



High Court weighs in on the Defence Force Discipline Act

When does the army have a right to punish its soldiers?

PHOTO: Pigsels

DAVID LETTS More

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The High Court has unanimously dismissed the latest challenge to the constitutional validity of the Defence Force Discipline Act 1982, but in doing so the Court has gone much further than any previous decision on this topic, David Letts writes.

In the case of [Private R v Brigadier Michael Cowen](#), decided on 9 September 2020, the High Court of Australia ruled that it is legally valid to proceed with charges under the Australian Defence Force (ADF)'s military discipline law system even in circumstances where the offending conduct occurs outside of what might ordinarily be considered a military context.

A brief explanation of the facts in the case will help to explain.

A 'Private R' had previously been in an intimate relationship with a fellow member of the ADF, but that relationship had ceased some time before 30 August 2015 when the alleged offending took place. On that day, Private R booked a hotel room for use by himself and the fellow ADF member to get changed for a birthday party they were both attending in the Brisbane suburb of Fortitude Valley.

It is alleged that Private R made a series of unwanted advances towards the fellow ADF member at a number of places they visited during the evening, and this culminated in an alleged assault occurring in the hotel room later that night.

In particular, it is alleged that Private R, who was by that time heavily intoxicated and angry, assaulted the fellow ADF member in the hotel room by grabbing her by the throat, pushing her against the wall, shaking her, and yelling at her.

After she broke free, it is alleged that Private R tackled her to the ground, placed his knees on her chest and choked her with both his hands until two security guards entered the room and tackled him. Importantly, neither Private R nor the fellow ADF member were on duty or in uniform when this took place.

After details of the alleged offending emerged a number of years later, Private R was charged by the [Director of Military Prosecutions](#) (DMP) and appeared before a Defence Force Magistrate (DFM), Brigadier Michael Cowen, on 26 August 2019.

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At that hearing, Private R argued that the Defence Force Discipline Act (DFDA) lacked jurisdiction to hear the charge due to a lack of 'service connection' with the alleged offender.



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Arguably, the main legal issue sufficient to enliven its jurisdiction.

High Court was whether the nature of the alleged offence was

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It has been established in earlier cases that the basis upon which the ADF exercises its discipline powers over its members is pursuant to the 'defence power' in Section 51(vi) of the Australian Constitution.

Previous challenges had left some uncertainty as to whether the military's jurisdiction over servicemen and women was based on the so-called 'service connection' test – meaning whether or not the alleged offence was sufficiently connected with the accused person's ADF service – or the 'service status' test – based simply on whether or not the accused person is a serving member of the ADF.

The High Court has settled this issue in emphatic fashion, albeit with different reasoning applied by the Court's judges. A plurality approached the question from a constitutional law perspective, rather than a narrow glance at whether or not any service connection/status could reasonably be established.

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In essence, the plurality stated that defence force personnel are always required to adhere to the law of the land, as this is '... a basic requirement of a disciplined and hierarchical force organised for the defence of the nation'. Further, no constitutional problem arises at all from the military having this requirement.

Perhaps the most telling reasoning in the High Court's decision in Private R is that provided by Justice Gageler, who said that the DFDA prescribes a rule of conduct for defence members – compliance with the ordinary criminal law – which assists with maintaining the good order and discipline of the defence force, as well as supplementing ordinary criminal law.

Justice Gageler was also emphatic that previous challenges to the constitutional validity of the DFDA should be '... determined once and for all...', thereby signalling that the High Court had made its final decision on the matter.

The High Court's decision in Private R v Brigadier Michael Cowen has settled an area of uncertainty regarding the extent of the reach of military discipline law that has existed for more than 30 years and marks a significant step in the Australian legal landscape.

In doing this, the Court has made it very clear that the military can prosecute a case against a defence member, under military discipline law, even when that case might ordinarily be prosecuted by a state or territory court.

The Court's reasoning is that the Parliament has made it clear that it expects members of the ADF to abide by the law, and that a breach of this requirement is a clear breach of the expectation placed upon members of the ADF as being part of a disciplined armed force.

Whether or not the High Court's decision will result in an explosion of military discipline law cases remains to be seen, but the implications are clear for members of the ADF: disobey the law of the land at your peril.



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