IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S272 of 2019

BETWEEN:

PRIVATE R
Plaintiff

and

BRIGADIER MICHAEL COWEN
First Defendant

and

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S REPLY

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

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1. The essence of the second defendant's case is that the service status of a member is sufficient to attract the jurisdiction of service tribunals, and also that there is no meaningful distinction between the "service status" and "service connection" tests.[1] There are several difficulties with these propositions. First, the second defendant's case is founded upon the views of Mason CJ, Wilson & Dawson JJ in *Re Tracey* concerning the validity of s.61 when in fact that was a minority position. In *Re Tracey*, Brennan & Toohey JJ, Deane J and Gaudron J each held that a service connection beyond mere service membership was necessary to attract military jurisdiction. The minority view did not gain acceptance in either *Re Nolan* or *Re Tyler*. It is also contrary to the observations of Gleeson CJ in *White*.[2]

10 2. Second, it is a logical fallacy (CS [17]) to suppose that it follows, *a priori*, that because an offence is committed by a defence member there is a "service connection" sufficient to attract military jurisdiction under the defence power.[3]

3. Third, while it is true that some civil offences reflect on a member's "fitness to serve" (i.e. their character) or may be embarrassing to "the reputation" of the defence force, it does not follow that "any crime" committed by a defence member anywhere reflects on the discipline *of the defence force* justifying exercise of military jurisdiction, especially where the offence is unrelated to them acting in any military capacity and occurs out of uniform and off duty. On the second defendant's contention, military jurisdiction extends to all aspects of a member's life - any offence[4] committed in Australia by a defence member equally reflects just as much
20 on the discipline of the defence force as any other – there is no difference between speeding whilst a member is on holiday, chopping down a protected tree in their private backyard,[5] unlawful chastisement of a child in their private home and sexually assaulting a non-military neighbour in the neighbour's home– all can be prosecuted by the Director of Military Prosecutions before a service tribunal (outside of Ch III and without any of the protections guaranteed to ordinary citizens in Commonwealth or State trials) even though they cannot all be sensibly characterised as having a service connection in the requisite sense. Moreover, this position proceeds on the false premise that trying defence members in service tribunals for "any crime", regardless of the circumstances, is "reasonably appropriate and adapted" to

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[1] Commonwealth's Submissions (CS) [3], [17]
[2] (2007) 231 CLR 570 at [21], [24].
[3] The differences of opinion between Mason CJ, Dawson and Wilson JJ on the one hand and the other justices of this Court in the trilogy of cases reflects the meaningful distinction between the two tests.
[4] Territory offences under s.61 are not limited to "crimes" in the ordinary sense but all offences against the law of the Commonwealth or any other law in force in the Jervis Bay Territory.
[5] r.20 of the *Road Transport (Road Rules) Regulation 2017* (ACT) and s.15 the *Tree Protection Act 2005* (ACT) respectively.

maintaining discipline in the defence force.[6] However, where a member is unfit to serve or has engaged in conduct that adversely affects the reputation of the defence force because they have committed a civil crime, they can be dismissed and their conduct dealt with by the civil authorities (without any loss of their ordinary rights as a civilian that are lost in a trial by a service tribunal).[7] It cannot sensibly be considered "reasonably appropriate and adapted" to the maintenance and enforcement of military discipline to try a member in a service tribunal, and if convicted dismissing and/or imprisoning them,[8] if they can be dismissed by command under the regulations and tried by the civilian authorities (and imprisoned if found guilty and the circumstances warrant). The second defendant offers no explanation how the latter course does not ensure the maintenance of military discipline thereby rendering military prosecution entirely unreasonable and unnecessary (and thus not reasonably and appropriately adapted to the defence power). The second defendant's reliance on the Chief of Army's Directive 28/16 (CS [4], [39]) to establish a "service connection" justifying a trial by a service tribunal is therefore misplaced.[9] In any event, command (or the executive) cannot determine whether an act by the executive is within the scope of constitutional power by declaration.[10]

4. As to the submissions at CS [19], [20], whether the prosecution of a defence member is a valid *exercise* of jurisdiction under s.61 depends upon it being "reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline".[11] It has long been recognized that the operation of the defence power varies according to the facts upon which its application depends.[12] As Brennan & Toohey JJ observe, the availability of civil courts is a highly relevant (and may be a determinative) circumstance. No decision of this Court needs to be overturned. The reasoning of Brennan & Toohey JJ in the trilogy of cases was plainly not rejected in those cases and was not rejected in *Re Aird*, which concerned the *application* of the service connection test.[13] Similarly, the decision in *White* did not involve any rejection of that reasoning and did not deal with the plaintiff's contentions. In that case the member was charged with acts of indecency against and assault of *subordinates from her own ship*.[14] It was not in contest that those circumstances gave rise to the requisite service

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[6] The observations of Gleeson CJ in *White* at [21] illustrate that, depending on the circumstances, there can be a distinction between a breach of military discipline and a breach of the civil order.
[7] "in time of peace members of the services should enjoy, *as far as their duties permit, the ordinary rights of citizens*": *The Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 503 per Windeyer J.
[8] The only greater punishment than dismissal from the defence force is imprisonment: DFDA s.68(1).
[9] The Directive postdates the plaintiff's alleged conduct in any event.
[10] cf *Australian Communist Party v Cth* (1951) 83 CLR 1 regarding the Parliament's declarations of purpose.
[11] That is if it has a "reasonably direct or proximate and clearly perceived effect on discipline": see PS [40]
[12] *Re* Tracey (1989) 166 CLR 518 at 597 per Gaudron J
[13] (2004) 220 CLR 308 at 312.
[14] *White* at [31].

connection. The argument advanced by the parties in *White* was not directed to which of the "service connection" or "service status" tests should be preferred and the Court did not consider the issue.[15] The second defendant submits (CS [20]) that were service tribunals unable to exercise jurisdiction over ordinary crimes where civil courts are available, it would have the "extraordinary consequence" that a member who assaults a superior could not be dealt with. That submission is without merit as it fails to appreciate that this involves an express DFDA offence of 'assaulting a superior' contrary to s.25, an offence no civilian court could try.[16]

5. The submission (CS [21]) that the plaintiff's argument, that his conduct should be "left solely in the hands of the civilian authorities", would lead to situations where the military would be "powerless" to address the offending conduct both misstates the plaintiff's case and is misplaced. A common consideration for all civilian prosecution authorities is that charges will be prosecuted if there are reasonable prospects of conviction and it is in the public interest/interests of justice (and the more serious the offence the more likely it will be). If a civilian DPP reaches the conclusion that an offence should not be prosecuted in light of those considerations then it can hardly be in the interests of military discipline to prosecute an alleged offender for the same offence. If command considers, on the lower civil standard of proof, that action is needed then it is open to dismiss the member (which addresses the possibility of other members being "reluctant to serve" with a member: CS [39]), reduce them in rank if dismissal is too severe,[17] or impose a lesser administrative sanction such as censure or warnings.

6. The second defendant's submissions (CS [23], [28]) misstate the plaintiff's case and incorrectly submit it is wrong. The plaintiff did not submit there was never concurrent jurisdiction between civil and military courts. Rather, that in the United Kingdom prior to federation, civilian courts had primacy and that the *exercise* of military jurisdiction (in contradistinction to *power* to exercise) over ordinary civil crimes was not considered appropriate (i.e. reasonably necessary to maintain discipline) where the jurisdiction of civil courts could conveniently and appropriately be invoked.[18] In Victoria prior to federation and for the Commonwealth following the *Defence Act 1903*, military jurisdiction did not extend to civil offences in peacetime (see [12] below). It follows that the conferral of military

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[15] See Gleeson CJ at [3]. The plaintiff's contention in *White* went only to scope of Ch III: *White* at 572-573.
[16] Which has a self-evident service connection.
[17] There is no "undue delay" involved, to the contrary under the regulations the member has only 14 days to respond to a notice of termination or reduction in rank: Regulations 14 and 24 *Defence Regulation 2016*.
[18] It must also be remembered that both the imperial and the colonial parliaments did not have the same restrictions as the Commonwealth Parliament has vis-à-vis Ch III and Ch IV.

jurisdiction over all civil crimes at all times was not considered reasonably necessary to maintain service discipline.

7. The second defendant's reliance on *Solorio v United States* (CS [24], [29]) is misplaced for several reasons. First, unlike the Supreme Court this Court has no principle of "judicial deference" to parliament on questions of constitutional limits of the defence power.[19] Second, as the dissent of Marshall J explains, none of the authorities relied upon by the majority for the proposition that military jurisdiction was exercised purely on the basis of the member's status support that proposition, indeed each of them had very clear service connections. Third, unlike the United States, the application of the "service connection" test has not vexed the Courts in Australia.[20] Fourth, even at federation the United States military did *not* have jurisdiction over ordinary common law felonies, that did not happen until 1916.[21]

8. Contrary to the second defendant's assertion otherwise (CS [25]), s.39 of the *Naval Discipline Act 1860* only extended to military/naval offences, not the ordinary criminal law, to "any place on shore" within the United Kingdom.[22] The ordinary criminal law only applied in places with a naval connection or otherwise within Admiralty control.[23]

9. The second defendant's submissions (CS [26]) misstate the Plaintiff's submissions as to the military discipline regime before federation then incorrectly assert it is not true. It was not submitted that all colonial regimes made no provision for the trial of ordinary criminal offences in peacetime, but rather that was the position in Victoria at federation[24] and in the Commonwealth following the enactment of the *Defence Act 1903* (Cth).[25] Both in Victoria prior to federation and in the Commonwealth following the enactment of the *Defence Act 1903* (Cth), the only offences to which service members were subject in peacetime within Australia were military offences, not the ordinary criminal law.[26]

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[19] So much is clear from reasoning of the majority in the *Communist Party case*.

[20] in the 25 years since *Re Tyler*, this Court has had to consider the application of the service connection test once (*Re Aird*), it has never been considered by the Federal Court and has only twice been considered by the Defence Force Discipline Appels Tribunal (*Williams v Chief of Army* [2016] ADFDAT 3 and *Komljenovic v Chief of Navy* [2017] ADFDAT 4).

[21] see Plaintiff's Submissions (PS) [32] and fn 29 which the second defendant does not address.

[22] The offences punishable in the United Kingdom did not extend to all or any ordinary civil crimes: both the specific and the "miscellaneous offences" were disciplinary; ss.23-24 related to prejudicial conduct.

[23] So much is clear from s.39 (s.46 of the 1866 Act).

[24] The second defendant incorrectly asserts that the Victorian legislation applied at all times. The reference at fn71 completely overlooks the operation of s.17 which conditions the application of the *Army Discipline and Regulation Act 1879* in s.19 to circumstances of invasion, hostile attack or general signals of alarm i.e. active service. ss.11 and 13 of the *Naval Discipline Act 1884* (SA), was in materially identical terms.

[25] ss.55-56 make it plain members were only subject to the Imperial statutes "*while on active service*".

[26] *Victorian Military Forces Regulations 1892* and in Part VII ss.73 – 85 of the *Defence Act 1903* and the *Regulations for the Australian Military Forces of the Commonwealth 1904* respectively

10. The suggestion (CS [30]) that the existence of sedition as an offence under the Mutiny Act is fatal to the plaintiff's case should not be accepted – apart from mutiny, it is difficult to conceive a crime (directed as it is to inciting others to defy authority) committed by a service member that is more inimical to the discipline of a hierarchical armed force.[27] It says nothing about ordinary civil crimes of a soldier unconnected to their service.[28]

11. The facts upon which the constitutional question is to be answered should not extend beyond those of the charge and surrounding circumstances considered by the first defendant in making his decision.[29] The Commonwealth has relied upon and mis-characterised the disputed, unsworn hearsay allegation of the complainant in support of its case that the offence is sexual in nature.[30] Not only are the complainant's allegations irrelevant to the jurisdictional question raised by the application, on no fair reading of them did the plaintiff assault the complainant in such circumstances.

12. For the reasons at [3] and [5] above, the mere fact that a defence member is alleged to have committed an offence of violence in peacetime in Australia does not automatically lead to the conclusion that there is the requisite service connection justifying a military trial. It is only where there is conduct involving circumstances sufficiently connected with military service (and where civil courts are not reasonably available) that a military trial can "reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline" and thus a valid exercise of the defence power. For the reasons at PS [48]-[52], those circumstances are absent in the present case.

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[27] especially where elements of the army had recently rebelled after the fall of James II.

[28] The passage cited at CS [31] demonstrate that jurisdiction is directed to the discipline of service members as service members (i.e. *military* discipline) not their personal discipline unrelated to their military capacity.

[29] The material before the DFM included the charge sheet and a statement of agreed facts (CB 71), i.e. those facts appearing at [2], [4], [6]-[13] of the Statement of Agreed Facts (CB 48-49). It is only the nature of the charge and the surrounding circumstances of the offence, not the details of the manner of offending that have ever been considered by this Court in determining questions of jurisdiction: see *Re Aird* at [1], [12]-[18], [51]-[52]; *White v DMP* (2007) 231 CLR 570 at [21] per Gleeson CJ.

[30] CS at [4] fn12. The charges here are patently not a sexual assault or of a sexual nature. The submissions at CS [38]-[39] are irrelevant to the present case and should be rejected.