THE NEW SERVICE OFFENCE OF CYBERBULLYING: DEFINING THE SCOPE OF SECTION 48A OF THE *DEFENCE FORCE DISCIPLINE ACT 1982* (CTH)

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Two years have passed since the new service offence of 'cyberbullying' was enacted. Interestingly, not a single case has been tried by a superior military tribunal. In the absence of precedent, this article provides detailed commentary on the characteristics of s 48A of the Defence Force Discipline Act 1982 *(Cth) and offers guidance on existing uncertainties surrounding its application. The analysis presented may aid the development of internal Australian Defence Force ('ADF') policy in this area of military discipline law to ensure ADF members, those authorised to lay charges, and those who will hear cyberbullying matters in the future are confident in the application of the new offence in promoting good order and discipline within the Defence Force.*

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I INTRODUCTION

It has long been recognised that the maintenance and enforcement of discipline among an armed force lies at the heart of an effective military justice system.[1] As noted by the Honourable Richard Tracey, '[t]he instinctive adherence to the norms of conduct which are essential for success on the battlefield is a feature of military life which sets it apart from most civilian pursuits'.[2] The *Defence Force Discipline Act 1982* (Cth) ('*DFDA*') is the primary legislative basis for Australia's military discipline system. This system functions during times of peace and armed conflict, operating 'both within Australia and when forces are deployed away from Australia, during routine operations, exercises and other activities as well as when the defence force is being employed in its combat role'.[3] Members of the Australian Defence Force ('ADF') are, hence, subject to both Australian military discipline law and domestic civilian law.[4] The requirement for ADF members to abide by a code of behaviour that supports good order and discipline is fundamental to unit cohesion and morale, operational efficiency, and reputation. This context is important to bear in mind for the purposes of this article, which explores the creation of a new offence — the offence of 'cyberbullying' — introduced with the overarching goal of supporting the maintenance and enforcement of discipline through deterrence.[5] While only Defence Force members are subject to this offence, it is useful for the civilian population to understand its application and how members of the ADF are held accountable for engaging in cyberbullying, a phenomenon associated with a range of significant negative implications.[6]

Part II of the article examines the creation of the new service offence, before considering the characteristics of s 48A of the DFDA, including its elements and most notable features. Part III then addresses potential uncertainties surrounding the application of the offence. By referring to relevant statutes and case law, insight into the meaning of terms referenced in s 48A (with an emphasis on construing the term 'offensive' for the purposes of s 48A) is provided. Furthermore, original commentary

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[1] Robyn Creyke, Dale Stephens and Peter Sutherland, *Military Law in Australia* (Federation Press, 2nd ed, 2024) 113.
[2] Richard Tracey, 'Military Discipline Law' in Robyn Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 1st ed, 2019) [8.2].
[3] Ibid.
[4] Defence Force Discipline Act 1982 (Cth) ('DFDA').
[5] Explanatory Memorandum, Defence Legislation Amendment (Discipline Reform) Bill 2021(Cth) 31.
[6] See, eg, Colette Langos, 'Cyberbullying: The Shades of Harm' (2015) 22(1) *Psychiatry, Psychology and Law* 106, 106; Jing Wang, Tonja R Nansel and Ronald J Iannotti, 'Cyber and Traditional Bullying: Differential Association with Depression' (2011) *Journal of Adolescent Health* 48(4) 415, 417; Sameer Hinduja and Justin W Patchin, 'Bullying, Cyberbullying and Suicide' (2010) *Archives of Suicide Research* 14(3) 206, 216.

is offered on the objective standard by which the use of a social media service or relevant electronic service is measured. Readers are assisted in better understanding the application of the 'reasonable person' test by examining two hypothetical examples that demonstrate how the offence operates practically.

II THE OFFENCE

The creation of the offence of cyberbullying was part of a suite of recent reforms to the Australian military discipline system, introduced through the *Defence Legislation Amendment (Discipline Reform) Act 2021* (Cth).[7] In terms of procedural history, the Defence Legislation Amendment (Discipline Reform) Bill ('the Bill') was introduced into the Commonwealth Parliament House of Representatives on 12 August 2021, referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee ('Senate Committee') on 26 August 2021, passed by both Houses on 1 December 2021 and received assent on 13 December 2021.[8] It came into force on 13 December 2022. The offence is provided for in s 48A of the *DFDA*.[9]

A *Section 48A*

The Explanatory Memorandum accompanying the Bill acknowledged that '[c]yberbullying by a member in any form is conduct corrosive to good order and discipline; it is contrary to the Defence Value of respect towards others and has a negative impact on morale, operational effectiveness and reputation of the ADF'.[10] Further, it was recognised that 'the risks of emotional, mental, and physical harm are high where such offending occurs, and in severe cases, can result in tragic consequences for persons affected by cyberbullying'.[11] A fundamental aim of the offence, then, is to 'protect the people who choose to serve in our Defence Force'.[12] Its introduction is regarded as a necessary measure, one which sends an unequivocal

[7] Note that the reforms introduced a range of new offences including 'Failure to comply with removal order' as per s 48B of the *DFDA* (above n 4). This provision provides that a service tribunal may make a content removal order if a member is convicted under s 48A. Failure to remove the content constitutes an offence under s 48B. The aim of the provision is to facilitate expedient removal of cyberbullying material where practicable. This article will not explore the scope of s 48B as it is comparatively less complex in its application.

[8] Department of Parliamentary Services (Cth), Bills Digest (Digest No 33 of 2021–22, 22 November 2021) 1, 3; Commonwealth, *Acts of Parliament Assented To: Act No. 132 to 142 of 2021*, No 133, 20 January 2022.

[9] *DFDA* (n 4) s 48A.

[10] Explanatory Memorandum, Defence Legislation Amendment (Discipline Reform) Bill 2021(Cth) 9 [28].

[11] Ibid 31.

[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2021, 8106 (Andrew Gee, Minister for Defence Personnel and Minister for Veterans' Affairs).

message to ADF members that 'the use of social media to cyberbully another person is unacceptable and will not be tolerated in the Australian Defence Force'.[13]

The specific wording of the offence provided in s 48A of the *DFDA* is included below:

> **Section 48A Cyber-bullying**
>
> (1) A defence member commits an offence if:
>
> (a) the member uses a social media service or relevant electronic service; and
>
> (b) the member does so in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing, or humiliating another person.
>
> Maximum punishment: Imprisonment for 2 years.[14]

The offence of cyberbullying is a 'service offence',[15] as distinct from an 'infringement'.[16] Specifically, it is characterised as a 'Schedule 1A offence',[17] as opposed to a 'serious service offence'[18] or a 'prescribed offence'[19]; this means that for ADF members of or below 0–4 rank (Lieutenant Commander/Major/Squadron Leader), there is no upfront right of election for a trial by court martial ('CM') or Defence Force Magistrate ('DFM').[20] This enables a summary authority to deal with Schedule 1A offences. Summary authorities in the military discipline system are military officers who are not legally qualified.[21] Thus, they have limited powers of

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[13] Ibid.
[14] *DFDA* (n 4) s 48A.
[15] See *DFDA* (n 4) s 3(1) for the definition of 'service offence'. Service offences are crafted as criminal law offences and utilise the criminal responsibility provisions in Chapter II of the *Criminal Code Act 1995* (Cth).
[16] *DFDA* (n 4) s 9D(1). Note, this includes specific forms of misconduct of a minor nature.
[17] See *DFDA* (n 4) s 3(1) for the definition of 'Schedule 1A offence'.
[18] *DFDA* (n 4) s 101(1).
[19] Ibid s 104.
[20] Ibid ss 131(1)–(2), 111B(2)(c); a charged member must be provided with an opportunity to elect to have that charge tried by a Cour Martial or Defence Force Magistrate where, during trial by summary authority, the summary authority forms the view that there is sufficient evidence to support a charge and, that if the charged member is convicted of that charge, then it would be appropriate to impose an 'elective punishment'. Elective punishments are more severe than the summary authority's normal powers of punishment; see *DFDA* (n 4) s 3(1) for the definition of 'elective punishment'.
[21] Office of the Judge Advocate General, Submission No 2 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry Into the Provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (8 September 2021) 2 [5] ('JAG-ADF Submission').

punishment and, generally, deal with less serious offences[22] in an expeditious manner.

B *Scrutiny*

The new provision came under significant scrutiny, leading to the enactment of the military discipline reforms. A 'note of caution' pertaining to the (then proposed) offence, initially flagged in the Judge Advocate General's ('JAG') Report for the period 01 January to 31 December 2020 ('Annual Report') by Rear Admiral His Honour Justice MJ Slattery AM RAN, and echoed by Rear Admiral JT Rush RFD QC RAN in the JAG-ADF Submission to the Senate Committee, related to the fact that the offence requires 'no connection to the discipline of the Defence Force beyond the accused being a member of the Defence Force'.[23] This was highlighted as 'exceptional' as *DFDA* offences 'generally have either an explicit connection to service in the Defence Force or have a close civilian criminal law counterpart with equivalent penalties'.[24] Whilst a similar civilian offence exists in the form of 'using a carriage service to menace, harass, or cause offence',[25] the maximum penalty for that Commonwealth offence is three years imprisonment (exceeding the two-year maximum term of imprisonment prescribed under s 48A).[26] Rear Admiral JT Rush RFD QC RAN also questioned the suitability of the offence being a Schedule 1A offence, commenting that it is unfair for members not to have the right of an upfront election for a hearing by a superior tribunal[27] and that hearing a cyberbullying matter 'involves [complex] legal considerations beyond the reasonable competence of lay summary authorities'.[28]

Contrasting perspectives were offered. For example, the Defence Submission to the Senate Committee argued it is unnecessary for there to be a connection to good order and discipline beyond an accused being a Defence member;[29] that is, there need not be additional criteria to satisfy the nexus.[30] Furthermore, it was

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[22] *DFDA* (n 4) ss 68B, 69C.
[23] JAG-ADF Submission (n 21) 1 [2] citing Judge Advocate General, *Report for the period 01 January to 31 December 2020* (Annual Report, 2021) [93].
[24] JAG-ADF Submission (n 21) 1 [2].
[25] *Criminal Code Act* 1995 (Cth) sch 1 s 474.17 ('*Criminal Code*').
[26] A discussion about the Commonwealth offence is included in the next section of this article.
[27] JAG-ADF Submission (n 21) 2 [6].
[28] Ibid 2 [5].
[29] Department of Defence, Submission No 5 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry in to the provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (17 September 2021) 8 ('Defence Submission').
[30] See also Centre for Military and Security Law, ANU, Submission No 3 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry into the Provisions*

emphasised that the ADF's needs require that alleged cyberbullying conduct be managed promptly, especially in deployed environments.[31] For this reason, it was submitted that it was highly appropriate that the offence be crafted as a Schedule 1A offence capable of being tried by a summary authority.[32] The Defence Submission also elucidated that serious instances of cyberbullying can be heard by a superior tribunal or can be referred to civilian police (even as a Schedule 1A offence); the discipline system is sufficiently flexible to ensure that the most appropriate body deals with serious instances.[33] In the most serious cases, a charge can also be brought under the *DFDA* as a 'territory offence' (an accused can be prosecuted in a civilian criminal court).[34]

Similarly to the Defence Submission to the Senate Committee, the Office of the Inspector-General of the Australian Defence Force ('IGADF') Submission observed that '[g]iven the Australian Defence Force's predominantly digitally-literate, young adult demography, mechanisms to allow lower level cyberbullying offending to be tried summarily are desirable'.[35] It was highlighted that members charged under s 48A have protections available, including 'automatic review and appeal mechanisms, and oversight not only by the Judge Advocate General but also my office'.[36]

Ultimately, the Senate Committee, in its Report released on October 14, 2021, concurred with and supported the introduction of the offence as a Schedule 1A offence, recognising the need for better management of disciplinary breaches and enhanced protections for members tried summarily. Now, let us examine some of the most notable features of the offence to better understand its operation.

C *Notable Features*

As a *DFDA* service offence, the general principles of criminal responsibility apply as per the *Criminal Code Act 1995* (Cth) ('*Criminal Code*').[37] As such, the prosecution must prove the following elements of s 48A beyond reasonable doubt:

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of the Defence Legislation Amendment (Discipline Reform) Bill 2021 (16 September 2021) 4 ('Centre for Military and Security Law'); *Private R v Cowen* (2020) 271 CLR 316, 345 [81].

[31] Defence Submission (n 29) 9.

[32] Ibid 8–9.

[33] Ibid 8. See also Centre for Military and Security Law (n 30) 5.

[34] See *DFDA* (n 4) s 3(1) for the definition of 'territory offence'.

[35] Inspector-General of the Australian Defence Force, Submission No 7 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry into the Provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (16 September 2021) 1–2.

[36] Ibid 2.

[37] *Criminal Code* (n 25) sch 1 s 10.

1. That the charged member was **a defence member**[38] or that the charged member was reckless to the fact that he or she was a defence member (default fault element of recklessness);[39] and
2. The charged member used a social media service[40] or relevant electronic service;[41] and
3. That the charged member **intended to use** a **social media service** or **relevant electronic service** (default fault elements of intention);[42] and
4. That the use of the service by the charged member was done in a way that a **reasonable person** would regard as **offensive or as threatening, intimidating, harassing, or humiliating** another person (physical element of circumstance); and
5. That the charged member was **reckless** as to the fact that a **reasonable person** would regard the use of the service by the member as **offensive or as threatening, intimidating, harassing, or humiliating** another person (default fault element of recklessness).[43]

To better understand how the provision operates, it is helpful to consider some of the most notable features that emerge when examining the above elements.

1 *Captures conduct by a defence member which occurs off-duty and not on service land*

The fact that a defence member is off duty when the alleged conduct occurs does not preclude the member from being charged under s 48A. The provision stipulates (see element 1 above) that the person must be a defence member (or was reckless to that fact); there is no additional requirement that the defence member also be on duty at the time of carrying out the offence. Further, there is no requirement that the electronic service used is on service land; the location of the social media service or relevant electronic service is not limited.

[38] *DFDA* (n 4) s 3.
[39] *Criminal Code* (n 25) sch 1 s 5.2(1).
[40] *DFDA* (n 4) s 48A (2)(a).
[41] Ibid s 48A (2)(b).
[42] *Criminal Code* (n 25) sch 1 s 5.4(1).
[43] Ibid.

2 *Captures communications accessible by end users inside and outside of Australia*

Definitions pertaining to 'social media service' and 'relevant electronic service' provided for in s 48A (see element 2 above) incorporate meanings provided for in the *Online Safety Act 2021* (Cth) ('*Online Safety Act*'),[44] facilitating consistent use of statutory terms. Essentially, a social media service is one that enables online interaction between two or more end-users, allowing users to post material on the service.[45] Well-known examples of such services include Facebook, Instagram, and Snapchat. A relevant electronic service allows end users to communicate with other users through email, instant messaging, short message service ('SMS'), multimedia message service ('MMS'), chat service, or a service enabling online gaming.[46] Interestingly, definitions of these terms are broader under the service offence of cyberbullying than those provided in the *Online Safety Act* as s 48A is designed to encompass not only material accessible to end-users in Australia but also that which is accessible outside of Australia.[47] In this manner, defence members are accountable when material deemed to fall within the scope of the offence is accessible overseas (meeting the disciplinary needs of the ADF in deployed environments).

3 *Unintentional use is not captured by the offence*

A defence member must use a social media service or a relevant electronic service intentionally to fall within the ambit of the offence. This means that where, for example, a defence member's social media account or email has been hacked and the post or communication appears (incorrectly) to be communicated by the defence member, the default fault element of intention will not be established on the facts; the defence member cannot be charged under s 48A.

4 *Must the recipient actually feel offended or feel threatened, intimidated, harassed or humiliated?*

It is not a requirement of the offence that the recipient of the material actually be offended, threatened, intimidated, harassed, or humiliated as a result of the conduct. Rather, the physical element of circumstance (element 4 above) requires consideration of the accused's *use* of a social media service or relevant electronic service by evaluating whether a 'reasonable person' would find the accused's use offensive or threatening, intimidating, harassing, or humiliating to another person and whether the accused was reckless regarding that fact (element 5 above). 'Use' of

[44] *Online Safety Act 2021* (Cth) s 13, 13A ('*Online Safety Act*').
[45] Ibid s 13(1)(a).
[46] Ibid s 13A(1).
[47] *DFDA* (n 4) 48A(2)(a)(b).

a social media or relevant electronic service refers to the 'method of use or the content of a communication or both'.[48]

Given the dearth of ADF cyberbullying cases heard to date, there are likely to be some uncertainties surrounding the application of s 48A. The next Part considers some potential 'pain points' for those deciding whether to lay a charge under s 48A of the *DFDA* and those hearing future cyberbullying matters. The commentary provided could assist in shaping internal Defence policy (guidance) on this offence.

III Potential Uncertainties Surrounding the Offence of Cyberbullying

To date, a charge of cyberbullying has not been heard by a superior tribunal. This is somewhat surprising given that cyberbullying has been regarded as 'a phenomenon that is occurring in the Australian Defence Force, as it is in the wider society'.[49] One possible explanation for the scarcity of cases being tried is that personnel authorised to lay charges are uncertain about what constitutes using a social media or relevant electronic service in an 'offensive' or 'threatening, intimidating, harassing, or humiliating' way. Since the terms are not defined in the *DFDA*, there are no specific statutory definitions that provide guidance on how to construe these terms for the purposes of s 48A. Furthermore, while the offence stipulates that an objective standard should measure the use of the service, no guidance as to the application of the 'reasonable person' test is provided. Hence, it is possible that alleged conduct falling within the scope of the new offence is, instead, being dealt with via an alternate charge or is being handled administratively. Sections A and B below provide a brief analysis of these uncertain aspects of the offence, which may assist those authorised to lay charges and, equally, those trying matters in the future.

A *Meaning of 'Offensive' or 'Threatening, Intimidating, Harassing, or Humiliating' Another Person*

Construed in accordance with its ordinary definition, the term 'offensive' means 'displeasing', 'annoying' or 'insulting'.[50] Further, 'threatening' means 'to try to influence a person by menaces';[51] 'intimidating' means 'to inspire with fear';[52] 'harassing' means 'unwarranted speech or behaviour causing annoyance, alarm or distress';[53] and 'humiliating' means 'to lower the dignity or self-respect' of the

[48] See eg, *Smart v The Queen* [2021] WASCA 175, [38] ('*Smart*').
[49] Defence Submission (n 29) 9.
[50] *Oxford English Dictionary* (online at December 2024) 'offensive' (adj, def 3).
[51] *Oxford English Dictionary* (online at December 2024) 'threaten' (v, def 2a).
[52] *Oxford English Dictionary* (online at December 2024) 'intimidating' (v, def 1).
[53] *Oxford English Dictionary* (online at December 2024) 'harassing' (adj, def 1).

subject.[54] Of these terms, 'offensive' reflects the widest literal meaning and has the potential to encompass broadly reaching acts, including conduct which is merely annoying or displeasing. Lack of guidance on scope may lead to uncertainty as to the uses of a social media service or a relevant electronic service deemed sufficiently serious to fall within the bounds of the new service offence.

The following paragraphs consider how some of these terms have been defined within relevant statutes — that is, legislation that, like s 48A DFDA, prohibits conduct deemed either offensive, menacing, or harassing — and interpreted by the courts hearing matters concerning similarly crafted civilian criminal offences. Notably, 'offensive', being the term with the broadest literal construction, has received significant attention from policymakers and the judiciary in regard to how the term ought to be construed in relation to similar criminal provisions as discussed below.

1 *'Offensive' as per the* Online Safety Act

It is useful to consider whether any statutory guidance regarding the scope of the meaning of the term 'offensive' can be found in the *Online Safety Act*, noting that several definitions applicable to s 48A — for example, 'social media service' and 'relevant electronic service' — are found within that Act. Notably, s 8 of the *Online Safety Act* stipulates how the term 'offensive' is to be understood when the eSafety Commissioner (Australia's independent online safety regulator established under the *Online Safety Act*) considers whether particular material targeting an Australian adult would be regarded as menacing, harassing or *offensive* and, in turn, whether adult cyber abuse has occurred under the Adult Cyber Abuse Scheme.[55] The provision stipulates that the 'standards of morality, decency and propriety generally accepted by reasonable adults', the 'literary, artistic and educational merit of the material' and 'the general character of the material (including whether it is of a medical, legal or scientific character)' are matters to be taken into account when determining whether particular material is 'offensive'.[56] This statutory meaning, therefore, requires that both the inherent nature of the material and its value be considered and measured against generally accepted societal standards. The Adult Cyber Abuse Scheme Regulatory Guidance (2025) suggests that the eSafety Commissioner will consider material as 'offensive' when 'it is calculated to, or likely to, cause significant anger, significant resentment, outrage, disgust, or hatred, and it

[54] *Oxford English Dictionary* (online at December 2024) 'humiliating' (v, def 2).
[55] *Online Safety Act* (n 45) s 7(1); eSafety Commissioner, *Adult Cyber Abuse Scheme Regulatory Guidance* (Regulatory Guidance, January 2025) 5.
[56] *Online Safety Act* (n 45) s 8(1).

does more than simply hurt or wound a person's feelings'.[57] This construction substantially narrows the meaning of 'offensive' from one that encompasses fleeting emotional reactions of mere annoyance or displeasure to one that requires a more *significant effect* on a person. Whilst not binding for the purposes of s 48A, consideration of how the term is treated per the eSafety civil enforcement scheme may, nevertheless, assist those ADF members authorised to lay and hear charges to determine an appropriate threshold that conduct should rise to for it to fall within the scope of the service offence.

2 *'Offensive' as per the* Criminal Code

Section 474.17 of the *Criminal Code* — 'using a carriage service to menace, harass or cause offence' — is the most comparable criminal offence to s 48A of the *DFDA.* A perpetrator commits this federal indictable offence if they use a carriage service (which includes 'making a telephone call, sending a message by facsimile, sending an SMS message, or sending a message by email or some other means of using the Internet')[58] to 'menace, harass or cause offence' to a victim (based on an objective standard). The physical and fault elements of s 474.17 operate in the same way as they do in regard to s 48A of the *DFDA*. Two noteworthy points of distinction between the two offences are that: a) s 474.17 'is not tailored to support the Australian Defence Force to maintain good order and discipline',[59] since proceedings under s 474.17 of the *Criminal Code* would likely be significantly more protracted than those under s 48A *DFDA* where a summary authority can hear a cyberbullying matter promptly (this is critical in deployed environments); and b) the maximum punishment under s 474.17 is three years whereas the maximum punishment under s 48A is two years imprisonment.

The offence lies within Part 10.6 of the *Criminal* Code which, by way of s 474.3, provides some statutory guidance on the meaning of the term 'offensive' for the purposes of s 474.17. Interestingly, the same factors included in s 8 of the *Online Safety Act* (referenced above) are to be taken into account when determining whether material is offensive for the purposes of s 474.17. Arguably, this strengthens the case that this matrix of factors ought to be considered when construing the meaning of 'offensive' for the purposes of s 48A.

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[57] eSafety Commissioner (n 56) 5.
[58] Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth) 32.
[59] Defence Submission (n 29) 9.

3 *Case law on 'offensive', 'menacing', and 'harassing'*

Further contextualisation of several of the above listed terms — namely 'offensive', 'menacing' and 'harassing' — may be gleaned by considering relevant case law. In the High Court decision of *Monis v The Queen*,[60] the joint judgement of Crennan, Kiefel and Bell JJ considered the meaning of the term 'offensive' in the context of whether a reasonable person would regard use of a postal or similar service to be, in all the circumstances, menacing, harassing or offensive under s 471.12 of the *Criminal Code*. They held that it was important to note the subjection of the three words to the same objective standard of assessment for the purposes of that offence suggest that 'what is offensive will have a quality at least as serious in effect upon a person as the other words convey'.[61] They went on to posit more specifically:

> The words 'menacing' and 'harassing' imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be 'offensive', a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[62]

This construction of the term 'offensive' aligns with the statutory meaning of the *Online Safety Act* and the *Criminal Code* (discussed above), the common thread being that 'offensive' excludes hurt feelings or momentary reactions, and rather encompasses uses of a service which are likely to have a significant effect on a person. Hayne J also provided some insight on the term 'menacing', suggesting it connotes 'uttering or holding out threats'.[63] This would appear to sit within the bounds of the literal meaning of the term and the meaning as opined by the majority in *Monis*. Arguably, this term is synonymous with the term 'threatening' used in s 48A of the *DFDA*. Thus, although the word 'menacing' is not specifically referred to in s 48A, it is helpful to consider the judicial interpretation of 'menacing' to better understand that the uttering of a threat is likely to be regarded as falling within the scope of s 48A (being a menacing use of a social media service or relevant electronic service). In regard to 'harassing', Hayne J suggested that the term 'connotes troubling or vexing by repeated attacks',[64] which arguably significantly narrows the literal meaning afforded to the term. In line with this construction, use of a service objectively viewed as being a mere annoyance is unlikely to reach the level of seriousness required.

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[60] (2013) 249 CLR 92 ('*Monis*').
[61] Ibid 310.
[62] Ibid.
[63] Ibid 154.
[64] Ibid.

In the more recent matter of *Smart v The Queen*, the Western Australian Supreme Court of Appeal also considered the terms 'menacing' and 'harassing' as they related to s 474.17 of the *Criminal Code* (note, 'offensive' was not assessed in this particular case).[65] Here, it was held that 'menacing' means 'a communication of such a nature that it is likely to cause a person of normal stability and courage to become apprehensive for their own safety and wellbeing. It must be something more than a communication which is distasteful or causes a sense of unease'.[66] 'Harassing' was held to mean 'to trouble or vex by repeated communications that are again, likely to cause a person of normal stability and courage to become apprehensive for their own safety and wellbeing'.[67] The main distinction between these two descriptions appears to be the aspect of repeated communications connected with 'harassment'. Both fall within the ambit of the meanings espoused in *Monis*. It is safe to argue that use of a social media service or relevant electronic service to communicate either a single or repeated communication likely to cause apprehension or fear will likely be encompassed by s 48A *DFDA*.

Only two terms referred to in s 48A, namely 'intimidating' and 'humiliating', lack guidance from relevant statute or case law. It would be prudent for those laying a s 48A charge and those hearing a cyberbullying matter to apply their literal meanings (offered above).

Of course, the other uncertainty not yet addressed relates to application of the *objective test* in determining whether the particular use of a social media service or relevant electronic communication is offensive or threatening, intimidating, harassing or humiliating from the perspective of a *reasonable person*. The following section addresses how this test may be applied for the purposes of s 48A.

B *The Reasonable Person Test Explained in a s 48A Context*

Reference to the 'reasonable person' in s 48A means that use of a social media service or a relevant electronic service is to be measured by an objective standard — it imports an objective but qualitative criterion on criminal liability. Application of a reasonable person (objective) test to a statutory provision has deep historical

[65] *Smart* (n 48) [1], [7], [8], [9].
[66] Ibid [40].
[67] Ibid.

roots,[68] both in criminal law and tort law (negligence).[69] So who is the reasonable person?

Scholar Mayo Moran comments that 'looking at the reasonable person across his many appearances makes at least one thing clear — he is most often the common or ordinary man'.[70] The characteristics of the reasonable person were considered more recently by the High Court in *Monis.* French CJ noted:

> The characteristics of the reasonable person, judicially constructed for the purpose of such statutory criteria, have been variously described. A 'reasonable man' in *Ball v McIntyre*[71] was 'reasonably tolerant and understanding, and reasonably contemporary in his reactions'. A reasonable person was said, in the Supreme Court of New South Wales, to be 'neither a social anarchist, nor a social cynic'.[72] The reasonable person is a constructed proxy for the judge or jury. Like the hypothetical reasonable person who is consulted on questions of apparent bias,[73] the construct is intended to remind the judge or the jury of the need to view the circumstances of allegedly offensive conduct through objective eyes and to put to one side subjective reactions which may be related to specific individual attitudes or sensitivities.[74]

As espoused in the majority judgement of Crennan, Kiefel and Bell JJ, the reasonable person reflects 'contemporary societal standards, including those relating to robust debate'.[75] In the context of s 48A, then, the assessment as to whether particular use of a social media service or relevant electronic service would be regarded as offensive or as threatening, intimidating, harassing, or humiliating another person is made objectively from the perspective of a person who is reasonably tolerant of contemporary societal standards and opinion and refrains from measuring the alleged conduct against their own subjective sensibilities.

What follows are two examples designed to help better understand how the reasonable person test may apply in relation to the service offence of cyberbullying. The reader may assume that fault elements one to three (see Part IIC above) are established. What is to be determined for the purposes of the examples relates to

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[68] Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27(2) *Monash University Law Review* 197, 223.
[69] Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14(4) *Lewis & Clark Law Review* 1233, 1234, 1236.
[70] Ibid 1236.
[71] *Ball v McIntyre* (1966) 9 FLR 237, 245 (Kerr J).
[72] *Spence v Loguch* (Supreme Court of New South Wales, Sully J, 12 November 1991).
[73] *Johnson v Johnson* (2000) 201 CLR 488, 492 [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[74] *Monis* (n 60) 122–3 [44] (French CJ).
[75] Ibid 210 [336] (Crennan, Kiefel and Bell JJ).

element four — being the physical element of circumstance (application of the objective standard which determines whether an accused uses a social media service or relevant electronic service in a way a reasonable person would regard as offensive or as threatening, intimidating, harassing, or humiliating another person) and element five – being the default fault element of recklessness (that the accused was reckless as to the fact that a reasonable person would regard the use of the service by the member as offensive or as threatening, intimidating, harassing, or humiliating another person).

1 *Video and comment post to 'friends' on social media*

> Flight Lieutenant ('FLTLT') X, being a defence member with a ten-year service history, posts to Facebook a video clip showing graphic images of a person being subjected to physical torture and comments 'this is how Squadron Leader ('SQNLDR') Y treats his subordinates'. SQNLDR Y is a senior officer in FLTLT X's Unit.
>
> FLTLT X intends the post (comprising a video and comment) to be a joke; there is no truth to the comment. FLTLT X's post can only be seen by his 'Facebook friends' who are all in the same Unit.
>
> One of the Facebook friends reports the conduct and FLTLT X is subsequently charged under s 48A *DFDA*.

(a) Element four analysis

FLTLT X's use of Facebook in the manner described is highly likely to be regarded as offensive or threatening, intimidating, harassing, or humiliating another person. Whilst the video itself is likely to be 'removable' content based on Meta Terms of Service,[76] falling afoul of Community Standards,[77] viewed holistically, the post (comprising the video and comment) is, at the very least, likely to offend an ordinary person reasonably tolerant of contemporary societal standards and opinions, putting aside their own subjective sensibilities.

The graphic video and the accompanying post suggest that a senior officer in the ADF engages in practices akin to torture. The inherent (general) nature of the content and the complete absence of any literary, artistic and educational merit factor into a reasonable person's assessment as to whether an offence under s 48A

[76] Meta, *Terms of Service* (Web Page) <https://www.facebook.com/terms/>.
[77] Meta, *Community Standards* (Web Page) <https://transparency.meta.com/en-gb/policies/community-standards/>.

of the *DFDA* has occurred. This particular use of Facebook is highly likely to be regarded as more than a mere annoyance or a displeasure and is likely to have a significant effect on a reasonable person (more than a fleeting emotional reaction). It is irrelevant to consider if FLTLT X intended this post to be 'a joke'; subjective intention of the accused is not an element of the offence. The fact that the material was restricted to FLTLT X's 'Facebook friends' (as opposed to being accessible by the public at large) is a factor which can be taken into account. However, in this case, it is unlikely to make any difference in a reasonable person's assessment of FLTLT X's use of Facebook; the post is so gravely offensive that it is likely to be deemed as falling within the scope of the offence whether directed at one or multiple 'Facebook friends'.

(b) Element five analysis

To establish element five, it must be shown that FLTLT X was aware (that is, had foresight) of a substantial risk that his use of Facebook would be regarded as offensive and that he was unjustified in taking that risk. A substantial risk has been described as 'real and apparent on the evidence presented … not a risk that is without substance or which is fanciful or speculative'.[78] It is not sufficient to demonstrate that the risk that reasonable persons would regard the Facebook post as being offensive was obvious or well known.[79] It also does not matter if FLTLT X subjectively believed he was justified in taking the risk (for example, the post was only accessible by my Facebook friends and they will get the joke).[80]

Sharing content depicting torture or mistreatment of others and commenting on that material in a manner that suggests a senior officer in the ADF condones and engages in such practices lies in deep contradiction to Defence Values. On the facts, it is highly likely that FLTLT X had a conscious awareness that there was a legitimate risk (more than a possibility) that his use of Facebook would be regarded as offensive given his position as an ADF officer and the duration of his service experience in the ADF.

This is a situation where the member's conduct will likely fall within the scope of the service offence of cyberbullying.

[78] *Hann v DPP* (2004) 144 A Crim R 534, [25] (Gray J).
[79] *Smart* (n 48) [41].
[80] Ibid.

(c) Additional comment

Notably, if the material was posted *before* s 48A came into effect on 13 December 2022 and remained on Facebook (noting that, presumably, the content would have been taken down by Facebook), FLTLT X could still be charged under s 48A at a time *after* 13 December 2022. The justification here lies in the fact that the physical element of circumstance requires consideration of FLTLT X's use of Facebook. Use is not isolated to FLTLT X clicking 'post' on his device. Rather, use in this instance relates to both the act of posting and the accessible content itself.

2 *The Skype messages*

> Leading aircraftwoman ('LACW') X receives a Skype Business ('Skype') text message from Leading aircraftman ('LAC') Y, stating 'Don't forget we have a 5 km run this morning. Hope you didn't eat over the weekend; you wouldn't want to die trying to run (laughing emoji)'. LACW feels upset by this comment, but replies 'I'm sure I'll be fine, bought an energy drink with me'.
>
> After the run, LAC Y messages LACW X on Skype again and states 'You must be near death, why do you even bother with the ADF when you know fitness is important. You will never be able to pass your fitness test if you don't start shedding some massive pounds — you run like a fat sick cow (laughing emoji)'.
>
> The following morning, LAC Y messages LACW X on Skype again: 'The fat cow is alive (laughing emoji)! Eat much last night?'.
>
> LACW X reports the behaviour of LAC Y. She is deeply affected by these comments and requests leave. A charge under s 48A *DFDA* is laid.

(a) Element four analysis

LAC Y's use of the Skype messaging service in the manner described is highly likely to be regarded as offensive or threatening, intimidating, harassing, or humiliating to another person. Whilst the comments directed at LACW X are likely humiliating in that the belittling remarks serve to lower the dignity of LACW X, they are also, at the very least, likely to offend an ordinary person reasonably tolerant of contemporary societal standards and opinions, putting aside subjective sensibilities.

The general nature of the comments, being inherently belittling and derogatory to LACW X, and the complete absence of any literary, artistic and educational merit factor into a reasonable person's assessment as to whether an offence under s 48A of the *DFDA* has occurred. The fact that LAC Y's use of Skype involved multiple

comments (rather than just one) can also be taken into account, suggesting that this use of a service is likely to be regarded as more than a mere annoyance or displeasure. The repetitive nature of the remarks is likely to have a significant effect on a reasonable person (more than a fleeting emotional reaction). Including laughing emojis in the comments may be an indication that LAC Y intended the comments to be jovial banter. However, his subjective intention is irrelevant in establishing element four.

(b) Element five analysis

Based on the information available, it is likely that this element can also be established. It is likely that LAC Y had a conscious awareness that there was a real risk, beyond a speculative risk, that his use of Skype would be perceived as reflecting acutely disrespectful discourse, likely to offend a reasonable person. On the facts, there is no plausible justification for LAC Y taking the risk; LAC Y's belief that the comments were mere jovial banter, as shown by his inclusion of laughing emojis in each of the comments, is not a valid justification.

This is a situation where the member's conduct will likely fall within the scope of s 48A of the *DFDA*.

The potential scenarios of a defence member's use of a social media service or relevant electronic service are seemingly limitless. It is important to note that even where a charge under s 48A could be laid against an accused, it does not automatically follow that the charge will be laid. Ultimately, it will be open to Command to determine how to best manage the accused's conduct in accordance with available options under policy.

IV CONCLUDING REMARKS

The new service offence of cyberbullying is a novel addition to the *DFDA*, enacted as part of the recent reforms to the military discipline system to ensure that those who use social media (or another relevant service) to cyberbully another person are held accountable and punished swiftly and fairly. Given that not a single cyberbullying case has been heard by a superior tribunal to date, this article offers guidance on the operation of s 48A of the *DFDA*. The article highlights how references to relevant statutes and case law examining similar offences provide a solid foundation for understanding the meaning of 'offensive' use of a social media or relevant electronic service for the purposes of the provision, a meaning which is narrower than a literal interpretation suggests. Furthermore, guidance for better understanding the reasonable person test (by which the use of a social media service or relevant electronic service is measured) is provided by drawing on relevant case law.

Hypothetical scenarios then give the reader a practical perspective through which to view the application of the objective standard. Ultimately, this article aims to frame or influence internal Defence policy guidance for members, those authorised to lay charges, and those who will hear future cyberbullying matters in furtherance of promoting good order and discipline in the Defence Force.