The defence power, Ch III and service tribunals

Private R v Cowen [2020] HCA 31

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Introduction

Can military service tribunals try ordinary criminal offences? Does the power conferred on the Commonwealth Parliament by s 51(vi) of the Constitution to make laws with respect to 'naval and military defence' authorise the conferral of jurisdiction on service tribunals to try such offences? If so, are such tribunals exercising judicial power contrary to Ch III of the Constitution? When can an alleged contravention of ordinary criminal law by a member of the Australian Defence Force (ADF) be tried by a service tribunal rather than a civil court?

These questions were considered recently by the High Court in *Private R v Cohen* [2020] HCA 31 (*Private R*).

Background

Private R was charged with assault occasioning actual bodily harm contrary to s 61(3) of the *Defence Force Discipline Act 1982* (Cth), which operated to make a contravention of ordinary criminal law a service offence. Where a plea of not guilty is entered, the service tribunal hears sworn evidence subject to the rules of evidence and, upon conviction, is empowered to impose punishment that includes a term of imprisonment. The service tribunal applies the facts to the law to determine liability. The tribunal is established within the chain of command under s 68 of the Constitution, which provides '[t]he command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.

Private R and the complainant were both members of the ADF. They had previously been in an intimate relationship. Private R was alleged to have, inter alia, grabbed the complainant by the throat, pushed her against the wall, shaken her, yelled at her, tackled her to the ground and placed his knees on her chest and choked her with both his hands until two security guards intervened.

Private R argued that the Defence Force

magistrate did not have jurisdiction. The magistrate held that the tribunal had jurisdiction because Private R was a member of the ADF when the charge was committed (the 'service status' test). Private R commenced proceedings in the original jurisdiction of the High Court seeking a writ of prohibition against the Defence Force magistrate from hearing the charge. He argued that the magistrate did not have jurisdiction, because the circumstances of the case were not sufficiently connected to defence force discipline (the 'service connection' test). The Commonwealth contended that 'soldiers whose conduct amounts to the commission of a criminal offence manifest qualities of attitude and character that may detract from the maintenance of a disciplined and hierarchical defence force' and that the 'service status' test was a sufficient basis for the conferral of jurisdiction on the Defence Force magistrate.

Unanimous decision

In five separate judgments, the Court unanimously dismissed Private R's appeal and held that s 61(3) of the Act was valid. Their Honours held that service tribunals do not exercise the judicial power of the Commonwealth under Ch III of the Constitution, although service tribunals are required to act judicially. This system of military justice operates concurrently with, and is supplementary to, ordinary criminal law.

However, their Honours did not agree about whether service tribunals exercised judicial (or executive or administrative) power. They also did not agree about whether it was necessary to prove a 'service connection' between the nature and circumstances of an alleged offence and defence force discipline, or whether 'service status' was sufficient to enable a service tribunal to adjudicate the charge. The Court's approach to these issues is considered seriatim.

Whether service tribunals exercised judicial power

Although the parties accepted that service tribunals exercised judicial power (at [157]), the Court was not unanimous in its approach to this issue.

Kiefel CJ, Bell and Keane JJ held that the text of the constitution and prior cases 'show clearly' that s 68 (and not Ch III) of the Constitution provided the institutional framework within which the disciplinary code enacted under s 51(vi) is to be enforced (at [54]). Their Honours considered it 'more accurate to say that the power so exercised is executive or administrative in character' (at [55]).

Conversely, each of Nettle, Gordon and Edelman JJ appear to have preferred the approach, settled 'for more than a century', that service tribunals exercised judicial power (albeit not the judicial power of the Commonwealth). Nettle J observed that there was 'little of substance to be gained… by now reclassifying the power of service tribunals as administrative power' (at [122]). In a similar vein, Gordon J considered it well-settled that service tribunals exercised judicial power, although it was not necessary to take the step of characterising the power as either judicial or executive (at [134] – [135]). Edelman J held that having regard to the nature of the power and the manner in which it is exercised, the weight of authority and principle support that service tribunals exercise judicial power (at [167] – [171]). Although Gageler J did not expressly refer to this issue, his Honour's approach (at [95]) was largely consistent with the reasoning of Mason CJ, Wilson and Dawson J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 where their Honours also considered it to be uncontroversial that service tribunals exercised judicial power (at [114] (Nettle J) and [164], [173] (Edelman J)).

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Is a nexus required between the alleged criminal offence and defence force discipline?

Five justices held that it was not necessary to establish a connection between the nature and circumstances of the alleged crime and defence force discipline. That is, s 61(3) was a wholly valid exercise of the defence power in all its applications. Kiefel CJ, Bell and Keane JJ observed that requiring ADF members to observe the law of the land 'is readily seen to be a basic requirement of a disciplined and hierarchical force organised for the defence of the nation' (at [80]). Their Honours considered that the 'service connection' test was uncertain, unfocussed and unwieldy (at [85]). This was shown by the 'surprising conclusion' reached by Marshall J in *Solorio v United States* 483 U.S. 435 (1987) that crimes involving the sexual abuse of two daughters of a fellow serviceman did not pose a challenge to the maintenance of order in the local command (at [88]).

Gageler J observed that it had emerged by at least the second half of the nineteenth century that compliance by defence personnel with ordinary criminal law was itself so important to the good order of the forces so as to justify enforcement even if it was not practicable or convenient to do so in the civil courts (at [105]). Edelman J held that to act in contravention of ordinary criminal law 'is not only to break the law, but also to act to the prejudice of good order and military discipline' (at [194]).

However Nettle and Gordon JJ held that it was necessary to establish a connection between the nature and circumstances of the charge and defence force discipline; albeit that this connection was established on the facts alleged. Nettle J held that to the extent s 61(3) treats all offences as service offences regardless of their nature and circumstances, it is not reasonably appropriate and adapted or proportionate to the defence of the Commonwealth (at [130]). Similarly, Gordon J held that the question of whether the law in its application is a law with respect to defence required a connection between the charge that is laid and defence force discipline (at [139]).

Conclusion

Following *Private R*, it appears now to be clear that any crime involving an ADF member defendant can be tried by a service tribunal and it is not necessary to establish a connection between the alleged offence and defence force discipline. Their Honours' disagreement as to whether service tribunals exercise judicial or executive (or administrative) power appears to have devolved to a preference between accepting either: that service tribunals exercise executive or administrative power even though it is a central attribute of judicial power to impose punishment following adjudication; or that the Constitution permits the conferral of judicial power on service tribunals as an exception to the exclusive exercise of judicial power by Ch III courts. BN