a court to act effectively within its jurisdiction can constitute a contempt of court[43].

Jones (1985) 2 NSWLR 47 at 55 per Kirby P, 61 per Samuels JA; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-477 per McHugh JA, Glass JA agreeing at 467; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 43 per Toohey J; [1995] HCA 19; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 44 per Fitzgerald P and Lee J; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 335 [15] per Gleeson CJ and Gummow J; [2003] HCA 52; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at 353 [20] per Spigelman CJ, Handley JA and M W Campbell A-JA agreeing at 368.

41 New South Wales Law Reform Commission, *Contempt by publication*, Discussion Paper No 43, (2000) at [10.20].

42 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55, 57 per Kirby P; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 per McHugh JA, Glass JA agreeing at 467; *"Mr C"* (1993) 67 A Crim R 562 at 563 per Hunt CJ at CL, Smart and James JJ agreeing at 566.

43 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 per McHugh JA, Glass JA agreeing at 467; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 355-356 per McHugh JA, Hope JA agreeing at 344; *Savvas* (1989) 43 A Crim R 331 at 334 per Hunt J; *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 333-334 per Samuels AP, Clarke and Meagher JJA agreeing at 348.

25 In 2004 the Privy Council held that there is no common law power to make orders against the public at large prohibiting the reporting of open court proceedings. Such a power, it was said, must be conferred by legislation[44]. On the other hand, it has been said in Australia that there is at common law a limited power to prohibit publication of proceedings conducted in open court. In *Ex parte The Queensland Law Society Inc*[45], McPherson J, after reviewing the authorities, said:

> "the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognized and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice; and, apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open court, as in all but exceptional cases they must be."

That statement was quoted with apparent approval by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal (NSW)*[46]. It was also approved in *John Fairfax Publications Pty Ltd v District Court (NSW)*[47]. Doubts about the existence of such a power as an element of the inherent jurisdiction or implied powers of courts have been expressed in Victoria[48].

26 In my opinion the better view is that there is inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. The exercise of the power must be justified by reference to the necessity of such orders in the interests of the administration of justice. Such an order may be made to and bind the parties, witnesses, counsel,

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44 *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2005] 1 AC 190 at 216 [67].

45 [1984] 1 Qd R 166 at 170.

46 (1986) 5 NSWLR 465 at 479.

47 (2004) 61 NSWLR 344 at 357 [42] per Spigelman CJ, Handley JA and M W Campbell A-JA agreeing at 368.

48 *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275 at 288 [29]; *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68 at 77 [29]; *Herald and Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299 at 305-306 [27]-[29].

solicitors and, if relevant, jurors and media representatives, or other persons present in court when the order is made, or to whom the order is specifically directed. It is not necessary for present purposes to reach a concluded view on the full extent of the power in relation to the general public.

27 Beyond the common law, it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced[49]. An example of such a law in the federal context is s 50 of the *Federal Court of Australia Act* 1976 (Cth), recently considered by this Court in *Hogan v Australian Crime Commission*[50]. Specific powers to make suppression orders or orders for the exclusion of the public, where such orders are in the interest of security or defence of the Commonwealth, can be found in the *Crimes Act* 1914 (Cth)[51] and the *Criminal Code* (Cth)[52]. There are many other examples of such provisions enacted by State parliaments[53]. Where it is left by statute to a court's discretion to determine whether or not to make an order closing part of a hearing or restricting the publication of evidence or the names of parties or witnesses, such provisions are unlikely to be characterised as depriving the court of an essential characteristic of a court and thereby rendering it an unfit repository for federal jurisdiction[54]. Nevertheless, a statute which affects the

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49 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.

50 (2010) 240 CLR 651; [2010] HCA 21.

51 *Crimes Act* 1914 (Cth), s 85B.

52 *Criminal Code* (Cth), s 93.2.

53 *Court Suppression and Non-publication Orders Act* 2010 (NSW), ss 7, 8 (yet to commence); *Civil Procedure Act* 2005 (NSW), s 72; *Witness Protection Act* 1995 (NSW), s 26; *Supreme Court Act* 1986 (Vic), s 18; *County Court Act* 1958 (Vic), s 80; *Magistrates' Court Act* 1989 (Vic), s 126; *Evidence Act* 1929 (SA), ss 69, 69A; *Witness Protection Act* 1996 (SA), s 25; *Children's Protection Act* 1993 (SA), s 59A; *Supreme Court of Queensland Act* 1991 (Q), s 128; *Child Protection Act* 1999 (Q), ss 99ZG, 192, 193; *Criminal Procedure Act* 2004 (WA), s 171; *Children's Court of Western Australia Act* 1988 (WA), s 35; *Family Court Act* 1997 (WA), s 243; *Evidence Act* 1906 (WA), s 36C; *Justices Act* 1959 (Tas), s 106K; *Terrorism (Preventative Detention) Act* 2005 (Tas), s 50; *Evidence Act* 2001 (Tas), s 194J.

54 See however, *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 in which the Court of Appeal held that a provision of the *Supreme Court Act* 1970 (NSW) mandating in-camera hearings of appeals against acquittals for contempt was consistent with the principles enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24, but infringed the

(Footnote continues on next page)

open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle. That approach, which accords with the principle of legality, informs the construction of s 42 in this case. The section must also be construed so as to minimise its intrusion upon common law freedom of speech. The Charter requires that so far as it is possible to do so consistently with their purpose, such provisions "must be interpreted in a way that is compatible with human rights."[55] Relevant human rights set out in Pt 2 of the Charter include the right to freedom of expression[56] and the right to participate in public life[57]. There are other rights which may be affected by a suppression order. They include the right of children to be protected[58] and the right of privacy[59].

The construction of s 42

28 As appears from the location of s 42 in Pt 5 of the Act, entitled "Miscellaneous", and as appears from the content of the section, its function in the scheme of the Act is ancillary. It operates in connection with proceedings in the court under other provisions of the Act. Such proceedings include applications for extended supervision orders[60], for the review[61] and renewal[62] of such orders, and for interim extended supervision orders[63] and their extension[64]. There is also provision for appeals to be made to the Court of Appeal[65].

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implied freedom of political communication. The question whether such a provision could survive Ch III scrutiny today may be regarded as open.

55 Charter, s 32(1).

56 Charter, s 15(2).

57 Charter, s 18(1).

58 Charter, s 17(2).

59 Charter, s 13(a).

60 Act, s 5.

61 Act, s 21.

62 Act, s 24.

63 Act, s 25A.

64 Act, s 25N.

65 Act, ss 36-39.

29 The power conferred upon the court by s 42(1) is a power to make an order that prohibits, conditionally or otherwise, the publication of specified classes of information. The first two classes are well defined. They comprise the "evidence given in the proceeding" and "the content of any report or other document put before the court in the proceeding". No clear definition applies to "information" the subject of an order under s 42(1)(c). However, the term "information" as used in s 42(1)(c) should only be taken as referring to information before the court in the proceedings relevant to the offender or to other persons as participants in those proceedings. Absent clear words, the Parliament should not be taken to have conferred power on the courts to prohibit public dissemination of information in the public domain which is not derived from the proceedings in which the suppression order is made. So much is required by the principle of legality and, in my opinion, by s 32(1) of the Charter.

30 Written submissions filed on behalf of Mr Hinch included the proposition that the purpose of s 42 was "[t]o allow government to contain and/or silence any community discussion and/or protests about the sentencing and release back into the community of serious sex offenders". Another purpose attributed to the section was facilitation of the covert release of serious offenders into the community. Febrile rhetoric of that kind is of no assistance**.** Section 42 confers the power to make suppression orders on the Supreme and County Courts of Victoria. Those courts cannot constitutionally be placed at the behest of the Executive Government or be directed by it as to the way in which the power is to be exercised in any particular case[66]. Section 42 does not offend against that principle.

31 Section 42 requires that the court, before making an order under that section, be satisfied that "it is in the public interest to do so". The term "public interest" and its analogues have long informed judicial discretions and evaluative judgments at common law. Examples include the enforceability of covenants in restraint of trade[67], claims for the exclusion of evidence on grounds of public interest immunity[68], governmental claims for confidentiality at

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66 *South Australia v Totani* (2010) 85 ALJR 19; 271 ALR 662; [2010] HCA 39.

67 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535 at 565; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 653; [1950] HCA 48; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 139 per Gleeson CJ, Gummow, Kirby and Hayne JJ; [2001] HCA 45.

68 *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614-619; [1993] HCA 24.

equity[69], the release from the implied obligation relating to the use of documents obtained in the course of proceedings[70], and in the application of the law of contempt[71]. When used in a statute, the term derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears[72]. The court is not free to apply idiosyncratic notions of public interest.

32 In exercising its powers under s 42, the court must assess public interest by reference to the place of the section in the statutory scheme, the purpose of the Act as a whole and the purposes of extended supervision orders. In determining whether to make a suppression order with respect to identification of an offender, the court must consider the extent, if any, to which the order would enhance the protection of the community. It must also consider its effect upon the offender's prospects of rehabilitation. Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest. A court considering such an order must also look to the larger constitutional and legal context which informs the interpretation of the statute, having regard to the effect of the order upon the open justice principle, on common law freedom of speech, and on the human rights guaranteed by the Charter. The application of a public interest criterion may require a balancing of competing interests and "be very much a question of fact and degree."[73]

33 Having referred to the purposes for which suppression orders may be made under s 42 and factors which may be relevant to those purposes, it is necessary to give closer consideration to the scope of the prohibition authorised by s 42(1)(c).

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69 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-53; [1980] HCA 44.

70 *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476.

71 *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249-250 per Jordan CJ.

72 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; [1989] HCA 61, citing *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; [1947] HCA 21; *Osland v Secretary, Department of Justice* (2010) 84 ALJR 528 at 533-534 [13] per French CJ, Gummow and Bell JJ; 267 ALR 231 at 236; [2010] HCA 24.

73 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 395 per Mason CJ, Wilson and Dawson JJ; 72 ALR 1 at 5; [1987] HCA 27.

34 As already explained, the information covered by s 42(1)(c) is information derived from the proceedings in respect of which the order is made. It must be information relating to the offender or other persons as participants in those proceedings. It is necessarily related to the kind of identification that the suppression order can legitimately seek to prevent. The word "identify" has a number of shades of meaning. In s 42(1)(c) it bears its ordinary meaning, namely to ascertain or establish that a given person is an offender or is a person who has appeared or given evidence in a proceeding under the Act[74]. That is the outcome which a prohibition under s 42(1)(c) seeks to prevent. That object informs the construction of the provision.

35 The informant argued that the prohibition authorised by s 42(1)(c) in respect of offenders extended to the publication of any information which might enable a person to be identified as an offender, including information already published and in the public domain. The Attorney-General for New South Wales, on the other hand, submitted that the natural construction of s 42(1)(c) limited its application to information enabling an offender or another person to be identified in connection with a proceeding under the Act. The Attorney-General of Queensland found a via media and proposed that s 42(1)(c) authorises a court to prohibit the publication of information that might cause a given person to be recognised as an offender. It would not necessarily prohibit publication of the fact that a person of a stated name had committed an offence or even that such a person had been the subject of an extended supervision order.

36 The submissions made on behalf of the Attorney-General of Queensland showed the way to a construction of s 42(1)(c) consistent with its character as an ancillary provision and consistent with the context and purpose of the Act. It is also consistent with an application of the principle of legality and s 32 of the Charter, which will limit the scope of the power to the minimum interference with freedom of expression.

37 Section 42(1)(c) applies to the identification of a particular person as an offender where that person has been a party to proceedings under the Act. It also applies to the identification of a particular person, such as a witness, who appeared in, or gave evidence in, such a proceeding. On the preferred construction, a suppression order under s 42(1)(c) will prohibit publication of information derived from the proceeding that might enable a member of the public to conclude that a particular person falls into one or other of those categories. It will prohibit publication of information which might enable a

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74 See *Oxford English Dictionary*, 2nd ed (1989), vol VII at 619, defining "identify" as "to ascertain or establish what a given thing or who a given person is". To like effect, the *Macquarie Concise Dictionary*, revised 3rd ed (2004) at 586 defines "identify" as "to recognise or establish as being a particular person or thing".

particular person to be identified as an offender who is the subject of an extended supervision order or of proceedings under the Act, or as a person who has appeared in, or given evidence in, proceedings under the Act. The identification of such a person, contrary to the suppression order, might, for example, be done by:

- stating that such a person resides at a particular address; or
- stating that such a person is employed in a specified capacity by a named employer at specified premises.

More than one means of identification would be caught by a suppression order.

38 An order under s 42(1)(c) would not necessarily prevent the publication of information that a person of a stated name had been convicted of a serious sexual offence and sentenced to a specified term of imprisonment, and had completed the parole term at a specified date. If, however, the circumstances of the publication might enable a particular person to be identified as an offender subject to an extended supervision order, or as one who had been the subject of proceedings under the Act, then the publication would fall within the prohibition notwithstanding that the information published could be obtained in the public domain. As to s 42(1)(a) and (b) relating to evidence, reports or documents before the court in the proceeding, those paragraphs are not amenable to a narrower construction than the ordinary meaning of their words suggests.

39 As is pointed out in the joint reasons, there is no provision in the Act requiring that the terms of a suppression order be brought to public notice[75]. There is a presumption that knowledge of the wrongfulness of an act is an essential ingredient in every offence. That presumption may be displaced by the language of the statute creating the offence[76]. That the offence furthers the object of suppression orders, the making of which represents a departure from the norm of open justice, strengthens the presumption of mens rea[77]. Members of the public (including, but not limited to, media organisations and broadcasters) should not be expected, absent a clear indication from the language of the statute, to watch what they say because of the possibility that a suppression order may

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75 Joint reasons at [76].

76 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529 per Gibbs CJ, Mason J agreeing at 546; see also at 565-566 per Brennan J, 594 per Dawson J; [1985] HCA 43.

77 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 529-530 per Gibbs CJ, Mason J agreeing at 546, 594-595 per Dawson J.

apply to the subject matter of their speech. Two of the cases relied upon by the informant concerned s 80 of the *County Court Act* 1958 (Vic), as it stood in 1988 and 2007 respectively[78]. The other authorities were concerned with the provisions of the *Evidence Act* 1929 (SA)[79]. The language of the provisions considered in those cases differed from that of s 42. Whatever the correctness of those decisions, as to which I express no view, the words of s 42(3) "must not publish or cause to be published any material in contravention of an order" do not displace the presumption that the alleged contravenor must know of the existence of the suppression order which he or she is said to be contravening. The proposition that the offence is a strict liability offence is singularly unattractive. I do not accept that s 42, properly construed, reflects any legislative intention to give effect to that proposition.

Whether s 42 offends Ch III of the Constitution

40 It was submitted for Mr Hinch that s 42 conferred a function upon the Supreme and County Courts incompatible with their character as courts capable of exercising the judicial power of the Commonwealth pursuant to Ch III of the Constitution. His specific complaints in summary were:

1. The section empowers a court, without any limitations or safeguards, to abrogate the open justice principle.

2. The section empowers a court to make decisions having a bearing on public safety, without providing reasons.

3. There is no mechanism for appeal or review of a suppression order under s 42.

41 The complaints are not sustainable. There are limitations upon the power to make suppression orders under s 42. Such orders must be made according to law. Their operation does not extend beyond what s 42, properly construed, permits. They cannot impose a general prohibition on the publication of material in the public domain unless that publication might have the prescribed effect of enabling a given person to be "identified" in the limited sense already explained. The "public interest" consideration does not authorise the court to act upon its

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78 *Bailey v Hinch* [1989] VR 78 at 86 per Gobbo J; *R v Australian Broadcasting Corporation* [2007] VSC 498 at [38]-[44] per Harper J.

79 *Nationwide News Pty Ltd v Bitter* (1985) 38 SASR 390 at 393-397 per Olsson J; *South Australian Telecasters Ltd v Director of Public Prosecutions* (1996) 188 LSJS 42 at 52 per Lander J; *Registrar of the Supreme Court v Herald & Weekly Times Ltd* (2004) 233 LSJS 473 at 484-488 [40]-[53] per Gray J.

whim. It directs the court to attend to the main purpose of the legislation and the stated purposes of extended supervision orders. It necessarily requires attention to be directed to the open justice principle and the common law freedom of speech as well as the Charter.

42 The Act does not expressly require the court making a suppression order to give reasons for doing so. Not every judicial decision attracts a duty to give reasons. Nevertheless, as McHugh JA said in *Soulemezis v Dudley (Holdings) Pty Ltd*[80]:

> "when the decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons."

The making of an order under s 42 is a judicial function. It is a significant decision which must be made having regard to the public interest. It imposes restrictions upon freedom of speech and infringes the open-court principle. As appears below, it is amenable to review or appeal. In the ordinary course a judge making such an order, other than a short-term "holding" order, should give reasons for so doing. A suppression order made in association with an extended supervision order, even if, as in this case, qualified by words such as "until further order", cannot thereby be immunised from any obligation to explain it on the basis that it is merely interlocutory. There is an express requirement that a court making a decision in relation to an extended supervision order must state the reasons for its decision and cause them to be entered into the records of the court[81]. Reasons for making the extended supervision order should ordinarily incorporate the reasons for any associated suppression order.

43 There is nothing in the Act which authorises or requires an application for an extended supervision order to be conducted in camera. Any order to that effect would have to be an exercise of inherent jurisdiction, implied power or a general statutory power outside the Act. There is nothing in the Act to prevent media organisations seeking, in the ordinary way, to apply to be heard in proceedings under the Act in relation to any proposed suppression order. If the proceedings are conducted in the County Court, then they are subject to review for jurisdictional error or error of law on the face of the record[82]. A media organisation affected by a suppression order would have standing to seek such

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80 (1987) 10 NSWLR 247 at 279.

81 Act, s 35.

82 Supreme Court (General Civil Procedure) Rules 2005 (Vic), O 56.

review in the Supreme Court[83]. It is true that a media organisation given leave to intervene in extended supervision order proceedings in the Supreme Court is not granted any right of appeal under Pt 3 of the Act. That Part only provides for appeals by offenders and by the Secretary against the making, or refusal to make, an extended supervision order[84]. However, an appeal lies to the Court of Appeal from any determination of the Trial Division of the Supreme Court constituted by a judge of the Court unless otherwise expressly provided by any Act[85]. That a media organisation affected by a suppression order will generally have standing in an appellate court to challenge that order by way of appeal, does not seem to be in doubt[86].

44 None of the specific complaints advanced on behalf of Mr Hinch relating to the operation of s 42 are made out. It remains to consider the general question of the effect of s 42 upon the open justice principle and whether that offends Ch III of the Constitution.

45 The power conferred by s 42 to make suppression orders is conferred upon the Supreme and County Courts of Victoria. They are, pursuant to Ch III of the Constitution and laws made under it, part of a national integrated court system. They cannot validly be empowered or required to do things which are "repugnant to or incompatible with the exercise of the judicial power of the Commonwealth."[87] That broad criterion of invalidity encompasses functions which would be inconsistent with or inimical to the defining characteristics of a court, or which deprive a court of one or other of those defining characteristics. A law which deprives a court of the capacity to accord procedural fairness would

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83 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 468-470 per Mahoney JA, 482 per McHugh JA, Glass JA agreeing at 467; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 151, 156 per Kirby P, 169 per Mahoney JA, Hope A-JA agreeing at 169; *Herald and Weekly Times Ltd v Braun* [1994] 1 VR 705 at 711 per Beach J; *Nationwide News Pty Ltd v District Court (NSW)* (1996) 40 NSWLR 486 at 498 per Meagher JA, see also at 489-490 per Mahoney P.

84 Act, ss 36-39.

85 *Supreme Court Act* 1986 (Vic), ss 10(1)(a) and 17(2). See also *Herald and Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299 at 303 [14] per Maxwell P and Nettle JA.

86 *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435 at 440 [17].

87 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 104 per Gaudron J, quoted with approval in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, Hayne J agreeing at 648 [198].

fall into that category[88]. So too would a law which places the court at the behest of the executive or recruits the judicial function of the court to an essentially executive process[89].

46 The open hearing is an essential characteristic of courts, which supports the reality and appearance of independence and impartiality. Its corollary is the freedom to make a fair and accurate report of what transpires in court proceedings, including the orders made by the court. However, at common law the open justice principle has, consistently with the judicial function, long been subject to qualifications reflected in the inherent jurisdiction of courts or their implied incidental power to hear part of their proceedings in camera and to restrict the publication of evidence or the names of witnesses. Chapter III does not impose on federal courts or the courts of the States a more stringent application of the open justice principle than that described above. The extent at common law of a power to prohibit publication of evidence or information disclosed in proceedings in open court may be contentious. The existence of a power to make such orders to bind the world at large is doubtful. Debate on that issue goes to the common law and implied powers of courts. Its resolution does not conclude the question whether such a power is one which cannot be conferred by statute. Having regard to the existence of analogous common law powers, albeit powers not as far reaching as s 42, it cannot be said that that section confers upon the court functions inconsistent with its essential curial characteristics or deprives it of those characteristics. Importantly, the section confers a discretion on the court to decide whether or not to prohibit publication of certain information derived from proceedings before it. It requires the court to apply familiar criteria in reaching that decision. There is nothing in the nature of the power conferred upon the court by s 42, properly construed, which is repugnant to or incompatible with the judicial function or otherwise incompatible with any implication derived from Ch III.

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88 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470; [1992] HCA 29; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [55] per French CJ, 366-367 [97]-[98] per Gummow and Bell JJ; [2009] HCA 49.

89 *South Australia v Totani* (2010) 85 ALJR 19; 271 ALR 662.

The implied freedom of political communication

47 The test adopted by this Court in *Lange v Australian Broadcasting Corporation*[90], as modified in *Coleman v Power*[91], to determine whether a law offends against the implied freedom of communication involves the application of two questions:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

2. If the law effectively burdens that freedom, is the law reasonably appropriate and 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 and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?

If the first question is answered yes, and the second answered no, the law will be invalid[92]. It was submitted on behalf of Mr Hinch that s 42 authorises prohibition of the publication of information which may be necessary to communicate a view upon the operation of the legislation with reference to the effectiveness of the rehabilitation of specific offenders and/or the circumstances under which specific offenders may have re-offended or breached extended supervision orders. Such information, it was submitted, is critical to any meaningful discussion of the Act and of the government's performance in respect of a key policy issue.

48 It was submitted for the Commonwealth that the implied freedom applies only to communications in relation to politics or government at the Commonwealth level. That limitation may be a logical consequence of the source of the implied freedom. That source is to be found in the scheme adopted by the Commonwealth Constitution for a representative democracy and for the amendment of the Constitution by referendum. The limit propounded, despite its logical attraction, is not of great practical assistance. There is today significant interaction between the different levels of government in Australia. The use of cooperative executive and legislative arrangements between Commonwealth and State and Territory governments through the Council of Australian Governments, Ministerial Councils and otherwise, makes it difficult to identify subjects not

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90 (1997) 189 CLR 520.

91 (2004) 220 CLR 1 at 51 [95]-[96] per McHugh J, 78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J.

92 (1997) 189 CLR 520 at 567-568.

capable or potentially capable of discussion as matters which are or should be or could be of concern to the national government. The supervision and rehabilitation of serious sex offenders, for example, may raise questions about the adequacy of Commonwealth funding of State and Territory services and cooperative arrangements between the Commonwealth and the States and Territories. It is notable that the suppression orders made in the present case authorised the entry of the offenders' names on the Australian National Child Offender Register. The Register is the product of an Intergovernmental Agreement to which the Commonwealth is a party[93].

49 The generality of this Court's statement in *Lange* about the scope of the communications covered by the freedom tends to bear out these observations[94]:

> "this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia."

And further[95]:

> "the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable."

The range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society. For these are, at the very least, matters potentially within the purview of government.

50 It is conceivable that a suppression order, authorised under s 42, could have the effect of preventing or restricting public discussion of the supervision or treatment by government agencies of a particular offender whose identity and

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93 See fn 24.

94 (1997) 189 CLR 520 at 571.

95 (1997) 189 CLR 520 at 571-572.

personal history is relevant to that discussion. On the other hand, as Hayne J observed in *APLA Ltd v Legal Services Commissioner (NSW)*[96]:

> "in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication".

That observation may indeed be an answer to the submissions made on this issue on behalf of Mr Hinch in so far as the identification of offenders might be used as a rhetorical device. It may be, however, that there are occasions on which the use of the offender's identity is directly relevant to a point to be made about public administration in relation to serious sex offenders generally. On that basis it may be accepted that s 42 has the capacity to burden political communication. Properly construed, however, the section is, in my opinion, reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of representative and responsible government provided for in the Constitution. Its objects are the protection of the community and the rehabilitation of serious sex offenders who are at risk of re-offending after they have completed their sentences. Having regard to the limits on the application of s 42, properly construed, and its relationship to long-established common law and implied powers, it is a reasonable means of achieving those objects. It is not applied absolutely. The making of orders under s 42 requires consideration by the court of the public interest in light of the purposes of the Act, the open-court principle, the common law freedom of speech and the freedom of expression referred to in the Charter. In my opinion the provision satisfies the second limb of the *Lange* test.

Conclusion

51 For the preceding reasons, the challenge to the validity of s 42 fails. I agree with the order proposed in the joint reasons.

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96 (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44.

52 GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. Section 1(1) of the *Serious Sex Offenders Monitoring Act* 2005 (Vic) ("the Act") states the "main purpose" of the statute. It 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."

Section 1(2) of the Act states:

> "In outline this Act –
>
> (a) defines the class of sex offender to whom it applies; and
>
> (b) empowers the Supreme Court or County Court to make an extended supervision order of up to 15 years in respect of an eligible offender on the application of the Secretary to the Department of Justice; and
>
> (c) gives functions to the Adult Parole Board in relation to giving instructions or directions in respect of an extended supervision order and supervising offenders who are subject to such an order; and
>
> (d) provides for the suspension, review and renewal of extended supervision orders."

53 Content is given to par (a) of s 1(2) by the definition of "eligible offender" in s 4. In particular, at the time at which an application is made for an "extended supervision order" under Pt 2 (ss 5-35) the offender must be serving a custodial sentence, and must be a person sentenced for a "relevant offence". This is one of the 44 offences listed in the Schedule to the Act. Contrary to the tenor of the speech of the responsible Minister on the Second Reading in the Legislative Assembly of the Bill for the Act[97], the offenders are not limited to what may be called "child-sex offenders".

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97 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 February 2005 at 9-10.

54 The court proceedings under the Act include not only those in the Supreme Court or the County Court under Pt 2 with respect to extended supervision orders and interim extended supervision orders, but appeals under Pt 3 (ss 36-39A)[98] to the Court of Appeal. Breach by an offender of an extended supervision order or an interim extended supervision order is an offence (s 40), and according to the circumstances may be heard in the Supreme Court, the County Court or the Magistrates' Court (s 41). Thus these prosecutions also give rise to court proceedings under the Act.

55 It is the validity of s 42 which is challenged in this Court. The section has two sequential operations. First, sub-ss (1) and (2) of s 42 empower a court in any proceeding under the Act, on its own initiative or on the application of a party, to make an order that certain matters not be published except in the manner and to the extent (if any) specified in the order. Secondly, s 42(3) makes it an offence for a person to publish or cause to be published any material in contravention of such an order.

The litigation

56 On 29 September 2008, the defendant was charged with contraventions of orders which had been made in Pt 2 proceedings by the County Court under s 42 of the Act. The contraventions alleged were of two descriptions. One concerned the publication on the website "www.hinch.net" of articles which identified an offender, and the other was the stating by the defendant of the name of an offender at a public protest rally in Melbourne on 1 June 2008.

57 The County Court orders were made on 20 December 2007, 21 April 2008 and 4 July 2008. They were expressed as made until further order and pursuant to s 42 of the Act. The first order relevantly stated that "any information that might enable [the offender] or his whereabouts to be identified must not be published". The second and third orders were in like form, stating "no information that might enable [the offender] to be identified is to be published". The orders were so drawn as to do no more than restate the terms of par (c) of s 42(1), "any information that might enable an offender or another person who has appeared or given evidence in the proceeding to be identified".

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98 The Act was repealed by s 200 of the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic), but the previous legislation continues to apply to the present litigation: *Interpretation of Legislation Act* 1984 (Vic), s 14(2).

58 The making of orders in the terms of par (c) was not beyond the power conferred by s 42(1) but was an undesirable practice. The authorities discussed in *ICI Australia Operations Pty Ltd v Trade Practices Commission*[99] indicate that an injunction should not be framed in terms which do no more than reproduce the text of a statutory prohibition; rather, the injunction should indicate the conduct which is enjoined or commanded to be performed, so that the defendant knows what is expected on its part. Further, Lockhart J added in *ICI*[100]:

> "It is not only parties who are answerable for contempt of order of courts. As mentioned earlier, persons who counsel, procure or induce parties to breach injunctions are directly responsible for those breaches. Hence, it is desirable that the terms of the injunctions be readily available to all persons who may be affected by them."

59 This reasoning is particularly applicable to the framing of orders made under s 42 of the Act. The sanction of contempt is supplemented by the offence provision in s 42(3) and the orders are addressed not merely to designated parties, but to the world at large.

60 The defendant was summoned to appear at the Magistrates' Court of Victoria on 29 October 2008. Thereafter, while that cause was still pending, by order made under s 40(1) of the *Judiciary Act* 1903 (Cth) on 30 July 2010, there was removed into this Court so much of the cause as concerns the validity of s 42 of the Act. The Attorneys-General for the Commonwealth, New South Wales, Queensland, South Australia and Western Australia intervened under s 78A of the *Judiciary Act*. For the reasons which follow s 42 is valid.

The submissions

61 The defendant makes three principal submissions. The first concerns the jurisdiction or power conferred by s 42(1), to make what are called "suppression orders". The submission is that the jurisdiction or power conferred by s 42, and exercised by the County Court in making its orders on 20 December 2007, 21 April 2008 and 4 July 2008, impermissibly diminishes the institutional

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99 (1992) 38 FCR 248 at 259-262.

100 (1992) 38 FCR 248 at 262.

integrity of the courts of Victoria in the sense explained by this Court most recently in *International Finance Trust Co Ltd v New South Wales Crime Commission*[101] and *South Australia v Totani*[102].

62 The second submission is that the prohibitions imposed by those County Court orders were contrary to an implication derived from Ch III of the Constitution that all State and federal courts must be open to the public and carry out their activities in public.

63 The third submission is that the statutory prohibition upon publication which is imposed by s 42(3), and founds the charges against the defendant, has an operation which is at odds with the implied freedom of political communication considered in *Lange v Australian Broadcasting Corporation*[103]; in particular, it is said that s 42(3) inhibits the ability of the defendant and others to criticise the Act itself and to seek legislative changes by public assembly, protest and dissemination of "factual data concerning court proceedings as a means of seeking such changes".

64 The defendant, in elaboration of the third submission and in reliance upon a passage in the reasons of Mason CJ, Toohey and Gaudron JJ in *Stephens v West Australian Newspapers Ltd*[104], also contended that the implication considered in *Lange* had its counterpart in the Constitution of the State of Victoria. The submission was not developed, but if the third submission fails it also must fail in any event.

65 In response to the third submission, New South Wales and Queensland contended that any exercise of executive or judicial authority under the Act was well removed from any "federal issue" and thus from the scope of the *Lange* implication.

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101 (2009) 240 CLR 319; [2009] HCA 49.

102 (2010) 85 ALJR 19; 271 ALR 662; [2010] HCA 39.

103 (1997) 189 CLR 520; [1997] HCA 25.

104 (1994) 182 CLR 211 at 232-234; [1994] HCA 45.

Section 42 of the Act

66 Before turning to consider the submissions, the text of s 42 should be set out. This presents several questions of construction to be answered before embarking upon the issues of validity.

67 Section 42 (which is headed "Suppression orders") reads:

> "(1) In any proceeding before a court under this Act, *the court, if satisfied that it is in the public interest to do so, may order –*
>
> (a) that any evidence given in the proceeding; or
>
> (b) that the content of any report or other document put before the court in the proceeding; or
>
> (c) that any information that might enable an offender or another person who has appeared or given evidence in the proceeding to be identified –
>
> must not be published except in the manner and to the extent (if any) specified in the order.
>
> (2) An order under this section may be made on the application of a party or on the court's own initiative.
>
> (3) A person must not publish or cause to be published any material in contravention of an order under this section.
>
> Penalty: 500 penalty units in the case of a body corporate;
>
> 120 penalty units or imprisonment for 1 year or both in any other case." (emphasis added)

68 The exercise of the power conferred by s 42(1) is conditioned upon the satisfaction of the court that it is in the public interest to make an order of the description in pars (a), (b) or (c). If the court attains that satisfaction then, for reasons of the kind explained in *Hogan v Australian Crime Commission*[105], the

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105 (2010) 240 CLR 651 at 664 [32]-[33]; [2010] HCA 21.

court is to implement that satisfaction by making the order. The phrase "the court ... may order" is to be read accordingly.

69 The expression "that it is in the public interest" imports a judgment to be made by reference to the subject, scope and purpose of the Act[106]. The main purpose of the Act disclosed by s 1(1) is enhancement of community protection by supervision of certain offenders who have served custodial sentences. But, as will now appear, the question of what is in the public interest has more than one dimension[107].

70 That additional dimension is supplied by the requirement that the Act, "[s]o far as it is possible to do so consistently with [its] purpose", must be interpreted in a way that is compatible with the civil and political rights set out in Pt 2 (ss 7-27) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Human Rights Act"). This method of interpretation is enjoined by s 32(1) of the Human Rights Act.

71 Section 6(1) of the Human Rights Act states that "[a]ll persons have the human rights set out in [Pt] 2". The rights listed in Pt 2 relevantly include that of offenders the subject of supervision orders not to have their privacy arbitrarily interfered with (s 13), and the right of the defendant to freedom of expression in any chosen medium, but subject to lawful restrictions "reasonably necessary" to respect the rights and reputation of other persons (s 15). Those rights of other persons include those of offenders identified in s 13.

72 The phrase "reasonably necessary", which is used in s 15 of the Human Rights Act, supplies a criterion for judicial evaluation and decision-making in many fields. Examples from the common law, statute law and Australian constitutional law were collected and discussed by Gleeson CJ in *Thomas v Mowbray*[108]. In an earlier decision, his Honour had pointed out that "necessary"

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106 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217; [1989] HCA 61.

107 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]; [2006] HCA 45; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 323 [137]; [2008] HCA 37.

108 (2007) 233 CLR 307 at 331-333 [20]-[27]; [2007] HCA 33.

does not always mean "essential" or "unavoidable"[109]. He also observed that, particularly in the field of human rights legislation, the term "proportionality" might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms[110].

73 Paragraphs (a) and (b) of s 42(1) of the Act are concerned with material identified with some specificity, being evidence in the proceeding and the content of any report or other document "put before the court in the proceeding". This last expression is apt to catch such things as assessment reports by which an application for an extended supervision order must be accompanied (ss 6, 8) and instructions and directions with respect to an extended supervision order given to the offender by the Secretary to the Department of Justice (s 16). Those instructions or directions may concern the offender's place of residence and the times at which the offender must be at home (pars (a) and (b) of s 16(3)).

74 Paragraph (c) of s 42(1) is concerned with "any information" which might enable "to be identified" either an offender or another person who has appeared or given evidence in the proceeding in question. In the setting provided by s 42 and the Act as a whole, the prohibition is concerned with information which might enable those in possession of it to recognise, ascertain or establish that a given person is an offender or a witness or other person who has appeared at the proceeding in question. The focus is not upon naming a particular person as having committed or having been convicted of an offence. The focus of s 42 (and s 42(1) in particular) is upon the conduct of the subsequent proceeding under the Act[111]. Whether publishing a person's name is to publish information which might enable to be identified an offender or a witness or other person who has given evidence at the proceeding in question would be an issue of fact to be decided by reference to the whole of the relevant publication and any other relevant evidence. The provision in par (c) of s 42(1), like those in pars (a) and (b), is directed in aid of the efficacy of the proceeding under the Act which is before the court.

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109 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]; [2004] HCA 41.

110 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 198-199 [36]-[37]. See also *In re British Broadcasting Corporation* [2010] 1 AC 145; *In re Guardian News and Media Ltd* [2010] 2 AC 697.

111 See *Bailey v Hinch* [1989] VR 78 at 93.

75 The submission of the Queensland Attorney-General in this respect should be accepted. The Act provides for a regime under which, after release, an eligible offender may be subjected to an intrusive monitoring regime which requires an identified and fixed place of residence. This is done in aid of the main purpose of the Act spelled out in s 1(1). The orders establishing this regime may be frustrated by such steps as identification of the offender as living in a particular area or publication of photographs showing a distinctive appearance. The power conferred by s 42(1) is designed to protect against frustration of the processes of the court in the proceeding in question.

76 With this construction of s 42(1) in mind, the offence created by s 42(3) of the Act falls for consideration. Several things should be remarked here. The first is that proceedings for contempt of an order made under s 42, whether in the Supreme Court or the County Court, would require personal service on the person bound of a copy of the judgment indorsed with a notice naming the person served and requiring compliance: Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 66.10; County Court Civil Procedure Rules 2008 (Vic), r 66.10. The power to dispense with service under such provisions is sparingly exercised[112]. The second is that, by way of contrast, there is no provision in the Act for publication of orders made under s 42, although they may be addressed to the world at large and the existence of the order is the factum upon which the offence provision in s 42(3) operates.

77 The third consideration is that the first two considerations point away from the submission for the informant based upon the decision of Gobbo J in *Bailey v Hinch*[113], which considered the differently constructed provision in s 80 of the *County Court Act* 1958 (Vic). The submission is that s 42(3) creates an offence of "strict liability", and that neither knowledge of the order nor any further mens rea is required to complete the offence, although a defence of honest and reasonable mistake of fact may be permitted.

78 To the contrary of the informant's submission, the phrase in s 42(3) "publish or cause to be published ... in contravention of an order" indicates a requirement of knowledge of that order in contravention of which the publication

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112 *Drummoyne Municipal Council v Lewis* [1974] 1 NSWLR 655 at 658.

113 [1989] VR 78.

is made. "Contravention" is used in the sense of disputation or denial rather than mere failure to comply with an unknown requirement. Such a construction of s 42(3) also better accommodates the provision in s 15(3) of the Human Rights Act respecting reasonably necessary restrictions upon the right to freedom of expression.

79 It is convenient now to come to the defendant's three submissions asserting invalidity. As will appear, the second is a cognate of the first, and both concern the power conferred by s 42 upon the Supreme Court and the County Court to make "suppression orders".

Institutional integrity

80 As indicated earlier in these reasons, the power to make a "suppression order" is enlivened by the satisfaction of the court that it is "in the public interest" to do so. That expression derives content from the main purpose of the Act, which is identified in s 1(1). Section 42(1) does not present to the court a criterion which is "so indefinite as to be insusceptible of strictly judicial application"[114]. Examples of criteria for the exercise of the judicial power of the Commonwealth which have been stated in broad terms and held valid are collected in *Thomas v Mowbray*[115]. The criterion for the exercise of power under s 42 is 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.

81 Nor is there substance in the submission by the defendant that there is no appellate avenue to challenge an unreasoned decision to make an order under s 42.

82 The three orders made by the County Court on 20 December 2007, 21 April 2008 and 4 July 2008 were authorised by s 42, if made "[i]n any proceeding [which was before the County Court] under [the] Act". If that proceeding, as appears to be the case here, related to an extended supervision order under Pt 2, then in determining the application s 42 operated as an adjunct

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114 *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J; [1960] HCA 46.

115 (2007) 233 CLR 307 at 344-348 [71]-[79], 509 [600], 526 [651].

to Pt 2. Section 35 required the court to "state the reasons for its decision" and decisions under Pt 2 attracted the provisions of Pt 3 for appeals to the Court of Appeal. Those reasons should include reasons for making an order under s 42(1) and it would therefore ordinarily be expected that there would be identified why it was judged to be in the public interest to make an order preventing publication of particular information.

83 Part 4 (ss 40-41) stands apart. It creates an offence of breach of an extended or interim extended supervision order, and provides the procedure for dealing with those offences. To the conduct of those proceedings, s 42(1) would attach. There is nothing in the Act to deny the operation of ordinary appellate and review structures in Victoria with respect to convictions of an offence under Pt 4[116].

84 The complaint of the defendant with respect to these aspects of s 42 appeared to be that he had had no right thereunder to be notified and to be heard before the orders in question had been made. But, as already indicated, no contempt proceeding could advance in the absence of personal service of the order. Further, the right to freedom of expression under s 15 of the Human Rights Act may be subject to lawful restrictions reasonably necessary to respect the rights of other persons to privacy provided by s 13. The construction of the offence provision in s 42(3) given earlier in these reasons accommodates those interests to the main purpose of the legislation stated in s 1(1).

Open justice

85 However, the defendant then contends in his second submission that the restrictions imposed by the three County Court orders could not be supported by s 42 because that law empowered the court acting thereunder to act contrary to a requirement derived from Ch III that "all Federal and State Courts must be open to the public".

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116 See *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; [2006] HCA 38; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 555 [19]; [2008] HCA 4.

86 In *Dupas v The Queen*[117] the Court observed:

> "Having regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the Constitution."

87 An understanding of those and other attributes of the federal judicial power may be assisted by the remarks of Isaacs J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*[118]:

> "The final and paramount consideration in all cases is that emphasized in *Scott v Scott*[119], namely, 'to do justice' (Viscount *Haldane* LC). All other considerations are means to that end. They are ancillary principles and rules. Some of them are so deeply embedded in our law as to be elementary and axiomatic, others closely approach that position. Of the latter class is publicity, which can only be disregarded where necessity compels departure, for otherwise justice would be denied to those whom Earl *Loreburn*[120] termed 'the parties entitled to justice.'"

88 Some care is required here. First, the present issue does not concern the authority of the courts by further decision to add to those situations where the necessity spoken of by Isaacs J compels departure from the requirement that justice be administered publicly. In *Scott v Scott*[121], Viscount Haldane LC recognised the diverse and special cases which arose in the wardship and lunacy jurisdictions and in disputes respecting trade secrets. Secondly, there are to be distinguished from the power of courts to close their proceedings, rules of evidence which confer an immunity against disclosure in court of certain

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117 (2010) 241 CLR 237 at 243 [15]; [2010] HCA 20.

118 (1923) 32 CLR 518 at 549; [1923] HCA 39. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; [1999] HCA 9.

119 [1913] AC 417 at 437.

120 [1913] AC 417 at 446.

121 [1913] AC 417 at 437-438.

communications made in the public interest[122]. Thirdly, in order to resolve the present issue it is unnecessary to accept that there is an inherent jurisdiction or implied power in some circumstances to restrict the publication of proceedings conducted in open court. Fourthly, the focus of the present case is not upon the inherent powers of the courts or exclusionary rules of evidence, but upon the competence of the Victorian legislature to confer upon Victorian courts the power provided in s 42 of the Act.

89 It is here that the argument by the defendant breaks down. The powers of the Parliament of the Commonwealth are conferred by the Constitution subject to Ch III. They extend to furnishing courts exercising federal jurisdiction with authorities incidental to the exercise of the judicial power[123]. Thus, while s 17 of the *Federal Court of Australia Act* 1976 (Cth) requires the jurisdiction of that Court to be exercised in open court, that is qualified by s 50, which empowers the Court in certain circumstances to forbid or restrict the publication of evidence[124].

90 A further example of federal legislation of that character was s 97(1) of the *Family Law Act* 1975 (Cth) ("the Family Law Act"), held invalid in *Russell v Russell*[125]. The sub-section required the hearing in closed court of all proceedings under that statute, whether in the Family Court of Australia or the Supreme Court of a State or Territory. The High Court was dealing with pending causes removed from the Supreme Courts of Victoria and South Australia. Gibbs J said that to require a court invariably to sit in closed court was to alter an essential aspect of its character[126]. But his Honour added[127]:

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122 See *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 246-248 per McHugh JA.

123 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270; [1956] HCA 10; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 407-408 [234]-[235]; [2005] HCA 44.

124 See *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

125 (1976) 134 CLR 495; [1976] HCA 23.

126 (1976) 134 CLR 495 at 520.

127 (1976) 134 CLR 495 at 520.

> "Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court. If the [Family Law Act] had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed court in appropriate cases I should not have thought that the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of their most important attributes. This it cannot do."

91 This reasoning should be followed here and has three consequences. First, it denies any restriction drawn from Ch III which in absolute terms limits the exercise of the legislative power of the Parliament. Secondly, it indicates that a federal law to the effect of s 42 would be valid and would not deny an essential characteristic of a court exercising federal jurisdiction. Thirdly, this being so, as a State law s 42 does not attack the institutional integrity of the State courts as independent and impartial tribunals in the sense discussed in *International Finance Trust* and *Totani*.

Freedom of political communication

92 There remains the defendant's third submission. It is made clear in *Lange*[128] and *Coleman v Power*[129] that the implied freedom of political communication operates as a constraint upon legislative power in a particular sense. Communications concerning the exercise of judicial power stand apart in the sense discussed in detail by McHugh J in *APLA Ltd v Legal Services Commissioner (NSW)*[130].

93 In the course of that discussion of principle in *APLA*, McHugh J remarked[131]:

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128 (1997) 189 CLR 520 at 567-568.

129 (2004) 220 CLR 1 at 50-51 [92]-[96], 77-78 [196], 82 [211]; [2004] HCA 39.

130 (2005) 224 CLR 322 at 361 [65]-[66].

131 (2005) 224 CLR 322 at 361 [66].

> "The *Lange* freedom arises from the necessity to promote and protect representative and responsible government. Because it arises by necessity, the freedom is limited to 'the extent of the need'[132]. Courts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense."

His Honour also said[133]:

> "There is a difference between a communication concerning legislative and executive acts or omissions concerned with the administration of justice and communications concerning that subject that do not involve, expressly or inferentially, acts or omissions of the legislature or the Executive Government. Discussion of the appointment or removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts, for example, are communications that attract the *Lange* freedom. That is because they concern, expressly or inferentially, acts or omissions of the legislature or the Executive Government. They do not lose the freedom recognised in *Lange* because they also deal with the administration of justice in federal jurisdiction. However, communications concerning the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom. In some exceptional cases, they may be. But when they are, it will be because in some way such communications also concern the acts or omissions of the legislature or the Executive Government."

94 The defendant submits that the communications by him which found the charges laid by the informant under s 42(3) concern acts or omissions of the legislative and executive branches of the government of Victoria. He seeks the repeal of the Act, in particular of s 42 itself, and contends that his communications do not lose protection of the freedom recognised in *Lange* because they also deal with the administration of justice by the courts of a State,

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132 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118 per Kitto J; [1961] HCA 71.

133 (2005) 224 CLR 322 at 361 [65].

within the meaning of s 77(iii) of the Constitution. Accordingly, the defendant says that an affirmative answer must be given to the first *Lange* question[134]:

> "does the law [s 42(3)] effectively burden freedom of communication about government or political matters either in its terms, operation or effect?"

95 It may be accepted that an affirmative answer should be given to this question. But s 42(3) does not display a "direct" rather than "incidental" burden upon that communication. The distinction was explained as follows by Gleeson CJ in *Mulholland v Australian Electoral Commission*[135]. After pointing out that there are many laws (and s 42 of the Act is one such law) which affect freedom to communicate, his Honour continued:

> "Some such laws have only an indirect or incidental effect upon communication about matters of government and politics. Others have a direct and substantial effect. Some may themselves be characterised as laws with respect to communication about such matters. In *Australian Capital Television Pty Ltd v The Commonwealth*[136], Deane and Toohey JJ said that 'a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications'. The passage was cited by Gaudron J in *Levy v Victoria*[137]."

96 Earlier, in *Cunliffe v The Commonwealth*[138], Deane J spoke of cases where the law in question involved no significant curtailment of the freedom of political communication and discussion, and continued:

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134 (1997) 189 CLR 520 at 567.

135 (2004) 220 CLR 181 at 200 [40].

136 (1992) 177 CLR 106 at 169; [1992] HCA 45.

137 (1997) 189 CLR 579 at 618-619; [1997] HCA 31.

138 (1994) 182 CLR 272 at 339; [1994] HCA 44; see also *Levy v Victoria* (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ.

> "That may even be so in a case where the law prohibits or regulates a particular type of communication or discussion which is neither inherently political in its nature nor a necessary ingredient of political communication or discussion (eg incitement or conspiracy to commit a serious criminal offence). In such cases, any incidental curtailment of freedom of political communication and discussion will be consistent with the constitutional implication if it is reasonably capable of being seen as necessary or appropriate and adapted to the legitimate legislative aim being pursued by the Parliament."

97 The second question posed by *Lange* (as reformulated in *Coleman*) asks whether s 42(3) of the Act is reasonably appropriate and 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[139].

98 The provisions of s 42, given the construction placed upon them earlier in these reasons, operate in aid of the scheme embodied in the Act, particularly that respecting extended or interim extended supervision orders. The burden upon political communication in any particular case will vary and depend upon the scope of the orders which the court makes under s 42(1), having regard to the circumstances. The offence created by s 42(3) is not one of strict liability.

99 The answer to the second *Lange* question must be answered "yes" and thus in favour of the validity of s 42. This makes it unnecessary to pursue the question whether there is an insufficient connection with any "federal issue" to attract the implied freedom of political communication.

Order

100 This Court should make a declaration that s 42 of the *Serious Sex Offenders Monitoring Act* 2005 (Vic) is not invalid upon any of the grounds asserted in submissions to this Court. There remains in the State court so much of the cause as was not removed into this Court.

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139 See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 402 [213].

Gummow J
Hayne J
Heydon J
Crennan J
Kiefel J
Bell J

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