IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S272 of 2019



BETWEEN:

**PRIVATE R**
Plaintiff

and

**BRIGADIER MICHAEL COWEN**
First Defendant

and

**COMMONWEALTH OF AUSTRALIA**
Second Defendant

# PLAINTIFF'S SUBMISSIONS

## *Part I: Publication*

1. The plaintiff certifies that these submissions are in a form suitable for publication on the internet.

## *Part II: Issues*

2. The issue that calls for resolution is the extent to which s.51(vi) of the Constitution supports the jurisdiction of a "service tribunal" constituted under Part VII of the *Defence Force Discipline Act 1982* (Cth) (**DFDA**) to try defence members for offences under s.61(3) that are committed in Australia in a time of peace and civil order and where the civil courts are reasonably available.

3. If jurisdiction is enlivened by the connection between the identified offence and the maintenance of service discipline rather than merely the offender's status as a defence member, then can such a connection be established in circumstances where the material discloses no more than that the offender and the complainant are both members of the defence force?

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***Part III: Judiciary Act 1903***

4. The plaintiff certifies that notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) have been served on the attorney's-general of each state and territory.

***Part IV: Reports of reasons***

5. The decision of the first defendant is not reported.

***Part V: Relevant facts***

6. The material facts in relation to the circumstances of the charge are not in contest. The alleged offence occurred on Sunday 30 August 2015 in a private hotel room at Fortitude Valley, Queensland that had been booked in the name of the plaintiff and paid for by him. The surrounding circumstances of the alleged offence were as follows:[1]

(a) the plaintiff was a member of the Australian Regular Army;

(b) the complainant, was a member of the Permanent Air Force;

(c) the plaintiff and the complainant had previously been in an intimate relationship and had known each other prior to the complainant joining the Air Force;

(d) it occurred on a weekend when both the plaintiff and the complainant were properly absent from their places of work;

(e) it occurred away from a defence establishment and at a place not under military control or use and in the context of a personal relationship between the plaintiff and complainant;

(f) it was in Australia during peacetime and civil order;

(g) it was entirely unconnected to the performance of the plaintiff's military duties;

(h) the complainant was not engaged in the performance of any duty relating to the military;

(i) a civilian court in which the case can be prosecuted is reasonably available;

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[1] See Statement of Agreed Facts at [2], [4], [6]–[11] (CB47-48)

(j) the complainant was not within the plaintiff's unit or even service, and was posted to a different defence establishment more than 1000km away;

(k) it did not involve any flouting of military authority; and

(l) it was unconnected with any military property.

7. In October 2017, the complainant first informed her Air Force chain of command of the alleged incident which is the subject of the charge.

8. On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions with one count of assault occasioning actual bodily harm pursuant to ss.61(3) of the DFDA and s.24 of the Crimes Act.

10 9. The complainant discharged from the Australian Defence Force in early 2019.

10. On 26 August 2019, the first defendant heard an objection by the plaintiff under s.141(1)(b)(v) of the DFDA to the defendant's jurisdiction to hear the charge. The first defendant dismissed the objection and concluded that he was bound by the decision of the Defence Force Appeal Tribunal in *Williams v Chief of Army* [2016] DFDAT 3 at [51] that his jurisdiction was enlivened solely by virtue of the plaintiff's membership of the Defence Force.

11. This is an application for a writ of prohibition in this Court's original jurisdiction conferred by s.75(v) of the Constitution and referred pursuant to the *High Court Rules 2004* r 25.09.3(c).

20 ***Part VI: Plaintiff's argument***

12. Having regard to the fact the first defendant decided the case on the basis that his jurisdiction was enlivened by virtue of the plaintiff's status as a defence member, this issue is addressed first. While the underlying rationale in the trilogy of cases[2] that have considered the jurisdiction of service tribunals is diverse, this Court has not accepted that the "service status" of a defence member is, of itself, sufficient to support the jurisdiction of service tribunals to try civil offences committed in Australia during peacetime. On each occasion it has been considered, a majority of judges in this Court have not accepted the service status test, by either expressing acceptance of the

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2 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

"service connection" test[3] or disagreement with the underlying rationale of the "service status" test.[4] As Kirby J observed in *Re Aird; ex parte Alpert* (2004) 220 CLR 308, the "service status" test is "incompatible ... with the highest measure of agreement to which past judicial concurrence in [this Court] has extended."[5]

13. As is submitted below, the defence power only supports a law conferring jurisdiction on service tribunals to try defence members for civil offences committed in Australia in peacetime if the law is reasonably appropriate and adapted to the maintenance and enforcement of service discipline. The conferral of jurisdiction to try civil offences committed in Australia in peacetime merely on the basis of a person's status as a defence member offends the principle of proportionality. The law is only valid to the extent the proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing *service* discipline. The trial of a defence member by a service tribunal for an offence under s.61(3) of the DFDA where the civil courts are reasonably and conveniently available does not serve this purpose.

*Statutory context*

14. The jurisdiction of "service tribunal" (which relevantly includes a Defence Force magistrate) to try a charge is set out under Part VII of the DFDA.

15. Section 129(1) of the DFDA provides that a Defence Force magistrate has the same jurisdiction and powers as a restricted court martial. Section 115(1) of the DFDA provides that a court martial has the power to "try any charge against any person". The term "charge" is relevantly defined in s.3 of the DFDA as meaning "a charge of a service offence", and in turn "service offence" is defined as including an offence against the DFDA.

16. Section 61(3) of the DFDA provides:

> *(3) A person who is a defence member or a defence civilian commits an offence if:*

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3 *Re Aird* per McHugh J at [37] (Gleeson CJ, Gummow and Hayne JJ generally agreeing, Kirby J at [90], Callinan and Heydon JJ at [158].

4 *Re Tracey* per Deane J at 591 and Gaudron J at 602-605; *Re Nolan* per Deane J at 491-492, Gaudron J at 494 and McHugh J at 499; *Re Tyler* per Deane J at 34, Gaudron J at 35 and McHugh J at 39.

5 At [96]. More recently, in *White v Director of Military Prosecutions* (2007) 231 CLR 570, while the test adopted by Brennan and Toohey JJ was not in issue, Gleeson CJ expressly approved the approach of Brennan and Toohey JJ in *Re Tracey* (at [24]). Only a minority in this Court have ever expressly endorsed the service status test: Mason CJ, Wilson and Dawson JJ in *Re Tracey* and Mason CJ and Dawson J in *Re Nolan* and *Re Tyler*.

*(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and*

*(b) engaging in that conduct would be a Territory Offence, if it took place in the Jervis Bay Territory (whether or not in a public place).*

17. Paragraph (b) of the term "Territory Offence" is relevantly defined in s.3 of the DFDA as:

> *"an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences."*

10 18. The laws in force in the Jervis Bay Territory include the laws in force in the Australian Capital Territory, which relevantly include the Crimes Act: s.4A of the *Jervis Bay Acceptance Act 1915* (Cth). Section 61 thus picks up the provisions of the criminal law in the Australian Capital Territory.

19. Pursuant to s.24 of the Crimes Act, it is an offence for a person to assault another person and by the assault occasions actual bodily harm, which is punishable, on conviction, by imprisonment for 5 years.[6]

20. Accordingly, an offence against s.24 of the Crimes Act by a defence member is a "service offence" and, subject to the Constitution, may be tried by a service tribunal.

21. By its terms, s.61 of the DFDA makes any conduct by a "defence member" that would
20 be an offence under the Crimes Act, a service offence. Put simply, s.61 subjects all defence members to the ordinary criminal law in relation to their conduct in Australia, merely by virtue of their status as a defence member and regardless of whether the circumstances of the offence have any service connection. For the reasons that follow s.61 must be read down in accordance with s.15A of the *Acts Interpretation Act 1901* (Cth) to make it a valid exercise of the defence power.

*Construction of statutes under the defence power*

22. It is not in contest that the power in s.51(vi) of the Constitution to enact laws for the "naval and military defence of the Commonwealth" implicitly confers on the

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[6] The offence is an "indictable offence", which entitled the accused to a trial by jury if the offence is tried in the ACT: s.24 *Crimes Act 1900* (ACT) and s.19 *Magistrates Court Act 1930* (ACT). Relevantly to the present circumstances, the offence as also an indictable offence under s.339(1) of the *Criminal Code 1899* (Qld) and pursuant to s.552B of the *Criminal Code 1899* (Qld), which entitles an accused to a trial by jury.

Parliament the power to enact laws regulating the discipline of the defence forces both in peace and in war. This arises out of the *necessity* of maintaining the discipline of an armed force to which the authorities referred to below refer.[7]

23. The extent of the jurisdiction that may be conferred pursuant to this power is informed by three considerations: (1) the constitutional history and the jurisdiction exercised by military tribunals at the time of federation; (2) the requirements dictated by Ch III and s.106 of the Constitution to which s.51 is subject; and (3) the circumstances faced by the Commonwealth at the time jurisdiction is exercised.

*Jurisdiction of military tribunals prior to federation*

24. The cases that have considered the jurisdictional scope of service tribunals establish that consideration of the historical context of service tribunals up to the time of federation is important to understanding the extent to which they are supported by the defence power.[8]

25. As has been revealed by a detailed historical analysis of the scope of the court martial jurisdiction in English law prior to federation,[9] until the enactment of the *Army Discipline and Regulation Act 1879* (Imp),[10] there was no military jurisdiction to try members of the British Army for ordinary civil criminal offences committed in the United Kingdom in a time of peace and civil order. Hence commanding officers had a duty to assist the civil authorities apprehend soldiers accused of civil crimes so they could be tried by the civil courts.[11] Soldiers convicted of those crimes could expect to be dismissed from the service (cashiered).[12]

26. Prior to the enactment of the *Army Discipline and Regulation Act* the discipline of the army was governed by annual *Mutiny Acts* and the *Articles of War* issued thereunder.[13]

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7 See also *R v Bevan* (1944) 66 CLR 452 at 468 per Starke J, at 481 per Williams J

8 *Re Tracey; at 539-543,554-563*; *Re Nolan* at 481; see also *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 582-583, 592, 596-597.

9 See *Re Tracey* (1989) 166 CLR 518 at 554-561 per Brennan & Toohey JJ.

10 42 & 43 Vict c.33. This Act replaced the *Mutiny Act* and *Articles of War* that had hitherto governed discipline in the army. It was replaced by the *Army Act 1881* (Imp), which remained applicable, subject to modifications by the *Defence Act 1903*, to Australian military forces until the enactment of the DFDA in 1982.

11 *Mutiny Act* of 1873 (Imp), s.76.

12 Charles Clode: "The administration of justice under military and martial law as applicable to the Army, Navy Marines, and Auxiliary Forces" 2nd ed (1874) "Clode" at p98; *Re Tracey* per Brennan & Toohey JJ at 558-559.

13 By its preamble the annual Mutiny Acts applied to govern the discipline of the standing army in the United Kingdom. Until the *Mutiny Act* of 1712, discipline of the army outside the United Kingdom

The preamble of each *Mutiny Act* recognised the competing requirements of the constitutional guarantees provided for under the Magna Carta, the Petition of Right and the Bill of Rights on the one hand and the need to maintain discipline of a standing army within the realm on the other. However, as the Act provided, the former was not to be wholly displaced by the latter. From 1712 until its replacement in 1879 the preamble read:

> "whereas no man may be forejudged of life or limb, or subjected in time of peace to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm, - yet nevertheless it being requisite, for the retaining all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert Her Majesty's service, or be guilty of crimes and offences to the good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow."

27. As to the *Mutiny Act's* object of maintaining discipline, Lord Loughborough in *Grant v Gould* observed, "there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army...an undisciplined soldiery are apt to be too many for the civil power".[14] No doubt in recognition of the competing requirements acknowledged in the foregoing preamble, his Lordship went on to observe that the jurisdiction of courts-martial "is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no

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in time of war was left entirely to *Articles of War* issued under the royal prerogative. Thereafter, the the Crown was given express power to issue Articles of War applicable to the dominions under s.1 of the Mutiny Act. In 1718 power was conferred to issue of Articles of War applicable within the United Kingdom and in 1803 both within and without the UK. From 1749 a proviso was inserted to the effect that the Articles only applied to punishment extending to life or limb or penal servitude within the United Kingdom where expressly provided for by the Mutiny Act. In 1879 the Army Discipline and Regulation Act replaced both the Mutiny Act and the statutory Articles of War: Manual of Military Law (1899) p15-16; Clode 25, 26, 30; W Winthrop "Military Law and Precedents" (1896) Vol 1 p8-9 ("Winthrop").

14 *Grant v Gould* (1792) 2 H BL 69, 99; 126 ER 434, 450; cited with approval by this Court in *Groves v Commonwealth* (1982) 150 CLR 113 at 125-126 and *Re Tracey* at 557, 558 per Brennan & Toohey JJ.

further than they are thought *necessary to the regularity and due discipline of the army*".[15]

28. Under the *Mutiny Acts* and *Articles of War*, military jurisdiction extended only to offences that were of a military character, including thefts from comrades or of military property.[16] Apart from such obviously service related offences, in 1833 other "petty offences of a felonious or fraudulent character" became punishable by court-martial.[17] When the *Mutiny Act* was amended in 1847 by omitting the word "petty", the unintended increase in jurisdiction led to a General Order being issued in November 1851 that a court-martial should be had recourse to "only where the civil authorities declined or omitted to prosecute, or where from circumstances, which render it difficult to bring the case before the Civil Courts, it may be necessary for the ends of justice and the maintenance of discipline to resort to trial by Court-martial."[18] Otherwise, under the *Articles of War* of 1873, the jurisdiction of the military to try soldiers for civil crimes applied only outside of the United Kingdom and, in the case of the dominions, where there was no civil courts competent to try such offences.[19]

29. The introduction of s.41 of the *Army Discipline and Regulation Act* and the *Army Act* did not change matters in policy or practice. While, the statute expressly provided that the most serious offences (murder, manslaughter, treason and rape) committed in the United Kingdom could not be tried by court-martial, consistently with the long established principles and custom adverted to above, it was official policy not to exercise court-martial jurisdiction to try members for other criminal offences committed in the United Kingdom or the dominions where the civil courts were reasonably available, "especially [for offences] which would ordinarily be tried by a jury".[20]

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15 2 H BL 69, 100; 126 ER 434, 450 (our emphasis).

16 *Re Tracey* at 559 per Brennan & Toohey JJ.

17 *Mutiny Act* of 1833, s.9: Clode p100

18 Clode at p100. The natural inference to be drawn from this order is that command did not regard it as necessary to maintain and enforce discipline to prosecute such offences.

19 Art 143, 145: see Clode at p98-99.

20 Manual of Military Law, Ch VII, pp107-108 published by the War Office 1899. It is noteworthy that not only do each of the qualifications to this "general rule" have a service connection, they are self-evidently designed to have a direct and palpable impact on the maintenance of "*military* discipline": see further [39]-[40] below.

30. In the case of the navy, while the introduction of the *Naval Discipline Act 1860* (Imp)[21] similarly granted jurisdiction over service members for offences under the ordinary criminal law of England,[22] jurisdiction to try such offences committed in the United Kingdom were strictly limited to those places closely connected to the navy,[23] offences committed outside these places were left to be tried by the civil courts.[24] Otherwise, court-martial jurisdiction only extended to disciplinary offences[25] committed any place on shore.

31. At the time of federation, the military and naval forces of the Australian colonies were governed by a multitude of statutes although in each case they relevantly incorporated
10 the provisions of the *Army Act* in the case of the colonies' military forces and the *Naval Discipline Act 1866* in the case of their naval forces.[26] In the case of Victoria, military and naval jurisdiction only applied when its permanent forces were on "active duty".[27] That was the position adopted by the Commonwealth with the enactment of the *Defence Act 1903* (Cth).[28] The disciplinary regime in peacetime therefore made no provision for the trial of civil offences, which were left to the civil courts.

32. Similarly, at the time of federation the position in the United States was materially identical, despite the differences in its constitutional framework. Military jurisdiction did not extend to common law felonies, excluding murder and rape, committed in the United States in peacetime until 1916. The crimes of murder and rape committed in

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21 23 & 24 Vict. c.123

22 cl.XXXVIII. The 1860 Act was subsequently revised on several occasions culminating in the *Naval Discipline Act 1866* (29 & 30 Vict., cap 109) with this provision being re-enacted in s.45.

23 Such as harbours, rivers, wharves, docks, barracks etc: clXXXIX (s.46 of the 1866 Act).

24 cl.LXXXIX provided that "Nothing in this Act contained shall be deemed or taken to supersede or affect the Authority or Power of any Court or Tribunal of ordinary Civil or Criminal Jurisdiction, or any Officer thereof, in Her Majesty's Dominions, in respect of any Offence mentioned in this Act which may be punishable or cognizable by the Common or Statute Law" (s.101 of the 1866 Act)

25 Such as mutiny, communications with the enemy, insubordination, desertion and absence without leave etc: clXXXIX (s.46 of the 1866 Act).

26 *Military and Naval Forces Regulation Act 1871* (NSW); *Defence Act 1884* (Qld); *Defence Act 1885* (Tas); *Defence Forces Act 1894* (WA); *Defences Act 1895* (SA), applicable to the military, and *Naval Discipline Act 1884* (SA) applicable to naval forces on active service.

27 *Defences and Discipline Act 1890* (Vic).

28 Section 55 provided that the military forces were at all times, while on "active service", subject to the Army Act (Imp). Similarly, s.56 provided that the naval forces were at all times, while on "active service", subject to the Naval Discipline Act (Imp). "Active service" was defined in s.4 as "service in or with a force which is engaged in operations against the enemy and includes any naval or military service in time of war".

peacetime in the United States did not fall under military jurisdiction until the introduction of the *Uniform Code of Military Justice* in 1950.[29]

33. Indeed, until the enactment of the DFDA in 1982, and consistently with centuries of practice, offences against the ordinary criminal law committed by members of the Australian Army during peacetime in Australia were triable only by the civil courts. Such offences were only triable by service tribunals where the alleged offender was serving outside Australia or on war service inside Australia.[30]

34. By the time of the *Naval Discipline Act 1866* (Imp) and the *Army Act 1881* (Imp), given the varied circumstances and places that British military and naval forces could be expected to operate, including in places where British or dominion civil courts were not available, it was self-evidently necessary to maintain discipline that military and navy commanders had authority to sanction breaches of the ordinary criminal law by the forces under their command. However, consistent with the long established constitutional principles described above, these disciplinary powers were never exercised in all places at all times merely by dint of a person's status as a soldier or sailor. Rather, it was "governed by the nature of the offence, the circumstances in which the offence was committed and the place and circumstances in which the disciplinary powers were invoked."[31] During peacetime and civil order in the United Kingdom and the dominions, military jurisdiction was not exercised if it was practicable and convenient for the civil courts to exercise their jurisdiction.

35. Moreover, from the time an English standing army was first regulated under the first *Mutiny Act* in 1689, to the regulation of the army and navy at the apogee of the British Empire under the *Naval Discipline Act* and the *Army Act* through to federation and the enactment of the *Defence Act 1903* (Cth), the maintenance of military and naval discipline of soldiers and sailors within both the United Kingdom and Australia "was achieved primarily by subjecting members of the naval and military forces to the

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29 F B Wiener, *Courts-martial and the Bill of Rights: The Original Practice I*, 72 Harv L Rev 1 (1958), 10-12; Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 12 Vand L Rev 435 (1960), 452-453.

30 *Defence Act 1903* (Cth) , ss.54, 55. "war service" was defined in s.4 as "active service, any naval, military or air-force service in time of war, and any naval, military or air-force between the issue of a proclamation declaring that by reason of the recent existence of a time of war it is necessary in the public interest that the Military Forces should be temporarily subject to the Army Act, and the issue of a proclamation declaring that such necessity no longer exists."

31 *Re Tracey* at 563 per Brennan & Toohey JJ.

processes of the ordinary courts of law where that was practicable and convenient."[32] What emerges from this historical analysis is that military jurisdiction was never exercised solely because of the status of the member.

*Scope of the defence power in peacetime*

36. The criterion of validity of a law made in exercise of a constitutional power directed to a purpose of object, such as the defence power, is that it must be reasonably capable of being seen as "appropriate and adapted" to achieving that purpose or as "reasonably proportionate" to that purpose and the means adopted in pursuit of it: *Re Nolan* at 484.

37. Moreover, unlike other heads of power, while the meaning of defence power does not change, the scope of its application depends upon facts that are apt to change and the operation of powers confered upon the Executive by the Parliament in the exercise of the power is similarly affected by changing facts: *Andrews v Howell* (1941) 65 CLR 255 at 278 per Dixon J. Consequently, in a time of a major war or where the internal civil order of one or more States is seriously threatened, the power extends far beyond its reach in a time of peace or civil order: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 195-196,197-198, 206-207, 268.

38. Further, the defence power, like all heads of power in section 51 is expressed to be "subject to this Constitution". Consequently, the extent of any jurisdiction conferred on service tribunals under the DFDA must be balanced against the rights directly or indirectly guaranteed by Ch III and Chapter IV, in particular through s.106, which preserves the jurisdiction of the States including the application of the criminal law.[33]

39. This Court has consistently upheld the principle that the defence power supported the establishment of service tribunals to enforce service discipline and that while the functions of service tribunals are judicial, they are outside Ch III because they are not the judicial power *of the Commonwealth*: *Re Tracey* at 540-541, 565, 572. However, as the constitutional history outlined above demonstrates, this conclusion is based

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32 *Re Tracey* at 562 per Brennan & Toohey JJ.

33 The rights guaranteed directly or indirectly under Ch III and Ch IV, which are absent from trials by service tribunals of offences under the DFDA, include: a trial before an independent judiciary, and a jury for indictable offences; the right to appeal both sentence and conviction; and rights of mentally ill persons under mental health provisions contained in *Mental Health (Criminal Procedure) Act 1990* (NSW), *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), *Mental Health Act 2000* (Qld), *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) and the *Mental Health (Consequential Provisions) Act 1996* (WA).

entirely on the pragmatic acceptance of "the necessities of *military* discipline".[34] Consistently with this rationale and the requirement for a law under the defence power to be "reasonably appropriate and adapted" to the "naval and military defence" of the Commonwealth and the states, the jurisdictional scope of service tribunals is limited to that which can reasonably be regarded as *necessary* for the maintenance of *military* discipline, which stands in contradistinction to the individual or private discipline of a soldier or sailor acting in their civilian capacity unconnected to their service. If a civil crime is committed in such circumstances it has always been the case that an officer or soldier may be dismissed from the service, as they may be if they do not display the attributes command considers are required of a service member.[35] The maintenance of the discipline of the defence force is therefore unaffected by the absence of a power to try defence members for civil crimes in the circumstances described.

40. Therefore, for a prosecution of an offence to be cognizable under s.61 it must have a reasonably direct or proximate impact as opposed to an indirect effect on the maintenance of *military* discipline,[36] otherwise it cannot be said to be reasonably proportionate to "naval and military defence". Whether a prosecution can be characterised as such will depend not only on whether the circumstances of the offence are connected to the member's service but whether the offence occurs in Australia at a time of peace and civil order.[37]

41. Not only do the historical considerations outlined above reveal the limited extent of military jurisdiction and pre-ordinate jurisdiction of the civil courts in relation to ordinary civil crimes committed by service members during peacetime in the United Kingdom and Australia, it gainsays any suggestion that it is *reasonably necessary* to maintain discipline to make all civil crimes subject to military jurisdiction at all times

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34 See also *White v Director of Military Prosecutions* (2007) 231 CLR 570 per Kirby J at [142], [171].

35 The power to administratively discharge a defence member where it is considered their retention is not in the interests of the defence force is presently found in Reg 24 of the *Defence Regulation 2016* (Cth). If that sanction is considered by command to be too severe a member may also be reduced in rank pursuant to Reg 14.

36 In *Chief of the General Staff v Stuart* (1995) 58 FCR 299 at 324 per Lockhart J (with whom Black CJ and Davies J agreed at 308, 309) it was held that for a defence member to be guilty of behaviour 'likely to prejudice the discipline of the defence force' contrary to s.60 of the DFDA the conduct must have a "reasonably direct or proximate and clearly perceived effect on discipline". It follows, *a priori*, that conduct that only indirectly affects discipline cannot be prejudicial to discipline and therefore cannot be characterised as being reasonably proportionate to the maintenance of military discipline.

37 *Re Nolan* at 484 per Brennan & Toohey JJ.

merely because the offender was a service member and regardless of the circumstances in which it occurred.[38]

42. It was never considered necessary for a service tribunal to try a service member with an ordinary civil crime commited in peacetime United Kingdom or Australia where it was reasonably practicable to be dealt with in civilian courts. A contrary conclusion can only be reached if centuries of constitional history and practice of service tribunals are ignored.

43. As held by Brennan and Toohey JJ in *Re Nolan*, because s.61 of the DFDA is expressed in general terms, it must be read down in accordance with s.15A of the *Acts Interpretation Act 1901* (Cth) to render it constitutionally valid.[39] The test for validity is as stated by Brennan and Toohey JJ in *Re Tracey* at 570 where it was observed that to reconcile the constitutional objectives of: (i) defence of the Commonwealth and the control of the armed forces and (ii) the pre-ordinate jurisdiction of the civil courts and the protection of civil rights to defence members who are charged with criminal offences, ".. proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline." This test will not be satisfied where the jurisdiction of a civil court "can conveniently and appropriately be invoked to hear and determine a corresponding civil court offence". Thus military jurisdiction would be enlivened in a remote part of Australia where no civil court is reasonably available and it is necessary to maintain discipline to prosecute a defence member but would not be "if the unit were stationed closer to a town."

44. Consequently, the jurisdiction to prosecute a defence member for an offence pursuant to s.61(3) committed in Australia during a time of peace and civil order does not extend to circumstances where the jurisdiction of a competent civil court can conveniently and appropriately be invoked to hear and determine a corresponding civil criminal

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38 Indeed, even more recent United Kingdom authority demonstrates that where civil offences may be tried by either civil or military authorities, it is not necessary for the military to try the service member. While the decision is ultimately for the civil authorities, it is only where the alleged criminal conduct is primarily a service interest rather than a general public interest that it is more appropriate that the member be tried by a service tribunal: *R v Spear* [2003] 1 AC 734, 747 per Lord Cornhill, 760 per Lord Rodger of Earlsferry.

39 *Re Nolan* at 485, 487-488.

offence. This is so *a fortiori* where the offence is unconnected with their service in the defence force.

45. Were a defence member to be prosecuted in these circumstances they would not only lose the protection to which they are entitled by the practice and procedure of the civil courts, especially the right to trial by jury in serious cases,[40] they would have no right to plead autrefois acquit or autrefois convict in any subsequent civil prosecution and face the prospect of being punished twice for the same offence.[41] Further, were there to be a subsequent civil prosecution, there remains the possibility of a different verdict, which would not only serve to undermine morale and public confidence in service tribunals but also the effectiveness of those tribunals in maintaining and enforcing service discipline. These risks are substantially ameliorated if not eliminated through the application of the service connection test as described by Brennan & Toohey JJ.

46. It follows therefore that s.61(3) does not extend to all offences under the *Crimes Act* committed in Australia merely by reason of the member's status as a service member and the first defendant erred in concluding that jurisdiction is enlivened based solely on the plaintiff's "service status". The Defence Force Appeals Tribunal therefore erred in concluding otherwise in *Williams* and first defendant's reliance on it was misplaced.

*No service connection*

47. Although the first defendant erred in concluding he had jurisdiction because of the plaintiff's service status, on a proper application of the test articulated by Brennan and Toohey JJ in *Re Tracey*, the first defendant did not otherwise have jurisdiction because, for the reasons described below, prosecution of the charge cannot reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline.

48. Having regard to the relevant circumstances in which the offence was committed,[42] as described at paragraph 7 above, it is apparent that the only relationship the alleged

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40 *Re Tracey* per Brennan and Toohey JJ at 566. See also footnote 33.

41 *Re Tracey* per Brennan and Toohey JJ at 577 and *Re Nolan* per Brennan and Toohey JJ at 481.

42 In *Relford v US Disciplinary Commandant* 401 US 355 (1971) at 365 the Supreme Court listed 12 (non exhaustive) factors relevant to determining whether there was a service connection between the service and the offence in a time of peace. Those factors were considered equally relevant to the Australian context by Brennan & Toohey JJ in *Re Tracey* (at 569) and McHugh J in *Re Aird* (at [36]): "(1) the serviceman's proper absence from the base; (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its commission within our territorial limits and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the

offence bears to the plaintiff's military service is the fact he happens to be a defence member. Each of the 12 factors in *Relford* unequivocally leads to the conclusion that there is no service connection between the alleged offence and defence force. The mere fact that the complainant was a defence member at the time is not of itself sufficient to attract jurisdiction, it is the circumstances of the alleged offence that is determinative: *White* per Gleeson CJ at [21]. Indeed, the fact the complainant was a defence member loses any force when the context is considered: she was in a different service posted over 1000km away from the plaintiff, they could not be reasonably expected to have any interaction with each other in the performance of their duties;[43] and her relationship with the plaintiff was personal.

49. Moreover, the circumstances of the alleged offence are entirely divorced from any of the factors that have been held by this Court in each of *Re Tracey*, *Re Nolan*, *Re Tyler* and *Re Aird* to be reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline.[44] The offence itself and the circumstances in which it was allegedly committed are wholly unrelated to the plaintiff's military activities and duties and can conveniently and appropriately be heard in the Queensland courts.

50. Prosecution of what can only be characterised as a civil offence that occurred in private and which can conveniently be prosecuted in the civil courts would be inimical to

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defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; ..(12) the offense's being among those traditionally prosecuted in civilian courts."

43 The plaintiff and complainant at no time encountered each other in the performance of their duties during the complainant's service with the Air Force: Statement of Agreed Facts [8] (CB48)

44 In each of *Re Tracey*, *Re Nolan* and *Re Tyler* the offences were directly connected to the performance of the member's military duties and obligations. In *Re Aird* the factors relevant to the existence of a service connection were: (1) when overseas members of the military are seen as representatives of the Australian Government even when on leave and if they engage in conduct against the Crimes Act that that conduct is likely to be a crime under local law the local citizens would likely be critical and even hostile to ADF members; (2) the local government would likely become aware of the identity of the soldier and if such incidents occurred regularly they might deny entry to ADF members seeking rest and recreation which would directly impact morale and discipline – it is even possible they may deny entry to ADF members for training purposes; (3) the soldier's presence in Thailand was the result of his military service because he was on recreation leave – he was not a free agent and was liable to immediate recall to his duties (and for that reason had to show his address and phone number on his leave form): per McHugh J at [40], [41], [44], with whom Gleeson CJ (at [9]) and Hayne J (at [156]) expressly agreed and with whom Gummow J was in general agreement (at [58]).

morale and the interests of the ADF for the reasons given by Callinan and Heydon JJ (albeit in dissent) in *Re Aird*:

> "Indeed, the knowledge that the military authorities have the right to intrude into the private life of soldiers, and to discipline them in military proceedings for conduct far removed from their military service, and that in such proceedings there is no right to a committal and a jury, is likely to prove a disincentive to enlistment itself, let alone to morale."[45]

51. One might also add that the prosecution of a defence member by a service tribunal rather than a civilian court in circumstances that a reasonable citizen would regard as far removed from the military, could rationally lead to a sentiment that defence members are treated differently from a civilian in identical circumstances, which has the obvious potential to undermine the public trust and confidence in the ADF.

52. Therefore the prosecution of the plaintiff by the defendant cannot reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

***Part VII: Orders sought***

53. The Plaintiff seeks the following orders:

(a) the defendant be prohibited from proceeding further with the charge relating to the plaintiff identified in the charge sheet dated 12 June 2019;

(b) the second defendant pay the plaintiff's costs.

***Part VIII: Estimate***

54. The estimate of hours required for the presentation of the plaintiff's oral argument (including reply) is 3.0 hours.

Dated: 17 April 2020

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45 At [167].

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