HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

RE COLONEL STEVEN AIRD & ORS — RESPONDENTS

EX PARTE STEWART WAYNE ALPERT — APPLICANT/PROSECUTOR

Re Colonel Aird; Ex parte Alpert [2004] HCA 44
9 September 2004
B60/2003

ORDER

1. *The question asked in the case stated:*

   "Insofar as s 9 of the Defence Force Discipline Act *1982 (Cth) ('DFDA') purports to apply the provisions of that Act, including s 61 DFDA, so as to permit the trial by general court martial under that Act of the Prosecutor in respect of the alleged offence … is it beyond the legislative power of the Commonwealth and, to that extent, invalid?"*

   is answered "No".

2. *Costs in the case are to be costs in the action in this Court.*

Representation:

J A Logan SC with P E Nolan for the applicant/prosecutor (instructed by Beven Bowe & Associates)

No appearance for the first and second respondents

D M J Bennett QC, Solicitor-General of the Commonwealth with G B Hevey, S B Lloyd and B D O'Donnell for the third respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Colonel Aird; Ex parte Alpert

Constitutional law (Cth) – Defence – Offences by service members – Service offences – Offence of sexual intercourse without consent – Offence allegedly committed overseas – Service member on leave – Whether beyond legislative power to make conduct of a service member allegedly committed while overseas on leave a service offence triable before an Australian service tribunal.

Defence – Military forces – Discipline – Service member on leave – Offence of sexual intercourse without consent – Offence alleged to have occurred in Thailand – Whether offence may be prosecuted before Australian service tribunal in Australia – Whether beyond constitutional power so to provide – Whether service connection sufficient within Constitution to found valid conferral of power upon tribunal.

Constitution, s 51(vi), Ch III.
Defence Force Discipline Act 1982 (Cth), ss 9, 61.

1 GLEESON CJ. Private Alpert, the prosecutor, is a member of The Royal Australian Regiment. In 2001, he was deployed to Malaysia, where his unit was serving at the Royal Malaysian Air Force Base at Butterworth. It is alleged that, while on recreation leave in Thailand, he raped a young woman. The complainant, a citizen of the United Kingdom, resides in England. She complained to the military authorities, who intend to try the prosecutor by general court martial in Australia under the *Defence Force Discipline Act* 1982 (Cth) ("the Act"). The issue before the Court concerns the validity of provisions of the Act which make the alleged conduct of the prosecutor an offence against Australian law, and, specifically, a "service offence". The specific problem is whether it is beyond the power of the Australian Parliament to make it an offence, punishable by a military tribunal, for a member of the Regular Army, who is on overseas service, but who is on recreation leave at the time, to engage in an act of rape.

2 The power relied upon by the Commonwealth is the defence power, conferred by s 51(vi) of the Constitution. That is, relevantly, a power to make laws for the peace, order, and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States[1]. The argument concerns the limits of the defence power insofar as it supports the creation of a code of military discipline applicable to members of the Defence Force ("defence members") serving outside Australia.

3 Sections 9 and 61 of the Act are set out in the reasons of McHugh J. The prosecutor is a defence member within the meaning of s 9. Under that section, the provisions of the Act apply to the prosecutor outside Australia. One such provision is s 61, which provides that a defence member is guilty of an offence if he or she does, outside the Jervis Bay Territory, an act which, if done in the Jervis Bay Territory, would be a Territory offence. A "Territory offence" is defined (by s 3) to mean an offence punishable under the Crimes Act of the Australian Capital Territory in its application to the Jervis Bay Territory. Rape is such an offence. As was pointed out in *Re Tracey; Ex parte Ryan*[2], this is simply a drafting technique by which the Act, in creating service offences by reference to the content of Australian law, selects one out of the multiplicity of laws potentially available in a federation. It is a form of convenient legislative shorthand which removes the necessity to repeat, in the Act, all the provisions of an Australian criminal statute. The outcome of the present case would be no different if the Act had provided in terms that a defence member is guilty of an offence if the defence member has sexual intercourse with another person without that other person's consent. Of course, the Act would then have had to

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1 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540.

2 (1989) 166 CLR 518 at 545.

specify, in a similar manner, all the other offences as well. The drafting technique employed shortens the legislation, but it makes no difference to the legal consequences.

4 It was also pointed out in *Re Tracey*[3] that, in the United States, Canada and New Zealand, there is comparable legislation which treats civil offences committed by members of the defence forces as service offences, and that "both as a matter of history and of contemporary practice, 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". We are here concerned with a law which makes it a service offence for a defence member to do, outside Australia, an act (rape) which, if done in Australia, would constitute a civil offence. There is no question of any potential conflict between the jurisdiction of a military tribunal and an Australian civil court, or of any denial to the prosecutor of substantive rights or procedural safeguards that would apply if he were prosecuted in an Australian civil court. Apart from the operation of ss 9 and 61 of the Act, the alleged conduct of the prosecutor would not be an offence against Australian law because it occurred in Thailand, and he is not liable to prosecution in an Australian civil court. The question is whether the Parliament has the power to make the conduct a service offence triable before an Australian military tribunal. No doubt the alleged conduct would be a civil offence in Thailand, but no action has been taken against the prosecutor by the Thai authorities, perhaps because the complaint was made, not to them, but to the prosecutor's military superiors.

5 Historically, it was not unusual for acts of rape by members of armed forces on overseas service to be treated as service offences covered by military codes[4]. That the Australian Parliament should legislate with regard to such conduct by a soldier on overseas deployment is hardly novel or surprising. The conduct 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 Defence Force to carry out its assignments. To adopt the language of Lamer CJ

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3 (1989) 166 CLR 518 at 543.

4 eg *Ex Ruffo Leges Militares* discussed in Brand, *Roman Military Law* (1968) at 130ff. Rape appears as a military crime in the Articles of War of Richard II (1385), reproduced in the Appendix to Winthrop, *Military Law and Precedents*, 2nd ed (1920) at [1412], in Henry V's Articles of War for soldiers in France, and in Henry VIII's Articles of 1544: see Prichard, "The Army Act and Murder Abroad", (1954) *Cambridge Law Journal* 232. Rape also appears in James II's General Articles of War of 1688, reproduced in the Appendix to Winthrop, above at [1439].

in *R v Généreux*[5], it is a matter that pertains directly to the discipline, efficiency and morale of the military.

6 As was argued by the Commonwealth, while defence members serving overseas must obey local laws, the imposition of minimum standards of behaviour by reference to Australian law is a legitimate means of preserving discipline, bearing in mind that Australian forces might be located in places where there is no government, or where there is a hostile government, or where peacekeeping is necessary. The relevant provisions of the Act apply generally, even in countries whose laws are similar to those of Australia, but Parliament's power under s 51(vi) is not circumscribed in a way that requires it to differentiate between localities. If it is accepted to be a proper concern of Parliament to require defence members, when serving overseas, to behave according to standards of conduct prescribed by Australian law, then there is power to impose such a requirement generally; it does not vary according to local circumstances and conditions in different places. The reasons in *Re Tracey* all acknowledge that the potential ambit of military discipline in the case of conduct of defence members on overseas service is wide[6].

7 Even apart from military discipline, it is not necessarily inconsistent with proper limits on constitutional power for the Parliament to legislate with respect to conduct of Australians overseas. The *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth) makes certain kinds of sexual misconduct committed outside Australia an offence against Australian law. That legislation was presumably enacted under the external affairs power, and is enforced in the civil courts. Even so, it is difficult to reconcile with the proposition that the application of ss 9 and 61 of the Act to the alleged conduct of the prosecutor is unconstitutional simply because the conduct occurred in a foreign country.

8 The argument for the prosecutor turned mainly upon the circumstance that he was on recreational leave in Thailand at the time of the alleged conduct. It was said that different considerations would apply if the events in question had occurred in Malaysia. The issue concerns the power of Parliament to legislate with respect to the conduct of a defence member while deployed overseas by making it a service offence for the defence member to commit rape. If the power to make laws with respect to the naval and military defence of the Commonwealth comprehends a power to make it a service offence to rape somebody while on overseas deployment, I am unable to accept that it does not extend to a power to make such conduct a service offence while the defence

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5 [1992] 1 SCR 259 at 293.

6 (1989) 166 CLR 518 at 544 per Mason CJ, Wilson and Dawson JJ, 570 per Brennan and Toohey JJ, 585 per Deane J, 601 per Gaudron J.

member is on leave. The power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code[7]. So much is agreed. It is for Parliament to decide whether such a code, in its application to soldiers on overseas service, should extend to conduct while on leave. The Act, in its application to the conduct in question in this case, is sufficiently connected with the requirements of military discipline for the legislative power to sustain it. It is for Parliament, within the limits of the power, to decide the manner of its exercise.

9 For the above reasons, the reasons given by McHugh J, and the additional reasons given by Gummow J, I agree that the question in the case stated should be answered "No" and the costs of the case should be costs in the action in this Court.

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7 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541.

10 McHUGH J. A Justice of the Court has stated a special case for the Full Court of this Court that asks:

> "Insofar as s 9 of the *Defence Force Discipline Act* 1982 ('DFDA') purports to apply the provisions of that Act, including s 61 DFDA, so as to permit the trial by general court martial under that Act of the Prosecutor in respect of the alleged offence, described in par 28(a) below, is it beyond the legislative power of the Commonwealth and, to that extent, invalid?"

11 The offence with which the prosecutor is charged is sexual intercourse without consent. The offence is alleged to have occurred in Thailand while the prosecutor, a soldier, was on recreation leave. In my opinion, the question should be answered, No.

The facts stated

12 The prosecutor is a soldier in the Regular Army and a member of D Company, 6th Battalion of The Royal Australian Regiment. In August 2001, along with other members of D Company, he was deployed to the Royal Malaysian Air Force base at Butterworth in Malaysia. The deployment ended on 10 November 2001. The deployment enabled members of D Company to have infantry training in Malaysia and to train with the Malaysian Armed Forces and other regional military forces. The deployed soldiers also had responsibility for securing Australian Defence Force assets including Royal Australian Air Force aircraft at the Butterworth base. A staff instruction known as Land Command Staff Instruction 1/00 governed the deployment.

13 Upon arrival in Malaysia in August 2001, the prosecutor and other members of D Company were briefed in respect of the Land Command Staff Instruction. Paragraph 59 of that document stated that:

> "Personnel serving in or with RCB[8] are subject to the DFDA."

14 On 22 September 2001, the prosecutor was granted stand down leave for the period 22 September 2001 to 30 September 2001 inclusive. Stand down leave was governed by par 53 of the Land Command Staff Instruction. That paragraph declared that, in the absence of express prior approval of the Officer Commanding, leave was required to be taken in the peninsula area of Malaysia or Thailand or Singapore. The prosecutor took his leave in Thailand. To do so, he was required to lodge a leave application with the unit's orderly room of D Company at the Butterworth air base. The application contained his leave

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8 An abbreviation for "Rifle Company Butterworth", the name given to the deployment.

destination, accommodation address and telephone number. These details were given so as to facilitate the immediate recall to duty from leave of the prosecutor if circumstances so required. If those details were to change while he was on leave, he was required to notify the unit's orderly room by telephone of the change.

15 After the prosecutor was granted leave, he went to Phuket in Thailand in the company of fellow soldiers. They were driven to the Thai border by RAAF bus. From the border, they proceeded by private transport to Phuket. The prosecutor entered Thailand from Malaysia on his personal, civilian Australian passport without using any form of military identification and without acting under any arrangement between the Australian and Thai governments. At no relevant time has the Commonwealth of Australia had a Status of Forces Agreement with the Kingdom of Thailand maintaining Australian jurisdiction over visiting Australian service personnel in September 2001 or thereafter. The prosecutor's visit was purely recreational. It had no military content of any nature. He paid for his own accommodation, meals and incidental expenses. He wore civilian clothes when he entered and while he remained in Thailand.

16 During the evening of 28 September 2001, the prosecutor, while in the company of about 20 fellow soldiers, met a woman at the Shark Bar at Patong Beach, Phuket. His fellow soldiers were also on leave. None of them were in uniform. The soldiers included officers and other ranks.

17 The woman alleges that the prosecutor raped her in the early hours of 29 September 2001. On 2 October 2001, she asked an Army officer for the prosecutor's full name and contact details. She told the officer she was "going to try and have him charged with rape". Subsequently, by letter dated 26 November 2001, addressed to the Commanding Officer of 6th Royal Australian Regiment at that unit's headquarters in Brisbane, she alleged that the prosecutor had raped her. She sought details as to the steps that she would need to take to press a charge of rape against him.

18 In February 2003, an officer who was a convening authority for the purposes of the DFDA[9] approved and signed a charge laid under s 61 of the DFDA. The charge alleged that, on or about 29 September 2001 at Phuket, the prosecutor engaged in non-consensual sexual intercourse with the woman and that the offence, if committed in the Jervis Bay Territory of Australia, would constitute an offence against s 54 of the *Crimes Act* 1900 (ACT) in its application to that Territory.

19 Section 9 of the DFDA provides:

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9 *Defence Force Discipline Act* 1982 (Cth), s 102.

"The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian."

20 Section 61 of the DFDA provided:

"(1) A person, being a defence member or a defence civilian, is guilty of an offence if:

...

(c) the person does or omits to do (whether in a public place or not) outside the Jervis Bay Territory an act or thing the doing or omission of which, if it took place (whether in a public place or not) in the Jervis Bay Territory, would be a Territory offence."

21 Section 3 of the DFDA defines "Territory offence" to mean inter alia:

"...

(b) an offence punishable under the Crimes Act 1900 of the Australian Capital Territory, in its application to the Jervis Bay Territory, as amended or affected by Ordinances in force in that Territory; ..."

22 Section 54(1) of the *Crimes Act* 1900 (ACT) makes it an offence for a person to engage "in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse". This offence applies in the Jervis Bay Territory[10].

23 Section 3 of the DFDA defines "service tribunal" to mean "a court martial, a Defence Force magistrate or a summary authority". It defines "service offence" to mean, inter alia, "an offence against this Act or the regulations". It defines "defence member" to include a member of the Regular Army.

24 Section 115 of the DFDA confers jurisdiction on a court martial to try any charge against a defence member, subject to conditions which are not relevant in the present case.

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10 *Jervis Bay Territory Acceptance Act* 1915 (Cth), s 4A.

The validity of s 61 of the DFDA

25 Section 51 of the Constitution authorised the making of the DFDA. It empowers the Parliament of the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to:

> "...
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> (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
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> ...
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> (xxix) external affairs;
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> ...
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> (xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;
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> ...
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> (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament ... or in the Government of the Commonwealth ... or in any department or officer of the Commonwealth".

26 Three other sections of the Constitution are also relevant to any discussion of the power of the federal Parliament to make laws with respect to the armed forces. Section 68 declares that "[t]he command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative". Section 114 declares that a "State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force". Section 119 declares that the "Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence".

27 The external affairs power (s 51(xxix)) authorises a law of the federal Parliament that makes it an offence to do an act in a country outside Australia[11]. That power authorises the extra-territorial operation that s 9 of the DFDA gives to s 61 of that Act. However, the Solicitor-General of the Commonwealth did not rely on the external affairs power to support the legislation. Probably, he

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11 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501.

thought that reliance on that power would raise the question whether, consistently with Ch III of the Constitution, s 115 of the DFDA could validly vest a court martial with jurisdiction to hear a charge dependent for its validity on the external affairs power. The Solicitor-General was content to rely on the defence power (s 51(vi)) to support the validity of the DFDA in its extra-territorial operation.

28 Unlike most powers conferred on the Parliament, the extent of the defence power rests on facts concerning Australia's relations with other countries[12] and its internal security[13]. In time of war, or when external or internal forces threaten the security of Australia, the power may have a range that extends far beyond its reach in a time of peace[14]. In time of war, the Parliament of the Commonwealth may make laws in respect of any subject, the regulation or control of which would "conduce to the successful prosecution of the war"[15]. Moreover, this extended operation of the defence power does not end with "the collapse of enemy resistance"[16]. It may continue for "some reasonable interval of time"[17] while the community adjusts from being organised for a state of war to enjoying a state of peace[18]. But the operation of the defence power is more limited when no external or internal threat to the security of the country is present.

29 Whatever the peace-time limits of the defence power may be, however, no one has ever doubted that it extends to recruiting and maintaining armed forces during peace-time. In *Australian Communist Party v The Commonwealth*[19], Fullagar J said:

> "It is obvious that such matters as the enlistment (compulsory or voluntary) and training and equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of

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12 *Andrews v Howell* (1941) 65 CLR 255 at 278.

13 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

14 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195-196, 197-198, 206-207, 268.

15 *Farey v Burvett* (1916) 21 CLR 433 at 441.

16 *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 at 84.

17 *Dawson v The Commonwealth* (1946) 73 CLR 157 at 184.

18 *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 at 84.

19 (1951) 83 CLR 1 at 254.

> weapons and the erection of fortifications, fall within this primary aspect of the defence power. These things can be undertaken by the Commonwealth as well in peace as in war, because they are *ex facie* connected with 'naval and military defence'."

30 Moreover, the primary aspect of the defence power extends to the setting up of courts martial[20] to deal with offences against the discipline[21]. Because that is so, I would have thought that it was beyond argument that, independently of Ch III, the defence power extended to making it an offence for a serving member of the armed forces to commit the offence of rape while on leave in a foreign country.

31 A trilogy of cases in this Court has held that, although a court martial tribunal exercises judicial power, it does not exercise the judicial power of the Commonwealth. That is because the power to make laws with respect to the defence of the Commonwealth under s 51(vi) of the Constitution contains the power to enact a disciplinary code that stands outside Ch III of the Constitution[22]. In *Re Tracey; Ex parte Ryan*, a majority of the Court held that a Defence Force magistrate, not appointed in accordance with Ch III of the Constitution, had jurisdiction to hear a charge of making an entry in a service document with intent to deceive, as well as two charges of being absent without leave. Mason CJ, Wilson and Dawson JJ held that "it is not possible to draw a clear and satisfactory line between offences committed by defence members which are of a military character and those which are not"[23]. Their Honours said[24]:

> "It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. As already explained, the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces and the conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces."

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20 *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 13-14, 23-24, 27.

21 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

22 *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.

23 (1989) 166 CLR 518 at 544.

24 (1989) 166 CLR 518 at 545.

32 Two other Justices in the majority in *Re Tracey* (Brennan and Toohey JJ) took a different view of the power of Parliament to invest service tribunals with jurisdiction to hear offences. Brennan and Toohey JJ said that two constitutional objectives had to be reconciled[25]. The first was dictated by s 51(vi) which empowered the Parliament to give service authorities a broad authority to impose discipline on defence members and defence civilians. The second was dictated by Ch III and s 106 of the Constitution. It consisted in the recognition of the pre-ordinate jurisdiction of the civil courts and the protection of civil rights which those courts afforded civilians and defence members including defence civilians who are charged with criminal offences. Their Honours said[26]:

> "To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline."

33 They went on to say that "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"[27]. Brennan and Toohey JJ said that the power conferred on service tribunals was "sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline"[28]. Deane and Gaudron JJ, the other Justices who heard *Re Tracey*, dissented.

34 The division of opinion that arose in *Re Tracey* continued in *Re Nolan; Ex parte Young*[29], a case decided after Wilson J had left the Court. In *Re Nolan*, a majority of the Court held that a Defence Force magistrate, not appointed in accordance with Ch III, had jurisdiction to hear charges concerning falsifying and using a service document – a pay list. Mason CJ and Dawson J said that they saw no reason to resile from the views that they had expressed in *Re Tracey* as to the scope of legislative power[30]. They considered that it was open to the Parliament to provide that any conduct which constitutes a civil offence should

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25 (1989) 166 CLR 518 at 569-570.

26 (1989) 166 CLR 518 at 570.

27 (1989) 166 CLR 518 at 570.

28 (1989) 166 CLR 518 at 574.

29 (1991) 172 CLR 460.

30 (1991) 172 CLR 460 at 474.

constitute a service offence if committed by a defence member. Brennan and Toohey JJ also maintained the views that they had expressed in *Re Tracey*. They said that "the relevant power conferred by s 51(vi) does not extend to the making of a law to punish defence members and defence civilians for their conduct unless the proceedings taken in order to punish them can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline"[31]. Later their Honours said[32]:

> "Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions. Here, the charges are obviously 'service connected' but that is not the ultimate criterion though it is an important element in determining whether proceedings on those charges could reasonably be regarded as serving the purpose of maintaining and enforcing service discipline."

Deane and Gaudron JJ again dissented, holding to the views that they had expressed in *Re Tracey*. I agreed with the judgment of Deane J.

35 As I explained in the third of the trilogy – *Re Tyler; Ex parte Foley* – the "divergent reasoning of the majority judges in *Re Tracey* and *Re Nolan* means that neither of those cases has a ratio decidendi"[33]. In *Re Tyler*, a majority of the Court held that a general court martial had jurisdiction to hear a charge against an Army officer that he had dishonestly appropriated property of the Commonwealth. *Re Tyler* also failed to obtain a majority of Justices in favour of any particular construction of the defence power in relation to offences by service personnel.

36 The difference between the views of Mason CJ, Wilson and Dawson JJ and on the other hand Brennan and Toohey JJ in these cases is the difference between the "service status" view of the jurisdiction and the "service connection" view of that jurisdiction. The "service status" view – which is now applied in the United States[34] – gives a service tribunal jurisdiction over a person solely on the basis of the accused's status as a member of the armed forces. The "service connection" view of the jurisdiction requires a connection between the service

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31 (1991) 172 CLR 460 at 484.

32 (1991) 172 CLR 460 at 489.

33 (1994) 181 CLR 18 at 37.

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

and the offence. It was the view formerly accepted in the United States[35]. However, *Solorio v United States* rejected the "service connection" view. In *Relford v U S Disciplinary Commandant*[36], the Supreme Court had referred to twelve factors which the Court considered *O'Callahan v Parker*[37] had emphasised in requiring a service connection. They were:

> "1. The serviceman's proper absence from the base.
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> 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 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.
>
> One might add still another factor implicit in the others:
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> 12. The offense's being among those traditionally prosecuted in civilian courts."

37 The argument of the parties in the present case accepted, sometimes expressly but more often by assumption, that the general words of s 51(vi) of the

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35 *O'Callahan v Parker* 395 US 258 (1969).

36 401 US 355 at 365 (1971).

37 395 US 258 at 273-274 (1969).

Constitution must be read down to comply with Ch III of the Constitution, as interpreted in the trilogy of *Tracey*, *Nolan* and *Tyler*. Since those cases, it seems to have been generally accepted[38] – indeed it was accepted by the Judge Advocate in the present case – that the proper test is the "service connection" test and not the "service status" test.

38 The question then in this case is whether the discipline of the Australian Defence Force may be enhanced by requiring service personnel to conduct themselves in accordance with the prohibitions in the legislation of the Australian Capital Territory in its application to the Jervis Bay Territory. More particularly, it is whether that discipline is enhanced by a rule that requires a soldier while overseas on recreation leave not to engage in non-consensual sexual intercourse with another person.

39 The prosecutor contends that, while he was in Thailand, he had no connection with the Army. He points out that, when the offence allegedly occurred, he was on leave in Thailand from his posting as a member of an infantry company. He was wearing civilian attire at all material times. He did not enter Thailand under any military arrangement or for any military purposes and his visit to Thailand was for recreational purposes only. He also points out that he paid for his own accommodation, meals and incidental expenses. The prosecutor concedes, however, that, if he had committed the alleged offence while he was in Malaysia, his offence would be within the jurisdiction of the service tribunal because his presence would be connected to his military service. But he contends his presence in Thailand was unconnected with his Army service. His argument was concerned with the scope of the defence power. He did not seek to re-open the question whether Ch III of the Constitution precluded a court martial from hearing an offence that would be a civil offence under the general law. In contrast, the Commonwealth contends that ss 9 and 61 of the DFDA impose minimum standards of conduct on defence members and that those standards are reasonably appropriate for maintaining discipline in the service.

40 In determining whether the standards of conduct imposed on Defence Force personnel by reference to the legislation of the Australian Capital Territory have the potential to maintain and enhance the discipline of the Defence Force, an important factor is that, when overseas, they are likely to be perceived by the government of the foreign country and members of the local population as representatives of the Australian government. In this respect, they are different from ordinary Australians who visit a foreign country as tourists. It is not to the

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38 Tracey, "The Constitution and Military Justice", paper delivered at the Annual Public Law Weekend: "The Australian Constitution in Troubled Times", Canberra, 8 November 2003 at 13.

point that, so far as dress and other matters are concerned, they cannot be distinguished from an ordinary Australian tourist. If a soldier on recreation leave is involved in conduct that is prohibited by the *Crimes Act* of the Australian Capital Territory, it is likely that that conduct will also be unlawful under the laws of the foreign country or at all events regarded as undesirable conduct. And it is not unlikely that the local citizenry will soon become aware that the person involved in that conduct was a member of the Australian Defence Force. It is a likely consequence of such conduct, therefore, that the local citizenry will be critical of its occurrence and may even become hostile to Australian Defence Force members.

41 Moreover, even if the local citizens do not become aware of the soldier's connection with the Australian Defence Force, it is likely that the government of the country will be aware of the identity of the soldier. If such conduct occurred regularly, it might have the consequence that the government of the foreign country would deny entry to Australian Defence Force members in so far as they seek to visit areas for rest and recreation. If that happened, it would have a direct impact on the morale and discipline of the Defence Force. It is possible that in extreme cases the unruly behaviour of personnel would cause a foreign country to refuse entry to Australian Defence Force members for Defence Force purposes such as training exercises. It may be that some conduct that is an offence under the law of the Australian Capital Territory in its relation to the Jervis Bay Territory has no relation to the defence power. If so, the operation of s 61 of the DFDA would have to be read down to exclude such conduct.

42 However, even if some of the standards of conduct required by the *Crimes Act* of the Australian Capital Territory go beyond the defence power – go beyond what is required for maintaining the discipline and morale of the Defence Force – the prohibition against rape goes to the heart of maintaining discipline and morale in the Defence Force. Rape and other kinds of sexual assault are acts of violence. It is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence. And 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. This may be out of fear for personal safety or rejection of such conduct or both. Such reluctance can only have a detrimental effect on the discipline and morale of the armed services.

43 Accordingly, the standard of conduct imposed by the legislation of the Australian Capital Territory in respect of the offence of sexual intercourse without consent "can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline". In so far as ss 9 and 61 of the DFDA make it an offence for a soldier, while on stand down leave in a foreign country, to commit non-consensual sexual intercourse, they are valid enactments of the federal Parliament.

44 The prosecutor made much of the fact that objectively his position could not be distinguished from that of an ordinary tourist. But this submission concentrates on the events of the recreation leave itself and leaves out the many factors that show that his presence at Phuket on the night in question was connected with his Army service. First, he was in Malaysia and thereafter Thailand as a result of his deployment by and service with the Australian Defence Force. Indeed, his presence in Thailand resulted from his military service because his recreation leave arose out of his military service and was no doubt designed to ensure that the prosecutor would be better able to carry out his military duties. Furthermore, he was not a free agent who could visit any country that he wished. There were only three countries in which he could spend his leave without the permission of his Commanding Officer. Thailand was one of them. Moreover, he was liable to immediate recall to his duties. It was for that reason that on his leave form he had to show his destination, his address and his telephone number.

45 It is true that the twelve factors referred to in *Relford*[39] point strongly against there being a service connection. If that list was regarded as exhaustive, it would be impossible to say that there was a service connection. But the twelve factors listed in *Relford* cannot be regarded as an exhaustive indicia of what constitutes a "service connection". In any event, as Brennan and Toohey JJ pointed out in *Re Tracey*, a service connection is evidence of but not definitive of what is necessary to maintain discipline and morale in the armed forces. A soldier who rapes another person undermines the discipline and morale of his army. He does so whether he is on active service or recreation leave.

46 Accordingly, the prosecutor has failed to show that it is beyond the legislative power of the Commonwealth to enact s 9 of the DFDA in so far as it applies s 61 of that Act so as to permit the trial by general court martial of the prosecutor in respect of the offence of rape occurring while he was in Thailand.

Order

47 The question of law for the opinion of the Court should be answered, No.

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39 401 US 355 at 365 (1971).

48 GUMMOW J. The question in the special case stated for the Full Court should be answered "No" and the costs of the case should be the costs in the action in this Court.

49 I agree generally with the reasons for this conclusion given by McHugh J and would add the following.

50 The prosecutor is a member of the Australian Army which, as provided in Pt III, Div 1 (ss 30-32B) of the *Defence Act* 1903 (Cth), is a component of the Defence Force. The Australian Army consists of two parts, the Regular Army and the Army Reserve ("the Reserve") (s 31). The prosecutor was at all relevant times a member of the Regular Army and the issues that arise in this litigation do not concern the law respecting members of the Reserve.

51 The offence charged is said to have been committed in Thailand, but the complainant is not a Thai national; she was aged 18 at the time of the alleged offence and was visiting Thailand from the United Kingdom during her "gap year". The Extradition (Thailand) Regulations[40], made under the *Extradition Act* 1988 (Cth) ("the Extradition Act"), declare Thailand to be an extradition country for the purposes of that legislation (reg 3). Once a person is found to be eligible for extradition from Australia, it is for the Attorney-General to determine whether or not the person is to be surrendered. Section 22 of the Extradition Act regulates and limits in various respects the power of the Attorney-General to authorise such surrender. It is common ground in the present case that no application for the surrender of the prosecutor has been made by Thailand. The complainant now is in the United Kingdom.

52 The deployment of the prosecutor and other members of Delta Company of the Sixth Battalion, The Royal Australian Regiment, to the Royal Malaysian Air Force Base at Butterworth attracted the operation of a status of forces agreement between Australia and Malaysia. The relevant provisions are found in Annexure III to a Note dated 1 December 1971 from the Australian High Commissioner in Malaysia to the Malaysian Deputy Minister of Defence, forming part of what is known as the Five Power Defence Arrangements[41]. In the case of certain offences by a member of an Australian force punishable under the laws of both countries, the Malaysian authorities had the primary right to exercise jurisdiction[42]. The prosecutor did not enter Thailand under any arrangement of this nature between the Governments of Australia and Thailand.

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40 SR No 372/1995.

41 [1971] *Australian Treaty Series* No 21.

42 Annexure III, Section 1, cl 3(b).

53 The primary submission for the prosecutor, as finally formulated in oral submissions, is that the outer limit of the power of the Parliament to legislate pursuant to s 51(vi) of the Constitution had been passed at the time of the alleged offence. This was because at that stage none of his activities could be said to be in the course of military duty; he had been released from that duty and from the control of his officers.

54 Section 9 of the *Defence Force Discipline Act* 1982 (Cth) ("the DFDA") states:

> "The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian."

55 The other relevant provisions of the DFDA fall into two categories. The first (Pt III, Div 8) (s 61) created the offence with which the prosecutor was charged and drew in to the alleged circumstances in Thailand the provisions of the general criminal law as applied in the Jervis Bay Territory. The second, contained in Pt VII, Div 3 (ss 114-126), conferred jurisdiction to try the charge upon a court martial (s 115).

56 It is unnecessary here further to consider the authorities[43] bearing upon the relationship between Ch III of the Constitution and the legislative power conferred by s 51(vi). This is because the prosecutor's case is that, even if the jurisdiction in respect of the charge under s 61 of the DFDA were conferred not upon a court martial but upon a court exercising federal jurisdiction under a law based in s 76(ii) and s 77 of the Constitution, the charge could not lie. That result, it is said, follows because s 61 itself in its application to the present facts is beyond the limit of the power conferred in s 51(vi) of the Constitution.

57 Thus, on the prosecutor's case, no occasion arises here to determine the criterion, given the subjection in the text of the Constitution of legislative powers conferred by provisions such as s 51(vi) to the judicial power found in Ch III, by which there is to be adjudged the validity of the court martial jurisdiction conferred by s 115 of the DFDA. The several views in the authorities respecting the criterion by which the validity of a provision such as s 115 may be decided are detailed in the reasons of McHugh J. But in accordance with the practice of this Court in such matters[44], this is no occasion to choose between "the service

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43 *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.

44 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252] and the authorities there mentioned, in particular *Attorney-General for NSW v*

(Footnote continues on next page)

connection" or any other "test" found in the Ch III cases. The only question before the Court is the question reserved for its consideration in the special case. No broader question of the "validity of the proceedings against the prosecutor" is raised. This case turns upon the validity of the offence provisions constituted by ss 9 and 61 of the DFDA, not the validity of s 115, and no Ch III question was raised by the parties or now arises.

58 Section 51(vi) has two clauses, the first reading "the naval and military defence of the Commonwealth and of the several States". In the course of argument, reference was made to the second clause:

> "and the control of the forces to execute and maintain the laws of the Commonwealth".

59 In *Re Tracey; Ex parte Ryan*[45], Brennan and Toohey JJ said:

> "The traditional jurisdiction to discipline military personnel has two aspects. The first is an authority to compel military personnel to conduct themselves in a manner which is conducive to efficiency and morale of the service; the second is an authority to punish military personnel who transgress the ordinary law of the land while acting or purporting to act as military personnel. These two aspects of the traditional jurisdiction are reflected in the two limbs of s 51(vi)."

Their Honours went on to describe the second limb of s 51(vi) as being concerned with power[46]:

> "to control persons who, being part of the armed forces and acting or purporting to act in that capacity, transgress the ordinary law of the land or fail to obey the lawful directions of the Executive Government as to the activities of the armed forces and the conduct of persons who are part of the armed forces".

Brewery Employés Union of NSW (1908) 6 CLR 469 at 590; *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347, 356; *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361-362 [16]-[18]; *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 230 [202].

45 (1989) 166 CLR 518 at 564.

46 (1989) 166 CLR 518 at 564.

60 In the same case, Mason CJ, Wilson and Dawson JJ expressed a different view. Their Honours observed[47]:

> "Notwithstanding that it might be thought that the second clause of s 51(vi) is relevant to the question of military discipline by reason of the phrase 'the control of the forces' we doubt whether that is so. It seems to us that the content of that phrase relates to the work of law enforcement. It is not the ordinary function of the armed services to 'execute and maintain the laws of the Commonwealth'."

The construction indicated in this passage is to be preferred.

61 The term "defence" in s 51(vi) may be thought primarily to be concerned with response to hostile activity, actual or potential, from external sources. However, there is an internal aspect with which the Constitution also has dealt. Section 69 provided for the transfer of the State departments of naval and military defence to the Commonwealth. Thereafter, s 114 required the consent of the Commonwealth Parliament to the raising or maintaining by a State of any naval or military force. The States were to be protected not only against invasion but also, on the application of their Executive Governments, against "domestic violence" (s 119). Domestic violence may threaten the Commonwealth itself. Section 68 of the Constitution vests in the Governor-General as the representative of the Queen the command in chief of the naval and military forces of the Commonwealth. Section 61 emphasises that the executive power of the Commonwealth extends to "the execution and maintenance" of the Constitution and of the laws of the Commonwealth, and the cognate phrase "to execute and maintain" is found in s 51(vi). The second limb in s 51(vi) thus supports laws in aid of that executive power. It is unnecessary here to consider further the scope of those executive and legislative powers.

62 It is sufficient, as was emphasised in argument, that the term "defence" in the first limb of s 51(vi) authorises laws of the nature in question here. Windeyer J once observed[48]:

> "[T]he power to make laws for naval and military defence must be considered against a background of established principles of British law concerning the position of the armed forces in the community – against the rule, that is, that in time of peace members of the services should enjoy, *as far as their duties permit*, the ordinary rights of citizens". (emphasis added)

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47 (1989) 166 CLR 518 at 540.

48 *The Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 503.

63 The reference by Windeyer J in this passage to "time of peace" reflects a contrast drawn in the judgments in a number of cases between the reach of the defence power in time of war and that in time of peace. However, more recent experience indicates that service personnel are engaged in a range of operations in troubled times in which this country has not declared war in the formal sense.

64 The range of activities beyond Australia with which members of the Defence Force may be involved is indicated by s 3(7) of the DFDA. This states:

> "For the purposes of this Act, a person's membership of the Defence Force is not affected by reason only of the person's attachment to, or allotment for duty with:
>
> (a) the armed forces of another country;
>
> (b) a force raised or organized by the United Nations or another international body; or
>
> (c) a Peacekeeping Force within the meaning of Part IV of the *Veterans' Entitlements Act 1986* [(Cth)]."

Part IV of that statute defines (in s 68) the term "Peacekeeping Force" in terms which include a force raised or organised for the purpose of peacekeeping in an area outside Australia or observing or monitoring any activities of persons in an area outside Australia that may lead to an outbreak of hostilities.

65 Two passages from the joint judgment of Mason CJ, Wilson and Dawson JJ in *Tracey* make what for the present case is the essential point. The first passage followed acceptance by their Honours of the premise that[49]:

> "as a matter of discipline, 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".

Their Honours continued[50]:

> "There can be little doubt that in war-time or upon overseas service such considerations warrant the treatment of civil offences as service offences and it is open to the legislature to regard the position in peace-time as warranting similar treatment. Good order and military discipline, upon

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49 (1989) 166 CLR 518 at 543.

50 (1989) 166 CLR 518 at 544.

> which the proper functioning of any defence force must rest, are required no less at home in peace-time than upon overseas service or in war-time."

66 The second passage in the joint judgment of Mason CJ, Wilson and Dawson JJ in *Tracey* is as follows[51]:

> "In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces. And Parliament's decision will prevail so long at any rate as *the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members*." (emphasis added)

67 Article 1, s 8, cl 14 of the Constitution of the United States empowers the Congress "to make Rules for the Government and Regulation of the land and naval Forces". In his judgment in *O'Callahan v Parker*[52], Harlan J, in the course of construing that provision, made observations of present significance. This is nonetheless so given that, whilst Harlan J was in dissent, his views later achieved acceptance by the Supreme Court[53]. Harlan J said[54]:

> "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 services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. 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:
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> > '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.'[55]"

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51 (1989) 166 CLR 518 at 545.

52 395 US 258 (1969).

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

54 395 US 258 at 281-282 (1969) (footnote omitted).

55 14 Writings of George Washington 140-141 (Bicent ed).

68 Harlan J went on to stress a consideration of particular importance where defence personnel are stationed in other countries, namely, that[56]:

> "[a] soldier's misconduct directed against civilians, moreover, brings discredit upon the service of which he is a member".

69 With these further reasons, I support the conclusion that the provisions of the DFDA which permit the trial by general court martial of the prosecutor in respect of the alleged offence are not invalid. The offence provisions of the DFDA are sufficiently connected with the regulation of the Regular Army of which the prosecutor is a member, and with the maintenance of good order and discipline among its members.

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56 395 US 258 at 282 (1969).

70 KIRBY J. In *Re Tracey; Ex parte Ryan*[57], Mason CJ, Wilson and Dawson JJ acknowledged that s 61 of the *Defence Force Discipline Act* 1982 (Cth) ("the Act"), by applying to defence personnel "the one law whether [an] offence is committed anywhere within Australia or overseas", could produce "some curious results". So it has proved in this case, stated for the opinion of the Full Court.

71 If the provision permitting the result defended in this case is constitutionally valid, an Australian soldier, serving in Malaysia, is rendered liable before a military tribunal in Queensland (not a jury) for an alleged rape, which he denies, said to have happened not in Australia but on a beach in the Kingdom of Thailand during an interval of recreation leave. Moreover, he is liable not for the crime as provided by the law of Thailand, or even Queensland, but for an offence against the law of the Jervis Bay Territory of Australia, applying there the provisions of the *Crimes Act* 1900 of the Australian Capital Territory[58]. By this triple fiction, a law made by the Federal Parliament purports to put the soldier on trial outside the judicature of Thailand and even outside any of the courts of the judicature of Australia, for acts allegedly done whilst a tourist. A curious result indeed.

72 The validity of s 61 of the Act, in its application to such a crime, has not been considered in earlier decisions of this Court addressed to the constitutional validity of the Act[59]. Those decisions have not been concerned with the statutory fictions in their application to members of the Australian Defence Force ("ADF") for their conduct overseas.

73 In its earlier decisions, this Court was sharply divided. So it is in this case. Only one member of the Court, McHugh J, who participated in two of the earlier decisions, remains. In one of those cases[60], he expressed the opinion that "unless a service tribunal is established under Ch III of the Constitution, it has jurisdiction to deal with an 'offence' by a member of the armed services *only* if such an 'offence' is exclusively disciplinary in character or is concerned with the disciplinary aspect of conduct which constitutes an offence against the general law". In a later case, his Honour said that he "remain[ed] convinced that the reasoning of the majority Justices in *Re Nolan* and *Re Tracey* is erroneous"[61].

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57 (1989) 166 CLR 518 at 545.

58 *Crimes Act* 1900 (ACT), s 54 dealing with the crime of sexual intercourse without consent.

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

60 *Re Nolan* (1991) 172 CLR 460 at 499 (original emphasis).

61 *Re Tyler* (1994) 181 CLR 18 at 39.

Now, this "erroneous" view of the Constitution is not only applied but even extended by a divided decision of this Court. This result follows, although the opportunity is presented to prevent a misapplication of the Constitution, effecting a denial of constitutional rights and causing individual injustice.

74 This case illustrates the way in which, when wrong turnings are made in constitutional interpretation, they are often pushed further by their beneficiaries[62]. Because I would not permit this to happen, I would answer the question in the stated case: "Yes".

The facts, legislation and issues

75 *The facts and legislation*: The facts are set out in the reasons of other members of the Court, as derived from the stated case[63] or from inferences properly available from the case[64]. Also contained there are the relevant provisions of the Act[65], of the laws of the two Australian territories purportedly enlivened[66] and of the Constitution which are said to support the validity of s 61 of the Act in its application to the charge of rape brought against Private Stewart Alpert ("the prosecutor")[67].

76 The other reasons also explain the history of the three decisions that have addressed earlier questions about the Act and the factual circumstances of the charges faced by service personnel in those cases[68]. Those facts involved respectively making a false entry in a *service* document and being absent without leave from *service* duty[69]; falsification of *service* pay lists[70]; and dishonestly

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62 See *Silbert v Director of Public Prosecutions (WA)* (2004) 78 ALJR 464 at 467 [20]; 205 ALR 43 at 48.

63 Reasons of McHugh J at [12]-[18]; reasons of Gummow J at [50]-[53].

64 Reasons of Callinan and Heydon JJ at [167].

65 Reasons of McHugh J at [19]-[24]; reasons of Gummow J at [54], [64].

66 Reasons of McHugh J at [22]. The laws of the Australian Capital Territory are in force in the Jervis Bay Territory of the Commonwealth by virtue of the *Jervis Bay Territory Acceptance Act* 1915 (Cth), s 4A(1).

67 Reasons of McHugh J at [25]-[26].

68 Reasons of Callinan and Heydon JJ at [162].

69 *Re Tracey* (1989) 166 CLR 518.

70 *Re Nolan* (1991) 172 CLR 460.

claiming a *service* rental allowance[71]. I agree with Callinan and Heydon JJ that, in every past case before this Court, the offences, of their intrinsic nature, were immediately connected with aspects of the accused's *service* in the ADF[72].

77 *Divisions in past authority*: As McHugh J explains in his reasons, the earlier decisions of this Court failed to yield a majority for a settled principle to govern the constitutional connection necessary to render an offence cognisable in the service tribunal established for discipline under the Act, outside the ordinary courts of law[73].

78 The broadest view[74] in the earlier decisions was close to the "service status" test now prevailing in the Supreme Court of the United States, as expressed in *Solorio v United States*[75]. According to that view, it was enough to render the offence cognisable before a service tribunal if the Parliament decided that this was "necessary and appropriate for the maintenance of good order and discipline" in the service[76]. The intermediate view[77] adopted a test that required that the offence "reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline"[78]. That view was close to the "service connection" criterion followed by the Supreme Court of the United States in its earlier decision in *O'Callahan v Parker*[79].

79 The third and narrowest view, which McHugh J twice pronounced convincing[80], imposed a still stricter test. To survive as an offence of "service discipline", prosecuted outside Ch III of the Constitution, the offence had to be

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71 *Re Tyler* (1994) 181 CLR 18.

72 Reasons of Callinan and Heydon JJ at [162].

73 Reasons of McHugh J at [31]-[36].

74 Favoured by Mason CJ, Wilson and Dawson JJ in *Re Tracey* (1989) 166 CLR 518.

75 483 US 435 (1987).

76 *Re Tracey* (1989) 166 CLR 518 at 545. See reasons of McHugh J at [31].

77 Favoured by Brennan and Toohey JJ.

78 *Re Tracey* (1989) 166 CLR 518 at 570.

79 395 US 258 (1969). See also *Relford v U S Disciplinary Commandant* 401 US 355 (1971). See reasons of McHugh J at [36].

80 *Re Nolan* (1991) 172 CLR 460 at 499; *Re Tyler* (1994) 181 CLR 18 at 39.

"exclusively disciplinary in character". It followed that, if its "character" were essentially that of a civilian crime of general application, it would, at least normally, fall outside the ambit of service discipline. As a consequence, if it were to be prosecuted at all, that would normally have to occur in a civil court.

80 *Common ground*: I say "normally" because, in the present case, as in the trilogy that preceded it, this Court has not been concerned with four potentially important circumstances. The constitutional position might be different were those circumstances different:

(1) The prosecutor is a serving member of the ADF, so that the validity of the purported extension of the Act to civilian or "prescribed" employees of the ADF need not be considered[81];

(2) The issue of constitutional validity is also to be assessed upon the basis that Australia is presently at peace. The special needs of the ADF in respect of discipline in times of war (or other times when the services "stand in most urgent need" of disciplinary powers) were inapplicable at the time of the prosecutor's alleged offence[82];

(3) The offence did not occur in an actual theatre of combat or during military, policing or peacekeeping operations in which, whether at home or abroad, special needs for military discipline might be inherent in the functions of "defence"; and

(4) The case is not one where the accused was in a place outside Australia "beyond the reach of the ordinary criminal law"[83] or where there is no effective law at all. It was accepted that Thailand is a place with a functioning legal system, applicable to visitors and with a law of rape which, whilst different in limited respects from that of the Australian territories named[84], is still recognisably similar in its essentials. It was legally applicable to the prosecutor's alleged offence.

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81 See the Act, ss 3, (definition of "defence civilian"), 6 and offence provisions such as s 28; see *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23 per Dixon J; *Re Tracey* (1989) 166 CLR 518 at 552, 565-566.

82 *Re Tracey* (1989) 166 CLR 518 at 572-573. See also *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*") (1951) 83 CLR 1 at 195.

83 *Re Tracey* (1989) 166 CLR 518 at 585 per Deane J.

84 The provisions of the Penal Code of Thailand, s 276. See reasons of Callinan and Heydon JJ at [161], fn 204. The points of difference relate to the exemption from

(Footnote continues on next page)

81 *The parties' confined submissions*: The respective cases of the parties presented curious features. Doubtless discouraged by the three earlier challenges to the Act, the prosecutor did not mount an outright attack on the validity of the Act based on Ch III of the Constitution. However, he did invoke the requirements of that Chapter (and the exception to the normal rule that service tribunals constitute) as a reason for confining the reach of military discipline under the powers in the Constitution propounded to support the validity of the impugned section, especially s 51(vi). I disagree with Gummow J's statement that "no Ch III question was raised by the parties or now arises"[85]. True, it does not arise as a basis for an all-out attack on the separate system of military tribunals outside Ch III of the Constitution. The prosecutor disclaimed such an argument[86] and in the present state of this Court's authority that was a correct position to adopt. But he did not – nor could he – ignore the implications of Ch III for the scope of the constitutional foundation of the contested law[87]. The transcript of argument in this Court in the present case, including many interventions from the Court itself, demonstrates that this is so[88]. In *Al-Kateb v Godwin*[89], Gummow J correctly pointed to the necessity, in that case, to consider the constitutional context in approaching and deciding the question of construction. The same is true in this case.

82 For their part, the respondents did not seek to sustain the validity of the contested provision on the basis of the external affairs power. Presumably this was for the reason explained by McHugh J[90]. Whatever the scope of military discipline included in the grant of legislative power with respect to the defence of the Commonwealth, no immunity from Ch III of the Constitution could operate with respect to a law sustained only by the legislative power with respect to "external affairs"[91]. Although s 61 of the Act in its application to the prosecutor

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liability for rape of a wife and restriction of the offence to one against a woman; see *R v L* (1991) 174 CLR 379.

85 Reasons of Gummow J at [57].

86 [2004] HCATrans 042 at 96, 893 and 3876.

87 [2004] HCATrans 042 at 878.

88 [2004] HCATrans 042 at 920, 1000, 1475, 1555, 3207, 3246 and 3935.

89 [2004] HCA 37 at [111].

90 Reasons of McHugh J at [27].

91 Constitution, s 51(xxix).

is clearly a law with respect to matters external to Australia, that head of power would not avail the respondents given the mode of trial in a service tribunal which the respondents invoked and for which the Act provides[92]. It is this consideration that makes it irrelevant to call in aid the Australian law rendering overseas sexual offences against children amenable to the jurisdiction of Australian courts[93]. Indeed they are. However, such procedures occur not before military tribunals but in the ordinary (civilian) courts of the land with all of the protections that this entails.

83 This Court, including in constitutional matters, resolves the controversies brought to it by the parties. Where, by narrowing the focus of the matters in contest, or by addressing the interpretation of impugned legislation[94], the Court can properly avoid issues of constitutional invalidity, it does so. However, it is not competent for parties, by concession, argument or oversight, to oblige a court to give meaning and operation to a law in a way that conflicts with the Constitution[95]. In Australia, courts are not merely arbitrators of the competing arguments of litigants. Ultimately, they owe a higher duty to the law. Most particularly is this so where the matter in contest is before this Court, which is created by the Constitution with the primary responsibility to uphold the federal compact in the exercise of the judicial power of the Commonwealth[96]. Especially is this the case where a party comes before the Court (as the prosecutor does) specifically to challenge proceedings brought against him, presenting a contention that the federal law propounded to support those proceedings is invalid under the Constitution. Chapter III is not, and cannot be, disjoined from the Constitution. Donning judicial blinkers, for whatever reason, will not make Ch III go away.

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92 See *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 528, 549, 599, 652, 696, 712.

93 See reasons of Gleeson CJ at [7] referring to the *Crimes Act* 1914 (Cth), ss 50AA-50GA, inserted by the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth).

94 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186-187 per Latham CJ; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; *R v Hughes* (2000) 202 CLR 535 at 565-566 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

95 See *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]. See also *Coleman v Power* [2004] HCA 39 at [231].

96 Constitution, s 71.

84 No rule of practice[97], no judicial observations and no agreement of the parties may therefore deflect the Court's attention from the legal context, viewed as a whole. The constitutional validity of the offence charged against the prosecutor cannot be considered without postulating a test for the suggested link between the offence and the Constitution. This Court cannot ignore the fact, significant for validity, that the Parliament has purported to provide for the trial of the subject offence before a service tribunal[98], constituted by a convening order under s 119 of the Act[99]. The contested offence is *only* triable before such a military tribunal. It is not triable in any Australian court, least of all before a jury.

85 *Absence of a legally binding rule*: The absence of a simple rule, established by decision of a majority of this Court in any of the three earlier decisions, has two immediate consequences. The first is factual; the second legal.

86 Since the earlier decisions, service prosecuting authorities have sensibly adopted a "conservative" approach in the charges that they have laid against ADF members before service tribunals. This approach is described in the following terms[100]:

> "[F]or over a decade now, service tribunals in Australia have applied Brennan and Toohey JJ's test [in *Re Tracey*] in determining whether or not they have jurisdiction to try charges. This has not given rise to the type of problem which beset military law in the United States before *Solorio*. The main reason is that convening authorities have adopted a conservative approach when determining whether to refer charges to service tribunals. Where doubt exists, cases are referred to the appropriate Director of Public Prosecutions. Protocols have been developed under which consultation regularly occurs between military lawyers and DPP solicitors

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97 See reasons of Gummow J at [57] and reasons of Hayne J at [156] referring to *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252] per Gummow and Hayne JJ.

98 Of a kind provided by the Act, s 114 with jurisdiction afforded by s 115.

99 The court martial is convened with the appointment by a "convening authority" of a President and other members and with "an adequate number of reserve members" (the Act, s 119).

100 Tracey, "The Constitution in Troubled Times: The Constitution and Military Justice", paper delivered at the Annual Public Law Weekend, Australian National University (Canberra), 8 November 2003 at 13.

before any decisions are made about whether charges, which have civilian counterparts, should be dealt with in service tribunals or civil courts."

87 Such sensible arrangements within Australia will generally have little or no application where the competing law involved is that of a foreign country[101]. Yet, if the present prosecutor's trial is held valid, the precedent set for the trial in a service tribunal of a charge of rape happening *abroad* will necessarily apply *within* Australia, as well as overseas. Accordingly, the question in the stated case must be answered with due attention to that consequence.

88 The second result of the division of opinion in the earlier decisions is one of law. There is no legal principle that binds this Court to the application of a given rule in the present case. In this respect, the position is identical to that held to exist in *Shaw v Minister for Immigration and Multicultural Affairs*[102]. The highest common denominator of agreement established by the earlier authority is that which the prosecuting military authorities accepted. It is found in the reluctant alternative application by Mason CJ and Dawson J in *Re Tyler; Ex parte Foley*[103] of the principle expounded in the earlier cases by Brennan and Toohey JJ and the even more reluctant application of that principle by McHugh J in the same case[104], although his Honour remained "convinced that the reasoning of the majority … is erroneous". A flimsier foundation for a constitutional rule could scarcely be imagined.

89 Not for the first time, I find myself in agreement with the approach of Deane J to a fundamental constitutional question[105]. Alike with his Honour (and with McHugh J in *Re Nolan; Ex parte Young*[106]) it is my view that unless a

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101 By the Act, s 144(3), where a person has been acquitted or convicted by an overseas court of an "overseas offence", the person "is not liable to be tried by a service tribunal for a service offence that is substantially the same offence". There is no attempted restriction upon subsequent trial in an overseas court of a person acquitted or convicted by a service tribunal in Australia.

102 (2003) 78 ALJR 203 at 210 [36], 212 [50]; 203 ALR 143 at 152, 155.

103 (1994) 181 CLR 18 at 27.

104 (1994) 181 CLR 18 at 39.

105 See, for example, as in the meaning of the Constitution, s 80 expressed in *Kingswell v The Queen* (1985) 159 CLR 264. See also *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; *Cheng v The Queen* (2000) 203 CLR 248 at 322-323 [221]-[224].

106 (1991) 172 CLR 460 at 499.

service tribunal is established under Ch III of the Constitution, it has jurisdiction to deal with an "offence" by a member of the armed forces *only* if such an "offence" is exclusively disciplinary in character or is concerned with a distinct disciplinary aspect of conduct constituting an offence against the general law. The absence of a different binding rule, and the apparent departure of the service prosecutors in this case from the "conservative" approach hitherto adopted, suggests the need for this Court to reinstate this simple rule of principle derived from the constitutional language and structure. One day that will happen, unless the present decision puts the law on a mistaken track that proves irreversible.

90 In the absence of a wider argument on the part of the prosecutor, challenging the validity of the provisions of the Act under Ch III, and in order to refine the point upon which this Court now divides, I will assume in these reasons that the rule applicable to constitutional validity is that stated by Brennan and Toohey JJ in *Re Tracey*. This adopts, in effect, the "service connection" test. It has the merit of rejecting the "service status" test, which is overbroad, however attractive it may be to some service personnel. As Brennan and Toohey JJ pointed out in *Re Tracey*[107] (and later repeated[108]), the greater enlargement of the powers of service tribunals is incompatible with many considerations that need to be taken into account in resolving the question now presented for decision.

91 Where, as here, there is no earlier decision clearly applicable to the legal question before this Court, our duty is to answer the question in the special case by reference to the usual sources which judges call upon in such matters. These are the state of legal authority; any relevant legal principles; and any applicable considerations of legal policy[109]. I turn to those considerations.

Considerations of legal authority

92 *The scope of military discipline*: The language of the Constitution, granting power to the Federal Parliament to make laws for the defence of the Commonwealth (and of the States)[110], should be given a broad meaning, capable

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107 (1989) 166 CLR 518 at 572.

108 *Re Nolan* (1991) 172 CLR 460 at 482.

109 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; see *Fairchild v Glenhaven Funeral Service Ltd* [2003] 1 AC 32 at 43-44 [8]-[9], 46-47 [14], 66-67 [33].

110 Constitution, s 51(vi). See also s 51(xxix) (external affairs), (xxxii) (railway transport of military personnel), (xxxix) (incidental powers), and see reasons of McHugh J at [25].

of varying with changing circumstances and different dangers for the security of the nation.

93 Thus, in times of war, federal law has been accorded a very large ambit to regulate activities that would "conduce to the more effectual prosecution of the War"[111]. In times of immediate danger, and preparation for possible combat, this Court has accepted the existence of substantial federal law-making authority[112]. The position is the same in times of demobilisation and thereafter in respect of appropriate post-war arrangements[113]. Nevertheless, this Court has never surrendered to the Parliament, or the Executive, the conclusive determination of the constitutional validity of a military regulation[114]. The defence power, and the other heads of power relied upon in this case, are not disjoined from the Constitution. They are part of the "one coherent instrument"[115] which is "intended to be construed and applied in the light of other provisions of the Constitution"[116].

94 It is for this reason that the defence power is subject to s 51(xxxi)[117] and s 116[118]. Likewise, both by the structure of the Constitution and by the express statement that the grants of legislative power in s 51 are "subject to this Constitution", the defence power is also subject to the requirements of Ch III.

95 This last mentioned qualification has to be reconciled with the necessity for a measure of power over service discipline, inherent in the grant in s 51(vi). No one doubts the power to establish a non-judicial system of military discipline in time of war or civic danger[119]. Before the Constitution was adopted, this was

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111 *Farey v Burvett* (1916) 21 CLR 433 at 442.

112 *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 219-220, 245, 255-257.

113 *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43 at 84.

114 *Communist Party Case* (1951) 83 CLR 1 at 252.

115 *Lamshed v Lake* (1958) 99 CLR 132 at 154.

116 *Bank of NSW* (1948) 76 CLR 1 at 185.

117 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 317-318, 325, 331.

118 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 131, 149, 155, 159.

119 *Re Tracey* (1989) 166 CLR 518 at 540-541.

long a feature of British constitutional law, at least since the first *Mutiny Acts*[120]. The issue in this case is one of reconciling the "two sets of constitutional objectives"[121] just stated. It involves doing so in a time of peace, in respect of activity not specifically service-related, that happened in a place that was not lawless and whose laws provide for the punishment of an offence, if the alleged conduct could be proved.

96 Adopting the criteria accepted by Brennan and Toohey JJ in *Re Tracey* does not, it is true, provide a "bright line" that will distinguish every offence for which members of the ADF are subject to military discipline from those for which they are not. But if there is uncertainty of classification, this is inherent in many tasks of constitutional characterisation. The uncertainty can be reduced by the provision of criteria that will assist in classifying an offence, in effect, as "service related" (and thus subject to military discipline) or "non-service related" (and thus subject to civilian law). Such criteria were adopted in the past by the courts in the United States. In my view, the extension of service "offences" to include that of rape, happening in the circumstances of this case, pushes the boundary of service discipline beyond its constitutional limits. Effectively, it adopts the "service status" test although this is incompatible with Australia's constitutional history and text and with the highest measure of agreement to which past judicial concurrence in this Court has extended.

97 A list of criteria of service connection is set out in the reasons of McHugh J. As his Honour points out, this list is not exhaustive[122]. However, it provides a useful guide, as illustrated by the application of the criteria to the present case in the reasons of Callinan and Heydon JJ[123]. As additional support, the Commonwealth Director of Public Prosecutions and relevant military authorities have agreed upon a set of guidelines which incorporated some of these criteria for use in Australia[124]. Their list reinforces the conclusion that the offence in the present case was not one that is "service connected". Clearly enough, it suggests that this case represents an attempt to move away from a "service connected" approach to one of "service status". That move should be rejected.

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120 *Re Tracey* (1989) 166 CLR 518 at 563-564, 572-573.

121 *Re Tracey* (1989) 166 CLR 518 at 569.

122 Reasons of McHugh J at [45].

123 Reasons of Callinan and Heydon JJ at [161].

124 Brown, "Military Justice in Australia: W(h)ither Away? The Effects of Re Tracey; Ex parte Ryan", (1989) 13 *Criminal Law Journal* 263 at 271.

98 I agree with Callinan and Heydon JJ that, if an alleged act of rape whilst on leave as a tourist in a foreign beach resort far from military deployment can be classified as "service connected", virtually every serious criminal offence by service personnel must be so catalogued[125]. This would effectively render the requirement of connection to some aspect of national "defence" meaningless. Yet that connection is imperative because of the text of the Constitution and the obligation, resting on the respondents, to demonstrate that the offence is a service offence, and thus, exceptionally, susceptible to trial outside the judicature referred to in Ch III of the Constitution.

99 It was this task of reconciliation of two constitutional imperatives that prevented Brennan and Toohey JJ from embracing the approach favoured by Mason CJ, Wilson and Dawson JJ in *Re Tracey*. Now, without saying so directly, this Court effectively endorses the "service status" approach. To the extent that the differentiation between service and non-service offences is glossed over, the anomaly to Ch III is enlarged. To the extent that *any* serious criminal offence is deemed a "service offence", because committed by a serving member of the ADF, this denies the obligation of the Commonwealth to justify the large exception that the system of service tribunals carves out of the obligations of Ch III.

100 None of the earlier cases decided by this Court has come even close to the present circumstances. Nor, for that matter, have any of the reported decisions concerning offences by ADF personnel whilst overseas. In virtually all such cases to this time the offences have occurred in the course of actual combat. In the pretended application of the middle road accepted by Brennan and Toohey JJ in *Re Tracey*, this Court is therefore, effectively, accepting the approach of Mason CJ, Wilson and Dawson JJ in that case. But that was an approach that has never, until now, commanded the assent of a majority of this Court.

101 *Lessons of constitutional history*: That this is so may be demonstrated by reference to the pains to which Brennan and Toohey JJ went, in *Re Tracey*, to explain why they could not agree in the view of service offences endorsed by Mason CJ, Wilson and Dawson JJ. They did so by reference to ancient and modern constitutional history concerning military law. The reasons of Brennan and Toohey JJ[126] recall the long struggles in Britain before the adoption of the Australian Constitution. By those struggles, the Parliament in Great Britain ultimately prevailed over the assertion of the prerogatives of the Crown in the matter of martial law and military tribunals. It is a famous history. It illustrates repeatedly the jealousy with which the British Parliament viewed the growth of

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125 Reasons of Callinan and Heydon JJ at [163].

126 (1989) 166 CLR 518 at 554-563.

military law and its general unwillingness to accord such powers in the control of military and naval personnel until it became absolutely necessary to do so for the immediate defence of the realm[127].

102 Before the Australian Constitution was adopted, the English courts repeatedly insisted on the ultimate superiority of civil law; the distinction of the law of England, in this respect, from the laws of Europe; and the fundamentally non-military character of the British state. Thus in *Grant v Gould*[128], cited by Brennan and Toohey JJ in *Re Tracey*[129], Lord Loughborough declared:

> "In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts."

103 Moreover, in *Burdett v Abbot*[130], also cited by their Honours[131], Lord Mansfield CJ said in lambent words:

> "[S]ince much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens … It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman."

104 Given the great care that Brennan and Toohey JJ took to expound these principles of basic constitutional doctrine, to explain the position they reached in *Re Tracey*, it is unthinkable that their Honours intended their test of "service connection" to be so debased as effectively to expand "disciplinary offences" so as to apply to circumstances such as those alleged in the present case. Such an interpretation of the authority of *Re Tracey* would have rendered redundant the pains that Brennan and Toohey JJ took to demonstrate the special resistance of British constitutional law to the extension of martial law preceding the grant of

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127 Holdsworth, "Martial Law Historically Considered", (1902) 18 *Law Quarterly Review* 117 at 119-122.

128 (1792) 2 H Bl 69 at 99 [126 ER 434 at 450].

129 (1989) 166 CLR 518 at 558.

130 (1812) 4 Taunt 401 at 449-450 [128 ER 384 at 403].

131 *Re Tracey* (1989) 166 CLR 518 at 575 (extracted in a passage from *Pitchers v Surrey County Council* [1923] 2 KB 57 at 62). See also at 546, 584.

legislative powers relating to matters of "defence" contained in the Australian Constitution.

105 It is true that the constitutional powers with respect to "defence" are not limited forever to those accepted in the United Kingdom and Australia in 1900[132]. The needs of the armed services and the needs of the defence of the Commonwealth have changed significantly in the intervening century. The Constitution is a living document. It adapts and changes with the changing circumstances of Australia and the world to which it must apply.

106 Yet it remains the case that the Australian Commonwealth is the beneficiary of the resolution of the great constitutional struggles occurring in England in this connection. The grant of law-making power with respect to "defence" picks up, and carries with it into Australian constitutional law, the fundamental notions of national "defence" that derive from British constitutional history. The word expands and contracts in its potential application to the differing circumstances, as cases over the past century illustrate. But the word is not without a core or essential meaning. It does not connote anything that the Parliament decides to attribute to it. Ultimately, it is for this Court, not the Parliament, to say whether a propounded enactment is within the constitutional word[133]. And the word must be understood in its context. In Australia, that context includes the provisions of Ch III and the important rights and obligations that it imports.

107 The strict containment of military law and the powers of service tribunals, together with the refusal to treat service personnel as mere servants of the Crown's prerogative but rather as citizens too, are basic features of Australian constitutional doctrine. This Court should do nothing to impair such fundamentals. As Brennan and Toohey JJ explained in *Re Tracey*[134]:

> "If the [contrary] view were adopted without qualification, service tribunals would be authorized to trespass upon the proper jurisdiction of the civil courts over defence members and defence civilians and their civil rights would be impaired. The protection of Magna Charta and the victory

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132 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 549-554 [35]-[49], 599-600 [186]-[187]; *Sue v Hill* (1999) 199 CLR 462 at 487-488 [50]-[52], 569 [280]; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 495-497 [23]-[26], 522-525 [110]-[118].

133 *Coleman v Power* [2004] HCA 39 at [213].

134 (1989) 166 CLR 518 at 569.

> of Parliament over the Royal forces which resulted in the Bill of Rights would become the unintended casualties of the Australian Constitution."

It must not be so. This Court has a duty to preserve the predominance of the judicature and the civil power over matters of defence as inherent, and also expressly stated, in the Constitution.

108 *Constitutional separation of powers*: Whilst Australia does not have a general Bill of Rights[135] or a charter of rights[136], the separation of the judicial power of the Commonwealth, under the Constitution, provides a bulwark against both federal[137] and State[138] attempts to confer incompatible functions on the judiciary or to deploy any part of the judicial power of the Commonwealth otherwise than in accordance with Ch III.

109 Although this case is not the occasion to reconsider the general validity of courts martial created by the Act, the consistently rigorous approach taken by this Court in recent years to the application of Ch III carries clear lessons for the ambit of the "pragmatic exception" permitted in the case of service tribunals. To the extent that this exception is expanded beyond clear *service* offences, into the very core of *general* criminal offences (and then in a non-military circumstance and context), this Court effectively condones invasions by service tribunals of the essential functions of courts of law.

110 In the present case, the Court does this in relation to the courts of a foreign state. But, in so far as this is permissible under the Constitution, this Court necessarily condones a like intrusion into the functions of the criminal courts within Australia. Even acknowledging a legitimate ambit for service justice, including in peacetime, comprising a form of "judicial power" outside Ch III, the dangers of depriving citizens, who are serving members of the ADF, of rights that, in practice, they would otherwise enjoy in courts of law, must inform the

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135 *Toth v Quarles* 350 US 11 (1955); *O'Callahan v Parker* 395 US 258 (1969).

136 *R v Généreux* [1992] 1 SCR 259 applying s 11(d) of the *Canadian Charter of Rights and Freedoms*, in *Constitution Act* 1982 (Can). This provision guarantees an "independent and impartial tribunal". The Supreme Court of Canada held that Canadian law governing courts martial was insufficient to guarantee the independence of military tribunals from the Executive.

137 eg *Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

138 eg *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Re Wakim* (1999) 198 CLR 511.

line of constitutional validity that this Court draws in a case such as the present[139].

111 The need for vigilance is especially clear where what is involved is an accusation by one arm of the Executive of criminal conduct on the part of a citizen serving another part of the Executive[140]. That is what the present case involves. Consistency with this Court's recent decisions about Ch III obliges a stringent approach in limiting the expansion of the ambit of service discipline. This case, and those that may follow its holding, illustrate why that must be so.

112 Because of the provisions of the Act[141], and the narrow view that this Court has taken to the operation of the guarantee of jury trial in s 80 of the Constitution[142], it is fruitless to complain that the expansion of service prosecutions, absent an indictment, diminishes the availability under federal law of jury trial for federal offenders accused of serious offences against a law of the Commonwealth. If the prosecutor were tried in Thailand (the place of the alleged crime) he would not be entitled to jury trial. But if the principle urged by the respondents is established, that for the offence of rape anywhere in the world Australian service personnel are subject to prosecution before a service tribunal for that offence, the constitutional validity of the provision is acknowledged. Logically, it would also permit trial by service tribunals of such offences happening anywhere within Australia.

113 That conclusion could effectively exclude Australian criminal courts from their usual role in such trials. It could authorise a switch of the trials of defence personnel for crimes of rape to military tribunals, away from the ordinary courts, whose adjudications members of the public may more conveniently view, learn from and criticise. In practical terms, the election by a complainant could deprive service personnel in Australia of the ordinary right of jury trial in such matters. It could exclude citizens, as jurors, from participation in such trials. This Court may, as it pleases, ignore these consequences of expanding the ambit of service offences outside Ch III. But it is a step opposed to past legal authority. It is antagonistic to very long constitutional history. It is also inconsistent with

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139 *Re Tracey* (1989) 166 CLR 518 at 581-582.

140 *Re Tracey* (1989) 166 CLR 518 at 581.

141 The Act, ss 106-111A.

142 *R v Bernasconi* (1915) 19 CLR 629 at 637; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-584; *Spratt v Hermes* (1965) 114 CLR 226 at 244; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198; *Kingswell* (1985) 159 CLR 264 at 276-277, 298-302; *Cheng* (2000) 203 CLR 248 at 266 [43], 282-283 [94]-[95], 291-292 [126]-[129], 325 [228], 344-345 [283].

the Court's recent doctrine on Ch III. And it is antithetical to the functions of citizen jurors and the rights of service personnel, enjoyed as Australian citizens, and long observed in the courts of our legal tradition. The foregoing represent very strong reasons of legal authority for holding back from the step which the respondents urged this Court to take. But there are also issues of legal principle and legal policy to consider.

Considerations of legal principle

114 *Provisions of international law*: Differing views have been expressed concerning the extent to which it is permissible, in the interpretation of the Constitution, to take into account universal principles of international law. Some members of this Court have objected to this notion, believing it to be inconsistent with the history and function of the Constitution as a charter for national government[143]. My own view is that the Constitution, like all other law in Australia, now operates in a context profoundly affected by international law[144]. Context is always a vital consideration in deriving legal rules.

115 In the twenty-first century, national final courts must accommodate the global context in which municipal law, including constitutional law, has its operation[145]. The proliferation of international law, especially in the last three decades, demands of this Court recognition that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"[146]. In giving meaning to the Australian Constitution, this Court is therefore inevitably influenced by conceptions of the world in which the Constitution operates and the application of the constitutions and laws of other nation states that impinge upon it.

116 Ignoring international law will sometimes result not only in chaos and futility. It will reduce the enlargement of the international rule of law, to which

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143 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384-386 [97]-[101]; *AMS v AIF* (1999) 199 CLR 160 at 180 [50]; *Al-Kateb* [2004] HCA 37 at [63] per McHugh J; Walker, "International Law as a Tool of Constitutional Interpretation", (2002) 28 *Monash University Law Review* 85 at 96-97.

144 See, for example, *Al-Kateb* [2004] HCA 37 at [169]-[191].

145 Martinez, "Towards an International Judicial System", (2003) 56 *Stanford Law Review* 429; Ginsburg and Merritt, "Affirmative Action: An International Human Rights Dialogue", (1999) 21 *Cardozo Law Review* 253 at 282.

146 *The Bremen v Zapata Off-Shore Co* 407 US 1 at 9 (1972).

municipal, regional and international law together contribute[147]. In particular, to be unconcerned about any relevant universal principle of international law, when giving meaning to an uncertain or ambiguous provision of a national constitution, is to "act on [a] blinkered view [and] to wield power divorced from responsibility"[148].

117 The decisions of national courts, in so far as they affect the operation of universal principles of international law, contribute to the content of public international law, as the Statute of the International Court of Justice recognises[149]. In making such decisions, including in respect of their national constitutions, municipal courts exercise a form of international jurisdiction[150]. They should do so alert to any applicable rules of international law and so as to avoid, as far as they lawfully can, conflict with such rules. It makes little sense to acknowledge such obligations in connection with other municipal laws[151] but to deny them when it comes to the national constitution. Even the Supreme Court of the United States, long resistant to the use of international law in its constitutional decisions, has lately taken that law into account in constitutional elaboration[152]. This Court should do likewise[153].

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147 Martinez, "Towards an International Judicial System", (2003) 56 *Stanford Law Review* 429 at 444.

148 *Semanza v Prosecutor*, International Criminal Tribunal for Rwanda, ICTR-97-20-A (Decision of 31 May 2000), Separate Opinion of Judge Shahabuddeen at [25].

149 Statute of the International Court of Justice, signed at San Francisco on 26 June 1945, Art 38(1)(d). See Brownlie, *Principles of Public International Law*, 6th ed (2003) at 22.

150 See La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues", (1996) 34 *The Canadian Yearbook of International Law* 89 at 100-101; van Ert, *Using International Law In Canadian Courts*, (2002) at 45-46; *R v Finta* [1994] 1 SCR 701 at 774.

151 See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 [29].

152 *Atkins v Virginia* 536 US 304 at 316 (2002); *Lawrence v Texas* 539 US 558 at 572-573, 576-577 (2003) per Kennedy J. See Koh, "International Law as Part of Our Law", (2004) 98 *American Journal of International Law* 43; Bodansky, "The Use of International Law Sources in Constitutional Opinion", (2004) 32 *Georgia Journal of International and Comparative Law* 421.

153 See Walker, "Treaties and the Internationalisation of Australian Law", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 204 at 234; Simpson and Williams, "International Law and Constitutional Interpretation",

(Footnote continues on next page)

118 The language of the Charter of the United Nations[154], to which Australia is a founding signatory, appears mainly intended to provide that nation states, members of the Organisation, are juridically equal[155]. Thus, each such state enjoys the rights inherent in full sovereignty. Each state has a duty to respect the legal personality of other states. The territorial integrity and political independence of each state are inviolable. Each state has a legal obligation to comply fully, and in good faith, with its international obligations and to live in peace with other states[156].

119 It is a fundamental principle of international law that the nation state ordinarily has the exclusive authority to govern its own territory and all events and persons there, except so far as this authority may have been modified by consent of the territorial sovereign[157]. Certainly, where "public law" is involved, that is, the law involving sovereignty or governance, it is recognised that the nation state normally enjoys exclusive jurisdiction to prescribe any laws applicable to its territory.

120 Historically, criminal law is part of public law. Thus, by public international law, the enforcement and punishment of conduct constituting a *crime* are normally reserved to the sovereign in the territory where the crime occurred, except where it consents to the application of another nation's criminal law in its territory. The common law recognises the general principle that "crime is local"[158]. There is a good reason why this is so. It derives from the nature of crime as an offence against the peace of the community in which it occurs.

(2000) 11 *Public Law Review* 205; Walker, "International Law as a Tool of Constitutional Interpretation", (2002) 28 *Monash University Law Review* 85.

154 Charter of the United Nations, signed at San Francisco on 26 June 1945.

155 Broms, "States", in Bedjaoui (ed), *International Law: Achievements and Prospects*, (1991) 41 at 61.

156 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), General Assembly Resolution 2625 (XXV) of 24 October 1970. See Broms, "States", in Bedjaoui (ed), *International Law: Achievements and Prospects*, (1991) 41 at 61-62.

157 Oliver, "The Jurisdiction (Competence) of States", in Bedjaoui (ed), *International Law: Achievements and Prospects*, (1991) 307 at 309; see *Polyukhovich* (1991) 172 CLR 501 at 551 per Brennan J.

158 *Lipohar v The Queen* (1999) 200 CLR 485 at 497 [15], 542 [141], 546-547 [154].

Crime is thus an affront to the state, not simply a dispute between private individuals.

121 So, would it offend international law for Australia's Constitution to be construed so as to empower the Federal Parliament to render the criminal law of the Australian Capital Territory, as applicable in the Jervis Bay Territory, applicable in turn to conduct on a beach in Thailand? Would it be contrary to international law for this to be enacted by the Parliament of Australia, at least without the consent of Thailand? An affirmative answer might appear conformable to notions of jurisdiction and judicial power based on considerations of geography. It could provide a reason of legal principle to reinforce the prosecutor's objection to the application to the facts of his case of the provisions of the Australian Act. However, an analysis of the applicable international law discloses that the purported extension of jurisdiction involved in the Act would not violate such law.

122 An established basis upon which a state is entitled, at international law, to exercise jurisdiction in a particular case is personal jurisdiction (the nationality principle)[159]. This includes: (a) the active nationality principle – when the person against whom proceedings are taken is a national of the state taking proceedings; and (b) the passive nationality principle – jurisdiction may be assumed by the state of which the person suffering the injury is a national.

123 The active nationality principle appears to be settled in international law. Professor O'Connell wrote of it[160]:

> "There is no restriction on the competence in international law of a State to prosecute its own nationals for acts done on foreign territory."

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159 The others are: territorial jurisdiction (jurisdiction over acts within the geographical territory of the state); protective jurisdiction (jurisdiction over people whose acts prejudice the security of the state, whether or not they are within the state, or a national of the state); universal jurisdiction (jurisdiction exists regardless of place or nationality. It applies to particular offences only, such as piracy and war crimes, and its scope is contested).

160 O'Connell, *International Law*, 2nd ed (1970), vol 2 at 824. See also Shearer, *Starke's International Law*, 11th ed (1994) at 210-211; Shaw, *International Law*, 5th ed (2003) at 588-589; *Restatement of the Foreign Relations Law of the United States*, 3d, §421(2)(d).

124 The nationality principle so described sits alongside the territorial principle of jurisdiction. One does not "trump" the other. They are concurrent[161]. Thus, in the present case, by international law, Thailand (under the territorial principle) and Australia (under the active nationality principle) and also the United Kingdom (under the passive nationality principle) could exercise jurisdiction over the prosecutor. To conform with international law, there is no need for any of the three states to obtain the permission of the others, or to have in place a relevant treaty agreeing to such a course. Any rule against infringement of state sovereignty[162] would not apply in the present case because Australia is not seeking to exercise jurisdiction *in* the territory of Thailand. Accordingly, it is not interfering with Thailand's internal affairs[163]. Thailand would not be prevented from launching a subsequent prosecution against the prosecutor.

125 It follows that Australia's application of its own criminal law (rape) to an Australian national (the prosecutor) while that national was overseas (in Thailand) would not contravene international law. Accordingly, whilst the design and application of the Australian legislation to events on a beach in Thailand seems at first to be an intrusion of Australian law into Thailand's sovereignty, that is not the way international law has responded to such a case. Thus, the prosecutor can derive no comfort from this aspect of international law.

126 *Universal human rights law*: But what of another part of international law, which concerns the principles of human rights and fundamental freedoms? Are these rules available to help resolve doubts and ambiguities affecting the reach of Australian constitutional law in the present case[164]?

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161 O'Connell, *International Law*, 2nd ed (1970), vol 2 at 603; Schwarzenberger and Brown, *A Manual of International Law*, 6th ed (1976) at 74; Brownlie, *Principles of Public International Law*, 6th ed (2003) at 310.

162 *The Case of the SS "Lotus"* (1927) *Permanent Court of International Justice*, Series A, No 10, Judgment No 9 at 18-19; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), General Assembly Resolution 2625 (XXV) of 24 October 1970.

163 *The Case of the SS "Lotus"* (1927) *Permanent Court of International Justice*, Series A, No 10, Judgment No 9 at 18-19; Schwarzenberger and Brown, *A Manual of International Law*, 6th ed (1976) at 52, 74.

164 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657; *Kartinyeri* (1998) 195 CLR 337 at 417-418 [166]; *Austin v The Commonwealth* (2003) 77 ALJR 491 at 543-544 [257]; 195 ALR 321 at 392.

127 I leave aside for present purposes those provisions of the international law of human rights that concern the rights of an individual to equality before the law and to an independent and impartial tribunal established by law[165]. The latter aspect of such entitlements is expressly restricted, relevantly, to "the determination of any *criminal* charge" against the accused. I will assume for the purposes of this case that the provision of the Act, impugned in this case, might be distinguished on the basis that the charge is of a *military-disciplinary* character, not, as such, *criminal*.

128 One of the most fundamental principles of the international law of human rights (known as *non bis in idem* or *ne bis in idem*) is that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country"[166]. This principle gives effect to the rule against double jeopardy in any punishment for offences alleged by the state. Effectively, this rule is reflected in Australian law by a number of substantive, procedural and possibly constitutional requirements[167].

129 The exposure of a person, accused of a serious criminal offence before a service tribunal, to the risk of double jeopardy, in a further accusation and trial before an Australian court, is serious enough. In practice, in most cases, arrangements might be made to avoid this risk by cooperation of the kind that now exists in Australia between military and civilian prosecuting authorities. However unsatisfactory this solution might be for the dangers of double jeopardy *within* Australia, it might work out adequately in practice. However, no such practical arrangements could be assured in respect of the prosecuting authorities in a foreign state (such as Thailand), operating in a different language, with different procedures, distinct substantive offences, different prosecutorial traditions and separate constitutional requirements[168]. The unresolved possibility of a form of double jeopardy, unaddressed by the provisions of the Act, appears to illustrate the dangers of the application of the Act, in its terms, to events occurring in any place in the world in peacetime, outside the circumstances of combat or service deployment.

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165 International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23 ("ICCPR"), Art 14.1.

166 ICCPR, Art 14.7.

167 *R v Carroll* (2002) 213 CLR 635; see Kirby, "Carroll, double jeopardy and international human rights law", (2003) 27 *Criminal Law Journal* 231.

168 See, for example, the Act, s 144(3)(b).

130 In Europe, by the operation of regional human rights obligations, independent judicial scrutiny of service disciplinary decisions has been enlarged, rather than reduced, in recent years[169]. The trend, occurring in most developed countries, has been to diminish rather than enhance the ambit of service discipline[170]. Recent events (such as the destruction of the World Trade Center in New York in September 2001) illustrate the indispensable role played in modern crises by disciplined services (police and fire officers) who certainly operate under the general law administered by independent courts without the need of exceptional tribunals functioning separately from the judicature[171].

131 But does the international law of human rights, with its express and implied protections against repeated exposure to punishment arising out of the same alleged facts, apply to a case such as the present? If it does, may that fact be invoked in elaborating the requirements of the Australian Constitution?

132 International law upholds the principle that the rule against double jeopardy (*non bis in idem*) does not apply in the international context to forbid successive prosecutions by *different* sovereigns based on the same facts[172]. Thus,

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169 Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification", (2002) 65 *Modern Law Review* 36 at 51.

170 See Ives and Davidson, "Court-Martial Jurisdiction over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?", (2003) 175 *Military Law Review* 1 at 84. The extent to which, by constitutional and legislative changes and constitutional decisions, the peacetime jurisdiction and powers of military tribunals changed to assimilate them to judicial bodies is well described in Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, (2004), vol 1 at 153-168.

171 Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification", (2002) 65 *Modern Law Review* 36 at 43.

172 *AP v Italy*, Human Rights Committee Communication No 204/1986 (1990) at [7.3] ("The Committee observes that [Art 14.7 of the ICCPR] prohibits double jeopardy only with regard to an offence adjudicated in a given State"); *A R J v Australia*, Human Rights Committee Communication No 692/1996 (1997); *Cardot v France* (1991) 13 EHRR 853 at 870; *US v Duarte-Acero* 208 F 3d 1282 at 1287-1288 (2000); *Principle of* ne bis in idem *under International Law* (1987) BVerfGE 75, 1, translated into English in *Decisions of the* Bundesverfassungsgericht – *Federal Constitutional Court – Federal Republic of Germany*, vol 1/II (1992) 644 at 650: "There is presently no general rule of public international law that states that a person who has been sentenced to imprisonment in a third state and has also served this sentence is unable to be retried or reconvicted for the same offence in another state".

the current rules of international law give no support of legal authority to a suggestion that the risk of successive exposure of the prosecutor to Australian and Thai prosecutions, arising out of exactly the same facts, is offensive to the principles of human rights and fundamental freedoms as currently expounded.

133 *Conclusion: International law is unavailing*: The time may come when this approach will be modified in response to a recognition of the practical burdens imposed by globalisation and jurisdictional overlap[173]. But, for the moment, international law is clear. Once again, it gives no comfort to the prosecutor. Whilst noting the point, therefore, I will pass on and assume that it does not assist the resolution of the legal issues in this case. The foregoing analysis shows that attention to the principles of international law is not always availing. It is a coherent legal system. It is sometimes relevant and helpful. But it does not mean all things to all people.

Considerations of legal policy

134 *Restricting exceptions to Ch III*: But are there reasons of Australian constitutional policy for resisting any unnecessary enlargement of the exceptional jurisdiction of service tribunals in Australia, beyond that convenient and appropriate for the purpose of maintaining or enforcing service discipline, properly so called? In my view, there are. Such reasons lie in the undesirability of increasing the ambit of the exercise of judicial power outside the independent courts of the nation.

135 If such expansion could succeed in respect of the trial of members of the ADF accused of well-established criminal offences, such as rape, it may also succeed in respect of the trial of crimes of the federal public service, of the police, of security services, intelligence services, anti-terrorist squads and the many others that may demand a similar "exceptional" status. It is the nature of executive government (like the Crown before it under its prerogatives) to press for the expansion of exceptions to judicial supervision. This Court has elsewhere resisted such pretended exceptions[174]. This is not an occasion for the Court to weaken in its resolve. On the contrary, it is a case for particular vigilance against the risks inherent in setting a bad precedent.

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173 See Lopez, "Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent *non bis in idem*", (2000) 33 *Vanderbilt Journal of Transnational Law* 1263.

174 See, for example, *Wilson* (1996) 189 CLR 1; *Kable* (1996) 189 CLR 51; *Re Wakim* (1999) 198 CLR 511; *Plaintiff S157/2002* (2003) 211 CLR 476.

136 The danger of the posited ground for expanding the jurisdiction of the service tribunal in this case is obvious. It has grave implications for future cases. In every instance, it will be said, as it was here, that fellow "defence members" would not want to serve with a person guilty of "such a crime" (as if such an assertion proves the fact or should be given decisive weight for legal and constitutional purposes). Just imagine what wrongs could be done to citizens in the name of the "will of the people". A contrary concern exists that, if defence personnel consider that a military justice system incorporating the full range of civil offences is "not as fair or just as the civil system", this will be counterproductive to the true discipline and morale of the defence forces[175]. Invocations of such considerations are therefore ultimately without legal merit.

137 The independent courts exist not for the benefit of the judiciary. They uphold the Constitution and defend the people of the Commonwealth and those dependent on its protection. The exceptions for service discipline should not be expanded. The true independence and impartiality of service tribunals has long been questioned in Australia. "Typical criticisms of service tribunals … include: the tribunal may be concerned to adhere to the views of those higher in the chain of command; the tribunal members may be personally acquainted with or even in command over the accused; and the members' career aspirations may influence their conduct in the trial."[176] Chapter III of the Constitution provides protections for judicial independence through security of tenure and the maintenance of a long tradition of impartiality. Extending the meaning of "service offence" to the present case means that such protections are bypassed.

138 Concerns over the independence of service tribunals have been addressed in recommendations contained in recent reports[177] including the Abadee report[178],

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175 Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499 at 522.

176 Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499 at 504.

177 Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499 at 505.

178 Abadee, *A Study into Judicial System under the Defence Force Discipline Act*, (1997), referred to in Australia, Parliament, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, (1999) at 5.

a report by the Commonwealth Ombudsman[179] and a report by the Joint Standing Committee on Foreign Affairs, Defence and Trade[180]. The very fact that there have been three major investigations into "military justice" or the "military judicial system" in Australia in quick succession speaks volumes about the seriousness of the problems that tend to be endemic in such a system. The culture of the military is not one in which independent and impartial resolution of charges comes naturally. These considerations reinforce the need for great caution in expanding the reach of the system of service tribunals, particularly in time of peace.

139 The original statutory extension of the jurisdiction of courts martial in the United Kingdom for a crime such as rape was expressly restricted in that country to apply to personnel on active service and where the crime occurred at a place "more than one hundred miles … from any city or town in which the offender can be tried for such offence by a competent civil court"[181]. Clearly, the purpose of that provision was to defend the determination of the rights and duties of military personnel, as citizens, in the ordinary courts of the land having jurisdiction over them – not in special tribunals made up of special people applying special laws.

140 In the present case, application of the approach that I favour would mean that any trial of the prosecutor for rape would have to take place in a court of Thailand. It should not be for the complainant, in effect, to select the jurisdiction of an Australian service tribunal when the relevant civilian court, applicable to her complaint of the crime of rape, was the criminal court of Thailand having jurisdiction with respect to allegations of that crime occurring on Patong Beach. The proper response of the Australian service authorities to the complainant's accusation was not, therefore, to abandon their hitherto "conservative" application of the law, as defined by Brennan and Toohey JJ in this Court. It was not to try out what is effectively a "service status" criterion for military offences. It was to inform the complainant that she should take her complaint to the Thai authorities (and possibly to facilitate that complaint in practical ways).

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179 Australia, Ombudsman, *The Australian Defence Force: Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences – Review of Practices and Procedures*, Report of the Commonwealth Defence Force Ombudsman under section 35A of the *Ombudsman Act 1976*, (1998).

180 Australia, Parliament, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, (1999).

181 *Army Act* 1881 (UK) (44 and 45 Vict c 58), s 41(5)(a).

141 In the case of an equivalent complaint in Australia, the proper response would have been to send the complainant to enliven the jurisdiction of "a competent civil court". Unless there is a specific service purpose for maintaining or enforcing service discipline, this Court should not authorise an expansion of the jurisdiction of service tribunals that necessarily diminishes the jurisdiction of the courts of law.

142 *Restricting military exceptionalism*: Still further reasons of policy reinforce the conclusion not to expand the reach of military law in the circumstances arising in the present case. As Douglas J, writing for the majority of the Supreme Court of the United States in *O'Callahan v Parker*[182], observed:

> "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service …
>
> Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'"[183]

143 Later in the same decision, Douglas J noted[184]:

> "The 17th century conflict over the proper role of courts-martial in the enforcement of the domestic criminal law was not … merely a dispute over what organ of government had jurisdiction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes."

144 In their joint reasons in *Re Tracey*, Brennan and Toohey JJ cited these passages with approval[185]. They pointed to the existence of protections in the Bill of Rights in the United States which are absent from Australian law. This consideration increases the importance of maintaining the Australian resistance to the "general use of military courts for trial of ordinary crimes" compatibly with our constitutional text, judicial authority and historical tradition.

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182 395 US 258 at 265 (1969).

183 Citing *Toth v Quarles* 350 US 11 at 22-23 (1955).

184 395 US 258 at 268 (1969).

185 (1989) 166 CLR 518 at 566.

145 In the past, in other contexts, this Court has been attentive to the foregoing tradition and respectful of it[186]. The services have sometimes endeavoured to cut themselves off from ordinary law[187]. In special and limited circumstances, where it is proportional and appropriate for national defence, it must be so, at least for a short time, as during actual conflict. But under the Australian Constitution, the armed services are not divorced from civil law. Indeed, they exist to uphold it. It is the duty of this Court to maintain the strong civilian principle of the Constitution. It is one of the most important of Australia's legacies from British constitutional law.

146 It is particularly important to adhere to this time-honoured approach at a time when increased demands are being made for greater executive and legislative power. At such a time, as in the past, we should maintain the function of the courts to ensure that military power is only deployed in accordance with the Constitution[188]. This is not an occasion to enhance the operation of military tribunals. The directions in which the expansion of military law can sometimes lead may be seen in other countries[189]. They afford a warning that this Court should heed.

147 In support of their broader view concerning the ambit of the Act, Mason CJ, Wilson and Dawson JJ called in aid the unfortunate decision of the United States Supreme Court in *Ex parte Quirin*[190]. A reflection upon the failure of judicial supervision evident in that decision affords strong grounds of policy for this Court to avoid travelling in the same direction[191]. Faithful adherence to our own constitutional tradition, which has been different from that of the United States, is a reason for avoiding the unnecessary enlargement of the jurisdiction of Australian service tribunals. History teaches that such enlargement is rarely reversed. It usually comes at the cost of individual liberty, of the rights of

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186 See, for example, *Parker v The Commonwealth* (1965) 112 CLR 295 at 301; *Groves v The Commonwealth* (1982) 150 CLR 113 at 125-126.

187 See *X v The Commonwealth* (1999) 200 CLR 177 at 230-231 [166]-[168].

188 See *Communist Party Case* (1951) 83 CLR 1 at 195; cf *Plaintiff S157/2002* (2003) 211 CLR 476 at 513-514 [103]-[104].

189 Steyn, "Guantanamo Bay: The Legal Black Hole", (2004) 53 *International and Comparative Law Quarterly* 1.

190 317 US 1 (1942). See *Re Tracey* (1989) 166 CLR 518 at 541.

191 White, "Felix Frankfurter's 'Soliloquy' in *Ex parte Quirin*", (2002) 5 *Green Bag* 2d 423.

citizens and of the essential functions of the independent courts in upholding the rule of law[192].

148 *Other considerations of policy*: Different issues of policy were raised during argument. They included the ease of transport of service personnel today to distant parts of the world; the special needs of the ADF in peacekeeping, policing and United Nations service; and the necessity to have effective operational discipline in countries where there is little or no law.

149 As to transport, this renders it easier (as do modern means of telecommunications) to bring cases before civilian courts having jurisdiction outside the immediate needs for maintaining or enforcing separate service discipline in what are essentially ordinary criminal cases. As to peacekeeping and similar deployments, where these are operational, and especially in places of potential or actual combat, different rules will apply. In places beyond the reach of effective law, or where there is no law, the ambit of service discipline will expand, just as it does in times of war or equivalent necessity for national defence, compared with times of peace. None of these considerations applies to this case.

150 Rape is an abhorrent crime. It is possible that a belated complaint of rape to the Thai authorities would now produce no redress for the complainant. However, had she complained, or been directed or assisted to complain, to the Thai authorities when she first made contact with the ADF, it cannot be assumed that they would not have acted. A court must also consider the rights of the prosecutor, who denies the accusation and contests the validity of the charge.

151 Most especially, this Court must uphold the Constitution. It must do so where the consequence of failure is a serious departure from past authority and constitutional history; the enlargement of a limited exception to Ch III of the Constitution; and an expansion of military law that is undesirable and out of keeping with our constitutional tradition. No agreement of the parties or concessions or assumptions in the course of advancing their arguments can excuse this Court from its duty to maintain the Constitution and its own past decisional authority in such an important matter.

152 The citation with approval of the dissenting opinion of the second Justice Harlan[193], quoting in turn the military injunction of General George Washington,

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192 See McHugh, "The Strengths of the Weakest Arm", paper delivered at the Australian Bar Association Conference, Florence, 2 July 2004; *Al-Kateb* [2004] HCA 37 at [149].

193 In *O'Callahan v Parker* 395 US 258 (1969). See reasons of Gummow J at [67]-[68].

can only be explained by an adoption of the "service status" approach to the application of service discipline. This is an approach that, until now, has been rejected by the majority in this Court out of respect for the express subjection of s 51(vi) of the Australian Constitution to the requirements of Ch III[194]. There is no exact equivalent to this in the United States Constitution. Particularly in matters of constitutional interpretation, it is the text of the written law, not the opinions of previous judges, that should prevail. It is to that text that the Justices of this Court are bound in duty to the people of Australia[195].

Conclusion and orders

153 Applying the approach expressed in the successive reasons of Brennan and Toohey JJ in this Court, I would therefore reject the validity of the proceedings against the prosecutor. Civilian jurisdiction in Thailand could conveniently and appropriately have been invoked in this case. It is the jurisdiction that should have been exercised. The jurisdiction of the service tribunal was only available under the Constitution for the limited purpose of maintaining or enforcing service discipline, properly so called. In the context of the exceptional character of service tribunals, standing outside Ch III, the crime of rape allegedly committed by the prosecutor, whilst a tourist off duty, in the circumstances described in the special case, was not one to which service discipline applied.

154 The present is not a time to expand, beyond this Court's established authority, the jurisdiction and powers of military tribunals in Australia – any more than the power of indefinite punishment or detention at the will of the Parliament and Executive Government[196]. It is at times like the present that this Court – as it has done in the past[197] – must adhere steadfastly to the protection of basic civil rights in Australia's constitutional arrangements. Other final courts are doing so[198]. We should be no less vigilant.

155 These are the reasons why the question asked in the stated case should be answered: "Yes".

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194 See *Al-Kateb* [2004] HCA 37 at [110]-[111], [133] per Gummow J, [146]-[147] of my own reasons.

195 *Stevens v Head* (1993) 176 CLR 433 at 461-462, 464-465 and cases cited.

196 cf *Al-Kateb* [2004] HCA 37 at [144]-[150].

197 cf *Communist Party Case* (1951) 83 CLR 1.

198 cf *Rasul v Bush* 72 USLW 4596 (2004); *Beit Sourik Village Council v The Government of Israel* HCJ 2056/04 at [86].

156 HAYNE J. For the reasons given by McHugh J, and the additional reasons given by Gummow J, the question in the special case stated for the Full Court should be answered "No" and the costs in the case should be costs in the action in this Court.

157 CALLINAN AND HEYDON JJ. The facts and the issue to which they give rise have been stated by McHugh J. His Honour has also considered the relevant legislation and has analyzed each of the authorities in which a similar, although not identical, problem has had to be solved. As McHugh J has demonstrated, there is no majority of High Court Justices in any case favouring any particular construction of the defence power as a basis of legislation relevant to offences by service personnel. The Court remains at liberty to choose from among available tests.

158 We should say at the outset that we respectfully agree with his Honour's adoption of the test of "service connexion" but that we are unable to agree that its application here results in a negative answer to the question stated in the special case. As there is a majority in favour of a negative answer to that question, we will give our reasons in short form, and we will do so on the same basis as McHugh J, that the Commonwealth relies upon the defence power only as supporting the challenged provisions, ss 9 and 61 of the *Defence Force Discipline Act* 1982 (Cth) ("the Act") and that the prosecutor places no reliance on Ch III of the Constitution.

159 In our opinion, the result of a comparison of the facts present here, with the factors that the Supreme Court of the United States emphasized as being relevant to a test of service connexion in *Relford v U S Disciplinary Commandant*[199], and repeated by McHugh J in his judgment, provides reason why ss 9 and 61 of the Act should be regarded as invalid in their application to the charge brought against the prosecutor, that he engaged in non-consensual sexual intercourse with a woman at Patong Beach, Phuket, Thailand on or about 29 September 2001.

160 In making the comparison we have kept in mind the observations of Dixon J in *Australian Communist Party v The Commonwealth*[200]:

> "The meaning of the [defence] power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever-changing course of events, the practical application of the power will vary accordingly."

The case stated does not reveal any fact supportive of the view that Australia was at war with any other nation in September 2001 and in particular with Thailand; or that it was a period of any waxing of the defence power; or that there existed

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199 401 US 355 at 365 (1971).

200 (1951) 83 CLR 1 at 195.

any international emergencies which required any expansive view of the defence power to be taken at that time. The second clause of s 51(vi) of the Constitution, "and the control of the forces to execute and maintain the laws of the Commonwealth" adds nothing here. Those words on their face simply mean that the control of the forces may extend to the enforcement of the laws of the Commonwealth itself, even though that could involve military intrusion into civil affairs otherwise unacceptable internally.

161 We come then to the relevant factors.

1. The prosecutor was in all respects properly and lawfully away from his base. He was not even in the country in which it was situated and in which he had been deployed. Nothing turns on the fact that he was subject to recall. He had not in fact been recalled. Soldiers are entitled to leave and leisure to live as civilians until that leave expires, or they are recalled.

2. The alleged crime was committed far away from the prosecutor's base.

3. He was in no way subject, at Patong Beach, to military control or command, beyond being subject to recall.

4. Not only was the prosecutor outside Australian territorial limits but he was also beyond the limits of the country in which the unit of the Australian Defence Force in which he was serving, was a guest.

5, 6 & 7. Nothing that the prosecutor was alleged to have done was done under colour of any military authority, or was or could have been done because he was a member of the Defence Force, or was materially facilitated by reason of his membership of it. The alleged offence was totally unconnected with any military duty. In this respect the qualification clearly stated in the judgment of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*[201] is important: that the "authority to punish military personnel who transgress the ordinary law of the land" is for their transgressions "*while acting or purporting to act as military personnel*."[202]

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201 (1989) 166 CLR 518.

202 (1989) 166 CLR 518 at 564 (emphasis added).

8. All crime has been said to be local[203]. The act alleged against the prosecutor would appear likely to constitute a crime according to the law of Thailand and to be triable in the courts of that country[204]: certainly no party submitted to the contrary.

9. No military authority was flouted. It is true that military service in both peace-keeping and war requires the application of disciplined force. But military service requires discipline in all of its activities. Discipline is the nature of military service. Any form of criminal conduct involves a departure from self-discipline and is abhorrent. Whether the requisite degree of connexion exists cannot depend upon the presence or absence, or degree of force, involved in the commission of the crime, or whether, in greater or lesser degree other service people will regard it as abhorrent.

10 & 11. No military post or property was threatened.

12. The alleged crime is among those that have traditionally been prosecuted in civilian courts.

162 Something should be said of the trilogy of cases referred to by McHugh J. None are determinative of this case. This follows from an examination of the facts which led to the decisions in those cases. In *Re Tracey; Ex parte Ryan*[205] the prosecutor was charged with three offences, first, of making an entry in a *service* document relating to leave which was false in a material particular. The other two charges related to absence (from *service*) without leave. In *Re Nolan; Ex parte Young*[206] the prosecutor was charged with the falsification of military pay lists in order to receive an amount of pay greater than his entitlement. In *Re*

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203 See *Lipohar v The Queen* (1999) 200 CLR 485 at 497 [15] per Gleeson CJ, 521 [91], 527 [106] per Gaudron, Gummow and Hayne JJ.

204 Section 276 of the Penal Code of the Kingdom of Thailand provides: "Whosoever has sexual intercourse with a woman, who is not [his] wife, against her will, by threatening by any means whatever, by doing any acts of violence, by taking advantage of the woman being in the condition of inability to resist, or by causing the woman to mistake him for the other person, shall be punished with imprisonment of four to twenty years and [a] fine of eight thousand to forty thousand baht."

205 (1989) 166 CLR 518.

206 (1991) 172 CLR 460.

Tyler; Ex parte Foley[207] the prosecutor was charged with dishonestly claiming a military temporary rental allowance ("TRA"). Under the TRA scheme, any entitlement a recipient otherwise had to an allowance ceased on the acquisition of a home suitable for his or her family. The prosecutor had purchased a suitable family home but elected to rent the purchased home, for his own gain, while still receiving TRA. In every case therefore, each of the offences had an intimate connexion with military service.

163 If the test of service connexion is to be applied on the basis that it will be satisfied if the acts alleged constitute an undisciplined application of force, or conduct that would be regarded as abhorrent by other soldiers, then it is difficult to see how any serious crime committed anywhere, including in Australia, under any circumstances would not be susceptible to the military jurisdiction exclusively. The further consequence would be the denial to the soldier and the prosecuting authority of trial by jury. It is sometimes overlooked that the prosecuting authority and the community which it represents have as great as and as real an interest in trial by jury as the person on trial.

164 We do not, with respect, therefore subscribe to the view that to ask the question whether the discipline of the military service will be enhanced by a certain measure or course, is to ask the same question as "Is there a service connexion?" Any measure for the proscription of any form of misconduct has as its end, discipline. If enhancement of discipline is to be effectively the only test, there will be very few offences of any kind, committed anywhere, in any countries, which will escape the all-enveloping net of "service connexion".

165 The respondent in argument sought to rely upon part of a paragraph stated by General Washington on 24 February 1779[208]. That part was quoted with approval by Harlan J in *O'Callahan v Parker*[209]. It is important to set out the whole of the relevant paragraph to indicate the context in which the General was speaking, and by which he emphasized the delicacy of the situation which prompted its promulgation:

> "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. The General does not mean to decide

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207 (1994) 181 CLR 18.

208 *Writings of George Washington*, vol 14 at 140-141.

209 395 US 258 at 281-282 (1969).

> in the present case nor to include Colo. Craige's conduct in that description; but he seriously recommends it to all officers to consider the delicacy of their situation with respect to the inhabitants and cautiously to refrain from every thing that may have even the appearance of an abuse of power. A real one so far as depends upon him will never escape the severest notice."

That statement cannot be given general application, and certainly has no application to this case. It was part of a general order given by the leader of an army in rebellion against the colonial power in circumstances in which the loyalties of the inhabitants were divided. It was given during the course of an insurrection taking place in the General's homeland in circumstances in which injury to the inhabitants had a great potential to affect the outcome of the rebellion. It was directed to conduct adverse to the inhabitants of the colonies in which the hostilities were taking place at the time, and not to the inhabitants of another country in which a soldier was present but not performing military duties of any kind.

166 The difference between a soldier on leave in a foreign country in which he is neither on active duty, serving nor based, and a civilian tourist is not to be overstated. Nor are we persuaded that criminal misconduct, unrelated to the performance of a soldier's military duties is likely to provoke greater protest or reluctance on the part of another country to admit and harbour Australians, including, relevantly Australian military units, than criminal misconduct by Australian tourists. Equally it might be asserted that misbehaviour by other Australian groups of visitors to foreign countries, whether organized formally or informally or not, such as sporting teams and their followers, would be likely to provoke protest and resistance to the reception of Australians generally, including members of its defence forces. Strictly these are factual matters and no fact material to them appears in the case stated or otherwise. But this is clear, misbehaviour, criminal and otherwise, whether committed by soldiers or civilians reflects badly on a nation and is capable of adversely affecting its interests. It would be a form of chauvinism to regard another nation and its people as being incapable of drawing a distinction between the behaviour of a soldier on leave from a base in a third country in an entirely civilian setting, and the behaviour of a soldier there actually under military orders or carrying out military duties. It would be equally chauvinistic to regard the country in which the criminal conduct has occurred as being incapable of detecting it and trying and punishing an offender for it. All foreigners or nationals present in a country must obey its local laws. Although both the prosecutor and the complainant here were foreigners, each was under that obligation. The complainant was entitled to invoke the protection of those laws, and the prosecutor liable to suffer their application to him.

167 The majority also stress the importance of discipline and morale in the defence forces and McHugh J makes factual assertions about the reluctance of both male and female military personnel to serve with rapists. Again, these are factual issues which neither the case stated nor any evidence touches on. But it may be assumed that the importance of morale in a defence force is no doubt very great. It is likely to be put at serious risk however if charges against soldiers in respect of criminal misconduct committed on leave in a foreign country in circumstances totally unrelated to their military activities and duties, are to be heard and determined by court martial in Australia without a jury. 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.

168 The contrary view rests on a conception of military service to the Crown which, while it has strong historical roots, has tended to fade in modern conditions[210]. If the Commonwealth desires to try and punish soldiers in the position of the prosecutor, then it would probably be possible for it to make all crimes of any character committed abroad by Australian nationals, whether soldiers or not, triable and punishable in Australia. From the point of view of public international law, the "nationality" basis for jurisdiction over extraterritorial acts is well recognized, at least for serious offences[211]. It is likely that the external affairs power would support legislation of that kind, and there would then be no Ch III problems if the legislation provided for the trials to be conducted by Ch III courts.

169 The prosecutor made a concession at the hearing that had he been alleged to have committed the crime the subject of the charge in Malaysia he would have been unable to contend that it was not service related. There are some obvious differences between the actual circumstances, and the circumstances as they would have been had they occurred in Malaysia, in particular the existence of the arrangements between that country and Australia regarding the prosecutor's presence there, but whether they should give rise to a different consequence, and whether the concession was properly made it is unnecessary to say.

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210 For example, the effective overruling of statements made by Windeyer J in *Parker v The Commonwealth* (1965) 112 CLR 295 by this Court in *Groves v The Commonwealth* (1982) 150 CLR 113.

211 Brownlie, *Principles of Public International Law*, 6th ed (2003) at 301-302; Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 462-463.

170 The submissions of the respondents failed to grapple with the practical and legal problems that would arise, if, for example the prosecutor had been taken into the custody of the Thai authorities and if he were tried in Thailand. The respondents' response, that there would then be a case for the exercise of a prosecutorial discretion not to prosecute, was not an entirely satisfactory or convincing one. In a sense the alleged victim has sought to choose a different, her own preferred forum, a military tribunal, for the trial of her alleged aggressor, from the "natural forum", the criminal courts of Thailand. In particular, no attempt was made to explore what would happen if Australia and Thailand were each to assert jurisdiction, and the consequential difficulties of extradition if that occurred[212]. None of these matters of themselves can be decisive of the answer to the question but they are matters of relevance which help to fortify us in the conclusion that we have reached.

171 We would answer the question in the stated case: "Yes".

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212 As Gummow J points out in his judgment Thailand is an extradition country for the purposes of the *Extradition Act* 1988 (Cth).

Callinan J
Heydon J

62.