

SUPREME COURT OF VICTORIA

COURT OF APPEAL

Note: **This proceeding is subject to a suppression order**

No 131 of 2008

RJE

Appellant

V

THE SECRETARY TO THE DEPARTMENT
OF JUSTICE,

Respondent

ATTORNEY-GENERAL FOR THE STATE
OF VICTORIA

Interveners

and

VICTORIAN HUMAN RIGHTS & EQUAL
OPPORTUNITY COMMISSION

JUDGES:

MAXWELL P, NETTLE and WEINBERG JJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

11-13 November 2008

DATE OF JUDGMENT:

18 December 2008

MEDIUM NEUTRAL CITATION:

[2008] VSCA 265

CRIMINAL LAW – Extended supervision order – Whether open on evidence to conclude appellant likely to commit relevant offence if released unconditionally – Meaning of ‘satisfied to a high degree of probability’ – Meaning of ‘likely to commit a relevant offence’ – *Bouhey v The Queen* (1986) 161 CLR 10, *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1976) 14 SASR 303 considered – *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 not followed – *Serious Sex Offenders Monitoring Act 2005* (Vic), ss 11, 14.

CRIMINAL LAW – Appeal – Extended supervision order – Expert evidence – Assessment of risk offender will commit relevant offence if released unsupervised – Whether material before court justifying departure from unchallenged expert opinion – *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 8(2), 11(1).

HUMAN RIGHTS – Charter – Whether interpretive task under s 11(1) attracts operation of Charter – *Charter of Human Rights and Responsibilities Act 2006*(Vic) s 7(1), 32(1).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr G J Thomas SC with Mr S K McGregor	Victoria Legal Aid
For the Respondent	Ms P M Tate SC, SG with Mr D Grace QC, Mr C P Young and Ms J Davidson	Russell Kennedy Solicitors
For the 1 st Intervener	Dr K Emerton SC with Ms K L Walker	Victorian Government Solicitor's Office
For the 2 nd Intervener	Dr S P Donaghue	Victorian Human Rights & Equal Opportunity Commission

1 On 23 April 2008 a judge of the County Court ordered, pursuant to s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic) ('the *Monitoring Act*'), that the appellant, RJE, be subject to an extended supervision order for a period of 10 years. Pursuant to s 36(2) of the *Monitoring Act*, RJE appeals against the making of that order.

2 In our opinion, the appeal must be allowed and the extended supervision order revoked.¹ The detailed reasons which follow may be summed up quite shortly, as follows. The judge erred in concluding, on the evidence presented, that RJE was likely to commit a relevant offence if released unsupervised into the community. The evidence did not permit that conclusion to be drawn. The appeal thus succeeds on the merits, without it being necessary to decide any of the questions which were said to arise under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the *Charter*').²

The nature of an extended supervision order

3 Only the Supreme Court of Victoria or the County Court can make an extended supervision order ('ESO').³ If a court makes an ESO, it must also determine the period of the ESO (which must not exceed 15 years) and specify that period in the order.⁴

4 The ESO must also have attached to it the conditions specified in s 15(3) of the *Monitoring Act*. Those conditions provide that:

... during the period of the order, the offender must –

(a) not commit, whether in or outside Victoria, another relevant offence or an offence that, if committed in Victoria, would be a relevant offence;

¹ See s 39(1)(b).

² See [54]–[56] below.

³ *Monitoring Act* s 1(2)(b).

⁴ *Monitoring Act* s 14(1).

- (b) attend at any place as directed by the Secretary or the Adult Parole Board for the purpose of supervision, assessment or monitoring;
- (c) report to, and receive visits from, the Secretary or any person nominated by the Secretary for the purposes of this paragraph;
- (d) notify the Secretary of any change of name or employment at least 2 clear working days before the change;
- (e) not move to a new address without the prior written consent of the Secretary;
- (f) not leave Victoria except with the permission of the Secretary granted either generally or in relation to the particular case;
- (g) obey all lawful instructions and directions of the Secretary given under section 16(1);⁵
- (h) obey all lawful instructions and directions of the Adult Parole Board given under section 16(2).⁶

5 Section 15(2) states that the purposes of these conditions are twofold, namely –

- (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.

6 In relation to para 15(3)(g), s 16(1) provides that the Secretary to the Department of Justice may give any instruction or direction which he or she considers necessary to ‘ensure the effective and efficient implementation and administration of the conditions of the order’. In relation to para 15(3)(h), the Adult Parole Board is empowered by s 16(2) to give any instruction or direction it considers necessary to achieve the purposes set out in s 15(2). These may include instructions or directions as to:

- (a) where the offender may reside;
- (b) times at which the offender must be at home;
- (c) places or areas that the offender must not visit or may only visit at specified times;
- (d) treatment or rehabilitation programs or activities that the offender must

⁵ See below.

⁶ See below.

attend and participate in;

- (e) the types of employment in which the offender must not engage;
- (f) community activities in which the offender must not engage;
- (f) persons or classes of person with whom the offender must not have contact;
- (h) forms of monitoring (including electronic monitoring) of compliance with the extended supervision order to which the offender must submit;
- (i) personal examinations by a medical expert for which the offender must attend for the purpose of the Board being given a report by the expert to assist it in determining the need for, or form of, any instruction or direction under this section.

7 Specific provision is made by s 16(3A) for the Board to give an instruction or direction which requires the offender to 'reside at premises situated on land that is ... within or outside any walls erected on prison land ... but does not form part of the prison'. In such a case, the offender is considered to 'have been released in the community and to be residing in the community' for the purposes of the *Monitoring Act*.⁷

Assessing the risk

8 Under s 11(1) of the *Monitoring Act*, a court may only make an ESO in respect of an offender

... if it is 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.

The application for such an order is made by the Secretary to the Department of Justice (the respondent to the present appeal).⁸ Under s 11(2), the Secretary bears the onus 'of proving the existence of the likelihood referred to in sub-s (1).'

9 The Secretary's application for an order against RJE was dated 15 November

⁷ *Monitoring Act* s 16(3B); see *Fletcher v Secretary to the Department of Justice* (2006) 165 A Crim R 569.

⁸ *Monitoring Act* s 5(1).

2007. At that time, the term ‘relevant offence’ was confined to sexual offences against children. RJE was then approaching the end of a term of imprisonment of 10 years and three months imposed on him in the County Court on 24 August 1998. The offences for which he was sentenced on that occasion included sexual offences against girls aged 15 and 16 respectively.⁹

10 RJE was therefore an ‘eligible offender’ for the purposes of the *Monitoring Act*, because he was at the time of the application serving a custodial sentence in respect of a relevant offence.¹⁰ The definition of ‘relevant offence’ also defined the question which the judge had to address, namely, whether RJE was ‘likely to commit’ a sexual offence against a child. (Since the application against RJE was made, the definition of ‘relevant offence’ has been substantially broadened. It now covers sexual offences generally.¹¹ Those amendments have no bearing on the present appeal.)

11 In accordance with s 11(3) of the *Monitoring Act*, the Court was required, in determining whether RJE was likely to commit a relevant offence if released unconditionally, to have regard to any ‘assessment report’ filed by the Secretary or by the offender. As required by s 6 of the Act, the Secretary’s application was accompanied by an assessment report from a forensic psychologist, Ms Bea Raymond MAPS. By the time of the hearing of the application, Ms Raymond had prepared an addendum to that report. No assessment report was prepared on behalf of RJE.

12 The *Monitoring Act* contains a number of prescriptions governing the making and content of an assessment report. First, an assessment report can only be made by a psychologist or a psychiatrist.¹² Secondly, an assessment report can only be made following a personal examination of the offender.¹³ Thirdly, under s 8(1), an

⁹ See [57]–[69] below.

¹⁰ *Monitoring Act* 4(1)(a), (b)(i).

¹¹ See *Justice Legislation Amendment Act 2008* (Vic) s 24(1).

¹² Under s 7(1)(c) of the *Monitoring Act* the regulations may also prescribe other types of ‘health service provider’.

¹³ *Monitoring Act* s 7(1).

assessment report must address the following matters in relation to the offender:

- (a) whether or not the offender has a propensity to commit relevant offences in the future;
- (b) the pattern and progression to date of sexual offending behaviour on the part of the offender and an indication of the nature of any likely future sexual offending behaviour on his or her part;
- (c) efforts made to date by the offender to address the causes of his or her sexual offending behaviour, including whether he or she has actively participated in any rehabilitation programs;
- (d) if the offender has participated in any rehabilitation programs, whether or not this participation has had a positive effect on him or her;
- (e) relevant background of the offender, including developmental and social factors and other offending behaviour;
- (f) factors that might increase or decrease any identified risks;
- ...
- (g) any other relevant matters.

13 Critically for present purposes, s 8(2) requires an assessment report to state:

- (a) the medical expert's assessment of the risk that the offender will commit another relevant offence if released in the community and not made subject to an extended supervision order; and
- (b) his or her reasons for that assessment.

In addition to the assessment report, s 11(3) permits the court to have regard to 'anything else that it considers appropriate.'

14 The decision whether or not to make an extended supervision order is for the court, not the assessor, to make. Plainly enough, it is for the judge deciding the application to decide whether he/she is satisfied of the relevant likelihood. For that purpose, the court is not confined to – or bound by – the assessment report.¹⁴ But the scheme of the Act makes it clear that the expert's assessment of risk is of the highest importance to that process of decision-making.

15 The Act places the assessment report at the centre of the risk assessment process which s 11(1) requires the court to carry out. The report is the only matter

¹⁴ *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 121 [39] – 122 [42] (Callaway AP).

which the court is obliged to take into account.¹⁵ And the critical opinion which the report must express is an opinion on the very question which the court itself must decide – ‘the risk that the offender will commit another relevant offence if released in the community and not made subject to an extended supervision order.’¹⁶

16 Predicting whether a particular person will commit a criminal offence in the future is notoriously difficult.¹⁷ The *Monitoring Act* recognises that the prediction of future dangerousness, if it is to be attempted at all, is a matter for expert opinion. As the report in the present case illustrates, the making of such a prediction in a particular case requires expertise in observation and assessment of those who commit offences of the particular type, and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending. The necessary expertise combines the ability to make a qualitative assessment of an individual and the ability to utilise the available quantitative risk assessment instruments.¹⁸

17 One thing is clear. Judges, including experienced criminal judges, have no such expertise. Neither the conduct of criminal trials nor the sentencing of offenders requires judges to have, or equips them with, the ability to assess the likelihood that an offender will re-offend. We express this view fully recognising that a sentencing judge has to consider the need for specific deterrence and the prospects for rehabilitation; that bail decisions often involve predictive considerations; and that

¹⁵ By contrast, counterpart Western Australian legislation requires a court to consider, in addition to the requisite psychiatric report, a wide range of other matters including ‘information indicating whether or not the person has a propensity to commit serious sexual offences in the future’ and ‘whether or not there is any pattern of offending behaviour ...’: see *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, 383 [26] (Hasluck J). These are of course the very types of matters which, under the Victorian scheme, the author of the assessment report must address.

¹⁶ The statutory scheme thus conflicts with the exclusionary rule of expert evidence at common law, which precludes an expert witness from giving evidence about the ‘ultimate issue’ in a proceeding. The exclusionary rule reflects the principle that expert evidence cannot be permitted to displace the responsibility of the tribunal of fact to determine the relevant factual matter for itself.

¹⁷ See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 622-4 [123]-[126] (Kirby J); *Attorney-General v David* [1992] 2 VR 46, 61-2 (Hedigan J).

¹⁸ See [70] – [81] below.

assessing dangerousness is the basis of decisions under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to impose or vary supervision orders in respect of persons found not guilty of criminal offending by reason of mental impairment.¹⁹

18 Judges are, of course, expert in assessing matters of fact, and an expert report 'is no better than the facts on which it is based.'²⁰ But where – as here – the facts are not in contest, and the expert opinion is both cogent and unchallenged,²¹ a judge should ordinarily be slow to depart from the risk assessment which the expert has made.

19 This point may be simply illustrated. If the undisputed opinion of the expert assessor was that the offender *was* likely to commit a relevant sex offence if released unsupervised, it is difficult to imagine on what other grounds a judge might fail to be satisfied that the likelihood existed. Conversely, if the assessor's unchallenged opinion was that the offender was *not* likely to offend again if released unsupervised, it is again difficult to imagine what material – being material which (*ex hypothesi*) the assessor must not have considered – could be sufficiently demonstrative of risk to justify the court nevertheless being satisfied that the relevant likelihood existed. If such other material existed, it would seem to us to be far preferable for the expert to be asked whether it affected the risk assessment previously made. In the present case, as will appear, the assessor was asked to comment on particular matters in just this way.

20 There is, we think, a useful parallel with the position of a jury faced with

¹⁹ In making such decisions, the court must assess (i) the likelihood of dangerousness; and (ii) the risk of 'serious endangerment': ss 26 and 40 (matters to be taken into account in deciding whether to make, vary or revoke a custodial or non-custodial supervision order); s 32 (no variation of custodial to non-custodial supervision order unless court satisfied of no serious endangerment).

²⁰ *R v Kotzmann* [1999] 2 VR 123, 135 (Callaway JA).

²¹ *Cf DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, 406 (Hasluck J) (little weight accorded to those parts of psychiatric reports based upon predictive instruments using research data and methods found not to have been established on the evidence). See also *DPP (WA) v GTR* [2007] WASC 318; *cf DPP (WA) v Moolarvie* [2008] WASC 37; *State of WA v Woods* [2007] WASC 320.

unanimous medical evidence on a question of mental abnormality. In *Taylor v R*,²² Smithers J said:

It is clear, therefore, that in a case such as the present the jury should understand that the medical opinions are central to the case for the accused, that they may be sufficient of themselves to prove as a fact what the state of mind of the accused was at the critical time, and that, where they are accepted as honest and competent and are unchallenged, then unless the facts on which the medical witnesses have relied to form their opinions are not satisfactorily established or are contradicted by other acceptable evidence, or the jury are not persuaded that steps of reasoning in the formation of those opinions were soundly taken, or there is some other factor before them reflecting on the validity of the opinions expressed, the jury should not reject or ignore those opinions.²³

The meaning of 'likely to commit a relevant offence'

21 As already noted, an ESO may only be made in respect of an offender if the court is 'satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence.' For reasons which follow, we consider that in this context 'likely to commit' means 'more likely that not to commit.' That is, the Court must be satisfied that there is a greater than 50 per cent chance that a relevant offence will be committed if the offender is released unsupervised. The previous decision of this Court in *TSL*, holding that a less than 50 per cent chance might suffice for this purpose, should not be followed, though the result in the present case would have been the same even if *TSL* applied.²⁴

22 It was common ground on the appeal that the test in s 11(1) involves two distinct elements. The first element defines the standard of proof, the second defines the matter which has to be established. We deal first with the standard of proof.

²² (1978) 22 ALR 599, 608; see also 618 (Connor and Franki JJ); *R v Gemmill* (2004) 8 VR 242, 253-4 (Eames JA).

²³ See also *Taylor v R* (1978) 22 ALR 599, 617-8 (Connor and Franki JJ); *R v Klamo* [2008] VSCA 75, [44]-[50] (Maxwell P).

²⁴ See [94] below.

23 In a criminal trial, the standard of proof is ‘beyond reasonable doubt’; in a civil trial, the standard of proof is ‘on the balance of probabilities’. The *Monitoring Act* imposes a standard of proof which is *sui generis*. It was contended for RJE that the requirement that the court be satisfied ‘to a high degree of probability’ should be equated with the criminal standard of proof. Counsel for the Secretary, on the other hand, argued that Parliament would have used the language of ‘beyond reasonable doubt’ if it had been intended to impose the criminal standard of proof; and that, although the standard of proof was clearly higher than that required in a civil proceeding, it was not to be equated with the criminal standard.

24 We note that the discussion in *Cross on Evidence* of the different standards – or ‘degrees’ – of proof opens with the following statement by Denning J in *Miller v Minister of Pensions*²⁵ about the criminal standard:

That degree [of proof] is well settled. *It need not reach certainty, but it must carry a high degree of probability.* Proof beyond a reasonable doubt must not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable”, the case is proved beyond reasonable doubt, but nothing short of that will suffice.²⁶

25 On this view, the standard of proof adopted in s 11(1) of the *Monitoring Act* is no less stringent than the criminal standard itself. It is unnecessary, however, to explore this matter further. Plainly enough, Parliament’s use of the phrase ‘high degree of probability’ requires the judge before making an ESO to feel a high degree of satisfaction that the Secretary has proved ‘the existence of the likelihood’ referred to in s 11(1). Adapting what Dixon J said in *Briginshaw v Briginshaw*,²⁷ the gravity of the consequences under the *Monitoring Act* which flow from an affirmative finding of likelihood means that the satisfaction which the sub-section requires ‘should not be

²⁵ [1947] 2 All E R 372, 373-4.

²⁶ Emphasis added.

²⁷ (1938) 60 CLR 336, 362.

produced by inexact proofs, indefinite testimony or indirect inferences’. Again:

...[T]he importance and gravity of the question make it impossible to be reasonably satisfied on the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact.²⁸

Proof of likelihood

26 We turn to the second element. Of what must the judge be satisfied to this very high standard? What is the *factum probandum*? It is that the offender – if released without being subject to an ESO – is likely to commit a relevant offence. Everything turns, for this purpose, on what is meant by the word ‘likely’. In our view, the starting-point for the task of construction must be that the language governing the standard of proof – ‘high degree of probability’ – is not to be read as governing the language defining that which has to be proved – ‘likely to commit a relevant offence’. The two elements of s 11(1) are distinct. The first is expressed in the language of probability, the second in the language of likelihood.

27 As Mason P remarked in *Tillman v Attorney General for the State of New South Wales*²⁹ (*Tillman*), ‘the universal requirement to construe words in context becomes even more pressing for chameleon-like words such as ‘likely’.³⁰ Mason P referred to the decision of McClellan CJ in *Attorney-General (New South Wales) v Winters*³¹ (*Winters*), in which his Honour demonstrated the significance of statutory context by citing a large number of decided cases in which the meaning attributed to the word ‘likely’ varied with the context.³²

28 A similar survey was undertaken by Marks J as a member of the Full Court in *Department of Agriculture and Rural Affairs v Binnie*.³³ In that case, the court was

28 Ibid 368; see also *Rejcek v McElroy* (1965) 112 CLR 517, 521 (The Court).

29 [2007] 178 A Crim R 133.

30 Ibid 450 [7].

31 (2007) 176 A Crim R 249.

32 Ibid 261-4.

33 [1989] VR 836, 840-843.

considering a ground of exemption under the *Freedom of Information Act 1982* (Vic) which required consideration of whether the disclosure of a document ‘would be reasonably likely to endanger the lives or physical safety of persons ...’ The court concluded that, in context, the phrase ‘reasonably likely’ spoke of ‘a chance of an event occurring or not occurring which is real – not fanciful or remote.’ It did not refer to a chance which was more likely than not to occur, that is, one which was ‘odds-on’.³⁴

29 That conclusion was based in part on the decision of the High Court in *Boughey v The Queen*.³⁵ The Court was there concerned with a provision of the Tasmanian Criminal Code, to the effect that culpable homicide was murder if committed

... (c) by means of an unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances
...

The High Court majority rejected the appellant’s contention that, in context, the word ‘likely’ meant ‘more likely than not’ or ‘odds-on’ or ‘more than a 50 per cent chance’. In their joint judgment, Mason, Wilson and Deane JJ expressed the view that

the word “likely” is used in both [provisions] with what we apprehend to be its ordinary meaning, namely, to convey the notion of a substantial – a “real and not remote” – chance regardless of whether it is less or more than 50 per cent.³⁶

30 This conclusion may be contrasted with that reached by Bray CJ in *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd*.³⁷ His Honour was considering the effect of s 139B of the *Post and Telegraph Act 1901* (Cth), which provided that a person doing any work was liable to pay compensation to the Commission for damage to its property where that person had ‘reasonable cause to believe that the doing of the work is likely to interfere with or damage’ property of

³⁴ Ibid 842.

³⁵ (1986) 161 CLR 10.

³⁶ Ibid 21.

³⁷ (1976) 14 SASR 303.

the Commission. Bray CJ said that, in some contexts, ‘probable’ may be regarded as stronger than ‘likely’ and, in other contexts, ‘likely’ may be stronger than ‘probable’.³⁸ He continued:

... [T]he ordinary and natural meaning of the word is synonymous with the ordinary and natural meaning of the word “probable” and both words mean ... that there is an odds-on chance of the thing happening. That is the way in which statutes containing the words have usually been construed ... Particularly is this so when the statute is a penal statute ... or, I think, where, as here, an additional liability in tort beyond the common law liability is being imposed.

... I think that is the meaning which should be attached to the word “likely” in subs (1)(a). It is the natural and ordinary meaning and there is nothing to show that another meaning was intended. Like the learned Special Magistrate, therefore, I think that “likely” in the subsections means “probable” and I think that that means that there is a more than fifty per cent [chance] of the thing happening.³⁹

The learned Chief Justice evidently had a quite different view of the ordinary and natural meaning of the word ‘likely’ from that of the majority in *Bouhey v The Queen*.

31 In *Air New Zealand Ltd v Commerce Commission*,⁴⁰ Davison CJ undertook an analysis of the various meanings capable of being given to the term ‘likely’. The statutory question to be determined by the Commission was whether a particular proposal ‘[was] or [was] likely to be contrary to the public interest’. In his Honour’s view, a proposal was likely to be contrary to the public interest where the Commission, even though unable to form the view that it was in fact contrary to the public interest, was left in a state of mind where there was a probability that this would be so.

32 Davison CJ referred to dictionaries in which ‘likely’ was regarded as synonymous with ‘probably’. His Honour said of these two terms:

It is difficult to differentiate clearly between them in any sensible degree. On a graduated scale one might place expressions of likelihood in the following order of certainty – possible; distinct or significant possibility; reasonably

³⁸ Ibid 311.

³⁹ Ibid 312–3 (citations omitted).

⁴⁰ [1985] 2 NZLR 338.

probable; probable; highly probable.⁴¹

His Honour concluded that, in its ordinary sense and in the context in which it appeared, the word ‘likely’ should be understood as meaning at least ‘probable’. His Honour had, as has been seen, described the latter word as having a degree of certainty beyond ‘reasonably probable’. It necessarily follows that he intended to convey that the word ‘likely’, in the particular statutory context, meant ‘more likely than not’.

33 On the other hand, there are cases (apart from *Bouhey v The Queen*) where the word ‘likely’ has been interpreted as meaning ‘a real or not remote chance or possibility’, regardless of whether it is more than 50 per cent. In *Jungarrayi v Olney*,⁴² the Full Court of the Federal Court adopted that construction, though it did so in a context where the construction was ‘appropriate’ and ‘beneficial’. There was also extrinsic material in that case to support that particular interpretation.

34 The Federal Court in Canada accepted that the ordinary meaning of the word ‘likely’ was ‘probable’ or ‘more probable than not’.⁴³ In the particular statutory context, however, ‘likely’ was to be read as something less than ‘probable’. The statutory context was a provision allowing the deportation of landed immigrants who were ‘likely’ to participate in activities of a terrorist organisation. The French text of the relevant statute (which could not be ignored in the interpretation of the relevant provision) justified the construction adopted. The text used the French word ‘susceptible’, which translated as ‘capable of, admitting of, liable to’, rather than any precise equivalent to the English word ‘likely’.⁴⁴

35 Were it necessary for us to express a concluded view on the ordinary meaning of ‘likely’ – which is, after all, a question of fact rather than of law⁴⁵ – we would be respectfully inclined to agree with Bray CJ in *Australian Telecommunications*

⁴¹ Ibid 342.

⁴² (1992) 34 FCR 496, 504-506.

⁴³ *Al Yamani v Canada (Solicitor General)* [1996] 1 FC 174, 213-214 (MacKay J).

⁴⁴ Ibid.

⁴⁵ *Hope v Bathurst City Council* (1980) 144 CLR 1.

Commission v Krieg Enterprises Pty Ltd. In our view, when it is said that a particular team is likely to win a sporting contest, or that a particular person is likely to recover from illness, what is being conveyed is that the event is more likely than not to occur. Conversely, we do not think it would accord with ordinary usage for an occurrence to be described as ‘likely’ if the odds were against it occurring, that is, if there were a greater chance that it would not occur than that it would.⁴⁶

The statutory context

36 It is not, however, necessary to decide that question since what falls for decision in this case is the statutory meaning of ‘likely’, that is, its meaning in the context of the *Monitoring Act*. Uninstructed by authority, we should have thought that its meaning in this context too was ‘more likely than not’. That is, the court before making an ESO must be satisfied that it is more likely than not that the offender will commit a relevant offence if released without being subject to an ESO. Our reasons are as follows.

37 First, the authorities make clear that one of the possible meanings of ‘likely’ is ‘more likely than not’, that is, the probabilities favour the occurrence of the event in question; the chance of its occurring is greater than 50 per cent. In other contexts, as we have seen, ‘likely’ connotes a lower degree of probability. A choice of interpretations is therefore available. On ordinary principles of construction, we should favour that interpretation which produces the least infringement of common law rights – in this case, the right to be at liberty.⁴⁷ Plainly enough, the power which s 11(1) confers is a power to interfere with the liberty of a person who would otherwise be at large following completion of sentence. It follows that we should adopt the strongest of the available meanings of ‘likely’.⁴⁸

⁴⁶ See also *Air New Zealand Ltd v Commerce Commission* [1985] 2 NZLR 338, 342 (Davidson CJ); *Bouhey v The Queen* (1986) 161 CLR 10, 14 (Gibbs CJ). It should be noted that, if a less than ‘odds-on’ chance were to be treated as synonymous with ‘likely’, then the prospects of the matter eventuating would be both likely and unlikely at the same time.

⁴⁷ See, for example, *Balog v Independent Commission Against Corruption & Ors* (1990) 169 CLR 625, 635-6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

⁴⁸ *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron & McHugh JJ); *CTM*

38 Secondly, the indications in the extrinsic materials⁴⁹ are that the section is directed at ‘high risk offenders’. According to ordinary conceptions, an offender is not at ‘high risk’ of re-offending – as distinct from a ‘real risk’ of re-offending – if the chance of his or her re-offending is less than even.

39 The same conclusion about the meaning of ‘likely’ was reached, respectively, by McClellan CJ in *Winters*⁵⁰ and by Mason P (dissenting) in *Tillman*,⁵¹ to which we referred earlier. It was also the view preferred by the majority in *Tillman* (Giles and Ipp JJA),⁵² though their Honours felt constrained to follow the decision of this Court in *TSL v Secretary to the Department of Justice*,⁵³ to which we now turn.

The TSL analysis

40 The leading judgment in *TSL* was given by Callaway AP, with whose reasons Buchanan JA and Coldrey AJA agreed. In the relevant part of his reasons, Callaway AP said that the critical phrase in s 11(1) (‘satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence’) was open to two alternative readings. His Honour said:

The first way in which the words may be read is that “high degree of probability” performs a function similar to the expressions “balance of probabilities” and “beyond reasonable doubt”, so that the court must be satisfied to that standard that the offender is likely to commit a relevant offence. In order to express the point simply, let us use “being reasonably sure” as shorthand for satisfaction to a high degree of probability. On the first reading of the words, they would mean that the court must be reasonably sure that the offender is likely to commit a relevant offence.

The other reading of the [words] takes as its starting point the fact that the meaning of “likely” varies according to the context in which it is used. Because it was concerned with the future, Parliament could not require the court to be satisfied that the offender will commit a relevant offence. All that the court could be satisfied of is that the offender is likely to do so or that there is a risk that the offender will do so. The ordinary meaning of likely, as

v R (2008) 247 ALR 1, 13 [35] (Gleeson CJ, Gummow, Crennan & Kiefel JJ).

⁴⁹ To which we were referred under s 35(b) of the *Interpretation of Legislation Act 1984* (Vic).

⁵⁰ (2007) 176 A Crim R 249, 265 [50].

⁵¹ [2007] 178 A Crim R 133.

⁵² *Ibid* 147 [88].

⁵³ (2006) 14 VR 109.

explained by Mason, Wilson and Deane JJ in *Boughey v R*, is “a substantial – a ‘real and not remote’ – chance”. Not surprisingly, Parliament considered that threshold to be too low. *The expression “to a high degree of probability” was included to show that, in this context, “likely” connotes a high degree of probability. On this second reading of the italicised words, the court must be satisfied that there is a high degree of probability that the offender will commit a relevant offence.*

In my opinion, the second meaning is to be preferred. It is understandable that Parliamentary counsel would have chosen the word “likely” in relation to a future state of affairs but almost inconceivable that Parliament would have intended that word to bear its ordinary meaning. All too many offenders are likely, in that sense, to commit a relevant offence. A person subject to an extended supervision order is a prisoner in all but name. The threshold would be far too low, in a free society, if a court had a discretion to make an extended supervision order simply because it was satisfied that there was “a substantial – a ‘real and not remote’ – chance” of his or her re-offending. That is why the word “likely” in s 11(1) is used in the sense of a high degree of probability.

I desire to guard against misunderstanding. To say that “likely” is used in that sense does not mean that the secretary must prove that it is more likely than not that a person will commit a relevant offence. Likelihood, in the ordinary sense of that word identified in *Boughey v R*, includes a low degree of probability. *What the legislature requires the court to be satisfied of is a high degree of probability. There is no reason to think that it must be more than 50%.* With experience, it may be possible to be more precise, but we should always return to the words the legislature has chosen and the context in which they appear.

The conclusion that the word “likely” in s 11(1) is used in the sense of a high degree of probability accords with the main purpose of the Monitoring Act as stated in s 1. The Act is concerned with offenders who are a *serious* danger to the community. It also accords with the second reading speeches, which explained that the legislation was aimed at *high risk* offenders and offenders assessed as being at *high risk* of re-offending. It is also the construction that the learned judge was invited to adopt. [Counsel for the secretary below] ... submitted, correctly, “[T]here is a degree of probability that [TSL] will commit a relevant offence if not subject to supervision or to an extended supervision order. The question is whether it is a high degree.”https://www.lexisnexis.com/au/legal/frame.do?tokenKey=rs_h-23.382519.4649152196&target=results_DocumentContent&reloadEntirePage=true&rand=1227761011756&returnToKey=20_T5238705795&parent=docview-20#20 I readily assume that her Honour directed herself in the same way. Her decision cannot be impugned on the basis that she asked the wrong question.⁵⁴

41 There are three key steps in this analysis. First, his Honour rejected the *Boughey* test (‘a substantial – a “real and not remote” – chance’) as not reflecting what

⁵⁴ Ibid 112–4 [8]–[12] (citations omitted; emphasis added).

Parliament intended. Secondly, his Honour treated the phrase ‘to a high degree of probability’ as showing that, in this context, the word ‘likely’ connoted a high degree of probability. As his Honour went on to say, the effect of this interpretation was to require the court to be satisfied that ‘there is a high degree of probability that the offender will commit a relevant offence’. Thirdly, his Honour said that there was ‘no reason to think’ that this required the court to be satisfied of a likelihood greater than 50 per cent.

42 With great respect, we are unable to agree with either the second or the third step in the analysis. As to the second, there is no warrant for treating the distinct elements of s 11(1) as if they were merged into one, that is, no warrant for substituting the language of the standard of proof for the language of that which has to be proved. The word ‘likely’ does not mean ‘highly probable’. If it did, it would require a degree of probability well above 50 per cent. Thus, even if (contrary to our view) the second step were correct, the third step would not follow. The learned Solicitor-General, appearing for the Secretary on this appeal, did not demur from these propositions.

43 The explanation for the third step may be that Callaway AP was influenced by the High Court’s determination in *Bouhey v The Queen* that the word ‘likely’ in s 157(1) of the *Criminal Code Act 1924* (Tas) conveyed a notion of ‘a substantial, real and not remote chance’, regardless of whether it was more or less than 50 per cent. His Honour distinguished *Bouhey v The Queen*, to the extent of observing that ‘likely’ in s 11(1) of the *Monitoring Act* excluded a ‘low degree of probability’, but appears to have embraced the view articulated in *Bouhey v The Queen* that to interpret ‘likely’ as ‘more likely than not’ or as ‘a more than 50 per cent, or odds on chance’ would be to attribute to it a requirement of ‘a specific degree of mathematical probability which the word does not convey either as a matter of ordinary language or in its context’.⁵⁵

⁵⁵ (1986) 161 CLR 10, 21 (Mason, Wilson & Deane JJ).

44 But, if we may respectfully say so, there are also several aspects of that reasoning which are questionable. Fundamentally, it is of the essence of a 'high probability' that it be, at least, a better than even chance. How then could something be likely, in the sense of connoting a high degree of probability, unless it was at least more likely than not to occur?

45 Secondly, the interpretation given to 'likely' in *Bouhey v The Queen* was informed by a different statutory context. With respect, it made sense in the context of s 157 of the *Criminal Code* to interpret 'likely' as including a risk of less than 50 per cent. The history of the offence of reckless murder, and the social imperative of protecting human life from the delinquency of reckless indifference, justified a conclusion that foresight of a real risk to human life, even if of a less than 50 per cent risk, was enough to attract criminal liability. The same was true of 'likely' in the context of the kind of industrial safety legislation dealt with in some of the cases referred to in *Bouhey v The Queen*. The protection of workers from unsafe systems of work dictated that an employer's foresight of a risk, even if of less than 50 per cent, should expose the employer to criminal responsibility.

46 Contrastingly, where – as in s 11 of the *Monitoring Act* – what is contemplated is the restriction of the liberty of the subject, the opposite should logically be the case. Just as an offender is not to be convicted unless proved beyond reasonable doubt to have committed the offence with which he or she is charged, so too is the liberty of the subject not to be restricted for fear that he or she will re-offend unless there is a high risk that he or she will do so. Why should it be supposed that a less than even chance of such re-offending was intended to be sufficient?

47 Thirdly, to require that something 'be more likely than not' or an 'odds on chance' is in no way to require any particular degree of mathematical probability.⁵⁶ In either case, the degree of precision is no greater than 'upon the balance of probabilities', a notion which is de rigueur for judges and juries and with which by

⁵⁶ It allows for a seamless range of probabilities, starting from a point infinitesimally in excess of halfway and continuing to one.

and large they have little difficulty dealing. Fourthly, in terms of natural and ordinary meaning, any of the epithets: ‘more probable than not’; ‘odds on chance’; and ‘greater than 50%’, is surely a more natural and comprehensible connotation of ‘likely’ than that ‘there is no reason to think that it must be more than 50%’.

48 As a general rule, this Court will not depart from its own earlier decisions unless we regard those decisions as clearly, or plainly, wrong.⁵⁷ For the reasons we have given, we have come to the conclusion that the decision in *TSL* – so far as it concerns the meaning of the word ‘likely’ – is clearly wrong. This is a question which directly affects the liberty of the subject and there is good reason why the error should not be perpetuated.⁵⁸

Comity between intermediate appellate courts

49 The position is complicated, however, by the majority decision of the New South Wales Court of Appeal in *Tillman*. The relevant passage from the joint judgment is in these terms:

In our view, there is much to be said for the view expressed by McClellan CJ at CL in *Winters*, namely, that “likely” is used in the section as meaning more probable than not. On the other hand, it is a respectable view that the legislature recognised the infringement of personal liberty by requiring satisfaction to a high degree of probability, so that it would be wrong to impose in the shade of meaning adopted for “likely” a further strict requirement of likelihood in the sense of more probable than not. *There is ambiguity in the word “likely”, and if unconstrained we would tend towards his Honour’s view. Nevertheless, the view expressed in TSL is reasonably open and we are not persuaded that it is clearly wrong.* In the light of what has emanated from the High Court in regard to the respect that an intermediate appellate court of one Australian jurisdiction should give to a decision of an intermediate appellate court of another Australian jurisdiction on issues that are substantially the same, we would follow and adopt the approach of Callaway AP in *TSL*.⁵⁹

50 Comity between intermediate appellate courts is a matter of great importance,

⁵⁷ *Avco Financial Services Ltd v Abschinski* [1994] 2 VR 659; *Farrar v Western Metropolitan College of TAFE* [1999] 1 VR 224, 228-9 (Winneke P).

⁵⁸ See *Nguyen v Nguyen* (1990) 169 CLR 245, 269-70 (Dawson, Toohey & McHugh JJ).

⁵⁹ *Tillman* [2007] 178 A Crim R 331, 147 [88] (emphasis added).

as the High Court recently restated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.⁶⁰ *Tillman* and *Cornwall v Attorney General for New South Wales*⁶¹ having now been decided as they were, it would be facile to construe the *Monitoring Act* as if it were unique to Victoria and the problem of its construction were of merely parochial concern.

51 As against that, however, as Mason P pointed out in his dissent in *Tillman*, the decisions presently under review do not concern Commonwealth law or any uniform national scheme of legislation of the kind under consideration in *Australian Securities Commission v Marlborough Gold Mines Ltd*,⁶² nor do they deal with any question of property, commercial law or tort law having national significance. If we may respectfully say so, therefore, there is much to be said for the view of Mason P that:

... [T]he judge of an intermediate appellate court determining an appeal remains bound by the judicial oath to do justice according to law. In a proper case, that duty will require departure from non-binding precedents if the judge discerns that legal principles of higher authority require such departure. Each individual judge is obliged to pursue justice, not prudence, even though it may turn out that his or her views do not obtain the assent of appellate colleagues or are overturned upon appeal to the High Court.

52 We would add that the question of comity on issues of interpretation under State law was recently addressed by the High Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*. The Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) cited with approval the following statement by McHugh J in *Marshall v Director-General, Department of Transport*:⁶³

But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial

⁶⁰ (2007) 230 CLR 89, 151-2.

⁶¹ [2007] NSWCA 374.

⁶² (1993) 177 CLR 485.

⁶³ (2001) 205 CLR 603, 632-3 [62] cited in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270.

decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.

53 We have already concluded that we should not follow the decision in *TSL* on the meaning of the word 'likely'. Given that the majority judgment in *Tillman* was itself based on the decision in *TSL*, and was contrary to the expressed preference of all three judges in that case, we likewise decline to follow *Tillman*. We conclude, therefore, that on ordinary principles of interpretation the meaning of the word 'likely' in s 11(1) of the *Monitoring Act* is 'more likely than not'.

No occasion to decide any Charter question

54 As we have said, our conclusion about the meaning of the word 'likely' in s 11(1) is arrived at by the application of ordinary principles of statutory interpretation, in particular the common law rule favouring that interpretation which least encroaches on individual freedom.⁶⁴ That choice of meanings having been resolved, the interpretive task does not attract the operation of s 32(1) of the Charter, which provides:

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.

55 In view of that conclusion, there is no occasion to consider further the question – debated at some length on the appeal – of the correct methodology to be applied where s 32(1) is applicable.⁶⁵ While that is undoubtedly a question of real significance following the advent of the Charter, it is not appropriate that we decide that question when it is unnecessary to do so. The correct result is more likely to be arrived at in a case where the choice to be made is of practical consequence, that is, where the court is able to assess the different results which might be produced by the competing approaches.

⁶⁴ See [36]-[38] above.

⁶⁵ See, for example, *R v Hansen* [2007] 3 NZLR 1.

We are conscious, too, that detailed and helpful submissions were made by all parties on a range of Charter questions, none of which now falls for decision in view of our conclusion that the threshold condition for the exercise of the power under s 11(1) was not satisfied. Those questions were:

- (a) whether a judge exercising the power under s 11(1) is acting judicially or administratively;⁶⁶
- (b) whether the effect of s 32(1) of the Charter is to limit the scope of the power conferred by s 11(1) of the *Monitoring Act* such that, for example, a judge considering making an ESO must be satisfied that the conditions (likely) to be imposed by the Parole Board under s 16(2) will not limit the offender's rights further than s 7(2) of the Charter would permit;
- (c) whether the Parole Board, though at present exempted from the Charter, must nevertheless in practice refrain from imposing conditions which would be incompatible with the Charter;
- (d) whether, on appeal from the making of an ESO, this Court can examine whether the conditions imposed by the Parole Board under s 16(2) are compatible with the Charter.

These are all important questions and they will be dealt with as and when they arise.

*The previous offending*⁶⁷

Before we examine the assessment relied on by the Secretary in the present case, it is necessary to examine the circumstances of the prior offending which made RJE an 'eligible offender' for the purposes of the *Monitoring Act*.

In 1997, RJE was in a de facto relationship with CF and their daughter, TE, then aged 15. RJE had lived with CF for approximately 17 years. Shortly before that

⁶⁶ Cf Charter s 4(1)(j)

⁶⁷ The factual summary which follows is taken from the sentencing remarks of the County Court Judge on 24 August 1998 and from the report of Dr Lester Walton dated 26 June 1998, which was before the Court on that occasion. Those materials were examined by the assessor for the purposes of the assessment report in this case.

relationship began, RJE had had a sexual encounter with a woman in Sydney who, at around the same time, had been having sexual relationships with several other men. In 1997 RJE was contacted by PD, who said she was his daughter from the relationship in Sydney. PD had lived in New South Wales with her mother for most of her life. She told RJE that she had stopped living with her mother after being sexually abused by her step-father and a male relative.

59 In April 1997, PD came to live at RJE's home. (The sentencing judge did not consider that there was sufficient evidence from which it could be concluded that RJE had organised for PD to live with him 'with a view to taking part in sexual activity with her'.) At this time, RJE was 39 and PD was 16.

60 On the afternoon of 6 June 1997, RJE collected his daughters, PD and TE, from the bus stop. They went to a hotel for about half an hour and then went home and had dinner. They then returned to the hotel and remained there for two hours. PD drank about three bottles of beer. They returned home. At around midnight, TE and CF went to bed. PD, who was wearing pyjamas, was on the floor of the lounge-room under a doona watching television. At about 2.00 am RJE moved next to PD under the doona. Against her protests he digitally penetrated her and then penetrated her with his penis, saying 'You'll really enjoy this, Bubby'. This incident formed the basis of the two counts of incest to which RJE pleaded guilty. They were representative counts.

61 A few weeks later, on the morning of 2 July 1997, RJE arrived home after working night shift, having dropped his daughters at the bus stop. RJE and CF were in the bedroom. He told CF that he wanted to have sex but she refused. He ignored her refusal, tore off her underpants, penetrated her vagina and ejaculated. This incident was the basis of the first count of rape to which RJE pleaded guilty.

62 The next count was of intentionally causing injury to CF. RJE told CF that a boyfriend of hers had been ringing the house repeatedly. RJE was angry and struck CF, causing her to fall onto a couch. He accused her a number of times of being

unfaithful. He grabbed her by the clothing, threw her across the room, and she hit a wall. She was crying and trying to placate him. RJE calmed down for a short time and then continued to assault her. She landed on the floor. He then grabbed her on the shoulder, pushed her across the room and pushed her head into the sink area, covering her mouth with his hand. She suffered a swollen and slightly lacerated lower lip. She had bruising to the thighs and her hands. She felt pain to the back of her head. After this assault, CF and the two daughters moved out of the house and ceased to have any association with RJE.

63 RJE also pleaded guilty to a separate count of rape, the victim being a 15-year-old friend of his daughter TE. The friend rang RJE's home and said that she wanted to visit TE. RJE falsely stated to her that she could visit TE (who had already moved out). He said that he would pick up CH and bring her to the house to see TE. Some time after picking her up from her home, RJE told CH that TE and CF were no longer living with him. He told her that it was too late for her to return home and that he would take her back the following day. CH later said that she had trusted RJE, not only because he was an adult but because she had known him, since she was a child, as the father of her friend (TE).

64 RJE drove her to his home. At about 11.30 pm that evening, RJE went to work. CH fell asleep on the couch. On his arrival home from work the following morning, RJE picked up CH and carried her into the bedroom. She woke up and became aware that he was touching her inappropriately. She was crying and protesting and he slapped her a number of times. She tried to push him away but he overpowered her physically and penetrated her vagina with his penis. This continued for some time.

65 The applicable maximum penalties were 25 years' imprisonment for rape and incest, and five years' imprisonment for intentionally causing injury. The judge sentenced RJE as follows:

On the two counts of incest with PD	5 years and 4 years' imprisonment respectively
On the count of rape of CF	6 years
On the count of intentionally causing injury to CF	6 months
On the count of rape of CH	10 years

After cumulation, the total effective sentence was 10 years and three months' imprisonment. The judge ordered that RJE serve a minimum term of seven and a half years before becoming eligible for parole.

66 The judge had obtained a pre-sentence report from Dr Lester Walton, a consultant psychiatrist with extensive forensic experience. In his report, Dr Walton noted that RJE did not accept that PD was his daughter or, therefore, that what had occurred was properly characterised as incest:

I suspect that at a psychological level he had convinced himself that she was not his progeny which gave him some permission in terms of breaching a usual taboo.

RJE was 'adamant that he was involved with no inappropriate sexual activity regarding his own undisputed daughter'. In relation to the rape of his partner, Dr Walton reported that RJE was 'most reluctant indeed to accept that he has actually offended' against her.

67 Dr Walton's report contained the following passages of relevance to the present appeal:

In a situation of chronic sexual frustration, [RJE] has engaged in various forcible acts of sexual misconduct. He does not accept that there was an inappropriate age gap between he and the so-called family friend [CH], even if she had been consenting ...

...

I am inclined to describe [RJE] as sexually irresponsible rather than determinedly paedophilic in terms of his sexual proclivities and clearly his predominant and preferred mode of sexual interaction is with age-appropriate females.

As is not at all uncommon in situations of rape, apart from the obvious sexuality of the situation, there are issues of power and aggression and the

latter seemed to be particularly relevant in this case. I suspect that [RJE] was markedly resentful of his alleged daughter intruding into his household and, at least by his account, that caused a major ruction to his usual immediate family. He has gone on to express his anger towards her and his partner in the sexual acts which occurred.

...

I presume that this man will be incarcerated and, if so, that he will eventually be classified to Ararat Prison where he might be exposed to the Sex Offenders' Treatment Programme. While I would endorse such involvement, [RJE] does not impress as a good candidate because of his fundamental reluctance to admit wrongdoing and essentially his problems are in relation to anger rather than sexual psychopathology. Otherwise he does not require any psychiatric treatment.

...

There is no reason to suppose that any particular sentence may not have the usual specific deterrent impact upon this man, he exhibiting no relevant psychiatric impairment in that regard. What is encouraging is that [RJE] does not seem to have been an habitual sexual offender and his recent offending has arisen out of a particular set of circumstances which would seem most unlikely to arise again, thus the likelihood of recidivism for sexual offending would seem to be reasonably low and perhaps that comment can be extended towards recidivism in general, given the apparent lengthy period of time that this man has avoided any sort of offending at all.

68 Dr Walton's report was apparently accepted without challenge on the plea, and the opinions expressed in it were relied on by the judge when sentencing him in 1998. In our view, it was of obvious significance to the present application that an assessment – made relatively soon after RJE's sole period of sexual offending – should have diagnosed RJE's problems as being 'essentially in relation to anger rather than sexual psychopathology', and should have assessed the likelihood of sexual re-offending as being 'reasonably low'.

69 It was particularly significant that RJE was said to be 'sexually irresponsible rather than determinedly paedophilic' and that 'clearly his predominant and preferred mode of sexual interaction is with age-appropriate females'. This final statement was directly relevant to the issue raised by the present application. As will appear, the assessment of Ms Raymond came to essentially the same conclusion.

Ms Raymond's assessment

70 Between September 2007 and March 2008, Ms Raymond prepared three written reports and one letter, in each of which she expressed her opinion about the likelihood of RJE re-offending. As will appear, her assessment remained unchanged throughout.

71 In her first report, dated 7 September 2007, she said:

[B]ased on the available documented information, [RJE] has demonstrated that he continues to have difficulty self-regulating his behaviour. His limited social support networks and beliefs pertaining to sexual entitlement remain contributory to risk level.

[RJE] has not participated in offence specific treatment to date. It is recommended that he be supported to participate in treatment.

[RJE] does not present with a pattern and progression of offending which would indicate that he has a high risk of offending. Furthermore, his static risk assessment indicates that his current level of risk is moderate high, therefore not appropriate for an Extended Supervision Order.

It is therefore my conclusion that [RJE] requires ongoing offence specific intervention and support to develop strategies to reduce anxiety and frustration, however he does not meet the criteria for an Extended Supervision Order.

72 That report was prepared without Ms Raymond having interviewed RJE. In order that she could prepare a report which would comply with s 7(1) of the Act, and because the Secretary had asked her to reconsider some aspects of her assessment, Ms Raymond interviewed RJE and prepared her second report, dated 7 November 2007 ('the November report'). Between the two reports, Ms Raymond had been asked to review a collection of letters to and from RJE, to which reference will be made later. Her opinion on those letters was set out in a letter dated 8 October 2007 ('the October letter'). Finally, Ms Raymond prepared an addendum to her November report dated 12 March 2008 ('the March addendum').

73 According to Ms Raymond, there are three categories of risk for the purposes of an assessment such as this: high, moderate and low. Ms Raymond's clinical opinion of RJE was expressed in the March addendum – in these terms: '... He represents as falling at the high end of the moderate risk category of sexual re-

offending.’

74 In Ms Raymond’s opinion, the factors which contributed to this risk status were as follows:

- he had not participated at any time in offence-specific treatment;
- he had a history of alcohol abuse;
- he had poor emotional regulation, specifically as regards anger management;
- he had limited problem solving skills; and
- he had a history of ‘anti-social behaviours including non-compliance with supervision and domestic violence.’

(We note at this point that RJE’s refusal to participate in offence-specific treatment had the consequence that he was not granted parole and served the full sentence of ten years and three months’ imprisonment).

75 On the other hand, Ms Raymond said, the following factors ‘assist in containing’ the risk of RJE offending:

- he had no prior convictions for contact sexual offences;
- he had had no stranger victims and no male victims; and
- there was no evidence of deviant sexual arousal to children.

Further, Ms Raymond noted in the November report that RJE ‘does not present with a pattern and progression of offending which would indicate that he has a high risk of sexual re-offending.’ In the March addendum, she similarly noted that ‘[RJE] does not have in his history a pattern and progression of offending.’ According to that addendum, ‘The lack of pattern and progression contains his assessed risk level in the moderate band.’

76 In the November report, Ms Raymond referred in some detail to the offending for which RJE was sentenced in 1998. She noted a report from February 2006, stating that RJE had refused to participate in offence-specific intervention, giving as his

reason that he 'was not able to move from his current location to where the programme was offered due to his anxiety issues.' Ms Raymond's report continued:

25. [RJE] has not participated in offence-specific treatment. As would be expected, [RJE] appears to have little insight into his offending behaviour. Poor insight together with ongoing reticence to develop meaningful strategies to deal with his anger, and issues relating to anxiety, contribute to him not meeting intimate needs and maintaining his level of risk for further offending. Ongoing development in understanding his mood state, continues to be of concern.

77 Ms Raymond then proceeded to describe how she had applied to RJE's case three separate risk assessment 'instruments', as follows. The first, known as the 'Static-99 Risk Assessment', is a pure actuarial prediction of sexual recidivism. The assessment

is based upon static factors found to be related to recidivism and [it] provides explicit rules for combining risk factors in specific probability estimates. The Static-99 is intended to be a measure of long-term risk potential.

Ms Raymond further explained that the recidivism estimates provided by the actuarial instrument were

group estimates based upon reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the Static-99 depending on the other risk factors not measured by this instrument.

78 Using this instrument, Ms Raymond said, RJE was considered

to fall into the moderate high risk category relative to other male sexual offenders. The score achieved by [RJE] statistically corresponds with groups that have about a 26% likelihood for being reconvicted of a new sexual offence within 5 years post release and a 36% likelihood of being reconvicted of a new sexual offence within 15 years post release.

According to this assessment, therefore, the likelihood of RJE re-offending within five years was approximately one in four, and the likelihood of his re-offending (and being convicted) within 15 years was approximately one in three. In each case, the likelihood as assessed was well below 50 per cent.

79 Ms Raymond then proceeded to describe 'clinically adjusted actuarial assessment', which takes into consideration 'empirically determined dynamic risk

factors.’ For this purpose, two instruments were used. The first, called STABLE, is designed to assess ‘stable dynamic risk factors’, being factors which are amenable to change, but in the absence of intervention tend to remain relatively constant. Using this instrument, Ms Raymond placed RJE in the ‘moderate risk category’.

80 The second instrument, called the ACUTE, is designed to assess ‘acute dynamic risk factors’. According to the November report:

Recidivism risk increases when offenders have frequent and easy access to potential victims. The ACUTE measures current access to ACUTE dynamic risk factors. The ACUTE focuses on current functioning in the past month or less.

Using this instrument, Ms Raymond concluded that RJE fell into the ‘low risk category.’ In reaching that conclusion, Ms Raymond considered risk factors which included ‘victim access/grooming’ and ‘sexual preoccupation’. As to the latter, Ms Raymond’s opinion was that RJE did *not* present with sexual preoccupation towards children. We deal with the question of victim access and grooming below.

81 Having considered both stable and acute dynamic risk factors, Ms Raymond expressed her clinical judgment, to which we have already referred. Her clinical assessment of risk was the same as the static risk assessment. That is, she assessed RJE’s level of risk at the high end of the moderate category (referred to elsewhere in the report as ‘moderate high’). In addressing the question raised by s 8(1)(a) of the *Monitoring Act* (whether or not the offender has a propensity to commit relevant offences in the future), Ms Raymond said:

Against empirically determined static risk factors and review of file information and interview with [RJE], he is assessed as being at moderate high risk of committing further sexual offences. The possibility of further sexual offences remains moderate high due to limited evidence of internal control behaviours related to sexual offending.

Ms Raymond’s oral evidence

82 Ms Raymond was called as a witness for the Secretary on the hearing of the application. Although a number of important matters emerged during her evidence, Ms Raymond’s assessment of the risk did not change. It was pointed out to the

Court that in the September report Ms Raymond had first expressed the view that the risk was 'moderate high' and had gone on to express the opinion that RJE was therefore not suitable for an extended supervision order. Under questioning by counsel for RJE and by the judge, Ms Raymond confirmed that her assessment of the risk did not change after she had interviewed RJE and had reviewed his correspondence as requested by those representing the Secretary. She confirmed that, at the time of the November report, she did not think RJE met the criteria for an extended supervision order and that this remained her view as at March 2008. Answering a question from the judge, Ms Raymond confirmed that she was experienced in giving evidence in applications such as these.

83 In her evidence-in-chief, Ms Raymond confirmed that,

in reviewing the information and after interviewing [RJE], there is no indication that his primary sexual arousal is to children. So, in terms of discriminating against ... whom he would offend against, it's my understanding or it's in - as part of my assessment that he would offend against predominantly women.

When asked by senior counsel for the Secretary what the risk would be if RJE were 'placed in a situation where he was in the company of an ... adolescent ... who was attractive to him', Ms Raymond answered:

I believe that he was in a 17 year relationship with that - there was no reported incidences of him having sexual contact with teenagers. So I believe that he has - it's not a high probability - that he would offend against teenagers.

Senior counsel then asked Ms Raymond about the 1997 offending against PD and CH. Ms Raymond said:

It would appear that there were a number of issues that were happening in his life at that time. Some of it was in regards to the vulnerability - the wrong word. Some of it was in relation to the volatility of the relationship that he was in with [CF] at the time. Some of it was around some of the other lack of social supports, alcohol. There was a number of issues that came into play. But I - and I think that it was opportunistic at the time, but I don't think it was a cause and effect. I think that there was a number of things that contributed to him offending in the particular way that he did.

Alleged 'grooming' of victims

84 At the hearing before the judge, and again on this appeal, senior counsel for the Secretary placed great emphasis on correspondence passing between RJE and a woman (to whom we shall refer as JG) who had young children. Counsel took as his starting point a letter of 3 October 2007 from the Department of Human Services, which stated the following:

The Department of Human Services, Child Protection, has never met with [RJE], however, based on his history of sexual offending against children and his grooming activity of the [JG] children by letters to them, DOHS assesses he poses a significant risk to them when he is released.

85 Senior counsel also drew to the judge's attention – properly – the opinion expressed by Ms Raymond in her October letter:

... dynamically there is concern regarding his history of violence and apparent threats towards [JG] through the letters, *however, there is no evidence that [RJE] is aiming to offend against [her] three children.* It's not suggested that [RJE] would be permitted to reside with [JG] and further investigation support for her to protect the children is considered paramount.

Nevertheless, in his submissions below and on this appeal, senior counsel persisted with the use of the word 'grooming' to characterise RJE's communications with the JG family. Thus he submitted to the judge that 'the letters ... reflect the ongoing grooming as late as mid-2007'. On the appeal, he submitted that this Court should take the view that RJE was 'grooming' the children of JG as potential future victims.

86 This is, in our view, a good example of an issue on which expert opinion is of the highest importance. As we have already pointed out, the view of the expert assessor did not support the characterisation that RJE was 'grooming' the children of JG. On the contrary, Ms Raymond said that there was no evidence that RJE intended to offend against those children. Ms Raymond expressly confirmed under cross-examination that there was no evidence that RJE was engaged in 'grooming activity ... for the purpose of committing sexual offences against children.' That being the considered opinion of the expert upon whom the Secretary was relying, the submission about grooming advanced on the Secretary's behalf was simply not open. In the absence of any expert opinion to the contrary, we see no basis upon which the judge – or this Court for that matter – could have rejected the expert's

conclusion and come to the opposite conclusion. The judge did not adopt the ‘grooming’ characterisation. Nor would we.

Personality traits irrelevant

87 After hearing the evidence of Ms Raymond, the judge asked senior counsel for the Secretary what other matters were relied on, apart from the assessment, to support the application. Senior counsel listed the following matters:

- the sentencing remarks of the judge who sentenced RJE in 1998, and the seriousness of that offending as reflected in the sentencing remarks;
- RJE’s refusal to undergo a sex offender treatment program;
- his having absconded before the January 2008 hearing of the Secretary’s application.

All of these, according to the submission, reflected ‘a disinclination on [RJE’s] part to be restricted by society’s laws, mores, customs ...’. The submission went on:

His deceptions, lies told to the [JG] family, and particularly to [JG] are clearly indicative as recently as mid-last year, ten years into his sentence, that this man’s not rehabilitated. He’s in the process of grooming, and sure, one can accept what Ms Raymond says, there was no evidence to indicate he was going to have or wanted to have sex with any of the [JG] children, but isn’t it instructive ... for there to be the concerns of the Department of Human Services that this man be kept away from that family?

88 At the conclusion of Ms Raymond’s evidence, the judge sought to confirm that Ms Raymond had taken into account the lies which RJE had told to JG and others about the offences for which he was in custody. (RJE persistently maintained in his communications that he had been jailed for manslaughter, having caused a death when he intervened to protect a young child from sexual assault). Ms Raymond replied:

That’s correct. One of the things that we were very – the field has very – got a lot of research in is in regards to personalities or how people operate in their worlds in terms of their personalities. What we know is that personality traits are not a risk factor in whether or not somebody re-offends or has a likelihood of re-offending. So whilst [RJE] has a number of areas and personality traits that are unsavoury, those traits unto themselves are not a risk factor in his

likelihood of re-offending.

89 This, too, was evidence of very considerable importance. Quite simply, it deprived the Secretary of any proper basis for arguing that RJE's repeated lies about his offending could support any adverse inference relevant to the issue before the Court, namely, the risk that he would commit further sexual offences against children. Ms Raymond had already expressed the view that the correspondence did not affect her assessment of the risk. Here, she made it unambiguously clear that, however 'unsavoury' RJE's personality and behaviour might be viewed as being, this was of no relevance in assessing the risk of his re-offending.

The judge's reasons

90 The judge at first instance set out a summary of Ms Raymond's report, and commented:

From that Report, a particular concern to me is [RJE's] refusal to participate in offence-specific intervention and lack of insight into his offending behaviour.⁶⁸

Later in the reasons, the judge said:

I note, in her evidence, there was no evidence that [RJE's] primary sexual arousal was to children, based on prior criminal history, that there was not a high probability he would offend against teenagers.

This, however, was not the totality of her evidence. This evidence looked at in isolation in my assessment is not definitive of the matter. It is clear from Ms Raymond's Reports, including 7 November 2007, and her evidence before me, that there are real concerns expressed by her about [RJE's] ability to avoid sexual re-offending.⁶⁹

And again:

Whilst it is apparent from her reports and evidence that there are some factors which suggest [RJE] does not present as a risk of committing sexual offences against young children and teenagers, there is, however from the material a risk of his sexual re-offending based on his limited insight into his offending and lack of offence-specific courses undertaken by him to reduce the risk of sexual re-offending. I also note the offending dealt with [in 1998] involved two children as well, of course as I said, as his partner.⁷⁰

⁶⁸ Reasons [19].

⁶⁹ Reasons [37]–[38].

⁷⁰ Reasons [42].

91 After referring to the 1997 offences, and to Dr Walton's report, her Honour noted that she was neither hearing nor sentencing for that matter again. She then said:

[T]his indicates to me a certain attitude expressed at that stage by [RJE] to his offending which has not changed since, such continuing attitude being exhibited in the correspondence, phone calls and persistent refusal to participate in sex offender programmes. I am also concerned regarding [RJE's] lack of discrimination between adult victims and the 'child' victims of his offending dealt with [then].

Her Honour did not, however, refer to Ms Raymond's evidence that the distasteful nature of RJE's correspondence had not altered her assessment of the risk which he posed.

92 Her Honour also expressed concern

about [RJE's] risk of sexual re-offending given the circumstances of his most recent failure to appear when this matter was first listed for hearing. ... It is open to me to infer from this material that [RJE's] absconding and the circumstances of it was to avoid this matter being determined. That RJE was attempting to avoid the consequences of an Extended Supervision Order being made. This is consistent with [RJE's] attitude towards his offending and persistence in not participating in treatment programs following sentencing ... in 1998.⁷¹

With respect, we do not consider that this conclusion was open. (RJE had failed to appear on the date fixed for the hearing of the Secretary's application, and had subsequently been arrested in Murray Bridge). The unchallenged opinion of the expert assessor was that the failure to appear did not affect her risk assessment at all. Ms Raymond had specifically addressed this issue in her March addendum. Having reviewed all of the reports regarding the circumstances of his failure to appear, Ms Raymond said:

There is no indication that [RJE] returned to Murray Bridge to have contact with one of his victims. Furthermore, there is no suggestion that his return to Murray Bridge was motivated by any knowledge that his victim resided in the area. Rather, it appears that [RJE] returned to Murray Bridge because he is familiar with the area and had some social networks with which he had had some contact.

[RJE's] return to Murray Bridge does not contribute to increasing his assessed sexual re-offence risk.

⁷¹ Reasons [56].

In the face of that considered opinion, we see no basis upon which the absconding

could have been used as a basis for inferring a heightened risk of sexual re-offending against children.

Conclusion

93 Ms Raymond's unchallenged – and unchanging – opinion was that RJE was at the high end of the moderate risk category. In her opinion, RJE did not present a high risk of re-offending. According to Ms Raymond's report, the risk of his re-offending over the next 10 years was well under 40 per cent. She was at all times of the view that he did not meet the criteria for an ESO.

94 For the reasons we have given, the material before the learned judge afforded no basis for departing from the expert's assessment of the risk. It was therefore not open on the evidence to conclude that RJE was likely to commit a child sex offence if released unsupervised. (We would have reached exactly the same conclusion even if we had been constrained to follow the *TSL* approach, such that something less than a 50 per cent chance could have counted as a sufficient likelihood for the purposes of s 11(1).)

95 It follows that the order should not have been made and it must be revoked.

NETTLE JA:

96 I agree with the President and Weinberg JA that the appeal should be allowed and the extended supervision order set aside.

97 I share their Honours' view that 'likely' in s 11 of the *Serious Sex Offenders Monitoring Act 2005* ('the Act') means at least more likely than not, and that it was not open on the evidence before the judge to be satisfied to a high degree of probability that it is more likely than not that the appellant will commit a relevant offence unless subjected to the order. There is nothing which I can usefully add to what their Honours have said as to the quality or effect of that evidence. But I have

approached the construction of s 11 in a different fashion.

98 Uninstructed by authority, I too should have thought that ‘likely’ in s 11(1) means at least ‘more likely than not’. Although the meaning of ‘likely’ is especially sensitive to context, in ordinary speech it usually means ‘more likely than not’.⁷² As Marks J noted in *Department of Agriculture and Rural Affairs v Binnie*:⁷³

There can be little doubt that the ordinary use of the word ‘likely’ is synonymous with ‘probable’, that is, there being more than a 50 per cent chance of the event happening. In this regard, useful observations were made by Bray CJ in *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd*.⁷⁴

99 There are also the statutory constructional considerations adumbrated in the President’s and Weinberg JA’s reasons under the headings of *The Statutory Context* and *The TSL analysis*, of which the most important is doubtless that, because s 11 prescribes a test for imposing orders which trench upon the liberty of the subject, and because the word ‘likely’ is capable of more than one meaning, such if any ambiguity as remains after the application of ordinary principles of construction ought be resolved in favour of the subject.⁷⁵

100 In *TSL v Secretary to the Department of Justice*⁷⁶ this court held that ‘likely’ in s 11 is capable of meaning less likely than not. Callaway AP, with whom Buchanan JA and Coldrey AJA agreed, concluded that, although ‘likely’ was used in the sense of connoting ‘a high degree of probability’, there was no reason to think that it must be more than 50 per cent.⁷⁷

⁷² *The Oxford English Dictionary* gives the primary meaning of ‘likely’ as: ‘Probably, in all probability’. *The Oxford Australian Dictionary* gives it as: ‘probable’ and, as an alternative, ‘such as might well happen or be true’. *The Macquarie Dictionary* gives it as: ‘probably or apparently going or destined (to be etc), likely to happen’. *Webster’s Dictionary* gives: ‘In all probability; probably’. *The Hamlyn Dictionary* offers the meaning ‘probably or apparently going or destined (to be, etc): likely to happen’.

⁷³ [1989] VR 836, 841.

⁷⁴ (1975) 14 SASR 303.

⁷⁵ *Beckwith v The Queen* (1976) 135 CLR 569, 576; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6; *CTM v R* (2008) 247 ALR 1, 13 [35].

⁷⁶ (2006) 14 VR 109.

⁷⁷ *Ibid* 113, [11].

101 As the President and Weinberg JA point out, there are several aspects of the reasoning in *TSL* which are open to question. Other things being equal, that might be a sufficient basis to decline to follow *TSL*. But as it happens, other things are not equal; inasmuch as the New South Wales Court of Appeal has now twice followed *TSL*, in *Tillman v Attorney-General (NSW)*⁷⁸ and *Cornwall v Attorney General for New South Wales*.⁷⁹

102 In *Tillman*, the New South Wales Court of Appeal were inclined to the view that ‘likely’ in s 17(3) of the *Crimes (Serious Offenders) Act 2006* (NSW) means ‘more probable than not’. But their Honours regarded themselves as constrained by the High Court’s edict in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁸⁰ to follow and adopt the approach in *TSL*. In *Cornwall*, the court followed *Tillman*.

103 On one view of the matter, *Farah* may not have required that result. Although the Act and the New South Wales Act are similar,⁸¹ they are not uniform national legislation in the sense contemplated in *Australian Securities Commission v Marlborough Gold Mines Ltd*,⁸² and it is to be doubted that *Farah* applies to the construction of statutes which are not within that category. As the High Court recently observed *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*:⁸³

[31] The caution required in construing modern Australian legislation by reference to ‘principles’ derived in this way is indicated by McHugh J in *Marshall v Director-General, Department of Transport*.⁸⁴ That case concerned the expression ‘injuriously affecting’ as it appeared in s 20 of the *Acquisition of*

⁷⁸ [2007] 178 A Crim R 133.

⁷⁹ [2007] NSWCA 374.

⁸⁰ (2007) 230 CLR 89, 151 [135]:

Intermediate appellant courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.

⁸¹ As too is the Act in Queensland on which the Victorian Act is based.

⁸² (1993) 177 CLR 485.

⁸³ (2008) 233 CLR 259, 271.

⁸⁴ (2001) 205 CLR 603, 632–633 [62].

Land Act 1967 (Qld); ss 49 and 63 of the 1845 Act had used the same phrase as had the subsequent legislation in various jurisdictions. Differing interpretations had been given to the expression in question. McHugh J noted the similarity in the terms of the legislation and went on:

... But that does not mean that the courts of Queensland, when construing the legislation of that state, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.⁸⁵

104 Nevertheless, *Tillman* and *Cornwall* having now been decided as they were, it would be facile to construe the Act as if it were unique to Victoria and the problem of its construction were of merely parochial concern. Given that Victoria and New South Wales⁸⁶ have each enacted legislation in similar terms, and that the New South Wales Court of Appeal has in comity twice followed the interpretation attributed by this court to one of the essential provisions of the legislation, I consider that we should not depart from that interpretation without a compelling reason to do so. Since the President's and Weinberg JA's criticisms of *TSL* were in one way or another all considered in *Tillman*, I am not persuaded that they are a compelling reason to do so.

105 That is not the end of the matter, however, for in this state it is now necessary to consider to the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter'). Although it came into force after the Act and after *TSL* was decided, it operates on the construction of the Act regardless of *TSL*. Now perforce of s 32 of the Charter, it is necessary to construe s 11 of the Act (so far as it is possible to do so consistently with the purpose of the section) in a way that is 'compatible with human rights'.

106 The 'human rights' are set out in Part 2 of the Charter. They include the right

⁸⁵ Ibid [31].

⁸⁶ And Queensland, on whose legislation the Act is based.

to freedom of movement in s 12 and the right to privacy in s 13 and the right to liberty in s 21. Section 7 provides that a human right (and thus the rights to freedom of movement, privacy and liberty) may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. It follows that one is now compelled to construe s 11 of the Act, so far as it is possible to do so consistently with the purpose of the section, in a way that subjects the appellant's rights to freedom of movement, privacy and liberty only to such reasonable limits as can demonstrably be justified in a free and democratic society, etc. In my view, that requires a departure from the *TSL* interpretation of 'likely'.

107 Evidently, the purpose of s 11 of the Act is to guard against the dire consequences of the commission of a relevant offence. In some circumstances, that might justify significant encroachments on an individual's rights of freedom of movement and privacy and even liberty. But if 'likely' in s 11 of the Act is construed as including a less than even chance, it is capable of rendering the requirement for satisfaction to a high degree of probability illusory. For example, one might, well be satisfied to a high degree of probability (say, 80 per cent) that there is a 45 per cent chance of the commission of a relevant offence, and yet, according to the laws of probability, the risk of the commission of the offence as so assessed would be only 36 per cent. That would mean that a relatively low risk of re-offending could provide a sufficient basis for making an order. Even giving full weight to the purpose of s 11, I cannot conceive of the potentially far reaching restrictions on rights provided for in the Act as being capable of demonstrable justification in the relevant sense unless the risk of an offender committing a relevant offence is at least more than even.

108 Counsel for the respondent and counsel for the Attorney submitted that, although it is open to the Secretary or Parole Board to impose onerous restrictions on an offender under ss 15 and 16, when it comes to the interpretation of s 11 the court should presume that the Secretary and Parole Board will act lawfully, and so in accordance with the Charter; and, therefore, that such orders and directions as the

Secretary or Parole Board might give would never go further in restricting the rights of an offender than would be demonstrably justifiable according to the criteria delineated in s 7 of the Charter.

109 Reference was made to material put before the court as to the orders and directions which have been given in this case, and it was submitted that it was open to the court to take that into account as evidence of the way in which the Act operates in fact and thus as legislative facts which may assist in the interpretation of the legislation.⁸⁷ In the main, however, the argument rested on observations of Lord Bingham of Cornhill in *Kay v Lambeth LBC*⁸⁸ and the reasoning of Lamer J of the Supreme Court of Canada in *Slaight Communications Inc v Davidson*.⁸⁹

110 In the former case, Lord Bingham was concerned with a question of whether it was necessary for a public authority seeking possession of land to plead and prove as an element of its cause of action that it was acting in accordance with the *Human Rights Act 1998*. The question was one of practice and procedure which does not arise in this case. Possibly, *Slaight* is more pertinent. The case was concerned with the effect of the *Canadian Charter of Rights and Freedoms* on the interpretation of a section of the *Canadian Labour Code* which purported to empower an adjudicator to make orders to some extent infringing an employer's freedom of expression and, as in this case, there was a question of the extent to which the court should take into account the possible scope of the adjudicator's powers in determining the validity of the legislation. In reasoning to a conclusion that the orders were justifiable, Lamer J said:

[I]t is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to

⁸⁷ See and compare *Ford v Quebec (Attorney General)* [1998] 2 SCR 712, 775-778.

⁸⁸ [2006] 2 AC 465, 495 [39].

⁸⁹ [1989] 1 SCR 1038.

more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.*⁹⁰

111 In my view, however, it is to be doubted that the same kind of reasoning applies to the interpretation of s 11 of the Act - if only because the Parole Board is for the time being exempted by regulations from compliance with the Charter. Presumably, the exemption was given just so the Parole Board could act lawfully in ways that are not demonstrably justified in a free and democratic society having regard to the criteria delineated in s 7 of the Charter.

112 There is also a difficulty with s 11 of the Act, not present in the legislation dealt with in *Slaight*, which arises from the way in which the section splits the decision making function between the Court and the executive. Under s 11, the Court decides whether the offender is likely to commit a relevant offence and the Secretary and the Parole Board may thereafter issue directions to the offender under s 16 on the basis that the Court has determined that he is likely to commit a relevant offence. A possible consequence of that division of responsibility is to suggest that the Secretary and the Parole Board would be warranted in going further in restricting the rights of an offender than if the Secretary and the Parole Board were required to make their own assessment of the risks of commission of a relevant offence and to justify their proposed restrictions on the rights of the offender by reference to the actual risk as assessed of the commission of the offence. If so, the court might need to consider a wider range of possible directions and orders for the purposes of interpreting s 11.

113 Further, and even if the reasoning in *Slaight* is applicable to the interpretation of s 11 of the *Monitoring Act*, it is apparent on the face of the Act that an extended supervision order results in the offender being bound by forthwith by ss 15(3)(b), (c) and (f) to attend whenever and wherever directed to do so for supervision, assessment and monitoring; report to and receive visits from the Secretary regardless of the offender's wishes; and not move within or without Victoria without

⁹⁰ [1989] 1 RCS 1038, 1078 (emphasis added).

permission. In my view, the effect of those provisions is that, no matter how anodyne the directions and orders given by the Secretary and Parole Board under s 16, the making of an extended supervision order of itself so restricts an offender's right to move freely within Victoria and to enter and leave it (s 12), and his right to privacy (s 13), if not his right to liberty (s 21),⁹¹ that it is not capable of demonstrable justification in the relevant sense unless the risk of the offender committing a relevant offence is at least more likely than not.

114 I acknowledge that, if *TSL*, *Tillman* and *Cornwall* are regarded as having been correctly decided according to ordinary conceptions of statutory construction,⁹² it must also be accepted that Parliament's intention at the time of enacting s 11 of the Act was that 'likely' need not mean more likely than not. To adopt now the construction which I prefer is to accept that the intention has changed. But that appears to be the way in which the Charter was intended to operate. As Lord Woolf CJ explained in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*⁹³ in relation to s 3 of the *Human Rights Act 1998* (UK):⁹⁴

It is difficult to overestimate the importance of section 3. It applies to legislation passed both before and after the *Human Rights Act 1998* came into force. Subject to the section not requiring the court to go beyond that which is possible, it is mandatory in its terms. In the case of legislation predating the *Human Rights Act 1998* where the legislation would otherwise conflict with the Convention, section 3 requires the court to now interpret legislation in a manner which it would not have done before the *Human Rights Act 1998* came into force. When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in section 3. *It is as though legislation which predates the [Human Rights Act] and conflicts with the Convention has to be*

⁹¹ According to a number of decisions of the United Nations Human Rights Commission, the right to liberty under article 9 of The International Covenant on Civil and Political Rights (on which the right to liberty under the Charter is based) applies only to 'severe deprivations of liberty such as incarceration with a certain building ... rather than restrictions on one's ability to move freely around a State, or even a smaller locality. The latter circumstances raise issues with regard to article 12 [right to liberty of movement and freedom to choose residence] rather than article 9': Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd Ed [11.09].

⁹² According to ordinary conceptions of statutory construction in the absence of the *Charter of Human Rights and Responsibilities Act 2006*.

⁹³ [2002] QB 48.

⁹⁴ On which s 32 of the *Charter of Human Rights and Responsibilities Act* is evidently modelled.

*treated as being subsequently amended to incorporate the language of section 3.*⁹⁵

I see no reason to doubt that the same is true of s 32.⁹⁶

115 In *Poplar*, Lord Woolf CJ went on to give the following additional directions concerning the application of s 3:

the following points, which are probably self-evident, should be noted.

- (a) Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention).
- (b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility.
- (c) Section 3 does not entitle the court to *legislate* (its task is still one of *interpretation*, but interpretation in accordance with the direction contained in section 3).
- (d) The views of the parties and of the Crown as to whether a 'constructive' interpretation should be adopted cannot modify the task of the court (if section 3 applies the court is required to adopt the section 3 approach to interpretation)...⁹⁷

As at present advised, I think that one should adopt the same approach in relation to s 32.

116 In *R v Hansen*⁹⁸ Elias, CJ came to a different view as to the way in which to go about the process in New Zealand. But in *HKSAR v Wai and Man*,⁹⁹ Mason NPJ followed the *Poplar* approach in relation to comparable provisions in Hong Kong; and with respect, I prefer the *Poplar/HKSAR* approach for its clarity and simplicity.

117 As already explained, I consider that the interpretation of s 11 of the Act which was adopted in *TSL*¹⁰⁰ is now inconsistent with an offender's right to move

⁹⁵ [2002] QB 48, 72 [75] (my emphasis).

⁹⁶ See also *Regina v A (No 2)* [2002] AC 45, 68 [44] (Lord Steyn).

⁹⁷ Ibid.

⁹⁸ [2007] 3 NZLR 1, 12 [15]–[23].

⁹⁹ Unreported, Final Court of Appeal of the Hong Kong Special Administrative Region, 31 August 2006, No 4 of 2005.

¹⁰⁰ Without reference to the Charter.

freely within and without Victoria and the offender's right to privacy, if not his or her right to liberty. It follows from Lord Woolf's second direction in *Poplar* that the Charter cannot be ignored. Consistently with his Lordship's third direction, however, I consider that to construe 'likely' in s 11 as meaning 'at least more likely than not' is within the permissible ambit of *interpretation*, well short of the forbidden territory of *legislation*.

118 In the course of argument, reference was made to *Ghaidan v Godin-Mendoza*¹⁰¹ in which a majority of the House of Lords spoke in terms which attributed a more far reaching scope to the notion of *interpretation*. Lord Nicholls of Birkenhead, who delivered the principal speech, said this:

But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.¹⁰²

119 It is unnecessary for the purposes of this proceeding to determine whether s 32 of the Charter goes that far. It is enough that, unless 'likely' means at least more probable than not, s 11 would impose limits on an offender's right to move freely within and without Victoria and right to privacy, if not his or her right to liberty, which are not capable of demonstrable justification in a free and democratic society

¹⁰¹ [2004] 2 AC 557.

¹⁰² Ibid [31] and [32].

based on human dignity, equality and freedom taking into account the matters delineated in s 7 of the Charter; and that to interpret 'likely' in s 11 of the Act as conveying the meaning of 'at least more likely than not' is both consistent with the principles of interpretation enunciated in *Poplar* and sufficient to enable s 11 to operate consistently with the Charter.

120 It is on that basis that I would join in the orders proposed by the other members of the court.



**SUPREME COURT OF VICTORIA
COURT OF APPEAL**

RJE

V

SECRETARY TO THE DEPARTMENT OF JUSTICE

ORDER MADE BY THE COURT OF APPEAL (THE HONOURABLE JUSTICE
MAXWELL, THE HONOURABLE JUSTICE NETTLE AND THE HONOURABLE
JUSTICE WEINBERG)
ON 18 DECEMBER 2008

Pursuant to s 42 of the *Serious Sexual Offenders Monitoring Act 2005*, it is ordered that, until further order, there be no publication by print, radio, television, electronic means or any other means whatsoever of any information that might enable the appellant to be identified, provided that this order does not prohibit the publication of any extract from the court's reasons for judgment.

Signed

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The Honourable Justice Nettle
18 December 2008