
THE RULE OF LAW

The rule of law allows us to live in a country where laws regulate our actions so that we can enjoy our rights and freedoms without hurting others. ***The fundamental principle of the rule of law is the supremacy of law – we all have defined rights and responsibilities and everyone is answerable to the law.***

The following characteristics have been identified as elements of the rule of law:

- The supremacy of law;
- The separation of powers;
- Equality before the law; and
- Clear and prospective legislation.

1. Read the following and identify which aspect/s of the Rule of Law is illustrated in each:

- a. Judge Marcus Einfield was sentenced to two years imprisonment for perjury and for perverting the course of justice over a \$77 speeding fine.
A NSW Judge was charged in the same way that any other citizen would have been treated in the circumstances and this illustrates the Supremacy of Law.
- b. WA's mandatory sentencing laws force judges to impose jail terms for assaults against police, ambulance officers, prison guards and security staff on public transport and in the courts.
Separations of powers - Judges' discretionary powers have been restricted. Such legislation tends to have unintended consequences, as was the case of the mentally ill person who was one of the first people charged under the new legislation. This bill removes the discretionary power of the judicial officer and reduces their capacity to take in to account factors such as age, mental illness and prior good character in the sentencing process.
'We have seen with the mandatory sentencing laws that the police and the Director of Public Prosecutions are being given discretionary powers to, in effect, determine whether a person would go to prison, rather than have a judge determine the matter as part of the independent judicial process.'¹
- c. Families enjoying a favourite wine or beer at beaches and parks across Perth on Australia Day 2010 were targeted in the same way as drunken louts. The police say that street drinking is illegal 365 days a year for everyone, and they cannot be expected to turn a blind eye.²
Supremacy of law – all citizens are treated equally before the law.
- d. The proposed Criminal Organisations Control Bill being debated in the WA Parliament proposes to give Courts the power to declare bkie gangs criminal organisations and bkie members will be prohibited from associating with one another.
Equality before the law – the power to prohibit members of bkie gangs from associating with one another due to their association with a bkie gang raises equality before the law questions.

¹ The Law Society of Western Australia, *New Stop and Search Laws to Bring WA Closer to Police State*, <http://www.lawsocietywa.asn.au/article.php?article_id=482>.

² Beatrice Thomas and Adrian Watson, 'Police ban 'quiet drink' on Australia Day', *The West Australian* (Perth) 13 Jan, 2010, 20.

- e. Read the following section of the Criminal Code.

Self-defence against provoked assault S249

When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe on reasonable grounds that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

- f. Is this legislation easy to understand? Describe its meaning in your own words.

No, for a lot of people in the community S249 would be difficult to understand.

When Person 1(P1) assaults or provokes Person 2 (P2) and P2 responds by assaulting P1 and P1 reasonably fears death or grievous bodily harm (GBH) and reasonably believes that it is necessary to use force to prevent their death or GBH P1 can use force to prevent their death or GBH and will not be criminally responsible, even if that force results in death or GBH of P2.

ANTI-GRAFFITI LAWS

From 1 January 2010 it is illegal in Western Australia to sell spray paint and certain marker pens or similar implements to persons less than 18 years of age. The penalty is a maximum fine of \$6,000 for a first offence and a maximum fine of \$12,000 for a subsequent offence.

Sellers and their employees will have to take reasonable steps to be satisfied that the purchaser is not a minor. This can be done by sighting a current driver's licence or other suitable identification.

What is a "graffiti implement"?

"Graffiti implements" are defined in Chapter 24 of the *Criminal Code (WA)* to mean:

- spray paint;
- a pen or marker pen, or similar implement, that –
 1. has a tip over 6mm wide; and
 2. contains a fluid that is not water soluble and can mark a surface.

- g. Why did the Western Australian parliament introduce this legislation?

The new laws will complement the efforts of government agencies, local governments and the community to combat graffiti vandalism by increasing existing penalties to deter offenders, and introducing new offences and penalties to prohibit the sale, and reduce availability, of graffiti implements to minors.

- h. How would you rate the graffiti legislation in terms of the rule of law?

The legislation brings the purchase of the items identified as graffiti implements in line with a number of other goods which are not available to minors, e.g. alcohol, cigarettes etc. The difference with this law, however, is that some young people may be using the markers for a very legitimate purpose and they may claim that they are being discriminated against as a result of this legislation.

- i. Name some other laws or proposed laws which illustrate the use/misuse of the Rule of Law.

June 2011: The WA Police forcing the cancellation of 'Kronic' events which were to be held the night prior to new legislation criminalizing the synthetic cannabis came into effect. *Under the rule of law legislation should be prospective and it would appear that the WA Police were acting on legislation prior to it becoming enforceable.*

CHOGM 2011: The enacting of laws specific to CHOGM such as stop and search powers, the handing of police powers to security officers in some circumstances and the suspension of judicial review (appeals) under some parts of the Commonwealth Heads of Government Meeting (Special Powers) Bill 2011. *Under the rule of law everyone is equal before the law and there are enshrined rights and freedoms. The special powers created in this legislation question these elements of the rule of law during CHOGM.*

Diplomatic immunity raises some significant questions under the principle of the rule of law. Such immunity guarantees diplomats safe and unhindered passage in the fulfillment of their duties.

PRINCIPLES OF NATURAL JUSTICE/PROCEDURAL JUSTICE

The principles of natural justice/procedural justice originated from the Magna Carta 1215:

- 39 'No freeman shall be arrested or imprisoned or disseised (to deprive somebody wrongfully of possession of land) or outlawed or exiled or in any other way harmed. Nor will we [the king] proceed against him, or send others to do so, except according to the lawful sentence of his peers and according to the Common Law.'³

The following is a translation of section 39 of the Magna Carta 1215.

- 39 No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.⁴

The main principles of natural justice are:

1. Disputes should be heard by an unbiased judge, and
2. Each party should have an equal opportunity to present their case,

A particularly relevant case to natural justice and procedural fairness is the High Courts' 'Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41 (11 November 2010)' judgment and a summary of that judgment

³ Magnacartaplus.org, *The 1215 Magna Carta*, <<http://www.magnacartaplus.org/magnacarta/index.htm>>.

⁴ Fordham University, *The Text of Magna Carta*, <<http://www.fordham.edu/halsall/source/magnacarta.html>>.

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can be accessed via <http://www.hcourt.gov.au/publications/judgment-summaries/2010-judgment-summaries>