SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v McBride (No 4)**
Citation:	**[2024] ACTSC 147**
Hearing Date:	6 May 2024
Decision Date:	14 May 2024
Before:	Mossop J
Decision:	1. On the charge of contravening s 73A(1) of the *Defence Act 1903* (Cth) (CAN 2897/2019), the offender is convicted and sentenced to imprisonment for 34 months, commencing on 14 May 2024 and ending on 13 March 2027. 2. On the charge of contravening s 73A(1) of the *Defence Act 1903* (Cth) (CAN 2899/2019), the offender is convicted and sentenced to imprisonment for 34 months, commencing on 14 October 2025 and ending on 13 August 2028. 3. On the charge of contravening s 131.1(1) of the *Criminal Code* (Cth) (CAN 41388/2018), and having taken into account the charge of contravening s 70(1) of the *Crimes Act* on the s 16BA schedule (CAN 2900/2019), the offender is convicted and sentenced to imprisonment for 27 months, commencing on 14 October 2027 and ending on 13 January 2030. 4. The non-parole period commences on 14 May 2024 and ends on 13 August 2026.
Catchwords:	**CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and punishment – sentence – theft of confidential documents from Australian Defence Force premises – offending occurred over a substantial period and involved multiple occasions – gross breach of trust held by senior legal advisor in a sensitive position within the Army – consideration of consequences of theft for Australia's defence, national security and international relations – sentence of imprisonment imposed **CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and punishment – sentence – unlawfully communicating naval, military or air force information – offender disclosed stolen documents and information to journalists – offending enabled by senior position of trust – lack of remorse – importance of general deterrence – consideration of consequences of disclosure for Australia's defence, national security and international relations – sentence of imprisonment imposed **STATUTES** – INTERPRETATION – Treatment of maximum penalty for offence under s 73A of the *Defence Act 1903* (Cth) – where maximum penalty is "a fine of any amount or imprisonment for any term, or both" – consideration of legislative history – offence provision repealed and substituted in 2001 – clear legislative intention to retain severity of penalty provision – penalty applies in accordance with its terms

Legislation Cited:

Australian Security Intelligence Organisation Act 1979 (Cth), s 18(2)
Crimes Act 1914 (Cth), ss 16, 16A, 16BA, 17A, 19AB, 70, 78(1)(b), 79(3)
Crimes (Sentencing) Act 2005 (ACT), s 11(3)
Criminal Code (Cth), s 131
Defence Act 1903 (Cth), ss 73, 73A, 73B, 73C, 73D, 73E, 73F, 75, 76, 122B
Defence Force Discipline Act 1982 (Cth), s 58
Defence Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)
Defence of the Realm Act 1914 (UK)
Defence of the Realm Consolidation Act 1914 (UK)
Evidence Act 2011 (ACT), s 184(2)(b)
National Security Act 1939 (Cth), s 10
Public Interest Disclosure Act 2013 (Cth)
Public Service Act 1999 (Cth)
War Precautions Act 1914 (Cth)
War Precautions Act 1915 (Cth)

Cases Cited:

Chia v The Queen [2018] WASCA 103
Della-Vedova v R [2009] NSWCCA 107
DPP v Vincent (No 2) [2023] ACTSC 379
Grant v Headland (1977) 17 ACTR 29
Markarian v The Queen [2005] HCA 25; 228 CLR 357
McBride v R [2023] ACTCA 42
Nguyen v The Queen [2016] HCA 17; 256 CLR 656
Peterson v R (District Court (NSW), Hanley DCJ, 30 November 2020, unrep)
R v Campbell [2010] ACTCA 20
R v Crowley (District Court (WA), Voil DCJ, 17 March 1997, unrep)
R v Jafari [2017] NSWCCA 152
R v Johns (a pseudonym) [2019] ACTSC 399
R v Kessing (District Court (NSW), Bennet DCJ, 22 June 2007, unrep)
R v Lappas [2003] ACTCA 21; 152 ACTR 7
R v McBride [2023] ACTSC 328; 20 ACTLR 272
R v McBride (No 2) [2023] ACTSC 330
R v Seivers and O'Ryan (Supreme Court (ACT), Gray J, 10 June 2009, unrep)
R v Scerba (No 2) [2015] ACTSC 359
Seivers v The Queen [2010] ACTCA 9

Texts Cited:

Commonwealth, *Parliamentary Debates,* House of Representatives, 7 September 1939, 163 (Robert Menzies, Prime Minister)

Parties:

The King

David McBride (Offender)

Representation:	**Counsel**
	P McDonald SC and C Tran (Crown)
	S Odgers SC and E Kerkyasharian (Offender)
	A Berger KC and L Johnston (Attorney-General (Cth) and Commonwealth)
	Solicitors
	Commonwealth Director of Public Prosecutions (Crown)
	XD Law (Offender)
	Australian Government Solicitor (Attorney-General (Cth) and Commonwealth)
File Number:	SCC 127 of 2019

MOSSOP J:

Introduction

1. On 17 November 2023, David McBride pleaded guilty to three offences:

    (a) Count 1, theft, contrary to s 131.1(1) of the *Criminal Code* (Cth) (CAN 41388/2018). The particulars of the charge are that, between about 1 December 2013 and about 26 February 2018, in Griffith and other places in the Australian Capital Territory (ACT) and New South Wales, Mr McBride dishonestly appropriated property belonging to a Commonwealth entity with the intention of permanently depriving the entity of the property. The maximum penalty is 10 years' imprisonment or a fine of 600 penalty units, or both.

    (b) Two counts of unlawfully communicating naval, military or air force information, contrary to s 73A(1) of the *Defence Act 1903* (Cth) (CAN 2897/2019 and CAN 2899/2019). The particulars of the charges are as follows:

        (i) Count 2: Between about 1 August 2014 and about 31 December 2015, in New Acton and Forrest and other places in the ACT, Mr McBride, being a member of the Defence Force, 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.

        (ii) Count 3: Between about 2 May 2016 and about 11 July 2017, in Griffith and other places in the ACT, Mr McBride, being a member of the Defence Force, 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.

2. The maximum penalty for an offence against s 73A is set out in s 73F. Where the offence is prosecuted upon indictment, the maximum penalty is "a fine of any amount or imprisonment for any term, or both". If the offence is prosecuted summarily, the maximum fine for an individual is two penalty units and the maximum period of imprisonment is six months.

3. There is also a charge of contravening s 70(1) of the *Crimes Act 1914* (Cth). This is included in a schedule pursuant to s 16BA of the *Crimes Act* in relation to count 3. Section 16BA permits an offender to admit his guilt in respect of offences specified in the list and then have them taken into account by the court in passing sentence on him for the offence or offences for which he has been convicted. The particulars of the charge are that, between about 4 April 2016 and about 31 May 2016, in Deakin and other places

in the ACT, Mr McBride, being a Commonwealth officer, published a fact or document, except to some person to whom he was authorised to publish it, which came to his knowledge or into his possession by virtue of him being a Commonwealth officer and which it was his duty not to disclose. This relates to disclosures on a website known as "The Ops Room".

4. In summary, the chronology of the offending is as follows:

   (a) about 1 December 2013 to about 26 February 2018 – theft;

   (b) about 1 August 2014 to about 31 December 2015 – disclosure to Mr Masters and Mr Clark;

   (c) about 4 April 2016 to about 31 May 2016 – disclosure on The Ops Room; and

   (d) about 2 May 2016 to about 11 July 2017 – disclosure to Mr Oakes.

Maximum penalty

5. It is necessary to say something more about the maximum penalty for counts 2 and 3, the offences under s 73A. Permitting an offence to be punishable by "a fine of any amount or imprisonment for any term, or both" is a rare formulation. It has only been included in three Commonwealth Acts and the *Defence Act* is the only one of those Acts where such a provision remains in force.

6. The formulation was first included in the *War Precautions Act 1914* (Cth) as amended by the *War Precautions Act 1915* (Cth). The Act introduced a scheme for punishing contraventions of regulations or orders made pursuant to the Act, which distinguished between offences prosecuted summarily and offences prosecuted upon indictment. Where an offence was prosecuted upon indictment, the Act permitted "a fine of any amount or imprisonment for any term, or both". If it was proved that the offence was committed with the intention of assisting the enemy, the penalty was death. The 1915 amending Act followed changes made to the *Defence of the Realm Act 1914* (UK) when it was superseded by the *Defence of the Realm Consolidation Act 1914* (UK). The *War Precautions Act 1914* (Cth) was repealed in 1920.

7. In September 1939, shortly after the commencement of the Second World War, the *National Security Act 1939* (Cth) was passed. It was intended to operate until six months after the end of the war, but no longer. Like the earlier *War Precautions Act*, it included a broad regulation making power to be exercised by the Governor-General. Section 10 provided that a person who contravened or failed to comply with a regulation made under the Act was guilty of an offence against the Act. Section 10(3) provided different penalties depending upon whether or not the offence was prosecuted summarily or upon

indictment. A modest penalty was imposed if prosecuted summarily, but if prosecuted upon indictment, the maximum penalty was "a fine of any amount or imprisonment for any term, or both". The consent of the Attorney-General or the Minister for Defence was required if an offence was to be prosecuted summarily. The second reading speech by the Prime Minister, Mr Menzies, made it clear that the legislation followed the model in the *War Precautions Act* "with which most honourable members are already familiar": Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 163 (Robert Menzies, Prime Minister).

8. In 1941, the *Defence Act* was amended so as to insert s 73F. This was a penalty provision that related to offences against ss 73, 73A, 73B, 73C, 73D and 73E of the Act. Prior to the amendments, the offence under s 73A (as well as those against ss 73, 73B and 73C), if prosecuted upon indictment, had a maximum penalty of three years' imprisonment. Following the amendment, s 73F provided for a modest penalty if the offence was prosecuted summarily and, if prosecuted upon indictment, "a fine of any amount or imprisonment for any term, or both".

9. While counsel for Mr McBride correctly pointed out that the *National Security Act* provision was designed to accommodate breaches of a wide variety of regulations, it is not correct to say that this fact should be used to qualify the significance of the unlimited sentence available under the *Defence Act*. Section 73F of the *Defence Act* related to six particular offences in the Act. Most of those involved fraud affecting matters relating to the war effort and it was to those provisions that the Minister for the Army referred in his second reading speech as "serious frauds". For example, s 73C made it an offence to provide food of a quality inferior to that specified in a contract to supply such food to the Commonwealth for use by the Defence Force. Section 73(3) related to obtaining pay belonging to another member of the Defence Force. Section 73A, while not involving what would be characterised as a "serious fraud" in the same way that the other offences might, is an offence provision which, by its terms, can obviously be very serious.

10. The amendments made in 1941 involved a clear choice to dramatically increase the penalties for particular types of offending, including that under s 73A. Those penalties are to be contrasted with the penalties in other provisions, such as the penalties for resisting the draft (s 75) or refusing to take the required oath (s 76), which remained modest.

11. Finally, it must be noted that each of the other offence provisions in relation to which the penalty provision, s 73F, applied (ss 73, 73B, 73C, 73D and 73E) were repealed in 2001. Section 73A was repealed and substituted so as to accommodate drafting more suitable for the application of the *Criminal Code* (Cth). This was done by the *Defence Legislation*

Amendment (Application of Criminal Code) Act 2001 (Cth). The decision to maintain s 73A as the only one of the original provisions the subject of the unlimited term of imprisonment represents a recent legislative decision recognising the ongoing significance of the offence and its penalty, and precludes characterisation of ss 73A and 73F as being relics of the Second World War.

12. In that context, it is not possible to accept the submission made on behalf of Mr McBride that the unlimited penalty was only imposed to accommodate a smorgasbord of possible offences available under the *National Security Act* and that there was no intention to increase the maximum penalty for s 73A at all when the *Defence Act* was amended in 1941. Further, it is not possible to accept the submission that "it certainly would not be appropriate to treat the penalty as indicating a maximum penalty of life imprisonment" or that "it is inconceivable that it was intended that even serious frauds might be the subject of very lengthy terms of imprisonment". When understood in its proper context, the parliamentary intention to dramatically increase the penalty for offences including s 73A is clear. Further, given the repeal and substitution of s 73A in 2001 when the surrounding sections were repealed, there can be no doubt that s 73F applies to s 73A in accordance with its terms.

13. Given the legislative history, it is also not possible to accept the submission made on behalf of Mr McBride that guidance as to the appropriate sentence should be obtained not by the terms of s 73F itself, but instead by reference to the penalties provided in other provisions, such as s 58 of the *Defence Force Discipline Act 1982* (Cth) (two years) and s 70(1) of the *Crimes Act* (two years). Section 73F must be applied in accordance with its terms and not subject to qualification by the penalties provided in other legislation. While that means that the "yardstick" (in the sense described in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [30]-[31]) provided by a fixed maximum penalty or by a maximum penalty of imprisonment for life are not available, an appropriate sentence that meets the requirements of s 16A of the *Crimes Act* must be worked out. Such a sentence must necessarily be determined in the context of general expectations as to how long people live, even in the absence of a more specific numerical yardstick provided by the legislature.

Facts

14. The facts are set out in an Agreed Statement of Facts. The Agreed Statement of Facts contains 138 paragraphs and has four annexures totalling 108 pages. The Agreed Statement of Facts sets out in substantial detail what happened. The annexures shed light on Mr McBride's motivations for doing what he did. The following description of the

events giving rise to the charges largely reflects the facts upon which the parties have expressly agreed.

Mr McBride

15. Mr McBride is a lawyer. On 15 December 2005, he joined the Australian Defence Force (ADF) as a Reserve Legal Officer with the rank of Captain. At that time, he signed two acknowledgements relating to his duty to keep information confidential.

16. One was an "Acknowledgement of the Requirements of Service in the Australian Defence Force (ADF)" dated 15 December 2005, in which he acknowledged that:

    (a) he had been informed of the provisions of the laws of the Commonwealth relating to official secrecy, including s 73A of the *Defence Act 1903* (Cth) and s 70 of the *Crimes Act 1914* (Cth); and

    (b) as a member of the ADF he must comply with directions and orders given to him by persons in the ADF who have the legal authority to issue such directions and orders.

17. The other was an "Official Secrecy Acknowledgment" dated 15 December 2005, in which he:

    (a) acknowledged that laws of the Commonwealth relating to official secrecy may apply to him, including s 70 of the *Crimes Act* and s 73A of the *Defence Act*;

    (b) stated that he understood that all official information acquired by him in the course of his duties was to be regarded as the property of the Commonwealth and any such information which it was his duty not to disclose was not to be published or communicated to another person in any form either during or after his service in, or in association with, the Commonwealth; and

    (c) stated that he understood that any breach of laws in relation to the safeguarding of official information was an offence, and may render him liable to prosecution.

18. On 1 January 2009, Mr McBride was promoted to the rank of Major and transferred from the Army Reserve to the Regular Army.

19. In 2010, he was posted to an Army base in Townsville, Queensland. Prior to this, he had been stationed at various locations in New South Wales.

20. In April 2011, Mr McBride was deployed to his first tour in Afghanistan with the Combined Team Uruzgan (CTU). CTU was a Brigade level organisation numbering around 5000 troops with a US Commander. He was the senior Legal Advisor for that

Commander. His job was to advise on the Rules of Engagement, the use of force and charging or defending soldiers. He was based at the Tarin Kowt base in Uruzgan Province. Mr McBride was deployed in Afghanistan with CTU until February 2012.

21. On 16 January 2012, he was posted to the position of Special Operations Legal Officer at the Rank of Major at Special Forces Command, at an ADF facility near Bungendore. In this role, he was responsible for the legal issues that arose during overseas deployments as well as domestic anti-terrorism operations. His principal responsibility was oversight of legal matters in Afghanistan.

22. Between August and December 2013, Mr McBride was the Special Operations Task Group (SOTG) Legal Officer and was deployed in that role to the Special Forces base in Tarin Kowt, Urzugan Province, Afghanistan.

23. In December 2013, Mr McBride returned to Australia from overseas deployment and was based at Special Operation Headquarters at the Bungendore facility as a Special Operations Legal Officer. During that time, his private residence was in the ACT.

24. On 19 January 2015, Mr McBride was posted to the Military Law Centre in Canberra.

25. On 18 January 2016, Mr McBride was posted to the Directorate of Administrative Law and Advisings in Canberra as a Staff Officer Grade 2.

26. From 7 September 2016, Mr McBride moved between various temporary positions at different locations.

27. From 25 January 2017, Mr McBride was no longer part of the ADF. He was discharged for medical reasons, including due to suffering from Major/Agitated Depression, Attention-deficit / Hyperactivity Disorder and Substance Abuse Disorder. In late 2016, he was also diagnosed with Post-Traumatic Stress Disorder (PTSD).

28. On 1 July 2012, 1 July 2013, 1 July 2014 and 30 June 2015, Mr McBride was issued a Legal Officer Practising Certificate under ACT law.

29. Mr McBride has not been previously charged with or convicted of any criminal offence.

Background – security

30. The Commonwealth government applies the Australian Government Security Classification System (AGSCS) to Commonwealth records. The four levels of national security classification are PROTECTED, CONFIDENTIAL, SECRET and TOP SECRET. Significantly for present purposes, the 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. Compromise of the confidentiality of TOP SECRET material could be expected to cause "exceptionally grave damage" to the national interest, organisations or individuals. The purpose of the policy is to require that agencies take all reasonable and appropriate precautions to ensure that only people with a proven need-to-know and correct security clearance gain access to sensitive and security classified information.

31. In addition to the security classifications, there are other classifications referred to as "caveats" which further restrict the access to Commonwealth information. The caveat AUSTEO, meaning Australian Eyes Only, indicates that information should only be viewed by Australian citizens with an appropriate security clearance. The caveat LIMDIST, meaning Limited Distribution, limits access to an identified list of persons or classes of persons. There are other caveats known as codewords which provide that an individual needs further security briefings before they can access the information.

32. Mr McBride held a level of security clearance known as "Positive Vetting", which allowed him to access information at all classification levels, including TOP SECRET, as well as certain types of caveated information.

33. Mr McBride had completed security awareness training on five occasions during his career with the ADF, in 2008, 2009, 2010, 2011 and 2014, which reinforced the rules relating to the handling of classified material.

McBride's concerns

34. Rules of engagement (ROE) are directives issued to the ADF in consultation with the Australian government, which regulate the use of force and activities connected to the use of force. On 21 December 2012, members of the Special Forces Command were involved in drafting a ROE amplification (ROEAMP). This was a clarification of the meaning of the existing ROE.

35. In late 2012 and early 2013, prior to his deployment on his second tour of Afghanistan, Mr McBride prepared a working paper on the ROE. As a result of Mr McBride's work, his supervisor sought the legal advices that had been prepared during the course of formulating the ROEAMP. Mr McBride's concern was that the ADF was overcomplicating things and thereby misdirecting its efforts. He was provided with the legal advices and prepared a minute outlining his concerns. The minute was addressed to the Chief of Joint Operations (CJOPS). This was the appropriate way to raise such concerns.

36. In around April 2013, Mr McBride expressed concern to his supervisor about whether the military police had jurisdiction to commence investigations into matters in theatre in the absence of a reasonable suspicion that a crime had been committed. His supervisor did not regard it as necessary or appropriate to pursue the matter further because she

was aware, from a discussion with the CJOPS and another officer, that they were aware of a disagreement between deployed forces and military police regarding the circumstances under which military police had a right to ask questions about operational incidents.

37. In late 2013, while deployed in Afghanistan, Mr McBride advised four ADF members of an issue that he was having with another more senior ADF officer. His concern related to search warrants obtained by military police of the Australian Defence Force Investigative Service (ADFIS) in relation to the SOTG. Mr McBride believed that the SOTG should not be subject to such action.

38. Upon his return from deployment in late 2013, Mr McBride advised his supervisor that he held concerns that there 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 ROE by persons in the chain of command who were outside Afghanistan. Mr McBride advised his supervisor that he intended to raise a complaint with the Inspector General of the Australian Defence Force (IGADF). Mr McBride's supervisor believed that this was the appropriate avenue available for Mr McBride to resolve the matters that concerned him.

39. In the middle of 2014, Mr McBride met with two senior ADF officers and advised them that he was working on an IGADF complaint about ADFIS' conduct in Afghanistan. One of the senior officers was frustrated by what he perceived to be Mr McBride's work performance and asked Mr McBride, "why are you persisting with the complaint to the detriment of your work". Further, this senior officer said, forcefully, "what are you trying to achieve?" and "how will it benefit you, Command and the army?". The officer was one who often spoke in a forceful manner. That senior officer did not say that Mr McBride should not make a complaint.

Misappropriation of documents

40. In early 2014, when Mr McBride resolved to make a formal complaint, he did so because he was dissatisfied with certain practices in the ADF which he considered to be corrupt.

41. As part of his employment, he had access to ADF records on a record management system which ran on a secure ADF network. That system could hold information up to and including the SECRET classification.

42. In May 2014, Mr McBride began accessing documents on the record management system and storing them in a personal folder on his ADF computer at the Bungendore headquarters after his ordinary work day had ended. He printed several documents and

removed them from the headquarters by putting them in his backpack and exiting the facility. He took them to his private residence in the ACT. **This was the commencement of his offending which is charged as count 1, the rolled up count of theft**.

43. He engaged in similar conduct of printing and removing documents from other ADF facilities where he was based from time to time. This included the Victoria Barracks in Sydney. He took these documents to his private residence in the ACT. Between May 2014 and December 2015, he removed 235 documents from ADF facilities. He did not have permission to do so. 207 of the documents held the national security classification SECRET.

44. On 3 November 2016, he moved into a new residence in Griffith in the ACT. He stored the documents in four large plastic storage tubs in a cupboard in the lounge room. Unsurprisingly, this did not comply with the Commonwealth government's policy on storage of information bearing the protective marking SECRET.

45. On 1 February 2018, Mr McBride engaged a real estate agent to sell the property. It was open for inspection by prospective buyers on a number of occasions. Members of the public walked through the property to inspect it. Mr McBride was not in attendance during these inspections. During the public inspections, the documents remained in the plastic tubs in the cupboard of the lounge room.

46. On 26 February 2018, the Australian Federal Police (AFP) executed a search warrant at the Griffith property, where they located and seized the documents from the tubs in the cupboard in the lounge room.

47. **It is the theft of the 235 documents between May 2014 and February 2018 that gives rise to count 1, the count of theft**.

Complaint to AFP

48. On 14 May 2014 (the day after his initial submission to the IGADF – see [51] below), Mr McBride accessed the AFP website to report a crime. He submitted a document entitled "Notification of Potential Improper Conduct by Senior Defence Officers, and the Defence Force Investigation Service." In the document (which was not tendered for the purposes of the sentencing hearing), Mr McBride outlined that the following offences may have occurred:

    (a) conspiracy to pervert the course of justice;

    (b) misuse of Commonwealth resources;

    (c) interference with a legal officer performing their duty;

(d) failure to comply with a general order; and

(e) improperly prejudicing ADF members' careers.

49. On 16 May 2014, Mr McBride met with two AFP officers to discuss his complaint. He told them that he was concerned that ADFIS was investigating matters in which no criminal offence had occurred. He made reference to four incidents in which the deaths of civilians had occurred and contended that there were insufficient grounds to suspect that a criminal offence had been committed by an Australian soldier. He also complained that even if the investigators had formed the view that the investigations were warranted, proper processes were not followed. Mr McBride stated that certain investigations by ADFIS into Australian soldiers were a waste of time and were having a severely adverse effect on the soldiers being investigated.

50. At the conclusion of this meeting, the AFP advised Mr McBride that the information provided by him did not disclose evidence of a criminal offence and related to internal ADF matters. The AFP indicated that the IGADF would be best placed to investigate his concerns.

Mr McBride's complaint to the IGADF

51. Mr McBride used the documents he removed from ADF facilities to prepare various complaints about practices within the ADF. On 13 May 2014 (the day before he used the AFP website to report a crime), he sent a submission to the IGADF enclosing "two individual submissions relating to Military Justice".

52. The first submission was entitled "Individual Submission for IGADF on the Investigation of Serious Incident Occurring On Operations". It was one page long and contained four numbered paragraphs. It asserted that the "current ADF policy resulted in the commencement of discipline investigations in contravention of Australian law and ADF policy". It indicated that he would supply detailed reasoning and evidence upon request. It indicated that his superiors were aware of him having made the individual submission and had neither discouraged nor endorsed it.

53. The second submission was entitled "Individual submission for IGADF on Improper Discrimination in the ADF". It was also one page long. The submission asserted that "Army (through DOCM) are using illegal/and or improper process to select officers for promotion and ACSC".

54. The same day that he sent the submission to the IGADF, an officer responsible for investigations within the Office of the IGADF asked Mr McBride to provide the relevant

evidentiary materials so as to enable a proper preliminary assessment of the matters raised.

55. In July 2014, Mr McBride corresponded with the officer, indicating that he had completed his submission and that it included three lever arch files of supporting documents, most of which were classified SECRET.

56. On 15 August 2014, he personally delivered his submission and its supporting documents to the office of the IGADF. In these reasons, the submission made on 15 August 2014 will be referred to as the IGADF Submission.

57. There were 86 supporting documents. They were in two lever arch folders. Two versions of the IGADF Submission were also in the folders. The documents in the two folders of documents will be referred to as the Supporting Documents. Most of the Supporting Documents were the same as documents that Mr McBride had removed from the ADF facilities.

58. The IGADF Submission contained information derived from the SECRET documents that Mr McBride had removed from ADF facilities. It also included other SECRET information that Mr McBride knew by virtue of his employment at the ADF. Because of the SECRET information within the IGADF Submission, that submission was also classified SECRET. Mr McBride was aware of the classification of the IGADF Submission. Most of the Supporting Documents were classified SECRET. The IGADF Submission and the Supporting Documents contained substantial amounts of naval, military or air force information as defined in s 73A(1) of the *Defence Act.*

59. A redacted and unclassified version of the IGADF Submission was admitted into evidence as part of the Crown Tender Bundle.

The IGADF Submission

60. The IGADF Submission was entitled "Detailed Information Relating to the Allegations of Illegal Investigations of Special Operations Task Group in 2013". The summary at the commencement of the submission was as follows:

> In the following five cases, revealed under the protections provided by ref A, I believe there was an absence of the 'reasonable suspicion' necessary to commence a criminal investigation IAW ref B:
>
> a. 03 Oct 10 (Shooting death of detainee)
>
> b. 28 Feb 13 (Helicopter fire support CIVCAS)
>
> c. 28 Apr 13 (SSE Incident)

d. 23 Sep 13 (Shooting death of PRC detainee)

e. 26 Sep 13 (CIVCAS)

(Citations omitted)

61. The reference to "ref A" was to the *Public Interest Disclosure Act 2013* (Cth) (PID Act). The reference to "ref B" was to a Defence Instruction entitled "Management and Reporting of Notifiable Incidents".

62. Although this summary suggested that the submission was a narrowly focused legal contention, the terms of the balance of the document suggest that it reflected broader concerns.

63. In addition to the summary, the submission contained eight parts (A to H) and a conclusion. They were headed as follows:

(a) A. The gradual growth of bias against SOTG by HQJOC Legal;

(b) B. The commencement of illegal/vexatious investigations;

(c) C. The incident of 28 Feb 13;

(d) D. The CIVCAS of 26 Sep 13;

(e) E. The incident of 28 Apr 13;

(f) F. The deaths of 'detainees' of 3 Oct 10 and 23 Sep 13;

(g) G. The investigation into the incident of 03 Oct 10;

(h) H. The investigation of the incident of 23 Sep 13; and

(i) Conclusion.

64. Section A dealt with the ROEAMP. This was characterised as taking the ADF backwards and reinforcing unrealistic expectations of ADF soldiers during the course of a firefight. The justification for the ROEAMP was characterised as "spurious". The criticism was that the ADF was placing unnecessary risk on the lives of their own soldiers in order to avoid any public embarrassment. The ROEAMP was promulgated on 29 April 2013 and the submission indicated that there could have been better training on the existing ROE.

65. Section B asserted that, in early 2013, a change occurred, so that where civilians were killed, the deaths were automatically investigated as possible murders even if there was no suspicion that a crime had been committed.

66. Section C related to an incident on 28 February 2013, when a number of civilians were killed by mistake. There were two groups which matched the description of "two boys

with donkeys/farm animals". The wrong group was targeted and civilians were killed. The submission contended that there was no basis for an investigation of the war crime of murder because there was nothing to suggest that the boys were deliberately targeted with the knowledge that they were not insurgents. Despite this, the submission records that a decision was made to conduct an investigation into the war crime of murder.

67. Section D related to an incident on 26 September 2013. A child was killed when a bullet went through the body of an armed individual and into an unseen sleeping child behind him during a night engagement. The submission contended that the circumstances did not give rise to a suspicion of a crime that would warrant an investigation. A sensitive incident was not synonymous with a suspicious one. The submission contended that the appropriate method to investigate the incident was an Administrative Inquiry, until some suspicious piece of evidence emerged. The submission pointed out that, ultimately, the experienced inquiry team cleared the soldiers.

68. Section E related to an incident on 28 April 2013. This was an incident where one or more (the submission was ambiguous) dead insurgents' hands were removed in order to identify whether any one of them was a key bomb maker. The submission indicated that this involved a failure to distinguish between an incident which was sensitive and one which was suspicious. The section on this incident was lengthy. It contended that the soldier's actions were justified by military necessity and that the soldier had received a lecture from an ADFIS member who had given him the impression that removing the whole hand was best practice to ensure accurate identification. The submission criticised the commencement of a disciplinary investigation in circumstances where the action had been investigated and no administrative action had been recommended. It criticised the finding of the Administrative Inquiry that the officer in question had exercised "poor judgment" by failing to appreciate potential responses from "the Australian public and media". The submission criticised the lack of support from the Minister for Defence and the Chief of the Defence Force when, on 30 August 2013, the Australian Broadcasting Corporation (ABC) reported on the incident. It criticised the proposition that Special Forces should have to consider what the "Australian media" might think of their actions during combat. Finally, the submission contended that if there was a failure, it was a failure by the Army to train the officer properly if the practice was so abhorrent. It noted that there was no criticism of the Army at all in the documentation.

69. Section F introduced the investigations of incidents that occurred on 3 October 2010 and 23 September 2013. These were both cases in which an ADF member was momentarily alone in a room with a suspected insurgent. In both cases, the ADF member said that the suspected insurgent made an attempt to attack him, the first by grabbing a sickle-like

blade from the door and the second by trying to wrestle control of the member's slung weapon while his handcuffs were removed. In both cases, the suspected insurgent was shot and killed. In neither case was there a motive for the member to shoot the insurgent in cold blood. In both cases, their commanders were said not to have doubted the soldiers' version of events.

70. Section G was a brief section relating to the incident on 3 October 2010. It referred to a brief from the CJOPS to the Chief of the Defence Force which recorded his satisfaction that the Special Forces soldier acted in accordance with his ROE and that the lethal force was applied in a lawful exercise of self-defence. Notwithstanding that, the head of ADFIS directed an investigation. The investigators were said to have interviewed 97 members and two commanding officers over 14 months and produced a five-page report that came to the same conclusion as the CJOPS.

71. Section H dealt with the investigation of the incident on 23 September 2013. It is another long section and arose out of events with which Mr McBride was personally involved. It related to the shooting of an Afghan detainee who was shot while apparently trying to wrestle the control of a weapon from a Special Forces member who was removing the detainee's handcuffs from behind his back with the intention of reapplying them in front to prepare the detainee for a helicopter flight. The submission criticised the decision of the ADFIS to investigate the incident on the basis of a suspicion that a murder had occurred. It criticised the murder investigation as being of an "ill-conceived 'political' nature" despite all the known facts supporting the soldier's story. It then criticised in detail the conduct of the ADFIS investigators in attempting to secure the weapon involved in the incident, notwithstanding that it had been subsequently used and cleaned and, the submission contended, would be of no forensic value. It criticised the process adopted by the investigators and the legal basis for the warrants for the weapon and equipment. It then referred to abusive and threatening telephone calls that were made to Mr McBride in relation to his questioning of the validity of the warrants. It suggested that the threats may constitute an "offence against s 122B of the *Defence Act"*. (Section 122B provides: "A legal officer acting in that capacity is entitled to exercise his or her professional rights, and discharge his or her professional duties and obligations, in accordance with the generally accepted rights, duties and obligations applying to legal practitioners.")

72. The Conclusion of the IGADF Submission provided:

> Ever since the 'Jedi Council' investigations begun, all Army units have been under extreme scrutiny. Unpalatable as those allegations were, they involved a hand-full [sic] of people, and any similar sized organisation would have had similar in recent years. Our existing systems are quite capable of dealing with such incidents.

> The challenge for the ADF is to maintain a sense of balance and proportion. Appearance is important, but it is not the only thing. If one reads 'Pathways to Change' (I wonder how many have), it's [sic] seems to focus on two things, only: our appearance to government and our appearance to the public. I wonder if they have missed anything.
>
> I believe the over-zealous investigations of the Special Forces in 2013 were driven by appearances rather than suspicion of a crime. However, as I stated in the covering minute, they come at a cost. It is acceptable for the ADF to be uncompromising on [breaches] of policy and the law. But it works both ways.

The consideration of the IGADF Submission

73. The officer responsible for investigations at the IGADF undertook a preliminary assessment of the IGADF Submission and distilled 65 concerns from it.

74. On 25 August 2014, Mr McBride attended a meeting with the IGADF himself. He then had a meeting with the investigating officer and the Deputy IGADF. While the IGADF does not remember whether he briefed the Chief of the Defence Force with an outline of Mr McBride's complaint, it would have been usual practice to have done so.

75. In the meeting with the investigating officer and the Deputy IGADF, Mr McBride confirmed that the investigating officer had accurately identified the concerns raised in the IGADF Submission. The investigating officer discussed the operation of the PID Act. At that time, disclosures about alleged ADF misconduct could not be made under the PID Act to the IGADF. The investigating officer explained to Mr McBride the process that could be followed to allow the IGADF Submission to be treated as a disclosure under the PID Act, but Mr McBride declined that opportunity, saying that he preferred the IGADF to investigate his disclosure.

76. The IGADF determined to hold an inquiry into the matters identified in the IGADF Submission. Two assistant IGADFs were appointed for that task. One was a former judge of the County Court of Victoria and one was a captain in the Royal Australian Navy. Mr McBride was interviewed by them on 2 December 2014.

77. On 21 August 2015, Mr McBride was advised of the outcome of the inquiry. In summary, the assistant IGADFs found that:

    (a) many of the complaints made by Mr McBride could not be substantiated; and

    (b) some warrants issued by ADFIS were invalid because they identified the wrong service offence, and they made adverse findings in relation to the issuing of those warrants.

78. Nothing in the Agreed Statement of Facts indicates that the conclusions reached by the inquiry were incorrect.

79. In late 2015, Mr McBride was given, and took up, the opportunity to read the report that had been prepared by the officers of the IGADF. He did not raise any concerns about the report with anyone at the IGADF.

The disclosure to Chris Masters

80. In late 2014 (or early 2015), after he had submitted the IGADF Submission but before he was advised of the outcome of the inquiry, Mr McBride obtained the phone number of Chris Masters, an Australian journalist. He sought out Mr Masters because he knew that Mr Masters had written about the ADF. He phoned him and left a message. Mr Masters returned his call and they had a lengthy conversation in which Mr McBride outlined some of his complaints about the ADF.

81. Subsequently, at Mr Masters' request, they met at a hotel named "Hotel Hotel" in New Acton, ACT, and discussed Mr McBride's complaints. Mr McBride took a plastic bag to the meeting containing two lever arch folders, being the IGADF Submission and the Supporting Documents. He gave Mr Masters the two folders of documents. At the time of doing so, he was aware that his conduct gave rise to the risk of him being prosecuted and punished by being subject to a sentence of imprisonment.

82. Mr McBride met with Mr Masters on two subsequent occasions, but they did not discuss the documents or complaints in great detail. The IGADF Submission and the Supporting Documents provided to Mr Masters contained a significant amount of "military information" within the meaning of s 73A of the *Defence Act*. Mr McBride did not have authority or permission to provide the documents and the provision was not in the course of his official duties. Mr McBride was aware that ADF Instructions, which had the force of law, prohibited the provision of the documents to Mr Masters. **It is the giving of the IGADF Submission and the Supporting Documents to Mr Masters that is one component of count 2.**

83. Mr Masters did not publish any of the material provided to him by Mr McBride.

Disclosure to Andrew Clark

84. In late 2014 (or early 2015), after he had provided the documents to Mr Masters, Mr McBride contacted another Australian journalist named Andrew Clark. He knew Mr Clark through a family member. He arranged to meet Mr Clark at a property in Forrest in the ACT.

85. Mr McBride took two lever arch folders with him to the meeting. These contained the IGADF Submission and the Supporting Documents. He gave these folders to Mr Clark as he believed Mr Clark could help him advance his complaints. Mr McBride knew that

what he was doing was inconsistent with the ADF Instructions on handling classified information.

86. Mr McBride and Mr Clark subsequently met at a café in Manuka in the ACT to discuss the complaint and the documents. During this meeting, Mr Clark expressed interest in publishing a story based on the material that he had been given. Mr Clark asked Mr McBride whether he was prepared for the repercussions of publishing a story based on the material, including whether he was prepared to go to jail. Mr McBride responded by saying words to the effect of, "Look, I don't really want to go to jail, obviously, but I'm prepared to be named if you need to".

87. As with Mr Masters, the documents provided by Mr McBride to Mr Clark contained a significant amount of "military information" within the meaning of s 73A of the *Defence Act*. Mr McBride did not have authority or permission to provide the documents to Mr Clark. He was aware that ADF Instructions, having the force of law, prohibited the provision of the documents to Mr Clark. **It is this disclosure to Mr Clark which, along with the earlier disclosure to Mr Masters, constitutes count 2.**

88. Mr Clark did not publish any of the material provided by Mr McBride. In 2015, Mr Clark told Mr McBride that he had destroyed the documents that had been provided to him and thereafter ceased contacting him.

Mr McBride's awareness of the PID Act scheme

89. Mr McBride was aware of the PID Act scheme. He made reference to it in his IGADF Submission and, on 2 April 2015, he made use of it in relation to a recruitment matter unrelated to these proceedings. Following correspondence in April 2015, that complaint did not proceed further under the PID Act.

The Ops Room

90. On or about 4 April 2016 (that is, approximately eight months after he was told of the outcome of the IGADF inquiry and several months after he had read the report), Mr McBride created a website called "The Ops Room". It was publicly accessible at www.THEOPSROOM.com. This will be referred to as "the Website". Between April and May 2016, Mr McBride wrote and posted a number of blog posts on the Website which detailed his concerns about how the ADF was managed. Some of the facts contained in some of the blog posts came to Mr McBride's knowledge or into his possession by virtue

of him being a Commonwealth officer. He also uploaded a number of documents to the Website in order to substantiate his concerns. These included:

(a) an unsigned version of the IGADF Submission, which was 20 pages long and dated July 2014;

(b) pages 74 and 75 of a 2014 ADF report titled "Review into the Treatment of Women in the Australian Defence Force";

(c) a report commissioned by the ADF and authored by the consultancy firm Deloitte titled "Chief of Army's Women's Workshop" (9 May 2012);

(d) a document titled "Chief of Service Committee Outcomes" which was marked "Committee in Confidence";

(e) a document titled "Decision Brief for SOCAUST: CASAC Prebrief Submission – Enhancing Capability through Diversity – Gender Plan" (9 March 2012) marked "Committee in Confidence"; and

(f) a two page report authored by Mr McBride titled "Illegal Investigations of Special Operations Task Group in 2013".

91. The unsigned version of the IGADF Submission was the only document on the Website which contained information classified SECRET, but the document itself was not marked SECRET. The two documents which were marked "Committee in Confidence" contained information classified PROTECTED. The remaining documents were not marked with national security classifications, but were not otherwise publicly available.

92. Mr McBride was not authorised to publish or communicate much of the information contained in the blog posts or the documents available on the Website. **It is the conduct of publishing the material on the Website which gives rise to the offence on the schedule under s 16BA of the *Crimes Act***.

93. On 31 May 2016, an officer of ADF Legal Services wrote to Mr McBride in relation to the publication of documents and information on the Website. He reminded Mr McBride of his duties as a member of the ADF not to disclose information obtained by virtue of his employment as a Commonwealth officer. He noted in the correspondence that he was "very cognizant of the need to support [Mr McBride in his] current state of health". The officer said that, as a result of the disclosure of the material on the Website, Mr McBride's Positive Vetting security clearance had been suspended and, as a result, his access to ADF systems and secure buildings was also suspended.

94. By the time of the officer's correspondence, Mr McBride had already removed some of the materials from the Website. He removed the remainder of the materials after receiving the correspondence.

Disclosure to Daniel Oakes

95. On 2 May 2016, that is, while the Website was still up and prior to the letter from the officer at ADF Legal Services, another Australian journalist, Daniel Oakes, contacted Mr McBride after reading material on the Website. He asked Mr McBride whether he wanted to discuss the complaints and material on the Website. Mr McBride said that he did, and Mr Oakes told Mr McBride that he wanted to communicate using the encrypted app "Signal", as he was concerned about security.

96. On about 17 May 2016, Mr Oakes and his colleague, Neil Mercer, travelled to Canberra and met Mr McBride at his home in Deakin. During the meeting, Mr McBride showed Mr Oakes and Mr Mercer a number of documents to substantiate his complaints. Mr Oakes asked Mr McBride for copies of these documents and suggested that they meet later that day at the Kingston Hotel in Griffith in the ACT.

97. Later that day, Mr McBride met Mr Oakes and Mr Mercer at the Kingston Hotel. Mr McBride provided Mr Oakes with a plastic bag containing two lever arch folders of documents. Those documents included the IGADF Submission and Supporting Documents. They also included some additional documents that Mr McBride had collected since he first made his complaint to the IGADF. Mr McBride knew that what he was doing was inconsistent with the ADF Instructions on handling classified information.

98. In relation to the additional documents that Mr McBride provided to Mr Oakes, the following facts are known.

    (a) In June 2019, when the AFP executed a search warrant at the ABC, they located seven spreadsheets which detailed a number of individual documents. The AFP made a comparison of the documents seized at Mr McBride's Griffith property and the documents listed on the ABC spreadsheets. In addition to the Supporting Documents, 139 additional documents were listed on the ABC spreadsheets that correlated with documents seized at the Griffith property. Of those 139 additional documents, 120 were classified SECRET. The 139 additional documents contained naval, military or air force information as defined in s 73A(1) of the *Defence Act*. In relation to 10 of the documents referred to in the ABC spreadsheets, the AFP could not identify a correlating document from the Griffith property.

(b) In court proceedings between the ABC and members of the AFP which followed the execution of the search warrant, it was an agreed fact that Mr Oakes and another journalist relied on information provided to Mr Oakes by informants in circumstances where Mr Oakes had promised the informants not to disclose their identity. The stories ultimately run by the ABC, referred to as "The Afghan Files", stated that they were based upon information provided by such sources. The AFP has not identified any other person apart from Mr McBride known or suspected to have passed information or material to the ABC that resulted in the publication of those stories.

99. The IGADF Submission, most of the Supporting Documents and most of the additional documents which Mr McBride provided to Mr Oakes contained "military information" within the meaning of s 73A. Mr McBride did not have authority or permission to provide the documents to Mr Oakes. He was aware that ADF Instructions, having the force of law, prohibited the provision of the documents to Mr Oakes. **It is the disclosure of documents to Mr Oakes by Mr McBride that gives rise to count 3.**

100. Mr McBride and Mr Oakes had one subsequent meeting in person. After that, they communicated via the Signal app. Mr McBride later deleted most of his communications with Mr Oakes.

101. Later, Mr Oakes contacted Mr McBride via Signal to discuss the contents of the stories that Mr Oakes intended to publish. In his interview with police, Mr McBride said:

> But I met Dan Oakes, and I gave him all the materials. So again he was very enthusiastic and again he seemed to get it. And again, he was going to do a story. And he did do a story on it, but a totally different story to the one, um, that I was pushing.
>
> …
>
> He calls me and he says, "I'm going to run a story, it's going to be very damning, it's going to say the SAS kill people unnecessarily. I'm going to use this other witness[.] A total opposite to what you've said. I'm just warning you." And I was like, "Never call me again."

102. On 10 and 11 July 2017, Mr Oakes published a series of articles which were collectively titled The Afghan Files. The information contained in the documents provided to Mr Oakes by Mr McBride was contained in this series of articles.

103. On 11 July 2017, the AFP received a referral from the Chief of the Defence Force and the Secretary of the Department of Defence to investigate the unlawful communication of information.

104. The Commonwealth Director of Public Prosecutions subsequently decided that, notwithstanding that there was a reasonable prospect of conviction, it was not in the public interest to prosecute Mr Oakes.

Departure, return, arrest and interviews

105. Mr McBride departed Australia for Spain on 22 September 2017. He had no immediate intention of returning to Australia. Almost a year later, on 1 September 2018, he returned to Australia to attend a family event. He was arrested on 5 September 2018 at Sydney International Airport as he attempted to board a plane to return to Spain.

106. On 13 October 2018, he participated in a recorded interview with the AFP. On 22 January 2019, he participated in another interview with the police.

The police interviews

107. Mr McBride participated in two interviews with police, the first on 13 October 2018 and the second on 22 January 2019. The first interview largely involved Mr McBride saying what he wanted about what had occurred. It extended over 33 pages of transcript. This interview is of significance because, in parts of it, Mr McBride gives his explanation for why he did what he did. The second interview involved the police asking specific questions relevant to the offence provisions. Mr McBride gave his answers over 49 pages of transcript. This interview is of significance because it allowed the police to obtain admissions relating to particular aspects of the offences with which Mr McBride had been, or would be, charged. On both occasions, his ex-wife attended as a support person.

Procedural history

108. Prior to 31 May 2016, when the officer at ADF Legal Services wrote to Mr McBride in relation to the publication of documents on the Website, the ADF was aware that he had created the Website. No disciplinary action or prosecution was brought in relation to this conduct.

109. On 5 September 2018, when Mr McBride was arrested, he was charged with one count of an offence of theft under s 131.1 of the *Criminal Code*. He was granted bail.

110. On 7 March 2019, three charges were laid under s 73A(1) of the *Defence Act* and one charge of an offence under s 70 of the *Crimes Act*.

111. On 30 May 2019, he was committed for trial. At that stage, Mr McBride was unrepresented. He indicated that he wished to formally make admissions of certain matters by way of agreed facts. The Crown drafted a document reflecting, in large part,

the admissions made by Mr McBride in the course of his interviews with the AFP. The agreed facts reflected almost all of the factual matters (as distinct from the conclusions to be drawn from those facts) alleged in the Crown Case Statement prepared for trial. The agreed facts were approved by Elkaim J for the purposes of s 184(2)(b) of the *Evidence Act 2011* (ACT) on 25 October 2019.

112. Mr McBride was arraigned on 11 November 2019. The trial was listed to commence on 2 March 2020. However, on 5 February 2020, Mr McBride sought immunity from prosecution under the PID Act. The claim was listed for a pre-trial hearing to commence on 2 March 2020. However, on 14 February 2020, the trial listed to commence on 2 March 2020 was vacated because Mr McBride had obtained legal representation.

113. The PID Act claim was listed for hearing to commence on 29 September 2020. Because of the COVID-19 pandemic, the date was subsequently vacated and relisted for 3 May 2021. On 2 March 2021, the hearing to commence on 3 May 2021 was vacated on the application of the Commonwealth Director of Public Prosecutions. The hearing was relisted for 20 September 2021. That listing was subsequently vacated at Mr McBride's request and relisted for 24 October 2022. However, when it came to the hearing of the claim, Mr McBride discontinued his claim under the PID Act.

114. On 13 April 2023, the criminal proceedings were again listed for trial commencing on 6 November 2023 with an estimate of three weeks.

115. At the commencement of the trial, the court made a ruling as to the directions that would be given to the jury: *R v McBride* [2023] ACTSC 328; 20 ACTLR 272; *R v McBride (No 2)* [2023] ACTSC 330. An application for leave to appeal to the Court of Appeal was refused on 16 November 2023: *McBride v R* [2023] ACTCA 42. On 17 November 2023, Mr McBride pleaded guilty to the three counts for which he is to be sentenced.

The Documents

116. It is agreed in the Agreed Statement of Facts that the public disclosure of information in many of the documents taken by Mr McBride would, or would have been likely to, have prejudiced the defence, national security or international relations of Australia at the time. The information in a number of the documents is still capable of causing such prejudice as at the date when the Statement of Facts was agreed. The potential risks from disclosure of the documents will continue to decrease over time. However, some documents, in particular the ROE, have enduring intelligence value. The harm or potential harm to Australia's defence, national security or international relations from disclosure of the ROE still exists.

117. It is agreed in the Agreed Statement of Facts that risk should not be assessed by reference only to a particular piece of information, because pieces of information can be combined to reveal more information than each piece of information considered individually. It is also agreed that the risk of prejudice is incapable of precise quantification and that any prejudice may not be immediately realised or apparent. Information in some of the documents has been declassified and publicly released. In their declassified format, those documents are incapable of prejudicing the defence, national security or international relations of Australia.

118. In August 2016, Major General Paul Brereton contacted Mr McBride via his ADF email address, which was still current. He advised Mr McBride that he had been appointed to conduct the IGADF's Afghanistan Inquiry and invited Mr McBride to speak to him. Mr McBride did not respond to this email and has no recollection of receiving an email from Major General Brereton. Major General Brereton used some information from Mr McBride's IGADF Submission to identify some issues for inquiry. The Afghanistan Inquiry was initiated by the ADF more than 12 months prior to the ADF becoming aware of Mr McBride's disclosures.

119. A small number of the documents that Mr McBride took contained within them confidential cabinet communications.

120. The harm or potential harm to the defence, national security or international relations of Australia is agreed to have arisen in the following ways:

    (a) the removal of the documents from ADF facilities, including the subsequent multiple movements of the documents and storage of the documents at Mr McBride's Griffith property;

    (b) the unauthorised disclosure of the documents to three journalists, including the copying of the documents and multiple movements of the documents; and

    (c) the publication of materials on the Website.

121. These three aspects of the harm or potential harm are elaborated in the Agreed Statement of Facts as follows.

<u>Removal of the documents from ADF facilities</u>

122. Mr McBride's removal of the documents from ADF facilities and their subsequent movements gave rise to the possibility that an unauthorised person had access to them. No investigation has been conducted into whether any such access occurred.

123. Because of the potential that a person had read or copied the materials found in Mr McBride's Griffith property, 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 relationship with those allies and partners. Such disclosure may reduce their willingness to share information with Australia and Australia may not be informed of that change in attitude. If that occurred, it would disadvantage ADF operations and, more broadly, would be to the detriment of Australia's international relations and national security interests.

124. Further, the public disclosure of identities of any Special Operations Command or Special Forces personnel may have exposed those personnel and their families to an increased risk of attack and harassment and may have exposed them to exploitation by foreign intelligence services. While there is no evidence that this has occurred, it is an ongoing concern to the ADF.

125. The ADF has taken steps in respect of future operations because of the possibility that an unauthorised person has accessed the material. Those steps are outlined in a confidential annexure to the Agreed Statement of Facts, which was admitted into evidence and which I have read but which it is not necessary to say any more about.

126. If a person had read or copied the documents found at Mr McBride's Griffith property, the information contained in those documents may have given rise to certain risks:

    (a) The public disclosure of information which would likely prejudice future collection and analysis of intelligence, risk of damage to critical international relationships and risk prejudicing the security of future ADF operations.

    (b) The public disclosure of information relating to ROE risks informing Australia's adversaries of the limits of the ADF's use of force. This would give adversaries tactical advantages, including by employing methods that took advantage of the limitations imposed by the ROE. That would give rise to an increased risk of harm to ADF personnel and compromise the effectiveness of current and future military operations.

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

<u>Unauthorised disclosure to journalists</u>

127. Although the three journalists to whom disclosures were made were professional journalists, they were not authorised to receive the classified documents. The risks relating to identification of Special Operations Command or Special Forces personnel

and the need for the ADF to take precautions or countermeasures ([123] and [125] above) arise from the possibility of disclosure of the material by the journalists and any work-related use of the material. Further, the need to notify Australian foreign partners ([123] above) and the potential damage arising from the risks ([126] above) also exists. However, the ADF has taken no steps to ascertain whether or not the documents were accessed by any person other than the named journalists. There is no evidence that they were.

Publication on the Website

128. As a result of Mr McBride's publication of materials on the Website, there is the possibility that an unauthorised person accessed the materials. However, the information in the materials published on the Website was such that it gave rise to very little risk of any prejudice to the defence, national security or international relations of Australia.

Subjective circumstances

129. Some facts relevant to the subjective circumstances of Mr McBride are outlined earlier as part of the Agreed Statement of Facts. Other evidence of his subjective circumstances is contained in the intensive correction order assessment report dated 15 March 2024, two reports by Sam Borenstein, a clinical psychologist, dated 31 January 2024 and 23 February 2024, 15 character references, four performance appraisal reports prepared between August 2012 and September 2014 and his interviews with police.

130. Mr McBride is 60 years old. His parents were both doctors. His father was famous for alerting the world to the negative impacts of thalidomide and subsequently being deregistered for scientific fraud.

131. He was sent to boarding school at the age of seven and then boarded at high school until Year 12. He studied law at the University of Sydney. He had a good relationship with his parents. He went to the United Kingdom to complete a Masters degree in law at Oxford University. He joined the British Army in 1988. He was deployed to Northern Ireland in 1994. He served until 1998, leaving with the rank of Captain.

132. He returned to Australia to work as a solicitor at a big firm. He left the firm and worked in a security-related role with a TV documentary team for about two years, travelling through Afghanistan, the Sahara and South Africa. He then returned to Australia and worked as a political staffer for a federal politician. He stood as a candidate at an election for the New South Wales seat of Coogee in the 2003 state election but was unsuccessful. After that, he practised as a barrister in New South Wales for five years.

133. He married his wife in 2005. They have two children, born in about 2006 and 2008.

134. As a barrister, he took on some legal work with the Army Reserve and eventually joined the Army on a full-time basis as a lawyer in 2009.

135. In 2011, he was deployed to Afghanistan where he remained for nine and a half months as a legal officer.

136. The performance appraisals from the Army show that, during the period from August 2012 until September 2014, he was receiving very positive assessments of his performance and conduct. These are discussed in more detail later in these reasons (see [153]-[157] below).

137. He returned to Afghanistan in 2013 as a Legal Officer for the Special Operations Task Group.

138. In December 2013, he again received a positive performance assessment.

139. In a performance assessment in September 2014, he was recorded as having prioritised a personal representation to the IGADF (the IGADF Submission) between May and September of that year, which impacted upon his capacity to perform his assigned duties.

140. He separated from his wife in 2016. The couple were divorced in 2018.

141. He was diagnosed in 2016 as suffering from Major Depressive Disorder. He was medically discharged from the Army in early 2017. He was diagnosed to be suffering from PTSD. Dr Adesanya, a psychiatrist, identified the primary diagnosis as being PTSD, which explained the development of the symptoms of Major Depressive Disorder, anxiety, Alcohol and Substance Use Disorders and associated symptoms.

142. After being medically discharged, and after Mr Oakes published "The Afghan Files", Mr McBride went to Spain. He lived off his superannuation. He was arrested after returning to Australia in September 2018.

143. Mr Borenstein records the conclusion that 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 prescription medication (Dexamphetamine), as a form of self medication, which was the case prior to and during the offending period."

144. Mr Borenstein also records that Mr McBride's current presentation is improved because of daily exercise, attendance at Alcoholics Anonymous meetings and combined psychiatric and psychological treatment. In a supplementary report, he records that Mr McBride's symptoms would worsen if subject to a custodial sentence, "possibly requiring intensive psychiatric and psychological treatment, and inpatient care".

145. The personal references recorded that Mr McBride has “a rare combination of humility and at the same time a passion for justice”. Another reference relates to his participation in Alcoholics Anonymous and suggests that a non-custodial sentence would make a “huge and positive difference” both to Mr McBride and to other members of Alcoholics Anonymous who he helps to stay sober. It also records that separation from his therapy dog would be “extremely damaging”.

146. Amongst the additional bundle of references that were tendered are a mix of references from members of his family, long-time friends of his as well as those that have known him through his work as a reserve legal officer or a full-time member of the ADF. A common theme of the references relating to his time in the military is his sense of duty, his sense of professional responsibility, his intelligence and hard work. The long-time friends talk of his empathy, kindness and compassion. One of the references, which recognises the significant emotional toll taken on him by his tours of active service, attempts to address the offending conduct and describes it as “an appalling lack of judgment”.

147. The intensive correction order assessment report does not record any remorse in relation to the offending. It records the following:

> He minimised the offending, attributing it to a difference in legal interpretation. Mr McBride expressed the belief that, if prosecuted, his conduct would be protected under a the [sic] defence of acting in the public interest. However, he recognised a judge had now determined this defence was not available to him and therefore conviction and punishment were to follow.
>
> Despite this, he emphasised his differing interpretation of the legislation and stated he was likely to appeal the decision, regardless of whether this would impact his sentence. Mr McBride justified his decision to offend, claiming he believed the Department of Defence (the Department) had been acting outside the bounds of the law, due to political interference, in a manner which was dangerous to the community. He positioned himself as acting in a completely lawful manner due to a belief he had a responsibility, as a lawyer, to rectify this issue. Mr McBride expressed the belief the theft of the documents was justified to prove the above claims. He also stated the provision of these documents to the media felt necessary, as he was unsatisfied with the result of his internal complaint and felt he had no other available options.

148. Mr McBride has no criminal history.

149. Some further aspects of Mr McBride’s subjective circumstances are addressed in the next section of these reasons which relate to specific submissions on factual matters made on behalf of Mr McBride.

Defendant's submissions on issues of fact

150. At the sentencing hearing, counsel for Mr McBride submitted that five findings of fact, favourable to Mr McBride, should be made for the purposes of determining the appropriate sentence. They were as follows:

    (a) prior to the offending, during the period of conduct constituting the offending and to this day, Mr McBride was and is a man of exemplary character;

    (b) Mr McBride's motivation in engaging in the offending conduct was honourable in that he honestly believed that there was misconduct within the ADF with respect to the conduct of the Defence Force investigations of Special Forces soldiers in 2013;

    (c) Mr McBride honestly believed at the time he did all of the conduct that was the subject of the offences, that he was not committing any criminal offence;

    (d) prior to and during the period that he engaged in the conduct of taking the copies of the documents home and then passing some of them on to journalists, he suffered from a number of mental disorders which materially contributed to his offending; and

    (e) the level of harm or the risk of harm from Mr McBride's offending was low.

151. These matters include matters going to the objective seriousness of the offending, as well as the subjective circumstances of the offender. They will be considered in the manner and order that the arguments were presented.

Exemplary good character

152. Counsel for Mr McBride submitted that the court should find that, prior to the offending, during the period of conduct constituting the offending and to this day, Mr McBride was and is a man of exemplary character. He went as far as to say that Mr McBride's character was unusual insofar as it involved "adherence to the highest ethical and moral standards of honesty, duty, courage, honour and passion for justice".

153. He relied upon the terms of performance appraisals relating to the period of his service as a full-time Army officer between March 2012 and September 2014.

154. In August 2012, Mr McBride was recorded as being "a well respected specialist officer" and a strong contender for advancement to Lieutenant Colonel in 2013.

155. In February 2013, his assessor was "thoroughly impressed with his performance" as acting Command Legal Officer at the Special Operations Command. He continued to be a strong contender for promotion to Lieutenant Colonel.

156. In December 2013, he was assessed as having been “a very effective Legal Advisor” for the SOTG rotation 20. He was identified as being of “superior intellect” and “a very articulate and convincing speaker”. Some indications of the tensions that were developing are shown by the comments that he could improve “by continuing to develop a more detailed understanding of the [nuances] involved in providing legal advice when there are competing priorities between command responsibilities and policy/legality” and the need to find common ground “when there are competing priorities between command responsibilities and policy/legality”. However, he continued to be recommended for higher rank.

157. By September 2014, the performance appraisal noted that he had “prioritised his development of a personal representation to [the] IGADF, impacting on the time and resources he was able to commit to the legal section”. It indicated that working on the IGADF Submission had “caused him stress and fatigue, impacting on his performance”. It noted that he “works relentlessly - sometimes to his personal detriment”. It noted that he “stands firm to his convictions” and takes “a deep personal responsibility and interest in the professional wellbeing of the Command and its members”. He was identified as “a highly confident lawyer with a strong belief in himself, his abilities and capacity to effect change”. Although at that stage, the assessors anticipated him re-establishing his usual work capacity, no subsequent assessments were put into evidence.

158. The report of Mr Borenstein summarises Mr McBride as placing “significant emphasis on honesty and adherence to morals and ethics” and notes his “sensitivity to diversions from moral and ethical standards”.

159. A personal reference from a former lawyer and friend of Mr McBride refers to him as having “a rare combination of humility and at the same time a passion for justice”. The other personal references to which I have briefly referred earlier support the proposition that, in his personal and professional life, except during the period of the offending, he was a person of good character.

160. I accept that Mr McBride was a person of good character. More than that, he demonstrated a strong devotion to his duty and performed well in the roles that he was assigned, at least up until his return from his second tour of Afghanistan. He was consistently identified as a person who was a strong candidate for further promotion within the ADF. There were signs, however, even within the performance appraisals upon which he relied, that he came to lack the ability to moderate his own opinions and the conviction of the correctness of his own opinions in a way which would allow him to continue to function at the level that he had within the Army.

161. As a result of his experiences when posted to Afghanistan in 2013, he appears to have, over time, become obsessed with the correctness of his own opinions as to the conduct of the organisation for which he worked. He came to be unable to accept that his views may not be correct. It was this misguided self-belief that led him to disregard the institutional methods for addressing his grievances and pursue them through the criminal conduct for which he is now charged.

162. It is therefore not possible to make the finding contended for by counsel for Mr McBride. He was a person of good character and committed to his service within the ADF until he became so convinced of the correctness of his own opinions that he was unable to operate within the legal framework that his duty required him to.

Motivation

163. Counsel for Mr McBride submitted that his motivation in engaging in the offending conduct was honourable in that he honestly believed that there was misconduct within the ADF with respect to the conduct of the Defence Force investigations of Special Forces soldiers in 2013. It was submitted that this was relevant both to the objective seriousness of the offending, as well as to subjective considerations.

164. It is significant to note that no attempt was made to prove as a fact, for the purposes of sentencing, that the claims made by Mr McBride were justified, that they were inappropriately addressed by the IGADF or that the mechanisms for complaint or redress available under the law were not adequate. Rather, the contention put on behalf of Mr McBride was merely that he had an honest belief in the matters that he put forward.

165. It is clear that Mr McBride had formed the opinion that the extent of the investigation of soldiers involved in the killing of civilians in Afghanistan had changed in 2012, and that this reflected the desires of the senior commanders of the ADF, but was improper because it involved investigation of soldiers even in circumstances where there was no prospect that they had committed the war crime of murder.

166. It appears that his experiences during his second Afghanistan posting, during which he was personally involved in conflict with investigators sent by the ADFIS, had a very profound impact upon him. He had specific issues with the threshold for the commencement of investigations, the conduct of investigators and their use of warrants in one particular case. His experience caused him to lose faith in the leadership of the ADF in relation to the approach adopted to the investigation of killings of civilians in Afghanistan. He came to believe that the approach involved what he described as “cynical window dressing” in order to satisfy political concerns as to the death of civilians.

167. His 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.

168. 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 Mr McBride 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 Mr McBride held that belief, it is only of relevance insofar as it precludes more reprehensible motivations such as a desire to assist foreign powers.

Honest belief not committing an offence

169. Counsel for Mr McBride submitted that the court should find that Mr McBride honestly believed, "at the time he did all of the conduct that was the subject of these offences", that he was not committing any criminal offence. This was said to be on the basis that, although he knew that what he was doing breached disciplinary regulations and orders, he believed that he would ultimately be vindicated and a court would conclude that he acted in the public interest and thereby committed no criminal offence.

170. Principal reliance is placed upon what is said in his recorded interviews with police in October 2018 and January 2019. However, the statements made during these interviews, when taken as a whole, do not permit a finding that Mr McBride honestly believed that he was not committing any criminal offence. Rather, they indicate that, in a non-specific way, he hoped that his conduct would ultimately be somehow vindicated. That is very different from an honest belief that no offence was occurring.

171. Amongst the passages from the transcript of the police interviews which were relied upon were the following. At page 74 of the Crown Tender Bundle:

> You know, of course the Department of Defence lie, of course it's all a big sham, of course, you know, what did you think it was. I mean I don't accept that and I never did, you know, maybe I am strung too tight, maybe I do have to – to a higher sense of public duty, but it's genuine and I, um, I can't see that it – it means I'm guilty of an offence because, um, I take truth in public life or in the ADF seriously. I think it matters when generals lie. I think it matters when they sacrifice [the] lives of their own troops in order for their own careers to go ahead. I think it matters, um, when Australian officers turn the other way. Um, and I am happy to go to court and have the judge or the jury decide whether I am a criminal, a mad man or a soldier.

172. At page 78:

> … but a bit of a spoiler alert, I'll say now, that the reason why I'm making all these points is because I'm going to admit, um, that I took the documents from the base, I won't say illegally, because I don't, um, admit that it was illegally, because I believe that was in pursuit of, um, a legal duty. But I did take them …

173. At page 86:

> I'm firmly of the opinion that it was my legal obligation to expose criminal activity, I believe I was doing what I was meant to do as a soldier.

174. At page 87:

> … my justification is – it was an obligation to – no law, no matter how, you know, no matter what, the Official Secrets Act or the equivalent says, it can never over-ride the reporting of a serious crime, you know, no government can say, um, to the police, for example, "Oh, if you see a murder, you're not allowed to tell anybody, and if you tell anybody, we're going to put you in jail." … And I'm happy for – you know, that may go to the High Court, the High Court may decide differently, but I am convinced that that must be the case. Ah, that it must be interpreted, I believe that's what the Act actually says, the Protected Disclosure Act, I believe I'm within that, but I believe that even if I'm not within that, there must be some sort of common law – it would be an illegal abusive government that could say, "You're not allowed, as a public servant, you're not allowed to reveal, um, criminal activity within the government, on penalty of jail, um, at any cost." Especially, if you're a legal officer and your job is exactly that to make sure the law is enforced. [He then made reference to the holding of a practising certificate and continued] But it comes with responsibilities, you can't lie, you have to report crime, you have to abide by the law. And I had a legal obligation to report – I believe anyway. That's – of course, that's going to be the question that comes up in court.

175. At page 102, when discussing whether he should have destroyed the stolen documents, he said:

> And, um, ah, you know, I - because afterwards, when I'd heard you came and done the, um - and - and taken the documents with the warrant, I was thinking, well, I actually wished I had destroyed the documents. But even then, something - something inside me was kind of glad that I didn't, because it was - it was always, as I said to you, or I said to Paul, your colleague, I always thought that I was going to be vindicated at some point. I always thought eventually there would be an investigation into my allegations, and eventually people - someone would say, "You've done well here, you've stuck to your guns and you've exposed corruption." …

> So I was glad that I kept them in some ways, even though I could see that it was - I was possibly facing prison, because I felt - as I said, I felt that they, um, that they would vindicate me.

176. At page 107, when asked about the obligations of a person who holds a Positive Vetting top secret clearance, he said:

> … I don't think I did the wrong thing. I think the positive vetting is a - must lie under overarching national security obligations … And while I deserved my - I didn't tell any lies to get my PV, I deserved it, I did a good job, but I'd never said during my PV that I will cover up crime by the government or the organisation I work for in order not to breach my PV. I mean, that's - that goes without saying.

177. Counsel submitted that the crimes to which Mr McBride referred in his interview with police were those which were recorded in the Agreed Statement of Facts as having been disclosed to the AFP in May 2014, namely:

(a) conspiracy to pervert the course of justice;

(b) misuse of Commonwealth resources;

(c) interference with a legal officer performing their duties;

(d) failure to comply with a general order; and

(e) improperly prejudicing ADF members' careers.

178. No particulars were provided of any such offences. The AFP reached the conclusion that, based upon the information that Mr McBride had provided, no criminal offence was disclosed. That conclusion on the part of the AFP has not been shown to be wrong.

179. I do not accept that the passages in the interviews with police demonstrate, on the balance of probabilities, that Mr McBride genuinely believed that he was not committing a crime. The statements do not reflect any coherent argument as to how his conduct may have been rendered lawful. They involve vague and unparticularised claims of criminal activity. They involve complaints of lies and "window dressing" by the senior leadership of the ADF. His statements also involve vague and unparticularised claims of a legal entitlement to breach the law in order to expose such (vague and unparticularised) criminal activity. This may be seen from other passages in his interview with police.

180. At page 66 of the Crown Tender Bundle, he said:

> I'm pleading not guilty, the whole – well, there's a lot of central tenets of my [d]efence, but one of the – the core of my defence is that, um, the senior officers of the Australian Defence Force were not truthful and did things that were underhand, unethical and half-truths – and actually broke the law.

181. At page 67:

> … but there's no point, um, beating around the bush in that regard. By that I mean the law was being habitually broken. And I don't mean, um, I mean the law, yeah, but it definitely comes down to it wasn't things I didn't like or things that were unethically, it was certainly – it's suspicious anyway as I said. I can't make that judgment but there were things that I believed needed to be looked at by either judges or, um, the High Court would be a good thing … I imagined, one of the things the prosecution will claim is, "Oh, well, you just weren't happy about the way your internal complaints went." But I – I refute that completely, in that I will intend to prove that the complaints that I made were never properly dealt with, never legally dealt with, forcing me, um, to consider further options, because they were either side-stepped or they were ignored or they were, a smoke screen was used. Anyway that's obviously a matter for the court.

182. He described at pages 78-79 having prepared the IGADF Submission between May and August 2014:

> … it took me till the end of two thousand and fourteen to write a detailed – so that – another August, so May, June, July, August, three – three or four months after I first saw the police in May, two thousand and fourteen, ah, that I finished, um, a very long document detailing all the – what I would call relatively small breaches of the law, because I'd written this to the Special Operations Command. But the point I was clearly trying to make was not about the illegal searches and the illegal investigations or that. But there was something very wrong in the Defence Force that, um, as I said, the first complaint was to … the AFP … it was about spending. So even from a spending point of view, doing investigations which had no – had no – had no genuine purpose but were just being done to window dress in order to make the minister or the press happy, I believe is illegal, because it's a waste of tax payers money and you couldn't – you couldn't get away with it – I'm sure you wouldn't get away with it as police officers. … And that was just a symptom of a – of a complete lack of leadership, because not only these investigations cost money, they cost lives, they cost people – as I was later to find out, in the JEDI [council] case, which was another symptom of a sick, a sick management policy where anything – anything would be done, and I mean that, you know, anything would be done by Defence in order to make themselves look good or the senior management look good and sacrifice the soldiers … but the documents which I saw with my own eyes, the documents which I took and the documents which I spent hours and hours of downloading purposely to show that the Defence Force habitually lied to the Australian public, which I believe is an offence, habitually lied to their own people. Habitually, um, destroyed the lives of their own soldiers, betrayed their own special forces operatives … the ADF knew they committed no crime, they were still sacrificed to the god of public relations and it just sickened me.

183. Even taking into account the decline in Mr McBride'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. I consider that the statements he made to police at the time were reflective of a desire to justify his conduct in the context of having been charged and that they expressed a hope that there may be some legally plausible defence, but did not

reflect any actual belief that the conduct did not involve criminal offending at the time that it occurred.

Mental disorders

184. Counsel for Mr McBride submitted that the court should find that, prior to and during the period that he engaged in the conduct of taking the copies of the ADF documents home and then passing some of them on to journalists, he suffered from a number of mental disorders which materially contributed to his offending. It was submitted that the court should find that he developed PTSD during his deployment in Afghanistan in 2011 and particularly in the latter half of 2013.

185. Counsel for Mr McBride principally relied upon the evidence in Mr Borenstein's report, which records the first diagnosis of Major Depressive Disorder in 2013 and Mr McBride's medical discharge from the Army in 2017 following a diagnosis of PTSD. Mr Borenstein expressed the opinion that, during the offending, Mr McBride was suffering from symptoms of Major Depressive Disorder and combined Alcohol and Substance Use Disorders as well as PTSD. He also expressed the opinion that the level of disturbance to his thought, mood, volition, perception and memory impaired Mr McBride's emotional wellbeing, judgment and behavioural choices.

186. The foundation for the opinion of Mr Borenstein is undermined by what Mr McBride told the author of the intensive correction order assessment report:

> Mr McBride acknowledged his consumption of alcohol had escalated prior to and during the commission of the offences. He also recognised his diagnosis of PTSD had come shortly after the offending occurred. Despite this, he denied that alcohol or his mental health played a role in his decision to offend. He stated he was currently [abstinent] from alcohol and still believed he made the correct choice. Mr McBride also advised he believed his PTSD was, in part, caused by the offences.

187. Notwithstanding Mr McBride's denial, there is no basis upon which to reject the statement in Mr Borenstein's report that "in 2013, following return from deployment to Afghanistan, he was diagnosed to be suffering with Major Depressive Disorder and PTSD". It is not clear whether it was his underlying personality or his declining mental health which led to him becoming obsessed with the conduct of senior management of the ADF. Both propositions appear to be consistent with Mr Borenstein's opinion. However, it is likely that the stress caused by the years of offending conduct after his return from deployment contributed to the decline in his mental health. It is in that context that it is possible to accept the opinion of Mr Borenstein that during the offending period Mr McBride was suffering with symptoms of Major Depressive Disorder, combined Alcohol and Substance Use Disorders and PTSD. It is also possible to accept that his mental health condition made a material, if only minor, contribution to his offending conduct.

Harm from actions

188. Counsel for Mr McBride submitted that an inference should be drawn from the agreed facts that the level of harm or the risk of harm caused by his conduct was low.

189. In relation to count 1, while accepting that the documents were and remain highly sensitive and could have presented serious risks to Australia's interests, counsel submitted there is no evidence of actual harm and it could not be inferred that significant harm was in fact caused. He also submitted that the risk of actual disclosure was low, given that the documents were kept in tubs at Mr McBride's home. While the possibility of disclosure cannot be excluded, he emphasised that there has been no investigation to try to find out whether there has been any unauthorised access to the documents other than the access the subject of the other charges.

190. In relation to counts 2 and 3, counsel submitted that the disclosures were to reputable journalists. As a consequence, the risk that the documents would find their way to some adversary country or entity was low.

191. 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.

192. In the written submissions made on behalf of Mr McBride, it was submitted that the disclosure of some of the information has advanced the public interest. First, this was said to be because it was "used by Major General Brereton to identify issues for inquiry in the course of the [IGADF] Afghanistan Inquiry". I do not accept this submission. The agreed facts referred to the use by Major General Brereton of some information from the IGADF Submission, a lawful disclosure which Mr McBride was allowed time at work to prepare. Major General Brereton did not use any information from the unlawful disclosures the subject of the charges. Second, the advancement of the public interest was said to have arisen through raising awareness of the conduct of Australian Special Forces through the publication of The Afghan Files. I do not accept the thrust of this submission. There is no doubt that the subject matter of The Afghan Files was a matter of significant public interest. However, the agreed facts indicate that the IGADF Inquiry into the conduct of Special Forces in Afghanistan was initiated by the ADF more than 12 months prior to the ADF becoming aware of Mr McBride's disclosures. Further, the articles published by Mr Oakes were the exact opposite of what Mr McBride had intended when making the disclosures. In those circumstances, it is not appropriate to treat any

raising of awareness by reason of Mr Oakes' journalistic activities as being a matter reducing the seriousness of Mr McBride's conduct.

Objective seriousness

193. The following points can be made about the objective seriousness of count 1, the count of theft.

(a) The removal of documents occurred over a substantial period, between May 2014 and December 2015 (one year and seven months) and their retention continued over years.

(b) The taking of the documents involved multiple occasions on which the offender surreptitiously removed documents from ADF facilities.

(c) The course of conduct that Mr McBride engaged in involved a gross breach of the trust reposed in him as a senior legal advisor in a sensitive position within the ADF.

(d) It involved a breach of obligations in relation to which Mr McBride had received specific training on multiple occasions.

(e) The course of conduct also involved grave breaches of his duty as a lawyer.

(f) Having regard to the evidence that Mr McBride was working on his IGADF Submission during work hours and at the expense of his other duties, his culpability is not reduced by any need that might have existed to refer to the documents for the purposes of preparing a submission.

(g) Although the motivation for the thefts may have varied somewhat over time, the motivation for the thefts was to give the offender the potential to use and disclose the documents other than for the purpose of his official duties.

(h) It is a rolled up charge involving a large number of documents, a significant proportion of which held the SECRET classification. Of the 235 documents removed, 207 were classified SECRET.

(i) There have been specific consequences that flowed from the theft, arising from the need to make disclosures to Australia's foreign partners, the concern arising from the disclosure of identities of Special Operations Command and Special Forces personnel and operational consequences disclosed in the confidential annexure to the Agreed Statement of Facts.

(j) Although it was an agreed fact that, at the time he commenced the misappropriation of the documents, he considered certain practices in the ADF

to be “corrupt”, no attempt was made for the purposes of sentencing to establish the correctness of that belief or, indeed, its reasonableness.

194. It is necessary to address some of the specific submissions made on behalf of Mr McBride in relation to the objective seriousness of this offence:

(a) Counsel for Mr McBride submitted that it was relevant that the theft of the documents did not deprive the Commonwealth of the original documents. That the Commonwealth was not deprived of the original documents is not of great significance in the present case because the value of the documents arose from their confidential nature.

(b) Counsel for Mr McBride submitted that, although the taking of the documents was dishonest, it did not involve “actually telling lies or actively misleading any person”. That the taking of the documents did not involve actually telling lies or misleading any person is only a feature of the present case because of the very trusted position which Mr McBride held and which was abused in order to complete the theft.

(c) Counsel for Mr McBride submitted that the property was not obtained in order to obtain a financial advantage. This is not of great significance because financial advantage is not the sole nor necessarily the most culpable motivation for an offence of theft.

(d) Counsel for Mr McBride submitted that the dishonestly appropriated property was initially taken in order to prepare the IGADF Submission. If that was the case, his conduct was unnecessary as the evidence indicates that Mr McBride was able to prepare his submission during work hours and, as a result, his performance of his usual duties was affected (see [157] above).

(e) I have earlier rejected the submission that Mr McBride believed that he was not committing any offence (see [183] above)

195. Although the offending in the present case is not a traditional example of theft because the financial value of that which was stolen is not a significant factor in assessing its objective seriousness, the above features of the offending put it above the mid-range of objective seriousness for this offence.

196. Count 2, the charge of disclosing information to Mr Masters and Mr Clark, is a rolled up charge because it involves disclosures to two separate journalists on two distinct occasions and each such disclosure involved multiple documents. It involved disclosures of substantial volumes of documents, many of which bore the SECRET classification. The disclosures occurred at a time when legitimate processes for addressing

Mr McBride's concerns were still on foot and after he had been told by the AFP that no criminal offences were disclosed by his complaints. It did not involve any subsequent publications by the journalists because, for undisclosed reasons, they did not see fit to publish stories based upon the material. The harm and risk of harm are as described at [122]–[126] above.

197. I do not accept the submission made on behalf of Mr McBride that breach of trust cannot be an aggravating feature of the offence because this feature of the offending is necessarily engaged by the fact that it is an element of the offence that the person be a member of the Defence Force or engaged under the *Public Service Act 1999* (Cth). While the requirement to be a member of the ADF or a public servant means that the relationship of any charged person to the Commonwealth will necessarily involve duties of loyalty and confidentiality, there is a difference between someone in a junior position with limited access to information and someone in a more senior and trusted position with access to more sensitive information. Mr McBride was plainly in the latter category, having trusted access to very sensitive information. That is clearly an aggravating feature of his offending.

198. I assess count 2 as being in the mid-range of objective seriousness for an offence against s 73A.

199. Count 3 relates to the disclosure to Mr Oakes. Once again it involved disclosures of substantial volumes of documents, many of which bore the SECRET classification. It involved disclosure of more documents than had been disclosed to Mr Masters or Mr Clark. The documents disclosed included the Supporting Documents and some additional documents that Mr McBride had collected since he first made the complaint to the IGADF. The correlation between the documents in Mr McBride's possession and those listed in Mr Oakes' spreadsheets is described at [98(a)] above. It is not possible to determine beyond reasonable doubt the number of additional documents because of the possibility that Mr Oakes obtained them from another source. There were 86 Supporting Documents, most of which were classified SECRET. The disclosure occurred after Mr McBride knew the outcome of the IGADF process, of which there was no criticism by Mr McBride at the time or in these proceedings. Publication did occur as a result of the disclosure. The intent of those stories was the opposite of that which the Mr McBride had hoped to be published. The harm and risk of harm is described at [122]–[126] above.

200. It too is an offence in the mid-range of objective seriousness, even though it involved publication to only one person.

201. The charge to be taken into account at sentence in relation to count 3 involves the disclosure of documents on the Website. The provision creating the offence is slightly broader than s 73A of the *Defence Act* because it extends to any document coming into his possession which it was his duty not to disclose and is not limited to documents relating to naval, military or air force information. Nevertheless, the nature of the conduct involved is essentially the same as that for count 3, namely, disclosure of documents that should not have been disclosed. Having said that, the material that was in fact disclosed was such that it gave rise to very little risk of any prejudice to the defence, national security or international relations of Australia. It is connected with count 3 because it was this disclosure which Mr Oakes came across and that then prompted him to get in contact with Mr McBride, leading to the offence the subject of count 3.

Plea of guilty and assistance to authorities

202. Mr McBride provided substantial assistance to authorities by making admissions about his conduct in the two interviews that he did with the AFP. His claim relating to the possible application of the PID Act, which was ultimately not pursued, had the effect of delaying the proceedings. The assistance to authorities is to be taken into account pursuant to s 16A(2)(h) of the *Crimes Act*.

203. Following the rejection of the legal argument that he put forward at the commencement of his trial and the refusal of leave to appeal from that decision, he entered a plea of guilty. There is substantial utilitarian value in the plea of guilty having been entered, even though it was late. This is to be taken into account pursuant to s 16A(2)(g). A reduction on account of the plea of guilty of 10 percent appropriately reflects its utilitarian value. It is also appropriate to take his guilty plea into account in determining the manner in which any sentence of imprisonment should be served.

204. I do not accept that this is a case where it was not reasonably possible for Mr McBride to have pleaded guilty at an earlier stage. I accept that the ruling in relation to the directions that would ultimately be given to the jury proved decisive in causing him to change his plea. The absence of a definitive ruling upon that legal issue did not preclude him from entering his plea earlier. There is no evidence that he only chose not to enter an early plea because of legal advice as to the merits of the argument to be put on that issue.

Time in custody

205. Mr McBride has spent no time in custody prior to sentence. Therefore, no issue of backdating his sentence arises.

Comparative cases

206. The Crown provided a schedule of cases said to be comparable. The schedule included cases involving s 131.1(1) of the *Criminal Code* as well as those said to be of comparative value for the purposes of s 73A. Counsel for Mr McBride identified an additional comparable case.

Section 131.1(1)

207. So far as the offence of theft contrary to s 131.1(1) of the *Criminal Code* is concerned, the cases provided were not very comparable at all. That may simply be a product of the fact that the present circumstances were unusual.

208. *Chia v The Queen* [2018] WASCA 103 related to misappropriation of Centrelink payments. It is not usefully comparable.

209. *R v Jafari* [2017] NSWCCA 152 involved a solicitor responsible for managing a trust for a disabled person. The solicitor misappropriated $220,000. There was limited evidence of remorse or contrition and the offender had a gambling addiction. He was given a sentence of three years' imprisonment, to be released after 18 months upon entry into a recognizance to be of good behaviour.

210. *Della-Vedova v R* [2009] NSWCCA 107 involved a long-serving member of the ADF who misappropriated 10 rocket launchers. The offender had no criminal record and his ADF service record was impressive. He was given a six-year sentence with a non-parole period of four years on the theft charge.

211. *Peterson v R* (District Court (NSW), Hanley DCJ, 30 November 2020, unrep) was a charge which proceeded summarily involving theft of tools and equipment from Air Services Australia. It was not usefully comparable.

212. Generally speaking, because of the different circumstances of these cases, they do not have much value as comparable cases. Although the circumstances in *Jafari* are very different to the present case, they did involve a gross breach of trust by a lawyer and, in that respect, *Jafari* is comparable to some extent.

Section 73A

213. The schedule of cases provided by the Crown indicates that there have been no previous prosecutions for an offence against s 73A(1) of the *Defence Act*. The schedule did identify some cases involving the disclosure of material contrary to laws of the Commonwealth.

214. *R v Scerba (No 2)* [2015] ACTSC 359 involved a contravention of s 70 of the *Crimes Act*, which carried a maximum penalty of two years' imprisonment. It involved uploading two pages of a Defence Intelligence Report to the 4chan website. The pages contained a summary of key intelligence assessments and identified the intelligence sources used to develop the report. It was not possible to determine whether the publication had caused actual damage to Australia's national security. The offender was suffering from Major Depressive Disorder, had a low risk of reoffending and there was evidence of contrition. The offender was sentenced to 12 months' imprisonment, to be released after three months subject to a good behaviour order.

215. *R v Crowley* (District Court (WA), Voil DCJ, 17 March 1997, unrep) involved another breach of s 70 of the *Crimes Act*. A junior legal officer at the Commonwealth Director of Public Prosecutions published documents concerning the Attorney-General's consent to the institution of proceedings against Alan Bond to Alan Bond's son, John. This conduct involved a gross breach of the officer's obligations as a prosecutor. The offender was of prior good character, had a record of public service and a sentence of imprisonment would have had an adverse effect on his family. There was the prospect of disciplinary proceedings. He received a sentence of 15 months' imprisonment to be released after six months on a recognizance to be of good behaviour.

216. *Grant v Headland* (1977) 17 ACTR 29 involved a charge of attempting to communicate prescribed information to a person not authorised to receive it, contrary to s 79(3) of the *Crimes Act*. The maximum penalty was two years' imprisonment. The offender was a 19-year-old probationary trainee at the Australian Security Intelligence Organisation (ASIO) who had undertaken a misguided personal practical experiment to ascertain whether a response could be obtained to an overture to a foreign agency. He was stopped before the communication could be sent. He was not motivated by disloyalty, but by a desire to outperform other trainees. He was of very good character. He was sentenced to three months' imprisonment to serve one month and enter into a recognizance to be of good behaviour.

217. *R v Lappas* [2003] ACTCA 21; 152 ACTR 7 involved an intelligence analyst who befriended a sex worker. He gave the sex worker a TOP SECRET report so that she could sell it to a particular foreign power. Annotations made by Mr Lappas on the document "tended to reveal sources of ongoing intelligence". He then initiated contact with representatives of foreign countries to attempt to sell it. He also photocopied two even more sensitive documents and gave them to the sex worker to sell. He was found guilty of espionage contrary to s 78(1)(b) of the *Crimes Act,* which carried a maximum

penalty of seven years' imprisonment, and s 79(3), unauthorised communication of a prescribed document, which carried a maximum penalty of two years' imprisonment.

218. The espionage offence required that the offender be acting "for a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions". He was about 25 years old at the time of the offences. He was found to be suffering from significant mental illness at the time of the offending. He was sentenced to two years' imprisonment for the espionage count and six months' imprisonment for disclosing a prescribed document. The total sentence was 27 months' imprisonment, to serve six months prior to release on a recognizance to be of good behaviour.

219. *R v Kessing* (District Court (NSW), Bennet DCJ, 22 June 2007, unrep) involved a former Australian Customs Service Officer who provided two documents about Sydney Airport to journalists. The charge was under s 70 of the *Crimes Act* and carried a maximum penalty of two years' imprisonment. The documents related to drug offences and breaches of airport security that had not been reported or otherwise addressed. The documents were sensitive and confidential and could compromise law enforcement operations and methodology. As a result of the disclosure, the Commonwealth government appointed a committee which recommended increased airport security. The offender was motivated by a sense of injustice and frustration at the lack of security. He had no contrition. He had no prospects of rehabilitation from the current type of offending. He was otherwise of good character and was 59 years old. He was given a suspended sentence of nine months' imprisonment.

220. *R v Seivers and O'Ryan* (Supreme Court (ACT), Gray J, 10 June 2009, unrep) involved a contravention of s 18(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) which carried a maximum penalty of two years' imprisonment. It involved disclosure of documents marked "confidential" or not marked at all. Mr Seivers brought the documents home to prepare for a Senate inquiry. Mr O'Ryan, on his own initiative, copied them and sent them to four different news organisations. The documents had the capacity to prejudice Australia's national security as well as the functions of ASIO. Mr Seivers demonstrated no contrition but was of good character. Mr O'Ryan showed contrition and had been motivated by a desire to make public certain matters related to the Bali Bombings. Both received a sentence of imprisonment of 12 months, with six months to be served by periodic detention and the balance suspended. Mr Seivers' conviction was set aside on appeal: *Seivers v The Queen* [2010] ACTCA 9.

221. *R v Johns (a pseudonym)* [2019] ACTSC 399 was a case in which the offender entered pleas of guilty to a number of offences which bear some similarity to those in the present case. The difficulty is that the judgment has been so heavily redacted it is not possible

to say what offences were committed or to describe the circumstances of the offending. It is therefore not possible to determine the maximum penalties for the offences which were committed and hence how the seriousness of the offences was assessed against that yardstick. The aggregate sentence of imprisonment was two years and seven months. The motivation for the offending was anger over what the offender considered to be unfair treatment. The risk of harm arising from the conduct involved the possibility of "critical harm to Australia's national security" and "quite grave" risks to individuals.

222. The most obvious point to be made about these cases is that all except for *Lappas* and possibly *Johns* involve a maximum penalty of two years' imprisonment, and this has clear consequences for the length of the sentences ultimately imposed. *Lappas* did involve the espionage offence, which carried a maximum penalty of seven years' imprisonment and contained within it a purposive element not required as part of the present charges. Even the maximum penalty that applied in *Lappas* is very different from the unlimited maximum penalty available in the present case. *Kessing* involved an offender who was motivated by a sense of injustice and frustration in relation to the issue which he disclosed, but there appears to have been some evidence that his concerns were ultimately found to have substance as evidenced by the subsequent recommendations for increased security. None of the cases involved such substantial volumes of SECRET material as involved in the present case.

Consideration

223. In sentencing Mr McBride, it must be recognised that the unlimited term of imprisonment that may be imposed for offending against s 73A has to accommodate circumstances much more extreme than those that exist in the present case. It must accommodate offending which involves the disclosure of extremely damaging naval, military or air force information in circumstances, such as war, where Australia is under immediate military threat. Recognition of that fact means that, notwithstanding that the objective seriousness of the offending can be characterised as in the mid-range, any sentence imposed on Mr McBride must accommodate the need for much more severe sentences in other cases committed in more extreme circumstances.

224. The nature and circumstances of the offences (s 16A(2)(a)) and the manner in which it involved a course of conduct (s 16A(2)(c)) have been described above.

225. I will take into account the charge on the s 16BA schedule in relation to count 3, in accordance with the principles outlined in *R v Campbell* [2010] ACTCA 20 at [47]-[48] (s 16A(2)(b)).

226. The extent to which there has been harm arising from the offences (s 16A(2)(e)) is also described above.

227. As pointed out earlier, the offender has shown no contrition for his offending (s 16A(2)(f)).

228. I have taken into account the fact of his guilty plea, its timing and the degree to which that has resulted in benefit to the community through the avoidance of the need for a trial (s 16A(2)(g)). I have also addressed above the extent of his cooperation with law enforcement agencies through his participation in the two interviews with police (s 16A(2)(h)).

229. It is necessary to give consideration to the need for both specific and general deterrence (ss 16A(2)(j) and (ja)). General deterrence is clearly of very significant importance in the circumstances of this case. The system for security classification and the protection of material from disclosure is fundamental to the operation of government institutions. That is even more the case when dealing with military information. It is of greater significance when that information involves active conflicts such as that with which the Special Forces were concerned in Afghanistan.

230. Undoubtedly, a large organisation has the capacity to generate tensions and frustrations for those operating within it. That is particularly so when it is a disciplined force and that force is involved in life or death military conflicts. However, the Army was the institution that Mr McBride chose to serve. That comes with it both privileges and constraints, particularly when he was not only a soldier but also a lawyer. Mr McBride was not prepared to operate within the constraints of the organisation which he had taken an oath to serve. I do not accept his statements that somehow, either as a lawyer or a soldier, he had an obligation or duty to do what he did. He very clearly breached his duty as both. His statements to the contrary made to police did not reflect reality.

231. Notwithstanding the availability of other legitimate means by which he 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 disclose 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.

232. Recognising the importance of general deterrence, its significance (and the significance of some of the other purposes of sentencing) may be lessened where a disclosure is

made that is recognised as in the public interest or in circumstances where legitimate means of addressing the matters of concern were not available. It is important to note that no attempt was made in the sentencing proceedings either to establish that Mr McBride's thefts or disclosures were somehow in the public interest or that the legitimate and lawful means by which Mr McBride could have raised his concerns were inadequate.

233. The need for specific deterrence is somewhat less than that for general deterrence. It is, however, significant that the offender has no remorse and still considers that he did the right thing. Mr McBride needs to be deterred from any further disclosures of military information which he learned during his service as a soldier.

234. Two factors qualify the need for specific deterrence. First, it is unlikely that he will be placed in any position of equivalent trust in government or the military in the future. Despite that, the intensive correction order assessment report makes reference to him continuing to practice as a solicitor, a situation in which compliance with obligations of confidentiality remains fundamental. Second, it is clear that the process of being subject to criminal charges has had a substantial impact upon him (and thereby his family) and this will tend to have a deterrent effect upon him which reduces the significance of specific deterrence in the sentence.

235. The sentence must ensure that he is adequately punished for his offending (s 16A(2)(k)). Punishment must adequately reflect the importance of the obligations which were breached. In relation to count 3, the sentence must take into account that there will be no punishment for the conduct the subject of the s 16BA schedule offence.

236. The relevant aspects of his character, antecedents, age, means and physical or mental condition have been described earlier in these reasons (s 16A(2)(m)). So far as his mental condition at the time of the offending and today are concerned, I have accepted Mr Borenstein's conclusion that during the offending Mr McBride suffered from a number of mental health conditions. I also accept Mr Borenstein's evidence that his present condition has improved with psychiatric and psychological treatment as well as exercise. I have concluded, despite Mr McBride's statement to the contrary, that his mental health conditions made a material, albeit minor and indirect, contribution to his offending conduct. That is relevant to his moral culpability but only in a minor way. I do not consider that his mental health conditions have any significant consequence for the suitability of his sentence as a vehicle for general deterrence or the need for specific deterrence. I also accept Mr Borenstein's evidence that there is a risk of deterioration of his condition if incarcerated and that includes a risk of a significant deterioration. It is not possible to quantify the extent of that risk. Having regard to the possibility of deterioration of his

condition if he is incarcerated, I have taken into account the potential that, by reason of his mental health conditions, particularly the PTSD, a sentence of imprisonment may be more burdensome than it would otherwise be for a person without that condition.

237. Section 16A(2)(ma) requires consideration of whether the person's standing in the community was used by the person to aid in the commission of the offence. This was the subject of competing submissions by the parties. I do not think that this is the sort of case in which that specific consideration has effect. It was the position of trust in which he was placed as a result of being an officer in the Army that made it possible for him to commit the offences. The grave breach of trust involved in the offending must be taken into account. However, that is a different consideration to the specific consideration in paragraph (ma), which refers to "standing in the community" as a means of engaging in other offending.

238. So far as his prospects of rehabilitation are concerned (s 16A(2)(n)), that is difficult to assess in circumstances where Mr McBride has demonstrated no remorse and, as a consequence, has not recognised the wrongfulness of his own conduct. So far as this type of offending is concerned, his prospects of rehabilitation must be considered to be guarded because of his apparently unwavering belief in his own correctness and his willingness to commit serious breaches of the criminal law.

239. The imposition of a custodial sentence would have an adverse effect upon his family (s 16A(2)(p)), most particularly his two daughters, although they are beyond an age where they would be most seriously affected by incarceration of their father. The imposition of an intensive correction order would require him to live in the ACT, away from his ex-wife and daughters. Such a disposition would be likely to have a lesser impact upon him and his family.

240. The sentences must also recognise the state of uncertainty in which the offender has lived since the charges were laid in September 2018 and March 2019. The delay in bringing the matter to trial was a product of the complexities of dealing with confidential information, the COVID-19 pandemic and the making, by Mr McBride, of the application under the PID Act which he subsequently abandoned.

241. Having regard to the fact that no maximum penalty is specified for an offence under s 73A, it is necessary for the court to formulate a sentence in relation to each of counts 2 and 3 which appropriately reflects the purposes of sentencing and is of a severity appropriate in all the circumstances of the offence. As pointed out earlier in these reasons, the unlimited term of imprisonment available for a contravention of s 73A cannot be characterised as a relic of the past (cf the quote in *Markarian* at [30]). On the other

hand, it must be recognised that the very high penalties available under the section must accommodate extremely serious disclosures in grave circumstances of a threat to the Australian nation.

242. The contention on behalf of Mr McBride was that, if a custodial penalty was to be imposed, it should be of a length which could be served by an intensive correction order. On the other hand, the submission put by the Crown was that a custodial sentence requiring full-time imprisonment should be imposed along with a non-parole period.

243. The starting point must be consideration of whether or not the threshold in s 17A of the *Crimes Act* has been passed. I am satisfied that the seriousness of the offending is such that, having considered the other available alternatives, no sentence other than a sentence of imprisonment is appropriate. I do not consider that a sentence other than imprisonment would appropriately satisfy the purposes of sentencing.

244. So far as individual sentences are concerned, having incorporated a 10 percent reduction on account of the plea of guilty (referred to at [203] above) the appropriate sentences are as follows:

    (a) Count 2: a sentence of 34 months' imprisonment;

    (b) Count 3: a sentence of 34 months' imprisonment (having taken into account the s 16BA offence); and

    (c) Count 1: a sentence of 27 months' imprisonment.

245. The sentences on count 2 and count 3 are the same, notwithstanding that count 2 involved disclosure to two different journalists, because the disclosure to Mr Oakes involved the disclosure of additional documents.

246. It is next necessary to consider the structure of the sentence, which includes consideration of the issue of totality. Notwithstanding the submissions made on behalf of Mr McBride, I do not consider that this is a case in which wholly concurrent sentences would be appropriate. It is not a case where the criminality of one offence was sufficiently comprised within the criminality of another offence so as to warrant making them wholly concurrent: cf *Nguyen v The Queen* [2016] HCA 17; 256 CLR 656 at [62]. Rather, while the offences were related to some extent, each involved additional criminality beyond the others. Therefore, while there is room for a significant degree of concurrency, there must also be some cumulation. Count 2 will be imposed first. Count 3 will be cumulative as to 17 months, but otherwise concurrent. Count 1 will be cumulative as to 17 months upon count 3, but otherwise concurrent. This gives an aggregate sentence of imprisonment of 68 months, or five years and eight months.

247. The next question is how that sentence should be served. In considering this issue, I have had specific regard to the evidence of Mr Borenstein as to the possible consequences of a sentence of imprisonment for Mr McBride's mental health.

248. 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.

249. Given that the aggregate sentence exceeds three years, the appropriate means of serving the sentences is by full-time detention with a single non-parole period: *Crimes Act*, s 19AB. The non-parole period will be a period of 27 months. Although representing a smaller than usual proportion of the head sentence, it nevertheless reflects the minimum period of full-time detention necessary to fulfil the purposes of sentencing. The lengthy period on parole will continue to provide a deterrent for any further offending.

Orders

250. For those reasons, the orders of the Court are:

1. On the charge of contravening s 73A(1) of the *Defence Act 1903* (Cth) (CAN 2897/2019), the offender is convicted and sentenced to imprisonment for 34 months, commencing on 14 May 2024 and ending on 13 March 2027.

2. On the charge of contravening s 73A(1) of the *Defence Act 1903* (Cth) (CAN 2899/2019), the offender is convicted and sentenced to imprisonment for 34 months, commencing on 14 October 2025 and ending on 13 August 2028.

3. On the charge of contravening s 131.1(1) of the *Criminal Code* (Cth) (CAN 41388/2018), and having taken into account the charge of contravening s 70(1) of the *Crimes Act* on the s 16BA schedule (CAN 2900/2019), the

offender is convicted and sentenced to imprisonment for 27 months, commencing on 14 October 2027 and ending on 13 January 2030.

4. The non-parole period commences on 14 May 2024 and ends on 13 August 2026.

I certify that the preceding two hundred and fifty [250] numbered paragraphs are a true copy of the Reasons for Sentence of his Honour Justice Mossop.

Associate:

Date: 14 May 2024