

BETWEEN:

PRIVATE R
Plaintiff

and

BRIGADIER MICHAEL COWEN
First Defendant

and

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

Part I: Publication

1. The Plaintiff certifies this outline is in a form suitable for publication on the internet.

Part II: Outline of Oral Argument

2. Plaintiff charged with assault occasioning actual bodily harm pursuant to s.61(3) of the DFDA and s.24 of the *Crimes Act 1900* (ACT). (CB 62). The offence is also an offence against s.339 of the *Criminal Code 1899* (Qld) for which the accused has a right to trial by jury (JBA2 Tab 8).

3. The DFDA confers jurisdiction on all "service tribunals" (Summary Authorities, Defence Force Magistrates and Courts Martial) to try defence members on any charge within jurisdiction: DFDA Part VII. A General Court Martial can impose punishment upto to life imprisonment: DFDA ss.67, 69 and Sch 2. The Director of Military Prosecutions selects forum: DFDA s.103. Majority verdicts for courts martial (s.133(2)). There is no right to legal representation before a Summary Authority. Can be no double jeopardy if civil conviction: s.144. Appeal rights against conviction but not sentence: *Defence Force Discipline Appeals Act 1955* (Cth) s.20 (JSA Tab 1). Members may be dismissed if they have committed a crime dealt with by the civil courts or their conduct has rendered them unsuitable to serve in the ADF or reduced in rank: *Defence Regulation 2016* Regs 24, 14 (JBA1 Tab 6). (PS [14]-[21])

4. Section 61 picks up the criminal law of the ACT and Commonwealth offences: "territory offence" DFDA s.3. Some legislative attention has been given to what "general criminal offences" should be dealt with as service offences when committed in Australia: ss.33(a); 33A, 46, 47C.

5. Historical and legislative context bears out the primacy given to the jurisdiction of civil courts. Where it existed, military and naval jurisdiction to try charges under the ordinary criminal law was not exercised merely by reason the offender was a service member. The analysis of Brennan & Toohey JJ in *Re Tracey* at 556-563 is accurate: cf Mason CJ, Wilson & Dawson JJ at 543-544. Also, the *Jurisdiction in Homicides Act 1862* (JSA Tab 4) and the manner of its exercise emphasises the primacy of the civil jurisdiction in maintaining discipline and the distinction between military and social relationships (see Clode, JSA Tab 7).

6. Under the *Naval Discipline Act 1866* (NDA), (JBA2 Tab 24)), jurisdiction over civil offences committed in the UK was limited to places closely connected to the Navy or under Admiralty control: cf *Re Tracey* at 542, 561. Section 41 of the *Army Discipline and Regulation Act 1879* and the *Army Act 1881* (JBA2 Tab 15), despite conferring military jurisdiction over all civil offences committed within the UK was in practice only exercised where the circumstances made it reasonably necessary to maintain and enforce service discipline and where the civil courts were not conveniently available (see Manual of Military Law JBA5 Tab 52). This bears out the conclusion in *Re Tracey* at 562. The Victorian legislation (JBA2 Tab 11) only applied the Army Act to members on active service (JBA2 Tab 11) and the NDA according to its terms. Sections 55 and 56 of the *Defence Act 1903* only applied the Imperial Acts to members on active service (JBA2 Tab 5). Ordinary criminal offences committed by service members in Australia during peacetime were tried only in civil courts: *Re Tracey* at 561-562. (PS [25]-[35], [41]-[42], PR [6], [8]-[9])

7. The defence power in s.51(vi) is both purposive and “subject to this Constitution”. The scope of the defence power waxes and wanes according to the facts upon which its application depends: *Andrews v Howell* at 278 per Dixon J; *Communist Party Case* at 226 per Williams J. The extent of any jurisdiction conferred on service tribunals is also subject to the limitations imposed by Ch III (see: *Re Tracey* at 569 per Brennan & Toohey JJ; *White v DMP* at [24] per Gleeson CJ) and the rights indirectly guaranteed by Chapter V, in particular s.106 (*Re Tracey* at 570 per Brennan & Toohey JJ). Where a head of power is purposive or subject to a limitation, a law must be “appropriate and adapted” or “proportionate” to that purpose and go no further than reasonably necessary to achieve that purpose and having regard to the limitation: *Cunliffe v Commonwealth* at 295-296 per Mason CJ, at 321-322 per Brennan J; *Leask v Commonwealth* at 593-594 per Brennan CJ, at 605-606 per Dawson J, at 624 per Gummow J; *Maloney v The Queen* at [182] per Kiefel J.

8. Applying these principles, the defence power only supports trials by service tribunals under s.61(3) that are reasonably necessary for the maintenance of *service* discipline. Otherwise the law cannot be characterised as “reasonably appropriate and adapted” to the “naval and military

defence” of the Commonwealth and the states. It has never been reasonably necessary to exercise military jurisdiction over all civil crimes committed anywhere in Australia at all times regardless of any service connection where the civil courts are conveniently available. (PS [22]-[23], [36]-[39])


9. The jurisdiction of service tribunals to try charges of offences under s.61(3) extends only to proceedings that can reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline (*Re Tracey* at 570; *Re Nolan* at 477, 484, 489). The factors described in *Relford* are of assistance but not conclusive: *Re Aird* at 321 per McHugh J. Depending on the circumstances, the availability of civil jurisdiction may be as important as the service connection: *Re Tyler* at 36-37; *Re Aird* at 324. As s.61 is expressed in terms that can extend beyond the permitted jurisdiction of service tribunals it must be read down in accordance with s.15A of the *Acts Interpretation Act 1901* (Cth); *Re Nolan* at 485, 487-488. (PS [41], [43]-[45], PR [4]).

10. The plaintiff was a member of the Regular Army. The complainant was a member of the Permanent Air Force. They had met, commenced and ended an intimate relationship before the complainant joined the ADF but remained in social contact. The alleged incident occurred in August 2015, in a private hotel room in Brisbane booked and paid for by the plaintiff in his private name. The matter was not raised by the complainant until October 2017. No complaint was ever made to the police. (CB 48-49)

11. Since the question raised involves the reading down of legislation and the jurisdictional limits of service tribunals, the circumstances for consideration are not “at large” but are limited to what might broadly be described as the external circumstances to the offence charged not the motives or particular manner of offending. The complainant’s unsworn statement and prosecution allegation of facts as to the latter matters are irrelevant. The ADF policies (CB 112, 137, 162) do not and cannot purport to extend service jurisdiction.

12. On an objective view of the material facts the offence was: wholly unrelated to the performance of any military duty; occurred outside the context of any military relationship (in contradistinction to a social relationship) and on private property on the weekend. To the objective observer the offence occurred in entirely civilian circumstances. (CB47; PS [6]-[8], PR [11]). The offence was reported to military authorities years later. The offence is appropriately characterised as a breach of the civil order rather than military discipline and is squarely within the jurisdiction of the civil authorities, which remains open even now. (PS [48]-[49], PR [5], [12]).

Dated 29 June 2020


Tim Game


Bradley Jones


Joshua Nottle

