

## **PRIVATE R v COWEN & ANOR (S272/2019)**

Date application for a constitutional or other writ filed: 13 September 2019

Date application referred to Full Court: 3 March 2020

Private R is a soldier who has been a member of the Australian Defence Force (“the ADF”) since 2006. In June 2019 he was charged with assault occasioning actual bodily harm (“the Charge”) by the Director of Military Prosecutions, under s 61(3) of the *Defence Force Discipline Act 1982* (Cth) (“the DFD Act”) and s 24(1) of the *Crimes Act 1900* (ACT). The Charge followed an investigation by military police of a complaint made by the alleged victim (“the Complainant”), who was also a member of the ADF at the time of the alleged incident.

The alleged offence is said to have occurred in a Brisbane hotel room in August 2015, soon after Private R and the Complainant had attended a social event in the hotel. Both persons were off duty and out of uniform at the time. (Private R and the Complainant previously had been in an intimate relationship, prior to the Complainant’s joining the ADF.)

On 26 August 2019 a Defence Force Magistrate (“DFM”), Brigadier Michael Cowen, overruled an objection by Private R that he (the DFM) lacked jurisdiction to hear the Charge.

Private R then applied to this Court for the issuance of a writ of prohibition to Brigadier Cowen, prohibiting him from proceeding on the Charge. Private R contends that s 61(3) of the DFD Act does not validly confer jurisdiction on service tribunals to try criminal charges during peacetime where civilian courts are available. This is on the basis that s 61(3) of the DFD Act cannot be supported by the relevant head of power in the Constitution, s 51(vi), because s 61(3) is not reasonably appropriate or adapted to the maintenance of service discipline.

Brigadier Cowen filed a submitting appearance, after which the Commonwealth of Australia was joined, with the consent of Private R, as a defendant to the proceeding.

The Commonwealth submits that s 61(3) is wholly valid, it being open to the Parliament to decide that any crime by a member of the ADF reflects on the person’s fitness to serve and more broadly on the discipline in and the reputation of the ADF.

The application was referred by Justice Edelman for consideration by a Full Court, upon a statement of facts agreed by the parties.

A Notice of a Constitutional Matter was filed by Private R. At the time of writing, no Attorney-General had intervened in the proceeding.