

RULE OF LAW

INSTITUTE OF AUSTRALIA

Australian Soldiers Charged

*A case study examination in the context of the
year 11 preliminary legal studies course (NSW)*

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RoLIA

The Rule of Law Institute is an independent non-profit association formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

RoLIA advocates:

- On legislation which respects the rule of law.
- On the need for education on the rule of law.
- Against excessive use of power by the executive.
- On enhanced parliamentary scrutiny of our regulators.
- On the need for a free press.
- On the independence of open courts.

Introduction

This presentation studies the case of two Australian commandos who were charged over an incident in Afghanistan in 2009.

Through this, the presentation will examine:

- Basic legal concepts
 - Meaning of law
 - Procedural fairness
 - Rule of law
 - Anarchy and tyranny

Introduction

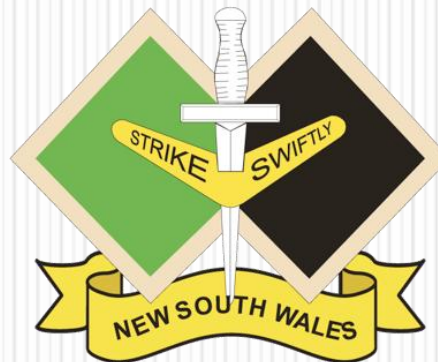
- Sources of contemporary Australian common law
 - Court hierarchy
- Classification of law
 - Military criminal procedures including legal personnel
 - Comparison between military and civilian criminal proceedings
- Resolving disputes
 - The role of the media and interest groups

Introduction

- Law in practice
 - Relationship between justice, law and society
 - Importance of the rule of law
 - Responsiveness of the legal system in dealing with issues
 - The effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society

The Facts

- February 12, 2009 - Australian soldiers from the elite 1st Commando Regiment undertook a night-time raid in pursuit of a suspected enemy leader in Afghanistan's Uruzgan province.



- During that raid, five children were killed along with a suspected Taliban fighter. Two additional children and two additional adults were injured.

The Facts

- Three senior Australian commandos were charged over the incident.
- Two of these commandos, identified only as Sergeant J and Lance Corporal D were charged with manslaughter and in the alternative, two counts of dangerous conduct with negligence as to consequence.



The Rule of Law

- **Law** – recognised and enforceable rules that are binding on those within the jurisdiction.
- **Jurisdiction** – the area over which a court or government has authority.
- **Rule of law** – encompasses several aspects including that all people and institutions are equal before the law.
- **Procedural fairness and natural justice** - Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. Natural justice is associated with procedures used within the court system.



The Rule of Law applying to the Soldiers

- **Anarchy** – the absence of the rule of law, a state of lawlessness
- **Tyranny** – the absence of the rule of law, a ruler or government vested with absolute power
- “The ability to call to account not only our opponents but our own...is the mark of a mature civilised society in which the rule of law is well-established.” – Justice Paul Brereton in an address to the 2010 RoLIA conference.



Qaddafi



Hitler



Mugabe

The Rule of Law applying to the Soldiers

Review questions:

1. How does the prosecution of soldiers charged with offences demonstrate the operation of the rule of law?
2. How does the operation of the rule of law contrast with anarchy and tyranny?



Disciplinary proceedings

- Discipline within the Australian Defence Force (ADF) is governed by the Defence Force Discipline Act (1982) (DFDA).
- The ADF conducted an investigation of the incident and in November 2009 referred the matter to the Director of Military Prosecution (DMP).



DMP Brigadier Lyn McDade

Disciplinary proceedings

- The DMP requested further investigations be undertaken and these proceeded through 2010.
- After viewing these investigations and consultation with the ADF under s 5A of the *DFDA*, the DMP decided to charge and prosecute the soldiers under s 87(1) *DFDA*.
 - DMP decision to charge soldiers
- Following a decision to prosecute, the matter is heard by courts-martial, constituted by service personnel

Disciplinary proceedings

- The legal personnel involved in the process include the:
 - **ADF investigation service** who investigate alleged breaches of the *DFDA*.
 - **DMP** who decides whether or not the individuals will be charged
 - An office created by *DFDA* s 188G
 - Given functions by *DFDA* s 188GA
 - A military officer although independent of the chain of command
 - Has a Prosecution Policy which outlines matter to consider when deciding whether or not to prosecute
 - **Prosecution and defence teams**
 - Tasked with representing their positions to the courts-martial. Includes raising a case and discrediting the case of the opposing party.
 - **Members of the military courts-martial**
 - Decides the guilt or innocence of the accused person
 - Constituted by military officers

Disciplinary proceedings

188GA Functions of the Director of Military Prosecutions

- (1) The Director of Military Prosecutions has the following functions:
 - (a) to carry on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate, whether or not instituted by the Director of Military Prosecutions;
 - (b) to seek the consent of the Director of Public Prosecutions as required by section 63;
 - (c) to make statements or give information to particular persons or to the public relating to the exercise of powers or the performance of duties or functions under this Act;
 - (d) to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal;
 - (e) to do anything incidental or conducive to the performance of any of the preceding functions.

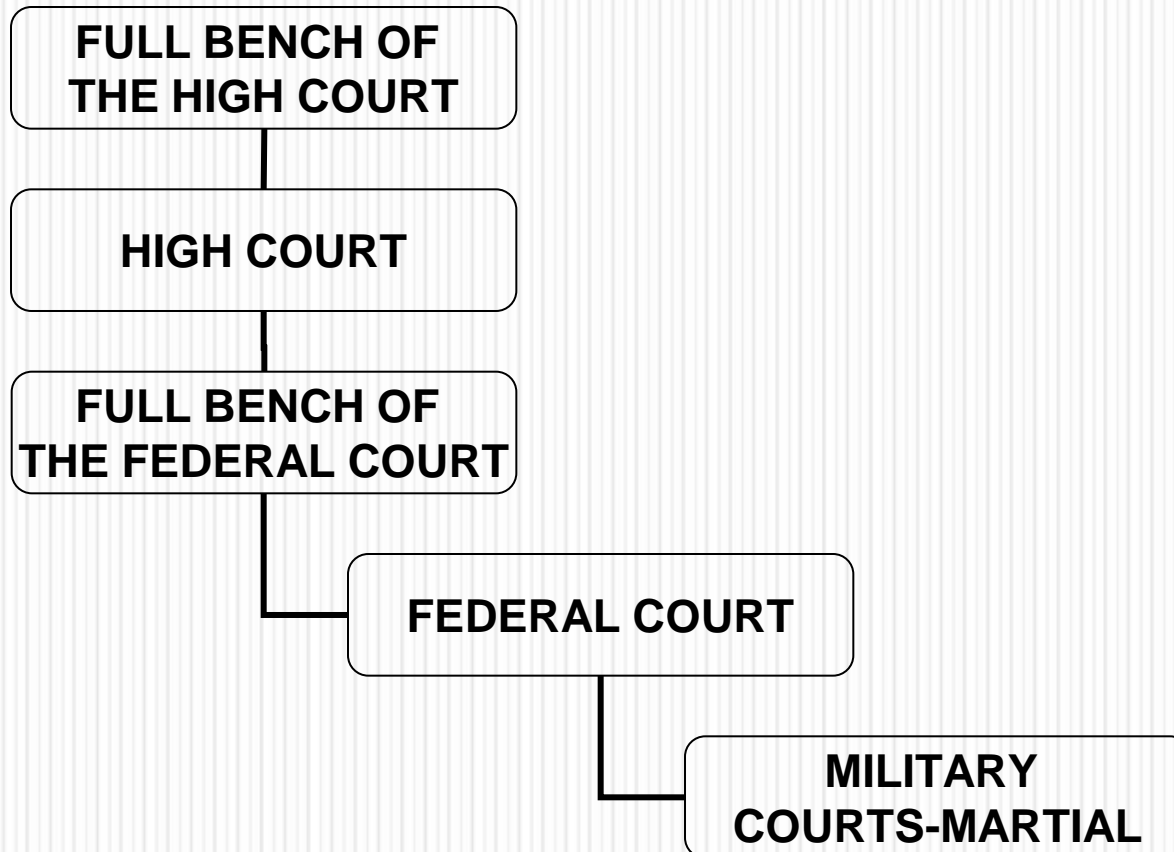
- (2) In addition to his or her functions under subsection (1), the Director of Military Prosecutions also has:
 - (a) the functions conferred on the Director of Military Prosecutions by or under this Act or any other law of the Commonwealth; and
 - (b) such other functions as are prescribed by the regulations.

Disciplinary proceedings

- Comparing courts-martial with civilian court

	Courts-martial	Civilian court
System	Adversarial	Adversarial
Standard of proof	Beyond reasonable doubt	Beyond reasonable doubt
Judge	Judge advocate	Judge
Jury	A panel of military officers	A panel of lay-persons
Prosecution service	Director of Military Prosecutions	Director of Public Prosecutions
Appeal process	Yes	Yes

Court hierarchy



Disciplinary proceedings

Review questions:

1. What are the benefits of having military officers with specialist knowledge, understanding and experience as members of the military courts-martial?
2. Do you agree with the idea of a military courts-martial or should the soldiers be prosecuted within a civilian court? Why/why not?
3. Do similar disciplinary tribunals exist in other professions?
4. What are the reasons for a court hierarchy? Does a court hierarchy support the rule of law?

Media and interest groups

The case attracted intense debate within the media, interest groups and the wider Australian community.

- ABC news video
 - [Soldiers charged over civilian deaths](#)
 - [Labor accused of betraying Australian soldiers](#)
 - [Diggers charged over Afghan civilian deaths](#)
- Print media
 - [Sydney Morning Herald - article 1](#)
 - [Sydney Morning Herald - article 2](#)
 - [The Australian - article 1](#)
 - [The Australian - article 2](#)

Media and interest groups

- Soldiers statement
 - [Statement](#)
- Alan Jones
 - [Alan Jones' comment on the matter](#)
 - [Media Watch article and audio regarding Alan Jones](#)
- RSL
 - [RSL Statement on the matter](#)
- ADF
 - [ADF comment](#)

Media and interest groups

The media can be effective as a means of highlighting issues of law and legal proceedings that have public appeal and implications.

However, the rule of law requires that legal proceedings be undertaken without influence or interference from people and institutions outside the court system.

This is enforced through the law of contempt

It is a contempt of court to engage in conduct that might improperly influence the outcome of pending prosecutions in civil courts.

The [Defence Act, s 89](#) may also apply in the current circumstances.

Media and interest groups

Justice Brereton states that:

“The law of contempt, in its protection of participants and witnesses in litigation from improper pressure and vilification that might otherwise divert the course of justice is an essential and insufficiently appreciated pillar of the rule of law”

Media and interest groups

- With topical cases, it is clear to see the relationship between justice, law and society.
- The importance of the rule of law in protecting the operation of justice is clear.
- It is also clear that the legal system is sufficiently able to deal with issues as they arise and that both legal and non-legal mechanisms exist for the furtherance of an individual's justice



Media and interest groups

Review questions:

1. What role does the media play in legal proceedings?
2. How does the rule of law protect the deliverance of justice from potentially improper pressure that may divert the course of justice?

Outcome for the Commandos

- Chief Judge Advocate, Brigadier Ian Westwood, during the pre-trial directions hearing in May 2011 in the court martial dismissed the case and ruled that the case against the pair would not proceed to a court martial that was schedule for July 2011.
- Brigadier Westwood dismissed the charges because they "did not disclose service offences" and that it had to be established that the soldiers had a duty of care before it could be decided whether or not they'd been negligent. Brigadier Westwood found an "absence of plain words" on any duty of care to non-combatants.

[Transcript of proceedings](#)



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Outcome for the Commandos

- Brigadier Westwood referred the charges back to the DMP, Brigadier Lyn McDade, who was to decide:
 1. whether to bring further charges
 2. seek a review of the decision in the Federal Court
 3. not to pursue the matter further



High Court of Australia

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Outcome for the Commandos

- Brigadier McDade ultimately decided not to pursue any further prosecution of these soldiers in this matter and would not seek a review of the ruling.
 - Media release - DMP not taking further action against soldiers

Recap

- Defined legal concepts
- Examined the rule of law's application to the soldiers' case
- Examined the disciplinary proceedings faced by the soldiers
- Examined the role of media and interest groups and the relevance of the rule of law
- Had an overview of the law in practise

Questions

- Either alone or in a group, act as the DMP and discuss and present reasons for prosecuting the soldiers.
- Either alone or in a group, act as the RSL and discuss and present reasons for not prosecuting the soldiers.
- Why is contempt of court an important aspect of the rule of law?



Questions

- Do you agree with Justice Paul Brereton’s conclusion in his address to the 2010 Rule of Law in Australia Conference that a courts-martial is better equipped to judge prosecutions for service offences than a judge of a Chapter III Court?
Why/Why not?
- In their media release, the RSL argue that the “excessive and unexplained” delays for the soldiers to come to trial are an affront to the deliverance of justice. Do you agree with their argument and does this raise rule of law concerns?

Questions

- Examining the [Defence Act 1903, s 89](#), consider if this imposes restrictions on what the media can say. For example Alan Jones.
- With regard to the DMP's [Prosecution Policy](#), outline the factors in favour of prosecuting the soldiers and those factors against prosecution.
- You are defending Sergeant J. How will you collect evidence of the incident and test the truth of what the Afghans claimed happened? Who pays for this?
- How realistic is it to expect a soldier to be under a duty of care to non-combatants when in the heat of a physical battle?
- Sergeant J must be subject to the rule of law but also must be protected by it. How can this happen? The Israeli Courts have said useful things on the subject.

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Thank you

Further resources are available at our
website: www.ruleoflaw.org.au