



New Zealand  
**DEFENCE  
FORCE**  
Te Ope Kātua O Aotearoa

# MANUAL OF ARMED FORCES LAW

**Commander's Handbook on Military Law**

DM 69 (2 ed) Volume 1

**A FORCE FOR  
NEW ZEALAND**

**Amendment No.6 to Manual of Armed Forces Law (2<sup>nd</sup> Edition) Volume 1**

1. This amendment makes various changes and additions to Chapter 3 and Chapter 4.
2. Delete and replace the listed pages of DM 69 (2 ed) Volume 1, as indicated below.

**Contents**

Remove Pages			Insert New Pages		
i	through	iv	i	through	iv

**Chapter 3: Preliminary Inquiries into Suspected Offences**

Remove Pages			Insert New Pages		
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			3-7b	reverse	3-8
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4-9	reverse	4-12	4-9	reverse	4-12

Dated at WELLINGTON this 8<sup>th</sup> day of June 2020



L.M. Ferris  
Brigadier  
Director Defence Legal Services

**AMENDMENT No. 5 TO MANUAL OF ARMED FORCES LAW (2<sup>nd</sup> EDITION)  
VOLUME 1**

1. This amendment updates provisions in light of the Armed Forces Discipline Amendment Act 2010.
2. Replace the listed pages of the Manual of Armed Forces Law (2<sup>nd</sup> Edition) Volume 1, as indicated below.

**Chapter 7: Summary Proceedings**

Remove Page			Insert New Page		
7-11	reverse	7-12	7-11	reverse	7-12
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**Chapter 8: Punishment**

Remove Page			Insert New Page		
8-7	reverse	8-8	8-7	reverse	8-8

11 October 2010

By order of the Chief of Defence Force

  
**K.J. RIORDAN**  
Brigadier  
Director General Defence Legal Services

**AMENDMENT NO 4 TO MANUAL OF ARMED FORCES LAW (2ND EDITION)  
VOLUME 1**

1. This order amends the following pages of DM 69 (2 ed) Volume 1. Errors in form or substance that have been noted since initial publication of the Volume are remedied with this amendment.

2. Replace the listed pages of DM 69 (2 ed) Volume 1, as indicated below.

**Chapter 1: Introduction**

Remove Page			Insert New Pages		
1-1	reverse	1-2	1-1	reverse	1-2
1-7	reverse	1-8	1-7	reverse	1-8

**Chapter 2: Jurisdiction**

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## Chapter 11: Inquiries

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## Chapter 12: Cooperation with the Civil Authority

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## Chapter 13: Discipline Forms

Remove Form		Insert New Form	
MD613		MD613	

Dated at WELLINGTON this 30<sup>th</sup> day of August 2010.

  
J. MATEPARAE  
Lieutenant General  
Chief of Defence Force

**AMENDMENT No. 3 TO MANUAL OF ARMED FORCES LAW (2<sup>nd</sup> EDITION)  
VOLUME 1**

1. This order amends the following 65 pages of the Manual of Armed Forces Law (2<sup>nd</sup> Edition) Volume 1. Errors in form or substance that have been noted since initial publication of the Volume are remedied with this amendment.

2. Replace the listed pages of the Manual of Armed Forces Law (2<sup>nd</sup> Edition) Volume 1, as indicated below.

**Amendment Sheet**

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**Chapter 6: The Law of Evidence**

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## Chapter 13: Discipline Forms

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-			MD601D		
MD613			MD613		
MD631			MD631		

Dated at WELLINGTON this 13<sup>th</sup> day of January 2010.

  
J. MATERPARAE  
Lieutenant General  
Chief of Defence Force

**AMENDMENT No. 2 TO MANUAL OF ARMED FORCES LAW (2nd EDITION)**

1. This amendment replaces Volume 1, Chapter 4, page 4–11 with revised provisions detailing which classes of offence may be tried only in the Court Martial.
2. Replace the listed pages of the Manual of Armed Forces Law (2nd Edition) as indicated below.

**Volume 1**

Chapter 4 Offences and Charges

<u>Remove Page</u>	<u>Insert New Page</u>
4–11 reverse 4–12	4–11 reverse 4–12

**Volume 2**

To be issued.

**Volume 3**

Nil changes.

**Volume 4**

To be issued.

27 July 2009

By order of the Chief of Defence Force

  
**K.J. RIORDAN**  
Brigadier  
Director General Defence Legal Services



**AMENDMENT No. 1 TO MANUAL OF ARMED FORCES LAW (2<sup>nd</sup> EDITION)  
VOLUME 1**


1. This amendment replaces Annex C to Chapter 7 with a new Annex C to Chapter 7, which prescribes the Disciplinary Officer Procedure for a Not Guilty Plea.
2. Replace the listed pages of the Manual of Armed Forces Law (2<sup>nd</sup> Edition) Volume 1, as indicated below.

**Chapter 7: Summary Proceedings**

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23<sup>rd</sup> February 2009

By order of the Chief of Defence Force

  
**K.J. RIORDAN**  
Brigadier  
Director General Defence Legal Services

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**SECTION 1 – THE COMMANDER’S HANDBOOK ON MILITARY LAW**

- 1.1.1** This volume of the Manual of Armed Forces Law is designed primarily for use by commanders at all levels who are responsible for administering summary discipline and inquiring into incidents and accidents.
- 1.1.2** The contents of this volume are Defence Force Orders issued pursuant to the AFDA. These orders come into force on 1 July 2009. The text is authoritative only to the extent that it is consistent with provisions of the Armed Forces Discipline Act 1971 (AFDA) and other Acts of Parliament, statutory instruments and relevant judicial decisions. In the event of any inconsistency, the Act, statutory instrument or judicial decision prevails. The AFDA and other relevant statutory instruments are reproduced in Volume 3 of this manual.
- 1.1.3** No non-statutory provision in this volume is to be construed as prevailing over any applicable Act of Parliament or any regulations or rules made under it. In the event of conflict between the provisions of the Manual of Armed Forces Law and any other orders or procedures issued within the New Zealand Defence Force, this manual is to prevail. Any such conflict is to be reported through service channels to the Chief of Defence Force, for the attention of the Director General of Defence Legal Services, without delay. Any other errors or omissions are to be similarly reported.
- 1.1.4** Terms used in the Manual of Armed Forces Law take their meanings from AFDA s 2 and s 2 of the Defence Act 1990 (DA) unless otherwise indicated. A glossary of terms is prescribed at p 1-4. The meanings of abbreviations used are prescribed on p 1-3. Unless the context otherwise requires, any reference to a paragraph in this volume refers to a paragraph within this volume.
- 1.1.5** The Manual of Armed Forces Law is administered by the Directorate of Legal Services, Headquarters New Zealand Defence Force, Wellington.
- 1.1.6** In any case of doubt as to the proper interpretation of any provision of military law, a legal officer is to be consulted without delay.

4<sup>th</sup> November 2008

By order of



J. MATEPARAE  
Lieutenant General  
Chief of Defence Force

## ABBREVIATIONS

<b>AFDA</b>	Armed Forces Discipline Act 1971
<b>AFDR</b>	Armed Forces Discipline Regulations 2008 (also designates an individual regulation)
<b>CA</b>	Chief of Army
<b>CAF</b>	Chief of Air Force
<b>CDF</b>	Chief of Defence Force
<b>CMA</b>	Court Martial Act 2007
<b>CMAA</b>	Court Martial Appeals Act 1953
<b>CMAC</b>	Court Martial Appeal Court
<b>CN</b>	Chief of Navy
<b>CO</b>	Commanding Officer
<b>COMJFNZ</b>	Commander Joint Forces New Zealand
<b>DA</b>	Defence Act 1990
<b>DFO</b>	Defence Force Order
<b>DGDLS</b>	Director General of Defence Legal Services. For the purposes of DM 69 (2 ed), DGDLS includes the appointment of Director of Legal Services (DLS).
<b>DMP</b>	Director of Military Prosecutions
<b>DR</b>	Defence Regulations 1990 (also designates an individual regulation)
<b>HQJFNZ</b>	Headquarters Joint Forces New Zealand
<b>HQNZDF</b>	Headquarters New Zealand Defence Force
<b>JAG</b>	Judge Advocate General
<b>JNCO</b>	Junior non-commissioned officer
<b>NCO</b>	Non-commissioned officer
<b>r</b>	rule
<b>reg</b>	regulation
<b>RNZAF</b>	Royal New Zealand Air Force
<b>RNZN</b>	Royal New Zealand Navy
<b>RNZNR</b>	Royal New Zealand Naval Reserve
<b>RNZNVR</b>	Royal New Zealand Naval Volunteer Reserve
<b>RP</b>	Armed Forces Discipline Rules of Procedure 2008 (also designates an individual rule)
<b>s</b>	section (of an Act)
<b>SACNZ</b>	Summary Appeal Court of New Zealand
<b>SNCO</b>	Senior non-commissioned officer
<b>TAF</b>	Territorial Air Force of the RNZAF
<b>TF</b>	Territorial Force of the New Zealand Army
<b>VCDF</b>	Vice Chief of Defence Force



## GLOSSARY OF TERMS

Term	Meaning	Authority
<b>Active service</b>	<p>A part of the Armed Forces is on active service when:</p> <ul style="list-style-type: none"> <li><b>a.</b> There is for the time being in force an active service order, issued by or under the authority of CDF, posting it for active service; or</li> <li><b>b.</b> It is engaged in operations against the enemy; or</li> <li><b>c.</b> It is in armed occupation of any foreign country.</li> </ul> <p>A member of the Armed Forces is on active service when:</p> <ul style="list-style-type: none"> <li><b>a.</b> There is for the time being in force an active service order, issued by or under the authority of CDF, posting that member for active service; or</li> <li><b>b.</b> The part of the Armed Forces with which that member is serving or which that member is visiting is on active service.</li> </ul>	AFDA s 5
<b>Air Force</b>	The Royal New Zealand Air Force.	DA s 2(1)
<b>Allied force</b>	A force or part of a force of another country acting in co-operation with a part of the Armed Forces.	AFDA s 2(1) DA s 2(1)
<b>Armed Forces</b>	The Navy, the Army and the Air Force collectively. The term includes any branch, corps, formation, unit or other part of the Armed Forces, but does not include any part of the cadet forces.	AFDA s 2(1) DA s 2(1)
<b>Army</b>	The New Zealand Army.	DA s 2(1)
<b>Civil offence</b>	An offence against any Act other than the AFDA.	AFDA s 74(1)
<b>Enemy</b>	<p>Any country, or any armed force, or any authority or government controlling any such force, with which New Zealand, or any force acting in cooperation with any part of the Armed Forces of New Zealand, is at war or is engaged in armed combat operations.</p> <p>The term includes:</p> <ul style="list-style-type: none"> <li><b>a.</b> Any member of any such armed force or any member of that authority or government;</li> <li><b>b.</b> Any person materially assisting that country, force, authority, or government in its war effort or armed combat operations;</li> </ul>	AFDA s 2(1) DA s 2(1)

## GLOSSARY OF TERMS continued

Term	Meaning	Authority
	<p><b>c.</b> Any ally of that country, force, authority, or government;</p> <p><b>d.</b> All pirates; and</p> <p><b>e.</b> All armed persons who are engaged in any mutiny, rebellion, or riot against New Zealand or against any Service authority of the Armed Forces of New Zealand or against any ally of New Zealand.</p>	
<b>Judge</b>	A Judge of the Court Martial.	AFDA s 2(1) and CMA s 5(1)
<b>Military tribunal</b>	The Court Martial of New Zealand, the Summary Appeal Court of New Zealand, or a disciplinary officer.	AFDA s 2(1)
<b>Navy</b>	The New Zealand Naval Forces.	DA s 2(1)
<b>Preliminary inquiry</b>	A disciplinary investigation which precedes the recording of a charge under the AFDA, to determine whether the allegation is well-founded.	
<b>Regular forces</b>	The RNZN, the Regular Force of the Army and the Regular Air Force.	DA s 2(1)
<b>Reserve forces</b>	The Naval Reserves (other than the RNZNR and RNZNVR), the Army Reserve and the Air Force Reserve.	DA s 2(1)
<b>Right of election</b>	The right to elect trial by the Court Martial.	
<b>Service offence</b>	An offence against the AFDA, other than an offence against AFDA s 74(1).	
<b>Territorial forces</b>	The RNZNR, the RNZNVR, the TF and the TAF.	DA s 2(1)

## **SECTION 2 – GENERAL ORDERS FOR DISCIPLINE**

### **GENERAL DUTY OF MEMBERS OF THE ARMED FORCES**

- 1.2.1** it is the duty of all members of the Armed Forces to comply with the lawful orders of their superior officers (as defined in AFDA s 2) and with the established customs and practices of the Service to which they belong and, where applicable, the Service or joint force to which they are attached.

### **ADDITIONAL RESPONSIBILITIES – OFFICERS AND NCOs**

- 1.2.2** In addition to their general responsibilities as members of the Armed Forces, officers and NCOs are at all times to afford the utmost aid and support to their superiors. They are to ensure that good order and discipline is maintained among their subordinates whether on duty or not.
- 1.2.3** Officers and NCOs are on all occasions to set an example of good conduct and refrain from the use of offensive language. They are to avoid saying or doing anything which, if heard or seen by, or reported to, their subordinates, might cause those subordinates to be dissatisfied with their conditions of Service or discourage those subordinates from the performance of their duties.
- 1.2.4** Officers and NCOs are to adopt towards their subordinates such methods of command and treatment as will ensure respect for authority and foster that sense of self respect which is essential to good discipline . They are not to reprove a subordinate officer or NCO in the presence or hearing of that member's subordinates .
- 1.2.5** Officers and NCOs are to refrain from making remarks or passing criticisms on the conduct or orders of their superiors which may tend to bring those superiors into contempt.

### **CONFLICTING LAWFUL ORDERS**

- 1.2.6** Should a member of the Armed Forces receive an order which the member considers to conflict with any other order to which he or she is already subject, the member is to represent the conflict orally or in writing (if there is no urgency) to the superior officer who issued the later order. If the member is then directed to obey the order of that superior officer, he or she is to do so.

### **ACQUAINTANCE WITH WRITTEN ORDERS**

- 1.2.7** Every member of the Armed Forces is to acquaint himself or herself with:
- a.** DFOs, including DFOs for his or her respective Service; and
  - b.** Such general, standing, daily, or routine orders as are applicable to him or her.

### **ESTABLISHMENT OF DETENTION QUARTERS**

- 1.2.8** The Services Corrective Establishment, Burnham (**SCE Burnham**) continues to be a detention quarter and is classified as a Service corrective establishment.

- 1.2.9** Any base, camp, or unit guardroom and any cell fitted in a naval ship is a detention quarter and is classified as a unit detention quarter.

### **COMMAND AND MANAGEMENT OF DETENTION QUARTERS**

- 1.2.10** All detention quarters provided by the NZDF are under the overall command of the CDF. Detailed orders for the regulation and management of SCE Burnham and unit detention quarters are prescribed in Defence Force Orders (Discipline) for the Operation of Detention Quarters in New Zealand (DFO(D) DQ).

### **COMMAND OF SCE BURNHAM**

- 1.2.11** SCE Burnham is an Army unit under the command of the Commander, 3 Land Force Group.

### **NAVAL AND AIR FORCE PERSONNEL IN SCE BURNHAM DEEMED TO BE ATTACHED**

- 1.2.12** Any member of the Navy or the Air Force who is posted to the staff of SCE Burnham is deemed to be attached to the Army.<sup>1</sup>
- 1.2.13** Any rating or airman committed to SCE Burnham to serve a sentence of detention is deemed to be attached to the Army from the time of his or her committal.<sup>2</sup>

### **COMMAND OF UNIT DETENTION QUARTERS**

- 1.2.14** Unit detention quarters are under the command of the CO of the unit providing such quarters, notwithstanding that such quarters may be used by other units not having their own unit detention quarters.

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1 DA s 19(3)(a).  
2 DA s 19(3)(g).

## SECTION 3 – ARMED FORCES RELATIVE RANKS

### PART A – INTRODUCTION

#### DEFINITION

- 1.3.1** In this Section, **attached member** means a member of the armed forces of another State attached to a Service of the New Zealand Armed Forces.

#### RANK GRADES

- 1.3.2** The rank grades used in this Section are based on NATO STANAG 2116. The rank grades for the New Zealand Armed Forces are prescribed in Part B. The rank grades are:
- a. OF 6-10.** General/flag/air officer grades;
  - b. OF 3-5.** Senior officer grades;
  - c. OF 0-2.** Junior officer grades;
  - d. W1-W5.** Warrant officer rank grades for the armed forces of Indonesia, the Philippines and the United States of America;
  - e. OR 6-9.** Senior NCO/warrant officer grades;
  - f. OR 3-5.** Junior NCO grades; and
  - g. OR 1-2.** Other ranks.

#### PRESCRIPTION OF RELATIVE RANKS

- 1.3.3** The relative rank of an attached member is the rank in the Service to which he or she is attached which has the same rank grade as the rank which the attached member holds.
- 1.3.4** The rank grades which apply to the various ranks of the armed forces of the prescribed States are prescribed in the following Parts of this Section.

## PART B – NEW ZEALAND

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-10	Admiral of the Fleet	Field Marshal	Marshal of the Royal New Zealand Air Force
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice Marshal
OF-6	Commodore	Brigadier	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
OF-0	Ensign	Second Lieutenant	Pilot Officer
	Midshipman	Officer Cadet	Officer Cadet

## Other ranks

Rank Grade	Navy	Army	Air Force
OR-9	Warrant Officer	Warrant Officer Class One	Warrant Officer
OR-8		Warrant Officer Class Two	
OR-7	Chief Petty Officer	Staff Sergeant	Flight Sergeant
OR-5/6	Petty Officer	Sergeant	Sergeant
OR-4	Leading Rank	Bombardier / Corporal	Corporal
OR-3		Lance Bombardier Lance Corporal	
OR-2	Able Rank Ordinary Rank General Service Hand	Gunner Trooper Sapper Signaller Private	Leading Aircraftman Aircraftman General Service Hand

## PART C – AUSTRALIA

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-10	Admiral of the Fleet	Field Marshal	Marshal of the Royal Australian Air Force
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice-Marshal
OF-6	Commodore	Brigadier	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
OF-0	Acting Sub Lieutenant	Second Lieutenant	Pilot Officer
	Midshipman	Officer Cadet	Officer Cadet

## Other ranks

Rank Grade	Navy	Army	Air Force
OR-9	Warrant Officer	Warrant Officer Class One	Warrant Officer
OR-8		Warrant Officer Class Two	
OR-7	Chief Petty Officer	Staff Sergeant	Flight Sergeant
OR-5/6	Petty Officer	Sergeant	Sergeant
OR-4	Leading Seaman	Bombardier / Corporal	Corporal
OR-3		Lance Bombardier Lance Corporal	
OR-2	Able Seaman Seaman	Private	Leading Aircraftman Aircraftman

## PART D – CANADA

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-9	Admiral Amiral	General Général	General Général
OF-8	Vice-Admiral Vice-amiral	Lieutenant General Lieutenant-général	Lieutenant General Lieutenant-général
OF-7	Rear-Admiral Contre-amiral	Major General Major-général	Major General Major-général
OF-6	Commodore	Brigadier Brigadier-général	Brigadier Brigadier-général
OF-5	Captain Capitaine de vaisseau	Colonel	Colonel
OF-4	Commander Capitaine de frégate	Lieutenant Colonel Lieutenant-colonel	Lieutenant Colonel Lieutenant-colonel
OF-3	Lieutenant Commander Capitaine de corvette	Major	Major
OF-2	Lieutenant Lieutenant de vaisseau	Captain Capitaine	Captain Capitaine
OF-1	Sub Lieutenant Enseigne de vaisseau 1re classe	Lieutenant	Lieutenant
OF-0	Acting Sub Lieutenant Enseigne de vaisseau 2e classe	Second-Lieutenant Sous-lieutenant	Second-Lieutenant Sous-lieutenant
	Midshipman Aspirant de marine	Officer Cadet Élève-officier	Officer Cadet Élève-officier



**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Chief Petty Officer 1st Class Premier maître de 1re classe	Chief Warrant Officer Adjudant-chef	Chief Warrant Officer Adjudant-chef
OR-8	Chief Petty Officer 2nd Class Premier maître de 2e classe	Master Warrant Officer Adjudant-maître	Master Warrant Officer Adjudant-maître
OR-7	Petty Officer 1st Class Maître de 1re classe	Warrant Officer Adjudant	Warrant Officer Adjudant
OR-6	Petty Officer 2nd Class Maître de 2e classe	Sergeant Sergent	Sergeant Sergent
OR-5	Petty Officer 2nd Class Maître de 2e classe <sup>1</sup> / Master Seaman Matelot chef	Sergeant Sergeant <sup>1</sup> / Master Corporal Caporal chef	Sergeant Sergeant <sup>1</sup> / Master Corporal Caporal chef
OR-4	Leading Seaman Matelot de 1re classe	Corporal Caporal	Corporal Caporal
OR-3	Able Seaman Matelot de 2e classe	Private trained Soldat entraîné	Private trained Soldat entraîné
OR-2	Ordinary Seaman Matelot de 3e classe	Private Basic Soldat	Private Basic Soldat
OR-1	Seaman Matelot	Private Recruit Soldat recrue	Private Recruit Soldat recrue

**Note:**

- 1 Sergeants (E) with less than three years' seniority are considered OR-5.

**PART E – FIJI****Officer ranks**

Rank Grade	Navy	Army
OF-7	Rear Admiral	Major General
OF-6	Commodore	Brigadier
OF-5	Captain	Colonel
OF-4	Commander	Lieutenant Colonel
OF-3	Lieutenant Commander	Major
OF-2	Lieutenant	Captain
OF-1	Sub Lieutenant	Lieutenant
OF-0	Ensign	Second Lieutenant
	Midshipman	Officer Cadet

**Other ranks**

Rank Grade	Navy	Army
OR-9	Warrant Officer	Warrant Officer Class One
OR-8		Warrant Officer Class Two
OR-7	Chief Petty Officer	Staff Sergeant
OR-6	Petty Officer	Sergeant
OR-5		
OR-4	Leading Rank	Corporal
OR-3		Land Corporal
OR-2	Able Rank Ordinary Rank	Private

## PART F – FRANCE

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-10	Amiral de France <sup>1</sup>	Maréchal de France <sup>1</sup>	Maréchal de France <sup>1</sup>
OF-9	Amiral	Général d'armée	Général d'armée aérienne
OF-8	Vice-amiral d'escadre	Général de corps d'armée	Général de corps d'armée aérienne
OF-7	Vice-amiral	Général de division	Général de division aérienne
OF-6	Contre-amiral	Général de brigade	Général de brigade aérienne
OF-5	Capitaine de vaisseau	Colonel	Colonel
OF-4	Capitaine de frégate	Lieutenant-colonel	Lieutenant-colonel
OF-3	Capitaine de corvette	Chef de bataillon / Chef d'escadron	Commandant
OF-2	Lieutenant de vaisseau	Capitaine	Capitaine
OF-1	Enseigne de vaisseau 1re classe	Lieutenant	Lieutenant
OF-0	Enseigne de vaisseau 2e classe	Sous-lieutenant	Sous-lieutenant
	Aspirant	Aspirant	Aspirant

**Note:**

- 1 This is not a rank but a title which corresponds to a high position in the State.

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Major Maître principale	Major Adjutant-chef	Major Adjutant-chef
OR-8 / OR-7	Premier maître	Adjudant	Adjudant
OR-6	Maître	Sergent-chef	Sergent-chef
OR-5	Second maître	Sergent	Sergent
OR-4	Quartier-maître de 1re classe	Caporal-chef Brigadier-chef	Caporal-chef
OR-3	Quartier-maître de 2e classe	Caporal Brigadier	Caporal
OR-2	Matelot breveté	Soldat de 1re classe	Aviateur de 1re classe
OR-1	Matelot	Soldat de 2e classe	Aviateur de 2e classe

## PART G – INDONESIA

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-9	Laksamana Admiral	Jendral General	Marsekal Air Chief Marshal
OF-8	Laksamana Madya Vice Admiral	Letnan Jendral Lieutenant General	Marsekal Madya Air Marshal
OF-7	Laksamana Muda Rear Admiral	Mayor Jendral Major General	Marsekal Muda Air Vice Marshal
OF-6	Laksamana Pertama First Admiral	Brigadir Jenderal Brigadier General	Marsekal Pertama Air Commodore
OF-5	Kolonel Colonel	Kolonel Colonel	Kolonel Colonel
OF-4	Letnan Kolonel Lieutenant Colonel	Letnan Kolonel Lieutenant Colonel	Letnan Kolonel Lieutenant Colonel
OF-3	Mayor Major	Mayor Major	Mayor Major
OF-2	Kapten Captain	Kapten Captain	Kapten Captain
OF-1	Letnan Satu First Lieutenant	Letnan Satu First Lieutenant	Letnan Satu First Lieutenant
OF-0	Letnan Dua Second Lieutenant	Letnan Dua Second Lieutenant	Letnan Dua Second Lieutenant
	Taruna Officer Cadet	Taruna Officer Cadet	Taruna Officer Cadet

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Pembantu Letnan Satu Warrant Officer Class I	Pembantu Letnan Satu Warrant Officer Class I	Pembantu Letnan Satu Warrant Officer Class I
OR-8	Pembantu Letnan Dua Warrant Officer Class II	Pembantu Letnan Dua Warrant Officer Class II	Pembantu Letnan Dua Warrant Officer Class II
OR-7	Sersan Mayor Sergeant Major	Sersan Mayor Sergeant Major	Sersan Mayor Sergeant Major
	Sersan Kepala Master Sergeant	Sersan Kepala Master Sergeant	Sersan Kepala Master Sergeant
OR-6	Sersan Satu Sergeant 1st Class	Sersan Satu Sergeant 1st Class	Sersan Satu Sergeant 1st Class
OR-5	Sersan Dua Sergeant 2nd Class	Sersan Dua Sergeant 2nd Class	Sersan Dua Sergeant 2nd Class
OR-4	Kopral Kepala Master Corporal	Kopral Kepala Master Corporal	Kopral Kepala Master Corporal
	Kopral Satu Corporal 1st Class	Kopral Satu Corporal 1st Class	Kopral Satu Corporal 1st Class
OR-3	Kopral Dua Corporal 2nd Class	Kopral Dua Corporal 2nd Class	Kopral Dua Corporal 2nd Class
OR-2	Kelasi Kepala Seaman 1st Class	Prajurit Kepala Private 1st Class	Prajurit Kepala Private 1st Class
	Kelasi Satu Seaman	Prajurit Satu Private	Prajurit Satu Private
OR-1	Kelasi Dua Seaman Recruit	Prajurit Dua Recruit	Prajurit Dua Recruit

## PART H – MALAYSIA

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-10		Field Marshal	Marshal of the Royal Malaysian Air Force
OF-9	Laksamana Admiral	Jeneral General	Jeneral General
OF-8	Laksamana Madya Vice Admiral	Leftenan Jeneral Lieutenant General	Leftenan Jeneral Lieutenant General
OF-7	Laksamana Muda Rear Admiral	Mejar Jeneral Major General	Mejar Jeneral Tudm Major General
OF-6	Laksamana Pertama First Admiral	Brigedier Jeneral Brigadier	Brigedier Jeneral Tudm Brigadier
OF-5	Kepten Captain	Kolonel Colonel	Kolonel Tudm Colonel
OF-4	Komander Commander	Leftenan Kolonel Lieutenant Colonel	Leftenan Kolonel Tudm Lieutenant Colonel
OF-3	Leftenan Komander Lieutenant Commander	Mejar Major	Mejar Tudm Major
OF-2	Leftenan Lieutenant	Kapten Captain	Kapten Tudm Captain
OF-1	Leftenan Madya Sub Lieutenant	Leftenan Lieutenant	Leftenan Tudm Lieutenant
OF-0	Leftenan Muda Acting Sub Lieutenant	Leftenan Muda Second Lieutenant	Leftenan Muda Tudm Second Lieutenant
	Pegawai Kadet Kanan Midshipman	Officer Cadet	Officer Cadet

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Pegawai Waran I Warrant Officer Class I	Pegawai Waran I Warrant Officer Class I	Pegawai Waran Warrant Officer
OR-8	Pegawai Waran II Warrant Officer Class II	Pegawai Waran II Warrant Officer Class II	
OR-7	Chief Petty Officer	Staf Sarjan Staff Sergeant	Flight Sergeant
OR-6 / OR-5	Petty Officer	Sarjan Sergeant	Sarjan Sergeant
OR-4	Leading Rank	Koperal Corporal  Bombardier	Koperal Corporal
OR-3	First Class Able Rank	Lance Bombardier  Lans Koperal Lance Corporal	
OR-2	Second Class Able Rank Junior Able Rank	Gunner Trooper Sapper Signalman Craftman Driver Private	Leading Aircraftman Aircraftman Cadet
OR-1	Recruit		



## PART I – PAPUA NEW GUINEA

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-7	Rear Admiral	Major General	Air Vice-Marshal
OF-6	Commodore	Brigadier General	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
OF-0		Second Lieutenant	Pilot Officer
	Midshipman	Officer Cadet	Officer Cadet

## Other ranks

Rank Grade	Navy	Army	Air Force
OR-9 / OR-8	Warrant Officer	Chief Warrant Officer	Chief Warrant Officer
OR-7	Chief Petty Officer	Warrant Officer	Warrant Officer
OR-5/6	Petty Officer	Sergeant	Sergeant
OR-4	Leading Seaman	Corporal	Corporal
OR-3		Lance Corporal	
OR-2	Able Seaman Seaman	Private	Leading Aircraftman Airman

## PART J – THE PHILIPPINES

Officer ranks<sup>1</sup>

Rank Grade	Navy <sup>2</sup>	Army	Air Force
OF-10	Fleet Admiral	General of the Army	General of the Air Force
OF-9	Admiral	General	General
OF-8	Vice-Admiral	Lieutenant General	Lieutenant General
OF-7	Rear-Admiral	Major General	Major General
OF-6	Commodore	Brigadier General	Brigadier General
OF-5	Captain	Colonel	Colonel
OF-4	Commander	Lieutenant Colonel	Lieutenant Colonel
OF-3	Lieutenant-Commander	Major	Major
OF-2	Lieutenant	Captain	Captain
OF-1	Lieutenant Junior Grade	First Lieutenant	First Lieutenant
OF-0	Ensign	Second Lieutenant	Second Lieutenant

## Notes:

- Warrant Officers are a separate and distinct category of personnel in the Philippines Armed Forces. Their rank and precedence is below that of a Second Lieutenant but above that of enlisted personnel. Consequently Warrant Officer grades cannot be included in either the “OR” or “OF” grades. Warrant Officer grades are as follows for all branches of the Philippines Armed Forces:  
W-4 Chief Warrant Officer  
W-3 Chief Warrant Officer  
W-2 Chief Warrant Officer  
W-1 Warrant Officer
- Although the Philippines Marine Corps is part of the Philippines Navy, ranks correspond with those of the Philippines Army, except that the Marine Corps has no equivalent for OF-10.

**Other ranks**

<b>Rank Grade</b>	<b>Navy<sup>1</sup></b>	<b>Army</b>	<b>Air Force</b>
OR-9	Master Chief Petty Officer	Sergeant-Major	Chief Master Sergeant
OR-8	Senior Chief Petty Officer	Master Sergeant	Senior Master Sergeant
OR-7	Chief Petty Officer	Sergeant First Class	Master Sergeant
OR-6	Petty Officer First Class	Staff Sergeant	Technical Sergeant
OR-5	Petty Officer Second Class	Sergeant	Staff Sergeant
OR-4	Petty Officer Third Class	Corporal	Senior Airman / Sergeant
OR-3	Seaman	Private First Class	Airman First Class
OR-2	Seaman Apprentice	Private E.2	Airman
OR-1	Seaman Recruit	Private E.1	Basic Airman

**Note:**

- Although the Philippines Marine Corps is part of the Philippines Navy, ranks correspond with those of the Philippines Army, except for the following:  
OR-9 Sergeant Major/Master Gunnery Sergeant/Sergeant Major of the Marine Corps  
OR-8 Master Sergeant/First Sergeant  
OR-7 Gunnery Sergeant  
OR-3 Lance Corporal

**PART K – SINGAPORE****Officer ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OF-8	Vice Admiral	Lieutenant General	Lieutenant General
OF-7	Rear Admiral (2 star)	Major General	Major General
OF-6	Rear Admiral (1 star)	Brigadier	Brigadier
OF-5	Colonel	Colonel	Colonel
OF-4	Lieutenant Colonel	Lieutenant Colonel	Lieutenant Colonel
OF-3	Major	Major	Major
OF-2	Captain	Captain	Captain
OF-1	Lieutenant	Lieutenant	Lieutenant
OF-0	Second Lieutenant	Second Lieutenant	Second Lieutenant
	Midshipman	Officer Cadet	Officer Cadet

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Senior Warrant Officer Master Warrant Officer First Warrant Officer	Senior Warrant Officer Master Warrant Officer First Warrant Officer	Senior Warrant Officer Master Warrant Officer First Warrant Officer
OR-8	Second Warrant Officer	Second Warrant Officer	Second Warrant Officer
OR-7	Master Sergeant Staff Sergeant	Master Sergeant Staff Sergeant	Master Sergeant Staff Sergeant
OR-6	First Sergeant Second Sergeant	First Sergeant Second Sergeant	First Sergeant Second Sergeant
OR-5	Third Sergeant	Third Sergeant	Third Sergeant
OR-4	Corporal	Corporal	Corporal
OR-3	Lance Corporal	Lance Corporal	Lance Corporal
OR-2	Private First Class Private	Private First Class Private	Private First Class Private

## PART L – THAILAND

## Officer ranks

Rank Grade	Navy	Army	Air Force
OF-10	Phon Rua Admiral of the Fleet	Chom Phon Field Marshal	Phon Aakaad Marshal of the RTAF
OF-9	Phon Rua Eg Admiral	Phon Eg General	Phon Aakaad Eg Air Chief Marshal
OF-8	Phon Rua Tho Vice Admiral	Phon Tho Lieutenant General	Phon Aakaad Tho Air Marshal
OF-7	Phon Rua Tri Rear Admiral	Phon Tri Major General	Phon Aakaad Tri Air Vice Marshal
OF-6	Special Captain	Senior Colonel	Senior Group Captain
OF-5	Nawa Eg Captain	Phan Eg Colonel	Nawa Aakaad Eg Group Captain
OF-4	Nawa Tho Commander	Phan Tho Lieutenant Colonel	Nawa Aakaad Tho Wing Commander
OF-3	Nawa Tri Lieutenant Commander	Phan Tri Major	Nawa Aakaad Tri Squadron Leader
OF-2	Rua Eg Lieutenant	Roi Eg Captain	Rua Aakaad Eg Flight Lieutenant
OF-1	Rua Tho Junior Lieutenant	Roi Tho First Lieutenant	Rua Aakaad Tho Flying Officer
OF-0	Rua Tri Sub-Lieutenant	Roi Tri Second Lieutenant	Rua Aakaad Tri Pilot Officer
	Midshipman	Taruna Officer Cadet	Officer Cadet

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
OR-9	Phan Ja Eg Chief Petty Officer First Class	Ja Sip Eg Master Sergeant First Class	Phan Ja Aakaad Eg Flight Sergeant First Class
OR-8	Phan Ja Tho Chief Petty Officer Second Class	Ja Sip Tho Master Sergeant Second Class	Phan Ja Aakaad Tho Flight Sergeant Second Class
OR-7	Phan Ja Tri Chief Petty Officer Third Class	Ja Sip Tri Master Sergeant Third Class	Phan Ja Aakaad Tri Flight Sergeant Third Class
OR-6 / OR-5	Ja Eg Petty Officer First Class	Sip Eg Sergeant	Ja Aakaad Eg Sergeant
OR-4	Ja Tho Petty Officer Second Class	Sip Tho Corporal	Ja Aakaad Tho Corporal
OR-3	Ja Tri Petty Officer Third Class	Sip Tri Lance Corporal	Ja Aakaad Tri Leading Aircraftman
OR-2	Seaman First Class	Sip Tri Kongprajumkan Private First Class	Phon Thahaan Aakaad Airman
OR-1	Phon Thahaan Rua Seaman Second Class	Phon Thahaan Private	

**PART M – TONGA****Officer ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air</b>
OF-5	Captain	Colonel	Colonel
OF-4	Commander	Lieutenant Colonel	Lieutenant Colonel
OF-3	Lieutenant Commander	Major	Major
OF-2	Lieutenant	Captain	Captain
OF-1	Sub Lieutenant	Lieutenant	Lieutenant
OF-0	Acting Sub Lieutenant	Second Lieutenant	Second Lieutenant
	Midshipman	Officer Cadet	Officer Cadet

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army</b>	<b>Air</b>
OR-9	Warrant Officer Class One	Warrant Officer Class One	Warrant Officer Class One
OR-8	Warrant Officer Class Two	Warrant Officer Class Two	Warrant Officer Class Two
OR-7	Staff Sergeant	Staff Sergeant	Staff Sergeant
OR-5/6	Sergeant	Sergeant	Sergeant
OR-4	Corporal	Corporal	Corporal
OR-3	Lance Corporal	Lance Corporal	Lance Bombardier Lance Corporal
OR-2	Private	Guardsman (Royal Tonga Guards) Private	Private

## PART N – UNITED KINGDOM

## Officer ranks

Rank Grade	Navy <sup>1</sup>	Army including RM <sup>2</sup> and QARANC <sup>3 4</sup>	Air Force including PMRAFNS <sup>3 4</sup>
OF-10	Admiral of the Fleet <sup>5</sup>	Field Marshal <sup>5</sup>	Marshal of the Royal Air Force <sup>5</sup>
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice Marshal
OF-6	Commodore Captain (over 6)	Brigadier	Air Commodore
OF-5	Captain (under 6)	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
OF-0	Acting Sub Lieutenant	Second Lieutenant	Pilot Officer Acting Pilot Officer (but junior to Second Lieutenant)
	Midshipman	Officer Cadet	Officer Cadet

## Notes:

- 1 Including Queen Alexandra's Royal Naval Nursing Service (QARNNS).
- 2 The Royal Marines are a separate corps of the regular forces and its members are at all times subject to the Army Act 1955. They rank with other members of the regular forces of the same title. However, when borne on the books of any of HM ships or Naval Establishments, Royal Marines are subject to the Naval Discipline Act 1957 and in these circumstances the relative rank of RM officers of the rank of colonel and below is one grade higher.
- 3 PMRAFNS: Princess Mary's Royal Air Force Nursing Service.  
QARANC: Queen Alexandra's Royal Army Nursing Corps.
- 4 In the performance of their duties in wards, nursing personnel are to use professional titles, eg nurse, sister, (charge nurse in respect of male nurses), senior sister, matron, etc.
- 5 Rank applicable in wartime only.



**Other ranks**

<b>Rank Grade</b>	<b>Navy<sup>4</sup></b>	<b>Army including RM and QARANC<sup>1 4</sup></b>	<b>Air Force including PMRAFNS<sup>4</sup></b>
OR-9	Warrant Officer 1	Warrant Officer Class I	Warrant Officer Master Aircrew <sup>3</sup>
OR-8	Warrant Officer 2	Warrant Officer Class II	
OR-7	Chief Petty Officer	Staff Sergeant Colour Sergeant RM	Flight Sergeant Chief Technician
OR-5/6	Petty Officer	Sergeant	Sergeant
OR-4	Leading Rating	Corporal	Corporal
OR-3		Lance Corporal	Junior Technician
OR-2	Able Rating Staff Nurse / Enrolled Nurse, QARNNS		Leading Aircraftman Senior Aircraftman
OR-1	Ordinary Rating	Private <sup>2</sup> Marine	Aircraftman

**Notes:**

- 1 In various corps of the British Army, titles given may be different from the basic military titles. In such cases, the relative rank is the British Army rank to which the particular title corresponds, as advised by the Defence Adviser, British High Commission, Wellington, or the officer commanding the British force with which a New Zealand force is serving.
- 2 The following titles are also in use: Trooper, Sapper, Signaller, Guardsman, Fusilier, Kingsman, Rifleman, Ranger, Driver, Craftsman, etc.
- 3 Master Aircrew is a generic title which embraces all Warrant Officer aircrew ranks, ie Master Engineer, Master Air Electronics Operator, Master Air Loadmaster, Master Signaller.
- 4 In performance of their duties nursing personnel and members of Queen Alexandra's Royal Naval Nursing Service (QARNNS), Queen Alexandra's Royal Army Nursing Corps (QARANC) and Princess Mary's Royal Air Force Nursing Service (PMRAFNS) use the professional title of nurse, staff nurse, etc, within the clinical environment.

## PART 0 – UNITED STATES OF AMERICA

Officer ranks<sup>1</sup>

Rank Grade	Navy	Army (including USMC) <sup>2</sup>	Air Force
OF-10	Fleet Admiral	General of the Army	General of the Air Force
OF-9	Admiral	General	General
OF-8	Vice Admiral	Lieutenant General	Lieutenant General
OF-7	Rear Admiral (Upper Half)	Major General	Major General
OF-6	Rear Admiral (Lower Half)	Brigadier General	Brigadier General
OF-5	Captain	Colonel	Colonel
OF-4	Commander	Lieutenant Colonel	Lieutenant Colonel
OF-3	Lieutenant-Commander	Major	Major
OF-2	Lieutenant	Captain	Captain
OF-1	Lieutenant Junior Grade	First Lieutenant	First Lieutenant
OF-0	Ensign	Second Lieutenant	Second Lieutenant

## Notes:

- 1 The warrant officer is a separate and distinct category of personnel in the US armed forces. The warrant officer ranks take precedence below Second Lieutenant but above the enlisted ranks. Warrant officer grades are as follows for all US Services:  
W-4 Chief Warrant Officer  
W-3 Chief Warrant Officer  
W-2 Chief Warrant Officer  
W-1 Warrant Officer.
- 2 Although the US Marine Corps is part of the US Department of the Navy, ranks correspond with those of the US Army, except that the US Marine Corps has no equivalent for OF-10.

**Other ranks**

<b>Rank Grade</b>	<b>Navy</b>	<b>Army (including USMC)<sup>1</sup></b>	<b>Air Force</b>
OR-9	Master Chief Petty Officer	Sergeant-Major	Chief Master Sergeant
OR-8	Senior Chief Petty Officer	Master Sergeant	Senior Master Sergeant
OR-7	Chief Petty Officer	Sergeant First Class	Master Sergeant
OR-6	Petty Officer First Class	Staff Sergeant	Technical Sergeant
OR-5	Petty Officer Second Class	Sergeant	Staff Sergeant
OR-4	Petty Officer Third Class	Corporal	Senior Airman / Sergeant
OR-3	Seaman	Private First Class	Airman First Class
OR-2	Seaman Apprentice	Private E.2	Airman
OR-1	Seaman Recruit	Private E.1	Basic Airman

**Note:**

- 1 Although the US Marine Corps is part of the US Department of the Navy, ranks correspond with those of the US Army, except for the following:
- OR-9 Sergeant Major/Master Gunnery Sergeant/Sergeant Major of the Marine Corps
  - OR-8 Master Sergeant/First Sergeant
  - OR-7 Gunnery Sergeant
  - OR-3 Lance Corporal

**PART P – VANUATU****Officer ranks**

Rank Grade	Vanuatu Mobile Force
OF-6	Commissioner
OF-5	Colonel
OF-4	Lieutenant Colonel
OF-3	Major
OF-2	Captain
OF-1	Lieutenant
OF-0	Second Lieutenant

**Other ranks**

Rank Grade	Vanuatu Mobile Force
OR-8 / OR-7	Warrant Officer Class Two
OR-6 / OR-5	Sergeant
OR-4	Corporal
OR-3	Lance Corporal
OR-2	Private

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## SECTION 1 – MILITARY TRIBUNALS

- 2.1.1** A person subject to the AFDA may be tried either by:
- a.** The Court Martial of New Zealand (Court Martial); or
  - b.** A disciplinary officer, namely a superior commander, a CO, a detachment commander or a subordinate commander.
- 2.1.2** The Court Martial, the Summary Appeal Court and disciplinary officers are collectively referred to as **military tribunals**.<sup>1</sup>
- 2.1.3** This chapter describes the jurisdiction of military law generally and the jurisdiction of disciplinary officers specifically.

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AFDA s 2(1). There is also a Court Martial Appeal Court. See Court Martial Appeals Act 1953.

## SECTION 2 – JURISDICTION AS TO OFFENCE

- 2.2.1** The Court Martial has jurisdiction to try any offence against the AFDA.<sup>2</sup> Subject to paragraph 2.2.3, a disciplinary officer has jurisdiction to try any offence against the AFDA, except an offence described in paragraph 4.3.1.
- 2.2.2** Offences against the AFDA are either **service offences** provided for in the AFDA itself, or **civil offences** which are also offences against the AFDA by virtue of AFDA s 74(1). Any act or omission which would, if done or omitted in New Zealand, be an offence against any Act other than the AFDA is a civil offence.
- 2.2.3** In addition to those offences described in paragraph 4.3.1, a subordinate commander is not to try an offence against the following sections of the AFDA without the prior approval of his or her CO:
- a.** Sections 35, 42, 44(3), 45, 46(1), 47, 64(2), 65(2) or 69; or
  - b.** Sections 75 to 77 (so far as they relate to an offence against any of the preceding sections).

**SECTION 3 – JURISDICTION AS TO PLACE**

- 2.3.1** The AFDA applies to all acts done or omitted by persons subject to the AFDA, whether in New Zealand or elsewhere.<sup>3</sup> Proceedings under the AFDA may equally be conducted either in New Zealand or elsewhere, subject to any agreed limitations to which a New Zealand force overseas is subject.
- 2.3.2** The Court Martial may not try any of the offences of treason, murder, manslaughter, sexual violation or bigamy, if the offence is alleged to have been committed in New Zealand, without the consent of the Attorney-General.<sup>4</sup>

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3 AFDA s 4.  
4 AFDA s 74(4).



## SECTION 4 – JURISDICTION AS TO TIME

- 2.4.1** In general, persons cannot be tried for an offence against the AFDA unless they are tried, or the case is referred to the DMP, within three years after the alleged commission of the offence.<sup>5</sup> Time spent as a prisoner of war, absent without leave,<sup>6</sup> or in a civil prison does not count for this purpose.<sup>7</sup> If an offence is a continuing offence, eg absence without leave, the limitation period does not begin to run until the course of conduct has ceased.
- 2.4.2** The time limitation in paragraph 2.4.1 does not apply if the alleged offence is against ss 23(1), 24(1), 26, 32, 33 or 47 of the AFDA.<sup>8</sup> If the alleged offence is a civil offence and the relevant Act (or another Act) provides for a specific limitation period for that offence, this also has an impact.<sup>9</sup> In such cases, the advice of a legal officer is to be sought.
- 2.4.3** A person who has ceased to be subject to the AFDA may only be tried by the Court Martial in respect of offences allegedly committed while he or she was so subject<sup>10</sup> and only within the time limits stated in paragraph 2.4.5. See also paragraph 2.5.37.
- 2.4.4** A member of the Armed Forces who has ceased to be employed on full-time service may only be tried in respect of offences allegedly committed while he or she was serving full-time within the time limits stated in paragraph 2.4.5.
- 2.4.5** In the cases to which paragraphs 2.4.3 and 2.4.4 apply, trial may only occur if:<sup>11</sup>
- a.** The accused is tried, or the case is referred to the DMP, within six months after the accused has ceased to be subject to the AFDA or ceased to be employed on full-time service, as the case may be; or
  - b.** The alleged offence is against one of the provisions mentioned in paragraph 2.4.2 or is a civil offence.

<sup>5</sup> AFDA s 20(1).

<sup>6</sup> For this exception to apply, a court of inquiry must have declared the person absent without leave under AFDA s 201.

<sup>7</sup> AFDA s 20(2).

<sup>8</sup> AFDA s 20(6).

<sup>9</sup> AFDA s 20(3).

<sup>10</sup> AFDA s 18.

<sup>11</sup> AFDA s 20(4) and (5).

## SECTION 5 – JURISDICTION AS TO PERSON

## MEMBERS OF THE ARMED FORCES

- 2.5.1** All officers, ratings, soldiers and airmen of the regular forces are subject to the AFDA at all times.<sup>12</sup>
- 2.5.2** Ratings, soldiers and airmen of the territorial and reserve forces are subject to the AFDA when:<sup>13</sup>
- a.** Undergoing or required to undergo training, whether in uniform or not;
  - b.** Performing or required to perform any Service duty, whether in uniform or not;
  - c.** Going to or from any place of parade, training, or Service duty;
  - d.** Absent on leave or without leave from their place of duty;
  - e.** Declared liable for continuous service pursuant to a Proclamation issued under DA s 39 or s 40;
  - f.** Called out under any enactment in aid of the civil power;
  - g.** Called out under any enactment to render assistance in a disaster;
  - h.** Present, whether in uniform or not, when members of the Armed Forces are parading or undergoing training; or
  - i.** In uniform.
- 2.5.3** Ratings of the RNZNR, RNZNVR or the Naval Reserves are subject to the AFDA when in or on any naval ship, aircraft, vehicle, or establishment.<sup>14</sup>
- 2.5.4** Soldiers of the TF or Army Reserve are subject to the AFDA when in or on any military camp, unit, ship, aircraft or vehicle.<sup>15</sup>
- 2.5.5** Airmen of the TAF or Air Force Reserve are subject to the AFDA when in or on any Air Force base, unit, ship, aircraft or vehicle.<sup>16</sup>
- 2.5.6** Members of the Armed Forces continue to be subject to the AFDA when attached to the forces of another country or to a United Nations force.<sup>17</sup>

12 AFDA s 6(1)(a) and (b), (2)(a) and (b), and (3)(a) and (b). Ratings, soldiers and airmen of any additional force raised in time of war or like emergency are also so subject: AFDA s 6(1)(d), (2)(d) and (3)(d).

13 AFDA s 6(1)(c), (2)(c) and (3)(c).

14 AFDA s 6(1)(c)(iii).

15 AFDA s 6(2)(c)(iii).

16 AFDA s 6(2)(c)(iii).

17 AFDA s 8.

## MEMBERS OF FOREIGN ARMED FORCES

- 2.5.7** A member of the armed forces of another State who is attached to the New Zealand Armed Forces under DA s 23A is subject to the AFDA.<sup>18</sup>

## VOLUNTEERS AND TRAINEES

- 2.5.8** If any person who is not otherwise subject to the AFDA:
- a.** Volunteers or engages for service, training or an exercise with any part of the Armed Forces; or
  - b.** Is a member of a foreign armed force and is under orders to carry out any training or exercise in any defence area or ship or with any unit or other part of the Armed Forces
- that person is subject to the AFDA during that service, training or exercise.<sup>19</sup>
- 2.5.9** CDF may exempt any volunteer or force from paragraph 2.5.8 by DFO.
- 2.5.10** If the volunteer or trainee holds a rank in a foreign armed force, the AFDA applies as if he or she held the corresponding rank in the New Zealand Armed Forces.<sup>20</sup> The relative ranks of the New Zealand Armed Forces and the armed forces of other States are prescribed in Chapter 1 Section 3.
- 2.5.11** In any case to which paragraph 2.5.10 does not apply, the AFDA applies as if the volunteer were a private (equivalent).<sup>21</sup>

## PRISONERS OF WAR

- 2.5.12** Prisoners of war (PW) in the custody of the Armed Forces are subject to the AFDA.<sup>22</sup>
- 2.5.13** The application of the AFDA to a PW is subject to the provisions of the Geneva Conventions Act 1958. The necessary modifications include that:
- a.** Not less than three weeks before any trial, the DMP must serve on the Protecting Power<sup>23</sup> (if there is one), the accused and the prisoners' representative<sup>24</sup> a notice containing the particulars referred to in s 4(2) of the Geneva Conventions Act.

18 AFDA s 9.

19 AFDA ss 10(1) and 11(1).

20 AFDA ss 10(2)(a) and 11(2)(a).

21 AFDA ss 10(2)(b) and 11(2)(b).

22 AFDA s 12(1).

23 **Protecting Power** means the State or organisation (eg International Committee of the Red Cross) which is carrying out, in the interests of the State to whose forces the PW belongs, the duties assigned to Protecting Powers by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("GCIII"): s 2(1) of the Geneva Conventions Act 1958.

24 **Prisoners' representative** means the person by whom those functions, as defined by article 79 of GCIII, were exercisable in relation to that PW at the camp or place at which the PW was last detained as a PW: s 4(4) of the Geneva Conventions Act 1958.

- b.** PW are entitled to assistance by a prisoner comrade and the services of a competent interpreter, and must be informed of these rights and the right to call witnesses and be legally represented before trial.<sup>25</sup>
- c.** PW may only be tried if they are represented by counsel<sup>26</sup> and may therefore only be tried by the Court Martial.
- d.** PW must be provided with counsel of choice. The Registrar of the Court Martial will provide the Protecting Power with contact details for the Armed Forces Defence Counsel Panel, from which that Power may appoint counsel for the PW if the PW does not do so.<sup>27</sup>
- e.** The trial may not proceed unless the Court Martial is satisfied that counsel for the accused has had at least 14 days since first being instructed.<sup>28</sup>
- f.** The punishment of reduction in rank may not be imposed.<sup>29</sup>
- g.** The time limit for an appeal to the CMAAC is subject to section 6 of the Geneva Conventions Act.

**2.5.14** AFDA ss 28, 30, 34(5)(c), 33, 37(1)(b) and 47 do not apply to PW.<sup>30</sup>

**2.5.15** The advice of a legal officer is to be sought in every case where a charge is to be laid against a PW.

### **SPIES, ETC**

**2.5.16** If a person who is not otherwise subject to the AFDA is alleged, outside New Zealand, to have spied for the enemy contrary to AFDA s 26, seduced or endeavoured to seduce a member of the Armed Forces from his or her duty or allegiance contrary to AFDA s 27, that person is subject to the AFDA as soon as such a charge has been recorded.<sup>31</sup>

**2.5.17** A person subject to the AFDA under paragraph 2.5.16 ceases to be subject to the AFDA when:

- a.** The charge is dismissed;
- b.** The person is acquitted; or
- c.** If the person is convicted, any sentence imposed has been served.

25 Article 105 of GCIII.

26 Section 5(1)(a) of the Geneva Conventions Act 1958.

27 Article 105 of GCIII.

28 Section 5(1)(b) of the Geneva Conventions Act 1958.

29 Article 87 of GCIII.

30 AFDA s 12(2).

31 AFDA s 13.

- 2.5.18** See paragraph 3.2.40 regarding the arrest of persons covered by paragraph 2.5.16 outside New Zealand. Such persons are under the command of the CO of the part of the Armed Forces in which they are being held in custody.<sup>32</sup>

## PASSENGERS

- 2.5.19** Any person who is not otherwise subject to the AFDA who is a passenger in a ship, aircraft or vehicle of the Armed Forces (**passenger**) is subject to the AFDA<sup>33</sup> and is under the command of the officer commanding that ship, aircraft or vehicle or the officer's delegate.
- 2.5.20** If the passenger holds a rank in a foreign armed force, the AFDA applies as if he or she held the corresponding rank in the New Zealand Armed Forces. The relative ranks of the New Zealand Armed Forces and the armed forces of other States are prescribed in Chapter 1 Section 3.
- 2.5.21** If paragraph 2.5.20 does not apply, the officer commanding the ship, aircraft or vehicle may issue a certificate stating that the passenger is to be treated as an officer. In such a case, the AFDA applies to that passenger as if he or she were an officer.
- 2.5.22** A certificate issued under paragraph 2.5.21 may be revoked at any time by the officer who issued it or an officer superior in command.
- 2.5.23** If paragraph 2.5.20 does not apply and no certificate is issued under paragraph 2.5.21, the AFDA applies as if the passenger were a private (equivalent).
- 2.5.24** Only the following provisions of Parts 2 and 3 of the AFDA apply to passengers:
- a.** Sections 26, 27, 29(1)(a), 32, 33, 34(5) and (6), 37, 39, 40, 44, 45, 70, 71 and 74.
  - b.** Sections 75 to 77 so far as they relate to those sections specified in subparagraph a.
  - c.** Sections 78 to 80 and 85 to 87A.
- 2.5.25** Paragraph 2.5.32 applies to passengers as if they were subject to the AFDA under s 16.

## CIVILIANS CLOSELY ASSOCIATED WITH THE ARMED FORCES

- 2.5.26** **Active service.** If a New Zealand force is on active service, any civilian (other than a person who is subject to the AFDA under another provision of the AFDA):
- a.** Employed in the service of that force or any member of the force; or
  - b.** Accompanying the force;

<sup>32</sup> AFDA s 14.

<sup>33</sup> AFDA s 15.

is subject to the AFDA and on active service while so employed or accompanying the force.<sup>34</sup> He or she is under the command of the officer designated by the officer commanding the force.<sup>35</sup>

**2.5.27 Force outside New Zealand.** The following civilians are subject to the AFDA when they are within the limits of the command of any officer commanding a New Zealand force outside New Zealand and are under the command of the officer designated by the officer commanding the force:<sup>36</sup>

- a. Members of the Civil Staff or other New Zealand public servants employed in any capacity connected with the Armed Forces outside New Zealand.
- b. Employees seconded to or sponsored into an international military organisation by the New Zealand Government.
- c. Civilians attached to or accompanying a part of the Armed Forces for the purposes of their profession or employment, pursuant to an authorisation granted by or on behalf of CDF.
- d. Family members of any person covered by subparagraphs a, b or c who are residing with them, about to reside, or departing after residing with them.
- e. Civilians employed by a member of the Armed Forces or a person covered by subparagraphs a, b, c or d, and their family members residing with them, about to reside, or departing after residing with them.

**2.5.28** The officer commanding the part of the force with which a civilian covered by paragraphs 2.5.26 or 2.5.27 is associated may issue a certificate stating that that person is to be treated as an officer. In such a case, the AFDA applies to that person as if he or she were an officer.

**2.5.29** A certificate issued under paragraph 2.5.28 may be revoked at any time by the officer who issued it or an officer superior in command.<sup>37</sup>

**2.5.30** If no certificate is issued under paragraph 2.5.28, the AFDA applies as if the civilian were a private (equivalent).

**2.5.31** Only the following provisions of Parts 2 and 3 of the AFDA apply to civilians who are covered by paragraph 2.5.27:<sup>38</sup>

- a. Sections 34(5) and (6), 37, 39, 40, 44, 45, 70, 71 and 74.
- b. Sections 75 to 77 so far as they relate to those sections specified in subparagraph a.

34 AFDA s 16(1), (2) and (9).

35 AFDA s 16(5).

36 AFDA s 16(3) and (5), and Schedule 1 to the AFDA.

37 AFDA s 16(8).

38 AFDA s 16(4).

- c. Sections 78 to 80 and 85 to 87A.

**2.5.32** The following modifications apply to investigations and proceedings under the AFDA in respect of civilians covered by paragraphs 2.5.26 and 2.5.27:<sup>39</sup>

- a. A civilian may only be arrested under the AFDA by a provost officer, a NCO exercising authority under a provost officer, or a person acting on the order of an officer.
- b. A disciplinary officer may not find a civilian guilty unless he or she has given the civilian the option to elect trial in the Court Martial and the civilian has elected summary trial.
- c. The Court Martial may only sentence a civilian to imprisonment or a fine not exceeding \$3000.
- d. A disciplinary officer may only impose a fine not exceeding \$1000.
- e. A civilian may not be ordered to pay compensation exceeding \$1000.

#### **SERVICE PRISONERS AND DETAINEES**

**2.5.33** Members of the Armed Forces sentenced to imprisonment or detention who are also dismissed from Her Majesty's Service or discharged in accordance with DFO 4 Chapter 16 remain subject to the AFDA until finally released from custody in due course of law.<sup>40</sup>

**2.5.34** A Service prisoner who is not a member of the Armed Forces but is serving his or her sentence in a Service penal establishment remains subject to the AFDA until finally released from custody in due course of law.<sup>41</sup>

#### **TRIAL OF PERSONS CEASING TO BE SUBJECT TO THE AFDA**

**2.5.35** Despite DA s 52(3), if any proceedings (including any appeal) against any member of the regular forces are continuing or pending under the AFDA, that member's period of service does not complete until those proceedings have been completed, including any term of imprisonment or detention imposed.<sup>42</sup>

**2.5.36** If a Service prisoner or detainee who is a member of the regular forces applies for release from the Service, his or her period of service does not complete until his or her sentence has been served.<sup>43</sup>

39 AFDA s 16(6) and (7).

40 AFDA s 17(1).

41 AFDA s 17(2).

42 DA s 57(2).

43 DA s 57(3).

- 2.5.37** A person who has ceased to be subject to the AFDA<sup>44</sup> may be tried by the Court Martial for offences allegedly committed while he or she was so subject, and is subject to the AFDA from the day the charge is recorded until it is disposed of (and any sentence of imprisonment or detention is served).<sup>45</sup> See paragraph 2.4.3.
- 2.5.38** The following modifications apply to investigations and proceedings under the AFDA in respect of persons covered by paragraph 2.5.37:<sup>46</sup>
- a.** The accused holds the same status and rank as he or she held immediately before ceasing to be subject to the AFDA.
  - b.** The accused may only be arrested under the AFDA by warrant.
  - c.** The accused's CO is:
    - (1)** His or her CO immediately prior to ceasing to be subject to the AFDA; or
    - (2)** If that appointment does not exist, an officer appointed by the Chief of the Service to which he belonged immediately prior to ceasing to be subject to the AFDA.

44 It should be noted that, in many cases, members of the regular forces who have been released continue to be subject to the AFDA for some time under their reserve liability as members of the Naval Reserves, Army Reserve or Air Force Reserve.

45 AFDA s 18(1), (2)(a) and (4).

46 AFDA s 18(2)(b) and (3).



## SECTION 6 – DOUBLE JEOPARDY

### NO TRIAL UNDER CIVIL LAW AND THE AFDA FOR SAME ACT OR OMISSION

#### 2.6.1 If:

- a. A person has been acquitted<sup>47</sup> or convicted<sup>48</sup> of an offence by a military tribunal;
- b. A charge against a person under the AFDA has been dismissed; or
- c. The Court Martial has taken an offence into consideration in sentencing a person for another offence;<sup>49</sup>

the person must not subsequently be charged before a District Court or the High Court with having committed any offence that is substantially the same<sup>50</sup> as the offence which was dealt with by the military tribunal.<sup>51</sup>

#### 2.6.2 If, whether in New Zealand or overseas:

- a. A person has been acquitted or convicted<sup>46</sup> by a competent court of ordinary criminal jurisdiction (**civil court**) or by a court-martial of an allied force<sup>52</sup> (**allied court-martial**) of an offence against the law applicable by that court;
- b. A civil court or allied court-martial has taken an offence into consideration in sentencing a person for another offence;<sup>48</sup> or
- c. A person has been found to be under disability by a civil court or allied court-martial and the proceedings in respect of the relevant charge have been stayed;

the person must not subsequently be charged before a military tribunal with having committed any offence that is substantially the same<sup>49</sup> as the offence which was dealt with by the civil court or allied court-martial.<sup>53</sup>

47 **Acquitted** in this context includes a situation where the SACNZ quashes a finding of guilty: AFDA s 2(7)(c).

48 **Convicted** in this context includes a situation where the court found the charge proved but did not record a conviction: AFDA s 21(5)(b) and (c).

49 This subparagraph does not apply if sentence passed is quashed or the decision to take the offence into consideration is overturned on appeal or review: AFDA s 21(4)(d).

50 An **offence that is substantially the same** means an offence of which the accused could have been convicted, under the AFDA or otherwise, on the same facts: AFDA s 21(5)(a).

51 AFDA s 21(1).

52 This means a force or part of a force acting in cooperation with a part of the Armed Forces: AFDA s 2(1).

53 AFDA s 21(3) and (4).

**NO TRIAL UNDER AFDA FOR OFFENCES ALREADY DISPOSED OF****2.6.3** If:

- a.** A person has been acquitted or convicted of an offence by a military tribunal or an allied court-martial;<sup>54</sup>
- b.** A charge against a person under the AFDA has been dismissed; or
- c.** The Court Martial or an allied court-martial has taken an offence into consideration in sentencing a person for another offence;<sup>55</sup>
- d.** The proceedings in respect of that charge under the AFDA are subject to a stay of proceedings ordered by the DMP; or
- e.** A person has been found unfit to stand trial by a military tribunal and the proceedings in respect of the relevant charge have been stayed;

a charge alleging that the person committed that offence must not subsequently be tried by any military tribunal.<sup>56</sup>

54 This paragraph does not apply where the conviction is overturned on appeal and a new trial ordered: AFDA s 22(3)(a).

55 This subparagraph does not apply if the sentence passed is quashed or the decision to take the offence into consideration is overturned on appeal: AFDA s 22(3)(b).

56 AFDA s 22(1) and (2). See also paragraph 4.2.4 regarding stays granted by the DMP.

## SECTION 7 – CONCURRENT JURISDICTION

### IN NEW ZEALAND

- 2.7.1** If an allegation is made which could constitute a civil offence,<sup>57</sup> jurisdiction is shared with the New Zealand Police or another New Zealand law enforcement agency (**civil authority**). In such cases, the member's CO is to decide whether a charge will be laid under the AFDA or whether the matter will be referred to the civil authority acting under the civil law. In making this decision the officer is to be guided by this Section. If he or she is in any doubt as to whom should exercise jurisdiction, he or she is to consult with higher authority and, where necessary, the civil authority.
- 2.7.2** If it is decided that the allegation should be referred to the civil authority, the CO of the member against whom the allegation is made is to request the civil authority to investigate the allegation, giving the member's name and unit, particulars of the alleged offence and, if possible, the names of any witnesses. Once an allegation has been referred to the civil authority the matter passes out of the hands of the Armed Forces unless the civil authority decide not to prosecute, in which event the allegation may, if deemed advisable, still be investigated under the AFDA.
- 2.7.3** Without limiting the discretion conferred on a CO by paragraph 2.7.1, the guidelines to be applied in deciding whether or not to refer an allegation to the civil authority are:
- a.** If the alleged offence is of a type which is prevalent in civil life and which is alleged to have been committed by the member in his or her capacity as an individual citizen, or if the alleged offence is likely to have affected the community at large in the same degree whether it was committed by a member of the Armed Forces or a civilian, then the allegation should be investigated by the civil authority; or
  - b.** If the alleged offence is of a type which is of particular concern to the discipline or efficiency of the Armed Forces (eg an offence by one member of the Armed Forces against another) or is alleged to have been committed in a defence area or in relation to Service property, the allegation should be investigated under the AFDA.
- 2.7.4** This means that in peacetime in New Zealand allegations of the following offences should normally be investigated by the civil authority and the CO should report them to the civil authority at the earliest possible moment in accordance with paragraph 2.7.2:
- a.** Treason, murder, manslaughter, sexual violation, or bigamy;<sup>58</sup>
  - b.** Any serious sexual assault which may afford grounds for a charge of sexual violation;

<sup>57</sup> See paragraph 2.2.2 for the definition of **civil offence**.

<sup>58</sup> See paragraph 2.3.2.

- c. Any serious assault or injury which may result in the death of a person and thus lead to a charge of murder or manslaughter;
- d. Any offence relating to the property or person of a civilian committed outside a defence area;
- e. Any offence to which a civilian is also alleged to be a party committed outside a defence area;
- f. Any offence initially reported to the Police and over which the Police do not waive jurisdiction; and
- g. All traffic offences committed off duty outside a defence area.

**2.7.5** Where a member of the Armed Forces is handed over to the Service authorities to be tried or dealt with under the AFDA, the member's CO should in due course inform the Police in writing of the result of the case.

**2.7.6** See Chapter 12 Section 1 regarding the procedure to be adopted where a member of the Armed Forces is sought or charged by the Police and appears in the District Court or High Court.

## OUTSIDE NEW ZEALAND

**2.7.7** Where the civil authorities of a foreign country wish to arrest a member of the Armed Forces on a criminal charge and there is an agreement or treaty with the country concerned regulating the jurisdiction of the courts of that country and the jurisdiction of the Service authorities in respect of criminal offences committed by members of the Armed Forces in that country, the member's CO is to act in accordance with the provisions of that agreement or treaty referring the matter, where necessary, to the appropriate superior commander, with full details of the case, for instructions.

**2.7.8** Where there is no such agreement or treaty the position is governed by the rules of customary international law on the status of warships or armed forces units visiting friendly foreign countries.

**2.7.9** Legal advice is to be sought in respect of any case where paragraphs 2.7.7 or 2.7.8 might apply.

**2.7.10** If the member of the Armed Forces whose arrest is sought is on board one of HMNZ ships, his or her CO is not to hand the member over to the civil authorities unless an order for extradition is made by a court of competent jurisdiction in New Zealand or the commanding officer is instructed to hand the member over by his or her superior commander. As long as the member remains on board, the New Zealand Service authorities have exclusive jurisdiction over him or her. The CO of the ship cannot be compelled by the civil authorities to permit them to search for the member on board.

**2.7.11** In any other case, the CO of the member of the Armed Forces is not obliged actively to assist the civil authorities to apprehend the member but neither should he or she obstruct their inquiries. In such cases the commanding officer is to contact the New Zealand diplomatic representative in the country,

if there is one, or, if there is not, he or she is to signal the appropriate superior commander for instructions giving full details of the case.

- 2.7.12** In all cases, the CO is to require the representative of the civil authorities to produce his or her warrant or to provide satisfactory evidence of the capacity in which he or she acts.
- 2.7.13** See Chapter 12 Section 1 regarding the procedure to be adopted where a member of the Armed Forces is sought or charged by the civil authorities of a foreign country and appears in a foreign court.

## SECTION 8 – JURISDICTION OF DISCIPLINARY OFFICERS

### COMMANDING OFFICER

- 2.8.1** See paragraphs 7.1.6 to 7.1.8 for the definition of **commanding officer (CO)**.
- 2.8.2** A CO may try summarily any member of the Armed Forces (including a chaplain<sup>59</sup>) under his or her command who holds a rank at least two grades lower than that of the CO.<sup>60</sup>

### DETACHMENT COMMANDER

- 2.8.3** See paragraphs 7.1.9 to 7.1.10 for the definition of **detachment commander**.
- 2.8.4** A detachment commander has the same disciplinary jurisdiction as a CO, subject to any restrictions imposed on the detachment commander by the CO who appoints him or her, having regard to the detachment commander's rank and experience.

### SUPERIOR COMMANDER

- 2.8.5** See paragraphs 7.1.3 to 7.1.5 for the definition of **superior commander**.
- 2.8.6** A superior commander<sup>61</sup> may try summarily any officer under his or her command (including a chaplain<sup>57</sup>) who holds a rank at least two grades lower than that of the superior commander.

### SUBORDINATE COMMANDER

- 2.8.7** See paragraphs 7.1.11 and 7.1.12 for the definition of **subordinate commander**.
- 2.8.8** A CO may appoint one or more officers under his or her command to be subordinate commanders.<sup>62</sup>
- 2.8.9** Subject to the restrictions imposed under his or her delegation from the CO, a subordinate commander may try summarily any rating, soldier or airman under his or her command who holds a rank below that of staff sergeant (equivalent).<sup>63</sup>

59 The classes of chaplains and their equivalent ranks for the purposes of the AFDA are as follows: Class I (colonel (E)); Class II (lieutenant colonel (E)); Class III (major (E)); Class IV (captain (E)): AFDA s 117ZJ(3).

60 AFDA s 108(1).

61 See definition of this term in AFDA s 2(1).

62 AFDA s 106(1).

63 AFDA s 106(3).

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## SECTION 1 – QUESTIONING SUSPECTS

### DEFINITIONS

#### 3.1.1 In this Chapter:

- a. **Investigator** means any member of the NZDF or New Zealand Police who is carrying out a preliminary inquiry;
- b. **Preliminary inquiry** means an inquiry conducted by or on behalf of a CO to collect evidence which will:
  - (1) Assist the CO to determine whether there is a well-founded allegation that a person subject to the AFDA has committed an offence against that Act; and
  - (2) Be relevant and admissible in any subsequent proceedings.
- c. **Suspect** means a person subject to the AFDA who the investigator suspects has committed an offence.

### INTERVIEWING SUSPECTS<sup>1</sup>

**3.1.2** An investigator may question any person in connection with a preliminary inquiry, including any suspect. Any person questioned by an investigator is to be informed at the beginning of the interview of the reason for the interview. The investigator must not suggest that it is compulsory for the person questioned to answer.

**3.1.3** Whenever an investigator:

- a. Has collected enough evidence to be satisfied that an allegation is well-founded,<sup>2</sup> and has therefore made up his or her mind to recommend to a suspect's CO that the suspect be charged; or
- b. Has placed a suspect under close arrest;

the investigator is to caution the suspect before asking him or her any questions or any further questions, as the case may be. Questions asked after the caution has been administered must not amount to cross-examination.

**3.1.4** The caution to be administered is:

“You have the right to refrain from making any statement and to remain silent. Do you understand this?”

“You have the right to consult and instruct a lawyer without delay and in private before deciding to answer questions, unless operational circumstances do not permit that, and this right may be exercised without charge under the Armed Forces Legal Aid Scheme. Do you understand this? Do you wish to exercise this right?”

<sup>1</sup> These orders are based on the *Chief Justice's Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

<sup>2</sup> See paragraph 4.2.2.

“Anything you say will be recorded and may be given in evidence. Do you understand this?”

**3.1.5** Every statement made by a suspect under caution in accordance with paragraph 3.1.3 is to be recorded by video, unless:

- a.** That is impractical; or
- b.** The suspect declines to be recorded by video.

**3.1.6** Where the statement is not recorded by video, it is to be recorded permanently as an audio recording or in writing.

**3.1.7** The suspect is to be given an opportunity to review the recording or written statement or to have the written statement read over, and is to be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the suspect is to be asked if he or she wishes to confirm the written record as correct by signing it. If the suspect does not give a statement, the caution and the suspect’s responses are to be recorded in a document prepared for that purpose.

**3.1.8** The suspect is to be requested to initial each page of any statement made and to sign at the end of the statement to indicate that he or she understands the caution and accepts that the statement is his or her statement.

**3.1.9** If the investigator is not completely confident that the suspect understands the advice, the investigator is to take all reasonable steps to ensure that the suspect does understand.

**3.1.10** If the suspect is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence is to be fairly explained.

**3.1.11** If an investigator wishes a suspect to attend at a specified place for an interview and decides that the suspect will not be free to leave the interview at any time, the investigator is to place the suspect under close arrest<sup>3</sup> and then comply with paragraph 3.1.4. The investigator is to inform the suspect of the reason for the arrest at the time of the arrest or as soon as possible after the arrest, and in any case not later than 24 hours after the arrest.<sup>4</sup>

#### THE EXERCISE OF THE RIGHT TO A LAWYER

**3.1.12** If the suspect decides to exercise his or her right to consult and instruct a lawyer before or during the interview, the following action is to be taken:

- a.** **In all cases.** The suspect is to be given the contact details of the Armed Forces Defence Counsel Panel; and

<sup>3</sup> See paragraph 3.2.8.

<sup>4</sup> AFDA s 100.

**b. In bases and camps in New Zealand and HMNZ ships alongside.** The suspect is to be provided with access to a telephone in a private area. If the suspect wishes to meet with his or her lawyer in private and/or be attended by his or her lawyer during the interview, all reasonable requests are to be facilitated. Once the suspect has decided to exercise his or her right, no further questions are to be asked until he or she has been given a reasonable opportunity to obtain legal advice. See Section 6 if the suspect wishes to obtain free legal assistance under the Armed Forces Legal Aid Scheme.

**c. In units and detachments deployed outside New Zealand (including HMNZ ships at sea).**

- (1)** If it is practicable and consistent with the maintenance of discipline, the interview is to be deferred until the unit or detachment returns to New Zealand or the ship returns alongside a New Zealand port, at which time the action in subparagraph b. of this paragraph is to be taken.
- (2)** If the interview must proceed without deferral, the suspect is to be provided with access to communications with a lawyer, unless this is precluded by operational circumstances. The communications are to be provided in an area with as great a degree of privacy as is possible in the circumstances. Once the suspect has asserted his or her right, no further questions are to be asked until the suspect has been given a reasonable opportunity to obtain legal advice. See Section 6 if the suspect wishes to obtain free legal assistance under the Armed Forces Legal Aid Scheme.
- (3)** If the interview must proceed without deferral and the operational circumstances preclude providing the suspect with access to communications with a lawyer, the suspect is to be advised as follows:

“Due to operational requirements, your right to consult and instruct a lawyer cannot be afforded at this time, although you may exercise that right later. I remind you that you may still seek advice and assistance from another member of the unit and may have that person present during this interview unless that person is not available due to the exigencies of the Service.”

**3.1.13** If the suspect decides to waive his or her right to consult and instruct a lawyer, that decision is to be recorded in writing on any statement that the suspect may give, and is to be initialled by the suspect. The suspect is to be informed that he or she may still assert his or her right to consult and instruct a lawyer at any time during the interview.

**3.1.14** The caution required to be given by paragraph 3.1.4 is to be repeated if:

- a.** The interview is conducted on two or more occasions significantly separated in time;
- b.** The interview is interrupted by an obviously distracting event;

- c. A second line of inquiry is followed which is entirely disassociated with the matter on which the suspect has been informed he or she is being questioned; or
- d. A new investigator is appointed to inquire into the allegation.

#### **CAUTION WHEN SUSPECT CHARGED**

**3.1.15** Whenever an officer or NCO records an allegation against a suspect in the form of a charge, the officer or NCO is to:

- a. Inform the suspect promptly and in detail of the nature and cause of the charge; and
- b. Caution the suspect in accordance with paragraph 3.1.4 and then ask whether the suspect wishes to say anything in answer to the charge.

## SECTION 1A – OFFENCES ONLY TO BE INVESTIGATED BY NZDF MILITARY POLICE OR NEW ZEALAND POLICE

**3.1A.1** Subject to this Section, a preliminary inquiry may be conducted either by a member of the New Zealand Defence Force Military Police (NZDF MP), a member of New Zealand Police or by a member of the unit of the CO concerned.

**3.1A.2** Except as provided in paragraph 3.1A.3 a preliminary inquiry into the following offences must be investigated by a member of NZDF MP or New Zealand Police:

- a.** Unauthorised disclosure of information (AFDA s 25);
- b.** Creating alarm or despondency in relation to armed combat operations (AFDA s 29);
- c.** Offences in relation to capture by the enemy (AFDA s 30);
- d.** Official corruption (AFDA s 54);
- e.** Offences relating to the proceedings of a military tribunal or a court of inquiry (AFDA s 70);
- f.** False evidence (AFDA s 71) and perjury (AFDA s 74(1));
- g.** Any offence for which the maximum punishment is life imprisonment or a term of imprisonment of seven years or greater, except an offence contrary to AFDA s 57(1), 58(1) or 61(1), or Crimes Act 1961 s 219 and 223;
- h.** Ill-treatment of person of a lower rank (AFDA s 41);
- i.** Inducing by threat another to consent to an indecent act (Crimes Act 1961, s 129A(2));
- j.** Exploitatively does an indecent act on a person with a significant impairment (Crimes Act 1961 s 138(4));
- k.** Injuring any person with intent to injure, or with reckless disregard for the safety of others (Crimes Act 1961 s 189(1));
- l.** Aggravated assault (Crimes Act 1961 s 192);
- m.** Assault with a weapon (Crimes Act 1961 s 202C);
- n.** Being a party to an offence mentioned above (AFDA s 75);
- o.** Attempting to commit an offence mentioned above (AFDA s 76); and
- p.** Being an accessory after the fact to an offence mentioned above (AFDA s 77).

**3.1A.3** A preliminary inquiry into an offence specified at paragraph 3.1A.2 may be carried out by a member of the NZDF other than a member of NZDF MP or New Zealand Police in the following circumstances:

- a.** Where one of HMNZ ships has a Master at Arms as part of ship's company, in which case the Master at Arms may conduct the preliminary inquiry under the technical control of the Provost Marshal; or
- b.** Where the Provost Marshal has, on written application of a CO, waived the requirement for the preliminary inquiry to be conducted in accordance with paragraph 3.1A.2.

**3.1A.4** If, at any point, it appears to an investigator (not being a member of NZDF MP or New Zealand Police) that the preliminary inquiry into an offence not specified at paragraph 3.1A.2 includes:

- a.** Allegations of an inappropriate sexual nature;
- b.** Complex issues of fact or law; or
- c.** Issues which may cause reputational harm to the NZDF,

the investigator is to halt the preliminary inquiry and report to his or her CO who is to consider whether to refer the matter to NZDF MP or New Zealand Police to investigate.

## SECTION 2 – ARREST

### PART A – POWERS OF MEMBERS OF THE ARMED FORCES

#### DEFINITIONS

##### 3.2.1 In this Chapter:

- a. **Arresting officer** means the person who lawfully arrests another person, orders that person into arrest, or gives an order for that person's arrest.
- b. **Other rank** means a rating, soldier, airman or airwoman.
- c. **Provost officer** means a provost marshal, assistant provost marshal, or other officer appointed to exercise the functions of a provost officer. It includes a person attached or lent as a provost officer to, or seconded for service or appointed for duty as a provost officer with, any part of the Armed Forces, but does not include a midshipman, officer cadet or chaplain.<sup>5</sup>
- d. **Persons lawfully exercising authority under or on behalf of a provost officer.** By Service custom, such persons hold written evidence of their authority in the form of a warrant card. They are generally members of the Naval Police trade of the RNZN, the Royal New Zealand Military Police, or the Air Security trade of the RNZAF.

#### CATEGORIES OF ARREST

- 3.2.2** Arrest may be either open or close arrest. The type of arrest should be specified by the authority ordering the arrest. If it is not so specified it is close arrest.

#### JUSTIFICATION FOR ARREST

- 3.2.3** The mere allegation that a member of the Armed Forces has committed an offence does not of itself warrant placing that person under arrest. If the alleged offence is of a trivial nature the member is not to be placed under arrest but is to be informed of the charge and required to report at a specific place, date and time. He or she is to be dealt with promptly in all cases.
- 3.2.4** If it is necessary to place a person under arrest, care is to be taken that no more restraint is put on his or her personal liberty than the discipline of the Service (or, in certain cases, security) requires and the nature of his or her alleged offence renders expedient. Only such force may be used as is reasonably necessary to carry out the arrest.<sup>6</sup>
- 3.2.5** Arrest is not a punishment. It is generally used to ensure the safe custody of an alleged offender or to ensure that discipline (or security) is maintained.
- 3.2.6** If a member of the Armed Forces is placed under arrest, the provisions of Section 4 are to be complied with.

<sup>5</sup> AFDA s 2(1).

<sup>6</sup> AFDA s 94 and DR 35(3).



**OPEN ARREST**

- 3.2.7** Open arrest involves only such restraint as may be necessary to ensure a continued presence. A member of the Armed Forces under open arrest is to remain in uniform except when in his or her quarters. The member is to attend such parades or musters as may be required. The member is not to consume alcohol. He or she may perform his or her normal duties.

**CLOSE ARREST**

- 3.2.8** Close arrest involves deprivation of all liberty and continuous supervision. Generally a person is to be placed under close arrest only when confinement is necessary to ensure his or her safe custody or to maintain discipline or security. Circumstances which would warrant placing a member of the Armed Forces under close arrest include those where:

- a.** The alleged offence is one for which the maximum or only punishment is life imprisonment.
- b.** The member is deliberately trying to undermine discipline. While isolated instances of using insubordinate language or violence during the investigation would warrant placing an offender under close arrest until brought before a disciplinary officer to be dealt with, they would not in themselves warrant keeping the offender under close arrest whilst awaiting any subsequent trial by the Court Martial for the original offence.
- c.** The member is likely to injure himself or herself or others.
- d.** The member is likely to suborn witnesses.
- e.** The member has not surrendered but has been apprehended as an illegal absentee or is an habitual absentee.
- f.** It is desirable in the interests of discipline that the member be confined or separated from his or her comrades.

- 3.2.9** In addition to the circumstances specified in paragraph 3.2.8, a member is to be placed or kept under close arrest in the following circumstances:

- a.** During his or her trial by the Court Martial, provided that the Judge may direct that for the period of any adjournment the accused may be held under open arrest.
- b.** From the time of the award of a punishment of imprisonment or detention until committal.

- 3.2.10** A member under close arrest is not to perform his or her normal duties and is to be supervised by another member of at least equivalent rank and of the same sex. Adequate daily exercise under supervision is to be given a member under close arrest. A member under close arrest is to be visited once every 24 hours by an officer who is to note his or her condition and ask the member whether he or she wishes to make any representations.

- 3.2.11** A member placed under close arrest is to be deprived of any object which might be used as a weapon, to facilitate escape, or to cause injury or damage.
- 3.2.12** An escort is to be in attendance upon a member under close arrest. The escort is to ensure the safety and safe custody of the member under close arrest and is to remain close enough to him or her to be able to exercise physical restraint, should that be required. The escort is to include at least one member of the same gender as the member under close arrest.
- 3.2.13** Any restraint imposed on the member under close arrest in the presence of the public is to be effected as inconspicuously as possible. Gags are not to be used. Handcuffs are only to be used if strictly necessary to ensure safe custody. The escort is not to be armed unless specifically authorised by the CO of the member under close arrest.
- 3.2.14** When an officer or NCO has occasion to place a member of the Armed Forces under close arrest, he or she is, wherever possible, to obtain the assistance of one or more members of the Armed Forces of equal rank to the member being arrested to conduct the member into custody.
- 3.2.15** If a person is placed under close arrest, the arresting officer is to comply with paragraph 3.1.11.
- 3.2.16** A person who is placed under close arrest should ordinarily be subject to a personal search, as to which see paragraph 3.3.21 and the paragraphs which follow.

### ENTRY ON PRIVATE PROPERTY TO EFFECT AN ARREST

- 3.2.17** In normal circumstances, an arresting officer may go on to private property to seek a person he or she is lawfully authorised to arrest under the implied licence of the occupier, which permits entry for any reasonable and legitimate purpose. Such an implied licence may be revoked by the occupier or his or her authorised representative, in which case the arresting officer enjoys a reasonable time within which to withdraw from the property.<sup>7</sup>
- 3.2.18** If the arresting officer is required to withdraw, he or she may request the attendance of a member of the Police, who has the power to enter on any premises, by force if necessary, to effect an arrest under the AFDA (with the assistance of the arresting officer, if required).<sup>8</sup> In many circumstances, if it is known that a suspected offender to be arrested is present on private property, it will be prudent to seek the attendance of a member of the Police at the outset.
- 3.2.19** By way of exception to the above, if an arresting officer is executing a warrant for arrest issued by a Judge of the Court Martial under AFDA s 101B or CMA s 53 (ie for a breach of bail), he or she may, at any time, enter on to any premises, by force if necessary, if he or she has reasonable grounds to believe that the person against whom the warrant is issued is on those premises.<sup>9</sup> If the arresting officer making such an entry is a provost officer or a person lawfully exercising

<sup>7</sup> *Transport Ministry v Payn* [1977] 2 NZLR 50, 59 (CA); *Baker v Police* [1997] 2 NZLR 467, 469.

<sup>8</sup> Section 317(1) of the Crimes Act 1961.

<sup>9</sup> AFDA s 101B(3) and CMA s 53(3). See paragraph 3.2.26 and the following paragraphs for an explanation of this power of arrest.

authority under or on behalf of a provost officer, he or she is to<sup>10</sup>:

- a. Wear uniform;
- b. Take the warrant issued by the Judge with him or her;
- c. Produce the arrest warrant and his or her warrant card when he or she enters the premises; and
- d. Produce the arrest warrant subsequently on request.

### REARREST AND CHANGE OF FORM OF ARREST

**3.2.20** The CO of a member under arrest is to keep under constant review the need to keep the member under arrest and the form of arrest. Except in the circumstances provided for by paragraph 3.2.9, the CO may at any time release the member from arrest without prejudice to rearrest, or may change the form of arrest from open to close arrest or from close to open arrest.

### ARREST WITHOUT WARRANT IN CONNECTION WITH SUSPECTED OFFENCE (AFDA s 88)

**3.2.21 Power of arrest.** This power of arrest without warrant is conferred on:

- a. **All officers**, who may arrest:
  - (1) Officers who are not their superior officers.<sup>11</sup>
  - (2) Officers, of whatever rank, if:<sup>12</sup>
    - (a) The offence or suspected offence is mutiny; or
    - (b) The officer is behaving in a disorderly or violent manner.
  - (3) Other ranks.<sup>13</sup>
- b. **All NCOs**, who may arrest:
  - (1) Other ranks who are not their superior officers.<sup>14</sup>
  - (2) Other ranks, of whatever rank, if:<sup>15</sup>
    - (a) The offence or suspected offence is mutiny; or
    - (b) The other rank is behaving in a disorderly or violent manner.
- c. **Provost officers**, who may arrest any person subject to the AFDA.<sup>16</sup>

<sup>10</sup> AFDA s 101B(4) and CMA s 53(4).

<sup>11</sup> AFDA s 88(2)(a)(ii). See paragraphs 4.5.3 to 4.5.5 for the definition of **superior officer**.

<sup>12</sup> AFDA s 88(2)(a)(iii).

<sup>13</sup> AFDA s 88(2)(a)(i).

<sup>14</sup> AFDA s 88(2)(b)(i). See paragraphs 4.5.3 to 4.5.5 for the definition of **superior officer**.

<sup>15</sup> AFDA s 88(2)(b)(ii).

<sup>16</sup> AFDA s 88(2)(c).

d. **Persons lawfully exercising authority under or on behalf of a provost officer,** who may arrest:<sup>17</sup>

- (1) Any other rank; and
- (2) Any officer, if ordered to do so by a provost officer.

**3.2.22 Grounds for arrest.** An arresting officer may arrest a person he or she is empowered to arrest under paragraph 3.2.21 if he or she:

- a. Finds the person committing an offence against the AFDA;<sup>18</sup> or
- b. Has reasonable grounds to suspect that the person is committing or has committed such an offence.<sup>19</sup>

**3.2.23 Reasonable grounds to suspect** means one or more reasonable grounds of suspicion upon which a reasonable person might act.<sup>20</sup> This is an objective test. The grounds need not be based solely on admissible evidence and the arresting officer may rely on credible information provided by witnesses as well as his or her own personal observations.<sup>21</sup>

**3.2.24 Duty to arrest.** It is the duty of every member of the Armed Forces to arrest a person subject to the AFDA if lawfully ordered to do so under AFDA s 88.<sup>22</sup>

**3.2.25 Foreign forces serving together with a New Zealand force.** A member of a foreign force that is declared to be serving together with a New Zealand force under DA s 23B has the same powers of arrest of a member of the New Zealand force as a member of the New Zealand Armed Forces of relative rank.<sup>23</sup>

### **ARREST OF PERSON ABSCONDING OR BREACHING BAIL CONDITIONS (AFDA s 101B and CMA s 53)**

**3.2.26 Power of arrest.** This power of arrest under warrant is exercisable by provost officers, persons lawfully exercising authority under or on behalf of a provost officer, and members of the Police.<sup>24</sup>

**3.2.27 Grounds for warrant.** A Judge of the Court Martial may issue a warrant for the arrest of a person released on bail by the JAG or a Judge of the Court Martial if:<sup>25</sup>

- a. The Judge is satisfied by evidence on oath that:
  - (1) The person has absconded or is about to abscond for the purpose of evading justice; or

17 AFDA s 88(2)(c) and proviso to AFDA s 88(2).

18 AFDA s 88(1)(a).

19 AFDA s 88(1)(b).

20 *Police v Anderson* [1972] NZLR 233, 242 (CA).

21 *Duffy v Attorney-General* (1985) 1 CRNZ 599, 602 (CA); *Hill v Attorney-General* (1990) 6 CRNZ 219, 221 (CA).

22 AFDA s 88(3).

23 The relative ranks of the New Zealand Armed Forces and the armed forces of other States are prescribed in Chapter 1 Section 3.

24 AFDA s 101B(2)(b) and CMA s 53(2)(b).

25 AFDA s 101B(1) and CMA s 53(1).

- (2) The person has contravened or failed to comply with any condition of bail; or

b. The person:

- (1) Does not attend personally at the time and place specified in the grant of bail; or
- (2) Does not attend personally at any time and place to which, during the course of the proceedings, the hearing has been adjourned.

**3.2.28 Delivery of arrested person.** A person arrested under warrant issued by a Judge under AFDA s 101B or CMA s 53 must be brought before a Judge as soon as possible.<sup>26</sup>

#### **CITIZEN'S ARREST (s 35 of the Crimes Act 1961)**

**3.2.29 Justification for arrest.** This is not a power of arrest, but a justification for carrying out an arrest. The justification is available to any person, including a member of the Armed Forces.

**3.2.30 Grounds for arrest.** A person is justified in arresting any other person without warrant if he or she finds that person committing an offence against the Crimes Act 1961:

- a. For which the maximum punishment is not less than three years' imprisonment;<sup>27</sup> or
- b. By night.<sup>28</sup>

**3.2.31 Night** means between 2100 and 0600 hours.<sup>29</sup>

#### **ARREST FOR OFFENCES IN DEFENCE AREAS, HMNZ SHIPS, AND MILITARY AIRCRAFT (DR 35)**

**3.2.32 Power of arrest.** This power of arrest is exercisable in New Zealand and overseas by:<sup>30</sup>

- a. The officer in charge of a defence area, one of HMNZ ships, or a military aircraft; or
- b. An authorised person.

**3.2.33 Authorised person** means a member of the NZDF (including the Civil Staff) authorised to exercise the power in writing by the officer in charge.<sup>31</sup> Authorisation is to be given in form MD 4.

<sup>26</sup> AFDA s 101C(1) and CMA s 54(1).

<sup>27</sup> Section 35(a) of the Crimes Act 1961.

<sup>28</sup> Section 35(b) of the Crimes Act 1961.

<sup>29</sup> Section 2(1) of the Crimes Act 1961.

<sup>30</sup> DR 35(2).

<sup>31</sup> DR 2 and 31(b).

**3.2.34 Geographical limit on power of arrest.** This power of arrest can only be exercised while the person to be arrested is:

- a. In a defence area, or on board one of HMNZ ships or a military aircraft;<sup>32</sup>
- b. Entering or leaving the defence area, ship or aircraft;<sup>33</sup> or
- c. Attempting to enter or leave the defence area, ship or aircraft.<sup>34</sup>

**3.2.35 Grounds for arrest.** The arresting officer may arrest any other person without warrant if he or she:<sup>35</sup>

- a. Finds that person committing an offence against the law of the country in which his or her defence area, ship or aircraft is situated; or
- b. Suspects on reasonable grounds that that person has committed such an offence;

while the person is or was in, entering or leaving, or attempting to enter or leave, the defence area, ship or aircraft.

**3.2.36 Reasonable grounds to suspect.** See paragraph 3.2.23.

**3.2.37 Legal advice to be obtained outside New Zealand.** If the defence area, ship or aircraft is situated in a foreign State, the application of this power of arrest will raise issues of foreign law and the territorial sovereignty of the foreign State under international law. The advice of a legal officer is to be sought in every case where the exercise of this power of arrest is contemplated outside New Zealand.

**3.2.38 Custody of arrested person.** As soon as possible after arresting a person under DR 35, the arresting officer must:

- a. In the case of a person subject to the AFDA, comply with Section 4.
- b. In the case of a member of an allied force, deliver the member to the officer commanding the allied force, or to a member of that force acting under the authority of that commanding officer, for the purpose of that member's arrest under the law applicable to the allied force.<sup>36</sup>
- c. In the case of any other person, deliver the person to the civil police of the country in which the defence area, ship or aircraft is situated for the purpose of the person's arrest by the local police.<sup>37</sup>

**3.2.39 Allied force.** See Glossary of Terms in Chapter 1 Section 1.

32 DR 35(2)(a).

33 DR 35(2)(b).

34 DR 35(2)(c).

35 DR 35(1) and (2).

36 DR 35(5).

37 DR 35(4).

**ARREST OF SPIES ETC OUTSIDE NEW ZEALAND (AFDA s 90)**

- 3.2.40 Power of arrest.** This power of arrest is conferred on all members of the Armed Forces, including provost officers, and also on any person lawfully exercising authority under or on behalf of a provost officer.
- 3.2.41 Grounds for arrest.** An arresting officer may arrest any person without warrant if he or she, outside New Zealand:<sup>38</sup>
- a.** Finds that person in one of HMNZ ships or a defence area:
    - (1)** Spying for the enemy;<sup>39</sup> or
    - (2)** Seducing or endeavouring to seduce a member of the Armed Forces from his or her duty or allegiance to Her Majesty the Queen;<sup>40</sup> or
  - b.** Has reasonable grounds to suspect that the person is committing or has committed such an offence in that ship or defence area outside New Zealand.
- 3.2.42 Defence area** means any land, water, or part of the seabed, or any building or part of a building, either in New Zealand or elsewhere, that is set apart, used or occupied for the purposes of the NZDF.<sup>41</sup>
- 3.2.43 Enemy.** See Glossary of Terms in Chapter 1 Section 1.
- 3.2.44 Reasonable grounds to suspect.** See paragraph 3.2.23.

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38 AFDA s 90(1).

39 AFDA s 26.

40 AFDA s 27.

41 AFDA s 2(1) and DA s 2(1).

## PART B – POWERS OF NEW ZEALAND POLICE

### GENERAL

- 3.2.45** The purpose of this Part is to briefly describe the powers of arrest available to members of the Police under Defence legislation. These powers are available in addition to a range of other arrest powers which the Police may exercise in respect of members of the Armed Forces in the same way that they do in respect of civilians under other Acts. Furthermore, a member of the Police may exercise all of the powers of arrest described in Part A of this Section.<sup>42</sup>
- 3.2.46** This Part does not cover the powers of arrest exercisable by the New Zealand Police in respect of members of visiting forces and foreign absentees or deserters, which are described in Volume 3 Chapter 8.

### ARREST UNDER WARRANT (AFDA s 89)

- 3.2.47 Power of arrest.** A member of the Police may arrest a person subject to the AFDA in execution of a warrant issued by that person's CO or an officer superior in command to that CO.<sup>43</sup> The warrant is to be issued in form MD 626.
- 3.2.48 Grounds for warrant.** The CO or an officer superior in command to the CO may issue a warrant for the arrest of a person subject to the AFDA if the CO or officer has reasonable grounds to suspect that that person has committed an offence against the AFDA.<sup>44</sup>
- 3.2.49 Reasonable grounds to suspect.** See paragraph 3.2.23.
- 3.2.50 Form of warrant.** The warrant is to be in form MD 626.
- 3.2.51 Delivery into Service custody.** On making an arrest under a warrant issued under AFDA s 89, the arresting officer must deliver the arrested person into Service custody as soon as practicable to be dealt with in accordance with the AFDA.<sup>45</sup>
- 3.2.52 Cancellation of warrant.** Whenever a person for whom a warrant has been issued surrenders or is arrested, his or her CO is to be informed at once. The CO is to arrange for the cancellation of the warrant.

### ARREST WITHOUT WARRANT (AFDA ss 91 and 92)

- 3.2.53 Powers and grounds of arrest.** A member of the Police may, without warrant, arrest a person subject to the AFDA if:
- a.** The member of the Police has reasonable grounds to suspect that the person is a Service prisoner or detainee unlawfully at large.<sup>46</sup>
  - b.** The person is a Service prisoner or detainee on temporary release in accordance with an order issued by or under the authority of CDF

42 Section 315(4) of the Crimes Act 1961.

43 AFDA s 89(1) and (3).

44 AFDA s 89(1).

45 AFDA s 89(4).

46 AFDA s 91(1).



and the member of the Police has reasonable cause to suspect that the Service prisoner or detainee has failed to comply with any of the conditions of his or her release.<sup>47</sup>

- c. The member of the Police has reasonable grounds to suspect that the person is a deserter or absentee from the Armed Forces.<sup>48</sup>

**3.2.54 Reasonable grounds to suspect.** See paragraph 3.2.23.

**3.2.55 Delivery into Service custody.** On making an arrest without warrant, the arresting officer must deliver up the arrested person as soon as practicable:

- a. In the case of a Service prisoner or detainee, into Service custody or to the officer in charge of the place where the prisoner or detainee was imprisoned or detained before he or she escaped or was temporarily released.<sup>49</sup>
- b. In the case of a suspected deserter or absentee, into Service custody to be dealt with in accordance with the AFDA.<sup>50</sup>

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47 AFDA s 91(2).

48 AFDA s 92(1).

49 AFDA s 91(3).

50 AFDA s 92(2).

## SECTION 3 – SEARCH AND SEIZURE

### DEFINITION OF SEARCH

- 3.3.1** **Search**, in general terms, is an examination of a person or property. Though sometimes used in a wider sense, to search means to endeavour to find something not readily at hand or available. The general connotation is of investigation or scrutiny in order to expose or uncover; going beyond or penetrating some degree of concealment.<sup>51</sup>
- 3.3.2** Whether or not a particular evidence-gathering activity constitutes a search will depend in part on whether the suspect has a reasonable expectation of privacy, and the quality of any such expectation. The quality of privacy attaching to barrack accommodation is quite different to, and less than, that applying to the private home of a member of the Armed Forces.<sup>52</sup>
- 3.3.3** The entry of a room or cabin by an officer or NCO conducting a routine inspection or rounds under applicable written orders or Service custom is not a search.<sup>53</sup>

### DEFINITION OF SEIZURE

- 3.3.4** A **seizure** is a taking of that which is discovered during a search.<sup>54</sup>

### SEARCHES AND SEIZURES TO BE LAWFUL AND REASONABLE

- 3.3.5** Section 21 of the New Zealand Bill of Rights Act 1990 provides that “everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise”.
- 3.3.6** **Unreasonable.** Whether a search or seizure is unreasonable depends on the subject matter and the particular time, place and circumstances. A lawful search or seizure may still be unreasonable. An unlawful search or seizure will normally be unreasonable.<sup>55</sup> However, a breach of the law relating to search or seizure will not render that search or seizure unreasonable if:<sup>56</sup>
- a.** The breach was minor or technical; and
  - b.** The authority conducting the search or seizure was not aware of the breach when the search or seizure was conducted.

### USE OF FORCE

- 3.3.7** Only so much force may be used as is reasonably necessary to carry out the search.<sup>57</sup>

51 *R v Fraser* [1997] 2 NZLR 442, 449 (CA).

52 *R v Jack* [1999] 3 NZLR 331, 336; (1999) 1 NZCMAR 324, 331 (CMAC).

53 *R v Jack*, above.

54 *R v Grayson and Taylor* [1997] 1 NZLR 399, 406 (CA).

55 *R v Williams* [2007] 3 NZLR 207, 219 (CA).

56 *R v Williams*, 220-221.

57 AFDA s 94 and DR 32(4).

**OFFICERS**

**3.3.8** A personal search of an officer may only be carried out by or on the orders of another officer.<sup>58</sup>

**GENDER REQUIREMENT**

**3.3.9** Personal searches may only be carried out by and in the presence of persons of the same gender as the person to be searched.<sup>59</sup>

**SEARCH IN CONNECTION WITH SUSPECTED OFFENCE (AFDA s 95)**

**3.3.10 Power of search.** This power of search is conferred on COs in respect of:

- a.** Persons under their command; and
- b.** Premises within the limits of their command.

**3.3.11 Grounds for search.** A CO may exercise this power of search if he or she has reasonable grounds to suspect that a person subject to the AFDA has in his or her possession:<sup>60</sup>

- a.** Any property which has been unlawfully obtained; or
- b.** Any article or thing which is or may be evidence relating to the commission of an offence.

**3.3.12 Extent of search power.** Under this power of search, the CO may:

- a.** Detain and search the person.<sup>61</sup>
- b.** Search any premises within the limits of his or her command occupied or used by the person,<sup>62</sup> including, so far as it is necessary to do so:<sup>63</sup>
  - (1)** Breaking into those premises and seizing any property, article or thing referred to in paragraph 3.3.11; and
  - (2)** Breaking open any container found on those premises which the CO (or authorised person) has reasonable grounds to suspect contains any such property, article or thing.
- c.** Take possession of the property, article or thing.<sup>64</sup>

58 AFDA s 98(3).

59 AFDA s 98(4) and DR 32(3).

60 AFDA s 95(1).

61 AFDA s 95(1)(a).

62 AFDA s 95(1)(b).

63 AFDA s 95(3).

64 AFDA s 95(1)(c).

- 3.3.13 Exercise of search power.** This power of search may be exercised by the CO personally or by any person authorised or ordered to do so by the CO.<sup>65</sup> Any authorisation or order given by the CO must relate to a specific search in respect of which the CO is satisfied that there are reasonable grounds to suspect as described in paragraph 3.3.11.
- 3.3.14 Reasonable grounds to suspect.** See paragraph 3.2.23.
- 3.3.15 Premises within the limits of a CO's command** includes any defence area, ship, vehicle or aircraft under the CO's command.<sup>66</sup> It also includes any part of a defence establishment or facility which is for the time being used or occupied by personnel under the command of that CO.<sup>67</sup>
- 3.3.15A Application to personal electronic devices (PEDs).** The right to be free from unreasonable search and seizures is a fundamental right. The Courts have recognised that the privacy interests a person has in his or her PEDs is likely to be high<sup>68</sup>. Members of the Armed Forces are entitled to this right even if the military context means that it will be subject to the reasonable limits which can be demonstrably justified in relation to the efficient and disciplined operation of the Armed Forces<sup>69</sup>.
- 3.3.15B** The following requirements apply in every case where a CO grants authorisation to seize and/or search a PED under AFDA s 95:
- a. COs are to ensure that all seizure and/or search authorisations have an evidential basis (which can include hearsay) sufficient for a reasonable person in the CO's position to suspect that the PED contains evidence of offending;
  - b. PEDs may be seized on the verbal authority of the CO, however a PED may not be searched until the CO has provided written authorisation;
  - c. Temporal (or "reach-back") limits are to be included in any authorisation to search a PED and reasons should be given to justify these limits. The temporal limits must be logically connected to the suspected offence(s) and balance the right of a suspect to be free from unreasonable search and seizure and his or her reasonable expectation of privacy;
  - d. Any authorisation should be as specific as possible about the material being looked for and where practicable, the procedures that will be adopted to locate the material;
  - e. Should the position and/or parameters regarding the search change in any way or should unexpected material be located in the context of the search, the search is to be paused, further advice sought and, if applicable, this should be the subject of a further section 95 search request to the CO;

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65 AFDA s 95(2).

66 AFDA s 98(3)

67 AFDA s 98(4) and DR 32(3).

68 McCartin v R, [2016] NZHC 1807 and R v A [2019] NZHC 293

69 R v Jack (1999) 1 NZCMAR 324, 335

- f. COs are to obtain legal advice (verbal or written) from a NZDF legal officer prior to authorising a search of a PED unless it is impracticable to do so.

**3.3.16 Disposal of items seized during search.** See paragraph 3.3.41.

#### **SEARCH OF ARRESTED PERSON (AFDA s 98(1))**

- 3.3.17 Power of search.** This power of search is conferred on every arresting officer making an arrest under the AFDA, including any person acting under the direction of the arresting officer.
- 3.3.18 Grounds for search.** The exercise of a power of arrest under the AFDA automatically authorises a search under AFDA s 98(1).
- 3.3.19 Extent of search power.** Under this power of search, the arresting officer and any person acting under his or her direction may search the arrested person and take from that person any thing found on him or her, or in his or her possession.
- 3.3.20 Possession.** Possession requires both a physical element of custody and a mental element of knowledge of that custody.<sup>70</sup> It is sufficient for the physical element of custody that the accused has effective control of the items, eg where they are held by another person who will surrender them on demand.<sup>71</sup> Knowledge without control is insufficient.<sup>72</sup>

#### **SEARCH OF PERSON IN CUSTODY (AFDA s 98(2))**

- 3.3.21 Power of search.** This power of search is conferred on:
- a. Every provost officer;
  - b. A custody officer;<sup>73</sup> and
  - c. Any person acting under the direction of a provost officer or custody officer.
- 3.3.22 Grounds for search.** Searches under AFDA s 98(2) are authorised at any time (subject to paragraph 3.3.5) in respect of persons subject to the AFDA who are in Service custody.
- 3.3.23 Extent of search power.** Under this power of search, the provost officer, custody officer, or person acting under their direction, may search the person in Service custody and take from that person any thing found on him or her, or in his or her possession.
- 3.3.24 Possession.** See paragraph 3.3.20.

<sup>70</sup> *R v Cugullere* [1961] 2 All ER 343.

<sup>71</sup> *R v McRae* (1993) 10 CRNZ 61 (CA).

<sup>72</sup> *R v Riley* (2002) 134 A Crim R 495, 497 (Tas CA).

<sup>73</sup> See definition of **custody officer** in paragraph 3.4.1.

**SEARCH AT CHECKPOINT OR CHECKING AREA (AFDA s 96)**

- 3.3.25 Power of search.** This power of search is conferred on every member of the Armed Forces who is ordered by his or her CO to carry out searches at a checkpoint or within a checking area established by the CO within the limits of his or her command in order to prevent smuggling.
- 3.3.26 Grounds for search.** Searches under AFDA s 96 are authorised at any time (subject to paragraph 3.3.5) in respect of persons subject to the AFDA who are in a checking area or passing through a checkpoint. The rank of the person to be searched is not a consideration under AFDA s 96.
- 3.3.27 Extent of search power.** Under this power of search, the member of the Armed Forces may detain and search:
- a. Any person subject to this Act (including any clothing or any other article of any description worn by him or her) who is within the checking area or about to pass through the checkpoint, as the case may be; or
  - b. Any ship, vehicle, or aircraft, or any container, receptacle, or parcel, or any other thing whatsoever, that is in the possession or under the control of any such person who is within the checking area or about to pass through the checkpoint.
- 3.3.28 Possession.** See paragraph 3.3.20.

**SECURITY SEARCH POWER (DR 32)**

- 3.3.29 Power of search.** This power of search is exercisable in New Zealand and overseas by:<sup>74</sup>
- a. The officer in charge of a defence area, one of HMNZ ships, or a military aircraft; or
  - b. A member of the NZDF (including the Civil Staff) authorised to exercise the power in writing by the officer in charge (“authorised person”).<sup>75</sup>
- 3.3.30 Authorised person.** Authorisation is to be given in form MD 4. The MD 4 must be shown on demand to the person to be detained or searched.<sup>76</sup>
- 3.3.31 Grounds for search.** Searches under DR 32 are authorised at any time (subject to paragraph 3.3.5) in respect of any person who is:<sup>77</sup>
- a. In a defence area, or on board one of HMNZ ships or a military aircraft;
  - b. Entering or leaving the defence area, ship or aircraft;<sup>78</sup> or
  - c. About to enter or leave the defence area, ship or aircraft.<sup>79</sup>

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74 DR 32(1).

75 DR 2 and 31(b).

76 DR 32(2).

77 DR 32(1).

78 DR 35(2)(b).

79 DR 35(2)(c).

- 3.3.32 Extent of search power.** Under this power of search, the officer in charge or authorised person may, for the purpose of maintaining the security of the area, ship or aircraft:
- a.** Detain and search:<sup>80</sup>
    - (1)** Any person; and
    - (2)** Any ship, boat, vehicle, or aircraft, receptacle, parcel or thing in the possession or under the control of that person; and
  - b.** Seize from the person searched any thing that the officer or authorised person has reasonable grounds to believe has been used or is being used in the commission of an offence against the law of the country where the defence area, ship or aircraft is situated.<sup>81</sup>
- 3.3.33 Possession.** See paragraph 3.3.20.
- 3.3.34 Disposal of items seized during search.** See paragraph 3.3.46.
- 3.3.35 Legal advice to be obtained outside New Zealand.** If the defence area, ship or aircraft is situated in a foreign State, the application of this power of search will raise issues of foreign law and the territorial sovereignty of the foreign State under international law. The advice of a legal officer is to be sought in every case where the exercise of this power of search is contemplated outside New Zealand.

#### CUSTOMARY SEARCH POWER (AFDA s 97)

- 3.3.36 Power of search.** This power of search is inherent in the authority of a CO and may be exercised, by or on behalf of the CO,<sup>82</sup> to the extent permissible under Service custom.<sup>83</sup>
- 3.3.37 Grounds for search.** To the extent consistent with Service custom (including orders in force in that part of the Armed Forces), the CO, or any person acting under the express or implied authority of the CO, may search his or her command to ensure obedience to applicable orders and in furtherance of the safety, readiness, cleanliness and good order of that command. Typical examples are ship, aircraft and barrack searches, and searches by gangway staff in ships.<sup>84</sup>
- 3.3.38 Extent of search power.** To the extent consistent with Service custom (including orders in force in that part of the Armed Forces), the CO, or a person acting under the authority of the CO, may search any place within the limits of the CO's command at any time on the grounds stated above in paragraph 3.3.37.

<sup>80</sup> DR 32(1).

<sup>81</sup> DR 32(5).

<sup>82</sup> *R v Jack* (1999) 1 NZCMAR 324, 334 (CMAC).

<sup>83</sup> AFDA s 97.

<sup>84</sup> *R v Jack*, see above.

**3.3.39 Delegation of authority to exercise customary search power.** The CO's customary power to search may be delegated pursuant to orders given by the CO or by an officer superior in command to the CO, or by virtue of a Service custom which pertains to the manner in which the CO's authority is exercised in that Service.<sup>85</sup>

**3.3.40 Service custom.** Service customs vary between the Navy, the Army and the Air Force. If the lawfulness of a search conducted under AFDA s 97 is contested, the disciplinary officer must satisfy himself or herself as to the nature of the custom in the relevant Service. In a joint force, it is the customs of the Service to which the person who is to be searched belongs, which must be respected.

### DISPOSAL OF PROPERTY SEIZED DURING SEARCH UNDER AFDA

**3.3.41** Any property seized in a search conducted under the AFDA is to be disposed of in accordance with paragraphs 3.3.42 to 3.3.45.

**3.3.42 Untainted property.** If:

- a. The seized property is not required as evidence in proceedings under the AFDA; or
- b. A disciplinary officer finds that the property was not used in the commission of an offence against the AFDA;

it is to be returned to the person from whose possession it was taken or to any other person who is lawfully entitled to it.<sup>86</sup>

**3.3.43 Tainted property.** If a disciplinary officer finds that the seized property was used in the commission of an offence against the AFDA and belongs to the offender, or is in the offender's possession with the consent of its owner, the disciplinary officer may:

- a. Direct that the property (including, if the property is liquor, the receptacles containing it<sup>87</sup>) is forfeited to the Crown;<sup>88</sup> or
- b. Make a restitution order requiring that the property be delivered to another person who appears to be entitled to it.<sup>89</sup>

**3.3.44 Disposal of forfeited property.** Unless paragraph 3.3.45 applies, the superior commander of the disciplinary officer is to cause:<sup>90</sup>

- a. Any property forfeited to the Crown to be sold either by public auction or private contract; and
- b. The proceeds of the sale to be paid into the Crown Bank Account.

85 AFDA s 2(3)(c).

86 AFDA s 99(1)(a).

87 AFDA s 52(2).

88 AFDA s 99(1)(b).

89 AFDA s 87.

90 CDF has delegated this duty, imposed by AFDA s 99(1)(b), or as the case may be AFDA s 52(2), to the superior commander of every disciplinary officer under DA s 30(2).



**3.3.45 Disposal of valueless or unlawful property.** If:

- a. It would, apart from AFDA s 99, be unlawful to sell the property forfeited to the Crown; or
- b. It appears to the superior commander that the property has no value;

the superior commander is to cause the property to be destroyed or to be otherwise disposed of in such manner as he or she thinks fit.<sup>91</sup>

**DISPOSAL OF PROPERTY SEIZED DURING SEARCH UNDER DR**

**3.3.46** Any property seized in a search conducted under the DR is to be disposed of in accordance with paragraphs 3.3.47 to 3.3.49.

**3.3.47 Untainted property.** If:

- a. No proceedings are brought against the person searched; or
- b. The person is acquitted of any offence with which he or she was charged in relation to;

the property seized is to be returned to the person from whose possession it was taken.<sup>92</sup>

**3.3.48 Tainted property.** If a District Court Judge convicts the person searched of an offence under DR 38 and 39 in relation to a matter with which the search was connected, the Judge may order that any property seized be forfeited to the Crown.<sup>93</sup>

**3.3.49 Disposal of forfeited property.** The Minister of Defence may give directions as to whether any property forfeited to the Crown by order of a District Court Judge under DR 32(6) is to be:

- a. Sold; or
- b. Otherwise disposed of as the Minister directs.

**RESTITUTION FOR LOSS CAUSED BY SEARCH****3.3.50 Eligibility.** Restitution is to be made if:<sup>94</sup>

- a. As the result of a search of premises under the AFDA, a person suffered economic loss by reason of damage to or destruction or loss of any property belonging to that person, or in which the person has a special property or interest; and

91 Proviso to AFDA s 99(1). CDF has delegated this duty to the superior commander of every disciplinary officer under DA s 30(2).

92 DR 32(7).

93 DR 32(6).

94 AFDA s 95(4).

- b. No evidence of an offence against the AFDA was found; or
- c. The suspected offender was acquitted or not proceeded against; or
- d. The property belongs to a person other than the suspected offender; or
- e. A person other than the suspected offender has a special property or interest in the property.

**3.3.51 Discretion in respect of restitution.** If restitution must be made pursuant to paragraph 3.3.50, the CO who ordered or authorised the search is to either:<sup>95</sup>

- a. Cause the property to be repaired or replaced; or
- b. Pay to the person who suffered the economic loss such amount as the CO considers necessary to enable that person to have the property repaired or replaced.

**3.3.52 Premises** includes any defence area, ship, vehicle or aircraft.<sup>96</sup>

<sup>95</sup> This duty, imposed by AFDA s 95(4), has been delegated to the CO who ordered or authorised the search by CDF pursuant to DA s 30(2).

<sup>96</sup> AFDA s 95(5).

## SECTION 4 – PRE-TRIAL CUSTODY AND BAIL

### DEFINITIONS

**3.4.1** In this Section:

- a. Arresting officer** has the meaning given in paragraph 3.2.1.
- b. Custody officer** means the member of the Armed Forces to whose custody a person is committed by the arresting officer.
- c. Service custody** means that a person has been deprived of his or her liberty by the Armed Forces or a part of the Armed Forces.<sup>97</sup> A person under close arrest is in Service custody; a person under open arrest is not.

### REPORTS TO SERVICE AUTHORITIES ON PERSON IN SERVICE CUSTODY

**3.4.2** Where a person is committed to Service custody, the arresting officer is to make a written report to the custody officer:

- a.** At the time of the committal; or
- b.** If it is not practicable to do so at that time, not later than 24 hours afterwards;

stating the offence that the arrested person is alleged to have committed.<sup>98</sup>

**3.4.3** The custody officer is to make a written report to his or her CO (or the CO's authorised representative) in accordance with paragraph 3.4.4:<sup>99</sup>

- a.** As soon as practicable after the time of committal of a person to his or her custody; or
- b.** If it is not practicable to do so at that time, not later than 24 hours afterwards.

**3.4.4** The report required by paragraph 3.4.3 is to contain the following information:

- a.** So far as is known to the custody officer:
  - (1)** The name of the arrested person and the offence that he or she is alleged to have committed;
  - (2)** The name and the rank or other description of the person who is making the allegation; and
- b.** If the custody officer has received it, the report required by paragraph 3.4.2.

<sup>97</sup> See *Police v McFadyen* [1982] 2 NZLR 641 for the meaning of **custody**. See AFDA s 2(1) for the meaning of **service**.

<sup>98</sup> AFDA s 101(1).

<sup>99</sup> AFDA s 101(2).

**DUTY TO BRING PROCEEDINGS OR RELEASE**

**3.4.5** Where a person subject to the AFDA has been placed under arrest in respect of any alleged offence, his or her CO must, within 48 hours after the arrest, unless it is impracticable to do so, ensure either:<sup>100</sup>

- a.** That proceedings for the hearing and determination of the allegation are set in motion; or
- b.** That the person is released from arrest.

**3.4.6** A failure to fulfil this duty may constitute an offence: see paragraph 4.14.16.

**REPORTS TO JAG ON PERSON IN SERVICE CUSTODY**

**3.4.7** If a person subject to the AFDA has been in Service custody for four days after being arrested and the alleged offence has not been:

- a.** Referred to the DMP for trial by the Court Martial; or
- b.** Tried or otherwise dealt with summarily under the AFDA;

the person's CO must make a report in writing to the JAG, with an information copy to his or her superior commander, stating the reasons for the delay.<sup>101</sup> The address for such reports, which are to take the form of an official letter,<sup>102</sup> is:

Judge Advocate General  
C/- Headquarters New Zealand Defence Force  
WELLINGTON

**3.4.8** A further report must be made in accordance with paragraph 3.4.7 for every eight days after the initial period covered by the initial report.<sup>103</sup>

**JAG MAY GRANT BAIL PENDING TRIAL**

**3.4.9** If the JAG receives a report on a person in Service custody in accordance with paragraphs 3.4.7 or 3.4.8, the JAG may:<sup>104</sup>

- a.** Grant bail to that person; and
- b.** Impose any conditions of bail that the JAG thinks fit.

**3.4.10** In determining whether to grant bail, the JAG is required to take into account the same considerations as a Judge considering a bail application.<sup>105</sup>

100 AFDA s 101(3).

101 AFDA s 101(4).

102 The official letter may, and in ordinary circumstances should, be sent by electronic means.

103 AFDA s 101(5).

104 AFDA s 101A(3).

105 See paragraphs 3.4.14 and 3.4.15.

**PERSON IN SERVICE CUSTODY MAY APPLY FOR BAIL**

**3.4.11** If a person has been accused of an offence against the AFDA and is being held in Service custody, he or she may apply to a Judge for bail.<sup>106</sup> Bail applications are to be made in form MD 605.<sup>107</sup> Legal aid is available for bail applications.<sup>108</sup>

**3.4.12** An application for bail will be heard before a Judge at date and time fixed by the Registrar of the Court Martial in form MD 614.<sup>109</sup> The DMP is the respondent to any such application and may make recommendations with respect to it.<sup>110</sup>

**3.4.13** After hearing an application for bail, the Judge may:<sup>111</sup>

- a. Grant bail to the applicant; and
- b. Impose any conditions of bail that the Judge thinks fit.

**3.4.14** In deciding whether to grant bail, the Judge must take into account:<sup>112</sup>

- a. Whether there is a real and significant risk that:
  - (1) The accused may fail to appear before the relevant military tribunal on the date required;
  - (2) The accused may interfere with witnesses or evidence; or
  - (3) The accused may offend while on bail;
- b. Any matter that would make it unjust to keep the accused in custody;
- c. The seriousness of the alleged offence;
- d. Whether there are urgent and exceptional circumstances that favour the grant of bail; and
- e. The effect on Service discipline of remanding the accused on bail.

**3.4.15** In deciding whether to grant bail, the Judge may also take into account:<sup>113</sup>

- a. The strength of the evidence and the probability of conviction or otherwise;
- b. The severity of the punishment that is likely to be imposed on the accused if convicted;

<sup>106</sup> CMA s 49.

<sup>107</sup> RP 145(1).

<sup>108</sup> See Section 6 of this chapter.

<sup>109</sup> RP 145(3)(a).

<sup>110</sup> CMA s 52(2).

<sup>111</sup> CMA s 49(3).

<sup>112</sup> CMA s 49(4)(a) and section 8(1) of the Bail Act 2000.

<sup>113</sup> CMA s 49(4)(b) and section 8(2) of the Bail Act 2000.

- c. The character and past conduct or behaviour, in particular proven criminal behaviour, of the accused;
- d. Whether the accused has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions;
- e. The likely length of time before the matter will come to hearing or trial;
- f. The possibility of prejudice to the defence in the preparation of the defence if the accused is kept in Service custody; and
- g. Any other special matter that is relevant in the particular circumstances.

**3.4.16** The Judge must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.<sup>114</sup>

#### DEALING WITH PERSONS ABSCONDING OR BREACHING BAIL CONDITIONS

**3.4.17** If a person subject to the AFDA who is on bail absconds or breaches his or her bail conditions, a Judge may issue a warrant for the person's arrest, following which the person is to be brought before the Judge or another Judge.<sup>115</sup>

**3.4.18** If a Judge is satisfied that a person brought before him or her has:

- a. Absconded or was about to abscond; or
- b. Contravened or failed to comply with any condition of bail;

the Judge must reconsider the question of bail.<sup>116</sup>

#### USE OF SERVICE PRISONS OR DETENTION QUARTERS

**3.4.19** A Service prison or a detention quarter may be used for the temporary custody of a member of the Armed Forces who:

- a. Is alleged to have committed an offence against the AFDA; or
- b. Has been remanded for trial in the Court Martial.

**3.4.20** Where a member of the Armed Forces is to be committed to a Service corrective establishment for temporary custody, he or she is to be committed on form MD 630B, signed by the member's CO or a competent Service authority. When the member is to be released from temporary custody or delivered into the custody of an escort, this is to be effected using form MD 630D signed by the member's CO or a competent Service authority.

<sup>114</sup> CMA s 49(4)(c).

<sup>115</sup> See paragraphs 3.2.26 to 3.2.28.

<sup>116</sup> AFDA s 101C(2) and CMA s 54(2).

## SECTION 5 – SUSPENSION FROM DUTY

### SUSPENSION FROM DUTY

- 3.5.1** If a member of the Armed Forces is alleged to have committed an offence which renders him or her unsuitable for Service duties, whether the reason concerns honesty, moral standing, or any other matter whatsoever, and it is not considered appropriate to place the member under open or close arrest, his or her CO may suspend that member from all duties pending resolution of the matter.
- 3.5.2** If a CO considers that he or she should suspend a member of the Armed Forces from duty, the CO is to give the member written notice of his or her intention and a reasonable period (which must not be less than 24 hours) within which the member can make a written submission to the CO regarding the proposed suspension. The CO is to take into account any submission made by the member in deciding whether to suspend him or her.
- 3.5.3** An order suspending any member of the Armed Forces from duty terminates only at the direction of the member's CO. Placing the member in close or open arrest subsequent to such an order has no effect on the order unless the CO so specifies.

### EFFECT ON PAY AND ALLOWANCES OF SUSPENSION FROM DUTY

- 3.5.4** Suspension from duty is on full pay. However, if a member of the Armed Forces is suspended from duty in respect of an alleged offence, and is then convicted of that offence (either by a civil court or a military tribunal), the member forfeits one day's allowances for every day he or she was suspended.<sup>117</sup>
- 3.5.5** **Allowances** means all allowances payable to a member by the Crown in respect of his or her service in the Armed Forces, but does not include any payment by way of expenses, refunds, or allowances to meet expenditure already incurred.<sup>118</sup>
- 3.5.6** **Cancellation of forfeiture.** The forfeiture of allowances for a period during which a member of the Armed Forces is suspended before conviction may be cancelled in whole or in part by:
- a.** The member's CO, if the member is convicted by a civil court;<sup>119</sup> or
  - b.** The Court Martial or the disciplinary officer who found the member guilty.<sup>120</sup>

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117 AFDR 7(1)(b) and 8(1)(b).

118 AFDR 3.

119 AFDR 7(2).

120 AFDR 8(2).

## SECTION 6 – PRE-TRIAL LEGAL AID

### ELIGIBILITY

- 3.6.1** A person subject to the AFDA is eligible for pre-trial legal aid under the Armed Forces Legal Aid Scheme if he or she is:
- a.** Being questioned by an investigator under a caution administered in accordance with paragraph 3.1.4; or
  - b.** Under close arrest.
- 3.6.2** Pre-trial does not include any proceeding conducted in the Court Martial after a charge has been referred to the DMP. See Volume 2 for the provision of legal aid in respect of proceedings in the Court Martial.
- 3.6.3** Close arrest has the meaning given in paragraph 3.2.8 and does not include a period of detention or imprisonment imposed as a punishment under the AFDA.

### NATURE OF ENTITLEMENT

- 3.6.4** Legal aid under paragraph 3.6.1 is to be provided without any contribution from the person to whom it is granted, up to a maximum of three hours for any one matter.
- 3.6.5** Legal aid may be claimed in respect of any legal services provided by counsel assigned which are connected with:
- a.** An interview to be conducted with a suspect as part of a preliminary inquiry; or
  - b.** An application for bail under CMA s 49.<sup>121</sup>
- 3.6.6** A grant of legal aid under paragraph 3.6.1 covers:<sup>122</sup>
- a.** The professional fees of counsel assigned;
  - b.** All charges for receiving instructions, preparation, correspondence, research, reports, and attendances;
  - c.** Counsel's travel costs; and
  - d.** Other necessary expenses (for example, toll charges) to the extent that the Registrar of the Court Martial is satisfied that the expenses are fair and reasonable both as to nature and cost.

121

This includes any appeal against a decision of the Court Martial relating to bail under CMAA s 6.

122

AFDR, Part 2 and DM 69 (2 ed) Volume 2, Chapter 5, Section 4, Annex B.



## ASSIGNMENT OF COUNSEL

**3.6.7** The Registrar of the Court Martial will designate one or more Regional Defence Counsel from the Armed Forces Defence Counsel Panel for each of the following regions of New Zealand:

- a. Northern.** From Cape Reinga to the southern boundary of Taupo.
- b. Central.** From the southern boundary of Taupo to the northern boundary of Paraparaumu.
- c. Wellington.** From the northern boundary of Paraparaumu to Cook Strait.
- d. Nelson/Marlborough and West Coast.**
- e. Canterbury.**
- f. Otago/Southland.**

**3.6.8** The names and contact details of the Armed Forces Defence Counsel Panel, including the designation of Regional Defence Counsel, are to be promulgated to all COs and members of the Service Police.

**3.6.9** If a suspect is being interviewed as part of a preliminary inquiry and asserts his or her right to consult and instruct a lawyer without charge under the Armed Forces Legal Aid Scheme, or a person held in custody under the AFDA wishes to obtain legal aid in connection with an application for bail, the investigator or custody officer<sup>123</sup> is to:

- a. In New Zealand.** Seek the assistance of one of the Regional Defence Counsel for the region in which the interview is taking place, or in which the person is being held in custody. If there is more than one Regional Defence Counsel, the suspect or person in custody may be assigned his or her preference.
- b. Outside New Zealand.** Contact the Registrar of the Court Martial (+64 4 498 6824) for the assignment of counsel or, if the investigator or custody officer cannot contact the Registrar, seek the assistance of a member of the Armed Forces Defence Counsel Panel chosen by the suspect or person in custody.

**3.6.10** Counsel assigned to provide legal assistance to a suspect at an interview or a person in custody will not necessarily be assigned to represent that person on legal aid in any subsequent proceedings under the AFDA.

123

See paragraph 3.4.1 for the definition of **custody officer**.

## SECTION 7 – VICTIMS’ RIGHTS

### DEFINITION

**3.7.1**      **Victim.** See paragraphs 8.1.2 to 8.1.6.

**3.7.1A**    **Specified offence.** See paragraphs 4.2.9 to 4.2.11.

### TREATMENT OF VICTIMS

**3.7.2**      Victims are to be treated with courtesy and compassion and respect for their dignity and privacy by all members of the NZDF who deal with them as part of their official duties.<sup>124</sup>

### ACCESS TO SERVICES<sup>125</sup>

**3.7.3**      Where an alleged offence which is the subject of a charge under the AFDA has a victim, that victim is entitled to the following services at public expense, to the extent that those services are reasonably available in the circumstances:

- a.**          Counselling and pastoral care from NZDF chaplaincy services;
- b.**          Counselling from NZDF social and welfare services; and
- c.**          Counselling from NZDF psychological services.

**3.7.4**      A victim who is a member of the NZDF is to receive medical treatment or assistance for any injuries or medical problems associated with the offence from NZDF health services.

**3.7.5**      A victim who is not a member of the NZDF is to be referred to an external health services provider. Any costs associated with the victim’s treatment are to be referred to the Accident Compensation Corporation under the relevant accident compensation legislation.

### INFORMATION ABOUT SERVICES

**3.7.6**      Subject to paragraph 3.7.8, where an allegation has been made for the purposes of AFDA s 102, the following information is to be given to the victim about the following matters as soon as practicable.<sup>126</sup>

- a.**          The progress of the preliminary inquiry into the offence;
- b.**          The charges laid or reasons for not laying charges, and all changes to the charges laid;
- c.**          The victim’s role as a witness in the hearing of the charge;
- d.**          The date and place of any proceedings conducted before a military tribunal in connection with the offence; and

<sup>124</sup> Section 7 of the Victims’ Rights Act 2002.

<sup>125</sup> Section 8 of the Victims’ Rights Act 2002.

<sup>126</sup> Section 12 of the Victims’ Rights Act 2002.

- e. The final disposition of the charge, including the outcome of any appeal.

**3.7.7** The information referred to in paragraph 3.7.6 is to be given to the victim by:

- a. **Prior to the proceedings before the disciplinary officer:** The member of the Service Police or other person responsible for carrying out the preliminary inquiry into the allegation;
- b. **During the proceedings before the disciplinary officer:** The disciplinary officer;
- c. **Once a charge has been remanded for trial by the Court Martial:** The Director of Military Prosecutions; and
- d. **At any other time:** The victim's CO or his or her representative or, in the case of a victim who is not a member of the Armed Forces, the offender's CO or his or her representative.

**3.7.8** The information referred to in paragraph 3.7.6 does not have to be provided if:<sup>127</sup>

- a. Good reason exists for withholding it for the purposes of sections 6, 7 or 9 of the Official Information Act 1982 (see DFO 70 Chapter 3, Section 2); or
- b. The information in question may not be disclosed to the victim as a consequence of an order made by the Court Martial pursuant to CMA s 39.

**3.7.9** The information referred to in paragraph 3.7.6 may instead be provided to the victim's partner, parent or close relative if the victim cannot receive it or is not, or may not be, capable alone of understanding it.<sup>128</sup> In this paragraph, **partner** has the meaning given to that term in Part 1 of DFO 3.

## WITHHOLDING OF VICTIM'S ADDRESS

**3.7.10** No information which identifies, or may lead to the identification of, the address of the place where the victim lives (for example, his or her postal address, email address, fax number, or phone number) is to be disclosed in summary proceedings under the AFDA unless the disciplinary officer makes an order to that effect.

**3.7.11** A disciplinary officer is not to make an order for the purposes of paragraph 3.7.10 unless satisfied that:

- a. The information is directly relevant to the facts in issue in the proceedings; and
- b. The evidential value of the information (if any) outweighs any prejudice to the victim's interests, or any harm to the victim, that is likely to be caused by the giving of the information.

<sup>127</sup> Section 13 of the Victims' Rights Act 2002.

<sup>128</sup> Section 14 of the Victims' Rights Act 2002.

**RIGHTS TO BE AFFORDED TO VICTIMS OF SPECIFIED OFFENCE**

**3.7.11A** The victim support officer and the Director of Military Prosecutions must make all reasonable efforts to ensure that a victim of a specified offence is accorded the rights outlined in the following sections of the AFDA:

- a.** Section 198D – Victim’s views about release on bail of accused or offender.
- b.** Section 198E – Right to receive notice of certain matters and to appoint representatives, which provides that:
  - (1)** The victim has the right to be given reasonable notice of the prescribed matters on request, if the victim provides his or her address; and
  - (2)** The victim has the right to appoint a representative to exercise the abovementioned rights on his or her behalf, if the victim or representative provides the representative’s address.

**3.7.11B** Prescribed matters are, in relation to a specified offence:

- a.** The release of an accused or offender on bail;
- b.** Any terms of such bail which are relevant to the security of the victim;
- c.** The changing of such bail terms;
- d.** The impending temporary or permanent release of a service prisoner or detainee from prison or a detention quarter;
- e.** The escape of an accused or service prisoner or detainee from prison or a detention quarter, or the absconding of such a person while on bail;
- f.** The conviction of an offender for escaping from custody or failure to answer bail contrary to sections 45 or 45A of the AFDA; and
- g.** The impending release of a person who has been ordered to be detained in a hospital as a special patient or as a patient by the Court Martial acting under Part 10 of the AFDA.

## SECTION 8 – DESERTERS AND ABSENTEES

### ACTION ON ABSENCE

- 3.8.1** As soon as there is reason to believe that a member of the Armed Forces has deserted or is absent without leave, his or her CO or unit commander as appropriate is to cause the following actions to be taken:
- a. Service kit and personal effects.** Not later than 24 hours after notification of absence, the member's Service kit and personal effects<sup>129</sup> are to be collected and placed in safe custody. An inventory is to be prepared and signed by two SNCOs. The inventory is to list Service kit separately from personal effects and is to be retained at the member's unit. Service stores and equipment on loan for which the absentee is personally responsible are to be returned on his or her or her behalf. Any deficiencies of items listed in paragraph 3.8.4b are to be carefully noted and recorded for use in any court of inquiry assembled under paragraph 3.8.3.
  - b. Notification of Service Police.** The relevant Service Police authority is to be notified of the absence and of any subsequent return.
  - c. Withholding of pay.** The absentee's pay is to be withheld.<sup>130</sup> All pay withheld under this paragraph is to be credited to the member as soon as practicable after his or her return to duty, except where:<sup>131</sup>
    - (1)** The member is to be charged with an offence against the AFDA in respect of the member's absence without leave or desertion; or
    - (2)** The member has been declared by a court of inquiry to be an absentee and paragraph 3.8.6 applies.

### WARRANT FOR ARREST

- 3.8.2** If a member of the Armed Forces is absent without leave and there are grounds for believing that he or she has deserted, a warrant is to be issued immediately for his or her arrest in accordance with paragraph 3.2.47. In other cases, while an absence of one day would be sufficient to justify the issue of a warrant, in practice a longer period of absence, such as seven days, would be more appropriate. In no case, however, is more than 14 days to elapse without a warrant being issued.

### INQUIRY ON ABSENCE OF MEMBER OF THE ARMED FORCES

- 3.8.3** If a member of the Armed Forces has been absent without leave for a period of 21 days, a court of inquiry is to be assembled to inquire into the fact of that absence, and any deficiency in the Service property issued to him or her.<sup>132</sup>

129 See definition in DR 2.

130 DR 12(1).

131 DR 12(2).

132 AFDA s 201(1).

- 3.8.4** If the court of inquiry is satisfied that the member is absent without leave or other sufficient reason, the court is to make a declaration in form MD 635 that the member is an absentee. Every such declaration is to specify:<sup>133</sup>
- a.** The period of absence; and
  - b.** The extent to which the arms, ammunition, clothing or other Service property issued or entrusted to the absentee are deficient.
- 3.8.5** The form MD 635 is to be countersigned by the CO of the absentee in duplicate and is then to be filed in the absentee's personal file.<sup>134</sup>
- 3.8.6** If the absentee does not surrender within six months after the date on which he or she went absent, or is not apprehended within that period, the form MD 635 has the legal effect of a conviction by the Court Martial for desertion for the purposes of AFDA s 202.<sup>135</sup> See AFDA s 202(3) with respect to the treatment of an absentee's pay and personal effects once he or she has been absent for six months or more.

#### NZDF DESERTERS AND ABSENTEES IN AUSTRALIA

- 3.8.7** The authorities designated to request assistance in the apprehension of deserters and absentees from the New Zealand Armed Forces in Australia pursuant to section 116F of the Defence Act 1903 (Commonwealth of Australia) are the Head, New Zealand Defence Staff, Canberra ("the Head") and, in the case of the Navy only, COs of HMNZ ships visiting Australia, for the duration of the visit.
- 3.8.8** Except in a case to which paragraph 3.8.9 applies, where a member of the Armed Forces (not being an Australian citizen) who has deserted or is absent without leave is in Australia, his or her CO is to ask the Head to request assistance in apprehending the member from the Australian authorities under Division 3 of Part IXA of the Defence Act 1903 (Cth). For that purpose the CO is to provide the Head with the details contained on form MD 626.
- 3.8.9** Where an officer or rating deserts or is absent without leave from one of HMNZ ships visiting Australia, the CO of the ship, so long as the ship is still in Australia, is to request assistance in his or her apprehension under Division 3 of Part IXA of the Defence Act 1903 (Cth) from the CO of the nearest Royal Australian Navy establishment. For that purpose the CO of the ship is to provide the CO of the establishment with the details contained on form MD 626. A copy of the request and the details of the deserter or absentee are also to be sent to the Head by the CO of the ship.

#### FORFEITURE OF PAY AND BENEFITS

- 3.8.10** The following forfeitures apply if an absentee is convicted by the Court Martial or found guilty by a disciplinary officer of desertion or absence without leave, or paragraph 3.8.6 applies:

<sup>133</sup> AFDA s 201(2).

<sup>134</sup> AFDA s 201(2).

<sup>135</sup> AFDA s 201(2).

- a. The offender forfeits one day's pay and allowances for each day during which he or she was in desertion or absent without leave.<sup>136</sup> However, if the period of absence is less than 24 hours, the Court Martial or the disciplinary officer may cancel this forfeiture in whole or in part, as the Court Martial or disciplinary officer thinks just.<sup>137</sup>
- b. The period during which the offender was in desertion or absent without leave, where the period exceeds 27 days, is not to be counted as service towards promotion, leave, medals, badges, grants, completion of engagement, or any other benefit or condition of service.<sup>138</sup>

### RECOVERY OF FORFEITED PAY AND ALLOWANCES

**3.8.11** The pay and allowances that are to be forfeited under paragraph 3.8.10a may, without limiting any other mode of recovery, be recovered from the offender:<sup>139</sup>

- a. By deduction from any pay and allowances that was withheld in accordance with paragraph 3.8.1c; and
- b. To the extent that the withheld pay and allowances (if any) are insufficient to meet the amount to be forfeited, by deduction from any other pay and allowances or other money due to the offender from the NZDF in relation to his or her service in the Armed Forces.<sup>140</sup>

### RECOVERY OF TRANSPORT EXPENSES

**3.8.12** Where a member of the Armed Forces is charged with desertion or absence without leave, the particulars of the offence should, in accordance with paragraph 4.2.10, include details of any expense suffered by the Crown through or by means of the offence in connection with the transport of the member from the place of recovery to his or her unit or other place of duty, to enable a compensation order to be made under AFDA s 117ZA.

**3.8.13** The transport expenses for which compensation may be sought include:

- a. Where commercial transport is used, the cost of any fares paid for by the NZDF on the member's behalf.
- b. Where a Service vehicle is used to convey the member, the cost of a single journey with one passenger irrespective of whether or not the member is escorted. If more than one deserter or absentee is transported in the same vehicle, the cost is to be apportioned equally between them.
- c. The cost of any meals paid for or provided by the Crown less the cost of any meals which would normally be provided for the member.

136 AFDA s 202(1).

137 AFDA s 202(1A).

138 AFDA s 202(2).

139 AFDA s 202(2A).

140 This does not include a death benefit payable under the Government Superannuation Fund Act 1956.

- d. Any accommodation expenses incurred by the NZDF on behalf of the member where non-Service accommodation is used.

**3.8.14** The transport expenses for which compensation may be sought do not include the expenses of any escort who accompanies the member.

**3.8.15** In every case the actual amount of compensation which may be awarded is subject to the limits prescribed by paragraph 8.4.3.



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# OFFENCES AND CHARGES

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## SECTION 1 – OFFENCES GENERALLY

**4.1.1** This chapter provides guidance on the offences with which a person subject to the AFDA may be charged and found guilty by a disciplinary officer.<sup>1</sup> These offences are created by Part 2 of the AFDA or incorporated by AFDA s 74(1) (**civil offences**) and fall into the following categories:

- a. Offences relating to desertion and absence without leave;
- b. Offences relating to violence and insubordination;
- c. Sexual offences;
- d. Drug offences;
- e. Offences relating to performance of duty and obedience to orders;
- f. Offences relating to ships, vehicles, aircraft and weapons;
- g. Driving offences;
- h. Property offences;
- i. Offences relating to arrest and custody;
- j. Offences relating to false statements;
- k. Offences relating to the administration of justice; and
- l. Miscellaneous offences.

**4.1.2** The above mentioned offences, including the most common civil offences, are examined in detail in Sections 4 to 15. Section 3 identifies those offences which, in the military justice system, may be tried in the Court Martial only. Section 16 explains the law of attempts and parties to offences.

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Offences which are triable in the Court Martial only are discussed in Volume 2, Chapter 3.

## SECTION 2 – RECORDING A CHARGE

### THE DECISION TO CHARGE

- 4.2.1** Only the CO of a person subject to the AFDA may charge the person with an offence against the AFDA.
- 4.2.2** If it is alleged that a person subject to the AFDA has committed an offence against the AFDA, his or her CO must, unless he or she considers that the allegation is not well founded, either:<sup>2</sup>
- a.** Record it as a charge in form MD 601; or
  - b.** Refer it to the Police or other civil authority.
- 4.2.3** An allegation is **well-founded** if:
- a.** There is a reasonable prospect of a finding of guilty on a charge; and
  - b.** It is in the interests of service discipline that the allegation is recorded in the form of a charge.
- 4.2.3A** A reasonable prospect of a finding of guilty exists only when:
- a.** The alleged facts logically support every element that must be proved before the accused could be found guilty and there is some evidence to support each element. If there is a conflict of evidence between witnesses, the proper place to resolve this is at summary trial. The CO must find that the allegation is well-founded if there is one version of events which is supported by evidence and, if believed by the disciplinary officer or Court Martial, may result in a finding of guilty; and
  - b.** The alleged facts do not raise a defence allowing no reasonable prospect of a finding of guilty.
- 4.2.3B** It will not be in the interests of service discipline to record the allegation in the form of a charge or to refer it to the appropriate civil authority if:
- a.** The allegation did not cause harm which the law is intended to prevent; or
  - b.** The allegation is:
    - (1)** Of a minor or trivial nature, except where that allegation presents a challenge to Service discipline; and
    - (2)** The allegation can be better dealt with through mechanisms such as additional training or duties, except where such mechanisms circumvent the disciplinary system.

- 4.2.3C** A CO should obtain written legal advice from a legal officer before deciding that an allegation is not well-founded where:
- a. A defence allows no reasonable prospect of a finding of guilty; or
  - b. The allegation did not cause harm which the law is intended to prevent.

#### DETERMINATION OF WHETHER A CHARGE IS A SPECIFIED OFFENCE

**4.2.3D** When a CO determines an allegation of offending against a person under his or her command to be well-founded, the CO must also determine whether the charge is a specified offence<sup>3</sup>. If the offence is a specified offence the CO of the accused must:

- a. Advise the CO of the victim and the Director of Military Prosecutions of this determination; and
- b. Appoint a member of the NZDF to assist the victim if the victim does not have a CO.

**4.2.3E** The victim's CO or, if the victim does not have a CO, the member of the Defence Force appointed to assist the victim is termed the victim support officer and must ensure that the rights and obligations at paragraphs 3.7.13 to 3.7.14 are complied with.

**4.2.3F** A specified offence is<sup>3a</sup>:

- a. An offence of a sexual nature specified in:
  - (1) Part 7 of the Crimes Act 1961, excluding the offences in ss 143 and 144; or
  - (2) Sections 216H to 216J of the Crimes Act 1961; or
  - (3) Section 42(b) of the AFDA.
- b. An offence of serious assault that does not come within paragraph 4.2.3Fa.;
- c. An offence that has resulted in serious injury to a person, in the death of a person, or in a person becoming incapable; or
- d. An offence of another kind, and that has led to the victim having ongoing fears, on reasonable grounds:
  - (1) For his or her physical safety or security; or
  - (2) For the physical safety or security of one or more members of his or her immediate family.

<sup>3</sup> AFDA s 102A.  
<sup>3a</sup> Victims' Rights Act 2002, s 29



**4.2.3G** Part 7 of the Crimes Act 1961 includes the following offences of a sexual nature:

- a. Section 124 – Distribution or exhibition of indecent matter;
- b. Section 124A – Indecent communication with young person under 16;
- c. Section 125 – Indecent act in public place;
- d. Section 126 – Indecent act with intent to insult or offend;
- e. Section 128B – Sexual violation;
- f. Section 129 – Attempted sexual violation and assault with intent to commit sexual violation;
- g. Section 129A – Sexual conduct with consent induced by certain threats;
- h. Section 130 – Incest;
- i. Section 131 – Sexual conduct with a dependant family member;
- j. Section 131B – Meeting young person following sexual grooming;
- k. Section 132 – Sexual conduct with child under 12;
- l. Section 134 – Sexual conduct with young person under 16;
- m. Section 135 – Indecent assault;
- n. Section 138 – Sexual exploitation of person with significant impairment; and
- o. Section 142A – Compelling indecent act with animal.

**4.2.3H** Sections 216H to 216J of the Crimes Act 1961 are as follows:

- a. Section 216H – Prohibition on making of intimate visual recording;
- b. Section 216I – Prohibition on possessing intimate visual recording in certain circumstances; and
- c. Section 216J – Prohibition on publishing, importing, exporting or selling an intimate visual recording.

## STAY OF PROCEEDINGS

**4.2.4** If the CO considers that, although an allegation is well-founded, there are compelling reasons that it should not be proceeded with under paragraph 4.2.2, he or she may apply to the DMP for a stay of proceedings.<sup>4</sup> The DMP may order that the proceedings against the accused under the AFDA be stayed for such period as the DMP thinks fit. If the DMP so orders, he or she must provide a copy of the order, together with his or her written reasons for ordering it, to:<sup>5</sup>

(1) The Solicitor-General;

<sup>4</sup> AFDA s 101H(1).

<sup>5</sup> AFDA s 101H(2).

- (2) The CO; and
- (3) The accused in question.

## DRAFTING A CHARGE

- 4.2.5** Any charge against the AFDA is to be recorded in form MD 601.<sup>6</sup>
- 4.2.6** Each charge must consist of a statement of offence and a statement of the particulars.<sup>7</sup>
- 4.2.7** The statement of offence is a short capitalised phrase describing the offence alleged, for example, STEALING PROPERTY OF A COMRADE CONTRARY TO AFDA s 57(1)(a)(ii). Statements of offence for all service offences and the most common civil offences are included in Sections 4 to 16. If it is intended to record a charge which is not mentioned in Sections 4 to 16, the advice of a legal officer is to be sought.
- 4.2.8** The statement of the particulars describes the place, date and circumstances which are said to constitute the offence in the specific case. It must contain sufficient details of the alleged offence to give the accused reasonable information concerning every act or omission to be proved against him or her.<sup>8</sup> Sections 4 to 16 include sample statements of the particulars for all service offences and the most common civil offences, by way of guidance.
- 4.2.9** **Place.** The particulars must give a general description of the place where the offence was committed, eg at Burnham, at RNZAF Base Ohakea, on board HMNZS PHILOMEL. The prepositions “near” or “between” or “at or near”, may be used to assist in describing a place which is not exactly known, unless the exact place is a material element of the offence, eg a charge of sleeping at his or her post under AFDA s 34(2)(a).
- 4.2.10** **Date.** The particulars must state the date on which the offence was committed. If the exact date is not known the offence may be stated as having been committed “on or about” a specified date or “on a date unknown between” two stated dates, whichever is most accurate. This will suffice without amendment if the evidence shows that the offence was committed within a reasonable period of that date and the exact date is not material. The date is material if the whole of the evidence is relevant to that date and no other, and there is evidence of an alibi. It is material if the date and time are important elements of the particular charge, eg a charge of absence without leave. It may also be material where there is a time limit on the bringing of charges.<sup>9</sup>

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6 See Chapter 13 Section 2.  
 7 RP 7(1)(d).  
 8 RP 7(1)(g)(i).  
 9 See Chapter 2 Section 4.

**4.2.11 Value.** The particulars must state the value of the goods or other property unlawfully obtained or damaged, or the loss or expense occasioned by the alleged offence, if that value is:

- a. Material to the offence;
- b. Relevant to a statutory level of punishment, eg theft;<sup>10</sup> or
- c. Necessary to support a possible compensation or restitution order.<sup>11</sup>

The value is to be expressed in figures, eg \$1,000.

**4.2.12 Active service.** If the offence provides for a higher penalty for active service and it is alleged that the accused was on active service at the relevant time, that must be stated in the particulars.<sup>12</sup> If the jurisdiction of the disciplinary officer relies on the fact that the accused was on active service, eg the case of certain civilians, that should be stated in the particulars.

## DUPLICITY

**4.2.13** No charge may state more than one offence.<sup>13</sup> This is the rule against duplicity. For example, if the particulars of a charge of striking a superior officer also allege that the accused used insubordinate language, the whole charge is bad for duplicity. In any case of doubt, the advice of a legal officer is to be sought.

**4.2.14** A charge is bad for duplicity if it alleges conduct on more than one occasion, unless the offence is a continuing offence. A continuing offence is one constituted by conduct which goes on from day to day but is a separate and distinct offence each day the conduct continues, eg absence without leave.

**4.2.15** The fact that the evidence may establish more than one offence does not make the charge bad for duplicity provided that the charge only alleges one offence. For example, on a single charge of common assault, the evidence may establish that the accused struck the victim several times.

**4.2.16** A single offence may have more than one victim or object.

## REPRESENTATIVE CHARGES

**4.2.17** In situations where the alleged conduct occurred a number of times over a period of time, but each act cannot be specifically differentiated, a representative charge may be recorded.

**4.2.18** Representative charges are most appropriate where the actual time of each alleged offence cannot be specified, eg drug or theft offences that have occurred on a number of unspecified occasions over a period such as a year. A representative charge will allege a number of transactions occurred over a period of time, and the proof of any one of those alleged transactions will satisfy the proof of the charge as a whole. Descriptive particulars of each incident

<sup>10</sup> See Section 11.

<sup>11</sup> RP 7(1)(g)(iii).

<sup>12</sup> RP 7(1)(g)(ii).

<sup>13</sup> RP 7(1)(a). However, see paragraph 4.2.21 with respect to offences against AFDA s 73, which are an exception to this rule to a limited extent.

and any other available specifics must be included as much as is possible. If any particular transaction is able to be addressed as an individual incident, a representative charge should not be used for that particular transaction. A legal officer is to be consulted in the drafting of representative charges.

## ALTERNATIVE CHARGES

**4.2.19** Charges may be recorded as alternatives in descending order of gravity.<sup>14</sup> For example, an accused charged with striking her superior officer may be charged with common assault in the alternative, if there may be some doubt as to whether she knew or had reasonable cause to believe that the victim was her superior officer.

**4.2.20** An example of the correct manner of expressing alternative charges in form MD 601 is:

### First Charge

#### **ABSENCE WITHOUT LEAVE CONTRARY TO AFDA s 48**

in that he, at Linton on 13 April 20XX at 0800 hours absented himself without leave until 1023 hours on 13 April 20XX.

### Second Charge (Alternative to the First Charge)

#### **AVOIDANCE OF DUTY CONTRARY TO AFDA s 49(a)**

in that he, at Linton on 13 April 20XX, without reasonable excuse, failed to parade with A Coy, 1 RNZIR, a parade which it was his duty to attend.

**4.2.21** A charge that a person did or omitted an act which was likely to prejudice Service discipline, contrary to AFDA s 73(1)(a), may in the same charge allege in the alternative that:

- a.** The act was likely to bring discredit on the Service contrary to AFDA s 73(1)(b);
- b.** The person negligently failed to perform a duty imposed on him or her by Service order, training or custom contrary to AFDA s 73(1)(c); and/or
- c.** The person negligently performed a duty imposed on him or her by Service order, training or custom contrary to AFDA s 73(1)(d);

and vice versa.<sup>15</sup>

## MULTIPLICITY

**4.2.22** While one incident may give rise to a number of charges, care is to be exercised to ensure that an accused is not faced with an oppressive number of separate charges in respect of one transaction.

<sup>14</sup> RP 7(1)(c).

<sup>15</sup> AFDA s 73(3).

**SECTION 3 – OFFENCES TO BE TRIED ONLY IN THE COURT MARTIAL**

- 4.3.1** The following classes of offence may not be tried or otherwise dealt with summarily and must be referred to the Director of Military Prosecutions<sup>15a</sup>.
- a.** Unauthorised disclosure of information (AFDA s 25);
  - b.** Creating alarm or despondency in relation to armed combat operations (AFDA s 29);
  - c.** Offences in relation to capture by the enemy (AFDA s 30);
  - d.** Official corruption (AFDA s 54);
  - e.** Offences relating to the proceedings of a military tribunal or a court of inquiry (AFDA s 70);
  - f.** False evidence (AFDA s 71);
  - g.** Any offence for which the maximum punishment is life imprisonment or a term of imprisonment or seven years or more, except an offence contrary to AFDA sections 57(1), 58(1) or 61(1), or Crimes Act 1961 sections 219 and 223;
  - h.** Being a party to an offence mentioned above (AFDA s 75);
  - i.** Attempting to commit an offence mentioned above (AFDA s 76); and
  - j.** Being an accessory after the fact to an offence mentioned above (AFDA s 77).
- 4.3.2** Such matters referred to the Director of Military Prosecutions in accordance with paragraph 4.3.1 must be disposed of as the Director of Military Prosecutions decides.

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15a AFDA s 206(1)(ab).

## SECTION 4 – DESERTION AND ABSENCE WITHOUT LEAVE

### DESERTION

- 4.4.1 Offence.** A person subject to the AFDA deserts if:<sup>16</sup>
- a.** With intent to remain permanently absent from duty, he or she leaves or fails to attend at his or her place of duty without authority; or
  - b.** Having left or failed to attend at his or her place of duty, he or she behaves in a manner which shows intent to remain permanently absent from duty without authority; or
  - c.** Having been warned for active service, he or she is absent from duty without authority, with intent to avoid that service.
- 4.4.2 Punishment.** If this offence is committed on active service or after having been warned for active service, the maximum punishment is life imprisonment.<sup>17</sup> In any other case, the maximum punishment is two years' imprisonment.<sup>18</sup>
- 4.4.3 Active service.** See Glossary of Terms in Chapter 1 Section 1.
- 4.4.4 Withholding and forfeiture of pay.** See Chapter 3 Section 8 for the withholding and forfeiture of the pay of deserters. To enable the amount of the forfeiture to be calculated, the date and time of the commencement and termination of the desertion must be stated in the particulars of the offence with as much precision as possible.
- 4.4.5 Arrest.** See Chapter 3 Section 8 for the arrest of deserters.

### Specimen Charges

- No 1 DESERTION CONTRARY TO AFDA s 47(1)(a)  
in that he, after having been warned for active service, at Trentham not later than 0800 hours on 19 February 20XX, with intent to avoid active service, absented himself from duty without authority and remained absent until not earlier than 1257 hours on 9 March 20XX.
- No 2 DESERTION CONTRARY TO AFDA s 47(1)(b)  
in that she, at RNZAF Base Ohakea on 19 February 20XX at 1020 hours, deserted her place of duty and remained absent until 1927 hours on 18 April 20XX.

<sup>16</sup> AFDA s 47(2).

<sup>17</sup> AFDA s 47(1)(a). Such an offence may only be tried in the Court Martial.

<sup>18</sup> AFDA s 47(1)(b).

**Disciplinary Officer's Checklist (AFDA s 47(2)(a) desertion)**

Element	Proved?
Subject to the AFDA	
Left or failed to attend place of duty	
Intended to leave or fail to attend	
Date and time	
Without authority	
Intended to remain permanently absent from duty	
<i>(If active service alleged in particulars)</i> Accused / unit on active service	

**Disciplinary Officer's Checklist (AFDA s 47(2)(b) desertion)**

Element	Proved?
Subject to the AFDA	
Left or failed to attend place of duty	
Intended to leave or fail to attend	
Date and time	
Behaved in a manner which showed intent to remain permanently absent from duty without authority	
<i>(If active service alleged in particulars)</i> Accused / unit on active service	

**Disciplinary Officer's Checklist (AFDA s 47(2)(c) desertion)**

Element	Proved?
Subject to the AFDA	
Had been warned for active service	
Absent from duty	
Intended to be absent	
Date and time	
Intended to avoid active service	

ABSENCE WITHOUT LEAVE

- 4.4.6      Offence.** A person subject to the AFDA is absent without leave if he or she leaves or fails to attend his or her place of duty without authority such as a valid grant of leave.<sup>19</sup>
- 4.4.7      Punishment.** The maximum punishment is 12 months’ imprisonment.
- 4.4.8      Withholding and forfeiture of pay.** See Chapter 3 Section 8 for the withholding and forfeiture of the pay of absentees. To enable the amount of the forfeiture to be calculated, the date and time of the commencement and termination of the desertion must be stated in the particulars of the offence with as much precision as possible.
- 4.4.9      Arrest.** See Chapter 3 Section 8 for the arrest of absentees.

Specimen Charge

ABSENCE WITHOUT LEAVE CONTRARY TO AFDA s 48

in that he, on board HMNZS TE MANA on 19 February 20XX at 0800 hours, absented himself without leave until 1005 on 19 February 20XX

[necessitating his transportation at public expense by air from Brisbane to Darwin in order to meet his ship at a cost of \$600].

Disciplinary Officer’s Checklist

Element	Proved?
Subject to the AFDA	
Left or failed to attend place of duty	
Intended to leave or fail to attend OR recklessly failed to attend OR negligently failed to attend	
Date and time	
Without leave or other authority	

19

AFDA s 48.



## SECTION 5 – VIOLENCE AND INSUBORDINATION

### VIOLENCE TO A SUPERIOR OFFICER

**4.5.1 Offences.** A person subject to the AFDA is guilty of an offence if he or she:

- a. Strikes;<sup>20</sup> or
- b. Otherwise than by striking, uses violence to;<sup>21</sup> or
- c. Offers violence to;<sup>22</sup>

his or her superior officer.<sup>23</sup>

**4.5.2 Punishment.** The maximum punishment is five years' imprisonment.

**4.5.3 Superior officer,** in relation to a member of the Armed Forces, means another member of the Armed Forces holding a higher rank (not being an honorary rank) and includes another member of equal rank (not being an honorary rank) who is entitled to exercise powers of command over him or her.<sup>24</sup> The relative ranks of members of the Armed Forces and foreign forces are prescribed in Chapter 1 Section 3.

**4.5.4 Members of foreign forces.** A member of a foreign force holding a higher relative rank will be a superior officer if the member is attached to a New Zealand Service<sup>25</sup> or serving in a force which CDF has declared is serving together with a New Zealand force.<sup>26</sup>

**4.5.5 Midshipmen and officer cadets.** Midshipmen and officer cadets are not superior officers for the purposes of these offences except when they are:<sup>27</sup>

- a. Posted to a naval ship; or
- b. Authorised in writing to exercise powers of command by their CO.

**4.5.6 Strikes** means hitting the person with the hand or fist or with something held in the hand.<sup>28</sup> Kicking is not striking.

**4.5.7 Uses violence.** The particulars are to specify the form of violence alleged.

**4.5.8 Offers violence** means acting in a threatening manner, where the nature of the conduct and the surrounding circumstances are such that, at the time the act is done, a reasonable person in the position of the superior officer would believe that the offender was about to use violence against him or her.<sup>29</sup> The

20 AFDA s 35(1)(a).

21 AFDA s 35(1)(b).

22 AFDA s 35(1)(c).

23 If there is doubt whether the victim was a superior officer or whether the accused knew the victim was a superior officer, a charge of assault should be considered.

24 AFDA s 2(1).

25 DA s 23A.

26 DA s 23B.

27 AFDA s 2(1).

28 *The New Shorter Oxford English Dictionary*, Volume 2 (1993).

29 *R v Meek* [1981] 1 NZLR 499 (CA).

intervention of circumstances which prevent the use of violence after the initial offer of violence is therefore irrelevant to a charge of offering violence, unless a reasonable person in the position of the superior officer would have foreseen the intervention and known that it was not possible for the offender to use violence against him or her. Although there must be an intention to offer violence, there need not be an intention to use violence.<sup>30</sup>

### Specimen Charges

- No 1 STRIKING HIS SUPERIOR OFFICER CONTRARY TO AFDA s 35(1)(a)  
in that he, at Linton on 25 April 20XX, struck W100043 Corporal P.D. James, his superior officer.
- No 2 USING VIOLENCE TO HER SUPERIOR OFFICER CONTRARY TO AFDA s 35(1)(b)  
in that she, at RNZAF Base Auckland on 25 April 20XX kicked and struggled with Master Warrant Officer H.J. De La Croix, Canadian Forces, her superior officer.
- No 3 OFFERING VIOLENCE TO HIS SUPERIOR OFFICER CONTRARY TO AFDA s 35(1)(c)  
in that he, on board HMNZS TE KAHA on 25 April 20XX, pointed a loaded Steyr rifle at Lieutenant H.G. Wells, RNZN, his superior officer.

### Disciplinary Officer's Checklist (AFDA s 35(1)(a) striking)

Element	Proved?
Subject to the AFDA	
Hit victim with the hand or fist or with something held in the hand	
Intended to hit victim	
Victim was superior officer	
Date	
<b>Defence (accused to prove on balance of probabilities)<sup>31</sup></b> Did not know or have reasonable cause to believe that victim was superior officer	

<sup>30</sup> *R v Adams* [1999] 3 NZLR 144 (CA).

<sup>31</sup> AFDA ss 35(2) and 3(2)

**Disciplinary Officer's Checklist (AFDA s 35(1)(b) using violence)**

Element	Proved?
Subject to the AFDA	
Used violence to victim in the manner stated in the particulars	
Intended to use violence to victim	
Victim was superior officer	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Did not know or have reasonable cause to believe that victim was superior officer	

**Disciplinary Officer's Checklist (AFDA s 35(1)(c) offering violence)**

Element	Proved?
Subject to the AFDA	
Did the act(s) / said the words alleged in the particulars	
In the circumstances, a reasonable person in the position of the superior officer would have believed that the accused was about to use violence against him or her	
Intended to offer violence to the victim	
Victim was superior officer	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Did not know or have reasonable cause to believe that victim was superior officer	

**VIOLENCE TO A PERSON ON GUARD DUTY OR WATCH**

**4.5.9 Offences.** A person subject to the AFDA is guilty of an offence if he or she:

- a.** Strikes any person (not being an enemy) who is on guard duty or watch;<sup>32</sup>
- b.** Otherwise than by striking, uses force against any person (not being an enemy) who is on guard duty or watch;<sup>33</sup> or
- c.** By threat of force, compels any person (not being an enemy) who is on guard duty or watch to allow him or her or any other person to pass.<sup>34</sup>

<sup>32</sup> AFDA s 34(5)(a).

<sup>33</sup> AFDA s 34(5)(b).

<sup>34</sup> AFDA s 34(5)(c).

- 4.5.10 Punishment.** If these offences are committed on active service, the maximum punishment is 10 years' imprisonment.<sup>35</sup> In any other case, the maximum punishment is two years' imprisonment.<sup>36</sup>
- 4.5.11 Person on guard duty** means a person who is ordered to patrol, or who is a member of a guard or other party mounted or ordered to patrol, or who is posted, for the purpose of:
- a. Protecting any person, place, or premises, or any ship, vehicle, aircraft, weapons, or other equipment or stores;
  - b. Preventing or controlling entry to or departure from any place, premises, ship, vehicle, or aircraft; or
  - c. Regulating traffic by land, water, or air.<sup>37</sup>
- 4.5.12 Enemy and active service.** See Glossary of Terms in Chapter 1 Section 1 for the meaning of these terms.
- 4.5.13 Strikes.** See paragraph 4.5.6.
- 4.5.14 Uses force.** The particulars are to specify the form of force alleged.

### Specimen Charges

- No 1 STRIKING A PERSON ON GUARD DUTY CONTRARY TO AFDA s 34(5)(a) AND (6)  
in that he, at RNZAF Base Ohakea on 26 August 20XX, struck Mr Windsor Castle, a civilian security guard on guard duty at the main gate to RNZAF Base Ohakea.
- No 2 USING FORCE AGAINST A PERSON ON GUARD DUTY CONTRARY TO AFDA s 34(5)(b) AND (6)  
in that she, at Whakatane on 26 August 20XX, kicked U100045 Private C.K. Stead, a person ordered to patrol White Street for the purpose of regulating road traffic.
- No 3 COMPELLING A PERSON ON WATCH TO ALLOW A PERSON TO PASS CONTRARY TO AFDA s 34(5)(c) AND (6)  
in that he, on active service on board HMNZS TE MANA on 26 August 20XX, compelled ASCS M. Gee, Quartermaster of the first watch, to let him pass by threatening to strike ASCS Gee with an iron bar.

<sup>35</sup> Such an offence may only be tried in the Court Martial.

<sup>36</sup> AFDA s 34(6).

<sup>37</sup> AFDA s 34(1).

**Disciplinary Officer's Checklist (AFDA s 34(5)(a) striking)**

Element	Proved?
Subject to the AFDA	
Hit victim with the hand or fist or with something held in the hand	
Intended to hit victim	
Victim was on guard duty or on watch	
Knew victim was on guard duty or watch	
Victim was not the enemy	
Date	

**Disciplinary Officer's Checklist (AFDA s 34(5)(b) using force)**

Element	Proved?
Subject to the AFDA	
Used force to victim in the manner stated in the particulars	
Intended to use specified force	
Victim was on guard duty or on watch	
Knew victim was on guard duty or watch	
Victim was not the enemy	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 34(5)(c) compelling by threat of force)**

Element	Proved?
Subject to the AFDA	
Victim allowed accused or other person to pass	
Victim's act caused by threat of force from accused	
Intended to compel victim in this manner	
Victim was on guard duty or on watch	
Knew victim was on guard duty or watch	
Victim was not the enemy	
Date	

**VIOLENCE TO A PERSON MAKING AN ARREST**

**4.5.15 Offence against member of the Armed Forces.** A person subject to the AFDA is guilty of an offence if he or she:

- a. Strikes;<sup>38</sup> or
- b. Otherwise than by striking, uses violence to;<sup>39</sup> or
- c. Offers violence to;<sup>40</sup>

any member of the Armed Forces who has lawfully ordered the person into arrest.

**4.5.16 Offence against other persons.** A person subject to the AFDA is guilty of an offence if he or she:

- a. Strikes;<sup>41</sup> or
- b. Otherwise than by striking, uses violence to;<sup>42</sup> or
- c. Offers violence to;<sup>43</sup>

any person who attempts to arrest the person or is holding the person in custody under the AFDA.

**4.5.17 Punishment.** The maximum punishment is two years' imprisonment.

**4.5.18 Strikes.** See paragraph 4.5.6.

**4.5.19 Uses violence.** The particulars are to specify the form of violence alleged.

**4.5.20 Offers violence.** See paragraph 4.5.8.

### Specimen Charges

- No 1 STRIKING A MEMBER OF THE ARMED FORCES LAWFULLY ORDERING HIM INTO ARREST CONTRARY TO AFDA s 44(2)(a)  
in that he, at Linton on 25 April 20XX, on being lawfully ordered into arrest by W100043 Corporal P.D. James, struck the said corporal.
- No 2 OFFERING VIOLENCE TO A PERSON ATTEMPTING TO ARREST HER CONTRARY TO AFDA s 44(3)(c)  
in that she, at Wellington on 9 January 20XX, when Constable Melanie Te Paki attempted to arrest her on suspicion of being absent without leave, pointed a bayonet at her and said "Back off, or I'll cut you", or words to that effect.

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38 AFDA s 44(2)(a).  
 39 AFDA s 44(2)(b).  
 40 AFDA s 44(2)(c).  
 41 AFDA s 44(3)(a).  
 42 AFDA s 44(3)(b).  
 43 AFDA s 44(3)(c).

**Disciplinary Officer's Checklist (AFDA s 44(2)(a) striking)**

Element	Proved?
Subject to the AFDA	
Hit victim with the hand or fist or with something held in the hand	
Intended to hit victim	
Victim was a member of the Armed Forces	
Victim had lawfully ordered accused into arrest	
Accused knew victim was member of the Armed Forces ordering him/her into arrest	
Date	

**Disciplinary Officer's Checklist (AFDA s 44(2)(b) using violence)**

Element	Proved?
Subject to the AFDA	
Used violence to victim in the manner stated in the particulars	
Intended to use violence to victim	
Victim was a member of the Armed Forces	
Victim had lawfully ordered accused into arrest	
Accused knew victim was member of the Armed Forces ordering him/her into arrest	
Date	

**Disciplinary Officer's Checklist (AFDA s 44(2)(c) offering violence)**

Element	Proved?
Subject to the AFDA	
Did the act(s) / said the words alleged in the particulars	
In the circumstances, a reasonable person in the position of the victim would have believed that the accused was about to use violence against him or her	
Intended to offer violence to the victim	
Victim was a member of the Armed Forces	
Victim had lawfully ordered accused into arrest	
Accused knew victim was member of the Armed Forces ordering him/her into arrest	
Date	

**Disciplinary Officer's Checklist (AFDA s 44(3)(a) striking)**

Element	Proved?
Subject to the AFDA	
Hit victim with the hand or fist or with something held in the hand	
Intended to hit victim	
Victim was attempting to arrest accused or was holding accused in custody under the AFDA	
Accused knew victim was attempting to arrest him/her or was holding him/her in custody under the AFDA	
Date	

**Disciplinary Officer's Checklist (AFDA s 44(3)(b) using violence)**

Element	Proved?
Subject to the AFDA	
Used violence to victim in the manner stated in the particulars	
Intended to use violence to victim	
Victim was attempting to arrest accused or was holding accused in custody under the AFDA	
Accused knew victim was attempting to arrest him/her or was holding him/her in custody under the AFDA	
Date	

**Disciplinary Officer's Checklist (AFDA s 44(3)(c) offering violence)**

Element	Proved?
Subject to the AFDA	
Did the act(s) / said the words alleged in the particulars	
In the circumstances, a reasonable person in the position of the victim would have believed that the accused was about to use violence against him or her	
Intended to offer violence to the victim	
Victim was attempting to arrest accused or was holding accused in custody under the AFDA	
Accused knew victim was attempting to arrest him/her or was holding him/her in custody under the AFDA	
Date	



**ILL-TREATING A PERSON OF LOWER RANK**

**4.5.21 Offences.** A person subject to the AFDA is guilty of an offence if he or she:

- a. Strikes;<sup>44</sup> or
- b. Otherwise than by striking, ill-treats;<sup>45</sup>

a person subject to the AFDA who holds a lower rank.

**4.5.22 Punishment.** The maximum punishment is two years' imprisonment.

**4.5.23 Lower rank.** The relative ranks of members of the Armed Forces and foreign forces are prescribed in Chapter 1 Section 3.

**4.5.24 Members of foreign forces.** The ill-treatment of a member of a foreign force holding a lower relative rank will be an offence against AFDA s 41 if the member is attached to a New Zealand Service<sup>46</sup> or serving in a force which CDF has declared is serving together with a New Zealand force.<sup>47</sup>

**4.5.25 Strikes.** See paragraph 4.5.6.

**4.5.26 Ill-treatment.** The particulars are to specify the form of ill-treatment alleged. While the least touching, if intentional, is an assault, a significantly greater degree of force is required to amount to ill-treatment. Whether an assault constitutes ill-treatment is a matter of degree.<sup>48</sup> Ill-treatment may also be effected by means other than physical force, such as intimidation.<sup>49</sup>

### Specimen Charges

- No 1 STRIKING A PERSON OF LOWER RANK CONTRARY TO AFDA s 41(a)  
in that he, at Linton on 25 April 20XX, struck W100043 Corporal P.D. James,  
a person subject to the Act holding a lower rank.
- No 2 ILL-TREATING A PERSON OF LOWER RANK CONTRARY TO AFDA s 41(b)  
in that she, on board HMNZS MANAWANUI on 25 April 20XX, kicked ADR J.  
Verne, a person subject to the Act holding a lower rank.

<sup>44</sup> AFDA s 41(a).

<sup>45</sup> AFDA s 41(b).

<sup>46</sup> DA s 23A.

<sup>47</sup> DA s 23B.

<sup>48</sup> *R v Jeremy Stevenson* (1985) 1 NZCMAR 110, 117 (CMAC).

<sup>49</sup> See *R v Jeremy Stevenson*, 118.

**Disciplinary Officer's Checklist (AFDA s 41(a) striking)**

Element	Proved?
Subject to the AFDA	
Hit victim with the hand or fist or with something held in the hand	
Intended to hit victim	
Victim was person subject to the Act holding a lower rank	
Knew victim was person subject to the Act holding a lower rank	
Date	

**Disciplinary Officer's Checklist (AFDA s 41(b) ill-treating)**

Element	Proved?
Subject to the AFDA	
Did act or omission alleged in the particulars	
Intended to do that act or omission	
Act or omission constitutes ill-treatment	
Victim was person subject to the Act holding a lower rank	
Knew victim was person subject to the Act holding a lower rank	
Date	

**WOUNDING WITH INTENT TO INJURE OR WITH RECKLESS DISREGARD**

- 4.5.27 Offence.** A person subject to the AFDA is guilty of this offence if, with intent to injure any one, or with reckless disregard for the safety of others, he or she wounds, maims, disfigures, or causes grievous bodily harm to any person.<sup>50</sup>
- 4.5.28 Punishment.** The maximum punishment is seven years' imprisonment.
- 4.5.29 Injure** means to cause actual bodily harm.<sup>51</sup> This requires a hurt or injury calculated to interfere with the health or comfort of the victim not necessarily permanent or grievous, but more than merely transitory and trifling.<sup>52</sup> A psychiatric injury may suffice.<sup>53</sup>
- 4.5.30 Reckless.** See paragraph 5.2.15.
- 4.5.31 Grievous bodily harm** means bodily harm that is really serious.<sup>54</sup> The term includes death, so a person who intends to kill by the infliction of grievous bodily

50 Section 188(2) of the Crimes Act 1961.

51 Section 2(1) of the Crimes Act 1961.

52 *R v McArthur* [1975] 1 NZLR 486; *R v Donovan* [1934] 2 KB 498.

53 *R v Mwai* [1995] 3 NZLR 149 (CA).

54 *R v Waters* [1979] 1 NZLR 375, 379, per McMullin J; *R v Mwai* [1995] 3 NZLR 149.

harm intends both to kill and to cause grievous bodily harm.

**4.5.32 Wound** means to sever the continuity of the skin, either externally or internally.<sup>55</sup>

**4.5.33 Maim** means to deprive another of the use of a member (eg an arm) such as to render him or her less able to defend him or herself in a fight.<sup>56</sup>

**4.5.34 Disfigure** means cause an external injury which detracts from personal appearance. Disfigurement, however, does not necessarily involve permanent injury or damage.<sup>57</sup>

**4.5.35 Method of wounding.** An assault is not a necessary ingredient of this offence, which covers cases in which, with the required intent, the specified injury is caused by indirect means.<sup>58</sup> In *R v Mwai* the infection of the victim with HIV as a delayed result of intercourse was held to constitute causing grievous bodily harm.

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY [WOUNDING] [MAIMING] [DISFIGURING] [CAUSING GRIEVOUS BODILY HARM] WITH INTENT TO INJURE CONTRARY TO SECTION 188(2) OF THE CRIMES ACT 1961  
in that he, at Linton on 25 April 20XX, with intent to injure W100043 Corporal P.D. James, [wounded][maimed][disfigured][caused grievous bodily harm to] him.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY [WOUNDING] [MAIMING] [DISFIGURING] [CAUSING GRIEVOUS BODILY HARM] WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS CONTRARY TO SECTION 188(2) OF THE CRIMES ACT 1961  
in that she, at RNZAF Base Auckland on 25 April 20XX, with reckless disregard for the safety of others, [wounded][maimed][disfigured][caused grievous bodily harm to] LAC E. Bronte V1012345 AVMECH.

### Disciplinary Officer's Checklist (Wounding With Intent To Injure)

Element	Proved?
Subject to the AFDA	
Wounded <b>OR</b> maimed <b>OR</b> disfigured <b>OR</b> caused grievous bodily harm to the victim <b>[Note: The option selected in the charge must be proved.]</b>	
Intended to injure the victim or another person	
Date	

<sup>55</sup> *R v Waters* [1979] 1 NZLR 375, 378.

<sup>56</sup> 4 *Blackstones Commentaries* (1966) 205-206.

<sup>57</sup> *R v Rapana and Murray* (1988) 3 CRNZ 256.

<sup>58</sup> *R v McCready* [1978] 3 All ER 967, 970, per Lawton LJ.

**Disciplinary Officer's Checklist (wounding with reckless disregard)**

Element	Proved?
Subject to the AFDA	
Wounded <b>OR</b> maimed <b>OR</b> disfigured <b>OR</b> caused grievous bodily harm to the victim <b>[Note: The option selected in the charge must be proved.]</b>	
Recklessly disregarded the safety of others	
Date	

**INJURING WITH INTENT OR WITH RECKLESS DISREGARD**

**4.5.36 Offence.** A person subject to the AFDA is guilty of this offence if, with intent to injure any one, or with reckless disregard for the safety of others, he or she injures any person.<sup>59</sup>

**4.5.37 Punishment.** The maximum punishment is five years' imprisonment.

**4.5.38 Injure.** See paragraph 4.5.29.

**4.5.39 Reckless.** See paragraph 5.2.15.

**Specimen Charges**

No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
INJURING WITH INTENT CONTRARY TO SECTION 189(2) OF THE CRIMES ACT  
1961  
in that he, at Linton on 25 April 20XX, with intent to injure W100043  
Corporal P.D. James, injured him.

No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
INJURING WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS  
CONTRARY TO SECTION 189(2) OF THE CRIMES ACT 1961  
in that she, at RNZAF Base Auckland on 25 April 20XX, with reckless  
disregard for the safety of others, injured LAC E. Bronte V1012345 AVMECH.

**Disciplinary Officer's Checklist (injuring with intent)**

Element	Proved?
Subject to the AFDA	
Injured the victim	
Intended to injure the victim or another person	
Date	

**Disciplinary Officer's Checklist (injuring with reckless disregard)**

Element	Proved?
Subject to the AFDA	
Injured the victim	
Recklessly disregarded the safety of others	
Date	

**INJURING BY UNLAWFUL ACT**

**4.5.40 Offence.** A person subject to the AFDA injures by an unlawful act if he or she injures any other person in such circumstances that, if death had been caused, he or she would have been guilty of manslaughter.<sup>60</sup>

**4.5.41 Punishment.** The maximum punishment is three years' imprisonment.

**4.5.42 Injure.** See paragraph 4.5.29.

**4.5.43 Manslaughter.** Manslaughter is killing a person by:<sup>61</sup>

- a. An unlawful act;<sup>62</sup>
- b. An omission without lawful excuse to perform or observe any legal duty;
- c. Subparagraphs a and b combined;
- d. Causing the person by threats or fear of violence, or by deception, to do an act which causes his or her death; or
- e. Wilfully frightening a child under the age of 16 years or a sick person.

60 Section 190 of the Crimes Act 1961.

61 Section 160(2) of the Crimes Act 1961.

62 Only an act which all reasonable people would recognise must subject the other person to at least some risk of harm, albeit not serious harm, is an "unlawful act" for these purposes: *R v Church* [1965] 2 All ER 72, 76 (EWCA); applied in *R v Myatt* [1991] 1 NZLR 674 (CA).

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
INJURING BY AN UNLAWFUL ACT CONTRARY TO SECTION 190 OF THE  
CRIMES ACT 1961

in that he, at Sarajevo on 29 September 20XX, injured Radovan Dalic in  
such circumstances, namely by threatening to shoot him if he did not jump  
from a second storey window, that if death had been caused he would have  
been guilty of manslaughter.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Injured the victim	
Intended to injure the victim or some other person	
The injury was caused by: <ul style="list-style-type: none"> <li>a. An unlawful act; <b>OR</b></li> <li>b. An omission without lawful excuse to perform or observe any legal duty; <b>OR</b></li> <li>c. Subparagraphs a and b combined; <b>OR</b></li> <li>d. Causing the person by threats or fear of violence, or by deception, to do an act which causes his or her death; <b>OR</b></li> <li>e. Wilfully frightening a child under the age of 16 years or a sick person.</li> </ul>	
Date	

### AGGRAVATED INJURY

**4.5.44 Offence.** A person subject to the AFDA is guilty of this offence if he or she injures a person with any of the intents specified in paragraph 4.5.47.<sup>63</sup>

**4.5.45 Punishment.** The maximum punishment is seven years' imprisonment.

**4.5.46 Injure.** See paragraph 4.5.29.

**4.5.47 Intents.** The specified intents for the purposes of this offence are:

- a. To commit or facilitate the commission of any crime;
- b. To avoid the detection of him or herself or of any other person in the commission of any crime; or
- c. To avoid the arrest or facilitate the flight of him or herself or of any other person upon the commission or attempted commission of any crime.

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY AGGRAVATED INJURY CONTRARY TO SECTION 191(2) OF THE CRIMES ACT 1961

in that she, on board HMNZS RESOLUTION on 22 June 20XX, with intent to avoid the arrest of herself upon the commission of a crime, namely theft contrary to section 223(b) of the Crimes Act 1961, injured A.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Injured the victim	
Intended to injure the victim or some other person	
Purpose of act was to: a. Commit or facilitate the commission of any crime; <b>OR</b> b. Avoid the detection of him or herself or of any other person in the commission of any crime; <b>OR</b> c. Avoid the arrest or facilitate the flight of him or herself or of any other person upon the commission or attempted commission of any crime. <b>[Note: The option selected in the charge must be proved.]</b>	
Date	

### AGGRAVATED ASSAULT

**4.5.48 Offence.** A person subject to the AFDA is guilty of this offence if he or she assaults a person with any of the intents specified in paragraph 4.5.47.<sup>64</sup>

**4.5.49 Punishment.** The maximum punishment is three years' imprisonment.

**4.5.50 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY AGGRAVATED ASSAULT CONTRARY TO SECTION 192(1)(a) OF THE CRIMES ACT 1961 in that he, at Auckland on 27 May 20XX, with intent to facilitate the commission of the crime of robbery contrary to section 234(2) of the Crimes Act 1961, assaulted William Wordsworth.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY AGGRAVATED ASSAULT CONTRARY TO SECTION 192(1)(b) OF THE CRIMES ACT 1961 in that she, at Taupo on 16 May 20XX, with intent to avoid the detection of Francis Bacon in the commission of the crime of robbery contrary to section 234(2) of the Crimes Act 1961, assaulted Samuel Pepys.
- No 3 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY AGGRAVATED ASSAULT CONTRARY TO SECTION 192(1)(c) OF THE CRIMES ACT 1961 in that he, at Wellington on 12 November 20XX, with intent to avoid the arrest of himself upon the attempted commission of the crime of robbery contrary to section 234(2) of the Crimes Act 1961, assaulted William Wordsworth.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Purpose of assault was to: a. Commit or facilitate the commission of any crime; <b>OR</b> b. Avoid the detection of him or herself or of any other person in the commission of any crime; <b>OR</b> c. Avoid the arrest or facilitate the flight of him or herself or of any other person upon the commission or attempted commission of any crime. <b>[Note: The option selected in the charge must be proved.]</b>	
Date	

### ASSAULTING A MEMBER OF THE POLICE

**4.5.51 Offence.** A person subject to the AFDA is guilty of this offence if he or she assaults a constable or any person acting in aid of a constable, or any person in the lawful execution of any process, with intent to obstruct the person so assaulted in the execution of his or her duty.<sup>65</sup>

**4.5.52 Punishment.** The maximum punishment is three years' imprisonment.

65

Section 192(2) of the Crimes Act 1961.



**4.5.53 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
ASSAULTING A MEMBER OF THE POLICE CONTRARY TO SECTION 192(2) OF  
THE CRIMES ACT 1961  
in that she, at Wellington on 12 June 20XX, assaulted Robert Peeler, a  
constable, with intent to obstruct Constable Peeler in the execution of his  
duty.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Victim was a: a. Constable; <b>OR</b> b. Person acting in the aid of a constable; <b>OR</b> c. Person in the execution of the process specified in the particulars.	
<b>[If charge laid in respect of process]</b> The execution of the process by the victim was lawful	
Knew that victim held appointment specified (ie constable, etc)	
Purpose of assault was to obstruct the victim in the execution of his or her duty	
Date	

### ASSAULT WITH INTENT TO INJURE

**4.5.54 Offence.** A person subject to the AFDA is guilty of this offence if he or she assaults a person with intent to injure any person.<sup>66</sup>

**4.5.55 Punishment.** The maximum punishment is three years' imprisonment.

**4.5.56 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

**4.5.57 Injure.** See paragraph 4.5.29.

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
 ASSAULT WITH INTENT TO INJURE CONTRARY TO SECTION 193 OF THE  
 CRIMES ACT 1961  
 in that he, at RNZAF Base Woodbourne on 8 May 20XX, with intent to injure  
 Charles Darwin, assaulted him.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Intended to injure the victim or some other person	
Date	

**ASSAULT WITH INTENT TO ROB**

- 4.5.58 Offence.** A person subject to the AFDA is guilty of this offence if he or she assaults a person with intent to rob any person.<sup>67</sup>
- 4.5.59 Punishment.** The maximum punishment is seven years' imprisonment.
- 4.5.60 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.
- 4.5.61 Rob.** Robbery is theft accompanied by violence or threats of violence, to any person or property, used to extort the property stolen or to prevent or overcome resistance to its being stolen.<sup>68</sup>

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
 ASSAULT WITH INTENT TO ROB CONTRARY TO SECTION 236(2) OF THE  
 CRIMES ACT 1961  
 in that he, at Honiara, Solomon Islands on 17 June 20XX, with intent to rob  
 Solomon Isola, assaulted him.

<sup>67</sup> Section 236(2) of the Crimes Act 1961.

<sup>68</sup> Section 234(1) of the Crimes Act 1961.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Intended to rob the victim or some other person	
Date	

### ASSAULTING A CHILD

**4.5.62 Offence.** A person subject to the AFDA is guilty of this offence if he or she assaults a child under the age of 14 years.<sup>69</sup>

**4.5.63 Punishment.** The maximum punishment is two years' imprisonment.

**4.5.64 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

#### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
ASSAULTING A CHILD CONTRARY TO SECTION 194(a) OF THE CRIMES ACT  
1961  
in that he, at Devonport on 13 February 20XX, assaulted Harry Potter, a  
child aged nine years.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Victim was a child under the age of 14 years	
Date	

### ASSAULT BY A MALE ON A FEMALE

**4.5.65 Offence.** A male is guilty of this offence if he assaults a female.<sup>70</sup>

**4.5.66 Punishment.** The maximum punishment is two years' imprisonment.

<sup>69</sup> Section 194(a) of the Crimes Act 1961.

<sup>70</sup> Section 194(b) of the Crimes Act 1961.

**4.5.67 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ASSAULTING A FEMALE CONTRARY TO SECTION 194(b) OF THE CRIMES ACT 1961  
in that he, at Waionuru on 10 May 20XX, assaulted Jane Mary Smith, a female.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Accused was a male	
Victim was a female	
Knew that victim was a female	
Date	

### COMMON ASSAULT

**4.5.68 Offence.** A person subject to the AFDA commits an assault if he or she:<sup>71</sup>

- a. Intentionally applies or attempts to apply force to the person of another, directly or indirectly; or
- b. Threatens by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose.

**4.5.69 Punishment.** The maximum punishment is one year's imprisonment.

**4.5.70 Attempt.** There may be an assault by way of attempt even though it was impossible to succeed and even though the intended victim was unaware of the attempt.<sup>72</sup>

**4.5.71 Intention.** A person is guilty of assault if he or she intends to apply force to a person, even if the person he or she intended to assault is not the person he or she applies force to in the event. This is an example of the principle of

<sup>71</sup> Sections 2(1) and 196 of the Crimes Act 1961.

<sup>72</sup> *R v Kerr* [1988] 1 NZLR 220.

“transferred malice”.<sup>73</sup>

**4.5.72 Force.** The slightest degree of force will suffice. Not only does force include the forcible striking of another with a hand, stick, or the like, but every touching of another’s clothes.<sup>74</sup>

**4.5.73 Directly or indirectly.** The force need not be applied directly to the person of another, eg in *Kovalev v Police*<sup>75</sup> there was an assault by the attempted indirect application of force when the accused wired a toaster so that it would deliver an electric shock to a person who turned it on and in *Moir v Police*<sup>76</sup> intentionally spitting on another’s clothing was held to be an assault.

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
COMMON ASSAULT CONTRARY TO SECTION 196 OF THE CRIMES ACT 1961  
in that he, at Trentham on 10 May 20XX, assaulted Paul Simon.

### Disciplinary Officer’s Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the victim	
Intended to apply force to the victim or some other person	
Date	

## FIGHTING

**4.5.74 Offence.** A person subject to the AFDA is guilty of fighting if he or she participates in an unlawful physical contest with one or more other persons, other than the enemy.<sup>77</sup> A fight is an unlawful physical contest unless it is a sparring match or playfight not intended to cause bodily harm, or a boxing match organised in accordance with recognised rules.<sup>78</sup>

**4.5.75 Punishment.** The maximum punishment is three months’ imprisonment.

**4.5.76 Enemy.** See Glossary of Terms in Chapter 1 Section 1.

<sup>73</sup> *Gore’s Case* (1611) 9 Co Rep 81; 77 ER 853.

<sup>74</sup> *Police v Bannin* [1991] 2 NZLR 237, 244, per Fisher J.

<sup>75</sup> Unreported, Randerson J, 22 May 2000, HC Auckland, A40/00.

<sup>76</sup> Unreported, Jeffries J, High Court at Christchurch, 10 November 1986, AP220/86.

<sup>77</sup> AFDA s 43(a).

<sup>78</sup> *R v Lee* [2006] 3 NZLR 42, 115 (CA).

**Specimen Charge**

FIGHTING CONTRARY TO AFDA s 43(a)  
in that he, at Honiara on 17 September 20XX, fought with Horatio Nelson.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Participated in physical contest with another person or persons	
Intended to participate	
Contest was unlawful	
The other person or persons were not the enemy	
Date	

**INSUBORDINATE BEHAVIOUR**

**4.5.77 Offence.** A person subject to the AFDA is guilty of insubordinate behaviour if he or she:

- a. Uses threatening language to his or her superior officer;<sup>79</sup>
- b. Uses insubordinate language to his or her superior officer;<sup>80</sup>
- c. Uses insulting language to his or her superior officer;<sup>81</sup> or
- d. In the presence of his or her superior officer, behaves with contempt towards him or her.<sup>82</sup>

**4.5.78 Punishment.** The maximum punishment is two years' imprisonment.

**4.5.79 Superior officer.** See paragraphs 4.5.3 to 4.5.5.

**4.5.80 Insubordinate language.** The words must be used with an insubordinate intent, ie they must either in themselves, or in the manner or circumstances in which they are spoken, be disrespectful of the authority vested in the superior officer to whom they refer, by his or her rank or command. Usually the words used will indicate a display of rebelliousness or disobedience, threatened or actual. The language used need not be discourteous so long as it indicates a deliberate intention to be insubordinate.<sup>83</sup> The language may properly be regarded as disrespectful of authority

<sup>79</sup> AFDA s 36(1)(a).

<sup>80</sup> AFDA s 36(1)(b).

<sup>81</sup> AFDA s 36(1)(c).

<sup>82</sup> AFDA s 36(1)(d).

<sup>83</sup> *R v H* (1998) 1 NZCMAR 314, 322 (CMAC).

although courteously expressed, eg a member of the Armed Forces who, having been given a lawful command not requiring immediate compliance, states politely to his or her superior officer that he or she does not intend to comply with it may be charged with using insubordinate language. If there is doubt whether the language used is insubordinate and if it appears that it was merely insulting and not directed at the authority of the superior officer, the accused should be charged with using insulting language.

### **Specimen Charges**

- No.1 USING THREATENING LANGUAGE TO HIS SUPERIOR OFFICER CONTRARY TO AFDA s 36(1)(a)  
in that he, at Linton on 17 November 20XX, said to W56754 Sergeant C.S. Lewis, his superior officer, “Go away or I’ll bash your head in”, or words to that effect.
- No 2 USING INSUBORDINATE LANGUAGE TO HER SUPERIOR OFFICER CONTRARY TO AFDA s 36(1)(b)  
in that she, on board HMNZS TE MANA on 9 June 20XX, when ordered by POCSS W. Ihimaera, her superior officer, to report to the Officer of the Day at 1600 that day said to him, “No! Go yourself, I’m going ashore”, or words to that effect.
- No 3 USING INSULTING LANGUAGE TO HER SUPERIOR OFFICER CONTRARY TO AFDA s 36(1)(c)  
in that she, at Wellington on 28 January 20XX, said to Flight Sergeant S. Tzu, her superior officer, “You are a yellow coward. Don’t bother coming inside my house”, or words to that effect.
- No 4 BEHAVING WITH CONTEMPT TOWARDS HIS SUPERIOR OFFICER CONTRARY TO AFDA s 36(1)(d)  
in that he, at Burnham on 10 September 20XX, while being admonished by J1000432 Corporal A.T. Mahan, his superior officer, threw his hat to the ground, made a rude gesture with his fingers towards the said superior officer, and walked away muttering without waiting to be dismissed.

**Disciplinary Officer's Checklist  
(AFDA s 36(1)(a), (b) or (c) language)**

Element	Proved?
Subject to the AFDA	
Used language specified in the particulars	
Language was threatening <b>OR</b> insubordinate <b>OR</b> insulting <b>[Note: The option selected in the charge must be proved.]</b>	
Language was heard or read by superior officer	
Intended that language be heard or read by superior officer	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 36(1)(d) behaving with contempt)**

Element	Proved?
Subject to the AFDA	
Behaved in manner specified in particulars	
Did so in the presence of superior officer	
Behaviour indicated contempt for superior officer	
Intended to behave with contempt towards superior officer	
Date	



## SECTION 6 – SEXUAL OFFENCES

### INDUCING INDECENT ACT BY THREAT

**4.6.1 Offence.** A person subject to the AFDA is guilty of this offence if he or she does an indecent act on another person knowing that the other person has been induced to consent to that act by:

- a. An express or implied threat that the person doing the indecent act or some other person will commit an offence which is punishable by imprisonment but which does not involve the actual or threatened application of force to any person;<sup>84</sup>
- b. An express or implied threat that the person doing the indecent act or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made;<sup>85</sup> or
- c. An express or implied threat by the person doing the indecent act to make improper use, to the detriment of the other person, of any power or authority arising out of any occupational or vocational position held by the person doing the indecent act or any commercial relationship existing between that person and the other person.<sup>86</sup>

**4.6.2 Punishment.** The maximum punishment is five years' imprisonment.

**4.6.3 Indecent act.** See paragraphs 4.6.6 and 4.6.8.

#### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
INDUCING AN INDECENT ACT BY THREAT CONTRARY TO SECTION 129A(2)  
OF THE CRIMES ACT 1961  
in that he, at Christchurch on 15 May 20XX did an indecent act on A100456  
Lance Corporal M.E. Tuwhare, namely ....., knowing that she had been  
induced to consent to the act by a threat that he would destroy her property,  
an offence contrary to AFDA s 61(1)(b).

84 Section 129A(2), (4) and (5)(a) of the Crimes Act 1961.

85 Section 129A(2), (4) and (5)(b) of the Crimes Act 1961.

86 Section 129A(2), (4) and (5)(c) of the Crimes Act 1961.

**Disciplinary Officer's Checklist (threat of committing offence)**

Element	Proved?
Subject to the AFDA	
Made threat specified in the particulars	
Threat was that the accused or another person would commit a non-violent offence punishable by imprisonment if victim did not consent to an indecent act	
Did an indecent act on or with the victim <b>OR</b> Caused victim to do an indecent act	
The victim consented because of the threat made	
Knew that the victim was consenting because of the threat made	
Date	

**Disciplinary Officer's Checklist (threat of accusation)**

Element	Proved?
Subject to the AFDA	
Made threat specified in the particulars	
Threat was that the accused or another person would make an accusation or disclosure (true or false) about misconduct by any person (living or dead) likely to damage seriously the reputation of the person against or about whom the accusation or disclosure was made if victim did not consent to an indecent act	
Did an indecent act on or with the victim <b>OR</b> Caused victim to do an indecent act	
The victim consented because of the threat made	
Knew that the victim was consenting because of the threat made	
Date	

**Disciplinary Officer's Checklist (threat of abuse of power)**

Element	Proved?
Subject to the AFDA	
Made threat specified in the particulars	
Threat was to make improper use, to the detriment of the victim, of any power or authority arising out of any occupational or vocational position held by the accused or any commercial relationship existing between the accused and the victim	
Did an indecent act on or with the victim <b>OR</b> Caused victim to do an indecent act	
The victim consented because of the threat made	
Knew that the victim was consenting because of the threat made	
Date	

**DOING AN INDECENT ACT ON A YOUNG PERSON**

- 4.6.4 Offence.** A person subject to the AFDA commits this offence if he or she does an indecent act on a young person.<sup>87</sup>
- 4.6.5 Punishment.** The maximum punishment is seven years' imprisonment.
- 4.6.6 Indecent act** includes indecent assault.<sup>88</sup>
- 4.6.7 Young person** means a person under the age of 16 years.<sup>89</sup>
- 4.6.8 Indecent** is to be given its ordinary meaning in general usage and is to be judged in the context of the time, place and circumstances.<sup>90</sup>
- 4.6.9 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.
- 4.6.10 Married couples.** A person cannot be convicted of this offence if he or she was married to the young person concerned at the time of the indecent act concerned.<sup>91</sup>

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY DOING AN INDECENT ACT ON A YOUNG PERSON CONTRARY TO SECTION 134(3) OF THE CRIMES ACT 1961  
in that she, at Dunedin on 10 April 20XX, indecently assaulted Jane Austen, a girl then aged 14 years.

87 Section 134(3) of the Crimes Act 1961.  
88 Section 134(6)(b) of the Crimes Act 1961.  
89 Section 134(6)(a) of the Crimes Act 1961.  
90 *Milne v Police* (1990) 6 CRNZ 636, 641.  
91 Section 134(4) of the Crimes Act 1961.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Did an act on the victim	
Intended to do the act on the victim	
Act was, because of its nature and/or the circumstances, indecent	
Intended to do an act which, because of its nature and/or the circumstances, was indecent	
Victim was a person under the age of 16	
Date	

## INDECENT ASSAULT

**4.6.11 Offence.** A person subject to the AFDA commits this offence if he or she indecently assaults another person.<sup>92</sup>

**4.6.12 Punishment.** The maximum punishment is seven years' imprisonment.

**4.6.13 Indecent.** See paragraph 4.6.8.

**4.6.14 Assault.** See paragraphs 4.5.68 and 4.5.70 to 4.5.73.

## Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY INDECENT ASSAULT CONTRARY TO SECTION 135 OF THE CRIMES ACT 1961 in that he, on board HMNZS PHILOMEL on 22 March 20XX, indecently assaulted Nicola Mary Jones.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Applied force to the person of the victim	
Intended to apply force to the victim	
Assault was, because of its nature and/or the circumstances, indecent	
Intended to commit an assault which, because of its nature and/or the circumstances, was indecent	
Date	

## SECTION 7 – DRUG OFFENCES

### CONTROLLED DRUGS

**4.7.1** **Controlled drug** means any substance, preparation, mixture, or article specified or described in Schedules 1, 2 or 3 to the Misuse of Drugs Act 1975, or a controlled drug analogue.<sup>93</sup> The Schedules to the Misuse of Drugs Act, which are reproduced as the Annexes to this chapter, classify controlled drugs according to their relative harmfulness. Three classes have been created:

- a. **Class A** includes heroin, cocaine, LSD, MDA, methamphetamine ('P') and certain other hallucinogens. Some of these are sometimes referred to as 'hard drugs'.
- b. **Class B** includes cannabis preparations,<sup>94</sup> MDMA ('ecstasy'), fantasy, morphine, opium, and the amphetamines.
- c. **Class C** includes cannabis plant, seed, or fruit, and a number of amphetamine-like drugs. It also includes BZP and related substances.

**4.7.2** **Identification.** When a controlled drug is seized, its identity is proved by calling the person who analysed the drug or substance or by producing a certificate in terms of section 31 of the Misuse of Drugs Act 1975. However, there is no rule that scientific evidence must be called in every case and indeed there will be times when there will be no drug or substance to refer to analysis, eg where it has already been used or dealt with. The question must always be whether in the circumstances of the case the totality of the evidence put forward is sufficient to enable the disciplinary officer to conclude beyond reasonable doubt that the substances involved were of a kind alleged in the charge.<sup>95</sup> In deciding whether the identification made by a witness, or the accused in a statement, is likely to be correct, the disciplinary officer is to consider whether the identification was within his or her personal knowledge (and not merely hearsay) by reference to the source of that knowledge, eg previous experience with drugs and involvement in the drug scene and familiarity with the drug 'jargon'.<sup>96</sup>

### GENERAL EXCEPTIONS TO DRUG OFFENCES

**4.7.3** In certain circumstances it is lawful for controlled drugs to be prescribed, produced, manufactured, supplied, or administered in connection with medical, dental or veterinary care.<sup>97</sup> If there is any doubt about whether these exceptions apply, the advice of a legal officer is to be sought before recording the allegation in the form of a charge.

**4.7.4** If the accused seeks to rely upon a licence or other exception under the Misuse of Drugs Act 1975 which permits him or her to lawfully do something in connection with controlled drugs which would otherwise be an offence, the accused has the onus of proving that the exception applies on the balance of probabilities.<sup>98</sup>

93 A **controlled drug analogue** is a substance which has a structure similar to a controlled drug.

94 See section 29B of the Misuse of Drugs Act 1975.

95 *R v Cruse* [1989] 2 NZLR 279.

96 *Police v Coward* [1976] 2 NZLR 86.

97 Section 8 of the Misuse of Drugs Act 1975 and section 31 of the Misuse of Drugs Amendment Act 2005.

98 Section 30 of the Misuse of Drugs Act 1975 and AFDA s 3(2).

**FORFEITURE OF PROPERTY INVOLVED IN DRUG OFFENDING**

- 4.7.5** If a person is found guilty of an offence against the Misuse of Drugs Act 1975, he or she forfeits to the Crown anything in his or her possession which was used or involved in the commission of the offence.<sup>99</sup> Anything so forfeited must be sold, destroyed or otherwise disposed of as directed by the Minister of Health.<sup>100</sup>

**SUPPLYING OR ADMINISTERING CLASS C CONTROLLED DRUGS<sup>101</sup>**

- 4.7.6** **Offence.** A person subject to the AFDA commits an offence if he or she supplies or administers, or offers to supply or administer, a Class C controlled drug to a person of or over the age of 18 years.<sup>102</sup>
- 4.7.7** **Punishment.** The maximum punishment for this offence is three months' imprisonment or a fine not exceeding \$500 or both.<sup>103</sup>
- 4.7.8** **Supply** includes to distribute, give or sell.<sup>104</sup> If the evidence on a charge of supplying indicates that there has been a sale, that must be alleged in the particulars rather than a supply generally.<sup>105</sup> The importance of this in the military justice system lies in the fact that the maximum punishment for selling a Class C drug to a person of or over 18 years old is eight years' imprisonment,<sup>106</sup> whereas the maximum punishment for a supply to such a person which is not a sale is three months' imprisonment and a \$500 fine.<sup>107</sup> Pursuant to section 6(5) of the Misuse of Drugs Act 1975, a supply to any person is deemed to be a sale until the contrary is proved,<sup>108</sup> so a supply to a person of or over 18 should be charged as a sale in the absence of evidence to the contrary, with a charge of supplying in the alternative (see Specimen Charge No 2).<sup>109</sup>
- 4.7.9** **Sell.** A sale takes place once the seller agrees to sell a certain quantity of a controlled drug for a certain price, and the buyer agrees to pay that price for that amount of the controlled drug.<sup>110</sup>
- 4.7.10** **Administer.** A controlled drug is administered when the accused causes it to enter another person's system, eg by way of a syringe.<sup>111</sup>
- 4.7.11** **Offer to supply or administer.** An offer to supply or administer can occur even if no controlled drug exists. It is not necessary to prove that the accused intended to carry out the offer.<sup>112</sup>

99 Section 32(1) of the Misuse of Drugs Act 1975.

100 Section 32(2) of the Misuse of Drugs Act 1975.

101 See Volume 2, Chapter 3, Section 6 for offences involving the supply or administering of Class A and B controlled drugs, and the supply or administering of Class C controlled drugs to minors.

102 Section 7(1)(b) of the Misuse of Drugs Act 1975.

103 Section 7(2)(b) of the Misuse of Drugs Act 1975.

104 Section 2(1) of the Misuse of Drugs Act 1975.

105 *R v Hooper* [1975] 2 NZLR 763.

106 Section 6(1)(e) and (2)(c) of the Misuse of Drugs Act 1975. This offence may only be tried in the Court Martial: see Volume 2 Chapter 3 Section 6.

107 Section 7(1)(b) and (2)(b) of the Misuse of Drugs Act 1975.

108 The accused bears the onus of proving this on the balance of probabilities: AFDA s 3(2).

109 *R v Paterson* [1985] 1 NZLR 334; (1984) 1 CRNZ 441 (CA).

110 *R v Hooker* [1998] 3 NZLR 562 (CA).

111 *R v Tan* (1985) 15 CCC (3d) 383 (Saskatchewan CA).

112 *R v Brown* [1978] 2 NZLR 174 (CA).

### Specimen Charges

No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY OFFERING TO SUPPLY A CLASS C CONTROLLED DRUG CONTRARY TO SECTION 6(1)(d) AND (2)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that she, at Nelson on 21 May 20XX, offered to supply cannabis, a Class C controlled drug, to Jimi Hendrix.

No 2 First Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY SELLING A CLASS C CONTROLLED DRUG TO A PERSON OF OR OVER THE AGE OF 18 YEARS CONTRARY TO SECTION 6(1)(e) AND (2)(c) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at Burnham on 12 August 20XX, sold two cannabis cigarettes, a class C controlled drug, to Arthur Garfield, a person then aged 22.

Second Charge (Alternative to the First Charge)

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY SUPPLYING A CLASS C CONTROLLED DRUG CONTRARY TO SECTION 7(1)(b) AND (2)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at Burnham on 12 August 20XX, supplied two cannabis cigarettes, a class C controlled drug, to Arthur Garfield.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Supplied <b>OR</b> administered specified substance <b>OR</b> offered to do so <b>[Note: The option selected in the charge must be proved.]</b>	
Intended to do so	
The specified substance is a Class C controlled drug	
Knew that specified substance was a controlled drug	
Date	

**DEALING IN A CLASS C CONTROLLED DRUG<sup>113</sup>**

**4.7.12 Offence.** A person subject to the AFDA commits this offence if he or she deals in a Class C controlled drug.<sup>114</sup>

**4.7.13 Punishment.** The maximum punishment for this offence is three months' imprisonment or a fine not exceeding \$500 or both.<sup>115</sup>

**4.7.14 Dealing.** This term does not mean 'carry on business' and is confined to activities not coming within the terms **supply** or **administer** or offering to do so (see paragraphs 4.7.8 to 4.7.11), eg bartering or exchanging.<sup>116</sup>

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
DEALING IN A CLASS C CONTROLLED DRUG CONTRARY TO SECTION 7(1)(b)  
AND (2)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at Devonport on or about 2 May 20XX, dealt in pseudoephedrine,  
a Class C controlled drug.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Dealt in specified substance	
Intended to do so	
The specified substance is a Class C controlled drug	
Knew that specified substance was a controlled drug	
Date	

113 See Volume 2, Chapter 3, Section 6 for offences involving dealing in Class A and B controlled drugs.

114 Section 7(1)(b) of the Misuse of Drugs Act 1975.

115 Section 7(2)(b) of the Misuse of Drugs Act 1975.

116 *R v Hooper* [1975] 2 NZLR 763, 764.



**CONSPIRING TO DEAL WITH CLASS C CONTROLLED DRUGS<sup>117</sup>**

**4.7.15 Offence.** A person subject to the AFDA commits this offence if he or she conspires with another person to commit any of the following offences:<sup>118</sup>

- a. Importing into or exporting from New Zealand a Class C controlled drug;
- b. Producing or manufacturing a Class C controlled drug;
- c. Supplying, administering, or offering to supply or administer, a Class C controlled drug;
- d. Selling, or offering to sell, a Class C controlled drug; or
- e. Possessing a Class C controlled drug for the purpose selling, supplying or administering it.

**4.7.16 Punishment.** The maximum punishment for this offence is seven years' imprisonment.<sup>119</sup>

**4.7.17 Conspiracy.** See paragraph 4.16.12 for the meaning of conspiracy. A person who obtains controlled drugs for his or her own use should not be charged with conspiracy in relation to the seller's dealing activity.<sup>120</sup> Such a person commits an offence against section 7 of the Misuse of Drugs Act 1975 of procuring or attempting to procure the controlled drug.

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
CONSPIRING TO IMPORT INTO NEW ZEALAND A CLASS C CONTROLLED  
DRUG CONTRARY TO SECTION 6(2A)(c) OF THE MISUSE OF DRUGS ACT  
1975

in that he, at Singapore on 7 July 20XX, conspired with Sun Tzu, Alfred Mahan, and persons unknown to import into New Zealand 100 tablets of codeine, a Class C controlled drug.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Accused was party to an agreement with another person or persons to commit an offence against section 6(1) of the Misuse of Drugs Act 1975	
Date	

117 See Volume 2, Chapter 3, Section 6 for offences involving conspiracy to deal in Class A and B controlled drugs.

118 Section 6(2A) of the Misuse of Drugs Act 1975.

119 Section 6(2A)(c) of the Misuse of Drugs Act 1975.

120 *R v Lang* (1998) 16 CRNZ 68 (CA)

**PROCURING OR POSSESSING CONTROLLED DRUGS**

- 4.7.18 Offence.** A person subject to the AFDA commits this offence if he or she procures or possesses a controlled drug.<sup>121</sup>
- 4.7.19 Punishment.** The maximum punishment for this offence is:
- a. If any of the drugs procured or possessed was a Class A drug, six months' imprisonment, a \$1000 fine, or both.<sup>122</sup>
  - b. In any other case, three months' imprisonment, a \$500 fine, or both.<sup>123</sup>
- 4.7.20 Procuring,** in the context of the Misuse of Drugs Act 1975, means obtaining possession of a controlled drug.<sup>124</sup>
- 4.7.21 Possession.** To establish possession of a controlled drug, it must be proved that:
- a. The accused had physical control of the substance;
  - b. The accused knew that he or she had the substance in his or her possession;
  - c. The accused intended to exercise exclusive control over the substance (*animus possidendi*);<sup>125</sup>
  - d. The accused was willingly in possession of the substance;
  - e. The accused knew the nature of the substance;<sup>126</sup> and
  - f. The substance constituted a usable quantity of controlled drug.
- 4.7.22 Physical control** includes anything subject to the control of the accused which is in the custody of another. Actual physical custody of a thing is not essential provided the accused can be said to retain the right of control over it.<sup>127</sup>
- 4.7.23 Willingness to be in possession.** A person who is forced by threats to assume the custody of drugs is not in possession of them because, although he or she intended to exercise possession, that intention was not willingly entertained.<sup>128</sup>
- 4.7.24 Usable quantity.** The quantity of drug must be 'usable' in the sense that minute and useless residues are not capable of being possessed, although a very small quantity can be possessed if it is able to be rendered usable by addition to other quantities of drug.<sup>129</sup> This element does not have to be proved unless the

121 Section 7(1)(a) of the Misuse of Drugs Act 1975.

122 Section 7(2)(a) of the Misuse of Drugs Act 1975.

123 Section 7(2)(b) of the Misuse of Drugs Act 1975.

124 *R v Mills* [1963] 1 All ER 202.

125 *Dong Wai v Audley* [1937] NZLR 390.

126 *Police v Emirali* [1976] 1 NZLR 286; *R v Strawbridge* [1970] NZLR 909 (CA).

127 *R v McRae* (1993) 10 CRNZ 61, 66-67.

128 *R v McIntyre*, unreported, Court of Appeal, 9 March 1978, CA94/77.

129 *Police v Emirali* [1976] 2 NZLR 476 (CA).

accused raises it as an issue.<sup>130</sup>

**4.7.25 Possession of consumed drugs.** Where drugs are consumed and their character alters such that no further use can be made of them, a person cannot be in 'possession' of them if traces are detected in his or her urine. Such traces, however, may be prima facie evidence of consumption on an earlier occasion or of possession immediately prior to consumption. On the other hand, when a person swallows drugs in order to conceal them, but without any change in their character, he or she may well be held still to be in possession of the drugs.<sup>131</sup>

**4.7.26 Possession of a container's contents.** Difficulties arise where a person, found in possession of a container which turns out to contain controlled drugs, maintains that he or she thought the container was empty, or that it contained something other than drugs, or that it contained drugs but not controlled drugs. Where the controlled drug allegedly possessed by the accused was, on the evidence, at all material times within a container, it must be proved that the accused:

- a. Had custody of the container;
- b. Knew he or she had such custody; and
- c. Knew that the container contained something.<sup>132</sup>

If the disciplinary officer is not sure on these matters, a prima facie case does not exist. On the other hand, if the disciplinary officer is sure, a strong prima facie inference is raised that the accused possessed not only the container, but also its contents. To avoid being found guilty, the accused must point to some evidence suggesting that he or she:

- a. Had no opportunity (or was not legally entitled) to examine the container's contents;
- b. Had no reason to suspect that the contents were illicit; and
- c. Honestly believed that the contents were something different from the actual contents (and not merely a different kind of controlled drug).

If the disciplinary officer is left with a reasonable doubt as to one of the points indicated above, the accused is entitled to an acquittal.

**4.7.27 Mistake as to nature of substance.** It is no defence if the accused thinks the substance is a controlled drug other than that specified in the charge.<sup>133</sup>

**4.7.28 Defences.** It is a defence to a charge of possession of a controlled drug if the accused proves on the balance of probabilities that, knowing or suspecting the substance to be a controlled drug, he or she took possession of it for the purpose of:

130 Section 29A of the Misuse of Drugs Act 1975.

131 *Hambleton v Callinan and Others* [1968] 2 All ER 943.

132 *R v Lambert* [2001] 3 All ER 577 at 599 (HL).

133 Section 29 of the Misuse of Drugs Act 1975; *R v Gestro*, unreported, Court of Appeal, 9 March 1982, CA218/81.

- a.

Preventing another from committing or continuing to commit an offence in connection with the drug and that as soon as possible after taking possession of it he or she took all reasonable steps to destroy the drug or to deliver it into the possession of a person lawfully entitled to have possession of it;<sup>134</sup> or
- b.

Delivering it into the possession of a person lawfully entitled to have possession of it and that as soon as possible after taking possession of it he or she took all reasonable steps to deliver it into the possession of such a person.<sup>135</sup>

Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY [PROCURING] [POSSESSING] A CLASS C CONTROLLED DRUG CONTRARY TO SECTION 7(1)(a) AND (2)(b) OF THE MISUSE OF DRUGS ACT 1975 in that he, on board HMNZS CANTERBURY on 12 June 20XX, [procured] [had in his possession] 15 grams of diazepam, a Class C controlled drug.

Disciplinary Officer’s Checklist (Procuring A Controlled Drug)

Element	Proved?
Subject to the AFDA	
Obtained physical control of the specified substance	
Intended to obtain possession of specified substance	
Intended to exercise exclusive control over the substance	
Willingly procured specified substance	
The specified substance is a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
<b>If raised as issue by accused:</b> The quantity of the controlled drug was usable	
Date	

134

Section 7(3)(a) of the Misuse of Drugs Act 1975.

135

Section 7(3)(b) of the Misuse of Drugs Act 1975.

**Disciplinary Officer's Checklist (possessing a controlled drug)**

Element	Proved?
Subject to the AFDA	
Had physical control of the specified substance	
Knew that had possession of specified substance	
Intended to exercise exclusive control over the substance	
Willingly in possession of substance	
The specified substance is a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
<b>If raised as issue by accused:</b> The quantity of the controlled drug was usable	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> See paragraph 4.7.28.	

**CONSUMING, SMOKING OR OTHERWISE USING CONTROLLED DRUGS**

**4.7.29 Offence.** A person subject to the AFDA commits this offence if he or she consumes, smokes or otherwise uses a controlled drug.<sup>136</sup>

**4.7.30 Punishment.** The maximum punishment for this offence is:

- a. If any of the drugs procured or possessed was a Class A drug, six months' imprisonment, a \$1000 fine, or both.<sup>137</sup>
- b. In any other case, three months' imprisonment, a \$500 fine, or both.<sup>138</sup>

**4.7.31 Mistake as to nature of substance.** See paragraph 4.7.27.

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
SMOKING A CLASS C CONTROLLED DRUG CONTRARY TO SECTION 7(1)(a)  
AND (2)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at RNZAF Base Ohakea on 2 January 20XX, smoked cannabis, a  
Class C controlled drug.

<sup>136</sup> Section 7(1)(a) of the Misuse of Drugs Act 1975.

<sup>137</sup> Section 7(2)(a) of the Misuse of Drugs Act 1975.

<sup>138</sup> Section 7(2)(b) of the Misuse of Drugs Act 1975.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Consumed <b>OR</b> smoked <b>OR</b> otherwise used the specified substance [Note: The option selected in the charge must be proved.]	
Intended to do this	
The specified substance is a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
Date	

## CULTIVATING PROHIBITED PLANTS

**4.7.32 Offence.** A person subject to the AFDA commits this offence if he or she cultivates a prohibited plant.<sup>139</sup>

**4.7.33 Punishment.** The maximum punishment for this offence is seven years' imprisonment.<sup>140</sup>

**4.7.34 Prohibited plant** means:<sup>141</sup>

- a. Any plant of the genus *Cannabis*;
- b. Any plant of the species *Papaver somniferum* (opium poppy);
- c. *Erythroxylon coca* and *Erythroxylon novagranatense* (syn *E truxillense*) and every other species of the genus *Erythroxylon* from which a controlled drug can be produced (cocaine-producing plants);
- d. Any plant of the species *Lophophora williamsii* or *Lophophora lewinii* (peyote cactus, which produces mescaline); and
- e. Any fungus of the genera *Conocybe*, *Panaeolus*, or *Psilocybe* from which a controlled drug can be produced or which contains a controlled drug (commonly known as 'magic mushrooms').

**4.7.35 Cultivate** includes the sowing of seed and it is not necessary that the seed is sown by being planted in soil. It is enough if the seed is put into a dish containing moist tissue paper. In the context of this offence, the notion of sowing seed is something which may take place if use is made of a suitable environment whether it be soil or otherwise for the purpose of promoting germination of the seed and no doubt subsequent growth of the plant.<sup>142</sup> The fact that a seed did not, or might not, germinate is no defence to a charge of cultivation, the offence

139 Section 9(1) of the Misuse of Drugs Act 1975.

140 Section 9(2) of the Misuse of Drugs Act 1975.

141 Section 2(1) of the Misuse of Drugs Act 1975.

142 *R v Shattock* [1908] 2 NZLR 486.

being proved by evidence of the sowing of a seed with the required intent.<sup>143</sup>

- 4.7.36 Lawful cultivation of opium poppy.** It is a defence to a charge of cultivation if the person charged proves, on the balance of probabilities, that the prohibited plant to which the charge relates was an opium poppy, and that it was not intended to be a source of any controlled drug or that it was not being developed as a strain from which a controlled drug could be produced.<sup>144</sup>

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
CULTIVATING A PROHIBITED PLANT CONTRARY TO SECTION 9(1) AND (2) OF  
THE MISUSE OF DRUGS ACT 1975  
in that she, at Auckland on or about 12 February 20XX, cultivated two plants  
of *papaver somniferum*, a prohibited plant.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Cultivated the plant	
Intended to do this	
The specified plant is a prohibited plant	
Knew the nature of the plant	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Plant was an opium poppy; not intended to be a source of any controlled drug; not being developed as a strain from which a controlled drug could be produced.	

### POSSESSING SEED OR FRUIT OF PROHIBITED PLANTS

- 4.7.37 Offence.** A person subject to the AFDA commits this offence if he or she possesses the seed or fruit of a prohibited plant, if that seed or fruit is not itself a controlled drug (**prohibited seed or fruit**).<sup>145</sup>
- 4.7.38 Punishment.** The maximum punishment for this offence is one year's imprisonment or a \$500 fine or both.<sup>146</sup>
- 4.7.39 Possession.** See paragraphs 4.7.21 to 4.7.26.

<sup>143</sup> *Wilson v Police* (1989) 4 CRNZ 426.

<sup>144</sup> Section 9(4) of the Misuse of Drugs Act 1975.

<sup>145</sup> Section 13(1)(b) of the Misuse of Drugs Act 1975.

<sup>146</sup> Section 13(3) of the Misuse of Drugs Act 1975.

- 4.7.40 Lawful possession of opium poppy seed or fruit.** It is a defence to a charge of possessing prohibited seed or fruit if the person charged proves, on the balance of probabilities, that the seed or fruit to which the charge relates is opium poppy seed or fruit, and that the seed or fruit was not intended to be a source of any controlled drug or that it was not being developed as a strain from which a controlled drug could be produced.<sup>147</sup>
- 4.7.41 Lawful possession by servants of the Crown and carriers.** A person in the service of the Crown may lawfully possess prohibited seed or fruit for the purposes of and in connection with his or her official duties.<sup>148</sup> A carrier, and any agent or servant of a carrier, may possess prohibited seed or fruit in the course of carriage to such extent as is necessary or incidental to the business of the carrier.<sup>149</sup>

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY POSSESSING THE SEED OF A PROHIBITED PLANT CONTRARY TO SECTION 13(1)(b) AND (3) OF THE MISUSE OF DRUGS ACT 1975 in that she, at Auckland on or about 12 February 20XX, had in her possession the seed of *papaver somniferum*, a prohibited plant.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Had physical control of the specified seed or fruit	
Knew that had possession of specified seed or fruit	
Intended to exercise exclusive control over the seed or fruit	
Willingly in possession of seed or fruit	
The seed or fruit is that of a prohibited plant	
Knew the nature of the seed or fruit	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Seed or fruit was that of an opium poppy; not intended to be a source of any controlled drug; not being developed as a strain from which a controlled drug could be produced.	

<sup>147</sup> Sections 9(4) and 13(2) of the Misuse of Drugs Act 1975.

<sup>148</sup> Regulation 16(2) of the Misuse of Drugs Regulations 1977.

<sup>149</sup> Regulation 16(3) of the Misuse of Drugs Regulations 1977.



**THEFT OF CONTROLLED DRUGS**

**4.7.42 Offence.** A person subject to the AFDA commits this offence if he or she steals a controlled drug.<sup>150</sup>

**4.7.43 Punishment.** The maximum punishment for this offence is seven years' imprisonment.

**4.7.44 Stealing.** See paragraph 4.11.1 for the definition of this term. In addition to 'common theft', this offence can also be committed as a form of theft by a person in a special relationship, as to which see paragraph 4.11.16.<sup>151</sup>

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
STEALING A CONTROLLED DRUG CONTRARY TO SECTION 11(1)(a) OF THE  
MISUSE OF DRUGS ACT 1975  
in that he, at Melbourne on 16 May 20XX, stole 10 pills of MDA, a Class A  
controlled drug, the property of Napoleon Bonaparte.

**Disciplinary Officer's Checklist (stealing controlled drug by taking)**

Element	Proved?
Subject to the AFDA	
Took the specified substance	
Intended to do this	
Knew that specified substance was a controlled drug	
Taking was dishonest	
Intended to deprive the owner permanently of the controlled drug or of any interest in the drug	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that taking was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Misuse of Drugs Act 1975 itself.	

150 Section 11(1)(a) of the Misuse of Drugs Act 1975.

151 Section 11(3) of the Misuse of Drugs Act 1975.

**Disciplinary Officer's Checklist (stealing controlled drug by using, etc.)**

Element	Proved?
Subject to the AFDA	
Had possession of or control over the specified substance	
The specified substance was a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
Used or dealt with the controlled drug in a manner contrary to any mandate or authority or consent from the owner in relation to it	
Intended to do this	
Using or dealing was dishonest	
Intended to deprive the owner permanently of the controlled drug or of any interest in the drug	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that using or dealing was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Misuse of Drugs Act 1975 itself.	

**FRAUDULENTLY OBTAINING POSSESSION OF OR PROCURING CONTROLLED DRUGS**

- 4.7.45 Offence.** A person subject to the AFDA commits this offence if he or she, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by the false pretence, obtains possession of or title to a controlled drug, or procures a controlled drug to be delivered to any person other than himself or herself.<sup>152</sup>
- 4.7.46 Punishment.** The maximum punishment for this offence is seven years' imprisonment.
- 4.7.47 Possession.** See paragraphs 4.7.21 to 4.7.26.
- 4.7.48 False pretence.** Obtaining by false pretences is the equivalent of the Crimes Act offence now designated obtaining by deception. As to obtaining by deception, see paragraph 4.11.31. When a person pretends to have certain symptoms for the purpose of obtaining a controlled drug, he or she obtains that drug by a false pretence. Mere use of a false name to obtain a prescription will not amount to this offence unless it was intended to and did cause the medical practitioner to issue the prescription. A person in possession of drugs obtained by false pretences does not come within the term 'lawfully supplied' in section 8(2)(c) of the Misuse of Drugs Act 1975 and so cannot rely on the defence contained in that provision in respect of dealing or using offences under sections 6 or 7 of the Misuse of Drugs Act.

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY OBTAINING A CONTROLLED DRUG BY FALSE PRETENCES CONTRARY TO SECTION 11(1)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that she, at Trentham Military Camp on 18 April 20XX, with intent to defraud by means of a false pretence, namely that she was a courier detailed to carry evidence to an ESR laboratory, obtained from W997865 Sergeant I.B. Sleuth, RNZMP 14 pills of amphetamine, a Class B controlled drug.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY PROCURING A CONTROLLED DRUG BY FALSE PRETENCES CONTRARY TO SECTION 11(1)(b) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at Darwin on 17 September 20XX, with intent to defraud by means of a false pretence, namely that he was a member of the Naval Police branch, procured 100 grams of cannabis, a Class C controlled drug, to be delivered from the Darwin Police Office to AWT1 Graham Bell.

### Disciplinary Officer's Checklist (obtaining by false pretence)

Element	Proved?
Subject to the AFDA	
Obtained possession of or title to the specified substance	
Intended to do this	
The specified substance is a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
Used a false pretence, either directly or through the medium of any contract obtained by the false pretence, to obtain possession of the controlled drug	
Intended to defraud the owner of the controlled drug	
Date	

**Disciplinary Officer's Checklist (procuring by false pretence)**

Element	Proved?
Subject to the AFDA	
Procured delivery of the specified substance to the specified other person	
Intended to do this	
The specified substance is a controlled drug of the specified class	
Knew that specified substance was a controlled drug	
Used a false pretence, either directly or through the medium of any contract obtained by the false pretence, to procure delivery of the controlled drug	
Intended to defraud the owner of the controlled drug	
Date	

**RECEIVING CONTROLLED DRUGS**

- 4.7.49 Offence.** A person subject to the AFDA commits this offence if he or she receives a controlled drug obtained by any crime, or by any act, wherever committed, that, if committed in New Zealand, would constitute a crime, knowing that the controlled drug had been dishonestly obtained or being reckless as to whether or not the controlled drug had been stolen or so obtained.<sup>153</sup>
- 4.7.50 Punishment.** The maximum punishment for this offence is seven years' imprisonment.
- 4.7.51 Receiving.** See paragraphs 4.11.48 to 4.11.50.
- 4.7.52 Recklessness.** See paragraph 5.2.15.

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
RECEIVING A CONTROLLED DRUG CONTRARY TO SECTION 11(1)(c) OF THE  
MISUSE OF DRUGS ACT 1975  
in that he, at Linton on 7 December 20XX, received 25 grams of cannabis  
resin, a Class B controlled drug obtained by a crime, namely theft of a  
controlled drug contrary to section 11(1)(a) of the Misuse of Drugs Act 1975,  
knowing it had been dishonestly obtained.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Obtained possession of or control over or helped in concealing or disposing of the specified substance	
Intended to do this	
The specified substance is a controlled drug	
Knew that specified substance was a controlled drug	
Controlled drug was obtained by a crime, or by any act, wherever committed, that, if committed in New Zealand, would constitute a crime	
Knew that controlled drug had been dishonestly obtained <b>OR</b> Was reckless as to whether controlled drug had been stolen or dishonestly obtained	
Date	

**PERMITTING PREMISES OR VEHICLES, ETC TO BE USED FOR THE COMMISSION OF AN OFFENCE INVOLVING CLASS B OR CLASS C CONTROLLED DRUGS<sup>154</sup>**

- 4.7.53 Offence.** A person subject to the AFDA commits this offence if he or she knowingly permits any premises or any vehicle, aircraft, hovercraft, motor vehicle, or other mode of conveyance to be used for the purpose of the commission of an offence against the Misuse of Drugs Act 1975.<sup>155</sup>
- 4.7.54 Punishment.** The maximum punishment for this offence is:
- If any of the drugs in relation to which the offence was committed was a Class B drug, seven years' imprisonment.<sup>156</sup>
  - In any other case, three years' imprisonment.<sup>157</sup>
- 4.7.55 Knowingly.** Proof of actual knowledge is necessary; mere suspicion or reasonable grounds for suspicion will not do, although knowledge may be inferred as a matter of fact from evidence of wilful blindness to suspicious circumstances.<sup>158</sup>
- 4.7.56 Permitting.** To be able to 'permit' an activity, a person must have some element of a right or duty of control over the premises or vehicle. That right or duty need not amount to ownership nor need the person be the occupier or be concerned with the management. It is sufficient to prove that the person had control or a share of control over the premises, etc, in fact.<sup>159</sup> Once a person in a position to

<sup>154</sup> See Volume 2 Chapter 3 Section 6 for the equivalent offence involving Class A drugs, which may only be tried in the Court Martial.

<sup>155</sup> Section 12(1) of the Misuse of Drugs Act 1975.

<sup>156</sup> Section 12(2)(b) of the Misuse of Drugs Act 1975.

<sup>157</sup> Section 12(2)(c) of the Misuse of Drugs Act 1975.

<sup>158</sup> *R v Sweeney* [1982] 2 NZLR 229 (CA).

<sup>159</sup> *R v Sweeney*.

permit offending knows of it, he or she is required to take all reasonable steps in the circumstances to prevent the offending. If he or she deliberately refrains from taking steps which he or she knows could reasonably be taken to prevent the unlawful use, then he or she will be liable to conviction for this offence.<sup>160</sup>

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY PERMITTING A MOTOR VEHICLE TO BE USED FOR THE PURPOSE OF THE COMMISSION OF AN OFFENCE AGAINST THE MISUSE OF DRUGS ACT 1975 CONTRARY TO SECTION 12(1) OF THAT ACT  
in that he, at Auckland on 12 June 20XX, knowingly permitted a motor vehicle, namely a Toyota Corolla registration number DOPE1 to be used for the purpose of smoking cannabis plant, a Class C controlled drug, an offence against section 7(1)(a) and (2)(b) of the Misuse of Drugs Act 1975.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Had control or a share of control over the premises or conveyance specified	
Another person committed the specified offence against the Misuse of Drugs Act 1975 in or in relation to the premises or conveyance	
Knew that the other person was committing that offence	
<b>If raised by evidence from the accused:</b> Did not take reasonable steps to prevent the commission of the offence	
Date	

### POSSESSING PIPES OR OTHER UTENSILS

- 4.7.57 Offence.** A person subject to the AFDA commits this offence if he or she possesses a pipe or other utensil (not being a needle or syringe) for the purpose of the commission of an offence against the Misuse of Drugs Act 1975.<sup>161</sup>
- 4.7.58 Punishment.** The maximum punishment for this offence is one year's imprisonment, or a \$500 fine, or both.<sup>162</sup>
- 4.7.59 Possession.** See paragraphs 4.7.21 to 4.7.26.
- 4.7.60 Utensil** includes every article used for the purpose of the commission of an

<sup>160</sup> *R v Sweeney*.

<sup>161</sup> Section 13(1)(a) of the Misuse of Drugs Act 1975.

<sup>162</sup> Section 13(3) of the Misuse of Drugs Act 1975.

offence against the Misuse of Drugs Act.<sup>163</sup>

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY POSSESSING A PIPE FOR THE PURPOSE OF THE COMMISSION OF AN OFFENCE AGAINST THE MISUSE OF DRUGS ACT 1975 CONTRARY TO SECTION 13(1)(a) AND (3) OF THAT ACT  
in that she, on board HMNZS TE KAHA on 13 June 20XX, possessed a pipe for the purpose of using methamphetamine, a Class A controlled drug, an offence against section 7(1)(a) and (2)(a) of the Misuse of Drugs Act 1975.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Had physical control of the pipe or utensil	
Knew that had possession of pipe or utensil	
Intended to exercise exclusive control over the pipe or utensil	
Willingly in possession of pipe or utensil	
Intended to commit an offence against the Misuse of Drugs Act 1975 using the pipe or utensil	
Date	

## POSSESSING NEEDLES OR SYRINGES

**4.7.61 Offence.** A person subject to the AFDA commits this offence if he or she, for the purpose of the commission of an offence against the Misuse of Drugs Act 1975, possesses a needle or syringe that:

- a. He or she obtained from a person (**supplier**) who he or she could not have reasonably believed at the time of the acquisition was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative; or<sup>164</sup>
- b. Another person (**acquirer**) obtained on his or her behalf from a supplier who the acquirer could not have reasonably believed at the time the needle or syringe was obtained was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative.<sup>165</sup>

<sup>163</sup> *Police v Lincoln* (1978) 14 MCD 325.

<sup>164</sup> Section 13(1)(aa)(i) of the Misuse of Drugs Act 1975.

<sup>165</sup> Section 13(1)(aa)(ii) of the Misuse of Drugs Act 1975.

- 4.7.62 Punishment.** The maximum punishment for this offence is one year's imprisonment, or a \$500 fine, or both.<sup>166</sup>
- 4.7.63 Needle** means a needle forming part of, or attached to, or designed for attachment to and use with, a syringe.<sup>167</sup>
- 4.7.64 Possession.** See paragraphs 4.7.21 to 4.7.26.
- 4.7.65 Approved medical practitioner** means a medical practitioner approved by the Director-General of Health under the Health (Needles and Syringes) Regulations 1998.<sup>168</sup>
- 4.7.66 Authorised representative** means, in relation to an agency, an association, or a body approved by the Director-General of Health, a person for the time being approved by the Director-General as a representative of that agency, association, or body.<sup>169</sup>
- 4.7.67 Pharmacy employee** means a person employed in a pharmacy within the meaning of the Medicines Act 1981.<sup>170</sup>

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY POSSESSING A NEEDLE FOR THE PURPOSE OF THE COMMISSION OF AN OFFENCE AGAINST THE MISUSE OF DRUGS ACT 1975 CONTRARY TO SECTION 13(1)(aa)(i) AND (3) OF THAT ACT  
in that he, at Linton on 12 May 20XX, for the purpose of using methamphetamine, a Class A controlled drug, an offence against section 7(1)(a) and (2)(a) of the Misuse of Drugs Act 1975, possessed a needle that he or she obtained from A, a person who he did not have reasonable grounds to believe at the time of the acquisition was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY POSSESSING A SYRINGE FOR THE PURPOSE OF THE COMMISSION OF AN OFFENCE AGAINST THE MISUSE OF DRUGS ACT 1975 CONTRARY TO SECTION 13(1)(aa)(ii) AND (3) OF THAT ACT  
in that she, on board HMNZS OTAGO on 17 March 20XX, for the purpose of using cocaine, a Class A controlled drug, an offence against section 7(1)(a) and (2)(a) of the Misuse of Drugs Act 1975, possessed a syringe that A had obtained from B, a person who A did not have reasonable grounds to believe at the time of the acquisition was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative.

166 Section 13(3) of the Misuse of Drugs Act 1975.

167 Section 13(4) of the Misuse of Drugs Act 1975.

168 Section 13(4) of the Misuse of Drugs Act 1975.

169 Section 13(4) of the Misuse of Drugs Act 1975.

170 Section 13(4) of the Misuse of Drugs Act 1975.



**Disciplinary Officer's Checklist  
(needle or syringe obtained from supplier)**

Element	Proved?
Subject to the AFDA	
Had physical control of the needle or syringe	
Knew that had possession of needle or syringe	
Intended to exercise exclusive control over the needle or syringe	
Willingly in possession of needle or syringe	
Did not have reasonable grounds to believe at the time the needle or syringe was acquired that the supplier was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative	
Intended to commit an offence against the Misuse of Drugs Act 1975 using the needle or syringe	
Date	

**Disciplinary Officer's Checklist  
(needle or syringe obtained from acquirer)**

Element	Proved?
Accused subject to the AFDA	
Accused had physical control of the needle or syringe	
Accused knew that had possession of needle or syringe	
Accused intended to exercise exclusive control over the needle or syringe	
Accused willingly in possession of needle or syringe	
Accused obtained needle or syringe from person named in the charge (A)	
A did not have reasonable grounds to believe at the time the needle or syringe was acquired that the supplier was a pharmacist, pharmacy employee, approved medical practitioner, or an authorised representative	
Accused intended to commit an offence against the Misuse of Drugs Act 1975 using the needle or syringe	
Date	

## SECTION 8 – OFFENCES RELATING TO PERFORMANCE OF DUTY AND OBEDIENCE TO ORDERS

### DISOBEYING A LAWFUL COMMAND

**4.8.1 Offence.** A person subject to the AFDA commits this offence if he or she intentionally disobeys a lawful command of his or her superior officer, however communicated.<sup>171</sup>

**4.8.2 Punishment.** The maximum punishment is five years' imprisonment.

**4.8.3 Lawful command** means an order which is:<sup>172</sup>

- a. Not contrary to New Zealand or international law, including the law of armed conflict;
- b. Within the authority of the officer or NCO who issued it;
- c. Within the physical capability of the person to whom it is directed; and
- d. Connected with a Service purpose.

**4.8.4 Lawfulness.** It is the duty of a member of the Armed Forces to obey any order of his or her superior officer which is not manifestly unlawful.<sup>173</sup>

**4.8.5 Communication.** A lawful command may be communicated orally or in writing, or in any other manner which is customary in the NZDF, including through electronic means.<sup>174</sup> It is an element of the offence of disobeying a lawful command that the command was communicated to the accused.

**4.8.6 Mandatory language.** A lawful command or order is a method of communication which leaves no reasonable doubt that the superior officer is exercising his or her authority to compel obedience. It must therefore be expressed in mandatory language. It is customary to use the expressions 'is to' and 'are to' to convey this meaning. Guidance and communications expressing the wish or intent of a superior officer, which are not expressed in mandatory language, are not lawful commands or orders.

**4.8.7 Conflicting lawful orders.** If a member of the Armed Forces receives an order which the member considers to conflict with any other order to which he or she is already subject, the member is to represent the conflict orally or in writing (if there is no urgency) to the superior officer who issued the later order. If the member is then directed to obey the order of that superior officer, he or she is to do so.

**4.8.8 Time of disobedience.** The prohibited disobedience relates to the time at which the order is required to be carried out. Therefore, if an order is to be carried out at a later time, the order will not be disobeyed until the time arrives for carrying it out. In this situation, a statement by the member of the Armed Forces that he or she will not carry out the order does not constitute disobeying a lawful command at the time the order is given but may constitute the offence of insubordinate

<sup>171</sup> AFDA s 38(1).

<sup>172</sup> *R v Lawrence* (1977) 1 NZCMAR 73 (CMAC).

<sup>173</sup> *R v Lawrence*, 76-77.

<sup>174</sup> DA s 100(1).

language (see paragraph 4.5.77).

**4.8.9 Superior officer.** See paragraphs 4.5.3 to 4.5.5.

**Specimen Charge**

DISOBEYING A LAWFUL COMMAND OF HIS SUPERIOR OFFICER CONTRARY TO AFDA s 38(1)  
in that he, at Waiouru on 19 February 20XX, when ordered by B57523 Sergeant Jamie Oliver, his superior officer, to report to the Other Ranks Mess kitchen at 0800 hours, did not do so.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Specified command in mandatory language	
Specified command communicated to the accused	
Originator of command was the accused's superior officer	
Accused did not obey the command	
Intended to disobey	
Command was not unlawful	
Command was within authority of superior officer	
Accused physically capable of obeying command	
Command connected with a Service purpose	
Date	
<b>Defence (accused to prove on balance of probabilities)<sup>175</sup></b> Did not know or have reasonable cause to know that the person who gave the command was the accused's superior officer	

**FAILURE TO COMPLY WITH WRITTEN ORDERS**

**4.8.10 Offence.** A person subject to the AFDA commits this offence if he or she fails to comply with a lawful order of which he or she knows or could, with reasonable diligence, have had knowledge, if the order is:

- a.** A Defence Force Order;<sup>176</sup> or

<sup>175</sup> AFDA s 38(2).

<sup>176</sup> AFDA s 39(a).

- b. A general, standing, daily, or routine order made for any part of the Armed Forces.<sup>177</sup>

**4.8.11 Punishment.** The maximum punishment is two years' imprisonment.

**4.8.12 Lawful order.** See paragraphs 4.8.3 to 4.8.6.

**4.8.13 Promulgation of and acquaintance with orders.** Lawful orders may be promulgated orally or in writing, or in any other manner which is customary in the NZDF, including through electronic means.<sup>178</sup> Non-compliance with an order which has not been promulgated is not an offence. Members of the Armed Forces are to acquaint themselves with orders that apply to them: see paragraph 1.2.7.

**4.8.14 Mandatory language.** See paragraph 4.8.6.

**4.8.15 Conflicting lawful orders.** See paragraph 4.8.7.

### Specimen Charges

- No 1 FAILING TO COMPLY WITH WRITTEN ORDERS CONTRARY TO AFDA s 39(a) in that he, on board HMNZS PHILOMEL on 19 February 20XX, kissed ACO Marilyn Monroe W999427, contrary to DFO(N) 2601.2, which states in part, "Personnel are not to fraternise with other service personnel within a service environment".
- No 2 FAILING TO COMPLY WITH WRITTEN ORDERS CONTRARY TO AFDA s 39(b) in that she, at RNZAF Base Ohakea on 12 May 20XX, smoked in the main building of the OTSU complex contrary to Ohakea Technical Support Unit Standing Orders, paragraph 3.10, which states in part, "Smoking is not permitted within any building which is part of the OTSU complex."

<sup>177</sup> AFDA s 39(b). If a written order does not fall within one of these categories, it may nevertheless constitute a lawful command for the purposes of AFDA s 38(1): see paragraph 4.8.1.

<sup>178</sup> DA s 100(1).

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Specified order in mandatory language	
Specified order was duly promulgated	
Knew of order or could, with reasonable diligence, have had knowledge of it	
Accused did not comply with the order	
Act or omission which constituted non-compliance was intentional	
Order was not unlawful	
Order was within authority of issuing authority	
Accused physically capable of obeying order	
Order connected with a Service purpose	
Date	

### AVOIDANCE OF DUTY

**4.8.16 Offences.** A person subject to the AFDA commits this offence if, without reasonable excuse, he or she:

- a. Fails to attend for a muster, parade or any other Service duty.<sup>179</sup>
- b. Leaves a muster or parade or stops performing any other Service duty before he or she is authorised to do so.<sup>180</sup>

**4.8.17 Punishment.** The maximum punishment is six months' imprisonment.

### Specimen Charges

- No 1 AVOIDANCE OF DUTY CONTRARY TO AFDA s 49(a)  
in that she, at Linton on 19 February 20XX, without reasonable excuse, failed to attend for Required Fitness Level testing, a duty for which she was required to attend.
- No 2 AVOIDANCE OF DUTY CONTRARY TO AFDA s 49(b)  
in that he, at RNZAF Base Woodbourne on 19 February 20XX, without reasonable excuse, stopped performing his duty as Duty Barperson at the Airmen's Club before he was authorised to do so.

179 AFDA s 49(a).

180 AFDA s 49(b).

**Disciplinary Officer's Checklist (AFDA s 49(a) avoidance)**

Element	Proved?
Subject to the AFDA	
Required to attend muster, parade or for other Service duty	
Knew of muster, parade or Service duty	
Did not attend	
Date	
<b>Defence (accused to prove on balance of probabilities)<sup>181</sup></b> Reasonable excuse for not attending	

**Disciplinary Officer's Checklist (AFDA s 49(b) avoidance)**

Element	Proved?
Subject to the AFDA	
Required to attend muster, parade or perform other Service duty	
Knew of muster, parade or Service duty	
Left or stopped performing duty before authorised	
Date and time	
<b>Defence (accused to prove on balance of probabilities)</b> Reasonable excuse for leaving or stopping	

**SLEEPING ON WATCH OR GUARD DUTY**

**4.8.18 Offence.** A person subject to the AFDA who is on guard duty or on watch commits this offence if he or she:

- a. Sleeps at his or her post or on watch;<sup>182</sup> or
- b. Not being on duty at a post, sleeps at a time when it is his or her duty to be awake.<sup>183</sup>

**4.8.19 Punishment.** The maximum punishment is:<sup>184</sup>

- a. If the offence was committed on active service, life imprisonment;<sup>185</sup> or
- b. In any other case, two years' imprisonment.

<sup>181</sup> AFDA s 3(2).

<sup>182</sup> AFDA s 34(2)(a).

<sup>183</sup> AFDA s 34(2)(b).

<sup>184</sup> AFDA s 34(4).

<sup>185</sup> Such an offence may only be tried in the Court Martial.

**4.8.20** **A person on guard duty** means a person ordered to patrol, or who is a member of a guard or other party mounted or ordered to patrol, or who is posted, for the purpose of:<sup>186</sup>

- a. Protecting any person, place, or premises, or any ship, vehicle, aircraft, weapons, or other equipment or stores;
- b. Preventing or controlling entry to or departure from any place, premises, ship, vehicle, or aircraft; or
- c. Regulating traffic by land, water, or air.

### Specimen Charges

- No 1 WHILE ON WATCH SLEEPING ON WATCH CONTRARY TO AFDA s 34(2)(a) AND (4)  
in that she, on board HMNZS TE KAHA on 15 July 20XX, when petty officer of the watch on deck of the middle watch, was asleep on watch.
- No 2 WHILE ON GUARD DUTY NOT BEING ON DUTY AT A POST SLEEPING WHEN IT WAS HIS DUTY TO BE AWAKE CONTRARY TO AFDA s 34(2)(b) AND (4)  
in that he, at Honiara on 19 September 20XX, when on guard duty and ordered to patrol the perimeter of Rove Prison, was asleep at a time when it was his duty to be awake.

### Disciplinary Officer's Checklist (AFDA s 34(2)(a) sleeping at post or on watch)

Element	Proved?
Subject to the AFDA	
On guard duty <b>OR</b> on watch	
Knew this	
Slept at post or on watch	
Date	

**Disciplinary Officer's Checklist**  
**(AFDA s 34(2)(b) sleeping on duty other than at a post)**

Element	Proved?
Subject to the AFDA	
On guard duty	
Knew this	
Slept	
It was his or her duty to be awake	
Knew this	
Date	

**LEAVING PLACE OF DUTY ON WATCH OR GUARD DUTY**

**4.8.21 Offence.** A person subject to the AFDA who is on watch or guard duty commits this offence if he or she, without lawful excuse:<sup>187</sup>

- a. Leaves his or her post; or
- b. Otherwise absents himself or herself from a place where it was his or her duty to be.

**4.8.22 Punishment.** See paragraph 4.8.19.

**4.8.23 A person on guard duty.** See paragraph 4.8.20.

**Specimen Charge**

WHILE ON WATCH WITHOUT LAWFUL EXCUSE ABSENTING HERSELF  
 CONTRARY TO AFDA s 34(2)(d) AND (4)  
 in that she, on board HMNZS ROTOITI on 7 May 20XX, while on watch as  
 bosun's mate of the middle watch, absented herself without lawful excuse  
 from the bridge where it was her duty to be.



**Disciplinary Officer's Checklist  
(AFDA s 34(2)(d) leaving post)**

Element	Proved?
Subject to the AFDA	
On guard duty <b>OR</b> on watch	
Knew this	
Left specified post	
Intended to do so	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Lawful excuse for leaving post	

**Disciplinary Officer's Checklist  
(AFDA s 34(2)(d) otherwise absent from place of duty)**

Element	Proved?
Subject to the AFDA	
On guard duty <b>OR</b> on watch	
Knew this	
Absented himself or herself from specified place	
It was accused's duty to be at the specified place	
Knew this	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Lawful excuse for being absent	

**NEGLIGENTLY FAILING TO PERFORM A DUTY**

**4.8.24 Offence.** A person subject to the AFDA commits this offence if he or she negligently fails to perform a duty imposed on him or her by Service order, training, or custom.<sup>188</sup>

**4.8.25 Punishment.** The maximum punishment is two years' imprisonment.

**4.8.26 Negligently,** in this context, means failing to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would not have failed to do.<sup>189</sup>

<sup>188</sup> AFDA s 73(1)(c).

<sup>189</sup> *R v Sullivan* (1994) 1 NZCMAR 207, 213 (CMAC).

- 4.8.27 Service order, training, or custom.** The disciplinary officer must satisfy himself or herself beyond reasonable doubt that the duty was imposed on the accused by a Service order, training, or custom.
- 4.8.28 Other charges to be preferred.** A charge under AFDA s 73 must not be recorded if the act or omission constitutes an offence against another section of the AFDA.<sup>190</sup>
- 4.8.29 Alternatives.** As an exception to the rule against duplicity, a charge of negligently failing to perform a duty may allege, in the alternative, that the accused:<sup>191</sup>
- Did an act likely to prejudice Service discipline;
  - Did an act likely to bring discredit on the Service; and/or
  - Negligently performed a duty imposed on him or her by Service order, training or custom.

### Specimen Charge

NEGLIGENTLY FAILING TO PERFORM A DUTY CONTRARY TO AFDA s 73(1)(c) in that she, on board HMNZS TE MANA on 27 May 20XX, negligently failed to complete the ship's log for the Middle Watch, which was her duty as on-watch Quartermaster.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Failed to do the thing specified	
The thing specified was the duty of the accused, imposed by Service order, training or custom	
A reasonably capable and careful person of the accused's seniority and experience in the Service would have known that it was his or her duty	
A reasonably capable and careful person of the accused's seniority and experience in the Service would not have failed to perform the duty	
Date	

<sup>190</sup> AFDA s 73(2).

<sup>191</sup> AFDA s 73(3).

**NEGLIGENT PERFORMANCE OF DUTY**

**4.8.30 Offence.** A person subject to the AFDA commits this offence if he or she negligently performs a duty imposed on him or her by Service order, training, or custom.<sup>192</sup>

**4.8.31 Punishment.** The maximum punishment is two years' imprisonment.

**4.8.32 Negligently.** See paragraph 4.8.26.

**4.8.33 Service order, training, or custom.** See paragraph 4.8.27.

**4.8.34 Other charges to be preferred.** See paragraph 4.8.28.

**4.8.35 Alternatives.** As an exception to the rule against duplicity, a charge of negligent performance of duty may allege, in the alternative, that the accused:<sup>193</sup>

- a. Did an act likely to prejudice Service discipline;
- b. Did an act likely to bring discredit on the Service; or
- c. Negligently failed to perform a duty imposed on him or her by Service order, training or custom.

**Specimen Charge**

NEGLIGENTLY PERFORMING A DUTY CONTRARY TO AFDA s 73(1)(d)  
in that he, at Burnham Military Camp on 9 June 20XX, negligently carried out the unload drill on his IW Steyr, causing an unauthorised discharge from the weapon.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Did the thing specified in a manner which a reasonably capable and careful person of the accused's seniority and experience in the Service would not have done	
The thing specified was the duty of the accused, imposed by Service order, training or custom	
A reasonably capable and careful person of the accused's seniority and experience in the Service would have known that it was his or her duty	
Date	

192 AFDA s 73(1)(d).

193 AFDA s 73(3).

**MALINGERING**

**4.8.36 Offences.** A person subject to the AFDA commits this offence if he or she:

- a.** Falsely represents that he or she is suffering from any sickness or disability, with intent to avoid service or duty.<sup>194</sup>
- b.** Injures him or herself with intent to render or keep him or herself unfit for service or duty.<sup>195</sup>
- c.** With intent to render or keep him or herself unfit for service or duty, causes or permits some other person to injure him or her.<sup>196</sup>
- d.** With intent to render or keep him or herself unfit for service or duty, does or fails to do anything by which he or she produces, prolongs, or aggravates any sickness or disability.<sup>197</sup>

**4.8.37 Punishment.** If this offence is committed on active service, the maximum punishment is life imprisonment.<sup>198</sup> In any other case, the maximum punishment is two years' imprisonment.<sup>199</sup>

**4.8.38 Active service.** See Glossary of Terms in Chapter 1 Section 1.

**4.8.39 Unfit** includes temporarily unfit.<sup>200</sup>

**4.8.40 Injure.** See paragraph 4.5.29.

### Specimen Charges

- No 1 MALINGERING CONTRARY TO AFDA s 50(1)(a) and (2)(a)  
in that she, when on active service, on board HMNZS ENDEAVOUR on 1 October 20XX, with intent to avoid service or duty, falsely represented to POMED A.C. Green that she was suffering from a sprained ankle.
- No 2 MALINGERING CONTRARY TO AFDA s 50(1)(b) and (2)(b)  
in that he, at Linton on 1 October 20XX, with intent to render himself unfit for service or duty, injured himself by cutting his hand with a knife.
- No 3 MALINGERING CONTRARY TO AFDA s 50(1)(c) and (2)(b)  
in that she, at RNZAF Base Ohakea on 1 October 20XX, with intent to keep herself unfit for service or duty, permitted Ronald Biggs to injure her by injecting her with battery acid.
- No 4 MALINGERING CONTRARY TO AFDA s 50(1)(d) and (2)(b)  
in that he, at Wellington on 1 October 20XX, with intent to render himself unfit for service or duty, swallowed a quantity of metal polish thereby producing sickness.

194 AFDA s 50(1)(a).

195 AFDA s 50(1)(b).

196 AFDA s 50(1)(c).

197 AFDA s 50(1)(d).

198 AFDA s 50(2)(a). It follows that the charge of malingering on active service may only be tried in the Court Martial.

199 AFDA s 50(2)(b).

200 AFDA s 50(3).

**Disciplinary Officer's Checklist (AFDA s 50(1)(a) malingering)**

Element	Proved?
Subject to the AFDA	
Represented that he or she was suffering from a sickness / disability	
Representation was false	
Knew that representation was false	
Intended to avoid service or duty	
Date	

**Disciplinary Officer's Checklist (AFDA s 50(1)(b) malingering)**

Element	Proved?
Subject to the AFDA	
Injured him or herself	
Intended to injure him or herself	
Intended to render or keep him or herself unfit for service or duty	
Date	

**Disciplinary Officer's Checklist (AFDA s 50(1)(c) malingering)**

Element	Proved?
Subject to the AFDA	
Caused or permitted a person to injure him or her	
Did so knowingly	
Intended to render or keep him or herself unfit for service or duty	
Date	

**Disciplinary Officer's Checklist (AFDA s 50(1)(d) malingering)**

Element	Proved?
Subject to the AFDA	
Did something <b>OR</b> failed to do something as stated in the particulars	
The act or omission produced, prolonged or aggravated some sickness or disability	
Intended to produce, prolong or aggravate some sickness or disability	
Intended to render or keep him or herself unfit for service or duty	
Date	

**DRUNKENNESS**

- 4.8.41 Offence.** A person subject to the AFDA commits this offence if, owing to the influence of alcohol or a drug (not being a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer it), whether alone or in combination with each other or any other circumstances, he or she is unfit to perform his or her duty or any duty that he or she may be required to perform.<sup>201</sup>
- 4.8.42 Punishment.** If this offence is committed on active service, the maximum punishment is two years' imprisonment.<sup>202</sup> In any other case, the maximum punishment is 12 months' imprisonment.<sup>203</sup>
- 4.8.43 Active service.** See Glossary of Terms in Chapter 1 Section 1.
- 4.8.44 Evidence of drunkenness.** Any person with a reasonable degree of experience of the effects of intoxication is entitled to give an opinion as to whether the accused was intoxicated, based on the witness's perception of the accused's behaviour and other characteristics typical of intoxication. If a member of the Armed Forces suspected of being drunk is apprehended, the member is, if possible, to be assessed by a medical officer or other person with appropriate medical training with a view to establishing the cause of the symptoms observed.

**Specimen Charge**

DRUNKENNESS CONTRARY TO AFDA s 51(1)(b)\*  
in that he, at Waiohuru on 19 February 20XX, was drunk.

**\*If committed on active service, substitute "AFDA s 51(1)(a)" in the statement of offence and insert "when on active service" in the particulars.**

201 AFDA s 51.

202 AFDA s 51(1)(a).

203 AFDA s 51(1)(b).

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Unfit to perform his or her duty or a duty he or she may be required to perform	
Reason for unfitness (whether or not combined with other circumstances) is alcohol <b>OR</b> drugs <b>OR</b> alcohol + drugs	
Date	
<i>(If active service alleged in particulars)</i> Accused / unit on active service	
<b>Defence (accused to prove on balance of probabilities)<sup>204</sup></b> Unfitness caused by prescribed drugs	

### DRUNKENNESS ON WATCH OR GUARD DUTY

- 4.8.45 Offence.** A person subject to the AFDA who is on watch or guard duty commits this offence if, owing to the influence of alcohol or a drug (not being a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer it), whether alone or in combination with each other or any other circumstances, he or she is unfit to perform his or her duty.<sup>205</sup>
- 4.8.46 Punishment.** See paragraph 4.8.19.
- 4.8.47 A person on guard duty.** See paragraph 4.8.20.
- 4.8.48 Evidence of drunkenness.** See paragraph 4.8.44.

### Specimen Charge

WHILE ON GUARD DUTY BEING DRUNK CONTRARY TO AFDA s 34(2)(c) AND (4)  
in that he, at RNZAF Base Ohakea on 1 May 20XX, when on guard duty at No 10 hangar, was drunk.

204 AFDA s 3(2)  
205 AFDA s 34(2)(c) and (3).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Unfit to perform his or her duty or a duty he or she may be required to perform	
Reason for unfitness (whether or not combined with other circumstances) is alcohol <b>OR</b> drugs <b>OR</b> alcohol + drugs	
Date	
<i>(If active service alleged in particulars)</i> Accused / unit on active service	
<b>Defence (accused to prove on balance of probabilities)<sup>206</sup></b> Unfitness caused by prescribed drugs	



## SECTION 9 – OFFENCES RELATING TO SHIPS, VEHICLES, AIRCRAFT AND WEAPONS

### NEGLIGENTLY LOSING, STRANDING OR HAZARDING A SHIP, AIRCRAFT OR ARMoured FIGHTING VEHICLE<sup>207</sup>

- 4.9.1 Offence.** A person subject to the AFDA commits an offence if he or she negligently causes or permits a ship, aircraft or vehicle to be lost, stranded or hazarded while responsible for the navigation, control, operation or propulsion of that ship, aircraft or vehicle.<sup>208</sup>
- 4.9.2 Punishment.** The maximum punishment is two years' imprisonment.
- 4.9.3 Causes,** in this context, means 'effects or brings about'.<sup>209</sup>
- 4.9.4 Permits,** in this context, means that the accused refrained from taking steps which he or she knew that he or she could reasonably have taken to prevent the loss, stranding or hazarding.<sup>210</sup>
- 4.9.5 Lost** means totally lost. A surface ship can be lost without necessarily being lost to view as, for example, when salvage operations for her recovery are abandoned. Salvage operations undertaken for the purpose of merely saving anything of value that may be in the hull, but not the hull itself, will not prevent a ship from being regarded as lost. A ship which is wholly submerged and incapable of coming to the surface by its own efforts is lost within the meaning of this section. The same applies to aircraft or armoured fighting vehicles, which are lost when written off, notwithstanding that some components are salvaged.
- 4.9.6 Stranded.** A ship is stranded when all or part of it has grounded. It is immaterial what part of the ship is in contact with the ground. A ship is stranded even though it may move or drag as the result of the wind or the tide or the currents, or a combination of these matters, provided that there is some contact with the ground, at least on the ebbing tide. The grounding can be temporary, in the sense that the ship can be towed off or manoeuvred off under its own power or with assistance, but a ship is not stranded if the contact with the ground is only a 'touch and go' eg scraping over a shoal patch.<sup>211</sup> An armoured fighting vehicle could be stranded by driving it onto soft ground or into deep water, whereupon it becomes stuck. An aircraft could be stranded by taxiing off the runway or taxiing strip and getting 'bogged down' in soft ground. In cases of doubt, an alternative charge of hazarding should be added.
- 4.9.7 Hazarded** has always been regarded as having its ordinary dictionary sense of 'exposed to danger'. When a large ship is brought into risk of collision with a small boat which could not endanger it, the large ship cannot be said to be hazarded. It is common sense that a ship, aircraft, or armoured fighting vehicle must be hazarded before it is lost or stranded. A charge of hazarding therefore could, if appropriate, be added as an additional or alternative charge to one of losing or stranding. Where the same acts or omissions caused or permitted

207 See Volume 2 Chapter 3 Section 7 for this offence if the conduct is wilful, rather than negligent, in which case it may only be tried in the Court Martial.

208 AFDA s 64(2).

209 *Auckland City Council v Morgan* [1983] NZLR 723, 725 (CA).

210 *R v Sweeney* [1982] 2 NZLR 229, 230 (CA).

211 *Dorn v Maritime Safety Authority* [1999] 2 NZLR 482.

the loss or stranding, the charge of hazarding should be an alternative charge. A charge of hazarding should only be an additional charge if there is a real time difference between the hazarding and the stranding so that they may be considered as two distinct phases.

4.9.8 Negligently. See paragraph 4.8.26.

Specimen Charges

- No 1 NEGLIGENTLY PERMITTING A SHIP TO BE STRANDED CONTRARY TO AFDA s 64(2)  
in that he, at Jervis Bay, Australia, on 2 July 20XX, while responsible for the navigation of HMNZS WELLINGTON, negligently permitted the ship to be stranded by failing to ensure that the ship was properly anchored.
- No 2 NEGLIGENTLY CAUSING AN AIRCRAFT TO BE LOST CONTRARY TO AFDA s 64(2)  
in that she, at Putaruru on 12 April 20XX, while responsible for the control of a NH 90 helicopter, NZ 1234, negligently caused the aircraft to be lost by permitting the usable fuel in the aircraft to become exhausted in flight, resulting in the aircraft crashing to the ground.

Disciplinary Officer’s Checklist

Element	Proved?
Subject to the AFDA	
Ship, aircraft or armoured fighting vehicle specified was lost <b>OR</b> hazarded <b>OR</b> stranded <b>[specified category of offence to be proved]</b>	
Accused was responsible for navigation <b>OR</b> control <b>OR</b> operation <b>OR</b> propulsion <b>[specified responsibility to be proved]</b>	
Accused caused <b>OR</b> permitted loss, hazarding or stranding <b>[causing or permitting to be proved]</b>	
Act or omission was something which in the circumstances a reasonably capable and careful person of the accused’s seniority and experience in the Service would not have done or omitted	
Date	

**DANGEROUS ACTS OR OMISSIONS<sup>212</sup>**

- 4.9.9 Offence.** A person subject to the AFDA commits an offence if he or she, while operating, handling, servicing or storing a ship, aircraft, armoured fighting vehicle, weapon, missile, explosive or other dangerous thing which is used by or under the control of the Armed Forces or an allied force, negligently does or omits an act which he or she knows, or which having regard to all the circumstances ought to know, is likely to cause loss of life or bodily injury to any person other than an enemy.<sup>213</sup>
- 4.9.10 Punishment.** The maximum punishment is five years' imprisonment.
- 4.9.11 Loss of life or bodily injury.** A person subject to the AFDA may be convicted of this offence even though no actual loss of life or bodily injury occurred.
- 4.9.12 Negligently.** See paragraph 4.8.26.
- 4.9.13 Likely** means a real or substantial risk of death or bodily injury. It need not be more probable than not but it should be more than a bare possibility.<sup>214</sup>
- 4.9.14 Allied force** means a force or part of a force of another country acting in co-operation with a part of the Armed Forces.<sup>215</sup>
- 4.9.15 Enemy.** See Glossary of Terms in Chapter 1 Section 1.

**Specimen Charge**

NEGLIGENTLY OMITTING AN ACT SUCH OMISSION BEING LIKELY TO CAUSE LOSS OF LIFE OR BODILY INJURY WHILE OPERATING A WEAPON CONTRARY TO AFDA s 65(2)

in that he, at Waiouru on 30 August 20XX, while operating a medium range anti-armour weapon, negligently omitted to ensure that no person was present in his back blast danger area, an omission which he knew or ought to have known was likely to cause loss of life or bodily injury to a person other than the enemy.

<sup>212</sup> See Volume 2 Chapter 3 Section 7 for this offence if the conduct is wilful, rather than negligent, in which case it may only be tried in the Court Martial.

<sup>213</sup> AFDA s 65(2).

<sup>214</sup> *R v Piri* [1987] 1 NZLR 666 (CA).

<sup>215</sup> AFDA s 2(1).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Accused was operating <b>OR</b> handling <b>OR</b> servicing <b>OR</b> storing a ship <b>OR</b> an aircraft <b>OR</b> armoured fighting vehicle <b>OR</b> a weapon <b>OR</b> a missile <b>OR</b> an explosive <b>OR</b> the specified dangerous thing <b>[specified action and thing must be proved]</b>	
The specified thing was used by or under the control of the Armed Forces or an allied force	
Did <b>OR</b> omitted the specified act	
Did or omitted the act voluntarily in circumstances where a reasonably capable and careful person of the accused's seniority and experience in the Service would not have done or omitted the act	
The act or omission was likely to cause loss of life <b>OR</b> bodily injury	
Knew that the act or omission was likely to cause loss of life <b>OR</b> bodily injury <b>OR</b> a reasonably capable and careful person of the accused's seniority and experience in the Service would have known this	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused honestly believed only the enemy likely to be killed or injured	

## FAILING TO COMPLY WITH DIRECTIONS GIVEN BY THE CAPTAIN OF A SHIP OR AIRCRAFT

**4.9.16 Offence.** A person subject to the AFDA commits this offence if he or she, when in or near any ship or aircraft, fails to comply with a lawful direction given to him or her by or with the authority of the person in command of the ship or aircraft:

- a. In relation to the sailing or handling of the ship or the flying or handling of the aircraft;<sup>216</sup> or
- b. Affecting the safety of the ship or aircraft.<sup>217</sup>

**4.9.17 Punishment.** The maximum punishment is five years' imprisonment.

**4.9.18 Status of person in command of ship or aircraft.** For the purposes of this offence, it does not matter whether the person in command of the ship or aircraft is a member of the Armed Forces or not.

<sup>216</sup> AFDA s 40(a).

<sup>217</sup> AFDA s 40(b).

### Specimen Charge

FAILING TO COMPLY WITH A LAWFUL DIRECTION GIVEN BY OR WITH THE AUTHORITY OF A PERSON IN COMMAND OF A SHIP CONTRARY TO AFDA s 40(a)  
in that he, on board HMNZS RESOLUTION on 7 September 20XX, when directed by Sub Lieutenant James Cook, RNZN, the Officer of the Watch, to stop obstructing the view from the bridge of the Officer of the Watch, did not do so.

### Disciplinary Officer's Checklist (AFDA s 40(a))

Element	Proved?
Subject to the AFDA	
Accused in or near a ship or aircraft	
Accused given a lawful direction	
Direction given by person in command of ship or aircraft, or with that person's authority	
Direction related to the sailing or handling of the ship or the flying or handling of the aircraft	
Accused did not comply with the direction	
Intended not to comply	
Date	

### Disciplinary Officer's Checklist (AFDA s 40(b))

Element	Proved?
Subject to the AFDA	
Accused in or near a ship or aircraft	
Accused given a lawful direction	
Direction given by person in command of ship or aircraft, or with that person's authority	
Direction affected the safety of the ship or aircraft	
Accused did not comply with the direction	
Intended not to comply	
Date	

**INACCURATE CERTIFICATION AFFECTING SAFETY OR EFFICIENCY**

**4.9.19 Offence.** A person subject to the AFDA commits this offence if he or she:

- a. Gives, makes or signs;<sup>218</sup> or
- b. Makes or signs an entry in;<sup>219</sup>

a certificate, book, record, or other document relating to any matter affecting the safety or efficiency of a Service ship, aircraft, armoured fighting vehicle, field gun, or missile which is inaccurate in a material particular, without having taken reasonable care to ensure the accuracy of the document or entry.

**4.9.20 Punishment.** The maximum punishment is two years' imprisonment.

**4.9.21 Reasonable care** means the care which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would have taken.<sup>220</sup>

### Specimen Charges

No 1 NEGLIGENTLY SIGNING AN INACCURATE DOCUMENT RELATING TO A MATTER AFFECTING THE SAFETY OR EFFICIENCY OF A SERVICE SHIP CONTRARY TO AFDA s 66(a)

in that she, on board HMNZS CANTERBURY on 22 September 20XX, signed RNZN 158 Watertight Integrity Log, a document relating to the safety or efficiency of the ship, which stated inaccurately that compartment 3GZ had been closed at 0534, without having taken reasonable care to ensure the accuracy of the document.

No 2 NEGLIGENTLY MAKING AN INACCURATE ENTRY IN A DOCUMENT RELATING TO A MATTER AFFECTING THE SAFETY OR EFFICIENCY OF AN AIRCRAFT CONTRARY TO AFDA s 66(b)

in that he, at RNZAF Base Auckland on 18 October 20XX, made an entry in form RNZAF LOG 47, a document relating to the safety or efficiency of C130 Hercules NZ 7123, which stated inaccurately that the flight control boost shut-off valve check had been conducted, without having taken reasonable care to ensure the accuracy of the document.

<sup>218</sup> AFDA s 66(a).

<sup>219</sup> AFDA s 66(b).

<sup>220</sup> *R v Sullivan* (1994) 1 NZCMAR 207, 213 (CMAC).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Gave <b>OR</b> made <b>OR</b> signed a document <b>OR</b> made or signed an entry in a document <b>[specified action must be proved]</b>	
Intentionally did so	
The document related to a matter affecting the safety or efficiency of a Service ship <b>OR</b> an aircraft <b>OR</b> an armoured fighting vehicle <b>OR</b> a weapon <b>OR</b> a field gun <b>OR</b> a missile <b>[specified thing and safety/efficiency aspect must be proved]</b>	
Knew that the document related to the safety or efficiency specified	
Did not take reasonable care to ensure the accuracy of the document (namely the care which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would have taken)	
Date	

## SECTION 10 – DRIVING OFFENCES

## DANGEROUS DRIVING

**4.10.1 Offence.** A person subject to the AFDA commits an offence if he or she drives a vehicle in any place, whether public or otherwise:<sup>221</sup>

- a. Recklessly; or
- b. At a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to any person or to the property of any person.

**4.10.2 Punishment.** The maximum punishment is two years' imprisonment.

**4.10.3 Driving** is a combination of acts which produces the result of the controlled movement of the vehicle. Thus steering a vehicle while another operates all the controls is driving.<sup>222</sup> Driving requires a voluntary act done with the intention of putting the vehicle in motion or controlling its movement.<sup>223</sup>

**4.10.4 Reckless**, in this context, means foresight of dangerous consequences that could well happen combined with an intention to continue the course of conduct even though those consequences are a clear risk.<sup>224</sup>

**4.10.5 Dangerous.** Whether driving is dangerous is to be judged objectively and does not depend on the accused's state of mind.<sup>225</sup> However, the liability is not absolute. It must be shown that the driver failed to meet the standard of care expected of a reasonable and competent driver.

## Specimen Charges

No 1 DRIVING A VEHICLE RECKLESSLY CONTRARY TO AFDA s 67(1)(a)  
in that she, at Nelson on 9 August 20XX, drove a motor vehicle, registration DCR4567, recklessly.

No 2 DRIVING A VEHICLE IN A DANGEROUS MANNER CONTRARY TO AFDA s 67(1)(a)  
in that he, at Waiohuru on 18 June 20XX, drove a light armoured vehicle, NZ1234, in a manner which, having regard to all the circumstances of the case, was or might have been dangerous to any person or to the property of any person.

221 AFDA s 67(1)(a).

222 *Bassanti v Rangī*, unreported, Quilliam J, Supreme Court at Wellington, 15 November 1972.

223 *Blayney v Knight* [1975] Crim LR 237.

224 *R v Harney* [1987] 2 NZLR 576 (CA).

225 *R v Evans* [1962] 3 All ER 1086 (CA).



**Disciplinary Officer's Checklist (reckless driving)**

Element	Proved?
Subject to the AFDA	
Was the driver of the vehicle	
Drove the vehicle in a place	
Driving was voluntary (ie not accidental or unconscious)	
Fell below the standard of care expected of a reasonable and competent driver	
The resulting situation was dangerous from an objective viewpoint	
Was aware of the potential danger and continued to act despite knowledge of the possible consequences	
Date	

**Disciplinary Officer's Checklist (dangerous driving)**

Element	Proved?
Subject to the AFDA	
Was the driver of the vehicle	
Drove the vehicle in a place	
Driving was voluntary (ie not accidental or unconscious)	
Fell below the standard of care expected of a reasonable and competent driver, in respect of speed <b>OR</b> manner of driving in the circumstances	
The resulting situation was dangerous from an objective viewpoint	
Date	

**DRIVING UNDER THE INFLUENCE OF ALCOHOL OR A DRUG**

**4.10.6 Offence.** A person subject to the AFDA commits this offence if he or she drives a vehicle while under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle.<sup>226</sup>

**4.10.7 Punishment.** The maximum punishment is two years' imprisonment.

**4.10.8 Driving.** See paragraph 4.10.3.

**4.10.9 Drug,** in this context, does not include a drug administered by or taken in accordance with the directions of a person lawfully authorised to administer that drug. This is an exception or qualification which the accused must prove on the balance of probabilities, if he or she wishes to rely on it as a defence.<sup>227</sup>

226 AFDA s 67(1)(b).

227 AFDA s 3(2).

**Specimen Charge**

DRIVING A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL CONTRARY TO AFDA s 67(1)(b)  
 in that she, at Tokoroa on 27 April 20XX, drove a motor vehicle, registration DFG12967, while under the influence of alcohol, to such an extent as to be incapable of having proper control of the vehicle.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Was the driver of the vehicle	
Drove the vehicle under the influence of alcohol <b>OR</b> a drug [specified substance must be proved]	
Did so voluntarily	
Influence of alcohol or drug caused accused to be incapable of having proper control of the vehicle	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Driving impairment caused by a drug administered by or taken in accordance with the directions of a person lawfully authorised to administer that drug.	

**CARELESS DRIVING**

**4.10.10 Offence.** A person subject to the AFDA commits this offence if he or she drives a vehicle carelessly in any place.<sup>228</sup>

**4.10.11 Punishment.** The maximum punishment is three months' imprisonment.

**4.10.12 Driving.** See paragraph 4.10.3.

**4.10.13 Carelessly.** A person drives carelessly if, in his or her driving, he or she does not observe the standard of care of a reasonable prudent driver.<sup>229</sup>

**Specimen Charge**

DRIVING A VEHICLE CARELESSLY CONTRARY TO AFDA s 67(2)(a)  
 in that he, at Taihape on 2 July 20XX, rode a motorbike, registration DCT378, carelessly.

<sup>228</sup> AFDA s 67(2)(a).

<sup>229</sup> *D'Almeida v Auckland City Council* (1984) 1 CRNZ 281.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Was the driver of the vehicle	
Drove the vehicle voluntarily	
Did not observe the standard of care of the reasonable prudent driver	
Date	

## INCONSIDERATE DRIVING

**4.10.14 Offence.** A person subject to the AFDA commits this offence if he or she drives a vehicle in any place without consideration for persons in or near that place.<sup>230</sup>

**4.10.15 Punishment.** The maximum punishment is three months' imprisonment.

**4.10.16 Driving.** See paragraph 4.10.3.

**4.10.17 Without consideration.** It is no offence to subject other persons using or in the vicinity of a road or other place to the ordinary and reasonable exigencies, irritations and delays which may occur in a reasonable use of that road or place.<sup>231</sup>

## Specimen Charge

DRIVING A VEHICLE WITHOUT CONSIDERATION CONTRARY TO AFDA s 67(2)  
(b)  
in that she, at Hunterville on 12 August 20XX, drove a light armoured vehicle, NZ1245, without consideration for persons in or near that place.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Was the driver of the vehicle	
Drove the vehicle voluntarily	
Did so without consideration for persons in or near that place	
Date	

230 AFDA s 67(2)(b).

231 *McManus v Gordon* [1959] NZLR 587, 589.

**USING A SERVICE VEHICLE FOR AN UNAUTHORISED PURPOSE**

**4.10.18 Offence.** A person subject to the AFDA commits this offence if he or she uses a Service vehicle for an unauthorised purpose.<sup>232</sup>

**4.10.19 Punishment.** The maximum punishment is three months' imprisonment.

**Specimen Charge**

USING A SERVICE VEHICLE FOR AN UNAUTHORISED PURPOSE CONTRARY TO AFDA s 67(3)

in that he, at RNZAF Base Ohakea on 11 May 20XX, without authority, used a Toyota Corolla car, registration no. DCF7891, a Service vehicle, to collect his personal groceries from the Palmerston North Pak n Save supermarket.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Used the specified vehicle for the specified purpose	
The vehicle was a Service vehicle	
Knew it was a Service vehicle	
Did not have authority to use the vehicle for the specified purpose	
Knew he or she did not have authority	
Date	

**CIVIL DRIVING OFFENCES**

**4.10.20** The Land Transport Act 1998<sup>233</sup> (**LTA**) establishes responsibilities for participants in the land transport system and provides for sanctions for road-user offences.

**4.10.21** Obligations on drivers include those provided for by sections 7 and 8 of the LTA:

**7 Drivers not to be reckless or dangerous**

(1) A person may not operate a motor vehicle recklessly on a road.

(2) A person may not drive a motor vehicle on a road, or cause a motor vehicle to be driven on a road, at a speed or in a manner which, having regard to all the circumstances, is or might be dangerous to the public or to a person.

**8 Drivers not to be careless or inconsiderate**

A person may not operate a vehicle on a road carelessly or without reasonable

<sup>232</sup> AFDA s 67(3).

<sup>233</sup> See <http://www.legislation.govt.nz/act/public/1998/0110/latest/DLM433613.html> for the full text of this Act.

consideration for other persons using the road.

**4.10.22** The more serious offences of causing death through the breaching of the obligations described in paragraph 4.10.21 are provided for by sections 36, 38 and 39 of the LTA. The serious offences of causing injury or death while intoxicated by alcohol or drugs are provided for by section 61 of the LTA. If a person is convicted under one of those sections, the sentencing court must order that person to be disqualified from holding or obtaining a driver licence for a prescribed period. As neither disciplinary officers nor the Court Martial have the jurisdiction to make such an order, any allegation of such offending is to be:

- a.** Recorded in the form of a charge of reckless, dangerous, or careless driving, or driving a vehicle under the influence of alcohol or a drug (as the case may require), contrary to AFDA s 67; or
- b.** Recorded in the form of a charge of manslaughter contrary to AFDA s 74(1) and CA s 177(1) (provided that, if the charge relates to an incident in New Zealand, the Attorney-General's consent is obtained for the trial of the offence in the Court Martial: see AFDA s 74(4)); or
- c.** Referred to the appropriate civil authority for investigation in accordance with AFDA s 102(1)(b).

## SECTION 11 – PROPERTY OFFENCES

### DEFINITION OF THEFT AND STEALING<sup>234</sup>

#### 4.11.1 Theft or stealing is the act of:

- a. Dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property; or
- b. Dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.

#### 4.11.2 **Dishonestly**, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.<sup>235</sup>

#### 4.11.3 **Claim of right**, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed.<sup>236</sup>

#### 4.11.4 **Taking**. For tangible property, theft is committed by a taking when the offender moves the property or causes it to be moved.<sup>237</sup> However, taking does not include obtaining ownership or possession of, or control over, any property with the consent of the person from whom it is obtained, whether or not consent is obtained by deception.<sup>238</sup>

#### 4.11.5 **Intent to permanently deprive**. An intent to deprive any owner permanently of property includes an intent to deal with property in such a manner that:<sup>239</sup>

- a. The property cannot be returned to any owner in the same condition; or
- b. Any owner is likely to be permanently deprived of the property or of any interest in the property.

### STEALING SERVICE PROPERTY OR THE PROPERTY OF A COMRADE

#### 4.11.6 **Offence**. A person subject to the AFDA commits an offence if he or she steals:

- a. Any Service property;<sup>240</sup> or
- b. Any property belonging to a person subject to Service law or in which a person subject to Service law has a special property or interest.<sup>241</sup>

#### 4.11.7 **Punishment**. The maximum punishment is seven years' imprisonment.

<sup>234</sup> AFDA s 2(1) and section 219 of the Crimes Act 1961.

<sup>235</sup> Section 217 of the Crimes Act 1961.

<sup>236</sup> Section 2(1) of the Crimes Act 1961.

<sup>237</sup> Section 219(4) of the Crimes Act 1961.

<sup>238</sup> Section 219(3) of the Crimes Act 1961.

<sup>239</sup> Section 219(2) of the Crimes Act 1961.

<sup>240</sup> AFDA s 57(1)(a)(i).

<sup>241</sup> AFDA s 57(1)(a)(ii).

**4.11.8 Stealing.** See paragraphs 4.11.1 to 4.11.5.

**4.11.9 Service property** means any property belonging to the Crown in right of New Zealand and includes any other property (whether belonging to the Crown or not) used by or in the possession or under the control of the Armed Forces or an allied force, or a Service mess, band, club, institution, or the Armed Forces Canteen Council.<sup>242</sup>

**4.11.10 Person subject to Service law.** In addition to persons subject to the AFDA, this includes persons subject to the military law of a foreign force which is acting in co-operation with a part of the New Zealand Armed Forces.<sup>243</sup>

### Specimen Charges

No 1 STEALING SERVICE PROPERTY CONTRARY TO AFDA s 57(1)(a)(i) in that she, on board HMNZS HAWEA on 17 May 20XX, stole a laptop computer serial number XYZ123456789 valued at \$2000, being Service property.

No 2 STEALING PROPERTY OF A COMRADE CONTRARY TO AFDA s 57(1)(a)(ii) in that he, at Waiouru on 7 June 20XX, stole an iPod serial number ABCD9876543 valued at \$200, the property of J1057999 Pte M. Maher, RNZALR, a person subject to Service law.

### Disciplinary Officer's Checklist (stealing Service property)

Element	Proved?
Subject to the AFDA	
Took specified property <b>OR</b> used or dealt with specified property after obtaining possession of or control over it	
Did so dishonestly	
Did so with intent to permanently deprive the owner of the property or the owner's interest in the property	
Specified property is Service property	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

<sup>242</sup> AFDA s 2(1).

<sup>243</sup> AFDA s 2(1).

**Disciplinary Officer's Checklist (stealing property of a comrade)**

Element	Proved?
Subject to the AFDA	
Took specified property <b>OR</b> used or dealt with specified property after obtaining possession of or control over it	
Did so dishonestly	
Did so with intent to permanently deprive the owner of the property or the owner's interest in the property	
Specified person owns or has special property or interest in the specified property	
Specified person is subject to Service law	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

**THEFT**

**4.11.11 Offence.** A person subject to the AFDA commits this offence if he or she steals any property.<sup>244</sup>

**4.11.12 Punishment.** The maximum punishment for this offence is:

- a. Seven years' imprisonment if the value of the property stolen exceeds \$1,000.<sup>245</sup>
- b. One year's imprisonment if the value of the property stolen exceeds \$500 but does not exceed \$1,000.<sup>246</sup>
- c. Three months' imprisonment if the value of the property stolen does not exceed \$500.<sup>247</sup>

**4.11.13 Stealing.** See paragraphs 4.11.1 to 4.11.5.

<sup>244</sup> Section 223 of the Crimes Act 1961.

<sup>245</sup> Section 223(b) of the Crimes Act 1961.

<sup>246</sup> Section 223(c) of the Crimes Act 1961.

<sup>247</sup> Section 223(d) of the Crimes Act 1961.



### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY THEFT CONTRARY TO SECTION 223(b) OF THE CRIMES ACT 1961  
in that he, at Timaru on or about 1 May 20XX, stole a motor vehicle, registration number DCR2976, valued at \$15,000, from Benjamin Elton.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY THEFT CONTRARY TO SECTION 223(c) OF THE CRIMES ACT 1961  
in that he, at Timaru on or about 1 May 20XX, stole a stereo system, serial number BXFSR000196483, valued at \$699, from Rowan Atkinson.
- No 3 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY THEFT CONTRARY TO SECTION 223(d) OF THE CRIMES ACT 1961  
in that he, at Timaru on or about 1 May 20XX, stole a Nokia mobile phone, valued at \$300, from Edward Murphy.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Took specified property <b>OR</b> used or dealt with specified property after obtaining possession of or control over it	
Did so dishonestly	
Did so with intent to permanently deprive the owner of the property or the owner's interest in the property	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

### THEFT BY PERSON IN SPECIAL RELATIONSHIP

**4.11.14 Offence.** A person subject to the AFDA commits this offence if he or she has a **special relationship** with another person in respect of certain property and he or she:<sup>248</sup>

- a. Intentionally fails to account to the other person as required by the terms of the special relationship; or
- b. Intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with the requirements of the other person under the special relationship.

**4.11.15 Punishment.** The maximum punishment for this offence is seven years' imprisonment.<sup>249</sup>

**4.11.16 Special relationship.** A special relationship exists between the accused and another person in respect of the relevant property if the accused has received, or is in possession of, or has control over, the property on terms or in circumstances that the accused knows require him or her:<sup>250</sup>

- a. To account to the other person for the property, or for any proceeds arising from the property; or
- b. To deal with the property, or any proceeds arising from the property, in accordance with the requirements of the other person.

**4.11.17 Possession or control.** See paragraphs 4.7.21 to 4.7.23.

**4.11.18 Defence of honest belief.** The accused has a defence to a charge involving theft by a person in a special relationship if the disciplinary officer finds that, although the accused intentionally dealt with the property in breach of his or her obligations, the accused honestly believed that he or she was entitled to do so.<sup>251</sup> If the disciplinary officer has a reasonable doubt as to whether the accused held such a belief, the accused is entitled to the benefit of that doubt.

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY THEFT CONTRARY TO SECTION 223(a) OF THE CRIMES ACT 1961  
in that she, at Wellington between 1 March 20XX and 30 June 20XX, having received an advance of \$400 from the imprest account of Lieutenant Jack Daniels, on terms that she knew required her to account to Lieutenant Daniels for that advance, intentionally failed to account for the advance as so required.

249 Section 223(a) of the Crimes Act 1961.

250 Section 220(1) of the Crimes Act 1961.

251 *R v Williams* [1985] 1 NZLR 294, 308 (CA).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Received property <b>OR</b> had possession of property <b>OR</b> was in control of property	
Terms or circumstances ( <b>special relationship</b> ) required accused to: (a) Account for the property to another person ( <b>A</b> ) for the property or any proceeds arising from it; <b>OR</b> (b) Deal with the property, or any proceeds arising from it, in accordance with the requirements of A.	
Knew that these were the terms or circumstances	
Failed to account to the other person as required by the terms of the special relationship <b>OR</b> Dealt with the property, or any proceeds of the property, otherwise than in accordance with the requirements of A under the special relationship	
Did so intentionally	
Date	
<b>Defence</b> Accused honestly believed entitled to act as he or she did	

## DEMANDING WITH INTENT TO STEAL

**4.11.19 Offence.** A person subject to the AFDA commits this offence if he or she, with menaces or by any threat, demands any property from any persons, with intent to steal it.<sup>252</sup>

**4.11.20 Punishment.** The maximum punishment for this offence is seven years' imprisonment.

**4.11.21 Menace.** Any sort of threat is a 'menace', though threats of violence may also amount to attempted robbery. The menaces need not be of physical harm to the person threatened.<sup>253</sup> Where the person threatened is of at least ordinary courage and firmness of purpose, there is no requirement that his or her will actually be overborne.<sup>254</sup> Where there is conduct which would not affect the ordinary person, there will still be a threat if the person at whom the conduct is directed perceives the conduct to be a threat and is influenced by it, and the accused is aware that his or her conduct is likely to so affect the person to whom it is addressed.<sup>255</sup>

**4.11.22 Demands.** A demand does not have to be couched in abusive terms, so long as it is clear that it is a request for something.<sup>256</sup> Nor is it necessary that the demand is communicated to the victim; the offence is complete when, with the necessary intent, the demand is made.<sup>257</sup>

252 Section 239(2) of the Crimes Act 1961.

253 *R v Hare* (1910) 29 NZLR 641.

254 *R v Clear* [1968] 1 All ER 74.

255 *R v Garwood* [1987] 1 All ER 1032.

256 *R v Heard* (1985) 1 CRNZ 474, 479.

257 *R v McLean* (1998) 16 CRNZ 108, 110.

**Specimen Charge**

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY DEMANDING WITH INTENT TO STEAL CONTRARY TO SECTION 239(2) OF THE CRIMES ACT 1961

in that he, at Waiouru Military Camp on or about 13 May 20XX, with menaces, demanded from T1028765 Spr P.T. Spade a Dell widescreen laptop, with intent to steal it.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Demanded specified property from specified person(s)	
Did so with menaces <b>OR</b> by any threat	
Intended to steal the specified property	
Date	

**TAKING OR CONVERTING PROPERTY OF THE CROWN OR PROPERTY OF A COMRADE OTHER THAN BY STEALING**

**4.11.23 Offence.** A person subject to the AFDA commits this offence if he or she unlawfully and without claim of right, but not so as to be guilty of stealing, takes or converts to his or her own use or to the use of any other person:

- a. Any motor vehicle, or other vehicle or carriage of any description, or ship, or aircraft, or aircraft material, which belongs to the Crown or to any person subject to Service law or in which any person subject to Service law has a special property or interest;<sup>258</sup>
- b. Any part of any such vehicle, carriage, ship, aircraft, or aircraft material;<sup>259</sup> or
- c. Any animal (being an animal capable of being stolen) which belongs to the Crown or to any person subject to Service law or in which any person subject to Service law has a special property or interest.<sup>260</sup>

**4.11.24 Punishment.** The maximum punishment for this offence is two years' imprisonment.

**4.11.25 Claim of right.** See paragraph 4.11.3.

**4.11.26 "...but not so as to be guilty of stealing".** A person subject to the AFDA who takes or converts the specified property may be guilty of this offence but not

258 AFDA s 60(1)(a).

259 AFDA s 60(1)(b).

260 AFDA s 60(1)(c).

stealing if it is not proved that:

- a. He or she did so dishonestly, as to which see paragraph 4.11.2; or
- b. He or she did so intending to permanently deprive the owner of the property or of the owner's interest in the property.

**4.11.27 Taking.** See paragraph 4.11.4.

**4.11.28 Conversion.** Conversion is committed when an offender, who is in possession of property, intentionally uses the property in such a way as to show that he or she is treating it as his or her own and is intentionally violating the title of its real owner.<sup>261</sup>

**4.11.29 Person subject to Service law.** See paragraph 4.11.10.

**4.11.30 Animals capable of being stolen.** The following animals are capable of being stolen:

- a. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in New Zealand, while confined and after they have escaped from confinement.<sup>262</sup>
- b. All other living creatures wild by nature which are confined or being pursued after escaping from confinement.<sup>263</sup>
- c. Shellfish of all types when in oyster beds, marine farms, layings, and fisheries that are the property of any person and that are sufficiently marked out or shown as such property.<sup>264</sup>

### Specimen Charge

UNLAWFULLY TAKING A MOTOR VEHICLE CONTRARY TO AFDA s 60(1)(a) in that he, at Trentham Military Camp on 2 April 20XX, unlawfully and without claim of right, but not so as to be guilty of stealing, took for his own use a motor vehicle, registered number DCT6789, belonging to the Crown.

<sup>261</sup> *R v Dunbar* [1963] NZLR 253, 257 (CA).

<sup>262</sup> Section 218(3) of the Crimes Act 1961. A wild living creature is in a state of confinement so long as it is in an enclosure designed to prevent escape, or otherwise secured, and to allow its owner to take possession of it when he or she pleases: section 218(5) of the Crimes Act 1961.

<sup>263</sup> Section 218(4) of the Crimes Act 1961. See footnote above regarding when a wild creature is in a state of confinement.

<sup>264</sup> Section 218(6) of the Crimes Act 1961.

**Disciplinary Officer's Checklist (AFDA s 60(1) taking)**

Element	Proved?
Subject to the AFDA	
Took the specified property	
Intended to do so	
The specified property is within one of the categories described in paragraph 4.11.23	
Did not steal the specified property (see paragraph 4.11.26)	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for taking or conversion	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that taking was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

**Disciplinary Officer's Checklist (AFDA s 60(1) conversion)**

Element	Proved?
Subject to the AFDA	
Was in possession of specified property belonging to another person	
Used specified property in such a way as to show that he or she was treating it as his or her own	
Intended to do so	
The specified property is within one of the categories described in paragraph 4.11.23	
Did not steal the specified property (see paragraph 4.11.26)	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for taking or conversion	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

**OBTAINING BY DECEPTION OR CAUSING LOSS BY DECEPTION**

**4.11.31 Offence.** A person subject to the AFDA commits this offence if he or she, by any deception and without claim of right:

- a. Obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly;<sup>265</sup> or
- b. In incurring any debt or liability, obtains credit;<sup>266</sup> or
- c. Induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage;<sup>267</sup> or
- d. Causes loss to any other person.<sup>268</sup>

**4.11.32 Punishment.** The maximum punishment for this offence is as follows:

- a. If the loss caused or the value of what is obtained or sought to be obtained exceeds \$1,000, seven years' imprisonment.
- b. If the loss caused or the value of what is obtained or sought to be obtained exceeds \$500 but does not exceed \$1,000, one year's imprisonment.
- c. If the loss caused or the value of what is obtained or sought to be obtained does not exceed \$500, three months' imprisonment.

**4.11.33 Deception** means:<sup>269</sup>

- a. A false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and:
  - (1) Knows that it is false in a material particular; or
  - (2) Is reckless as to whether it is false in a material particular; or
- b. An omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
- c. A fraudulent device, trick, or stratagem used with intent to deceive any person.

**4.11.34 Claim of right.** See paragraph 4.11.3.

**4.11.35 Obtain,** in relation to any person, means obtain or retain for himself or herself or for any other person.<sup>270</sup>

265 Section 240(1)(a) of the Crimes Act 1961.

266 Section 240(1)(b) of the Crimes Act 1961.

267 Section 240(1)(c) of the Crimes Act 1961.

268 Section 240(1)(d) of the Crimes Act 1961.

269 Section 240(2) of the Crimes Act 1961.

270 Section 217 of the Crimes Act 1961.

- 4.11.36 Representation.** Where the representation is ambiguous it is for the disciplinary officer to decide in what sense the accused meant the representation to be acted upon.<sup>271</sup>
- 4.11.37 Valueless cheques.** The giving of a cheque instead of cash is a representation that the cheque is a good and valid order for its amount and that it will be met from the giver's account on due date. If the giver of the cheque believes that it will be paid on presentation on due date there is no deception. The test of the giver's belief that his or her cheque will be met is a subjective one and is not to be qualified by an additional objective test of the reasonableness of the belief.<sup>272</sup>
- 4.11.38 Credit cards.** The use of a credit card by its holder is a representation by the holder that he has actual authority to make on the bank's behalf a contract with the retailer and that the bank will honour the voucher on presentation. It is not a representation as to the holder's credit-standing at the bank.<sup>273</sup>
- 4.11.39 Obtains credit** means to obtain credit in respect of the payment or repayment of money.<sup>274</sup> A giving of credit does not involve an agreed postponement of payment in all cases, eg where a person consumes a meal in a restaurant they obtain credit despite the fact that they are expected to pay immediately on the consumption of the meal. Credit may be obtained without any express stipulation for credit, eg where a person takes a taxi journey he or she obtains credit despite the fact that her or she is expected to pay on the conclusion of the journey and notwithstanding that no mention may have been made of the time for payment.<sup>275</sup> Where a person obtains an extension of time to meet an existing liability without giving rise to a new liability this will not be an obtaining of credit.<sup>276</sup>
- 4.11.40 Induces or causes.** It must be proved that the deception operated on the mind of the victim 'causing' or 'inducing' him or her to act. Where there is no specific evidence of inducement by the victim, inducement may still be inferred if such an inference is irresistible on the facts as a whole.<sup>277</sup> Where the false representation is not the only inducement, it is sufficient that the pretence was an influencing factor, i.e. it was made with the intent that it should be acted upon and it was acted upon. In such a case, it is immaterial that the victim was influenced in addition by other circumstances.<sup>278</sup>

271 *R v Searby* (1906) 26 NZLR 690.

272 *R v Conrad* [1974] 2 NZLR 626; *R v Miller* [1955] NZLR 1038; *Smith v Elder* [1955] NZLR 12; *Kuff v R* [1962] VR 578.

273 *Metropolitan Police Commissioner v Charles* [1976] 3 All ER 112; *R v Lambie* [1981] 2 All ER 776.

274 *R v Kinsman* [1969] NZLR 678.

275 *Police v Griffiths* [1976] 1 NZLR 498.

276 *R v Thornton* [1964] 2 QB 176.

277 *R v Lambie* [1981] 2 All ER 776 (HL).

278 *R v Lince* (1873) 12 Cox 451, 453.



### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY OBTAINING BY DECEPTION CONTRARY TO SECTIONS 240(1)(a) and 241(c) OF THE CRIMES ACT 1961  
in that she, at Rotorua on 7 June 20XX, without claim of right, obtained 50 litres of fuel, valued at \$90.00, by a deception, namely by omitting to disclose that she was not authorised to use a fuel card issued to the NZDF by BP New Zealand Ltd, a particular which it was her duty to disclose.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY CAUSING LOSS BY DECEPTION CONTRARY TO SECTIONS 240(1)(d) and 241(a) OF THE CRIMES ACT 1961  
in that he, on board HMNZS TE KAHA on 2 March 20XX, without claim of right, caused loss in the amount of \$2510.60 to the Crown by a deception, namely by falsely representing to X26723 POCH I.M. Bright that the rations in the Ration Store were unfit for human consumption.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Obtained a benefit <b>OR</b> caused loss as described in paragraph 4.11.31	
Did so by a deception (see paragraph 4.11.33)	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

### FRAUDULENTLY MISAPPLYING SERVICE PROPERTY OR THE PROPERTY OF A COMRADE

- 4.11.41 Offence.** A person subject to the AFDA commits an offence if he or she fraudulently misapplies:
- Any Service property;<sup>279</sup> or
  - Any property belonging to a person subject to Service law or in which a person subject to Service law has a special property or interest.<sup>280</sup>
- 4.11.42 Punishment.** The maximum punishment is seven years' imprisonment.
- 4.11.43 Fraudulent misapplication.** A person fraudulently misapplies property if he or she:<sup>281</sup>

<sup>279</sup> AFDA s 57(1)(b)(i).

<sup>280</sup> AFDA s 57(1)(b)(ii).

<sup>281</sup> *R v Williams* [1985] 1 NZLR 294, 308 (CA).

- a. Is in possession of or has control over that property; and
- b. Has an obligation to deal with the property in a certain manner; and
- c. Deliberately deals with the property in breach of that obligation, knowing that he or she is breaching the obligation.

**4.11.44 Possession or control.** See paragraphs 4.7.21 to 4.7.23.

**4.11.45 Defence of honest belief.** See paragraph 4.11.18.

**4.11.46 Service property.** See paragraph 4.11.9.

**4.11.47 Person subject to Service law.** See paragraph 4.11.10.

### Specimen Charge

FRAUDULENTLY MISAPPLYING SERVICE PROPERTY CONTRARY TO AFDA s 57(1)(b)(i)  
in that he, at RNZAF Base Ohakea between 2 January 20XX and 13 October 20XX, fraudulently misapplied public funds in the amount of \$2000, being Service property, by transferring those funds into the Air Bank account of the RNZAF Ohakea Tiddlywinks Club.

### Disciplinary Officer's Checklist (fraudulently misapplying Service property)

Element	Proved?
Subject to the AFDA	
Had possession <b>OR</b> control of property	
Had obligation to deal with property in a certain manner	
Dealt with the property otherwise than in accordance with that obligation	
Did so intentionally	
Knew that acting in breach of obligation	
Specified property is Service property	
Date	
<b>Defence</b>	
Accused honestly believed entitled to act as he or she did	

**Disciplinary Officer's Checklist (fraudulently misapplying property of a comrade)**

Element	Proved?
Subject to the AFDA	
Had possession <b>OR</b> control of property	
Had obligation to deal with property in a certain manner	
Dealt with the property otherwise than in accordance with that obligation	
Did so intentionally	
Knew that acting in breach of obligation	
Specified property belongs to a person subject to Service law <b>OR</b> a person subject to Service law has a special property or interest in the property	
Date	
<b>Defence</b> Accused honestly believed entitled to act as he or she did	

**DEFINITION OF RECEIVING<sup>282</sup>**

**4.11.48** The act of receiving any property stolen or obtained by any other crime is complete as soon as the offender:

- a. Has, either exclusively or jointly with the thief or any other person, possession of, or control over, the property; or
- b. Helps in concealing or disposing of the property.

**4.11.49 Possession or control.** See paragraphs 4.7.21 to 4.7.23.

**4.11.50 Theft or other crime outside New Zealand.** If the property received was obtained by an act outside New Zealand, that act must be a crime:

- a. Under the law of New Zealand, had the act been committed in New Zealand;<sup>283</sup> and
- b. Under the law of the place where the property was obtained, although this may be presumed unless the accused disputes it.<sup>284</sup>

**RECEIVING SERVICE PROPERTY OR THE PROPERTY OF A COMRADE**

**4.11.51 Offence.** A person subject to the AFDA commits an offence if he or she receives:

- a. Any Service property;<sup>285</sup> or

282 Section 246(3) of the Crimes Act 1961.

283 Section 246(2) of the Crimes Act 1961.

284 Section 246(5) of the Crimes Act 1961. If the accused disputes the unlawfulness of the act through which the property was obtained in the country where it took place, this element must be proved beyond reasonable doubt.

285 AFDA s 58(1)(a).

- b. Any property belonging to a person subject to Service law or in which a person subject to Service law has a special property or interest;<sup>286</sup>

knowing the property to have been stolen or fraudulently misapplied.

**4.11.52 Punishment.** The maximum punishment is seven years' imprisonment.

**4.11.53 Receiving.** See paragraphs 4.11.48 to 4.11.50.

**4.11.54 Service property.** See paragraph 4.11.9.

**4.11.55 Person subject to Service law.** See paragraph 4.11.10.

**4.11.56 Stealing.** See paragraphs 4.11.1 to 4.11.5.

**4.11.57 Fraudulent misapplication.** See paragraph 4.11.43.

### Specimen Charges

- No 1 RECEIVING SERVICE PROPERTY CONTRARY TO AFDA s 58(1)(a)  
in that he, at Linton Military Camp on or about 13 September 20XX, received four Steyr individual weapons, being Service property, knowing those weapons to have been stolen.
- No 2 RECEIVING PROPERTY OF A COMRADE CONTRARY TO AFDA s 58(1)(b)  
in that he, at RNZAF Base Ohakea on 12 January 20XX, received an iPod, the property of LAC W.E. Johns T999879 AVMECH, a person subject to Service law, knowing the iPod to have been stolen.

### Disciplinary Officer's Checklist (Receiving Service Property)

Element	Proved?
Subject to the AFDA	
Had possession <b>OR</b> control <b>OR</b> helped in concealing or disposing of specified property	
Knew that specified property had been stolen <b>OR</b> fraudulently misapplied	
Specified property is Service property	
Date	

**Disciplinary Officer's Checklist (receiving property of a comrade)**

Element	Proved?
Subject to the AFDA	
Had possession <b>OR</b> control <b>OR</b> helped in concealing or disposing of specified property	
Knew that specified property had been stolen <b>OR</b> fraudulently misapplied	
Specified property belongs to a person subject to Service law <b>OR</b> a person subject to Service law has a special property or interest in the property	
Date	

**DISHONESTLY TAKING OR USING A DOCUMENT**

**4.11.58 Offence.** A person subject to the AFDA commits an offence if he or she, with intent to obtain any property, service, pecuniary advantage, or valuable consideration, dishonestly and without claim of right:

- a. Takes or obtains any document;<sup>287</sup> or
- b. Uses or attempts to use any document.<sup>288</sup>

**4.11.59 Punishment.** The maximum punishment is seven years' imprisonment.

**4.11.60 Obtain.** See paragraph 4.11.35.

**4.11.61 Dishonestly.** See paragraph 4.11.2.

**4.11.62 Claim of right.** See paragraph 4.11.3.

**4.11.63 Document** means a document, or part of a document, in any form; and includes:<sup>289</sup>

- a. Any paper or other material used for writing or printing that is marked with matter capable of being read;
- b. Any photograph, or any photographic negative, plate, slide, film, or microfilm, or any photostatic negative;
- c. Any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced;
- d. Any material by means of which information is supplied, whether directly or by means of any equipment, to any device used for recording or storing or processing information; or

<sup>287</sup> Section 228(a) of the Crimes Act 1961.

<sup>288</sup> Section 228(b) of the Crimes Act 1961.

<sup>289</sup> Section 217 of the Crimes Act 1961.

- e. Any material derived, whether directly or by means of any equipment, from information recorded or stored or processed by any device used for recording or storing or processing information.

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY DISHONESTLY TAKING A DOCUMENT TO OBTAIN A PECUNIARY ADVANTAGE CONTRARY TO SECTION 228(a) OF THE CRIMES ACT 1961  
in that he, at Cromwell on 26 April 20XX, dishonestly and without claim of right took from George Nepia a document, namely a credit card, to obtain a pecuniary advantage, namely a cash advance.
- No. 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY DISHONESTLY USING A DOCUMENT WITH INTENT TO OBTAIN A SERVICE CONTRARY TO SECTION 228(b) OF THE CRIMES ACT 1961  
in that she, at Mangaweka on 3 August 20XX, dishonestly and without claim of right, used a document, namely a taxi chit issued to the account of the NZDF, with intent to obtain a service, namely a taxi ride to Palmerston North.

### Disciplinary Officer's Checklist (taking or obtaining a document)

Element	Proved?
Subject to the AFDA	
Specified thing is a document	
Took <b>OR</b> obtained the document	
Intended to obtain the specified property, service, pecuniary advantage, or valuable consideration	
Did not believe that there was express or implied consent to, or authority for, the act from a person entitled to give such consent or authority	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

**Disciplinary Officer's Checklist (using or attempting to use a document)**

Element	Proved?
Subject to the AFDA	
Specified thing is a document	
Used <b>OR</b> attempted to use the document	
Intended to obtain the specified property, service, pecuniary advantage, or valuable consideration	
Did not believe that there was express or implied consent to, or authority for, the act from a person entitled to give such consent or authority	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

**UNLAWFUL POSSESSION OF SERVICE PROPERTY OR THE PROPERTY OF A COMRADE**

**4.11.64 Offence.** A person subject to the AFDA commits this offence if he or she, without authority or other lawful excuse, is in possession of:

- a. Any Service property;<sup>290</sup> or
- b. Any property belonging to a person subject to Service law or in which a person subject to Service law has a special property or interest.<sup>291</sup>

**4.11.65 Punishment.** The maximum punishment is six months' imprisonment.

**4.11.66 Possession.** See paragraphs 4.7.21 to 4.7.23.

**4.11.67 Service property.** See paragraph 4.11.9.

**4.11.68 Person subject to Service law.** See paragraph 4.11.10.

290 AFDA s 59(a).

291 AFDA s 59(b).

### Specimen Charges

- No 1 BEING IN UNLAWFUL POSSESSION OF SERVICE PROPERTY CONTRARY TO AFDA s 59(a)  
in that she, at Linton Military Camp on 13 September 20XX, without authority or other lawful excuse, was in possession of a Steyr individual weapon, being Service property.
- No 2 BEING IN UNLAWFUL POSSESSION OF PROPERTY OF A COMRADE CONTRARY TO AFDA s 59(b)  
in that he, on board HMNZS TAUPU on 12 January 20XX, without authority or other lawful excuse, was in possession of a Dell laptop, the property of LCSS H. Nelson, a person subject to Service law.

### Disciplinary Officer's Checklist (unlawful possession of Service property)

Element	Proved?
Subject to the AFDA	
Had possession of specified property	
Specified property is Service property	
Did not have authority to be in possession	
Knew that had no authority to be in possession	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for being in possession	

### Disciplinary Officer's Checklist (unlawful possession of property of a comrade)

Element	Proved?
Subject to the AFDA	
Had possession of specified property	
Specified property belongs to a person subject to Service law <b>OR</b> a person subject to Service law has a special property or interest in it	
Accused did not have authority to be in possession	
Knew that had no authority to be in possession	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for being in possession	



## UNLAWFUL INTERFERENCE WITH CONVEYANCE BELONGING TO THE CROWN OR A COMRADE

**4.11.69 Offence.** A person subject to the AFDA commits this offence if he or she unlawfully and without claim of right interferes with or gets into or upon any motor vehicle, or other vehicle or carriage of any description, or ship, or aircraft, which belongs to the Crown or to any person subject to Service law or in which any person subject to Service law has a special property or interest.<sup>292</sup>

**4.11.70 Punishment.** The maximum punishment for this offence is two years' imprisonment.

**4.11.71 Claim of right.** See paragraph 4.11.3.

**4.11.72 Person subject to Service law.** See paragraph 4.11.10.

### Specimen Charge

UNLAWFULLY GETTING INTO A MOTOR VEHICLE CONTRARY TO AFDA s 60(2) in that he, at Kingston in Canada on 3 June 20XX, unlawfully and without claim of right, got into a motor vehicle, registration number C3A1234Z, belonging to Captain C. Dion of the Canadian Forces, a person subject to Service law.

### Disciplinary Officer's Checklist (AFDA s 60(2) interference with property of the Crown)

Element	Proved?
Subject to the AFDA	
Interfered with <b>OR</b> got into or upon the specified vehicle, carriage, ship or aircraft	
Intended to do so	
Specified vehicle belonged to the Crown in right of New Zealand	
Knew that	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for do what he or she did	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

**Disciplinary Officer's Checklist  
(AFDA s 60(2) interference with property of a comrade)**

Element	Proved?
Subject to the AFDA	
Interfered with <b>OR</b> got into or upon the specified vehicle, carriage, ship or aircraft	
Intended to do so	
Specified vehicle belonged to a person subject to Service law <b>OR</b> such a person had a special property or interest in it	
Knew that	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for do what he or she did	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the AFDA.	

**NEGLIGENTLY DAMAGING OR DESTROYING SERVICE PROPERTY OR THE PROPERTY OF A COMRADE**

**4.11.73 Offence.** A person subject to the AFDA commits this offence if he or she negligently causes or permits damage to or the destruction of:

- a. Any Service property;<sup>293</sup> or
- b. Any property belonging to a person subject to Service law or in which a person subject to Service law has a special property or interest.<sup>294</sup>

**4.11.74 Punishment.** The maximum punishment is two years' imprisonment.

**4.11.75 Negligently.** See paragraph 4.8.26.

**4.11.76 Causes** means effects or brings about.<sup>295</sup>

**4.11.77 Permits** means that the accused had control or a share of control over the property in fact and refrained from steps which he or she could reasonably have taken to prevent the damage to or the destruction of the property.<sup>296</sup>

**4.11.78 Service property.** See paragraph 4.11.9.

**4.11.79 Person subject to Service law.** See paragraph 4.11.10.

<sup>293</sup> AFDA s 61(2)(a).

<sup>294</sup> AFDA s 61(2)(b).

<sup>295</sup> *Auckland City Council v Morgan* [1983] NZLR 723, 725 (CA).

<sup>296</sup> *R v Sweeney* [1982] 2 NZLR 229, 230 (CA).

### Specimen Charge

NEGLIGENTLY PERMITTING THE DESTRUCTION OF SERVICE PROPERTY  
 CONTRARY TO AFDA s 61(2)(a)  
 in that he, on board HMNZS ROTOITI on 30 May 20XX, negligently permitted the destruction of a 12 horsepower outboard motor valued at \$500.00, being Service property, by failing to withdraw it from service after being informed that the incorrect mixture had been inserted in its tank, thereby resulting in it exploding when subsequently used.

### Disciplinary Officer's Checklist (causing damage to or destruction of property)

Element	Proved?
Subject to the AFDA	
Specified property was damaged <b>OR</b> destroyed	
Specified property is Service property <b>OR</b> belongs to a person subject to Service law <b>OR</b> a person subject to Service law has a special property or interest in it	
Did or omitted specified act	
In all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would not have done or omitted this	
Specified act or omission caused the specified damage or destruction	
Date	

### Disciplinary Officer's Checklist (permitting damage to or destruction of property)

Element	Proved?
Subject to the AFDA	
Specified property was damaged <b>OR</b> destroyed	
Specified property is Service property <b>OR</b> belongs to a person subject to Service law <b>OR</b> a person subject to Service law has a special property or interest in it	
Had control or a share of control of the specified property	
Refrained from doing specified act	
Specified act would have prevented damage or destruction of specified property	
In all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would not have omitted specified act	
Date	

**LOSING OR WASTEFULLY EXPENDING SERVICE PROPERTY**

**4.11.80 Offence.** A person subject to the AFDA commits this offence if he or she:

- a. Loses;<sup>297</sup> or
- b. Wastefully expends;<sup>298</sup>

any Service property issued for his or her use or entrusted to his or her care in connection with his or her duties.

**4.11.81 Punishment.** The maximum punishment is two years' imprisonment.

**4.11.82 Service property.** See paragraph 4.11.9.

**Specimen Charges**

- No 1 LOSING SERVICE PROPERTY CONTRARY TO AFDA s 62(1)(a)  
in that she, at Wellington on 30 May 20XX, lost one form MD 58 New Zealand Defence Force Identity Card valued at \$30.00, being Service property issued for her use.
- No 2 LOSING SERVICE PROPERTY CONTRARY TO AFDA s 62(1)(a)  
in that he, at Seattle on 3 September 20XX, lost US\$150.00, being Service property entrusted to his care in connection with his duties as imprestee for C130 Hercules NZ1234.
- No 3 WASTEFULLY EXPENDING SERVICE PROPERTY CONTRARY TO AFDA s 62(1)(b)  
in that she, on board HMNZS TE KAHA on 17 July 20XX, wastefully expended one litre of red paint, valued at \$30.00, being Service property entrusted to her care in connection with her duties, by using it to paint unauthorised words on the bulkhead in the forward female heads and bathrooms.

**Disciplinary Officer's Checklist (losing Service property)**

Element	Proved?
Subject to the AFDA	
Specified property was Service property	
Specified property was issued to accused <b>OR</b> entrusted to accused's care in connection with his or her duties	
Lost specified property	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Took reasonable steps for the care and preservation of the specified property	

297 AFDA s 62(1)(a).

298 AFDA s 62(1)(b).

**Disciplinary Officer's Checklist (wastefully expending Service property)**

Element	Proved?
Subject to the AFDA	
Specified property was Service property	
Specified property was issued to accused <b>OR</b> entrusted to accused's care in connection with his or her duties	
Wastefully expended specified property	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Took reasonable steps for the care and preservation of the specified property	

**INTENTIONAL ARSON<sup>299</sup>**

**4.11.83 Offence.** A person subject to the AFDA commits this offence if he or she intentionally or recklessly damages, by fire or by means of any explosive, any property (other than immovable property, or a vehicle, ship or aircraft):

- a. In which that person has no interest, without claim of right;<sup>300</sup> or
- b. With intent to:<sup>301</sup>
  - (1) Obtain any benefit; or
  - (2) Cause loss to any other person.

**4.11.84 Punishment.** The maximum punishment is seven years' imprisonment.

**4.11.85 Reckless.** See paragraph 5.2.15.

**4.11.86 Property** includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest.<sup>302</sup>

**4.11.87 Immovable property** means, in broad terms, interests in land and anything fixed to that land, such as a house, which cannot be removed from the land except by destruction.<sup>303</sup>

**4.11.88 Ship** means every description of vessel used in navigation, however propelled. It includes any barge, lighter, dinghy, raft, or like vessel; and also includes any ship belonging to or used as a ship of the armed forces of any country.<sup>304</sup>

299 See Volume 2 Chapter 3 for more serious forms of this offence which can only be tried in the Court Martial.

300 Section 267(2)(a) of the Crimes Act 1961.

301 Section 267(2)(b) of the Crimes Act 1961.

302 Section 2(1) of the Crimes Act 1961.

303 *Elitestone Ltd v Morris* [1997] 2 All ER 513, 522 (HL) and *Re Ah Chong* (1913) 33 NZLR 384, 388.

304 Section 2(1) of the Crimes Act 1961.

**4.11.89 Claim of right.** See paragraph 4.11.3.

**4.11.90 Benefit** means any benefit, pecuniary advantage, privilege, property, service or valuable consideration.<sup>305</sup>

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ARSON CONTRARY TO SECTION 267(2)(a) OF THE CRIMES ACT 1961  
in that he, at Burnham Military Camp on 3 May 20XX, intentionally damaged a television, the property of the Armed Forces Canteen Council, by means of an explosive.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ARSON CONTRARY TO SECTION 267(2)(b) OF THE CRIMES ACT 1961  
in that she, on board HMNZS PUKAKI on 12 December 20XX, intentionally damaged her laptop computer by setting fire to it, with intent to obtain a benefit, namely a financial settlement from New Zealand Insurance Ltd.

### Disciplinary Officer's Checklist (arson in respect of property in which accused has no interest)

Element	Proved?
Subject to the AFDA	
Caused damage by fire <b>OR</b> explosive to specified property	
Intended to do so (if alleged to be intentional) <b>OR</b> saw the risk of this occurring and took that risk (if alleged to be reckless)	
Specified property was not immovable property, or a vehicle, ship or aircraft	
Accused had no proprietary interest in specified property	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

**Disciplinary Officer's Checklist  
(arson with intent to obtain benefit or cause loss)**

Element	Proved?
Subject to the AFDA	
Caused damage by fire <b>OR</b> explosive to specified property	
Intended to do so (if alleged to be intentional) <b>OR</b> saw the risk of this occurring and took that risk (if alleged to be reckless)	
Specified property was not immovable property, or a vehicle, ship or aircraft	
Intended to obtain specified benefit <b>OR</b> cause specified loss to specified person	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Believed that action taken was lawful <b>Note:</b> Such a belief ( <b>claim of right</b> ) may be based on ignorance or mistake of fact or of any matter of law other than the Crimes Act 1961.	

#### ARSON WITH RECKLESS DISREGARD

- 4.11.91 Offence.** A person subject to the AFDA commits this offence if he or she intentionally damages by fire or by means of any explosive any property with reckless disregard for the safety of any other property.<sup>306</sup>
- 4.11.92 Punishment.** The maximum punishment is five years' imprisonment.
- 4.11.93 Reckless.** See paragraph 5.2.15.
- 4.11.94 Property.** See paragraph 4.11.86.

#### Specimen Charges

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ARSON CONTRARY TO SECTION 267(3) OF THE CRIMES ACT 1961  
 in that he, at Tukituki on 7 June 20XX, intentionally damaged a bail of straw, the property of Mr Jim Farmer, by fire, with reckless disregard for the safety of Mr Farmer's barn and the equipment in that barn.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Caused damage by fire <b>OR</b> explosive to specified property	
Intended to do so	
Saw risk to safety of specified other property	
Disregarded the risk	
Date	

## IMPROPER DISPOSAL OF MILITARY DECORATIONS

**4.11.95 Offence.** A person subject to the AFDA commits this offence if he or she, without the authority of the Minister of Defence or CDF, sells, pawns, exchanges, gives away, or otherwise disposes of any military decoration awarded to him or her by or with the approval of Her Majesty the Queen, whether in right of New Zealand or otherwise.<sup>307</sup>

**4.11.96 Punishment.** The maximum punishment is six months' imprisonment.

**4.11.97 Decoration** means the insignia of any decoration or order, or any medal, clasp, or good conduct badge; and includes any miniature of any of them.<sup>308</sup>

## Specimen Charge

IMPROPERLY DISPOSING OF A MILITARY DECORATION ISSUED TO HIM BY OR WITH THE APPROVAL OF THE QUEEN CONTRARY TO AFDA s 63(1) in that he, at Auckland on 15 April 20XX, without the authority of the Minister of Defence or the Chief of Defence Force, sold his New Zealand Operational Service Medal, being a military decoration awarded to him by Her Majesty the Queen.

307 AFDA s 63(1).

308 AFDA s 2(1).



### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Sold <b>OR</b> pawned <b>OR</b> exchanged <b>OR</b> gave away <b>OR</b> otherwise disposed of the specified decoration	
Intended to do so	
Specified decoration is a military decoration	
Specified decoration was awarded to accused by or with the approval of HM the Queen	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Had authority to dispose from the Minister of Defence or CDF	

#### IMPROPER DISPOSAL OF ISSUED PROPERTY

**4.11.98 Offence.** A person subject to the AFDA commits this offence if he or she, without authority, sells, pawns, exchanges, gives away, or otherwise disposes of any clothing, arms, ammunition, or other equipment issued to him or her for his or her own use or Service purposes.<sup>309</sup>

**4.11.99 Punishment.** The maximum punishment is two years' imprisonment.

#### Specimen Charge

UNLAWFULLY DISPOSING OF CLOTHING ISSUED TO HER CONTRARY TO AFDA s 63(2)  
in that she, at Napier on 17 May 20XX, without authority, gave away one pair of DPM trousers issued to her for her own use.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Sold <b>OR</b> pawned <b>OR</b> exchanged <b>OR</b> gave away <b>OR</b> otherwise disposed of the specified property	
Intended to do so	
Specified property is clothing, arms, ammunition, or other equipment issued to accused for his or her own use or Service purposes	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Had authority to dispose of property	

## SECTION 12 – OFFENCES RELATING TO ARREST AND CUSTODY

### REFUSING TO OBEY AN ORDER INTO ARREST

**4.12.1 Offence.** A person subject to the AFDA commits an offence if he or she refuses to obey another member of the Armed Forces who has lawfully ordered him or her into arrest.<sup>310</sup>

**4.12.2 Punishment.** The maximum punishment is two years' imprisonment.

**4.12.3 Lawful order.** See paragraphs 4.8.3 to 4.8.6.

#### Specimen Charge

REFUSING TO OBEY A MEMBER OF THE ARMED FORCES LAWFULLY ORDERING HIM INTO ARREST CONTRARY TO AFDA s 44(1) in that he, at Lawrence on 8 December 20XX, on being lawfully ordered into arrest by T56789 Sgt M. Hutch, RNZMP, refused to obey the order.

#### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Was ordered into arrest by a member of the Armed Forces	
The order was lawful	
Refused to obey order	
Did so intentionally	
Date	

### FAILING TO ANSWER BAIL

**4.12.4 Offence.** A person subject to the AFDA commits an offence if, having been released from custody on bail, he or she fails without reasonable excuse to attend personally:

- a. At the time and before the military tribunal or the Court Martial Appeal Court specified in the grant of bail;<sup>311</sup> or
- b. At any time and place to which, during the course of the proceedings, the hearing has been adjourned.<sup>312</sup>

**4.12.5 Punishment.** The maximum punishment is one year's imprisonment.

<sup>310</sup> AFDA s 44(1).

<sup>311</sup> AFDA s 45A(a).

<sup>312</sup> AFDA s 45A(b).

**4.12.6 Military tribunal** means a disciplinary officer, the SACNZ, or the Court Martial.<sup>313</sup>

**4.12.7 Bail.** See Chapter 3 Section 4 with respect to pre-trial custody and bail. See Chapter 10 Section 5 for bail pending an appeal to the SACNZ.

### Specimen Charge

FAILING TO ANSWER BAIL CONTRARY TO AFDA s 45A(a)  
in that he, at Auckland on 13 May 20XX, having been released from custody on bail by a Judge of the Court Martial, without reasonable excuse, failed to attend personally before the military tribunal specified in his grant of bail, namely his commanding officer, at the time so specified.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Had been released from custody on bail under the CMA or the CMAA	
Grant of bail required accused to attend at a certain time before military tribunal <b>OR</b> at a certain place	
Failed to do so	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a reasonable excuse for failing to attend	

### ESCAPING FROM CUSTODY

**4.12.8 Offence.** A person subject to the AFDA commits an offence if he or she escapes from custody in which he or she is being held under the AFDA.<sup>314</sup>

**4.12.9 Punishment.** The maximum punishment is two years' imprisonment.

**4.12.10 Escape.** A person has not 'escaped' from custody while he or she remains in the control of the person or persons having lawful custody of him or her, nor if, after having left that control, the person is being pursued and kept in sight by the custodians.<sup>315</sup>

<sup>313</sup> AFDA s 2(1).

<sup>314</sup> AFDA s 45.

<sup>315</sup> *R v Keane* [1921] NZLR 581, 583-584 (CA).

### Specimen Charge

ESCAPING FROM CUSTODY CONTRARY TO AFDA s 45  
in that he, at Linton on 16 February 20XX, when in custody in the Linton  
Military Camp unit detention quarter, escaped.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Was in lawful custody under the AFDA	
Escaped from that custody	
Did so intentionally	
Date	

## WILFULLY PERMITTING THE ESCAPE OF PRISONERS

**4.12.11 Offence.** A person subject to the AFDA commits an offence if he or she:<sup>316</sup>

- a. Wilfully and without authority releases; or
- b. Wilfully permits the escape of;

any person who is committed to his or her charge or whom it is his or her duty to guard.

**4.12.12 Punishment.** The maximum punishment is five years' imprisonment.

**4.12.13 Escape.** See paragraph 4.12.10.

### Specimen Charges

- No 1 WILFULLY AND WITHOUT AUTHORITY RELEASING A PERSON CONTRARY TO AFDA s 46(1)  
in that she, on board HMNZS PHILOMEL on 9 June 20XX, wilfully and without authority released ACH N. Lawson, a person whom it was her duty to guard.
- No 2 WILFULLY PERMITTING THE ESCAPE OF A PERSON CONTRARY TO AFDA s 46(1)  
in that he, at Burnham Military Camp on 21 August 20XX, wilfully permitted the escape of F1000567 Pte J. Oliver, a person committed to his charge.

**Disciplinary Officer's Checklist (AFDA s 46(1) releasing prisoner)**

Element	Proved?
Subject to the AFDA	
Prisoner was a person committed to the charge of accused <b>OR</b> accused had a duty to guard prisoner	
Released prisoner	
Did so intentionally	
Did not have authority to release prisoner	
Date	

**Disciplinary Officer's Checklist (AFDA s 46(1) permitting escape of pris**

Element	Proved?
Subject to the AFDA	
Prisoner was a person committed to the charge of accused <b>OR</b> Accused had a duty to guard prisoner	
Permitted prisoner to escape	
Did so intentionally	
Date	

**PERMITTING THE ESCAPE OF PRISONERS WITHOUT AUTHORITY**

**4.12.14 Offence.** A person subject to the AFDA commits an offence if he or she:

a. Without authority, releases;<sup>317</sup> or

b. Without lawful excuse, permits the escape of;

any person who is committed to his or her charge or whom it is his or her duty to guard.

**4.12.15 Punishment.** The maximum punishment is two years' imprisonment.

**4.12.16 Escape.** See paragraph 4.12.10.

**4.12.17 Mental element.** As these offences are less serious than those referred to above at paragraph 4.12.11 and are identical with the exception that the element of 'wilfulness' is not required, it follows that it need not be proved that the accused intended to release or permit the escape of the prisoner.

### Specimen Charges

- No 1 WITHOUT AUTHORITY RELEASING A PERSON CONTRARY TO AFDA s 46(2)(a) in that she, on board HMNZS PHILOMEL on 9 June 20XX, without authority released ACH N. Lawson, a person whom it was her duty to guard.
- No 2 WITHOUT LAWFUL EXCUSE PERMITTING THE ESCAPE OF A PERSON CONTRARY TO AFDA s 46(2)(b) in that he, at Burnham Military camp on 21 August 20XX, without lawful excuse, permitted the escape of F1000567 Pte J. Oliver, a person committed to his charge.

### Disciplinary Officer's Checklist (AFDA s 46(2)(a) releasing prisoner)

Element	Proved?
Subject to the AFDA	
Prisoner was a person committed to the charge of accused <b>OR</b> Accused had a duty to guard prisoner	
Released prisoner	
Did not have authority to release prisoner	
Date	

### Disciplinary Officer's Checklist (AFDA s 46(2)(b) permitting escape of prisoner)

Element	Proved?
Subject to the AFDA	
Prisoner was a person committed to the charge of accused <b>OR</b> Accused had a duty to guard prisoner	
Permitted prisoner to escape	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused had a lawful excuse for his or her action or omission	

## FACILITATING THE ESCAPE OF PRISONERS

**4.12.18 Offence.** A person subject to the AFDA commits an offence if he or she, with intent to facilitate the escape of any person lawfully detained in a prison or a Service penal establishment:

- a.** Conveys or causes to be conveyed into any such institution or establishment any thing whatsoever,<sup>318</sup> or

318

AFDA s 46(2)(c)(i).

- b. Otherwise facilitates the escape of any person so detained.<sup>319</sup>

**4.12.19 Punishment.** The maximum punishment is two years' imprisonment.

**4.12.20 Facilitate.** An escape must actually be attempted before this charge can be proved. However, it does not need to be proved that the accused's conduct materially contributed to the escape; it is sufficient if the accused actively joined in the enterprise of escaping.<sup>320</sup>

**4.12.21 Escape.** See paragraph 4.12.10.

**4.12.22 Service penal establishment** includes any Service prison or detention quarter (whether in New Zealand or elsewhere), including the Services Corrective Establishment, and equivalent institutions operated by allied forces.<sup>321</sup>

### Specimen Charges

- No 1 CONVEYING ANYTHING INTO A SERVICE PENAL ESTABLISHMENT WITH INTENT TO FACILITATE ESCAPE CONTRARY TO AFDA s 46(2)(c)(i) in that she, at Burnham Military Camp on 6 April 20XX, with intent to facilitate the escape of V109876 Pte R. Biggs, a person lawfully detained in the Services Corrective Establishment, conveyed a Sig Sauer pistol into the establishment.
- No 2 FACILITATING ESCAPE FROM A UNIT DETENTION QUARTER CONTRARY TO AFDA s 46(2)(c)(ii) in that he, on board HMNZS PHILOMEL on 21 August 20XX, with intent to facilitate the escape of AMT D. Turpin, a person lawfully detained in the naval detention quarter, caused a power blackout on the Quarterdeck, thereby facilitating his escape.

### Disciplinary Officer's Checklist (AFDA s 46(2)(c)(i) conveying thing into place of custody)

Element	Proved?
Subject to the AFDA	
Took the specified thing into the specified place <b>OR</b> caused that to be done	
Specified place is a prison or Service penal establishment	
Did act with intent to facilitate escape of person ( <b>A</b> ) from the prison or Service penal establishment	
A was lawfully detained in the prison or Service penal establishment	
Date	

319 AFDA s 46(2)(c)(ii).

320 *R v Harrer* (1998) 124 CCC (3d) 368, 374 (British Columbia CA).

321 AFDA s 2(1).



**Disciplinary Officer's Checklist  
(AFDA s 46(2)(c)(ii) facilitating escape of prisoner)**

Element	Proved?
Subject to the AFDA	
Did or omitted the specified act	
Did act with intent to facilitate escape of person (A) from specified place	
A escaped or attempted to escape from the specified place	
Specified place is a prison or Service penal establishment	
A was lawfully detained in the prison or Service penal establishment	
Date	

#### **FAILING TO RELEASE PRISONERS IN ACCORDANCE WITH LAW**

**4.12.23 Offence.** A person subject to the AFDA commits an offence if he or she, being under a duty to release or order the release of a person subject to Service law who is in custody, without lawful excuse fails to fulfil that duty.<sup>322</sup>

**4.12.24 Punishment.** The maximum punishment is two years' imprisonment.<sup>323</sup>

**4.12.25 Person subject to Service law.** See paragraph 4.11.10.

#### **Specimen Charge**

FAILING TO RELEASE A PERSON IN CUSTODY CONTRARY TO AFDA s 69(2) AND (3)  
in that he, at Burnham Military Camp on 28 June 20XX, without lawful excuse, when under a duty to do so as Commandant of the Services Corrective Establishment, failed to release AC R. Hood C1000987 AVMECHUT, a person subject to Service law in custody, on receipt of an order in form MD 631 directing him to do as soon as practicable.

<sup>322</sup> AFDA s 69(2).

<sup>323</sup> AFDA s 69(3).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Specified person was in custody	
Specified person was subject to Service law	
Accused had a duty to release <b>OR</b> order release of specified person	
Failed to perform that duty	
Did so intentionally	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused had a lawful excuse for his or her omission	

## SECTION 13 – FALSE STATEMENTS

### FALSE STATEMENTS ON APPOINTMENT OR ENLISTMENT

**4.13.1 Offences.** A person subject to the AFDA commits an offence if, at or before the time of his or her appointment or enlistment, he or she:<sup>324</sup>

- a. Knowingly gave a false answer to any question set out in a document required to be completed in connection with his or her appointment or enlistment; or
- b. Knowingly gave any false information or document in connection with his or her appointment or enlistment.

**4.13.2 Punishment.** The maximum punishment is six months' imprisonment.

**4.13.3 Jurisdiction as to time.** This offence provides for jurisdiction over a person under the AFDA in respect of conduct committed before the person was subject to the AFDA.

**4.13.4 Appointment or enlistment.** Officers are appointed to a Service, while ratings, soldiers and airmen are enlisted.<sup>325</sup>

### Specimen Charges

- No 1 GIVING A FALSE ANSWER IN CONNECTION WITH HIS ENLISTMENT  
CONTRARY TO AFDA s 53(a)  
in that he, at Tauranga on 19 January 20XX, in answer to a question in form MD 116: Enlistment in the New Zealand Army, a document required to be completed in connection with his enlistment, stated that he had never been convicted in a civilian court of an offence other than a parking offence, knowing such answer to be false.
- No 2 GIVING A FALSE DOCUMENT IN CONNECTION WITH HER ENLISTMENT  
CONTRARY TO AFDA s 53(b)  
in that she, at Nelson on 19 January 20XX, in connection with her enlistment, knowingly gave a false birth certificate showing her date of birth as 25 September 19XX.
- No 3 GIVING FALSE INFORMATION IN CONNECTION WITH HIS APPOINTMENT  
CONTRARY TO AFDA s 53(b)  
in that he, at Auckland on 19 January 20XX, in connection with his appointment as an officer in the Royal New Zealand Navy, stated that he was a fluent speaker of the Indonesian language knowing such information to be false.

324 AFDA s 53.  
325 DA ss 32(1)(a) and 33.

**Disciplinary Officer's Checklist (AFDA s 53(a) false answer)**

Element	Proved?
Subject to the AFDA now	
Gave false answer to question in a document	
Document was required to be completed in connection with appointment (officers) or enlistment (other ranks)	
Knew answer was false	
Date	

**Disciplinary Officer's Checklist (AFDA s 53(b) false information or document)**

Element	Proved?
Subject to the AFDA now	
Gave false information <b>OR</b> a false document	
Gave information or document in connection with appointment (officers) or enlistment (other ranks)	
Knew information or document was false	
Date	

**FALSIFICATION OF SERVICE DOCUMENTS**

**4.13.5 Offences.** A person subject to the AFDA commits an offence if he or she:

- a. Makes or signs an official document knowing that the document is false in a material particular;<sup>326</sup>
- b. Makes or signs an entry in an official document knowing that the entry is false in a material particular;<sup>327</sup>
- c. Makes an alteration to an official document with intent to render the document false in a material particular;<sup>328</sup>
- d. Fails to make an entry in an official document with intent to render the document false in a material particular;<sup>329</sup> or
- e. Wilfully suppresses, defaces, makes away with, or destroys an official document which he is under a duty to keep or to produce to any person.<sup>330</sup>

**4.13.6 Punishment.** The maximum punishment is two years' imprisonment.

326 AFDA s 55(1)(a).

327 AFDA s 55(1)(b).

328 AFDA s 55(1)(c).

329 AFDA s 55(1)(d).

330 AFDA s 55(1)(e).

**4.13.7 Official document** includes a book, record, return, report, map or plan, signal, tape recording, or any form of computer input or output, or any other document or similar material (whether produced mechanically, electronically, or manually, or by any other means whatsoever), which is used by or for the purposes of the Armed Forces.<sup>331</sup>

**4.13.8 False in a material particular** means false in an important respect, something which matters.<sup>332</sup>

### Specimen Charges

- No 1 MAKING A FALSE OFFICIAL DOCUMENT CONTRARY TO AFDA s 55(1)(a)  
in that she, at Waiouru Military Camp on 2 April 20XX, in a written report made by her as orderly officer, stated that she had checked the security of all buildings at three hourly intervals, thereby rendering such report to her knowledge, false in material particular.
- No 2 MAKING A FALSE ENTRY IN AN OFFICIAL DOCUMENT CONTRARY TO AFDA s 55(1)(b)  
in that he, on board HMNZS TE MANA on 9 October 20XX, in form RNZN 136: Personal Information / Next of Kin Form, stated that Marilyn Monroe was his wife, knowing such entry was false in material particular.
- No 3 ALTERING AN OFFICIAL DOCUMENT WITH INTENT TO RENDER THE DOCUMENT FALSE CONTRARY TO AFDA s 55(1)(c)  
in that he, at Burnham Military Camp on 12 June 20XX, with intent to render the document false in a material particular, altered an entry dated 2 June 20XX in the column headed "Cigarettes (20s)" in the bar daily stock book of the Burnham Camp Warrant Officers' and Sergeants' Mess by substituting the figure "400" for the figure "100".
- No 4 FAILING TO MAKE AN ENTRY IN AN OFFICIAL DOCUMENT WITH INTENT TO RENDER THE DOCUMENT FALSE CONTRARY TO AFDA s 55(1)(d)  
in that she, at RNZAF Base Woodbourne on 15 May 20XX, with intent to render the document false in a material particular, failed to enter the receipt of 24 bottles of Spy Valley chardonnay wine in the daily stock book of the RNZAF Base Woodbourne Officers' Mess.
- No 5 WILFULLY DESTROYING AN OFFICIAL DOCUMENT CONTRARY TO AFDA s 55(1)(e)  
in that he, on board HMNZS PHILOMEL on 10 April 20XX, wilfully destroyed his form MD 58(N): Royal New Zealand Navy Identity Card, an official document which he was under a duty to keep.

331 AFDA s 55(2).

332 *R v Mallett* [1978] 3 All ER 10, 13 (CA)

**Disciplinary Officer's Checklist  
(AFDA s 55(1)(a) making false official document)**

Element	Proved?
Subject to the AFDA	
Made <b>OR</b> signed the specified document	
Specified document is an official document	
One or more of the particulars in the document is false	
The false particular(s) is or are material	
Knew that the document was false in a material particular when he or she made or signed it	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 55(1)(B) Making False Entry In Official Document)**

Element	Proved?
Subject to the AFDA	
Made <b>OR</b> signed the specified entry in the specified document	
Specified document is an official document	
All or part of the entry is false	
The false part of the entry is material	
Knew that the entry was false in a material particular when he or she made or signed it	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 55(1)(c) altering official document)**

Element	Proved?
Subject to the AFDA	
Made an alteration to the specified document	
Specified document is an official document	
Intended that the document be rendered false in a material particular by the alteration	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 55(1)(d) failing to make entry in official document)**

Element	Proved?
Subject to the AFDA	
Had a duty to make an entry in the specified document	
Failed to make the entry	
Specified document is an official document	
Intended that the document be rendered false in a material particular by the failure to make the entry	
Date	

**Disciplinary Officer's Checklist (AFDA s 55(1)(e) suppressing, defacing, making away with or destroying official document)**

Element	Proved?
Subject to the AFDA	
Suppressed <b>OR</b> defaced <b>OR</b> made away with <b>OR</b> destroyed the specified document	
Did so intentionally	
Specified document is an official document	
Under a duty to keep or to produce the specified document to any person	
Date	

**FALSE STATEMENT IN ORDER TO OBTAIN BENEFIT**

**4.13.9 Offences.** A person subject to the AFDA commits an offence if he or she, in or in connection with or in support of an application for any Service grant, payment, allotment of money, allowance, leave of absence, travel warrant, or any other benefit, either for him or herself or for some other person (whether that person is subject to the AFDA or not):

- a. Makes to any person any statement, either written or oral, which he or she knows to be false or misleading in a material particular;<sup>333</sup> or
- b. Without lawful excuse, fails to disclose any material information that it is his or her duty to disclose.<sup>334</sup>

**4.13.10 Punishment.** The maximum punishment is six months' imprisonment.

**4.13.11 Material.** See paragraph 4.13.8.

<sup>333</sup> AFDA s 56(a).

<sup>334</sup> AFDA s 56(b).

### Specimen Charges

- No 1 MAKING A FALSE OR MISLEADING STATEMENT IN ORDER TO OBTAIN A BENEFIT CONTRARY TO AFDA s 56(a)  
in that she, at Linton Military Camp on 9 September 20XX, in an application for payment of equivalent surface fare, stated that she was travelling in her own vehicle, knowing such statement to be false in a material particular.
- No 2 FAILING TO DISCLOSE MATERIAL INFORMATION IN ORDER TO OBTAIN A BENEFIT CONTRARY TO AFDA s 56(b)  
in that he, on board HMNZS PHILOMEL on 17 May 20XX, without lawful excuse, failed to disclose to the Naval Qualifications Officer that he had failed the examination for the New Zealand Boatmaster Certificate, being material information that it was his duty to disclose.

### Disciplinary Officer's Checklist (AFDA s 56(a) false statement to obtain benefit)

Element	Proved?
Subject to the AFDA	
Made the specified statement	
Specified statement addressed either explicitly or by implication to a person	
Statement made in or in connection with or in support of an application for any Service grant, payment, allotment of money, allowance, leave of absence, travel warrant, or any other benefit	
One or more of the particulars in the statement was false or misleading	
The false or misleading particular(s) was or were material	
Knew that the statement was false or misleading in a material particular when he or she made it	
Date	



**Disciplinary Officer's Checklist**  
**(AFDA s 56(b) failing to disclose information to obtain benefit)**

Element	Proved?
Subject to the AFDA	
Failed to disclose the specified information	
Specified information was material	
Had duty to disclose specified information	
Duty to disclose arose in or in connection with or in support of an application for any Service grant, payment, allotment of money, allowance, leave of absence, travel warrant, or any other benefit	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b>	
The accused had a lawful excuse for his or her omission	

#### FORGERY<sup>335</sup>

**4.13.12 Offence.** A person subject to the AFDA commits this offence if he or she makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon as genuine, whether in New Zealand or elsewhere.<sup>336</sup>

**4.13.13 Punishment.** The maximum punishment is three years' imprisonment.

**4.13.14 False document** means a document:<sup>337</sup>

- a. Of which the whole or any material part purports to be made by any person who did not make it, or by a fictitious person;
- b. Of which the whole or any material part purports to be made by or on behalf of any person who did not authorise its making, or on behalf of a fictitious person;
- c. Of which the whole or any material part has been altered, whether by addition, insertion, deletion, obliteration, erasure, removal, or otherwise, and that purports to have been altered by or on behalf of a person who did not alter it or authorise its alteration, or by or on behalf of a fictitious person;
- d. That is, in whole or in part, a reproduction of any other document, and that purports to have been made by or on behalf of a person who did not make it or authorise its making, or by or on behalf of a fictitious person; or
- e. That is made in the name of a person, either by that person or by that person's authority, with the intention that it should pass as being made by some other person who did not make it, or by a fictitious person.

<sup>335</sup> See Volume 2 Chapter 3 for the more serious offence of forgery with intent to obtain a benefit.

<sup>336</sup> Section 256(2) of the Crimes Act 1961.

<sup>337</sup> Section 255 of the Crimes Act 1961.

**4.13.15 When forgery complete.** Forgery is complete as soon as the document is made with the knowledge and intent described in paragraph 4.13.12.<sup>338</sup> It is complete even though the false document may be incomplete, or may not purport to be such a document as would be binding or sufficient in law, if it is so made and is such as to indicate that it was intended to be acted upon as genuine.<sup>339</sup>

Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY FORGERY CONTRARY TO SECTION 256(2) OF THE CRIMES ACT 1961 in that she, at Helensville on 13 May 20XX, made a false document, namely a form MD 58 NZDF Identity Card, knowing it to be false, with the intent that it be used or acted upon, whether in New Zealand or elsewhere, as genuine.

Disciplinary Officer’s Checklist

Element	Proved?
Subject to the AFDA	
Made the specified document	
Specified document was a false document	
Knew it was false	
Intended that it be used or acted upon as genuine	
Date	

338

Section 256(3) of the Crimes Act 1961.

339

Section 256(4) of the Crimes Act 1961.

## SECTION 14 – OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

### DISSUADING WITNESSES

- 4.14.1 Offences.** A person subject to the AFDA commits an offence if he or she:
- a.** Dissuades or attempts to dissuade a person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter (whether civil or criminal, and whether tried or to be tried in New Zealand or in an overseas jurisdiction);<sup>340</sup> or
  - b.** Accepts any bribe or other corrupt consideration to abstain from giving evidence (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction).<sup>341</sup>
- 4.14.2 Punishment.** The maximum punishment for this offence is seven years' imprisonment.
- 4.14.3 Dissuasion** means dissuading a person from attending as a witness or persuading him or her to stand mute. If a person is dissuaded from giving true evidence, that is covered by the offences of attempting to pervert the course of justice (see paragraph 4.14.5 below).<sup>342</sup>
- 4.14.4 Bribe** means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect.<sup>343</sup>

### Specimen Charges

- No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ATTEMPTING TO DISSUADE A WITNESS CONTRARY TO SECTION 117(a) OF THE CRIMES ACT 1961  
in that he, at Christchurch on 14 June 20XX, attempted to dissuade Dwight Eisenhower from giving evidence in the Court Martial by a bribe, namely \$2000.
- No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY ACCEPTING A BRIBE OR OTHER CORRUPT CONSIDERATION TO ABSTAIN FROM GIVING EVIDENCE CONTRARY TO SECTION 117(c) OF THE CRIMES ACT 1961  
in that she, on board HMNZS ROTOITI on 7 April 20XX, accepted a bribe, namely \$150, to abstain from giving evidence in the summary trial of ACH M.T. Cleaver before a disciplinary officer.

<sup>340</sup> Section 117(a) of the Crimes Act 1961.

<sup>341</sup> Section 117(c) of the Crimes Act 1961.

<sup>342</sup> *R v Gray* (1903) 23 NZLR 52 (CA).

<sup>343</sup> Section 99 of the Crimes Act 1961.

**Disciplinary Officer's Checklist (dissuading witness)**

Element	Proved?
Subject to the AFDA	
A civil or criminal proceeding (eg under the AFDA) was reasonably in contemplation	
Accused convinced specified person not to give evidence in the proceedings	
Persuasion involved specified threat <b>OR</b> bribe <b>OR</b> corrupt means	
Specified person did not give evidence in the proceedings because of accused's persuasion	
Date	

**Disciplinary Officer's Checklist (attempting to dissuade witness)**

Element	Proved?
Subject to the AFDA	
A civil or criminal proceeding (eg under the AFDA) was reasonably in contemplation	
Accused attempted to convince specified person not to give evidence in the proceedings	
Persuasion involved specified threat <b>OR</b> bribe <b>OR</b> corrupt means	
Date	

**Disciplinary Officer's Checklist (accepting bribe not to give evidence)**

Element	Proved?
Subject to the AFDA	
A civil or criminal proceeding (eg under the AFDA) was reasonably in contemplation	
Accused was offered specified bribe or corrupt consideration not to give evidence in the proceedings	
Accused accepted specified bribe or corrupt consideration	
Date	

## ATTEMPTING TO PERVERT THE COURSE OF JUSTICE

- 4.14.5 Offences.** A person subject to the AFDA commits an offence if he or she wilfully attempts to pervert the course of justice in New Zealand or the course of justice in an overseas jurisdiction.<sup>344</sup>
- 4.14.6 Punishment.** The maximum punishment for this offence is seven years' imprisonment.
- 4.14.7 Wilfully.** An intention to pervert the course of justice is an essential element of the offence and it is insufficient to establish merely that the accused's acts had a tendency to pervert the course of justice.<sup>345</sup>
- 4.14.8 Attempts,** in the context of this offence, means that the accused undertakes conduct which is intended and has a tendency to lead to a miscarriage of justice, regardless of whether a miscarriage actually occurs.<sup>346</sup> It includes concealing the commission of an offence or giving false information to the Service Police when they are investigating an offence, with the intention of perverting or obstructing a possible prosecution. However, mere silence or a refusal to answer questions is not perversion of the course of justice; nor is a simple denial of guilt.<sup>347</sup>
- 4.14.9 The course of justice** includes, in addition to actual and imminent proceedings, a prosecution which the accused contemplates may take place notwithstanding no decision to prosecute has been made at the time.<sup>348</sup>
- 4.14.10 Just outcome is no defence.** If the accused has used unlawful means to secure the conviction or acquittal of a person, it is no defence to a charge of perversion of the course of justice that the outcome sought or obtained was the just outcome.<sup>349</sup>

### Specimen Charge

COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
WILFULLY ATTEMPTING TO PERVERT THE COURSE OF JUSTICE CONTRARY TO  
SECTION 117(e) OF THE CRIMES ACT 1961  
in that he, at Trentham Military Camp on 26 December 20XX, wilfully  
attempted to pervert the course of justice by putting a pipe, used for the  
commission of an offence against the Misuse of Drugs Act 1975, in the  
barrack room occupied by V1004567 Pte X.T. See.

344 Section 117(e) of the Crimes Act 1961. This provision also refers to obstructing, preventing or defeating the course of justice, however these terms overlap and may all be charged as examples of perverting the course of justice: *R v Kane* [1967] NZLR 60 (CA).

345 *R v Machirus* [1996] 3 NZLR 404, 408 (CA).

346 *R v Machin* [1980] 3 All ER 151 (CA).

347 *Cane v R* [1968] NZLR 787, 791 (CA).

348 *R v Lee* (1993) 10 CRNZ 553.

349 *R v Taffs* [1991] 1 NZLR 69 (CA); *R v Meyrick*, unreported, Court of Appeal, 14 June 2005, CA513/04.

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Did or omitted the specified act	
Did so intentionally	
Act or omission had a tendency to cause a miscarriage of justice	
Intended that a miscarriage of justice take place (includes a just outcome by unlawful means)	
Date	

## FALSE ACCUSATION

**4.14.11 Offences.** A person subject to the AFDA commits an offence if he or she:

- a. Makes an accusation against a person subject to Service law knowing that accusation to be false;<sup>350</sup> or
- b. In making a complaint claiming that he or she has been wronged:
  - (1) Makes a statement which detrimentally affects the character of a person subject to Service law and which he or she knows to be false;<sup>351</sup> or
  - (2) Suppresses a material fact with intent to affect detrimentally the character of a person subject to Service law.<sup>352</sup>

**4.14.12 Punishment.** The maximum punishment for this offence is two years' imprisonment.

**4.14.13 Complaint.** See DFO 4 Chapter 12 and DA s 49.

**4.14.14 Person subject to Service law.** See paragraph 4.11.10.

**4.14.15 Material fact.** See paragraph 4.13.8.

350 AFDA s 68(a).

351 AFDA s 68(b)(i).

352 AFDA s 68(b)(ii).

### Specimen Charges

- No 1 MAKING A FALSE ACCUSATION CONTRARY TO AFDA s 68(a)  
in that he, on board HMNZS TE KAHA on 2 August 20XX, stated to his divisional officer that LSTD B. Fawlt, a person subject to Service law, had stolen four bottles of rum from the Wardroom, knowing that accusation to be false.
- No 2 MAKING A FALSE STATEMENT IN A COMPLAINT CONTRARY TO AFDA s 68(b)(i)  
in that she, at RNZAF Base Ohakea on 31 March 20XX, in making a complaint claiming that she had been wronged, stated to the detriment of the character of FLTLT T. Cruz, her flight commander, a person subject to Service law, that her flight commander was having an affair with the wife of F/S J. Nicholasson C990897 SSUPLR, knowing such statement to be false.
- No 3 SUPPRESSING A MATERIAL FACT IN A COMPLAINT CONTRARY TO AFDA s 68(b)(ii)  
in that he, at Wellington on 2 May 20XX, in making a complaint claiming that he had not been recommended for promotion because of his race, with intent to affect detrimentally the character of Lieutenant Colonel C. Dundee, a person subject to Service law, omitted to state that he had failed his promotion course.

### Disciplinary Officer's Checklist (AFDA s 68(a) false accusation)

Element	Proved?
Subject to the AFDA	
Made the specified accusation against the specified person	
The specified person is a person subject to Service law	
The accusation was false	
Knew the accusation was false	
Date	

### Disciplinary Officer's Checklist (AFDA s 68(b)(i) false statement in a complaint)

Element	Proved?
Subject to the AFDA	
Made the specified statement in a formal complaint	
The statement was false	
Knew the statement was false	
The statement detrimentally affected the character of the specified person	
Intended this effect	
The specified person is subject to Service law	
Date	

**Disciplinary Officer's Checklist**  
**(AFDA s 68(b)(ii) suppressing material fact in a complaint)**

Element	Proved?
Subject to the AFDA	
Made a formal complaint	
Did not mention the specified fact in that complaint	
The fact was material	
Intended to detrimentally affect the character of the specified person	
The specified person is subject to Service law	
Date	

#### DELAY OR DENIAL OF JUSTICE

**4.14.16 Offences.** A person subject to the AFDA (**A**) commits an offence if another person subject to Service law (**B**) is under arrest or is in custody for an offence alleged to have been committed against the AFDA, and A, being under a duty:

- a. To take steps to bring B before the proper authority for investigation of the alleged offence;<sup>353</sup> or
- b. To investigate, try summarily or otherwise deal with a charge against B or bring B before the Court Martial;<sup>354</sup>

without lawful excuse, fails to carry out his or her duty as soon as practicable after B has been arrested or taken into custody.

**4.14.17 Punishment.** The maximum punishment for this offence is two years' imprisonment.<sup>355</sup>

**4.14.18 Investigation,** in this context, means the first part of a summary hearing conducted under Part 5 of the AFDA, in which the disciplinary officer determines whether there is a prima facie case. See Chapter 7 and particularly Section 6 of that chapter.

**4.14.19 Proper authority.** The proper authority is the disciplinary officer prescribed in paragraph 7.2.4.

**4.14.20 Person subject to Service law.** See paragraph 4.11.10.

<sup>353</sup> AFDA s 69(1)(a).

<sup>354</sup> AFDA s 69(1)(b).

<sup>355</sup> AFDA s 69(3).



### Specimen Charges

- No 1 DELAYING BRINGING A PERSON UNDER ARREST OR IN CUSTODY BEFORE THE PROPER AUTHORITY FOR INVESTIGATION OF AN ALLEGED OFFENCE CONTRARY TO AFDA s 69(1)(a) and (3)  
in that he, at Waiohuru Military Camp between 6 and 21 May 20XX, without lawful excuse, when under a duty to do so as the person into whose custody W1107897 Gnr P.J. Hunt had been committed, failed to bring Gnr Hunt before a disciplinary officer for the investigation of the charges against him.
- No 2 DELAYING TO INVESTIGATE A CHARGE AGAINST A PERSON UNDER ARREST OR IN CUSTODY CONTRARY TO AFDA s 69(1)(b) and (3)  
in that she, on board HMNZS PHILOMEL between 21 April and 17 May 20XX, without lawful excuse, when under a duty to do so as the relevant disciplinary officer, failed to investigate the charge against ACO F.E. Smith, a person subject to Service law in custody, contained in form MD 601 PHL 3/XX, as soon as practicable after ACO Smith had been arrested.
- No 3 DELAYING TO BRING BEFORE THE COURT MARTIAL A CHARGE AGAINST A PERSON UNDER ARREST OR IN CUSTODY CONTRARY TO AFDA s 69(1)(b) and (3)  
in that he, at RNZAF Base Auckland between 3 July 20XX and 10 November 20XX, without lawful excuse, when under a duty to do so as commanding officer, failed to remand for trial in the Court Martial CPL W.E. Johns V78965 ACFTECH, a person subject to Service law in custody, as soon as practicable after CPL Johns had been arrested.

### Disciplinary Officer's Checklist (AFDA s 69(1)(a) failing to bring person before proper authority)

Element	Proved?
Subject to the AFDA	
Specified person was under arrest or was in custody for an alleged offence under the AFDA	
Accused had a duty to bring specified person before specified authority for investigation of the alleged offence	
Failed to do so as soon as practicable after the specified person was arrested or taken into custody	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused had a lawful excuse for his or her omission	

**Disciplinary Officer's Checklist**  
**(AFDA s 69(1)(b) failing to commence proceedings under the AFDA)**

Element	Proved?
Subject to the AFDA	
Specified person was under arrest or was in custody for an alleged offence under the AFDA	
Accused had a duty to investigate <b>OR</b> try summarily <b>OR</b> otherwise deal with a charge against specified person <b>OR</b> bring specified person before the Court Martial	
Failed to do so as soon as practicable after the specified person was arrested or taken into custody	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused had a lawful excuse for his or her omission	

#### IMPROPERLY INFLUENCING COURT MARTIAL ELECTION

**4.14.21 Offences.** A person subject to the AFDA commits an offence if he or she influences or attempts to influence, by threats or bribes or other improper means;<sup>356</sup>

- a. An accused's decision to elect trial in the Court Martial or summary trial; or
- b. An accused's decision concerning the withdrawal of such an election.

**4.14.22 Punishment.** The maximum punishment for this offence is two years' imprisonment.<sup>357</sup>

**4.14.23 Election of trial in the Court Martial or summary trial.** See Chapter 7 Sections 5 and 6.

<sup>356</sup> AFDA s 69(2A).

<sup>357</sup> AFDA s 69(3).

### Specimen Charges

- No 1 ATTEMPTING TO INFLUENCE AN ELECTION OF TRIAL IN THE COURT MARTIAL CONTRARY TO AFDA s 69(2A) and (3)  
in that he, at Waiouru Military Camp on 20 August 20XX, attempted to influence the decision of X1008987 Spr I.B. Plumber whether to elect trial in the Court Martial by a threat, namely by saying to Spr Plumber “I’ll make your life a misery if you don’t take the CO’s punishment, you horrible little man”, or words to that effect.
- No 2 INFLUENCING A DECISION CONCERNING THE WITHDRAWAL OF AN ELECTION OF TRIAL IN THE COURT MARTIAL CONTRARY TO AFDA s 69(2A) and (3)  
in that he, on board HMNZS TAUPU on 8 April 20XX, influenced the decision of ASCS J. Sparrow to withdraw her election to be tried in the Court Martial by improper means, namely by detailing her in the duty watch for the whole of April 20XX and telling her that she would be part of duty watch until she withdrew her election.

### Disciplinary Officer’s Checklist (AFDA s 69(2A) influencing election)

Element	Proved?
Subject to the AFDA	
Disciplinary officer had given specified person the right to elect trial in the Court Martial or summary trial	
Accused influenced <b>OR</b> attempted to influence specified person in making that election	
Used the specified threat or bribe or other improper means to do this	
Intended to influence the specified person	
Date	

### Disciplinary Officer’s Checklist (AFDA s 69(2A) influencing decision concerning withdrawal of election)

Element	Proved?
Subject to the AFDA	
Specified person given the right to elect trial in the Court Martial or summary trial	
Specified person elected trial in the Court Martial	
Accused influenced <b>OR</b> attempted to influence specified person in a decision concerning the withdrawal of that election	
Used the specified threat or bribe or other improper means to do this	
Intended to influence the specified person	
Date	

## SECTION 15 – MISCELLANEOUS OFFENCES

## THREATENING TO KILL

**4.15.1 Offence.** A person subject to the AFDA commits an offence if he or she:

- a. Threatens to kill or do grievous bodily harm to any person;<sup>358</sup> or
- b. Sends, or causes to be received, any letter or writing containing any threat to kill or do grievous bodily harm to any person, knowing the contents.<sup>359</sup>

**4.15.2 Punishment.** The maximum punishment is seven years' imprisonment.

**4.15.3 Threat.** It is unnecessary to prove an intention to carry out the threat and the offence will be committed even though the disciplinary officer may regard the threat as a bluff.<sup>360</sup> The threat need not be to kill or injure the person to whom the threat is communicated, or indeed any specified person. The threat may be one of death or injury to a third person; even a person not yet selected as the victim. For example, the offence may be committed if A threatens B that he or she will kill B's partner or child, or the first person who walks through the door.<sup>361</sup>

**4.15.4 Sends or causes to be received.** It is enough if the accused gave the letter to another person to post, put it where it might be found, eg under the cloth on the kitchen table.<sup>362</sup>

**4.15.5 Grievous bodily harm.** See paragraph 4.5.31.

## Specimen Charges

No 1 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
THREATENING TO KILL CONTRARY TO SECTION 306(1)(a) OF THE CRIMES  
ACT 1961  
in that he, at Palmerston North on 7 October 20XX, threatened to kill John  
Kennedy.

No 2 COMMITTING A CIVIL OFFENCE CONTRARY TO AFDA s 74(1) NAMELY  
THREATENING TO DO GRIEVOUS BODILY HARM CONTRARY TO SECTION  
306(1)(b) OF THE CRIMES ACT 1961  
in that she, at Matamata on 28 July 20XX, knowing a letter to contain a  
threat to do grievous bodily harm to Peter Rabbit, sent it to Beatrice Potter.

358 Section 306(1)(a) of the Crimes Act 1961.

359 Section 306(1)(b) of the Crimes Act 1961.

360 *R v Adams* [1999] 3 NZLR 144, 147.

361 *Police v Lloyd* [1973] 2 NZLR 486.

362 *R v Jones* (1851) 5 Cox CC 226.

**Disciplinary Officer's Checklist (threat to kill or do grievous bodily harm)**

Element	Proved?
Subject to the AFDA	
Made threat to kill <b>OR</b> do grievous bodily harm to a person ( <b>A</b> )	
Intended that the threat be taken seriously <sup>363</sup>	
Communicated threat to A or to another person	
Date	

**Disciplinary Officer's Checklist  
(sending letter containing threat to kill or do grievous bodily harm)**

Element	Proved?
Subject to the AFDA	
Sent specified letter or writing to a person ( <b>A</b> ) <b>OR</b> Caused specified letter or writing to be received by A	
Specified letter or writing contained a threat to kill <b>OR</b> do grievous bodily harm	
Threat was directed at A or another person	
Knew that letter or writing contained this threat	
Intended to send it <b>OR</b> cause it to be received	
Date	

**ACCEPTING BRIBES**

**4.15.6 Offence.** A person subject to the AFDA, for the time being acting as an official, commits an offence if he or she corruptly:<sup>364</sup>

- a. Accepts or obtains; or
- b. Agrees, or offers to accept; or
- c. Attempts to obtain;

any bribe for him or herself, or any other person, in respect of any act done or omitted, or to be done or omitted, by the person in his or her official capacity.

**4.15.7 Punishment.** The maximum punishment is seven years' imprisonment.

**4.15.8 Official** means any person subject to the AFDA who is acting in his or her official capacity in or in connection with the Armed Forces. In particular it includes any

<sup>363</sup> *R v Adams* [1999] 3 NZLR 144 (CA).

<sup>364</sup> AFDA s 54(1).

person subject to the AFDA who is for the time being acting:<sup>365</sup>

- a. As an official of a Service mess, band, club, canteen, or other Service institution;
- b. As a trustee of any unit, mess, or canteen fund, or of any other non-public Service fund; or
- c. Under the control or direction of the Armed Forces Canteen Council.

**4.15.9 Corruptly** means the deliberate doing of an act which is forbidden as tending to corrupt.<sup>366</sup>

**4.15.10 Bribe** means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect.<sup>367</sup>

### Specimen Charge

OFFICIAL CORRUPTION CONTRARY TO AFDA s 54(1)  
in that she, at Wellington on 1 May 20XX, corruptly accepted a bribe, namely \$5000, to accept the tender of ABC Ltd to supply rations to the New Zealand Army.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Was acting as an official	
Accepted or obtained <b>OR</b> agreed or offered to accept <b>OR</b> attempted to obtain a bribe	
Did so intentionally	
Bribe was to do or refrain from doing something in accused's official capacity	
Date	

### OFFERING BRIBES

**4.15.11 Offence.** A person subject to the AFDA commits an offence if he or she corruptly gives or offers or agrees to give a bribe to any person, with intent to influence another person subject to the AFDA for the time being acting as an official in respect of any act or omission by the person in his or her official capacity.<sup>368</sup>

<sup>365</sup> AFDA s 54(3).

<sup>366</sup> *Singh v Trinidad and Tobago* [2005] 4 All ER 781 (PC).

<sup>367</sup> AFDA s 54(3).

<sup>368</sup> AFDA s 54(2).

**4.15.12 Punishment.** The maximum punishment is three years' imprisonment.

**4.15.13 Official.** See paragraph 4.15.8.

**4.15.14 Corruptly.** See paragraph 4.15.9.

**4.15.15 Bribe.** See paragraph 4.15.10.

### Specimen Charge

OFFICIAL CORRUPTION CONTRARY TO AFDA s 54(2)  
in that he, at RNZAF Base Auckland on 19 July 20XX, with intent to influence  
FLT LT J.S. Cash, the Treasurer of the RNZAF Base Auckland Officers' Mess,  
corruptly offered to give him a bribe if he would take no action on the  
accused's overdue mess account and the accused's dishonoured cheque.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Gave or offered or agreed to give a bribe to the specified person (A)	
Intended to influence A or another specified person	
The person to be influenced was subject to the AFDA	
The person to be influenced was acting as an official	
Bribe was to do or refrain from doing something in the specified person's official capacity	
Date	

### POSSESSION OF ALCOHOLIC LIQUOR

**4.15.16 Offence.** A person subject to the AFDA commits an offence if, knowingly and without authority, he or she is in possession of alcoholic liquor within the bounds of any naval ship or defence area, or any other place where members of the Armed Forces are quartered, stationed, or serving, or are undergoing exercises or training.<sup>369</sup>

**4.15.17 Punishment.** The maximum punishment is six months' imprisonment.

**4.15.18 Alcoholic liquor** means any fermented, distilled, or spirituous liquor (including spirits, wine, ale, beer, porter, honeymead, stout, cider, and perry) that is found on analysis to contain 1.15 percent or more alcohol by volume.<sup>370</sup>

<sup>369</sup> AFDA s 52(1).

<sup>370</sup> Section 2 of the Sale of Liquor Act 1989.

- 4.15.19 Forfeiture of alcohol.** If a person is found guilty of this offence, any alcohol in respect of which the offence was committed is forfeited to the Crown.<sup>371</sup> It is to be disposed of by sale to such mess or canteen as the accused's CO directs, and the proceeds are to be paid into the public account.<sup>372</sup>

### Specimen Charge

BEING IN POSSESSION OF ALCOHOLIC LIQUOR CONTRARY TO AFDA s 52(1) in that she, on board HMNZS ENDEAVOUR on 19 February 20XX, knowingly and without authority, was in possession of six bottles of beer.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Had item specified in particulars in his or her physical custody (including accused's locker, kitbag, room or car, or some other place where the accused can retrieve it at will)	
Place where item was located is in a naval ship, defence area or other place where Service members are quartered, stationed or serving, or undergoing exercises or training	
Item specified is alcoholic liquor	
Knew that item specified was alcoholic liquor	
Knew that item specified was in his or her physical custody	
Did not have authority to have possession of the alcoholic liquor	
Date	

### OBSTRUCTION OF PROVOST OFFICERS

- 4.15.20 Offence.** A person subject to the AFDA commits an offence if he or she:

- a. Obstructs;<sup>373</sup> or
- b. After being called on to do so, refuses to assist;<sup>374</sup>

a provost officer while acting in the execution of his or her duty, or a person (whether subject to the AFDA or not) lawfully exercising authority under or on behalf of a provost officer.

<sup>371</sup> AFDA s 52(2).

<sup>372</sup> AFDA s 52(2) and DA s 30(2).

<sup>373</sup> AFDA s 37(1)(a).

<sup>374</sup> AFDA s 37(1)(b).



**4.15.21 Punishment.** The maximum punishment is two years' imprisonment.

**4.15.22 Provost officer:**<sup>375</sup>

- a. Means a provost marshal, assistant provost marshal, or other officer of the Navy, the Army, or the Air Force duly appointed to exercise the functions conferred by the AFDA on a provost officer; and
- b. Includes a person duly attached or lent as a provost officer to, or seconded for service or appointed for duty as a provost officer with, any part of the Armed Forces; but
- c. Does not include any midshipman or officer cadet or chaplain.

**4.15.23 Knowledge of provost officer status.** It is a defence to this charge if the accused proves that he or she neither knew nor had reasonable cause to believe that the person against whom the offence was alleged to have been committed was a provost officer or, as the case may be, a person lawfully exercising authority under or on behalf of a provost officer.<sup>376</sup>

### Specimen Charges

- No 1 OBSTRUCTING A PERSON EXERCISING AUTHORITY UNDER OR ON BEHALF OF A PROVOST OFFICER CONTRARY TO AFDA s 37(1)(a)  
in that he, at Trentham Military Camp on 8 June 20XX, when W56789 Sergeant R. Capp, RNZMP, a person who was then lawfully exercising authority under or on behalf of a provost officer, was attempting to arrest a soldier, obstructed Sergeant Capp by endeavouring to pull the soldier from him.
- No 2 REFUSING TO ASSIST A PROVOST OFFICER ACTING IN THE EXECUTION OF HER DUTY CONTRARY TO AFDA s 37(1)(b)  
in that he, on board HMNZS PHILOMEL on 2 May 20XX, after being called upon to assist Lieutenant Commander B.A. Jossman, a provost officer, refused to assist her.

375 AFDA s 2(1).  
376 AFDA s 37(2).

**Disciplinary Officer's Checklist (AFDA s 37(1)(a) obstructing provost officer)**

Element	Proved?
Subject to the AFDA	
Obstructed specified person	
Intended to do so	
Specified person was a provost officer or a person (whether subject to the AFDA or not) lawfully exercising authority under or on behalf of a provost officer	
Specified person was acting in the execution of his or her duty	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused neither knew nor had reasonable cause to believe that the specified person was a provost officer or a person lawfully exercising authority under or on behalf of a provost officer	

**Disciplinary Officer's Checklist (AFDA s 37(1)(b) refusing to assist provost officer)**

Element	Proved?
Subject to the AFDA	
Specified person called on accused to assist	
Accused refused	
Intended to do so	
Specified person was a provost officer or a person (whether subject to the AFDA or not) lawfully exercising authority under or on behalf of a provost officer	
Specified person was acting in the execution of his or her duty	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The accused neither knew nor had reasonable cause to believe that the specified person was a provost officer or a person lawfully exercising authority under or on behalf of a provost officer	

**BEHAVING IN A CRUEL MANNER**

**4.15.24 Offence.** A person subject to the AFDA commits an offence if he or she behaves in a cruel manner towards any person, or any animal used for the purposes of the Armed Forces or kept in captivity.<sup>377</sup>

**4.15.25 Punishment.** The maximum punishment is two years' imprisonment.

**4.15.26 Cruel behaviour** means behaviour which deliberately inflicts severe suffering to a level which society would condemn as outrageous.<sup>378</sup> The suffering need not be physical; psychological suffering may also result from cruel behaviour.

**4.15.27 Ill-treatment of animals.** If a person subject to the AFDA ill-treats an animal which is not used for the purposes of the Armed Forces or kept in captivity, that may constitute an offence against the Animal Welfare Act 1999. In such cases, advice is to be sought from a legal officer.

### Specimen Charge

BEHAVING IN A CRUEL MANNER CONTRARY TO AFDA s 42(a)  
in that he, at Waiohuru Military Camp on 10 September 20XX, ordered  
S1002345 Pte H.G. Wells to leopard crawl up Waitangi Hill wearing FMSO  
including full pack for two hours.

### Disciplinary Officer's Checklist (Human Victim)

Element	Proved?
Subject to the AFDA	
Did the act alleged to the specified person	
Intended to do so	
The act inflicted severe suffering to a level which society would condemn as outrageous	
Date	

### Disciplinary Officer's Checklist (Animal Victim)

Element	Proved?
Subject to the AFDA	
Did the act alleged to the specified animal	
Intended to do so	
The act inflicted severe suffering to a level which society would condemn as outrageous	
The specified animal was used for the purposes of the Armed Forces <b>OR</b> kept in captivity	
Date	

**BEHAVING IN A DISGRACEFUL AND INDECENT MANNER**

**4.15.28 Offence.** A person subject to the AFDA commits an offence if he or she behaves in a disgraceful and indecent manner.<sup>379</sup>

**4.15.29 Punishment.** The maximum punishment is two years' imprisonment.

**4.15.30 Disgraceful and indecent.** What is disgraceful and what is indecent in the Service context are both matters of fact for the disciplinary officer to determine given the time, place and circumstances of the alleged offending. The consent or non-consent of those present during the conduct is irrelevant.<sup>380</sup>

**Specimen Charge**

BEHAVING IN A DISGRACEFUL AND INDECENT MANNER CONTRARY TO AFDA s 42(b)  
in that he, at Linton on 6 April 20XX, in the presence of U999876 Private T.P. McGill, placed his hand down his trousers and stated to her "Feel this, this is what a real man feels like" or words to that effect.

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Did the act alleged	
Intended to do so	
The act was disgraceful	
The act was indecent	
The accused intended to do something which was disgraceful and indecent	
Date	

**USING THREATENING, INSULTING, OR PROVOCATIVE LANGUAGE**

**4.15.31 Offence.** A person subject to the AFDA commits an offence if he or she uses threatening, insulting, or provocative language to any person who is not the enemy.<sup>381</sup>

**4.15.32 Punishment.** The maximum punishment is three months' imprisonment.

**4.15.33 Enemy.** See Glossary of Terms in Chapter 1 Section 1.

<sup>379</sup> AFDA s 42(b).

<sup>380</sup> *R v Dunn* (1994) 1 NZCMAR 202 (CMAC).

<sup>381</sup> AFDA s 43(b).

### Specimen Charge

USING THREATENING INSULTING OR PROVOCATIVE LANGUAGE CONTRARY TO AFDA s 43(b)  
in that he, at Linton on 21 July 20XX, said to C999897 LCpl K. Hulme, “If you do not move I will knock your head off”, or words to that effect.

### Disciplinary Officer’s Checklist

Element	Proved?
Subject to the AFDA	
Communicated the words alleged to the specified person	
Intended to do so	
The words were threatening, insulting, or provocative	
Date	
<b>Defence (accused to prove on the balance of probabilities)</b> The specified person was the enemy	

### CAUSING A DISTURBANCE

**4.15.34 Offence.** A person subject to the AFDA commits an offence if he or she:<sup>382</sup>

- a. Causes a disturbance; or
- b. Behaves in a manner likely to cause a disturbance.

**4.15.35 Punishment.** The maximum punishment is three months’ imprisonment.

**4.15.36 Likely.** See paragraph 4.15.46.

### Specimen Charges

- No 1 CAUSING A DISTURBANCE CONTRARY TO AFDA s 43(c)  
in that she, at Trentham, on 18 May 20XX, caused a disturbance to break out in the camp cinema by refusing to sit down thereby obscuring the view of persons behind her.
- No 2 BEHAVING IN A MANNER LIKELY TO CAUSE A DISTURBANCE CONTRARY TO AFDA s 43(c)  
in that he, at Suai on 10 January 20XX, while in the camp canteen stood in front of the exit in order to prevent customers from leaving the canteen.

**Disciplinary Officer's Checklist (AFDA s 43(c) causing a disturbance)**

Element	Proved?
Subject to the AFDA	
Did or omitted the act alleged	
Intended to do so	
The act or omission caused a disturbance	
Date	

**Disciplinary Officer's Checklist  
(AFDA s 43(c) behaving in manner likely to cause a disturbance)**

Element	Proved?
Subject to the AFDA	
Did or omitted the act alleged	
Intended to do so	
The act or omission was likely to cause a disturbance	
Date	

**ENDANGERING THE HEALTH OF MEMBERS OF THE ARMED FORCES**

**4.15.37 Offence.** A person subject to the AFDA commits an offence if he or she, without lawful excuse, refuses or fails to submit him or herself to an essential medical, surgical, or dental treatment or procedure by a medical or dental practitioner, as the case may require, after being ordered to do so:<sup>383</sup>

- a. By a medical or dental officer who is a medical practitioner or dental practitioner; or
- b. By a competent officer acting on the advice of any such medical or dental officer.

**4.15.38 Punishment.** The maximum punishment is two years' imprisonment.

**4.15.39 Essential medical, surgical, or dental treatment or procedure** means a medical, surgical, or dental treatment or procedure, whether preventive, protective, or curative, which is stated by the medical or dental officer who gives the order or advice to be, in his or her opinion:<sup>384</sup>

- a. Essential in the interests of the health of other members of the Armed Forces; or

383 AFDA s 72(1).

384 AFDA s 72(1).

- b. Such that refusal or failure to submit to it would:
- (1) Constitute a potential menace to the health of other members of the Armed Forces; or
  - (2) Prejudice the operational efficiency of any part of the Armed Forces.

**4.15.40 Right to a second opinion.** If a medical or dental officer is considering giving or recommending the giving of an order of the kind referred to in paragraph 4.15.37, the officer is to inform the patient that he or she may ask for a second opinion on whether the treatment or procedure meets the test described in paragraph 4.15.39. If the patient asks for a second opinion, the opinion is to be obtained at public expense from a suitably qualified medical or dental practitioner, unless it is not reasonably practicable to do so. Any such opinion which is obtained is to be taken into account by the medical or dental officer in deciding whether to give or recommend the giving of the order.

**4.15.41 Consent to treatment or procedure.** Although a person subject to the AFDA commits an offence if he or she does not consent to a treatment or procedure which is ordered in the circumstances described in paragraph 4.15.37, the law remains that the genuine informed consent of the patient is required before the treatment or procedure is administered. Hence the patient may be charged but not treated without his or her consent.

**4.15.42 Dental practitioner** means a health practitioner who is, or is deemed to be, registered with the Dental Council established by section 114(2) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of dentistry.<sup>385</sup>

**4.15.43 Medical practitioner** means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1) (a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine.<sup>386</sup>

### Specimen Charge

#### REFUSING TO SUBMIT TO A MEDICAL TREATMENT OR PROCEDURE CONTRARY TO AFDA s 72(1)

in that he, at Linton Military Camp on 27 July 20XX, without lawful excuse, refused to submit himself to be vaccinated against cholera by Dr I.G. Smitherman, a medical practitioner, after being ordered to do so by Major R.R. Sharpe, a competent officer acting on the advice of Dr Smitherman that a failure to submit to that vaccination would prejudice the operational efficiency of the part of the Armed Forces in which the accused was serving.

385 AFDA s 2(1).

386 AFDA s 2(1).

## Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Specified treatment or procedure was medical, surgical or dental	
Specified medical or dental officer stated that specified treatment or procedure was essential on one of the grounds stated in paragraph 4.15.39.	
Specified medical or dental officer was a medical or dental practitioner as a matter of law	
Specified medical or dental officer <b>OR</b> competent officer acting on advice of such an officer ordered accused to submit to specified treatment or procedure	
Accused refused <b>OR</b> failed to submit	
Date	
<b>Defence (accused to prove on balance of probabilities)</b> The order related to curative surgery and paragraph 4.15.40 (right of member of the Armed Forces to ask for a second opinion) was not complied with.	
<b>Defence (accused to prove on balance of probabilities)</b> Accused had a lawful excuse for refusing or failing to submit him or herself to the specified treatment or procedure.	

## DOING AN ACT LIKELY TO PREJUDICE SERVICE DISCIPLINE

- 4.15.44 Offence.** A person subject to the AFDA commits an offence if he or she does or omits an act that is likely to prejudice Service discipline.<sup>387</sup>
- 4.15.45 Punishment.** The maximum punishment is two years' imprisonment.
- 4.15.46 Likely** means that there was a real or substantial risk of the prohibited result occurring. It need not be more probable than not but it should be more than a bare possibility.<sup>388</sup>
- 4.15.47 Service discipline** means the system of rules, some written and some not, by which a Service is controlled and regulated, and which prescribes the conduct of Service members.<sup>389</sup>
- 4.15.48 Other charges to be preferred.** See paragraph 4.8.28.
- 4.15.49 Alternatives.** As an exception to the rule against duplicity, a charge of doing an act likely to prejudice Service discipline may allege, in the alternative, that the accused:<sup>390</sup>

**a.** Did an act likely to bring discredit on the Service;

387 AFDA s 73(1)(a).

388 *R v L* (1992) 1 NZCMAR 150, 163 (CMAC); *R v Piri* [1987] 1 NZLR 66 (CA).

389 *R v Wayne Lawrence* (Sentencing) (2001) 1 NZCMAR 484, 486 (CMAC).

390 AFDA s 73(3).



- b. Negligently failed to perform a duty imposed on him or her by Service order, training or custom; or
- c. Negligently performed a duty imposed on him or her by Service order, training or custom.

### Specimen Charges

- No 1 DOING AN ACT LIKELY TO PREJUDICE SERVICE DISCIPLINE CONTRARY TO AFDA s 73(1)(a)  
in that she, on board HMNZS TE KAHA on 17 August 20XX, published in Daily Orders an offensive cartoon depicting Cdr A.B. Hood, RNZN, the Commanding Officer of HMNZS TE KAHA.
- No 2 DOING AN ACT LIKELY TO PREJUDICE SERVICE DISCIPLINE OR BRING DISCREDIT ON THE SERVICE TO WHICH HE BELONGS OR IS ATTACHED CONTRARY TO AFDA s 73(1)(a) OR (b)  
in that he, at the Christchurch Officer's Club on 3 January 20XX, made a lewd remark to Mary Shelley, the wife of Captain J.B. Shelley, RNZIR, namely "I'm up for it if you are, darling", or words to that effect.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Did or omitted the act alleged	
Intended to do so	
The act or omission was likely to prejudice Service discipline	
Knew he or she was acting improperly	
Date	

#### DOING AN ACT LIKELY TO BRING DISCREDIT ON THE SERVICE

**4.15.50 Offence.** A person subject to the AFDA commits an offence if he or she does or omits an act that is likely to bring discredit on:<sup>391</sup>

- a. The Service to which he or she belongs; or
- b. If he or she is attached another Service of the New Zealand Armed Forces, either to that Service or the Service to which he or she belongs.

**4.15.51 Punishment.** The maximum punishment is two years' imprisonment.

<sup>391</sup> AFDA s 73(1)(b).

**4.15.52 Likely.** See paragraph 4.15.46.

**4.15.53 Attachment to another Service.** See DA s 19 for the circumstances in which members of the Armed Forces are deemed to be attached to another Service.

**4.15.54 Other charges to be preferred.** See paragraph 4.8.28.

**4.15.55 Alternatives.** As an exception to the rule against duplicity, a charge of doing an act likely to bring discredit on the Service may allege, in the alternative, that the accused:<sup>392</sup>

- a. Did an act likely to prejudice Service discipline;
- b. Negligently failed to perform a duty imposed on him or her by Service order, training or custom; or
- c. Negligently performed a duty imposed on him or her by Service order, training or custom.

### Specimen Charge

DOING AN ACT LIKELY TO BRING DISCREDIT ON THE SERVICE TO WHICH HE BELONGS OR IS ATTACHED CONTRARY TO AFDA s 73(1)(b) in that he, at Waitangi on 6 February 20XX, while in uniform, made a rude gesture in the direction of a member of the public.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Did or omitted the act alleged	
Intended to do so	
The act or omission was likely to bring discredit on the Service to which the accused belongs or was attached	
Knew he or she was acting improperly <sup>393</sup>	
Date	

<sup>392</sup> AFDA s 73(3).

<sup>393</sup> *R v L* (1992) 1 NZCMAR 150, 163 (CMAC).

## SECTION 16 – ATTEMPTS AND PARTIES TO OFFENCES

## AIDING, ABETTING, INCITING, COUNSELLING OR PROCURING THE COMMISSION OF AN OFFENCE

**4.16.1 Offence.** A person subject to the AFDA commits an offence (as a secondary party) if he or she:

- a. Does or omits any act for the purpose of aiding any person to commit an offence (**the principal offence**);
- b. Abets any person in the commission of such an offence; or
- c. Incites, counsels, or procures any person to commit such an offence;

whether or not the principal offence is actually committed.<sup>394</sup>

**4.16.2 Example.** Person A burgles a house. Person B lends A a ladder to help him with the burglary. A is the principal party to the offence of burglary contrary to section 231(a) of the Crimes Act 1961. If B is subject to the AFDA, B commits the offence of being a secondary party to the offence of burglary contrary to AFDA s 75(4). It does not matter whether A is also subject to the AFDA.<sup>395</sup>

**4.16.3 Punishment.** The maximum punishment is:

- a. Seven years' imprisonment if the maximum punishment for the principal offence is more than seven years' imprisonment; or
- b. In any other case, the maximum punishment for the principal offence.

**4.16.4 Principal offender also a party.** The person who actually commits the principal offence is also referred to as a party to the offence by AFDA s 75, namely the principal party.<sup>396</sup>

**4.16.5 Abetting** means communicating encouragement to the principal party.<sup>397</sup> Passive acquiescence may constitute abetting if the accused had a duty to prevent the offence from taking place.<sup>398</sup>

**4.16.6 Inciting** has a meaning which overlaps with that of 'abetting', namely urging on, instigating or encouraging.<sup>399</sup>

**4.16.7 Counselling** primarily means to advise or recommend.<sup>400</sup>

**4.16.8 Procuring** means to produce by endeavour. The accused procures something by setting out to see that it happens and taking the appropriate steps to produce

394 AFDA s 75(4). The person to whom the secondary party's acts (or omissions) are directed need not be subject to the AFDA. But see paragraph 4.16.9 for special rules where that person is subject to the AFDA.

395 AFDA s 75(2).

396 AFDA s 75(1)(a).

397 *R v Shriek* (1996) 14 CRNZ 449, 459 (CA).

398 *Rubie v Faulkner* [1940] 1 All ER 285 adopted in *Theeman v Police* [1966] NZLR 605.

399 *R v Tamatea* (2003) 20 CRNZ 363, 368.

400 *R v Tamatea*, 368.

that happening.<sup>401</sup>

**4.16.9 Relevance of the nature of the principal offence.** If a person subject to the AFDA (**A**) incites, counsels or procures another person subject to the AFDA (**B**) to be a party to an offence against the AFDA:

- a. A is a party to that offence if B is convicted of it, even if it was committed in a manner different to that suggested by A;<sup>402</sup> and
- b. A is a party to any other offence which B commits because of A's inciting, counselling or procuring and which A knew B would be likely to commit because of that.<sup>403</sup>

### Specimen Charge

- No 1 BEING A SECONDARY PARTY TO AN OFFENCE CONTRARY TO AFDA s 75(4) in that he, at Waiohuru Military Camp on 12 November 20XX, aided and abetted R1009654 Cpl T. Leaf in the commission of the offence of stealing Service property contrary to AFDA s 57(1)(a)(i) by lending his car to Cpl Leaf to enable him to travel to the scene of the offence.
- No 2 BEING A SECONDARY PARTY TO AN OFFENCE CONTRARY TO AFDA s 75(4) in that she, at RNZAF Base Ohakea on 9 August 20XX, when supervising the driving of a Service vehicle, registration no. DCH789, by AC E. Kineevil X1098765 SUPLRUT, aided and abetted AC Kineevil in the commission of the offence of driving a vehicle carelessly contrary to AFDA s 67(2)(a), by omitting to intervene to prevent AC Kineevil's careless driving.
- No 3 BEING A SECONDARY PARTY TO AN OFFENCE CONTRARY TO AFDA s 75(4) in that he, on board HMNZS ENDEAVOUR on 29 May 20XX, incited, counselled, and procured ASCS K. Nuckle to commit a civil offence contrary to AFDA s 74(1), namely the offence of common assault contrary to section 196 of the Crimes Act 1961, by encouraging him to assault ACSS R. Plotter.

### Disciplinary Officer's Checklist (AFDA s 75(4) aiding)

Element	Proved?
Subject to the AFDA	
Did or omitted the act alleged	
Intended to do so	
Intended that the act or omission would assist the specified person to commit the specified offence	
Date	

401 Attorney General's Reference (No 1 of 1975) [1975] 2 All ER 684 (CA), applied in *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563, 569.

402 AFDA s 75(5).

403 AFDA s 75(6).

**Disciplinary Officer's Checklist (AFDA s 75(4) abetting or inciting by positive act)**

Element	Proved?
Subject to the AFDA	
Did the act alleged (eg said specified words)	
Intended to do so	
Communicated the act to the specified person in some manner	
Intended that the act would encourage the specified person to commit the specified offence	
Date	

**Disciplinary Officer's Checklist (AFDA s 75(4) abetting or inciting by omission)**

Element	Proved?
Subject to the AFDA	
Had a duty to act to prevent the commission of the specified offence	
Failed to carry out that duty	
Failure to do so was intentional	
Intended that the failure to do so would encourage the specified person to commit the specified offence	
Date	

**Disciplinary Officer's Checklist (AFDA s 75(4) counselling)**

Element	Proved?
Subject to the AFDA	
Gave the advice or recommendation alleged to the specified person	
Intended to do so	
The advice or recommendation suggested that the specified person commit the specified offence	
Date	

**Disciplinary Officer's Checklist (AFDA s 75(4) procuring)**

Element	Proved?
Subject to the AFDA	
Did the act alleged	
Intended to do so	
Intended that the specified offence be committed	
Intended that the act alleged lead to the commission of the specified offence	
Date	

**CONSPIRING TO COMMIT AN OFFENCE**

**4.16.10 Offence.** A person subject to the AFDA commits an offence (as a secondary party) if he or she conspires with one or more persons to commit an offence (**the principal offence**), whether or not that offence is actually committed.<sup>404</sup>

**4.16.11 Punishment.** See paragraph 4.16.3.

**4.16.12 Conspiring** means forming an intention, which is common to the mind of the other conspirators, and manifesting that intention by mutual consultation and agreement among the conspirators. It is of the essence of a conspiratorial agreement that there must not only be an intention to agree but also a common design to commit some offence; that is to put the design into effect.<sup>405</sup>

**Specimen Charge**

CONSPIRING TO COMMIT AN OFFENCE CONTRARY TO AFDA s 75(4)  
in that he, at Burnham Military Camp on 12 November 20XX, conspired with R1009876 Spr R.B. Hood and T1014567 Pte F. Tuck to commit the offence of stealing Service property contrary to AFDA s 57(1)(a)(i).

**Disciplinary Officer's Checklist**

Element	Proved?
Subject to the AFDA	
Intended that act(s) or omission(s) constituting the specified offence be committed	
Agreed with co-conspirators that those act(s) or omission(s) to take place	
Participated in formulation of plan to undertake agreed act(s) or omission(s)	
Date	

404 AFDA s 75(4).

405 *R v Gemmell* [1985] 2 NZLR 740, 743 (CA).

**ATTEMPTING TO COMMIT AN OFFENCE**

- 4.16.13 Offence.** A person subject to the AFDA commits an offence if he or she, with intent to commit an offence against the AFDA, does or omits an act for the purpose of accomplishing that objective.<sup>406</sup>
- 4.16.14 Punishment.** The maximum punishment is the same as the maximum punishment for the offence which the offender attempts to commit.<sup>407</sup>
- 4.16.15 Impossible attempts which are criminal.** If the person tries to do something which is an offence, he or she is guilty of an attempt even if it was impossible in the circumstances for the person to achieve that aim.<sup>408</sup> For example, a person imports a white substance into New Zealand, believing it to be methamphetamine. It is actually sugar. He or she is still guilty of attempting to import a Class A controlled drug.
- 4.16.16 Impossible attempts which are not criminal.** If the person tries to do something which is not an offence, he or she is not guilty of an attempt.<sup>409</sup> For example, a person imports sugar into New Zealand, mistakenly believing it to be unlawful to do so. He or she is not guilty of an attempt, because what he or she has tried to do is not an offence.
- 4.16.17 An attempt or mere preparation.** An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing intent to commit that offence.<sup>410</sup> The central question for the disciplinary officer is whether, in all the circumstances, the accused has taken a real and substantial step towards committing the offence.<sup>411</sup>

**Specimen Charges**

- No 1 ATTEMPTING TO COMMIT AN OFFENCE NAMELY STEALING PROPERTY OF A COMRADE CONTRARY TO AFDA ss 57(1)(a)(ii) AND 76(1) and (4)  
in that she, on board HMNZS HAWEA on 29 June 20XX, attempted to steal an iPod, the property of ASCS A. Matelot, a person subject to Service law.
- No 2 ATTEMPTING TO COMMIT A CIVIL OFFENCE CONTRARY TO AFDA ss 74(1) AND 76(1) and (4) NAMELY PROCURING A CLASS A CONTROLLED DRUG CONTRARY TO SECTION 7(1)(a) AND (2)(a) OF THE MISUSE OF DRUGS ACT 1975  
in that he, at Auckland on 9 May 20XX, attempted to procure 10 grams of methamphetamine, a Class A controlled drug.

406 AFDA s 76(1).  
 407 AFDA s 76(4).  
 408 AFDA s 76(1).  
 409 *R v Sew Hoy* [1994] 1 NZLR 257, 267 (CA).  
 410 AFDA s 76(3).  
 411 *Police v Wylie* [1976] 2 NZLR 167, 170 (CA).

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
Intended to do or omit something which is the specified offence against the AFDA	
Did or omitted something immediately or proximately connected with the commission of the specified offence	
Intended to do so	
In the circumstances, accused's act or omission was a real and substantial step towards the commission of the specified offence	
Date	

### BEING AN ACCESSORY AFTER THE FACT

**4.16.18 Offence.** A person subject to the AFDA commits an offence if he or she is an accessory after the fact to an offence against the AFDA.<sup>412</sup> An accessory after the fact is a person who, knowing any other person to have been a party to the offence:

- a. Receives, comforts, or assists that person; or
  - b. Tamper with or actively suppresses any evidence against him or her;
- in order to enable him or her to escape after arrest or to avoid arrest or conviction.<sup>413</sup>

**4.16.19 Punishment.** The maximum punishment is for being an accessory after the fact to an offence is:

- a. If the maximum punishment for the other offence is life imprisonment, seven years' imprisonment;<sup>414</sup>
- b. If the maximum punishment for the other offence is 10 or more years' imprisonment, five years' imprisonment;<sup>415</sup> and
- c. In any other case, half the maximum term of imprisonment for the other offence.<sup>416</sup>

**4.16.20 Receives, comforts, or assists.** These words are not to be construed literally but collectively express a general allegation that an accused, by one means or another, assisted the offender to evade justice.<sup>417</sup>

**4.16.21 Spouses and civil union partners exempt.** This offence does not apply to

<sup>412</sup> AFDA s 77(1).

<sup>413</sup> AFDA s 77(2).

<sup>414</sup> AFDA s 77(1)(a).

<sup>415</sup> AFDA s 77(1)(a).

<sup>416</sup> AFDA s 77(1)(b).

<sup>417</sup> *Adams on Criminal Law*, CA71.02(3).



anything done or omitted by a person to assist his or her spouse<sup>418</sup> or civil union partner (together with any co-offenders, if applicable) to escape after arrest or avoid arrest or conviction.<sup>419</sup>

### Specimen Charge

BEING AN ACCESSORY AFTER THE FACT TO AN OFFENCE CONTRARY TO AFDA s 77(1)(b)  
in that she, at Auckland on 12 April 20XX, knowing that OCH G. Ramsay had committed the offence of escaping from custody contrary to AFDA s 45, received, comforted and assisted him by hiding and feeding him, and providing him with civilian clothes, in order to enable him to avoid arrest.

### Disciplinary Officer's Checklist

Element	Proved?
Subject to the AFDA	
The specified offence was committed by the specified person	
Accused received <b>OR</b> comforted <b>OR</b> assisted the specified person, <b>OR</b> tampered with or actively suppressed any evidence against the specified person	
Knew that specified person was a party to the specified offence	
Did the specified act to enable the specified person to escape after arrest or to avoid arrest or conviction.	
Date	

<sup>418</sup> In this context, **spouse** means a person with whom the accused is in a legal marriage.  
<sup>419</sup> AFDA s 77(3).

## ANNEX A TO CHAPTER 4

## SCHEDULE 1 TO THE MISUSE OF DRUGS ACT 1975

## CLASS A CONTROLLED DRUGS

## 1. The following substances, namely:

- ACETORPHINE (03-acetyl-7,8-dihydro-7 a -[1 (R)-hydroxy-1-methyl-butyl]-06-methyl-6,14-endo etenomorphine).
- BUFOTENINE (3-(2-dimethylaminoethyl)-5-hydroxyindole).
- CANTHARIDIN (hexahydro-3a,7a-dimethyl-4,7-epoxyisobenzofuran-1,3-dione).
- COCAINE (methyl ester of benzoylecgonine), except when contained in a Class C controlled drug:\*\*]
- DESOMORPHINE (dihydrodeoxymorphine).
- DET (N, N-diethyltryptamine).
- DMA (2-amino-1-(2,5-dimethoxyphenyl) propane).]
- DMHP (3-(1,2-dimethylheptyl)-1-hydroxy-7, 8, 9, 10-tetrahydro-6, 6, 9-trimethyl-6 H-dibenzo[b, d] pyran).
- DMT (N, N-dimethyltryptamine).
- DOB (2-amino-1-(4-bromo-2, 5-dimethoxyphenyl) propane) (also known as bromo-DMA).]
- ETORPHINE (7,8-dihydro-7 a -[1 (R)-hydroxy-1-methylbutyl]-06-methyl-6,14-endo etenomorphine).
- HEROIN (diacetylmorphine).
- KETOBEMIDONE (4-meta-hydroxyphenyl-1-methyl-4-propionylpiperidine).
- LYSERGIC ACID (essential precursor for manufacture of LSD).]
- LYSERGIDE (N, N-diethyllysergamide or lysergic acid diethylamide).
- MDA (2-amino-1-(3,4-methylenedioxyphenyl) propane).
- Mescaline (3,4,5-trimethoxyphenethylamine).
- METHAMPHETAMINE (2-methylamino-1-phenylpropane).]
- 5-METHOXYDIMETHYLTRYPTAMINE (5-methoxy-N, N-dimethyl-tryptamine).
- 2-METHOXY-4, 5-METHYLENEDIOXYAMPHETAMINE (2-amino-1-(2-methoxy-4, 5-methylenedioxyphenyl) propane) (also known as MDMA or MDMA-2).]
- 3-METHOXY-4, 5-METHYLENEDIOXYAMPHETAMINE (2-amino-1-(3-methoxy-4, 5-methylenedioxyphenyl) propane) (also known as MDMA).]
- MPTP (1-methyl-4-phenyl-1,2,5,6-tetrahydropyridine).\*\*]
- PARAHEXYL (3-hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo [b, d] pyran).
- PCE (N-ethyl-1-phenylcyclohexylamine).]

- PCPY 1-(1-phenylcyclohexyl) pyrrolidine).\*\*\*
- PHP 1-(1-phenylcyclohexyl) pyrrolidine).\*\*\*
- PEPTP (1-(2-phenylethyl)-4-phenyl-1,2,5,6-tetrahydropyridine).\*\*]
- PHENCYCLIDINE (1-(1-phenylcyclohexyl) piperidine).
- PIPERIDYL BENZILATES (N-methylpiperidyl benzilates and N-ethylpiperidyl benzilates but excluding the methobromide salts).
- PMA (2-amino-1-(4-methoxyphenyl) propane).]
- PSILOCINE (3-(2-dimethylaminoethyl)-4-hydroxyindole).
- PSILOTSIN (3-(2-dimethylaminoethyl)-4-hydroxyindole).
- PSILOCYBINE (3-(2-dimethylaminoethyl) indol-4-yl dihydrogen phosphate).
- STP,DOM (2-amino-1-(2,5-dimethoxy-4-methyl) phenylpropane).
- TCP (1-[1-(2-thienyl) cyclohexyl] piperidine).\*\*\*]
- THALIDOMIDE (a -phthalimidoglutaramide).
- TMA (2-amino-1-(3, 4, 5-trimethoxyphenyl) propane).]

2. The isomers of the substances mentioned in this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
3. The esters and ethers of the substances mentioned in this Schedule and the esters and ethers of the isomers mentioned in clause 2 of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Schedule and the salts of the isomers, esters, and ethers mentioned in clause 2 or clause 3 of this Schedule.
5. Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Schedule.

**ANNEX B TO CHAPTER 4****SCHEDULE 2 TO THE MISUSE OF DRUGS ACT 1975****CLASS B CONTROLLED DRUGS****PART 1**

- 1.** The following substances, namely:  
  
AMPHETAMINE (2-amino-1-phenylpropane).  
  
CANNABIS preparations: that is, any preparation containing any tetrahydrocannabinols, including cannabis resin (commonly known as hashish) and cannabis oil (commonly known as hash oil), produced by subjecting cannabis plant material to any kind of processing.  
  
MDMA (2-methylamino-1-(3,4-methylenedioxypheyl) propane).  
  
METHCATHINONE.  
  
MORPHINE.  
  
OPIUM.  
  
TETRAHYDROCANNABINOLS, except when contained in a Class C controlled drug.
- 2.** The isomers of the substances mentioned in clause 1 of this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
- 3.** The esters and ethers of the substances mentioned in clause 1 of this Part of this Schedule and the esters and ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
- 4.** The salts of the substances mentioned in clause 1 of this Part of this Schedule and the salts of the isomers, esters, and ether mentioned in clause 2 or clause 3 of this Part of this Schedule.
- 5.** Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Part of this Schedule.
- 6.** The substance gamma-hydroxybutyrate (GHB) (commonly known as fantasy) and—
  - a.** the esters, ethers, and amides of GHB; and
  - b.** all substances from which GHB can be derived, including (without limitation)—

- (1) 1,4-butanediol:
  - (2) gamma-aminobutyric acid:
  - (3) gamma-butyrolactone:
  - (4) gamma-hydroxybutyraldehyde; and
- c. the salts of GHB (including sodium oxybate) and the salts of any substance referred to in paragraph (a) or paragraph (b); and
- d. any substance, preparation, or mixture containing any proportion of GHB or any substance referred to in any of paragraphs (a) to (c).

## PART 2

1. The following substances, namely:

BENZPHETAMINE (2-benzylmethylamino-1-phenylpropane).  
 CATHINONE (2-amino-1-phenylpropan-1-one).  
 DOET (2-amino-1-(2,5-dimethoxy-4-ethylphenyl) propane).  
 N-ETHYLAMPHETAMINE (2-ethylamino-1-phenylpropane).  
 FENCAMFAMINE (N-ethyl-3-phenylbicyclo2.2.1heptan-2-amine).  
 FENETHYLLINE (3,7-dihydro-1,3-dimethyl-7-2-(1-methyl-2-phenylethyl)-aminoethyl-1H-purine-2,6-dione).  
 ENPROPOREX (2-(2-cyanoethylamino)-1-phenylpropane).  
 MEFENOREX (2-(3-chloropropylamino)-1-phenylpropane).  
 METHAQUALONE (2-methyl-3-(2-methylphenyl)-4 (3H)-quinazolinone).  
 4-METHYLAMINOREX (cis-2-amino-4-methyl-5-phenyl-2-oxazoline).  
 METHYLPHENIDATE (α-phenyl-2-piperidineacetic acid methyl ester).  
 4-METHYLTHIOAMPHETAMINE.  
 N-ETHYL MDA (2-ethylamino-1-(3,4-methylenedioxyphenyl) propane).  
 N-HYDROXY MDA (2-hydroxyamino-1-(3,4-methylenedioxyphenyl) propane).  
 NORPSEUDOEPHEDRINE (threo-2-amino-1-hydroxy-1-phenylpropane), including cathine.  
 PROPYLHEXEDRINE (1-cyclohexyl-2-methylaminopropane).  
 PYROVALERONE (1-(4-methylphenyl)-2-(1-pyrrolidinyl)-1-pentanone).

2. The isomers of the substances mentioned in this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.

3. The esters and ethers of the substances mentioned in this Part of this Schedule and the esters and ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Part of this Schedule and the salts of the isomers, esters, and ethers mentioned in clause 2 or clause 3 of this Part of this Schedule.
5. Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Part of this Schedule.

### PART 3

1. The following substances, namely:

ACETYL- $\alpha$ -METHYLFENTANYL (N-(1-( $\alpha$ -methylphenethyl)-4-piperidyl) acetanilide).

ACETYLMETHADOL (3-acetoxy-6-dimethylamino-4,4-diphenylheptane).

ALFENTANIL (N-1-2-(4-ethyl-4,5-dihydro-5-oxo-1H-(tetrazol-1-yl) ethyl-4-(methoxymethyl)-4-piperidiny-N-phenylpropanamide).

ALLYLPRODINE (3-allyl-1-methyl-4-phenyl-4-propionoxypiperidine)

ALPHACETYLMETHADOL ( $\alpha$ -3-acetoxy-6-dimethylamino-4,4-diphenyl-heptane)

ALPHAMEPRODINE ( $\alpha$ -3-ethyl-1-methyl-4-phenyl-4-propionoxy-piperidine).

ALPHAMETHADOL ( $\alpha$ -6-dimethylamino-4,4-diphenyl-3-heptanol).

ALPHAPRODINE ( $\alpha$ -1,3-dimethyl-4-Phenyl-4-propionoxy-piperidine)

ANILERIDINE (1-para-aminophenethyl-4-phenylpiperidine-4-carboxylic acid ethyl ester).

BENZETHIDINE (1-(2-benzyloxyethyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester).

BENZYLMORPHINE (3-benzylmorphine).

BETACETYLMETHADOL (b-3-acetoxy-6-dimethylamino-4,4-diphenyl-heptane).

BETAMEPRODINE (b-3-ethyl-1-methyl-4-phenyl-4-propionoxypiperidine)

BETAMETHADOL (b-6-dimethylamino-4,4-diphenyl-3-heptanol).

BETAPRODINE (b-1,3-dimethyl-4-phenyl-4 propionoxypiperidine).

BEZITRAMIDE (1-(3-cyano-3,3-diphenylpropyl)-4-(2-oxo-3-propionyl-1-benzimidazoliny) piperidine).

CLONITAZENE (2-para-chlorbenzyl-1-diethylaminoethyl-5-nitrobenzimidazole).

CODOXIME (dihydrocodeinone-6-carboxymethyloxime).

CONCENTRATE OF POPPY STRAW— that is, the material arising when parts of any plant of the species *Papaver somniferum* have entered a process for the concentration of the alkaloids.

DEXTROMORAMIDE ((+)-4-2-methyl-4-oxo-3,3-diphenyl-4-(1-pyrrolidiny) butyl morpholine).

DIAMPROMIDE (N-2-(methylphenethylamino) propyl] propionanilide).

DIETHYLTHIAMBUTENE (3-diethylamino-1,1-di-(2'-thienyl)-1-butene).

DIFENOXIN (1-(3-cyano-3,3-diphenylpropyl)-4-phenylisonipecotic acid).

DIHYDROMORPHINE.

DIMENOXADOL (2-dimethylaminoethyl 1-ethoxy-1,1-diphenylacetate.)

DIMEPHEPTANOL (6-dimethylamino-4,4-diphenyl-3-heptanol).

DIMETHYLTHIAMBUTENE (3-dimethylamino-1,1-di-(2'-thienyl)-1-butene).

DIOXAPHETYL BUTYRATE (ethyl 4-morpholino-2,2-diphenylbutyrate).

DIPHENOXYLATE (1-(3-cyano-3,3-diphenylpropyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester).

DIPIANONE (4,4-diphenyl-6-piperidine-3-heptanone).

DROTEBANOL (3,4-dimethoxy-17-methylmorphinan-6b,14-diol).

EGGONINE, its esters and derivatives which are convertible to ecgonine and cocaine, except when contained in a Class C controlled drug.

ETHYLMETHYLTHIAMBUTENE (3-ethylmethylamino-1,1-di-(2'-thienyl)-1-butene).

ETONITAZENE (1-diethylaminoethyl-2-para-ethoxybenzyl-5-nitro-benzimidazole).

ETOXERIDINE (1-[2-(2-hydroxyethoxy) ethyl]-4-phenylpiperidine-4-carboxylic acid ethyl ester).

FENTANYL (1-phenethyl-4-(N-propionylanilino) piperidine).

p-FLUOROFENTANYL (4'-fluoro-N-1-(phenethyl-4-piperidyl) propionanilide).

FURETHIDINE (1-(2-tetrahydrofurfuryloxyethyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester).

HYDROCODONE (dihydrocodeinone).

HYDROMORPHINOL (14-hydroxydihydromorphine).

HYDROMORPHONE (dihydromorphinone).

b-HYDROXYFENTANYL (N-(1-(b-hydroxyphenethyl)-4-piperidyl) propionanilide).

b-HYDROXY-3-METHYLFENTANYL (N-(1-(b-hydroxyphenethyl)-3-methyl-4-piperidyl) propionanilide).

HYDROXPETHIDINE (4-meta-hydroxyphenyl-1-methylpiperidine-4-carboxylic acid ethyl ester).

ISOMETHADONE (6-dimethylamino-5-methyl-4,4-diphenyl-3-hexanone).

LEVOMETHORPHAN ((-)-3-methoxy-N-methylmorphinan) but not including dextromethorphan ((+)-3-methoxy-N-methylmorphinan) and dextrorphan ((+)-3-hydroxy-N-methylmorphinan).

LEVOMORAMIDE ((-)-4-2-methyl-4-oxo-3,3-diphenyl-4-(1-pyrrolidinyl) butyl] morpholine).

LEVOPHENACYLMORPHAN ((-)-3-hydroxy-N-Phenacilmorphinan).

LEVORPHANOL ((-)-3-hydroxy-N-methylmorphinan).

MECLOQUALONE (3-(2-chlorophenyl)-2-methyl-4-(3H)-quinazolinone).

METAZOCINE (2'-hydroxy-2,5,9-trimethyl-6,7-benzomorphan).

METHADONE (6-dimethylamino-4,4-diphenyl-3-heptanone).

METHADONE-INTERMEDIATE (4-cyano-2-dimethylamino-4,4-diphenylbutane).

1-METHYL-4-PHENYL-4-PIPERIDINOL.

METHYLDESORPHINE (6-methyl-D6-deoxymorphine).

METHYLDIHYDROMORPHINE (6-methyldihydromorphine).

á-METHYLFENTANYL (N-(1-( á-methylphenethyl)-4-piperidyl) propionanilide).

á-METHYLTHIOFENTANYL (N-(1-(1-methyl-2-(2-thienyl)ethyl)-4-piperidyl) propionanilide).

3-METHYLFENTANYL (N-(3-methyl-1-phenethyl-4-piperidyl) propionanilide).

3-METHYLTHIOFENTANYL (N-(3-methyl-1-(2-(2-thienyl)ethyl)-4-piperidyl) propionanilide).

METOPON (5-methyldihydromorphinone).

MORAMIDE-INTERMEDIATE (2methyl-3-morpholino-1, 1-diphenyl-propanecarboxylic acid).

MORPHERIDINE (1-(2-morpholinoethyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester).

MORPHINE METHOBROMIDE and other pentavalent nitrogen morphine derivatives.

MORPHINE-N-OXIDE.

MPPP (1-methyl-4-phenyl-4-piperidinol propionate (ester)).

MYROPHINE (myristylbenzylmorphine).

NABILONE (trans-3-(1-1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6, 6-dimethyl-9H-dibenzo[b,d] pyran-9-one).

NICOMORPHINE (3,6-dinicotinylmorphine).

NORACYMETHADOL (á-acetoxy-6-methylamino-4,4-diphenyl-heptane).

NORLEVORPHANOL ((-)-3-hydroxymorphinan).

NORMETHADONE (6-dimethylamino 4,4-diphenyl-3-hexanone).

NORMORPHINE (demethylmorphine).

NORPIPANONE (4,4-diphenyl-6-piperidino-3-hexanone).

OXYCODONE (14-hydroxydihydrocodeinone).

OXYMORPHONE (14-hydroxydihydromorphinone).

PEPAP (1-phenethyl-4-phenyl-4-piperidinol acetate (ester)).

PETHIDINE (1-methyl-4-phenylpiperidine-4-carboxylic acid ethyl ester.)

PETHIDINE-INTERMEDIATE-A (4-Cyano-1-methyl-4-phenylpiperidine).

PETHIDINE-INTERMEDIATE-B (4-phenylpiperidine-4-carboxylic acid ethyl ester).

PETHIDINE-INTERMEDIATE-C (1-methyl-4-phenylpiperidine-4-carboxylic acid).

PHENADOXONE (6-morpholino-4,4diphenyl-3-heptanone).

PHENAMPROMIDE (N-(1-methyl-2-piperidinoethyl) propionanilide).

PHENAZOCINE (2'-hydroxy-5,9-dimethyl-2-phenethyl-6,7-benzomorphan).



PHENDIMETRAZINE (3,4-dimethyl-2-phenylmorpholine).

1-PHENETHYL-4-PHENYL-4-PIPERIDINOL.

PHENMETRAZINE (3-methyl-2-phenylmorpholine).

PHENOMORPHAN (3-hydroxy-N-phenethylmorphinan).

PHENOPERIDINE (1-(3-hydroxy-3-phenylpropyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester).

PIMINODINE (4-phenyl-1-(3-phenylaminopropyl) piperidine-4-carboxylic acid ethyl ester).

PIRITRAMIDE (1-(3-cyano-3,3-diphenylpropyl)-4-(1-piperidino) piperidine-4-carboxylic acid amide).

PROHEPTAZINE (1,3-dimethyl-4-Phenyl-4-propionoxyazacycloheptane).

PROPERIDINE (1-methyl-4-phenylpiperidine-4-carboxylic acid isopropyl ester).

RACEMETHORPHAN ((±)-3-methoxy-N-methylmorphinan).

RACEMORAMIDE ((±)-4-2-methyl-4-oxo-3, 3-diphenyl-4-(1-pyrrolidiny) butyl morpholine).

RACEMORPHAN ((±)-3-hydroxy-N-methylmorphinan).

REMIFENTANIL (1-(2-methoxycarbonyl-ethyl)-4-phenyl-propionyl-amino)-piperidine-4-carboxylic acid methyl ester).

SUFENTANIL (N-4-(methoxymethyl)-1-2-(2-thienyl) ethyl-4-piperidyl propionanilide).

THEBACON (acetyldihydrocodeinone).

THEBAINE.

THIOFENTANYL (N-(1-(2-(2-thienyl)ethyl)-4-piperidyl) propionanilide).

TILIDINE ((±)-ethyl trans-2-(dimethylamino)-1-phenyl-3-cyclo-hexene-1-carboxylate).

TRIMEPERIDINE (1,2,5-trimethyl-4-phenyl-4-propionoxypiperidine).

2. The isomers of the substances mentioned in this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
3. The esters and ethers of the substances mentioned in this Part of this Schedule and the esters and ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Part of this Schedule and the salts of the isomers, esters, and ethers mentioned in clause 2 or clause 3 of this Part of this Schedule.
5. Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Part of this Schedule.

**ANNEX C TO CHAPTER 4****SCHEDULE 3 TO THE MISUSE OF DRUGS ACT 1975****CLASS C CONTROLLED DRUGS****PART 1**

- 1.** CANNABIS FRUIT.  
CANNABIS PLANT (whether fresh, dried, or otherwise)— That is, any part of any plant of the genus *Cannabis* except a part from which all the resin has been extracted.  
CANNABIS SEED.  
CATHA EDULIS PLANT.  
COCA LEAF— That is, the leaf of any plant of any species of the genus *Erythroxylon*, except a leaf from which all ecgonine, cocaine, and any other ecgonine alkaloids have been removed.
- 2.** The following substances:  
  
BZP (1-benzylpiperazine or A2 benzylpiperazine or N-benzylpiperazine (1-benzyl-1,4-diazacyclohexane))  
TFMPP (1-(3-trifluoromethylphenyl)piperazine or N-(3-trifluoromethylphenyl)piperazine)  
pFPP (1-(4-fluorophenyl)piperazine)  
MeOPP (1-(4-methoxyphenyl)piperazine)  
mCPP (1-(meta-chlorophenyl)piperazine) or 1-(3-chlorophenyl)piperazine)  
MBZP (1-methyl-4-benzylpiperazine).
- 3.** The isomers of the substances mentioned in clause 2 whenever the existence of such isomers is possible within the specific chemical designation.
- 4.** The esters and ethers of the substances mentioned in clause 2 and the esters and the ethers of the isomers mentioned in clause 3 whenever the existence of such esters or ethers is possible.
- 5.** The salts of the substances mentioned in clause 2 and the salts of the isomers, esters, and ethers mentioned in clause 3 or 4.
- 6.** Substances containing any proportion of a substance mentioned in clause 2, 3, 4, or 5

**PART 2**

CODEINE (3-methylmorphine); its isomers, esters, and ethers, if any; its salts, and the salts of its isomers, esters, or ethers, if any; and any substance, preparation or mixture containing any proportion of the said substance or of any such isomer, ester, ether, or salt, other than a preparation or mixture named or described in Part 6 of this Schedule.

DIHYDROCODEINE; its isomers, esters, and ethers, if any; its salts, and the salts of its isomers, esters, or ethers, if any; and any substance, preparation, or mixture containing any proportion of the said substance or of any such isomer, ester, ether, or salt, other than a preparation or mixture named or described in Part 6 of this Schedule.

PROPOXYPHENE (a-4 (N, N-dimethylamino)-1, 2-diphenyl-3 methyl-2-propionoxybutane); its isomers, esters, and ethers, if any; its salts and the salts of its isomers, esters, or ethers, if any; except in preparations of propoxyphene described in clause 5A of Part 5 of this Schedule.

**PART 3**

1. The following substances, namely:  
  
ACETYLDIHYDROCODEINE.  
ETHYLMORPHINE (3-ethylmorphine).  
NICOCODINE (6-nicotinylcodeine).  
NICODICODINE (6-nicotinyldihydrocodeine or nicotinic acid ester of dihydrocodeine).  
NORCODEINE (N-demethylcodeine).  
PHOLCODINE (morpholinylethylmorphine).  
PROPIRAM (N-(1-methyl-2-piperidinoethyl)-N-2-pyridylpropionamide).
2. The isomers of the substances mentioned in this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
3. The esters and ethers of the substances mentioned in this Part of this Schedule and the esters and the ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Part of this Schedule and the salts of the isomers, esters, and ethers mentioned in clause 2 or clause 3 of this Part of this Schedule.
5. Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Part of this Schedule, other than a preparation or mixture named or described in Part 6 of this Schedule.

6. Preparations of pseudoephedrine, its salts, isomers, esters, and ethers (if any), and the salts of its isomers, esters, and ethers (if any), being preparations—
  - a. in solid or liquid form; and
  - b. containing not more than 60 mg of pseudoephedrine per dosage unit; and
  - c. containing either a single ingredient or being in combination with other pharmacologically active ingredients, being ingredients that are not named or described in the Schedule 1 or 2 or in Parts 1, 2, 4, or 5 of this schedule.

## PART 4

1. The following substances, namely:
 

ALLOBARBITAL (5,5-diallylbarbituric acid).

AMOBARBITAL (5-ethyl-5-(3-methylbutyl) barbituric acid).

BUPRENORPHINE (17-cyclopropylmethyl-7,8-dihydro-7-(1-hydroxy-1,2,2-trimethylpropyl)-6-O-methyl-6, 14-ethano-17 normorphine).

BUTALBITAL (5-allyl-5-isobutylbarbituric acid).

BUTOBARBITONE (5-butyl-5-ethylbarbituric acid).

CYCLOBARBITAL (5-(1-cyclohexen-1-yl)-5-ethylbarbituric acid).

GLUTETHIMIDE (2-ethyl-2 Phenylglutarimide).

NEALBARBITONE (5-allyl-5-neopentylbarbituric acid).

PENTOBARBITAL (5-ethyl 5-(1-methylbutyl) barbituric acid).

SECBUTABARBITAL (5-sec-butyl-5-ethylbarbituric acid).

SECOBARBITAL (5-allyl-5-(1-methylbutyl) barbituric acid).

VINYLBITAL (5-(1-methylbutyl)-5-vinylbarbituric acid).
2. The isomers of the substances mentioned in this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
3. The esters and ethers of the substances mentioned in this Part of this Schedule and the esters and the ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Part of this Schedule and the salts of the isomers, esters, and ethers mentioned in clause 2 or clause 3 of this Part of this Schedule.
5. Substances containing, any proportion of a substance mentioned in clause 1, clause 2, clause 3, or clause 4 of this Part of this Schedule, except a mixture of

a derivative of barbituric acid named or described in clause 1 of this Part of this Schedule compounded with one or more other pharmacologically active ingredients not named or described in clause 1 of this Part of this Schedule.

## PART 5

**1.** The following substances, namely:

ALPRAZOLAM.

AMFEPRAMONE (2-(diethylamino) propiophenone).

AMINOREX.

BARBITAL (5,5-diethylbarbituric acid).

BROMAZEPAM.

BROTIZOLAM.

CAMAZEPAM.

CHLORDIAZEPOXIDE.

CLOBAZAM.

CLONAZEPAM.

CLORAZEPATE.

CLOTIAZEPAM.

CLOXAZOLAM.

DELORAZEPAM.

DIAZEPAM.

EPHEDRINE.

ESTAZOLAM.

ETHCHLORVYNOL (ethyl-2-chlorovinylethynyl-carbinol).

ETHINAMATE (1-ethynylcyclohexanol carbamate).

ETHYL LOFLAZEPATE.

FLUDIAZEPAM.

FLUNITRAZEPAM.

FLURAZEPAM.

HALAZEPAM.

HALOXAZOLAM.

KETAZOLAM.

LOPRAZOLAM.

LORAZEPAM.

LORMETAZEPAM.

MAZINDOL (5-(4-chlorophenyl)-2,5 dihydro-3H-imidazo 2,1-a isoindol-5-ol).

MEDAZEPAM.

MEPROBAMATE (2-methyl-2-propyl-1,3-propanediol dicarbamate).

METHYLPHENOBARBITAL (5-ethyl-1-methyl-5-phenylbarbituric acid).

METHYLPRYLON (3,3-diethyl-5-methylpiperidine-2,4 dione).

MIDAZOLAM.

NIMETAZEPAM.

NITRAZEPAM.

NORDAZEPAM.

OXAZEPAM.

OXAZOLAM.

PEMOLINE.

PHENOBARBITAL (5-ethyl-5-phenylbarbituric acid).

PHENTERMINE (2-amino-2-methyl-1-phenylpropane).

PINAZEPAM.

PIPRADROL (1,1-diphenyl-1-(2-piperidyl) methanol).

PSEUDOEPHEDRINE (other than a preparation referred to in clause 6 of Part 3 of this schedule).

PRAZEPAM.

SPA ((-)-1-dimethylamino-1,2-diphenylethane).

TEMAZEPAM.

TETRAZEPAM.

TRIAZOLAM.

2. The isomers of the substances mentioned in this Part of this Schedule whenever the existence of such isomers is possible within the specific chemical designation.
3. The esters and ethers of the substances mentioned in this Part of this Schedule and the esters and ethers of the isomers mentioned in clause 2 of this Part of this Schedule whenever the existence of such esters or ethers is possible.
4. The salts of the substances mentioned in this Part of this Schedule and the salts of the isomers, esters, and ether mentioned in clause 2 or clause 3 of this Part of this Schedule.
5. Mixtures of a derivative of barbituric acid named or described in Part 4 of this Schedule compounded with one or more other pharmacologically active ingredients not named or described in Part 4 of this Schedule.
- 5A. Preparations of propoxyphene, its isomers, esters, and ethers, if any, its salts, and the salts of its isomers, esters, or ethers, if any, for oral use containing not more than the equivalent of 135 milligrams of propoxyphene base per dosage unit or with a concentration of not more than 2.5 percent in undivided preparations, being preparations whereof none of the other ingredients is a substance named or described in the Schedules 1 or 2 to this Act or in Parts 1 to 5 of this Schedule.

6. Substances containing any proportion of a substance mentioned in clause 1, clause 2, clause 3, clause 4, clause 5 or clause 5A of this Part of this Schedule, other than a preparation or mixture named or described in Part 6 of this Schedule.

## PART 6

The following preparations and mixtures, namely:

- a. Preparations containing any proportion of the following substances or of any salt or any such substance, namely, acetyldihydrocodeine, codeine, dihydrocodeine, ethylmorphine, and pholcodine when:
  - (1) Compounded with one or more other pharmacologically active ingredients in such a way that the substance cannot be recovered by readily applicable means or in a yield which would constitute a risk to health; and
  - (2) Containing not more than 100 milligrams of the substance in each dosage unit and with a concentration of not more than 2.5 percent in undivided preparations:
- aa. Preparations containing a derivative of barbituric acid named or described in Part 4 or Part 5 of this Schedule, in solutions containing not more than 0.5 percent of that derivative of barbituric acid:
- b. Preparations of cocaine containing not more than 0.1 percent of cocaine base, being preparations compounded with one or more other pharmacologically active ingredients (none of which are substances named or described in the Schedules 1 or 2 to this Act or in Parts 1 to 5 of this Schedule) in such a way that the preparation has no, or a negligible, risk of abuse, and in such a way that the cocaine cannot be recovered by readily applicable means or in a yield which would constitute a risk to health:
- c. Preparations of difenoxin containing, per dosage unit, not more than 0.5 mg of difenoxin and a quantity of atropine sulphate equivalent to at least 5 percent of the dose of difenoxin:
- d. Preparations of opium or morphine containing not more than 0.2 percent of morphine, being preparations compounded with one or more other pharmacologically active ingredients (none of which are substances named or described in the Schedules 1 or 2 to this Act or in Parts 1 to 5 of this Schedule) in such a way that the opium or the morphine, as the case may be, cannot be recovered by readily applicable means or in a yield which would constitute a risk to health:
- e. Single dosage units of diphenoxylate containing in each unit not more than 2.5 milligrams of diphenoxylate calculated as base and not less than 25 micrograms of atropine sulphate:

- f.** Liquid preparations of diphenoxylate containing, in each millilitre, not more than 0.5 milligrams of diphenoxylate calculated as base and not less than 5 micrograms of atropine sulphate:
- ff.** Preparations of propiram containing not more than 100 mg of propiram per dosage unit and compounded with at least the same amount of methylcellulose:
- g.** Ipecacuanha and opium powder containing 10 percent of opium in powder and 10 percent of ipecacuanha root in powder intimately mixed with finely powdered lactose:
- h.** Mixtures containing not more than one of the preparations specified in paragraphs (a) to (g) of this Part of this Schedule, being mixtures whereof none of the other ingredients is a substance named or described in the Schedules 1 or 2 to this Act or in Parts 1 to 5 of this Schedule.

## PART 7

AMPHETAMINE ANALOGUES, in which the 1-amino-2-phenylethane nucleus carries any of the following radicals, either alone or in combination:

- a.** 1 or 2 alkyl radicals, each with up to 6 carbon atoms, attached to the nitrogen atom:
- b.** 1 or 2 methyl radicals, or an ethyl radical, attached to the carbon atom adjacent to the nitrogen atom:
- c.** A hydroxy radical, attached to the carbon atom adjacent to the benzene ring:
- d.** Any combination of up to 5 alkyl radicals and/or alkoxy radicals and/or alkylamino radicals (each with up to 6 carbon atoms including cyclic radicals) and/or halogen radicals and/or nitro radicals and/or amino radicals, attached to the benzene ring.

PETHIDINE ANALOGUES, in which a 4-phenylpiperidine nucleus carries any of the following radicals, either alone or in combination:

- a.** An alkyl radical, with up to 6 carbon atoms, attached to the nitrogen atom:
- b.** A phenalkyl radical, with up to 12 carbon atoms, attached to the nitrogen atom:
- c.** A phenalkyl radical, as in paragraph (b), with 1 or more alkyl radicals, each with up to 6 carbon atoms, attached to the benzene ring in the phenalkyl radical:



- d.** An alkylcarbonyloxy or alkoxy carbonyl or hydroxy radical, with up to 6 carbon atoms, attached to the 4 position in the piperidine ring:
- e.** Any combination of up to 5 alkyl radicals and/or alkoxy radicals (each with up to 6 carbon atoms, including cyclic radicals) and/or halogen radicals, attached to the benzene ring.

PHENCYCLIDINE ANALOGUES, being chemical compounds with the 1-alkylamino-1-aryl cyclohexane structure, with any combination of the following alkylamino and aryl radicals:

- a.** The alkylamino radical is 1-piperidinyl, 1-pyrrolidinyl, 4-morpholinyl, or any other radical with up to 6 carbon atoms in the alkyl portion:
- b.** The aryl radical is phenyl, thienyl, pyridinyl, or pyrrolidinyl:
- c.** The aryl radical, as described in paragraph (b), carries any combination of up to 5 alkyl radicals and/or alkoxy radicals (each with up to 6 carbon atoms, including cyclic radicals) and/or halogen radicals.

FENTANYL ANALOGUES, in which the N-1-(2-phenethyl)-4-pipendylaniline nucleus has additional radicals, either alone or in combination, attached as follows:

- a.** An acetyl, propionyl, butenoyl or butanoyl radical, attached to the aniline nitrogen atom:
- b.** One or more alkyl radicals, with up to 10 carbon atoms in total, attached to the ethyl moiety:
- c.** Any combination of up to 5 alkyl radicals and/or alkoxy radicals (each with up to 6 carbon atoms, including cyclic radicals) and/or halogen radicals, attached to each of the benzene rings.

METHAQUALONE ANALOGUES in which the 3-arylquinazolin-4-one nucleus has additional radicals, either alone or in combination, attached as follows:

- a.** An alkyl radical, with up to 6 carbon atoms, attached at the two position:
- b.** Any combination of up to 5 alkyl radicals and/or alkoxy radicals (each with up to 6 carbon atoms, including cyclic radicals) and/or halogen radicals, attached to each of the aryl rings.

DMT (DIMETHYLTRYPTAMINE) ANALOGUES, in which the 3 (2 aminoethyl) indole nucleus has additional radicals, either alone or in combination, attached as follows:

- a.** 1 or 2 alkyl radicals each with up to 6 carbon atoms, including cyclic radicals, attached to the amino nitrogen atom:
- b.** 1 or 2 methyl groups, or an ethyl group, attached to the carbon atom adjacent to the amino nitrogen atom:
- c.** Any combination of up to 5 alkyl radicals and/or alkoxy radicals (each with up to 6 carbon atoms, including cyclic radicals) and/or halogen radicals, attached to the benzene ring.

## Chapter 5:

# CRIMINAL RESPONSIBILITY

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## SECTION 1 – INTRODUCTION

### PURPOSE OF THIS CHAPTER

- 5.1.1** The purpose of this chapter is to outline the general principles upon which criminal responsibility (or liability) for offences is based, in the context of proceedings before a disciplinary officer.
- 5.1.2** In any case of doubt as to the relevant principles, or how those principles apply in a particular case, disciplinary officers should not hesitate to seek advice from a legal officer.

## SECTION 2 – THE BASIS OF CRIMINAL RESPONSIBILITY

### THE NATURE OF AN ‘OFFENCE’

- 5.2.1** An offence is an unlawful act or omission which is contrary to the order, peace, and well-being of society and which is punishable as such by the State through criminal proceedings. The fact that it may also constitute an injury to the private interests of another person which gives rise to a civil action is immaterial.

### ACTUS REUS AND MENS REA

- 5.2.2** Before an accused person can be found guilty of an offence by a disciplinary officer, it is usually necessary that the officer be sure that:
- a.** A certain event or a certain state of affairs, which is forbidden by law, has been caused by the accused’s conduct (referred to as the *actus reus*); and
  - b.** That this conduct was accompanied by a prescribed state of mind (referred to as the *mens rea*).
- 5.2.3** Exceptions to the *mens rea* requirement occur in offences of negligence (see paragraphs 5.2.16 and 5.2.17) and in offences of strict or absolute liability (see paragraphs 5.2.18 to 5.2.20).

### RESPONSIBILITY FOR ACTUS REUS

- 5.2.4** No matter how clear it may be that the *actus reus* has occurred, it is still essential to link the accused with the *actus reus* before he or she can be held criminally responsible for it. Where the *actus reus* is produced by the commission of an act it is usually a straightforward matter to decide whether the accused can be linked in such a way as to make him or her responsible for it. Usually, proof that the accused did the act in question suffices. It is sometimes more difficult to establish this link, however, where the *actus reus* has been produced by an omission to do something. As a general rule, a person should not be held criminally responsible for an act or omission unless it was done in circumstances which in terms of causation, volition, or opportunity enable the occurrence to be linked with that person.

### VOLUNTARINESS

- 5.2.5** In determining whether or not the *actus reus* can be linked with the accused, it must be remembered that it is a generally recognised principle that criminal responsibility attaches only to voluntary conduct. If the *actus reus* of an offence includes an act, the accused must have voluntarily brought about that act. Conduct is involuntary if it happens either against, or at least without, the accused’s will. For example, A is not criminally responsible for striking B, his superior officer, if C seizes his hand and, against A’s will, forces his hand to strike B, or if A’s hand shoots out and strikes B as a result of A being afflicted by an epileptic seizure. Similarly if A, while driving, is attacked by a swarm of bees and is disabled from controlling her vehicle, she may well be held not to be ‘driving’ subsequent to the attack. In each of these examples, although A was conscious, A’s actions were involuntary because they did not flow from an exercise of his or her will.

- 5.2.6** Where A is unconscious, any movements of his or her body, eg while sleep-walking or in a state of concussion, are involuntary because they do not flow from an exercise by A of his or her will. The defence of automatism, as to which see paragraph 5.4.6, is an example of the exclusion of criminal responsibility because the accused's actions are involuntary.
- 5.2.7** Where the accused wishes to advance the defence that his or her conduct was involuntary, he or she must point to or adduce some evidence in support of this defence. As to the specific requirements where the defence of automatism is raised, see paragraph 5.4.6.

### DEFINITION OF *MENS REA*

- 5.2.8** *Mens rea* is often loosely translated as 'guilty mind' but this is frequently misleading as a person may have the requisite *mens rea* without any feeling of guilt on his or her part whatsoever. Indeed, a person may act with a perfectly clear conscience, believing his or her act to be morally and even legally right, yet still be held to have the requisite *mens rea*. It is entirely irrelevant to guilt that a person had a good motive. Similarly no motive, however evil, by itself makes a person guilty of an offence. Motive is the emotion prompting an act. In a charge of murder it may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so called 'mercy killings', compassion or love. In this sense motive is entirely distinct from intention or purpose. It is the intention of the accused, not his or her motive, which converts an *actus reus* into a criminal act.
- 5.2.9** While it is not necessary to prove motive to establish guilt, as evidence it is always relevant; not only to the state of mind accompanying an act but also to the question whether or not the accused did the act. If a person has a motive for committing an offence, then it is more likely that he or she did in fact commit it. Motive is also important when considering punishment; a good motive may be a factor in favour of a more lenient punishment.
- 5.2.10** The extent to which *mens rea* is required varies from offence to offence and in each case is a question of statutory interpretation. There are four categories of offences in this respect:
- a.** Offences where intention or recklessness is an ingredient;
  - b.** Offences of negligence;
  - c.** Strict liability offences, which permit the defence of total absence of fault; and
  - d.** Absolute liability offences.
- 5.2.11** The requisite *mens rea* for the offences which are described in Chapter 4 is indicated in the Disciplinary Officer's Checklist which accompanies the commentary. If a disciplinary officer is in any doubt as to the elements, including *mens rea*, of any offence which is not described in Chapter 4, he or she is to seek the advice of a legal officer.

## OFFENCES WHERE INTENTION OR RECKLESSNESS IS AN INGREDIENT

**5.2.12** Many statutory provisions expressly provide that, to be an offence, the act must be done with some specific mental element. The requirement to prove a mental element in an offence under the AFDA is often made clear in this way, eg 'wilfully' (s 46(1)), 'knowingly' (s 52(1)), 'fraudulently' (s 57(1)(b)), 'recklessly' (s 67(1)(a)) or 'with intent to' (s 23(1)). These provisions indicate the particular *mens rea* for the offence, which the disciplinary officer must be sure has been established before finding the accused guilty. Even if the statute does not make it clear, there is a presumption of the common law that every element of the *actus reus* requires an accompanying *mens rea* in the absence of indications to the contrary. The *mens rea* must be present at the time that the *actus reus*, or a material part of the *actus reus*, is committed.

**5.2.13** In many cases, it may be reasonably inferred from the nature and circumstances of the *actus reus* that the accused did have the requisite *mens rea*. For example, A is charged with common assault following an allegation that he punched B. The mental element of common assault is that the accused intended to apply force to the other person. If the disciplinary officer is satisfied that A did punch B, then as a matter of common sense the disciplinary officer can presume that A did so intentionally, in the absence of any evidence suggesting this was not so because, for example, it was an accident. This is what the law calls a reasonable inference. In drawing reasonable inferences from evidence presented, the disciplinary officer must be careful not to draw any inferences which do not logically follow from that evidence. If two or more possible inferences may be drawn, the inference which is most favourable to the accused must be adopted.

**5.2.14** **Transferred malice.** If a person, with the *mens rea* of a particular offence, does an act which causes the *actus reus* of the same offence, he or she is guilty even though the result, in some respects, is an unintended one. For example, if A, intending to murder B, shoots at B but misses and kills C who, unknown to A, was standing close by, A is still guilty of murder. This is known as the doctrine of transferred malice. It is important to note that it operates only when the *actus reus* and the *mens rea* of the same offence coincide. If a person, with the *mens rea* of one offence, does an act which causes the *actus reus* of a different offence, he or she cannot, as a general rule, be convicted of either offence.

**5.2.15** **Recklessness.** A person is reckless if:<sup>1</sup>

- a. Knowing that there is a risk that an event may result from his or her conduct or that a circumstance may exist, he or she takes that risk; and
- b. It is unreasonable for the person to take the risk having regard to the degree and nature of the risk which he or she knows to be present.

## OFFENCES OF NEGLIGENCE

**5.2.16** There are a number of offences under the AFDA (and under civil law) that may be committed although a person's act or omission is neither intentional nor reckless with respect to some element in the *actus reus*, provided he or she is

1

*R v Stephenson* [1979] 2 All ER 1198, 1203 (CA).

negligent with respect to it. If an offence is one of negligence it will in most cases be clearly indicated in the text of the offence provision, eg by the use of the word 'negligently' or the phrase 'without having taken reasonable care'.<sup>2</sup>

- 5.2.17** **Negligence** means doing something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would not have done or alternatively omitting to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would have done.<sup>3</sup>

### STRICT LIABILITY OFFENCES WHICH PERMIT THE DEFENCE OF TOTAL ABSENCE OF FAULT

- 5.2.18** If a penal provision is reasonably capable of two interpretations, the interpretation which is most favourable to the accused must be adopted.<sup>4</sup> The general approach to statutory offences, where the words give no clear indication of legislative intent and there is no overriding judicial history, is to begin by asking whether there is anything weighty enough to displace the ordinary rule that intention is an essential ingredient of criminal liability.<sup>5</sup> If there is, the next question is whether the statutory purpose and the interests of justice are on balance best served by allowing a defence of total absence of fault.<sup>6</sup>

- 5.2.19** In this class of offence, where the statute is not specific as to the mental element, the accused has the burden of showing, on the balance of probabilities, that he or she acted honestly and with all due diligence. Typical examples of this class arise when the provision creating the offence is directed at conduct having a tendency to endanger the public or sections of the public.

### ABSOLUTE LIABILITY OFFENCES

- 5.2.20** There is a restricted class of statutory provisions where the legislative intent to impose absolute liability (that is, liability irrespective of fault) is clear from the statute either expressly or by necessary implication. A common indicator of this is where the statute provides for a specific no fault defence. In this class of offence there is no relevant mental element. No Service offences under the AFDA fall into this category.

2 See, for example, AFDA s 66.

3 *R v Sullivan* (1994) 1 NZCMAR 207, 213 (CMAC).

4 *Civil Aviation Department v MacKenzie* [1983] NZLR 78, 81 (CA).

5 *R v K* [2002] 1 AC 462 (HL).

6 *Millar v MOT* [1986] 1 NZLR 660 (CA).

## SECTION 3 – BURDEN OF PROOF AND STANDARD OF PROOF

### BURDEN OF PROOF

**5.3.1** As a general rule, there is no burden upon the accused to prove anything, except as set out in paragraph 5.3.6. It is for the presenting officer to present evidence to the disciplinary officer, and for the disciplinary officer to make appropriate enquiries, to determine whether the offence is proved *beyond reasonable doubt*.

**5.3.2** For example, though it might be absolutely clear that A struck B, A's superior officer (the *actus reus*), A cannot be found guilty of striking a superior officer if the striking might reasonably have been accidental. If that is the case, it has not been proved beyond reasonable doubt that A had the requisite mental element. A does not have to satisfy the disciplinary officer that the striking was accidental; the disciplinary officer must find A not guilty, even if the disciplinary officer is not satisfied that A's story is true, if the officer is left with a reasonable doubt as to whether it might be true.

**5.3.3** There are, however, a number of exceptions to this general rule. They may be conveniently classified under the following headings:

- a. The defence of insanity (see paragraph 5.4.4).
- b. Certain statutory defences available in respect of particular offences (eg AFDA ss 35, 36, 37, 62 and 72).
- c. Where the accused relies for his or her defence on any excuse, exception, exemption, or qualification contained in the provision creating the offence.<sup>7</sup>
- d. Where the accused is charged with a strict liability offence and relies for his or her defence on the fact that he or she was without fault (see paragraph 5.2.19).

**5.3.4** In each of these cases the burden of establishing the defence is on the accused, though it is sufficient for the accused to establish the defence on the balance of probabilities.

**5.3.5** For example, if A strikes B, her superior officer, and A's defence is that she did not know or have reasonable cause to know that B was her superior officer, she must establish that on the balance of probabilities, as that is a statutory defence, the proof of which is upon her by virtue of AFDA s 35(2). Similarly, if C is charged with leaving his post without lawful excuse (AFDA s 34(2)(d)) but his defence is that he did leave it for some lawful purpose, he must prove it on the balance of probabilities because the defence is in the nature of an 'excuse' contained in the provision creating the offence.

**5.3.6** Where the accused raises a defence such as intoxication, compulsion or self-defence, which is not referred to in paragraph 5.3.3, the accused does not have the burden of establishing it. If no facts from which the defence might reasonably be inferred appear from the evidence presented in support of the charge, the accused must lay a foundation for the defence by introducing



evidence of such facts. Once such a foundation has been laid, however, the disciplinary officer must satisfy himself or herself beyond reasonable doubt that the accused is not entitled to be acquitted on account of that defence.

## STANDARD OF PROOF

**5.3.7** The disciplinary officer must be satisfied of the accused's guilt beyond reasonable doubt before he or she may find the accused guilty. The starting point is the presumption of innocence. The disciplinary officer must treat the accused as innocent until his or her guilt is proved. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence. Proof beyond reasonable doubt is a very high standard of proof which will have been met only if, at the end of the case, the disciplinary officer is sure that the accused is guilty. It is not enough for the disciplinary officer to be persuaded that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and that is not necessary. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in the disciplinary officer's mind about the guilt of the accused after the disciplinary officer has given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, the disciplinary officer is sure that the accused is guilty, he or she must find the accused guilty. On the other hand, if the disciplinary officer is not sure that the accused is guilty, he or she must find the accused not guilty.<sup>8</sup>

**5.3.8** The disciplinary officer must first be satisfied that every fact which is material and necessary to constitute the offence charged has been proved; put generally, that the offence charged was committed by someone and that the accused was the person who committed it. If this is proved, either by means of the witnesses called in support of the charge or with the aid of those called for the defence, it is open to the disciplinary officer to find the accused guilty in default of a sufficient answer or explanation by the accused or his or her witnesses. Such answer or explanation may take either of two forms or a combination of both. The accused may deny an allegation (eg 'I was not there') or may admit an allegation and seek to explain it away (eg 'I was there perfectly innocently. I had gone there to fetch my oilskin'). The accused is not obliged to furnish a satisfactory answer to every point proved against the accused or admitted by him or her. As a rule, it is sufficient for an acquittal if the accused's story, taken as a whole, together with such facts as have been proved against the accused or admitted by him or her may reasonably be true and if the inference to be drawn from that entire picture is either one of innocence, or uncertainty whether the accused's guilt has been established (but see AFDA s 3(2), and paragraph 5.3.3). If, after hearing all the evidence, the disciplinary officer is not satisfied beyond reasonable doubt of the accused's guilt, the accused must be found not guilty.

**5.3.9** Where a specific intent is an ingredient of an offence, it must be proved that the accused acted with that intent when he or she did what is alleged. Unless, however, the accused provides some direct evidence of his or her intent, as by a confession of it, it must usually be proved by means of the inference to be drawn from other evidence brought before the disciplinary officer. The disciplinary

officer must decide whether the accused did intend or foresee a particular result by reference to all the evidence, drawing such inferences from the evidence as appear proper in all the circumstances. If, on the whole of the evidence, there is room for more than one view as to the intent of the accused, the view which is most favourable to the accused must be adopted.

## SECTION 4 – MATTERS OF JUSTIFICATION OR EXCUSE

### INTRODUCTION

- 5.4.1** Where a person has caused an *actus reus* with the appropriate *mens rea*, he or she will generally be held criminally responsible. But this is not invariably so, because there are certain legal justifications or excuses (**defences**) which may still be available.
- 5.4.2** In certain cases the section creating the offence will also create a defence to it, as in AFDA ss 35 to 37, 62 and 72. But there are also a number of other defences which may be available, either in respect of certain types of offence, as in the case of self defence, or in respect of offences generally. They are all dealt with by Part 3 of the Crimes Act 1961 which applies, where applicable and with all necessary modifications, to every offence under the AFDA.<sup>9</sup>
- 5.4.3** This section discusses the more important defences dealt with by Part 3 of the Crimes Act.<sup>10</sup>

### INSANITY AND FITNESS TO STAND TRIAL

- 5.4.4** As has been seen, the basis on which a person is generally held criminally responsible is that he or she possessed a certain mental state at the time he or she committed a forbidden act. A mentally ill person, however, might, by reason of his or her illness, be unable to think rationally about an act at the time he or she committed it. If this is so, that person cannot be held responsible for it in the normal way. It may be that the person is unfit to stand trial. Alternatively, at trial it may be open to the accused to plead insanity as a defence on the basis of 'natural imbecility or a disease of the mind'.<sup>11</sup>
- 5.4.5** As the determination of fitness to stand trial and whether or not the defence of insanity is available are complex questions of law reserved to the Court Martial under Part 10 of the AFDA, if such an issue is raised during summary proceedings, or the disciplinary officer considers it should be raised, the disciplinary officer should:
- a.** Record a finding under AFDA s 108(2)(a) that he or she is not empowered to act as a disciplinary officer in relation to the charge;
  - b.** Remand the accused for trial in the Court Martial; and
  - c.** Refer the charge to the DMP.<sup>12</sup>

### AUTOMATISM

- 5.4.6** The defence of automatism is founded in the concept of voluntariness.<sup>13</sup> It is related to the defence of insanity in this respect, but sane automatism relates to

<sup>9</sup> AFDA s 3(1).

<sup>10</sup> The Crimes Act 1961 may be viewed on-line at:  
<http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>.

<sup>11</sup> Section 23 of the Crimes Act 1961.

<sup>12</sup> AFDA s 111.

<sup>13</sup> See paragraph 5.2.5.

involuntary conduct induced by an external cause, eg a drug or concussion from a blow to the head, rather than from a 'disease of the mind'.

- 5.4.7** As the determination of whether or not the defence of automatism is available is a complex question of law, if such an issue is raised during summary proceedings, or the disciplinary officer considers it should be raised, the disciplinary officer should take the action prescribed in paragraph 5.4.5.

## INTOXICATION

- 5.4.8** Intoxication, either as a consequence of alcohol or drugs, is not a defence. However, the degree of intoxication is relevant to whether or not the accused had the requisite *mens rea* for the particular charge.<sup>14</sup> The disciplinary officer should take into account the fact that a drunken intent may still be an intent to do a particular act. Whether the level of drunkenness is so great that the accused did not intend his or her actions is a question of fact and degree.

- 5.4.9** In some cases, it may be claimed that the intoxication was so great that the accused did not act voluntarily. This amounts to a defence of automatism, in which case the disciplinary officer should act under paragraph 5.4.7.

## MISTAKE

- 5.4.10** **General.** Mistake is a defence where it prevents a person from having the *mens rea* of the offence with which he or she is charged. A mistake which does not preclude *mens rea* is irrelevant and no defence. Where the law requires intention or recklessness with respect to some element in the *actus reus*, a mistake which precludes both states of mind will excuse. Where negligence is enough, then only a reasonable mistake can afford a defence; for an unreasonable mistake, by definition, is one which a reasonable person would not make and is therefore negligent. Where absolute liability is imposed, then even a reasonable mistake will not excuse. When considering mistake, a distinction must be drawn between mistakes of law and mistakes of fact.

- 5.4.11** **Mistake of law.** Generally speaking, ignorance of the law as to what constitutes an offence is no defence.<sup>15</sup> Knowledge that the act or omission is forbidden by law is usually no part of the *mens rea*, eg a person under the unfortunate misapprehension that theft does not constitute an offence cannot excuse himself or herself on that ground when he or she knowingly steals another's property. But in some offences the definition of the *actus reus* contains some aspect of legal status: a mistake as to the legal status of a person or thing on the facts (being a mistake of fact and law) may result in the accused not being intentional or reckless as to that element of the *actus reus*, so that he or she thereby lacks *mens rea*.<sup>16</sup> The question most frequently arises in property cases where the definition of the offence requires that the *actus reus* be caused by the accused 'without claim of right'; a mistake as to the law of property may enable the accused to rely on the defence of claim of right (see paragraph 5.4.31). It is important to note, however, the narrow limits within which the defence operates. The mistake must be one which leads the accused to believe he or she has a right to act in the alleged manner; it is not enough that he or she simply believes the act is not a crime.

<sup>14</sup> *R v Kamipeli* [1975] 2 NZLR 610 (CA).

<sup>15</sup> Section 25 of the Crimes Act 1961.

<sup>16</sup> See *R v Foox* (1999) 17 CRNZ 216 (CA).

**5.4.12 Mistake of fact.** Normally a genuine belief in the existence of facts which, if they existed, would constitute a defence is itself a sufficient defence, even if the mistaken belief is not based on reasonable grounds.<sup>17</sup> For example, if on a charge of absence without leave the disciplinary officer found that the accused believed, however unreasonably, that he had leave at the relevant time, the accused would be entitled to an acquittal. However, for some offences a reasonable and honest belief is required, for example that the victim consented to sexual connection, in the case of sexual violation.<sup>18</sup> This additional requirement is invariably provided for in the statute.

## COMPULSION

**5.4.13 Definition.** This defence, which embraces the common law defence of duress, is set out in section 24 of the Crimes Act 1961. Before an accused can resort to it, there must be evidence that:

- a. Threats were directed to the accused (or some other person<sup>19</sup>) by another who is present at the commission of the offence.
- b. Such threats were of immediate death or grievous bodily harm.<sup>20</sup>
- c. The accused believed the threats would be carried out.
- d. The accused was not a party to any association or conspiracy whereby he or she was subject to compulsion. However, the mere fact that the accused was a party to a criminal enterprise does not negative the defence. The association must be such that the accused should have foreseen the possibility that it might subject him or her to compulsion.<sup>21</sup>

**5.4.14 Onus of proof.** Where the accused raises the defence, the disciplinary officer cannot discount it unless he or she satisfies himself or herself, beyond reasonable doubt, that the defence is not available.<sup>22</sup>

**5.4.15 Exclusion of defence.** The defence is not available in respect of the following crimes:<sup>23</sup>

- a. Treason or communicating secrets;<sup>24</sup>
- b. Sabotage;<sup>25</sup>
- c. Piracy;<sup>26</sup>
- d. Piratical acts;<sup>27</sup>

17 *R v Wood* [1982] 2 NZLR 233, 237 (CA).

18 Section 128 of the Crimes Act 1961.

19 See *R v Sowman* [2007] NZCA 309, paragraph [40].

20 See paragraph 4.5.31 for the meaning of **grievous bodily harm**.

21 *R v Joyce* [1968] NZLR 1070, 1076-1077 (CA).

22 See paragraph 5.3.6.

23 Section 24(2) of the Crimes Act 1961.

24 Sections 73 and 78 of the Crimes Act 1961.

25 Section 79 of the Crimes Act 1961.

26 Section 92 of the Crimes Act 1961.

27 Section 93 of the Crimes Act 1961.

- e. Murder;<sup>28</sup>
- f. Attempted murder;<sup>29</sup>
- g. Wounding with intent;<sup>30</sup>
- h. Injuring with intent to cause grievous bodily harm;<sup>31</sup>
- i. Abduction;<sup>32</sup>
- j. Kidnapping;<sup>33</sup>
- k. Robbery;<sup>34</sup>
- l. Aggravated robbery;<sup>35</sup> and
- m. Arson.<sup>36</sup>

## SUPERIOR ORDERS

**5.4.16** It is unsettled whether there is a general defence of obedience to superior orders in New Zealand law. In *Police v Vialle*,<sup>37</sup> the Court of Appeal left the question open. Section 47 of the Crimes Act 1961 provides that members of the Armed Forces are justified in obeying any command given by their superior officer for the suppression of a riot unless the command is manifestly unlawful. In *Police v Vialle*, the Court noted that 'that special provision tends by implication to support the view that in general a superior order cannot be itself a defence if what was done or ordered to be done was unlawful'.

**5.4.17** If an accused does a prohibited act in accordance with superior orders, that is relevant to whether he or she:<sup>38</sup>

- a. Had the necessary accompanying *mens rea* for the offence; or
- b. Was negligent, if the offence is one of negligence.

**5.4.18** If a charge is recorded under the International Crimes and International Criminal Court Act 2000, there is a limited defence of superior orders under section 12(1)(a)(xi) of that Act and article 33 of the Rome Statute of the International Criminal Court. Legal advice is to be obtained before proceeding with such a charge.

28 Sections 167 and 168 of the Crimes Act 1961.  
 29 Section 173 of the Crimes Act 1961.  
 30 Section 188 of the Crimes Act 1961.  
 31 Section 189(1) of the Crimes Act 1961.  
 32 Section 208 of the Crimes Act 1961.  
 33 Section 209 of the Crimes Act 1961.  
 34 Section 234 of the Crimes Act 1961.  
 35 Section 235 of the Crimes Act 1961.  
 36 Section 267 of the Crimes Act 1961.  
 37 [1989] 1 NZLR 521, 524 (CA).  
 38 *Police v Vialle*, see above.

**SELF-DEFENCE**

- 5.4.19 General.** Section 48 of the Crimes Act 1961 provides that: ‘Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.’
- 5.4.20 Analysis.** When self-defence is raised, the disciplinary officer must analyse the evidence before him or her in answering the following questions:
- a. What were the circumstances that the accused believed to exist?**  
This is a subjective question; it does not matter what the circumstances actually were or whether the accused’s belief was a reasonable one, provided it was the accused’s honest belief.
  - b. In those circumstances, was the force used reasonable in the defence of the accused or another person?** This question has two sub-parts:
    - (1)** Was it reasonable to use force at all?
    - (2)** If it was reasonable to use force, was the force used in proportion to the threat?

These matters are to be judged by the disciplinary officer from an objective standpoint.

- 5.4.21** If the answer to either of the questions posed in paragraph 5.4.20b is no, the accused is criminally responsible for the excessive force used.<sup>39</sup>
- 5.4.22 Onus of proof.** See paragraph 5.4.14.

**CONSENT**

- 5.4.23 General rule.** The general rule is that, whether or not injury is intended, consent, and the accused’s honest belief in consent, is preserved by section 20(1) of the Crimes Act 1961 as a complete defence to any charge involving an assault, provided that what occurred comes within the scope of the consent.<sup>40</sup> If the accused honestly believes that the victim is consenting, it does not matter that that belief may be unreasonable.<sup>41</sup> This general rule is subject to the exceptions explained below in paragraphs 5.4.24 to 5.4.26.
- 5.4.24 No consent to death.** A person may not in law consent to be killed and the fact that a person has purported to do so does not alter the killer’s criminal responsibility.<sup>42</sup>
- 5.4.25 Fighting.** Consent is not a defence to fighting, other than sparring matches, playfights and organised matches conducted with a referee and according to established rules.<sup>43</sup>

<sup>39</sup> Section 62 of the Crimes Act 1961.

<sup>40</sup> *R v Lee* [2006] 3 NZLR 42, 119 (CA).

<sup>41</sup> This is not the case, however, on a charge of sexual violation: section 128 of the Crimes Act 1961.

<sup>42</sup> Section 63 of the Crimes Act 1961.

<sup>43</sup> *R v Lee*, see above.

**5.4.26 Where grievous bodily harm intended.** Where the accused, even in the course of an organised physical activity:

- a. Intended to cause grievous bodily harm; or
- b. Recklessly disregarded the safety of others;

public policy factors may require the disciplinary officer to disregard the consent of the victim for the purposes of determining the guilt or innocence of the accused.<sup>44</sup>

**5.4.27** When deciding whether consent should be disregarded under paragraph 5.4.26, the disciplinary officer is to take into account:<sup>45</sup>

- a. The victim's right to personal autonomy (ie to decide what he or she wishes to consent to);
- b. The social utility (or otherwise) of the activity;
- c. The level of seriousness of the injury intended or risked;
- d. The level of risk of such injury;
- e. The rationality of any consent or belief in consent; and
- f. Any other relevant factors in the particular case.

**5.4.28 Grievous bodily harm.** See paragraph 4.5.31.

**5.4.29 What constitutes consent?** To be true consent, consent must be freely given and fully informed.<sup>46</sup> Freely given means that it is given willingly and without duress or fear of retribution for that choice. Fully informed means that the victim must know what he or she is consenting to. Nevertheless, reluctant consent may still be genuine consent; it is for the disciplinary officer to determine the nature of the purported consent in the particular case.

**5.4.30 Implied consent.** Consent need not be express. It may be inferred from the circumstances. To kiss one's spouse or romantic partner, to shake hands on meeting, or to pat a friend by way of encouragement does not involve assault because of the implied consent.<sup>47</sup> Similarly, every member of society is taken to implicitly consent to the unavoidable level physical contact which occurs and is generally acceptable in the ordinary conduct of daily life. So nobody can complain of the jostling which is inevitable from his or her presence in, for example, a supermarket, an underground station or a busy street.<sup>48</sup>

44 *R v Lee*, see above.

45 *R v Lee*, see above.

46 *R v Cox*, unreported, Court of Appeal, 7 November 1996, CA213/96.

47 *Police v Bannin* [1991] 2 NZLR 237, 245.

48 *R v Brown* [1993] 2 All ER 75, 104 (HL).



**CLAIM OF RIGHT**

**5.4.31 General.** The definition of most offences involving interference with another's property includes the absence of 'claim of right' as an element of the offence.<sup>49</sup> In such cases the fact that the accused acted with claim of right will therefore provide a defence.

**5.4.32 Definition.** For the purposes of both the AFDA and the Crimes Act, the term 'claim of right' is defined in section 2(1) of the Crimes Act as follows:

**claim of right**, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed.

**5.4.33** It can therefore be seen that the defences of claim of right and mistake overlap (see paragraph 5.4.12). It is not necessary that the honest belief is also a reasonable one, though the unreasonableness of a claimed belief may be relevant to the credibility of the claim. The essence of the defence is honesty of purpose. Where an accused really believes he or she has the right asserted, it is a good defence (unless based on a mistake of the criminal law). The right supposed to be asserted need not be a right of the accused, and a claim of right may be asserted on behalf of another, eg where A takes B's property believing that it belongs to A's employer.

**5.4.34 Onus of proof.** Under the AFDA, the accused bears the onus of proving claim of right if he or she wishes to rely upon this as a defence.<sup>50</sup> The standard of proof is on the balance of probabilities.

49 AFDA ss 31, 57, 58 and 60 and sections 91, 219, 226, 228, 230, 267, 269, 271 and 307 of the Crimes Act 1961.

50 AFDA s 3(2).

## Chapter 6:

# THE LAW OF EVIDENCE

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## SECTION 1 – INTRODUCTION

### INTRODUCTION

- 6.1.1** This chapter provides guidance on the law of evidence as it applies to proceedings before a disciplinary officer. Section 4 Part C also applies to courts of inquiry. In any case of doubt, the disciplinary officer is to seek advice from a legal officer.

### THE MEANING AND PURPOSE OF EVIDENCE

- 6.1.2** Before a disciplinary officer is justified in finding an accused person guilty of an offence with which he or she is charged, the disciplinary officer must be satisfied beyond reasonable doubt that:

- a.** The alleged offence was committed; and
- b.** It was committed by the accused.

- 6.1.3** This result can only be obtained by establishing certain facts from which both **a** and **b** follow as a matter of course, or which are inconsistent with any rational conclusion other than **a** and **b**. The establishing of such facts is known as proving them. What facts may or may not be proved and how facts may be proved are determined by the rules of evidence.

- 6.1.4** As used in disciplinary proceedings, the word ‘evidence’ has two principal meanings:

- a.** The legal means, exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation; and
- b.** The subject-matter of such means.

- 6.1.5** The rules governing the proof of facts can be classified in six main divisions, namely:

- a. Relevance.** Does the evidence have a tendency to prove or disprove anything that is of consequence to the determination of the proceeding? (See Section 2.)
- b. Admissibility.** If the evidence is relevant, does the law permit evidence of that kind to be used as proof of a fact in a proceeding before a disciplinary officer? (See Section 3.)
- c. Mode of proof.** How may relevant and admissible evidence be lawfully brought before the disciplinary officer? (See Section 4.)
- d. Burden of proof.** If a fact is provable, who in a proceeding before a disciplinary officer has the legal duty to prove it? (See Chapter 5 Section 3.)

- e. **Weight of evidence.** How much value or weight is to be attached to evidence by the disciplinary officer? (See Section 5.)
- f. **Matters not requiring proof.** What things do not need to be proved by evidence? (See Section 6.).

## SECTION 2 – RELEVANCE

### GENERAL

- 6.2.1** Evidence is relevant in proceedings before a disciplinary officer if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceedings.<sup>1</sup>
- 6.2.2** The things which are of consequence to the determination of proceedings before a disciplinary officer are:
- a.** The elements of the offence; and
  - b.** Any matters of justification or excuse which might exculpate the accused, even if the elements of the offence are proved.
- 6.2.3** It follows that, in order to determine whether any evidence is relevant, the disciplinary officer must determine the elements of the offence and whether there are any such matters of justification or excuse which might exculpate the accused. The elements of most offences which will come before a disciplinary officer are set out in the Disciplinary Officer's Checklists in Chapter 4. Matters of justification or excuse are described in Chapter 5 Section 4. The disciplinary officer must then determine whether the evidence in question makes the existence of any of those elements or matters more or less likely. If it does, the evidence is relevant. If it does not, then the evidence is not relevant and is for that reason inadmissible under AFDA s 117ZK(2).

### CIRCUMSTANTIAL EVIDENCE

- 6.2.4** Facts, including the facts in issue, may be proved by direct or circumstantial evidence. The distinction does not lie in the nature of the evidence, since generally speaking all evidence must be direct in the sense that a witness may only speak of what he or she has seen, heard, or perceived by some sense other than sight or hearing. Instead the distinction lies in the manner in which the evidence that is tendered is used. For example, if the purpose for which the evidence is tendered is to prove fact A, direct evidence will be that of a witness who gives evidence of his or her observation of that very fact, whereas circumstantial evidence will be that of a witness who gives evidence not of his or her observation of fact A but of his or her observation of fact B or facts B, C, D, etc, from which an inference may be drawn as to the occurrence or non-occurrence of fact A. In regard to facts B, C, D, etc, such evidence is direct, but it is circumstantial in respect of fact A.
- 6.2.5** Both forms of evidence are equally admissible and 'both forms admit of every degree of cogency from the lowest to the highest'.<sup>2</sup> In the criminal sphere, reliance on circumstantial evidence is frequently necessary. In some cases, direct evidence is lacking. In such cases it is usual and proper for the disciplinary officer to decide on circumstantial evidence alone. Where the whole of the evidence is circumstantial, however, the disciplinary officer, after considering all the facts and circumstances together, must be satisfied beyond reasonable doubt that the inference of guilt is the only inference to be drawn

<sup>1</sup> AFDA s 117ZK(3).

<sup>2</sup> *Phipson on Evidence* (11th ed) 4.

before he or she can properly find the accused guilty. In other words, the disciplinary officer must be sure not only that the facts and circumstances are consistent with the accused having committed the offence, but the disciplinary officer must also be satisfied that the facts are such as to be inconsistent with any rational conclusion other than that the accused is guilty.

**6.2.6** In any case involving circumstantial evidence, it is necessary to consider the weight of the united force of all the circumstances put together. Where it is sought to establish a proposition by circumstantial evidence, all the facts proved must be consistent with the proposition. Circumstantial evidence is not like links in a chain, for if any one link broke the chain would fall. It is more like a rope composed of several strands. One strand might be insufficient to support the weight, ie the burden of proof, but several strands together might be quite sufficient. Thus, what matters is their combined strength, not the strength of each circumstance considered separately.

**6.2.7** Some of the principal forms of circumstantial evidence in criminal cases are:

- a.** The financial or other circumstances of the accused;
- b.** His or her disposition;
- c.** His or her motives;
- d.** Any threats he or she has made;
- e.** Any preparations or attempts he or she has made;
- f.** His or her fabrication or destruction of evidence;
- g.** His or her attempt to evade the Service authorities;
- h.** His or her possession of stolen property.

These are all facts closely related to the facts in issue because they are facts from which an inference may be drawn as to the occurrence or non-occurrence of the facts in issue. For this reason, they are relevant to the disciplinary officer's decision on finding.

## SECTION 3 – ADMISSIBILITY

### GENERAL

- 6.3.1** If the disciplinary officer decides that certain evidence is relevant, it is admissible unless the general exclusionary rule applies.<sup>3</sup>

### GENERAL EXCLUSIONARY RULE

- 6.3.2** The disciplinary officer must exclude evidence if its probative value is outweighed by the risk that the evidence will:<sup>4</sup>
- a.** Have an unfairly prejudicial effect on the outcome of the proceedings;  
or
  - b.** Needlessly prolong the proceedings.
- 6.3.3** Probative value is sometimes referred to as weight, so the disciplinary officer must determine how much weight to give each item of evidence – how reliable each item of evidence is.
- 6.3.4** In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the outcome of a summary trial, the disciplinary officer must take into account the right of the accused to offer an effective defence.

### PREVIOUS OFFENDING BY THE ACCUSED

- 6.3.5** It is a fundamental rule of justice that an accused's guilt or innocence should be judged on the basis of the evidence in respect of the particular charge, not on the basis that 'he's done it before, so he probably did it this time too.' Accordingly, because of its prejudicial effect, the disciplinary officer must not consider any evidence relating to offences which the accused has committed prior to or since the alleged offending which the disciplinary officer is investigating or trying summarily, unless:
- a.** It is relevant to the accused's veracity,<sup>5</sup> and the accused has put his or her veracity in issue, either by offering evidence about his or her veracity, or by challenging the veracity of a prosecution witness, by reference to matters other than the facts in issue.<sup>6</sup>
  - b.** The similarity between the previous offending and the offending alleged in the present case is so great that the probative value of the evidence in relation to the accused's propensity to commit the offence outweighs the prejudicial effect.<sup>7</sup>

3 AFDA s 117ZK(1).

4 AFDA s 117ZK(4).

5 This is the term used by the law of evidence for truthfulness, or what used to be called credibility.

6 See section 38(2)(a) of the Evidence Act 2006.

7 See section 43 of the Evidence Act 2006.



## SECTION 4 – MODE OF PROOF

### PART A: GENERAL

#### GENERAL

- 6.4.1** A fact can be proved by three different methods, namely, by oral evidence, by real evidence (ie by objects), and by documentary evidence. Real evidence may be produced by a witness as an exhibit.

#### DOCUMENTARY EVIDENCE

- 6.4.2** Documentary evidence may be produced by a witness as an exhibit.
- 6.4.3** In addition, a written statement of a person's evidence may be admitted at the discretion of a disciplinary officer, with the consent of the accused, instead of calling that person to give evidence orally.<sup>8</sup> If the admission of such a statement is sought in proceedings before a disciplinary officer, the accused and the presenting officer must each be given:<sup>9</sup>
- a.** A copy of the statement; and
  - b.** A copy of every exhibit (if any) referred to in that statement or information that is sufficient to enable the recipient to inspect the exhibit or a copy of it.

#### ORAL EVIDENCE

- 6.4.4** Oral evidence is given by legally competent witnesses, upon oath or affirmation, in the regular course of examination, subject to contradiction as to facts and to discredit as to veracity, and to privilege in refusing to answer.

#### ELIGIBILITY AND COMPELLABILITY OF WITNESSES

- 6.4.5** Any person, other than the disciplinary officer, is eligible to give evidence at a summary trial.
- 6.4.6** A disciplinary officer may compel any person to give evidence in proceedings before him or her by issuing a summons in accordance with paragraphs 7.6.2 and 7.6.3, or ordering the person's attendance if the witness is a member of the Armed Forces. However, while a person may be compellable to be a witness before a disciplinary officer, such witnesses have the same privileges as witnesses in the High Court.<sup>10</sup> These are set out below in Part C.
- 6.4.7** **Accused.** The accused is not a compellable witness in support of the charge or for the defence.<sup>11</sup> The accused can, however, give evidence at his or her own summary trial if he or she wants to.<sup>12</sup>
- 6.4.8** **Persons jointly charged or being tried together.** Section 73 of the Evidence Act

8 AFDA s 117ZM(1).

9 AFDA s 117ZM(4).

10 AFDA s 150B(a).

11 Section 73 of the Evidence Act 2006.

12 AFDA s 117O(2)(c).

2006 provides that an accused is not compellable to give evidence for, or against, an associated accused, unless the accused has already been tried, or is being tried separately. An associated accused, in relation to the accused in a criminal proceeding, means a person against whom a prosecution has been instituted for an offence that arose in relation to the same events as did the offence for which the accused is being prosecuted, or an offence that relates to, or is connected with, the offence for which the accused is being prosecuted. Associated accused may be tried jointly or separately. An associated accused (who is subject to the AFDA) is compellable for either the accused or in support of the charge if:

- a. The proceedings against him or her have been stayed, or the charge against the associated accused has been withdrawn or dismissed;
- b. The associated accused has been acquitted of the offence; or
- c. The associated accused, having pleaded guilty to, or having been found guilty of, the offence, has been sentenced or otherwise dealt with for that offence.

## SUPPORT PERSONS

- 6.4.9** Section 79(1) of the Evidence Act 2006 provides that a complainant, when giving evidence, is entitled to have one support person and may, with the permission of the disciplinary officer, have more than one support person. Any other witness (including the accused if he or she gives evidence) may have one or more support persons with the permission of the disciplinary officer. However, the disciplinary officer may, in the interests of justice, direct that support may not be provided to a complainant or to a witness by any person, or a particular person.
- 6.4.10** The name of the support person must be disclosed to all parties as soon as practicable, unless the disciplinary officer orders otherwise.
- 6.4.11** The conduct of a support person and of the witness receiving the support comes under the control of the disciplinary officer. In particular, the support person should not speak to the witness while the witness is giving evidence.

## PART B: CALLING EVIDENCE FROM WITNESSES

### EXAMINATION TO BE FAIR AND IN ACCORDANCE WITH RULES OF EVIDENCE

- 6.4.12** When witnesses are before a disciplinary officer, it is the disciplinary officer's duty to ensure that the case is conducted fairly and properly. The disciplinary officer should ensure that the rules relating to the examination, cross-examination and re-examination of witnesses are complied with. Witnesses should not be hurried into answering questions (especially during cross-examination) without having time to consider their answers.
- 6.4.13** A person examining, cross-examining, or re-examining a witness must not put a question which assumes, or is based on the assumption, that facts have been proved which have not been proved, or that answers have been given which have not been given. It may sometimes be proper, however, for the accused (or his

or her defending officer) to ask a witness in support of the charge a question in some such form, eg whether he or she would maintain his or her statement if a witness to be called for the defence said something else (which the accused has in a statement from him or her).

## ORDER OF EXAMINATION

**6.4.14** If the accused pleads not guilty, the evidence in support of the charge must be called by the presenting officer assigned under AFDA s 115.<sup>13</sup> This is the examination-in-chief of the witnesses in support of the charge. On the conclusion of the examination-in-chief of each witness, the accused (or his or her defending officer) must be given the opportunity to cross-examine the witness.<sup>14</sup> The disciplinary officer may then allow the presenting officer to re-examine any witness who has been cross-examined, if the disciplinary officer thinks that would be helpful.<sup>15</sup> Finally, the disciplinary officer may 'put such questions to each witness who gives evidence orally in support of the charge that the disciplinary officer considers are necessary to ensure that he or she fully understands the witness's evidence'.<sup>16</sup> If the accused calls any witnesses, the accused or his or her defending officer conducts the examination-in-chief.<sup>17</sup> The disciplinary officer may then allow the presenting officer to cross-examine the witness, in which case the accused or defending officer may re-examine.<sup>18</sup> In all cases, this is followed by any questions that the disciplinary officer wishes to ask.<sup>19</sup>

## EXAMINATION-IN-CHIEF

**6.4.15** The examination-in-chief of a witness should produce a coherent account by the witness in his or her own words of the facts about which he or she can give evidence. Success or failure in reaching this ideal depends to a very great extent upon the good judgment of the examiner. The examiner must decide whether the witness is capable of telling his or her story in his or her own way without introducing irrelevant matters or omitting material points or whether it is necessary to elicit the evidence by a series of questions with the additional effect of 'keeping the witness under control'. Usually it is desirable that a witness should be kept under control so as to avoid irrelevancies and other breaches of the rules of evidence; he or she may also need to be prompted by questions to bring his or her mind to the points that need to be dealt with and here the examiner must take care not to transgress the rules governing the use of leading questions. (See paragraph 6.4.32.)

## CROSS-EXAMINATION: GENERAL

**6.4.16** The cross-examination of a witness is that part of the examination which consists of the witness being questioned by the side opposed to that by which he or she was called. It is proper to accord the accused (or defending officer) a degree of latitude in exercising his or her right to cross-examine witnesses in support of the charge.

13 AFDA s 117J(1)(c).

14 AFDA s 117J(2)(a).

15 AFDA s 117J(2)(b).

16 AFDA s 117J(2)(c).

17 AFDA s 117O(2)(d).

18 AFDA s 117O(4).

19 AFDA s 117O(5).

- 6.4.17** When cross-examining a witness, the cross-examiner must question the witness on 'significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.'<sup>20</sup>
- 6.4.18** If the cross-examiner does not comply with this duty to 'put the case', the disciplinary officer may:<sup>21</sup>
- a. Grant permission for the witness to be recalled and questioned about the contradictory evidence by the opposing party;
  - b. Admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence;
  - c. Exclude the contradictory evidence; or
  - d. Make any other order the disciplinary officer considers just.

## OBJECTS AND METHOD OF CROSS-EXAMINATION

- 6.4.19** Cross-examination affords security against incomplete, distorted, or false evidence. It helps the disciplinary officer to decide the issues of the case by enabling him or her to assess the relative weight of the evidence called by the presenting officer in support of the charge, and by the accused, upon those issues. The objects of cross-examination are to direct the attention of the disciplinary officer to those facts upon which the evidence for one side conflicts with the evidence for the other, and, if possible, either to elicit something favourable to the cross-examiner's case or to destroy or impeach something unfavourable to that case. If a cross-examiner has studied his or her case carefully, he or she will have little difficulty in determining the matters about which there is a conflict between the opposing sides.
- 6.4.20** In cross-examination of a witness much more latitude is allowed than in the examination-in-chief. The cross-examiner may put leading questions to the witness, ask the witness why he or she did or said things, and question him or her about matters which are not necessarily relevant to the issue, provided that they are relevant to whether the witness ought to be believed, ie relevant to his or her veracity.
- 6.4.21** It has been mentioned that in cross-examination questions may be put to a witness which are relevant only to his or her veracity without being necessarily relevant to the issue. The rights and obligations of the cross-examiner in this respect are explained in paragraphs 6.4.36 to 6.4.50; the privileges of a witness are explained in Part C. However, in cross-examination which goes to a matter in issue, it is not improper for the cross-examiner to put questions to a witness suggesting fraud, misconduct, or the commission of any criminal offence (even though he or she is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation the question conveyed), if he or she is satisfied that the matters suggested are part of his or her case.

20 Section 92(1) of the Evidence Act 2006.

21 Section 92(2) of the Evidence Act 2006.

However, in pursuing such a line of questioning, the cross-examiner must bear in mind his or her duty not to ask unacceptable questions (see paragraph 6.4.22) and that, to be admissible, veracity evidence must be **substantially helpful** in assessing the witness's veracity.

**6.4.22 Unacceptable questions.** Under section 85 of the Evidence Act 2006, the disciplinary officer has discretion to disallow, or direct that a witness is not obliged to answer, any question which the disciplinary officer considers improper, unfair, misleading, needlessly repetitive or expressed in language that is too complicated for the witness to understand. Section 85(2) sets out a number of considerations which the disciplinary officer may have regard to in determining whether to disallow a question or direct that a witness need not answer that question. These are:

- a. The age or maturity of the witness;
- b. Any physical, intellectual, psychological, or psychiatric impairment of the witness;
- c. The linguistic or cultural background or religious beliefs of the witness;
- d. The nature of the proceeding; and
- e. In the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

## RE-EXAMINATION

**6.4.23** If a witness is to be re-examined pursuant to AFDA ss 117J(2)(b) or 117O(4)(b), the re-examiner may question him or her on matters arising out of the cross-examination and only on those matters, unless the disciplinary officer gives his or her permission.<sup>22</sup> It follows that, if a witness has not been cross-examined, he or she cannot be re-examined.

**6.4.24** The object of re-examination is to give the witness an opportunity of explaining any seeming inconsistency in his or her answers in cross-examination and of stating the whole truth as to any matter which was touched on, but not fully dealt with, in cross-examination.

## RECALLING WITNESSES AND CALLING ADDITIONAL WITNESSES

**6.4.25** As a general rule, the whole case in support of the charge should be put before the disciplinary officer before the accused is called upon to make his or her defence. However, AFDA s 117P(1) provides that, if evidence is put forward on behalf of the accused, the presenting officer may, at the conclusion of the evidence on behalf of the accused, with the leave of the disciplinary officer, call or recall any witness to give evidence on any matter raised by, or on behalf of, the accused in his or her defence that the presenting officer:

- a. Could not properly have put before the disciplinary officer before the accused's defence was disclosed; or

- b. Could not reasonably have foreseen.

**6.4.26** This provision contemplates the situation where, for example:

- a. The defending officer offers evidence during the defence case as to the accused's veracity and the presenting officer wishes to call rebuttal evidence on this issue, which the presenting officer could not properly have done during the prosecution case under section 38(2) of the Evidence Act 2006;<sup>23</sup> or
- b. The defending officer raises a substantive defence, eg self-defence, during the defence case, which the presenting officer could not reasonably have foreseen, and wishes to call evidence to rebut.

**6.4.27** In such cases, the disciplinary officer may give the presenting officer leave to call an additional witness or witnesses, or recall witnesses who have already given evidence.

**6.4.28** The disciplinary officer has the power to call additional witnesses or recall witnesses who have already given evidence if he or she considers that it is in the interests of justice to do so.<sup>24</sup> If the disciplinary officer does so, he or she may allow the presenting officer, the accused, or both to put any questions to the witness that the disciplinary officer considers proper.<sup>25</sup>

## REFERENCE TO A DOCUMENT BY A WITNESS

**6.4.29** A witness may not read his or her evidence, unless both the accused and the presenting officer consent to the giving of evidence in this form.<sup>26</sup>

## REFRESHING MEMORY

**6.4.30** For the purposes of refreshing his or her memory while giving evidence, a witness may, with the prior leave of the disciplinary officer, consult a document made or adopted at a time when his or her memory was fresh.<sup>27</sup> **Document** is widely defined, and includes written material, drawings, photographs, maps and electronically stored information.<sup>28</sup>

**6.4.31** Any document to be consulted by a witness must be shown to every other party in the proceeding.<sup>29</sup>

## LEADING QUESTIONS

**6.4.32** Reference has already been made to the impropriety in certain cases of putting leading questions to a witness. A leading question is one which is framed in such a way as to suggest the answer required or which contains a statement of some fact material to the issue. A question which enables a witness to answer 'Yes' or 'No', and which suggests which of those answers he or she should give,

23 Section 83(1)(b) of the Evidence Act 2006.

24 AFDA s 117P(2).

25 AFDA s 117P(3).

26 Section 83(1)(b) of the Evidence Act 2006.

27 Section 90(5) of the Evidence Act 2006.

28 Section 4(1) of the Evidence Act 2006.

29 Section 90(3) of the Evidence Act 2006.

is particularly leading. For example, a witness called to testify that A stole a pair of shoes from B's locker must not be asked, 'Did you see A go to B's locker and take a pair of shoes?'; for that question contains a statement of fact which is part of the issue being tried. Once it has been established that A was present, the question should simply be, 'What did you see?'.

**6.4.33** As a general rule leading questions may not be put to a witness during the examination-in-chief or any re-examination. However, 'leading' up to a certain point in examination-in-chief is not only permissible, but desirable, to avoid wasting time. In most cases it is necessary to prove a certain number of uncontested facts in order that the position of the parties and the circumstances surrounding the case may be understood by the disciplinary officer. As to these matters, leading questions may be put without objection.

**6.4.34** In cross-examination there is no objection to the use of leading questions.

#### REMINDING WITNESS OF PREVIOUS EVIDENCE

**6.4.35** There is no objection to bringing the attention of a witness to a portion of his or her previous evidence, or the evidence of another witness, for the purpose of asking a question in cross-examination.

#### CONTRADICTION OF WITNESSES

**6.4.36** **General.** The contradiction of a witness consists in calling other evidence which contradicts the evidence that the witness in question has given. The rules governing the contradiction of witnesses differ according to whether the witness has been called by the party seeking to contradict him or her, or by that party's opponent.

**6.4.37** **Party's own witness.** If a witness gives evidence which is unfavourable to the party who has called him or her, such party may call other witnesses to give contradictory evidence of the matters about which the first witness has given unfavourable evidence, and it will be for the disciplinary officer to decide where the truth lies.

**6.4.38** **Restrictions on discrediting own witness.** See paragraph 6.4.48.

**6.4.39** **Opponent's witnesses.** After a proper foundation has been laid in cross-examination, a party may contradict his or her opponent's witnesses by independent evidence on all matters relevant to the issue. Thus the accused, having challenged a witness in support of the charge on a particular matter in cross-examination, may call a witness to contradict the witness in support of the charge on that particular point.

**6.4.40** **Contradiction as to veracity.** Contradictory evidence can generally speaking only be called in relation to matters relevant to the issue. Thus denials of matters put to a witness in cross-examination for the purpose of challenging his or her veracity which are not relevant to the issue cannot usually be contradicted and the answers of the witness must be accepted as conclusive. The basis of this rule relating to collateral questions is now the general exclusionary rule in AFDA s 117ZK(4) – such evidence is likely to needlessly prolong the proceedings. The following have been accepted as exceptions to this rule:



- a. Previous convictions;
- b. Evidence of bias for or against the accused; and
- c. Previous inconsistent statements.

**6.4.41 Previous inconsistent statement may be proved.** Where it appears to a party that one of his or her opponent's witnesses has on a previous occasion made a statement relevant to the issue which is inconsistent with the evidence he or she has given to the disciplinary officer, the party has the right to call independent evidence to prove this fact, subject to the special conditions explained immediately below.

**6.4.42 Previous inconsistent statements by opponent's witness.** When it appears that a witness has made a statement before appearing before the disciplinary officer which is relevant to the issue and is inconsistent with the evidence he or she has given, the witness must first be asked in cross-examination whether he or she did make such a statement (orally or in writing) on such and such an occasion (such statement must be relative to the subject-matter of the case). The cross-examiner must mention to the witness the circumstances in which the supposed statement was made in sufficient detail to identify the particular occasion to the witness. If the witness does not then distinctly admit that he or she made the alleged statement as put to him or her, the witness may be cross-examined about it and proof may be given in due course that he or she did in fact make it.<sup>30</sup>

**6.4.43 Previous oral statement.** If the previous statement was made orally, the cross-examiner must ask leave of the disciplinary officer to call as a witness some person who heard the witness make the statement.

**6.4.44 Previous written statement.** If the previous statement by the witness was in writing (eg a signed statement to the Service Police), the witness may first of all be questioned about it without being shown the document, his or her attention being drawn to those parts which are alleged to be inconsistent with his or her present evidence. If the witness then does not expressly admit making the statement, the document must be shown to him or her and the witness must be asked whether it is signed by him or her or in his or her handwriting or written at his or her direction, as the case may be. If the witness does not admit this, the cross-examiner may ask leave of the disciplinary officer to call a witness to identify the handwriting or signature of the witness concerned or to swear that the statement was written at the direction or dictation of the witness concerned.

**6.4.45 Mere inconsistency sufficient.** The former statement need not be either directly or absolutely at variance with the present evidence—mere inconsistency is sufficient.

**6.4.46 Purpose of proving previous statement.** Unless a witness who is not a party unequivocally adopts his or her former statement as true at the summary trial, it does not become evidence and must be disregarded by the disciplinary officer except as tending to discredit the subsequent evidence of the witness.



**DISCREDITING WITNESSES**

- 6.4.47 General.** When a witness is giving evidence, the disciplinary officer must consider the extent to which he or she can be believed; so a party cross-examining an opponent's witness is entitled to show, if he or she can, that the disciplinary officer ought not to attach full weight to what the witness has said, either because the witness, though truthful, is mistaken or forgetful or because the witness is concealing or distorting the truth or even giving false evidence deliberately. The rules for dealing with the latter kind of witness are explained below.
- 6.4.48 When party's own witness is 'unfavourable'.** When a party calls a witness, he or she has to accept the witness with all his or her defects. If the witness gives evidence which is unexpectedly unfavourable to the party calling him or her, that party may, as has already been explained, contradict that evidence by the evidence of other witnesses who can testify to the same incidents. But the party calling the witness cannot, merely on the ground that the witness has given unfavourable evidence, call witnesses to show that his or her own witness is not the sort of person who should be believed, and he or she may not cross-examine the witness in such a case, unless the disciplinary officer declares the witness **hostile**.<sup>31</sup>
- 6.4.49 Hostile witness** means a witness who:<sup>32</sup>
- a. Exhibits, or appears to exhibit a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge;
  - b. Gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or
  - c. Refuses to answer questions or deliberately withholds evidence.
- 6.4.50** If the disciplinary officer determines that a witness is hostile and gives permission, the party who has called the witness may cross-examine the witness to the extent authorised by the disciplinary officer.<sup>33</sup>

**PART C: PRIVILEGE<sup>34</sup>****PRIVILEGE AGAINST SELF-INCRIMINATION**

- 6.4.51** Section 60 of the Evidence Act 2006 confers the privilege against self-incrimination. This privilege is the privilege of the witness, and applies to witnesses giving evidence before disciplinary officers, as well as where a person is required to provide specific information either by a person exercising a statutory power or duty or by a police officer or other public office holder in the course of investigating a criminal offence, if the provision of that information

31 Section 37(4)(a) of the Evidence Act 2006.

32 Section 4(1) of the Evidence Act 2006.

33 Section 94 of the Evidence Act 2006.

34 This section also applies to courts of inquiry, as to which see Chapter 11 Section 2. Where the section refers to the disciplinary officer, this should be read as the president in the case of a court of inquiry.

would be likely to incriminate the person under New Zealand law. It does not apply to the accused when giving evidence about the matter for which he or she is being tried.

**6.4.52** To **incriminate** means to provide information that is reasonably likely to lead to, or increase the likelihood of, the prosecution of a person for a criminal offence.<sup>35</sup>

**6.4.53** If it appears to a disciplinary officer that a witness may have grounds to claim the privilege against self-incrimination in respect of specific information required to be provided by that person, the disciplinary officer must satisfy himself or herself that the person is aware of the privilege and its effect.<sup>36</sup> If the witness claims the privilege, he or she must provide sufficient evidence to enable the disciplinary officer to assess whether self-incrimination is reasonably likely, if the person provided the information.<sup>37</sup>

**6.4.54** If the disciplinary officer assesses that self-incrimination is reasonably likely, the witness has the right to refuse to disclose the information.<sup>38</sup> The witness may however waive the privilege.<sup>39</sup>

## PRIVILEGE OF INFORMERS

**6.4.55** In the Service context, a person is an informer if he or she:<sup>40</sup>

- a. Supplies information to the Service Police or another Service authority, concerning the possible or actual commission of an offence, in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed; and
- b. Is not called to give evidence in support of the charge relating to that information.

**6.4.56** An informer has a privilege in respect of information that would disclose, or is likely to disclose, the informer's identity (**ID information**).<sup>41</sup> The privilege encompasses the rights to:

- a. Refuse in a proceeding to disclose his or her ID information;<sup>42</sup>
- b. Require non-disclosure of that information by any person who has received the informer's ID information from or with the authority of the informer in confidence, and for purposes related to the informer's supply of information to the Service Police or other Service authority; and<sup>43</sup>
- c. Waive the privilege.<sup>44</sup>

35 Section 4(1) of the Evidence Act 2006.  
 36 Section 62(1) of the Evidence Act 2006.  
 37 Section 62(2) of the Evidence Act 2006.  
 38 Section 53(2) of the Evidence Act 2006.  
 39 See paragraph 6.4.71.  
 40 Section 64(2) of the Evidence Act 2006.  
 41 Section 64(1) of the Evidence Act 2006.  
 42 Section 53(2) of the Evidence Act 2006.  
 43 Section 53(3) of the Evidence Act 2006.  
 44 See paragraph 6.4.71.

- 6.4.57** The disciplinary officer may disallow an informer's privilege if he or she is of the opinion that the ID information needs to be disclosed to enable the accused to present an effective defence.<sup>45</sup>

#### LEGAL PROFESSIONAL PRIVILEGE AND LITIGATION PRIVILEGE<sup>46</sup>

- 6.4.58** A client who obtains professional legal services from a lawyer<sup>47</sup> has legal professional privilege in respect of any communication (**privileged communication**) between the client and the lawyer if the communication was:<sup>48</sup>

- a. Intended to be confidential; and
- b. Made in the course of and for the purpose of the client obtaining professional legal services or the lawyer giving such services to the client.

- 6.4.59** A person who is, or on reasonable grounds contemplates becoming, party to a proceeding conducted by a court has litigation privilege in respect of any communication or information (**privileged information**) made, received, compiled or prepared for the dominant purpose of preparing for the proceeding.<sup>49</sup> The privilege applies to:<sup>50</sup>

- a. A communication between the party or his or her lawyer and any other person; and
- b. Information compiled or prepared by the party, his or her lawyer, or any other person at the request of the party or the lawyer.

- 6.4.60** The privileges mentioned above encompass the rights to:

- a. Refuse in a proceeding to disclose the privileged communication or information;<sup>51</sup>
- b. Require non-disclosure of the privileged communication or information by the lawyer or any other person who has come into possession of the communication or information in confidence with the authority of the person who has the privilege, and for purposes related to the circumstances in which the privilege has arisen; and<sup>52</sup>
- c. Waive the privilege.<sup>53</sup>

The disciplinary officer must disallow legal professional or litigation privilege if satisfied that there is a prima facie case that the communication was made or

45 Section 67(2) of the Evidence Act 2006.

46 The privileges are described here in abbreviated form. Further advice on the extent of the privileges may be obtained from a legal officer.

47 **Lawyer** means a person who holds a current practising certificate as a barrister or solicitor: section 51(1) of the Evidence Act 2006 and section 6 of the Lawyers and Conveyancers Act 2006.

48 Section 54(1) of the Evidence Act 2006.

49 Section 56 of the Evidence Act 2006.

50 Section 56(2) of the Evidence Act 2006.

51 Section 53(1) of the Evidence Act 2006.

52 Section 53(3) of the Evidence Act 2006.

53 See paragraph 6.4.71.

received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.<sup>54</sup>

- 6.4.61** The disciplinary officer may disallow legal professional or litigation privilege if he or she is of the opinion that the privileged communication or information needs to be disclosed to enable the accused to present an effective defence.<sup>55</sup>

#### CHAPLAINCY PRIVILEGE<sup>56</sup>

- 6.4.62** A person has a privilege in respect of any communication (**privileged communication**) with a chaplain if the communication was:<sup>57</sup>

- a. Made in confidence to or by the chaplain in his or her pastoral capacity; and
- b. Made for the purpose of the person obtaining or receiving religious or spiritual advice, benefit or comfort.

- 6.4.63** The privilege encompasses the rights to:

- a. Refuse in a proceeding to disclose the privileged communication or information;<sup>58</sup>
- b. Require non-disclosure of the privileged communication or information by the chaplain or any other person who has come into possession of the communication in confidence with the authority of the person who has the privilege, and for purposes related to delivery of pastoral care by the chaplain; and<sup>59</sup>
- c. Waive the privilege.<sup>60</sup>

- 6.4.64** The disciplinary officer must disallow chaplaincy privilege if satisfied that there is a prima facie case that the communication was made or received for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.<sup>61</sup>

- 6.4.65** The disciplinary officer may disallow chaplaincy privilege if he or she is of the opinion that the privileged communication needs to be disclosed to enable the accused to present an effective defence.<sup>62</sup>

54 Section 67(1) of the Evidence Act 2006.

55 Section 67(2) of the Evidence Act 2006.

56 This privilege also applies to civilian ministers of religion. See *R v F* (1997) 1 NZCMAR 277 (CMAC).

57 Section 58(1) of the Evidence Act 2006.

58 Section 53(1) of the Evidence Act 2006.

59 Section 53(3) of the Evidence Act 2006.

60 See paragraph 6.4.71.

61 Section 67(1) of the Evidence Act 2006.

62 Section 67(2) of the Evidence Act 2006.

**MEDICAL PRIVILEGE**

- 6.4.66** If a patient consults a medical practitioner<sup>63</sup> or clinical psychologist<sup>64</sup> for a drug dependency or any other condition or behaviour that may manifest itself in criminal conduct, the patient has a privilege in respect of:
- a.** Any communication made to the medical practitioner or clinical psychologist that the patient believes is necessary for that patient's treatment for the condition or behaviour;<sup>65</sup>
  - b.** Any information obtained by the medical practitioner or clinical psychologist as a result of consulting with or examining the patient in connection with the patient's treatment for the condition or behaviour;<sup>66</sup> and
  - c.** Any prescription, or notes of a prescription, for treatment prescribed by the medical practitioner or clinical psychologist in connection with the patient's treatment for the condition or behaviour.<sup>67</sup>
- 6.4.66A** Pursuant to the Health Act 1956, health practitioners may disclose relevant medical information if that information is required by a commander for the purposes of administering the AFDA or the DA. The advice of a legal officer is to be sought to determine if this exception applies.<sup>67A</sup>
- 6.4.67** **Drug dependency** means the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug<sup>68</sup> detrimental to the user, and involving a compulsive desire to continue consuming, smoking, or otherwise using the drug or a tendency to increase the dose of the drug.<sup>69</sup>
- 6.4.68** The privilege encompasses the rights to:
- a.** Refuse in a proceeding to disclose the privileged communication or information;<sup>70</sup>
  - b.** Require non-disclosure of the privileged communication or information by the medical practitioner or clinical psychologist, or any other person who has come into possession of the communication or information in confidence with the authority of the patient, and for purposes related to the treatment of the patient; and<sup>71</sup>
  - c.** Waive the privilege.<sup>72</sup>

63 See section 5(1) Health Practitioners Competence Assurance Act 2003 for the definition of this term.

64 See section 59(6) of the Evidence Act 2006 for the definition of this term.

65 Section 59(2) of the Evidence Act 2006.

66 Section 59(3) of the Evidence Act 2006.

67 Section 59(4) of the Evidence Act 2006.

67A Section 22C of the Health Act 1956.

68 See paragraph 4.7.1 for the definition of controlled drug.

69 Section 59(6) of the Evidence Act 2006.

70 Section 53(1) of the Evidence Act 2006.

71 Section 53(3) of the Evidence Act 2006.

72 See paragraph 6.4.71.

- 6.4.69** The disciplinary officer must disallow medical privilege if satisfied that there is a *prima facie* case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, to be an offence.<sup>73</sup>
- 6.4.70** The disciplinary officer may disallow medical privilege if he or she is of the opinion that the privileged communication or information needs to be disclosed to enable the accused to present an effective defence.<sup>74</sup>

### WAIVER OF PRIVILEGE

- 6.4.71** A person who is entitled to a privilege in respect of any communication or information may waive his or her privilege expressly or impliedly under section 65 of the Evidence Act 2006, and is deemed to do so if:
- a.** That person, or a person acting with his or her authority, voluntarily discloses or consents to the disclosure of any significant part of the privileged communication or information in circumstances that are inconsistent with a claim of confidentiality;<sup>75</sup> or
  - b.** That person acts so as to put the privileged communication or information in issue in the proceedings.<sup>76</sup>

### OVERRIDING DISCRETION AS TO CONFIDENTIAL INFORMATION

- 6.4.72** In addition to the specific privileges mentioned in the foregoing paragraphs of this Part, the disciplinary officer may direct that a particular item of confidential information or a confidential communication not be disclosed at a summary trial, on the grounds that the public interest in the disclosure of the communication or information is outweighed by the public interest in:<sup>77</sup>
- a.** Preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated;
  - b.** Preventing harm to the particular relationship in the course of which the confidential information or communication arose or to relationships of that kind in general; or
  - c.** Maintaining activities that contribute to or rely on the free flow of information.
- 6.4.73** The disciplinary officer may give the direction described above at paragraph 6.4.72 on his or her own initiative, or on the application of an interested person.<sup>78</sup>

73 Section 67(1) of the Evidence Act 2006.

74 Section 67(2) of the Evidence Act 2006.

75 Section 65(2) of the Evidence Act 2006.

76 Section 65(3)(a) of the Evidence Act 2006.

77 Section 69(2) of the Evidence Act 2006. This may apply to, for example, communications with medical officers not covered by section 59 of the Evidence Act 2006, communications with Anti-Harassment Advisors, or communications between spouses or partners.

78 Section 52(2) of the Evidence Act 2006.

- 6.4.74** When considering whether to give the direction described above at paragraph 6.4.72, the disciplinary officer must have regard to:<sup>79</sup>
- a.** The likely extent of harm that may result from the disclosure of the information or communication;
  - b.** The nature of the communication or information and its likely importance in the proceeding;
  - c.** The nature of the proceedings;
  - d.** The availability or possible availability of other means of obtaining evidence of the communication or information;
  - e.** The availability of means of preventing or restricting public disclosure of the evidence if the evidence is given;
  - f.** The sensitivity of the evidence, having regard to the time that has elapsed since the communication was made or the information was compiled or prepared and the extent to which the information has already been disclosed to other persons;
  - g.** Society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences; and
  - h.** Any other matters the disciplinary officer considers relevant.

#### DISCRETION AS TO MATTERS OF STATE

- 6.4.75** A disciplinary officer may direct that a communication or information that relates to matters of State must not be disclosed in proceedings before him or her if the disciplinary officer considers that the public interest in the communication or information being disclosed in the proceedings is outweighed by the public interest in withholding the communication or information.<sup>80</sup>
- 6.4.76** The disciplinary officer may give the direction described above at paragraph 6.4.75 on his or her own initiative, or on the application of an interested person.<sup>81</sup>
- 6.4.77** A communication or information that relates to matters of State includes a communication or information that could be withheld under sections 6, 7 or 9(2) (b) to (k) of the Official Information Act 1982.<sup>82</sup>

<sup>79</sup> Section 69(3) and (4) of the Evidence Act 2006.

<sup>80</sup> Section 70(1) of the Evidence Act 2006.

<sup>81</sup> Section 52(2) of the Evidence Act 2006.

<sup>82</sup> Section 70(2) of the Evidence Act 2006. See DFO 70 or [www.legislation.govt.nz](http://www.legislation.govt.nz) for the provisions of the Official Information Act.



## SECTION 5 – WEIGHT OF EVIDENCE

### GENERAL

- 6.5.1** When the evidence is finally given at a summary trial in accordance with the foregoing rules, it remains to be considered what weight the evidence has in proving the fact of which it is evidence. This is a matter for the disciplinary officer to decide.
- 6.5.2** A disciplinary officer is bound to find the accused guilty or not guilty on the weight of the evidence lawfully put before him or her. The disciplinary officer must not find the accused guilty based on a suspicion, however strong or however correct, which is not supported by adequate evidence. To do so would be a serious miscarriage of justice which could be expected to undermine discipline in the unit. An acquittal does not necessarily mean that the disciplinary officer is satisfied of the accused's innocence; it means that he or she does not regard the evidence produced as sufficient to establish the accused's guilt.

### ASSESSING THE VALUE OF ORAL EVIDENCE

- 6.5.3** Deciding the weight to be given to the evidence of a witness is often a matter of great difficulty. The witness's demeanour should be very carefully observed: his or her manner of giving evidence, even the way he or she stands or his or her movements, will often give some indication to an experienced person whether the witness is credible or not. A word of caution is required, however; a perfectly truthful witness will sometimes make an unfavourable impression because he or she is nervous or is shy of giving unpleasant details in public or because he or she is overawed by having to speak in front of a senior officer. Allowances must be made for the inability of many people to express themselves clearly. Many witnesses giving evidence are under a strain: for example, the accused because of the peril in which he or she stands or some other witness because he or she has to recount an unpleasant experience or has to give evidence against a superior. A sympathetic hearing will often elicit the truth better than questions asked in a hostile manner and every allowance must be made, where appropriate, for the factors mentioned above, before the disciplinary officer forms an opinion adverse to the witness. Sometimes the disciplinary officer will be tempted to disbelieve a witness because he or she said that certain events lasted five minutes, when it is clear from the evidence that they cannot have lasted more than a few moments. This is an unreliable guide to a witness's credibility, for some new and perhaps terrifying experience may temporarily destroy a person's sense of time. The disciplinary officer must judge for him or herself whether what the witness means is a long time or a short time, as the case may be, without reference to the hands of the clock.
- 6.5.4** Upon the disciplinary officer alone rests the responsibility of deciding whether a witness is telling the truth. Statements which appear clear in a written record may have been made by the witness in such a way as to produce exactly the opposite effect to that which is produced by the written language. The disciplinary officer who has seen and heard the witnesses can best form a reliable opinion of the effect of any individual statement. In assessing the credibility of what a witness says, the disciplinary officer should remember that persons may have hidden motives for giving evidence against someone; the disciplinary officer should consider that possibility and, if he or she thinks that it exists, the disciplinary officer should make full allowance for it, taking special



care if that factor might be present and the witness is the only witness, or the basic witness, against the accused.

**6.5.5** More generally, very great care must be taken before convicting in a case where the only evidence of the actual offence is that of one witness who affirms and the accused who denies the facts necessary to support the charge, unless the evidence of the witness is confirmed in some part of his or her story or unless the disciplinary officer is completely satisfied as to where the truth lies. Since an accused can give evidence and deny his or her guilt, failure to do so is a factor which the disciplinary officer may weigh in the balance when coming to his or her decision. It is not the law that an accused person must prove his or her innocence, and the accused is entitled to remain silent if he or she so wishes. If, therefore, the case in support of the charge is not strong enough for the disciplinary officer to find the accused guilty based on that evidence, the disciplinary officer must not draw an adverse inference if the accused refrains from giving evidence. However, if there is a *prima facie* case which appears to require an answer, the disciplinary officer is entitled to ask him or herself whether there is a valid reason, consistent with his or her innocence, for the refusal of the accused to give evidence.

**6.5.6** The disciplinary officer must bear in mind the need for caution before finding an accused guilty in reliance on evidence of a kind that may be unreliable.<sup>83</sup> Evidence which would fall within that category includes:<sup>84</sup>

- a. Hearsay evidence;<sup>85</sup>
- b. Evidence of a confession that is the only evidence of an offence;
- c. Evidence offered by a witness who may have motive to give false evidence prejudicial to the accused;
- d. Evidence of a statement by the accused to another person made while both the accused and the other person were detained in prison, a police station, or another place of detention; and
- e. Evidence about the conduct of the accused if that conduct is alleged to have occurred more than 10 years previously.

## NO CASE TO ANSWER

**6.5.7 General.** Before an accused can be called upon for his or her version of the events in summary proceedings under Part 5 of the AFDA (as described in Chapter 7), the disciplinary officer must be satisfied that a *prima facie* case has been made out.<sup>86</sup> A *prima facie* case means no more than that the disciplinary officer has before him or her sufficient evidence upon which a reasonable disciplinary officer, properly directed, could find the accused guilty (assuming that there is power to do so) in the absence of an answer or explanation from the accused. This is why, if the disciplinary officer does have sufficient evidence, there is said to be a case for the accused to answer.

83 Section 122(5) of the Evidence Act 2006.

84 Section 122(2) of the Evidence Act 2006.

85 A **hearsay statement** is a statement that was made by a person other than a witness which is offered in evidence at the proceeding to prove the truth of its contents: section 4(1) of the Evidence Act 2006.

86 AFDA s 117J(3).

**6.5.8** The question whether or not a prima facie case has been made out must be answered without reference to whether or not the accused intends to call or give evidence. As a matter of practice the disciplinary officer should only conclude that there is no prima facie case:

- a. When there has been no evidence to prove an essential element in the offence alleged; or
- b. When the evidence adduced in support of the charge has been so discredited as a result of questioning or is so manifestly unreliable that no reasonable disciplinary officer having power to do so could safely find the accused guilty of the charge.

**6.5.9** In deciding whether the evidence is sufficient, the disciplinary officer may take into account his or her own views on the veracity or reliability of witnesses as a guide to how a reasonable disciplinary officer would assess the evidence. This is particularly so when considering paragraph 6.5.8b above. The disciplinary officer must remember, however, that the charge does not have to be proved beyond reasonable doubt to amount to a prima facie case.

## IDENTIFICATION EVIDENCE

**6.5.10** Experience has shown that, in a trial in which the principal issue is whether the accused has been properly identified as the person who committed the alleged offence, special care is needed to ensure that the identification evidence is properly evaluated.

**6.5.11** Identification may be at issue in a summary trial. In such a case, the disciplinary officer must bear in mind the need for caution before finding the accused guilty based on identification evidence. In particular, the disciplinary officer must consider the possibility that the witness who has identified the accused is mistaken. Accordingly, the disciplinary officer must examine closely the circumstances in which the identification was made by each witness. Relevant factors include:

- a. **Has the witness had seen the accused before?** Recognition might be more reliable than identification by a stranger but, even when a witness is purporting to recognise someone whom he or she knew, the disciplinary officer should bear in mind that mistakes in recognition of close relatives and friends can be made.
- b. **Has the offender any special peculiarities which impressed themselves upon the witness at the time?**
- c. **Was the period between the time when the witness first described the offender and the time when he or she first saw the accused long or short?**
- d. **How long did the witness have the offender under observation?** For example, was it a fleeting-glance situation or a sustained observation?
- e. **Under what circumstances did the witness observe the offender?** For example, at what distance, in what light, was the observation

impeded in any way by passing traffic or a crowd of people?

- f. Was the witness's previous description consistent with his first identification of the accused as the offender?**

### **LIES BY THE ACCUSED**

**6.5.12** If the evidence brought before the disciplinary officer suggests that the accused lied either before or during the summary trial, the disciplinary officer must:<sup>87</sup>

- a.** Be satisfied before using the evidence that the accused did lie;
- b.** Have regard to the fact that people lie for various reasons; and
- c.** Not necessarily conclude that, just because the accused lied, the accused is guilty of the offence with which he or she is charged.

## SECTION 6 – MATTERS NOT REQUIRING PROOF

### JUDICIAL NOTICE

- 6.6.1** On some occasions formal proof need not be given: courts are said to take judicial notice (in other words, not to require evidence) of any facts that are so generally known as not to require special proof. Before a court notices a fact, it should be fully satisfied of its existence and should be cautious to see that there is no reasonable doubt as to its existence. There must be a presumption that all persons are aware of the fact or, in the case of proceedings before a disciplinary officer, that the fact may fairly be regarded as being within the general service knowledge of that disciplinary officer. Judicial notice, however, is to be distinguished from the use which the disciplinary officer may legitimately make of his or her own general knowledge in forming opinions on matters of credibility, probability, intention, knowledge, and the like.
- 6.6.2** In summary proceedings under the AFDA, the disciplinary officer is required to take judicial notice of all matters of common knowledge and of all other matters of which judicial notice would be taken by the High Court.<sup>88</sup> The disciplinary officer may also take judicial notice of matters which may fairly be regarded as being within his or her general service knowledge.<sup>89</sup>
- 6.6.3** By virtue of AFDA s 117ZN, evidence need not be given as to the relative rank of officers, as to the general duties, authorities, and obligations of different members of a Service, or generally as to any matters which an officer as such may reasonably be expected to know. The matters of which the disciplinary officer may take judicial notice also include: the ordinary course of nature; natural and artificial divisions of time; the meaning of English words; and all other matters which he or she is directed by any statute to notice. Nevertheless, it may be contended that a word bears or does not bear a particular meaning and, in such cases, reference may be made to dictionaries or encyclopaedias for assistance, though the ultimate decision remains that of the disciplinary officer, unless the word has been judicially interpreted in, say, the Summary Appeal Court. Should, however, any doubt arise as to whether the disciplinary officer may take judicial notice of a particular fact, the fact should be proved under the normal rules of evidence for summary proceedings.

88 AFDA s 117ZN(1).

89 AFDA s 117ZN(2).

# SUMMARY PROCEEDINGS

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SECTION 1 – DISCIPLINARY OFFICERS

GENERAL

- 7.1.1

Only a disciplinary officer may hear a charge recorded under the AFDA summarily. In doing so, the disciplinary officer must comply with Part 5 of the AFDA and the RP, as explained in this chapter. In addition, a disciplinary officer may give any order or direction, not inconsistent with the AFDA or the RP, that seems to him or her best calculated to do justice.<sup>1</sup>
- 7.1.2

The AFDA provides for four categories of disciplinary officer:

a.

Superior commander;

b.

CO;

c.

Detachment commander; and

d.

Subordinate commander.

SUPERIOR COMMANDER

- 7.1.3

**Superior commander** means:<sup>2</sup>

a.

CDF, VCDF, CN, CA, CAF or COMJFNZ;

b.

An officer not below the rank of colonel (equivalent) who is appointed by one of the officers in subparagraph a to act as a disciplinary officer in respect of officers under his or her command who are not below the rank of major (equivalent); or

c.

An officer of a foreign force that is declared to be serving together with a New Zealand force<sup>3</sup> who is not below the relative rank of colonel (equivalent) and who is authorised by CDF to act as a disciplinary officer in respect of officers under his or her command who are not below the rank of major (equivalent).

7.1.4

**Relative rank** means the appropriate relative rank prescribed in Chapter 1 Section 3 pursuant to DA s 17.<sup>4</sup>

7.1.5

Neither a CO nor a chaplain may be appointed a superior commander.<sup>5</sup>

COMMANDING OFFICER

- 7.1.6

**Commanding officer (CO)** means:<sup>6</sup>

a.

An officer for the time being appointed or authorised to be a CO for the purposes of the AFDA by a superior commander;

1

AFDA s 117ZO.

2

AFDA s 2(1)

3

DA s 23B.

4

AFDA s 2(1).

5

AFDA s 2(1).

6

AFDA s 2(1).



- b. An officer who is named as the CO of civilians accompanying or otherwise closely associated with a New Zealand force on active service or outside New Zealand;<sup>7</sup>
- c. The officer in command of one of HMNZ ships (other than a tender or boat) or naval establishments;
- d. The officer in command of a ship declared by CDF, CN, CA or CAF to be Service ship;
- e. The officer in command of a battalion or regiment; or
- f. An officer of a foreign force declared to be serving together with a New Zealand force,<sup>8</sup> who is for the time being appointed or authorised to be a CO for the purposes of the AFDA by a superior commander.

**7.1.7** Midshipmen, officer cadets and chaplains may not be appointed to be COs.<sup>9</sup>

**7.1.8** **Tender or boat.** If one of HMNZ ships is a tender, that will be indicated in its commissioning order.<sup>10</sup> Any vessel in naval service, other than a Service ship, which does not have a commissioning order is a tender or boat.

## DETACHMENT COMMANDER

**7.1.9** **Detachment commander** means:<sup>11</sup>

- a. In the Navy, an officer who is for the time being posted, or authorised by his or her CO to be, in command of:
  - (1) A tender or boat; or
  - (2) A body of persons stationed or employed at a distance from the ship or establishment to which they belong.
- b. In the Army and Air Force, an officer who is for the time being authorised by his or her CO to act as detachment commander of a part of a unit stationed or employed at a distance from its unit headquarters.

**7.1.10** Midshipmen, officer cadets and chaplains may not be appointed to be detachment commanders.<sup>12</sup>

## SUBORDINATE COMMANDER

**7.1.11** **Subordinate commander** means an officer to whom all or any of the powers to

7 See AFDA s 16(5).

8 DA s 23B.

9 AFDA s 2(1).

10 DFO(N) 0534.

11 AFDA s 2(1).

12 AFDA s 2(1).

act as a disciplinary officer have been delegated by a CO under AFDA s 106.<sup>13</sup> This does not include any midshipman or an officer cadet.<sup>14</sup>

- 7.1.12** A CO may, by written notice, delegate all or any of his or her powers to act as a disciplinary officer to an officer or class of officers under his or her command specified in the notice.<sup>15</sup>

### LIMITATIONS AND QUALIFICATIONS

- 7.1.13** No superior commander, CO, detachment commander or subordinate commander may act as a disciplinary officer in relation to a particular charge unless he or she holds:<sup>16</sup>

- a. A rank at least two rank grades above that of the accused; and
- b. A certificate of competency, as prescribed below in paragraph 7.1.15.

- 7.1.14** A subordinate commander may not act as a disciplinary officer in relation to a particular charge unless he or she holds a delegation from his or her CO under AFDA s 106 that authorises him or her to do so.<sup>17</sup> Any such delegation is subject to the following limitations:<sup>18</sup>

- a. A subordinate commander must not act as a disciplinary officer for an offence alleged to have been committed by a staff sergeant (equivalent) or above.
- b. A subordinate commander must not act as a disciplinary officer for an offence described in paragraph 2.2.3 without the prior approval of his or her CO.<sup>19</sup>
- c. Any limitation, consistent with the AFDA and DM 69 (2 ed), which is specified in the written notice of delegation.<sup>20</sup>

### CERTIFICATE OF COMPETENCY

- 7.1.15 Requirement for command.** Every officer who is to be appointed as a superior commander, CO, detachment commander, or subordinate commander must hold or obtain a current Certificate of Competency as a Disciplinary Officer before taking up that appointment. If a superior commander, CO, detachment commander, or subordinate commander ceases to hold a current Certificate of Competency while holding that appointment:

- a. The officer may not act as a disciplinary officer unless and until the certificate is re-issued; and

13 AFDA s 2(1).

14 AFDA s 106(2).

15 AFDA s 106(1).

16 AFDA s 108(1).

17 AFDA s 108(1)(d).

18 AFDA s 106(3).

19 AFDA s 106(4)(a).

20 AFDA s 106(4)(b).

- b. The officer is to be removed from the appointment which requires him or her to hold the certificate, unless CDF waives this requirement.

**7.1.16 Issue of certificate.** The issuing authority for Certificates of Competency as a Disciplinary Officer is DGDLS. The certificate is to be issued in form MD 603 and expires on the fourth anniversary of its issue.

**7.1.17 Revocation or suspension.** The issuing authority may revoke or suspend a Certificate of Competency, on such terms as he or she deems fit, if he or she has reasonable cause to doubt the suitability of an officer to hold such a certificate.

**7.1.18 Competency requirement.** In order to obtain a Certificate of Competency as a Disciplinary Officer, an officer must obtain a pass in the Level 3 course of the Military Justice Training Programme. This course is to consist of a distance learning component and a residential phase. The residential phase is to test the officer's ability to competently conduct summary proceedings under Part 5 of the AFDA. The issuing authority is not to issue a Certificate of Competency unless satisfied that the officer has the necessary knowledge and skills, and is in all other respects suitable, to act as a disciplinary officer in the NZDF.

**7.1.19** A Certificate of Competency which has expired may be revalidated by passing a Level 3 revalidation test under the Military Justice Training Programme to the satisfaction of the issuing authority.

## SECTION 2 – SUMMARY JURISDICTION

### DEFINITIONS

**7.2.1 Empowered to act as a disciplinary officer.** If an offence against the AFDA is able to be tried summarily,<sup>21</sup> a superior commander, CO, detachment commander, or subordinate commander is empowered to act as a disciplinary officer in relation to that charge if he or she is qualified to do so in accordance with paragraph 7.1.13 and, in the case of a subordinate commander, paragraph 7.1.14, unless:<sup>22</sup>

- a. The officer considers that it is necessary for the maintenance of discipline, or in the interests of justice, that the charge be referred to another person; or
- b. The officer is personally interested in the charge.

**7.2.2 Necessity to refer charge to another person.** The circumstances in which it would be proper for a disciplinary officer to refer a charge to another person under paragraph 7.2.1a are a question of judgment for the disciplinary officer. An example might be where the accused raises a complex point of law in his or her defence which is outside the scope of the disciplinary officer's competency in that role. See, for example, paragraph 5.4.5 in relation to the defence of insanity.

**7.2.3 Personally interested in the charge** means:<sup>23</sup>

- a. The charge alleges an offence against the disciplinary officer;
- b. The charge alleges an offence against any member of his or her family;
- c. The charge alleges an offence by any member of his or her family;
- d. The charge is one in respect of which the disciplinary officer or any member of his or her family is the sole witness to any material ingredient of the offence; or
- e. The officer otherwise has a personal interest in the charge that is likely to influence his or her judgment.

### INITIAL REFERRAL OF CHARGE

**7.2.4** Every charge recorded against a person subject to the AFDA must be referred as follows:

- a. **Sergeants (equivalent) and below.** The charge is to be referred to the accused's subordinate commander, if the accused has a subordinate commander who is empowered to act as a disciplinary officer in relation to it.<sup>24</sup> If the accused does not have such a subordinate commander, the

<sup>21</sup> See paragraph 4.3.1 for offences which can only be tried in the Court Martial.

<sup>22</sup> AFDA s 108(2).

<sup>23</sup> AFDA s 108(4).

<sup>24</sup> AFDA s 109.

charge is to be referred to the accused's CO.<sup>25</sup>

- b. **Staff Sergeants (equivalent) and above.** If the accused's CO holds a rank which is two rank grades or more above that of the accused, the charge is to be referred to the CO.<sup>26</sup> If the CO is too junior to act as the disciplinary officer in relation to the charge, the charge is to be referred to the next superior commander in the accused's chain of command who is empowered to act as a disciplinary officer in relation to it.<sup>27</sup> If there is no superior commander who is empowered to act as a disciplinary officer in relation to the charge, the accused must be remanded for trial in the Court Martial and the charge is to be referred to the DMP.<sup>28</sup>
- c. **Accused with detachment commander.** If the accused has a detachment commander who is empowered to act as a disciplinary officer in relation to the charge, subparagraphs a and b are to read as if the references to 'CO' were references to 'detachment commander', and the references to 'superior commander' were references to 'CO'.<sup>29</sup>

**7.2.5** All charges<sup>30</sup> against an accused which are known to the relevant disciplinary officer at the time the accused is brought before the disciplinary officer are to be tried or otherwise dealt with in the same summary proceeding. See paragraph 8.1.20 for the implications of this on the imposition of punishment.

## SPECIAL PROVISIONS FOR CERTAIN CATEGORIES OF ACCUSED

**7.2.6 PW and spies.** If the accused is subject to this AFDA as a prisoner of war or because he or she is charged with having committed an offence against AFDA s 26 or s 27:<sup>31</sup>

- a. **If the accused holds a rank in an armed force,** this chapter (with any necessary modifications) applies, as if the accused held the corresponding rank in the NZDF; or
- b. **In any other case,** this chapter (with any necessary modifications) applies, as if the accused were a private (equivalent).

**7.2.7 Midshipmen and officer cadets.** If the accused is a midshipman or officer cadet, this chapter (with any necessary modifications) applies, as if the accused were a private (equivalent).<sup>32</sup>

**7.2.8 Chaplains.** If the accused is a chaplain, this chapter (with any necessary modifications) applies, as if the accused:<sup>33</sup>

- a. In the case of a chaplain Class I, were a colonel (equivalent).

25 AFDA s 110.

26 AFDA s 110(2)(a).

27 AFDA s 110(2)(b).

28 AFDA s 111.

29 AFDA s 110(2).

30 This includes a well-founded allegation which the CO intends to record in the form of a charge.

31 AFDA s 117ZJ(1).

32 AFDA s 117ZJ(2).

33 AFDA s 117ZJ(3).

- b. In the case of a chaplain Class II, were a lieutenant colonel (equivalent).
- c. In the case of a chaplain Class III, were a major (equivalent).
- d. In the case of a chaplain Class IV, were a captain (equivalent).

#### **DISCIPLINE FOLLOWS COMMAND**

**7.2.9** The accused's CO for the purposes of the AFDA is the CO of the unit to which he or she is posted, unless a specific order is made varying this arrangement under paragraph 7.1.6a.

#### **OBJECTION RELATING TO PERSONAL INTEREST**

**7.2.10** If an accused, during the proceedings before a disciplinary officer, raises an objection that the disciplinary officer is personally interested in the charge, the disciplinary officer must ensure that the objection is recorded in the record of proceedings.<sup>34</sup> This will be done automatically if the proceedings are recorded electronically in accordance with paragraph 7.3.24.

**7.2.11** If, after an objection is made under paragraph 7.2.10, a disciplinary officer considers that he or she is personally interested in the charge:<sup>35</sup>

- a. He or she must not continue to act as the disciplinary officer in relation to the charge; and
- b. He or she is to apply to the next superior officer for the appointment of a replacement disciplinary officer.

**7.2.12** The next superior officer is to appoint a replacement disciplinary officer or arrange for the accused to be posted into a different unit, as the case requires.

**7.2.13** The replacement disciplinary officer may act under Part 5 of the AFDA as if the disciplinary officer he or she replaced had not begun to do so.<sup>36</sup>

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34 AFDA s 117ZR(1).

35 AFDA s 117ZR(2).

36 AFDA s 117ZQ(1).

## SECTION 3 – PRELIMINARY PROCEDURE

### CERTIFICATION OF CHARGE BY A LEGAL OFFICER

- 7.3.1** After a charge is referred to a disciplinary officer but before the accused is brought before him or her, the disciplinary officer must consider whether, if he or she found the accused guilty, he or she might impose a punishment or compensation order including:<sup>37</sup>
- a.** Detention;
  - b.** Reduction in rank; or
  - c.** A fine of an amount that exceeds the offender's basic pay for a period of 7 days; or
  - d.** A compensation order of an amount that exceeds the offender's basic pay for a period of 7 days.
- 7.3.2** In considering the question raised by paragraph 7.3.1, the disciplinary officer:<sup>38</sup>
- a.** Must have regard to the charge referred to him or her (including the nature of the offence alleged by the charge); but
  - b.** Is not required to have regard to any other information or document, or to make any further inquiries.
- 7.3.3** If the disciplinary officer considers that he or she might impose any of the punishments or a compensation order referred to in paragraph 7.3.1, he or she must not continue with the proceedings until he or she has received a Specified Certificate.<sup>39</sup> The disciplinary officer is to seek a Specified Certificate by forwarding an electronic or hard copy of the relevant form MD 601 Charge Report to the office or officer responsible for providing legal services to the disciplinary officer's command.
- 7.3.4** **Specified Certificate** means a certificate issued by a legal officer that certifies that, in the opinion of the legal officer, the charge:<sup>40</sup>
- a.** Discloses an offence against the AFDA;
  - b.** Is drawn in accordance with the RP; and
  - c.** Is otherwise correct in law.
- 7.3.5** The Specified Certificate is to take the form of a minute or e-mail from the legal officer to the disciplinary officer.

37 AFDA s 112(1).

38 AFDA s 112(2).

39 AFDA s 112(3).

40 AFDA s 112(5).

**DISCLOSURE OF INFORMATION TO ACCUSED**

**7.3.6** Before an accused is brought before a disciplinary officer, the disciplinary officer is to ensure that the accused is provided with a copy of the form MD 601 Charge Report and given access to any information that:<sup>41</sup>

- a. May be relied on as evidence against the accused; or
- b. Tends to show that the accused did not commit the offence charged.

**7.3.7** The information referred to in paragraph 7.3.6 includes any:<sup>42</sup>

- a. Statement by the accused;
- b. Relevant documentary evidence;
- c. Written statement made by a witness; and
- d. Unit or Service Police file that relates to the charge or, if applicable, the relevant portions of the file.

**7.3.8** **Form of disclosure.** The accused must be given a copy of the information required to be disclosed under paragraph 7.3.6 unless:<sup>43</sup>

- a. The information is in the form of physical evidence (such as clothing or other property); or
- b. Disclosure of the information would be likely to:
  - (1) Seriously prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand;
  - (2) Seriously prejudice the security or defence relationship between New Zealand and another State or international organisation;
  - (3) Seriously prejudice the maintenance of law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
  - (4) Endanger the safety of any person.

**7.3.9** If paragraph 7.3.8a applies, the accused is to be given:<sup>44</sup>

- a. Access to the evidence; and
- b. A copy of any image of the evidence that may be made.

**7.3.10** If paragraph 7.3.8b applies, the accused is to be provided with access to the

41 RP 9(1).

42 RP 9(2).

43 RP 10(1).

44 RP 10(2).



information to the extent reasonable in all the circumstances.<sup>45</sup> The advice of a legal officer is to be sought if it is thought that paragraph 7.3.8b might apply.

**7.3.11 Timing of disclosure.** The information required to be disclosed under paragraph 7.3.6 is to be made available to the accused in reasonably sufficient time to permit the accused to consider it in properly preparing his or her case before arraignment by the disciplinary officer.<sup>46</sup>

**7.3.12 Record of disclosure.** The disciplinary officer is to ensure that a description of all information disclosed to the accused under paragraph 7.3.6 is entered in form MD 601B, which is to be attached to the original form MD 601 Charge Report.<sup>47</sup>

### ASSIGNMENT OF DEFENDING OFFICER

**7.3.13** If an accused is brought before a disciplinary officer, the disciplinary officer is to ensure that an officer or NCO is assigned as defending officer to:<sup>48</sup>

- a. Assist the accused in the preparation and presentation of his or her case; and
- b. Act on behalf of the accused.

**7.3.14** Paragraph 7.3.13 does not apply if the accused states in writing that he or she does not require the assistance of a defending officer.<sup>49</sup> Any such statement is to be attached to the form MD 601 Charge Report.

**7.3.15 Change of defending officer.** The defending officer may be changed by the disciplinary officer at any time if:<sup>50</sup>

- a. The accused so requests; or
- b. The disciplinary officer considers that it is necessary to do so, having regard to the exigencies of the service.

### ASSIGNMENT OF PRESENTING OFFICER

**7.3.16** If an accused is brought before a disciplinary officer, the disciplinary officer is to ensure that an officer or NCO is assigned as presenting officer to:<sup>51</sup>

- a. Assemble the evidence in support of the charge; and
- b. Present the case in support of the charge, to the extent required by the disciplinary officer.

<sup>45</sup> RP 10(3).

<sup>46</sup> RP 11. See paragraph 7.4.2 for the procedure relating to arraignment in proceedings before a disciplinary officer.

<sup>47</sup> RP 13.

<sup>48</sup> AFDA s 114(1).

<sup>49</sup> AFDA s 114(2).

<sup>50</sup> AFDA s 114(4).

<sup>51</sup> AFDA s 115(1).

- 7.3.17 Change of presenting officer.** The presenting officer may be changed at any time by the disciplinary officer if the disciplinary officer considers that it is necessary or desirable to do so.<sup>52</sup>

## QUALIFICATIONS OF DEFENDING AND PRESENTING OFFICERS

- 7.3.18** The officer or NCO assigned to act as defending officer or presenting officer must:<sup>53</sup>
- a. Hold an appropriate certificate of competency, as prescribed below in paragraph 7.3.19; and
  - b. Not be a lawyer.<sup>54</sup>

## CERTIFICATE OF COMPETENCY

- 7.3.19** Every officer or NCO who is to be assigned as a defending officer or presenting officer must hold or obtain a current Certificate of Competency as a Defending and Presenting Officer before taking up that role.
- 7.3.20 Issue of certificate.** The issuing authority for Certificates of Competency as a Defending and Presenting Officer is DGDLS (or DLS). The certificate is to be issued in form MD 604 and expires on the fourth anniversary of its issue.
- 7.3.21 Revocation or suspension.** The issuing authority may revoke or suspend a Certificate of Competency, on such terms as he or she deems fit, if he or she has reasonable cause to doubt the suitability of an officer or NCO to hold such a certificate.
- 7.3.22 Competency requirement.** In order to obtain a Certificate of Competency as a Defending and Presenting Officer, an officer or NCO must obtain a pass in the Level 2 course of the Military Justice Training Programme. This course is to consist of a distance learning component and a residential phase. The residential phase is to test the officer or NCO's ability to competently undertake the roles of defending officer and presenting officer in summary proceedings under Part 5 of the AFDA. The issuing authority is not to issue a Certificate of Competency unless satisfied that the officer or NCO has the necessary knowledge and skills, and is in all other respects suitable, to act as a defending officer and presenting officer in the NZDF.
- 7.3.23** A Certificate of Competency which has expired may be revalidated by passing a Level 2 revalidation test under the Military Justice Training Programme to the satisfaction of the issuing authority.

## RECORDING THE PROCEEDINGS

- 7.3.24** The disciplinary officer must ensure that an audio recording is made of any proceedings before him or her wherever it is reasonably practicable to do so.<sup>55</sup> If it is not reasonably practicable to make an audio recording of the proceedings, or the audio recording fails, the disciplinary officer is to make a detailed written summary of the proceedings.<sup>56</sup>

<sup>52</sup> AFDA s 115(3).

<sup>53</sup> AFDA ss 114(3) and 115(2).

<sup>54</sup> A lawyer is a person who holds a current practising certificate as a barrister or as a barrister and solicitor: AFDA s 2(1).

<sup>55</sup> RP 18.

<sup>56</sup> RP 19.

## SECTION 4 – ARRAIGNMENT

### DEFINITION OF INVESTIGATION

- 7.4.1** The investigation of a charge, conducted under Part 5 Subpart 2 of the AFDA, is the first part of any summary proceeding conducted by a disciplinary officer. It is not to be confused with the process through which evidence is collected by or on behalf of the CO prior to the commencement of any proceedings, which is known as the preliminary inquiry.<sup>57</sup>

### ARRAIGNMENT

- 7.4.2** The arraignment is the first step in the investigation. At this stage the disciplinary officer must:<sup>58</sup>

- a. Inform the accused that the disciplinary officer is going to hear the charge;
- b. Ensure that the accused is correctly described in the record of proceedings;
- c. Read the charge to the accused;
- d. Ensure that the evidence in support of the charge has been adequately disclosed to the accused in the manner described in paragraphs 7.3.6 to 7.3.12; and
- e. Ask the accused whether he or she pleads guilty or not guilty to the charge.

### AMENDMENT OF CHARGE

- 7.4.3** A disciplinary officer may, after an accused is brought before him or her on a charge, amend that charge, substitute for it a different charge, or add a new charge, if the disciplinary officer considers that it is in the interests of justice to do so.<sup>59</sup>

- 7.4.4** Paragraphs 7.3.1 to 7.3.5 apply to any amended, substituted or additional charge (**new charge**).<sup>60</sup>

- 7.4.5** If the disciplinary officer exercises his or her power under paragraph 7.4.3 after hearing the evidence in support of the original charge, that step does not need to be repeated for the new charge unless the accused so requires.<sup>61</sup>

- 7.4.6** If the new charge differs substantially from the original charge, the disciplinary officer must:<sup>62</sup>

<sup>57</sup> See paragraph 3.1.1.

<sup>58</sup> AFDA s 116.

<sup>59</sup> AFDA s 113(1).

<sup>60</sup> AFDA s 113(2).

<sup>61</sup> AFDA s 113(3).

<sup>62</sup> AFDA s 113(4).

- a.** Explain the new charge to the accused;
- b.** Advise the accused of his or her right to seek an adjournment to consider the charge; and
- c.** If requested by the accused to do so, adjourn the proceedings for that purpose.

## SECTION 5 – PROCEDURE FOLLOWING GUILTY PLEA

### RECORDING THE PLEA

**7.5.1** If the accused pleads guilty to the charge, the disciplinary officer is to enter that plea in the form MD 601 Charge Report if the disciplinary officer is satisfied that the accused:<sup>63</sup>

- a.** Understands the nature of the charge;
- b.** Has made the plea voluntarily; and
- c.** Understands the consequences of the plea.

**7.5.2** The disciplinary officer is to exercise judgment in deciding what steps he or she needs to take to satisfy himself or herself in accordance with paragraph 7.5.1. Depending on the age, maturity and experience in the Service of the accused, the disciplinary officer may:

- a.** Decide that no particular steps are required;
- b.** Make enquiries of the defending officer either before or during the hearing; or
- c.** Make enquiries of the accused during the hearing.

**7.5.3** The disciplinary officer is to enter a plea of not guilty in the form MD 601 Charge Report and proceed accordingly if:<sup>64</sup>

- a.** The accused refuses to plead;
- b.** The accused pleads unintelligibly; or
- c.** The disciplinary officer is not satisfied of any of the matters referred to in paragraph 7.5.1.

### PLEAS TO ALTERNATIVE CHARGES

**7.5.4** If the accused pleads guilty to the first of two or more alternative charges and the disciplinary officer accepts that plea, the disciplinary officer is to:<sup>65</sup>

- a.** Proceed in accordance with the provisions of this Section in respect of that charge; and
- b.** Record no plea (**NP**) in respect of each subsequent alternative charge.

**7.5.5** If the accused pleads guilty to the second or any subsequent charge of two or more alternative charges, the disciplinary officer may either accept the plea or not accept the plea, even if the disciplinary officer is satisfied in accordance with

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63 AFDA s 117(1).

64 AFDA s 117(2).

65 RP 14(1).

paragraph 7.5.1.<sup>66</sup>

**7.5.6** If the disciplinary officer accepts a plea as described in paragraph 7.5.5, he or she is to:<sup>67</sup>

- a. Proceed in accordance with the provisions of this Section in respect of that charge;
- b. Dismiss any charge that precedes that charge in the form MD 601 Charge Report and record **D** in the finding panel; and
- c. Record no plea (**NP**) in respect of all subsequent alternative charges.

**7.5.7** If the disciplinary officer does not accept a plea as described in paragraph 7.5.5, he or she is to proceed as if the accused had pleaded not guilty to that charge and all the subsequent alternative charges.<sup>68</sup>

#### DISCIPLINARY OFFICER TO RECEIVE INFORMATION RELEVANT TO PUNISHMENT

**7.5.8** If the disciplinary officer enters a guilty plea in the form MD 601 Charge Report:<sup>69</sup>

- a. The presenting officer is to read out a summary of the facts relevant to the charge; and
- b. The disciplinary officer may hear all or any of the evidence relating to the charge if he or she considers that it is in the interests of justice or discipline to do so.

**7.5.9** **Summary of facts.** The summary of facts should be agreed between the presenting officer and the defending officer (or the accused, if the accused is unrepresented). If there is any area of disagreement, the presenting officer is to bring this to the attention of the disciplinary officer so that the disciplinary officer may decide whether to hear evidence in accordance with paragraph 7.5.8b.

**7.5.10** **Disputed facts which are elements of the offence.** If the accused does not accept a fact which is an element of the relevant offence, the disciplinary officer should advise the accused that the acceptance of that fact is a condition of pleading guilty and adjourn the hearing so that the accused can consider whether to change his or her plea to not guilty pursuant to AFDA s 117H(3). If the accused does not do so, but continues to dispute the relevant element of the offence, the disciplinary officer is to consider whether he or she should substitute a plea of not guilty on behalf of the accused and amend the form MD 601 Charge Report accordingly.<sup>70</sup>

#### CONSIDERATION OF POWERS

**7.5.11** If the plea of guilty is accepted, the disciplinary officer, after complying with paragraphs 7.5.8 to 7.5.10 above, is to consider whether, in his or her opinion,

<sup>66</sup> RP 14(2).

<sup>67</sup> RP 14(3).

<sup>68</sup> RP 14(4).

<sup>69</sup> AFDA s 117A(1)(a) and (b); AFDA s 117B(2) and (3).

<sup>70</sup> AFDA s 117H(5).

he or she:<sup>71</sup>

- a. Has sufficient powers of punishment in relation to the charge; and
- b. Is empowered to act as a disciplinary officer in relation to the charge.

**7.5.12 Sufficient powers of punishment.** This is to be assessed by judging what the appropriate level of punishment is likely to be and then determining whether the disciplinary officer is able to impose that level of punishment. The levels of punishment which are lawfully available to disciplinary officers are set out in Chapter 8 Annexes A (CO, detachment commander or subordinate commander) and B (superior commander).

**7.5.13 Empowered to act as a disciplinary officer.** See paragraph 7.2.1.

#### **ACTION IF SUBORDINATE COMMANDER HAS INSUFFICIENT POWERS**

**7.5.14** If a subordinate commander considers that he or she has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to a charge, he or she must refer the charge to the accused's CO (or detachment commander) without recording a finding of guilty on the charge.<sup>72</sup> The subordinate commander must also refer:<sup>73</sup>

- a. Any charge against another person for an offence arising from the same incident or series of incidents; and
- b. Any other charge against the accused for an offence arising from the same incident or series of incidents.

**7.5.15** At that point, the CO or detachment commander becomes the disciplinary officer in relation to the charge.<sup>74</sup> The guilty plea remains in place for the proceedings in front of the CO or detachment commander, unless the accused decides to change his or her plea pursuant to AFDA s 117H.

**7.5.16** Paragraphs 7.5.8 to 7.5.13 apply to a charge referred to the CO or detachment commander under paragraph 7.5.14 as if the subordinate commander had not done anything after entering the guilty plea.<sup>75</sup>

#### **ACTION IF SUBORDINATE COMMANDER HAS SUFFICIENT POWERS**

**7.5.17** If a subordinate commander considers that he or she has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to a charge, he or she is to:<sup>76</sup>

- a. Record a finding of guilty (**G**) against that charge in the form MD 601 Charge Report;

<sup>71</sup> AFDA ss 117A(1)(c) and 117B(4).

<sup>72</sup> AFDA s 117A(3).

<sup>73</sup> AFDA s 117ZF.

<sup>74</sup> AFDA s 117A(4).

<sup>75</sup> AFDA s 117B.

<sup>76</sup> AFDA s 117A(2).

- b. Inform the accused of that finding; and
- c. Proceed to the punishment phase as described in Chapter 8.

**7.5.18** If the charge on which the accused has been found guilty was one of a number of alternatives, and the disciplinary officer has recorded no plea against the subsequent alternatives in accordance with paragraph 7.5.4 or paragraph 7.5.6, the disciplinary officer is to record no finding (**NF**) in respect of those subsequent alternative charges in the form MD 601 Charge Report.

#### **ACTION IF CO, DETACHMENT COMMANDER OR SUPERIOR COMMANDER HAS INSUFFICIENT POWERS**

**7.5.19** If a CO, detachment commander or superior commander considers that he or she has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to a charge, he or she must remand the accused for trial in the Court Martial and refer the charge to the DMP.<sup>77</sup> The disciplinary officer must also refer:<sup>78</sup>

- a. Any charge against another person for an offence arising from the same incident or series of incidents; and
- b. Any other charge against the accused for an offence arising from the same incident or series of incidents.

**7.5.20** See Section 9 for the procedure relating to the referral of charges to the DMP.

#### **ACTION IF CO, DETACHMENT COMMANDER OR SUPERIOR COMMANDER HAS SUFFICIENT POWERS**

**7.5.21** If a CO, detachment commander or superior commander considers that he or she has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to a charge, he or she must consider whether the accused should be given the right to elect trial in the Court Martial (**the right of election**).<sup>79</sup>

**7.5.22** In making a decision under paragraph 7.5.21, the disciplinary officer must:<sup>80</sup>

- a. Consider the punishment, or combination of punishments, that he or she would be likely to impose;
- b. Consider the orders for compensation or restitution (or both) that he or she would be likely to make; and
- c. Bear in mind that a disciplinary officer is only permitted to:
  - (1) Impose a punishment from Column 2 of Chapter 8 Annex A or Annex B, as the case may be;<sup>81</sup> and/or

<sup>77</sup> AFDA s 117F(1)(a).

<sup>78</sup> AFDA s 117ZF.

<sup>79</sup> AFDA s 117C(1).

<sup>80</sup> AFDA s 117C(2).

<sup>81</sup> AFDA s 117W.



- (2) Make an order for compensation exceeding 14 days' basic pay (but not exceeding 28 days' basic pay);<sup>82</sup>

if the disciplinary officer has given the accused the right of election.

#### **ACTION IF RIGHT OF ELECTION NOT GIVEN**

- 7.5.23** If a CO, detachment commander or superior commander decides in accordance with paragraph 7.5.21 not to give an accused the right of election, he or she is to proceed in the same manner as a subordinate commander under paragraph 7.5.17.<sup>83</sup>

#### **OFFERING THE RIGHT OF ELECTION**

- 7.5.24** If a CO, detachment commander or superior commander decides in accordance with paragraph 7.5.21 to give the accused the right of election, he or she is to inform the accused as follows:<sup>84</sup>

*Because of the seriousness of the matter and the degree of punishment that it may be appropriate to impose on you for the offence(s) to which you have pleaded guilty, you have the right at this stage to elect trial by the Court Martial instead of being punished summarily by me. Do you wish to be tried by the Court Martial or do you wish to be punished summarily by me?*

- 7.5.25** The disciplinary officer must then:<sup>85</sup>
- a.** Adjourn the hearing and give the accused a reasonable period to consider the accused's election, which must be at least 24 hours if the accused wishes it; and
  - b.** Give the accused the opportunity to consult a lawyer in respect of the accused's election if it is reasonably practicable to do so. In this respect, the disciplinary officer is to apply paragraph 3.1.12, with any necessary modifications.

#### **ADVICE TO BE GIVEN ON RIGHT OF ELECTION**

- 7.5.26** During the adjournment referred to in paragraph 7.5.25a, the disciplinary officer is to ensure that the implications of the election set out below at paragraph 7.5.27 are fully explained to the accused by his or her defending officer or another officer or NCO who holds a Certificate of Competency as a Defending and Presenting Officer.

- 7.5.27** The implications to be explained in accordance with paragraph 7.5.26 are that:<sup>86</sup>
- a.** A summary trial by a disciplinary officer is not a trial by an independent court.

82 AFDA s 117ZA(2).

83 AFDA s 117E.

84 AFDA s 117D(1)(a).

85 AFDA s 117D(1)(b) and (c), and (2).

86 RP 15.

- b.** If the accused elects summary trial, he or she irrevocably waives his or her right under section 25(a) of the New Zealand Bill of Rights Act 1990 to be tried by an independent court.
- c.** A person tried by a disciplinary officer is not represented by a lawyer at that trial.
- d.** If the accused elects summary trial, he or she irrevocably waives his or her right under section 24(c) of the New Zealand Bill of Rights Act 1990 to legal representation.
- e.** If the accused elects trial by the Court Martial, he or she will be entitled to legal aid under the Armed Forces Legal Aid Scheme.
- f.** If the accused is found guilty by a disciplinary officer, the punishments that may be imposed are limited to those provided for in Chapter 8 Annex A or, as the case may be, Annex B.
- g.** If the accused is found guilty by the Court Martial, the Court Martial may impose any lawful sentence up to the maximum sentence for the offence.
- h.** The Court Martial is presided over by a Judge and applies the ordinary rules of evidence that are used in criminal courts.
- i.** Summary trials are conducted by disciplinary officers who are not Judges or lawyers and who do not apply the ordinary rules of evidence.
- j.** A summary trial can be commenced and completed more expeditiously than a trial by the Court Martial.

#### **ACTION IF ACCUSED ELECTS SUMMARY PUNISHMENT**

- 7.5.28** If the accused, after having been given the right of election, elects summary punishment by the disciplinary officer, the disciplinary officer is to proceed in the same manner as a subordinate commander under paragraph 7.5.17.<sup>87</sup>

#### **ACTION IF ACCUSED ELECTS TRIAL BY THE COURT MARTIAL**

- 7.5.29** If the accused, after having been given the right of election, elects trial by the Court Martial (or makes no election), the disciplinary officer is to:
- a.** Adjourn the proceedings for at least 24 hours, to provide the accused with an opportunity to reflect on his or her election;<sup>88</sup> and
  - b.** At the expiry of that adjournment, remand the accused for trial in the Court Martial and refer the charge to the DMP.<sup>89</sup>

<sup>87</sup> AFDA s 117E.

<sup>88</sup> AFDA s 117F(2).

<sup>89</sup> AFDA s 117F(1)(b).

**7.5.30** The disciplinary officer must also refer:<sup>90</sup>

- a.** Any charge against another person for an offence arising from the same incident or series of incidents; and
- b.** Any other charge against the accused for an offence arising from the same incident or series of incidents.

**7.5.31** See Section 9 for the procedure relating to the referral of charges to the DMP.

#### **GUILTY PLEA NOT REFERRED TO THE COURT MARTIAL**

**7.5.32** A guilty plea entered in proceedings before a disciplinary officer must not be taken into account by the Court Martial when making a finding on the charge.<sup>91</sup>

#### **RECORDING OF ELECTION**

**7.5.33** The accused's election under paragraph 7.5.24 is to be recorded in form MD 601C Record of Election and Waiver.

#### **ACCUSED MAY WITHDRAW ELECTION OF TRIAL BY THE COURT MARTIAL**

**7.5.34** If the accused elects to be tried by the Court Martial, he or she may withdraw that election at any time within 24 hours of making it.<sup>92</sup>

**7.5.35** If the accused does not withdraw his or her election within 24 hours of making it, he or she may withdraw it, with the consent of the disciplinary officer, at any time until the disciplinary officer has referred the charge to the DMP.<sup>93</sup>

**7.5.36** If the charge has been referred by the disciplinary officer to the DMP, the election may only be withdrawn with the consent of the DMP.<sup>94</sup>

**7.5.37** If the accused withdraws his or her election to be tried by the Court Martial, the disciplinary officer is to proceed in the same manner as a subordinate commander under paragraph 7.5.17.<sup>95</sup>

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90 AFDA s 117ZF.

91 AFDA s 117ZI(2).

92 RP 16(2).

93 RP 16(3).

94 RP 16(4).

95 AFDA s 117E.

## SECTION 6 – PROCEDURE FOLLOWING NOT GUILTY PLEA

### PRELIMINARY PROCEDURE

- 7.6.1** If the accused pleads not guilty to the charge, the disciplinary officer is to enter the plea in the form MD 601 Charge Report.<sup>96</sup> The disciplinary officer may then adjourn the proceedings for the time necessary to assemble the witnesses in support of the charge, if this has not already been done.
- 7.6.2** In addition to the disciplinary officer's power to order subordinate members of the Armed Forces to appear before him or her, every disciplinary officer has the power to issue a summons requiring any person to:<sup>97</sup>
- a.** Attend at the time and place specified in the summons;
  - b.** Give evidence; and
  - c.** Produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the proceedings.
- 7.6.3** The summons is to be in form MD 606 and may be issued on the application of the presenting officer or the accused, or on the initiative of the disciplinary officer.<sup>98</sup> The summons must be served in the manner indicated on the reverse of form MD 606.<sup>99</sup>
- 7.6.4** After any adjournment ordered under paragraph 7.6.1, the disciplinary officer is to ask the accused:<sup>100</sup> *Have you had adequate time and facilities to prepare a defence?*
- 7.6.5** If the disciplinary officer considers that the accused has not had adequate time or facilities (or both) to prepare a defence, the disciplinary officer is to adjourn the proceedings to allow the accused adequate time and a reasonable opportunity to obtain adequate facilities to prepare a defence.<sup>101</sup>

### INFORMATION TO BE PROVIDED BY SUBORDINATE COMMANDER

- 7.6.6** When a case is ready to proceed before a subordinate commander, the subordinate commander is to inform the accused:<sup>102</sup>

*I am investigating the charge to decide whether or not it should proceed and, if it should, whether it should be tried summarily by me or referred to your CO (or detachment commander, if applicable). You may question any witnesses who give evidence orally in support of the charge.*

*The evidence will not be given on oath unless you so require, in which case all witnesses who give evidence orally, including you if you give evidence, will be*

96 AFDA s 117I(1)(a).

97 AFDA s 150C(1).

98 AFDA s 150C(3) and RP 147(1).

99 AFDA s 150D.

100 AFDA s 117I(1)(b).

101 AFDA s 117I(2).

102 AFDA s 117J(1)(a).

sworn. Do you wish the evidence to be given on oath?

### INFORMATION TO BE PROVIDED BY CO, DETACHMENT COMMANDER OR SUPERIOR COMMANDER

- 7.6.7** When a case is ready to proceed before a CO, detachment commander or superior commander, that disciplinary officer is to inform the accused:<sup>103</sup>

*I am investigating the charge to decide whether or not it should proceed and, if it should, whether it should be tried summarily by me or whether you should be remanded for trial by the Court Martial. You may question any witnesses who give evidence orally in support of the charge.*

*The evidence will not be given on oath unless you so require, in which case all witnesses who give evidence orally, including you if you give evidence, will be sworn. Do you wish the evidence to be given on oath?*

### ADMINISTRATION OF OATHS AND AFFIRMATIONS

- 7.6.8** If the accused wishes the evidence to be given on oath, the disciplinary officer is to ask each witness whether the witness wishes to take the oath or make a solemn affirmation.

- 7.6.9** **Oath.** If the witness wishes to take the oath, the witness must:<sup>104</sup>

- a.** **If taking the Christian oath,** hold the Bible, the Old Testament or the New Testament in his or her right hand; or
- b.** **If taking the Jewish oath,** hold the Old Testament in his or her right hand;

and reply 'I do' to the following question:<sup>105</sup>

'Do you swear by Almighty God that the evidence you will give before me will be the truth, the whole truth, and nothing but the truth?'

- 7.6.10** A person taking an oath must remove any headdress, unless his or her religious belief requires that the headdress be worn.<sup>106</sup>

- 7.6.11** **Affirmation.** If the witness wishes to make a solemn affirmation, the witness must, with his or her right hand raised, reply 'I do' to the following question:<sup>107</sup>

'Do you solemnly, sincerely, and truly declare and affirm that the evidence you will give before me will be the truth, the whole truth, and nothing but the truth?'

### PRESENTING OFFICER TO OUTLINE CASE

- 7.6.12** Before beginning to hear the evidence, the disciplinary officer may ask the presenting officer to outline the case in support of the charge.<sup>108</sup> Whether this is

103 AFDA s 117J(1)(a).  
 104 RP 157.  
 105 RP 163.  
 106 RP 157(3).  
 107 RP 163.  
 108 AFDA s 117J(1)(b).

required will depend on the complexity of the case and the personal preference of the disciplinary officer.

### CALLING OF EVIDENCE IN SUPPORT OF THE CHARGE

**7.6.13** The disciplinary officer is to ask the presenting officer to:<sup>109</sup>

- a. Call each witness in support of the charge who is to give evidence orally to give evidence in the presence of the accused; and
- b. Produce, and to read aloud to the accused, any written statement that the disciplinary officer has decided to admit in evidence in support of the charge.<sup>110</sup>

**7.6.14** The disciplinary officer:<sup>111</sup>

- a. Must give the accused an opportunity to cross-examine each witness who gives evidence orally in support of the charge; and
- b. May allow the presenting officer an opportunity to re-examine each witness who has been cross-examined;<sup>112</sup> and
- c. May put questions to each witness who gives evidence orally in support of the charge that the disciplinary officer considers are necessary to ensure that he or she fully understands the witness's evidence.

**7.6.15** The disciplinary officer is to ensure that the examination of witnesses by the presenting officer and the defending officer, or the accused, complies with Chapter 6 Section 4 Part B.

### DETERMINING WHETHER THERE IS A PRIMA FACIE CASE

**7.6.16** After the disciplinary officer has heard the evidence in support of the charge, he or she must determine whether a prima facie case has been made out.<sup>113</sup>

**7.6.17** **Prima facie case** means that there is some evidence in respect of each element of the alleged offence, unless that evidence:

- a. Has been so discredited as a result of questioning; or
- b. Is so manifestly unreliable;

that no reasonable disciplinary officer could find the accused guilty based on it.<sup>114</sup>

109 AFDA s 117J(1)(c).

110 See paragraph 6.4.3 regarding the disciplinary officer's discretion to admit a written statement of evidence instead of requiring the person to give evidence orally.

111 AFDA s 117J(2).

112 The re-examination of witnesses in support of the charge who have been cross-examined is at the discretion of the disciplinary officer. In keeping with the inquisitorial nature of the proceedings, the question is whether the disciplinary officer might find such questioning by the presenting officer useful in carrying out his or her task.

113 AFDA s 117J(3).

114 *R v Smith* (1977) 1 NZCMAR 60, 66 (CMAC).

**ACTION IF THERE IS NO PRIMA FACIE CASE**

**7.6.18** If the disciplinary officer is not satisfied that a prima facie case has been made out, he or she is to:<sup>115</sup>

- a. Dismiss the charge;
- b. Record **D** in the form MD 601 Charge Report; and
- c. Announce the finding to the accused.

**ACTION IF THERE IS A PRIMA FACIE CASE**

**7.6.19** If the disciplinary officer is satisfied that there is a prima facie case, the disciplinary officer is to consider whether, in his or her opinion, he or she:<sup>116</sup>

- a. Has sufficient powers of punishment in relation to the charge; and
- b. Is empowered to act as a disciplinary officer in relation to the charge.

**7.6.20** **Sufficient powers of punishment.** See paragraph 7.5.12.

**7.6.21** **Empowered to act as a disciplinary officer.** See paragraph 7.2.1.

**ACTION IF SUBORDINATE COMMANDER HAS INSUFFICIENT POWERS**

**7.6.22** If a subordinate commander considers that he or she has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to a charge, he or she must refer the charge to the accused's CO (or detachment commander) without recording a finding of guilty on the charge.<sup>117</sup> The subordinate commander must also refer:<sup>118</sup>

- a. Any charge against another person for an offence arising from the same incident or series of incidents; and
- b. Any other charge against the accused for an offence arising from the same incident or series of incidents.

**7.6.23** At that point, the CO or detachment commander becomes the disciplinary officer in relation to the charge.<sup>119</sup> The not guilty plea remains in place for the proceedings in front of the CO or detachment commander, unless the accused decides to change his or her plea pursuant to AFDA s 117H.

**7.6.24** Paragraphs 7.6.1 to 7.6.19 apply to a charge referred to the CO or detachment commander under paragraph 7.6.22 as if the subordinate commander had not done anything after entering the not guilty plea.<sup>120</sup>

<sup>115</sup> AFDA s 117J(4).

<sup>116</sup> AFDA s 117K(1).

<sup>117</sup> AFDA s 117K(2)(b).

<sup>118</sup> AFDA s 117ZF.

<sup>119</sup> AFDA s 117K(3)(a).

<sup>120</sup> AFDA s 117K(3)(b) and (c).

**ACTION IF SUBORDINATE COMMANDER HAS SUFFICIENT POWERS**

- 7.6.25** If a subordinate commander considers that he or she has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to a charge, he or she is to try the accused summarily in accordance with Section 8.<sup>121</sup>

**ACTION IF CO, DETACHMENT COMMANDER OR SUPERIOR COMMANDER HAS INSUFFICIENT POWERS**

- 7.6.26** If a CO, detachment commander or superior commander considers that he or she has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to a charge, he or she must remand the accused for trial in the Court Martial and refer the charge to the DMP.<sup>122</sup> The disciplinary officer must also refer:<sup>123</sup>

- a. Any charge against another person for an offence arising from the same incident or series of incidents; and
- b. Any other charge against the accused for an offence arising from the same incident or series of incidents.

- 7.6.27** See Section 9 for the procedure relating to the referral of charges to the DMP.

**ACTION IF CO, DETACHMENT COMMANDER OR SUPERIOR COMMANDER HAS SUFFICIENT POWERS**

- 7.6.28** If a CO, detachment commander or superior commander considers that he or she has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to a charge, he or she must consider whether the accused should be given the right to elect trial by the Court Martial (**the right of election**).<sup>124</sup>

- 7.6.29** In making a decision under paragraph 7.6.28, the disciplinary officer must:<sup>125</sup>

- a. Consider the punishment, or combination of punishments, that he or she would be likely to impose;
- b. Consider the orders for compensation or restitution (or both) that he or she would be likely to make; and
- c. Bear in mind that a disciplinary officer is only permitted to:
  - (1) Impose a punishment from Column 2 of Chapter 8 Annex A or Annex B, as the case may be;<sup>126</sup> or
  - (2) Make an order for compensation exceeding 14 days' basic pay

121 AFDA s 117K(2)(a).

122 AFDA s 117K(4).

123 AFDA s 117ZF.

124 AFDA s 117L(1).

125 AFDA s 117L(2).

126 AFDA s 117W.



(but not exceeding 28 days' basic pay);<sup>127</sup>

if the disciplinary officer has given the accused the right of election.

### **ACTION IF RIGHT OF ELECTION NOT GIVEN**

**7.6.30** If a CO, subordinate commander or superior commander decides in accordance with paragraph 7.6.28 not to give an accused the right of election, he or she is to try the accused summarily in accordance with Section 8.<sup>128</sup>

### **OFFERING THE RIGHT OF ELECTION**

**7.6.31** If a CO, subordinate commander or superior commander decides in accordance with paragraph 7.6.28 to give the accused the right of election, he or she is to inform the accused as follows:<sup>129</sup>

*Because of the seriousness of the matter and the degree of punishment that it may be appropriate to impose on you if you are found guilty, you have the right at this stage to elect trial by the Court Martial instead of being tried summarily by me. Do you wish to be tried by the Court Martial or do you wish to be tried summarily by me?*

**7.6.32** The disciplinary officer must then:<sup>130</sup>

- a.** Adjourn the hearing and give the accused a reasonable period to consider the accused's election, which must be at least 24 hours if the accused wishes it; and
- b.** Give the accused the opportunity to consult a lawyer in respect of the accused's election if it is reasonably practicable to do so. In this respect, the disciplinary officer is to apply paragraph 3.1.12, with any necessary modifications.

### **ADVICE TO BE GIVEN ON RIGHT OF ELECTION**

**7.6.33** During the adjournment referred to in paragraph 7.6.32a, the disciplinary officer is to ensure that the implications of the election set out at paragraph 7.5.27 are fully explained to the accused by his or her defending officer or another officer or NCO who holds a Certificate of Competency as a Defending and Presenting Officer.

### **ACTION IF ACCUSED ELECTS SUMMARY TRIAL**

**7.6.34** If the accused, after having been given the right of election, elects summary trial, the disciplinary officer is to try the accused summarily in accordance with Section 8.<sup>131</sup>

127 AFDA s 117ZA(2).

128 AFDA s 117L(3).

129 AFDA s 117M(1)(a).

130 AFDA s 117M(1)(b) and (c), and (2).

131 AFDA s 117N(3)(a).

**ACTION IF ACCUSED ELECTS TRIAL BY THE COURT MARTIAL**

**7.6.35** If the accused, after having been given the right of election, elects trial by the Court Martial (or makes no election), the disciplinary officer is to:

- a. Adjourn the proceedings for at least 24 hours, to provide the accused with an opportunity to reflect on his or her election;<sup>132</sup> and
- b. At the expiry of that adjournment, remand the accused for trial in the Court Martial and refer the charge to the DMP.<sup>133</sup>

**7.6.36** The disciplinary officer must also refer:<sup>134</sup>

- a. Any charge against another person for an offence arising from the same incident or series of incidents; and
- b. Any other charge against the accused for an offence arising from the same incident or series of incidents.

**7.6.37** See Section 9 for the procedure relating to the referral of charges to the DMP.

**RECORDING OF ELECTION**

**7.6.38** The accused's election under paragraph 7.6.31 is to be recorded in form MD 601C Record of Election and Waiver.

**ACCUSED MAY WITHDRAW ELECTION OF TRIAL BY THE COURT MARTIAL**

**7.6.39** If the accused elects to be tried by the Court Martial, he or she may withdraw that election at any time within 24 hours of making it.<sup>135</sup>

**7.6.40** If the accused does not withdraw his or her election within 24 hours of making it, he or she may withdraw it, with the consent of the disciplinary officer, at any time until the disciplinary officer has referred the charge to the DMP.<sup>136</sup>

**7.6.41** If the charge has been referred by the disciplinary officer to the DMP, the election may only be withdrawn with the consent of the DMP.<sup>137</sup>

**7.6.42** If the accused withdraws his or her election to be tried by the Court Martial, the disciplinary officer is to try the accused summarily in accordance with Section 8.<sup>138</sup>

132 AFDA s 117N(2).

133 AFDA s 117N(1).

134 AFDA s 117ZF.

135 RP 16(2).

136 RP 16(3).

137 RP 16(4).

138 AFDA s 117N(3)(b).

## SECTION 7 – PROCEDURE FOLLOWING MIXED PLEAS OF GUILTY AND NOT GUILTY

### APPLICATION

**7.7.1** This Section applies if:<sup>139</sup>

- a.** There is more than one charge against the accused contained in the same form MD 601 Charge Report; and
- b.** The accused pleads guilty to one or more but not all of the charges.

### PROCEDURE

**7.7.2** Subject to paragraph 7.7.3, the disciplinary officer must:<sup>140</sup>

- a.** Act in accordance with Section 5 in respect of each charge to which the accused pleads guilty; but
- b.** Not act in accordance with Chapter 8 in respect of those charges until a finding has been recorded for the charges to which the accused has pleaded not guilty; and
- c.** Act in accordance with Section 6 in respect of each charge to which the accused pleads not guilty.

**7.7.3** If the disciplinary officer is to refer a charge to the DMP under paragraph 7.5.19 or 7.6.26, the disciplinary officer must not record a finding of guilty on that charge.

139 AFDA s 117G(1).

140 AFDA s 117G(2).

## SECTION 8 – SUMMARY TRIAL

## INFORMATION TO BE GIVEN TO ACCUSED

- 7.8.1** If a disciplinary officer is to try the accused summarily, the disciplinary officer must advise the accused as follows:<sup>141</sup>

*I have now heard the evidence in support of the charge. I have determined that there is a case to answer and that you should be tried summarily on the charge. You are not required to put forward any evidence but if you wish to do so now is the time. If you give evidence yourself, you may be questioned by the presenting officer and by me. Whether or not you give evidence, you may call witnesses and ask that evidence be admitted in the form of a written statement. You may question any witness you call, and that witness may also be questioned by the presenting officer and by me. Once I have received all the evidence I will decide whether you are guilty of the charge or not guilty of the charge.*

## THE CASE FOR THE DEFENCE

- 7.8.2** After advising the accused in accordance with paragraph 7.8.1, the disciplinary officer is to:<sup>142</sup>

- a. Ask the accused or the defending officer to:
  - (1) Outline his or her case; and
  - (2) State whether or not the accused wishes to put forward evidence in reply and, if so, what form the evidence will take;
- b. Ask the accused to give evidence orally if the accused wishes to do so; and then
- c. Ask the accused or the defending officer to call each witness on behalf of the accused who is to give evidence orally.

- 7.8.3** The disciplinary officer is to ensure that the examination of witnesses by the defending officer, or the accused, and the presenting officer complies with Chapter 6 Section 4 Part B.

- 7.8.4** After complying with paragraph 7.8.2, the disciplinary officer is to read aloud any written statement that he or she has decided to admit in evidence on behalf of the accused.<sup>143</sup>

- 7.8.5** If evidence is put forward on behalf of the accused, the disciplinary officer:<sup>144</sup>

- a. May allow the presenting officer to cross-examine each witness who gives evidence orally;<sup>145</sup> and

141 AFDA s 117O(1) and RP 17.

142 AFDA s 117O(2).

143 AFDA s 117O(3). See paragraph 6.4.3 for the admission of written statements in these circumstances.

144 AFDA s 117O(4).

145 The cross-examination of defence witnesses is at the discretion of the disciplinary officer. In keeping with the inquisitorial nature of the proceedings, the question is whether the disciplinary officer might find such questioning by the presenting officer useful in carrying out his or her task.

- b. If the presenting officer cross-examines a witness, must allow the accused an opportunity to re-examine the witness.

**7.8.6** The disciplinary officer may put any questions to a witness that the disciplinary officer considers necessary to ensure that he or she fully understands the witness's evidence.<sup>146</sup>

### CALLING AND RECALLING WITNESSES AT THE END OF THE DEFENCE CASE

**7.8.7** As a general rule, the whole case in support of the charge should be put before the disciplinary officer before the accused is called upon to make his or her defence. However, there are exceptions to this, which are described in paragraphs 6.4.25 to 6.4.28.

### THE FINDING

**7.8.8** After the disciplinary officer has received all the evidence in support of the charge and for the defence, he or she is to:<sup>147</sup>

- a. Determine whether the accused is guilty or not guilty on the charge;
- b. Record **G** or **NG** in the form MD 601 Charge Report; and
- c. Announce the finding to the accused and give reasons for the finding.

**7.8.9** If a charge is one of two or more alternative charges and the disciplinary officer finds the accused guilty, the disciplinary officer must record no finding (**NF**) in respect of any alternative charges that follow it.<sup>148</sup>

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146 AFDA s 117O(5).

147 AFDA s 117Q.

148 RP 14(5).

## SECTION 9 – REFERRAL OF CHARGES TO THE DIRECTOR OF MILITARY PROSECUTIONS

### TRANSCRIPTION OF AUDIO RECORDING

**7.9.1** Within seven days of making a decision to refer a charge to the DMP, the disciplinary officer is to:<sup>149</sup>

- a. Ensure that the audio recording of any proceedings before the disciplinary officer is transcribed;
- b. Certify the transcript as being true and correct; and
- c. Provide the accused with a certified copy of the transcript.

**7.9.2** If no audio recording was made in accordance with paragraph 7.3.24, the disciplinary officer is to provide the accused with a certified copy of his or her written summary of the proceedings.

**7.9.3** **Certification of transcript or written summary.** The disciplinary officer is to satisfy himself or herself that the transcript or summary is a true and accurate record of the proceedings before him or her. If the disciplinary officer considers that it is necessary to make any amendments for the sake of accuracy, these are to be initialled by him or her. The disciplinary officer is to initial each page of the transcript or summary, except the last page. The disciplinary officer is to cause the following notation to be added to the end of the transcript or summary and is then to sign and date it:

I certify that this transcript (*or summary*) is a true and accurate record of the proceedings before me on (*date*) at/on board (*ship, base, or camp*).

(*Name*)

(*Rank*)

(*Appointment*)

Disciplinary Officer

(*Date in full*)

**7.9.4** The following abbreviations are authorised for use in certified transcripts or written summaries made in accordance with paragraph 7.9.1 or paragraph 7.9.2:

- a. DISCO: disciplinary officer.
- b. PRESO: presenting officer.
- c. DEFO: defending officer.
- d. ACC: accused.
- e. WIT: witness.

**INFORMATION TO BE PROVIDED TO ACCUSED**

**7.9.5** Within seven days of making a decision to refer a charge to the DMP, the disciplinary officer is to:<sup>150</sup>

- a.** Provide the accused with:
  - (1)** Form MD 611 Guide for Accused Persons;
  - (2)** Form MD 610 Application for Legal Aid; and
  - (3)** Form MD 610A Statement of Means for Legal Aid; and
- b.** Inform the accused that, if he or she elects to present a defence, then he or she has seven days to provide the disciplinary officer with any signed written statements in his or her defence to be referred to the DMP.

**REFERRAL TO DMP THROUGH SUPERIOR COMMANDER**

**7.9.6** If the disciplinary officer is a CO or detachment commander, he or she must send the following documents to his or her superior commander not later than 14 days after making the decision to refer the charge to the DMP:<sup>151</sup>

- a.** The form MD 601 Charge Report, including any forms MD 601A, the form MD 601B Record of Disclosure and (if applicable) the form MD 601C Record of Election and Waiver.
- b.** The certified transcript or written summary prepared in accordance with paragraph 7.9.1 or paragraph 7.9.2.
- c.** Any written statements provided by the accused in accordance with paragraph 7.9.5b.
- d.** Any Service Police or other investigation report, including the report of any court of inquiry, that is relevant to the charge.
- e.** Any relevant exhibits.
- f.** Form MD 613 Particulars of the Accused's Service.
- g.** Form MD 620 Medical Officer's Certificate.

**7.9.7** Within seven days of receiving the documents mentioned above at paragraph 7.9.6, the superior commander is to forward the documents to the DMP under cover of a minute containing the superior commander's opinion as to whether prosecution of the charge is in the interests of the Service.<sup>152</sup>

<sup>150</sup> AFDA s 117ZG(1) and RP 20(1).

<sup>151</sup> AFDA s 117ZG(2) and RP 20(2).

<sup>152</sup> AFDA s 117ZG(3).

**REFERRAL TO DMP BY SUPERIOR COMMANDER**

- 7.9.8** If the disciplinary officer is a superior commander, he or she is to send the documents referred to in paragraph 7.9.6 to the DMP, not later than 14 days after making the decision to refer the charge to the DMP, under cover of a minute containing the superior commander's opinion as to whether prosecution of the charge is in the interests of the Service.<sup>153</sup>

**FUNCTIONS AND DUTIES OF THE DMP**

- 7.9.9** Once a prosecution has been referred to the DMP, the functions and duties of the DMP are:<sup>154</sup>

- a.** To determine whether the accused is to be committed for trial in the Court Martial;
- b.** To decide on what charge the accused should be tried;
- c.** To prepare and certify the charge sheet or charge sheets;
- d.** To give a copy of the certified charge sheet to the accused (including any amended charge sheet so certified);
- e.** To lay the charge sheet or charge sheets before the Registrar of the Court Martial;
- f.** If two or more persons are accused, to direct whether they are to be tried jointly or separately; and
- g.** To appoint counsel for the prosecution.

- 7.9.10** In performing his or her functions and duties, the DMP is not subject to command or Ministerial control.<sup>155</sup>

**DMP MAY DIRECT INVESTIGATION**

- 7.9.11** The DMP has a statutory power to direct any provost officer to investigate, or arrange the investigation of, any matter that the DMP considers to be relevant to a charge referred to the DMP.<sup>156</sup>

- 7.9.12** A provost officer must comply with a direction given in accordance with paragraph 7.9.11.<sup>157</sup>

**DMP MAY STAY PROCEEDINGS**

- 7.9.13** The DMP may, on the application of a disciplinary officer or on his or her own initiative, issue an order that the proceedings against an accused under the

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153 AFDA s 117ZG(4) and RP 20(3).

154 AFDA s 101F.

155 AFDA s 101I.

156 AFDA s 101G(1).

157 AFDA s 101G(2).



AFDA be stayed either temporarily or permanently.<sup>158</sup>

**7.9.14** The DMP must provide a copy of any order staying proceedings, together with his or her written reasons for the stay, to:

- a. The Solicitor-General;
- b. The disciplinary officer; and
- c. The accused in question.

#### **DMP MAY REFER CHARGE BACK TO DISCIPLINARY OFFICER**

**7.9.15 Charge referred because of insufficient powers.** If a charge is referred to the DMP by a disciplinary officer on the ground that the disciplinary officer is not empowered or does not have sufficient powers of punishment to act as a disciplinary officer in respect of it, the DMP may refer the charge back to the disciplinary officer with a direction that the officer is to:<sup>159</sup>

- a. Continue to act as a disciplinary officer in relation to the charge or charges; or
- b. Dismiss the charge or charges.

**7.9.16 Charge referred following election of trial by the Court Martial.** If a charge has been referred to the DMP in accordance with paragraph 7.5.29 or paragraph 7.6.35, the DMP may refer the charge back to the disciplinary officer with a direction that the officer must dismiss the charge or charges.<sup>160</sup>

**7.9.17 Election withdrawn after charge referred.** If, after a charge has been referred to the DMP in accordance with paragraph 7.5.29 or paragraph 7.6.35, the accused withdraws his or her election of trial by the Court Martial with the consent of the DMP,<sup>161</sup> the DMP may refer the charge back to the disciplinary officer with a direction that the officer must:<sup>162</sup>

- a. Continue to act as a disciplinary officer in relation to the charge or charges; or
- b. Dismiss the charge or charges.

**7.9.18 Additional directions permitted.** A direction given under paragraphs 7.9.15 or 7.9.17 may include:<sup>163</sup>

- a. A direction to give the accused the right of election;
- b. A direction to record another charge under the AFDA;<sup>164</sup> or

<sup>158</sup> AFDA s 101H(1).

<sup>159</sup> AFDA s 117ZH(1).

<sup>160</sup> AFDA s 117ZH(4).

<sup>161</sup> See paragraphs 7.5.36 and 7.6.41.

<sup>162</sup> AFDA s 117ZH(2).

<sup>163</sup> AFDA s 117ZH(3).

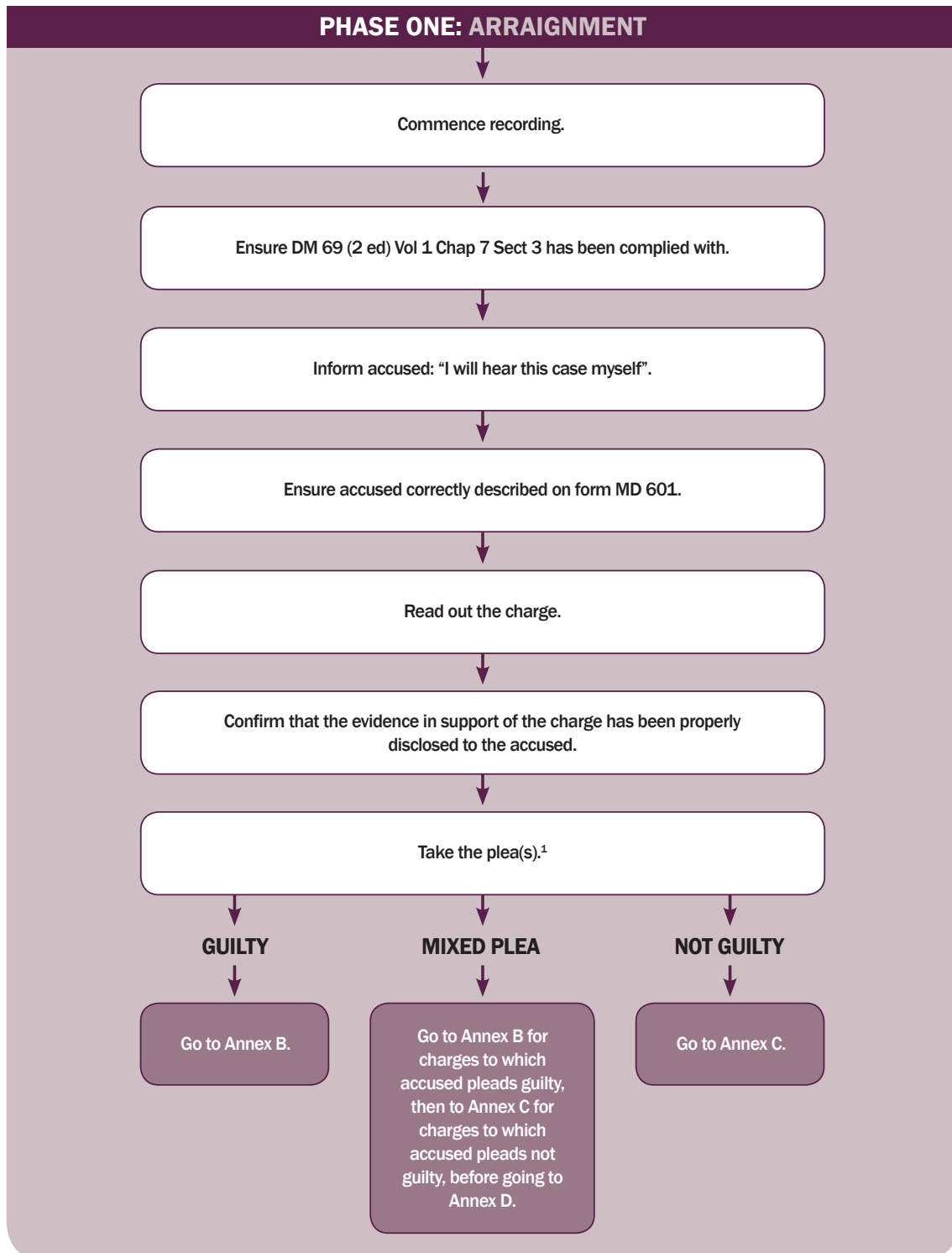
<sup>164</sup> AFDA s 117ZH(6)(a).

- c. Any other procedural directions that the DMP thinks fit.

**7.9.19 Application to associated charges.** A direction given under paragraphs 7.9.15 to 7.9.17 may apply to all or any other charges referred to the DMP by virtue of paragraphs 7.5.19, 7.5.30, 7.6.26, or 7.6.36.

**7.9.20 Accused to be informed.** The DMP is to inform the accused, through the accused's CO, of any action that is taken in respect of the accused in accordance with paragraphs 7.9.15 to 7.9.17.

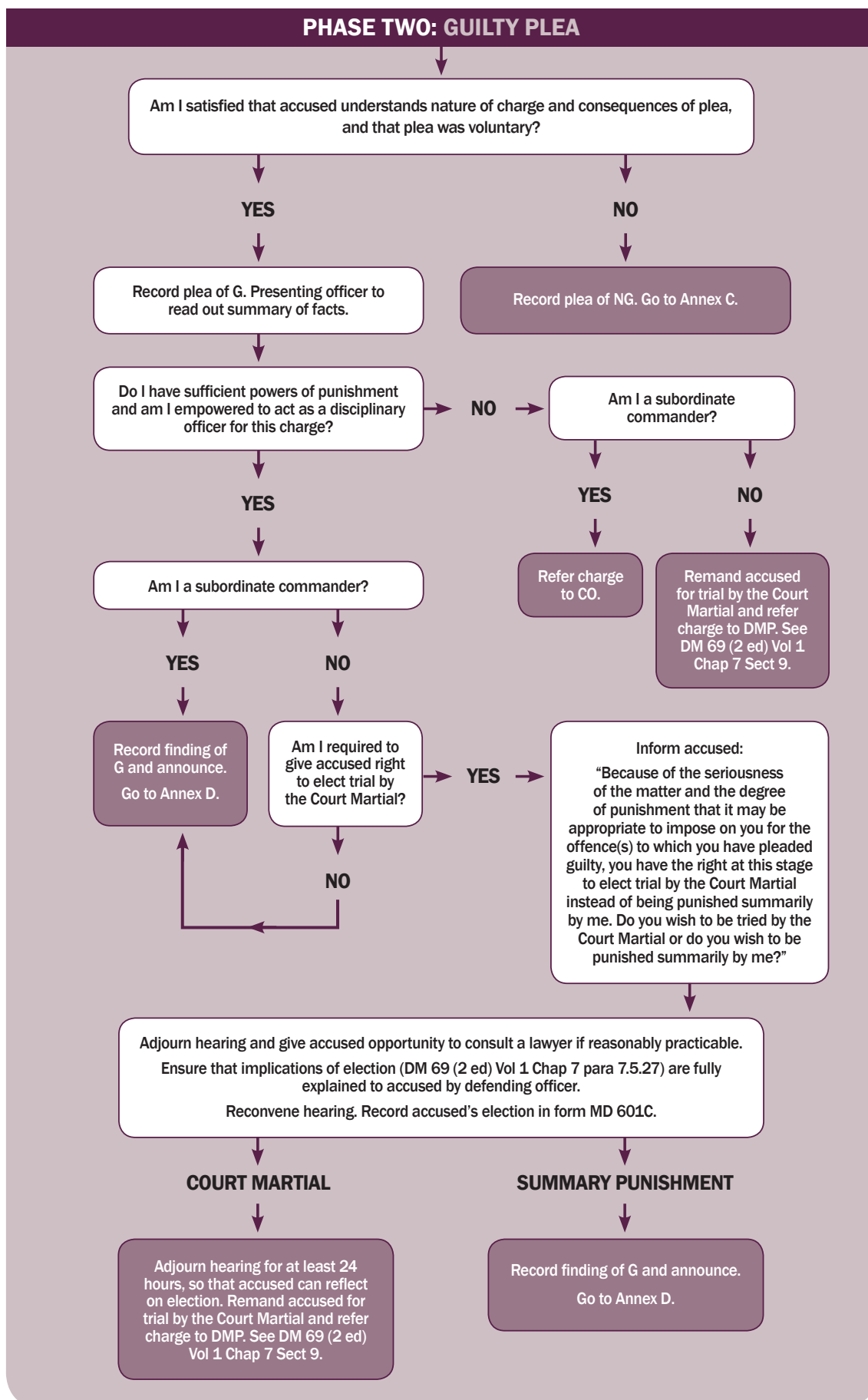
## ANNEX A: DISCIPLINARY OFFICER PROCEDURE



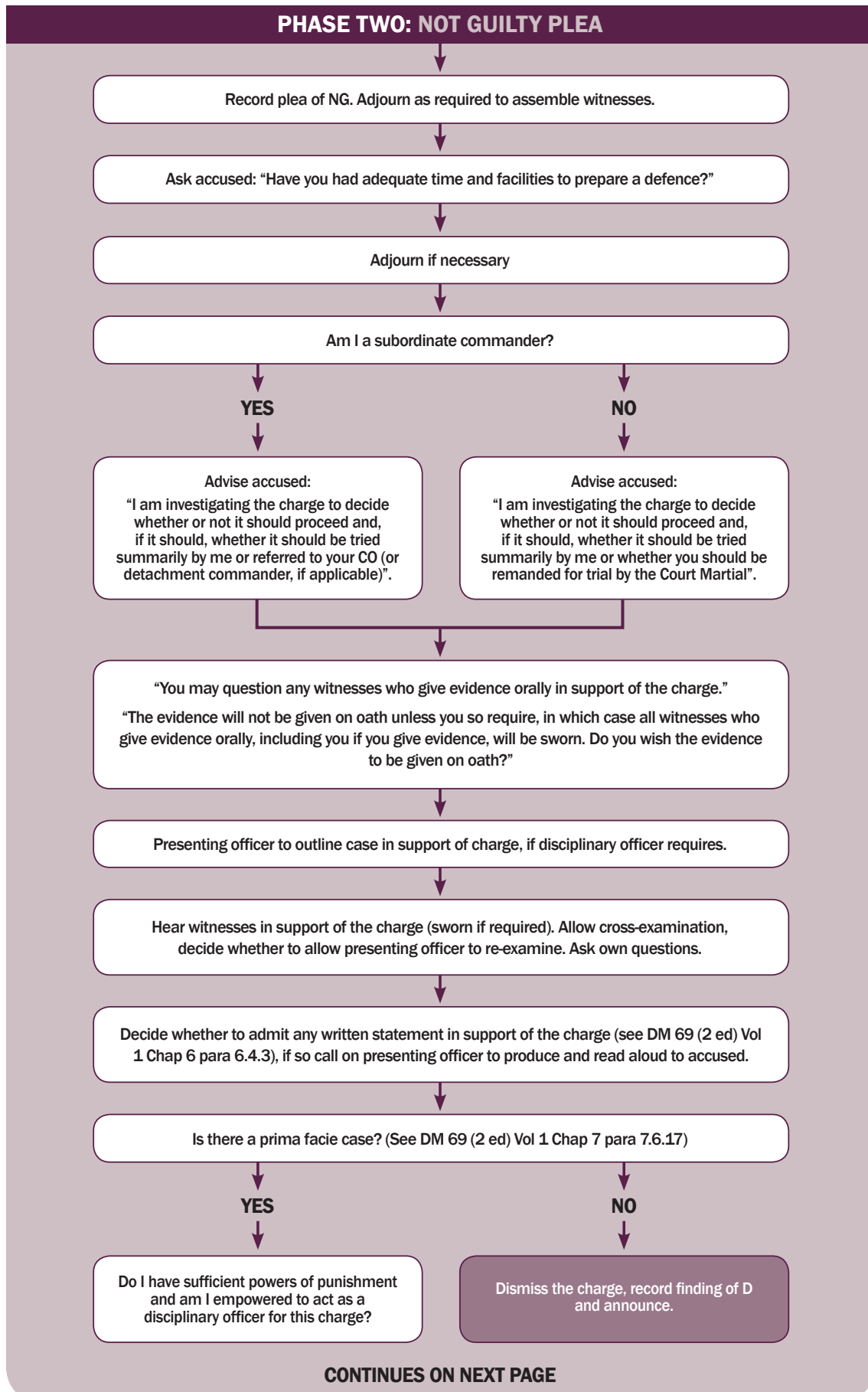
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Pleas to alternative charges. See DM 69 (2 ed) Vol 1 Chapter 7 paragraphs 7.5.4 to 7.5.7.

## ANNEX B: DISCIPLINARY OFFICER PROCEDURE

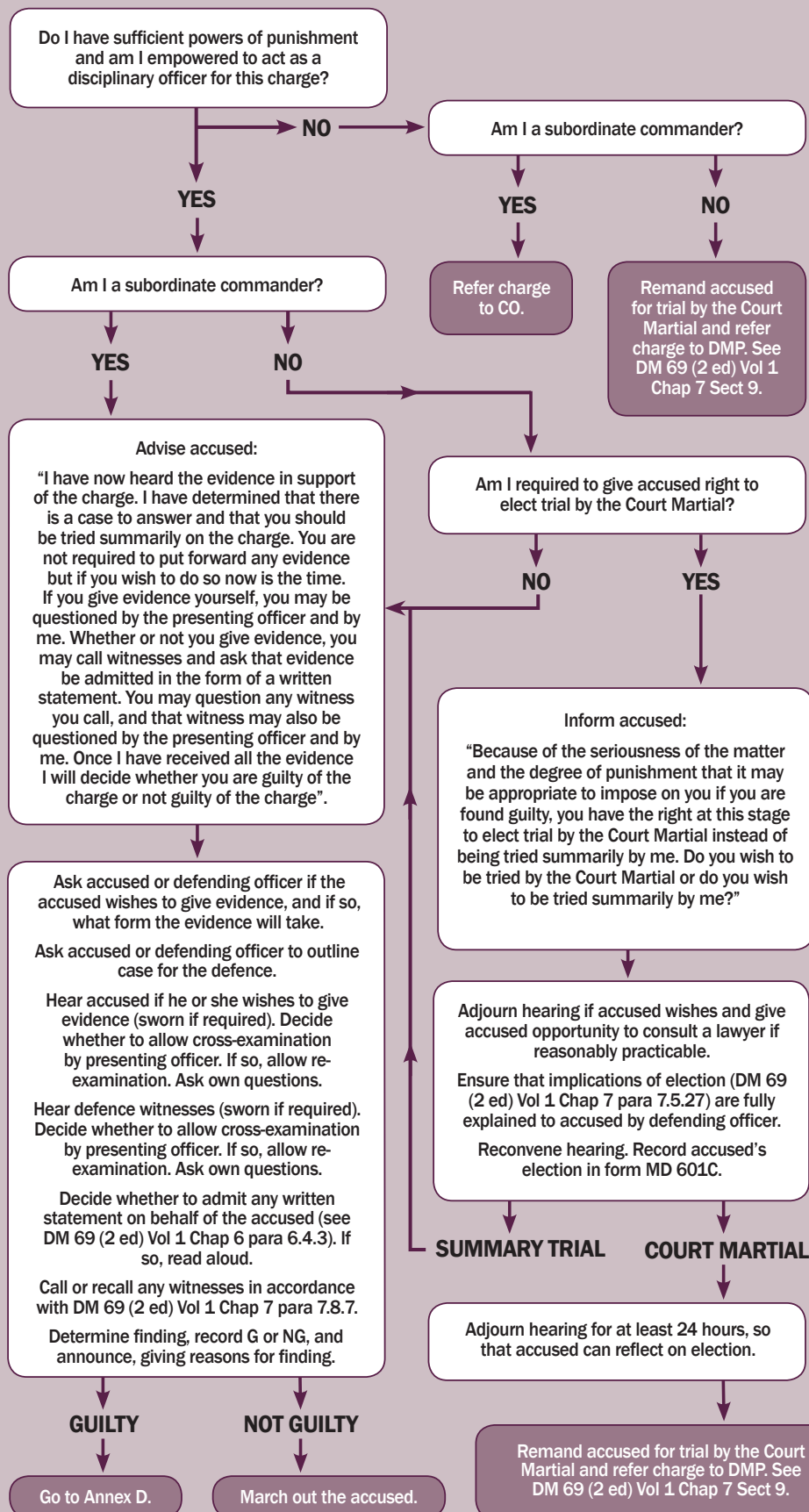


## ANNEX C: DISCIPLINARY OFFICER PROCEDURE

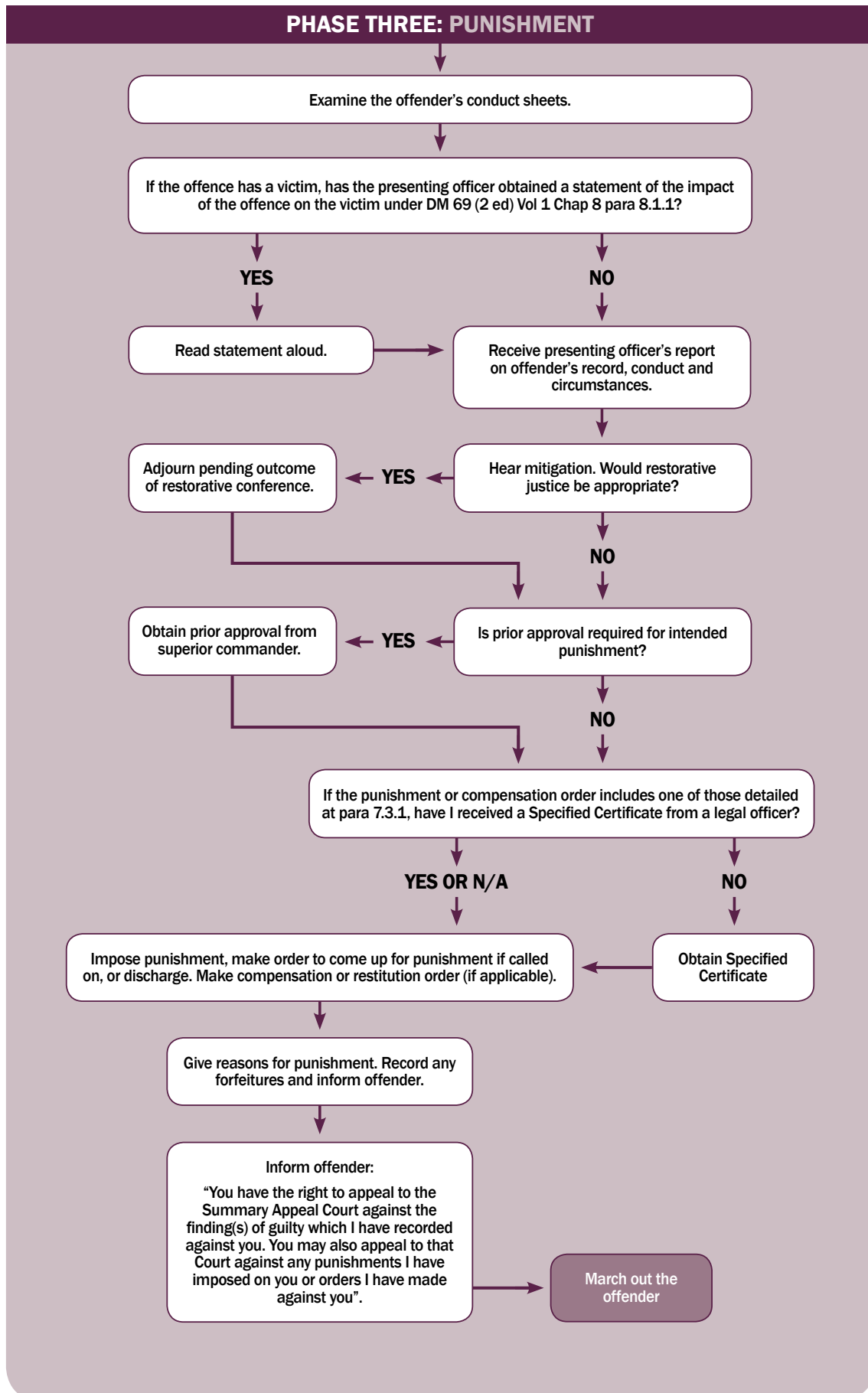


## ANNEX C: DISCIPLINARY OFFICER PROCEDURE Continued

## PHASE TWO: NOT GUILTY PLEA CONTINUED



## ANNEX D: DISCIPLINARY OFFICER PROCEDURE



## Chapter 8:

# PUNISHMENT

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## SECTION 1 – PUNISHMENT PROCEDURE

### CONSIDERATION OF CONDUCT SHEETS AND EFFECT ON VICTIM

**8.1.1** If a disciplinary officer records a finding of guilty on a charge, he or she must, before imposing a punishment:<sup>1</sup>

- a.** Examine the offender's conduct sheets;
- b.** If a victim of the offence so wishes, read aloud a written statement from the victim setting out:
  - (1)** Any physical injury or emotional harm suffered by the victim through, or by means of, the offence;
  - (2)** Any loss of, or damage to, property suffered by the victim through, or by means of, the offence; and
  - (3)** Any other effects of the offence on the victim.

**8.1.2** **Victim** means:<sup>2</sup>

- a.** A person against whom an offence is committed by another person;
- b.** A person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property;
- c.** A parent or legal guardian of a person under the age of 17 who falls within paragraph a or b; and
- d.** A member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable.

**8.1.3** **Victim does not include** any person charged (whether as a principal or party or accessory after the fact or otherwise) with the commission of, or convicted or found guilty of, or who pleads guilty to:

- a.** The relevant offence; or
- b.** Another offence relating to the same incident or series of incidents as the relevant offence.

**8.1.4** **Immediate family** means a member of the victim's family, whanau, or other culturally recognised family group, who is in a close relationship with the victim at the time of the offence.<sup>3</sup>

<sup>1</sup> AFDA s 117R(1)(a) and (b)..

<sup>2</sup> AFDA s 117R(4) and section 4 of the Victims' Rights Act 2002.

<sup>3</sup> Section 4 of the Victims' Rights Act 2002. It specifically includes the victim's spouse, civil union partner, de facto partner, child, step-child, sibling (including by marriage), parent, step-parent, or grandparent.

**8.1.5 Incapable** means that the person:<sup>4</sup>

- a. Lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
- b. Wholly lacks the capacity to communicate decisions in respect of matters of that kind.

**8.1.6 Incapable** includes a situation where the person is in a state of continuing unconsciousness.**PLEA IN MITIGATION****8.1.7** After complying with paragraph 8.1.1, the disciplinary officer must:<sup>5</sup>

- a. Give the offender a reasonable opportunity to make an explanation or plea in mitigation of punishment; and
- b. If the offender so wishes, give any witness on behalf of the offender a reasonable opportunity to give evidence in support of the explanation or plea in mitigation of punishment.

**PRESENTING OFFICER'S REPORT****8.1.8** The disciplinary officer may obtain from the presenting officer:<sup>6</sup>

- a. A report on the offender's record and general conduct in the Service<sup>6A</sup>;
- b. Details of any period during which the offender was held in custody awaiting trial; and
- c. Details of any information in the possession of the Service authorities relating to the offender's circumstances that may be relevant in considering punishment.

**RESTORATIVE JUSTICE****8.1.9** If it appears to the disciplinary officer that the offence arose out of an unresolved conflict between the offender and the victim(s), the disciplinary officer may propose a meeting (**restorative conference**) between the parties to resolve issues relating to the offence, prior to deciding what punishment to impose. In some cases a restorative conference will not be appropriate in a Service context, however in other cases it may enhance unit cohesion.**8.1.10** The disciplinary officer should not order a restorative conference unless:

- a. A suitable person (**facilitator**) is available to arrange and facilitate the conference;

4 Section 4 of the Victims' Rights Act 2002.

5 AFDA s 117R(1)(c) and (d).

6 AFDA s 117R(2)

6A MD 601D.

- b. The victim and the offender agree to hold a restorative conference;
- c. The resources required for a restorative conference are available; and
- d. The holding of a restorative conference is otherwise practicable, and is in all the circumstances appropriate.

**8.1.11** A restorative conference should not be ordered unless the offender explicitly admits that he or she committed the offence.

**8.1.12** A restorative conference may offer the victim the opportunity to directly express his or her feelings about the offence. It may also provide the offender with an opportunity to offer redress, by way of an apology or in some more tangible form. Such redress may include:<sup>7</sup>

- a. An agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur;
- b. Measures to be taken by the offender to:
  - (1) Make compensation to any victim of the offending or family, whanau, or family group of the victim;
  - (2) Apologise to any victim of the offending or family, whanau, or family group of the victim; or
  - (3) Otherwise make good the harm that has occurred; or
- c. Remedial action to be taken by the offender in relation to the circumstances of the offending.

**8.1.13** The disciplinary officer may defer imposing punishment until the restorative conference (and any actions that follow directly from that conference) are completed. The facilitator of the conference is to report on the outcome of the conference to the disciplinary officer. The disciplinary officer may take the outcome of the conference into account in deciding on the offender's punishment.

#### PRIOR APPROVAL OF CERTAIN SUMMARY PUNISHMENTS

**8.1.14** **When prior approval required.** Subject to paragraph 8.1.18, a CO who is below the rank of lieutenant colonel (equivalent) and who is otherwise authorised to do so, is not to:

- a. Make an order for compensation exceeding 14 days' basic pay; or
- b. Impose any of the punishments of:
  - (1) Detention for a period exceeding 14 days;

- (2) Reduction in rank;
- (3) Stay of seniority for a period exceeding six months; or
- (4) A fine exceeding 14 days' basic pay;

either alone or in combination with other punishments, without the prior approval of the appropriate superior commander.

**8.1.15 Requesting prior approval.** Where a CO wishes to make an order for compensation or impose any of the punishments which require prior approval, he or she is to forward to the superior commander through normal command channels:

- a. A minute, signal or e-mail summarising the information in the MD 601 Charge Report and the evidence he or she has heard, with the details of the order or punishment or combination proposed; and
- b. Details of the offender's service record and his or her personal circumstances so far as they are relevant.

**8.1.16 Decision of superior commander.** Where prior approval is sought the superior commander is to :

- a. Approve the order or punishment or combination proposed;
- b. Order that an order or punishment or combination within the powers of the CO and less severe than that or those proposed be substituted; or
- c. Suggest that an order or punishment or combination within the powers of the CO and more severe than that or those proposed be substituted (in which case the suggestion is approval for the imposition of an order or punishment or combination not exceeding that or those suggested by the superior commander).

**8.1.17 Record of approval.** The superior commander is to notify his or her decision to the CO who sought approval. A copy of the approval is to be attached to the form MD 601 Charge Report.

**8.1.18 Action to prevent unreasonable delay.** If the CO considers that the delay in obtaining approval for the order, punishment or combination proposed would substantially interfere with the maintenance of discipline, he or she may proceed to make the order or impose the punishment or combination without obtaining prior approval. In such a case, however, the CO is to report his or her action and the reasons for it to the appropriate superior commander at the earliest practicable opportunity and is to annotate the form MD 601 Charge Report accordingly.

## IMPOSITION OF PUNISHMENT

**8.1.19** The disciplinary officer may, after acting in accordance with paragraphs 8.1.1 to

8.1.8 (and paragraphs 8.1.9 to 8.1.18, where applicable):<sup>8</sup>

- a. Impose on the offender any one or more of the punishments that he or she is authorised to impose under Annex A or Annex B and considers just;
- b. Make an order that the offender come up for punishment if called on; or
- c. Discharge the offender without punishment.

**8.1.20 One punishment or combination of punishments for all offences.** Any punishment or punishments imposed by a disciplinary officer is to be in respect of all the offences of which the offender has been found guilty.<sup>9</sup>

**8.1.21 Compensation or restitution order.** The disciplinary officer may make a compensation order or a restitution order instead of, or in addition to, any of the punishment options referred to in paragraph 8.1.19.<sup>10</sup> See Section 4.

**8.1.22 Specified Certificate.** The disciplinary officer must ensure that he or she has received a Specified Certificate if he or she intends to impose a punishment or compensation order including:<sup>11</sup>

- a. Detention;
- b. Reduction in rank; or
- c. A fine of an amount that exceeds the offender's basic pay for a period of 7 days; or
- d. A compensation order of an amount that exceeds the offender's basic pay for a period of 7 days.

#### DISCIPLINARY OFFICER MUST GIVE REASONS

**8.1.23** The disciplinary officer must give reasons for any action he or she takes in accordance with paragraphs 8.1.19 or 8.1.22.<sup>12</sup> The reasons are to be recorded in accordance with paragraph 7.3.24.

#### RECORDING FORFEITURES

**8.1.24** After acting in accordance with paragraphs 8.1.19 to 8.1.23, the disciplinary officer must record the details of any forfeitures which apply in accordance with Section 5 (including any cancellation of the whole or part of those forfeitures).<sup>13</sup>

#### ADVICE ON RIGHT TO APPEAL

**8.1.25** Before concluding the summary proceeding, the disciplinary officer must inform the offender as follows:<sup>14</sup>

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8 AFDA s 117S(1).  
 9 AFDA s 117X.  
 10 AFDA s 117ZA.  
 11 AFDA s 117R(3) and s 117ZA(3). See paragraphs 7.3.1 to 7.3.5.  
 12 AFDA s 117S(2).  
 13 AFDA s 117S(4)(a).  
 14 AFDA s 117S(4)(b).

*You have the right to appeal to the Summary Appeal Court against the finding(s) of guilty which I have recorded against you. You may also appeal to that Court against any punishments I have imposed on you or orders I have made against you.*

## REDUCTION OF PUNISHMENT

**8.1.26** When a disciplinary officer has imposed a punishment, or a combination of punishments, he or she:<sup>15</sup>

- a. May not subsequently increase the punishment for that offence; but
- b. May reduce the punishment for the offence at any time before it has been completely carried out.

**8.1.27** A CO may reduce, but not increase, a punishment imposed by a detachment commander or by a subordinate commander.<sup>16</sup>

**8.1.28** **Severity of punishments.** The punishments available to a disciplinary officer are set out in Section 3 in their prescribed order of severity.<sup>17</sup> A combination of punishments (**A**) is less severe than another punishment or combination of punishments (**B**) if the most severe punishment in A is less severe than the most severe in B.<sup>18</sup> Any punishments which are the same in kind and amount are to be excluded from this comparison.

<sup>15</sup> AFDA s 117Z(1).

<sup>16</sup> AFDA s 117Z(2).

<sup>17</sup> AFDA Schedule 3, clause 2.

<sup>18</sup> AFDA Schedule 3, clauses 3 and 4.

## SECTION 2 – PUNISHMENT PRINCIPLES

### GENERAL PRINCIPLE

- 8.2.1** The basic principle of punishment which is to be applied by disciplinary officers is that only so much severity should be used as is necessary for the attainment of justice, the prevention of offences, and the maintenance of proper order and discipline.
- 8.2.2** Subject only to a few safeguards stated below, the degree of punishment to be imposed on an offender is solely a matter for the disciplinary officer concerned. The disciplinary officer is to do justice according to the law using his or her own judgment unfettered by ‘command influence’, political pressure, or any other extraneous influence.
- 8.2.3** The safeguards against undue severity are the appellate jurisdiction of the Summary Appeal Court,<sup>19</sup> the requirement for majors (equivalent) and below to obtain the prior approval of a superior commander before certain summary punishments are awarded, and the right to elect trial by the Court Martial before certain levels of punishment can be exceeded.

### FACTORS GOVERNING THE CHOICE OF PUNISHMENT

- 8.2.4** Some of the more important factors relevant to the choice of punishment by any military tribunal are listed below. The list is neither exhaustive nor arranged in order of importance:
- a.** The gravity of the offence.
  - b.** The frequency with which it is currently being committed.
  - c.** Its consequences.
  - d.** Its effect on discipline in the Service (or a joint force).
  - e.** Its effect on the public conscience.
  - f.** The necessity for protecting the public in and out of the Service from a repetition of the offence.
  - g.** The age and standing in the Service of the offender.
  - h.** The offender’s character, previous conduct record, mentality, and personality.
  - i.** Any circumstances of provocation.
  - j.** The reformatory effect of punishment.
  - k.** The outcome of any restorative conference that may have taken place.



- l.** The effects of the punishment on the offender's pay and career in the Service and subsequent career, including any financial effects.
- m.** The desirability or otherwise of retaining the offender in the Service.
- n.** The retributive effect of the punishment.
- o.** The effect of any forfeiture of pay in accordance with Section 5.
- p.** The need for uniformity of treatment, taking into account the fact that the circumstances of one case are rarely the same as another.

## SECTION 3 – PUNISHMENT OPTIONS

### SELECTION OF PUNISHMENT

- 8.3.1** A disciplinary officer may impose on an offender any one or more of the punishments mentioned in this Section in respect of any offence of which the disciplinary officer has found that offender guilty,<sup>20</sup> up to the limit he or she is authorised to impose by Annex A or, if he or she is a superior commander, Annex B. If the disciplinary officer finds the offender guilty of more than one offence, the punishment imposed is in respect of all the offences.<sup>21</sup>

### DETENTION

- 8.3.2** See Chapter 9 for provisions relating to the punishment of detention.

### REDUCTION IN RANK

- 8.3.3** If a disciplinary officer imposes the punishment of reduction in rank on a rating, the disciplinary officer may reduce the rating's rank:<sup>22</sup>
- a.** To any lower rank, not below able rank, in the rating's present branch; or
  - b.** In the case of the Naval Police Branch or the Physical Training Branch, to any lower rank, not below able rank, in the rating's former branch for which the rating is qualified.
- 8.3.4** If a disciplinary officer imposes a punishment of reduction in rank on a soldier, the disciplinary officer may reduce the soldier's rank to any lower rank, not below private.<sup>23</sup>
- 8.3.5** If a disciplinary officer imposes a punishment of reduction in rank on an airman, the disciplinary officer may reduce the airman's rank to any lower rank, not below leading aircraftman.<sup>24</sup>

### STAY OF SENIORITY

- 8.3.6** If a disciplinary officer imposes a punishment of a stay of seniority on a member of the Armed Forces, the member must remain in the rank and retain the amount of seniority that the member has on the day on which the punishment is imposed for the period, not exceeding one year, that the disciplinary officer specifies.<sup>25</sup>

### FINE

- 8.3.7** A fine is to be expressed as a specified sum of dollars and not in terms of "days' basic pay".<sup>26</sup>

20 AFDA s 117V(3).

21 AFDA s 117X.

22 AFDR 4(2).

23 AFDR 4(3).

24 AFDR 4(4).

25 AFDR 6(2).

26 AFDA s 85(1).

**CONFINEMENT TO SHIP OR BARRACKS**

- 8.3.8** A member of the Armed Forces who is awarded the punishment of confinement to ship or barracks is, in addition to his or her normal duties:
- a.** To remain within the confines of his or her ship, camp, or base except when authorised to leave that ship, camp, or base in the normal course of his or her duties;
  - b.** To undertake up to two hours' extra work and drill per day as determined by his or her CO;
  - c.** To attend such parades or musters as may be ordered by his or her CO; and
  - d.** Not to enter any wet canteen or mess bar, or utilise any other off-duty facilities which may be specified by his or her CO;
- for the duration of the punishment.

**EXTRA WORK AND DRILL**

- 8.3.9** A member of the Armed Forces who is awarded the punishment of extra work and drill is, in addition to his or her normal duties, to undertake up to two hours' extra work and drill per day, as determined by his or her CO, for the duration of the punishment.
- 8.3.10** This punishment does not involve stoppage of leave or any restriction on the use of off-duty facilities .
- 8.3.11** If extra work only is to be performed, the work should normally be manual tasks which are, if possible, different from those normally performed by the member.

**STOPPAGE OF LEAVE**

- 8.3.12** A member of the Armed Forces who is awarded the punishment of stoppage of leave is:
- a.** To remain within the confines of his or her ship, camp, or base, except when authorised to leave that ship, camp, or base in the normal course of his or her duties;
  - b.** To attend such parades or musters as may be ordered by his or her CO; and
  - c.** Not to enter any wet canteen or mess bar, or utilise any other off-duty facilities which may be specified by his or her CO;
- for the duration of the punishment.

**8.3.13** COs may direct that stoppage of leave is effective only on those days when leave is granted. In such cases any stoppage of leave not enforced at the expiration of 21 days from the date of the award or, where there has been more than one award, from the date of the first award, is remitted.

**8.3.14** In the context of this punishment, leave does not include annual leave and this punishment does not affect the entitlement of a member of the Armed Forces to annual leave.

#### **EXTRA DUTY**

**8.3.15** A member of the Armed Forces who is awarded the punishment of extra duty is, in addition to his or her normal duties, to undertake up to two hours' extra duty per day for the duration of the punishment, as determined by his or her CO.

**8.3.16** The extra duty performed under this punishment is to be of a less arduous nature than the extra work required for the punishment of confinement to ship or barracks and extra work and drill. It may be of the type usually undertaken by the member of the Armed Forces in the course of his or her normal duties.

#### **COMMENCEMENT AND DURATION OF CERTAIN PUNISHMENTS**

**8.3.17** Subject to paragraphs 8.3.13 and 8.3.18 to 8.3.20, the punishments described above in paragraphs 8.3.8 to 8.3.16 are to be awarded in days of 24 hours' duration commencing at 0800 on the day of the award except that, when awarded to a member of the Armed Forces already undergoing any of such punishments, they commence at 0800 on the morning on which the former punishment terminates.

#### **EFFECT OF DETENTION ON OUTSTANDING SUMMARY PUNISHMENTS**

**8.3.18** Where a member of the Armed Forces who has been awarded any of the punishments described in paragraphs 8.3.8 to 8.3.16, or a combination of punishments including any of those punishments, commits a further offence and is awarded or sentenced to detention, any part of any of the former punishments which has not been completed is remitted as from the date of the sentence of detention.

#### **SUMMARY PUNISHMENTS FOR OFFENCES COMMITTED IN DETENTION**

**8.3.19** Subject to paragraph 8.3.20, where a detainee undergoing detention in a unit detention quarter commits a further offence for which he or she is awarded confinement to ship or barracks or stoppage of leave, that punishment runs from the expiration of the term of detention.

**8.3.20** Any part of the latter punishment which would prolong the combined term of that punishment and the detention beyond 28 days is remitted.

#### **EFFECT OF CONFINEMENT ON OTHER SUMMARY PUNISHMENTS**

**8.3.21** Where a member of the Armed Forces who has been awarded extra work and drill or stoppage of leave commits a further offence and is awarded confinement to ship or barracks, any part of the former award that has not been completed is remitted.

**OFFENDER IN HOSPITAL OR SUBJECT TO MEDICAL RESTRICTIONS**

- 8.3.22** Where, during the currency of any punishment described in paragraphs 8.3.8 to 8.3.16, a member of the Armed Forces is in hospital or under medical restrictions which affect his or her ability to continue to undergo the punishment, the period in hospital or under medical restrictions counts towards completion of the balance of the punishment.

**PUNISHMENT ON SUNDAYS AND RELIGIOUS HOLIDAYS**

- 8.3.23** A member of the Armed Forces undergoing any punishment on a Sunday or religious holiday is to be given the opportunity to attend the religious services of his or her faith. This provision is to be modified for members of the Armed Forces under punishment who are of faiths requiring religious observances on other days, should such cases arise. Punishments involving extra work and drill are to be modified on Sundays and religious holidays so that no drill is carried out, and the total period is made up entirely of work.

**ORDER TO COME UP FOR PUNISHMENT IF CALLED ON**

- 8.3.24** Instead of imposing a punishment on an offender, a disciplinary officer may order the offender to appear for punishment if called on to do so within the period the disciplinary officer specifies, which must not exceed one year, commencing with the date on which the finding of guilty is recorded.<sup>27</sup>
- 8.3.25** If the disciplinary officer makes an order in accordance with paragraph 8.3.24, he or she must record and attach to the form MD 601 Charge Report a statement of his or her findings of fact in relation to the charge.<sup>28</sup> The purpose of this is to provide a factual basis on which a disciplinary officer could assess the proper punishment, if the offender were called on to come up for punishment. A copy of the MD 601 Charge Report including this statement is to be retained by or on behalf of the CO.
- 8.3.26** Each CO is to ensure that a register is maintained of those persons under his or her command who are subject to an order to come up for punishment if called on.
- 8.3.27** If a member of the Armed Forces is posted under another command during the currency of an order made under paragraph 8.3.24, the CO is to ensure that the new CO is informed of the existence of the order and is passed the documents referred to above at paragraph 8.3.25.

**OFFENDER TO COME UP FOR PUNISHMENT**

- 8.3.28** If, at any time within the period specified by a disciplinary officer in accordance with paragraph 8.3.24, a member of the Armed Forces subject to an order made under that paragraph:

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<sup>27</sup> AFDA s 117T(1) and (2).

<sup>28</sup> AFDA s 117T(3).

- a. Is convicted, or found guilty summarily, of a subsequent offence against the AFDA or any other Act;
- b. Fails to comply with a compensation or restitution order; or
- c. Fails to provide redress, promised in a restorative conference in accordance with paragraph 8.1.12, that was brought to the attention of the disciplinary officer at the time the disciplinary officer made the order;

the member's CO may order the offender to appear before the CO (or another disciplinary officer) to be punished for the original offence.<sup>29</sup>

**8.3.29** If an order is given in accordance with paragraph 8.3.28, the offender is to be placed in close arrest and brought before the disciplinary officer at a time and place directed by the disciplinary officer.<sup>30</sup> The MD 601 Charge Report in respect of the original offence is also to be laid before the disciplinary officer. If the disciplinary officer is satisfied of any of the matters specified in paragraph 8.3.28a, b or c, the disciplinary officer:<sup>31</sup>

- a. Must inquire into the circumstances of the original offence and the conduct of the offender since the order was made (including, if appropriate, the circumstances and seriousness of the subsequent offence (if any)); and
- b. May impose a punishment, or a combination of punishments, on the offender for the original offence.

**8.3.30** Unless paragraph 8.3.31 applies, any punishment imposed under paragraph 8.3.29 is to be recorded by amending the punishment in the original form MD 601 Charge Report and entering the notation 'Offender ordered to come up for punishment on [date]' in the appropriate panel.

**8.3.31** If the disciplinary officer is to punish the offender for an offence committed since the making of the order under paragraph 8.3.24, the punishment imposed is to be in respect of that offence and the offences in respect of which the order was made.<sup>32</sup> In that case, the punishment is to be entered in the new form MD 601 Charge Report. The notation "Offender ordered to come up for punishment on [date]" is to be entered in the appropriate panel of the original form MD 601 Charge Report, which is to be filed with the new Charge Report.

<sup>29</sup> AFDA s 117U(1) and (2).

<sup>30</sup> AFDA s 117U(3).

<sup>31</sup> AFDA s 117U(4).

<sup>32</sup> AFDA ss 117U(5) and 117X.

## SECTION 4 – COMPENSATION AND RESTITUTION ORDERS

### COMPENSATION ORDERS

**8.4.1** A disciplinary officer who finds an offender guilty of an offence may, in addition to or in substitution for any punishment or punishments that he or she may impose on the offender, order the offender to pay to any person (including the Crown in right of New Zealand) such sum as the disciplinary officer thinks just by way of compensation for:

- a. Any emotional harm;
- b. Any loss or destruction of or damage to property; or
- c. Any expense;

suffered by the victim through or by means of the offence.<sup>33</sup>

**8.4.2** Where on the arrest of the offender any money was found in his or her possession, the disciplinary officer may, at his or her discretion, if the disciplinary officer is satisfied that the money was obtained through or by means of the offence, order the whole or any part of the money to be applied to a compensation order.<sup>34</sup>

**8.4.3** The maximum amount that a disciplinary officer may order to pay by way of compensation is:<sup>35</sup>

- a. **If the offender was given the right to elect trial by the Court Martial,** an amount not exceeding 28 days' basic pay; or
- b. **If the offender was not given the right to elect trial by the Court Martial,** an amount not exceeding 14 days' basic pay.

**8.4.4** The disciplinary officer may make a compensation in combination with an order to come up for punishment if called on.<sup>36</sup>

### FORMS OF COMPENSATION ORDER

**8.4.5** A compensation order under paragraph 8.4.1 is to be made on a sheet attached to the form MD 601 Charge Report, in the following form:

In accordance with section 117ZA(1)(a) of the Armed Forces Discipline Act 1971, I (*insert Service description of disciplinary officer*) order (*insert Service description of offender*) to pay \$ \_\_\_\_\_ to (*beneficiary of order, eg the Crown*) by way of compensation.

(Signature)  
(Appointment)  
Disciplinary Officer

33 AFDA ss 86(1) and 117ZA(1)(a).

34 AFDA s 86(2) and 117ZA(1)(a).

35 AFDA s 117ZA(2).

36 AFDA s 117T(4).

I (*insert Service description of offender*) require\* / do not require\* the operation of this order to be suspended pending the exercise of my rights of appeal.

(Signature)

*\*Delete the words which are inapplicable*

**8.4.6** A compensation order under paragraph 8.4.2 is to be made on a sheet attached to the form MD 601 Charge Report, in the following form:

In accordance with section 117ZA(1)(a) of the Armed Forces Discipline Act 1971, I (*insert Service description of disciplinary officer*) order (*insert Service description of offender*) to pay \$ \_\_\_\_\_ to (beneficiary of order, eg the Crown) by way of compensation, and I further order that the sum of \$ \_\_\_\_\_ found in his/ her possession be applied to this payment.

(Signature)

(Appointment)

Disciplinary Officer

I (*insert Service description of offender*) require\* / do not require\* the operation of this order to be suspended pending the exercise of my rights of appeal.

(Signature)

*\*Delete the words which are inapplicable*

## SUSPENSION OF COMPENSATION ORDERS

**8.4.7** If a compensation order is made by a disciplinary officer and the offender requires the operation of the order to be suspended in the form prescribed at paragraph 8.4.5 or paragraph 8.4.6, the order is not to be actioned until the later of:<sup>37</sup>

- a. If the relevant summary proceedings took place outside New Zealand,** 35 days after the guilty finding was recorded;
- b. If the relevant summary proceedings took place within New Zealand,** 21 days after the guilty finding was recorded; or
- c. If an appeal against the order is brought** within the applicable period referred to above, the close of the day on which that appeal is determined by the Summary Appeal Court or abandoned by the appellant.

**8.4.8** If the compensation order is made under paragraph 8.4.2, the money that is the subject of the order is to be held in safe custody as directed by the disciplinary officer while the operation of the compensation order for compensation is suspended in accordance with paragraph 8.4.7.<sup>38</sup>

<sup>37</sup> RP 149(1) and AFDA s 125(5).

<sup>38</sup> RP 148(5).



**RECOVERY OF COMPENSATION ORDERS**

- 8.4.9** Although an order for compensation is not a punishment under the AFDA, the amount ordered to be paid is to be recovered in the same manner as a fine, in accordance with Section 5. Care is to be taken that any period allowed for payment is not so long that the compensatory effect of the order is lost. The rate of deduction may be set and varied as for a fine.

**RESTITUTION ORDERS**

- 8.4.10** If a disciplinary officer finds an offender guilty of:

- a. Stealing contrary to AFDA s 57;
- b. Receiving contrary to AFDA s 58;
- c. Unlawful possession of property contrary to AFDA s 59;
- d. Conversion of a vehicle contrary to AFDA s 60;
- e. A civil offence relating to the unlawful acquisition or possession of property;

the disciplinary officer may, in addition to or in substitution for any punishment that he or she may impose, order the whole or any part of specified property found in the offender's possession, or in the possession of another person acting on the offender's behalf, to be delivered to such person as appears to be entitled to it.<sup>39</sup>

- 8.4.11 Specified property** means:

- a. Any property in respect of which the offence is committed; or
- b. Any property (other than money) which the disciplinary officer finds has been obtained by the conversion or exchange of any property unlawfully obtained.<sup>40</sup>

- 8.4.12 Compensation to purchaser.** If a restitution order is made in respect of specified property and it appears to the disciplinary officer that a purchaser has bought the property in good faith and without knowledge that it was unlawfully acquired or possessed, the disciplinary officer may order that, on the restitution of the property, the offender is to pay to the purchaser a sum not exceeding the amount paid by him.<sup>41</sup>

- 8.4.13** The disciplinary officer may make a restitution order in combination with an order to come up for punishment if called on.<sup>42</sup>

<sup>39</sup> AFDA ss 87(1) and 117ZA(1)(b).

<sup>40</sup> AFDA s 87(2).

<sup>41</sup> AFDA s 87(3). Paragraphs 8.4.2 and 8.4.3 apply to a compensation order made under this paragraph.

<sup>42</sup> AFDA s 117T(4).

## FORM OF RESTITUTION ORDER

**8.4.14** A restitution order under paragraph 8.4.10 is to be made on a sheet attached to the form MD 601 Charge Report, in the following form:

In accordance with section 117ZA(1)(b) of the Armed Forces Discipline Act 1971, I *(insert Service description of disciplinary officer)* order *(insert Service description of offender or other person acting on the offender's behalf)* to deliver *(description of property)* to *(beneficiary of order, eg the Crown)* by way of restitution (if applicable, insert “and I direct that this order is not suspended in accordance with rule 151 of the Armed Forces Discipline Rules of Procedure 2008 because, in my opinion, the right to the possession of the property is not in dispute”).

(Signature)  
(Appointment)  
Disciplinary Officer

### Consent

I *(insert Service description of offender)* require\* / do not require\* the operation of this order to be suspended pending the exercise of my rights of appeal.

(Signature)

\*Delete the words which are inapplicable

## SUSPENSION OF RESTITUTION ORDERS

**8.4.15** If a restitution order is made by a disciplinary officer and the disciplinary officer states in the order that, in his or her opinion, the right to the possession of the property is not in dispute, that order is to take immediate effect, without the need to obtain the consent of the offender.<sup>43</sup> In such cases, the consent portion of the form in paragraph 8.4.14 does not need to be completed.

**8.4.16** If paragraph 8.4.15 does not apply, the consent portion of the form in paragraph 8.4.14 is to be completed. If the offender requires the operation of the order to be suspended, the order is not to be actioned until the later of:<sup>44</sup>

- a. **If the relevant summary proceedings took place outside New Zealand**, 35 days after the guilty finding was recorded;
- b. **If the relevant summary proceedings took place within New Zealand**, 21 days after the guilty finding was recorded; or
- c. **If an appeal against the order is brought** within the applicable period referred to above, the close of the day on which that appeal is determined by the Summary Appeal Court or abandoned by the appellant.

**8.4.17** While the operation of a restitution order is suspended, the property that is the subject of the order is to be held in safe custody as directed by the disciplinary

43 RP 150(3).

44 RP 151(3).

officer.<sup>45</sup>

## REVESTING OF STOLEN PROPERTY

**8.4.18** If a disciplinary officer finds an accused guilty of stealing goods, the property in the stolen goods reverts in the person who was the owner of the goods, or his or her personal representative, notwithstanding any intermediate dealing with them, whether by sale or otherwise.<sup>46</sup>

**8.4.19** **Goods** includes all personal property, other than money, including computer software.<sup>47</sup>

**8.4.20** Unless the disciplinary officer records in the form MD 601 Charge Report that, in his or her opinion, the title to the property is not in dispute, the operation of paragraph 8.4.18 is suspended until the later of:<sup>48</sup>

- a. **If the relevant summary proceedings took place outside New Zealand**, 35 days after the guilty finding was recorded;
- b. **If the relevant summary proceedings took place within New Zealand**, 21 days after the guilty finding was recorded; or
- c. **If an appeal against the order is brought** within the applicable period referred to above, the close of the day on which that appeal is determined by the Summary Appeal Court or abandoned by the appellant.

**8.4.21** While the operation of paragraph 8.4.18 is suspended, the relevant property is to be held in safe custody as directed by the disciplinary officer.<sup>49</sup>

45 RP 150(4).

46 Section 26(1) of the Sale of Goods Act 1908.

47 Section 2(1) of the Sale of Goods Act 1908. The definition given here is a simplified version of what is provided in the Act. Legal advice should be sought in case of doubt as to whether a particular item qualifies as **stolen goods**.

48 RP 153(a).

49 RP 152(2).

## SECTION 5 – ADMINISTRATION OF FINES, COMPENSATION ORDERS AND FORFEITURES

### CALCULATION OF DAYS IN THIS SECTION

- 8.5.1** In calculating the number of days a member of the Armed Forces is in custody or suspended from duty for the purposes of this Section, if that period (whether a continuous period or a number of separate periods of custody or suspension), calculated in hours:<sup>50</sup>
- a.** Is less than 24 hours, it must be counted as a day; or
  - b.** Is more than 24 hours, each multiple of 24 hours must be counted as a day and any remaining number of hours must be counted as a further day.
- 8.5.2** No period in respect of which a member of the Armed Forces would not otherwise have been entitled to pay and allowances may be counted in calculating the number of days the member is in custody or suspended from duty.<sup>51</sup>

### FORFEITURE OF ALLOWANCES WHILE SUSPENDED BEFORE FINDING OF GUILTY

- 8.5.3** If a member of the Armed Forces is found guilty of an offence by a disciplinary officer, the member forfeits one day's allowances for each day he or she is suspended from duty in respect of the offence before the finding of guilty, unless the disciplinary officer cancels the forfeiture in whole or in part.<sup>52</sup>

### HALF-PAY WHILE SERVING A SENTENCE OF DETENTION

- 8.5.4** A member of the Armed Forces sentenced to detention forfeits one half-day's basic pay for each day during which he or she is serving the sentence.<sup>53</sup>

### RECOVERY OF FINES, COMPENSATION ORDERS AND FORFEITURES

- 8.5.5** Fines, compensation orders and forfeitures may be paid by a member of the Armed Forces by:<sup>54</sup>
- a.** An immediate cash payment;
  - b.** A single deduction from the next pay due to the member; or
  - c.** Regular deductions from the member's pay over a period not exceeding six months.
- 8.5.6** In cases where the money is to be paid over a period of time, the disciplinary officer who imposed the fine, compensation order or forfeiture is to set the rate of deduction having regard to the evidence of the member's circumstances

50 AFDR 10(1).

51 AFDR 10(2).

52 AFDR 8.

53 AFDR 9(2).

54 AFDA s 85(2)(a) and AFDR 11 and 12.

adduced in mitigation. The rate of deduction may be varied by the member's CO or superior commander at any time before the money is paid in full. Care is to be taken that the period allowed for payment is not so long that its punitive effect is lost. Should the member be about to be released or discharged before the expiry of the period allowed for payment, the balance of the money is to be recovered by a single deduction from the member's pay or other money payable to the member on his or her release or discharge.

- 8.5.7** No deduction from the member's pay under paragraph 8.5.5 may exceed the sum that would allow the member to draw a minimum of 20% of his or her basic pay per day.<sup>55</sup>

## ANNEX A

**SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A  
COMMANDING OFFICER, DETACHMENT COMMANDER, OR SUBORDINATE  
COMMANDER ACTING AS DISCIPLINARY OFFICER<sup>1</sup>**

Punishments and jurisdictional circumstances			
Clause	Column 1: Rank of offender	Column 2: If offender was given right to elect trial by Court Martial	Column 3: If offender was not given right to elect trial by Court Martial
<b>1</b>	<b>Officer or WO</b>	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand	A fine, not exceeding 7 days' basic pay A reprimand
<b>2</b>	<b>SNCO</b>	Reduction in rank (this punishment may be imposed only on a petty officer or a sergeant who, at the time of the disposal of the charge, is on active service or sea service) Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days	A fine, not exceeding 7 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days
<b>3</b>	<b>JNCO</b>	Reduction in rank A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution	A fine, not exceeding 7 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution
<b>4</b>	<b>A rating of able rank, a private, or a leading aircraftman, or a rating, soldier, or airman of lower rank.</b>	Detention for a period not exceeding 60 days (this punishment may be imposed only in respect of an offence committed on active service or sea service) Detention for a period not exceeding 28 days A fine, not exceeding 28 days' basic pay A reprimand Confinement to ship or barracks for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution	A fine, not exceeding 7 days' basic pay A reprimand Confinement to ship or barracks for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution

**SEE NEXT PAGE FOR EXPLANATORY NOTES**

<sup>1</sup> AFDA Schedule 4.

### EXPLANATORY NOTES

For the purposes of clause 1, a disciplinary officer is not empowered to impose a punishment on an officer if the disciplinary officer holds a rank of less than two rank grades above that of the officer.

For the purposes of clause 2, a SNCO is one who holds the rank of:

- a. chief petty officer or petty officer in the Navy;
- b. staff sergeant or sergeant in the Army; or
- c. flight sergeant or sergeant in the Air Force.

For the purposes of clause 3, a JNCO is one who is:

- a. a rating of leading rank in the Navy;
- b. a bombardier, corporal, lance bombardier, or lance corporal in the Army; or
- c. a corporal in the Air Force.

For the purposes of this Annex, a person is on sea service if that person is a member of the crew of a ship that is at sea or of a ship whose CO has been ordered to keep the ship at less than 48 hours' notice for sea.

## ANNEX B

SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A SUPERIOR  
COMMANDER ACTING AS DISCIPLINARY OFFICER<sup>1</sup>

Punishments and jurisdictional circumstances		
Column 1: Rank of offender	Column 2: If offender was given right to elect trial by Court Martial	Column 3: If offender was not given right to elect trial by Court Martial
<b>Officer</b>	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand	A fine, not exceeding 7 days' basic pay A reprimand

## EXPLANATORY NOTE

For the purposes of this Annex, a superior commander is not empowered to impose a punishment on the officer if the superior commander holds a rank of less than two rank grades above that of the officer.

<sup>1</sup> AFDA Schedule 5.



## ANNEX C

### GUIDELINES FOR RESTORATIVE JUSTICE

#### Explanation of Restorative Justice

Restorative Justice is an opportunity for an offender and the victim to meet face to face with the aim of resolving issues relating to the offending. This enables parties to talk about what happened, how they have been affected and what might be offered to help right the wrong, enabling them to move on from the event.

A conference facilitator, the offender, the victim and support people for the offender and victim (if requested) attend a conference. The presenting and defending officers may also attend. Conference facilitators don't take sides, give advice or make rulings. What is said at the conference is Staff-in-Confidence, and is only disclosed to the disciplinary officer.

Restorative Justice seeks to meet the needs of victims by giving them the opportunity to tell offenders how they have been affected, to ask questions and to have a say in how the harm can be repaired. It also seeks to make offenders accountable for their actions by being directly accountable to victims, hearing about the harm they are responsible for, gaining an appreciation of the impact of this harm and giving the opportunity for them to make amends.

#### Restorative Conference

The purpose of the restorative conference is to hear the experiences of each participant at the time the offence was committed, deal with the emotional and material effects of the offence, and to arrange for outcomes that are constructive and appropriate.

**The victim** is central to the restorative conference process, and to the extent that it is possible, has control of the way in which the conference takes place. The victim's primary role is to communicate the consequences of the offending and to talk about ways in which the harm can be put right.

**The offender** also has a central role in the restorative justice process. He or she is able to contribute to decisions about the way in which the process takes place. The offender's role is to talk honestly about what happened, to hear and acknowledge what is said to them and to consider ways in which he or she can repair the harm he or she has caused.

**The defending officer** may attend the conference at the request of the offender. The defending officer's principle role is to discuss the restorative conference option with the offender. If the offender pleads guilty, participation in restorative justice is an opportunity for the offender to show remorse. The defending officer's role at the conference should generally be passive.

**The presenting officer** may also attend the conference at the request of the victim, also in a passive role.

The disciplinary officer may require the presenting and defending officers to attend as observers. In each case the participants will be tailored to the unique requirements of the situation, the offending and the victim.

CONTINUES ON NEXT PAGE

**The facilitator** is appointed by the disciplinary officer as a suitable person to facilitate a restorative justice conference. He or she is to be given a copy of the MD 601 Charge Report, the Summary of Facts and any Victim Impact Statement.

The facilitator will be assisted by the following guidelines:

### **The Pre-Conference Phase**

#### **Meeting with the Victim**

The initial stage of the meeting with the victim will involve the introduction of the facilitator and his or her role, an outline and agreement in respect of the areas that will be discussed, and the purpose of a restorative conference.

The second stage of the meeting with the victim will involve asking the victim to describe what happened to them and the effect of the offence on them, quantifying any loss, and exploring what could provide restoration to the victim. This can be difficult but can provide the opportunity for a tangible outcome. With the victim's consent, this information may then be passed on to the offender for consideration pre-conference.

#### **Meeting with the Offender**

The facilitator is also to meet separately with the offender to discuss the process involved and to discuss the summary of facts to confirm there are no significant matters of disagreement. The key question is whether the offender accepts responsibility for the offence. An offender who does not accept responsibility for the offence or who believes that the victim invited the harm it caused cannot take part in a restorative conference and the case must be referred back to the disciplinary officer. The facilitator is to ensure the offender understands the restorative conference purpose and process.

#### **Arranging the Conference**

The facilitator is to arrange a suitable date and venue for the conference notify the victim and offender as soon as possible and prepare the victim, offender and any support people.

#### **The Conference Phase**

The facilitator should ask the participants to speak in turn, without interruption. The conference is not a place to argue about what happened, or to sort out factual disputes. There is no set structure for the conference but it is recommended that the conference address in sequence:

- (a) The facts;
- (b) The consequences (emotional and material); and
- (c) Where to from here.

The conference begins with a reminder of what took place at the time of the offending. The summary of facts may be read out or summarised by the facilitator.

The offender is asked to confirm that he or she acknowledges responsibility for the offence, and then relate his or her version of what occurred.

Victims are more able and willing to participate if the offenders give their story first. By the offender telling their story first they are admitting what they did in front of the victim, without the admission being elicited by the victim. The offender is less likely to become defensive and deny points of detail. The offender's story must cover what happened on the day/

**CONTINUES ON NEXT PAGE**

night of the incident from his or her own perspective. Once the offender has spoken to the facts, invite the victim to give his or her perspective of the offence, identifying the effect of the offending on them.

In each case the facilitator is to tailor the conference process to best reflect the requirements of the situation, the offending, and the victim. Facilitators should not be constrained by these guidelines as to how to best conduct the conference and achieve the most appropriate outcome.

The outcome of the conference may be an agreement between the parties for some actions by way of redress to be undertaken. Refer to DM 69 (2 ed) Volume 1, para 8.1.12 for some examples of redress.

Any agreements or plans are noted by the facilitator and read back to the group for confirmation that they have been recorded accurately. Agreements need to be specific, have a time frame, and stipulate who will take what action. Where possible, agreements should be able to be put into action immediately, under the supervision of the facilitator.

### **The Reporting Phase**

The facilitator is to write the restorative conference report as per Annex A, and deliver the final signed report to the disciplinary officer and a copy to the victim and the offender. The report will form part of the record of the case, and is the only record of what transpired in the conference.

### **Further Guidance**

Further guidance may be obtained from a legal staff officer.

**ANNEX D****RESTORATIVE CONFERENCE REPORT****STAFF-IN-CONFIDENCE****Date:****Disciplinary Officer:****Offender:****Offence(s):****Conference held on:** (date) **From:** (time) **To:** (time)**Present:****Victim(s):****Offender(s):****Facilitator:****Other participants:****Summary:**

Provide a brief (one paragraph) summary of the process and outcome of the conference.

**Pre-conference:**

Describe pre-conference meetings. Who was present? Note any particularly important issues.

**Restorative Conference:**

Describe the process and interactions of the conference, what was offered and accepted or declined during the conference.

**Discussion of Outcomes and Plan:**

Briefly describe the discussion that led to the adoption of the outcome / plan. Describe the specific plans or agreements reached. Plans or agreements should be very specific – i.e., names, dates, amounts, who is supervising the actions agreed and how it will be reported back etc.

**Facilitator Comments:**

Optional. If the facilitator considers it necessary to point something out to the disciplinary officer this is the place to do so.

Signed by the Facilitator:

.....

Date:.....

**STAFF-IN-CONFIDENCE****SEE NEXT PAGE FOR GUIDANCE ON WRITING REPORT**

## GUIDANCE ON WRITING THE CONFERENCE REPORT

### Summary

This is a very brief outline of what happened at the conference that summarises the key interactions: expressions of remorse, summary of key impacts of the offence, summary of any agreements.

### Pre-conference:

Facilitators should only include comment from the pre-conference meetings if it is relevant to an understanding of the conference process.

### Restorative Conference:

Clear and concise description of the conference in chronological order. This part of the report aims to summarise the interactions of the offender, victim and participants at the conference - this can be effectively done by using quotes in the actual sequence in which they occur. The report should include material from all participants – such as the following:

- (a) Offender: Acknowledgements of offending, brief summary of the offender's retelling of the incident, any statements of remorse or apology.
- (b) Victim: Experience of the crime in the victim's words, emotional or material consequences, significant concerns and questions.
- (c) Other Participants: Significant contributions. Any empathic statements addressed to those in the other group.
- (d) Discussion of outcomes: Note any offers or requests that were put forward, and the response.

When there is agreement, the record of the agreement needs to be very specific as to –

- Who is going to undertake any action;
- What they are going to do;
- When it will be done by;
- Who is responsible for monitoring the action (normally the facilitator).

The conference report is the sole record of the proceedings of the conference. The conference is not recorded or transcribed, and does not become part of the transcript of proceedings. The conference report remains with the records of the proceeding, and is attached with the MD601 documents.

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## SECTION 1 – GENERAL

### DEFINITIONS

**9.1.1** **Custody** means:<sup>1</sup>

- a.** Detention in civil custody or under close arrest; but
- b.** Does not include open arrest.

**9.1.2** **Detainee** means a person under a sentence that includes the punishment of detention.<sup>2</sup>

### EXPRESSION OF PUNISHMENT

**9.1.3** Every punishment of detention imposed by a disciplinary officer is to be expressed as a period of days.

### RESTRICTIONS ON IMPOSITION OF DETENTION

**9.1.4** A disciplinary officer must not impose the punishment of detention on:

- a.** An officer (including a midshipman or an officer cadet);<sup>3</sup> or
- b.** A member of the Armed Forces who was under 18 at the time the offence was committed, except with the prior approval of a superior commander.<sup>4</sup>

### TIME IN CUSTODY NOT TAKEN INTO ACCOUNT

**9.1.5** In determining the period of any detention to be imposed, a disciplinary officer must not take into account any period during which the offender has been held in custody but must specify any such period on the committal order.<sup>5</sup> The period so specified may be taken into account in determining the date on which the punishment is to be reconsidered or on which the detainee will become eligible for remission or release.

**9.1.6** Paragraph 9.1.6 does not apply in respect of any time spent in custody that is unrelated to any charge before the disciplinary officer.<sup>6</sup>

### DETENTION NORMALLY SERVED IN NEW ZEALAND

**9.1.7** A detainee may serve a punishment of detention:<sup>7</sup>

- a.** In a detention quarter;

1 AFDA s 117Y(5).

2 AFDA s 2(1).

3 AFDA s 117Y(3).

4 AFDA s 117Y(4).

5 AFDA s 117Y(1).

6 AFDA s 117Y(2).

7 AFDA s 168(3).



- b. In Service custody; or
- c. In the case of a detainee who is:
  - (1) For the time being attached to any part of the Army or Air Force which is on active service; or
  - (2) A soldier or airman on active service;

as field punishment if so ordered by the disciplinary officer who imposed the punishment.

**9.1.8** A detainee may serve his or her punishment partly in one form as described above and partly in another, but a detainee who has been transferred to a detention quarter after serving part of the term of his or her detention as field punishment is not to be subsequently required to serve as field punishment:

- a. Any further part of that term of detention; or
- b. The term or part of the term of a concurrent or consecutive sentence of detention.

**9.1.9** Where a detainee has been punished outside New Zealand, he or she is to be removed to New Zealand to serve the punishment unless:

- a. There is a place in that other country declared by CDF to be a detention quarter;<sup>8</sup> or
- b. There is a place in that other country declared by the officer appointed to command that part of the Armed Forces in which the detainee is serving (**the force commander**) to be a detention quarter;<sup>9</sup>

and the force commander directs, or is directed by his or her superior commander, that the detainee is to serve his or her punishment in that place.

## CLASSIFICATION OF DETENTION QUARTERS

**9.1.10** Detention quarters provided by the NZDF are divided into the three categories below and a detainee may be committed to one of those categories in accordance with the following guidelines:

- a. **Service corrective establishments.** These accommodate all detainees other than those committed to a unit detention quarter or to a temporary detention quarter.
- b. **Temporary detention quarters.** These may be established if at any time and for any reason Service corrective establishments are closed or unable to be operated to accommodate all detainees who would otherwise be committed to a Service corrective establishment.

8 AFDA s 175(1).

9 AFDA s 176. See also paragraph 1.2.10.

- c. **Unit detention quarters.** These accommodate detainees undergoing sentences of short duration or who cannot be conveniently committed to a Service corrective establishment or temporary detention quarter.

**9.1.11** If a part of the Armed Forces is serving outside New Zealand, CDF's powers to establish, classify and regulate detention quarters may be exercised within that part of the Armed Forces by its officer in command.<sup>10</sup>

#### **SERVICES CORRECTIVE ESTABLISHMENT**

**9.1.12** Subject to paragraph 9.1.13, a detainee who is to serve his or her punishment in New Zealand is normally to be committed to the Services Corrective Establishment, Burnham (**SCE Burnham**). If SCE Burnham is at any time closed or unable to be operated, the detainee is to be committed to any temporary detention quarter that may have been duly established.

**9.1.13** If it is not practicable to send a detainee sentenced in New Zealand to SCE Burnham, eg because the sentence is of short duration and suitable transport is not available, the sentence is to be served in a unit detention quarter.

**SECTION 2 – COMMITTAL PROCEDURE**

- 9.2.1** This Section is to be read together with Defence Force Orders (Discipline) for the Operation of Detention Quarters in New Zealand.

**PART A: COMMITTAL PROCEDURE WHEN PUNISHMENT IMPOSED IN NEW ZEALAND****NOTIFICATION OF ARRIVAL**

- 9.2.2** Before a detainee is committed to a detention quarter, the officer responsible for committing him or her is to ensure that the officer commanding the detention quarter is given reasonable notice of the arrival of the prisoner or detainee.

**TIME OF ADMISSION**

- 9.2.3** Under normal circumstances a detainee committed to a detention quarter is to arrive between the hours of 0900 and 1600 . In other circumstances, such as where the detainee has travelled a long distance, he or she may be committed outside those hours by prior arrangement with the detention quarter.
- 9.2.4** No detainee will be admitted on a Sunday, Christmas Day, Good Friday or Anzac Day.

**COMMITTAL ORDER**

- 9.2.5** A detainee may be committed to a detention quarter only by an order signed by the appropriate authority. The appropriate authority is a competent Service authority<sup>11</sup> or the disciplinary officer who imposed the punishment.<sup>12</sup>
- 9.2.6** The order is to be in the appropriate form from the MD 628 series,<sup>13</sup> modified if necessary to meet the circumstances of the case.

**ESCORT AND DOCUMENTS REQUIRED FOR ADMISSION**

- 9.2.7** A detainee committed to a detention quarter is to be accompanied from his or her unit by an escort in accordance with paragraph 3.2.9. The member's CO is to ensure that the senior member of the escort is in possession of the following documents :
- a.** The original committal order;
  - b.** The medical officer's certificate as to fitness to undergo sentence in form MD 620;
  - c.** An inventory of kit;
  - d.** Certified copies of all entries in form MD 602 Cover for Conduct Sheets; and

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<sup>11</sup> AFDA s 169(1).

<sup>12</sup> AFDA s 169(2).

<sup>13</sup> See Chapter 13 Section 2.

- e. A report on the general character of the detainee together with any relevant welfare information.

### **CLOTHING AND NECESSARIES WHEN COMMITTED TO DETENTION QUARTER**

- 9.2.8** A detainee is to be in possession of the clothing set out in the relevant single Service scale when committed to a detention quarter. In addition he or she is to take:
- a. Sufficient personal cleaning materials and toilet requisites to meet his or her requirements for the duration of the punishment; and
  - b. A small amount of money (not less than half a day's basic pay) to cover likely purchases such as stamps, additional toilet requisites, etc.
- 9.2.9** A detainee is permitted to be in possession of a limited quantity of smoking materials for his or her own use when committed to a detention quarter. Such money and smoking materials are to be taken into safekeeping by the commandant of the detention quarter.

### **NOTIFICATION AND MOVEMENT OF DETAINEES TO SCE BURNHAM IN PEACETIME**

- 9.2.10** Units are to notify the commandant of SCE Burnham by telephone, e-mail or signal of the intended arrival of an escort and detainee stating:
- a. The detainee's number, rank, name, unit, and service;
  - b. The duration of the punishment; and
  - c. The estimated time of arrival at Burnham Camp or other place of arrival.
- 9.2.11** Where applicable, arrangements for the movement of escorts and detainees are to be made in accordance with DFO 36 Defence Force Orders for Movement. Escorts are to accompany the detainee to SCE Burnham and are to remain until all formalities of admission are completed.

## **PART B: COMMITTAL PROCEDURE WHEN PUNISHMENT IMPOSED OUTSIDE NEW ZEALAND**

### **COMMITTAL TO OVERSEAS DETENTION QUARTER**

- 9.2.12** A detainee who is to be committed to a detention quarter outside New Zealand is to be committed in the same manner as if he or she were being committed to a detention quarter in New Zealand.
- 9.2.13** Paragraph 9.2.2 and paragraphs 9.2.5 to 9.2.9 apply subject to any modifications contained in orders issued under AFDA s 176 by the officer appointed to command the part of the force to which the detention quarter belongs.

**REMOVAL TO NEW ZEALAND**

**9.2.14** A detainee who is to be removed to New Zealand to serve his or her punishment or the balance of his or her punishment is either:

- a.** To be committed direct to SCE Burnham and, where necessary pending committal, to be held in interim custody pursuant to AFDA s 174; or
- b.** To be committed to a local detention quarter and then subsequently transferred to SCE Burnham by order of a competent Service authority.<sup>14</sup>

**9.2.15** In any such case, paragraphs 9.2.5 to 9.2.9 apply in the same manner as if the detainee had been punished in New Zealand. When the detainee is removed to New Zealand, the competent Service authority authorising the removal is to make arrangements for his or her custody while in transit.

**FORMS**

**9.2.16** The forms to be used in cases to which paragraph 9.2.14a applies are:

- a.** The appropriate committal order; and
- b.** The order in form MD 629A for interim custody and transfer from one form of custody to another.

**9.2.17** The original committal order is to be given to SCE Burnham and shown where necessary to any place of interim custody used while in transit. Sufficient signed copies of form MD 629A are required for distribution to each place of interim custody.

**9.2.18** The forms to be used in cases to which paragraph 9.2.14b applies are:

- a.** The appropriate committal order; and
- b.** The order transferring the detainee in form MD 629 (which includes provision for interim custody under AFDA s 174).

**9.2.19** The original committal order is to be taken by the escort to the new place of detention and shown where necessary to any place of interim custody used while in transit. Sufficient copies of form MD 629 are required for distribution to each place of interim custody.

**9.2.20** Forms may be modified where necessary to meet the circumstances of the case.

**DUTIES OF ESCORT**

**9.2.21** The senior member of the escort for a detainee removed to New Zealand is to carry the forms specified above together with the documents listed in paragraph 9.2.7. On arrival in New Zealand, the escort is to accompany the detainee to the detention quarter and complete the formalities of admission.

## SECTION 3 – DETENTION SERVED AS FIELD PUNISHMENT

### SECTION APPLIES TO ARMY AND AIR FORCE ON ACTIVE SERVICE ONLY

**9.3.1** A detainee who is:

- a.** For the time being attached to any part of the Army or the Air Force which is on active service; or
- b.** A soldier or airman on active service;

may be ordered by the disciplinary officer to serve the term of his or her detention as field punishment.<sup>15</sup>

### PLACE WHERE FIELD PUNISHMENT MAY BE CARRIED OUT

**9.3.2** The place where the field punishment is to be carried out is to be determined as follows:

- a.** If the unit to which the detainee belongs or is attached is on the move, the detainee is to march with his or her unit, carry full equipment, perform all his or her duties as well as extra fatigue duties, and be treated as a defaulter.
- b.** If the unit to which the detainee belongs or is attached is halted or stationed at any place where there is a field punishment centre, the field punishment is to be carried out at the centre while the unit is halted or stationed there.

### NATURE OF FIELD PUNISHMENT

**9.3.3** A detainee who is serving his or her sentence as field punishment is to perform such useful duties and drills, in addition to those to which the detainee might be required to perform if he or she were not undergoing punishment, and is to incur such loss of privileges as may be directed by:

- a.** The detainee's CO;
- b.** The detainee's detachment commander; or
- c.** The officer appointed to supervise a field punishment centre.

### LIMITATIONS ON PERSONAL RESTRAINT

**9.3.4** A detainee who is serving detention as field punishment may not be placed under personal restraint except to prevent his or her escape or to protect the detainee or others from injury. The period for which a detainee may be kept continuously under personal restraint is not to exceed 24 hours.

**9.3.5** Handcuffs are not to be placed with the hands of the detainee behind his or her body unless it is necessary to prevent the detainee from being violent.

**RESTRICTIONS ON FIELD PUNISHMENT**

- 9.3.6** Field punishment is not to include corporal punishment or attachment to any object or building. Every form of field punishment is to be administered in such a manner as is calculated not to cause injury to life or limb.
- 9.3.7** A detainee serving detention as field punishment is not to be subjected to any treatment to which he or she could not be subjected if he or she were serving his punishment in a detention quarter.
- 9.3.8** **Effect of transfer to a detention quarter.** See paragraph 9.1.8.

**MEDICAL EXAMINATION AND EFFECT ON PUNISHMENT**

- 9.3.9** The unit commander or officer supervising a field punishment centre, as appropriate, is to ensure that any detainee undergoing field punishment is medically examined at frequent intervals. Any particular form of field punishment is to be discontinued upon a report by a medical officer or medical attendant that the continuance of that form of punishment would be prejudicial to the detainee's health.

## SECTION 4 – REMISSION FOR GOOD WORK AND CONDUCT

### ENTITLEMENT

- 9.4.1** Subject to paragraphs 9.4.2, 9.4.3 and 9.4.5, a detainee serving detention of more than 24 days is entitled by good work and conduct to have one third of the punishment remitted. Fractions of a day are to be disregarded.
- 9.4.2** Where remission granted under paragraph 9.4.1 would result in the detainee serving less than 24 days, the period of remission is to be the period by which the punishment exceeds 24 days.
- 9.4.3** A detainee may have all or part of his or her remission for good work and conduct forfeited in accordance with the provisions of any order under the AFDA.

### TOTAL PERIOD OF CUSTODY RELEVANT TO REMISSION

- 9.4.4** In determining the date on which a detainee will become eligible for remission of punishment, the detainee is to be deemed to have been serving the punishment during the whole of any period that he or she was held in custody in respect of the offences for which he or she has been punished, as specified on the committal order.<sup>16</sup>

### REMISSION OF CONCURRENT OR CONSECUTIVE PUNISHMENTS

- 9.4.5** Paragraph 9.4.4 does not apply to any time spent in custody while the offender was already serving a sentence of detention. If, therefore, a detainee who is serving his or her sentence in a detention quarter (**the first sentence**) is awarded a further sentence of the same kind (**the second sentence**), the remission to which he or she is entitled is to be calculated as follows:
- a.** If the second sentence is to run consecutively with the first sentence, he or she is entitled to remission on the first sentence calculated in accordance with paragraphs 9.4.1 to 9.4.4 and, on the expiry of that sentence after taking the remission into account, he or she is entitled to remission on the second sentence calculated from the date on which it begins to run.
  - b.** If the second sentence is to run concurrently with the first sentence, he or she is entitled to remission on the first sentence calculated in accordance with paragraphs 9.4.1 to 9.4.4 standing to his or her credit at the date of the award of the second sentence. The detainee is entitled to remission on the second sentence calculated from the date on which it begins to run.
- 9.4.6** Where the sentences are concurrent, a new record of remission is to be prepared to reflect the calculations in paragraph 9.4.5b. The date on which the detainee is due for release in such a case will be whichever is the later of the dates on which he or she would be due for release under either sentence after taking the remission into account.



## SECTION 5 – TRANSFER OF DETAINEES

### GENERAL

**9.5.1** A detainee may be transferred from one place to another or from one form of custody to another form of custody in accordance with the provisions of AFDA ss 169(3), 171, 172, or 174 . An example is the removal of a detainee to New Zealand to serve his or her sentence as provided in paragraph 9.1.9 and Section 2 Part B. The main limitation contained in the AFDA is that a detainee who is sentenced, or serving a punishment of detention, in New Zealand is not to be removed outside New Zealand to serve his or her punishment unless:

- a. He or she was enlisted in another territory administered by the New Zealand Government;<sup>17</sup> or
- b. He or she is to accompany or rejoin a force under orders to serve overseas in accordance with paragraph 9.5.7.

### RESTRICTION ON PERSONAL RESTRAINT

**9.5.2** During his or her transfer from one place to another, a detainee may be subjected only to such restraint as is necessary to ensure his or her safe conduct and removal.<sup>18</sup> The competent Service authority ordering the transfer is to make arrangements for the detainee's custody while in transit.

### MOVEMENT OF DETAINEE'S UNIT

**9.5.3** Subject to paragraph 9.5.5, a detainee serving his or her punishment in a detention quarter other than a unit detention quarter is, as a rule, to remain there when the unit to which he or she belongs moves from one place to another unless the unit is moving overseas and the detainee is to accompany his or her unit. The CO of a unit moving from one place to another is to notify the commandant of any change of locality affecting members of the Armed Forces belonging to the unit on release from detention.

**9.5.4** A detainee serving his or her punishment in a unit detention quarter is, as a rule, to accompany his or her unit when it changes its location (whether in New Zealand or overseas) and is to be committed to a detention quarter at the new location.

**9.5.5** If a unit is moved from overseas to New Zealand and a member of that unit is undergoing detention overseas, he or she is, as a rule, to accompany his or her unit to its new destination. If a unit is moved from one overseas country to another, such a member should normally accompany his or her unit and be committed to another detention quarter on arrival at the new destination.

### FORMS

**9.5.6** The forms in the MD 629 series<sup>19</sup> are to be used whenever a detainee is transferred. They may be modified where necessary to meet the circumstances

<sup>17</sup> See special provisions in AFDA s 171(1) relating to this.

<sup>18</sup> AFDA ss 169(6).

<sup>19</sup> See Chapter 13 Section 2.

of the case. Form MD 629B is to be used where it is necessary to remove a detainee temporarily from the detention quarter to which he or she has been committed to serve his or her punishment.

## **REMOVAL OF DETAINEES TO ANY PLACE OUTSIDE NEW ZEALAND**

- 9.5.7** In an appropriate case, a competent Service authority may give directions for delivery into Service custody of any detainee, and for his or her removal, whether separately or with the part of the force to which he or she belongs, to any place outside New Zealand where the part of the force to which he or she belongs for the time being is serving or is under orders to serve.<sup>20</sup> Where a detainee is to be so removed, form MD 629C is to be used.

## SECTION 6 – TEMPORARY CUSTODY OF DETAINEES

### TEMPORARY CIVIL CUSTODY

- 9.6.1** A detainee may be placed in temporary custody in a prison, police station, or other place in which prisoners may be lawfully confined, for a period not exceeding seven days.<sup>21</sup> An order signed by the detainee's CO in form MD 630 is required in any such case.
- 9.6.2** When the detainee is to be returned to Service custody at the expiry of his or her temporary custody, an order signed by the CO or a competent Service authority in form MD 630C is to be used.

## SECTION 7 – RELEASE OF DETAINEES

### PART A: NOTICE OF REMOVAL

#### NOTICE OF REMOVAL

- 9.7.1** If it is necessary to remove a detainee from a detention quarter prior to the expiry of his or her punishment, one day's notice of the day and hour of removal is, when practicable, to be given to the officer commanding the detention quarter by the officer authorising the removal.

### PART B: TEMPORARY RELEASE

#### DEFINITIONS

- 9.7.2** For the purposes of this Section:
- a. Spouse** means the wife, husband, or civil union partner of, or a person living in a relationship in the nature of a marriage with, the detainee.
  - b. Father** means a detainee who is or is to be the birth father or adoptive father of the relevant child or children.

#### AUTHORITY TO GRANT TEMPORARY RELEASE

- 9.7.3** On the recommendation of the commandant or CO, a superior commander may grant a temporary release for compassionate reasons to a detainee for a period not exceeding seven days. The order for temporary release is to be in form MD 631B . If the circumstances so warrant, he or she may grant an extension for a further period not exceeding seven days, but further extensions beyond that may only be granted with the prior approval of the Chief of the Service to which the prisoner or detainee belongs.
- 9.7.4** The period of temporary release is to be taken as annual leave.

#### CIRCUMSTANCES JUSTIFYING RELEASE

- 9.7.5** Temporary release for compassionate reasons may be granted only for the following reasons:
- a.** Death or critical illness of spouse or near relative if the superior commander is satisfied that:
    - (1)** The presence of the detainee is essential; and
    - (2)** Compassionate leave would have been granted were he or she not serving a punishment;
  - b.** Damage to the home of the family or near relative of the detainee if the superior commander is satisfied that his or her presence is essential;
  - c.** Confinement of the spouse prior to or subsequent to the birth of a child if the superior commander considers that the detainee's presence

as the father or principal caregiver is essential to enable domestic arrangements to be made;

- d. Urgent domestic difficulties such as making arrangements for the care of children deserted by the detainee's spouse if the superior commander is satisfied that his or her attendance is essential; or
- e. In any other circumstances if the superior commander considers those circumstances require the prompt attendance of the detainee and his or her attendance cannot be postponed until the expiry of the punishment.

### CONDITIONS APPLICABLE DURING TEMPORARY RELEASE

- 9.7.6** The superior commander granting temporary release may place any conditions on the detainee which he or she considers to be necessary or prudent, eg conditions as to custody during the period of temporary release or restrictions on the place or places where the detainee may go. Escorts will not normally be provided. The detainee is to be handed form MD 631C, informing him or her of the terms of the release.
- 9.7.7** If the detainee fails to comply with any conditions subject to which he or she was temporarily released, the period of his or her temporary release is thereby terminated.
- 9.7.8** If the detainee fails to comply with any of the conditions or fails to return on the due date, he or she may be arrested without warrant by any member of the Police under AFDA s 91(2),<sup>22</sup> or taken into Service custody pending his or her return to the detention quarter. The detainee may be charged with an offence against the AFDA or, where applicable, dealt with for a breach of establishment discipline under orders made under the AFDA.

### CURRENCY OF PUNISHMENT DURING TEMPORARY RELEASE

- 9.7.9** If a detainee is temporarily released, the period of his or her release is not to be counted as time spent serving his or her punishment. For the purposes of this paragraph, the period of his or her release commences at the beginning of the day on which he or she is released from custody and ends at the beginning of the day on which he or she returns to custody or on which his or her release is otherwise terminated, whichever is the earlier.

## PART C: PERMANENT RELEASE

### WHEN DETAINEE MAY BE RELEASED

- 9.7.10** A detainee is not to be permanently released from a detention quarter otherwise than:
- a. Pursuant to an order of the Court Martial, the Summary Appeal Court, or a civil court of competent jurisdiction;
  - b. Pursuant to an order in form MD 631A under paragraph 9.7.11, where

the punishment of detention has been reduced; or

- c. On the normal expiration of the detainee's punishment, taking into account any remission for good work and conduct awarded under Section 4 of this chapter.

## REDUCTION OF SUMMARY PUNISHMENT OF DETENTION

- 9.7.11** If a detainee is undergoing detention awarded by a disciplinary officer, the officer who imposed the punishment may reduce the term before the punishment has been completely served. In such a case the detainee is to be released on the expiry of the reduced term by an order on MD 631A signed by the officer who imposed the punishment.<sup>23</sup>

## TIMING OF RELEASE

- 9.7.12** Subject to paragraph 9.7.14 and the exigencies of the Service, a detainee who is serving his or her punishment in a detention quarter is to be released at 1400 on the day on which his or her punishment expires after allowing for any remission or reduction (**release date**), unless the commandant authorises his or her being kept in custody until the expiration of the punishment on the ground that his or her conduct and work while under punishment were unsatisfactory.
- 9.7.13** Notwithstanding paragraph 9.7.12, a detainee may be detained until the close of his or her release date, ie until midnight on that day.
- 9.7.14** If the day on which the punishment expires is a Sunday, Christmas Day, Good Friday, or, in New Zealand or Australia, Anzac Day, or any other statutory holiday and the detainee cannot commence his or her journey to his or her unit or home destination on that day, the detainee is to be released at 1400 on the last preceding day on which he or she can commence his or her journey.

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## SECTION 1 – INTRODUCTION

### PURPOSE OF THIS CHAPTER

- 10.1.1** The purpose of this chapter is provide sufficient information to disciplinary officers and other members of the Armed Forces for them to carry out their duties and exercise their rights in relation to the Summary Appeal Court.
- 10.1.2** A person who wishes to appeal to the Summary Appeal Court is entitled to be represented by a lawyer. Legal aid is available under the Armed Forces Legal Aid Scheme to facilitate this. Detailed information for lawyers on the procedures of the Summary Appeal Court is therefore provided in Volume 2.

### DEFINITION

- 10.1.3** In this chapter, **Registrar** means the Registrar of the Summary Appeal Court of New Zealand.

### SUMMARY APPEAL COURT

- 10.1.4** There is a Summary Appeal Court of New Zealand (**SACNZ**), which was established on 1 July 2009 to hear appeals against decisions of disciplinary officers.<sup>1</sup>
- 10.1.5** The SACNZ consists of the Judges of the Court Martial.<sup>2</sup> One Judge presides as the SACNZ for each appeal.<sup>3</sup>

### ROLE OF DIRECTOR OF MILITARY PROSECUTIONS

- 10.1.6** If a member of the Armed Forces appeals to the SACNZ, it is the duty of the DMP to represent the Crown in that appeal.<sup>4</sup> If the DMP does not appear in person, he or she will invariably be represented by a lawyer.

1 AFDA s 118(1), as inserted by section 38 of the Armed Forces Discipline Amendment Act (No 2) 2007.

2 AFDA s 119(1).

3 AFDA s 120.

4 AFDA s 141(1).



## SECTION 2 – RIGHT OF APPEAL

### RIGHT OF APPEAL

**10.2.1** Any person found guilty of an offence by a disciplinary officer may appeal to the SACNZ against one or more of the following:<sup>5</sup>

- a. The finding of guilty;
- b. The punishment, or the combination of punishments, imposed in relation to that finding;
- c. A compensation or restitution order (or both) made in relation to that finding; or
- d. An order to come up for punishment if called on.

### NOTICE OF APPEAL

**10.2.2** An appeal to the SACNZ must be made by lodging a notice of appeal in form MD 607 with the Registrar within the following time limits:<sup>6</sup>

- a. **If the case was heard in New Zealand.** A period of 21 days commencing with the day after the day on which the finding of guilty by the disciplinary officer is recorded.
- b. **If the case was heard outside New Zealand.** A period of 35 days commencing with the day after the day on which the finding of guilty by the disciplinary officer is recorded.

**10.2.3** The Registrar's address for service is: Registrar of the Summary Appeal Court, C/- HQNZDF, Wellington. If the time for lodging a notice of appeal with the Registrar expires on a day on which the office of the Registrar is closed, and by reason of that closure the notice cannot be lodged on that day, the notice is deemed to be lodged in time if it is lodged on the day on which the office is next open.<sup>7</sup>

**10.2.4** The SACNZ may extend the time allowed for lodging an appeal.<sup>8</sup> If such an extension is sought, this must be indicated in the relevant form MD 607 Notice of Appeal.<sup>9</sup>

**10.2.5** Every notice of appeal must specify:<sup>10</sup>

- a. The finding, punishment, combination of punishments, or order appealed from;
- b. The grounds of appeal in sufficient detail to fully inform the SACNZ of

5 AFDA s 124.

6 AFDA s 125 and RP 24.

7 AFDA s 125(4).

8 AFDA s 125(1)(b).

9 RP 26.

10 AFDA s 125(3).

the issues in the appeal;<sup>11</sup>

- c. Any other matters required by form MD 607.

#### ADMINISTRATION FOLLOWING NOTICE OF APPEAL

- 10.2.6** The Registrar must, as soon as practicable after receiving a notice of appeal, provide a copy of the notice of appeal to the disciplinary officer who made the finding of guilty and to the DMP.<sup>12</sup>
- 10.2.7** On receipt of the notice of appeal, the disciplinary officer is to ensure that the audio recording of the proceedings before him or her (if any) is transcribed and then certify that transcript as being true and correct.<sup>13</sup>
- 10.2.8** The disciplinary officer must, within 14 days of receiving a copy of the notice of appeal, send to the Registrar:<sup>14</sup>
- a. The relevant MD 601 Charge Report;
  - b. The certified transcript referred to in paragraph 10.2.7 or, if there was no audio recording, a certified copy of the written summary of the proceedings; and
  - c. A completed form MD 613 Statement of Particulars of the Accused's Service.
- 10.2.9** The Registrar must, within seven days of receiving the documents referred to in paragraph 10.2.8, send a copy of those documents to the DMP and to the appellant.<sup>15</sup>

#### DECISIONS OF SACNZ ARE FINAL

- 10.2.10** The decision of the SACNZ on any appeal is final and conclusive, and there is no right of appeal against the Court's decision.<sup>16</sup>

#### SACNZ MUST GIVE REASONS

- 10.2.11** The SACNZ must state its reasons in writing for a decision on any appeal.<sup>17</sup> The Registrar is to forward a copy of these reasons to:
- a. The appellant;
  - b. The DMP; and
  - c. The appellant's CO.

<sup>11</sup> See also RP 28 if a disparity in punishment is a ground of appeal.

<sup>12</sup> AFDA s 126(1).

<sup>13</sup> RP 31.

<sup>14</sup> AFDA s 126(2) and RP 32.

<sup>15</sup> AFDA s 126(3).

<sup>16</sup> AFDA s 136(1).

<sup>17</sup> AFDA s 136(2).

- 10.2.12** The Registrar may also promulgate the written reasons of the SACNZ within the NZDF, eg by electronic means, in a form which does not identify the appellant.

**SECTION 3 – SPECIAL REFERENCE BY THE JUDGE ADVOCATE GENERAL****PETITION TO JAG**

- 10.3.1** If a person has been found guilty of an offence by a disciplinary officer, any person (including the person found guilty) may petition the JAG to refer the finding, punishment and any orders made by the disciplinary officer to the SACNZ.<sup>18</sup>
- 10.3.2** A petition under paragraph 10.3.1 is to be made in form MD 608 and is to be forwarded to the JAG at the Office of the Judge Advocate General, c/- HQNZDF, Wellington.<sup>19</sup>

**SPECIAL REFERENCE TO SACNZ**

- 10.3.3** The JAG may refer one or more of the matters referred to in paragraph 10.2.1 to the SACNZ if the JAG considers that it is in the interests of justice or discipline to do so.<sup>20</sup> The JAG may do so following a petition under paragraph 10.3.1, or on the JAG's own initiative.
- 10.3.4** A special reference under paragraph 10.3.3 is treated as an appeal by the person found guilty of the offence.<sup>21</sup>

**OPPORTUNITY TO COMMENT ON SPECIAL REFERENCE**

- 10.3.5** The Registrar must, as soon as practicable after receiving a special reference from the JAG, send to the person found guilty of the offence:<sup>22</sup>
- a.** A copy of the reference in form MD 608A; and
  - b.** A notice in form MD 608B, seeking that person's comment on the special reference.
- 10.3.6** The SACNZ may deal with a special reference from the JAG on the papers if the person who is sent a notice under paragraph 10.3.5:<sup>23</sup>
- a.** Indicates that he or she does not want to be legally represented at an oral hearing of the matter;
  - b.** Otherwise indicates that he or she does not require an oral hearing of the matter; or
  - c.** Does not provide any comment within 21 days of the notice being sent.

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18 AFDA s 129(4).

19 RP 30.

20 AFDA s 129(1).

21 AFDA s 129(2).

22 AFDA s 130(1) and RP 29(3).

23 AFDA s 130(2).

## SECTION 4 – LEGAL AID IN THE SUMMARY APPEAL COURT

### RIGHT TO REPRESENTATION

- 10.4.1** As stated in paragraph 10.1.2, a person who wishes to appeal to the SACNZ (**appellant**) has the right to be represented by a lawyer<sup>24</sup> who may be either:
- a.** Counsel assigned by the Registrar from the Armed Forces Defence Counsel Panel, in response to an application for Armed Forces legal aid; or
  - b.** Counsel of the appellant's own choice employed by the appellant at his or her own expense.
- 10.4.2** Alternatively, an appellant may choose to conduct his or her own appeal.

### OBJECT OF THE ARMED FORCES LEGAL AID SCHEME

- 10.4.3** The object of the Armed Forces Legal Aid Scheme (**Scheme**) in the SACNZ context is to ensure that any person who wishes to appeal to the SACNZ against the determination of a disciplinary officer has the opportunity of being represented by counsel of suitable skill and experience if he or she applies for legal aid.
- 10.4.4** The Scheme does not provide for the accused to be represented by counsel of the appellant's own choice.

### ACTION BY DEFENDING OFFICER

- 10.4.5** As soon as a person has been punished by a disciplinary officer, that person's defending officer is to explain to him or her the right to appeal to the SACNZ and ensure that the person completes an application for legal aid in form MD 610 if he or she wishes to appeal and to be represented by counsel on legal aid.
- 10.4.6** If the person wishes to establish that he or she is unable to pay a 3% legal aid contribution, the defending officer must also ensure that he or she completes a statement of means in form MD 610A.
- 10.4.7** The defending officer is to send the original application for legal aid to the Registrar through the appellant's CO.

### AUTHORITY TO APPROVE LEGAL AID

- 10.4.8** The Registrar is to approve legal aid for every person who wishes to appeal to the SACNZ against the determination of a disciplinary officer.

### ASSIGNMENT OF COUNSEL

- 10.4.9** Once the Registrar has made a grant of legal aid, he or she is to :
- a.** Assign counsel from the Armed Forces Defence Counsel Panel;

- b. Notify the appellant's CO of the assignment and the contribution required under paragraph 10.4.12; and
- c. Notify the counsel assigned and invite him or her to contact the unit to arrange a meeting with the appellant. In some circumstances, contact with the appellant may be limited to electronic communications due to operational circumstances.

**10.4.10** If, in the course of preparing for the appeal, the counsel assigned concludes that the case is both so exceptionally complex and so serious that it warrants briefing senior counsel, and informs the Registrar accordingly, the Registrar may authorise the briefing of senior counsel.

**10.4.11** Selection of senior counsel is a matter for the Registrar, but in reaching his or her decision the Registrar must consult with the JAG.

#### CONTRIBUTION BY APPELLANT

**10.4.12** Subject to paragraphs 10.4.13 and 10.4.14, the appellant is ordinarily required to contribute towards the cost of legal aid:

- a. If the appellant is a member of the regular forces or the Civil Staff, 3% of his or her gross taxable pay for the 12 months immediately before the disciplinary officer found the appellant guilty;
- b. If the accused is a member of the territorial forces, a sum similarly calculated but on the basis of pay for notional continuous service for 365 days prior to being found guilty; or
- c. In any other case, a comparable sum based on the Registrar's assessment of the accused's Service equivalent for pay purposes.

**10.4.13** When the sum calculated in accordance with paragraph 10.4.12 is greater than the sum actually paid to the appellant's counsel, the excess is to be refunded to the appellant.

#### WAIVER OF CONTRIBUTION

**10.4.14** The Registrar may waive in whole or in part recovery of the appellant's contribution when he or she is satisfied that it is impracticable or would cause undue hardship to order recovery of the standard contribution.

#### RECOVERY OF CONTRIBUTION

**10.4.15** On receipt of the Registrar's notification of the grant of legal aid, the appellant's unit is to take the following action:

- a. **Appellant is a member of the regular forces or the Civil Staff.** Instruct the appropriate pay office to arrange payment, in accordance with the appellant's election in the application, of his or her contribution of:

- (1) Three percent of the appellant's gross taxable pay for the 12

months immediately before the disciplinary officer found the appellant guilty; or

- (2) Such lesser sum as the Registrar has determined under paragraph 10.4.14; or

- b. **In any other case.** Instruct the appropriate pay office to recover as an immediate cash payment as much of the contribution as is practicable and, in respect of the balance, to require the appellant to sign an acknowledgement of debt and undertaking to pay the money owing by regular fortnightly payments. A specimen form of acknowledgement of debt is set out at the Annex.

## FEES

- 10.4.16** The fees payable to members of the Armed Forces Defence Counsel Panel are prescribed by the Part 2 of the AFDR and Volume 2 of this manual.

## ACTION WHERE APPELLANT ENGAGES COUNSEL INDEPENDENTLY

- 10.4.17** Where the appellant engages counsel independently, the appellant is solely responsible for the payment of his or her fees.

## SECTION 5 – BAIL PENDING APPEAL

### APPLICATION FOR BAIL

- 10.5.1** A member of the Armed Forces on whom the punishment of detention is imposed by a disciplinary officer may apply to a Judge of the Court Martial for bail pending the determination of an appeal to the SACNZ.<sup>25</sup>
- 10.5.2** An application for bail under paragraph 10.5.1 is to be made in form MD 605A and is to be forwarded to the Registrar of the Court Martial, c/- HQNZDF, Wellington.
- 10.5.3** The onus is on the appellant to show cause why bail should be granted.<sup>26</sup>

### CONSIDERATIONS IN DETERMINING WHETHER TO GRANT BAIL

- 10.5.4** In determining whether to grant bail pending appeal, the Judge:<sup>27</sup>
- a.** Must take into account:
    - (1)** The seriousness of the offence;
    - (2)** Whether there are urgent and exceptional circumstances that favour the granting of bail; and
    - (3)** The effect on Service discipline of releasing the person on bail;
  - b.** May take into account the considerations set out in section 14(3) of the Bail Act 2000; and
  - c.** Must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.

### GRANT OF BAIL

- 10.5.5** A Judge may, on application by the appellant:<sup>28</sup>
- a.** Grant bail to the appellant; and
  - b.** Impose any conditions of bail that the Judge thinks fit.

### TIME ON BAIL PENDING APPEAL DOES NOT COUNT AS TIME SERVED

- 10.5.6** Any time during which an appellant is released from detention on bail pending an appeal to the SACNZ does not count as time served.<sup>29</sup>

<sup>25</sup> CMA s 50.

<sup>26</sup> CMA s 50(5).

<sup>27</sup> CMA s 50(4).

<sup>28</sup> CMA s 50(3).

<sup>29</sup> CMA s 51.



**ROLE OF DIRECTOR OF MILITARY PROSECUTIONS**

- 10.5.7** If an appellant applies to a Judge of the Court Martial for bail, it is the duty of the DMP to represent the Crown in that application.<sup>30</sup> If the DMP does not appear in person, he or she will invariably be represented by a lawyer.
- 10.5.8** The DMP may make recommendations to the Judge who is considering a bail application.<sup>31</sup> If the DMP does so, he or she must notify the Registrar of the Court Martial of those recommendations in form MD 605B and serve a copy of that form on the appellant.

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30 CMA s 52(2)(a).

31 CMA s 52(2)(b).

## ANNEX A

## ACKNOWLEDGEMENT OF DEBT

To: The Commanding Officer

\_\_\_\_\_  
(Unit)

**I ACKNOWLEDGE** that I owe the Crown the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, being the balance of my contribution in respect of a grant of legal aid made to assist me in obtaining representation in the Summary Appeal Court of New Zealand

**AND I AGREE** to pay the said sum by equal fortnightly instalments of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, the first of such instalments being due on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

**AND I ACKNOWLEDGE** that, in the event of my defaulting in payment of any one such instalment, the whole of the balance then outstanding is immediately payable and may be recovered by process of law.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_  
(Signature of appellant)\_\_\_\_\_  
(Full name of appellant)

Witness: \_\_\_\_\_

Occupation: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

# Chapter 11: INQUIRIES

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## SECTION 1 – INTRODUCTION

### FORMS OF INQUIRY

**11.1.1** There are three types of inquiry in the NZDF:

- a. A preliminary inquiry;
- b. A court of inquiry; and
- c. A command investigation.

**11.1.2** A **preliminary inquiry** is a disciplinary investigation which precedes the recording of a charge under the AFDA, to determine whether the allegation is well-founded. See Chapter 3.

**11.1.3** A **court of inquiry** is a court established pursuant to AFDA s 200A. It is designed to provide the officer in command of a part of the Armed Forces with ‘an expeditious fact finding procedure so that a matter can be promptly investigated and if necessary, prompt, remedial action can be taken’.<sup>1</sup> The procedure of a court of inquiry is provided for in Part 11 of the AFDA. Courts of inquiry have greater status in law than command investigations, and therefore offer certain protections which command investigations do not. See Section 2.

**11.1.4** A **command investigation** is a simple, informal process with the aim of ascertaining what has occurred in a particular situation, without the expenditure of resources or the formality inherent in a court of inquiry. A command investigation may assist an officer in command to assess whether any further action is required, such as a court of inquiry. A command investigation is not appropriate in all cases, for example if it appears that the incident raises an allegation that a member of the Armed Forces has committed an offence against the AFDA.<sup>2</sup> See Section 3.

<sup>1</sup> *R v Neave* (1995) 1 NZCMAR 230, 248 (CMAC).

<sup>2</sup> See paragraph 11.3.6.

## SECTION 2 – COURT OF INQUIRY

### DEFINITIONS<sup>3</sup>

- 11.2.1 Assembling authority** means CDF or the officer in command of any part of the Armed Forces.
- 11.2.2 Counsel assisting** means an officer who is a barrister or solicitor of the High Court appointed by the assembling authority to assist the court.
- 11.2.3 Member** means a member of a court of inquiry, and includes the president.
- 11.2.4 President** means the president of a court of inquiry.
- 11.2.5 Record of proceedings** includes:
- a. The record of the evidence collected; and
  - b. Any report or comment made by the court of inquiry and attached to the record of the evidence.

### PURPOSE OF COURT OF INQUIRY

- 11.2.6** An assembling authority may assemble one or more courts of inquiry for the purpose of collecting and recording evidence on any matters that the assembling authority has referred to the court.<sup>4</sup> The court of inquiry must report and comment on those matters, if required to do so by the assembling authority.

### PRISONER OF WAR STATUS DETERMINATION

- 11.2.7** A court of inquiry may be assembled to perform the functions and duties, and exercise the powers, of a competent tribunal under Article 5 of Schedule 3 of the Geneva Conventions Act 1958.<sup>5</sup> In this role, the function of the court of inquiry is to determine, in a case of doubt, whether a person who has committed a belligerent act and who is in the custody of a New Zealand force is entitled to prisoner of war status under Geneva Convention III. Counsel assisting is to be appointed in every case.

### ASSEMBLING AUTHORITY

- 11.2.8** The officer in command of that part of the Service or joint force involved in the matter to be inquired into is normally to be the assembling authority. Where that officer is personally involved in the matter, however, the circumstances are to be reported by him or her to the next superior authority and that authority is to be the assembling authority.

### COMPOSITION OF COURT OF INQUIRY

- 11.2.9** A court of inquiry must consist of not less than two members, of whom at least one must be an officer and the other or others must be officers, warrant officers,

<sup>3</sup> AFDA s 200.

<sup>4</sup> AFDA s 200A.

<sup>5</sup> AFDA s 200A(3).

or members of the Civil Staff of equivalent standing.<sup>6</sup>

**11.2.10** The assembling authority must appoint one of the members who is an officer to be the president.<sup>7</sup> The president should be the senior member of the court and should not normally be below the rank of lieutenant in the Navy, captain in the Army, or flight lieutenant.

**11.2.11** If the court of inquiry is to inquire into the conduct of an officer or warrant officer:<sup>8</sup>

- a. Every member must be of at least equal rank and seniority to that officer or warrant officer; and
- b. At least one member must be of superior rank.

**11.2.12** Paragraph 11.2.13 applies where a court of inquiry is assembled to inquire into a matter which concerns a part of:

- a. The Navy other than the Royal New Zealand Navy;
- b. The Army other than the Regular Force; or
- c. The Air Force other than the Regular Air Force.

**11.2.13** Where this paragraph applies, the assembling authority should endeavour to appoint at least one member of the court from that other part of the Navy, the Army, or the Air Force, as the case may be, unless, in his or her opinion, it is not reasonably practicable to do so.

## COUNSEL ASSISTING

**11.2.14** The assembling authority may appoint counsel assisting and must do so if the assembling authority considers that:<sup>9</sup>

- a. The character or reputation of any person may be affected by the inquiry; or
- b. The inquiry is likely to involve complex or serious issues of fact or law, or both.

**11.2.15** A counsel assisting is not a member of the court of inquiry, but may advise the court on questions of law and procedure and may ask questions of witnesses attending before the court for the purpose of assisting the court.<sup>10</sup>

## ORDER FOR ASSEMBLY

**11.2.16** An assembling authority is to order the assembly of a court of inquiry in form MD 634, which must specify the composition of the court, the place and time

6 AFDA s 200B(1).

7 AFDA s 200B(2).

8 AFDA s 200D.

9 AFDA s 200B(3).

10 AFDA s 200B(4).

at which the court is to assemble, and the terms of reference of the court.<sup>11</sup>  
The order must also state whether any report or comment is required upon the matter under investigation.<sup>12</sup>

**11.2.17** The assembling authority may, at any time, revoke, vary, or suspend the order.<sup>13</sup>

**11.2.18** When preparing the terms of reference for a court of inquiry the assembling authority is to note any special requirements laid down in DFOs or single Service publications concerning those terms and is to draw the attention of the court to them in the terms of reference.

### **SPECIAL ORDERS IN RESPECT OF AIRCRAFT ACCIDENTS**

**11.2.19** Where a court of inquiry is assembled to inquire into an aircraft accident:

- a. The president is to be a qualified aircrew officer.
- b. If the inquiry involves a fatal aircraft accident, the president is to be an officer not below the rank of lieutenant colonel (equivalent) unless an officer of that rank cannot be made available without delay.
- c. The assembling authority is to request that the Air Component Commander, HQJFNZ, nominates a member of the NZDF who has expertise in the investigation of aircraft accidents to be appointed a member of the court.
- d. The proceedings are to be recorded in the form prescribed in Annex A to Chapter 6 of NZAP 201 Manual of Flight Safety. They are to be forwarded by the assembling authority through normal command channels to COMJFNZ and the relevant Service Chief(s).<sup>14</sup>

### **SPECIAL ORDERS IN RESPECT OF THE DEATH OF OR SERIOUS INJURY TO A MEMBER OF THE ARMED FORCES IN PEACETIME**

**11.2.20 Mandatory court of inquiry.** Where a member of the Armed Forces dies or is seriously injured in the course of his or her duties, a court of inquiry is to be assembled to investigate the circumstances and determine the cause of that death or serious injury in every case and without delay, unless:

- a. The member of the Armed Forces died or was injured while serving in a war or taking part in armed combat operations; or
- b. The CO of any person subject to the AFDA considers that the death or serious injury may disclose an offence or offences under the AFDA by a person subject to that Act, in which case the person's CO is to decide what action should be taken pursuant to AFDA s 102.

**11.2.21 Terms of reference.** The terms of reference for any court of inquiry assembled in accordance with paragraph 11.2.20 are to be drafted by a legal officer.

11 AFDA s 200C(1).

12 AFDA s 200E.

13 AFDA s 200C(2).

14 AFDA s 200R(3)(c).



**11.2.22 Exhibits.** All personnel having control over documents or items which may be relevant to the death or serious injury are to ensure that those documents or items are not interfered with in any way and that they are immediately available to be produced to the court of inquiry or any inquiry or inquest which may be held by a coroner under Part 3 of the Coroners Act 2006.

### INQUIRY ON ABSENCE OF MEMBER OF THE ARMED FORCES

**11.2.23** Orders relating to members of the Armed Forces who are absent without leave for 21 days or more are at paragraph 3.8.3.

### ASSEMBLY AND PROCEDURE

**11.2.24** A court of inquiry must assemble at the time and place specified in the form MD 634. However, if the court is unable for any reason to assemble at the time or place so specified, it must:<sup>15</sup>

- a. Assemble as soon as possible after that time or, as the case may be, as near to that place as possible; and
- b. Note in the record of proceedings its reasons for being unable to assemble at the time or place specified.

**11.2.25** The president must first lay the form MD 634 before the court and the court must then proceed to collect and record evidence in accordance with the paragraphs which follow.

**11.2.26** Once it has assembled, a court of inquiry must sit at the times and in the places that the president appoints, and the president may adjourn the court.<sup>16</sup>

**11.2.27** Notwithstanding paragraph 11.2.26, the assembling authority may, at any time, direct the court to reassemble for any purpose that the assembling authority may specify.<sup>17</sup>

### COURT OF INQUIRY TO SIT IN PRIVATE

**11.2.28** A court of inquiry must sit in private, and no person may attend a sitting of the court except:<sup>18</sup>

- a. The members;
- b. Counsel assisting;
- c. A witness giving evidence;
- d. If paragraph 11.2.52 applies:
  - (1) The person who is affected or is likely to be affected by the inquiry; and

<sup>15</sup> AFDA s 200G(2).

<sup>16</sup> AFDA s 200H.

<sup>17</sup> AFDA s 200H(3).

<sup>18</sup> AFDA s 200F(1).

- (2) That person’s legal representative if the president approves the person being legally represented at the inquiry; and
- e. Any other persons who may be authorised by the president to be present.

ATTENDANCE OF WITNESSES

11.2.29 The president may direct a witness to attend before the court of inquiry by:<sup>19</sup>

- a. An order given by the president, if the witness is subject to the AFDA; or
- b. A summons signed by the president, if the witness is not subject to the AFDA.

11.2.30 Every summons to a witness issued under paragraph 11.2.29b is to be in form MD 637 and is to be served on the witness in one of the following ways:<sup>20</sup>

- a. By being delivered to the witness personally, or by being brought to his or her notice if he or she refuses to accept it;
- b. By being left for the witness with some other person at the witness’s usual place of residence at least 24 hours before his or her attendance is required; or
- c. By being sent to the witness by registered letter addressed to the witness’s last known or usual place of residence or place of business.

11.2.31 A member of the court must administer an oath or solemn affirmation to every witness before that witness gives evidence, in accordance with paragraphs 11.2.34 to 11.2.38.<sup>21</sup>

INTERPRETERS AND RECORDERS

11.2.32 A competent and impartial person or persons may be appointed at any time during the course of the inquiry by either the assembling authority or the president to act as interpreter, shorthand writer, typist, or operator of a recording machine to assist the court in collecting and recording the evidence.<sup>22</sup>

11.2.33 A member of the court must administer an oath or solemn affirmation to the interpreter before that interpreter commences his or her duties, in accordance with paragraphs 11.2.34 to 11.2.38.<sup>23</sup>

ADMINISTRATION OF OATH OR AFFIRMATION

11.2.34 **Oath.** Subject to paragraph 11.2.36, if the witness or interpreter wishes to take the oath, he or she must:

- a. If taking the Christian oath, hold the Bible, the Old Testament or the

19AFDA s 200I(1).

20AFDA s 200I(2).

21AFDA s 200J(1).

22AFDA s 200L(1).

23AFDA s 200J(1).

New Testament in his or her right hand; or

- b. If taking the Jewish oath, hold the Old Testament in his or her right hand.

**11.2.35** He or she must then reply 'I do' to the following question:

- a. **Witness.** *Do you swear by Almighty God that the evidence you will give before this court of inquiry will be the truth, the whole truth, and nothing but the truth?*
- b. **Interpreter.** *Do you swear by Almighty God that you will truly interpret the oath [affirmation] to be administered to the witness and the evidence about to be given and all other matters and things touching the present inquiry which you shall be required to interpret from the \_\_\_\_\_ language into the English language, and the English language into the \_\_\_\_\_ language according to the best of your skill and ability?*

**11.2.36 Scots form of oath.** If a witness wishes to take the oath in the Scots form, the member of the court administering the oath must hold up his or her hand, and say to the witness, *Witness, hold up your hand, and repeat after me: "I swear by Almighty God, as I shall answer to God at the great day of judgment, that I will speak the truth, the whole truth, and nothing but the truth."*<sup>24</sup>

**11.2.37** A person taking an oath must remove any headdress, unless his or her religious belief requires that the headdress be worn.<sup>25</sup>

**11.2.38 Affirmation.** If the witness or interpreter wishes to make a solemn affirmation, he or she must, with his or her right hand raised, reply 'I do' to the following question:

- a. **Witness.** *Do you solemnly, sincerely, and truly declare and affirm that the evidence you will give before this court of inquiry will be the truth, the whole truth, and nothing but the truth?*
- b. **Interpreter.** *Do you solemnly, sincerely, and truly declare and affirm that you will truly interpret the oath [affirmation] to be administered to the witness and the evidence about to be given and all other matters and things touching the present inquiry which you shall be required to interpret from the \_\_\_\_\_ language into the English language, and the English language into the \_\_\_\_\_ language according to the best of your skill and ability?*

**11.2.39 Child witness.** If a court of inquiry considers that a child<sup>26</sup> who is called as a witness does not understand the nature of an oath, the child's evidence may be received even though it is not given on oath, so long as the court is of the opinion that the child:<sup>27</sup>

<sup>24</sup> Section 16 of the Oaths and Declarations Act 1957.

<sup>25</sup> RP 157(3).

<sup>26</sup> A **child** is a person under the age of 18 years: section 8 of the Care of Children Act 2004.

<sup>27</sup> AFDA s 200J(2).

- a. Has sufficient intelligence to justify the reception of the evidence; and
- b. Understands the duty of speaking the truth.

### CAUTION

- 11.2.40** After he or she has been sworn, every witness is to be informed by the president as follows:

*Before you give evidence I must inform you that you may refuse to answer any question the answer to which may tend to incriminate you or to expose you to any penalty or forfeiture. It is for you to raise the objection and for the court to decide whether your objection is well-founded and whether you may therefore refuse to answer the question.*

- 11.2.41** The giving of the caution is to be recorded in the record of the proceedings of the court. See paragraph 11.2.62.

### RULES OF EVIDENCE AND QUESTIONING

- 11.2.42** A court of inquiry is not bound by the ordinary rules relating to the admissibility of evidence and may admit in evidence any matter of hearsay or any other matter that would not be admissible in a court of law.<sup>28</sup> If a court of inquiry admits evidence of that kind, it is for the court to determine the weight to be attached to that evidence.<sup>29</sup> However, courts of inquiry are obliged to comply with the law of evidence concerning privilege, which is set out in Chapter 6, Section 4, Part C.

- 11.2.43** A court of inquiry must put any questions to a witness that it considers desirable:<sup>30</sup>

- a. To test the truth or accuracy of any evidence given by the witness; and
- b. To elicit any further information that may be necessary to determine the truth.

### RECORDING OF EVIDENCE

- 11.2.44** A court of inquiry must record, or arrange to be recorded in writing, the evidence of every witness:<sup>31</sup>

- a. In narrative form as nearly as possible in the words used; or
- b. If the court considers it expedient, in the form of questions and answers.

- 11.2.45** Each witness may read over the record of his or her evidence and may ask that any necessary corrections be made to it.<sup>32</sup> He or she must initial all alterations

28 AFDA s 200K(1).

29 AFDA s 200K(2).

30 AFDA s 200K(3).

31 AFDA s 200K(4).

32 AFDA s 200K(5).

and must then sign the record of his or her evidence at the end and initial each page of it.<sup>33</sup>

## EXHIBITS

**11.2.46** Every document or thing produced in evidence at an inquiry must be made an exhibit.<sup>34</sup> However, if an original document or book is produced in evidence, a court of inquiry may, instead of making it an exhibit, compare a copy of, or an extract from, the document or book with the original and, if the court is satisfied that the copy or extract is correct:<sup>35</sup>

- a. The president must endorse on the copy or extract as follows: 'Certified that I have compared this copy with the original document / book and that it is a true copy'; and
- b. The court may return the original document or book to the witness, and attach the certified copy or extract to the record of proceedings as an exhibit.

**11.2.47** Every exhibit must:<sup>36</sup>

- a. Either be marked with a letter in sequence and signed by the president, or have attached to it a label so marked and signed; and
- b. Be attached to or kept with the record of proceedings unless, in the opinion of the president, it is not expedient to do so.

**11.2.48** If an exhibit is not attached to or kept with the record of proceedings, the president must ensure its safe custody pending the directions of the assembling authority for the ultimate disposal of the exhibit.<sup>37</sup> A photograph or digital image of the exhibit is to be attached to or kept with the record of proceedings. The president must endorse on the photograph or digital image as follows: 'Certified that I have compared the exhibit with the above photograph / digital image and that it is a true likeness'.

## PROCEDURE IF CONDUCT OF SUPERIOR OFFICER MAY BE IN QUESTION

**11.2.49** The president must adjourn the court of inquiry and report to the assembling authority if at any time it appears to the court that the conduct of an officer or a warrant officer who is senior or superior in rank to a member is, or is likely to be, called into question in the course of the inquiry.<sup>38</sup>

**11.2.50** On receiving the president's report, the assembling authority must consider the matter and, if satisfied that the conduct of the person is or is likely to be called into question, may dissolve the court and assemble a new court, having regard to the requirements of paragraph 11.2.11.<sup>39</sup>

33 AFDA s 200K(6).

34 AFDA s 200Q(1).

35 AFDA s 200Q(2).

36 AFDA s 200Q(3).

37 AFDA s 200Q(4).

38 AFDA s 200M(1).

39 AFDA s 200M(2).

**11.2.51** If the assembling authority does not dissolve the court, the assembling authority must direct it to continue its inquiry even though the conduct of an officer or a warrant officer senior or superior in rank to a member is, or is likely to be, called into question.<sup>40</sup> The president may make a further report under paragraph 11.2.49 if the evidence justifies that course of action.

### RIGHTS OF PERSON WHO MAY BE AFFECTED BY INQUIRY

**11.2.52** If at any time it appears to an assembling authority or to a court of inquiry that an inquiry affects or is likely to affect the character or the reputation of any person (whether or not the person is subject to the AFDA), the president must:<sup>41</sup>

- a. Ensure that the person is given adequate notice of the time, place, date, and nature of the inquiry; and
- b. Give the person a reasonable opportunity to exercise the rights set out in paragraph 11.2.54.

**11.2.53** Paragraph 11.2.52 does not apply to an inquiry under AFDA s 201 into the absence of a member of the Armed Forces.<sup>42</sup>

**11.2.54** The rights referred to paragraph 11.2.52 are as follows:<sup>43</sup>

- a. The person may read or have read or played back to him or her any evidence that has already been given;
- b. The person may require any witness who has already given evidence to be recalled to enable him or her to question the witness;
- c. The person may be present during the proceedings or the remainder of the proceedings (as the case may be) while the court is hearing evidence, and may question any witness who gives evidence that he or she considers affects his or her character or reputation;
- d. The person may give evidence himself or herself, or call any witness to give evidence, to rebut or explain any evidence that has been given that he or she considers affects his or her character or reputation;
- e. The person may seek and, if the exigencies of the case permit, must be granted an adjournment to enable him or her to obtain advice; and
- f. The person may be legally represented at the inquiry if the president approves.

**11.2.55** The president is to note in the record of proceedings which rights the person has decided to exercise and how those rights were afforded. If the person notifies the court that he or she does not wish to exercise the rights set out in paragraph 11.2.54, the president must note the record of proceedings to that effect.<sup>44</sup>

40 AFDA s 200M(3).

41 AFDA s 200N(1).

42 AFDA s 200N(4).

43 AFDA s 200N(2).

44 AFDA s 200N(3).

## LEGAL REPRESENTATION OF PERSON AFFECTED BY INQUIRY

**11.2.56** For the purposes of paragraph 11.2.54f, the president must take into account the following matters in determining whether a person who is affected or is likely to be affected by an inquiry should be legally represented at the inquiry, if that person applies for the president's approval to be so represented:<sup>45</sup>

- a. The seriousness of any allegations made against, or any potential penalty that may be imposed on, that person;
- b. Whether any questions of law are likely to arise;
- c. The capacity of that person to present his or her own case;
- d. Any procedural difficulties that are likely to arise;
- e. The need for reasonable speed in completing the inquiry; and
- f. The need for fairness as between that person and all persons who may appear before the court.

## CALLING OF WITNESS BY PERSON AFFECTED BY INQUIRY

**11.2.57** If a person who is affected or likely to be affected by an inquiry tells the president that he or she wishes to call a witness under paragraph 11.2.54d, the president must:<sup>46</sup>

- a. Direct that witness to attend under paragraph 11.2.29, unless it is impracticable to do so; and
- b. Make any necessary arrangements for that witness to attend the proceedings of the court of inquiry, unless it is impracticable to secure the witness's attendance.

**11.2.58** If it is impracticable to secure the attendance of a witness, the president must note that fact in the record of proceedings.<sup>47</sup>

**11.2.59** If the attendance of a witness is requested under paragraph 11.2.54d and the court of inquiry is satisfied that the attendance of that witness is not properly required by that person, any cost incurred by the Crown in procuring the attendance of the witness may be charged to, and recovered as a debt due by, the person affected or likely to be affected.<sup>48</sup>

## LIABILITY OF THE CROWN

**11.2.60** A member of a court of inquiry is not to make any admission of liability on behalf of the Crown in respect of the matter being inquired into. See paragraph 11.2.71.

45 AFDA s 2000.

46 RP 143 and AFDA s 200P(1).

47 AFDA s 200P(2).

48 AFDA s 200P(3).

**DISCIPLINARY PROCEEDINGS**

**11.2.61** Disciplinary action is not to be delayed pending the completion of an inquiry.

**PREPARATION, SIGNING AND DISPATCH OF RECORD OF PROCEEDINGS**

**11.2.62** The record of proceedings is to be prepared in the format set out in Annex A.

**11.2.63** The record of proceedings must, at the conclusion of the inquiry, be signed at the end by each member, who must add his or her rank and unit.<sup>49</sup> If there is a difference of opinion among the members on any material matter, the grounds of difference must be stated in the record.<sup>50</sup>

**11.2.64** After the record of proceedings has been signed, the president must forward it to the assembling authority, who must:<sup>51</sup>

- a. Record on the record his or her own opinion of the findings  
**(Assembling Authority's Comments);**
- b. Sign the record; and
- c. If necessary, forward the record to a superior commander.

**11.2.65** The record of proceedings must be given an appropriate security classification according to the nature of the inquiry and the evidence collected and recorded.<sup>52</sup> However, if the content of the record of proceedings does not warrant a security classification, the record of proceedings must be given an appropriate in confidence privacy marking.<sup>53</sup>

**ADMISSIBILITY OF RECORD OF PROCEEDINGS AND EVIDENCE**

**11.2.66** The record of proceedings and any evidence in respect of the proceedings, including any confession, statement, or answer to a question made or given by a person during the proceedings, must not be admitted in evidence against any person in any other proceedings, judicial or otherwise.<sup>54</sup> The Court Martial Appeal Court has interpreted the equivalent rule in the previous RP of 1983 to mean that any evidence in respect of the proceedings of a court of inquiry 'is not useable in evidence for any purpose', including the cross-examination of a witness who gives inconsistent evidence at a subsequent trial by the Court Martial.<sup>55</sup>

**11.2.67** However, notwithstanding the above paragraph:

- a. If a member of the Armed Forces is charged with desertion or absence without leave, the record of the declaration of the court under AFDA s 201 relating to the member of the Armed Forces is prima facie

49 AFDA s 200R(1).

50 AFDA s 200R(2).

51 AFDA s 200R(3).

52 AFDA s 200R(4).

53 AFDA s 200R(5).

54 AFDA s 200S(1).

55 *R v Neave* (1995) 1 NZCMAR 230, 248 (CMAC).



evidence of the matters stated in it;<sup>56</sup> and

- b. The record and evidence referred to in paragraph 11.2.66 may be given in evidence against that person if he or she is charged with:<sup>57</sup>
  - (1) Making a false statement contrary to AFDA s 71; or
  - (2) Perjury contrary to section 109 of the Crimes Act 1961.

## CONTROL OF RECORD OF PROCEEDINGS

**11.2.68** The record of proceedings of a court of inquiry must not be disclosed to:<sup>58</sup>

- a. Persons not subject to the AFDA without authority from a superior commander of the Service concerned; and
- b. Persons subject to the AFDA, unless those persons:
  - (1) Need to be aware of the contents to enable them to perform their Service duties; or
  - (2) Have been charged with an offence in respect of any matter or thing that has been investigated by the court of inquiry and have requested a copy of the record from the assembling authority.<sup>59</sup>

**11.2.69** Superior commanders are to seek advice from a legal officer when deciding whether to disclose all or part of the record of proceedings of a court of inquiry outside the NZDF.

**11.2.70** If a court of inquiry is to achieve its purpose of quickly finding out facts so that prompt remedial action can be taken by commanders, total frankness on the part of witnesses must be encouraged. AFDA s 200T recognises that if such frankness is to be obtained, the proceedings of the court of inquiry must be accorded a large measure of confidentiality (AFDA s 200S has a similar object). Nevertheless situations will arise where other persons or agencies may properly request information collected by a court of inquiry, particularly where they are charged with conducting investigations which overlap the ground covered by a court of inquiry, eg inquiries conducted by the police or coroners. Requests for information contained in the record of proceedings of a court of inquiry should therefore be dealt with on an individual basis, after taking legal advice where necessary. In general the following information may be released at the discretion of the superior commander:

- a. A list of witnesses and their addresses;
- b. Details of witnesses sought for the inquiry but not called;

56 AFDA s 200S(2).

57 AFDA s 200S(3).

58 AFDA s 200T. See also *Berryman v Solicitor-General* unreported, High Court at Wellington, Wild J, 18 February 2005, paragraph 67.

59 RP 144.

- c. A factual sequence or outline of events revealed by the inquiry avoiding, where possible, a direct recital of the statements of the witnesses or the findings of the court; and
- d. Information already published or readily available from other sources.

**11.2.71** The following information is not to be released without specific advice in each case from DGDLS:

- a. The original or a complete copy of the proceedings or a substantial part of it;
- b. Admissions of liability, civil or criminal, by any person, or evidence from which such liability can be clearly inferred; or
- c. Opinions of witnesses.

## OFFICIAL INFORMATION ACT 1982

**11.2.72** Subject to certain grounds for withholding it, ordinarily the NZDF is obliged on request under Part 2 of the Official Information Act 1982 to release any information it holds (**official information**) to any legal person who is:<sup>60</sup>

- a. A New Zealand citizen;
- b. A permanent resident of New Zealand;
- c. A person in New Zealand;
- d. A body corporate incorporated in New Zealand; or
- e. A body corporate incorporated outside New Zealand which has a place of business in New Zealand.

**11.2.73** The ordinary rule described above in paragraph 11.2.72 does not apply to any evidence given or submissions made to a court of inquiry, because it is not official information.<sup>61</sup> In order to promote the candour which is essential to the integrity of the court of inquiry process, such evidence or submissions are not to be released outside of the NZDF.

**11.2.74** The report of the court of inquiry and the assembling authority's comments are official information subject to the law mentioned in paragraph 11.2.72. However, the provisions of the Official Information Act do not overrule the provisions of AFDA s 200T, as described above in paragraph 11.2.68.<sup>62</sup>

60 Section 12 of the Official Information Act 1982. See DFO 70 Defence Force Orders for Official Information Chapter 3 Section 2 for the grounds for withholding official information. In case of doubt, the advice of a legal officer is to be sought.

61 Section 2(1) of the Official Information Act 1982.

62 Section 52(3)(b) of the Official Information Act 1982.

**STORAGE OF COURT OF INQUIRY PROCEEDINGS**

- 11.2.75** The original record of proceedings of every court of inquiry is to be forwarded through the chain of command to the Chief of Staff, HQ NZDF, for retention on completion of command and staff action.

## SECTION 3 – COMMAND INVESTIGATION

### GENERAL

- 11.3.1** The officer in command of any part of the Armed Forces (**commander**) may order a command investigation into any matter within his or her command. The commander may conduct the investigation, or may delegate the task to another person under his or her command.

### PURPOSE

- 11.3.2** Commanders require the ability to investigate the cause of minor or untoward incidents within their commands without the unnecessary expenditure of resources or the formality inherent in a court of inquiry.
- 11.3.3** A command investigation is a simple, informal process with the aim of ascertaining what has occurred in a particular situation. Command investigations may also assist as a preliminary, determinative assessment as to whether any further action is required, such as a court of inquiry.

### PROCEDURE

- 11.3.4** The power to order a command investigation derives from the prerogative of command, and therefore there are no specific procedures that need to be followed. The commander has complete discretion as to the investigation's form, but must ensure it is conducted in a manner consistent with New Zealand law.
- 11.3.5** The investigation may be conducted by any person under the commander's command or control, including a member of the Civil Staff. The report could be presented in a variety of forms including a minute from the investigating officer to the commander.

### WHEN A COMMAND INVESTIGATION IS NOT APPROPRIATE

- 11.3.6** A command investigation is not appropriate to inquire into:
- a.** Any matter which is likely to involve complex or serious issues of fact or law or both;
  - b.** Any matter where the reputation or character of a person might be affected, or where disciplinary action is contemplated;
  - c.** Any matter where there was a real likelihood that an outcome of the investigation might be the imposition of a financial penalty or other administrative or employment consequences for a member of the NZDF; or
  - d.** Any matter that involves a serious or systemic issue.
- 11.3.7** If, during the course of the command investigation, it becomes apparent to the investigating officer that the issue involves any of the elements listed above, the investigating officer is to immediately report back to the commander. If during

the course of the investigation it becomes apparent that disciplinary action may arise, the investigating officer is to immediately cease the inquiry and report back to the commander. Where practicable, the advice of a legal officer is to be sought.

**11.3.8** If the commander is satisfied that a command investigation is no longer appropriate, he or she is to direct that the investigation cease. The commander is then to:

- a. Report to his or her superior officer;
- b. Order the assembly of a court of inquiry;<sup>63</sup> or
- c. Order the commencement of a preliminary inquiry.<sup>64</sup>

### CAUTIONS

**11.3.9** It is important to ensure that command investigations are not used when disciplinary action is contemplated or where the character or reputation of an individual may be affected. There is no requirement to issue a caution to any individual being interviewed during a command investigation as command investigations are not intended to result in disciplinary action or be conducted in respect of matters that affect a person's character or reputation.

### ADMISSIBILITY AND RELEASE OF COMMAND INVESTIGATION REPORT

**11.3.10** Depending on the circumstances, the report or contents of a command investigation, including any evidence given by a person during the investigation, may be admissible in evidence in subsequent proceedings. Furthermore, subject to certain conditions, the report or contents of a command investigation may be released under the Official Information Act 1982.

**11.3.11** Before any command investigation is released, however, the procedures in DFO 70 Defence Force Orders for Official Information are to be complied with.

### ADVICE OF A LEGAL OFFICER

**11.3.12** Commanders and investigating officers may seek advice from a legal officer if there is any doubt as to whether a command investigation is the appropriate form of inquiry, or if any other unforeseen matter arises during the course of the command investigation.

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63 See Section 2.

64 In the case of members of the Armed Forces, see Chapter 3. In the case of members of the Civil Staff, see the Civil Staff Code of Conduct and Guide to Disciplinary Procedures.

ANNEX A

FORMAT FOR RECORD OF PROCEEDINGS OF COURT OF INQUIRY

Page 1

COURT OF INQUIRY

assembled by

(SERVICE DESCRIPTION, APPOINTMENT)

into

(SUBJECT MATTER)

Page 2

CONTENTS

Order of Assembly (MD 634) ..... 3

Statement in accordance with AFDA s 200G or s 200N (if applicable) ..... 4

Witnesses (1, 2, etc, by Service description and unit, or name if civilian) ..... 5

Report by court of inquiry ..... 20

Declaration by court in form MD 635 (if applicable) ..... 23

Comments by assembling authority ..... 24

Exhibits ..... 26–27

Page 3

ORDER FOR THE ASSEMBLY OF A COURT OF INQUIRY

Page 4

STATEMENT UNDER AFDA s 200G

(Refer to DM 69 (2 ed) Volume 1 Chapter 11 paragraph 11.2.24b. Omit statement if not applicable.)

The court was unable to assemble (insert details and reasons why the court was unable to assemble at the time of place).

## Page 4 continued.

**STATEMENT OF COMPLIANCE WITH AFDA s 200N**

(Refer to DM 69 (2 ed) Volume 1 Chapter 11 paragraphs 11.2.52 to 11.2.56. Omit statement if not applicable.)

The court took the following steps to comply with AFDA s 200N in respect of the persons named below: (insert details of compliance)

## Page 5

**WITNESS 1**

.....  
(Name, address, occupation)

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1 Chapter 11 paragraph 11.2.40 states on oath:

On the ..... (statement continues)

I produce ..... which relates to ..... (marked **A**)  
(details of exhibit)

.....  
(Signature of witness)

.....  
(Date)

**NOTE:** The evidence of each witness is to commence on a new page.

## Page 20

**REPORT OF THE COURT OF INQUIRY****General**

1. The inquiry was carried out over the period .....

Evidence from ..... witnesses was considered.

Page 20 continued.

**Heading** *(from terms of reference)*

2. We find that the incident was caused by .....<sup>1</sup>  
*(All material findings must be supported by reference to the evidence.)*

**Conclusions**

**Recommendations**

Dated at ..... on 25 April 20XX.

President

Members

1 Witness 1, Exhibit A. *(Footnotes rather than endnotes should be used.)*

Page 23

MD 635

**DECLARATION BY COURT OF INQUIRY ON ABSENCE OF  
MEMBER OF THE ARMED FORCES**

Page 24

**COMMENTS BY ASSEMBLING AUTHORITY**

Dated at ..... on 17 May 20XX.

.....  
*(Signature)*

*(Rank)* .....

*(Appointment)* .....



**Page 26****EXHIBIT A**

*Photograph or full description of the exhibit*

Certified that I have compared the exhibit with the above photograph / digital image and that it is a true likeness.

.....  
(Signature and rank of president)

President

**Page 27****EXHIBIT B**

*Insert true copy*

Certified that I have compared this copy with the original document / book and that it is a true copy.

.....  
(Signature and rank of president)

President

# COOPERATION WITH CIVIL AUTHORITY

■ <b>SECTION 1 – MEMBERS OF THE ARMED FORCES CHARGED IN CIVIL COURTS IN NEW ZEALAND OR OVERSEAS</b>	<b>12-2</b>
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Assistance to New Zealand Police	12-2
Assistance to civil authorities outside New Zealand	12-2
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CO to report arrest or summons	12-3
Attendance of officer or warrant officer where member of the Armed Forces other than officer or warrant officer charged	12-3
Attendance of an officer where officer or warrant officer charged	12-4
Service custody of member in accordance with treaty	12-4
Service custody of member in accordance with undertaking	12-4
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## SECTION 1 – MEMBERS OF THE ARMED FORCES CHARGED IN CIVIL COURTS IN NEW ZEALAND OR OVERSEAS

### INFRINGEMENT OFFENCE

**12.1.1** In this Section, **infringement offence**:

- a. **In New Zealand**, has the meaning given in section 2(1) of the Land Transport Act 1998; and
- b. **Outside New Zealand**, means offences against the local law equivalent to infringement offences under New Zealand law.

### ASSISTANCE TO NEW ZEALAND POLICE

**12.1.2** Where a member of the Armed Forces is sought by the New Zealand Police on or in connection with a criminal charge, his or her CO is to give all reasonable assistance to the Police in locating that member. The CO is to require the member of the Police requesting assistance to produce his or her warrant or to provide satisfactory evidence of the capacity in which he or she acts.

**12.1.3** Where a member of the Armed Forces is in Service custody for an offence against the AFDA and is sought by the New Zealand Police under civil law, his or her CO is to refer the matter to the CO's superior commander. The superior commander is to seek the advice of a legal officer before deciding whether to transfer the member to the custody of the Police.

### ASSISTANCE TO CIVIL AUTHORITIES OUTSIDE NEW ZEALAND

**12.1.4** See paragraphs 2.7.7 to 2.7.12.

### SERVICE OF SUMMONSES AND OTHER LEGAL PROCESSES IN NEW ZEALAND

**12.1.5** A CO is, in New Zealand, to give reasonable assistance to members of the Police and other authorised process servers who wish to serve a summons or other legal document on a member of the Armed Forces under his or her command who is charged with an offence to which the summons or other document relates.

**12.1.6** In certain cases service of a document on the CO of a member of the Armed Forces or on some other officer may be sufficient service on the member sought, eg section 28 of the Summary Proceedings Act 1957. In such cases the document is to be handed by that officer to the member sought at the earliest opportunity.

### MEMBER OF THE ARMED FORCES TO REPORT APPEARANCE IN COURT

**12.1.7** When a member of the Armed Forces is to appear before a civil court charged with an offence other than an infringement offence, the member is to notify his or her CO at once of the details of the charge and the date of his or her appearance. This provision is to be promulgated in daily or routine orders not less than once every six months.

**CO TO REPORT ARREST OR SUMMONS**

**12.1.8** When a member of the Armed Forces is arrested or summoned by the civil authorities, his or her CO is to report the circumstances to his or her superior commander, with an information copy to the Chief of his or her Service, on the following occasions:

- a. When the member of the Armed Forces has been charged with a serious offence; or
- b. When there is likely to be unusually adverse public interest; or
- c. When an overseas posting is imminent and the member's court appearance might affect his or her availability for that posting.

**ATTENDANCE OF OFFICER OR WARRANT OFFICER WHERE MEMBER OF THE ARMED FORCES OTHER THAN OFFICER OR WARRANT OFFICER CHARGED**

**12.1.9** An officer or warrant officer is normally to attend the court to assist the court upon request and to watch over the interests of the Service and the member when a member of the Armed Forces is charged with an offence other than an infringement offence. Where the attendance of an officer or warrant officer from the member's unit is impracticable or inconvenient, the CO may request the attendance of an officer or warrant officer from a unit closer to the court.

**12.1.10** The officer or warrant officer detailed to attend the court is to be acquainted with the following information about the member:

- a. Length of service;
- b. Service character and conduct;
- c. Pay; and
- d. Any other information which may be of assistance to the court.

**12.1.11** If called upon to give evidence as to the general character of the member, the officer or warrant officer who attends is not to give information of lesser offences against the discipline of the Service unless specifically requested to do so, since the nature of those offences is liable to be misunderstood to the prejudice of the member. If he or she is asked, the officer or warrant officer should be prepared to inform the court whether the alleged offence is of a type which might render the member liable to be discharged from the Service, or whether a conviction might have any other effect on his or her service. The officer or warrant officer concerned must be careful not to act in any way as an advocate.

**12.1.12** On his or her arrival at the court, the officer or warrant officer is to inform the prosecutor, clerk of the court or other court official, and the member or his or her counsel of the reason for his or her attendance and the information he or she is authorised to give. The officer or warrant officer is to request that the court be informed of his or her presence.

**ATTENDANCE OF AN OFFICER WHERE OFFICER OR WARRANT OFFICER CHARGED**

**12.1.13** Where an officer or a warrant officer has reported that he or she is to appear before a civil court charged with an offence, his or her CO is to inform the appropriate superior commander giving such details of the charge as may be available. The superior commander or the CO should normally appoint an officer to attend the proceedings if the case is to be heard in the High Court or a court of equivalent status overseas. An officer detailed to attend the proceedings is to take no part in the proceedings. If a conviction would be likely to reflect on the Service or on character of the officer or warrant officer who has been charged, the details of the charge are to be reported to the Chief of the Service concerned without awaiting the outcome of the proceedings.

**SERVICE CUSTODY OF MEMBER IN ACCORDANCE WITH TREATY<sup>1</sup>**

**12.1.14** In this Section, **defendant** means a person subject to the AFDA who is to be tried by a court of competent jurisdiction.

**12.1.15** Paragraph 12.1.16 applies if a defendant is to be tried in another country with which New Zealand has concluded an agreement relating to the presence in that country of persons subject to the AFDA (**treaty**). A Status of Forces Agreement is an example of such a treaty.

**12.1.16** If this paragraph applies, the defendant may be arrested, delivered into Service custody, and detained in Service custody pending his or her trial, if:

- a. The treaty provides for this; or
- b. The court orders this to occur in accordance with the treaty.

**12.1.17** The arresting officer and the custody officer are to comply with paragraphs 3.4.2 to 3.4.4.<sup>2</sup>

**SERVICE CUSTODY OF MEMBER IN ACCORDANCE WITH UNDERTAKING<sup>3</sup>**

**12.1.18** In this Section, **undertaking** means an undertaking, given by a person authorised in accordance with paragraph 12.1.20, to ensure that the defendant appears before the court at the appointed time to answer the charge against him or her.

**12.1.19** If a defendant is to be tried, whether in New Zealand or a foreign country, and the court orders the release of the defendant from civil custody pending his or her trial on the basis of an undertaking, the defendant may be arrested, delivered into Service custody, and detained in Service custody pending his or her trial.

**12.1.20** **Authorisation to give undertaking.** The following persons are authorised to give an undertaking as defined in paragraph 12.1.18:

- a. Any officer or warrant officer attending the court in accordance with

<sup>1</sup> AFDA s 93A.

<sup>2</sup> See paragraph 3.4.1 for the definition of **arresting officer** and **custody officer**.

<sup>3</sup> AFDA s 93A.

paragraph 12.1.9 or 12.1.13;

- b. The member's detachment commander (where appropriate);
- c. The member's CO; or
- d. Any officer superior in command to the member's CO.

**12.1.21** The arresting officer and the custody officer are to comply with paragraphs 3.4.2 to 3.4.4.<sup>4</sup>

## PAYMENT OF FINES AND OTHER EXPENSES

**12.1.22** A member of the Armed Forces convicted in a civil court is responsible for the payment of any fines, costs or other expenses which he or she is ordered to pay by that court. However, in countries overseas where his or her default in making payment could lead to a custodial sentence in lieu, or could in any way result in inconvenience to the Service, the officer or warrant officer attending the court may pay the fine from public funds if the member of the Armed Forces concerned signs an authority for the amount involved to be deducted from his or her pay and the advance has been approved by the appropriate Cost Centre Manager. Where it may be necessary for a sum of money to be advanced from public funds for this purpose the officer or warrant officer attending the court should make the necessary arrangements beforehand.

## CERTIFICATE OR RECORD TO BE OBTAINED ON CIVIL CONVICTION

**12.1.23** Where a member of the Armed Forces is convicted in a civil court in New Zealand for an offence other than an infringement offence, his or her CO is to obtain from the registry of that court a certificate stating that:<sup>5</sup>

- a. The member has been tried before the court for an offence specified in the certificate;
- b. The result of the trial; and
- c. What judgment or order was given or made by the court.

**12.1.24** Where a member of the Armed Forces is convicted in a civil court outside New Zealand for an offence other than an infringement offence and an officer or warrant officer has attended the court in accordance with paragraphs 12.1.9 or 12.1.13, a record of his or her attendance on form MD 602B is to be completed by the officer or warrant officer and forwarded to the member's CO.

**12.1.25** The CO is then to proceed in accordance with Chapter 13 Section 1.

<sup>4</sup> See paragraph 3.4.1 for the definitions of **arresting officer** and **custody officer**.  
<sup>5</sup> AFDA s 148.

## SECTION 2 – LEGAL AID IN CIVIL JURISDICTIONS

### CRIMINAL LEGAL AID IN NEW ZEALAND

- 12.2.1** There is no general provision for the NZDF to grant legal aid to members of the Armed Forces appearing on criminal charges in the civilian courts. However, in the situations outlined in the following paragraphs, financial assistance may be available. A member of the Armed Forces who is facing a serious criminal charge and who has sufficient funds to consult a lawyer should be encouraged to do so at the earliest possible opportunity.
- 12.2.2** If the member of the Armed Forces has insufficient funds to consult a lawyer, his or her CO should arrange for the member to consult the Legal Services Agency to see whether legal aid can be arranged under section 8 of the Legal Services Act 2000. The duty solicitor will also be available to advise in this regard among other things, although the services provided by duty solicitors are of a limited nature and do not generally include appearing for the member of the Armed Forces.

### REIMBURSEMENT OF LEGAL COSTS

- 12.2.3** If a member of the Armed Forces is charged with a criminal offence, or other unlawful conduct (eg under the Human Rights Act 1993 or the Health and Safety in Employment Act 1992) which arises out of the course of his or her service, the member's Service Chief may approve a claim for the reimbursement of the member's legal costs.
- 12.2.4** In deciding whether to approve reimbursement of the member's legal costs, the Service Chief is to consider:
- a.** The degree to which the unlawful conduct was connected with the performance of the member's Service duty;
  - b.** Whether the unlawful conduct was necessary for the member to perform his or her Service duty (eg was he or she ordered to do or omit the act which constituted the unlawful conduct);
  - c.** Whether, at the conclusion of the proceedings, the member has been shown to be without fault;
  - d.** Whether the member should not have been charged or otherwise proceeded against;
  - e.** Whether the costs claimed are fair and reasonable (if not, any reimbursement is to be abated accordingly);
  - f.** Whether the member committed any Service offence (other than under AFDA s 74) when he or she did or omitted the act in question;
  - g.** Whether there are any implications for Service discipline or the morale of the member's unit if the member is, or is not, reimbursed; and
  - h.** Whether there are any exceptional circumstances which would justify reimbursement of the member's costs.

## CIVIL CASES

- 12.2.5** If a member of the Armed Forces becomes involved in civil proceedings in a New Zealand court or tribunal and has insufficient means to engage a solicitor, he or she may be eligible for civil legal aid under section 9 of the Legal Services Act 2000. The member should therefore consult a lawyer and advise that lawyer of his or her financial situation and desire to apply for civil legal aid.
- 12.2.6** If a member of the Armed Forces is made a defendant in a civil action arising out of the course of his or her service, whether in New Zealand or overseas, the member is entitled to have the costs of his or her defence borne by the Crown under paragraph 12 of the Cabinet Directions for the Conduct of Crown Legal Business 1993. In such cases, the Attorney-General may take over the conduct of the case. If the member's CO believes that this paragraph may apply, he or she is to facsimile or signal a request for legal assistance through normal Service channels to DGDLS, setting out the circumstances of the case.

## CORONIAL INQUIRIES AND COMMISSIONS OF INQUIRY

- 12.2.7** Where:
- a.** A coroner is holding or is to hold an inquiry into the death of a member of the Armed Forces under Part 3 of the Coroners Act 2006; or
  - b.** A member of the Armed Forces has been or is to be called as a witness at an inquiry under the Coroners Act 2006, and that member's CO believes that it is in the interests of the NZDF, as distinct from those of the member, for the member to be represented by counsel; or
  - c.** A member of the Armed Forces has been or is to be called as a witness by a commission of inquiry (not being a court of inquiry under the AFDA), and that member's CO believes that it is in the interests of the NZDF, as distinct from those of the member, for the member to be represented by counsel;

the member's CO is to make a request for legal assistance through normal Service channels to DGDLS, setting out the circumstances of the case.

## CRIMINAL LEGAL AID OVERSEAS

- 12.2.8** Where a member of the Armed Forces has been charged with a criminal offence in a foreign jurisdiction and is to appear in an overseas court, his or her CO is to signal the appropriate superior commander, with an information copy to the Chief of his or her Service, detailing the circumstances of the case and applying for overseas legal aid.
- 12.2.9** In appropriate cases, the superior commander may, on the advice of a legal officer, approve payment from public funds of the whole or part of the fees of the member's defence counsel. In all such cases, the NZDF reserves the right to assign counsel of its own choice.
- 12.2.10** In deciding whether to approve an application made under paragraph 12.2.8,



superior commanders are to take into account:

- a.** Whether the cost of the defence under similar circumstances in New Zealand would be paid from public funds;
- b.** The relative cost of legal fees in the country concerned as compared with those prevailing in New Zealand;
- c.** The ability of the member to meet all or part of his or her own defence costs; and
- d.** The possibility of the member's defence being jeopardised or restricted in any way by lack of finance.

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## SECTION 1 – CONDUCT SHEETS

### GENERAL

- 13.1.1** The conduct sheets of a member of the Armed Forces are a record of commendatory occurrences, certain civil convictions and sentences, convictions and sentences of the Court Martial, and findings of guilty and punishments imposed by disciplinary officers.
- 13.1.2** All occurrences under paragraphs 13.1.4 or 13.1.5 are to be recorded in accordance with paragraphs 13.1.6 to 13.1.11 and relevant single Service orders which are consistent with these orders. The conduct sheets of each member of the Armed Forces are filed in form MD 602 Cover for Conduct Sheets, with recordable occurrences being separated from non-recordable occurrences, for use at unit level.

### PRIVACY

- 13.1.3** The information contained in conduct sheets is personal information within the meaning of the Privacy Act 1993. Conduct sheets are to be accorded staff-in-confidence handling at all times (see paragraph 13.1.15). COs and officers responsible for the custody of conduct sheets are to ensure that the principles of the Privacy Act and, where applicable, the Official Information Act 1982, as reflected in Chapter 4 of DFO 70 Defence Force Orders for Official Information, are complied with at all times.

### RECORDABLE OCCURRENCES

- 13.1.4** The following occurrences are recordable occurrences:
- a. Commendations.** Any special act of gallantry, bravery or distinguished service which has been recognised by the award of a single Service or Chief of Defence Force commendation, or a New Zealand Royal Honour.
  - b. Service convictions.** Any Service conviction which is:
    - (1)** A conviction by the Court Martial; or
    - (2)** A finding of guilty by a disciplinary officer where a punishment of detention, reduction in rank, a stay of seniority, or a fine exceeding seven days' basic pay is imposed or where an order for compensation exceeding seven days' basic pay is made.
  - c. Civil convictions.** Any civil conviction which is:
    - (1)** A conviction by the High Court of New Zealand for an offence or offences committed while a member of the Armed Forces; or
    - (2)** A conviction by a District Court in New Zealand for an offence or offences, other than an infringement offence (as defined in

paragraph 12.1.1), committed while a member of the Armed Forces where :

- (a) A sentence of imprisonment or supervision is imposed;
  - (b) A fine exceeding seven days' basic pay or reparation is imposed;
  - (c) An order disqualifying the member from holding or obtaining a driver's licence for a period of six months or more is made;
  - (d) In any other case, the member is below the rank of warrant officer and his or her CO considers that the offence is of such a nature as to merit permanent recording; or
  - (e) In any other case, the member is a warrant officer or an officer and the appropriate superior commander considers that the offence is of such a nature as to merit permanent recording.
- (3) A conviction by a civil court outside New Zealand for offences committed while a member of the Armed Forces where an officer or warrant officer was detailed to attend the court in accordance with paragraph 12.1.10 or 12.1.14 and:
- (a) The member's CO, in the case of a member below the rank of warrant officer; or
  - (b) The appropriate superior commander, in any other case;
- considers that the offence is of such a nature as to merit permanent recording and would probably have been recorded had the offence been committed in New Zealand.

## NON-RECORDABLE OCCURRENCES

**13.1.5** The following occurrences are non-recordable occurrences:

- a. **Service convictions.** Any finding of guilty by a disciplinary officer other than one which is classified as recordable; and
- b. **Civil convictions.** Any conviction by a civil court:
  - (1) In New Zealand for an offence or offences, not being infringement offences (as defined in paragraph 12.1.1), committed while a member of the Armed Forces, other than recordable occurrences; or
  - (2) Overseas for an offence or offences committed while a member of the Armed Forces where an officer or warrant

officer was detailed to attend the court in accordance with paragraph 12.1.10 or 12.1.14 other than recordable occurrences.

### **RECORDING SUMMARY FINDINGS**

- 13.1.6** All findings of guilty by disciplinary officers are to be recorded by filing the appropriate copy of form MD 601 in the correct section of form MD 602. All forms MD 601 containing recordable occurrences are to be indexed by entering the unit and serial number of the form MD 601 and the date of the conviction in the index panel on form MD 602.
- 13.1.7** Every completed original form MD 601 is to be forwarded to DGDLS for archival pursuant to the Public Records Act 2005, whether or not a finding of guilty has been recorded.

### **RECORDING CONVICTIONS BY THE COURT MARTIAL**

- 13.1.8** All convictions recorded by the Court Martial are to be recorded by filing the form MD 602A, with the relevant details entered on it, signed by the offender's CO, in the correct section of form MD 602.

### **RECORDING CIVIL CONVICTIONS**

- 13.1.9** All entries in respect of civil convictions are to be made by filing the certificate of conviction or form MD 602B in the correct section of form MD 602.
- 13.1.10** Where there is a discretion whether or not the entry is classified as recordable or non-recordable,<sup>1</sup> the CO or superior commander is to cause to be entered on the certificate or form MD 602B the words 'Directed that this occurrence is recordable' or 'Directed that this occurrence is non-recordable' and is then to date and sign the entry before the certificate or form MD 602B is filed.

### **RECORDING COMMENDATIONS**

- 13.1.11** All commendatory entries are to be made by the member's CO on form MD 602C which is then to be filed in the correct section of form MD 602.

### **RAISING OF FORM MD 602**

- 13.1.12** A form MD 602 for each member of the Armed Forces is to be raised:
- a.** On enlistment for every member of the Armed Forces below the rank of warrant officer in the regular forces; and
  - b.** Where there is no existing form MD 602, for officers and warrant officers in the regular forces and members of the territorial forces when it is required for the recording of an occurrence under paragraphs 13.1.4 or 13.1.5.

1

See paragraph 13.1.4c(2)(iv) and (v), and 13.1.4c(3).

**CUSTODY OF FORM MD 602**

**13.1.13** The form MD 602 is to be held:

- a.** In the case of a commissioned officer, or a warrant officer in the Army or Air Force, by the relevant single Service posting authority;
- b.** In the case of a warrant officer in the Navy, in his or her unit; and
- c.** In the case of midshipmen, officer cadets and members of the Armed Forces below the rank of warrant officer, in his or her unit.

**13.1.14** On promotion to warrant officer (in the Army or Air Force) or on appointment to a commission, whichever occurs first, the form MD 602 is to be forwarded for custody in accordance with paragraph 13.1.13.

**13.1.15** When not in use, form MD 602 is to be kept under lock and key.

**RETENTION AND DESTRUCTION OF RECORDABLE CONDUCT SHEETS**

**13.1.16** In accordance with the principles of the Privacy Act 1993, all conduct sheets containing recordable occurrences under paragraph 13.1.4b or c are to be withdrawn from form MD 602 and destroyed 10 years from the date of the last such occurrence. Conduct sheets containing commendations are to be retained permanently in form MD 602.

**13.1.17** Where recordable conduct sheets are withdrawn and destroyed in accordance with paragraph 13.1.16, the member is to be issued with a new form MD 602 if there are any entries on the index of recordable forms MD 601. Those occurrences in the old form MD 602 which are still current are to be carried forward to the new form MD 602. The issue of the new form 602 is to be authorised by the member's CO who is to sign and date it.

**RETENTION AND DESTRUCTION OF NON-RECORDABLE CONDUCT SHEETS**

**13.1.18** Subject to paragraphs 13.1.19 and 13.1.20, any conduct sheets containing non-recordable occurrences are to be removed from form MD 602 and destroyed:

- a.** Six months after enlistment;
- b.** Two years from the date of the finding or conviction;
- c.** On promotion to warrant officer;
- d.** On appointment to a commission; and
- e.** On release or discharge.

**ACTION ON DISCHARGE**

**13.1.19** Where a member of the Armed Forces is discharged either on the ground that:

- a. The member has shown by his or her conduct that retention is undesirable for the Service concerned; or
- b. The member has been convicted in a civil court of an offence which renders his or her retention undesirable for the Service concerned;

any conduct sheets containing non-recordable occurrences are to be kept for three months or, if a complaint under section 49 of the Defence Act 1990 concerning the discharge has been lodged prior to the discharge or within three months after the discharge, they are to be retained until after the complaint has been finally determined.

### ACTION ON DISMISSAL

**13.1.20** Where a member of the Armed Forces is sentenced by the Court Martial to be dismissed from Her Majesty's Service or is sentenced to imprisonment involving dismissal from Her Majesty's Service, any conduct sheets containing non-recordable occurrences are to be retained until the later of:

- a. 21 days after the date that the sentence was imposed;<sup>2</sup> or
- b. If the member appeals to the Court Martial Appeal Court, the day after the appeal is determined or abandoned; or
- c. If the member seeks the leave of the Court of Appeal or the Supreme Court to appeal against the judgment of the Court Martial Appeal Court (or subsequently the judgment of the Court of Appeal):
  - (1) The day after leave is refused; or
  - (2) If leave is granted, the day after the appeal is determined or abandoned.

## SECTION 2 – FORMS

**13.2.1** The following forms are prescribed for use in connection with proceedings before disciplinary officers, appeals to the SACNZ,<sup>3</sup> and courts of inquiry.

<b>MD 601</b>	Charge Report
<b>MD 601A</b>	Continuation Charge Report
<b>MD 601B</b>	Record of Disclosure
<b>MD 601C</b>	Record of Election and Waiver
<b>MD 601D</b>	Presenting Officer's Report
<b>MD 602</b>	Cover for Conduct Sheets (not included)
<b>MD 602A</b>	Conviction by the Court Martial of New Zealand
<b>MD 602B</b>	Record of Attendance of Officer/Warrant Officer at a Civil Court Outside New Zealand
<b>MD 602C</b>	Record of Commendation
<b>MD 603</b>	Certificate of Competency as a Disciplinary Officer
<b>MD 604</b>	Certificate of Competency as a Defending and Presenting Officer
<b>MD 605</b>	Notice of Application for Bail Pending Trial
<b>MD 605A</b>	Notice of Application for Bail Pending Appeal
<b>MD 605B</b>	Notice by Director of Military Prosecutions of Recommendations in Respect of Application for Bail
<b>MD 606</b>	Witness Summons by Disciplinary Officer
<b>MD 607</b>	Notice of Appeal by Person Found Guilty by Disciplinary Officer
<b>MD 608</b>	Petition to the Judge Advocate General for a Special Reference
<b>MD 608A</b>	Reference by Judge Advocate General
<b>MD 608B</b>	Notice of Reference by Judge Advocate General to the Summary Appeal Court
<b>MD 610</b>	Application for Legal Aid
<b>MD 610A</b>	Statement of Means for Legal Aid
<b>MD 611</b>	Guide for Accused Persons
<b>MD 613</b>	Particulars of the Accused's Service
<b>MD 620</b>	Medical Officer's Certificate

<sup>3</sup> Some more specialist forms relating to the SACNZ are located in Volume 2.



<b>MD 626</b>	Warrant to Arrest
<b>MD 626C</b>	Warrant to Arrest for Absconding, Breaching Bail Condition, or Failing to Appear
<b>MD 628</b>	Committal Order for Imprisonment / Detention
<b>MD 628A</b>	Committal Order for Imprisonment / Detention Consecutive Sentences
<b>MD 629</b>	Order for Transfer of a Service Prisoner / Detainee
<b>MD 629A</b>	Order for Interim Custody of Service Prisoner / Detainee and Transfer While in Interim Custody
<b>MD 629B</b>	Order for Delivery into Service Custody of Service Prisoner / Detainee for Temporary Removal and Return
<b>MD 629C</b>	Order for Delivery of Service Prisoner / Detainee into Service Custody for Removal Overseas
<b>MD 630</b>	Order for Detention of Service Prisoner / Detainee in Temporary Civil Custody
<b>MD 630A</b>	Order for Detention of Arrested Person in Temporary Civil Custody
<b>MD 630B</b>	Order for Temporary Custody in a Service Penal Establishment
<b>MD 630C</b>	Order for Release from Temporary Civil Custody
<b>MD 630D</b>	Order for Release from Temporary Custody in a Service Penal Establishment
<b>MD 631</b>	Warrant for Release of Detainee on Quashing or Variation of Punishment
<b>MD 631A</b>	Order for Release of Detainee on Reduction of Punishment
<b>MD 631B</b>	Order for Temporary Release of Service Prisoner / Detainee
<b>MD 631C</b>	Notification to Service Prisoner / Detainee of Terms of Temporary Release
<b>MD 634</b>	Order for the Assembly of a Court of Inquiry
<b>MD 635</b>	Declaration by Court of Inquiry on Absence of a Member of the Armed Forces
<b>MD 637</b>	Summons to Civilian Witness to Attend a Court of Inquiry

## CHARGE REPORT<sup>1</sup>

Service <sup>3</sup>		Arm <sup>3</sup>		Full Service Description <sup>4</sup>				Unit							
Plea <sup>5</sup>		CHARGES <sup>6</sup>							Finding <sup>7</sup>						
8		WITNESSES AND EXHIBITS <sup>9</sup>				RECORD OF SUMMARY PROCEEDINGS <sup>11</sup>									
						Investigated by _____ on _____ Remanded to _____ on _____ Investigated by _____ on _____ (Name and Appt) Accused given the right to trial in the Court Martial _____ Referred to DMP and remanded to Court Martial on _____ Punished/Discharged by _____ on _____ Signature of disciplinary officer who punished accused or discharged accused without punishment  _____ (Name) (Rank)									
		ACCUSED BASIC PAY <sup>10</sup> \$ _____ per day													
PUNISHMENTS AND ORDERS				DETAILS OF APPROVAL, ORDERS ETC <sup>13</sup>											
Detention				Days											
Reduction in Rank <sup>12</sup>		Rank		Seniority Date											
Stay of Seniority (Insert Period)															
Fine				\$											
Reprimand (Yes if applicable)															
Confinement to Ship or Barracks				Days											
Extra Work and Drill				Days											
Stoppage of Leave				Days											
Extra Duty				Days											
Caution (Yes if applicable)															
Order to Come Up for Punishment if Called On (Yes if applicable) <sup>15</sup>															
Compensation Order				\$											
Restitution Order (Yes if applicable)															
Fine Paid in Cash															
MD 1005 Serial No: _____				Date: _____											
Atlas TPR Raised No: _____ <sup>16</sup>				Date: _____											
Amending Atlas TPR Raised <sup>17</sup>															
No: _____				Date: _____											
For Use Following Reduction in Rank															
Rank		Trade		Sector		Tier		Level		New TFR		TPR Number		Date	

## NOTES AND INSTRUCTIONS ON THE USE OF FORMS MD 601 AND MD 601A

- 1 Where there is insufficient space on the front page to record all the information, the additional information is to be recorded in form MD 601A Continuation Charge Sheet, numbered and attached. The MD 601A is to have the same serial number as the MD 601 together with the Service, arm, full Service description, unit and base, ship or camp of the accused entered. Additional copies of the MD 601 or MD 601A may be made as required for lawful purposes.
- 2 Forms are to be numbered in sequence in each unit from 1 January each year.
- 3 For spaces Service and Arm see ATLAS Systems tables, General Service and Entry Arm respectively.
- 4 Full Service description, i.e. rank, first names, surname (in capitals), Service number, trade/branch or corps.
- 5 Enter **G** for Guilty and **NG** for not guilty. See DM 69 (2 ed) Volume 1 paragraph 7.5.6 for entering no plea (**NP**) to alternative charges which follow an alternative in respect of which the disciplinary officer has accepted a plea of guilty.
- 6 Charges are to be drawn in accordance with DM 69 (2 ed) Volume 1 Chapter 4 Section 2.
- 7 Enter **D** for dismissed, **G** for guilty, **NG** for not guilty. Unless the charge has been dismissed, a finding is to be recorded on each charge other than an alternative charge. If the charge is an alternative to another charge which precedes it in the charge report, and **G** is recorded for that preceding charge, enter **NF** for no finding.
- 8 Enter **A** if the witness is called by the accused. Enter **S** if the witness's evidence is given in the form of a written statement in accordance with AFDA s 117ZM (see DM 69 (2 ed) Volume 1 paragraph 6.4.3). Attach any written statement to the original copy of the MD 601.
- 9 Describe each witness by Service description if a Service member, or initials and surname if a civilian. In the case of documentary exhibits insert the letter or number of the exhibit and a brief description of the exhibit.
- 10 The accused's daily rate of pay is to be entered here. **Basic pay**, as defined in AFDA s 2(1), is the applicable daily rate of pay prescribed by CDF under the MRS.
- 11 Insert the appointment of the disciplinary officer, i.e. SUBCDR, DETCDR, CO, SUPCDR; and the date. If the accused was given the right to elect trial in the Court Martial, enter **Yes** where appropriate (if **Yes** is entered, the form MD 601 must be accompanied by a completed form MD 601C Record of Election and Waiver). Where the offender is punished or discharged without punishment the inapplicable option is to be deleted. The officer who punished the offender or discharged the offender without punishment is to sign and insert his or her name and rank in the appropriate place.
- 12 Where the punishment of reduction in rank is imposed AFDA s 84(2) requires the period of seniority to be credited to the offender to be specified. The new seniority date is to be inserted in the appropriate space. A new TFR is to be set based on Step 7 of the appropriate sector and tier for the trade of the offender.
- 13 This space is to record all the necessary additional information which is required to be recorded in respect of summary proceedings under the AFDA. Matters which are to be entered here include:
  - a Details of any approval to try a charge or impose a punishment under DM 69 (2 ed) Volume 1 paragraphs 2.2.3 or 8.1.14.
  - b Any orders made by the disciplinary officer which are prescribed in DM 69 (2 ed) Volume 1.
  - c Any direction under DM 69 (2 ed) Volume 1 paragraph 8.5.6 that a fine or compensation be paid by instalments.
  - d Any matters required to be noted in respect of compensation or restitution orders in accordance with DM 69 (2 ed) Volume 1 Chapter 8 Section 4.
  - e Any reduction of punishment ordered in accordance with DM 69 (2 ed) Volume 1 paragraph 8.1.27.
  - f Any undue delay in the disposal of the charge. In particular, where more than 30 days elapse between the commission of the offence and the commencement of the proceedings before the disciplinary officer, the reasons for the delay are to be inserted.
- 14 This box is to be used if the CO has examined the charge and/or determined the punishment is to be reduced in accordance with DM 69 (2 ed) Volume 1 paragraph 8.1.27.
- 15 If the disciplinary officer makes an order to come up for punishment if called on, he or she must record and attach to the MD 601 a statement of his or her findings of fact in relation to the charge. See DM 69 (2 ed) Volume 1 paragraph 8.3.26.
- 16 Following input to ATLAS the TPR Register/No is to be clearly annotated on the MD 601/MD 601A (e.g. SYSADMB 1006).
- 17 If an amending ATLAS action is taken following a successful appeal to the Summary Appeal Court (or following examination by the CO), when punishments are varied or quashed, see Note 15.
- 18 See DM 69 (2 ed) Volume 1 Chapter 13 Section 1.
- 19 Distribution of MD 601/MD 601A, refer to single Service orders, e.g. DFO(N), (A) and (F). Original is to be forwarded to DLS through appropriate chain of command, whatever finding is entered.



PAGE \_\_\_\_ OF \_\_\_\_

Serial No: \_\_\_\_\_ <sup>1</sup>**RECORD OF DISCLOSURE<sup>2</sup>**

Service Description		
The following information has been disclosed in accordance with rule 9 of the Armed Forces Discipline Rules of Procedure 2008		
Information/Evidence Disclosed <sup>3</sup>	Date Disclosed <sup>4</sup>	Signature of Accused <sup>5</sup>
MD 601/ <span style="float: right;">6</span>		
Signature and Service description of disciplinary officer <sup>7</sup>		

## NOTES AND INSTRUCTIONS ON THE USE OF FORM MD 601B

- 1 Enter the serial number of the MD 601 that the disclosure of information relates to.
- 2 MD 601B is the form used to record disclosure of information in compliance with DM 69 (2 ed) Volume 1 Chapter 7 Section 3 and must be attached to the original of each MD 601 in accordance with paragraph 7.3.12 of that Section.
- 3 DM 69 (2 ed) Volume 1 paragraph 7.3.6 requires the disciplinary officer to ensure that the accused is provided with a copy of the form MD 601 Charge Report and is given access to any information which:
  - a. May be relied upon as evidence against the accused; or
  - b. Tends to show that the accused did not commit the offence charged.

This information includes, but is not limited to, any:

- a. Statement made by the accused;
- b. Relevant documentary evidence;
- c. Written statement made by a witness; and
- d. Unit or Service Police file which relates to the charge or, if applicable, the relevant portions of the file.

See paragraphs 7.3.8 to 7.3.10 for information about the form of disclosure, particularly for physical evidence and for information about disclosure of information that might prejudice protected interests such as the security or defence of New Zealand, defence relationships, or the maintenance of the law.

- 4 Enter the date that each piece of information/evidence was disclosed to the accused. Information/evidence is required to be disclosed in reasonably sufficient time to allow the accused to consider it in properly preparing his or her case prior to being arraigned by the disciplinary officer (see paragraph 7.4.2).
- 5 The accused is to sign to acknowledge the receipt of each disclosure.
- 6 Enter the serial number of the form MD 601 that records the charges against the accused. This must be disclosed to the accused in accordance with DM 69 (2 ed) Volume 1 paragraph 7.3.6. If the form MD 601 is amended prior to the arraignment of the accused, the accused must be provided with a copy of the amended MD 601 before he or she is arraigned.
- 7 The disciplinary officer is to sign to certify that DM 69 (2 ed) Volume 1 Chapter 7 Section 3 has been complied with.

RECORD OF ELECTION AND WAIVER<sup>2</sup>

Service Description
I, the above named person subject to the Armed Forces Discipline Act 1971, having been offered the right to elect trial in the Court Martial or summary trial by a disciplinary officer, <b>certify as follows:</b>
I have been advised and I understand that:  a. A summary trial by a disciplinary officer is not a trial by an independent court.  b. If I elect summary trial, I irrevocably waive my right under section 25(a) of the New Zealand Bill of Rights Act 1990 to be tried by an independent court.  c. If I am tried by a disciplinary officer I cannot be represented by a lawyer at that trial.  d. If I elect summary trial, I irrevocably waive my right under section 24(c) of the New Zealand Bill of Rights Act 1990 to legal representation.  e. If I elect trial by the Court Martial, I will be entitled to legal aid under the Armed Forces Legal Aid Scheme.  f. If I am found guilty by a disciplinary officer, the punishments that may be imposed are limited to those provided for in Annex A (or, as the case may be, Annex B) of DM 69 (2 ed) Volume 1 Chapter 8.  g. If I am found guilty by the Court Martial, the Court Martial may impose any lawful sentence up to the maximum sentence for the offence.  h. The Court Martial is presided over by a Judge and applies the ordinary rules of evidence that are used in criminal courts.  i. Summary trials are conducted by disciplinary officers who are not Judges or lawyers and who do not apply the ordinary rules of evidence.  j. A summary trial can be commenced and completed more expeditiously than a trial by the Court Martial.
<b>I HEREBY ELECT:</b> <sup>3</sup>  a. <b>Trial by the Court Martial of New Zealand</b>  b. <b>Summary trial by a disciplinary officer</b> , and I waive my rights to trial by an independent court and to be represented by a lawyer.
<b>Signature of accused:</b> <sup>4</sup>

To be attached to original copy of MD 601

- 
- 1 Enter the serial number of the MD 601 that the election relates to.
  - 2 MD 601C is the form used to record the election of an accused to be tried in the Court Martial or summarily by a disciplinary officer in accordance with DM 69 (2 ed) Volume 1 paragraph 7.5.33 or paragraph 7.6.38, as the case may be, and must be attached to the original of each MD 601 where the right to elect is afforded to the accused.
  - 3 Delete whichever option the accused does not elect.
  - 4 The accused is to sign to confirm his or her election.

**PRESENTING OFFICER'S REPORT**  
(Delete those particulars which are not applicable)

---

*Service description and unit*

---

1. The offender:
  - a. Was born on \_\_\_\_\_  
*Date*
  - b. Is single/married/in a civil union/in a recognised relationship/divorced/separated/widowed  
and has \_\_\_\_\_ children and \_\_\_\_\_ other persons dependent upon him/her.
  - c. Was attested on \_\_\_\_\_ and was commissioned on \_\_\_\_\_.  
*Date* *Date*
  - d. Is serving on a standard/fixed term engagement (for \_\_\_\_\_ years).
  - e. Holds the substantive rank of \_\_\_\_\_ with seniority of \_\_\_\_\_.  
*Rank* *Date*  
and has held the acting rank of \_\_\_\_\_ since \_\_\_\_\_.  
*Rank* *Date*
  - f. Is now under sentence of imprisonment/detention imposed on \_\_\_\_\_.  
*Date*
  - g. Has been awaiting trial for \_\_\_\_\_ days of which \_\_\_\_\_ days have been spent in civil  
custody, \_\_\_\_\_ days in close arrest and \_\_\_\_\_ days in open arrest.
  - h. Is entitled to wear the decorations and awards listed in Schedule 1.
2. The offender has been found guilty by a disciplinary officer of the offences listed in Schedule 2.
3. The offender has previously been convicted by the Court Martial of the offences listed in Schedule 3.
4. The offender has been convicted by a civil court of the offences listed in Schedule 4.
5. The offender's total basic pay for a 14 day period is:

Gross Pay	\$ _____
Tax and Superannuation Deductions	\$ _____
Net Pay	\$ _____
6. The offender's general conduct in the Service is:
7. Other information relating to the offender's circumstances that may be relevant to punishment is:

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

---

*Signature, rank, appointment*

Presenting Officer



**SCHEDULE 1**  
Decorations and Awards

**SCHEDULE 2**  
Summary Convictions

Offence	Date found guilty	Punishment
---------	-------------------	------------

**SCHEDULE 3**  
Convictions by the Court Martial

Offence	Date convicted	Sentence
---------	----------------	----------

**SCHEDULE 4**  
Convictions by Civil Court

Offence	Date convicted	Sentence
---------	----------------	----------

## CONVICTION BY THE COURT MARTIAL OF NEW ZEALAND

1. On \_\_\_\_\_  
*Date* *Service description*

was convicted by the Court Martial of New Zealand of the following offences:<sup>1</sup>

2. On \_\_\_\_\_, the above mentioned member of the Armed Forces  
*Date*  
was sentenced to:<sup>2</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

\_\_\_\_\_  
Commanding Officer

\_\_\_\_\_  
1 Insert statements of offence.

2 Insert details of the sentence (if any) and/or any orders made by the Court Martial.

**RECORD OF ATTENDANCE OF OFFICER\*/WARRANT OFFICER\*  
AT A CIVIL COURT OUTSIDE NEW ZEALAND**

I, \_\_\_\_\_, state that:  
*Service description*

1. On \_\_\_\_\_, I attended the trial of  
*Date*  
\_\_\_\_\_ in the \_\_\_\_\_  
*Service description* *Name of court*  
at \_\_\_\_\_ to watch over his\* / her\* interests in accordance with  
*Place*  
DM 69 (2 ed) Volume 1 Chapter 12 Section 1.

2. On \_\_\_\_\_, the above mentioned member of the Armed Forces  
*Date*  
was convicted by the above mentioned court of the following offences:<sup>1</sup>

3. On \_\_\_\_\_, the above mentioned member of the Armed Forces  
*Date*  
was sentenced to:<sup>2</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

\_\_\_\_\_

\* Delete inapplicable option.

\_\_\_\_\_  
1 Insert details of convictions.  
2 Insert details of the sentence and any orders made by the court.

RECORD OF COMMENDATION

\_\_\_\_\_  
*Service description*

*(Insert details of any special act of gallantry, bravery, or distinguished service which has been recognised by the award of a single Service or Chief of Defence Force commendation, or a New Zealand Royal Honour.)*

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_

Commanding Officer



---

*Service description*

having successfully completed the Military Justice Training Programme,  
Level 3, and being in all respects suitable to act as a disciplinary officer,  
is awarded a

## **CERTIFICATE OF COMPETENCY AS A DISCIPLINARY OFFICER**

Dated at Wellington on \_\_\_\_\_

---

Director General of Defence Legal Services\*

\*Or Director of Legal Services, if applicable.



---

*Service description*

having successfully completed the Military Justice Training Programme, Level 2,  
and being in all respects suitable to act as a defending or presenting officer,  
is awarded a

## **CERTIFICATE OF COMPETENCY AS A DEFENDING AND PRESENTING OFFICER**

Dated at Wellington on \_\_\_\_\_

---

Director General of Defence Legal Services\*

\*Or Director of Legal Services, if applicable.

## NOTICE OF APPLICATION FOR BAIL PENDING TRIAL

Section 49 of the Court Martial Act 2007

To the Registrar of the Court Martial of New Zealand  
C/- Headquarters, New Zealand Defence Force, Wellington

Name of applicant: \_\_\_\_\_  
*Full name or Service description*

Respondent: Director of Military Prosecutions

I, the applicant named above, apply for bail under section 49 of the Court Martial Act 2007 on the grounds and for the reasons set out below.

- 1 I am accused of committing the following offence(s) against the Armed Forces Discipline Act 1971:<sup>1</sup>
- 2 I am currently being held in the following prison/Service penal establishment\*:<sup>2</sup>
- 3 In making this application, I rely on the following:<sup>3</sup>

I give answers as follows to the following questions:

- 1 Is any lawyer now acting for you?
- 2 If so, give his or her name and address and telephone number/fax numbers:
- 3 Have you applied, or do you intend to apply, to the Registrar of the Court Martial for a grant of legal aid?<sup>4</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Applicant

\* Select one.

- 1 Specify offences.
- 2 Specify name of prison or Service penal establishment, e.g. SCE Burnham.
- 3 Set out the grounds for your application, which should address the issues in section 49(4) of the Court Martial Act 2007, including the considerations in section 8(1) and (3) of the Bail Act 2000 and any considerations in section 8(2) of that Act that you wish the Judge to take into account, and be supported by relevant details. See DM 69 (2 ed) Volume 1 Chapter 3 Section 4.
- 4 If you wish to apply for legal aid, this must be done in form MD 610 and, if you wish to seek waiver of your 3% contribution, form MD 610A.

## NOTICE OF APPLICATION FOR BAIL PENDING APPEAL

*Section 50 of the Court Martial Act 2007*

To the Registrar of the Court Martial of New Zealand  
C/- Headquarters, New Zealand Defence Force, Wellington

Name of applicant: \_\_\_\_\_  
*Full name or Service description*

Respondent: Director of Military Prosecutions

I, the applicant named above, apply for bail under section 50 of the Court Martial Act 2007 on the grounds and for the reasons set out below.

1 I have been convicted of the following offence(s) against the Armed Forces Discipline Act 1971:<sup>1</sup>

and I am currently being held in the following prison/Service penal establishment\*:<sup>2</sup>

2 I have appealed against my conviction/sentence/conviction and sentence\* to the Summary Appeal Court/the Court Martial Appeal Court.\*

3 In making this application for bail pending the determination of my appeal, I rely on the following:<sup>3</sup>

I give answers as follows to the following questions:

1 Is any lawyer now acting for you?

2 If so, give his or her name and address and telephone number/fax numbers:

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Applicant

\* Select whichever apply.

- \_\_\_\_\_  
1 Specify offence(s) of which convicted, date of conviction and sentence (if any).  
2 Specify name of prison or Service penal establishment, e.g. SCE Burnham.  
3 Set out the grounds for your application, which should address the issues in section 50(4) of the Court Martial Act 2007, including any considerations in section 14(3) of the Bail Act 2000 that you wish the Judge to take into account, and be supported by relevant details.





**NOTICE BY DIRECTOR OF MILITARY PROSECUTIONS  
OF RECOMMENDATIONS IN RESPECT OF APPLICATION FOR BAIL**

*Section 52(2) of the Court Martial Act 2007*

To the Registrar of the Court Martial of New Zealand  
C/- Headquarters, New Zealand Defence Force, Wellington

Name of applicant: \_\_\_\_\_  
*Full name or Service description*

Respondent: Director of Military Prosecutions

**Take notice** that under section 52(2) of the Court Martial Act 2007 the Director of Military Prosecutions wishes to make the following recommendations to the Judge who considers the application for bail pending trial\*/bail pending determination of appeal\* dated \_\_\_\_\_, filed by the applicant named above:<sup>1</sup> *Date*

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Director of Military Prosecutions

\* Select one.

- \_\_\_\_\_  
1. Specify the recommendations you wish to make and the reasons, which should address the issues in section 49(3) of the Court Martial Act 2007 (in the case of an application for bail pending trial), or the issues in section 50(3) of that Act (in the case of an application for bail pending determination of appeal) and be supported by relevant details.



## WITNESS SUMMONS BY DISCIPLINARY OFFICER<sup>1</sup>

*Section 150C of the Armed Forces Discipline Act 1971*

**In the matter of** proceedings before a disciplinary officer under the Armed Forces Discipline Act 1971

Name of accused: \_\_\_\_\_  
*Full name or Service description*

To \_\_\_\_\_, of \_\_\_\_\_  
*Name Address*

You are ordered to attend at/on board \_\_\_\_\_ on \_\_\_\_\_ at \_\_\_\_\_  
*Place/Ship Date*  
\_\_\_\_\_am/pm\* and to give evidence for the purposes of proceedings before a disciplinary officer  
*Time*  
concerning the accused named above.

And you are ordered to bring with you and produce at the same time and place the following:<sup>2</sup>

### Failure to Attend

If you fail without reasonable excuse to comply with this summons, the disciplinary officer may order that you be arrested and taken before the nearest District Court, which may find you guilty of contempt of a military tribunal under the Armed Forces Discipline Act 1971. The penalty for contempt of a military tribunal under that Act is imprisonment for a term not exceeding 1 month or a fine not exceeding \$1,000, or both.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Disciplinary Officer

\* Select one.

- \_\_\_\_\_  
1 This form is to be completed in duplicate. The original is to be served on the witness in accordance with AFDA s 150D. After the original has been served, the duplicate is to be completed on the reverse with the details of service and then returned to the disciplinary officer who issued the summons.  
2 Specify the papers, documents, records or things in the person's possession or under the person's control to be produced.

## STATEMENT OF SERVICE

I, \_\_\_\_\_  
*Service description and unit*

state that on \_\_\_\_\_ I served \_\_\_\_\_  
*Date* *Name*

with a summons, a true copy of which appears on the reverse of this statement:

\*by delivering it to him\*/her\* personally at \_\_\_\_\_  
*Place*

\*by posting it to him\*/her\* by registered letter addressed to him\*/her\* at his\*/her\* usual place of  
residence, namely \_\_\_\_\_  
*address*

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

\_\_\_\_\_

Person who effected service

\* Delete inapplicable options.

**NOTICE OF APPEAL BY PERSON FOUND GUILTY BY DISCIPLINARY OFFICER**

*Sections 124 and 125 of the Armed Forces Discipline Act 1971*

**IN THE SUMMARY APPEAL COURT OF NEW ZEALAND**

To the Registrar of the Summary Appeal Court of New Zealand  
C/- Headquarters, New Zealand Defence Force, Wellington

<b>Name of appellant:</b>	<b>Disciplinary Officer:</b>
<b>Offence(s) of which found guilty:</b>	<b>Punishment(s)/order(s):</b>
<b>Date of finding by disciplinary officer:</b>	<b>Date when punishment imposed:</b>

I, the above-named appellant, give you notice that I wish to appeal to the Summary Appeal Court against:

\* the following finding(s) of guilty against me:<sup>1</sup>

\* the following punishment(s):<sup>2</sup>

\* the following order(s):<sup>3</sup>

\*Delete any inapplicable option.

*Please turn over*

- 
- 1 Specify finding(s).
  - 2 Specify the punishment or combination of punishments you are appealing against.
  - 3 Specify the order(s) (for compensation, restitution, or to come up if called upon) that you are appealing against.

The grounds on which I am appealing are set out in paragraph 6 below, and I give answers as follows to the following questions:

- 1 (a) Is any lawyer now acting for you?  
  
(b) If so, give his or her name and address and fax number:  
  
(c) Have you applied, or do you intend to apply, for a grant of legal aid?
- 2 (a) Are you are currently in a penal institution?  
  
(b) If so, specify the name of the penal institution:
- 3 If you do not currently have a lawyer, what is your current postal address and fax number (if any)?
- 4 (a) If you are in custody and are granted an oral hearing, do you wish to apply for leave to be present?  
  
(b) If so, what are your reasons for seeking leave to be present?<sup>4</sup>
- 5 You have 21 days from the date on which you were found guilty by the disciplinary officer (or 35 days if you were found guilty outside New Zealand) in which to file your notice of appeal with the Summary Appeal Court. The Summary Appeal Court may extend this time. If your appeal is out of time, what are your reasons for saying that the Summary Appeal Court should nevertheless extend the time and consider your appeal?
- 6 What are the grounds of your appeal?<sup>5</sup>
- 7 Do you wish your appeal to be considered at an oral hearing or to be dealt with on the papers?

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_

Appellant

4 If you wish to have bail, you must apply separately in form MD 605A.

5 You must specify the grounds of your appeal in sufficient detail to inform the court of the issues in the appeal.

**PETITION TO THE JUDGE ADVOCATE GENERAL FOR A SPECIAL REFERENCE***Section 129(4) of the Armed Forces Discipline Act 1971*

To the Judge Advocate General  
C/- Headquarters, New Zealand Defence Force, Wellington

Name of person found guilty of offence:	Disciplinary Officer:
Offence(s) of which found guilty:	Punishment(s)/order(s):
Date of finding by disciplinary officer:	Date when punishment imposed:

I, \_\_\_\_\_  
*Full name*

petition you to refer to the Summary Appeal Court under section 128 of the Armed Forces Discipline Act 1971 the following finding(s) of guilty/punishment(s)/order(s)\* made by the disciplinary officer in respect of the person named above:

- \* finding(s) of guilty made:<sup>1</sup>
- \* punishment or combination of punishments imposed:<sup>2</sup>
- \* order for compensation:
- \* order for restitution:
- \* order to come up if called upon.

I refer those finding(s)/punishment(s)/order(s)\* for the following reasons:<sup>3</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Petitioner

Address:

\*Delete any inapplicable option.

- \_\_\_\_\_  
1 Specify findings to which the petition relates.  
2 Specify punishments to which the petition relates.  
3 Specify in sufficient detail to fully inform the Judge Advocate General of issues relevant to appeal.



**REFERENCE BY JUDGE ADVOCATE GENERAL**  
*Section 129 of the Armed Forces Discipline Act 1971*

**IN THE SUMMARY APPEAL COURT OF NEW ZEALAND**

To the Registrar of the Summary Appeal Court of New Zealand  
C/- Headquarters, New Zealand Defence Force, Wellington

Name of person found guilty:	Disciplinary Officer:
Offence(s) of which found guilty:	Punishment(s)/order(s):
Date of finding by disciplinary officer:	Date when punishment imposed:

I refer to the Summary Appeal Court under section 129 of the Armed Forces Discipline Act 1971 the following finding(s) of guilty/punishment(s)/order(s)\* made by the disciplinary officer in respect of the person named above:

- \* finding(s) of guilty made:<sup>1</sup>
- \* punishment or combination of punishments imposed:<sup>2</sup>
- \* order for compensation:
- \* order for restitution:
- \* order to come up if called upon.

I refer those finding(s)/punishment(s)/order(s)\* for the following reasons:<sup>3</sup>

I intend/do not intend\* to appoint counsel as *amicus curiae*.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
Place Date

\_\_\_\_\_  
Judge Advocate General

\*Delete any inapplicable option.

- \_\_\_\_\_  
1 Specify findings to which the petition relates.  
2 Specify punishments to which the petition relates.  
3 Specify in sufficient detail to fully inform the Court of issues in the appeal.



**NOTICE OF REFERENCE BY JUDGE ADVOCATE GENERAL  
TO THE SUMMARY APPEAL COURT**

*Section 130(1) of the Armed Forces Discipline Act 1971*

**IN THE SUMMARY APPEAL COURT OF NEW ZEALAND**

To \_\_\_\_\_  
*Name of person found guilty of offence*

Name of person found guilty of offence:	Disciplinary Officer:
Offence(s) of which found guilty:	Punishment(s)/order(s):
Date of finding by disciplinary officer:	Date when punishment imposed:

- 1 Under section 129 of the Armed Forces Discipline Act 1971 (the **Act**), the Judge Advocate General has referred to the Summary Appeal Court the following finding(s) of guilty/punishment(s)/order(s)\* made by the disciplinary officer in respect of you:

- \* finding(s) of guilty made:<sup>1</sup>
- \* punishment or combination of punishments imposed:<sup>2</sup>
- \* order for compensation:
- \* order for restitution:
- \* order to come up if called upon.

- 2 A copy of the referral is attached to this notice.

- 3 You are asked to send the following information to the Registrar of the Summary Appeal Court within 21 days of the date of this notice (shown below):

- (a) Your written views on the finding(s) of guilty/punishment(s)/order(s)\* referred to above; and
- (b) Your written advice as to whether or not you wish to be legally represented at an oral hearing of the matter.

\*Delete any inapplicable option

*Please turn over*

1 Specify findings to which the petition relates.  
2 Specify punishments to which the petition relates.



## Advice about how Summary Appeal Court may deal with reference

For the purposes of Part 5A of the Act (which relates to appeals to the Summary Appeal Court), the reference by the Judge Advocate General must, with all necessary modifications, be treated as an appeal by you to that court.

The Summary Appeal Court may deal with the reference by way of a hearing on the papers if:

- (a) You indicate in writing that you do not want to be legally represented at an oral hearing of the matter; or
- (b) You otherwise indicate that you do not require an oral hearing of the matter; or
- (c) You do not provide the written advice requested in paragraph 3(b) above within 21 days of the date of this notice.

If you wish to apply for legal aid, you may do so in form MD 610 (and, if you seek the waiver of your contribution, form MD 610A), which is available:

- (a) In DM 69 (2 ed) Volume 1 Chapter 13 Section 2;
- (b) On the Forms page of the NZDF intranet site; and
- (c) From the Registrar at the address given below.

Dated at Wellington on \_\_\_\_\_  
*Date*

\_\_\_\_\_  
Registrar  
Summary Appeal Court

### The address to respond to this notice is:

The Registrar  
Summary Appeal Court of New Zealand  
C/- Headquarters New Zealand Defence Force  
WELLINGTON

## APPLICATION FOR LEGAL AID

\*Delete any inapplicable option

**To:** The Registrar of the Court Martial\*/Summary Appeal Court\*  
C/- Headquarters New Zealand Defence Force  
WELLINGTON

### PART 1: PERSONAL DETAILS

Service description of the Applicant:

Unit:

### PART 2: LEGAL AID ELIGIBILITY (Applicant to complete)

The Applicant applies for legal aid for:  
(✓Tick ONE of the following)

<b>Trial in the Court Martial.</b> You are eligible for this from the date you are remanded for trial in the Court Martial by a disciplinary officer.
<b>Appeal from the Court Martial.</b> You are eligible for this from the date you are convicted of an offence by the Court Martial, if you wish to appeal to the Court Martial Appeal Court, Court of Appeal or Supreme Court.
<b>Appeal to the Summary Appeal Court.</b> You are eligible for this from the date you are found guilty of an offence by a disciplinary officer, if you wish to appeal to the Summary Appeal Court.

### PART 3: STANDARD LEGAL AID CONTRIBUTION (Admin unit to complete)

<b>Panel A</b> Applicant's Total Fixed Remuneration for 12 months preceding the date he or she became eligible under Part 2	<b>Panel B</b> 3% contribution
\$	\$

### PART 4: LEGAL AID APPLICATION (Applicant to complete)

If you have a preferred counsel who is a member of the Armed Forces Defence Counsel Panel, WRITE HIS OR HER DETAILS HERE. This preference is not binding on the Registrar.

Name of counsel:

Address:

Telephone:

E-mail:

The Applicant agrees to pay to the New Zealand Defence Force, in the manner indicated below, the contribution determined by the Registrar in Part 8 in consideration of the Registrar granting legal aid.

✓Tick ONE of the following payment options:

**Panel A: Member of the regular forces or the Civil Staff of the New Zealand Defence Force**

<b>Lump sum.</b> This is payable in cash within seven days of the Applicant being notified of the grant of legal aid.
<b>Combination of lump sum and regular deductions from pay.</b>
<b>Regular deductions from pay.</b>

**Panel B: Other persons**

<b>Lump sum.</b> This is payable in cash within seven days of the Applicant being notified of the grant of legal aid.
<b>Combination of lump sum and equal fortnightly instalments.</b> <b>GO TO PART 7 IF YOU TICK THIS OPTION</b>

**PART 5: REQUEST FOR CONTRIBUTION WAIVER (Applicant to complete)**

✓Tick the following boxes if you wish all or part of the standard contribution to be waived:

I apply for the waiver or reduction of the standard contribution indicated in Panel B of Part 3 on the grounds that I have insufficient means to pay that contribution without undue hardship.
I enclose form MD 610A – Statement of Means for Legal Aid to support this application.

<p>Dated at _____ on _____</p> <p style="text-align: center;"><small>Place</small> <span style="margin-left: 100px;"><small>Date</small></span></p>  <p>_____</p> <p>Applicant</p>
--

**PART 6: NZDF CONTRIBUTION RECOVERY (Admin unit to complete)**

<b>Panel A</b> Lump sum	<b>Panel B</b> Regular deductions
\$	_____ instalments of \$_____ per pay period, commencing _____

**PART 7: NON-NZDF CONTRIBUTION RECOVERY (Admin unit to complete)**

<b>Panel A</b> Lump sum	<b>Panel B</b> Fortnightly instalments
\$	_____ instalments of \$_____ per fortnight, commencing _____

**PART 8: GRANT OF LEGAL AID (Registrar to complete)**

**To:** The Commanding Officer

The Applicant's application for contributory legal aid is granted.

The contribution amount is \$\_\_\_\_\_.

The following person is assigned as defence counsel:

Name of counsel:

Address:

Telephone:

E-mail:

\_\_\_\_\_  
**Registrar**

The Court Martial of New Zealand\*

The Summary Appeal Court of New Zealand\*

\* Delete inapplicable option

**STATEMENT OF MEANS FOR LEGAL AID**  
(To be attached to form MD 610 if Part 5 of that form has been completed)

**PART 1: DEPENDANTS**

The following persons are wholly/partly dependent on the Applicant. If partly dependent state extent of dependence.

Full name	Address	Relationship and age	Wholly/ partly dependent

**PART 2: FORTNIGHTLY INCOME**

Gross taxable fortnightly pay	Box A	\$
Tax and superannuation deductions	Box B	\$
Income assessed on a fortnightly basis from any other source (e.g. investments or shares) less tax	Box C	\$
<b>ADD BOXES A AND C AND SUBTRACT BOX B. ENTER SUM IN BOX D</b>		
Total net fortnightly income	Box D	

**PART 3: FORTNIGHTLY EXPENDITURE**

Rent/mortgage repayments	Box E	\$
Rates	Box F	\$
Insurance premiums	Box G	\$
Transport costs (if any to and from duty/work)	Box H	\$
Electricity, gas and other utilities	Box I	\$
Telephone	Box J	\$
Hire purchase repayments	Box K	\$
Food	Box L	\$
Clothing	Box M	\$
Other commitments (specify)	Box N	\$
		\$
		\$
		\$
<b>ADD BOXES E TO N. ENTER SUM IN BOX O</b>		
Total fortnightly expenditure	Box O	

**PART 4: FORTNIGHTLY INCOME LESS EXPENDITURE**

<b>SUBTRACT BOX O FROM BOX D. ENTER TOTAL IN BOX P</b>	
Total fortnightly income less expenditure	Box P

**PART 5: ASSETS**

Cash, bank deposits and negotiable instruments	Box Q	\$
Capital value of shares and debentures	Box R	\$
Estimated current market value of land, houses or business	Box S	\$
Motor vehicles <sup>1</sup>	Box T	\$
Boats <sup>1</sup>	Box U	\$
Television and audio equipment <sup>1</sup>	Box V	\$
Computers and computer-related equipment <sup>1</sup>	Box W	\$
Other valuable assets (specify) <sup>1</sup>	Box X	\$
		\$
		\$
		\$
ADD BOXES Q TO X. ENTER SUM IN BOX Y		
Total assets	Box Y	

Note:

1 Do not include any property which is subject to a hire purchase agreement.

**PART 6: LIABILITIES**

Outstanding principal and interest on mortgages	Box Z	\$
Other outstanding debts (specify)	Box AA	\$
		\$
		\$
		\$
ADD BOXES Z AND AA. ENTER SUM IN BOX AB		
Total liabilities	Box AB	

**PART 7: NET ASSETS/LIABILITIES**

SUBTRACT BOXES AB FROM BOX Y. ENTER TOTAL IN BOX AC		
Net assets (where liabilities exceed assets enter minus sign before the total, e.g. -\$100)	Box AC	

**PART 8: CERTIFICATION**

I certify that this statement shows my true financial position as at this date and I undertake, should my financial position improve before the date of the relevant proceedings, to disclose the relevant details at once to the Registrar of the Court Martial\*/Summary Appeal Court\*, and I understand that in such case, my contribution towards the cost of my legal representation may be reassessed. I further understand that any false statement contained in the above application, knowingly made, may result in disciplinary action against me, and the cancellation of my grant of legal aid.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
Place
Date

\_\_\_\_\_  
Applicant

## GUIDE FOR ACCUSED PERSONS

1. This leaflet is a very brief guide for persons who are to be tried by the Court Martial of New Zealand under the Armed Forces Discipline Act 1971. Full details of these rights are contained in DM 69 (2 ed), but this is no substitute for legal advice which you are advised to seek at an early stage.

### Representation and legal aid

2. You may either conduct your own defence or be represented by a lawyer or another member of the Armed Forces. You may employ a lawyer at your own expense or be represented by a lawyer assigned by the Registrar of the Court Martial (**the Registrar**) in response to an application for legal aid.

3. The Registrar is to approve legal aid for every accused who is to be tried by the Court Martial and who applies for legal aid.

4. You will be separately advised by your defending officer on your rights in regard to the conduct of your defence and on the whole subject of legal aid. Until you have obtained the services of a lawyer, you should address any queries that you may have to your defending officer.

### Preparation of your defence

5. You will be given sufficient opportunity to prepare your defence. In particular, all evidence which may be relied upon by the prosecution, or which is otherwise relevant to your case, must be disclosed to you by the prosecution. You will be given a copy of the charge sheet which has been certified by the Director of Military Prosecutions. Before your trial commences, the Registrar will give you written notice of the military members who are to be assigned to hear your case. You have the right to object in writing to the assignment of any of those military members, if you feel that they are not in a position to try you fairly and impartially.

6. So far as is practicable you will be allowed free communication with any defender or lawyer who is to represent you and with any witnesses whom you may wish to call. If you wish to call any witnesses, all reasonable steps will be taken by the Registrar to arrange their attendance at the trial. However, you need to give the Registrar a list of such persons not later than 48 hours before the commencement of the trial. Alternatively you may wish to arrange for their attendance yourself.

7. If you wish to give or call evidence in support of an alibi at your trial, you need to give the Director of Military Prosecutions written notice of your intention to do so not later than 14 days before the trial commences. More detail on this requirement is prescribed in rule 67 of the Armed Forces Discipline Rules of Procedure 2008.

### Separate trial and separation of charges

8. If you are being charged in the same charge sheet with more than one charge or you are being charged with another person and you think that this will prejudice your defence, you may apply in writing to the Court Martial (through the Registrar) to have the charges tried separately or to be tried separately from the other person. A Judge of the Court Martial will ordinarily rule on your application at a preliminary hearing before your trial.

### Medical examination

9. On the morning of your trial you will be examined by a medical officer to determine your fitness to undergo trial by the Court Martial. You may also request a medical examination on any following day of the trial if you feel doubt as to your fitness.

## **Arraignment and pleading**

10. At the trial you will be asked whether you plead guilty or not guilty to the charge. Before pleading to the charge you may offer one or more special pleas. For example, you may object to the jurisdiction of the court to try you or you may offer a plea in bar of trial on the ground that you have already been acquitted or convicted of the offence. These examples are not exhaustive and you should discuss the matter with your defender or lawyer if you have one. If you do not have a defender or lawyer and require advice you should seek this from the Judge.

11. If you plead guilty you admit the truth of the allegations contained in the charge. You will, however, have an opportunity of calling evidence and addressing the Court in mitigation of punishment, i.e. of informing the Court Martial of any personal difficulties, family worries, health, etc which may influence the Court when it considers what punishment to impose. You can choose to be brought before the Court Martial to plead guilty at any time after you have been given a certified copy of the charge sheet, i.e. before the military members have been assigned. The Court Martial may award extra credit on sentencing for an early guilty plea.

12. If you plead not guilty then the prosecution will have to prove the charge by the evidence which it presents to the Court Martial. If you plead not guilty to the charge you may change your plea to one of guilty at any time before the military members of the Court Martial retire to deliberate on their finding on the charge.

## **Adjournment**

13. If during the trial you require an adjournment, e.g. to enable you to further prepare your defence, you should apply to the Judge. The prosecutor may oppose your application and the Judge will only grant the adjournment if the Judge considers that it is in the interests of justice to do so.

## **Calling, examination and exclusion of witnesses**

14. At any time during the trial, you or the prosecutor may apply for an order excluding all or any of the witnesses from the courtroom until they are called to give their evidence. This is quite normal, except in the case of witnesses who are called as experts on a particular topic rather than because of what they saw or heard.

15. Every witness may be examined by the party which calls the witness, cross-examined by the other party and re-examined by the party calling the witness on any matter arising out of the cross-examination. The members of the Court Martial (which includes the Judge) may also question any witness.

## **Case for the prosecution**

16. You may admit any fact alleged against you so as to dispense with proof of that fact. Where the prosecutor calls a witness whose evidence has not been disclosed to you a reasonable time before trial, you may apply for an adjournment or a postponement of the cross-examination of that witness to enable you to consider the evidence.

17. You may object to any evidence which is given by the witnesses for the prosecution if you consider that it is inadmissible. If you do so, the prosecutor will address the Judge and you will have an opportunity to reply. The Judge will then rule on the admissibility of the evidence. If you do not agree with the Judge's ruling, you may appeal against it to the Court Martial Appeal Court with the permission of that Court. The Court Martial may or may not adjourn your trial while your appeal is waiting to be determined.



18. At the conclusion of the prosecution's case you may submit that there is no case to answer, i.e. that the prosecutor has failed to call sufficient evidence to justify you being called upon for your defence. The submission will be heard by the Judge in the absence of the military members, and both you and the prosecutor will have an opportunity to address the Judge on the matter before he or she makes a ruling.

### **Case for the defence**

19. If you are called upon for your defence you will be given the opportunity of:

- a. Giving evidence on your own behalf, in which case you may be cross-examined by the prosecutor; and
- b. Whether or not you do so, calling witnesses on your behalf.

20. The Judge will advise you of your options at the appropriate time. If you exercise either or both of the above options you may make an opening address setting out the substance of your defence and the evidence to be given.

21. At the conclusion of the case for the defence the prosecutor may, with the leave of the Judge, call or recall a witness to give evidence in rebuttal. The Judge will not lightly permit this. You may object if the prosecutor makes an application to do so.

### **Closing addresses and summing up**

22. Both you and the prosecutor may make a closing address. You will make your address after the prosecutor has made his or her closing address. The Judge will then sum up the evidence and advise the military members on the law relevant to the case.

### **Procedure subsequent to conviction following not guilty plea**

23. If you are found guilty on the charge, the prosecutor will call evidence of your age, rank, Service record and, wherever practicable, any other information which may be relevant to the question of the proper sentence to be imposed. Form MD 613 *Particulars of the Accused's Service* will be produced by a prosecution witness as a summary of the relevant entries in your Service record. You may, if you wish, insist on the production of your actual Service record if you think there may be any discrepancies between the form MD 613 and your Service record.

24. After this, you may give evidence yourself and/or call witnesses in mitigation of punishment and as to your character. The Judge may also call or recall a witness for the purpose of obtaining evidence on any matter relevant to sentence.

25. After this, the prosecutor will normally address the Court Martial on the question of sentence and you may make an address in mitigation of punishment.

### **Taking other offences into consideration**

26. You may ask the Court Martial to take into consideration any other similar offence which you admit to having committed and on which you have not already been tried. If the Court Martial agrees to do so you will not be able to be tried again for that offence.

### **Appeal**

27. You have the right to appeal to the Court Martial Appeal Court against a conviction, or a sentence, or both. There are also rights of appeal from the decision of the Court Martial Appeal Court to the Court of Appeal or Supreme Court of New Zealand.

28. The Court Martial Appeal Court may allow an appeal against conviction if it thinks that the finding of the Court Martial is unreasonable, cannot be supported having regard to the evidence, involves a wrong decision on a question of law, or that on any other ground there was a miscarriage of justice. The findings of fact made by the Court Martial will normally be accepted by the Court Martial Appeal Court if there is admissible evidence to support them and an adequate direction on the law has been given by the Judge. The Court Martial Appeal Court will not place itself in the position of retrying the case.

29. The Court Martial Appeal Court may allow an appeal against sentence if it thinks that a different sentence should have been imposed. The Director of Military Prosecutions may also appeal against the sentence. In general terms, the grounds for such an appeal are that the sentence was manifestly excessive (or manifestly inadequate), that it was based on a wrong principle, or that it was based on an incorrect assessment of the relevant facts (including facts which were not known the Court Martial at the time).

30. The rules governing appeals are complicated and you should seek advice from a lawyer. If you do not have a lawyer already you should contact the Registrar of the Court Martial for assistance. The Registrar can arrange for a grant of legal aid to help you obtain legal representation.

## PARTICULARS OF THE ACCUSED'S SERVICE

(Delete those particulars which are not applicable)

- 
- Service description and unit*
1. The accused:
    - a. Was born on \_\_\_\_\_ .  
*Date*
    - b. Is single/married/in a civil union/in a recognised relationship/divorced/separated/widowed and has \_\_\_\_\_ children and \_\_\_\_\_ other persons dependent on him/her.
    - c. Was attested on \_\_\_\_\_ and was commissioned on \_\_\_\_\_.  
*Date* *Date*
    - d. Is serving on a standard/fixed term engagement (for \_\_\_\_\_ years).
    - e. Holds the substantive rank of \_\_\_\_\_ with seniority of \_\_\_\_\_.  
*Rank* *Date*  
and has held the acting rank of \_\_\_\_\_ since \_\_\_\_\_.  
*Rank* *Date*
    - f. Is now under sentence of imprisonment/detention imposed on \_\_\_\_\_.  
*Date*
    - g. Has been awaiting trial for \_\_\_\_\_ days of which \_\_\_\_\_ days have been spent in civil custody, \_\_\_\_\_ days in close arrest and \_\_\_\_\_ days in open arrest.
    - h. Is entitled to wear the decorations and awards listed in Schedule 1. The acts of gallantry or distinguished conduct listed in Schedule 1 are recorded in the accused's MD 602 (Cover for Conduct Sheets).
  2. The accused's MD 602 records that the accused has been found guilty by a disciplinary officer of the offences listed in Schedule 2.<sup>1</sup>
  3. The accused has previously been convicted by the Court Martial of the offences listed in Schedule 3.<sup>2</sup>
  4. The accused's MD 602 records that the accused has been convicted by a civil court of the offences listed in Schedule 4.
  5. The accused's total basic pay for a 14 day period<sup>3</sup> is:

Gross Pay	Tax and Superannuation Deductions	Net Pay
\$	\$	\$

### CERTIFICATE

I hereby certify that this form contains a true summary of the entries in the Service records of the accused.

Dated at \_\_\_\_\_ on \_\_\_\_\_.  
*Place* *Date*

---

*Signature, rank, appointment*

Officer having charge of the Service records of the accused

---

1 This is limited to recordable offences and those within the past two years and includes any offences of which the accused was found guilty by an officer exercising summary powers before 1 July 2009.  
 2 This includes any offences of which the accused was convicted by a court-martial before 1 July 2009.  
 3 Calculated from relevant tier, sector and step under the MRS.

**SCHEDULE 1**  
Decorations and Awards

**SCHEDULE 2**  
Summary Convictions

Offence	Date found guilty	Punishment
---------	-------------------	------------

**SCHEDULE 3**  
Convictions by the Court Martial

Offence	Date convicted	Sentence
---------	----------------	----------

**SCHEDULE 4**  
Convictions by civil court

Offence	Date convicted	Sentence
---------	----------------	----------

## MEDICAL OFFICER'S CERTIFICATE

I, \_\_\_\_\_  
*Rank and name of medical officer*

certify that I have this day examined \_\_\_\_\_

\_\_\_\_\_  
*Service description, unit and Service*

and in my opinion the person named above is fit\*/unfit\*:

- a. To undergo trial in the Court Martial.
- b. To serve a sentence of detention involving category \_\_\_\_\_ physical training.
- c. To serve a sentence of imprisonment

\*and the examination and medical history (available to me) of the person named above both justify the belief that neither a trial nor a sentence of imprisonment or detention will be likely to have a significant adverse effect on that person's health.

\*but due to \_\_\_\_\_ ,  
*Specify medical condition*

the following limitations and/or supervision will need to be applied while the person is undergoing detention:

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature of medical officer*

\_\_\_\_\_  
*Name of medical officer*

\*Delete whichever is inapplicable

### NOTES

1. This certificate is to be completed in accordance with the provisions of DFO 18 Chapter 3 Section 11.
2. The reverse side of this form is to be completed by the accused when the accused is examined by the medical officer on the first morning of a trial in the Court Martial.

## ACKNOWLEDGEMENT BY ACCUSED

I, \_\_\_\_\_  
*Service description, unit and Service of accused*

acknowledge that I have been informed that I am entitled to be medically examined on any following day of my trial in the Court Martial if I feel any doubt as to my medical fitness to undergo trial in that Court.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature of accused*



## WARRANT TO ARREST

*Section 89 of the Armed Forces Discipline Act 1971*

To Every Member of the Police in New Zealand

1. I suspect on reasonable grounds that:

\_\_\_\_\_  
*Full name and Service particulars*

of \_\_\_\_\_,  
*Unit*

a person subject to the Armed Forces Discipline Act 1971 (**the Act**), has committed (an) offence(s) against the Act, namely:

2. I am an officer authorised to issue a warrant for the arrest of the person named above under section 89 of the Act.
3. I THEREFORE DIRECT you to arrest the person named above and to deliver that person into Service custody.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Commanding Officer\*/Officer superior in command  
to the commanding officer\* of the person to be arrested

\*Delete whichever is inapplicable

**WANTED BY NEW ZEALAND ARMED FORCES FOR OFFENCES AGAINST  
THE ARMED FORCES DISCIPLINE ACT 1971**

<b>Full name and Service particulars:<sup>1</sup></b>			
<b>Unit:</b>		<b>Date of birth:</b>	
<b>Ethnic origin:</b>		<b>Place of birth:</b>	
<b>Distinguishing marks:</b>			
<b>Complexion</b>	<b>Hair</b>	<b>Teeth</b>	<b>Eyes</b>
<b>Build</b>	<b>Height</b>	<b>Weight</b>	<b>Other</b>
<b>Civil occupation:</b>			
<b>Service trade or branch:</b>		<b>Date of enlistment or appointment:</b>	
<b>Address on enlistment or appointment:<sup>2</sup></b>			
<b>Name and address of previous employer:<sup>2</sup></b>			
<b>Marital status:</b>		<b>Absent since:</b>	
<b>Name and address of next of kin:</b>			
<b>Probable location of person sought:</b>		<b>Probable associates:</b>	
<b>Outstanding characteristics:<sup>3</sup></b>		<b>Other remarks:</b>	

**Distribution:**

**Original**     The Commander, \_\_\_\_\_ Police District

**Copy 1**     Single Service Provost Marshal

**Copy 2**     Next superior headquarters

- 
- 1 If a recent photograph or digital image of the person sought is available this is to be provided with the warrant.  
 2 Complete only if the person sought has served less than five years.  
 3 For example, mannerisms, speech impediments, accent.





**COURT MARTIAL OF NEW ZEALAND**

**WARRANT TO ARREST FOR ABSCONDING, BREACHING BAIL CONDITION,  
OR FAILING TO APPEAR**

*Sections 101B and 101C of the Armed Forces Discipline Act 1971  
Sections 53 and 54 of the Court Martial Act 2007*

To every constable

and

To every provost officer

On \_\_\_\_\_ a sworn complaint was made that on \_\_\_\_\_,  
*Date Date*

\_\_\_\_\_, of \_\_\_\_\_,  
*Full name and Service description Address*

(the person released on bail):<sup>1</sup>

**Either Option A**

At \_\_\_\_\_ on \_\_\_\_\_, has engaged in  
*Place Date*  
behaviour of a kind described in section 53(1)(a) of the Court Martial Act 2007\*/section 101B(1)(a) of the Armed Forces Discipline Act 1971\*, namely that the person released on bail:

(a) Has absconded or is about to abscond for the purpose of evading justice; or

(b) Has contravened or failed to comply with a condition of bail.

*\*Delete the inapplicable provision*

**or Option B**

Engaged in behaviour of a kind described in section 53(1)(b) of the Court Martial Act 2007\*/section 101B(1)(b) of the Armed Forces Discipline Act 1971\*, namely that the person released on bail:

(a) Did not attend personally at the time and place specified in the grant of bail; or

(b) Did not attend personally at the time and place to which, during the course of the proceedings, the hearing was adjourned.

*\*Delete the inapplicable provision*

*Continues on reverse*

<sup>1</sup> Select either Option A or Option B and delete the other option.

I am satisfied that there are grounds for the issue of a warrant to arrest the person released on bail.

I direct you to arrest the person released on bail and bring him or her before:

\*the Judge Advocate General as soon as possible under section 101C of the Armed Forces Discipline Act 1971.

\*a Judge of the Court Martial as soon as possible under section 54 of the Court Martial Act 2007.

For the purpose of executing this warrant, the member of the police, the provost officer, or a person lawfully exercising the authority under or on behalf of a provost officer, may at any time enter on to any premises, by force if necessary, if the member of the police, the provost officer, or the person lawfully exercising authority under or on behalf of a provost officer has reasonable grounds to believe that the person released on bail is on those premises.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Judge of the Court Martial

\*Delete whichever is inapplicable



## COMMITTAL ORDER FOR IMPRISONMENT\*/DETENTION\*

To the Manager\*/Commandant\*/Officer Commanding\*

---

*Name of prison or detention quarter*

and every other prison or Service penal establishment to which the Service prisoner or detainee is lawfully transferred.

1. On \_\_\_\_\_ , \_\_\_\_\_  
*Date* *Service description, unit and Service of Service prisoner or detainee*  
was convicted\*/found guilty\* by the Court Martial of New Zealand\*/a disciplinary officer\* of an offence under the Armed Forces Discipline Act 1971 (**the Act**) namely:<sup>1</sup>

2. On \_\_\_\_\_ , the above named person was sentenced to  
*Date*  
imprisonment\*/detention\* for \_\_\_\_\_ .  
*Period*

3. I THEREFORE DIRECT you to receive and confine the above named person in your custody until execution of the sentence is completed or until he\*/she\* is released or transferred to another place of custody in due course of law.

4. For the purposes of section 81A\*/117Y\* of the Act, the above named person has already spent \_\_\_\_\_ days in custody in relation to the offences specified above.

\*5. I FURTHER DIRECT under section 177(2) of the Act that the sentence commences from the beginning of the day on which the above named person is delivered into your custody, subject to the deduction of any period for which that person has been kept in confinement in respect of the sentence before being delivered, as certified overleaf.<sup>2</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

---

Competent Service Authority\*  
Disciplinary Officer\*

\*Delete whichever is inapplicable

---

1 Insert statement(s) of offence. Use additional sheet if necessary.  
2 This paragraph is only to be used when it is considered desirable, under AFDA s 177(2), to delay the execution of a sentence because there is no appropriate prison or detention quarter to which the offender can be sent to serve his or her sentence at or near the place where the trial was held.

**THIS PAGE TO BE COMPLETED ONLY WHEN COMMENCEMENT OF SENTENCE POSTPONED***Section 177(2) of the Armed Forces Discipline Act 1971*

Where the commencement of the sentence has been postponed in accordance with AFDA s 177(2), the following certificates are to be completed by an officer from each unit which has had charge of the offender to account for the whole period between the date on which the sentence was passed and the date of the offender's arrival at the Service penal establishment or prison in which he or she is to serve the sentence. If the offender takes passage by air, the certificate is to be signed either by the officer responsible for the offender during flight or by the officer or NCO in charge of the escort, who should be instructed as necessary before emplaning.

I certify that during the period from \_\_\_\_\_ to \_\_\_\_\_ inclusive, the person named on the face of this committal order:

\*has been in confinement for \_\_\_\_\_ day(s) in respect of the sentence imposed

\*has not been kept in confinement in respect of the sentence imposed.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Rank and appointment

I certify that during the period from \_\_\_\_\_ to \_\_\_\_\_ inclusive, the person named on the face of this committal order:

\*has been in confinement for \_\_\_\_\_ day(s) in respect of the sentence imposed

\*has not been kept in confinement in respect of the sentence imposed.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Rank and appointment

I certify that during the period from \_\_\_\_\_ to \_\_\_\_\_ inclusive, the person named on the face of this committal order:

\*has been in confinement for \_\_\_\_\_ day(s) in respect of the sentence imposed

\*has not been kept in confinement in respect of the sentence imposed.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Rank and appointment

I certify that during the period from \_\_\_\_\_ to \_\_\_\_\_ inclusive, the person named on the face of this committal order:

\*has been in confinement for \_\_\_\_\_ day(s) in respect of the sentence imposed

\*has not been kept in confinement in respect of the sentence imposed.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Rank and appointment



## COMMITTAL ORDER FOR IMPRISONMENT\*/DETENTION\* CONSECUTIVE SENTENCES

To the Manager\*/Commandant\*/Officer Commanding\*

---

*Name of prison or detention quarter*

and every other prison or Service penal establishment to which the Service prisoner or detainee is lawfully transferred.

1. \_\_\_\_\_ is already serving a term of  
*Service description, unit and Service of Service prisoner or detainee*  
imprisonment\*/detention\* of \_\_\_\_\_ which commenced on  
*Period*  
\_\_\_\_\_ (first sentence).  
*Date*
2. On \_\_\_\_\_, the above named person was convicted\*/found guilty\* by the  
*Date*  
Court Martial of New Zealand\*/a disciplinary officer\* of (an) offence(s) under the Armed Forces Discipline Act 1971 (**the Act**) namely:<sup>1</sup>
3. On \_\_\_\_\_, the above named person was sentenced to  
*Date*  
imprisonment\*/detention\* for \_\_\_\_\_ (second sentence).  
*Period*
4. The Court Martial\*/disciplinary officer\* imposing the second sentence ordered that it runs from the expiry of the first sentence, pursuant to section 178 of the Act.
5. I THEREFORE DIRECT you to receive and confine the above named person in your custody until execution of the sentences is completed or until he\*/she\* is released or transferred to another place of custody in due course of law.
6. For the purposes of section 81A\*/117Y\* of the Act, the above named person has already spent \_\_\_\_\_ days in custody in relation to the offences specified above.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

---

Competent Service Authority\*  
Disciplinary Officer\*

\*Delete whichever is inapplicable

---

1 Insert statement(s) of offence. Use additional sheet if necessary.



## ORDER FOR TRANSFER OF SERVICE PRISONER\*/DETAINEE\*

To the Manager\*/Commandant\*/Officer Commanding\*

\_\_\_\_\_  
*Name of prison or detention quarter*

1. On \_\_\_\_\_, \_\_\_\_\_  

*Date**Service description, unit and Service of Service prisoner or detainee*

was sentenced by the Court Martial of New Zealand\*/a disciplinary officer\* to imprisonment\*/detention\* for \_\_\_\_\_ under the Armed Forces Discipline Act 1971  

*Period*

and is now in your custody pursuant to that sentence.
2. I NOW DIRECT you to surrender the above named person to the escort producing this order for transfer  
to \_\_\_\_\_  

*Name of prison or detention quarter*
3. I FURTHER DIRECT that the above named person must be conveyed in Service custody and may be kept in Service custody or in civil custody or partly in one and partly in another and may be transferred from one to another as the occasion requires so far as is necessary to effect this transfer.

Dated at \_\_\_\_\_ on \_\_\_\_\_  

*Place**Date*

\_\_\_\_\_  
Competent Service Authority

\*Delete whichever is inapplicable





**ORDER FOR DELIVERY INTO CUSTODY OF SERVICE PRISONER\*/DETAINEE\*  
FOR TEMPORARY REMOVAL AND RETURN**

To the Manager\*/Commandant\*/Officer Commanding\*

---

*Name of prison or detention quarter*

1. On \_\_\_\_\_ , \_\_\_\_\_  

*Date**Service description, unit and Service of Service prisoner or detainee*

was sentenced by the Court Martial of New Zealand\*/a disciplinary officer\* to imprisonment\*/detention\* for \_\_\_\_\_ for (an) offence(s) under the Armed Forces  

*Period*

Discipline Act 1971 and is now in your custody pursuant to that sentence.
2. The above named person is to be present at \_\_\_\_\_ on  

*Place**Date*

for the purpose of \_\_\_\_\_  

*Insert details*
3. I DIRECT you to surrender the above named person to the officer or non-commissioned officer producing this order and to receive the person into your custody again on his\*/her\* return.
4. I FURTHER DIRECT that the officer or non-commissioned officer producing this order, and all other members of the Armed Forces having the custody of the above named person during that person's temporary removal, must:
  - a. Keep the person in Service custody and bring the person to  
\_\_\_\_\_ on \_\_\_\_\_  

*Place**Date*
  - b. On completion of the purpose specified above at paragraph 2, return the person to the above named prison or detention quarter, unless the person is to be released or transferred to another place of custody in due course of law.

Dated at \_\_\_\_\_ on \_\_\_\_\_  

*Place**Date*

---

Competent Service Authority





## ORDER FOR DELIVERY OF SERVICE PRISONER\*/DETAINEE\* INTO SERVICE CUSTODY FOR REMOVAL OVERSEAS

To the Manager\*/Commandant\*/Officer Commanding\*

---

*Name of prison or detention quarter*

1. On \_\_\_\_\_ , \_\_\_\_\_  

*Date**Service description, unit and Service of Service prisoner or detainee*

was sentenced by the Court Martial of New Zealand\*/a disciplinary officer\* to imprisonment\*/detention\* for \_\_\_\_\_ for (an) offence(s) under the Armed Forces  

*Period*

Discipline Act 1971 and is now in your custody pursuant to that sentence.
2. The above named person is to be delivered into Service custody for removal overseas to the place where the part of the force to which the person belongs for the time being is serving or is under orders to serve.
3. I DIRECT you to surrender the above named person to the officer or non-commissioned officer producing this order.
4. I FURTHER DIRECT that the officer or non-commissioned officer producing this order, and all other persons having the custody of the above named person during that person's removal overseas, must keep the person in Service custody so far as is necessary for the purpose of removing the person overseas to \_\_\_\_\_ .  

*Place where force is serving or under orders to serve*
5. On arrival at the place specified above at paragraph 4, the person is to be kept in Service custody as directed by a competent Service authority until execution of the sentence is completed or until the person is released or transferred to another place of custody in due course of law.
6. I FURTHER DIRECT that the above named person must be conveyed in Service custody and may be kept in Service custody or in civil custody or partly in one and partly in another and may be transferred from one to another as the occasion requires.

Dated at \_\_\_\_\_ on \_\_\_\_\_  

*Place**Date*

---

Competent Service Authority



**ORDER FOR DETENTION OF SERVICE PRISONER\*/DETAINEE\*  
IN TEMPORARY CIVIL CUSTODY**

To the Manager\*/Member of the Police in charge\*/Person in charge\*

---

*Name of prison, police station or other place in which prisoners may be lawfully detained*

1. On \_\_\_\_\_, \_\_\_\_\_  
*Date* *Service description, unit and Service of Service prisoner or detainee*  
was sentenced by the Court Martial of New Zealand\*/a disciplinary officer\* to imprisonment\*/  
detention\* for \_\_\_\_\_ for (an) offence(s) under the Armed Forces  
*Period*  
Discipline Act 1971 (**the Act**).
2. I NOW DIRECT you, pursuant to section 170(2) of the Act, to receive and confine the above  
named person in your custody for a period of \_\_\_\_\_ days<sup>1</sup> or until the person is released or  
transferred to another place of custody in due course of law.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

---

Commanding Officer

\*Delete whichever is inapplicable

---

1 The period of temporary civil custody must not exceed seven days.



## ORDER FOR DETENTION OF ARRESTED PERSON IN TEMPORARY CIVIL CUSTODY

To the Manager\*/Member of the Police in charge\*/Person in charge\*

---

*Name of prison, police station or other place in which prisoners may be lawfully detained*

1. \_\_\_\_\_ is in Service custody

*Service description, unit and Service of arrested person*

charged with\*/with a view to being charged with\* (an) offence(s) against the Armed Forces Discipline Act 1971 (**the Act**).

2. I NOW DIRECT you, pursuant to section 93(2) of the Act, to receive and confine the above named person in your custody for a period of \_\_\_\_\_ days<sup>1</sup>.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Commanding Officer

\*Delete whichever is inapplicable

---

1 The period of temporary civil custody must not exceed seven days.



## ORDER FOR TEMPORARY CUSTODY IN A SERVICE PENAL ESTABLISHMENT

To the Commandant\*/Officer Commanding\*

---

*Name of Service penal establishment*

1. \_\_\_\_\_ is in Service custody

*Service description, unit and Service of arrested person*

in connection with:

- a.\* An allegation that that person has committed an offence against the Armed Forces Discipline Act 1971.
- b.\* The remand of that person for trial in the Court Martial of New Zealand.

2. I NOW DIRECT you, pursuant to DM 69 (2 ed) Volume 1 Chapter 3 Section 4, to receive and confine the above named person in your custody until that person is released or transferred to another place of custody in due course of law.

Dated at \_\_\_\_\_ on \_\_\_\_\_

*Place*

*Date*

---

Commanding Officer\*  
Competent Service Authority\*

\*Delete whichever is inapplicable



## ORDER FOR RELEASE FROM TEMPORARY CIVIL CUSTODY

To the Manager\*/Member of the Police in charge\*/Person in charge\*

---

*Name of prison, police station or other place in which prisoners may be lawfully detained*

1. \_\_\_\_\_ is now in your custody pursuant to an  
*Service description, unit and Service of person in custody*  
order for temporary custody under section 93(2)\*/170(2)\* of the Armed Forces Discipline Act 1971.
2. I NOW DIRECT you to surrender that person to the escort producing this order.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

---

Commanding Officer\*  
Competent Service Authority\*

\*Delete whichever is inapplicable



## ORDER FOR RELEASE FROM TEMPORARY CUSTODY IN A SERVICE PENAL ESTABLISHMENT

To the Commandant\*/Officer Commanding\*

---

*Name of Service penal establishment*

1. \_\_\_\_\_ is now in your custody pursuant to an  
*Service description, unit and Service of person in custody*  
order for temporary custody.
2. I NOW DIRECT you to:
  - a.\* Surrender that person to the escort producing this order.
  - b.\* Release that person.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

---

Commanding Officer\*  
Competent Service Authority\*

\*Delete whichever is inapplicable



## SUMMARY APPEAL COURT OF NEW ZEALAND

### WARRANT FOR RELEASE OF DETAINEE ON QUASHING OR VARIATION OF PUNISHMENT

*Section 135(c) of the Armed Forces Discipline Act 1971*

To the Commandant\*/Officer Commanding\*

\_\_\_\_\_  
*Name of detention quarter*

1. On \_\_\_\_\_, the punishment of \_\_\_\_\_ days' detention was imposed on  
*Date*
- \_\_\_\_\_ (detainee) by a disciplinary officer  
*Service description, unit and Service of detainee*

under the Armed Forces Discipline Act 1971 (**the Act**) and the detainee is now in your custody in accordance with that punishment.

2. On \_\_\_\_\_, this Court, acting under section 133 of the Act:  
*Date*
- a.\* Quashed the punishment imposed on the detainee.
- b.\* Varied the punishment imposed on the detainee by substituting the following punishment:  
\_\_\_\_\_.

3. I NOW DIRECT you, pursuant to section 135(c) of the Act, to release the detainee:
- a.\* As soon as practicable.
- b.\* On the expiry of the term of detention substituted by this Court, taking into account any remission to be awarded in due course of law.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
Judge of the Summary Appeal Court



## ORDER FOR RELEASE OF DETAINEE ON REDUCTION OF PUNISHMENT

*Section 117Z of the Armed Forces Discipline Act 1971*

To the Commandant\*/Officer Commanding\*

\_\_\_\_\_  
*Name of detention quarter*

1. On \_\_\_\_\_, the punishment of \_\_\_\_\_ days' detention was imposed on  
*Date*  
\_\_\_\_\_  
*Service description, unit and Service of detainee* (**detainee**) by a disciplinary officer  
under the Armed Forces Discipline Act 1971 (**the Act**) and the detainee is now in your custody in  
accordance with that punishment.

2. On \_\_\_\_\_, the above mentioned punishment was reduced by me pursuant  
*Date*  
to section 117Z(1)\*/117Z(2)\* of the Act to a punishment of:

\_\_\_\_\_  
*Insert details of reduced punishment*

3. I NOW DIRECT you to release the detainee:
- a.\* As soon as practicable.
  - b.\* On the expiry of the reduced term of detention, taking into account any remission to be awarded in due course of law.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Rank*

\_\_\_\_\_  
*Appointment*

\*Delete whichever is inapplicable





## ORDER FOR TEMPORARY RELEASE OF SERVICE PRISONER\*/DETAINEE\*

To the Manager\*/Commandant\*/Officer Commanding\*

\_\_\_\_\_  
*Name of prison or detention quarter*

1. On \_\_\_\_\_, \_\_\_\_\_  
*Date* *Service description, unit and Service of Service prisoner or detainee*  
was sentenced by the Court Martial of New Zealand\*/a disciplinary officer\* to imprisonment\*/  
detention\* for \_\_\_\_\_ under the Armed Forces Discipline Act 1971 (**the Act**)  
*Period*  
and is now in your custody pursuant to that sentence.

2. In accordance with Defence Force Orders made pursuant to section 175(2)(h) of the Act, I am satisfied the above named person should be granted a temporary release for compassionate reasons to:

\_\_\_\_\_  
*Insert purpose of temporary release*

3. I NOW DIRECT you to release the above named person from custody on \_\_\_\_\_  
*Date*  
until \_\_\_\_\_, subject to the following conditions:  
*Date*

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Rank and appointment*

Superior Commander

\*Delete whichever is inapplicable

## NOTIFICATION TO SERVICE PRISONER\*/DETAINEE\* OF TERMS OF TEMPORARY RELEASE<sup>1</sup>

To \_\_\_\_\_  
*Service description, unit and Service of Service prisoner or detainee*

1. You have been granted a temporary release from custody for compassionate reasons to enable you to:

\_\_\_\_\_  
*Insert purpose of release*

2. You will be released from custody on \_\_\_\_\_ . Unless an extension of your  
*Date*  
temporary release is granted you are to report to \_\_\_\_\_ on or before  
*Person or place*  
\_\_\_\_\_  
*Date* .

3. The following conditions are to be observed during the period of your temporary release:<sup>2</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Rank and/or appointment*

### ACKNOWLEDGEMENT BY SERVICE PRISONER\*/DETAINEE\*

I, the Service prisoner\*/detainee\* named above, acknowledge that I fully understand:

- a. The terms and conditions of my temporary release;
- b. That the period of my release will not count as time spent serving my sentence; and
- c. That should I fail to report on the due date or fail to observe the conditions of my release I may be arrested or taken into Service custody and may be charged with an offence under the Armed Forces Discipline Act 1971 or dealt with for a breach of establishment discipline under orders made under that Act.

\_\_\_\_\_  
*Signature*

\*Delete whichever is inapplicable.

\_\_\_\_\_  
1 This form is to be completed in duplicate . The original copy is to be handed to the Service prisoner or detainee and an acknowledgement is to be obtained from him or her on the duplicate.  
2 Specify the conditions laid down by the superior commander in form MD 631B.  
3 To be signed by the commandant or person in charge of the prison or detention quarter.

## ORDER FOR THE ASSEMBLY OF A COURT OF INQUIRY

Orders by \_\_\_\_\_  
*Service description and appointment of assembling authority*

A court of inquiry consisting of the following persons is to assemble at \_\_\_\_\_  
*Place*

on \_\_\_\_\_ at \_\_\_\_\_ for the purpose of collecting and recording evidence on:<sup>1</sup>  
*Date Time*

(and reporting and commenting)<sup>2</sup> (and making a declaration under section 201 of the Armed Forces Discipline Act 1971)<sup>2</sup> as required by the terms of reference below.

President<sup>3</sup> \_\_\_\_\_

Members<sup>4</sup> \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Counsel assisting<sup>5</sup> \_\_\_\_\_

The president is to order or summon the witnesses to attend in accordance with section 200I of the Armed Forces Discipline Act 1971.<sup>6</sup> Upon completion the president is to forward the record of proceedings to the assembling authority.

The court is to have regard to sections 200M and 200N of the Armed Forces Discipline Act 1971 at all times. The court is to read DM 69 (2 ed) Volume 1 Chapter 11 Section 2 before commencing its inquiry.

### TERMS OF REFERENCE<sup>7</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature of assembling authority*

\_\_\_\_\_  
*Rank*

\_\_\_\_\_  
*Appointment*

- 1 Insert a short description of the matter to be inquired into.
- 2 Delete the words in parentheses if inapplicable.
- 3 Insert full Service description of the officer appointed as president.
- 4 Insert full Service description of the officer(s) and/or warrant officers and/or the members of the Civil Staff appointed as members.
- 5 Insert full Service description of the officer appointed as counsel assisting, if appointed.
- 6 A summons is to be in form MD 637.
- 7 Specify the terms of reference. If necessary attach an additional page.

## DECLARATION BY COURT OF INQUIRY ON ABSENCE OF A MEMBER OF THE ARMED FORCES

Pursuant to section 201(2) of the Armed Forces Discipline Act 1971, the court declares that

\_\_\_\_\_  
*Service description, unit and Service of absentee*

went absent without leave or other sufficient reason from \_\_\_\_\_

*Place*

at \_\_\_\_\_ on \_\_\_\_\_, that the person named above is still absent, and  
*Time Date*

that on \_\_\_\_\_ the person was deficient and still is deficient of the following articles:  
*Date on which inventory of kit taken*

Description	Quantity	Value

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature of president*

\_\_\_\_\_  
*Signature of member*

\_\_\_\_\_  
*Rank*

\_\_\_\_\_  
*Rank*

\_\_\_\_\_  
*Signature of member*

\_\_\_\_\_  
*Signature of member*

\_\_\_\_\_  
*Rank*

\_\_\_\_\_  
*Rank*

The declaration of the court of inquiry is duly noted for the purpose of DM 69 (2 ed) Volume 1 Chapter 3 Section 8.

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Rank*

Commanding Officer of the absentee



## SUMMONS TO CIVILIAN WITNESS TO ATTEND A COURT OF INQUIRY<sup>1</sup>

*Section 200I of the Armed Forces Discipline Act 1971*

**In the matter of** a court of inquiry which has been assembled under the Armed Forces Discipline Act 1971 to inquire into:

\_\_\_\_\_  
*Short description of the matter to be inquired into*

To \_\_\_\_\_, of \_\_\_\_\_  
*Name Address*

You are ordered to attend at/on board \_\_\_\_\_ on \_\_\_\_\_ at \_\_\_\_\_  
*Place/Ship Date*  
\_\_\_\_\_ am/pm\* and thereafter until you are released by the court to give evidence for  
*Time*

the purposes of proceedings before the above mentioned court of inquiry.

And you are ordered to bring with you and produce at the same time and place the following:<sup>2</sup>

### Failure to attend

If you fail without reasonable excuse to comply with this summons, the court of inquiry may order that you be arrested and taken before the nearest District Court, which may find you guilty of contempt of a court of inquiry under the Armed Forces Discipline Act 1971. The penalty for contempt of a court of inquiry under that Act is imprisonment for a term not exceeding 1 month or a fine not exceeding \$1,000, or both.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name and rank*

President of the court of inquiry

\* Select one.

- \_\_\_\_\_  
1 This form is to be completed in duplicate. The original is to be served on the witness in accordance with AFDA s 200I(2). After the original has been served, the duplicate is to be completed on the reverse with the details of service and then returned to the president of the court of inquiry.  
2 Specify the papers, documents, records or things in the person's possession or under the person's control to be produced.

## STATEMENT OF SERVICE

I \_\_\_\_\_  
Service description and unit  
state that on \_\_\_\_\_ served \_\_\_\_\_  
Date Name of witness

with a summons, a true copy of which appears on the reverse of this statement:

\*by delivering it to him\*/her\* personally at \_\_\_\_\_  
Address

\*by bringing it to his\*/her\* notice at \_\_\_\_\_ when  
Address  
he\*/she\* refused to accept it.

\*by leaving it with \_\_\_\_\_ at the witness's usual place of  
Name of third party  
residence at \_\_\_\_\_  
Address

at least 24 hours before the witness's attendance is required, namely at \_\_\_\_\_ on  
Time  
\_\_\_\_\_  
Date

\* by posting it to him\*/her\* by registered letter addressed to him\*/her\* at his\*/her\* last known or usual place of residence or business, namely:

\_\_\_\_\_  
Address

Dated at \_\_\_\_\_ on \_\_\_\_\_  
Place Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Rank

Person who effected service

\* Delete inapplicable options.