

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL**

Case Title:	McBride v The King
Citation:	[2025] ACTCA 16
Hearing Date:	3 March 2025
Decision Date:	28 May 2025
Before:	Baker, Taylor and Abraham JJ
Decision:	The appellant's appeals against his conviction and his sentence are dismissed.
Catchwords:	APPEAL – CRIMINAL LAW – appeal against conviction – unlawfully communicate naval, military or air force information other than in the course of the appellant's "official duty" contrary to s 73A(1) of the <i>Defence Act 1903</i> (Cth) – publish confidential information other than in the course of the appellant's "duty" contrary to s 70(1) of the <i>Crimes Act 1914</i> (Cth) – theft – where the appellant was a member of the Australian Defence Force at the time of the offending – where the appellant pleaded guilty – whether a miscarriage of justice arose because the appellant's guilty pleas were entered in consequence of a wrong decision of law – whether by way of the appellant's oath of enlistment the appellant's "duty" or "official duty" extended to acting in the "public interest", even where in contravention of a lawful general order – whether the scope of the appellant's duty may be defined by a lawful general order – no wrong decision of law – no miscarriage of justice – conviction appeal dismissed APPEAL – CRIMINAL LAW – Crime and Punishment – Sentence – appeal against sentence – whether primary judge erred in failing to take into account the appellant's motivation to remedy a perceived injustice when assessing the objective seriousness of the offending – where concern was with perceived over-investigation of alleged war crimes – whether appellant honestly believed offending conduct to be lawful – contribution of mental health condition to offending – <i>Verdins</i> principles considered – harm to the community – sufficient consideration of intensive correction order assessment report – sentence appeal dismissed
Legislation Cited:	<i>Acts Interpretation Act 1901</i> (Cth), s 23 <i>Crimes (Sentencing) Act 2005</i> (ACT), ss 11, 78 <i>Crimes Act 1914</i> (Cth), ss 16A, 16BA, 70 <i>Criminal Code</i> (Cth), s 131.1 <i>Defence (Personnel) Amendment Regulations 2002</i> (Cth), sch 2 <i>Defence Act 1903</i> (Cth), ss 45, 73A <i>Defence Force Discipline Act 1982</i> (Cth), ss 29, 190 <i>Public Interest Disclosure Act 2013</i> (Cth) <i>Public Service Act 1999</i> (Cth)

Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27
Allred v The Queen [2015] ACTCA 21
Attorney-General (NSW) v Perpetual Trustee Co (Ltd) [1952] HCA 2; 85 CLR 237
Bowen v The Queen [2011] VSCA 67
Brown v The Queen [2020] VSCA 212; 62 VR 491
Carr v The Queen [2020] NSWCCA 214
Cheung v R [2001] HCA 67; 209 CLR 1
Commonwealth v Carter (1965) 7 FLR 223
Commonwealth v Quince [1944] HCA 1; 68 CLR 227
Crane v The King [2024] NSWCCA 87
De Dohsé v Reg (unreported, Court of Appeal, 2 June 1885)
DPP (Cth) v De La Rosa [2010] NSWCCA 194; 79 NSWLR 1
DPP (Vic) v Zierk [2008] VSC 184; 184 A Crim R 582
DPP v Clarke (No 3) [2024] ACTSC 395
DPP v Coory [2011] VSCA 316; 214 A Crim R 301
DPP v Herrmann [2021] VSCA 160; 290 A Crim R 110
DPP v Vincent (No 2) [2023] ACTSC 379
Dunn v The Queen (1896) 1 QB 116
Elmir v The Queen [2021] NSWCCA 19; 357 FLR 274
Enever v The King [1906] HCA 3; 3 CLR 969
Fares v DPP (No 2) [2025] ACTCA 2
Groves v Commonwealth [1982] HCA 21; 150 CLR 113
Harrison v Melhem [2008] NSWCA 67; 72 NSWLR 380
Haskins v Commonwealth [2011] HCA 28; 244 CLR 22
House v The King [1936] HCA 40; 55 CLR 499
Hu v The King [2025] VSCA 60
Kentwell v The Queen [2014] HCA 37; 252 CLR 601
Marks v Commonwealth [1964] HCA 45; 111 CLR 549
Marks v The Queen [2019] VSCA 253; 280 A Crim R 23
McBride v The King [2023] ACTCA 42
Moiler v The Queen [2021] NSWCCA 73
Monfries v The Queen [2014] ACTCA 46; 19 ACTLR 99
Munda v Western Australia [2013] HCA 38; 249 CLR 600
Pense v Hemy [1973] WAR 40
Private R v Cowen [2020] HCA 31; 271 CLR 316
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
R v Anderson [1981] VR 155
R v District Court of the Northern District of Queensland; Ex parte Thompson [1968] HCA 48; 118 CLR 488
R v Engert (1995) 84 A Crim R 67
R v Guode [2020] HCA 8; 267 CLR 141
R v Hanson (No 3) [2025] ACTSC 6
R v Howell [2007] VSCA 119; 16 VR 349
R v McBride (No 2) [2023] ACTSC 330
R v McBride (No 4) [2024] ACTSC 147
R v McBride [2023] ACTSC 328
R v Mooney (Full Court of Supreme Court of Victoria, unreported, 21 June 1978)
R v Ruwhiu [2023] ACTCA 18
R v Verdins [2007] VSCA 102; 16 VR 269
R v Waters; Ex parte DPP (Cth) [2023] QCA 131

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362
Tasmania v Johnston [2009] TASSC 60; 18 Tas R 195
Watson v The Queen (No 2) [2020] ACTCA 30
White v Director of Military Prosecutions [2007] HCA 29; 231 CLR 570
X v Commonwealth [1999] HCA 63; 200 CLR 177

Texts Cited:

Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 4216 (Simon Corbell, Attorney-General)
 Clode C M, *The Administration of Justice under Military and Martial Law* (2nd ed, Murray, 1874)
 Clode C M, *The Military Forces of the Crown: Their Administration and Government* (J Murray, 1869)
 Dicey A V, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, 1915)
Halsbury's Laws of England (1st ed, Butterworth, 1913) vol 25

Parties:

David McBride (Appellant)
 Director of Public Prosecutions (Cth) (Respondent)
 Commonwealth of Australia (amicus curiae)

Representation:

Counsel

B Neild SC & K Ginges (Appellant)
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 A Berger KC & LM Johnston (Commonwealth)

Solicitors

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 Director of Public Prosecutions (Cth) (Respondent)
 Australian Government Solicitor (Commonwealth)

File Number:

AC 29 of 2024

Decision Under Appeal:

Court/Tribunal:	ACTSC
Before:	Mossop J
Date of Decision:	14 May 2024
Case Title:	R v McBride (No 4)
Citation:	[2024] ACTSC 147

THE COURT

Overview

1. Mr McBride (the appellant) was a lawyer and a member of the Australian Defence Force (ADF) with a rank of Major in the Australian Army. In this role, the appellant held a level of security clearance which allowed him to access information at all classification levels, including TOP SECRET, as well as certain types of caveated information.
2. During the course of his service with the ADF, the appellant became dissatisfied with what he perceived to be “illegal” and “vexatious” investigations into alleged war crimes by Australian soldiers, particularly where Afghan citizens had been killed as a result of the actions of Australian soldiers in Afghanistan. The appellant was of the view that these investigations were “driven by appearances rather than suspicion of a crime”, and “erode[d] morale and waste[d] resources”.
3. As part of his employment, the appellant had access to a record information system which ran on a secure ADF network. Commencing in May 2014, the appellant printed hundreds of documents (235 in total) from the ADF network, took them to his private home, and stored them in plastic tubs in his lounge room.
4. In late 2014 and early 2015, the appellant contacted two journalists, Mr Chris Masters and Mr Andrew Clark, the latter whom he knew through a family friend. In separate meetings in 2015, the appellant provided the journalists with two folders of documents containing confidential ADF material, together with a submission that he had prepared, which included confidential information drawn from these documents. Neither journalist published the information which had been provided to them by the appellant.
5. In April 2016, the appellant created a website called ‘The Ops Room’ (the Ops Room Website), on which he published various blogs detailing his concerns about ADF management. He also attached various documents to the blogs. The appellant was not authorised to publish or communicate much of the information contained in the blog posts or the documents available on the Ops Room Website.
6. In May 2016, an Australian journalist, Daniel Oakes, contacted the appellant after reading material on the Ops Room Website. Later that month, the appellant met Mr Oakes in person first at the appellant’s home and later at a hotel in Canberra, and provided him with a number of confidential ADF documents. Mr Oakes subsequently published information that was contained in these documents in a series of articles entitled ‘The Afghan Files’.

7. The appellant was subsequently charged with five offences: one count of theft contrary to s 131.1 of the *Criminal Code* (Cth); three counts of unlawfully communicating naval, military or air force information other than in the course of the appellant's "official duty" contrary to s 73A(1) of the *Defence Act 1903* (Cth); and one count of publishing confidential information other than in the course of his duty contrary to s 70(1) of the *Crimes Act 1914* (Cth).
8. The appellant initially entered a plea of not guilty to all charges. However, prior to the empanelment of the jury, the appellant sought an indication as to what instructions the jury would be given with respect to the scope of the "duty" referred to in s 73A(1) of the *Defence Act* and s 70(1) of the *Crimes Act*. The parties agreed that there was jurisdiction for the Court to hear the argument and to give a ruling on this issue.
9. In order to establish the offences against s 73A of the *Defence Act* and s 70 of the *Crimes Act*, it was necessary for the prosecution to establish beyond reasonable doubt that the appellant had not made the impugned communication in the course of his "duty" (or "official duty", in the case of s 73A). The appellant contended that the jury should be instructed that the "duty" referred to in these provisions "extended to acting in the 'public interest' or 'Australian public interest', as determined by the jury, even where that was in contravention of a lawful order that had been given to the accused".
10. The primary judge rejected the appellant's contention and on 16 November 2023, made orders to this effect: *R v McBride* [2023] ACTSC 328 (*McBride*); *R v McBride (No 2)* [2023] ACTSC 330 (*McBride (No 2)*). An application for leave to appeal was heard and dismissed by McCallum CJ in an *ex tempore* decision later that day: *McBride v The King* [2023] ACTCA 42.
11. Immediately following these rulings, on 17 November 2023, the appellant pleaded guilty to the following three offences in full satisfaction of the indictment:
 - (a) Count 1, theft, contrary to s 131.1(1) of the *Criminal Code*: between about 1 December 2013 and about 26 February 2018, the appellant dishonestly appropriated property belonging to a Commonwealth entity with the intention of permanently depriving the entity of the property.
 - (b) Count 2, unlawfully communicating naval, military or air force information, contrary to s 73A(1) of the *Defence Act*: between about 1 August 2014 and about 31 December 2015, the appellant, being a member of the ADF, communicated documents relating to naval, military or air force information to other persons, namely Chris Masters and Andrew Clark, and that communication was not in the course of his official duty.

- (c) Count 3, unlawfully communicating naval, military or air force information, contrary to s 73A(1) of the *Defence Act*: between about 2 May 2016 and about 11 July 2017, the appellant, being a member of the ADF, communicated documents relating to naval, military or air force information to another person, namely Daniel Oakes, and that communication was not in the course of his official duty.
12. Count 1 related to the appellant's conduct in taking the confidential documents from the ADF and storing them at his private home. Counts 2 and 3 related to the appellant's conduct in disclosing confidential documents to Mr Masters and Mr Clark, and Mr Oakes, respectively.
13. The primary judge was also asked to take into account, pursuant to s 16BA of the *Crimes Act*, a charge of contravening s 70(1) of the *Crimes Act* in relation to count 3. Section 16BA permits an offender who admits guilt for an offence, to have the offence taken into account by the court in passing sentence on them for the offence or offences for which they have been convicted. This charge related to the publication of confidential material on the Ops Room Website.
14. On 14 May 2024, the primary judge convicted the appellant of the three offences and imposed an overall sentence of imprisonment for 5 years and 8 months, comprised of individual sentences of 34 months (count 2); 34 months (count 3) and 27 months (count 1): *R v McBride (No 4)* [2024] ACTSC 147 (*R v McBride (No 4)*). The overall term commenced on 14 May 2024 and will end on 13 January 2030. A non-parole period of 27 months was fixed, commencing on 14 May 2024 and ending on 13 August 2026.
15. The appellant appeals against his conviction and sentence.
16. For the reasons below, the appeals against conviction and sentence are dismissed.

Contextual matters

17. Although primarily relevant to the appellant's sentence appeal, there are some contextual matters which should be noted before addressing the individual grounds of appeal.
18. *First*, as alluded to at [2] above, in taking and disclosing the confidential material, the appellant was not attempting to bring allegations of war crimes committed by Australian soldiers to the public's attention. On the contrary, the Statement of Facts agreed to by the appellant and the prosecution (the Agreed Facts), records that the appellant's concern was that:

... [t]here were soldiers doing their operational duties on behalf of the Commonwealth who were being held to account for actions on operations that were appropriate in the operational context but that were being misconstrued, misinterpreted or recast as contrary to the [Rules of Engagement] by those elsewhere in the chain of command outside Afghanistan.

19. In other words, the appellant's concern was not that alleged war crimes by Australian soldiers were being under-investigated by the ADF. Rather, his concern was the converse: that such allegations were being over-investigated by the chain of command.
20. Further, the appellant positively resisted any suggestion that the story he was (in his own words) "pushing" may have been misconceived. After the appellant gave the confidential material to Mr Oakes, Mr Oakes called the appellant and said:

I'm going to run a story, it's going to be very damning, it's going to say the SAS kill people unnecessarily ... A total opposite to what you've just said. I'm just warning you.
21. The appellant told police that he responded, "And I was like, 'Never call me again'".
22. The *second matter* of contextual importance concerns the character of the confidential information and the manner in which the appellant determined to make the confidential information public.
23. The confidential information was marked "SECRET". The Agreed Facts record that:

[T]he SECRET classification indicates that a compromise of the confidentiality of the information could be expected to cause 'serious damage' to the national interest, organisations or individuals. That damage may include loss of life.
24. As the *Public Interest Disclosure Act 2013* (Cth) (*PID Act*) recognises, there is a strong public interest in exposing wrongdoing by public officials. However, as the SECRET classification makes clear, compromises of confidentiality in documents of this nature can have serious impacts upon national security interests, and ultimately can result in the loss of Australian lives. These risks are particularly acute where the breach of confidentiality occurs in a military context.
25. In the proceedings below, the appellant accepted that the disclosures that were the subject of counts 2 and 3 were not made pursuant to the *PID Act*. In the initial stages of the proceedings, the appellant foreshadowed an argument that his acts were immune under the *PID Act*, but he later discontinued this application: *McBride (No 4)* at [113].
26. Prior to making the disclosures which were the subject of counts 2 and 3, the appellant had sought to agitate his concerns internally. However, it is important to note that the appellant engaged in the offending conduct before the internal inquiry, which he had set in motion, had concluded.
27. Specifically, the appellant had approached the Australian Federal Police (AFP) in May 2014 about his concerns that the ADF was illegally using disciplinary investigations to vexatiously and improperly prosecute Australian soldiers. The AFP advised the appellant that the information the appellant had provided did not disclose evidence of a criminal

offence. The AFP officers told the appellant that the Inspector General of the Australian Defence Force (the IGADF) would be best placed to investigate his concerns.

28. On 15 August 2014, the appellant prepared a submission to the IGADF. In that submission, the appellant stated that the disclosure was being made under the *PID Act*. However, on 25 August 2014, the Deputy Inspector General explained to the appellant that disclosures about alleged ADF misconduct could not be made under the *PID Act* to the IGADF at that time. The appellant was provided with information about the process that needed to be followed to allow his submission to be treated as a disclosure under the *PID Act*. The appellant declined that opportunity, saying that his preference was for the IGADF to investigate his concerns.
29. The IGADF determined to hold an inquiry (the IGADF Inquiry). Two assistant IGADFs were appointed to the task. One was a former judge of the County Court of Victoria and a Commodore in the Royal Australian Navy Reserve. The other was a captain in the Royal Australian Navy.
30. In August 2015, the IGADF provided a report (the IGADF report), which upheld the appellant's complaints about the validity of some warrants issued by the Australian Defence Force Investigative Service, but found that the other complaints made by the appellant, particularly concerning the alleged over-investigation of Australian soldiers, could not be substantiated. The appellant read the IGADF Report in the IGADF office in late 2015. He did not raise any concerns about the report with anyone at the IGADF at that time. Nor did he seek to raise any further concerns by utilising *PID Act* procedures after the IGADF report was published.
31. The chronology of these events as against the offences committed by the appellant is significant. The Agreed Facts records that count 1 (theft) commenced in May 2014. Count 2 (unlawfully communicating naval, military or air force information), which was constituted by the provision of documents to Mr Masters and Mr Clark, likewise occurred in either late 2014 or early 2015. Count 3 (unlawfully communicating naval, military or air force information), which was constituted by the provision of documents to Mr Oakes, occurred in 2016.
32. In short, the appellant chose to take unilateral action to remove SECRET documents from ADF headquarters, to store them insecurely in his private home, and to disclose SECRET information to journalists. The appellant undertook this action, including disclosing the documents to two journalists (Mr Masters and Mr Clark), before the IGADF had produced its report and before the appellant knew the outcome of the IGADF Inquiry. The appellant did not make any complaint to, or about, the IGADF Inquiry after the

production of its report. Nor did he take any other action after the IGADF Inquiry dismissed his complaints about the over-investigation of war crimes by the ADF. The appellant's communications with Mr Oakes occurred after Mr Oakes first made contact with the appellant.

33. The *third contextual matter* concerns the effects of the appellant's conduct, which will be addressed further below. The Agreed Facts records that the IGADF Inquiry subsequently conducted by Major General Brereton was initiated by the ADF more than 12 months before the ADF became aware of the appellant's disclosures. Apart from lawfully using the appellant's IGADF submission to identify lines of inquiry, Major General Brereton did not use any information from the appellant's unlawful disclosures the subject of the charges: *McBride (No 4)* at [192]. The appellant did not respond to Major General Brereton's emails inviting him to give evidence before the Inquiry (the appellant had no recollection of receiving the emails).
34. Finally, as the primary judge observed, whilst there is "no doubt that the subject matter of The Afghan Files was a matter of significant public interest... the articles published by Mr Oakes were the exact opposite of what [the appellant] had intended when making the disclosures": *McBride (No 4)* at [192]. In those circumstances, the primary judge concluded that it was "not appropriate to treat any raising of awareness [of alleged war crimes] by reason of Mr Oakes' journalistic activities as being a matter reducing the seriousness of [the appellant's] conduct".
35. Each of the above contextual matters were the subject of concessions in the Agreed Facts, and findings by the primary judge at first instance. None of these findings were the subject of challenge in this appeal.

Conviction appeal

Procedural Background

36. As explained in the proceedings below, the appellant contended that the "official duty" in s 73A of the *Defence Act* and "duty" in s 70 of the *Crimes Act* of a member of the ADF was, consistent with their oath of enlistment, to advance the Australian public interest, and that this could involve a disregard of lawful orders applying to that member. The s 131.1(1) *Criminal Code* offence of theft, to which the appellant pleaded guilty, is not directly impacted by the conviction appeal. It is not referred to in the primary judge's reasons (and it is assumed was not the subject of argument before the primary judge): see *McBride (No 2)*.
37. As part of that submission, the appellant contended that the scope of the appellant's duty, for the purposes of s 73A(1) and s 70(1), was not defined by duties imposed by the

Defence Force Discipline Act 1982 (Cth) (*Discipline Act*) including a “general order” pursuant to s 29, Internal Defence Instructions (part of the definition of general order), or any disciplinary code. On this basis, the appellant contended that general orders only had effect for the purposes of discipline under the *Discipline Act*. We note the general orders relied on by the prosecution to establish that the appellant’s conduct was not in the course of his official duty, and the duties said to arise therefrom, were summarised by the primary judge in his reasons. It is unnecessary for present purposes to repeat that summary.

38. After rejecting the appellant’s contention, the primary judge made the following orders on 16 November 2023, to reflect his conclusions:

1. Subject to any further order of the Court made during the trial:

- (a) The directions to the jury will not include a direction that, by reason of the oath taken by the accused under the *Defence (Personnel) Regulations 2002* (Cth) and s 45 of the *Defence Act 1903* (Cth), the duty of the accused for the purposes of s 73A of the *Defence Act 1903* and s 70 of the *Crimes Act 1914* (Cth) extended to acting in the “public interest” or “Australian public interest”, as determined by the jury, even where that was in contravention of a lawful order that had been given to the accused.
- (b) The directions to the jury will be framed in a manner that recognises that a lawful order contained in a “general order” within the meaning of the *Defence Force Discipline Act 1982* (Cth) may define the scope of the duty of the accused under s 73A of the *Defence Act 1903* and s 70 of the *Crimes Act 1914*.

39. Thereafter, the appellant pleaded guilty to the three counts described above.

40. The sole ground in the conviction appeal alleges that a “miscarriage of justice arose because the appellant’s pleas of guilty were entered in consequence of the wrong decision of questions of law in orders 1(a) and/or 1(b) in *R v McBride (No 2)* [2023] ACTSC 330”. This ground relates to the offence provision the subject of counts 2 and 3, namely s 73A(1) of the *Defence Act*. However, we note that in reply, the appellant maintained the same statutory construction for the meaning of “duty” in s 70(1) of the *Crimes Act*.

41. The respondent did not make any objection to the taking of an appeal against conviction following the entry of the guilty pleas. The appeal was conducted by both parties on the basis that if legal error was established in the primary judge’s decision concerning the directions to be given to the jury, it would follow that a miscarriage of justice would have been occasioned, requiring the convictions and sentences to be set aside: see similarly *Watson v The Queen (No 2)* [2020] ACTCA 30 at [13] – [17].

Statutory provisions

42. It is helpful at the outset to recite the terms of the two offence provisions the subject of the argument before the primary judge, as at the relevant dates.
43. Section 73A(1) of the *Defence Act* is as follows:

73A Unlawfully giving or obtaining information as to defences

- (1) A person who is a member of the Defence Force or a person appointed or engaged under the *Public Service Act 1999* is guilty of an offence if:
- (a) the person communicates to any other person any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information; and
 - (b) the communication is not in the course of the first-mentioned person's official duty.

44. Section 70(1) of the *Crimes Act* is as follows:

70 Disclosure of information by Commonwealth officers

A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.

Consideration

45. The appellant identified that before the primary judge he relevantly argued: (1) that “official duty” is not defined in the *Defence Act*; (2) for the purposes of s 73A(1), “official duty” refers to the duty arising from the oath taken on enlistment (and is not synonymous with duties imposed by the *Discipline Act*, including compliance with lawful general orders, or defence regulations); (3) that the promise in the oath to “well and truly serve Our Sovereign” should be understood as a duty to advance the Australian public interest; and (4) whether or not a particular action is in the “public interest” and thereby in the course of a person's official duty, is a matter for a jury to determine.
46. The appellant has not alleged any error in the primary judge's reasoning in rejecting those propositions, rather he challenges the primary judge's conclusion. By doing so, the appellant failed to properly grapple with the reasons of the primary judge or advance submissions directed as to why his Honour was incorrect.
47. The appellant's submission is one of statutory construction, being the meaning of the term “official duty” in s 73A(1) of the *Defence Act* (and “duty” in s 70(1) of the *Crimes Act*).
48. It is timely to recall that the starting point for ascertaining the meaning of a statutory provision is its text, having regard to its context and purpose: *SZTAL v Minister for*

Immigration and Border Protection [2017] HCA 34; 262 CLR 362 at [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69] – [71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [46] – [47].

49. That said, although the appellant made submissions directed to the statutory construction of s 73A, in practical terms, unless the appellant establishes the primary judge erred in concluding that the oath of enlistment does not require a member of the ADF to act in the “public interest” or “Australian public interest”, even when in contravention of a lawful order given to that member, he cannot succeed on his appeal. It is therefore appropriate to first consider that submission. That is because the appellant’s contention that he has a duty to act in the public interest is solely dependent on that duty arising from the terms of his oath. That is the only basis for a jury direction in the terms he sought. Although order 1(a) also refers to s 45 of the *Defence Act*, that was not relied on in the appeal. That is unsurprising given s 45 is simply a provision which created the obligation for “continuous full time military service” at the relevant time, as distinct from service in the Army Reserve, where the use of the word “service” could not provide a foundation for the duty the appellant contends for: *McBride* at [110].
50. Accordingly, the appellant confined his submission, as to the source and content of the duty, to the terms of the oath of enlistment. That is, his submission is premised on the proposition that by taking the oath of enlistment, as required by law to become a member of the ADF, that member has a duty to act to advance the Australian public interest, as that member determines it to be, and to act accordingly. That duty imposed on the member “to act in the Australian public interest” is to be carried out even if it involves disobeying lawful orders, or legal obligations imposed on that member by the ADF. This, according to the appellant, defines his official duty as a member of the ADF. As such, the appellant contended that a lawful general order within the meaning of the *Discipline Act* does not define the scope of the duty in s 73A (or s 70).
51. The appellant therefore submitted, in relation to the s 73A(1) offence:
- the jury would need to be directed [that] the Crown would need to establish beyond reasonable doubt that the particular communication was not reasonably necessary in order to advance the Australian public interest and that the Australian public interest would not necessarily be determined by reference to whether or not there was a lawful general order in place prohibiting the communication.
52. Before the primary judge, the proposed direction was put as follows, *McBride* at [104]:
- The jury must be satisfied beyond reasonable doubt that a communication could not be regarded, given the existing circumstances, as a carrying out of [the accused’s] official duty to serve the public interest. That is, the Crown must eliminate any reasonable possibility that

the communication could be regarded, given the existing circumstances, as a carrying out of the accused's official duty to serve the public interest.

53. The primary judge correctly rejected that proposition: *McBride* at [106] – [112].
54. His Honour recited the appellant's submission detailing the history of the oath, which is unnecessary to repeat here: *McBride* at [92] – [104]. The oath taken by the appellant was provided for in Schedule 2 to the *Defence (Personnel) Amendment Regulations 2002* (Cth) (*Defence Regulations*), and was as follows:

I, (insert full name of person) swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, as a member of the (insert **Australian Navy, Australian Army, or Australian Air Force**) (insert for the period of (number of years), and any extensions of that period or until retiring age,) and that I will resist her enemies and faithfully discharge my duty according to law.

55. The abovementioned oath is relevantly in the same terms as what the appellant identified he took as a commissioned officer: *McBride* at [96].
56. The appellant's submission was quoted by the primary judge at [98] to then follow that:

The duty to "well and truly serve" the Sovereign [as arising from the oath] should be understood, under the Australian constitutional framework, as a duty to advance the (Australian) public interest.

57. The appellant's submission finds no support in the terms of the oath. There is no reference to a duty to act in or advance the Australian public interest, and if there was such a duty, it would be expected the terms of the oath would expressly state so. As discussed further below, this is particularly so given the concept of military service and what that has historically entailed. Moreover, there is nothing in the terms of the oath that directs a member's attention to this being their duty, and that they have an individual obligation to assess the acts they are taking (i.e. whether such acts are in the public interest), instead of simply obeying the lawful orders the member is given. Again, if that is what is intended by the oath it would be expected that it would clearly and explicitly state so. Rather, the terms of the oath are to the contrary. The oath, as recited above, requires a member of the ADF to well and truly serve the Sovereign and that the member "will resist her enemies and faithfully discharge [their] duty according to law". The appellant's submission has not adequately explained the meaning or application of "according to law". Indeed, the appellant's written submissions (in chief and reply) do not refer to that aspect of the oath. The meaning of that phrase is self-evident. The oath is underpinned by the concept of service in line with the inherent nature of military service, within which, as identified below, compliance with orders is a central feature. That is the plain meaning of its terms.

58. It is important to recognise that the interpretation of the oath contended for by the appellant, if correct, would hold for all purposes. That is, the duty imposed on members of the ADF which he says arises from the oath would not be confined to the disclosure of confidential information (being the offence the subject of these proceedings) but would also extend to conduct of members in all spheres of a member's military service, including on the battlefield.
59. The appellant did not identify that the *Defence Regulations* or any other defence legislation expressly gave the oath the effect for which he contended: *McBride* at [108].
60. In so far as the appellant seeks to rely on the ordinary meaning of "service" as part of the oath to "well and truly serve", it does not assist him. The word must be considered in the context in which it appears, a military context.
61. As the primary judge observed at [114] – [115]:
- [114] The *Discipline Act* makes it clear that there is a duty to obey a lawful command of a superior officer (s 27) or of a lawful "general order" such as a Defence Instruction (s 28).
- [115] The *Defence Act* and the *Discipline Act* exist against a background which assumes the importance of a disciplined force that follows lawful orders.
62. There are many authorities which describe the nature of military service. Although the Courts there were not considering the argument advanced by the appellant in this case, the general concept nonetheless informs the nature of military service and reflects the content of the oath for membership in the ADF.
63. For example, in *Haskins v Commonwealth* [2011] HCA 28; 244 CLR 22, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed at [67]:
- To permit the plaintiff to maintain an action against those who executed that punishment (whether service police or the officer in charge of the Corrective Establishment) would be destructive of discipline. Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring a personal liability in tort.
64. In *White v Director of Military Prosecutions* [2007] HCA 29; 231 CLR 570, Gleeson CJ said at [19]:

An illustration of the problem of separating essentially disciplinary offences from civil offences may be seen in the archetypal disciplinary offence: mutiny. The essence of mutiny

lies in the combination to defy authority. The offence strikes at the heart of a disciplined, hierarchical service.

65. This description was echoed by Gummow, Hayne and Crennan JJ, who later said at both [52] and [61], that “the defining characteristic of armed forces [is] as disciplined forces organised hierarchically”.

66. As the respondent correctly observed, the notion of service in this context does not encompass simply doing what the soldier considers to be in the public interest, where

[t]hat would invert the relationship between the soldier and the sovereign. Soldier A does not serve the sovereign by promising the sovereign to do whatever Soldier A thinks is in the public interest even if contrary to the lawful general orders of the chain of command over which the sovereign ultimately presides. This is the very antithesis of service.

67. From the appellant’s perspective, the high point of his submission in respect to “service” was his reliance on a passage from McTiernan J in *Commonwealth v Quince* [1944] HCA 1; 68 CLR 227 at 250, in respect of a member of the Royal Australian Air Force:

His enlistment was an engagement for public service: for the defence and security of the community. As public service it was “for the public benefit” or the “good of the public” and could not at common law be the subject of a contract consisting of mutual promises (*Dunn v The Queen*).

(Citation omitted)

68. The appellant then referred to the passage in *Dunn v The Queen* (1896) 1 QB 116 at 118, where Lord Esher MR noted what he had said in *De Dohsé v Reg* (unreported, Court of Appeal, 2 June 1885):

All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service for the Crown is for the public benefit.

69. From those passages, the appellant submitted that the content of the “duty”

derives from the office, as was set out by McTiernan J in *Quince*, being by virtue of the office to act to serve the public. So we would say that that overarching official duty is a duty to act for the public benefit or, as it has been framed on behalf of the appellant, in the Australian public interest, and that is the answer to the legal question which we say Mossop J was in error in deciding to the contrary.

70. However, properly read, the comments by McTiernan J do not have the meaning or consequence the appellant contended for. His Honour does not suggest that it is the member’s duty to act in the public interest, that the member is to thereby act in that manner as the member determines it, or that this duty derives from the member’s oath of enlistment. Indeed, McTiernan J at 248 – 249, refers to the injured airman having

enlisted in the Royal Australian Air Force and having taken the oath of enlistment with the consequence that

[h]e thereby promised to serve the King in the Air Force for the duration of the war and twelve months thereafter, to resist the King's enemies and to cause his peace to be maintained and in all matters appertaining to his service, faithfully to discharge his duty according to law. The airman was bound under the regulations to serve according to the tenor of the oath.

71. Significantly, the comments of McTiernan J at 250 are in the context of what he was examining in that case, being the question of whether a claim can be brought by the Commonwealth against Quince who, through his negligence, caused injury to the airman. His Honour was explaining why there was no contract of service between the Crown and a soldier.

72. As the primary judge observed at [120]:

Neither that passage nor the case from which the references to “for the public benefit” or “good of the public” are drawn, support the proposition that there was some independent entitlement arising from the accused’s oath to disobey a lawful order.

73. No other member of the Court in *Quince* refers to the concept of service in the manner relied on by the appellant, although most refer to the oath of enlistment. To illustrate, Latham CJ in dissent said at 234 that “[t]he oath of enlistment imposes an obligation to render service”. His Honour also said at 238:

The authorities in my opinion show that the action lies when one person has a right to the services of another and can command that person in the doing of such services. The Commonwealth is entitled to the services of members of the forces. They swear that they will serve the King. Military service is service of the highest order of obligation. The obligation is enforced by discipline under the authority of military law. It is higher in degree than any contractual obligation or any obligation founded upon family relationship. It is, I think, true that a member of the forces is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relations of the parties. He may not be an officer or servant of the Crown within the meaning of a statute which imposes liability upon the Crown for the acts of its officers and servants – as was held in *McArthur v. The King*. But the very essence of his position is that he is bound to render service, to obey orders, and, in my opinion, the history of this form of action shows that in such cases the action lies, even though the obligation is not based on contract.

(Citation omitted)

74. Williams J, also in dissent, said the following at 255 and 257:

The oath is an oath to serve the King in person according to its tenor. Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.

In essence the obligation is the same as the obligation of any servant to obey the orders of his master. The difference is that a breach of the obligation does not give rise to an action for damages but to disciplinary punishment.

...

But, within this broad charter, an airman is bound, as I have said, to obey the lawful orders which he receives from time to time from a superior in rank.

75. The primary judge surveyed other cases relied on, being: *Marks v Commonwealth* [1964] HCA 45; 111 CLR 549; *R v District Court of the Northern District of Queensland; Ex parte Thompson* [1968] HCA 48; 118 CLR 488; *Groves v Commonwealth* [1982] HCA 21; 150 CLR 113; *X v Commonwealth* [1999] HCA 63; 200 CLR 177; *Private R v Cowen* [2020] HCA 31; 271 CLR 316; and *Commonwealth v Carter* (1965) 7 FLR 223. As his Honour commented, those cases are of limited assistance where none of them involve a consideration of the issue that arises in this case. That said, as the primary judge concluded at [129]:

none of [the cases] recognise a duty of a military officer arising pursuant to the oath taken, or otherwise, to act in the public interest when that is in direct contravention of a lawful order. On the contrary, the authorities recognise that discipline within the military is dependent upon the obligation of members to comply with a lawful order. The absence of any reference to any independent aspect of a member-of-the-Defence-Force's duty being to disobey a lawful order in the "public interest" or "Australian public interest" is because there is no textual, common law or historical foundation for the existence of such a duty.

76. As the respondent submitted, the history of military service is against the appellant's contention that a soldier's official duty is simply to advance the public interest even when their conduct is inconsistent with lawful general orders: see, e.g. Clode C M, *The Military Forces of the Crown: Their Administration and Government* (J Murray, 1869) at [110], [112] cited by Callinan J in *X* at 233; Clode C M, *The Administration of Justice under Military and Martial Law* (2nd ed, Murray, 1874) at 72 – 77, cited and part quoted with approval by Williams J in *Quince* at 254 and cited by Edelman J in *Private R v Cowen* at [193]; Dicey A V, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, 1915) at 189, 191 – 192, 196 – 197; *Halsbury's Laws of England* (1st ed, Butterworth, 1913) vol 25 at [79], quoted by Gummow, Hayne and Crennan JJ in *White* at [71].
77. The primary judge at [125] referred, inter alia, to Edelman J's recitation of a passage of Clode's work in *Private R v Cowen* at [193], describing it as particularly apt:

Obedience must be implicitly exacted by each responsible officer, "for nothing (even in Civil affairs) can be more dangerous than to allow the obligations to obey a law to depend on the opinion entertained by individuals of its propriety," [*Fergusson v Earl of Kinnoul* 9 Cl and Fin p 324] and in military affairs it would be intolerable.

78. As illustrated above, the concept of military service and what that has historically entailed supports the plain reading of the oath as reflected in the reasons of the primary judge (and is inconsistent with the interpretation contended for by the appellant).
79. The appellant has not established any error in the primary judge's conclusion that the oath does not give rise to the duty contended for. As a result, the appellant has not established there is any error in the primary judge's rejection of the jury direction in the terms he sought.
80. Nonetheless, it is appropriate to make the following observations which arise from the appellant's submissions.
81. *First*, there is no reference to public interest in s 73A (or s 70). If those provisions were intended to depend only upon the concept of acting in the public interest, then Parliament would simply have said so. The expression "public interest" is extremely familiar to parliamentary draftspersons.
82. *Second*, the appellant's submission is dependent on the phrase "official duty" in s 73A. That is, it is said the phrase signifies that the duty comes from the person's office, which in this case, is said to be derived from the oath of enlistment. Despite that, the appellant does not properly grapple with how this reasoning applies to s 70, which does not contain the same terminology (i.e. the absence of the word "official"). Rather, the submission is that the construction contended for in s 70 would be consistent with that in respect to s 73A, given the similarity of the provisions, albeit using different wording, referring to *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380 at [131]. However, the paragraph relied on from *Harrison v Melhem* simply refers to the principle of statutory interpretation supporting the presumption that a legislature intends to attach the same meaning to the same words when used in a subsequent statute in a similar connection: at [131]. That is not the situation in this case. The appellant's submission involves reading a word into s 70. His submission based on the meaning of "official duty" could not apply to s 70.
83. *Third*, we note the appellant submitted that s 73A and s 70 refer to there being a singular duty of office to be identified; that is one duty only, not duties plural. The reasons of the primary judge in *McBride* which describe the submissions advanced by the appellant (and which are not criticised in this regard) make no reference to such an argument: see at [41] – [47]. In any event, the use of singular language encompasses the plural: s 23(b) of the *Acts Interpretation Act 1901* (Cth). There is no indication in s 73A or s 70 to the contrary (and none were submitted by the appellant).

84. *Fourth*, although the appellant accepted that there is a duty to obey lawful general orders, he submitted that disobedience to this duty results in a service offence justiciable only within the military justice system. As the respondent submitted:

The result, on this argument, is that a duty to obey lawful general orders does not form part of the official duty of a member of the Defence Force, albeit it is a critical component of what is required of them within the system of military discipline.

85. There is no logical basis for confining a breach of general orders to the military justice system. The existence of s 73A of the *Defence Act* recognises the possibility that breaches of such orders could be outside the realm of military justice, and that disciplinary action may be insufficient. The criminal offence requires different elements and carries with it a greater sentence. There is no reason in principle why a duty which can result in disciplinary action for breach cannot also inform the extent of a person's official duty for the purposes of a criminal offence provision. As the respondent submitted, the fact that a particular duty is central to military discipline might be thought to provide a substantial reason as to why it would form part of the person's official duty.
86. Further, the appellant's reliance on s 190(1) of the *Discipline Act*, which provides that "a civil court does not have jurisdiction to try a charge of a service offence," is misplaced. That was said by the appellant to reflect a clear legislative intention to capture and retain within the system of military discipline matters which (while capable of being civil criminal law offences if committed by members of the armed forces on service territory) are to be dealt with only as disciplinary matters. He submitted that a breach of lawful general orders under the *Discipline Act* cannot be sufficient for criminal offences because it would mean the failure to follow a lawful general order would then "simultaneously and automatically" result in a criminal consequence. In this case that was submitted to mean that a breach of a service offence (i.e. a duty to follow general orders) would automatically give rise to a contravention of s 73A(1) of the *Defence Act*. That submission is misconceived. The offence of failing to comply with a lawful general order in s 29 of the *Discipline Act* is strict liability, whereas the criminal offence in s 73A(1), as explained below, contains fault elements. In any event, s 73A is not a service offence. Just because civil courts cannot charge a service offence, does not mean that any breaches of general orders (which may result in a service offence) cannot assist in defining the scope of a member's duty for the purposes of s 73A (and s 70).
87. In this context, the appellant also relied on a series of cases involving police officers, submitting his construction of "official duty" is consistent with previous decisions relating to the duty of members of the police force, citing: *Enever v The King* [1906] HCA 3; 3 CLR 969; *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* [1952] HCA 2; 85 CLR

237; *Pense v Hemy* [1973] WAR 40; *DPP (Vic) v Zierk* [2008] VSC 184; 184 A Crim R 582; *Tasmania v Johnston* [2009] TASSC 60; 18 Tas R 195. He submitted that these decisions confirm the distinction between a “duty of office” and legal or disciplinary duties imposed upon office holders, and thereby supports the proposition that the courts should be slow to hold that any such disciplinary duties give rise to a duty, a breach of which would amount to a criminal offence.

88. The primary judge surveyed the relevant cases at [61] – [88]. Again, the appellant did not identify any error in his Honour’s reasons in this regard. Rather, he merely asserts that the primary judge distinguished those authorities on the basis that “[t]hey related to a disciplined force but not to a military force in which discipline is of central importance”: *McBride* at [91]. Although that is an aspect of the primary judge’s reasoning, it is not complete. To put that statement in context, his Honour said when considering the effect of the *Discipline Act* at [89] – [91]:

[89] The rules of conduct in the *Discipline Act* are, self-evidently, contained in an Act of Parliament. They are not obligations arising from subordinate instruments. In the case of s 29, the statute gives statutory effect to subordinate instruments.

[90] The fact that the rules in the *Discipline Act* are not directly enforceable in the civilian courts is significant. However, it does not mean that the rules may be ignored when assessing the content of a member’s duty for the purposes of either the *Defence Act* or the *Crimes Act*. They remain statutory rules of conduct which define the duty of a member. There is no adequate reason why those rules of conduct may not be picked up by other statutes as elements of a member’s duty. To treat them as establishing a completely separate regime which could not be used to define the scope of a member’s duty would result in the anomalous situation where factual issues, such as where a member was posted and the task that the member was given to perform, would be able to be considered when determining the scope of the member’s duty, but all of the statutorily mandated constraints upon the exercise of those functions would be ignored.

[91] I do not consider that the police cases require a different conclusion. Each turned on the specific statutory provisions in question. They related to a disciplined force but not to a military force in which discipline is of central importance. The existence of an established body of common law defining the functions of police officers provided a more secure foundation for an argument that the scope of the officer’s duty could be found other than in the specific disciplinary rules in question. In contrast, on the accused’s argument, the content of the duty would be contained principally in s 45 of the *Defence Act* and the oath that was required by the relevant regulation at the time of the accused’s enlistment. The terms of s 45 are set out later in these reasons (see [98]). Even if they had the effect contended for by the accused, they would not provide any adequate definition of the duty of the accused. As will be described shortly, the terms of s 45 do not provide a general duty to act “in the Australian public interest”, even if that involves disobedience to orders or instructions. The consequence is that unless the rules provided by the *Discipline Act* are available to provide content to the duty of the accused, the law will provide very little content. Anomalously, the duty of the accused would be defined by

factual matters such as postings or instructions deprived of the legal content which, in reality, defines the nature of his service at the relevant times.

89. The appellant's submission fails to grapple with the fact there is a statutory command to comply with lawful general orders in s 29 of the *Discipline Act*, whereas there was no statutory command to comply considered in any of the decisions of *Pense*, *Zierk* and *Johnston* (i.e. they instead concern codes of conduct or standing orders). Similarly, although both the military and police are disciplinary forces, as explained in the cases referred to above regarding the nature of military service, there is a centrality of obedience to orders in the defence force.
90. Those authorities are properly distinguishable.
91. *Fifth*, the appellant also submitted that because the offence in s 73A of the *Defence Act* is not confined to members of the ADF, but also applies to persons appointed or engaged under the *Public Service Act 1999* (Cth) (who are not subject to the *Discipline Act*), the content of their "official duty" must derive from a different source as they do not all have a duty to obey lawful general orders. So much can be accepted. However, as the respondent submitted, "there is no reason why the official duties of members of the Defence Force must be the same as the official duties of those appointed under the *Public Service Act*". The former may be obliged to follow orders as part of their office in, or membership of, the ADF which may be different to the official duty of those employed under the *Public Service Act*. That does not reflect any inconsistency or lead to a conclusion that compliance with general orders cannot be part of the official duty of members of the ADF.
92. *Finally*, the appellant's written submission did not address the practical application of the direction he sought, including on the conduct of any trial. To address that, it is helpful to identify the elements of the offence.
93. In relation to an offence contrary to s 73A(1) of the *Defence Act*, the prosecution must prove that a person (a member of the ADF or a person appointed or engaged under the *Public Service Act*):
 - (a) communicates to any other person any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information (physical element – conduct; fault element – intention);
 - (b) the communication is not in the course of that person's official duty (physical element – circumstance; fault element – recklessness).

94. To establish its case, the prosecution must prove for the element of circumstance, that “the communication is not in the course of the person’s official duty”, which the appellant contended means proving that the particular communication was not reasonably necessary in order to advance the Australian public interest. The jury direction sought for this element (recited above at [51]), contains concepts (e.g. “Australian public interest” and “reasonably necessary”) not in the offence provision.
95. During the hearing, the appellant accepted that this direction would effectively require the prosecution in a case (where it is based on documents being communicated) to tender every document and leave the jury to assess each document to determine whether they are satisfied the communication was not reasonably necessary to advance the Australian public interest. To do so would likely require the prosecution having to lead classified evidence on matters of military and national security issues (including, but not limited to, the documents themselves). On the appellant’s submission, this direction is required in each case where this offence is charged, regardless of the motive of the accused, as the prosecution must establish its case. It must be able to do so even when an accused has not made any statement to the authorities (or revealed their motive). To suggest, as the appellant does, that an interpretation which has these consequences is consistent with Parliament’s intention in relation to s 73A(1) (or s 70(1)), is without any proper foundation. It is inherently unlikely.
96. We note also that the appellant had difficulty in articulating the application of his contended jury direction. In explaining the direction, he submitted that
- where a person is possessed of a belief that there is, for example, wrongdoing being committed by the Australian Defence Force, it would be a matter for the jury to determine whether or not [the communication is advancing the public interest].
97. However, as explained above, that direction would be required in each case irrespective of whether a motive is apparent. As the submission reflects, although the appellant disavowed that a person’s subjective motive was relevant to assessing reasonableness (affecting the scope of the evidence to be led by the prosecution), during the hearing, his submission repeatedly changed. He often reverted to referring to the subjective intention when explaining the direction. This reflects the artificial nature of the appellant’s submission, with which he never properly grappled. Further, it is to be recalled that the appellant submitted the same direction applies to both offence provisions, yet the terms of the provisions and therefore the elements of the offences, are different. The element of circumstance in s 70 is that a person has a duty *not* to disclose (to be contrasted with the appellant’s case for “official duty” in s 73A which refers to a positive duty to advance the Australian public interest).

Conclusion

98. The appellant has not established error in the primary judge's conclusion in order 1(a) of *McBride (No 2)* that the oath of enlistment taken by the appellant does not define the duty of the appellant for the purposes of s 73A of the *Defence Act* and s 70 of the *Crimes Act* as extending to acting in the Australian public interest, even where in contravention of a lawful order. Nor has he established error in the primary judge's conclusion in order 1(b) of *McBride (No 2)* that a lawful order contained in a "general order", within the meaning of the *Discipline Act*, may define the scope of the duty of the accused under s 73A of the *Defence Act* and s 70 of the *Crimes Act*. To put it another way relevant to this case, a communication of the type referred to in s 73A or s 70 may not be in the course of a person's "official duty" if that person was under a duty (which arises from, inter alia, general orders) not to make that communication.
99. Accordingly, the appeal against conviction is dismissed.

The sentence appeal

The grounds of appeal against sentence

100. The jurisdiction of this Court on an appeal against the severity of a sentence is limited. As this Court observed in *Allred v The Queen* [2015] ACTCA 21 at [10], the High Court's decision in *House v The King* [1936] HCA 40; 55 CLR 499 identifies only two bases upon which an appellate court may set aside a sentence imposed at first instance:

One is where there is specific error, such as taking into account irrelevant considerations, failing to take into account relevant considerations, mistaking the facts or acting on a wrong principle. The other is where the court cannot identify such a specific error but the sentence is what is now called manifestly excessive or inadequate and the court may infer that there has been an error such that the discretion has not been properly exercised.

101. In the present appeal, the appellant did not contend that the sentence imposed upon him was manifestly excessive. Accordingly, the appellant must demonstrate that there was specific error in the sentence imposed.
102. The appellant relies on the following six grounds in support of his appeal against the severity of his sentence:
- (a) The primary judge erred in failing to take into account that the appellant was motivated to remedy what he perceived to be an injustice occurring in the Australian Defence Force (Ground 2);
 - (b) The primary judge erred in failing to find that the appellant honestly believed, at the time of engaging in the offending conduct, that he was not committing offences against the criminal law (Ground 3);

- (c) The primary judge erred in holding that the appellant's "mental health condition" contributed only in a minor way to his offending conduct and did not have any "significant consequence for the suitability of his sentence as a vehicle for general deterrence" (Ground 4);
- (d) The primary judge erred in finding that "the offender's culpability for the offending having regard to the circumstances is high" (Ground 5);
- (e) The primary judge erred in finding that the "level of harm done to the community is significant" (Ground 6); and
- (f) The primary judge erred in failing to consider the intensive correction assessment when deciding whether to make an intensive correction order for the appellant, as required by s 78(2)(a) of the *Crimes (Sentencing) Act 2005* (ACT) (Ground 7).

103. Each of these grounds are addressed below.

Second ground of appeal: Whether the sentencing judge erred in failing to take into account that the appellant was motivated to remedy what he perceived to be an injustice occurring in the Australian Defence Force

104. The second ground of appeal relates to the following finding by the primary judge (at [167] – [168]):

[The appellant's] motivation was therefore to remedy what he perceived to be an injustice occurring within the ADF, even if it involved him committing very serious criminal offences. It is clear that he did not commit the offences in order to achieve any financial gain for himself or in order to assist Australia's adversaries. Rather, the offending was motivated by his opinion that there was an injustice occurring to individuals and to the institution of the Army because of political pressures upon its senior management. Characterising the conduct as "honourable" is apt to mislead, unless that word is simply used to indicate that there were not base motivations of financial gain or other personal advantage or a desire to assist Australia's adversaries.

It is therefore more appropriate to simply identify that the offending was not motivated by financial gain, personal advantage or a desire to assist Australia's adversaries. It may be accepted that the conduct reflected strongly held beliefs on his part. As I have indicated, no attempt was made to establish the correctness of those beliefs in these proceedings or to undermine the validity of the conclusions reached by the IGADF as a result of the inquiry arising from the IGADF Submission. Insofar as counsel submitted that [the appellant] was of the view that "the IGADF was biased and controlled by the Chief of the Defence Force", there was no attempt to establish that this was true or was a reasonable belief. To the extent that [the appellant] held that belief, it is only of relevance insofar as it precludes more reprehensible motivations such as a desire to assist foreign powers. (emphasis added)

105. Senior counsel for the appellant contended that the primary judge erred in taking into account the appellant's motivations "only insofar as they meant that he did not act out of 'base motivations'". In this respect, the appellant's senior counsel noted the well-

established line of authority that motivation may be relevant to the objective seriousness of an offence: see *R v Tepania* [2018] NSWCCA 247; 275 A Crim R 233 at [112]; *Elmir v The Queen* [2021] NSWCCA 19; 357 FLR 274 at [55]; *Cheung v R* [2001] HCA 67; 209 CLR 1 at [171] and *Marks v The Queen* [2019] VSCA 253; 280 A Crim R 23 at [56] – [57].

106. However, as the respondent pointed out, the difficulty with the appellant's submission is that it is predicated on the primary judge having failed to consider the appellant's motivation when assessing the objective seriousness of the offending at all. This is not the correct construction of the primary judge's reasons. It is clear from the passage extracted above that the primary judge properly accepted that the appellant's motivation was relevant to an objective assessment of the offending; his Honour simply determined that the appellant's motivation was not one, in all of the circumstances, that should operate to mitigate the sentence.
107. In essence, the appellant's complaint is that the primary judge did not place more weight on the fact that the appellant honestly believed that he was remedying a perceived injustice. This submission must be rejected. It is a firm principle that matters of weight are "very much matters for the sentencing judge": *R v Ruwhiu* [2023] ACTCA 18 at [75], quoting *Carr v The Queen* [2020] NSWCCA 214 at [47].
108. It is also important to bear in mind the observations made at the outset of this judgment when assessing the appellant's contentions under this ground of appeal. As outlined above, the injustice which the appellant was motivated to remedy was not that Australian soldiers were failing to be held to account for war crimes. Rather, the appellant's concern was that Australian soldiers were being over-investigated for such crimes. It is difficult to see why an honest belief that Australian soldiers were being over-investigated by the chain of command mitigated the appellant's conduct, particularly where the appellant decided to breach his duties of confidentiality *before* the IGADF Inquiry which he had initiated had made any findings. In these circumstances, the primary judge was correct to find that the appellant's motivation was only relevant insofar as it did not operate as an aggravating factor on sentence.
109. This ground of appeal should be dismissed.

Third ground of appeal: Whether the sentencing judge erred in failing to find that the appellant honestly believed, at the time of engaging in the offending conduct, that he was not committing offences against the criminal law

110. Whilst the primary judge accepted that the appellant honestly believed that he was acting to remedy the injustice described above, the primary judge did not accept that the

appellant honestly believed that he was not committing offences against the criminal law at the time that he engaged in the offences.

111. In his judgment, the primary judge set out various statements in the appellant's interview in which the appellant claimed that he honestly believed that he was not committing criminal offences: *McBride (No 4)* at [170] – [176]. However, the primary judge did not accept that these passages demonstrated that the appellant genuinely believed that he was not committing a crime: *McBride (No 4)* at [179]. At [183], the primary judge continued:

Even taking into account the decline of [the appellant's] mental state following his return from Afghanistan, I do not accept that he held a belief that what he was doing was not a criminal offence. He was not such a bad lawyer as to have genuinely reached a legal conclusion along the lines expressed in his interview. Rather, he had a hope at the time that his actions would ultimately be vindicated in some way other than by being found to be legally correct.

112. The appellant's third ground of appeal relates to this finding.
113. The appellant's senior counsel pointed out that the appellant maintained pleas of not guilty up until the time that the primary judge rejected the defence he intended to rely on in *McBride (No 2)*. He contended that in these circumstances, the primary judge should have found that the appellant had an honest belief that he was not committing criminal offences when he took the confidential materials to his home, or when he disclosed confidential information to the journalists.
114. A conclusion that a legal argument lacks merit does not necessarily carry with it an imputation that the belief was not honestly held. With respect, we would not adopt the primary judge's statement that the appellant "was not such a bad lawyer as to have genuinely reached a legal conclusion along the lines expressed in his interview". However, error is not established whenever the appellate court disagrees with an aspect of a sentencing judge's reasons. As senior counsel for the appellant properly acknowledged, it is necessary for the appellant to demonstrate that any error was material to the sentence imposed: *Kentwell v The Queen* [2014] HCA 37; 252 CLR 601 at [42].
115. The onus was on the appellant to demonstrate that he held an honest belief in the lawfulness of his actions on the balance of probabilities. A mere hope that one's action is lawful falls short of a positive belief in the lawfulness of that action and does not establish the matter to the necessary standard: see similarly *DPP v Coory* [2011] VSCA 316; 214 A Crim R 301.
116. The evidence in the present case fell far short of demonstrating that the appellant honestly believed in the lawfulness of his actions. In the Agreed Facts, the appellant

accepted that he was aware that “ADF instructions *having the force of law* prohibited the provision of the documents to [Masters, Clarke and Oakes]” (emphasis added). Further, when the appellant gave the documents to Mr Clark, he said “look, I don’t really want to go to jail, obviously, but I’m prepared to be named if you need to”. Importantly, on 22 September 2017, following the execution of the search warrant, the appellant moved to Spain with no immediate intention to return to Australia. In his interview with police, the appellant explained that he was aware from the Christopher Skase case that extradition from Spain would prove difficult and he “didn’t really want to go to jail”. The proper inference to be drawn from all of the appellant’s conduct is that the appellant hoped that his conduct was lawful, but that he did not positively believe that to be so.

117. Accordingly, whilst we do not adopt the reasoning of the primary judge in respect of the relevance of the appellant’s legal prowess, there is no material error in the primary judge’s conclusion that the appellant’s belief in the lawfulness of his actions was not of a nature that justified any mitigation of the sentence to be imposed.

Further contention under third ground of appeal: Whether a greater discount for plea of guilty should have been afforded

118. Under the third ground of appeal, the appellant also contended that the primary judge should have afforded the appellant a larger discount in recognition of his pleas of guilty.
119. Section 16A(2)(g) of the *Crimes Act* provides that where an offender pleads guilty to an offence, the sentencing court must consider the fact of the plea of guilty, the timing of the plea and the degree to which that fact and the timing of the plea resulted in any benefit to the community; or any victim of, or witness to the offence. These are utilitarian considerations which are concerned with the practical benefit that is actually occasioned as a result of an offender’s guilty plea: *Bae v The Queen* [2020] NSWCCA 35 at [55] – [57].
120. The appellant pleaded guilty on the fifth day of pre-trial argument of a trial that was listed for a jury trial with an estimated length of three weeks. The appellant did not put the Court, or the prosecution, on notice that he was intending to plead guilty if his legal contentions addressed in the pre-trial ruling were unsuccessful. The lateness of the plea would therefore also have occasioned significant inconvenience and cost to the prosecution and its witnesses, who were required to prepare for a trial that did not eventuate.
121. The primary judge afforded the appellant a 10 percent discount for his guilty pleas. This utilitarian discount was generous in the circumstances.
122. This ground of appeal should be dismissed.

Fourth ground of appeal: The sentencing judge erred in holding that the appellant's 'mental health condition' contributed only in a minor way to his offending conduct and did not have any 'significant consequence for the suitability of his sentence as a vehicle for general deterrence'

Relevant principles

123. In *R v Verdins* [2007] VSCA 102; 16 VR 269, the Victorian Court of Appeal held that an offender's impaired mental functioning may affect the determination of the sentence to be imposed in the following ways:

- (i) First, the condition "may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility". The Court explained that where an offender's moral culpability is reduced, "the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective": *Verdins* at [32(1)].
- (ii) Second, the condition may be relevant to an assessment of the weight to be given to general deterrence. The Victorian Court of Appeal emphasised that "[w]hether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both": *Verdins* at [32(3)].
- (iii) Third, the condition may be relevant to an assessment of the weight to be given to specific deterrence. Again, the Court emphasised that "[w]hether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both": *Verdins* at [32(4)].
- (iv) Fourth, "the existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health". In such circumstances, the weight to be given to punishment, denunciation, general and/or specific deterrence may be moderated: *Verdins* at [32(5)].

124. As a result of the above, the Victorian Court of Appeal held that an offender's mental condition "may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served": *Verdins* at [32(2)]. Further, the Court observed that where

there is a “serious risk of imprisonment having a significant adverse effect on the offender’s mental health, this will be a factor tending to mitigate punishment”: *Verdins* at [32(6)].

125. These principles were applied by the High Court in *R v Guode* [2020] HCA 8; 267 CLR 141 at [8] and [46], and have been followed in many Australian jurisdictions, including by this Court: *Monfries v The Queen* [2014] ACTCA 46; 19 ACTLR 99 at [65].
126. In respect of point (i) above, there are some suggestions in the authorities that there will be no reduction in an offender’s moral culpability unless there is a “direct causative link” between the offender’s mental impairment and the offending: see, for example, *Bowen v The Queen* [2011] VSCA 67 at [33]. However, more recent authorities are not so rigid, and have held that an offender’s mental impairment may reduce a person’s moral culpability where the offender’s mental impairment has made a “material contribution” to the offending, or has some other “realistic connection” to the offending: *Moiler v The Queen* [2021] NSWCCA 73 at [58]; *Crane v The King* [2024] NSWCCA 87 at [69] – [73]; *Hu v The King* [2025] VSCA 60 at [71].
127. We agree with these more recent authorities. The causes of human behaviour are complex and multilayered: see similarly *DPP v Herrmann* [2021] VSCA 160; 290 A Crim R 110 at [45]. The sentencing task should not be approached in “an unduly technical or restrictive way”, which disregards the complexity of human behaviour: *Crane* at [70]. For this reason, “[w]here the mental illness or impairment explains or sheds light on the offending conduct in some material way, an offender’s moral culpability may be reduced, and the weight afforded to denunciation and deterrence may be lessened”: *Crane* at [70].
128. However, it must also be borne in mind that a finding of reduced moral culpability does not necessarily require the weight to be given to general or specific deterrence to be reduced or eliminated: *Hu* at [65]. It is “erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances”: *R v Engert* (1995) 84 A Crim R 67 at [68], quoted in *Munda v Western Australia* [2013] HCA 38; 249 CLR 600 at [58]. Each case will depend upon its own facts. As Nettle JA (as his Honour then was) observed in *R v Howell* [2007] VSCA 119; 16 VR 349 at [24], “[t]he theory and reality upon which the intuitive synthesis approach to sentencing is built is that each case is unique”.
129. As explained by the Victorian Court of Appeal in *Verdins*, whether the weight to be given to general and/or specific deterrence should be moderated depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender: see also *Hu* at [65]. Of particular relevance to this

assessment will be whether the mental condition affected the offender's capacity to understand the wrongfulness of their conduct: *Hu* at [65]. Where an offender's mental illness is such that the offender is not an appropriate medium for making an example to others, the weight to be given to general deterrence may be reduced, potentially significantly so: see similarly *Hu* at [62], citing *R v Mooney* (Full Court of Supreme Court of Victoria, unreported, 21 June 1978) and *R v Anderson* [1981] VR 155.

Application

130. The evidence before the primary judge included two psychological reports of Mr Sam Borenstein, psychologist, dated 31 January 2024 and 23 February 2014, respectively.

131. In the first report, Mr Borenstein concluded:

During the offending period, Mr McBride was suffering with symptoms of Major Depressive Disorder and combined Alcohol and Substance Use Disorders and Post Traumatic Stress Disorder.

Mr McBride has consulted psychiatrists and psychologists who have confirmed the diagnoses.

Mr McBride was medically discharged from the Australian Defence Force, diagnosed to be suffering Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder and Alcohol and Substance Use Disorders, currently in sustained remission.

Medical records confirmed Mr McBride struggled with a deterioration in his mental health, which was the case during the offending period.

Mr McBride places significant emphasis on honesty and adherence to morals and ethics which dates to his boarding school days, (primary and high school), and his training as a solicitor and barrister. Mr McBride's sensitivity to diversions from moral or ethical values was strengthen [sic] when his father was subjected to considerable humiliation and disgrace in the medical profession for committing scientific fraud. Mr McBride's relationship with his father improved when his father accepted Mr McBride's advice to admit to "lies and dishonesty" so he could be reinstated medical practitioner prior to his death.

In summary, Mr McBride's sensitivity to diversions from moral and ethical standards made him vulnerable to developing symptoms of Major Depressive Disorder and PTSD against which he relied on alcohol and prescriptive medication (dexamphetamine), as a form of self medication, which was the case prior to and during the offending period.

Mr McBride's current presentation is improved because he pursues daily exercise, and he attends daily AA meetings, and he is engaged in combined psychiatric and psychological treatments.

Mr McBride's symptoms could worsen, particularly as he faces the real prospect of a custodial sentence.

132. Mr Borenstein confirmed these opinions in his second report, in which he stated:

You are in receipt of my report on the above named dated 31 January 2024, in which I opined Mr McBride was suffering with symptoms of Major Depressive Disorder, Alcohol and Substance Use Disorders, and Post Traumatic Stress Disorder during the offending period.

Mr McBride has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), which together with Major Depressive Disorder (MDD), Post Traumatic Stress Disorder (PTSD), and maladaptive coping mechanisms, ie Alcohol and Substance Use Disorders, represents a mental health impairment, and responsible for temporary or ongoing disturbance of thought, mood, volition, perception and memory, regarded as significant for clinical diagnostic purposes and the level of disturbance would, in my opinion, impair Mr McBride's emotional wellbeing, judgment and behavioural choices.

I further expressed the opinion Mr McBride places "significant emphasis on honesty and adherence to morals and ethics".

As mentioned in report [sic] dated 31 January 2024 (Page 3/Paragraph 5), Mr McBride witnessed the atrocities of war and "people I was close to were killed. I was feeling helpless and hopeless, and the local population were being killed unnecessarily. I witnessed vehicle and helicopter crashes, and as a legal officer, I had to investigate them. These were people who died and had the same children the same age as my children at the time". I commented making personal connections increases the impact and compounded Mr McBride's moral and ethical obligations, which dates to his boarding school days, and training as a solicitor and barrister. Mr McBride's moral and ethical values were further strengthened when his father was subjected to considerable humiliation and disgrace in the medical profession for committing scientific fraud.

Mr McBride's emphasis on honesty and adherence to morals and ethics is, in my opinion, far greater than the standards of ordinary persons.

Finally, Mr McBride's symptoms would worsen if subject to a custodial sentence, and likely worsen, possibly requiring intensive psychiatric and psychological treatment, and inpatient care.

133. However, as the primary judge observed (at [186]), the appellant did not himself attribute his offending to his mental illnesses. In his interview with the Intensive Correction Order Assessment Report (ICOAR) author, the appellant "denied that alcohol or his mental health played a role in his decision to offend" and stated that he "still believed he made the correct choice". The appellant also told the ICOAR author that in his view, his "PTSD was, in part, caused *by* the offences" (emphasis added), rather than the offending having resulted from the appellant's PTSD.
134. The primary judge accepted Mr Borenstein's opinion that the appellant suffered from symptoms of Major Depressive Disorder, combined with Alcohol and Substance Use Disorders and Post Traumatic Stress Disorder during the offending period: *McBride (No 4)* at [187]. However, his Honour was unable to determine whether it was the appellant's "underlying personality or his declining mental health" which caused the appellant to become "obsessed with the conduct of senior management of the ADF": *McBride (No 4)* at [187]. His Honour concluded that the appellant was to be sentenced

on the basis that the appellant's "mental health condition made a material, if only minor, contribution to his offending conduct", and that the appellant's mental health did not "have any significant consequence for the suitability of his sentence as a vehicle for general deterrence or the need for specific deterrence": *McBride (No 4)* at [236].

135. The appellant submitted that his Honour erred in so finding. In particular, the appellant's senior counsel contended that the appellant's "'underlying personality' may be understood as a 'mental health condition' which affected his assessment of his 'duty' in respect of what he perceived as injustice within the ADF". The appellant's senior counsel further submitted that "whether the cause of the appellant's 'obsession' was his underlying personality, his mental disorders, or a combination of the two, his [moral] culpability was diminished", such that the need for general deterrence should have been reduced.
136. In the present case, there is no suggestion that the offender suffered from a recognised Personality Disorder. We are not aware of any authority which holds that an offender's moral culpability may be reduced where the offender's 'underlying personality' (which does not amount to a Personality Disorder) contributed to the offending: cf *Brown v The Queen* [2020] VSCA 212; 62 VR 491 at [6] and *R v Waters; Ex parte DPP (Cth)* [2023] QCA 131 at [58]. An offender's personality (for example, an offender's level of impulsivity, risk taking, social attitudes, lack of self-control) will often contribute to their offending. An offender is not less morally blameworthy simply because their personality traits were a factor in a decision to engage in criminal conduct.
137. However, nothing turns on this distinction in the present case. The appellant has been diagnosed as suffering from, amongst other illnesses, PTSD and Major Depressive Disorder. These diagnoses, which were unchallenged by the prosecution, arose at least in part out of the appellant's defence service and were operative during the offending period. As outlined above, it is well-established that such mental impairments may be relevant to an assessment of the offender's moral culpability, and to the weight to be given to the sentencing purposes of denunciation, punishment, general and specific deterrence.
138. In the present case, there was a clear connection between these disorders and the offending conduct. As Mr Borenstein stated, the appellant's disorders were responsible for ongoing disturbances in, *inter alia*, the appellant's thoughts and perception. Further, as Mr Borenstein also stated, these disturbances "would have impaired [the appellant's] emotional wellbeing, judgment and behavioural choices". In this respect, it may also be observed that in correspondence directing the appellant to take down the Ops Room

Website upon first becoming aware of its existence, ADF Legal Services identified the “need to support [the appellant in his] current state of health”.

139. It matters not that the appellant did not himself attribute his offending conduct to his mental illnesses. The fact that an offender does not have insight into the effects of his or her mental condition does not preclude a finding that the offending was contributed to by an offender’s mental condition. It should be borne in mind that the nature of conditions such as PTSD and Major Depression may present a significant barrier to such insight.
140. As noted above, the primary judge accepted Mr Borenstein’s opinions. The primary judge also accepted that the appellant’s mental health condition had made a material contribution to the offending conduct. Nonetheless, his Honour concluded that this contribution was not such as to result in a significant reduction in the weight to be given to general or specific deterrence.
141. It was open to the primary judge to conclude that the need for general and specific deterrence remained high, despite the reduction in the offender’s moral culpability arising from his mental illnesses. As outlined at [128] – [129] above, it is not the case that a finding of reduced moral culpability must necessarily result in a reduction to the weight to be given to general or specific deterrence.
142. For the reasons outlined at [110] – [117] above, we have concluded that the appellant was aware that he was acting illegally (although he hoped that he may have had a lawful defence). The appellant’s mental illnesses were not such as to require a finding that the appellant was not an appropriate medium for making an example to others. As the primary judge observed (at [231]):

Notwithstanding the availability of other legitimate means by which [the appellant] could raise his concerns, he decided that he knew best and that he should disregard his legal obligations in order to pursue his own view of how the ADF should be managed. It is very important to deter others from such conduct. Self-confident people with strong opinions who are subject to legal duties not to disclosure information must be deterred from making disclosures in order to advance their own opinions. They must know that breaching their legal obligations to maintain the confidentiality which they have undertaken to protect will be met by significant punishment. That is particularly so when that information is secret and its disclosure has the potential to harm Australia’s national security.

143. It was similarly open to the primary judge to conclude that there remained a real need for specific deterrence. The appellant had shown no remorse for his offending. Although the appellant did not seek to establish (either before the primary judge or before this Court) that there were no other legitimate and lawful means for him to raise his concerns (*McBride (No 4)* at [231] – [232]), the appellant nonetheless maintained that he acted properly in breaching his duties of confidentiality. It was open to the primary judge to

conclude that, in these circumstances, the appellant “needs to be deterred from any further disclosures of military information which he learned during his service as a soldier”: *McBride (No 4)* at [233].

144. It is well established that the assessment of the extent of a mental condition, its connection (if any) with the offending, and any resulting reduction of an offender’s moral culpability and the sentence to be imposed “are all very much a matter for a sentencing judge”: *Moiler* at [58], citing *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 at [177]. As the findings of the primary judge concerning the weight to be given to general and specific deterrence were open, it follows that this ground of appeal must be dismissed.

Fifth ground of appeal: The sentencing judge erred in finding that “the offender’s culpability for the offending having regard to the circumstances is high”

145. The sentencing judge found that the offender’s moral culpability for the offending was high: *McBride (No 4)* at [248]. The appellant submitted that “this finding was not open in light of the matters raised (individually and/ or cumulatively) by grounds two, three and four”. The appellant did not advance any additional submissions in support of this ground.
146. For the reasons outlined above, we have concluded that grounds 2, 3 and 4 lack merit. It follows that this ground of appeal must also be dismissed.

Sixth ground of appeal: The sentencing judge erred in finding that the “level of harm done to the community is significant”

147. In the proceedings before the primary judge, senior counsel for the appellant contended that the level of harm occasioned to the community by the appellant’s conduct was low. The sentencing judge rejected this submission. At [191], his Honour said:

In my view, it is not appropriate to go beyond the detailed and nuanced description of the level of harm and risk of harm which is articulated in the Agreed Statement of Facts. There are multiple types of harm and risks of harm which are there described and it would not be consistent with those agreed facts to subject them to a uniform gloss by characterising the harm or risk as being “low”. Rather, the harm and risk of harm is accurately described in the Agreed Statement of Facts.

148. Later in the judgment, when considering whether it was appropriate to order that the sentence be imposed by way of an Intensive Corrections Order (ICO), the primary judge described the level of harm to the community as “significant”: *McBride (No 4)* at [248].
149. The appellant contended that the primary judge erred in finding that the level of harm that was occasioned to the community was “significant”. In particular, the appellant submitted that the primary judge:

... has effectively fallen into the same error which his Honour identified in the submission put to him below on behalf of the appellant's risk; that is, to seek to place a "uniform gloss" upon the agreed facts, in which the "harm and risk of harm" cause by the offending conduct is "accurately described".

150. In other words, in this ground of appeal, the appellant contended that in describing the level of harm to the community as "significant", the primary judge had, contrary to his earlier indication, characterised the level of harm occasioned to the community, and had found the level of harm occasioned by the appellant's conduct to be "significant" in the sense of occasioning a "high" risk of harm.
151. His Honour did not so conclude. In circumstances where the primary judge had previously declined to characterise the risk of harm by reference to a single label, it is clear that, read in context, the primary judge was not making a finding that the level of harm occasioned was high. Rather, read in context, his Honour was simply recording his rejection of the appellant's contention in the sentencing proceedings that the risk of harm was low.
152. It was open to the primary judge to reject the appellant's contention that the risk of harm occasioned by his conduct was low. The Agreed Facts contained the following information concerning the risk of harm that was occasioned by the appellant's conduct:

As a result of the potential that a person had read, or copied the materials found at [the appellant's] apartment, Australia's foreign partners had to be, and were, notified of that potential. The public disclosure of information obtained confidentially from allies and partners may damage Australia's relationships with those allies/partners. Unauthorised disclosure of allied and partner confidential information may reduce their willingness to share information with Australia in the future and Australia may not be informed of this change in attitude. If that has occurred, it would disadvantage ADF operations and, more broadly, would be of detriment to Australia's international relations and national security interests.

...

Had a person read, copied or photographed the documents found at [the appellant's] apartment, information contained in those documents may have given rise to risks such as:

- (1) The public disclosure of information relating to Australian intelligence operations including capabilities, sources, processes, analysis and advice, would likely prejudice the future collection (including, threatening Australian intelligence methods and sources) and analysis of intelligence, risk damage to critical international relationships, and risk prejudicing the security of future ADF operations.
- (2) The public disclosure of information relating to [rules of engagement] risks informing Australia's adversaries of the limits on the ADF's use of force. Such disclosure would give those adversaries tactical advantages, including the opportunity to employ methods that take advantage of the limitations imposed by the [rules of engagement] to the disadvantage of ADF operations, including through increased risk of harm to ADF personnel, giving rise to a risk of compromising the effectiveness of Australia's current and future military operations and place soldiers at a greater risk of injury or death.

- (3) Some documents reveal sensitive information such as certain policies, capabilities and response times, the public disclosure of which would prejudice their ongoing effectiveness, and could be employed to the detriment to Australia or its partners by domestic or overseas adversaries wishing to cause Australia or its partners harm.

153. In the Agreed Facts, the appellant accepted that public disclosure of the information in documents which he disclosed “would, or would have been likely to have prejudiced the defence, national security or international relations of Australia at the time”, and that whilst the potential risks “have decreased and will continue to decrease over time”, “the information in a number of documents is still capable of causing such prejudice as at the date of this statement of agreed facts”.
154. In these circumstances, the primary judge did not err in describing the level of harm occasioned to the community as “significant”.
155. Accordingly, this ground of appeal should be dismissed.

Seventh ground of appeal: The sentencing judge erred in failing to consider the intensive correction assessment when deciding whether to make an intensive correction order for the appellant, as required by s 78(2)(a) of the Crimes (Sentencing) Act 2005 (ACT)

156. Counsel for the appellant at first instance submitted that the Court should order that the appellant serve his sentence by way of an ICO. His Honour rejected that submission, finding as follows:

If the availability of an intensive correction order is to be assessed by reference to the aggregate sentence imposed then, clearly, one is not available because the aggregate sentence exceeds four years. However, I have previously held that the availability of an intensive correction order is to be assessed in relation to each individual sentence that is imposed, rather than the aggregate sentence: *DPP v Vincent (No 2)* [2023] ACTSC 379 at [71]-[75]. Each of the sentences which I have imposed is below the four-year threshold. It is therefore necessary to consider the matters in s 11(3) of the *Crimes (Sentencing) Act 2005* (ACT) and determine whether the imposition of an intensive correction order is appropriate in the circumstances of the case. In my view, the level of harm done to the community caused by the offending is significant. Further, the offender’s culpability for the offending having regard to all the circumstances is high. Given the nature of the offending and the aggregate sentence, I do not consider that it is appropriate that it be served by intensive correction. I consider that an intensive correction order would not adequately reflect the need for general deterrence, specific deterrence and punishment of the offender.

157. As alluded to in the above extract, an ICO is not available where the “sentence of imprisonment” to which it relates is more than four years: s 11(3) of the *Crimes (Sentencing) Act*. There is contradictory authority in this jurisdiction as to whether an ICO can be ordered where the combined total of individual sentences exceeds four years.
158. As noted in the above extract of the primary judge’s reasons, in an earlier, unrelated judgment, the primary judge had held that where multiple sentences are ordered to be

served by way of ICO, a separate ICO should be imposed for each offence: *DPP v Vincent (No 2)* [2023] ACTSC 379 at [71] – [75]. As a consequence, his Honour concluded that s 11(3) is not contravened where the combined sum of the ICOs totals more than four years, so long as each individual ICO is for a term of less than four years.

159. However, in *DPP v Clarke (No 3)* [2024] ACTSC 395, Taylor J accepted the prosecution's submission that an ICO relating to more than one sentence, where each sentence was partially concurrent, was a singular, global order. Her Honour concluded that s 11(3) precludes the imposition of an ICO where that global order would exceed four years' imprisonment.
160. In *R v Hanson (No 3)* [2025] ACTSC 6, the primary judge noted the different approaches that had been taken in *Vincent* and *Clarke (No 3)*, but did not find it necessary to resolve that controversy in those proceedings. (*Hanson* concerned an alleged breach of an ICO which related to a number of individual sentences. As the primary judge determined that it was inappropriate to take action on the breach, it was not necessary for his Honour to determine whether the ICO was properly characterised as a single, global order, or as a number of individual, concurrent orders.)
161. These difficult questions of construction were not the subject of submissions on this appeal. It is not necessary to determine this issue in the present case, other than to observe that, even if the construction of the primary judge is to be preferred and separate ICOs should be ordered for each offence, an ICO or ICOs should not be ordered where the aggregate of the individual sentences exceeded four years' imprisonment.
162. The absolute prohibition in s 11(3) of the *Crimes (Sentencing) Act* against imposing an ICO of more than four years represents a legislative determination that an ICO will not be appropriate where the offending is sufficiently serious to require a sentence of imprisonment of more than four years. So much is clear from the following explanation in the Second Reading Speech to the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 (ACT), which introduced s 11(3) of the *Crimes (Sentencing) Act*:

This limitation is intended to ensure that offences at the more serious level, *or a combination of offences* which would justify a longer sentence of imprisonment, would not ordinarily be eligible for an intensive correction order. Those offences would, and indeed should, usually attract an immediate term of imprisonment in full-time detention.

Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 4216 (Simon Corbell, Attorney-General).

163. For these reasons, where a sentencing judge determines that the criminality involved in a course of offending is such as to require a total term of imprisonment which exceeds four years, the leniency inherent in an ICO will be inappropriate. This was so in the

present case, in which the overall term of imprisonment ordered by the primary judge was imprisonment for 5 years and 8 months, with a non-parole period of imprisonment for 2 years and 3 months.

164. As noted above, the appellant did not contend that the sentence imposed was manifestly excessive. Nor did he contend that it was not open to the primary judge to reject his submission that the sentences should be served by way of an ICO or ICOs. Rather, his submission was limited to the process by which the primary judge considered the question of whether to order an ICO. In particular, the appellant noted that s 78(2)(a) of the *Crimes (Sentencing) Act* provides that when deciding whether to make an ICO for an offender, “the court must consider... the intensive correction order assessment”. The appellant contended that the primary judge had not given “proper, realistic and genuine consideration” to the ICOAR because his Honour only took the report into account “in a manner adverse to the appellant”.
165. As the appellant acknowledged, the primary judge expressly referred to the ICOAR at three points in his judgment: first when considering whether the appellant had demonstrated remorse for the offending, second when considering the offender’s mental health and third in assessing the need for specific deterrence: *McBride (No 4)* at [147], [186] and [234].
166. Whilst accepting that the appellant was *eligible* for an ICO, his Honour considered that the offending was too serious for the purposes of sentencing to be met by an ICO. Having so concluded, it was not necessary for his Honour to further address the ICOAR. As this Court held in *Fares v DPP (No 2)* [2025] ACTCA 2 at [49]:

The sentencing judge, having determined that a sentence of imprisonment served by intensive correction order would fail to reflect the gravity of the offending, was not required to go on to “genuinely engage” further with the appellant’s suitability and the assessment directed toward it. The offender’s suitability could not trump the determination the sentencing judge made as to the appropriateness of the alternative to full-time imprisonment. The offender’s suitability did not ‘cure’ that which the imposition of an intensive correction order would fail to observe.

167. The appellant has not established any error in the process by which the primary judge considered whether an ICO should be imposed, nor was the primary judge’s decision refusing to order an ICO or ICOs in error. This ground of appeal should also be dismissed.

Orders

168. For the above reasons, the appellant's appeals against his conviction and his sentence are dismissed.

I certify that the preceding one-hundred and sixty-eight [168] numbered paragraphs are a true copy of the Reasons for Judgment of the Court

Associate:

Date: