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

COMMONWEALTH'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 61(3) of the *Defence Force Discipline Act 1982* is wholly valid

2. The defence power confers power to enact laws regulating military discipline, whether in peacetime or wartime: CS[9]. The correct test of validity is whether a law creating a service offence is "reasonably capable of being considered appropriate and adapted to the regulation of the defence forces and the good order and discipline of the defence members": CS[12], PS[36]; cf PS[39], [40], [43]; ***Re Aird**, ex parte Alpert* (2004) 220 CLR 308 at [66] (Tab 34); *Attorney-General (SA) v Adelaide City* (2013) 249 CLR 1 at [57] (Tab 26); *Marcus Clarke & Co v Commonwealth* (1952) 87 CLR 177, 220.8.

3. It is open to Parliament to consider that the proper administration of the defence force requires the observance of its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals: *Re Aird* at [65]-[67] (Tab 34). Maintaining discipline is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances. That judgment, which is embodied in s 61(3), has also been made in the United Kingdom, New Zealand, the United States of America and Canada: *Armed Forces Act 2006* (UK) s 42(1); *Armed Forces Discipline Act 1971* (NZ) s 74(1); ***Solorio** v US* 483 US 435 (Tab 46); *R v **Stillman*** (2019) 436 DLR (4th) 193 (Tab 44).

4. There is no authority against the above submission: *Re Aird* (Tab 34), [35], [88], [157].

5. **Irrelevance of the availability of civilian courts (CS[19]-[21]):** The Plaintiff's contention (PS[43]-[44]) that where civilian courts are reasonably and conveniently available, the defence power cannot permit conferral of jurisdiction on a disciplinary tribunal, would produce absurd results and cannot be reconciled with existing authority: see, eg, *Lane v Morrison* (2009) 239 CLR 230 (Tab 30) at [63], [117].

6. **History (CS[22]-[28]):** The Plaintiff's historical analysis is incorrect in material respects: cf PS[25], [26], [31], [33], [42]. Expansive concurrent civil and military jurisdiction is of long standing: eg *Mutiny Act 1718* (Supp. Tab 12). Under the Mutiny Acts, that concurrent jurisdiction waxed and waned, contracting in 1749, and expanding in 1833 and 1847. While under the Mutiny Acts after 1718 ordinary civil jurisdiction

had priority over military jurisdiction, that priority existed only where civil authorities sought to exercise their jurisdiction (as opposed to whenever civil courts were available).

7. Concurrent military jurisdiction was extended to all offences against the ordinary criminal law by the *Naval Discipline Act 1860* (Tab 23), ss 39, 23-38 (contra PS[30], Reply [8]); *Naval Discipline Act 1866* (Tab 24), ss 43, 45; *Army Discipline and Regulation Act* 1879 and *Army Act 1881* (Tab 15), s 41.

8. The historical analysis in ***Re Tracey;*** *ex parte Ryan* (1989) 166 CLR 518 (Tab 36) of Mason CJ, Wilson and Dawson JJ (at 540-543) should be preferred to that of Brennan and Toohey JJ (at 554-563). Amongst other things, Brennan and Toohey JJ's analysis wrongly equates the priority of civilian jurisdiction with the availability of that jurisdiction, gives insufficient weight to the reforms made by the *Naval Discipline Act 1860* and the *Army Act 1881*, and states the law as it would have been if s 41(a) of the *Army Act 1881* had qualified s 41(5) (which it expressly did not do).

9. To the extent that the Plaintiff seeks to re-characterise his historical submissions as concerning the policy by reference to which military jurisdiction was exercised prior to federation, rather than to the existence of power to pick up offences against the ordinary criminal law as service offences, his submissions give insufficient weight to the difference between the existence of jurisdiction and the circumstances in which it is exercised: *Stillman* (Tab 44), [100]-[103]. The submissions provide no basis for concluding that s 51(vi) does not empower the Commonwealth Parliament to enact legislation of the same kind as existed in the United Kingdom and most Australian colonies prior to federation (Reply [6], [9]). In particular, the Plaintiff's submissions:

   9.1. discount that the policy on which he relies contemplated a large variety of circumstances in which it would expedient to exercise courts martial jurisdiction, including considerations arising from the importance of maintaining military discipline: War Office *Manual of Military Law* (1899) (Tab 52), p 107-8.

   9.2. in any event, do not explain how a policy as to the exercise of concurrent jurisdiction could have the result that the Commonwealth Parliament lacked power to enact legislation to confer that jurisdiction in the same terms as already applied in Australia at the time of federation, and as was discussed during the Convention Debates: *White* (Tab 39), [4], [7]-[9]; *Re Tracey* (Tab 36), 542-543.

10. Accepting the Plaintiff's submission would result in civilian prosecuting authorities becoming responsible for decisions potentially affecting the conduct of the defence forces, notwithstanding the differing purposes of civilian and military prosecutions: Director of Military Prosecutions' *Prosecution Policy* (SOAF Annexure E, CB 83 [1.1]).

Valid application of s 61(3) to the Plaintiff under the "service connection" test

11. The so-called "*Relford* factors" relied on by the Plaintiff have been explicitly rejected. A service connection can exist even where the *Relford* factors would "point strongly against there being a service connection": *Re Aird* (Tab 34), [45]; CS[33].

12. Contra Reply [11], fn 29, when assessing whether a prosecution has a "service connection", it is necessary to have regard to the "circumstances in which [the alleged offence] is committed". The complainant's statement (SOAF Annexure A, CB 52) is properly considered in assessing any "service connection".

13. There are four factors which (independently and cumulatively) confirm that, even if s 61(3) needs to be read down, it is valid in its application to the Plaintiff:

    13.1. The alleged offence involved the uncontrolled use of violence. The ADF equips soldiers with skills that make them particularly dangerous to fellow citizens. There is a clear "service connection" where alleged offences relate to violence and protecting the public: *Williams* (Tab 47), [47]; *Re Aird* (Tab 34), [42]; CS[35]-[36].

    13.2. The alleged offence was committed against another member of the forces: *White* (Tab 39), [4]; CS[37].

    13.3. The circumstances of the offence involve a social event attended by a "number of Defence personnel and civilian friends", and contact between the complainant and Defence personnel both shortly before and shortly after the alleged assault: CS[40].

    13.4. The Plaintiff and the complainant had a previous intimate relationship. The ADF has a clear and substantial interest, as a matter of discipline and morale, in seeking to eliminate the use of violence in intimate and interpersonal relationships: Chief of Army's *Directive 28/16* (CB 138); CS[38]-[39].

Dated: 30 June 2020

Stephen Donaghue QC **Joanna Davidson** **Daniel Ryan**
Solicitor-General of the Commonwealth