



NZDF INTERNAL PROSECUTION POLICY

August 2025

Introduction

1. The purpose of this policy is to set out the Director of Military Prosecutions' (DMP) approach to prosecution, including the decision-making process. It applies to all prosecutions undertaken under the Armed Forces Discipline Act 1971 (AFDA) that the DMP is required to make decisions in respect of.
2. Related guidance and orders include:
 - a. Defence Manual 69 (2nd edition), volumes [1](#) and [2](#); and
 - b. [The Solicitor-General's Prosecution Guidelines](#).

The military justice system

3. The underpinning purpose of the military justice system is to preserve discipline and good order in the armed forces. This includes enforcing compliance with the Laws of Armed Conflict and with orders on the full range of operational activities. The military justice system deals with a broad spectrum of behaviour that ranges from serious criminal offending to conduct that would not attract the attention of the civilian criminal law but is harmful in a military context.

DMP approach to prosecution

4. The DMP makes decisions that are fundamentally concerned with upholding and enforcing core New Zealand Defence Force (NZDF) values (Courage – Tū Kaha, Commitment – Tū Tika, Comradeship – Tū Tira and Integrity – Tū Maia). When making these decisions, the DMP will take into account the effect on operational effectiveness and the importance of maintaining discipline in the armed forces.
5. In doing so, the DMP will take into account the opinions of Superior Commanders (for example, Service Chiefs and Commander Joint Forces NZ), the views of victims, and the interests of service discipline and military justice. The interests of service discipline and military justice include the need to provide for public safety, denounce the conduct in which the offender was involved, deter similar offending, hold offenders accountable for their actions and provide for the interests of victims of offending.

How decisions about prosecutions are made

6. A matter is referred to the DMP after a Commanding Officer (CO) has determined that an allegation is "well founded" and has recorded the allegation in the form of a charge.¹ The test for determining whether a charge is well founded is different to the Test for Prosecution, described below.² If an allegation is too serious to be dealt with by the CO at summary trial or the accused person elects trial by the Court Martial, it is to be referred to the DMP.
7. When a matter is referred to the Office of the DMP it is assessed, in accordance with this policy, to decide whether a prosecution should be commenced. A prosecution is only commenced where an alternative method of responding to the matter is not available or appropriate. In making this assessment, the DMP follows the Solicitor-General's Prosecution Guidelines as far as practicable,³ noting that some features may not be applicable to the military justice system, when making decisions about prosecutions. If it is considered that prosecution is an appropriate response, the Test for Prosecution is applied by the DMP or approved delegate.⁴
8. In some cases, for example, where complex issues arise or where a decision might be made not to proceed with a prosecution where there is an identifiable victim, the DMP may seek guidance from a suitably experienced practitioner external to Defence Legal Services.

¹ Section 102 of the Armed Forces Discipline Act 1971 requires a CO to charge a person where an allegation is well founded.

² See Defence Manual 69 (2nd ed), volume 1, paragraphs 4.2.3 to 4.2.3C. An allegation is well founded if there is a reasonable prospect of a finding of guilty on a charge and it is in the interests of service discipline that the allegation is recorded as a charge. This policy does not apply to determining whether a charge is well founded or not.

³ In performing functions or duties, or exercising powers of the DMP, the DMP must act under the general supervision of the Solicitor-General in the same manner and to the same extent as a Crown Solicitor.

⁴ The Test for Prosecution is explained in detail in the Solicitor-General's Prosecution Guidelines. In brief, there are two stages to the test: The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt? The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?

9. The DMP or an approved delegate will make the final decision about whether to commence a prosecution. That decision will be documented in writing.
10. Where an offence requires Attorney-General consent, the DMP will seek consent in accordance with the [Statutory consents to prosecutions](#) guideline.

Available enforcement options

11. Other than commencing a prosecution before the Court Martial, the following alternative options are available to the DMP:
 - a. The DMP may direct that the charge or charges be dismissed where the Evidential Test or Public Interest Test are not met.
 - b. A matter may be referred for summary trial where the Evidential Test is met but the Public Interest Test favours the matter being heard at summary trial. A summary trial may be the appropriate forum for hearing the case where the allegations are less serious and there are appropriate sentencing options available to a disciplinary officer (in the event of the allegations being proven). A victim's view as to the appropriate forum must be taken into account when considering this option.
 - c. Where the threshold for prosecution is not met but the behaviour is contrary to the ethos and values of the NZDF, administrative action may be appropriate to address the behaviour.

Specific NZDF public interest considerations

12. When considering the public interest in laying a charge in the Court Martial the DMP considers:
 - a. public interest factors in the Solicitor-General's Prosecution Guidelines ([Decisions to prosecute](#)); and
 - b. specific public interest considerations that relate to the NZDF.
13. Offending will be evaluated in the military context in which it occurred. The DMP may have regard to the approach civilian courts would take had the offending occurred in a civilian context. However, the military context prevents an analogous approach.⁵
14. Offending in the military context will often be considered more serious than similar offending in a civilian context. This is because aggravating features particular to the armed forces are usually present.⁶ Consideration of criminal offending in the military context will also usually require consideration of both criminal offending and the service environment.⁷
15. Specific public interest considerations include:
 - a. the effect on the maintenance of good order and service discipline in the NZDF. This includes the likely impact, if any, on military operations. The view of the relevant Superior Commander will be taken into account when assessing this factor;
 - b. the views of the victim and any evident impact a decision to lay a charge may have on them;
 - c. whether the conduct breaches the principles of Operation RESPECT;⁸
 - d. whether there are national security concerns;
 - e. the likely effect on public confidence in military discipline or the administration of military justice;
 - f. the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence;

⁵ See *Duncan v R* [2023] NZHC 2405 at [77] and subsequent commentary on factors relevant in the military context.

⁶ See for example the Sentencing Guidelines of the Armed Forces Discipline Committee, dated 20 May 2019.

⁷ In *Duncan*, above n 5 at [93], the Court held that criminal and employment considerations, which are separate issues in the civilian jurisdiction, must be considered together in the military justice system.

⁸ Operation RESPECT is a culture change programme that is focused on creating a safe, respectful and inclusive work environment for all NZDF personnel.

- g. the availability and appropriateness of alternatives to prosecution in the Court Martial; and
 - h. whether the offending is best prosecuted in the military justice system or civilian justice system (see the section on jurisdiction below).
16. If an accused at summary trial elects trial by Court Martial, this will normally weigh in favour of laying the charge or charges before the Court Martial, provided the Evidential Test is met.
 17. Factors that are not taken into account are:
 - a. the DMP's personal feelings about the accused or victim;
 - b. possible or perceived political or reputational advantage or disadvantage to the NZDF, the government, or any political group or party; and
 - c. the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or any other member of the NZDF other than a victim.
 18. The rank of the accused will be taken into account only if it is material to the alleged offence (e.g., ill treatment of a person of lower rank), if rank is relevant factually (such as where the accused's abuse of rank is a feature of the offending), or where rank is relevant to sentencing options.

Review of DMP decisions by victim of an alleged offence

19. The DMP or an approved delegate must personally approve a decision not to prosecute⁹ in cases involving specified offences. This decision and the reasons for the decision must be explained to a victim in person (where possible). The victim must be advised that they can be accompanied by an appropriate support person (who is not a witness) if they wish. The victim must be advised that they may seek a review of the decision not to prosecute, and how long they have to request one (this will differ according to the circumstances of the particular case). A request for a review should be communicated to the office of the DMP in writing.
20. The victim should be advised of the likely timeframe for the review to be conducted and that they are entitled to support from an appropriate support person throughout the process.

Process where a review is sought by a victim where DMP decision is not to prosecute

21. A reviewer should be a Crown Solicitor or a partner at a Crown Solicitor's firm and hold a minimum classification of Senior Crown Prosecutor. In difficult or complex cases the matter may be referred to Crown Law for review. The reviewer must not have been involved in the original decision.
22. In transferring material to the reviewer, the DMP will, where appropriate, remove unnecessary identifying features of the accused and victim in order to reduce the risk of any unconscious bias in the conduct of the review.
23. The reviewer must provide reasons for their view to the DMP or approved delegate in writing.
24. Where there is disagreement between the original decision maker and the reviewer as to whether a prosecution should be commenced or continued which cannot be resolved, the matter should be referred to Crown Law for a decision, or for direction on the process for resolving the matter.
25. All reviews are to be conducted in a timely fashion and the outcome is to be communicated to the victim (in person where possible) as soon as practicable.

⁹ "Not prosecute" means a decision not to lay a charge in the Court Martial.

Independence and conflicts of interest

26. The DMP is a statutorily independent decision maker. Decisions are made independently of command or command influence. The DMP is also the Director of Defence Legal Services. There is potential for conflicts of interest to arise from time to time. Any actual or perceived conflicts of interest are to be identified as soon as reasonably possible. Where there is an actual, potential or perceived conflict of interest between the role of the DMP and their role as Director of Defence Legal Services, the DMP must refer the decision to prosecute to an approved delegate who does not have a conflict of interest.

Jurisdiction

27. A decision as to jurisdiction (military or civilian) must be made where a person subject to the AFDA allegedly commits offending in New Zealand that is punishable by both the civil law of New Zealand and military law. Where the DMP is aware of alleged offending, prior to charges being laid, the DMP will consult with the appropriate civilian authorities in order to determine the appropriate forum for any prosecution and/or alternatives to a prosecution in the Court Martial.¹⁰
28. The key consideration is the nexus or connection of the offending to the armed forces. Other factors that are taken into account when making a decision as to jurisdiction are:
- a. the degree of military interest in the case including whether the alleged offending undermines operational effectiveness;
 - b. the degree of civilian community interest in the case;
 - c. the informed views of the victim after the similarities and differences between the military and civilian systems are explained;
 - d. whether the accused, the victim or both are members of the NZDF, foreign militaries or are employed by or contracted to the NZDF;
 - e. whether the alleged offending occurred in a military environment or as part of service life;
 - f. whether the matter was investigated by military or civilian personnel;
 - g. the views of the investigative agency;
 - h. the availability of different sentencing powers and other orders within the military and civilian jurisdictions;
 - i. post-conviction consequences; and
 - j. the views of the Superior Commander.
29. If alleged offending occurs overseas, the DMP, where applicable, will consult with relevant parties to resolve any issue as to the appropriate forum and jurisdiction for any prosecution. The considerations listed at paragraph 28 will be relevant. However, there may be other considerations that are relevant to the Public Interest Test, including:
- a. the extent to which the alleged offending risked prejudicing the NZDF's reputation and standing;¹¹ and
 - b. where there is a compelling reason to try the allegation before the Court Martial, such as there is no other appropriate forum available to hear the charge/s due to jurisdictional issues.

Working with victims

30. Victims are to be consulted and kept informed about prosecution decisions in accordance with:
- a. the Victims' Rights Act 2002;
 - b. the [Victims Code](#);

¹⁰ This includes situations where legal advice is sought prior to a determination being made under s 102 of the AFDA.

¹¹ See *Tanginoa v R* and *R v Nove* [2025] NZHC 1207 at [20].

- c. the [Victims](#) guideline; and
- d. the [Prosecuting sexual violence](#) guideline, where that guidance applies.

Complaints by victims

- 31. This section applies if a victim or person considers:
 - a. that they are entitled to be accorded a right under 198C to 198O of the AFDA; and
 - b. they have not been accorded the right.
- 32. The victim or person may complain to the DMP. The DMP must deal with the complaint promptly and fairly. This complaint process is separate to that under the Defence Act 1990.

Review

- 33. This policy is to be reviewed no later than 1 January 2027.

JE Kennedy-Good

Brigadier

Director of Military Prosecutions