IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 272 OF 2019**

BETWEEN: **PRIVATE R**
Plaintiff

AND: **BRIGADIER MICHAEL COWEN**
First Defendant

AND: **COMMONWEALTH OF AUSTRALIA**
Second Defendant

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

Filed on behalf of the Second Defendant by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The issue in this proceeding is whether s 61(3) of the *Defence Force Discipline Act 1982* (Cth) (**DFDA**), which creates an offence that is applicable to any "defence member"[1] who engages in conduct outside the Jervis Bay Territory that would be a "Territory offence"[2] if it took place in the Jervis Bay Territory, is a valid exercise of the legislative power conferred by s 51(vi) of the Constitution.

3. The Plaintiff accepts that s 51(vi) empowers the Commonwealth Parliament to legislate to regulate the discipline of the defence forces.[3] However, he contends that a service tribunal can exercise jurisdiction by virtue of a law passed pursuant to s 51(vi) only if the offence in question has a "service connection",[4] which he presents as a stricter test than the "service status" test. In fact, those tests substantially, if not completely, overlap. While they may sometimes provide useful analytical tools, those "tests" should not be permitted to distract attention from the real question, which is whether s 61(3) of the DFDA is "sufficiently connected with the regulation of the forces and the good order and discipline of defence members"[5] so as to be properly characterised as a law with respect to s 51(vi). The Commonwealth submits that it is, it being open to the Parliament to decide that any crime committed by a defence member reflects on their fitness to serve in the defence forces, on the reputation of those forces, and on their discipline and good

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1 Defined in s 3 of the DFDA to mean, relevantly, a "member of the ... Regular Army".

2 "Territory offence" is defined in s 3 of the DFDA, in a way that includes assault occasioning actual body harm (that being an offence under s 24 of the *Crimes Act 1900* (ACT)).

3 Writ [16] (CB 7); PWS [22]. So much is established by *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 (***Re Tracey***).

4 Being a test that directs attention to whether a proceeding for an offence "can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline": *Re Tracey* at 570 (Brennan and Toohey JJ). As McHugh J (with whom Gleeson CJ, Gummow and Hayne JJ agreed) noted in *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 (***Re Aird***) at [45], an offence may satisfy that test even if it does not necessarily disclose a close "connection to service".

5 *Re Tracey* at 545 (Mason CJ, Wilson and Dawson JJ), cited with approval by Gummow J (with whom Gleeson CJ and Hayne J agreed) in *Re Aird* at [66].

order.[6] That conclusion is not inconsistent with any Australian authority,[7] and it accords with the prevailing authority in both Canada[8] and the United States.[9] Applying that approach, s 61(3) should be held to be wholly valid[10] (**Part V.A**).

4. It is only if s 61(3) is <u>not</u> wholly valid that it is necessary to consider whether it can be read down pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) so as validly to apply to the Plaintiff. If that point is reached, the Plaintiff's submission that the facts of this case do not disclose a "service connection" should be rejected. The Plaintiff, being a soldier who has served in active combat operations overseas and has received hand-to-hand and firearms training,[11] is alleged to have lost control and engaged in a violent and frightening assault on a fellow member of the defence forces after she refused his sexual advances.[12] That complaint was reported after the Chief of the Army had issued CA Directive 28/16, which made clear that family and domestic violence is a "workplace issue" because "[i]f Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined".[13] As the Chief of the Army put it, perpetrating such violence is "fundamentally at odds with the meaning and profession of soldiering".[14] Accordingly, even applying a "service connection" test, s 61(3) validly applied with respect to the alleged offence (**Part V.B**).

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. The Plaintiff's notice under s 78B of the *Judiciary Act 1903* (Cth) is adequate.

PART IV FACTS

6. The relevant facts are set out in the Agreed Statement of Facts and its annexures.

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6 *Re Tracey* at 543-544 (Mason CJ, Wilson and Dawson JJ).

7 See, eg, *White v Director of Military Prosecutions* (2007) 231 CLR 570 (***White***) at [3], where Gleeson CJ noted that the choice between the tests remained at large.

8 *R v Stillman* (2019) 436 DLR (4th) 193.

9 *Solorio v United States* 483 US 435 at 441, 444, 446 (1987).

10 As it was held be in *Re Tracey* at 545 (Mason CJ, Wilson and Dawson JJ).

11 SOAF, [3] (CB 47).

12 SOAF, Annexure A (CB 52).

13 SOAF, Annexure G (CA Directive 28/16), [2] (CB 138).

14 SOAF, Annexure G (CA Directive 28/16), [2] (CB 138).

PART V ARGUMENT

A. Parliament can validly select membership of the defence forces as the criteria for prosecutions before service tribunals

"Service connection" has not been accepted as the relevant test

7. There is no judgment of this Court holding that the so-called "service connection" test must be satisfied in order for jurisdiction under the DFDA to be available, or precluding acceptance of the "service status" test.[15] Indeed, there is not even any decision in which a majority of the Court has stated that a "service connection" test is preferable to the "service status" test. That was correctly recognised by the Defence Force Discipline Appeal Tribunal (constituted by Tracey, Brereton and Hiley JJ) in *Williams v Chief of Army (**Williams**)*,[16] which went on to adopt the "service status" test.

8. The judgments upon which the Plaintiff relies reflect nothing more than a perception that the "service connection" test is the more demanding test,[17] with the result that if that test is satisfied then there is no need to choose between the two tests.[18] The Plaintiff is therefore incorrect to start from the premise that there is authority rejecting the "service status" test, or that s 61(3) of the DFDA is invalid unless read down (PWS [12], [13]).

The correct question

9. It is well-established that s 51(vi) of the Constitution confers on Parliament the power to enact laws regulating military discipline in peacetime as well as wartime.[19] For that reason, the Plaintiff's submissions concerning the waxing and waning of the power conferred by s 51(vi) are a distraction (PWS [37]). Even in peacetime, the defining characteristic of armed forces is that they are "disciplined forces organised hierarchically".[20] To maintain that discipline, Parliament has long thought it appropriate

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15 *Re Aird* at [35] (McHugh J, with whom Gleeson, Gummow and Hayne JJ agreed), [77] and [88] (Kirby J), [157] (Callinan and Heydon JJ).

16 [2016] ADFDAT 3 at [30].

17 *Williams* at [30] referring to the "service connection" test as the "lowest common denominator".

18 *Williams* at [30].

19 See, eg, *Re Tracey* at 541 (Mason CJ, Wilson and Dawson JJ); *Re Aird* at [8] (Gleeson CJ). The Plaintiff does not dispute this: PWS [22].

20 *White* at [52], [61] (Gummow, Hayne and Crennan JJ); at [19] (Gleeson CJ). See also *Haskins v Commonwealth* (2011) 244 CLR 22 at [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

to exercise its power under s 51(vi) by authorising service tribunals to enforce military discipline.

10. Section 51(vi) of the Constitution is unusual in part because, while most heads of power concern a particular subject-matter, s 51(vi) is purposive.[21] The characterisation task for purposive powers requires consideration of "what the legislation operates *for*, not what it operates *upon*".[22] Nevertheless, as Brennan CJ put it in *Leask*:[23]

> the basic test of validity remains one of sufficient connection between the operation and effect of the law on the one hand and the head of power on the other. If the head of power is itself purposive (eg, the defence power), the existence of a connection may be determined more easily by comparing the purpose of the law and the purpose of the power.

11. While a comparison between the purpose of the impugned law and the purposive power "may" sometimes allow the existence of a sufficient connection to be "determined more easily", sometimes no such comparison is necessary because the connection is obvious. That is so for laws providing for good order and discipline of a standing military force, because such laws are central to the existence and maintenance of such a force, the evident purpose of which is defence.[24] Such laws therefore reveal a sufficient connection to s 51(vi) of the Constitution without there being any need to resort to proportionality reasoning to make it easier to identify that connection (such reasoning being, in the characterisation context, "nothing more than a guide to sufficiency of connection"[25]).

12. Applying the above principles to this case, the validity of s 61(3) of the DFDA turns on whether that provision is a law with respect to s 51(vi) of the Constitution, which in turn depends on whether that provision "is sufficiently connected with the regulation of the

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21 See, eg, *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 253 (Fullagar J), 273 (Kitto J); *Thomas v Mowbray* (2007) 233 CLR 307 at [135] (Gummow and Crennan JJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at [200] (Keane J).

22 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 89 (Dawson J).

23 *Leask v Commonwealth* (1996) 187 CLR 579 at 591 (Brennan CJ). See also 614-615 (Toohey J) and 616-617 (McHugh J).

24 See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 254 (Fullagar J); *Re Aird* at [30] (McHugh J, Gleeson CJ, Gummow and Hayne JJ agreeing).

25 *Leask v Commonwealth* (1996) 187 CLR 579 at 617 (McHugh J). For that reason, the language of "proportionality" is best avoided in the context of characterisation, for the inquiry is very different from that involved when the question is whether legislation infringes a constitutional limitation.

forces and the good order and discipline of defence members".[26] Having regard to the nature of the defence power, and the fact that "it is impossible to foresee or define the extent and variety of national exigencies, or ... of the means which may be necessary to satisfy them",[27] it is largely for "Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline".[28] For that reason, the characterisation question is appropriately framed by asking whether s 61(3), in stipulating that it is a service offence for a member of the military to engage in any criminal conduct, is "reasonably capable of being considered appropriate and adapted"[29] to the regulation of the defence forces and the good order and discipline of defence members.

13. The Plaintiff at one point correctly identifies this as the correct question (PWS [36]). Unfortunately, however, the Plaintiff then fails to recognise that the question is framed in that way for the very purpose of posing a "high threshold test" for invalidity.[30] The Plaintiff instead proceeds on the footing that the question just identified requires both a "necessity" analysis (PWS [39]) and also a "reasonably direct or proximate impact ... on the maintenance of military discipline" (PWS [40]). There is no warrant for either gloss on the applicable test, neither of which derives any support from authority or principle.

14. Of course, s 51(vi) of the Constitution is "subject to this Constitution", and therefore is subject to Ch III. However, while in most situations Ch III would prevent the exercise

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26 *Re Tracey* at 545 (Mason CJ, Wilson and Dawson JJ); *Re Aird* at [65] and [69] (Gummow J, with whom Gleeson CJ and Hayne J agreed).

27 Hamilton, Madison and Jay, *The Federalist*, Wright (ed) (Harvard University Press, 1961) pp 199-200 (italicised in the original), extracted with approval in *Thomas v Mowbray* (2007) 233 CLR 307 at [136] (Gummow and Crennan JJ); see also *White* at [9], [21] (Gleeson CJ).

28 *Re Tracey* at 545 (Mason CJ, Wilson and Dawson JJ); *Re Aird* at [8] (Gleeson CJ), [30] (McHugh J, Gleeson CJ, Gummow and Hayne JJ agreeing); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467-68 (Starke J), 481 (Williams J); *White* at [20] (Gleeson CJ). There is an analogy with the approach adopted to the assessment of the validity of (delegated) legislation made by the Executive for the prosecution of a war: see *Stenhouse v Coleman* (1944) 69 CLR 457 at 470 (Dixon J); *Australia Communist Party v Commonwealth* (1951) 83 CLR 1 at 255 (Fullagar J).

29 Applying, by analogy, the approach adopted in testing whether a law that implements a treaty is supported by s 51(xxix) in *Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [102]-[103] (Gummow and Crennan JJ), with whom in this respect Callinan J agreed at [588]. See also *Leask v Commonwealth* (1996) 187 CLR 579 at 614-615 (Toohey J).

30 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [48]ff, particularly [57]-[58] (French CJ); *Tajjour v New South Wales* (2014) 254 CLR 508 at [35] (French CJ).

of legislative power to provide for punishment other than through the engagement of the judicial power of the Commonwealth, Ch III is not transgressed by a law that has a sufficient connection with the regulation of the defence forces and the good order and discipline of defence members, for the simple reason that such a law "stands outside" Ch III.[31] Again, that conclusion does not depend on any "proportionality test", the Court having rejected any role for proportionality in ascertaining whether a law contravenes Ch III.[32] Furthermore, no form of "balancing" (PWS [38]) of the jurisdiction of service tribunals against either Ch III[33] or State jurisdiction[34] is required.

Section 61(3) of the DFDA is wholly valid

"Service status" and "service connection"

15. Identification of the relevant question as whether s 61(3) of the DFDA is reasonably capable of being considered appropriate and adapted to the regulation of the defence forces and the good order and discipline of defence members highlights the derivative or "secondary"[35] nature of the question as to whether the "service connection" or "service status" test is satisfied. Those tests were adopted from US jurisprudence, where they

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31 *Re Tracey* at 541 (Mason CJ, Wilson and Dawson JJ), 573-574 (Brennan and Toohey JJ); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467-468 (Starke J), 481 (Williams J); *White* at [14] (Gleeson CJ), [58] (Gummow, Hayne and Crennan J); *Lane v Morrison* (2009) 239 CLR 230 at [77] (Hayne, Heydon, Crennan, Kiefel and Bell JJ). The Plaintiff does not challenge these authorities: PWS [39].

32 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [32] (Kiefel CJ, Bell, Keane and Edelman JJ), [95] (Nettle J).

33 The Plaintiff's reliance on various rights that are said to be "directly or indirectly guaranteed by Ch III" (PWS fn 33) is untenable. For example, Ch III obviously does not provide any guarantee of trial by jury with respect to State offences, and likewise does not confer rights to appeal sentence and conviction, or say anything about the rights of mentally ill persons. As the decisions in *Seaegg v The King* (1932) 48 CLR 251 and *R v Gee* (2003) 212 CLR 230 at [88], [107]-[108] (Kirby J), [176]-[178] (Callinan J) make clear, the entitlement, and scope, of "appeal" for offences against Commonwealth law is determined by ss 72-77 of the *Judiciary Act 1903* (Cth), or by relevant appeal provisions under State law that are picked up by s 68(2) of the *Judiciary Act 1903* (Cth), not by Ch III.

34 This point being devoid of any substance, given that State courts retain jurisdiction to hear such a charge against any criminal law that overlaps with a service offence: see DFDA s 190 (subject to the exclusion of civil offences which are "ancillary" to service offences, that exclusion being of no present relevance because the "ancillary" jurisdiction is not excluded for service offences against s 61). See also *Lane v Morrison* (2009) 239 CLR 230 at [110]-[111] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

35 *White* at [60] (Gummow, Hayne and Crennan JJ).

have different constitutional foundations.[36] While they have become a recurrent feature of Australian constitutional jurisprudence,[37] they are nothing more than tools for analysing the question of "sufficient connection". They should not be permitted to distract attention from that question.

16. The Plaintiff contends[38] that s 61(3) of the DFDA is supported by s 51(vi) of the Constitution only where an offence has a "service connection" of the kind identified by Brennan and Toohey JJ in *Re Tracey*,[39] meaning that proceedings may be brought against a defence member 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" (PWS [43]). Importantly, that test will be satisfied, as Brennan and Toohey JJ acknowledged in *Re Nolan*, where disciplinary proceedings are directed towards "the maintenance of standards and morale in the service community of which the offender is a member".[40] We return to that point in Part V.B below. However, we deal first with the appropriateness of that "test".

17. The Plaintiff contends that a law that purports to expose all members of the defence forces to disciplinary action whenever they are alleged to have broken the ordinary criminal law lacks a sufficient connection to s 51(vi). That submission fails to recognise the inherent connection between, on the one hand, proper military order and discipline and, on the other, the need for a member of the armed forces to obey the law (*a fortiori* laws that control the use of force). The critical importance of members of the military being persons who are obedient to lawful authority means that a person's status as a member of the defence force itself provides the requisite connection between s 61(3) of the DFDA and s 51(vi) of the Constitution. For that reason, the distinction between the "service status" and "service connection" tests is more apparent than real. The fact that it is a

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36 See *O'Callahan v Parker* 395 US 258 (1969); *Re Tracey* at 567 (Brennan and Toohey JJ) recognising that the "service connection" test was founded on the terms of the fifth amendment "which has no counterpart in our Constitution"; see also at 569.

37 See, eg, the discussion of the authorities in *Re Aird* at [36] (McHugh J) and [78] (Kirby J); *White* at [3] (Gleeson CJ) and [60] (Gummow, Hayne and Crennan JJ); *Lane v Morrison* (2009) 239 CLR 230 at [117] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

38 PWS [3], [43]-[46].

39 *Re Tracey* at 570.

40 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 (***Re Nolan***) at 489 (Brennan and Toohey JJ).

member of the defence force who is alleged to have committed an offence creates a service connection, even where no such connection would have existed were attention confined simply to the elements of the offence. Disciplinary consequences can properly be attached to breach of the ordinary criminal law because "service as a defence member involves additional responsibilities whose enforcement calls for more than the application of the general law by civilian courts".[41] Those additional responsibilities "give to general norms of conduct a distinct and emphatic operation ... [that] may be apt for enforcement in a system of military justice".[42]

18. Consistently with the above, the DFDA is based on the premise that "the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals".[43] Such good order and discipline is required no less at home in peacetime than when serving overseas, or in wartime.[44] As Harlan J observed in *O'Callahan v Parker* (in dissent, although his views were ultimately accepted by the Supreme Court of the United States[45]):[46]

> The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military service ... The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty. Thus, as General George Washington recognized: 'All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.'

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41 *White* at [69]-[70] (Gummow, Hayne and Crennan JJ); *Marks v The Commonwealth* (1964) 111 CLR 549 at 573 (Windeyer J). As to the additional responsibilities of service members, see *White* at [71], quoting *Halsbury's Laws of England* (Butterworths, 1st ed, 1907-1917) Vol 25 ("Royal Forces"), para 79. See also Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) p 303: a citizen "in his military character of a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law".

42 *White* at [73] (Gummow, Hayne and Crennan JJ). See also at [4] (Gleeson CJ).

43 *Re Tracey* at 543 (Mason CJ, Wilson and Dawson JJ); quoted with approval in *Re Aird* at [65] by Gummow J (with whom Gleeson CJ and Hayne J agreed).

44 *Re Tracey* at 544 (Mason CJ, Wilson and Dawson JJ), again quoted with approval in *Re Aird* at [65] by Gummow J (with whom Gleeson CJ and Hayne J agreed).

45 *Solorio v United States* 483 US 435 (1987).

46 *O'Callahan v Parker* 395 US 258 (1969) at 281-282, endorsed in *Re Aird* at [67] (Gummow J, with whom Gleeson CJ and Hayne J agreed).

That passage recognises that soldiers who commit criminal offences (*a fortiori* offences of violence) by definition manifest qualities of attitude and character that are destructive of the maintenance of a disciplined defence force. As the Chief of Army recognised in the directive to which reference was made above, in circumstances where "Australia empowers its Army members with the skills, knowledge and weaponry to apply lethal force",[47] it is particularly essential that they are persons who obey the law.

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The asserted significance of civil courts being reasonably and conveniently available

19. The Plaintiff submits that "[t]he 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 [the purpose of maintaining or enforcing service discipline]": PWS [13], [44]. As offences against s 61(3) of the DFDA ordinarily could be prosecuted by civilian authorities in civilian courts, that argument involves a sweeping attack on the validity of s 61(3). The submission is plainly inspired by statements in the judgment of Brennan and Toohey JJ in *Re Tracey*.[48] Nevertheless, the argument cannot be accepted without overturning many existing decisions of this Court.[49] In particular, in *White* it was argued that, because "the charges based upon the Act [the DFDA] involved conduct which could be charged and tried in the ordinary civil courts of the State of Victoria and the punishment of imprisonment was available in respect of both categories of offence", the provisions of the DFDA were "outside that area within which the Parliament might legislate ... [in] reliance upon the defence power and without necessarily engaging Ch III".[50] The Court rejected that argument, upholding the prosecution of a number of offences under s 61(3), notwithstanding the fact that the courts of Victoria would clearly have been capable of hearing a charge under applicable Victorian law.[51]

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47 SOAF, Annexure G, [2] (CB 138).

48 *Re Tracey* at 563 and 570.

49 It would be necessary to overturn at least *Re Tracey*; *Re Nolan*; *White*; and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 (***Re Tyler***). As Gaudron J explained in *Re Tyler* at 34, that case (like *Re Tracey* and *Re Nolan*) involved the "central issue [of] whether the Parliament can validly authorize service tribunals to hear and determine charges against persons subject to military discipline, where the service offence charged is also a criminal offence under the general law". In each case, this Court upheld the jurisdiction of the service tribunals, without making any finding that the civil courts were not reasonably and conveniently available.

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50 *White* at [64] (Gummow, Hayne and Crennan JJ).

51 *White* at [21]-[23] (Gleeson CJ), [73]-[75] (Gummow, Hayne and Crennan JJ), [238] (Callinan J,

20. The Plaintiff's submission that a service offence that overlaps with the ordinary criminal law cannot be tried by a service tribunal, unless the jurisdiction of civilian courts cannot "conveniently and appropriately be invoked" (PWS [43], [44]), essentially repeats the argument rejected in *White*. That same inconsistency was recognised by French CJ and Gummow J in *Lane v Morrison*.[52] Were it the case that service tribunals cannot exercise jurisdiction with respect to offences against the criminal law if "civil courts are reasonably and conveniently available", that would have the extraordinary consequence that if a member of the defence force assaulted a superior officer, that could not be dealt with as a matter of military discipline unless for some reason it was impossible to prosecute the matter in a civilian court. That would go far beyond anything said in *Re Tracey*,[53] and would be destructive with the maintenance of a disciplined force.

21. The facts of this case provide a good illustration of the reasons that is so. The Plaintiff is alleged, while off duty, to have behaved in a manner that involved uncontrolled violence. The alleged behaviour is capable of giving rise to legitimate concerns on the part of his superiors about his ability to conform himself to lawful controls on the use of violence, as well as to concerns by other members of the defence forces about serving with him. Yet, on the Plaintiff's argument, regardless of any effect of that conduct on the disciplined operation of the military, any prosecution with respect to it must be left solely in the hands of the civilian authorities. Civilian police and prosecuting authorities would thereby become solely responsible for making decisions that may affect the conduct of the defence forces, despite the fact that they are not well placed to (and cannot reasonably be expected to) make decisions having regard to considerations of military discipline.[54] They may, for example, applying their own prosecution policies, decide not to prosecute (whether due to different priorities, or different views on the relevance of the passage of time or the credibility of witnesses). On the Plaintiff's argument, in this

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Heydon J relevantly agreeing).

52 (2009) 239 CLR 230 at [63] (French CJ and Gummow J), [117] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

53 *White* at [18]-[19] (Gleeson CJ), analysing Deane J's reasoning in *Re Tracey* at 587, who accepted that an assault on a superior officer could be dealt with in the military justice system.

54 Decisions about civilian and military prosecutions involve different considerations: the ends are not the same: see *Director of Military Prosecutions Prosecution Policy* (SOAF, Annexure E) at [1.3] (CB 85). As to the separate purposes of criminal law and military discipline, see *R v Stillman* (2019) 436 DLR (4th) 193 at [100]; *R v Darrigan* 2020 CACM 1 at [33]ff (Saunders JA, Bell CJ and Diner J agreeing).

situation the military is powerless to address the offending conduct, notwithstanding its effect on military discipline. It is no answer to these problems to point to the ability to dismiss an officer or soldier from military service if convicted of a civil crime.[55] Such a sanction may not be an adequate response to some offending, and it may be disproportionate in other cases. It may also involve undue delay, if as a matter of fairness any such action were to await the determination of the civil case.

History

22. The above submissions do not suggest that service tribunals should have exclusive jurisdiction where a member of the ADF is alleged to have committed an offence under the ordinary criminal law. They simply recognise that civil and military law each have their proper sphere of operation, which may overlap.[56]

23. Contrary to the Plaintiff's submissions, such a concurrent jurisdiction has long existed as a matter of history. Indeed, Parliament has never, in any statute that it enacted, wholly excluded military jurisdiction. In the constitutional struggles between the King and Parliament that culminated in the English Civil War, Parliament initially (in the Petition of Right) attempted to deny that military jurisdiction extended to anyone within the realm in times of peace (meaning, when the central courts were open[57]). However, as Holdsworth observes, that approach "was quite useless to preserve discipline in a modern army", such that "Parliament found it necessary to take further powers for the discipline of their troops".[58]

24. The Plaintiff's submissions concerning the 18th century history (PWS [25]-[28], [32]) make the same error that was identified by the US Supreme Court in *Solorio v United States*, which recognised that, by the time of the American Revolution, it was not the case that "military tribunals in England were available only where ordinary civil courts were unavailable".[59] As a matter of power, military tribunals remained available for

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55 PWS [25], [39].

56 This was recognized by Brennan and Toohey JJ in *Re Tracey* at 562-563.

57 Holdsworth, *History of English Law*, 7th ed (revised), vol 1, p 576.

58 Holdsworth, *History of English Law*, 7th ed (revised), vol 1, pp 576-577.

59 *White* at [9] (Gleeson CJ), discussing *Solorio v United States* 483 US 435 (1987) at 444. In Canada, the Supreme Court has recognised that its service offence provisions share the same historical

offences by soldiers against the ordinary criminal law in appropriate circumstances throughout the 18th and 19th centuries (that being increasingly true as the 19th century progressed), including where civilian authorities declined to prosecute.[60]

25. Most significantly, the Plaintiff's historical analysis mistakes the significance of the position clearly articulated in statute in the decades immediately prior to Federation, including in particular as a result of the *Army Act 1881* (**Army Act**)[61] and the *Naval Discipline Act 1860* (**ND Act**).[62] Those two Acts were picked up in colonial legislation[63] in a manner which is "highly significant".[64] They include express language revealing a legislative judgment, well before Federation, that the vast majority of ordinary criminal offences[65] by members of the armed forces posed a risk to military discipline and should be triable and punishable as such. Their effect, together with the *Mutiny Act 1872*,[66] was

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origins in the Army Act and ND Act as s 61 of the DFDA: *R v Stillman* (2019) 436 DLR (4th) 193 at [59]-[60].

60 Clode, *The Military Forces of the Crown* (1869) vol 1, pp 146-148, 159-160 (and see also, for example, the 1745 legal opinion reproduced at pp 520-521 on the case of the officer who had been previously tried and sentenced by a Court-Martial for 'feloniously stealing'. The law officers advised that the officer should thereafter be delivered into the hands of a civil magistrate to be punished 'according to law'. But that was *in addition to* the military punishment that had already been inflicted; there is no suggestion that the Court-Martial that had already been held was in any way wrongful or beyond power); Clode, *The Administration of Justice under Military and Martial Law* (2nd ed, 1874) p 100; *Mutiny Act 1833*, 3 and 4 Will c 5, s 9; *Mutiny Act 1847*, 10 and 11 Vict c 12, s 28.

61 44 and 45 Vict c 58, extracted in *Re Tracey* at 560 and described by Brennan and Toohey JJ (at 561) as "clearly the precursor" of ss 61 and 63 of the DFDA. That Act was a re-enactment, with amendments, of the *Army Discipline and Regulation Act 1879* (42 and 43 Vict c 33), s 41 of which provided that any offence punishable by the ordinary law is punishable as an offence against military law (if not punished in the exercise of civilian jurisdiction).

62 23 and 24 Vict c 123, re-enacted with some revision as the *Naval Discipline Act 1866*, 29 and 30 Vict c 109. The Plaintiff wrongly suggests (PWS [30]) that jurisdiction to try offences under the ordinary criminal law of England was "strictly limited to those places closely connected to the navy". He overlooks the text at the end of s 39 of the ND Act, which includes a conferral of jurisdiction over "Miscellaneous Offences" committed at "any place on shore" (which included offences with no particular connection to the navy or a naval place): see, eg, ss 23 and 24.

63 *Defences and Discipline Act 1890* (Vic), *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); *Naval Discipline Act 1884* (SA).

64 *Re Tracey* at 543 (Mason CJ, Wilson and Dawson JJ). See also *White* at [52] (Gummow, Hayne and Crennan JJ), identifying the "decisive consideration" as the historical existence of military and naval justice systems at the time of federation, being a system that proceeded in part "by reference to particular acts which would constitute offences under generally applicable laws".

65 With the exception of the most heinous offences of treason, murder, manslaughter and rape committed in the United Kingdom: see, eg, s 40(a) of the *Army Act*.

66 For example, under s 76 of the *Mutiny Act 1872*, 35 Vict c 3 (which was cited by Brennan and Toohey JJ in *Re Tracey* at 559), it was made clear that nothing in that Act excluded civilian jurisdiction for any felony, misdemeanour or other crime. But the civilian jurisdiction thereby

to confirm the existence of a substantial overlapping, co-ordinated military jurisdiction for conduct amounting to an offence under the ordinary criminal law, which applied even when an offence had no connection to the military other than that it was committed by members of the armed forces. That overlapping jurisdiction was correctly identified by Mason CJ, Wilson and Dawson JJ in *Re Tracey* (whose historical analysis is to be preferred to that of Brennan and Toohey JJ). As their Honours emphasised, it was significant that these provisions "were already operative in this country when s 51(vi) of the Constitution was drafted".[67]

26. The Plaintiff fundamentally misstates the application of the military disciplinary regime prior to Federation. It is simply not true that this regime made no provision for the trial of ordinary criminal offences in peacetime.[68] To the contrary, in Queensland, Western Australia and Tasmania, the permanent forces were at all times subject to the provisions of the *Army Act* and the *ND Act*.[69] In New South Wales and South Australia, the imperial disciplinary provisions applied to every member of the forces "during his term of service and until such service be legally dispensed with".[70] The Victorian legislation similarly applied from the time a person was engaged and assembled to service in the forces, not only while on "active duty".[71] Thus, at the time of Federation, each of the colonies had

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preserved was not exclusive. Section 1 of the *Mutiny Act 1872* authorised the King to make Articles of War, which contained (in s 81: see Clode, *The Administration of Justice under Military and Martial Law* (2nd ed, 1874), pp 274-275) a catch-all to the effect that "[a]ny soldier ... who shall commit any other offence of a felonious or fraudulent nature ... may, on conviction thereof before a ... court-martial, be sentenced to such punishments, other than death or penal servitude, as the court may award".

67 *Re Tracey* at 542 (Mason CJ, Wilson and Dawson JJ), cf 563 (Brennan and Toohey JJ). See also *Solorio v United States* 483 US 435 (1987) at 446.

68 Cf PWS [31], see also PWS [33].

69 Under the *Defence Act 1884* (Qld) s 26(3), members of the permanent force were deemed to be called out for active service for the purposes of discipline. See also ss 60 and 61, applying the *Army Act* and the *ND Act* during active service (and at some other times). The same deeming provision applied in Tasmania under s 28(3) of the *Defence Act 1885* (Tas) and see s 40 of the *Defence Forces Act 1894* (WA), applying the *Army Act* "always" to the Permanent Force.

70 *Military and Naval Forces Regulation Act 1871* (NSW) s 5 (see also ss 3 and 4, making clear that such term is not equated to active service or engagement in an operation, but to the point of enlistment until discharge, dismissal, removal or resignation); *Defences Act 1895* (SA), ss 23, 36. Cf s 13 of the *Naval Discipline Act 1884* (SA), which applied enactments in force for the discipline of the Royal Navy to all members of the Naval Brigade "from the time of his entering upon active service until his services shall be legally dispensed with", it being plain that members could be on "active service" outside periods during which they were summoned by the Governor: ss 6, 10-11.

71 Cf PWS [31]; see *Defences and Discipline Act 1890* (Vic), ss 4, 5, 19, applying from the time of persons assembling to serve in the forces "until their services shall be legally dispensed with".

laws in force whereby service offences included ordinary crimes committed in peacetime by members of the military, and military jurisdiction was available solely on the basis of the service membership of the offender.

27. Nothing said during the Convention Debates suggests any intention to change the existing practice concerning service tribunals. Indeed, Mr O'Connor referred to courts-martial and said that "Parliament would have abundant power to decide how these matters were to be conducted".[72] Having noted that passage, Gleeson CJ observed in *White*:[73]

> Not only is there "testimony to the absence of any consciousness on the part of the delegates that they were leaving the naval and military forces of the Commonwealth without authority to maintain or enforce naval and military discipline in the traditional manner", but, rather, it is clear that, as would be expected, the delegates were well aware of the role and functions of service tribunals ...

28. The legislation referred to above confirms the accuracy of Mason CJ, Wilson and Dawson JJ's statement in *Re Tracey* that "as a matter of history ... it has commonly been considered appropriate for the proper discipline of a defence force to subject its members to penalties under service law for the commission of offences punishable under civil law even where the only connexion between the offences and the defence force is the service membership of the offender".[74] The history demonstrates that, had the Plaintiff's alleged offence been committed in England in the 1880s or 1890s, he would have been liable to court martial. His submission that "military jurisdiction was never exercised solely because of the status of the member" is incorrect (PWS [35]).[75]

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72 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 10 March 1898, p 2259.

73 *White* at 583 [8] (Gleeson CJ), noting that the Debates went beyond the observation of Brennan and Toohey JJ in *Re Tracey* at 572 that the silence in the Convention Debates is "testimony to the absence of any consciousness on the part of the delegates that they were leaving the naval and military forces of the Commonwealth without authority to maintain or enforce naval and military discipline in the traditional manner"; see also *White* at [237] (Callinan J).

74 *Re Tracey* at 543 (emphasis added); *Re Aird* at [4] (Gleeson CJ); *White* at [4] (Gleeson CJ).

75 The supposed "official policy" of the War Office on which the Plaintiff relies (PWS [29]) cannot control any question of the scope of jurisdiction under the applicable legislation. In any event, the "policy" is overstated by the Plaintiff. The War Office's 1899 *Manual of Military Law* refers (at p 107) to s 41 of the Army Act giving military courts "complete jurisdiction over soldiers" and to the qualified nature of the exceptions for the most serious offences specified in s 41(a), outside which "a military court can try all civil offences of a soldier wherever committed". The *Manual* (at p 108) thereafter states the policy in terms of expediency, not jurisdiction, and recognised it was subject to many qualifications including "considerations arising out of the importance of maintaining military discipline".

No satisfactory test to identify offences with a service connection

29. A further factor that points strongly against treating the existence of a "service connection" as controlling the question of sufficiency of connection with s 51(vi) is that it is impossible to draw a clear and satisfactory line between offences which have such a connection and those which do not.[76] That was an important reason why the Supreme Court of the United States abandoned the "service connection" test in *Solorio v United States*.[77] As Gleeson CJ pointed out in *White*:[78]

> If, as appears to be accepted generally, a given offence, such as theft from a comrade, may have, in a military context, an aspect more serious than the same conduct would have in a civilian context, there appears to be no foundation for the proposition that tradition attempted to distinguish, in terms of procedures or punishment, between the service-related aspects and the general community aspects of such conduct.

Relevantly to this case, Gleeson CJ gave as another example of an offence that would be disciplinary in "most circumstances" a "sexual offence against another defence member".[79]

30. A striking example of the overlap between offences central to military discipline and those that are also offences under the general law is provided by sedition, which was one of the offences punishable by court martial under the first *Mutiny Act 1688*.[80] Although Brennan and Toohey JJ in *Re Tracey* described this offence (along with mutiny and desertion) as "clearly military offences", sedition is in fact a common law offence without any peculiarly military character, for any member of society is capable of conduct or speech inciting disaffection towards the state.[81] Yet, despite the absence of any peculiarly military aspect to the offence of sedition, and notwithstanding the availability

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76 *Re Tracey* at 544 (Mason CJ, Wilson and Dawson JJ), see also at 568 (Brennan and Toohey JJ) citing G Davis, *A Treatise on the Military Law of the United States* (3rd rev ed, 1915) p 437; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 481 (Willams J); *White* at [19]-[21], [24] (Gleeson CJ), [68]-[70] (Gummow, Hayne and Crennan JJ); *R v Moriarty* [2015] 3 SCR 485 at [54], [55]; *R v Stillman* (2019) 436 DLR (4th) 193 at [99].

77 483 US 435 (1987) at 449-450.

78 *White* at [19]. To similar effect see [73] (Gummow, Hayne and Crennan JJ).

79 *White* at [21].

80 1 Will & Mary c 5, expiring November 1689: see *Re Tracey* at 558 (Brennan and Toohey JJ). See also the examples of mutiny and assault on an officer given by Gleeson CJ in *White* at [19].

81 See eg *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; LW Maher, "The Use and Abuse of Sedition" (1992) 14 *Sydney Law Review* 287; M Head, "Sedition—Is the Star Chamber Dead?" (1979) 3 *Criminal Law Journal* 89.

of the ordinary civilian courts to try such an offence, from the 17th century onwards the English Parliament took the view that there is a particular danger to society if a soldier commits sedition, and that it should be punishable by court martial. That example is fatal to the Plaintiff's argument that the history of military jurisdiction shows that it is not available whenever resort to the civilian courts is possible.[82]

31. In summary, any failure by a member of the defence force to comply with the ordinary criminal law of itself undermines the discipline of the defence force, because "there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army".[83] In particular, it is "central to a disciplined defence force that its members are not persons who engage in uncontrolled violence".[84] A law providing that service tribunals have (non-exclusive[85]) jurisdiction over all offences committed by members of the defence forces is reasonably capable of being considered as appropriate and adapted to the regulation of the defence forces and the good order and discipline of defence members. That conclusion is strongly supported by the fact that the same judgment as has been made by the Commonwealth Parliament has also been made in the United States and in Canada.[86] For those reasons, s 61(3) is wholly valid, and there is no basis upon which prohibition can issue to restrain the First Defendant from hearing and determining the offence with which the Plaintiff is charged.

B. Alternatively, the "service connection" test is satisfied in this case

32. While different approaches have been taken in the past by different members of this Court, at a minimum, the Court has consistently held that s 51(vi) supports s 61(3) of the DFDA at least to the extent that the offence in question can reasonably be regarded as

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82 Eg PWS [13], [43]-[44].

83 *Grant v Gould* (1792) 2 H Bl 69 at 99-100; 126 ER 434 at 450, quoted in *Re Tracey* at 557 (Brennan and Toohey JJ).

84 *Re Aird* at [42] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed).

85 Contrary to the regime considered in *Re Tracey*, the DFDA does not now purport to ouster the jurisdiction of the civilian criminal courts (save with respect to the confined category of "ancillary offences" against ss 11.1, 11.4 or 11.5 of the *Criminal Code Act 1995* (Cth) or s 6 of the *Crimes Act 1914* (Cth), in relation to a service offence under the DFDA). That ouster of jurisdiction does not apply for ancillary offences to service offences under s 61. The permission requirement for certain matters to be prosecuted under the DFDA, which was discussed in *Re Tracey* at 541 (Mason, Wilson and Dawson JJ), remains in s 63 in substantially similar form, although the relevant permission must now be obtained from the Commonwealth Director of Public Prosecutions.

86 See *Solorio v United States* 483 US 435 (1987); *R v Moriaty* [2015] 3 SCR 485; *R v Stillman* (2019) 436 DLR (4th) 193.

substantially serving the purpose of maintaining or enforcing service discipline.[87] That test is satisfied in this case. Indeed, in the case with the most analogous facts (being *White*, which involved allegations of assaults on other members of the defence forces, while the people involved where not in uniform and not on duty), the existence of such a connection was conceded.[88] Accordingly, even if s 61(3) needs to be read down, it is valid in its operation with respect to the Plaintiff.[89]

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33. The Plaintiff assumes that a list of specific factors (the *"Relford* factors") operate as a "check-list" to determine the satisfaction of the "service connection".[90] That assumption is erroneous. The existence of such a connection is, at most, "evidence of but not definitive of what is necessary to maintain discipline and morale in the armed forces".[91] Thus, in *Re Aird,* McHugh J (with whom Gleeson CJ, Gummow and Hayne JJ agreed) upheld the connection to s 51(vi) despite the *Relford* factors "point[ing] strongly against there being a service connection".[92]

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34. On the facts of this case, the Plaintiff is quite wrong to assert that "the only relationship the alleged offence bears to the plaintiff's military service is the fact he happens to be a defence member" (PWS [48]). To the contrary, the following matters establish the existence of a "service connection".

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35. First, it is central to a disciplined defence force that its members are not persons who "engage in uncontrolled violence".[93] Control over the use of violence is essential "to

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87 That being the test adopted by Brennan and Toohey JJ in *Re Tracey* at 570; *Re Nolan* at 486; *Re Tyler* at 30. In each case, their Honours formed part of a majority, in which the reasoning of the other members of the majority adopted a wider test, meaning that their Honour's reasoning reflected the widest principle for which the case is authority: *Williams* at [30] (Tracey and Hiley JJ; Brereton J agreeing at [99]). As to the appropriateness of treating the case as authority at least for the reasoning adopted in the narrowest majority judgment, see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [34] (Gleeson CJ, Gummow and Hayne JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 186-187 (Wilson J).

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88 See *White* at [3] (Gleeson CJ).

89 *Re Nolan* at 485 (Brennan and Toohey JJ); *Re Aird* at [41] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed).

90 PWS [48] and fn 42, referring to *Relford v US Disciplinary Commandant* 401 US 355 (1971). Although the Plaintiff acknowledges that these factors are "non exhaustive", that acknowledgement is not reflected in his substantive argument.

91 *Re Aird* at [45] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed), citing *Re Tracey* at 568-569 (Brennan and Toohey JJ); *White* at [21] (Gleeson CJ).

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92 *Re Aird* at [45].

93 *Re Aird* at [42] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed); *White* at [74]

provide the proper protection for civilians from service personnel who bear, or have access to, arms".[94] Accordingly, the connection between military discipline and the offence of assault is self-evident. As noted in a directive from the Chief of Army:[95]

> Army exists for the lawful and disciplined use, or threat of use, of violence to protect Australia ... The ill-disciplined use of violence on operations is a war crime and at home is a criminal offence. Australia empowers its Army members with the skills, knowledge and weaponry to apply lethal force. If Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined.

36. As mentioned above, the circumstances of the alleged assault at issue in this proceeding involved an allegation of loss of control that resulted in the use of uncontrolled, serious, and repeated violence (choking, on the second instance to such an extent the Complainant was incapable of screaming or breathing).[96] The defence forces have a particular interest in ensuring that a member whom has been trained in the use of lethal force is amenable to disciplinary investigation and control if allegations are made against him which (if proved) would disclose a risk that he may lose his temper and lapse into violence.[97]

37. Second, the victim of the alleged offence was, at the time, also a member of the ADF.[98] Offences by one member of the ADF against another detract from the "essential espirit de corps, mutual respect and trust in comrades" essential to a disciplined force, and so is particularly "reprehensible".[99] That is so whatever the offence, but it is especially so when one soldier strikes another.[100] While the effect on morale might be heightened if

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(Gummow, Hayne and Crennan JJ).

94 *White* at [152] (Kirby J). Moreover, the "objects of disciplinary proceedings conventionally include protecting the public, maintaining proper standards of professional conduct by members of the relevant profession (here, the ADF), and protecting the profession's reputation": *Williams* at [47] (Tracey and Hiley JJ, Brereton J agreeing at [99]) (emphasis added).

95 SOAF, Annexure G (CA Directive 28/16), [2] (CB 138).

96 Bruising was also said to have resulted, along with soreness for approximately one week: SOAF, Annexure A, [18], [19], [26] (CB 55–57); Annexure B (CB 62); Annexure C, [11]-[13], [15] (CB 64–65).

97 As part of his service, the Plaintiff has received training with firearms and in hand-to-hand combat: SOAF [3] (CB 47–48). That some of that training post-dates the alleged offence does not alter the ADF's lawful disciplinary interest in a prosecution arising from a loss of control resulting in violence on the part of the Plaintiff.

98 SOAF, [4] (CB 48).

99 *White* at [4] (Gleeson CJ), quoting *R v Généreux* [1992] 1 SCR 259 at 294 (Lamer CJ).

100 *White* at [4], [19], and [21] (Gleeson CJ), [74] (Gummow, Hayne and Crennan JJ); *Re Aird* at [42] (McHugh J, Gleeson CJ, Gummow and Hayne JJ agreeing).

such an assault occurs on base, or upon a member of the same unit,[101] the absence of such factors does not detract from the basal adverse effect on service discipline of one member of the defence force assaulting another.

38. Third, the alleged offence involved an act of violence by a male member of the ADF on a female with whom he had been in an intimate relationship.[102] The Complainant's statement evinces the bearing of that past relationship on the events on the night of the alleged assault.[103] This Court has recognised the legitimate disciplinary interest of the ADF in allegations of sexual offences by service members. In *Re Aird*,[104] Gleeson CJ described the alleged offence of rape (not against a member of the services) as "conduct [that] involves serious violence and disregard for the dignity of the victim, and clearly has the capacity to affect discipline, morale, and the capability of the [ADF] to carry out its assignments". While in relation to a more serious offence, the Chief Justice's description of the conduct and its consequences applies to the present allegation.

39. The ADF has a substantial interest in combatting sexual violence. For example, by the time the Complainant reported the alleged offence, the Chief of Army had directed that such conduct "is fundamentally against Army's values" and that "perpetrators of [family and domestic violence] are fundamentally at odds with the meaning and profession of soldiering".[105] That direction reflects comments of McHugh J, upholding a prosecution under s 61(3) for rape, that: "it need hardly be said that other members of the Defence Force will be reluctant to serve with personnel who are guilty of conduct that in the Australian Capital Territory amounts to rape or sexual assault".[106] That may be so out of rejection of the conduct, fear for personal safety, or both.[107] The same is likewise true of

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101 For example, as was the case in *Williams* [2016] ADFAT 3.

102 SOAF, [6], [7] (CB 48); Annexure A, [6] (CB 53); Annexure C, [2], [4], [5], [7] (CB 64).

103 SOAF, Annexure A, [7], [9], [13], [27] (CB 53, 54, 57).

104 (2004) 220 CLR 308 at [5], see also McHugh J at [42]; *White* at [4], [21] (Gleeson CJ).

105 SOAF, Annexure G, [2]-[3] (CB 138). See also at [17] (CB 142). A guide to commanders and managers for responding to family and domestic violence was also issued in June 2016: SOAF, Annexure F (CB 113), which notes the ADF has a zero tolerance policy towards family and domestic violence (p 4) (CB 116), which it defines as "an abuse of power by a person over a partner, ex-partner family or household member" (p 5) (CB 117). See also "Defence Family and Domestic Violence Strategy 2017-2022": SOAF, Annexure H, p 2 (CB 166).

106 *Re Aird* at [42] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed).

107 *Re Aird* at [42] (McHugh J, with whom Gleeson CJ, Gummow and Hayne JJ agreed), cf [167] (Callinan and Heydon JJ, dissenting), quoted in PWS [50].

assault-based offences *simpliciter*.[108] Further, the necessity of the ADF being able to take a strong disciplinary stance on conduct of the kind alleged is not limited to matters internal to the forces. As the Chief of Army has noted, family and domestic violence is "detrimental to the bonds between Army, our personnel, and the broader community".[109]

40. Additional factors: The following matters emphasise the fallacy of the Plaintiff's submission that the alleged offending could have no bearing on the performance of military duties or that its prosecution in a service tribunal would have adverse effects on morale (PWS [48]-[51]). The Complainant reported the incident through ADF channels, some of which she found unsatisfactory.[110] She was concerned about reporting the incident because of the consequences it might have on the Plaintiff's current employment, or his future prospects within the ADF.[111] A number of potential witnesses who either attended the birthday party or were contacted by the Complainant in the aftermath of the alleged assault were members of the ADF, as is unsurprising given the party was thrown by a member of the ADF.[112] Those persons might be required to give evidence against other members of the forces. Taken together with the main factors identified above, the "service connection" test is amply satisfied in this case, with the result that prohibition should be refused.

PART VI ESTIMATED HOURS

41. It is estimated that 2.5 hours will be required for the presentation of the oral argument of the second respondent.

Dated: 15 May 2020

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108 *White* at [4] (Gleeson CJ) and [74] (Gummow, Hayne and Crennan JJ).

109 SOAF, Annexure G, [4] (CB 138). Indeed, the Plaintiff appears to accept (at PWS [51]) that "public trust and confidence in the ADF" is relevant to ascertaining whether a prosecution is valid under the "service connection" test.

110 See *Williams* at [40]; SOAF [12]-[14] (CB 48–49), Annexure A, [28] (CB 58).

111 SOAF, Annexure A, [19], [30] (CB 56, 58).

112 SOAF, Annexure A, [12], [24] (CB 54, 57). By analogy, see *Williams* at [39] (Tracey and Hiley JJ, Brereton J agreeing).

ANNEXURE A: PROVISIONS REFERRED TO IN SUBMISSIONS

	Constitution or statute	Version	Provision
1.	*Commonwealth Constitution*	Current	s 51(vi)
2.	*Acts Interpretation Act 1901* (Cth)	Current	s 15A
3.	*Army Act 1881* (44 and 45 Vict c 58)	As made	s 40 s 41
4.	*Army Discipline and Regulation Act 1879* (42 and 43 Vict c 33)	As made	s 41
5.	*Crimes Act 1900 (ACT)*	(Republication No 93) As at 22 August 2015	s 21 s 24
6.	*Crimes Act 1914* (Cth)	Current	s 6
7.	*Criminal Code Act 1995* (Cth)	Current	s 11.1 s 11.4 s 11.5
8.	*Defence Act 1884* (Qld)	As made	s 26 s 60 s 61
9.	*Defence Act 1885* (Tas)	As made	s 28
10.	*Defence Forces Act 1894* (WA)	As made	s 40
11.	*Defences Act 1895* (SA)	As made	s 23 s 36
12.	*Defences and Discipline Act 1890* (Vic)	As made	s 4 s 5 s 19
13.	*Defence Force Discipline Act 1982 (Cth)*	(Compilation 29) As at 1 July 2015	s 3 s 61 s 63 s 190

	Constitution or statute	Version	Provision
14.	*Judiciary Act 1903* (Cth)	Current	s 68 ss 72-77 s 78B
15.	*Military and Naval Forces Regulation Act 1871* (NSW)	As made	s 3 s 4 s 5
16.	*Mutiny Act 1688* (1 Will & Mary c 5)	As made	
17.	*Mutiny Act 1833* (3 and 4 Will c 5)	As made	s 9
18.	*Mutiny Act 1847* (10 and 11 Vict c 12)	As made	s 28
19.	*Mutiny Act 1872* (35 Vict c 3)	As made	s 1
20.	*Naval Discipline Act 1860* (23 and 24 Vict c 123)	As made	s 23 s 24 s 39
21.	*Naval Discipline Act 1866* (29 and 30 Vict c 109)	As made	
22.	*Naval Discipline Act 1884* (SA)	As made	s 6 s 10 s 11 s 13