

Explainer: how Australia's military justice system works

Written by Sam Hartridge, Teaching Fellow and PhD Candidate, UNSW



The rules of engagement regulate the conduct of Australian troops in conflict areas. AAP/Dave Hunt

The ABC this week published [leaked defence force documents](#) that allege Australian special forces soldiers in Afghanistan committed acts such as possible unlawful killings. If the allegations are found to be true, how could those involved be charged and prosecuted?

How is the system established?

The [Defence Force Discipline Act](#) establishes the main facets of Australia's military justice system. This includes the director of military prosecutions, who prosecutes Australian Defence Force (ADF) members for serious criminal conduct. The act also sets up our system of military tribunals, including defence force magistrates and courts martial.

Unlike most domestic criminal law, the act applies [extra-territorially](#). This allows the ADF to respond to criminal conduct alleged to have taken place overseas.

The act also sets out the “service offences” that can be committed by defence members (and a small category of civilians). There are three broad kinds of offences:

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those that are unique to the defence force, such as [disobeying a lawful general order](#) or being [absent without leave](#)

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those that are similar to civilian offences but have specific service aspects to them – for example, [assaulting a superior officer](#). In light of the discipline implications, sometimes these offences have penalties far more severe than their civilian counterparts; and

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those that are more directly analogous to civilian offences in the sense that they are not as military-specific – for example, [assault](#) .

This last category contains “territory offences”. These are criminal offences that apply to the Jervis Bay Territory.

What are territory offences?

Territory offences are those punishable under any law in force in the [Jervis Bay Territory](#) . The Jervis Bay Territory is under Commonwealth jurisdiction and largely subject to the ACT’s laws.

Specifically, this includes the [Crimes Act](#) , and the ACT common law. But a territory offence does not need to have been committed in the Jervis Bay Territory – and so it applies to offences committed by ADF troops overseas.

The effect of this is that territory offences incorporate the entire range of criminal offences into the Defence Force Discipline Act. This includes the most serious crimes – such as murder, assault, and sexual-based violence.

Prosecution for war crimes

The director of military prosecutions may also choose to prosecute ADF members under the [Commonwealth Criminal Code](#) .

The code creates several war crimes. These offences are territory offences, and are also subject to [universal jurisdiction](#) . This means it does not matter whether or not the conduct constituting the alleged offence occurs in Australia.

The code also includes command responsibility as a mode of criminal liability. This means commanders can be criminally liable if they knew or were reckless about whether their troops

were committing offences, and they failed to take “all necessary and reasonable measures” within their power to prevent or repress the offences, or to submit the matter to a competent authority for investigation and prosecution.

What are courts martial and defence force magistrates?

Proceedings for serious service offences are held before courts martial or defence force magistrates. These proceedings are headed by civilian judicial officers, who are also serving members of the military (usually reservists).

These service tribunals have broadly the same rules of evidence and procedure – and protections for the accused – as civilian courts.

Courts martial consist of a judge advocate and a panel of military officers, who are called the members of the court. The judge advocate’s role is to make rulings on questions of law and procedure. The members of the court make findings of fact and determine punishment.

These service tribunals’ decisions are subject to review by the chain of command, and can be appealed to the [Defence Force Discipline Appeals Tribunal](#) .

What are the rules of engagement?

The [rules of engagement](#) regulate the conduct of Australian troops. The federal government formulate them for particular operations.

These rules are based on domestic and international law, as well as policy requirements and other considerations such as status of forces agreements. Accordingly, the formulation process ordinarily involves the departments of Defence, Foreign Affairs and Trade, and Attorney-General.

The rules of engagement for any given operation are not law as such, and reflect the government’s decisions. This means they may be narrower than the law. So, the rules of engagement may forbid acts that either Australian domestic law or international law would

otherwise permit.

While the rules of engagement are not law, they ordinarily apply to ADF members as a lawful order for the purposes of the Defence Force Discipline Act. This means that a failure to comply with the rules is a service offence.

What is the role international humanitarian law?

International humanitarian law, also known as the law of armed conflict, is the primary body of international law that seeks to regulate belligerents' conduct in armed conflict.

The law consists of several treaties, including the four [Geneva Conventions](#) and their additional protocols, as well as a large body of customary international law.

These rules set out what is and isn't permissible in armed conflict. The overarching aim is to alleviate the suffering of war by protecting those who are not part of the fight, such as civilians or medical personnel, and restricting the means and methods of warfare.

This law forms the basis for international war crimes law, such as the offences found in Article 8 of the [Rome Statute](#), which established the [International Criminal Court](#). It also provides the foundation for the offences in Australia's Commonwealth Criminal Code.

Accordingly, if there were to be war crimes prosecutions under Australia's code, then the prosecuting authority would probably draw from relevant international materials and the legal principles of international war crimes tribunals.

Further reading: [How a special forces 'band of brothers' culture leads to civilian deaths in war](#)

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