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NEITHER SUPERIOR NOR SUBORDINATE: AN EXPLORATION OF THE MILITARY JURISDICTION IN DOMESTIC OPERATIONS

The Scenario

At the 2040 Olympic Games in Canberra, the Australian Defence Force ('ADF') has been called out to counter threats of domestic violence to a Commonwealth interest.

Being satisfied that there is a threat of domestic violence, but wishing to continue the Olympic Games, the authorising Ministers approve a div 4 call out under the *Defence Act 1903* (Cth), declaring select sporting arenas around the city to be specified areas for the purposes of the *Act*. ADF members, armed with rifles, are called out to assist civilian police establish vehicle checkpoints, and control the flow of people into the stadiums.

Thirteen days into Operation Green and Gold Assist, an ADF Corporal is conducting searches of bags for items linked to the domestic violence threat. One member of the public in another queue is beginning to cause a disturbance in refusing to allow for his bag to be opened. Addressing the sports-goer, the Corporal again demands the bag to be opened. The man does so, and in closing the bag nearly catches the Corporal's hand within the zip.

Enraged, the Corporal grabs the man by the back of the neck and throws him to the ground. Before anything further can occur, other members of the public and the ADF intervene.

With the consent of the victim, the Corporal is charged with the service offence of assault.[1]

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1 *Defence Force Discipline Act 1982* (Cth) s 33(a) ('*DFDA*').

I Introduction

There is no situation more liable for a potential abuse of power than the domestic deployment of military personnel. The inherent reservations that Australian citizens hold about domestic deployments, although poorly articulated, reflect this.[2] While the topic of domestic deployments and the necessary checks and balances has recently inspired a reinvigorated discussion — including, but not limited to, the amenability of a decision to call out the troops to judicial review[3] — this article focuses on another limb of accountability: the decision to prosecute any abuses of power by military personnel during a 'call out'.[4] Specifically, the article looks to explore the viability of the military jurisdiction under the *Defence Force Discipline Act 1982* (Cth) ('*DFDA*') to respond to offences committed by Australian Defence Force ('ADF') members during domestic operations. This article therefore seeks to explore the tension between jurisdictional choices of a court or court martial, as well as provide wider education to readers on the military jurisdiction — which is neither superior, nor subordinate, to the civil system. However, the article is not concerned with situations of armed conflict that could fall under the statutory framework of div 268 of the *Criminal Code Act 1995* (Cth) sch 1 ('*Commonwealth Criminal Code*').

Although multiple domestic deployments have occurred in Australia,[5] these have primarily occurred under non-statutory executive power with little consideration of what jurisdiction would apply for any criminal prosecutions.[6] Indeed, the legislation that provides the statutory footing for the domestic deployment of the ADF where the use of force is contemplated — namely, pt IIIAAA of the *Defence Act 1903* (Cth) ('*Defence Act*') — envisaged states and territories having jurisdiction to commence criminal proceedings against ADF members until its 2006 revision.[7] The legislation

2 Margaret White, 'The Executive and The Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 438.

3 See Samuel C Duckett White and Andrew Butler, 'Reviewing a Decision to Call Out the Troops' [2020] (99) *Australian Institute of Administrative Law Forum* 58.

4 The expression 'call out' traditionally refers to the use of 'reserves, militia and other auxiliary forces' for certain contingencies. In 18th century England, where regular troops were to be used they were said to be 'called in'. However, in time, the practice was to 'call out' troops in readiness to be 'called in': Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power' in Bruce Debelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (Federation Press, 2019) 211, 217 [15].

5 Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) 64. To this can be added the call out of the ADF to suppress a migrant riot at Bonegilla, Victoria in 1952: see 'Riot Alert at Bonegilla', *The Argus* (Melbourne, 19 July 1952) 1.

6 White, *Keeping the Peace of the Realm* (n 5) 64; BD Beddie and S Moss, 'Some Aspects of Aid to the Civil Power in Australia' (Occasional Monograph No 2, Department of Government, University of New South Wales, 1982) 59.

7 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) 24 [162] ('EM, DLA (Aid to Civilian Authorities) Bill 2005'). This is in juxtaposition to the *Maritime Powers Act 2013* (Cth) which provides a statutory footing for civil maritime security in the Australian offshore area.

now provides that ADF members are liable to civilian criminal punishment,[8] and vests control of the civilian prosecutorial process in the Commonwealth Director of Public Prosecutions ('CDPP') to the exclusion of state or territory prosecutors.[9] This provides consistency in the exercise of prosecutorial discretion for criminal acts when it is the Commonwealth that has stepped into the fray of an incident of domestic violence (a constitutional concept which is covered in more depth below).[10] Importantly, it does not exclude military jurisdictions.

The decision to prosecute must necessarily grapple with the fundamental decision of whether a civilian court or a court martial is the more appropriate forum to hold ADF members accountable. On the one hand, a civilian court offers public confidence in the transparency and unbiased nature of the judiciary. However, on the other hand, a court martial allows a greater variety of punishments[11] and exists purely to discipline and punish military personnel for misconduct (both military and criminal offences). It is, therefore, the *curia specialis* this article addresses, through the fictional scenario of Operation Green and Gold Assist outlined above, how an abuse of power by an ADF member can and should be dealt with. The article deliberately uses an example of 'common' assault[12] — a service offence within the *DFDA* (that is not a prescribed offence)[13] and thus could fall under the jurisdiction of a summary authority, a court martial, or a civilian court of the Commonwealth.

This article builds upon a recent decision by the High Court of Australia, which has finally and conclusively addressed the question of the applicability of the military jurisdiction to ADF members. *Private R v Cowen* ('*Private R*')[14] settled three important issues. First, the decision laid to rest two converging, and confusing, lines of judicial and academic thinking about whether military law applies as a matter of: (1) an accused simply serving as an ADF member (the 'service status' test); or

8 Through the application of the criminal law of the Jervis Bay Territory: *Defence Act 1903* (Cth) s 51Y(1) ('*Defence Act*').

9 Ibid s 51Y(3).

10 EM, DLA (Aid to Civilian Authorities) Bill 2005 (n 7) 24 [163].

11 In addition to imprisonment and fines, the *DFDA* allows for the punishments of dismissal, detention, reduction in rank, forfeiture of seniority, restriction of privileges, stoppage of leave and extra drill: *DFDA* (n 1) s 68(1).

12 The offence of 'assaulting another person' in a public place under the *DFDA* (n 1) s 33(a) is not called 'common assault' notwithstanding that it has no aggravating features such as: the victim being superior in rank to the accused: at s 25; the victim being subordinate in rank to the accused: at s 34; or the assault resulting in actual bodily harm: at 33A. By contrast, the equivalent offence under the *Crimes Act 1900* (ACT) s 26, is entitled 'common assault'.

13 Relevantly for summary authorities, a prescribed offence, with some specified exceptions, is a service offence punishable by more than two years civil imprisonment: *DFDA* (n 1) s 104; *Defence Force Discipline Regulations 2018* (Cth) reg 51. Summary authorities do not have jurisdiction to try a prescribed offence: see *DFDA* (n 1) ss 106, 107.

14 (2020) 271 CLR 316 ('*Private R*').

(2) because the subject matter of the accused's conduct relates to their ADF service (the 'service connection' test). The High Court dismissed the use of both the service status test and the service connection test.[15] Second, a law that 'tend[s] or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth'[16] was held 'valid in all its applications';[17] therefore, the territory offence provision in s 61(3) of the *DFDA* was found 'valid in all its applications'.[18] Finally, the High Court stated that the jurisdiction of service tribunals may operate concurrently with the ordinary criminal law of the states and territories[19] — in this regard, the jurisdiction is complementary, and not subordinate, to the ordinary criminal law.[20] Yet, *Private R* does not answer the question of when it is appropriate to pursue charges in a military jurisdiction; it merely again confirms that such a jurisdiction is constitutionally valid.

In order to address this, this article in Part II canvasses the legal framework for calling out the ADF. It does not focus on the spectrum of powers and defences available under the *Defence Act*, but looks to focus solely on the high constitutional threshold (being 'domestic violence') that must often be met in order to call out the troops.[21] This high threshold is critical for framing the exceptional situations that must arise for pt IIIAAA to apply. Part II utilises never-before published archival evidence to demonstrate the multiple requests that have occurred for a call out to occur since Federation. The scenario that this article addresses would therefore be the first call out to occur under the current statutory framework — a necessary factor in any jurisdictional assessment.

Part III then turns to address the viability of proffering charges within the military jurisdiction through a legislative framework designed by Parliament. It demonstrates the strengths and weaknesses of the military jurisdiction, utilising the scenario–response model so as to best articulate any possible prosecution decisions, defence and sensitivities. It does so for multiple legal and policy reasons. Confusion as to prosecutorial jurisdiction degrades morale and the subordination of the military to civil authorities; it is in the interests of both ADF members and citizens to know how and in what forum a member of the armed forces will be prosecuted for specific offences. Although these questions have been asked in relation to different jurisdictions, [22] there has been no discussion in Australia. Further, it is beneficial for

15 Ibid 331 [42], 345–7 [81]–[88] (Kiefel CJ, Bell and Keane JJ).

16 Ibid 332 [42], quoting *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 216 (Dixon CJ).

17 *Private R* (n 14) 332 [42].

18 Ibid 348 [89].

19 Ibid 335–6 [51].

20 Ibid 337 [54], 338 [61].

21 See, eg, *Defence Act* (n 8) s 33.

22 For an example of these discussions in the United States of America, see David E Engdahl, 'Foundations for Military Intervention in the United States' (1983) 7(1) *University of Puget Sound Law Review* 1.

Australians in general to understand how prosecutions occur when the victim is a member of Australian society. Finally, it is important with respect to domestic security operations — which have long been hypothesised but never eventuated — to understand what might happen in the aftermath.

II Legal Framework

Discussion of the legal framework is integral to an understanding of the potential for domestic operations to abuse power, as well as the historical checks and balances that have developed to address and mitigate the risk. This is particularly so due to the changed threshold requirement for calling out the ADF since 2019. After the Lindt Café siege in 2014, the State Coroner of New South Wales' report canvassed, inter alia, the use of the ADF in terrorist incidents and concluded that the 'challenge global terrorism poses for state police forces calls into question the adequacy of existing arrangements for the transfer of responsibility for terrorist incidents to the ADF'.[23] Consequentially, on 10 December 2018, the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) ('*2018 Defence Amendment*') was passed with bipartisan support. The amendments to pt IIIAAA aimed to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'.[24]

The thresholds were ostensibly lowered with the enactment of the *2018 Defence Amendment*. This has not, however, altered the requirement that the authorising Ministers must be satisfied that threat or violence merits calling out the ADF. Thus, although pt IIIAAA has not been used to date, it is foreseeable that the new statutory regime — which has now been in effect since 10 June 2019 — will increasingly become an option for Commonwealth, state or territory governments. The scope for calling out the ADF is wide and is increasingly considered a viable solution as a part of a Commonwealth response to a domestic emergency. This is unsurprising. The ADF demonstrates an ability to conduct operations without the need for external logistical support; it has a large pool of personnel and unique capabilities to counter non-routine threats and crises. This makes the ADF the Commonwealth government's go to agency to assist states and territories in resolving large scale

23 State Coroner of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (Report, Coroners Court of New South Wales, May 2017) 385 [32] ('*Lindt Café Inquest*').

24 Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2 [3] ('Explanatory Memorandum 2018'). These aims were corroborated by the Attorney-General in the second reading speech for the Bill: see Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6746 (Christian Porter, Attorney-General).

domestic disasters.[25] Yet, the consequences of the use of the ADF in such circumstances, particularly for potential criminal prosecution of ADF members, remains under discussed.

This article will accordingly first canvas the constitutional parameters for the use of the ADF domestically, before addressing the statutory operationalisation of these restrictions. It will then pivot and address the disciplinary checks and balances codified under the *DFDA*.

A *The* Australian Constitution

Critical to domestic deployments is s 119 of the *Australian Constitution*. It has important consequences for the scope of the role of the armed forces, and of the Commonwealth generally, in exercising a power to keep the peace of the realm.[26] Although described as the 'wallflower of the *Constitution*',[27] s 119 (combined with s 114) is anything but. On one reading, it can be constructed as the sole authority for federal intervention; from another lens, it confirms the reserve powers of states; and yet another analysis shows it to be just a specific scenario in which domestic operations can occur.[28]

This federal division of responsibility is reflected in Department of Defence policy when it comes to domestic operations. Importantly, this policy reflects what the law is believed to be. Whilst the accuracy of this divided policy has been critiqued, it usefully reflects the exceptional nature of military intervention.[29]Accordingly, as a matter of policy, the use of the military within Australia domestically falls into two broad categories: (1) Defence Assistance to the Civil Community ('DACC'); and (2) Defence Force Aid to the Civil Authority ('DFACA'). DACC relates to 'assisting the civil community in both emergency and non-emergency situations … [and does not] involve the use, or potential use, of force (including intrusive or coercive acts) by Defence members'.[30]

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25 Ian McPhee, Auditor-General, *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, Australian National Audit Office, 16 April 2014) 11–12; Department of Defence (Cth), *Defence Assistance to the Civil Community Policy* (Policy, 31 August 2021) [1.5] ('*DACC Policy*'); Department of Defence (Cth), *Defence Assistance to the Civil Community Manual* (Policy, 2 December 2022) [4.2] ('*DACC Manual*').

26 White, *Keeping the Peace of the Realm* (n 5).

27 Peta Stephenson, 'Fertile Ground for Federalism? Internal Security, the States and Section 119 of the *Constitution*' (2015) 43(1) *Federal Law Review* 289, 290.

28 White, *Keeping the Peace of the Realm* (n 5) 57.

29 Victor Windeyer questioned whether such a threshold 'should be the determinant of the need for and the lawfulness of an order by the Governor-General': see Windeyer (n 4) 227 [40].

30 *DACC Policy* (n 25) [1.5].

'Force', in turn, is defined within the *DACC Manual* to include 'the restriction of freedom of movement of the civil community whether there is physical contact or not'.[31] Examples of DACC, historically, include military aid in bushfires, floods and storms or use of specialist military personnel and equipment for explosive ordnance disposal.[32] It has also included flying displays involving helicopters or fighter jets appearing at motorsport events, helicopters or skydivers appearing at football matches, or bands appearing at ceremonial functions.[33]

If the ADF was called out to respond to a situation anticipated to require the use of force, this would be considered DFACA. When force is used by the ADF domestically,[34] outside of the security of defence premises and maritime law enforcement,[35] there is only one relevant statutory provision that may empower their conduct: pt IIIAAA of the *Defence Act*. These provisions, and their historical predecessor, have remained the only statutory provisions by which the ADF could deploy force domestically.

B *Part IIIAAA of the* Defence Act 1903 *(Cth)*

Since 1903, and the original *Defence Act*, there has been a statutory ability to call out the ADF to respond to instances of domestic violence.[36] In 2000, in preparation for the Sydney Olympic Games and the threat of possible terrorist activities, pt IIIAAA was introduced to the *Defence Act*, replacing the previous s 51 with 27 new sections.[37] The focus of pt IIIAAA related to land-based counterterrorism and hostage recovery situations and provided a statutory footing for 'the mechanics

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31 *DACC Manual* (n 25) annex 10F [14a]. It is implicit in this pattern of activity that the mere presence of ADF members, unarmed, does not constitute force and would seem to occur under the prerogative relating to the command, control and disposition of the ADF as found within s 68 of the *Australian Constitution*. For a more in-depth discussion of what the test of 'use of force' might be, see White, *Keeping the Peace of the Realm* (n 5) 12–15.

32 *DACC Manual* (n 25) ch 5, annex 10F. There are grey zones, however, such as what has happened on at least one occasion when the ADF assisted Victorian police in breaching motorcycle gang safe houses: see 'Army, Police Raid Melbourne Property in Ongoing Operation Targeting Outlaw Motorcycle Gangs', *ABC News* (online, 12 October 2013) <https://www.abc.net.au/news/2013-10-12/police-and-adf-raid-bikie-property-in-melbourne/5018414>.

33 See White, *Keeping the Peace of the Realm* (n 5) 8.

34 This article does not cover the situation of the ADF using force within Australia in the course of an armed conflict or pursuant to the *DFDA*.

35 Certain authorised ADF members are permitted to use force to protect defence premises: see *Defence Act* (n 8) pt VIA.

36 Ibid s 51, as enacted.

37 David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 115, 118. See *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth) ('*DLA (Aid to Civilian Authorities) Act 2000*').

for the deployment of the ADF in aid of the civil authorities'.[38] The provisions were amended again in 2006 to expand the basis for a call out to include threats to Commonwealth interests in the offshore area and to allow for the protection of critical infrastructure.[39] The *2018 Defence Amendment* streamlined the process for how a call out was to occur.

It is important to have a thorough understanding of the call out process, and threshold requirements, by the relevant decision-makers in order to demonstrate the exceptional nature of a call out order.

1 *Process to Call Out the ADF*

There are four potential call outs that may occur under the amended pt IIIAAA, as outlined in Table 1 below. The first two relate to Commonwealth interest call outs, the latter two to state and territory call outs.

Table 1: Type of Call Out Orders

Section	Call Out Type
33	Commonwealth interest
34	Commonwealth interest — contingent call out
35	Protection of states and territories
36	Protection of states and territories — contingent call out

A call out order is, for the most part, made by the Governor-General on the satisfaction of the authorising Ministers (being, the Prime Minister, the Attorney-General and the Minister for Defence)[40] that the relevant mandatory considerations are met — namely, that the ADF should be called out.[41]

However, situations arise that require speed and flexibility. Under div 7 of the *Defence Act*, the involvement of the Governor-General in a call out can be dispensed with in 'sudden and extraordinary emergenc[ies]'.[42] Such an order may simply be made verbally,[43] but a written record of the order must be made and signed by the

38 HP Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 226.

39 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) ('*DLA (Aid to Civilian Authorities) Act 2006*').

40 *Defence Act* (n 8) s 31. Part IIIAAA refers to 'the Minister', which, by virtue of the *Acts Interpretation Act 1901* (Cth) s 19, means that all Ministers in the Defence portfolio are 'the Minister' for the purposes of pt IIIAAA. For convenience, this article will refer to the senior Minister in the portfolio, the Minister for Defence.

41 *Defence Act* (n 8) s 33(1).

42 Ibid s 51U(1).

43 Ibid s 51U(3).

decision-maker(s) and the Chief of the Defence Force ('CDF') for the order to take effect.[44]

There are three different levels of authority by which an expedited call out may occur, and the call out may only progress in authority levels if the preceding option cannot be satisfied.[45] Primary responsibility is given to the Prime Minister unilaterally.[46] Where this is not practicable, the two remaining authorising Ministers may take responsibility for an expedited call out.[47] In the event that one of these two Ministers is unable, the remaining authorising Minister may work in concert with an alternative authorising Minister.[48] Although s 51V(1) of the *Defence Act* appears to give an expedited call out the same legal effect as a call out by the Governor-General, it seems inconsistent with the intent of div 7 — which imbues the legal authority for an expedited call out order with authorising or alternative authorising Ministers — that any action under div 7 would be anything other than a decision by an officer of the Commonwealth.

2 *Threshold Requirements*

For a majority of call out orders (except in the Australian offshore area) the threshold of 'domestic violence' must be met. The term 'domestic violence' has never been authoritatively defined in the *Australian Constitution*, parliamentary debates or the *Defence Act*. Whilst the constitutional provision has been cited in case law,[49] it has never been the subject of any jurisprudential commentary. It has only been the subject of narrow, sporadic academic commentary.[50]

Most recently, Anthony Gray has attempted to advocate for 'narrow' and 'broad' interpretations of the constitutional term.[51] Gray, in a somewhat disconnected manner, appears to try to link jurisprudential developments in the concept of domestic violence between individuals in relationships to the constitutional concept

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44 Ibid ss 51U(3)(a)–(b). This could allow, theoretically, for an expedited call out in under five minutes.

45 Ibid s 51U(2).

46 Ibid s 51U(2)(a).

47 Ibid s 51U(2)(b).

48 Ibid s 51U(2)(c). The alternative authorising Ministers are the Deputy Prime Minister, the Minister for Foreign Affairs, the Treasurer and the Minister for Home Affairs (who is defined by s 31 as the Minister who administers the *Australian Federal Police Act 1979* (Cth)): *Defence Act* (n 8) s 51U(2)(c).

49 Most recently in *Thomas v Mowbray* (2007) 233 CLR 307, 394–5 [247]–[249] (Kirby J).

50 See, eg, RM Hope, *Protective Security Review* (Report, 15 May 1979) 33.

51 Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *University of New South Wales Law Journal* 357, 362–3.

of domestic violence.[52] The link is not clear, except for an assertion that expansive definitions of domestic violence (in the family law context) have evolved with the times as should constitutional terms. Gray then posits that a liberal, non-literal interpretation of domestic violence could be applied,[53] recognising that the meaning of words in the *Australian Constitution* can change over time.[54] There is some benefit to this, despite an erroneous link between the alternate meanings of domestic violence and the incorrect and dangerous conclusions drawn from them with respect to the use of the military in Operation COVID-19 Assist.[55] Taking an expansive, flexible approach to the constitutional terms reflects it is a living document, capable of changing with the times. It also prevents fossilisation of particular concepts (such as 'domestic violence') unnecessarily constraining operations.

In making this assessment of how the constitutional term should be interpreted, it is useful to utilise Jonathan Crowe's tryptic contextual analysis methodology — this involves interpreting words using their ordinary meaning, their holistic meaning, and their dynamic meaning.[56] It has benefits because it takes into account the meaning of the term domestic violence both as it was intended, and as it currently stands.

(a) Ordinary Meaning of Domestic Violence

The first step is to assess the lexical meaning of the term 'domestic violence', at the time of enactment. The term comes from the *United States Constitution* art IV § 4. Relevantly, the term was intended to allow the federal government to counter domestic dangers, which one Founding Father of the United States of America ('US') thought 'more alarming' than the 'arms and arts of foreign nations'.[57] Particularly relevant for the US experience were fears of slave revolts; the term 'domestic violence' as opposed to 'insurrection' allowed for military force to be used against those who did not have the legal right to commit insurrection.[58] Within the US, the term has included 'local uprisings, insurrections or internal unrest within a state'.[59]

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52 Ibid.

53 Ibid 363.

54 See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

55 Gray (n 51) 373. Gray concludes that the nature and scale of the global health emergency in Operation COVID-19 Assist, and the scale of harm that could arise from the bushfires of Operation Bushfire Assist, would meet the threshold of domestic violence.

56 For a detailed argument in support of this approach, see Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41(1) *Federal Law Review* 417.

57 Alexander Hamilton, 'No 6: Concerning Dangers from Dissensions Between the States' in Mary Carolyn Waldrep and Jim Miller (eds), *The Federalist Papers* (Open Road Integrated Media, 2022) 30.

58 See Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vol 2, 467. See also Jay S Bybee, 'Insuring Domestic Tranquility: *Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause' (1997) 66(1) *George Washington Law Review* 1, 33.

59 Stephenson (n 27) 298.

Domestic violence has further been argued to include industrial disputes, protests, demonstrations, riots and 'many traditional forms of political opposition'.[60] Such a position is reflected in the Addendum to the Explanatory Memorandum to the *2018 Defence Amendment* which notes that domestic violence

> *refers to conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. *Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence'*.[61]

The ordinary meaning of the term is thus concerned with conduct which would rupture the social fabric.[62] Could the threshold be so low that it would include a riot? The answer must clearly be 'no'. William Finlason, writing in 1868 on the use of martial law to suppress rebellion, described the difference between riot and rebellion in terms of the legal framework that could be employed to deal with each:

> And these words, riot and rebellion, indicate the scope of the powers of common law and of martial law respectively. *Riot is, in its nature, casual, actual, and simple*; and simple measures of resistance may suffice, and the simple powers of the common law may be sufficient. But rebellion, as it is more dangerous and deep-seated, so it is necessarily more difficult to deal with, and may require not only full liberty of attack, but, as it may be passive as well as active, and may follow a policy of exhaustion and devastation rather than one of aggression or attack, even full liberty of attack may be insufficient to subdue it, and deterrent measures may be necessary, and the power of speedy punishment. … *Rebellion is war: that is the cardinal principle*. War requires measures of war …[63]

The *Australian Constitution* makes clear that domestic violence is not an actual and simple matter that can be dealt with under simple common law powers held by citizens; it requires the use of the military. This article argues that the term domestic violence is sui generis — a classification of belligerency that arguably falls above the concept of riot (being casual, actual and simple) and below that of rebellion (being war, or non-international armed conflict).

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60 Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 16. See also Michael Head, *Domestic Military Powers, Law and Human Rights: Calling Out the Armed Forces* (Routledge, 2020).

61 Addendum to the Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2 (emphasis added).

62 See James Mortensen, 'A History of "Domestic Violence" in Australian Politics' (2023) 20(2) *History Australia* 254.

63 WF Finlason, *A Review of the Authorities as to the Repression of Riot or Rebellion: With Special Reference to Criminal or Civil Liability* (Stevens and Richardson, 1868) 47–8 (emphasis altered).

(b) Contextual Meaning of Domestic Violence

The next step, according to Jonathan Crowe and Peta Stephenson, is to identify the broader contextual factors that underpin the meaning.[64] Noting the term comes from the *United States Constitution*, it is therefore relevant to explore both the US and Australian contextual meanings of the term.

Within the US, the history of the provision starts in 1786 when a group of British traders refused credit to Bostonian merchants; these merchants in turn demanded cash payments from subsistence farmers.[65] These farmers, under Revolutionary War veteran, Daniel Shays, led armed mobs through Massachusetts closing down public services.[66] Governor James Bowdoin dispatched privately funded militia, with federal troops being requested concurrently.[67] This call, importantly, largely went ignored.[68]

By February 1787, Shays' Rebellion was over but with Great Britain looking to reinstate the monarchy, concerns lingered over whether or not the new US confederation could survive internal discord.[69] This could be either from internal dissidents conducting a rebellion against the respective state, or one state invading another — a fear at the forefront of the Constitutional Convention debates that opened three months later.[70] It resulted in two additions to the *United States Constitution* — a Preamble which promised to 'insure domestic Tranquillity' and a guarantee to do so against domestic violence.[71]

The Australian experience was somewhat similar. Section 119 of the *Australian Constitution* was first introduced into the constitutional debates by Samuel Griffith, on or around March 1891,[72] in light of the Shearers' Strike. Here, unlike the US experience, the Queensland Government was successful in crushing the industrial action. But the provision must necessarily be read in the context of other Australian constitutional provisions, and the wider contextual history of the *Australian Constitution* itself.

64 Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36(2) *Sydney Law Review* 205, 229.

65 Bybee (n 58) 19.

66 See David Szatmary, 'Shays' Rebellion in Springfield' in Martin Kaufman (ed), *Shays' Rebellion: Selected Essays* (Westfield State College, 1987) 1.

67 Ibid 15–19.

68 Ibid.

69 See generally Robert A Feer, 'Shays's Rebellion and the Constitution: A Study in Causation' (1969) 42(3) *New England Quarterly* 388.

70 Ibid 404 n 32 (listing six state conventions who referenced the rebellion).

71 *United States Constitution* art IV § 4.

72 JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 61–2.

In preparation for Federation, which would result in the withdrawal of Imperial troops from the colonies and place the onus of defence on the new Commonwealth of Australia,[73] the barracks and fortifications of Imperial troops were handed to the local colonial governments, and Imperial military advisers were sent to ensure the requisite state of efficiency could be reached. Accordingly, Major-General Edwards was sent to Australia in 1889 to inspect and report on the defence of the colonies. His recommendations were made for a uniform system of military organisation, the establishment of '[a] federal military college for the education of the officers' and '[a] uniform gauge for the railways'.[74] These recommendations heavily influenced the drafting of the *Australian Constitution*, and indeed were one of the major drives for Federation generally.[75]

Accordingly, unlike the US experience, Australian states did not have their own militia per se to rely upon after Federation.[76] This may explain why Griffith was so 'concerned to seek a guarantee from the Commonwealth that military assistance would be provided to a state in cases of *uncontrollable* domestic violence'.[77] It may further explain why the Australian provision does not require the request to be from the legislature, but rather from the state executive.

Contextually, then, domestic violence is a term that carries with it the implications of, and against the backdrop of, federalism. Similar to the federal construct of the US, a mere passive policing role of the Commonwealth is not intended by s 119, but to create a framework to respond to a 'state … in which life and property were absolutely unsafe'.[78] However, unlike state guards within the federalist United States system, Australian states do not have an inherent military capacity. They are reliant upon the Commonwealth. The provision should therefore be read widely.

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73 Alpheus Todd, *Parliamentary Government in the British Colonies* (Little, Brown, and Co, 1st ed, 1880) 295.

74 Alpheus Todd, *Parliamentary Government in the British Colonies* (Lawbook Exchange, 2nd ed, 2006) 400.

75 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books Sydney, 1976) 562–3.

76 The *Australian Constitution* s 114 forbids states from raising naval or military forces without the consent of the Commonwealth. In theory, the states could develop forces for their own protection. No Commonwealth consent is required for paramilitary forces. In 1912, Prime Minister, Andrew Fisher, refused the request of the Queensland State Government under s 119 of the *Australian Constitution* for federal assistance to address the Brisbane General Strike on grounds it was a matter to be addressed by the state. This led to an interesting discussion of the role of the Commonwealth: see Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 1912, 84–5 (Alfred Deakin).

77 Stephenson (n 27) 294 (emphasis added).

78 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1912, 153 (William Hughes, Attorney-General).

(c) Dynamic Meaning of Domestic Violence

The final step to understanding the constitutional term is to ask for its dynamic meaning, reflecting that constitutional terms are not locked in a 'display cabinet in a constitutional museum'.[79] This involves looking at the social facts underpinning a term, and trying to minimise the cognitive bias within a single author's interpretative horizon.[80]

The notion of domestic violence clearly envisaged, at the time, non-peaceful and destructive actions by individuals, in person, against the government or organs thereof. Its dynamic meaning, however, can and should be extended to situations closer to the tearing of the social fabric. It may be open that a dynamic interpretation of domestic violence could include failure to comply with public health directions in a global pandemic, which threatened to tear a state apart and overwhelm public health services. But as the Explanatory Memorandum to the *2018 Defence Amendment* makes clear, physical force is key to current interpretations.

What is important, however, is that in making a determination to call out the ADF, the authorising Ministers must consider not just that domestic violence is occurring, but the nature of the domestic violence. This is a relevant mandatory consideration. This ensures that it is not just every instance of domestic violence that the ADF is called out to respond to. In making the determination, authorising Ministers may look to

> matters such as *the type of violence, the types of weapons used, the number of perpetrators* involved, *as well as the scale* of domestic violence (or anticipated domestic violence) where such information is available. For example, the ADF could be called out in response to unique types of violence, such as chemical, biological, radiological or nuclear attack … The ADF could also be called out where the type of violence is not unique — for example an active shooter — but *where the violence is so widespread, or there are so many shooters involved*, that law enforcement resources are in danger of being exhausted.[81]

The ADF may also be called out without a state or territory request.[82] While on its face, this seems to run contrary to the constitutional provision of s 119, it has nevertheless been argued to fall within s 61 of the *Australian Constitution*.[83]

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79 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ).

80 Martin Heidegger, *Being and Time*, tr John Macquarrie and Edward Robinson (Blackwell, 1962) 194–5.

81 White and Butler (n 3) 67, quoting Explanatory Memorandum 2018 (n 24) 6 (emphasis altered).

82 *Defence Act* (n 8) s 38(1).

83 Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (Australian National University Press, 2017) 189. See also White, *Keeping the Peace of the Realm* (n 5) 53–80.

Again, pt IIIAAA requires that the authorising Ministers must be satisfied that the ADF should be called out.

3 *Overall Importance With Respect to Jurisdiction*

This is all to say that the decision to call out the ADF, as per the fictional Operation Green and Gold Assist, is not one made lightly and reflects a paramount need for military assistance to the states, or for the Commonwealth to protect itself.[84]

Operation Green and Gold Assist would clearly be a military operation and the alleged criminal conduct would not be done by the Corporal in a personal capacity but done in the course of duty as a defence member. Per *Private R*, there would appear no constitutional bar, then, to allowing prosecution under a military jurisdiction. Indeed, pt IIIAAA seems to imply Parliament intended to allow for this.[85]

Deploying domestically, under established statutory processes, also has implications for prosecutions which are raised in more depth below. Primarily, the statute offers the ability for ADF members to train both in processes and in rules of engagement ('ROE'). ADF members are obliged to abide by the ROE that they are issued. ROE are best summarised as

> directions to operational and tactical level commanders that delineate the circumstances and limitations within which armed force may be applied by the ADF to achieve military objectives. ROE are issued both in peace and armed conflict. ROE will be issued by the Chief of Defence Force … The factors that influence the formulation of ROE are diplomatic, political, operational, and international and domestic law. Any ROE issued will include legal consideration of these factors.[86]

The phrase ROE came to the fore due to its use by the US during the Korean War.[87] ROE have expanded to cover all forms of armed conflict.[88] For the purposes of pt IIIAAA, ROE constitute a lawful general order and must be adhered to.[89] Any non-compliance with such orders is thus 'not just an individual breach of discipline, but jeopardises the implementation of national policy as reflected in the rules of

84 See generally White, *Keeping the Peace of the Realm* (n 5).

85 The difficulty of parliamentary intention is noted: see White, *Keeping the Peace of the Realm* (n 5) 83–5.

86 Royal Australian Air Force, *Operations Law for RAAF Commanders* (Australian Air Publication 1003, May 2004) 45 [5.16].

87 Jeffrey F Addicott, 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory' (2013) 45(1) *St Mary's Law Journal* 1, 14–15.

88 Jon Moran, 'Time to Move Out of the Shadows? Special Operations Forces and Accountability in Counter-Terrorism and Counter-Insurgency Operations' (2016) 39(3) *University of New South Wales Law Journal* 1239, 1251.

89 See *DFDA* (n 1) ss 15F, 27, 29.

engagement'.[90] This policy consequence, as well as wider constitutional context, are all relevant factors in deciding the jurisdiction that should apply to incidents such as that in the hypothetical scenario.

4 *Criminal Jurisdiction*

When it was enacted, pt IIIAAA had no provision addressing the criminal jurisdiction applicable to ADF members involved in a call out.[91] As the legislation was silent on the issue, this meant that ADF members were subject to the ordinary criminal law of the jurisdiction that they were operating in.[92] If an incident crossed over multiple jurisdictions, then these members would have been subject to multiple criminal jurisdictions. This risked creating different types of criminal liability for ADF members engaged in the same conduct when operating at the behest of the Commonwealth,[93] with no guarantee that the operational context of the situation would be considered in any decision to prosecute an ADF member.

The situation was remedied in 2006. This was achieved by an amendment to pt IIIAAA: the 'applicable criminal law' provision.[94] The applicable criminal law provision alters the jurisdictional position that would otherwise ordinarily apply to ADF members operating under a call out. It achieves this by doing two things. First, the provision applies the substantive criminal law applicable in the Jervis Bay Territory to the conduct of ADF members involved in a call out.[95] This includes offences, concepts of criminal responsibility and defences.[96] Secondly, the criminal law of the other states and territories is excluded from application.[97] In practical terms, this means the criminal law that applies to ADF members involved in a call out, regardless of where the alleged offending occurs, is: (1) the *Commonwealth Criminal Code*; (2) the *Crimes Act 1900* (ACT); and (3) the *Criminal Code 2002* (ACT). Finally, it gives responsibility for the prosecution of criminal offences to the CDPP.[98]

Before considering the operation of the applicable criminal law provision, it is appropriate to briefly mention the validity of the provision. By excluding the criminal

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90 Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85(2) *Australian Law Journal* 91, 95.

91 *DLA (Aid to Civilian Authorities) Act 2000* (n 37).

92 EM, DLA (Aid to Civilian Authorities) Bill 2005 (n 7) 24 [162].

93 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (Report, February 2006) 21 ('*Senate DLA 2005 Report*').

94 *Defence Act* (n 8) s 51Y. When it was initially enacted, this provision was s 51WA: *DLA (Aid to Civilian Authorities) Act 2006* (n 39) sch 6 item 13.

95 *Defence Act* (n 8) s 51Y(1)(a).

96 Ibid s 31 (definition of 'substantive criminal law').

97 Ibid s 51Y(1)(b).

98 *Defence Act* (n 8) s 51Y(3).

law of the states and territories, there is, perhaps, a risk that a court would find the provision beyond the legislative power of the Commonwealth to enact. The position is different to what arose when the constitutionality of the *DFDA* was first challenged.[99] When it was enacted, the *DFDA* contained double jeopardy provisions that prevented a civil court from trying a person for a civil offence when that person had been convicted or acquitted of a service offence that was substantially the same.[100] The provision was held to be invalid as it determined to be beyond the Commonwealth's legislative power to oust the jurisdiction of state courts.[101] As Brennan and Toohey JJ found:

> A defence member is and must remain liable to the ordinary criminal law; he does not acquire immunity merely because he has been dealt with by a tribunal other than the ordinary courts.[102]

The applicable criminal law provision does not completely oust the ordinary criminal law. As is analysed below, it merely restricts the exercise of criminal jurisdiction to the Commonwealth at the expense of the states and territories. It is beyond the scope of this article to provide a definitive answer to this issue, and the authors have proceeded on the basis that the applicable criminal law provision in pt IIIAAA is valid. Furthermore, the question is unlikely to be answered unless a state or territory, or indeed the Commonwealth, challenges the exercise of criminal jurisdiction over the conduct of a defence member arising out of a pt IIIAAA operation.

Tracing the history of the applicable criminal law provision offers insight into its purpose and how it is to operate in practice. When enacted, pt IIIAAA required an independent statutory review be conducted into its operation after three years.[103] Even after only three years, pt IIIAAA was considered too limited in application.[104] This was particularly evident when considered in the context of terrorist attacks that had occurred around the world since its enactment in 2000.[105] The *Statutory Review of Part IIIAAA* was completed in January 2004 and identified a number of major

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99 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 ('*Re Tracey*').

100 *DFDA* (n 1) ss 190(3), (5), (6).

101 *Re Tracey* (n 99) 547 (Mason CJ, Wilson and Dawson JJ), 574–8 (Brennan and Toohey JJ).

102 Ibid 576.

103 *Defence Act* (n 8) s 51IXA(3), as at 12 September 2000. There were, however, some events that would have altered the timeframe for an independent review. The independent review would have been required sooner than three years had a call out order been made: at s 51XA(1). Additionally, no review was required if a parliamentary committee had already presented a report on pt IIIAAA: at s 51XA(2).

104 Anthony Blunn, John Baker and John Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)* (Report, Department of Defence (Cth), 12 January 2004) 8 ('*Statutory Review of Part IIIAAA*').

105 *DLA (Aid to Civilian Authorities) Act 2000* (n 37) was enacted on 12 September 2000.

flaws in the legislation, particularly in relation to its too narrow scope, complexity, and likely inability to deal with a complex and evolving terrorist incident.[106]

A significant concern highlighted by the reviewers was the uncertainty of the legal regime that would be applicable to the prosecution of an ADF member involved in a call out. The review identified that for any prosecution of a called out ADF member, pt IIIAAA lacked 'a recognition of the military context in which the ADF operates in assessing the reasonableness of actions'.[107] The review acknowledged that it was possible a court or prosecuting authority would consider the provisions of pt IIIAAA as a whole, observing that

> [w]hilst these provisions do not provide much, if any, advance on the relevant Commonwealth and State law which would be applied to the use of force, they do recognise that the circumstances faced by members may require the use of force, including lethal force. In so doing they perhaps create a climate in which a court would have regard to the position in which the member exercising force is placed, given that in calling out the defence force, civil authority had clearly decided military force was necessary and anticipated the use of force, including, in assault situations, lethal force.[108]

However, the review ultimately determined that there was an inappropriate amount of legal uncertainty in pt IIIAAA for ADF members. The report recommended that 'action be initiated to provide appropriate and effective recognition to the military context in which members of the ADF engaged in aid to civil authority must act'.[109] The solution was to be legislative amendment.

In 2005, the Government introduced new legislation to address some of the flaws identified in pt IIIAAA by the independent review.[110] One of the amendments was the 'applicable criminal law provision'. The intent of the applicable criminal law provision was to provide a consistent approach to determining the criminal responsibility of ADF members operating under a call out. This was to be achieved by modifying the criminal law jurisdiction that would apply to ADF members subject to a call out,[111] as well as specifying the responsible prosecuting authority.[112] The jurisdiction chosen to achieve consistency was the substantive criminal law of the Jervis Bay Territory and the prosecuting authority (for criminal matters) of the

106 Blunn, Baker and Johnson, *Statutory Review of Part IIIAAA* (n 104) 8–11.

107 Ibid 12.

108 Ibid 11.

109 Ibid 13.

110 Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) ('2005 Bill').

111 Ibid sch 6 item 13.

112 Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth) 25 ('REM, DLA (Aid to Civilian Authorities) Bill 2006').

CDPP. The applicable criminal law provision, apart from being renumbered as part of the *2018 Defence Amendment*,[113] has remained unchanged since 2006.

The Revised Explanatory Memorandum for the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 explained that the primary purpose of the applicable criminal law provision was as follows:

> A nationally consistent approach to considering the prosecution of ADF members is more appropriate in circumstances where the ADF will be employed domestically by order of the Commonwealth Government. It is also possible that domestic security operations will be cross-jurisdictional. This would emphasise the importance of a consistent approach to any consideration to prosecute ADF personnel following such an operation.[114]

The means selected to achieve this was to have the CDPP provided with exclusive authority to prosecute criminal offences committed by ADF members during a call out. The CDPP was chosen because

> [i]n accordance with normal prosecutorial discretion, the CDPP can be expected to consider the context of a domestic security operation and the military chain of command in deciding whether to prosecute.[115]

The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) ('2005 Bill') was examined by the Senate's Legal and Constitutional Legislation Committee ('Senate Committee'). In its submission to the Senate Committee, the Department of Defence explained in relation to the applicable criminal law provision that

> [a]s the ADF is a Commonwealth entity operating under Commonwealth law (in this case the Defence Act) it is appropriate that any prosecutions arising from a domestic security operation should also be considered by the Commonwealth Director of Public Prosecutions (CDPP). The Bill ensures that the CDPP will assume responsibility for any prosecution of ADF personnel following allegations of unlawful activity when operating under Part IIIAAA. The Bill will also ensure that a uniform set of criminal laws can be applied and the ADF is able to prepare and train for potential domestic security operations under a consistent legal framework. The laws of the Jervis Bay Territory will apply to ADF personnel in the event of a prosecution resulting from a domestic security operation.[116]

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113 *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) sch 1 item 2.

114 REM, DLA (Aid to Civilian Authorities) Bill 2006 (n 112) 25 [165].

115 Ibid 25 [166].

116 Department of Defence, Submission No 6 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (23 January 2006) 9 ('Defence Submission on 2005 Bill').

The Senate Committee's consideration of the applicable criminal law provision was brief, but concluded that

> it is important to provide a consistent framework for dealing with offences committed by the military during a call-out. This cannot be achieved if the behaviour of troops is subject to the variable laws of the states and territories. It is also notable that should the state or territory wish to do so, there is nothing in the legislation which prevents state or territory police investigating an offence purported to be done by defence force members when operating under Part IIIAAA. The Committee also considers that as a federal entity, ADF prosecutions rightly should be conducted by the Commonwealth DPP, an independent statutory appointee.[117]

An important aspect of the military context of a pt IIIAAA operation is compliance with orders. In the context of a pt IIIAAA operation, there may be situations whereby a defence member is ordered to use force in circumstances where the defence member may not be aware of the reasons why such force is authorised in the circumstances. In such cases, and when such orders are not manifestly and obviously unlawful, the defence member is placing trust in their superiors that the order is lawful. It is for this reason that both pt IIIAAA and the *DFDA* provide limited defences for superior orders.[118] However, the scope of defences available to a called out defence member is different depending upon which jurisdiction the member is tried under.

For the specific pt IIIAAA superior orders defence to apply, the act must have been in the following circumstances:[119]

- done under an order of a superior, which the defence member has a legal obligation to obey;
- pursuant to an order that was not manifestly unlawful, where the member had no reason to believe that there had been a material change in the circumstances since the order was issued;
- the member had no reason to believe the order was issued under a mistake of a material fact; and
- the action that the member took to comply with the order was reasonable and necessary.

Under the *DFDA*, an additional limited defence of superior orders exists.[120] Section 14(b) of the *DFDA* provides that a person cannot be convicted of a service offence that was, relevantly, in obedience to 'an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful'.

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117 *Senate DLA 2005 Report* (n 93) 21.

118 *Defence Act* (n 8) s 51Z.

119 Ibid s 51Z(2).

120 *DFDA* (n 1) s 14(b).

The flip side of the situation is the potential consequences for an ADF member not complying with a lawful direction from a superior. ADF members are required to comply with lawful orders issued to them. They risk prosecution if they fail to follow such orders,[121] but also risk exposing themselves to prosecution if they do comply with a clearly unlawful order. This is not a new conundrum for members of the military in performing their duties and has been a longstanding concern in cases involving military aid to the civil power.[122]

Prosecutorial understanding of the military context of operating under pt IIIAAA may cut both ways for defence members. On the one hand, defence members who have used powers under pt IIIAAA for what they thought were lawful reasons should have their conduct assessed by a prosecutorial authority that understands the context surrounding the alleged offending. Likewise, such understanding will allow a prosecutorial authority to identify when purported reliance on powers under pt IIIAAA was inappropriate and not to be countenanced, notwithstanding a claim to the contrary.

It is clear from the independent statutory review, the 2005 Bill and its various Explanatory Memoranda that there was concern about how state and territory prosecutorial authorities might exercise their discretion following a pt IIIAAA operation. Of particular concern was that these authorities might not consider the wider military context of the pt IIIAAA operation; because they are either unable or unwilling to do so. The CDPP was seen, in terms of criminal jurisdiction, as the panacea to this problem.

The CDPP prosecutes offences against the laws of the Commonwealth.[123] Under the *Director of Public Prosecutions Act 1983* (Cth) ('*CDPP Act*'), the CDPP has functions[124] and powers.[125] Part IIIAAA of the *Defence Act* specifically refers to the 'functions' of the CDPP.[126] The functions of the CDPP include, relevantly: (1) instituting and carrying on prosecution of indictable offences against the laws of the Commonwealth;[127] (2) instituting and carrying on prosecution of summary offences against the laws of the Commonwealth;[128] and (3) other functions as conferred on the CDPP by another law of the Commonwealth and such functions as are

121 Ibid ss 27–9.

122 Charles J Napier, *Remarks on Military Law and the Punishment of Flogging* (T and W Boone, 1837) 23.

123 *Director of Public Prosecutions Act 1983* (Cth) ('*CDPP Act*'); 'About Us', *Commonwealth Director of Public Prosecutions* (Web Page) <https://www.cdpp.gov.au/about-us>.

124 *CDPP Act* (n 123) s 6.

125 Ibid s 9.

126 *Defence Act* (n 8) s 51Y(3).

127 *CDPP Act* (n 123) ss 6(1)(a)–(c).

128 Ibid ss 6(1)(d)–(e).

prescribed.[129] In order to carry out their functions, the CDPP has the power to prosecute offences against the laws of the Commonwealth on indictment.[130]

The role of the CDPP is not mentioned in the *Defence Act*'s simplified outline for div 8, containing the applicable criminal law provision.[131] However, the Revised Explanatory Memorandum to the 2005 Bill explains that

> the functions of the Director of Public Prosecutions under section 6 of the *Director of Public Prosecutions Act 1983* in relation to the law of the Jervis Bay Territory apply in relation to any prosecution of a Defence Force member arising as a result of a criminal act committed while operating under Part IIIAAA.[132]

To understand how div 8 is to operate, it is necessary to consider its wording in its entirety. Section 51Y of the *Defence Act* provides as follows:

> **51Y Applicable criminal law**
>
> *Application of criminal law of the Jervis Bay Territory*
>
> (1) In relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under this Part:
> (a) the substantive criminal law of the Jervis Bay Territory, as in force from time to time, applies; and
> (b) the substantive criminal law of the States and the other Territories, as in force from time to time, does not apply.
>
> (2) To avoid doubt, Chapter 2 of the Criminal Code does not apply to an act done, or purported to be done, under this Part that is a criminal act (except to the extent that it constitutes an offence against the law of the Commonwealth).
>
> *Functions of the Director of Public Prosecutions*
>
> (3) To avoid doubt, the functions of the Director of Public Prosecutions under section 6 of the *Director of Public Prosecutions Act 1983* (Cth) in relation to the law of the Jervis Bay Territory as applied by subsection (1) of this section are exclusive of the corresponding functions of any officer of a State or Territory, in relation to the law of the Jervis Bay Territory as so applied, under a law corresponding to that Act.
>
> Note: It is not intended that this section or Act restrict or limit the power of State or Territory police force to investigate any criminal acts done, or purported to be done, by Defence Force members when operating under this Part.

129 Ibid s 6(2).

130 Ibid s 9(1).

131 *Defence Act* (n 8) s 51X.

132 REM, DLA (Aid to Civilian Authorities) Bill 2006 (n 112) 26 [171].

Further, a criminal act is defined as 'an act or omission that would, if done or omitted to be done in the Jervis Bay Territory, contravene the substantive criminal law of the Jervis Bay Territory'.[133]

It is important to recognise that there are a number of things that the applicable criminal law provision does not do. First, it does not prevent the police forces of the states and territories from investigating offences allegedly committed by ADF members during a call out.[134] This makes sense in the context of the exercise of coronial jurisdiction, which would not be affected by the applicable criminal law provision, as well as allowing for an investigation for the purposes of the CDPP exercising their prosecutorial discretion. Second, while the provision ousts the criminal jurisdiction of the states and territories, it does not exclude action taken under the military justice system. This would include investigation and trial under the *DFDA* as well as administrative inquiries under the ADF's military administrative law system.[135] Finally, the provision does not alter how concepts of criminal responsibility apply to an applied offence. This means that Australian Capital Territory ('ACT') offences that utilise common law concepts of criminal responsibility — which form the bulk of ACT criminal law offences[136] — are not forced to apply the model criminal code concepts of criminal responsibility found in ch 2 of the *Commonwealth Criminal Code*.

Notwithstanding its stated intent, pt IIIAAA's applicable criminal law provision does not make it immediately clear how the provision is to operate. Part IIIAAA creates only two substantive offences: one applicable to defence members when they do not, when exercising certain powers, wear a uniform or identification,[137] and another that makes it an offence for a person to fail to comply with a direction given under divs 3, 4 or 5.[138] By contrast, the wording of the applicable criminal law provision does not, in and of itself, create an offence.

The first difficulty with the provision is that it is not clear what type of offence is committed when an ADF member's conduct amounts to offence contrary to ACT criminal law. It is not apparent whether that conduct is an offence against the *Defence Act*, which would make the conduct a Commonwealth offence, or the substantive criminal law of the Jervis Bay Territory, which could be a Commonwealth offence or an ACT offence. This is important when determining: (1) whether an offence is indictable; (2) the law in relation to sentencing; and (3) the powers and functions of the CDPP. Part IIIAAA is silent on these issues.

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133 *Defence Act* (n 8) s 31 (definition of 'criminal act').

134 Ibid s 51Y; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 43 of 2018–19, 13 November 2018) 36 ('Digest No 43').

135 *Defence (Inquiry) Regulations 2018* (Cth); *Inspector-General of the Australian Defence Force Regulation 2016* (Cth).

136 *Crimes Act 1900* (ACT) ('*ACT Crimes Act*'). Some ACT offences do apply the model criminal code concepts of criminal responsibility: see s 7.

137 *Defence Act* (n 8) s 50.

138 Ibid s 51R.

Other Commonwealth legislation provides some assistance in interpreting the pt IIIAAA criminal law provision. Applying the substantive criminal law of the Jervis Bay Territory in pt IIIAAA is not a novel concept. A number of Commonwealth statutes adopt the substantive criminal law of the Jervis Bay Territory to deal with unusual jurisdictional situations of concern to the Commonwealth. Apart from pt IIIAAA, these jurisdictions include offences committed: on Heard or McDonald Islands;[139] in the Australian Antarctic Territory;[140] by certain Commonwealth officials and associated persons overseas;[141] on aircraft;[142] at sea;[143] and by defence members, defence civilians and prisoners of war.[144] Incorporating the substantive criminal law of the Jervis Bay Territory by reference provides a complete criminal code for these jurisdictions without the need for the Commonwealth Parliament to legislate for one and, perhaps more importantly, keep it updated. Another advantage is that the Jervis Bay Territory is a jurisdiction where the Commonwealth can control and modify what law applies through ordinances and regulations.[145] This means that the Commonwealth can utilise a consistent approach to applying a criminal code to these unusual jurisdictions.[146]

A comparative analysis of pt IIIAAA and these other Commonwealth statutes provides some insight as to how pt IIIAAA's applicable criminal law provision operates. However, there is no uniform approach to incorporating Jervis Bay Territory law.

The *Heard Island and McDonald Islands Act 1953* (Cth) and the *Australian Antarctic Territory Act 1954* (Cth) use the method of applying the law to specific locations. These *Acts* provide that the substantive criminal law of the Jervis Bay Territory is 'in force' in their respective territories as if they formed part of the Jervis Bay Territory.[147] In addition, the legislation provides that ACT courts have jurisdiction over these territories.[148] Offences committed in these external territories are tried by ACT courts.[149] Both these *Acts*' criminal law provision do not themselves create any

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139 *Heard Island and McDonald Islands Act 1953* (Cth) ('*Heard and McDonald Islands Act*').

140 *Australian Antarctic Territory Act 1954* (Cth) ('*Antarctic Territory Act*').

141 *Crimes (Overseas) Act 1964* (Cth) ('*Crimes (Overseas) Act*').

142 *Crimes (Aviation) Act 1991* (Cth) ('*Crimes (Aviation) Act*').

143 *Crimes at Sea Act 2000* (Cth) ('*Crimes at Sea Act*').

144 *DFDA* (n 1) s 61.

145 *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4C.

146 Explanatory Statement, Crimes (Overseas) (Declared Foreign Countries) Amendment Regulations 2009 (No 1) 1.

147 *Heard and McDonald Islands Act* (n 139) s 5(2); *Antarctic Territory Act* (n 140) s 6(2).

148 *Heard and McDonald Islands Act* (n 139) s 9; *Antarctic Territory Act* (n 140) s 10; *Helicopter Resources Pty Ltd v Commonwealth* (2019) 264 FCR 174, 177 [3].

149 An example is prosecution under s 11 of the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*'), which has extra territorial application. See, eg, *May v Commonwealth [No 2]* [2019] ACTMC 31 ('*May*').

offence, instead specifying that the criminal laws are 'in force in the Territory as if the Territory formed part of the Jervis Bay Territory'.[150] The result is that criminal conduct committed in Heard Island, McDonald Island or the Australian Antarctic Territory would likely be treated as offences against the respective provision of the Jervis Bay Territory criminal law being invoked, rather than a Commonwealth offence committed under the 'parent' *Act*. The criminal law regime created for these areas is thus different to what has been established for pt IIIAAA.

The *Crimes at Sea Act 2000* (Cth) ('*Crimes at Sea Act*') utilises two methods of applying the criminal law of the Jervis Bay Territory to locations and classes of persons. First, the legislation creates a regime to confer jurisdiction on the Commonwealth for offences committed at sea outside the 'adjacent area'.[151] The result is that outside the adjacent area the substantive criminal law of the Jervis Bay Territory 'applies' to Australian ships, activities controlled from an Australian ship, abandoned Australian ships[152] and to foreign ships if the first country at which the ship or person calls is Australia.[153] Second, it also 'applies' outside the adjacent area to Australians on foreign ships, Australians in the course of activities controlled from a foreign ship, or Australians who have abandoned a foreign ship.[154] The consent of the Attorney-General must be obtained before a charge can proceed under the *Crimes at Sea Act*.[155] The wording of the consent provision usefully gives a clue as to how the offence provision is to work. It relevantly states that '[a] charge of an offence that arises under this section' cannot proceed without the consent of the Attorney-General.[156] The logical conclusion to draw is that a criminal act that would fall under the jurisdiction of the *Crimes at Sea Act* is an offence under that *Act*, rather than an offence under the relevant law of the Jervis Bay Territory. The *Crimes at Sea Act* is silent on the issue of how to determine whether an offence is indictable or not.

There have been a few reported cases where the courts have considered how the *Crimes at Sea Act* criminal law provision operates.[157] However, these have been torts cases and the judgments have not been concerned with the substantive issues in applying the *Act's* criminal law provision. Usefully, in the matter of *Rawlings v*

150 *Heard and McDonald Islands Act* (n 139) s 5(2); *Antarctic Territory Act* (n 140) s 6(2).

151 The 'adjacent area' is the defined area applicable to each state and the Northern Territory: *Crimes at Sea Act* (n 143) sch 1 cl 14.

152 Ibid s 6(1).

153 Ibid s 6(3).

154 Ibid s 6(2).

155 Ibid.

156 Ibid s 6(4).

157 *Blunden v Commonwealth* (2003) 218 CLR 330; *Rawlings v Royal Caribbean Cruises Ltd* [2020] NSWDC 822, [240] ('*Rawlings*'); *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 ('*Rawlings Appeal*').

Royal Caribbean Cruises Ltd ('*Rawlings*')[158] application of the *Crimes at Sea Act* criminal law provision was a small part of the case, and the facts reveal (in part) how it operated in practical terms.

Rawlings concerned a suit for false imprisonment. The plaintiff (an Australian) was accused of sexually assaulting another passenger on board a cruise ship when it was in international waters. He had been detained by the ship's security officers following the allegation.[159] The ship was registered in the Bahamas and its first port of call after the allegation was raised was New Caledonia. There, the police undertook some investigation into the allegation. In the course of providing consular support to the plaintiff, the Australian consular officer was advised by the Attorney-General's Department that the alleged offending likely fell within the scope of the *Crimes at Sea Act*[160] — the legal basis of the provision applying was the plaintiff being an Australian citizen onboard a foreign ship in the 'adjacent area'.[161] However, discussions between the Australian Federal Police ('AFP') and New South Wales ('NSW') Police resulted in it being agreed that NSW Police would take carriage of the investigation when the ship arrived in Sydney.

When the ship docked in Sydney, NSW Police commenced the investigation into the alleged sexual assault. The trial judge considered that this was odd, given the NSW Police's lack of jurisdiction:

> I accept that the NSW police were contacted about coming on board the ship when it arrived in Sydney. Quite why they were asked to be involved, bearing in mind the known jurisdictional limits on their capacity to take any action was not explained.[162]

At the conclusion of their investigation, NSW Police referred the brief of evidence to the AFP. NSW Police were of the view that there was insufficient evidence to support a charge against the plaintiff and they also acknowledged that NSW did not have jurisdiction over the matter.[163] After reviewing the evidence, the AFP decided not to prefer charges against the plaintiff.[164] Ultimately, proceedings under the *Crimes at Sea Act* were never brought against the plaintiff.

Rawlings highlights some uncertainty as to how an investigation by civilian police would occur in the context of a pt IIIAAA operation. The stated intent of the

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158 *Rawlings* (n 157) involved an initial trial in the New South Wales District Court, which found for the plaintiff, and an appeal decision in the New South Wales Court of Appeal, which reversed the trial judge's finding in favour of the plaintiff: *Rawlings Appeal* (n 157).

159 *Rawlings Appeal* (n 157) 60 [38].

160 *Rawlings* (n 157) [240].

161 *Rawlings Appeal* (n 157) 61 [48]; *Crimes at Sea Act* (n 143) s 6(2)(a).

162 *Rawlings* (n 157) [411].

163 Ibid [339].

164 Ibid [340].

applicable criminal law provision in pt IIIAAA is that state and territory police would not be precluded from investigating an ADF member's alleged criminal conduct, as reflected in the note to the section.[165] The *Crimes at Sea Act* does not have an equivalent note stipulating the role of state or territory police. That NSW Police conducted the investigation in *Rawlings*, notwithstanding an inability to prosecute the offence, would tend to support the position that state and territory police can still investigate these Commonwealth crimes. Given the observation, albeit in obiter, by Judge Hatzistergos at first instance in *Rawlings*,[166] this position may not be settled and the issue was not raised or addressed in the subsequent appeal.[167] However, notwithstanding the note to the applicable criminal law provision in pt IIIAAA, it may be that in some situations, it is beyond the power of state or territory police forces to investigate the alleged offending or they may otherwise be constrained in investigating an offence outside of their jurisdiction. It is beyond the scope of this article to consider such issues in detail.

The *Crimes (Aviation) Act 1991* (Cth) ('*Crimes (Aviation) Act*') utilises the location method to apply the criminal law of the Jervis Bay Territory.[168] It does this by criminalising specified behaviour in relation to certain aircraft. However, unlike most of the other Commonwealth statutes discussed above, the *Crimes (Aviation) Act* creates offences incorporating specified laws applicable in the Jervis Bay Territory. It creates a range of specific aviation related offences, such as hijacking,[169] making threats or false statements to endanger the safety of an aircraft,[170] as well as two offences that could be described as incorporating criminal law offences on board aircraft in a general sense. These general offences adopt some of the criminal law applicable in the Jervis Bay Territory and applies this law in two ways. First, it is an offence to engage in an act of violence against passengers or crew on board certain aircraft if that act would have constituted an offence if committed in the Jervis Bay Territory.[171] The second general offence provides that a person whose act or omission, had it taken place in the Jervis Bay Territory, would have been an offence against Commonwealth law and specified ACT statutes,[172] has committed an offence.[173] These are offences against the *Crimes (Aviation) Act* rather than

165 *Senate DLA 2005 Report* (n 93) 21; Digest No 43 (n 134); *Defence Act* (n 8) s 51Y.

166 See above n 162 and accompanying text.

167 *Rawlings Appeal* (n 157).

168 *Crimes (Aviation) Act* (n 142) s 14(1)(b).

169 Ibid s 13.

170 Ibid s 24.

171 Ibid s 14.

172 Ibid s 15(1)(b). The laws specified are: a law of the Commonwealth in force in that Territory; *ACT Crimes Act* (n 136); *Criminal Code 2002* (ACT); *Prostitution Act 1992* (ACT); or any other law of the ACT prescribed by the regulations in its application to the Jervis Bay Territory.

173 *Crimes (Aviation) Act* (n 142) s 15(1).

offences against the relevant law from the Jervis Bay Territory. As such, federal law dictates whether an offence is indictable or not.[174]

The *Crimes (Overseas) Act 1964* (Cth) ('*Crimes (Overseas) Act*') applies to a class of persons. The criminal laws of the Jervis Bay Territory 'apply' to certain classes of persons overseas who would not otherwise be subject to the criminal law where they are located.[175] In most cases, these are Australian government officials (and their families) serving overseas who enjoy diplomatic, consular or similar immunity in their host country.[176] Section 4(1) provides that the criminal laws of the Jervis Bay Territory apply as 'laws of the Commonwealth', to the act of a person as if the relevant act had occurred in the Jervis Bay Territory. The consent of the Minister must be provided for '[p]roceedings for an offence against the laws applied'.[177] Whether an offence is indictable is determined by reference to the relevant law of the Jervis Bay Territory, as if the offence had occurred there.[178] Jurisdiction is conferred on state and territory courts.[179] The construction of the provision suggests that an offence against the *Crimes (Overseas) Act* is an offence against that *Act* rather than an offence against an applied Jervis Bay Territory law.

The *DFDA* creates an offence by reference to the criminal law in force in the Jervis Bay Territory. It uses a form of 'legislative shorthand' to incorporate a complete criminal code into the statute,[180] known as a 'Territory offence'.[181] A defence member, defence civilian or prisoner of war[182] commits a Territory offence if they engage in conduct that, had it occurred in the Jervis Bay Territory, would be an offence against a law in force in the Jervis Bay Territory.[183] Such an offence is considered a service offence under the *DFDA* and not an offence under the 'borrowed' legislation

174 *Crimes Act 1914* (Cth) s 4G. See also *Donovan v Wilkinson* [2005] NTSC 8, [20] ('*Donovan*'), where the law applicable in making a reparation order for an offence against the *Crimes (Aviation) Act* was *Crimes Act 1914* (Cth) s 21B rather than the equivalent Northern Territory legislation.

175 *Crimes (Overseas) Act* (n 141) s 3A(1)(b).

176 These are persons enjoying privileges afforded by the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 31 ('*VCDR*'); *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 43. See *Crimes (Overseas) Act* (n 141) ss 3A(1)(b)(i)–(ii).

177 *Crimes (Overseas) Act* (n 141) s 4(2).

178 Ibid s 5.

179 Ibid s 7(1).

180 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 311–12 [3] (Gleeson CJ) ('*Re Aird*').

181 *DFDA* (n 1) s 3 (definition of 'Territory offence').

182 The *DFDA* applies to prisoners of war as if they were defence members, subject to the *Geneva Conventions Act 1957* (Cth): *DFDA* (n 1) s 7.

183 Ibid s 61.

from the Jervis Bay Territory.[184] Territory offences are regularly tried by service tribunals, and in the overwhelming majority of cases by a Defence Force Magistrate ('DFM') or court martial.[185] As will be explained in detail below, service offences are not tried on indictment and can only be tried by service tribunals.[186]

Apart from the *DFDA*'s Territory offence provision,[187] these criminal law provisions appear to be rarely utilised. For example, the CDPP reports that in the 2021–22 financial year, there were nine prosecutions under the *Crimes (Aviation) Act*, with no indication which type of offence was tried.[188] In some incidents where applying these criminal law provisions was possible, authorities have instead relied upon Commonwealth offences that have extra-territorial application.[189] This has meant that prosecutors did not need to rely upon the provisions of the relevant statute applying the criminal law of the Jervis Bay Territory. Conversely, in 2021, across the 53 trials by restricted court martial and DFM, there were 34 convictions for Territory offences.[190]

Outside of appeals of superior service tribunals to the Defence Force Discipline Appeal Tribunal ('DFDAT'), reported decisions involving these criminal offence provisions are even rarer.[191] At the time of writing, only one reported instance of a reliance upon one of these criminal law provisions of the Commonwealth statutes described above has occurred. This concerned an offence committed on an aircraft and so involved the *Crimes (Aviation) Act*.[192] In 2003, Michael Donovan was convicted of offensive behaviour following drunken actions onboard a Singapore

184 *Re Tracey* (n 99) 554; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 473 ('*Re Nolan*'); *Hoffman v Chief of Army* (2004) 137 FCR 520, 527–8 [8] (Black CJ, Wilcox and Gyles JJ) ('*Hoffman*').

185 In 2021, there were two convictions for Territory offences before summary authorities: Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2021* (Report, 11 August 2022) annexes C–F ('2021 JAG Annual Report').

186 *DFDA* (n 1) s 190.

187 Ibid s 61.

188 Commonwealth Director of Public Prosecutions, *Annual Report 2021–22* (Report, 11 October 2022) 78. Of those prosecutions, four were tried summarily and five on indictment.

189 *Helicopter Resources Pty Ltd v Commonwealth* (2019) 264 FCR 174; *R v Kapociunas [No 1]* (2015) 305 FLR 241 ('*Kapociunas*').

190 2021 JAG Annual Report (n 185) annexes J–M.

191 It is possible that many of these offences are prosecuted summarily in Magistrate courts and, apart from possible media reporting, are not reported. See, eg, Shari Hams, 'Actor Aleh Sidorchyk Fined But Not Jailed After Indecently Touching Passenger on Flight to Australia', *ABC News* (online, 19 June 2023) <https://www.abc.net.au/news/2023-06-19/actor-aleh-sidorchyk-fined-for-indecently-touching-passenger/102495782>. It is beyond the scope of this article to ascertain the accuracy of this assessment.

192 *Donovan* (n 174).

Airlines flight from Singapore to Brisbane. The aircraft had to be diverted to Darwin, and Donovan was removed from the aircraft and arrested.[193] Donovan was convicted of an offence contrary to the *Crimes (Aviation) Act*,[194] to which he pleaded guilty and was convicted. Donovan was not charged with the referenced ACT offence of 'offensive behaviour'.[195] This reflects the language of the provision which in and of itself creates a Commonwealth offence rather than an ACT one. This conclusion is supported by the manner by which the Northern Territory stipendiary Magistrate imposed a reparation order against Donovan for the loss suffered by Singapore Airlines, in having to divert their aircraft to Darwin. The reparation order was imposed pursuant to the *Crimes Act 1914* (Cth) rather than the relevant Northern Territory provision.[196]

Other instances of prosecutions in these jurisdictions have relied upon the extra-territorial character of various Commonwealth offences rather than relying upon the criminal law as it applies to the Jervis Bay Territory. In 2019, the Commonwealth was convicted under the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*'), following the death of David Wood who fell down a crevasse in the Australian Antarctic Territory.[197] In convicting the Commonwealth, the presiding ACT Magistrate made no reference to the *Australian Antarctic Territory Act 1954* (Cth).[198] As the *WHS Act* itself 'extends to every external Territory'[199] there was no need to consider relying upon the provision applying the criminal law of the Jervis Bay Territory.

Likewise, an alleged sexual offence against a child by the husband of an Australian diplomat was prosecuted as an extra-territorial offence under the *Commonwealth Criminal Code*.[200] The *Crimes (Overseas) Act* criminal law provision was not used. In 2015, Vytas Kapociunas, the husband of an Australian diplomat, was tried in the ACT Supreme Court for the offence of having engaged in sexual intercourse with a child when overseas.[201] Family of diplomatic staff are inviolable[202] in the same way diplomatic staff are,[203] meaning that the sending State, as opposed to the receiving State, has jurisdiction over their criminal conduct. This also meant

193 Ibid [6].

194 *Crimes (Aviation) Act* (n 142) s 15(1)(b)(ii).

195 *ACT Crimes Act* (n 136) s 392.

196 *Crimes Act 1914* (Cth) s 21B(1)(d); *Donovan* (n 174) [25].

197 *May* (n 149); *WHS Act* (n 149) s 32.

198 *May* (n 149).

199 *WHS Act* (n 149) s 11.

200 *Criminal Code Act 1995* (Cth) s 272.8(1) ('*Commonwealth Criminal Code*'); *Kapociunas* (n 189).

201 *Kapociunas* (n 189) 242 [2], 243 [8].

202 *VCDR* (n 176) art 37.

203 Ibid art 29.

that Kapociunas was charged with the more serious offences in the *Commonwealth Criminal Code*[204] rather than the equivalent ACT offences.[205]

(a) Trial on Indictment

An issue not addressed by pt IIIAAA's applicable criminal law provision is when offences are to be tried on indictment. The uncertainty arises because of the differences between Commonwealth law and ACT law as to what is an indictable offence. An indictable offence against a law of the Commonwealth, unless a contrary intention is apparent, is an offence that is punishable by more than 12 months' imprisonment.[206] Likewise, unless a contrary intention appears, a Commonwealth offence punishable by less than 12 months' imprisonment, or not punishable by imprisonment, is a summary offence.[207] In the ACT, an indictable offence is one where, unless the offence states it is indictable, the penalty is more than two years' imprisonment.[208] Part IIIAAA is silent on the issue of which offences are indictable. By contrast, the *Crimes (Overseas) Act* specifically addresses this issue, applying the laws in force in the Jervis Bay Territory to determine whether an offence is indictable.[209]

The question of whether an offence will be tried on indictment will dictate where the trial will be held. The *Australian Constitution* requires that the trial on indictment of any Commonwealth offence must be by jury and tried in the state where the offence occurred.[210] This factor alone may defeat the intended purpose of establishing a uniform means of applying criminal law to offences committed by ADF members on pt IIIAAA activities. In a pt IIIAAA operation, ADF members involved in the decisions that give rise to allegations of an offence being committed may be in different states or territories. In that scenario, assuming the offence is indictable, the trials may have to be heard in their respective locations. The *Australian Constitution* further provides that in situations where an indictable offence is not committed in a state — such as the offshore area — the trial will be held 'at such place or places' as prescribed by Parliament.[211] No such prescription has been provided for in pt IIIAAA.

Analysis of these other Commonwealth statutes ultimately provides no definitive insight into how pt IIIAAA's applicable criminal law provision is to operate.

204 *Commonwealth Criminal Code* (n 200) s 272.9. The maximum penalty for this offence is 20 years imprisonment.

205 *ACT Crimes Act* (n 136) s 55(2). The maximum penalty for this offence is 14 years imprisonment.

206 *Crimes Act 1914* (Cth) s 4G.

207 Ibid s 4H.

208 *Legislation Act 2001* (ACT) s 190(1).

209 *Crimes (Overseas) Act* (n 141) s 5.

210 *Australian Constitution* s 80.

211 Ibid.

The applicable criminal law provision falls into the category of applying to a class of persons: the question is how is the criminal law so applied? The general dearth of relevant reported decisions provides no suitable benchmark that could be used to assist in the interpretation of the applicable criminal law provision. The closest counterpart, the *Crimes at Sea Act*, has no reported decisions dealing with the substantive issues of how its criminal law provision is to operate. Like pt IIIAAA, the *Crimes at Sea Act* does not address which law, Commonwealth or ACT, is used to determine whether an offence is indictable or not. Those statutes that *apply* the substantive criminal law of the Jervis Bay Territory, as opposed to declaring such law to be *in force* would suggest that the answer is that any criminal offence committed by an ADF member in the course of a pt IIIAAA operation is a Commonwealth offence, committed under the *Defence Act*. The investigative response by both NSW Police and the AFP in *Rawlings* would suggest this is the approach that authorities have taken. In the context of a prosecution following arising out of a pt IIIAAA operation, the note in the applicable law provision seeking to preserve the investigative function of state and territory police, points towards a similar result in having state or territory police investigating criminal offences and Commonwealth authorities prosecuting a pt IIIAAA incident. This would seem to be more aligned with Parliament's intent as to how the ADF would be held accountable in the criminal justice system, and how the CDPP is to give effect to such accountability.

5 *Concurrency of Discipline Law*

Both pt IIIAAA and the Explanatory Memorandum for the 2005 Bill introducing the applicable criminal law provision are silent on the concurrent application of the *DFDA* during a pt IIIAAA operation. It is not clear whether this is a deliberate omission. At the same time the 2005 Bill was enacted in 2006, the *DFDA* was undergoing some of its most significant reform with regards to the prosecution of serious service offences. Legislation creating an independent military prosecuting authority, the Director of Military Prosecutions ('DMP'), was enacted on 12 December 2005,[212] with the changes commencing on 12 June 2006.[213] Neither the Department of Defence submission nor the evidence given by the Department of Defence witnesses to the Senate Committee into the 2005 Bill make any mention of the operation of the *DFDA* during a pt IIIAAA operation.[214] Furthermore, the operation of the *DFDA* is not mentioned in the Senate Committee's final report.[215] This is odd, noting that the legislation creating the DMP had already been enacted by the time the evidence was given to the Senate Committee, albeit the DMP (as a statutory office) had not commenced operating yet. The only discussion of prosecutions in the public hearing before the Senate Committee was concerned with state

212 *Defence Legislation Amendment Act (No 2) 2005* (Cth) ('*DLAA (No 2) 2005*').

213 Ibid s 2(1) item 6.

214 Defence Submission on 2005 Bill (n 116); Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 31 January 2006, 45–64 (John Andrew Dunn, Michael Pezzullo and Mark Cunliffe).

215 *Senate DLA 2005 Report* (n 93).

and territory police conducting investigations into alleged wrongdoing by ADF members during a call out.[216]

The Department of Defence's silence on the application of the *DFDA* to a pt IIIAAA activity could not logically be seen as excluding the operation of the *DFDA*. While the Department's submission states that 'the CDPP will assume responsibility for any prosecution of ADF personnel', this could not be taken to mean such responsibility extends to service offences.[217] The submission is focused on the application of criminal law as opposed to disciplinary law. The CDPP and civilian courts do not have jurisdiction to try service offences.[218] The scope of potential service offences an ADF member could commit in the course of a pt IIIAAA operation, noting its disciplinary context, is far broader than the scope of offending under the criminal law. To take the example of the Corporal at the checkpoint: suppose that the Corporal, just before assaulting the man, used insulting language towards the victim. This would be a service offence,[219] but it may not reach the higher threshold of the closest criminal offence equivalent of offensive behaviour.[220] It would be incongruous to suggest that the *DFDA* could not be utilised to deal with the Corporal's insulting words, irrespective of what action, if any, is taken in relation to the assault.

The result is there are two concurrent jurisdictions. In each jurisdiction is an independent statutory prosecuting authority that both have jurisdiction over offences committed by ADF members during a pt IIIAAA activity: the DMP and the CDPP. Apart from the consent requirements for specified Territory offences,[221] both offices have ostensibly equal rights to prosecute the Corporal for the alleged offending. How any jurisdictional impasse is to be resolved has already been developed.

In 2007, the DMP and Directors of Public Prosecution of all Australian jurisdictions entered into a memorandum of understanding ('MOU').[222] The MOU outlines how jurisdictional issues between the discipline and criminal systems will be resolved.[223] The MOU provides that the DMP will consult with the Director of Public Prosecutions ('DPP') of the relevant states or territories, or the CDPP

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216 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 31 January 2006, 51 (Mark Cunliffe).

217 Defence Submission on 2005 Bill (n 116) 9.

218 *CDPP Act* (n 123) ss 6(1)(a), (d) provides that the CDPP prosecutes summary and indictable offences against the laws of the Commonwealth — of which service offences are neither. Further, the *DFDA* does not grant civil courts jurisdiction over service offences: see *DFDA* (n 1) s 190(1).

219 *DFDA* (n 1) s 33(d) where a person 'uses insulting or provocative words to another person' or s 60(1) which refers to prejudicial conduct.

220 *ACT Crimes Act* (n 136) s 392.

221 *DFDA* (n 1) s 63(1).

222 Director of Military Prosecutions, *Report for the Period 12 June 2006 to 31 December 2007* (Report, 24 April 2008) annex B ('*DsPP/DMP MOU*').

223 Ibid 5–8.

> where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offence which should be dealt with in the criminal justice system.[224]

There are certain Territory offences that, if committed in Australia, require the consent of the CDPP before the matter can be tried by a service tribunal.[225] For those service offences, the decision of the CDPP whether to grant consent for prosecution is a matter for the CDPP.[226] The MOU highlights the military context of the alleged offending in making such a determination:

> Whether the alleged conduct took place in circumstances which would be more appropriately dealt with by a military tribunal, for example during a military operation or related activity.[227]

However, for any other service offence, it is a matter for the DMP to decide whether to prosecute a matter as a service offence, irrespective of the advice or position of the relevant DPP.[228]

On its face, the MOU provides the mechanism for addressing the issue of concurrency between the civilian criminal jurisdiction and the military disciplinary jurisdiction. Now that the High Court has clarified that the disciplinary jurisdiction is not subordinate to the ordinary criminal law,[229] it may be a matter of negotiation between the DMP and the CDPP as to which office will take carriage of a matter. An issue not specifically addressed in the MOU that is likely to affect a decision will be whether civilian or military police conduct an investigation. It may be that the matter is actually settled well before a brief of evidence is even compiled by investigators on the ground.

In a disciplinary context, the Corporal's alleged offending is likely to be considered a serious disciplinary incident when compared to its objective seriousness through a criminal law lens. When considering the wider intent of the applicable criminal law provision — that the military context of the pt IIIAAA operation would be considered by a prosecutorial authority before preferring charges — apart from very serious criminal activity, it is hard to argue that the CDPP is better placed than the

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224 Ibid 7.

225 *DFDA* (n 1) s 63(1). The offences are: treason; murder; bigamy; manslaughter; sexual assault in the first, second and third degree; sexual intercourse without consent; sexual intercourse with a young person in its application to the Jervis Bay Territory; and any offence of which proceedings could not be brought into the Jervis Bay Territory without the consent of a Minister or the CDPP. It also includes an ancillary Territory offence in relation to any of the above.

226 *DsPP/DMP MOU* (n 222) 6.

227 Ibid

228 Ibid 8.

229 *Private R* (n 14) 335–6 [51] (Kiefel CJ, Bell and Keane JJ).

DMP to make such an assessment. The MOU, perhaps inadvertently, but certainly in a broad sense, has already addressed this very issue.

III Military Jurisdiction

It is important then, noting that the *DFDA* applies to misconduct by ADF members arising out of a pt IIIAAA operation, to address what the military jurisdiction really is. Despite the streamlining of the common law,[230] and the civilianisation of military law,[231] the jurisdiction of the service tribunals over the Profession of Arms has been recognised by the High Court of Australia. In *Private R*, the plurality noted that

> [w]hile there may be an area of concurrent jurisdiction between civil courts and service tribunals, there is no warrant in the constitutional text for treating one as subordinate or secondary to the other.[232]

It is the suggestion of the authors that *Private R* is best read through the lens of 'breadth' and 'depth' of jurisdiction. The methodology was created by George Winterton to analyse constitutional executive power;[233] its application in the military jurisdiction has never been raised before. Breadth can be defined in the military jurisdiction as the subject matters a service tribunal is empowered to hear, having regard to the constraints of the federal system,[234] whilst depth denotes the precise actions which a service tribunal is empowered to undertake in relation to those subject matters.[235] *Private R* highlighted that the breadth of the military jurisdiction waxes and wanes depending on subject matter: littering can be within the remit, but matters relating to violence and dishonesty are of stronger foundation.[236] Offences of a pure military nature are core to the breadth of the jurisdiction. So too does the depth of punishment have stronger validity responding to matters of a purely military nature, but also corresponds to matters where there is no competition with the states.

Service tribunals, as part of a wider military justice process, seek to enforce the *DFDA*. The *DFDA* applies to all those that have 'voluntarily subscribed to "the King's hard bargain"'[237] by becoming members of the ADF. To take the King's hard bargain has been a 'traditional description for the rendering of military service to

230 White, *Keeping the Peace of the Realm* (n 5) 13.

231 See Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364.

232 *Private R* (n 14) 335–6 [51].

233 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29–30.

234 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 96 [130] (Gageler J), citing Winterton (n 233) 29, 111.

235 Ibid.

236 *Private R* (n 14) 343 (Kiefel CJ, Bell and Keane JJ).

237 *Igoe v Ryan [No 2]* (2020) 280 FCR 327, 329 [1] ('*Igoe*').

the Crown'.[238] The effect of this is that without forfeiting their civil rights and obligations, ADF members undertake additional obligations — one of which being that they are subject to the *DFDA*.[239]

The *DFDA* is not a draconian piece of legislation, but a positive act of Parliament to provide military commanders with an ability to instil and maintain discipline in the ADF. In *White v Director of Military Prosecutions*,[240] the plurality cited the following passage in the title 'Royal Forces' in *The Laws of England* with approval:

> It is one of the cardinal features of the law of England that a soldier does not by enlisting in the regular forces thereby cease to be a citizen, so as to deprive him of any of his rights or to exempt him from any of his liabilities under the ordinary law of the land. He does, however, in his capacity as a soldier, incur additional responsibilities, for he becomes subject at all times and in all circumstances to a code of military law contained in the *Army Act*, the King's Regulations and Orders for the Army, and Army Orders.[241]

This reflects the commonly held position that '[s]ervicepersons are not outlaws'.[242] But neither too are ADF members simply 'citizens in uniform'.[243] As noted over a century ago, '[a] soldier upon enlistment provides the clearest modern instance in English law of a distinct legal status such as Roman law defined with so much care'.[244]

The *DFDA* applies many basic principles of civilian criminal law and rules of evidence: the onus of proof and criminal standards are synchronised with civilian equivalents;[245] the accused is entitled to be legally represented without expense;[246]

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238 Ibid.

239 Ibid 329 [2]. See generally Samuel White, 'Taking the King's Hard Bargain' (2022) 96(9) *Australian Law Journal* 666, 666–86. The nature of military service is reflected constitutionally, with the command power being enshrined in s 68 of the *Australian Constitution*. There are serious consequences to this. Military service is not employment; it entails a suite of common law duties and obligations.

240 (2007) 231 CLR 570 ('*White*').

241 Ibid 601 [71] (Gummow, Hayne and Crennan JJ), quoting Earl of Halsbury, *The Laws of England* (Butterworth, 1913) vol 25, 42 [79].

242 *Groves v Commonwealth* (1982) 150 CLR 113, 136 (Murphy J).

243 Samuel C Duckett White, 'A Soldier by Any Other Name: A Reappraisal of the "Citizen in Uniform" Doctrine in Light of Part IIIAAA of the *Defence Act 1903* (Cth)' (2018–19) 57(2) *Military Law and Law of War Review* 279, 280.

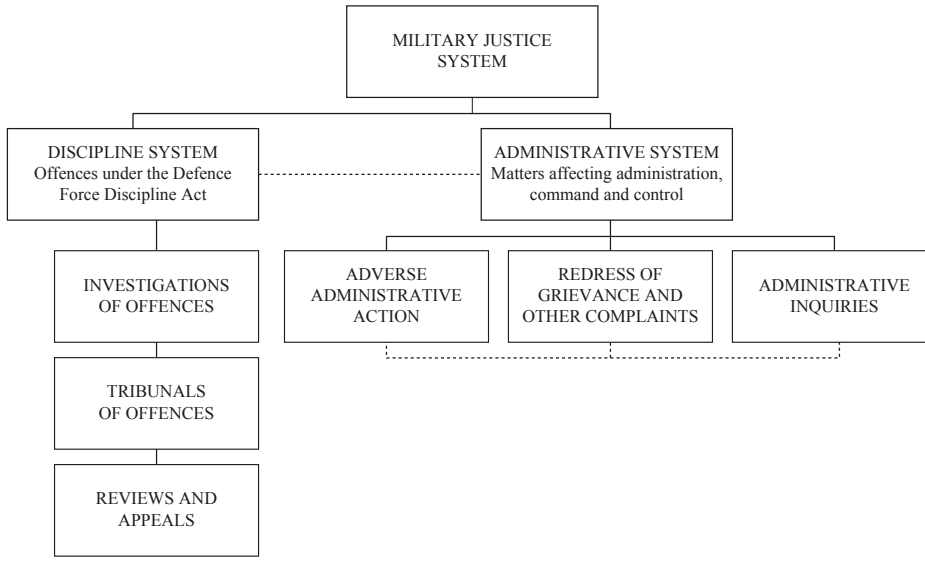
244 Viscount Birkenhead, *Points of View* (George H Doran, 1922) vol 2, 2.

245 *DFDA* (n 1) ss 10, 146, 146A; Justice John Logan, 'Military Court Systems: Can They Still Be Justified in This Age?' (Speech, Commonwealth Magistrate and Judges Association Triennial Conference, 10 September 2018). His Honour's speech was written to critique Pauline Therese Collins, *Civil-Military 'Legal' Relations: Where to From Here?* (Brill, 2019). Collins has most recently written on the Defence Force Discipline Appeal Tribunal ('DFDAT') in Pauline Collins, 'The Significance of the Defence Force Discipline Appeal Tribunal: Analysis of Its Activity over Four Years' (2022) 32(4) *Public Law Review* 348.

246 *DFDA* (n 1) s 137(2).

and importantly the accused is innocent until proven guilty.[247] Part VII of the *DFDA* envisages a three-tiered system of enforcing military discipline which may operate outside of Australia: a lower form system of discipline officers to deal with minor disciplinary infringements,[248] summary authorities to deal with the more serious offending;[249] and an ad hoc higher form of service tribunal which is enacted through DFMs and courts martial, to deal with serious (and complex) service offences.[250] It is complimented by a concurrent system of administrative sanctions[251] per Figure 1.

Figure 1: Military Justice System[252]



247 An implied right reiterated in *Randall v Chief of Army* (2018) 335 FLR 260, 262 [2] ('*Randall*'). See also *DFDA* (n 1) s 132.

248 *DFDA* (n 1) pt IA. As the jurisdiction of discipline officers is limited to disciplinary infringements, which are now managed administratively, it will not be dealt with in this article. Legislation was passed in 2021 that greatly expanded the role of discipline officers but clearly separates out 'disciplinary infringements' and specifies these are not considered service offences. See *Defence Legislation Amendment (Discipline Reform) Act 2021* (Cth) sch 1 div 3.

249 *DFDA* (n 1) pt VII div 2.

250 Ibid pt VII divs 3–4.

251 *Re Tracey* (n 99); *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Aird* (n 180); *White* (n 241); *Lane v Morrison* (2009) 239 CLR 230.

252 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (Final Report, 16 June 2005) 8 [2.6]. The solid lines of Figure 1 represent the framework of the military justice system, while the dotted lines represent the interaction that can occur between all parts of the system. What is not represented in the diagram are discipline officers, which are not service tribunals: see *DFDA* (n 1) s 3 (definition of 'service tribunal').

At all tiers of the summary authority jurisdiction, whilst an accused does have a right to legal advice, they do not have a prima facie right to be represented by a lawyer at trial.[253] Across the summary authority jurisdiction, however, these non-legally qualified officers may not imprison a member (although they may impose a punishment of detention).[254] Whilst some of the punishments have civilian equivalents, there are some that are distinctly military in nature: reduction in rank;[255] forfeiture of seniority;[256] restriction of privileges;[257] stoppage of leave;[258] or extra drill.[259] Regardless, summary authorities are required to give consideration to civilian sentencing principles along with the additional consideration of the need to maintain service discipline.[260] Whilst summary authority proceedings account for the vast majority of matters dealt with by service tribunals,[261] it is likely that trial by a summary authority would be considered inappropriate or inadequate to deal with a matter such as the one identified in this scenario. This is for a few reasons. One is the objective seriousness of the alleged offending in a disciplinary context: the assault of a civilian, in Australia, by an ADF member during a pt IIIAAA operation. The powers of a summary authority — with the most serious punishment that can be imposed in this case being reduction in rank by two ranks[262] — is likely to be seen as insufficient to deal with such a serious disciplinary issue. These interests are reflected in both law and practice: a matter can be referred to the DMP directly by the military police, or can be referred to the DMP from the accused member's unit.[263]

253 *Summary Authority Rules 2019* (Cth) r 7(3).

254 *DFDA* (n 1) s 69C. The purpose of these two punishments is very different. A period of detention is served at a corrective detention centre such as the Defence Force Correctional Establishment, and the punishment is intended to be rehabilitative in nature. As such, detention cannot be imposed as a punishment if a punishment of dismissal from the ADF is also imposed: see *DFDA* (n 1) s 71(3). A period of imprisonment, however, is served in a civilian prison, and such a punishment can only be imposed if it is accompanied by a punishment of dismissal from the ADF: see *DFDA* (n 1) s 71(1). The effect of dismissal as a punishment equates to the colloquial notion of a 'dishonourable discharge'.

255 *DFDA* (n 1) s 68(1)(e).

256 Ibid s 68(1)(g).

257 Ibid s 68(1)(k).

258 Ibid s 68(1)(m).

259 Ibid s 68(1)(na).

260 Ibid s 70(1).

261 Bryan Cavanagh and John Devereux, 'Reconsidering Summary Discipline Law' (2013) 32(2) *University of Queensland Law Journal* 295, 297. In the 2020 calendar year there were 1,211 summary authority hearings and 49 courts martial or DFM trials: Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period of 1 January to 31 December 2020* (Report, 28 June 2021) annexes E, N.

262 *DFDA* (n 1) s 69C.

263 A charge can be referred to the DMP before a trial commences (*DFDA* (n 1) s 105A), or by a summary authority during the trial: ibid s 131A.

The sensitivity of an assault occurring during a pt IIIAAA call out, it is submitted, lends itself to a trial by a DFM, Restricted Court Martial ('RCM') or General Court Martial ('GCM'). This would better reflect the seriousness and gravity of the offending. Further, courts martial hold higher sentencing powers. Additionally, in the same way that open justice promotes public confidence in the courts,[264] the interests of service discipline include maintaining public confidence in the military justice system; this dictates greater transparency and, therefore, that the trial should be held in public.[265] This would not occur under a summary authority proceeding, which are not public hearings.

A court martial panel also brings with them their service knowledge and values.[266] Unique to the military justice system, the hearing of service offences by 'officers, sworn to defeat the Queen's enemies, who are appropriately experienced in the servitude and grandeur of arms and the splendours and miseries of military life'[267] can be traced back to the 17th century.[268] The continued existence of a military discipline system separate from the civilian court system is indicative of a unique need, arising from the unique nature of military service. It further reflects the position inherent that an individual should be tried by their peers: those that have similarly taken the King's hard bargain.[269] Importantly, there is no requirement at common law for members of a court martial to give reasons for sentencing — an exception that has existed to reflect the particular legal relationship of a defence member, and a Commanding Officer.[270]

An RCM consists of a panel of no less than three officers,[271] with a President of not less than lieutenant colonel (or equivalent) in rank, sitting with a judge advocate who provides directions on any question of law.[272] The maximum punishment an RCM can impose is six months imprisonment.[273] At the apex of service tribunals is the GCM, which is convened as required for the most serious of service offences; it

264 *Hogan v Hinch* (2011) 243 CLR 506, 532 ('*Hogan*'); *John Fairfax Publications Pty Ltd v District Court* (NSW) (2004) 61 NSWLR 344, 351.

265 *US v Travers* 25 MJ 61, 62 (CMA 1987); *DFDA* (n 1) s 140. The President of a court martial, or a DFM, can order the proceedings to be closed if necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals.

266 *DFDA* (n 1) s 147(1).

267 *Haskins v Commonwealth* (2011) 244 CLR 22, 61 [103] (Heydon J).

268 See *Boyson v Chief of Army* [2019] ADFDAT 2, [20] ('*Boyson*'), where Logan J traces the history and development of courts martial from Prince Rupert of the Rhine, in his capacity as Commander-in-Chief of England, in 1672.

269 See above nn 221–3 and accompanying text.

270 *Igoe* (n 237) 341 [58], citing *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

271 *DFDA* (n 1) s 114(3).

272 Ibid ss 117, 134, 196.

273 Ibid s 69A(3)(b).

consists of a panel of no less than five officers, with a President of colonel (equivalent) and above, sitting with a judge advocate, who provides binding opinions on questions of law.[274] The maximum penalty a GCM can impose is life imprisonment.[275]

Although panel members may not be lower in rank than the accused,[276] and their decisions are not required to be unanimous,[277] as a tribunal of fact 'a court martial panel in the military justice system is directly analogous [to] that undertaken by a jury'.[278] Whilst similar to a jury in that courts martial members are not required to provide reasons, they further differ from a civilian jury in that they do not merely decide guilt but also decide punishments and impose orders following conviction.[279] Members of a court martial panel, a judge advocate and a DFM enjoy the same immunities in the performance of their duties as a justice of the High Court.[280]

A DFM is appointed in writing by the Judge Advocate General ('JAG') from the judge advocates' panel.[281] DFMs are legally qualified officers whose role is analogous to a judge-alone trial in the criminal justice system.[282] A DFM has the same powers of punishment as a RCM, the maximum punishment being imprisonment for up to six months.[283]

Prima facie, a trial by court martial or DFM is held in public.[284] Previously, the DMP's prosecution policy recognised that 'in some cases, the ADF interests may require that a matter be resolved publicly by proceedings under the *DFDA* before a superior service tribunal'.[285]

This public setting is, however, subject to a limited class of restrictions imposed by the *DFDA*.[286] This class of restrictions includes where it is necessary for the interests of security or defence of Australia, the proper administration of justice or

274 Ibid ss 114, 117, 134, 196.

275 Ibid ss 69A(2), 68(1)(a).

276 Ibid s 116(1)(c).

277 Ibid s 133(2).

278 *Boyson* (n 268) [17] (Logan J).

279 *DFDA* (n 1) s 132(1)(g).

280 Ibid s 193(1).

281 Ibid s 127.

282 Ibid ss 127, 135. The practice of sitting alone is common within Australia's inferior courts.

283 Ibid s 129(1).

284 Ibid s 140(1).

285 Director of Military Prosecutions, *Prosecution Policy* (10 July 2020) 11 [1.4] ('2020 DMP Prosecution Policy'). The 2021 DMP Prosecution Policy does not contain the same provision: Director of Military Prosecutions, *Prosecution Policy* (23 December 2021) ('2021 DMP Prosecution Policy').

286 *DFDA* (n 1) s 140(2).

public morals.[287] Moreover, the tribunal may pronounce non-publication orders.[288] Such an order, issued by the President of the court martial, requires consultation with the judge advocate.[289] As of 14 December 2021,[290] a list of upcoming proceedings and the outcomes of proceedings are publicly available on the internet.[291] The effect of this is covered in more depth below.

Upon conviction, all service tribunal proceedings are subject to a mandatory automatic review by a reviewing authority.[292] For review of courts martial and DFM trials, the report is prepared by a legal officer specially selected and recommended by the JAG.[293]

A convicted person can also lodge a petition with a reviewing authority for a review of the proceedings.[294] The petitioner is required to set out the grounds why the reviewing authority should exercise their power of review.[295] The reviewing authority must 'review the proceedings … having regard to the grounds set out in the petition' and then give a notice in writing of the result to the petitioner.[296]

Before commencing either an automatic or requested review, the reviewing authority must obtain a legal report on the proceedings,[297] which is binding upon the authority in relation to matters of law.[298] This legal report may be referred

287 Ibid.

288 Ibid ss 140(2)(b), 148(2). Additionally, as the laws of evidence of the ACT apply to courts martial and DFM trials, a court martial or DFM can make non-publication orders in relation to sexual offences: see *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.

289 *DFDA* (n 1) s 140(3).

290 Judge Advocate General, *Practice Note 1: Publication of Court Martial and Defence Force Magistrates Lists and Outcomes (Version 5)*, 14 December 2021 <https://www.defence.gov.au/sites/default/files/2023-06/jag-practice-note-1.pdf> ('JAG Practice Note 1').

291 Details include the rank and name of the accused, the charges and nature of the service offence. See: 'Upcoming Superior Service Tribunal Proceedings', *Australian Government: Defence* (Web Page) <https://www.defence.gov.au/about/governance/military-justice-system/upcoming-superior-service-tribunal-proceedings>; 'Outcomes of Superior Service Tribunal Proceedings', *Australian Government: Defence* (Web Page) <https://www.defence.gov.au/about/accessing-information/outcomes-superior-service-tribunal-proceedings>.

292 *DFDA* (n 1) s 152.

293 Ibid s 154(1)(a).

294 Ibid s 153(1).

295 Ibid s 153(3).

296 Ibid s 153(4).

297 Ibid s 154(1).

298 Ibid s 154(2).

to the JAG by the reviewing authority for a secondary, overriding and binding opinion.[299]

Finally, the CDF or a service chief can conduct a further review of the proceedings at any time.[300] A further review is conducted in the same manner as the automatic review,[301] with the CDF or service chief obtaining a legal report, and being bound by a matter of law set out in the legal report.[302]

Notably, certain convictions by courts martial and DFMs are considered to form part of an individual's criminal record and may be disclosed as such.[303] That is, these convictions will be disclosed, as a service offence, when a law requires disclosure of a conviction against a law of the Commonwealth.[304]

If convicted by a court martial or DFM, ADF members enjoy a limited right of appeal to the DFDAT under the *Defence Force Discipline Appeals Act 1955* (Cth). The DFDAT acts as a court of quasi-criminal appeal;[305] an individual can only appeal against their conviction, and, unless leave is otherwise granted, only on a ground that is a question of law.[306] Notable differences regarding rights of appeal in the military jurisdiction as opposed to the civilian jurisdiction are that a convicted person cannot appeal against their sentence, and there is no right to appeal for the prosecution. Appeals from the DFDAT on questions of law may go to the Federal Court of Australia,[307] and with special leave may further appeal to the High Court of Australia.[308] In the ordinary course of events, DFDAT sittings are public and held within Commonwealth courts.[309]

Membership of the DFDAT is an important consideration. It is restricted to judges and justices of federal courts and state or territory Supreme Courts[310] and appointed by the Governor-General by commission.[311] The members of the DFDAT enjoy the same protections and immunities enjoyed by a justice of the High Court.[312]

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299 Ibid ss 154(3)–(4).

300 Ibid s 155(1).

301 Ibid s 155(2).

302 Ibid ss 155(3)–(4).

303 Ibid ss 190A, 190B.

304 Ibid s 190A(3). See also Explanatory Memorandum, Defence Legislation (Enhancement of Military Justice) Bill 2015 (Cth) 15.

305 *Hembury v Chief of General Staff* (1998) 193 CLR 614, 649 [17] (McHugh J) ('*Hembury*').

306 *Defence Force Discipline Appeals Act 1955* (Cth) s 20(1).

307 Ibid s 52.

308 See, eg: *Hembury* (n 305); *Li v Chief of Army* (2013) 250 CLR 328.

309 *Defence Force Discipline Appeals Act 1955* (Cth) s 18.

310 Ibid s 8.

311 Ibid s 7(2).

312 Ibid s 40(1).

These membership requirements mean that the DFDAT is independent from both the Department of Defence and the CDF. While the members' roles are prescribed by statute, it is more involved in practice. Membership of the DFDAT has historically been reserved for serving members of superior courts with prior ADF experience as commissioned officers.[313] The effect of this service experience is that service knowledge is often merged with judicial foresight to ensure justice occurs. The benefit of this was explained by Logan J:

> My experience is that prior military service experience is desirable. That is not just because that experience gives one a disposition to accept an additional commission on the DFDAT. It is because that experience brings with it a greater likelihood of an understanding of service terms, conditions and context and more ready assimilation of service publications and other documentary evidence. The appointment practice doubtless also adds to the credibility of the DFDAT in defence circles, senior and junior.[314]

The interplay between 'justice' and 'military discipline' is a friction that has shaped discussions around the system for decades. On the one hand, there has been a great deal of criticism over the last 30 years concerning the fairness of the ADF's disciplinary system.[315] Parliament has had cause to conduct numerous inquiries into various facets of Australia's military justice system, including its disciplinary system.[316] The ADF has likewise also conducted a number of inquiries and reviews

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313 As the DFDAT is constituted at the time of writing: President Logan J was commissioned into the Australian Intelligence Corps in the Army Reserve and retired at the rank of Major; Perry J is a Legal Specialist Reservist in the Royal Australian Air Force and the Deputy Judge Advocate General for the Air Force; Barr J served as a Legal Officer in the Royal Australian Navy Reserve; and Slattery J was a longstanding member of the Royal Australian Navy Reserve, retiring at the rank of Rear Admiral, as well as Australia's Judge Advocate General from 2014–21: 'Members', *Defence Force Discipline Appeals Tribunal* (Web Page) <https://www.defenceappeals.gov.au/about/members>.

314 Justice Logan, 'Military Court Systems: Can They Still Be Justified in This Age?' (Speech, 18th Commonwealth Magistrates and Judges Association Triennial Conference, 10 September 2018) 17.

315 Some academic critiques of the military justice system include: Andrew D Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27(3) *Federal Law Review* 499; Groves, 'The Civilianisation of Australian Military Law' (n 231); Andrew D Mitchell and Tania Voon, 'Justice at the Sharp End: Improving Australia's Military Justice System' (2005) 28(2) *University of New South Wales Law Journal* 396.

316 See, eg: Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Sexual Harassment in the Australian Defence Force* (Report, August 1994); Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Crash of RAAF Nomad Aircraft A18-401 on 12 March 1990* (Report, April 1996); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* (Report, April 2001); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice in the Australian Defence Force* (Report, June 1999).

into its disciplinary system.[317] Yet on the other hand, Parliament's intent has been clear that the system is to exist. The sum of the foregoing has resulted in numerous reforms to improve the fairness and impartiality of the disciplinary system, particularly in relation to superior service tribunals. The most significant of these reforms has been to who prefers charges, how the service tribunal is selected to try those charges and who is responsible for the prosecution and defence of the charges. Previously, decisions in relation to these matters were made by senior officers in the ADF.[318] While there was no suggestion that these senior officers carried out their duties in anything other than a fair and efficient manner, there remained a perception that the conflation of all these functions in one officer did not represent a fair and impartial process.[319] The result of these reforms has seen the creation of the DMP, the RMJ and an expanded role of the JAG.[320] These statutory office holders now exercise these functions and their independence is enshrined in the *DFDA*. These appointments improve the perception of, if not the actual, impartiality and fairness of the disciplinary system.

IV Court or Court Martial?

So, then, to the Corporal.

A *Reporting to Parliament*

Built into the new call out regime is a reporting mechanism to Parliament.[321] The Minister is required to provide to Parliament a copy of the call out order, any specified area declarations related to the call out and a report about how the ADF was utilised under the call out order.[322] These must be provided to both Houses of Parliament within seven days from when the call out order ceases.[323]

The requirement to report to Parliament is an important means of providing oversight of a how a call out transpired.[324] This in turn re-emphasises civilian

317 AR Abadee, *A Study into Judicial System under the Defence Force Discipline Act* (Report, September 1997) ('Abadee Report'); JCS Burchett, *Report of an Inquiry into Military Justice in the Australian Defence Force* (Report, July 2001); Sir Laurence Street and Les Fisher, *Report of the Independent Review on the Health of the Reformed Military Justice System* (Report, 23 January 2009); *Review of the Summary Discipline System 2017* (Report, 16 November 2017).

318 These officers were known as 'Convening Authorities'. The role was abolished and the functions split across the DMP, RMJ and JAG: *DFDA* (n 1) s 103, as enacted.

319 Abadee Report (n 317) 151–3.

320 *Defence Legislation Amendment Act 2003* (Cth); *DLAA (No 2) 2005* (n 212).

321 *Defence Act* (n 8) s 51ZA.

322 Ibid s 51ZA(1).

323 Ibid s 51ZA(2).

324 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report No 12 of 2018, 27 November 2018) 110–11.

control over the ADF. The situation of the Corporal, however, presents a challenge in how the allegation would be reported to Parliament. A concern for the ADF would be to ensure that the Corporal receives a fair trial, while at the same time ensuring the Minister complies with their reporting obligations. The concern is one that can easily be addressed. Given the speed in which the report is to be provided to Parliament, it is highly unlikely that an investigation into the allegation against the Corporal would have been finalised beforehand, let alone charges being laid. There is nothing unusual in institutions, including the ADF, providing information to Parliament without risking the integrity of a potential follow-on trial.[325]

B *The Interests of Service Discipline*

The primary purpose of criminal law is the protection of the civil community. The primary purpose of military law is maintaining discipline, the degradation of which is the greatest danger which threatens the community. As Earl of Birkenhead Frederick Edwin Smith noted nearly a century ago:

> The civil community, as we have known it in the past, from the greatness of its size and the fact that it is a natural growth, is stronger than the military community, which is an artificial structure created for a specific purpose, and relatively small in size. The strain to which the military community is exposed is moreover infinitely the greater.[326]

The civil community can thus normally afford to take greater risks in itself; the military cannot. In all cases, the adverse impact upon service discipline is contagious and has a higher impact than a disregard for law in civilian communities. The disciplinary ecosystem of the military is much closer and more intimate than that of a civil community. It is therefore natural, and necessary, that service offences should have severe consequences — what in civilian settings might be considered harsh and unjust.

In DFMs and courts martial, matters are prosecuted by the DMP.[327] The position is independent from the military chain of command, and as 'a general rule, the DMP

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325 For example, the Chief of the Defence Force provided information in his opening remarks and follow-on questions to the Senate Foreign Affairs, Defence and Trade Legislation Committee after charges were preferred by the Director of Military Prosecutions against three members of the Australian Army following a civilian casualty incident in 2009. This information was given in such a way as not to prejudice the subsequent courts martial: Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 19 October 2010, 12–28 (Angus Houston, Air Chief Marshal).

326 Birkenhead (n 244) vol 2, 20–1.

327 A position established under the *DFDA* (n 1) s 188G, the functions of which are outlined in s 188GA.

is responsible for conducting the prosecution of alleged conduct which is a breach of service discipline'.[328]

While every ADF member of non-commissioned rank and above can be an investigating officer,[329] the investigation of serious or complex service offences is carried out by the military police investigators from the Joint Military Police Unit ('JMPU'). The JMPU (headed by the Provost Marshal ADF) has provided an independent body to investigate service offences since 2008.[330] The JMPU collects evidence within the constraints of the ADF jurisdiction and provides a brief of evidence to prosecutorial authorities, including the DMP, to determine whether a charge is preferred.

When an ADF member commits in Australia the offences of treason, murder, manslaughter, bigamy, sexual assault and any offence requiring consent of the CDPP or a Minister to prosecute,[331] consent must be sought from the CDPP in order to bring the matter before a service tribunal.[332] In determining whether consent shall be granted, the CDPP will have regard to whether it is in the public interest to have the matter prosecuted in the civilian criminal justice system as opposed to a service tribunal.[333] One such circumstance which may merit the prosecution occurring in the military jurisdiction is that the conduct took place during a military operation.[334] However, as Logan J has noted, '[j]urisdiction is one thing, occasion for its exercise is another'.[335]

Prosecutions for serious service offences are instituted by a charge under s 87(1) where the DMP reasonably believes that an ADF member has committed a service offence, and decides to exercise their prosecutorial discretion accordingly. This is aided by a prosecution policy which embraces the notion that not all suspected service offences should be prosecuted. Instead, a decision to prosecute must be based primarily on: (1) the interests of the ADF,[336] in the same way its civilian

328 *DsPP/DMP MOU* (n 222) 3 [15].

329 *DFDA* (n 1) s 101(1) (definition of 'investigating officer'). The definition of 'investigating officer' also includes a 'police member'.

330 As a result of the Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Reforms to Australia's Military Justice System: Fourth Progress Report* (Report, September 2008) 3, 33. The original name of this unit was the 'Australian Defence Force Investigative Service'.

331 Being an offence against *ACT Crimes Act* (n 136) ss 51–5 in its application to the Jervis Bay Territory.

332 *DFDA* (n 1) s 63.

333 CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (Guidelines, 19 July 2021) 5–6 [2.10] as required under the *DsPP/DMP MOU* (n 222) 6 [29].

334 *DsPP/DMP MOU* (n 222) 6 [29]. See also Letts and McLaughlin (n 37).

335 *Igoe* (n 237) 338 [47].

336 2021 DMP Prosecution Policy (n 285) 2 [12], 4–5 [17]–[18].

counterparts take into account the public interest when prosecuting crimes; and (2) the available, reliable evidence and reasonable prospect of conviction.[337] In the context of disciplinary prosecutions, the ADF interest is defined primarily in terms of the requirement to maintain the good order and discipline of the ADF.[338]

Before deciding to proceed with a charge, the DMP may invite a superior authority to make representations as to whether the prosecution would be in the interests of the ADF.[339] Such a representation is merely a submission and has no binding effect on the DMP. It does, however, allow for consideration of the particularities of service by the chain of command.[340] Importantly, the DMP retains the right to prosecute ADF members where administrative sanctions have already been imposed on the member for the same misconduct.[341] This is so even where an accused's chain of command has given undertakings only to take administrative actions.

When laying the charges, the DMP can request that the Registrar of Military Justice refer the charge to be heard by a DFM, RCM or GCM.[342] Relevantly, such a decision considers the level of service knowledge necessary to assess the particular service context of the alleged conduct, and whether the level of service tribunal has sufficient powers of punishment.[343]

C *Concurrency of Systems*

As canvassed above, the military jurisdiction is neither subordinate, nor secondary, to the civilian criminal jurisdiction.[344] This concurrency exists when civilian offences are committed by ADF members. The ADF requires its members to 'abide by the standards of behaviour prescribed by the criminal law applicable to all citizens'.[345] Noting that ADF members are subject to the *DFDA* in addition to their ongoing legal obligations as a citizen, the relevance of service tribunals and the need for concurrent jurisdiction becomes apparent. The majority in *Private R* accepted that the requirement for ADF members to abide by the law of the land is inextricably

337 Ibid 2–4 [12]–[16].

338 Ibid 1–2 [5]–[12].

339 *DFDA* (n 1) s 5A.

340 As was the case with the Afghanistan charges: see Brereton (n 90) 93.

341 *McCleave v Chief of Navy* (2019) 343 FLR 136, where the majority judgment upheld the right of the DMP to prosecute after administrative sanctions had been taken against the member by their respective chain of command.

342 *DFDA* (n 1) ss 103(1)(c)–(d).

343 2021 DMP Prosecution Policy (n 285) 8 [32].

344 *Private R* (n 14) 335 [51]. See above n 232 and accompanying text.

345 *Private R* (n 14) 321–2 [6].

linked with the maintenance of discipline;[346] such that even '[t]rivial breaches … if they occur frequently, may obviously have a serious bearing on discipline'.[347]

The right to be different is often raised in areas that appear separate and distinct from mainstream society: in counter-attacks on the imposition of court supervision over the administrative decisions of prison officials;[348] the preservation of the internal disciplinary system of firemen;[349] or more recently the right of university disciplinary proceedings to investigate and make findings of sensitive criminal law matters (sexual misconduct).[350] The particularities of the fire-fighting service, prison service and tertiary academics can be easily distinguished from those of ADF members.

Sailors, soldiers and aviators are not employees, nor do they have contractual rights — they serve in accordance with the terms of their enlistment, while officers serve in accordance with the terms of their commission.[351] An ADF member cannot terminate their service as readily as a civilian may terminate their employment; yet, regardless of rank, an ADF member may be terminated for a number of reasons,[352] including that continuing their service is 'not in the interests of the Defence Force'.[353] Just as an ADF member is not an employee, a theatre of operations (domestically or overseas) cannot and should not, in any sense, be construed as a normal workplace.[354] To construe it as such would fail to acknowledge the exceptional powers granted to, and duties imposed on, ADF members when aiding the civil power under pt IIIAAA.

Whilst the *DFDA* does not grant a civil court jurisdiction to try a charge of a service offence,[355] it does provide an 'important conduit for the influx of principles of the

346 Ibid 344–5 [80] (Kiefel CJ, Bell and Keane JJ), 355 [108] (Gageler J), 392 [194] (Edelman J).

347 Ibid 344 [80] (Kiefel CJ, Bell and Keane JJ).

348 The full details of which are expertly covered, and gratefully adopted, in Matthew Groves, 'Proceedings for Prison Disciplinary Offences: The Conduct of Hearings and Principles of Review' (1998) 24(2) *Monash University Law Review* 338, 349–51.

349 *Ex parte Fry* [1954] 1 WLR 730, in which the Court declined to interfere with the existing quasi-military discipline system. For criticism of the analogy, see SA de Smith, 'Discipline and Fireman Fry' (1954) 17(4) *Modern Law Review* 375.

350 *Y v University of Queensland* (2019) 280 A Crim R 63; *University of Queensland v Y* (2020) 5 QR 686.

351 *Coutts v Commonwealth* (1985) 157 CLR 91, 120 (Dawson J) ('*Coutts*'), citing *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392, 441 (Windeyer J). See also: *Defence Act* (n 8) s 27; *Millar v Bornholt* (2009) 177 FCR 67, 87 [72]; *C v Commonwealth* (2015) 234 FCR 81, 86 [24], 88 [38], 90 [54]–[55].

352 *Coutts* (n 351) 105 (Brennan J); *Marks v Commonwealth* (1964) 111 CLR 549, 586 (Windeyer J); *Commonwealth v Quince* (1944) 68 CLR 227, 241–2 (Rich J).

353 *Defence Regulation 2016* (Cth) reg 24(1)(c).

354 This raises the interesting, if slightly off topic, question of which body would investigate with regards to the *WHS Act* (n 149).

355 *DFDA* (n 1) s 190(1).

civilian criminal law'.[356] This is through the aforementioned application of the external, civilian criminal law as it applies to the Jervis Bay Territory.[357] There are multiple instances of both the DFDAT,[358] and the Full Court of the Federal Court of Australia,[359] referring to and implementing civilian jurisprudence when determining offences under a military jurisdiction. This is important: whilst civilian law cannot be used to maintain service discipline, Australia's military justice system is able to absorb and maintain currency with developments in the common law.

Civilian jurisprudence does not, however, squarely apply to matters prosecuted under the *DFDA*. One area where this is observed is sentencing. When service tribunals are determining an appropriate sentence, they must have regard to civilian sentencing principles.[360] However, for the same reason that an ADF member incurs additional responsibilities under military law,[361] the *DFDA* recognises that 'the need to maintain discipline in the Defence Force' is also a mandatory sentencing consideration.[362] As a result, a sentence imposed in the military jurisdiction may appear excessive or inadequate, and perhaps inconsistent, when compared with analogous civilian cases.[363] That is, the connotation of the offending may be more serious in a service context, thereby justifying a more severe sentence.[364] For the purposes of the scenario, this reflects, for example, the notion that

356 Groves, 'The Civilianisation of Australian Military Law' (n 231) 381–2.

357 *DFDA* (n 1) s 61.

358 *Kasprzyck v Chief of Army* (2001) 124 A Crim R 217 relating to property offences; *Mocicka v Chief of Army* (2003) 175 FLR 476, 479–80 [14] when considering the meaning of 'likely'. See also *Randall* (n 247) 261–2 [1]–[2] adopting the 'golden thread' in regard to the presumption of innocence.

359 See *Hoffman* (n 184) for example of civilian statutory construction principles.

360 *DFDA* (n 1) s 70(1)(a).

361 *Private R* (n 14) 339 [65].

362 *DFDA* (n 1) s 70(1)(b).

363 *Igoe* (n 237) 342–3 [62]; *White* (n 240) 581 [4] (Gleeson CJ), both citing *R v Généreux* [1992] 1 SCR 259, 294 (Lamer CJ).

364 *Igoe* (n 237) 342–3 [62] and *White* (n 240) 581 [4] (Gleeson CJ), both citing *R v Généreux* [1992] 1 SCR 259, 294 (Lamer CJ). Whether the matter would be classified as 'active service' however remains open, and remains a friction point for ADF members who risk wounding and death if called out under pt IIIAAA. The effect of this being that for offences committed while on active service the powers of punishment available to a summary authority increase: see *DFDA* (n 1) ss 69B–69C. Active service can arise from a declaration of active service by the Governor-General: see *DFDA* (n 1) s 3(1) (definition of 'active service'). The definition, however, also recognises that active service could be deemed to apply without such a declaration. The definition also allows for active service to mean 'service by the member in connection with operations against the enemy'. '[T]he enemy' is also defined: see *DFDA* (n 1) s 3(1) (definition of 'the enemy'). As it stands, it is uncertain whether, depending on the circumstances, a call out under pt IIIAAA would meet the threshold for active service. This issue could be considered in a later article.

> [i]f Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined.[365]

D *National Security Issues and the Operational Context*

As it stands, if prosecutions for misconduct arising under pt IIIAAA were to occur under civilian justice, civilian prosecutors would be expected to consider the operational context of the pt IIIAAA activity, which would include the relevant rules of engagement ('ROE').[366] ROE are CDF directives issued to the ADF that regulate the way that force will be used by ADF members during an operation.[367] ROE are specifically designed to comply with the law — in the context of pt IIIAAA, ROE need to comply with the Commonwealth's domestic legal obligations.

The simplicity of the consideration of the role of ROE has been described as a 'trap for the unwary'.[368] ROE are classified.[369] If prosecuted in the civilian sphere for a purported offence under pt IIIAAA, knowledge of the ROE would be required by the presiding civilian judge, prosecution, defence counsel and jury. Failure to do so, it is submitted, would be unjust, particularly due to the aforementioned obligation for ADF members to abide by their issued ROE. This would be of particular importance in a situation where civilians have been injured or killed as a result of the conduct of an ADF member during a pt IIIAAA operation. There may be occasions whereby civilian injury or death is unavoidable in order to neutralise a greater threat. As directives on the use of force, evidence and understanding of the ROE will be crucial in determining an ADF member's culpability if an offence is alleged to have occurred.

Yet it seems unlikely that Standard Operating Procedures and ROE would be de-classified.[370] When prosecuted within a military jurisdiction and before a service tribunal, ADF members may be judged by those who understand the complex terrain. The opposite is true as well; following the abolition of a separate military justice system, members of the Dutch judiciary in the Appeals Chambers of the Arnhem Court have noted a manifest lack of understanding by the prosecution of military

365 Australian Army, *The Army Family and Domestic Violence Action Plan* (CA Directive 28/16, 2016) 1 [2].

366 EM, DLA (Aid to Civilian Authorities) Bill 2005 (n 7) 24.

367 Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Report, 2020) 22, 287.

368 Simon Bronitt and Dale Stephens, 'Flying under the Radar: The Use of Lethal Force against Hijacked Aircraft' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 275.

369 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2005, 177 (De-Anne Kelly, Minister for Veterans' Affairs).

370 This reluctance is understandable and sensible: ibid. See also *Re Hocking* (1987) 12 ALD 554.

operations.[371] Additionally, a service tribunal avoids some, if not most, of the difficulties associated with trials involving classified information. Indeed, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*') does not apply to service tribunals as service tribunals do no try offences summarily or on indictment.[372] Instead, the *DFDA* applies common law tests in determining applications of public interest immunity to protect national security information.[373] Furthermore, participants in service tribunals (including the accused) are likely to possess a security clearance.

Officers participating in an RCM or GCM equally would, and should, understand the complexity surrounding the defence of superior orders, a defence under pt IIIAAA[374] and the *DFDA*.[375] The application of service knowledge — through courts martial, DFMs or on appeal to the DFDAT — would be invaluable when addressing the issues of identifying whether a member was a de facto or de jure superior, whether the order was indeed manifestly unlawful, and whether the action taken was reasonable and necessary to give effect to the order.[376] Retrospective analysis of an immediate decision by a soldier may give insufficient weight to the operational stressors. For example, the *DFDA* specifically provides that a service tribunal shall have regard to the relevant activities the accused was engaged in for service offences that involve an element of recklessness.[377] In a similar vein, for offences involving an element of negligence, the service tribunal shall have regard to the standard of care that would have been exercised by 'a member of the Defence Force with the same training and experience [who] was engaged in the relevant activities' that the accused was engaged in at the relevant time.[378] These standards exist to reflect that nature of service offences, and the context that such offences occur in. Assessment of the factors cannot be sensibly made without a reasonable degree of

371 Arne Willy Dahl, 'International Trends in Military Justice' (Speech, Oslo University, 23 November 2011) 8 <https://generaladvokaten.custompublish.com/getfile.php/5069677.3012.mnsutbqmn7azpk/_2011_11_international_trends_in_military_justice.pdf>. See further Bas van Hoek, 'Military Criminal Justice in the Netherlands: The "Civil Swing" of the Military Judicial Order' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 218.

372 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 13(1) ('*NSI Act*').

373 *DFDA* (n 1) ss 140, 148(2). Some of the relevant authorities include: *Sankey v Whitlam* (1978) 142 CLR 1, 43 (Gibbs ACJ); *Young v Quin* (1985) 4 FCR 483, 487–8 (Bowen CJ); *R v Fandakis* [2002] NSWCCA 5, [42].

374 *Defence Act* (n 8) s 51Z.

375 *DFDA* (n 1) s 14.

376 See Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210. This was an issue raised in the respective US and United Kingdom courts martial for behaviour by their military personnel in Abu Ghraib: see generally Sunita Patel, 'Superior Orders and Detainee Abuse in Iraq' (2007–8) 5(1) *New Zealand Yearbook of International Law* 91.

377 *DFDA* (n 1) s 11(1).

378 Ibid s 11(2).

service knowledge: this being knowledge that a service tribunal is likely to possess. Current, serving officers with relevant specialist knowledge and experience would, it is submitted, be a better judge for service offences arising under pt IIIAAA than a civilian judge who may lack such military experience. This is not to suggest 'that the military should become a law unto itself'[379] but to formally recognise that the ADF is, by necessity, a specialised society nested within civilian society.[380] So too should the *curia specialis* be utilised, then, for an active decision by the executive to call out the ADF under an Act of Parliament.

Even within the ADF, there are special units nested within the institutions. These units are implicitly recognised and are reflected within pt IIIAAA, primarily through the interplay between div 3 and div 4 powers. The legislation makes clear that, although they are separate divisions, powers under div 3 may also be utilised under div 4. If a power could be used under both, it is taken to be exercised under div 3.[381] The reason for this is that it is presumed that Special Operations Command ('SOCOMD') personnel will primarily conduct div 3 operations. Although the scenario in this article falls under div 4, it merits considering the applicability of a court, or court martial, to try an offence occurring during a div 3 call out, noting that the domestic violence threshold is often one that will require div 3 powers to resolve it.

SOCOMD personnel are highly trained and experienced combat soldiers, with a unique subculture.[382] Importantly for pt IIIAAA, for the tenure of their postings their identities are protected from both civilians and other ADF members. This protection is not found in law, and presumably comes from policy.[383] Yet, it is a policy that has *influenced* law, particularly pt IIIAAA, where for div 3 operations there is no requirement for soldiers to wear uniform or have any form of identification.[384] Whilst lengthy, the justification provided in the Explanatory Memorandum merits replication:

> The requirement to wear uniforms and identification applies to proposed Division 4, but not to proposed Division 3. This is because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where

379 Groves, 'The Civilianisation of Australian Military Law' (n 231) 365.

380 The terminology of which is taken from the US Supreme Court in *United States ex rel Toth v Quarles*, 350 US 11, 17 (1950). See also Brereton (n 90) 95–6.

381 *Defence Act* (n 8) ss 41, 43.

382 The effect of this isolation on the culture of SOCOMD was reportedly addressed in an internal review by sociologist Samantha Crompvoets: see Dan Oakes, 'Claims of Illegal Violence, Drugs and Alcohol Abuse in Leaked Australian Defence Report', *ABC News* (online, 9 June 2018) <https://www.abc.net.au/news/2018-06-08/allegations-of-australian-soldier-misconduct-detailed-in-report/9815182>.

383 For a discussion of these issues see *Private R Army v Chief of Army* [2022] ADFDAT 1, [25].

384 *Defence Act* (n 8) s 43.

> uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities. Protected identity status is required to maintain operational security and the safety of the individual and their family. By virtue of their protected identity status, ADF Special Forces soldiers are able to exercise powers under proposed Division 3 without being required to produce identification or wear uniforms. Tasks under Division 4 are more likely to be related to securing an area with, or in assistance to, the police. When carrying out Division 4 tasks, the ADF is more likely to need to display a visible presence and therefore uniforms will assist the conduct of these tasks.[385]

This raises interesting considerations of legal accountability and practical barriers that would occur in both military and civilian jurisdictions.

Protected identity, and the barriers this represents in a court, is neither novel nor unique to SOCOMD. In the case of *A v Hayden [No 2]*,[386] the applicants, members of the Australian Secret Intelligence Service and one army officer, sought an injunction to prevent the Commonwealth disclosing their identities to civilian law enforcement on the basis that it would endanger national security.[387] The applicants had been involved in a bungled training activity at the Sheraton Hotel in Melbourne. It was alleged that a number of offences, contrary to Victorian law, had been committed by the participants in the course of the activity, including possession of a prohibited weapon, burglary, criminal damage, assault and affray.[388] Oddly, the Court did not have to decide whether a claim of national security would protect the identity as it was conceded by the Commonwealth that it was not a matter of national security.[389] The question is thus unanswered at common law.

Relevantly, the Canadian experience of prosecuting Special Forces members charged with service offences has highlighted some of the barriers. In Afghanistan in 2005, a warrant officer in the highly regarded Joint Task Force 2 force element strangled another member for 45 seconds before being restrained; the offence and rank of the individual was deemed serious enough to merit a full court martial in Canada. However, the Chief Military Judge of the Canadian military declined to proffer charges because of the friction between an open court, and classified identities and the information surrounding the operation.[390] In a case closer to home, a prosecution against a member of the Australian Army accused of mishandling corpses in East Timor in 1999 was abandoned, in part because of a refusal by the presiding

385 Explanatory Memorandum 2018 (n 24) 60 [332].

386 (1984) 156 CLR 532 (‘*Hayden [No 2]*’).

387 Ibid 534. See also *A v Hayden [No 1]* (1984) 56 ALR 73.

388 *Hayden [No 2]* (n 386) 582 (Brennan J).

389 Ibid 575 (Wilson and Dawson JJ).

390 Moran (n 88) 1248–9; *Canada (Director of Military Prosecutions) v Canada (Court Martial Administrator)* [2007] FCA 390.

DFM to grant protective orders sought by members of the New Zealand Defence Force who were to appear as witnesses.[391]

The notion 'that justice should both be done and be manifestly seen to be done'[392] is more than just an adage. Open justice — consisting of public hearings, publicly communicated evidence, and public reasons for judgment — is a central feature of the common law and the administration of justice.[393] This was recognised by the recent, and important, development within Australia's military justice system, which will now publicly release the 'decisions of courts martial and the decisions and reasons for decision of DFMs' noting that it is 'an essential component of the administration of military justice'.[394] Just as within the civilian sphere, open justice within the military sphere is not absolute.[395] Relevantly to the protected identity status of certain ADF members, courts may derogate by ordering proceedings to be heard in closed court or the records of the proceedings be restricted.[396] Notice would be given under a court martial or DFM of the consequential publication, on which they may make contestations as to the effect it could have on the 'security or defence of Australia'.[397]

The practical difficulties of both protected identity and classified material in civilian court may prove to be too much of a barrier to prosecutions. Take, for example, an attempt by a defendant to admit into evidence classified ROE, for the purpose of demonstrating that the actions taken were in accordance with them. If the civilian judge, sitting in civilian court, were satisfied that such material would likely prejudice national security if disclosed, then the use of the material would be constrained by operation of the *NSI Act*. While not insurmountable, classified information creates difficulties in a trial arising out of a situation such as envisaged in the scenario detailed above.[398] Service tribunals are unlikely to suffer such difficulties

391 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 5 November 2003, 71–88 (Lt Gen Peter Leahy).

392 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

393 See, eg: *Scott v Scott* [1913] AC 417; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh J); *Ho v Loneragan* [2013] WASCA 20; *A-G (UK) v Leveller Magazine Ltd* [1979] 1 All ER 745, 749–51 (Lord Diplock). See also Justice James Spigelman, 'Seen to Be Done: The Principle of Open Justice (Pt 1)' (2000) 74(5) *Australian Law Journal* 290, 292.

394 JAG Practice Note 1 (n 290) 1.

395 *Hogan* (n 264) 530 (French CJ); *DFDA* (n 1) s 140.

396 *DFDA* (n 1) s 140(2). For example, both the applicant and the Commonwealth sought to suppress the applicant's name in *Private R* (n 14): see Transcript of Proceedings, *Private R v Cowen* [2020] HCATrans 23, 9–12. The recent case of *Boyson* (n 268) demonstrates the viability of these non-publication orders, where the name of the complainant was subject to a non-publication order in relation to a sexual offence.

397 JAG Practice Note 1 (n 290); *DFDA* (n 1) s 140(2).

398 In the past five years (2017–22), there have been five non-disclosure certificates issued under the *NSI Act* (n 372), four pursuant to s 26 (federal criminal proceedings), and one pursuant to s 38F (civil proceeding): see 'National Security Information

by virtue of the participants. That is, a service tribunal can consist of personnel that are subject matter experts in relation to the information that may be harmful to national security if disclosed. The likely need to adduce national security information (in the form of ROE) appears to support that, at first instance, the DMP take carriage of the matter. This would be particularly so for an offence that may not be particularly serious, such as the assault scenario described. The effect of this is that an open court hearing may encounter the same practical difficulties whether in a military or civilian jurisdiction. In addition, civilian courts may allow for protected identities to continue, although in a jury situation this may prove difficult and could realistically present a barrier to justice.

Grounds of challenge cannot simply be asserted without any factual basis, and the presumption of regularity would need to be rebutted by the available facts including reasonable inferences. It is possible that the call out order may be of some assistance in this regard, although it would not be required to be made public until it has ceased to be in force, if at all. These grounds of challenge would require considering police and ADF intelligence relied upon in making that decision and the national security implications of divulging that information. The friction between national security

(Criminal and Civil Proceedings) Act 2004 Annual Reports', *Attorney-General's Department* (Web Page, 22 July 2021) <https://www.ag.gov.au/national-security/publications/national-security-information-criminal-and-civil-proceedings-act-2004-annual-reports>. Some of these matters, to which the certificates relate, are still on foot. An example of how the application of the *NSI Act* adds a level of complexity and delay to legal proceedings is the Bernard Collaery matter. In November 2018, the Attorney-General applied for the *NSI Act* secrecy provisions to operate in relation to the Collaery prosecution: *Dean v Collaery [No 1]* [2018] ACTMC 29. In October 2019, the ACT Supreme Court considered the operation of the secrecy provisions in relation to court processes following an order made under s 22 of the *NSI Act*, pending a s 27(3) hearing: *R v Collaery* [2019] ACTSC 278. In May 2020, the ACT Supreme Court considered the proper interpretation of ss 24–5 of the *NSI Act* in relation to the application of these provisions during a s 27(3) hearing: *R v Collaery [No 8]* (2020) 354 FLR 35. In June 2020, the ACT Supreme Court granted the Attorney-General's application for non-disclosure orders which would result in much of the subsequent proceedings being held in closed court: *R v Collaery [No 7]* (2020) 354 FLR 7. In October 2021, the ACT Court of Appeal set aside the decision in relation to those non-disclosure orders and remitted the matter to the primary judge. In reaching its decision, the Court of Appeal considered the issue of weighing the risk of prejudice to national security against the interests of the administration of justice: *Collaery v The Queen [No 2]* [2021] ACTCA 28. While the Court of Appeal has only released a judgment summary (Supreme Court of Australian Capital Territory, *Collaery v The Queen [No 2] [2011] ACTCA 28* (Judgment Summary, 6 October 2021) <https://www.courts.act.gov.au/__data/assets/pdf_file/0004/1870627/Collaery-v-The-Queen-Judgment-Summary.pdf>), the primary judge, upon remittal, examined the Court of Appeal's decision in order to consider the scope of the remittal: see *R v Collaery [No 10]* (2021) 363 FLR 299. On 7 July 2022, the Attorney-General, exercising his powers under the *Judiciary Act 1903* (Cth) s 71(1), declined to proceed further with the prosecution of Collaery: see CDPP, 'Prosecution of Mr Bernard Collaery' (Media Release, 7 July 2022) <https://www.cdpp.gov.au/news/prosecution-mr-bernard-collaery>.

and public interest is neither novel nor unique.[399] This was made clear in the case of *Leghaei v Director General of Security* ('*Leghaei*') before Madgwick J in the Federal Court.[400]

Leghaei concerned an application for review under s 39B of the *Judiciary Act 1903* (Cth) of an adverse security assessment furnished by the Australian Security Intelligence Organisation ('ASIO') pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). The assessment had determined that the applicant was 'directly or indirectly a risk to Australian national security'.[401] The furnishing of that assessment obliged the Minister for Immigration to cancel the applicant's bridging visa.[402] Relevant to this article is how the Court dealt with sensitive national security matters.

In *Leghaei*, when considering first whether ASIO had a duty to afford procedural fairness to the applicant, Madgwick J rejected the respondent's submission that the *ASIO Act* or considerations of confidentiality and national security necessarily implied that procedural fairness should be excluded, noting that the *Migration Act 1958* (Cth) required a person to be informed when their visa would be cancelled.[403] Accordingly, Madgwick J held:

> it is my view that an obligation positively to consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process. … Thus, in relation to a lawful non-citizen etc, such as the applicant, whose visa would be directly threatened by an adverse security assessment, there was, in my view, a duty to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security, at the primary decision-making stage.[404]

After determining that ASIO had a duty to afford procedural fairness to the applicant, Madgwick J considered whether this duty had been discharged. Ultimately, Madgwick J was satisfied on the confidential evidence before the Court that the Director-General had genuinely considered disclosure and had afforded procedural fairness to the applicant, noting however that the potential prejudice to the interests of national security involved in such disclosure meant 'that the content of procedural fairness, [was] reduced, in practical terms, to nothingness'.[405] In coming to this conclusion, his Honour further stating that 'without the benefit of countervailing

399 Caroline Bush, 'National Security and Natural Justice' (2007) 57(1) *Australian Institute of Administrative Law Forum* 78, 84–6.

400 *Leghaei v Director General of Security* [2005] FCA 1576 ('*Leghaei*').

401 Ibid [6].

402 Ibid [9].

403 Ibid [73].

404 Ibid [82]–[83].

405 Ibid [88].

expert evidence in the present case, [his Honour was] not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure' as the 'Courts are ill-equipped to evaluate intelligence'.[406]

A recent 4:3 decision in *SDCV v Director-General of Security*[407] is of some relevance in this discussion. Specifically, Steward J (citing, among others, *Leghaei*) held that 'it is practically inevitable in such proceedings that the Director-General would successfully claim public interest immunity over certified documents'.[408] It is significant that while the applicant in *Leghaei* was unable to access information relied upon in making the negative security assessment, classified information and materials were made available to the Court. This included 'counsel for the applicant and the applicant's instructing solicitor', after they had undergone the requisite security clearances and had given 'appropriate undertakings as to confidentiality'.[409]

Such a level of disclosure was enough for Madgwick J to consider that procedural fairness had been afforded to the extent possible in light of national security interests and that the adverse assessment decision was not affected by jurisdictional error.[410] But, as Madgwick J states, the amount of 'comfort' that the applicant and interested members of the public can take from this process is 'regrettably limited'.[411] Accordingly, in the event a call out under pt IIIAAA occurred, it may indeed be possible to disclose sufficient materials to the court to allow for a determination as to whether it was valid or invalid.[412]

This was an issue core to the Coronial inquest into the Lindt Café siege. The Coroner dedicated some space in his findings to discuss the difficulties of timeliness, and sensitive evidence. Although finding that there was 'no realistic likelihood that any other form of public inquiry would have proceeded more expeditiously'[413] it may have been beneficial for an inquiry to have taken place within the Law Enforcement Conduct Commission ('LECC').[414] The LECC is familiar with relevant policy and procedure and made up of individuals who understood the civilian police system; this may have allowed for appropriate findings to be made.

406 *Leghaei* (n 400) [84].

407 (2022) 405 ALR 209.

408 Ibid 291 [313].

409 *Leghaei* (n 400) [101].

410 Ibid [88], [97].

411 Ibid [90].

412 This might include security situational reports or redacted intelligence updates. Equally, it might include text messages: see, eg, *Re Secretary, Department of Defence and Thomas* (2018) 74 AAR 379.

413 *Lindt Café Inquest* (n 23) 435 [129].

414 Ibid 435 [134].

The Coroner was sure to emphasise that this investigation take place in addition to, not in substitution of, a public hearing.[415] Yet the benefit of a court martial, conducted by individuals familiar with relevant policy, procedure, rank, experience, is that it is generally public.[416] As this article has demonstrated, fears of public transparency are not applicable to superior tribunal jurisdictions, in contradistinction to the stereotypes of summary authority jurisdictions.

E *Sentencing in Context*

An additional aspect for consideration is the context of the alleged offending and how this affects not only the decision to prosecute, but how an offender is sentenced if convicted. ADF members involved in a pt IIIAAA operation would anticipate that force would be used: a significant threat has been identified and the ADF has been deployed to deal with it. The ADF and the government expects that members of the ADF will use force in a controlled and measured way, and in a way directed by the ROE. In addition to training and strong leadership, exercised through a hierarchical structure, the ADF also uses its discipline system to enforce standards of behaviour. These standards of behaviour are different to those expected of ordinary civilians; it is why the purpose of the disciplinary system differs from the criminal law.[417] The Corporal in the fictitious example is, due to the nature of the operation, exposing themselves to potential harm. Furthermore, the Corporal is obliged to do so as a matter of law.[418] An ADF member engaging in misconduct during an operation to aid the civil power presents a serious disciplinary issue for the ADF.

Courts in the United Kingdom have grappled with the difficulty of determining the criminal responsibility of defence members performing their duties on domestic operations.[419] In a number of cases that arose out of the Troubles in Northern Ireland, the House of Lords had to consider the implications of a soldier's duty on their criminal responsibility with regards to homicides arising out of operations in Northern Ireland.[420] These cases highlight the tension in application of the ordinary criminal law to military operations, particularly operations in aiding the civil power.

The tension was aptly summarised by Lord Diplock in *A-G's Reference No 1*.[421] His Lordship observed that, prima facie, to kill or seriously wound another person

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415 Ibid 435 [132]–[133].

416 *DFDA* (n 1) s 140.

417 *Re Tracey* (n 99) 564; *Private R* (n 14).

418 At a minimum, the Corporal would likely be guilty of the service offence of 'disobeying a lawful command': *DFDA* (n 1) s 27, if they did not follow an order to carry out duties as part of Operation Green and Gold.

419 *R v MacNaughton* [1975] NI 203; *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 ('*A-G's Reference No 1*'); *R v Clegg* [1995] 1 All ER 334 ('*Clegg*').

420 The key cases were *A-G's Reference No 1* (n 419) and *Clegg* (n 419).

421 *A-G's Reference No 1* (n 419) 940–9.

by shooting is unlawful.[422] However, this presumption does not necessarily hold true when the military is engaged in aiding the civil power. This was, in part, the issue the House of Lords was asked to consider in *A-G's Reference No 1*: what was the criminal responsibility of a soldier using lethal force to prevent the escape of someone the soldier honestly and reasonably believed was a member of the organisation they were called out to respond to?[423] Lord Diplock acknowledged the difficulty with the law dealing with a situation whereby a soldier is asked to risk their life, in circumstances that were similar to, but not exactly the same, as a law enforcement activity. [424] The 'tool' provided to perform those duties was a lethal weapon (a rifle), such that the soldier had no real discretion in the level of force that could be used: '[i]t was a case of all or nothing'.[425]

Similar issues arose in the case of *R v Clegg*.[426] In that case Private Clegg was convicted of the unlawful killing of the passenger of a vehicle that drove through a vehicle checkpoint. His claim of self-defence was found to be invalid on the facts.[427] Private Clegg's use of force was found to be excessive and unreasonable in the circumstances. The House of Lords was of the view that it was regrettable, because of the special circumstances Private Clegg found himself in, that the only finding that could be made was of murder, as opposed to manslaughter.[428] Ultimately, the House of Lords determined that whether the conduct should amount to manslaughter was a matter for Parliament,[429] and found that Private Clegg was rightly convicted of murder.[430]

The Northern Ireland cases concern instances of the most serious offence on the criminal calendar. The reasoning of their Lordships in the cases shows a reluctance to attribute full criminal culpability for murder because of the special circumstances of the offending. That is: there is a recognition that homicide in the course of operations in aid of the civil power is different to cases of homicide normally faced by criminal courts. However, at the other end of the seriousness of offences against the person, it would appear a different approach is taken.

The objective seriousness of the fictional Corporal's assault, from the perspective of the criminal law, is towards the lower end of the scale. However, in the context of the maintenance of good and discipline of the ADF, the conduct is a serious breach of discipline. The ADF is more likely to treat such offending as serious given the context in which it occurred. The ADF is rightly sensitive to instances

422 Ibid 946.

423 Ibid 944.

424 Ibid 946–8.

425 Ibid 949.

426 *Clegg* (n 419).

427 Ibid 338–9 (Lord Lloyd).

428 Ibid 341.

429 Ibid 346–7.

430 Ibid 347.

of defence members using force in an unlawful manner against members of the public, and particularly so on operations, where improper use of force will garner public anger and distrust of the ADF and its mission. Quick and proper action in response that demonstrates disapproval of the misconduct is necessary to show the government and public at large that misbehaviour amongst ADF members will be treated seriously. Likewise, deterrence and the effect of the offending on morale is likely to loom large in a prosecutorial decision.

Most members of the ADF expect that members who fall short of the standards required of them will be disciplined in a fair, but robust manner. Misconduct that has not been dealt with properly is deleterious to the effectiveness of the ADF for two reasons: other members may not be deterred from engaging in similar unlawful behaviour in the future; and law-abiding members will be reluctant to serve with members they see as not upholding the standards and values of the wider ADF.

These disciplinary issues do not, as a matter of course, arise in the context of civilian criminal proceedings. In particular, they do not form part of considerations for sentencing, whereas they are mandatory factors before service tribunals.[431] Taking into account disciplinary factors would likely result in what a civilian court would hold to be a harsher sentence compared to one it might impose. This is not, in and of itself, a valid reason for preferring one jurisdiction over another. However, the implications of either not prosecuting, or of imposing — when considered through a disciplinary lens — an inadequate sentence, supports having the Corporal dealt with by a court martial rather than a court. A service tribunal can deal with both the 'criminality' of the Corporal's offending, while at the same time taking into account the disciplinary issues as well.

V Conclusion

The second reading speech that introduced pt IIIAAA to Parliament noted 'the unsatisfactory state of the existing call-out framework, including anachronistic provisions'.[432] The intent of the Bill was to, among other things, 'modernise the procedures to be followed for call-out of the Defence Force'.[433] In 2005, the legislative regime was reformed and expanded into areas which were recognised, at the time, to be authorised under the constitutional executive power.[434] This codification of the Royal prerogative, whilst subject to critique,[435] demonstrates a clear intent by Parliament to provide legal certainty to the domestic deployment of the ADF. It is lamentable, then, that such clarification has not been provided to the aftermath

431 *DFDA* (n 1) s 70.

432 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18410 (Sharman Stone).

433 Ibid 18411.

434 See, eg, Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 92 of 2005–06, 7 February 2006) 3.

435 See White, *Keeping the Peace of the Realm* (n 5) 11–17.

of responding to instances of domestic violence — a term that, as this article has expanded upon, often will require powers beyond those shared by all citizens to respond to.

This article has argued that a court martial, rather than court, should be the preferred jurisdiction to deal with the alleged misconduct of the fictional Corporal. Service tribunals retain a spectrum of powers that allow for appropriate punishments to be imposed for service offences, and allow for service knowledge to be applied when determining whether an ADF member has committed an offence in the course of ADF operations. Moreover, service tribunals retain an ability to appropriately deal with sensitive information and protected identities in a way that civilian courts cannot.

How the police and ADF interact will be a key consideration as this will impact how the scene is processed and individuals are investigated. Although the intent of pt IIIAAA would appear to be maintaining a clean delineation between state police and ADF members who are called out,[436] this may not necessarily be the case. Seeking clarity on prosecutions is one way that this may be mitigated.

The lack of defined outcome, post action, will have an impact on how the ADF plans for these scenarios. When the ADF plans for armed conflict in another country there is explicit knowledge that kinetic action can be taken lawfully, without fear of prosecution. This is integral to the ADF being able to risk manage the use of lethal force in an uncertain environment, where collateral damage can occur regardless of planning and rehearsals.

Lack of clarity in the consequences for ADF members operating under pt IIIAAA increases the risk threshold in a number of ways. Organisationally, it increases the risk threshold that must be planned as the tolerance for collateral damage is now significantly decreased. This creates a unique dilemma for planning, as it is the post action consequences that must be considered while planning for the kinetic actions. As a capability the ADF could potentially lose not only the operators, through the ensuing legal action, but also be subject to various enquiries from Comcare Australia, the coroner, state police and ADF internal investigations and administrative inquiries. This could absorb a significant amount of ADF resources that would ordinarily be focused on defending national interests, on top of the opportunity cost and capability building.[437]

436 Army Knowledge Centre, 'Working with Police' (2019) 56 (March) *Smart Soldier* 29–32.

437 See Justice John Logan, 'Administrative Discharge in Lieu of Military Disciplinary Proceedings: Supportive or Subversive of a Military Justice System?' (Speech, Queensland Tri-Service Reserve Legal Officer Panel Training Day, 16 November 2018) 5. Justice Logan addressed the costs of training soldiers, officers and Australian Defence Force Academy graduates respectively.

In order to mitigate this risk, two options are viable. The first is for Parliament to explicitly carve out the court martial option through clear, legislative amendments. The second is to update the MOU from 2007[438] in a way that reflects post-*Private R* developments and delineates responsibility in domestic operations. If the purpose of the applicable criminal law provision in pt IIIAAA was to ensure that the prosecuting authority deciding on charges against an ADF member involved in a call out would consider the military context in which the alleged offending occurred, then it stands to reason that the more appropriate body to hear such a charge would be a service tribunal rather than a criminal court. A statutory provision exists in the *DFDA* for chain of command to make representations on the interest of the ADF to the DMP for a possible trial of a defence member before a DFM or court martial.[439] Carving out court martial jurisdiction over pt IIIAAA activities risks creating a lacuna, particularly in instances where civilian authorities consider an accused ADF member's conduct not warranting criminal prosecution, but the ADF considers the matter serious from a disciplinary prospective.

There will always be a need for transparency of activities to ensure that the public has faith in the ADF as an organisation, and the conduct of inquiries post domestic kinetic action is a key mechanism to ensure that the public will accept that the military is not overstepping into what could have been a police action.

For the individual operator, there will need to be consideration on how those under the cloud of legal action are managed and supported. This will create a significant burden on the ADF welfare system for the unit who must manage the individual while they await the outcome of any investigation. This kind of inter-agency investigation involving many different departments could drag out over an extended period of time which will keep any member under investigation in limbo until the investigation and court case is complete. The possibility of this outcome could erode the confidence an ADF member has in executing their duties and potentially reduce their effectiveness.

438 See *DsPP/DMP MOU* (n 222).

439 *DFDA* (n 1) s 5A.