

## **HON PEENI HENARE, MINISTER OF DEFENCE**

### **Modernisation of the Military Justice System: Armed Forces Discipline Amendment Bill**

October 2022

This paper seeks agreement to proposals to modernise aspects of the military justice system to make it fairer, more efficient, and transparent.

The pack comprises the following documents:

- September 2022 Cabinet External Relations and Security Committee Minute of Decision *Modernisation of the Military Justice System: Armed Forces Discipline Amendment Bill* [ERS-22-MIN-0048]; and
- The associated Cabinet Paper *Modernisation of the Military Justice System: Armed Forces Discipline Amendment Bill*.

This pack has been released on the New Zealand Defence Force website, available at:

[www.nzdf.mil.nz/nzdf/search-our-libraries/documents/?document-type=Official+information&sort=relevance](http://www.nzdf.mil.nz/nzdf/search-our-libraries/documents/?document-type=Official+information&sort=relevance).

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- section 9(2)(f)(iv) of the OIA: *to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials; and*
- section 9(2)(g)(i) of the OIA: *to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty.*



# Cabinet External Relations and Security Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Modernisation of the Military Justice System: Armed Forces Discipline Amendment Bill

Portfolio                      Defence

On 20 September 2022, the Cabinet External Relations and Security Committee:

#### Background

- 1        **noted** that the Armed Forces Discipline Amendment Bill (the Bill) holds a [REDACTED] s.9(2)(f)(iv), s.9(2)(g)(i) [REDACTED]
- 2        **noted** that the objective of the Bill is to modernise aspects of the military justice system within the New Zealand Defence Force (NZDF) to make it fairer, more efficient, more transparent, and to advance the NZDF's action plan under Operation Respect, NZDF's campaign to eliminate inappropriate and harmful sexual behaviours in the Force;
- 3        **noted** that the Bill will implement recommendations made by an independent Ministry of Defence review of the military justice system carried out in 2019;
- 4        **noted** that the Bill will also address a number of other policy and technical issues that have been identified by the NZDF and the Judge Advocate General;
- 5        **agreed** to the following policy and technical changes for inclusion in the Bill;

#### Policy Changes to Implement Ministry of Defence Review's Recommendations

##### New Minor Infringement Sanctions system

- 6        **agreed** to the adoption of a new Minor Infringement Sanction system within the NZDF, which will operate on an administrative basis without the need to record a formal disciplinary charge, and:
  - 6.1      apply to minor infringements of 'purely disciplinary' offences under the Armed Forces Discipline Act 1971 (the Act) as specified by the Chief of Defence Force in orders;
  - 6.2      allow a Commanding Officer (or delegate) to impose a sanction of a caution, reprimand, extra work/drill, or extra duties without a summary trial;
  - 6.3      allow the individual being sanctioned to elect to have the issue dealt with at summary trial or to ask for an independent review of the sanction decision made against them;

6.4 be established by the Chief of Defence Force by orders made under the Act;

#### **Serious, complex and sensitive offending**

- 7 **agreed** to transfer responsibility for investigating and prosecuting serious, complex, or sensitive offending (including sexual offending) out of the chain of command from the Commanding Officer to the Director of Military Prosecutions, acting with the investigative support of the Provost Marshal;
- 8 **agreed** that the Chief of Defence Force may specify in orders the serious, complex, or sensitive offences to which this will apply;
- 9 **agreed** that responsibility for investigating allegations of other offending would remain with the Commanding Officer, but that the Commanding Officer may choose to refer allegations to the Director of Military Prosecutions, if the Commanding Officer considers that to be appropriate in the interests of justice;
- 10 **agreed** that the role and functions of the Provost Marshal to provide internal independent oversight and strategic direction of the policing, investigative, and custodial functions of the NZDF be established in the Act, with further elaboration by the Chief of Defence Force in orders;

#### **Extension of right to elect trial by the Court Martial**

- 11 **agreed** to extend an automatic right to elect trial by the Court Martial to all individuals charged with an offence under the Act, except those that have been charged with a 'purely disciplinary' offence as specified by the Chief of the Defence Force in orders;
- 12 **agreed** to facilitate the appointment of Court Martial Judges by:
- 12.1 enabling the Chief Judge of the Court Martial, rather than the Governor-General, to authorise a Judge to carry out employment (other than as a lawyer) or hold other office;
- 12.2 allowing for the appointment of acting Judges who are over the age of 70 (but not older than 75);

#### **Updated search powers**

- 13 **agreed** to replace the existing search power in section 95 of the Act with the following powers to search for evidence of offending under the Act:
- 13.1 a power for a Commanding Officer to authorise the search of a person, vehicle, or place under their command, where they have reasonable grounds to suspect that:
- 13.1.1 an offence has been committed under the Act; and
- 13.1.2 the search will find evidential material in respect of that offence;
- 13.2 a power for an Officer in Charge of a Defence Area to authorise the search of a person subject to the Act, vehicle, or place within that Defence Area, where they have reasonable grounds to believe that:
- 13.2.1 an offence has been committed under the Act; and
- 13.2.2 the search will find evidential material in respect of that offence;

- 13.3 a power for a member of the NZDF Joint Military Police Unit, when authorised by a warrant issued by a Judge of the Court Martial, to:
- 13.3.1 search a vehicle or premises outside a Defence Area owned, used, or occupied by a person subject to the Act;
  - 13.3.2 search, retrieve, and copy material stored on an electronic device, or other such device that contains data, that is owned or used by a person subject to the Act; and
  - 13.3.3 with explicit authorisation only, search, retrieve, and copy material that is accessible from but not stored in an electronic device, or other such device that contains data, that is owned or used by a person subject to the Act;
- 13.4 a power for a member of the NZDF Joint Military Police Unit to apply to a Judge of the Court Martial for a production order in accordance with Part 3, Subpart 2, Search and Surveillance Act 2012;
- 14 **agreed** that the search power under paragraph 13.3 above must be exercised in accordance with the requirements of Part 4, Subpart 4, of the Search and Surveillance Act 2012;
- 15 **agreed** that a Judge of the Court Martial may issue a search warrant, on application in accordance with Part 4, Subpart 3 of the Search and Surveillance Act 2012, where they have reasonable grounds to:
- 15.1 suspect that an offence has been committed under the Act; and
  - 15.2 believe that the search will find evidence in respect of that offence;
- 16 **agreed** that a Judge of the Court Martial may make a production order, on application by a member of the NZDF Joint Military Police Unit, where the conditions of Part 3, Subpart 2, of the Search and Surveillance Act 2012 are met;

#### **Protections for young people under 18 years**

- 17 **agreed** to allow a young person under the age of 18 years charged with an offence under the Act to be accompanied by a support person during a Court Martial or the summary trial and restorative justice conference processes conducted under Part 5 of the Act;

#### **Safeguards on the use of detention**

- 18 **agreed** that detention must not be imposed as a punishment at summary trial:
- 18.1 in addition to a fine; or
  - 18.2 on a young person aged under 18 at the time that the offence was committed;

#### **Other Key Policy Changes**

- 19 **agreed** that a Superior Commander may exercise the powers of a Commanding Officer to record a charge, authorise a search, or refer offending to the Director of Military Prosecutions or civil authorities in situations where the Commanding Officer is unable or unwilling to act;

- 20 **agreed**, subject to the enactment of the proposed National Security Information in Proceedings Bill, to adopt a new scheme to address the use of National Security Information in Court Martial Proceedings that will:
- 20.1 align with the scheme to be applied in criminal proceedings in the civilian courts, with any necessary modifications for the Armed Forces context;
  - 20.2 include provision for a Special Advocate to represent the interests of the accused;
- 21 **agreed** to create a new power authorising a Commanding Officer, subject to any restrictions imposed by the Chief of Defence Force in orders, to:
- 21.1 require a person under their command to submit to a drug test where they have reasonable grounds to believe that the person has committed a drug-related offence under the Act; and
  - 21.2 use the results of that test as evidence in disciplinary proceedings against the person under the Act;

### Technical Changes

- 22 **agreed** to make the technical changes set out in Appendix 3 of the paper under ERS-22-SUB-0048 to address inefficiencies and anachronisms in the current legislation;

### Next Steps

- 23 **invited** the Minister of Defence to issue drafting instructions to the Parliamentary Counsel Office in relation to the Bill s.9(2)(f)(iv), s.9(2)(g)(i)
- 24 **authorised** the Minister of Defence to make minor policy decisions in relation to the Bill within the overall framework approved by Cabinet, with any major policy issues to be subject to further Cabinet consideration and approval;
- 25 **agreed** that the Bill will bind the Crown;
- 26 **noted** that the changes outlined in the paper under ERS-22-SUB-0048 will be communicated to NZDF Armed Forces personnel by the Chief of Defence Force, and a dedicated communications and training package will be rolled out across the NZDF before the Bill comes into force.

Janine Harvey  
Committee Secretary

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#### Present:

Hon Grant Robertson  
Hon Kelvin Davis  
Hon Chris Hipkins  
Hon Andrew Little  
Hon David Parker  
Hon Nanaia Mahuta (Chair)  
Hon Peeni Henare  
Hon Michael Wood  
Hon Kiri Allan

#### Officials present from:

Office of the Prime Minister  
Officials Committee for ERS

## MODERNISATION OF THE MILITARY JUSTICE SYSTEM: ARMED FORCES DISCIPLINE AMENDMENT BILL

### Proposal

- 1 This paper seeks Cabinet agreement to proposals to modernise aspects of the military justice system to make it fairer, more efficient, more transparent, and to advance the NZDF's Operation Respect<sup>1</sup> action plan. If approved, the proposals will be implemented through the *Armed Forces Discipline Amendment Bill* (which has s.9(2)(f)(iv), s.9(2)(g)(i)

### Relation to Government Priorities

- 2 *Objective 1: Keep New Zealand safe from COVID-19.* The proposals aim to modernise the military justice system to ensure that the New Zealand Defence Force (NZDF) is optimised as a disciplined and effective force for New Zealand. The maintenance of good order and discipline of the Armed Forces, which this proposal will enhance, underpins the ability of the NZDF to support the all of Government response to the COVID-19 pandemic and allows the NZDF to keep New Zealand safe and secure.
- 3 *Objective 2: Accelerating the Recovery.* The proposals are focused on increasing the efficiency of the NZDF by streamlining the workload on commanders and their subordinates in administering the military justice system. This will allow greater focus of resources and ensure that the NZDF regenerates as an agile force able to deliver Government directed priorities as New Zealand recovers from COVID-19.
- 4 *Objective 3: Laying the Foundations for the Future.* The proposals aid in ensuring that the military justice system is a fair, efficient and transparent system commensurate with the expectations of the public, and of contemporary commanders and personnel in the NZDF. This will assist the NZDF to recruit and retain the talented personnel required for a modern future-facing NZDF.
- 5 Threaded throughout these objectives is my overarching priority of *people*. The proposals ensure that the military justice system is structured to uphold the reputation and credibility of the Armed Forces, the mana of all those that interact with it, and to enable the NZDF to make progress to address sexual harm as part of its efforts under Operation Respect.

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<sup>1</sup> "Operation Respect" is the name given to the NZDF's campaign to eliminate inappropriate and harmful sexual behaviours in the NZDF.

## Executive Summary

- 6 The *Armed Forces Discipline Amendment Bill* has s.9(2)(f)(iv), s.9(2)(g)(i)
- The objective of the Bill is to modernise aspects of the military justice system within the NZDF to make it fairer, more efficient, more transparent, and to advance the NZDF's Operation Respect action plan.
- 7 This paper seeks Cabinet's agreement to the matters to be included in the Bill. Key amongst these are:
- 7.1 proposed changes to the way that both low-level and serious, complex or sensitive offending (including sexual offending) is managed by the NZDF;
  - 7.2 extension of the right to elect trial before the Court Martial;
  - 7.3 creation of new search powers;
  - 7.4 adoption of greater protections for young persons under 18;
  - 7.5 a new regime for the use of national security information in Court Martial proceedings; and
  - 7.6 a new power authorising drug testing of Armed Forces personnel for disciplinary purposes.
- 8 It is assessed that these changes will also address concerns that have been raised about potential non-compliance with the NZ Bill of Rights Act 1990 (BORA) and will bring the military justice system into closer alignment with military partners. The financial impacts of the changes can be managed within NZDF baselines.
- 9 The proposed changes to dealing with low-level offences will require establishing safeguards to ensure fairness and consistency. A range of safeguards have been proposed, including an independent officer to review how the NZDF manages low level offending.
- 10 If Cabinet agrees to these proposals, I seek authority to issue drafting instructions to Parliamentary Counsel Office s.9(2)(f)(iv), s.9(2)(g)(i)

## Background

### *The military justice system*

- 11 The military justice system applies to uniformed Armed Forces personnel within the NZDF. It runs parallel to, but does not replace, the civilian justice system. It is established under the Armed Forces Discipline Act 1971 (AFDA), the Court Martial Act 2007 (CMA) and the Court Martial Appeals Act 1953 (CMAA). Unlike the civilian justice system, the military justice system applies to Armed Forces personnel everywhere in the world.
- 12 The military justice system is designed to:

- 12.1 maintain military discipline;
  - 12.2 operate consistently both on and off-shore, including in combat environments; and
  - 12.3 be expeditious, fair, efficient and simple.
- 13 Strong military discipline is central to ensuring the NZDF's operational effectiveness. Consistent with this, a wide range of behaviour is an offence in the military context – ranging from very minor offending (such as being late for duty) to very serious offending (such as assisting the enemy). Offences against the ordinary civilian law of New Zealand are also offences within the military justice system (such as assault, sexual violence, or misuse of drugs).
  - 14 At present, the decision to investigate and charge an individual with an offence is made by his or her Commanding Officer. The Commanding Officer has a very limited discretion in such cases. Under s 102 of the AFDA, they *must* record a charge unless they consider that the allegation is not “well-founded”.
  - 15 Most charges are prosecuted at summary trial and only the most serious offences are referred to the Director for Military Prosecutions for trial by the Court Martial. The summary trial is not a trial by a court. It is a process run by officers in the chain of command. Summary trials are conducted without the formality of a court and without lawyers. The presumption of innocence and criminal standard of proof apply. Persons found guilty at summary trial may appeal to the Summary Appeal Court of New Zealand, a Court of Record presided over by independent judges, where they may be represented by a lawyer.

#### *Oversight mechanisms*

- 16 Primary independent oversight of the military justice system is currently provided by the Judge Advocate General (JAG). The JAG is appointed by the Governor-General and also serves as the Chief Judge of the Court Martial and the Summary Appeal Court.
- 17 The NZDF has a specialist Joint Military Police Unit, which investigates serious offending. Internal oversight and strategic direction of the NZDF Joint Military Police Unit is provided by the Provost Marshal, who is appointed by the Chief of Defence Force.

#### *Impetus and objectives for change – to make the system fairer, more efficient, and address issues identified by external reviews*

- 18 Substantial changes were made to the military justice system in 2007 in order to bring it into compliance with the BORA. The centrepiece of these changes was the creation of the summary trial system to deal with low and mid-level offending.
- 19 The Ministry of Defence conducted an independent review of the summary trial system in 2019.<sup>2</sup> The review made 17 recommendations regarding the

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<sup>2</sup> Ministry of Defence, *Summary Report on Military Justice – Review of the summary trial system*, June 2019.



summary trial system, many of which require legislative reform. These recommendations were directed at making the military justice system fairer, more efficient, and more transparent. A number of other independent reviews have raised similar issues.<sup>3</sup>

- 20 Further, the “Independent Review of the New Zealand Defence Force’s Progress against its Action Plan for Operation Respect” found that the military justice system creates barriers to reporting harmful behaviour and sexual violence.<sup>4</sup> The external report by Francis Joychild, KC, found that investigations for certain offences should be free from command influence and that responsibility for investigating and deciding allegations of sexual offences should be removed from Commanding Officers.<sup>5</sup>
- 21 The external reviews generally concluded that the military justice system works well for mid-level offending. However, they have highlighted issues with respect to how both low-level offending and serious offending are dealt with. In particular:
- 21.1 The summary trial system is over-engineered for low-level offending.
  - 21.2 There is no power independent of a Commanding Officer to record a charge and authorise investigation of serious, complex or sensitive offending (including sexual offending).
  - 21.3 Existing search powers are out of date and do not sufficiently protect individuals’ privacy interests.
  - 21.4 There are limited protections for offenders aged under 18 years.
- 22 The Ministry’s 2019 review also raised particular concerns about the consistency of the summary trial process with the right in s 25(a) of the BORA to be tried by an “independent and impartial court”. Because summary trials are conducted within the chain of command the review considered that they cannot be viewed as “independent”. To address this, the Ministry recommended that the NZDF consider extending the right for an accused to elect trial by Court Martial; and also reconsider the use of detention as a punishment at summary trial.
- 23 The issues identified by the external reviews provide an opportunity to adjust aspects of the military justice system so that it operates more effectively and better aligns with modern human rights standards. In assessing the issues identified, the primary considerations have been to ensure that the military justice system is fair, efficient and transparent and:
- 23.1 Supports the maintenance of military discipline within the NZDF.

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<sup>3</sup> Ministry of Defence, *Independent Review of the New Zealand Defence Force’s Progress against its Action Plan for Operation Respect*, June 2020; Crown Law Office, *Assessment of the New Zealand Defence Force Prosecution Function*, July 2020; Frances Joychild KC, *Report to Chief of Air Force: Inquiry into Historic Sexual Abuse, Workplace Sexual Harassment and Bullying related to Robert Roper and Contemporary New Zealand Defence Force Systems and Processes for Handling Such Complaints*, July 2017.

<sup>4</sup> *Ibid*, page 18.


<sup>5</sup> *Ibid*, see recommendations 21, 23, and 27.

- 23.2 Is portable, expeditious and as simple as possible.
- 23.3 Is fair to both victims and accused and continues to protect the rights recognised in the BORA.

### **Policy Changes to Implement Ministry of Defence Review's Recommendations**

24 The NZDF has accepted the bulk of the 2019 Ministry of Defence review's recommendations for reform in whole or in part and recommendations of the external reviews relating to Operation Respect. Steps have already been taken to implement those recommendations that do not require legislative change. However, several recommendations can only be implemented through legislation.

#### *A better way of dealing with low-level offending – new Minor Infringement Sanction system*

- 25 A central conclusion of the Ministry's review was that the summary trial system is too complex and time-consuming for low-level offending. It recommended the development of a new system to enable sanctions to be imposed administratively as a response to low-level offending, without the complexity of a summary trial.
- 26 The adoption of a new **Minor Infringement Sanction** system (MIS) within the NZDF is proposed. The MIS would operate without the need to record a formal disciplinary charge. It would:
  - 23.1 Apply to minor infringements of "purely disciplinary" offences (such as being late for duty), which would be specified by the Chief of Defence Force in orders; and
  - 23.2 Allow a Commanding Officer (or delegate) to impose an administrative sanction of caution, reprimand, extra work/drill or extra duties without a summary trial.
- 27 It is proposed that the details of the operation of the MIS would be set out in Defence Force Orders as described in **Appendix 1**. These have been modelled on the United Kingdom (UK) British Armed Forces Minor Administrative Action system (the Australian Defence Force has also proposed a similar system). They include safeguards to protect the natural justice rights of the person being sanctioned. These include the right of the individual being sanctioned to elect instead to have the issue dealt with at summary trial or to ask an independent office holder for a review of the MIS decision against them. Provision for independent review would ensure that the MIS is fair and consistent. s.9(2)(f)(iv), s.9(2)(g)(i)  

- 28 The NZDF considers that the new MIS will provide a faster, more efficient and more transparent way of dealing with low-level "purely disciplinary" matters. It will ensure that such matters are dealt with consistently across the NZDF and that there is a clear record of the decisions that have been taken.

*A better way of dealing with serious, complex or sensitive offending*

- 29 At present, allegations of serious offending (such as sexual assault) are investigated by the NZDF Joint Military Police Unit under the direction of the accused's Commanding Officer. The Commanding Officer determines if the allegation is well-founded and, if it is, records a charge against the accused. That charge is then referred to the Director of Military Prosecutions, who decides whether to lay the charge for trial in the Court Martial.
- 30 The 2019 Ministry of Defence review raised concerns about this process. It recommended that serious and sensitive offending should be dealt with independently out of the chain of command and that better consideration be given to the views of the victim. In its 2021 review of the military prosecution function, the Crown Law Office has also questioned the "double handling" of charges by the Commanding Officer and Director of Military Prosecutions. Through the lens of assessing the NZDF's performance of addressing sexual harm under Operation Respect, similar issues were echoed in the 2020 Ministry of Defence review of Operation Respect and by Francis Joychild, KC.
- 31 To address these concerns, it is proposed that **responsibility for serious, complex or sensitive offending be transferred out of the chain of command from the Commanding Officer to the Director of Military Prosecutions** acting with the investigative support of the Provost Marshal.  
s.9(2)(g)(i)
- It is proposed that the serious, complex or sensitive offences to which this would apply would be specified by the Chief of Defence Force in orders.
- 32 Responsibility for investigating allegations of other offending would remain with the Commanding Officer. However, it is recommended that s 102 of the AFDA be amended to enable the Commanding Officer to refer an allegation to the Director of Military Prosecutions, if the Commanding Officer considers that to be appropriate in the interests of justice.
- 33 This proposal would ensure that serious, complex or sensitive offending is dealt with independently of command by officers with requisite subject matter expertise. It would also provide more scope for the victim's wishes to be taken into account when deciding whether to prosecute offending. The Director of Military Prosecutions applies the Solicitor-General's Guidelines, which specifically provide for consideration of the victim's wishes.
- 34 In order to support this proposal, the role of the Provost Marshal should be formalised in the Act and the following key elements of the role be established in the Act, supplemented by more detail in Defence Force Orders:
- 34.1 *Appointment:* The Provost Marshal is appointed in writing by the Chief of Defence Force and must be an officer.
- 34.2 *Purpose:* The primary purpose of the Provost Marshal is to provide strategic direction and oversight of the policing, investigative and custodial capabilities of the NZDF.

- 34.3 *Functions and Duties:* The Provost Marshal shall perform the functions or duties imposed by the AFDA, any other enactment, or as directed in orders by the Chief of Defence Force.
- 34.4 *Duty of Independence:* The Provost Marshal has a duty, owed to the Chief of Defence Force, to carry out their functions free from undue influence or improper interference.
- 34.5 *Duty to Assist:* Members of the NZDF must provide all necessary assistance to the Provost Marshal in the exercise of their functions and duties.

#### *Extension of right to elect trial by the Court Martial*

- 35 At present an accused only has the right to elect to have their case tried by the Court Martial where it involves particularly serious offending that is likely to attract penal consequences. Nearly all other cases are dealt with at summary trial. The 2019 Ministry of Defence review raised concerns that this may infringe on the right to a fair and public hearing by an independent and impartial court under s 25(a) of the BORA. Because the summary trial system is conducted within the chain of command, the review considered that it is not “independent and impartial”. The BORA assessment of the 2007 reforms considered that, in the military context, the trial rights under s 25(a) of the BORA were only engaged when an accused was at risk of receiving a true penal consequence. The NZDF accepts, however, that changes both in social attitudes and the nature of service in the Armed Forces may now mean that the trial rights under s 25(a) of the BORA should be more expansively applied.
- 36 Accordingly, it is proposed that ***the right to elect trial by the Court Martial should be extended*** to all but specified “purely disciplinary” offences (such as being late for duty). The list of such offences would be specified by the Chief of Defence Force in orders and would likely be the same as the offences to which the new MIS would apply.
- 37 This would significantly enhance the military justice system’s existing compliance with s 25(a) of the BORA. An accused would have the right to a trial by an independent and impartial court except in the case of the most minor offending. It would also align the NZDF more closely with the UK, Australia and Canada.
- 38 The NZDF anticipates that any increase in the workload of the Court Martial as a result of this change will be minimal. However, in order to future proof the Court Martial, the JAG/Chief Judge of the Court Martial has recommended that the CMA be amended to facilitate the appointment of additional Court Martial judges from outside the District Court bench, if required. It is proposed that ss 11 and 17 of the CMA should be amended to:
- 38.1 Enable the Chief Judge of the Court Martial, rather than the Governor-General, to authorise a Judge to carry out employment (other than as a lawyer) or hold other office. This would be consistent with the position in the District Court and other specialised courts.

38.2 Allow for the appointment of acting Judges who are over the age of 70 (but not older than 75). This would be consistent with the position in the District Court and other specialised courts.

#### *Up-to-date search powers*

- 39 The 2019 Ministry of Defence review criticised the search powers currently available under s 95 of the AFDA. It considered that these powers were out of date and did not sufficiently protect individuals' privacy interests.
- 40 Section 21 of the BORA protects members of the NZDF from "unreasonable search or seizure". The Courts have recognised that what constitutes an "unreasonable" search must be assessed in a military context.<sup>6</sup> One important distinguishing element in the military context is the power of command. Unlike a civilian law enforcement officer, a Commanding Officer has the inherent power to issue orders to a person under their command and, unless those orders are unlawful or conflict with orders from a higher authority, they must be obeyed.<sup>7</sup>
- 41 "Reasonable" search powers in the military context may therefore be broader than those that would apply in the ordinary civilian context. This only holds true where the search falls within the ordinary scope of command. The further the target of search is removed from the scope of command, such as the private residence of a member of the Armed Forces, the higher an individual's expectations of privacy become.
- 42 To address this, **three tiers of powers to search for evidence of offending** should be created in the AFDA. These would replace the existing Commanding Officer power under s 95 of the AFDA to authorise a search of persons or places under their command:
- 42.1 First, an updated power for a Commanding Officer to authorise searches of persons, vehicles or places under their command.
- 42.2 Second, a new power for the Officer in Charge of a Defence Area (NZDF camps, bases and headquarters facilities) to authorise searches of NZDF Armed Forces personnel, vehicles or places within a Defence Area.
- 42.3 Third, a new search warrant framework providing judicial oversight of searches of electronic devices and providing new powers for a judge to authorise the NZDF Joint Military Police Unit to search areas outside of a Defence Area owned, occupied or used by a member of the Armed Forces, or to request documents from third parties.
- 43 The scope of the proposed new search powers is set out in more detail in the tables in **Appendix 2**. These have been designed to be consistent with s 21 of the BORA and the Search and Surveillance Act 2012, taking account of the military context. In particular, it is proposed that the new powers for the NZDF Joint Military Police Unit must be conducted in accordance with the requirements of Part 4, Subpart 4 of the Search and Surveillance Act 2012,

<sup>6</sup> *R v Jack* (1999) 3 NZLR 331; *R v A* (2019) NZHC 293.

<sup>7</sup> Failure to comply with a lawful command is an offence under s 38 AFDA.

which relates to the carrying out of searches. This will ensure that the requirements for the conduct of the new search powers by the NZDF Joint Military Police Unit aligns with the requirements for searches by New Zealand Police. In addition, the restrictions on body searches in s 98(4) of the AFDA should be aligned with that Act.

- 44 The proposed changes will require the NZDF Joint Military Police Unit to obtain a search warrant before searching electronic devices, such as cell phones. Searches of data associated with an electronic device, but not stored on the device itself (e.g. messages stored on a remote server that can be accessed from the device) can be very valuable in obtaining evidential material. They can also raise complicated jurisdictional issues where the data is located and/or accessed outside of New Zealand.
- 45 The Law Commission and Ministry of Justice considered these issues in their 2016/17 joint review of the Search and Surveillance Act 2012. The recommendations from this review are yet to be implemented, but are due to be considered as part of an upcoming review of the Search and Surveillance Act 2012. The NZDF intends to revisit digital searches under the AFDA once that review has been completed. In the meantime, electronic devices will continue to be disconnected from the internet during searches, unless a search of the accounts associated with the device has been explicitly authorised in a warrant.

#### *Increased protection for young people under the age of 18*

- 46 Young people may join the Armed Forces at the age of 17, provided that they will be 18 at the time that they complete basic training. There are currently very few young people under the age of 18 in the NZDF.
- 47 The 2019 Ministry of Defence review noted that the NZDF has particular responsibilities towards these young people within the military justice system. Section 25(i) of the BORA guarantees a young person the right to be dealt with in a manner that takes account of their age.
- 48 Formal discipline is an intrinsic part of military life, and it is not appropriate, or practicable, to create a stand-alone youth justice system within the NZDF. However, I propose to **increase protection for young people under the age of 18** by allowing the young person to be accompanied by a support person during Courts Martial, summary trials and restorative justice conferences. The role of the support person, including provision of cultural support, will be developed further in Defence Force Orders. This will be supplemented by the development of specific NZDF guidance for Commanding Officers and disciplinary officers when disciplining young people under 18.

#### *Additional safeguards on the use of detention*

- 49 The 2019 Ministry of Defence review recommended that the NZDF consider whether it remains appropriate to impose sentences of detention following a

summary trial. The review was concerned that an accused could be deprived of their liberty in this way without having been tried by an independent court.

- 50 The NZDF considers that the use of detention continues to be an appropriate and effective way to maintain order and discipline within the Armed Forces. Such sentences are consistent with the nature of service in the Armed Forces. Sentences of detention are served at the specially designed Service Corrective Establishment at Burnham Military Camp. There is a strong emphasis on rehabilitation, including cultural rehabilitation, and most sentences of detention are relatively short (14 to 28 days, with 28 days detention being the maximum that may be imposed at summary trial outside of active or sea service). The Inspector of Service Penal Establishments serves as a safeguard to ensure that detention conditions meet appropriate standards.
- 51 The NZDF has committed to continuing to keep the use of detention under active review and will revisit the question of its use at summary trial on a regular 5 yearly basis.
- 52 In the meantime, the adoption of **additional safeguards on the use of detention** as a punishment at summary trial by prohibiting detention from being imposed in addition to a fine or on young persons under the age of 18 are proposed. These safeguards will bring the NZDF into closer alignment with the UK, Australia and Canada.

### Other Key Policy Changes

- 53 As well as the changes necessary to implement the review's recommendations, three other key policy changes are proposed for inclusion in the Bill.
- 54 First, to **authorise a superior commander to exercise the powers of a Commanding Officer** to charge a suspect, authorise a search, or refer offending to the Director of Military Prosecutions or civil authorities. There may be occasions where, for a variety of reasons, a Commanding Officer is unable or unwilling to record a charge, authorise a search or refer offending when they should have done so. This proposal will ensure that in such cases an officer higher up the chain of command can step in and exercise the powers instead. However, this proposal would not permit a superior commander to overrule a Commanding Officer's decision to refer offending to the Director of Military prosecutions or civilian authorities, or charge an individual with an offence.
- 55 Second, the creation of a **new scheme to address the use of National Security Information in Court Martial proceedings**. The current rules around the use of National Security Information in military justice proceedings are incomplete and unclear. In particular, there is limited protection for the rights of the accused in situations where evidence cannot be disclosed for national security reasons. The Ministry of Justice is currently developing a comprehensive scheme for the use of National Security Information in criminal proceedings in the civilian courts. This includes the use of a Special Advocate to represent the interests of the accused. If the National Security Information in Proceedings Bill is passed, it is proposed that an equivalent

scheme for the use of national security information should be adopted for Court Martial proceedings, with any necessary modifications for the Armed Forces context.

56 Third, the creation of a ***new statutory power for the NZDF to drug-test Armed Forces personnel for the purposes of maintaining discipline***. The NZDF currently has no express power to drug-test personnel for disciplinary purposes, even though the misuse of drugs places the NZDF's operational effectiveness at risk and is a disciplinary offence.<sup>8</sup> The proposed new power would:

56.1 Permit a Commanding Officer to require a member of the Armed Forces under their command to submit to a drug-test where there are reasonable grounds to believe they have committed a drug-related offence under the AFDA. Failure to comply with such a request would be an offence under s 38 of the AFDA.

56.2 Allow the results of that drug-test to be used as evidence in any subsequent prosecution under the AFDA.

57 Drug-testing is a form of search. The new drug-testing power has been designed to be consistent with the protection against unreasonable search in s 21 of the BORA, taking account of the military context.

58 It is proposed that the power to authorise a drug-test would rest with the Commanding Officer of the individual to be tested, rather than a judicial officer. This is appropriate because:

58.1 It falls directly within a Commanding Officer's command authority.<sup>9</sup>

58.2 A requirement for a judicial warrant would be impracticable when the varied circumstances in which tests may need to be administered are considered, including offshore, on board ship, during humanitarian assistance and disaster relief, and in combat environments.

58.3 Unlike the proposed new powers to search a private residence or personal electronic device, where a judicial warrant is appropriate, a drug test does not engage the privacy interests of non-Armed Forces personnel.

59 In addition, the following safeguards would apply:

59.1 The Commanding Officer must have reasonable grounds to **believe** that the person has committed a drug-related offence under the AFDA. This is a higher standard than the reasonable grounds to suspect standard applying to other Commanding Officer searches.

59.2 The Commanding Officer must ensure the drug-test is carried out in accordance with any procedure or restrictions prescribed by the Chief of Defence Force in orders. The use of blood tests would be prohibited.

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<sup>8</sup> Under ss 34, 51, 67, and 74 AFDA.

<sup>9</sup> As described in *R v A* (2019) NZHC 293.



- 59.3 Random drug-testing for disciplinary purposes would not be permitted. However, the NZDF may develop random drug-testing programmes under the Defence Act 1990 where necessary for the purposes of health and safety.

### Technical Changes

- 60 In addition to the policy changes that have been outlined above, it is proposed that the Bill should include a number of technical amendments.
- 61 These amendments are outlined at **Appendix 3**. They address inefficiencies and anachronisms in the current legislation. In most cases they will bring the military justice system more closely into line with the civilian criminal justice system.
- 62 The technical amendments of greatest significance are:
- 62.1 Specification of the suppression orders that may be made during the summary trial process, through a clearer application of Part 5, Subpart 2, of the Criminal Procedure Act 2011.
  - 62.2 Creation of a new power for the Summary Appeal Court to increase an offender's punishment on appeal by the Director of Military Prosecutions, if the Court considers that the punishment imposed at trial was manifestly inadequate.
  - 62.3 Creation of a new power for the Summary Appeal Court to substitute a finding of guilty for a different offence if it allows an appeal against finding on the original offence. To do so, the Summary Appeal Court would have to be satisfied that the factual basis for the finding on the original offence also provides a factual basis for the different offence. This would align the Summary Appeal Court's powers with those of civilian courts.
  - 62.4 Creation of a new power for the Summary Appeal Court to direct a re-trial in the summary jurisdiction in the event that the Court finds the disciplinary officer's decision to dismiss a charge or make a finding of not guilty is unreasonable or misapplied the applicable legal test.
  - 62.5 Alignment of the bail provisions in the AFDA and CMA with the Bail Act 2000, by reversing the current presumption that an offender is not entitled to bail as of right. The current presumption is inconsistent with s 24(b) BORA and s 7 of the Bail Act 2000.
  - 62.6 Update of the contempt provisions in the AFDA and CMA in light of the entry into force of the Contempt of Court Act 2019. It is proposed to align the AFDA and CMA provisions with the Contempt of Court Act 2019 as closely as possible. This will include the creation of a new citation procedure to deal with disruptive behaviour before the Court Martial, Summary Appeal Court and Court Martial Appeal Court.
  - 62.7 Clarification of the restrictions on personal searches of individuals, to align with the requirements of the Search and Surveillance Act 2012 more closely.

## Effect of Proposed Changes

- 63 It is assessed that the proposed changes will make the military justice system fairer, more efficient, and more transparent. Concerns that have been raised about potential non-compliance with the BORA will be addressed. The military justice system will also be brought into closer alignment with military partners.
- 64 The changes are expected to lead to a net decrease in the overall workload to administer the military justice system within the NZDF. The creation of the MIS system is anticipated to result in a significant decrease in the number of summary trials. The processes for dealing with serious, complex or sensitive offending will be more streamlined.
- 65 The expansion of the right to elect trial by the Court Martial is anticipated to have only a minimal impact on the volume of trials in the Court Martial. Only two people have elected trial by Court Martial in New Zealand in the last six years. This is consistent with overseas experience, which suggests that less than one percent of all offenders elect a Court Martial trial.
- 66 The new requirement for certain searches to be authorised by a warrant will see an increase in the workload of Judges of the Court Martial. The JAG/Chief Judge of the Court Martial has advised that he considers this to be manageable given recent increases to the number of Judges on the Court Martial bench.

## Financial Implications

- 67 The financial implications of the changes can be managed within the NZDF's existing baselines.

## Legislative Implications

- 68 The Bill has [REDACTED] s.9(2)(f)(iv), s.9(2)(g)(i) [REDACTED]
- 69 The changes in the Bill will need to be supported by changes to the Armed Forces Discipline Rules of Procedure 2008. [REDACTED] s.9(2)(f)(iv), s.9(2)(g)(i) [REDACTED]
- 70 In addition, the NZDF will need to develop Defence Force Orders and implement appropriate training, particularly to support the new MIS system. For these reasons it is proposed that the Bill should enter into force 12 months after it has received Royal assent.
- 71 It is proposed that the Bill will bind the Crown. The Bill would not limit or otherwise affect the Royal Prerogative.

## Impact Analysis

### Regulatory Impact Statement

- 72 Treasury's Regulatory Impact Analysis team has determined that this proposal is exempt from the requirement to provide a Regulatory Impact Statement on

the grounds that it would substantively duplicate the analysis in the Ministry of Defence's 'Summary Report on Military Justice' and the NZDF's 'Military Justice Modernisation Project: Working Paper'. It has reviewed these documents and confirmed that in combination they contain the requirements that would otherwise be included in a Regulatory Impact Statement.

- 73 A number of minor and technical amendments in the Bill would also be exempt on the grounds of their being suitable for inclusion in a revision Bill or on the grounds that they repeal or remove redundant legislative provisions.

### Climate Implications of Policy Assessment

- 74 These proposals do not have significant impacts on greenhouse gas emissions and a Climate Implications of Policy Assessment is not required.

### Population Implications

- 75 These proposals are assessed to have the following impacts on identified population groups:

Population group	How the proposal may affect this group
Children	The proposals in this paper will increase protections for young people in the military justice system by: removing detention as a punishment option at summary trial; allowing a young person to be accompanied by a support person during Courts Martial, summary trials and restorative justice conferences; and providing guidance to ensure that the interests of the young person are taken into account during the discipline process.

### Human Rights

- 76 The proposals in this paper engage the following rights affirmed in the BORA: the freedom of expression (s 14); the right to be secure against unreasonable search and seizure (s 21); the right to be released following charge unless there is just cause for continued detention (s 24(b)); the right to a hearing by an independent and impartial court (s 25(a)); the right for a child to be treated in a manner that takes account of their age (s 25(i)); and the right to natural justice (s 27(1)).
- 77 The military justice system has been designed to comply with the BORA, subject to such reasonable limits under s 5 of the BORA as are necessary for the efficient and disciplined operation of the Armed Forces.
- 78 The proposals in this paper will maintain, and in many cases, enhance that compliance. In particular:
- 78.1 The right to an independent review of MIS decisions ensures compliance with the right in s 27(1) of the BORA.
- 78.2 The proposal to extend the right to elect trial by the Court Martial to all but "purely disciplinary" offences enhances compliance with the right in s 25(a) of the BORA.

- 78.3 The proposal that searches of personal electronic devices or areas outside of a Defence Area must be authorised by a warrant from a Judge of the Court Martial and conducted in accordance with Part 4, Subpart 4, of the Search and Surveillance Act 2012 ensures compliance with the right in s 21 of the BORA.
- 78.4 The proposals to increase protections for young people within the military justice system enhance compliance with the right in s 25(i) of the BORA.
- 78.5 The proposed new scheme to address the use of National Security Information in Court Martial proceedings will align with legislative provisions currently under development for the civilian courts, which are consistent with the rights in ss 25 and 27 of the BORA.
- 78.6 The safeguards imposed on the power for the NZDF to drug-test Armed Forces personnel ensure compliance with s 21 of the BORA.
- 78.7 The proposal to reverse the presumption that offenders are not entitled to bail as of right enhances compliance with the right in s 24(b) of the BORA.
- 78.8 The proposals regarding suppression orders and contempt of court will align with existing legislative provisions that are consistent with the right in s 14 of the BORA.

### Consultation

- 79 The Ministry of Defence, Ministry of Justice, Oranga Tamariki, Crown Law and the Department of Prime Minister and Cabinet (National Security Group) have been consulted on this paper. The JAG/Chief Judge of the Court Martial has also been consulted.

### Communications

- 80 The changes outlined in this paper will be communicated to NZDF Armed Forces personnel by the Chief of Defence Force. If enacted, a dedicated communications and training package will be rolled out across the NZDF before the Bill comes into force.

### Proactive Release

- 81 I intend to proactively release this paper within 30 business days of decisions being confirmed by Cabinet, subject to redaction as appropriate under the Official Information Act 1982.

### Recommendations

The Minister of Defence recommends that Cabinet External Relations and Security Committee:

- 1 **Note** that the Armed Forces Discipline Amendment Bill (the Bill) has    
s.9(2)(f)(iv), s.9(2)(g)(i)

- 2 **Note** that the objective of the Bill is to modernise aspects of the military justice system within the NZDF to make it fairer, more efficient, more transparent , and to advance the NZDF’s action plan under Operation Respect.
- 3 **Note** that the Bill will implement recommendations made by an independent Ministry of Defence review of the military justice system carried out in 2019.
- 4 **Note** that the Bill will also address a number of other policy and technical issues that have been identified by the NZDF and the Judge Advocate General.
- 5 **Agree** to the following policy and technical changes for inclusion in the Bill.

### ***Policy Changes to Implement Ministry of Defence Review’s Recommendations***

#### *New Minor Infringement Sanctions system*

- 6 **Agree** to the adoption of a new Minor Infringement Sanction system within the NZDF, which will operate on an administrative basis without the need to record a formal disciplinary charge and:
  - 6.1 apply to minor infringements of “purely disciplinary” offences under the Armed Forces Discipline Act 1971 (the Act) as specified by the Chief of Defence Force in orders;
  - 6.2 allow a Commanding Officer (or delegate) to impose a sanction of a caution, reprimand, extra work/drill or extra duties without a summary trial;
  - 6.3 allow the individual being sanctioned to elect to have the issue dealt with at summary trial or to ask for an independent review of the sanction decision made against them; and
  - 6.4 be established by the Chief of Defence Force by orders made under the Act.

#### *Serious, complex and sensitive offending*

- 7 **Agree** to transfer responsibility for investigating and prosecuting serious, complex or sensitive offending (including sexual offending) out of the chain of command from the Commanding Officer to the Director of Military Prosecutions, acting with the investigative support of the Provost Marshal.
- 8 **Agree** that the Chief of Defence Force may specify in orders the serious, complex or sensitive offences to which this will apply.
- 9 **Agree** that responsibility for investigating allegations of other offending would remain with the Commanding Officer, but the Commanding Officer may choose to refer allegations to the Director of Military Prosecutions, if the Commanding Officer considers that appropriate in the interests of justice.
- 10 **Agree** that the role and functions of the Provost Marshal to provide internal independent oversight and strategic direction of the policing, investigative and

custodial functions of the NZDF be established in the Act, with further elaboration by the Chief of Defence Force in orders.

*Extension of right to elect trial by the Court Martial*

- 11 **Agree** to extend an automatic right to elect trial by the Court Martial to all individuals charged with an offence under the Act, except those that have been charged with a “purely disciplinary” offence as specified by the Chief of the Defence Force in orders.
- 12 **Agree** to facilitate the appointment of Court Martial Judges by:
  - 12.1 enabling the Chief Judge of the Court Martial rather than the Governor-General to authorise a Judge to carry out employment (other than as a lawyer) or hold other office; and
  - 12.2 allowing for the appointment of acting Judges who are over the age of 70 (but not older than 75).

*Updated search powers*

- 13 **Agree** to replace the existing search power in s 95 of the Act with the following powers to search for evidence of offending under the Act:
  - 13.1 a power for a Commanding Officer to authorise the search of a person, vehicle or place under their command, where they have reasonable grounds to suspect that:
    - 13.1.1 an offence has been committed under the Act; and
    - 13.1.2 the search will find evidential material in respect of that offence;
  - 13.2 a power for an Officer in Charge of a Defence Area to authorise the search of a person subject to the Act, vehicle or place within that Defence Area, where they have reasonable grounds to believe that:
    - 13.2.1 an offence has been committed under the Act; and
    - 13.2.2 the search will find evidential material in respect of that offence;
  - 13.3 a power for a member of the NZDF Joint Military Police Unit, when authorised by a warrant issued by a Judge of the Court Martial, to:
    - 13.3.1 search a vehicle or premises outside a Defence Area owned, used or occupied by a person subject to the Act;
    - 13.3.2 search, retrieve and copy material stored on an electronic device, or other such device that contains data, that is owned or used by a person subject to the Act; and
    - 13.3.3 with explicit authorisation only, search, retrieve and copy material that is accessible from but not stored in an electronic

device, or other such device that contains data, that is owned or used by a person subject to the Act;

- 13.4 a power for a member of the NZDF Joint Military Police Unit to apply to a Judge of the Court Martial for a production order in accordance with Part 3, Subpart 2, Search and Surveillance Act 2012.
- 14 **Agree** that the search power under [13.3] must be exercised in accordance with the requirements of Part 4, Subpart 4, of the Search and Surveillance Act 2012.
- 15 **Agree** that a Judge of the Court Martial may issue a search warrant, on application in accordance with Part 4, Subpart 3 of the Search and Surveillance Act 2012, where they have reasonable grounds to:
- 15.1 suspect that an offence has been committed under the Act; and
- 15.2 believe that the search will find evidence in respect of that offence.
- 16 **Agree** that a Judge of the Court Martial may make a production order, on application by a member of the NZDF Joint Military Police Unit, where the conditions of Part 3, Subpart 2, of the Search and Surveillance Act 2012 are met.

#### *Protections for young people under 18 years*

- 17 **Agree** to allow a young person under the age of 18 years charged with an offence under the Act to be accompanied by a support person during a Court Martial or the summary trial and restorative justice conference processes conducted under Part 5 of the Act.

#### *Safeguards on the use of detention*

- 18 **Agree** that detention must not be imposed as a punishment at summary trial:
- 18.1 in addition to a fine; or
- 18.2 on a young person aged under 18 at the time that the offence was committed.

#### **Other Key Policy Changes**

- 19 **Agree** that a Superior Commander may exercise the powers of a Commanding Officer to record a charge, authorise a search, or refer offending to the Director of Military Prosecutions or civil authorities in situations where the Commanding Officer is unable or unwilling to act.
- 20 **Agree**, subject to the enactment of the proposed National Security Information in Proceedings Bill, to adopt a new scheme to address the use of National Security Information in Court Martial Proceedings that will:
- 20.1 align with the scheme to be applied in criminal proceedings in the civilian courts, with any necessary modifications for the Armed Forces context; and

- 20.2 include provision for a Special Advocate to represent the interests of the accused.
- 21 **Agree** to create a new power authorising a Commanding Officer, subject to any restrictions imposed by the Chief of Defence Force in orders, to:
- 21.1 require a person under their command to submit to a drug test where they have reasonable grounds to believe that the person has committed a drug-related offence under the Act; and
- 21.2 use the results of that test as evidence in disciplinary proceedings against the person under the Act.

### **Technical Changes**

- 22 **Agree** to making the technical changes set out in Appendix 3 of this paper to address inefficiencies and anachronisms in the current legislation.

### **Next Steps**

- 23 **Invite** the Minister of Defence to issue drafting instructions to Parliamentary Counsel Office in relation to the Bill before s.9(2)(f)(iv), s.9(2)(g)(i)
- 24 **Authorise** the Minister of Defence to make minor policy decisions in relation to the Bill within the overall framework approved by Cabinet, with any major policy issues to be subject to further Cabinet consideration and approval.
- 25 **Agree** that the Bill will bind the Crown.
- 26 **Note** that the changes outlined in this paper will be communicated to NZDF Armed Forces personnel by the Chief of Defence Force, and a dedicated communications and training package will be rolled out across the NZDF before the Bill comes into force.

Authorised for lodgement

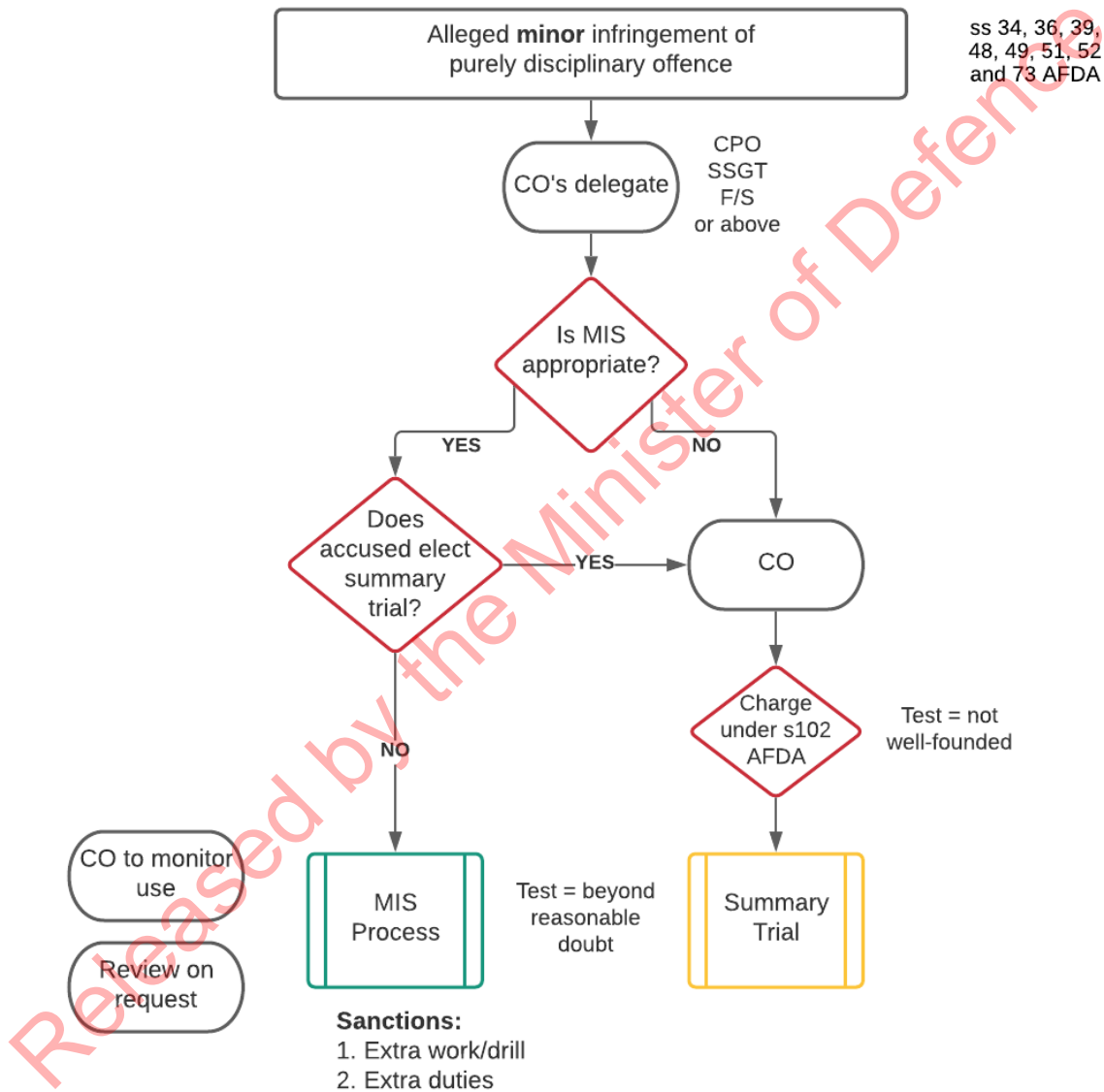
Hon Peeni Henare  
Minister of Defence



**KEY ELEMENTS OF  
NEW MINOR INFRINGEMENT SANCTION SYSTEM  
(to be set out in Defence Force Orders)**

- 1 Applies only to minor infringements of “purely disciplinary” offences specified by the Chief of Defence Force. These are anticipated to be: s 34(2) (asleep on guard duty); s 36 (insubordinate behaviour); s 39 (failure to comply with written orders); s 48 (absent without leave); s 49 (avoidance of duty); s 51 (drunkenness); s 52 (possession of alcohol on base) and s 73 of the AFDA (conduct prejudicial to service discipline).
- 2 Allows for sanctions of caution, reprimand, extra work/drill or extra duty to be imposed on an administrative basis without recording a charge under s 102 of the AFDA or a summary trial.
- 3 Exercised under Commanding Officer’s command authority. The Commanding Officer may delegate authority in writing to Chief Petty Officer (Navy)/Staff Sergeant (Army)/Flight Sergeant (Air Force) or above. The MIS decision maker must be 2 ranks higher than the offender.
- 4 Applies to all Armed Forces personnel up to, and including, the rank of Lieutenant (Navy)/Captain (Army)/Flight Lieutenant (Air Force). However, consistent with Schedule 4 of the AFDA, senior Non-Commissioned Officers and officers may not receive a sanction of extra work/drill or extra duty.
- 5 Factors to be considered when deciding whether the MIS system is appropriate in a particular case will include:
  - 5.1 Rank, age and level of responsibility of the individual.
  - 5.2 Nature of the conduct.
  - 5.3 Context in which the conduct occurred and its impact on unit discipline, efficiency or operational effectiveness.
  - 5.4 Extent of adverse impact on other individuals.
  - 5.5 Individual’s previous conduct.
- 6 Safeguards:
  - 6.1 Individual sanctioned may elect to have the issue dealt with by charge and summary trial.
  - 6.2 Individual sanctioned may ask an independent officer (such as the IGD or JAG/Chief Judge of the Court Martial) to review the MIS decision at any time after it has been imposed.
  - 6.3 Authority to impose MIS by delegation only – not as an automatic privilege of rank.

- 6.4 MIS decisions and supporting reasons to be recorded in writing.
- 6.5 Record to be retained in a unit register for 24 months.
- 6.6 Commanding Officer must review the unit register on a regular basis (at least every 3 months). An independent officer (such as the IGD or JAG/Chief Judge of the Court Martial) may review the register on request.



**SCOPE OF PROPOSED NEW POWERS TO SEARCH FOR EVIDENCE OF OFFENDING  
(to be set out in legislation)**

**Table A: Commanding Officer (CO) power**

<i>Type of search</i>	<i>Scope of Power</i>	<i>Exercised By</i>	<i>Authorised By</i>	<i>Threshold</i>
<b>Person subject to AFDA under CO command</b>	<p>Temporarily detain, search, and seize anything (including electronic device)</p> <p>(personal searches to be conducted in accordance with ss 125(3) and 126(4) Search and Surveillance Act 2012)</p>	<ul style="list-style-type: none"> <li>• Unit Investigator</li> <li>• NZDF Joint Military Police</li> </ul>	<ul style="list-style-type: none"> <li>• Commanding Officer</li> <li>• Superior Commander</li> </ul>	<p>“Reasonable grounds to <b>suspect</b>”:</p> <ul style="list-style-type: none"> <li>• offence has been committed under AFDA; and</li> <li>• the search will find evidential material in respect of the offence</li> </ul>
<b>Vehicle or premises within limits of CO command</b>	<p>Enter, search, and seize anything (including electronic device)</p>	<ul style="list-style-type: none"> <li>• Unit Investigator</li> <li>• NZDF Joint Military Police</li> </ul>	<ul style="list-style-type: none"> <li>• Commanding Officer</li> <li>• Superior Commander</li> </ul>	<p>“Reasonable grounds to <b>suspect</b>”:</p> <ul style="list-style-type: none"> <li>• offence has been committed under AFDA; and</li> <li>• the search will find evidential material in respect of the offence</li> </ul>

Table B: Defence Area power

<i>Type of search</i>	<i>Scope of Power</i>	<i>Exercised By</i>	<i>Authorised By</i>	<i>Threshold</i>
<b>Person subject to AFDA within, entering or leaving a Defence Area</b>	<p>Temporarily detain, search, and seize anything (including electronic device)</p> <p>(personal searches to be conducted in accordance with ss 125(3) and 126(4) Search and Surveillance Act 2012)</p>	<ul style="list-style-type: none"> <li>NZDF Joint Military Police (or person authorised by Provost Marshal)</li> </ul>	<ul style="list-style-type: none"> <li>Officer in Charge of Defence Area</li> </ul>	<p>“Reasonable grounds to <b>believe</b>”:</p> <ul style="list-style-type: none"> <li>offence has been committed under AFDA; and</li> <li>the search will find evidential material in respect of that offence</li> </ul>
<b>Vehicle or premises within a Defence Area</b>	<p>Enter, search, and seize anything (including electronic device)</p>	<ul style="list-style-type: none"> <li>NZDF Joint Military Police (or person authorised by Provost Marshal)</li> </ul>	<ul style="list-style-type: none"> <li>Officer in Charge of Defence Area</li> </ul>	<p>“Reasonable grounds to <b>believe</b>”</p> <ul style="list-style-type: none"> <li>offence has been committed under AFDA; and</li> <li>the search will find evidential material in respect of that offence</li> </ul>

**Table C: “sensitive” search powers (to be exercised in accordance with Part 4, Subpart 4, Search and Surveillance Act 2012)<sup>10</sup>**

<i>Type of search</i>	<i>Scope of Power</i>	<i>Exercised By</i>	<i>Authorised By</i>	<i>Threshold</i>
<b>Vehicles or premises outside a Defence Area owned, used or occupied by person subject to AFDA</b>	<i>Enter, search, and seize anything (including any electronic device)</i>	<ul style="list-style-type: none"> <li>NZDF Joint Military Police (or person authorised by Provost Marshal)</li> </ul>	<ul style="list-style-type: none"> <li>Court Martial Warrant (issued in accordance with Part 4, Subpart 3 Search and Surveillance Act 2012)</li> </ul>	<ul style="list-style-type: none"> <li>“Reasonable grounds to <b>suspect</b>” offence committed under AFDA; AND</li> <li>“Reasonable grounds to <b>believe</b>” the search will find evidential material in respect of the offence</li> </ul>
<b>Electronic device in the custody of NZDF Joint Military Police owned or used by person subject to AFDA</b>	<i>Search, retrieve, and copy material:</i> <ul style="list-style-type: none"> <li>stored on device; and</li> <li>accessible from, but not stored on device, only with express authorisation.</li> </ul>	<ul style="list-style-type: none"> <li>NZDF Joint Military Police (or person authorised by Provost Marshal)</li> </ul>	<ul style="list-style-type: none"> <li>Court Martial Warrant (issued in accordance with Part 4, Subpart 3 Search and Surveillance Act 2012)</li> </ul>	<ul style="list-style-type: none"> <li>Reasonable grounds to <b>suspect</b>” offence committed under AFDA; AND</li> <li>“Reasonable grounds to <b>believe</b>” the search will find evidential material in respect of the offence</li> </ul>
<b>Documents held by third party</b>	<i>Obtain, retain, copy, or reproduce documents</i>	<ul style="list-style-type: none"> <li>NZDF Joint Military Police (or person authorised by Provost Marshal)</li> </ul>	<ul style="list-style-type: none"> <li>Court Martial Production Order (issued in accordance with Part 3(2) Search and Surveillance Act 2012)</li> </ul>	<ul style="list-style-type: none"> <li>“Reasonable grounds to <b>suspect</b>” offence committed under AFDA; AND</li> <li>“Reasonable grounds to <b>believe</b>” document contains evidence relating to the commission of that offence</li> </ul>

<sup>10</sup> Sections 118, 119 and 120 Search and Surveillance Act 2012 with respect to individuals subject to the AFDA only.

**TECHNICAL AMENDMENTS  
(to be made to legislation)**

- a. Clarify the actions that the Director of Military Prosecutions (DMP) may take when exercising their prosecutorial authority, including referral of offending to civilian authorities if the DMP considers it is better addressed in the ordinary criminal justice system. Although this power is implicit in the DMP's prosecutorial authority it is not currently provided for in the AFDA.
- b. Clarify that under ss 108(2) and 111 of the AFDA a Disciplinary Officer must refer a charge to the DMP if it raises particularly complex questions of fact or law that are not suitable for disposal at summary trial. This will ensure that complex charges are not dealt with at summary trial, where the accused does not have the benefit of legal representation.
- c. Specify the suppression orders that may be made by a Disciplinary Officer at summary trial or the Summary Appeal Court, with reference to those available under Part 5, Subpart 3, of the Criminal Procedure Act 2011. At present, s 145 of the AFDA simply provides that Part 5, Subpart 3, of the Criminal Procedure Act 2011 applies "to the extent applicable and with all necessary modifications". This has been difficult to apply in practice.
- d. Enable the Summary Appeal Court to increase punishment on appeal by the DMP, if it considers the punishment imposed at summary trial was manifestly inadequate. This would align the Summary Appeal Court's powers with those of civilian courts.
- e. Enable the Summary Appeal Court to substitute a finding of guilty for a different offence if it allows an appeal against finding on the original offence. To do so, the Summary Appeal Court would have to be satisfied that the factual basis for the finding on the original offence also provides a factual basis for the different offence. This would align the Summary Appeal Court's powers with those of civilian courts.
- f. Enable the Summary Appeal Court to direct a re-trial in the summary jurisdiction in the event that the Court finds the disciplinary officer's decision to dismiss a charge or make a finding of not guilty is unreasonable or misapplied the applicable legal test. This would align the Summary Appeal Court's powers with those of civilian courts.
- g. Provide clear legal authority for the publication of summary trial decisions, by amending Part 5 of the AFDA to provide that:
  - i. A Disciplinary Officer may direct publication of any finding or decision made under sections 117E, 117Q, 117S and 117T of the AFDA if they consider that publication is appropriate for the proper discipline of, and administration of justice within, the Armed Forces.
  - ii. The Disciplinary Officer's power to direct publication is subject to any limitations or restrictions that may be imposed by, or in accordance with, orders of the Chief of Defence Force issued under 206(1)(h) AFDA.

- h. Align bail provisions with the Bail Act 2000 by reversing the current presumption under s of the 101A(2) AFDA and s 49(2) of the CMA that an offender is not entitled to bail as of right.
- i. Align the military justice system with the ordinary New Zealand criminal justice system and delete the procedure in s 22(1)(c) of the AFDA and s 64 of the CMA for other offences to be taken into account by the Court Martial in passing sentence. This was an oversight at the time of the 2007 reforms and there is no record of the procedure having been used.
- j. Update contempt provisions in ss 70 and 150E to 150G of the AFDA and ss 31 and 32 of the CMA to align with those in the Contempt of the Court Act 2019. This will include the creation of a new citation procedure to deal with disruptive behaviour before the Court Martial, Summary Appeal Court and Court Martial Appeal Court.
- k. Remove the anachronistic role of “defender” in s 68(b) of the CMA from trials before the Court Martial. This role is no longer appropriate and has not been used in the past 30 years. All accused in the Court Martial are offered access to free legal representation.
- l. Provide for Te Reo Māori and New Zealand Sign Language to be used in Summary Trials and the Court Martial.
- m. Appoint the Provost Marshal and the Warrant Officer of the Defence Force to the Armed Forces Discipline Committee.
- n. Specify under s 200N of the AFDA that, before a Court of Inquiry can adopt a finding adverse to any individual, it must be satisfied that the individual is aware of the matters on which the proposed finding is based and has had an opportunity to respond to them. This will align s 200N with s 14(3) of the Inquiries Act 2013.
- o. Clarify the time limits within which a charge must be recorded under the AFDA, by reference to the type and seriousness of the offence. The current provision in s 20 of the AFDA is confusing and is out of step with the ordinary civilian criminal law. It is proposed to replace s 20 of the AFDA with two new provisions:
  - i. One that clearly specifies the time limits within which a charge must be laid by reference to the type and seriousness of offence.
  - ii. One that specifies that a person no longer subject to the AFDA cannot be charged with an AFDA offence (other than a civilian offence or a loyalty offence) more than 6 months after they have ceased to be under the jurisdiction of the AFDA.
- p. Align the military justice system with s 143 Criminal Procedure Act 2011 and amend s 117Q AFDA and Part 2, Subpart 4, of the CMA to clarify that, where the commission of an offence includes the commission of another offence, the accused may be convicted of the included offence if it is proved – even if all of the elements of the first offence have not been proved.

- q. Allow a Judge to decline to state in public all or any of the facts, reasons or other considerations that have been taken into account in determining sentence if any of the grounds in s 39(1) of the CMA apply – i.e., national security, interests of justice, or protection of the victim.
- r. Repeal s 66(3) and (4) of the CMA and permit a sentence of dismissal to take effect immediately on conviction, or at the conclusion of any accompanying sentence of detention or imprisonment, subject to a right of reinstatement as of the date of dismissal if the sentence is overturned on appeal. The superannuation consequences that originally justified s 66(4) of the CMA no longer apply.
- s. Align s 177 of the AFDA with s 100 of the Sentencing Act 2002 to allow for commencement of sentences of detention or imprisonment to be deferred by up to 2 months on humanitarian grounds.
- t. Delete anachronistic reference in s 9(1)(b) of the Crimes Act 1961 to the jurisdiction of the Court Martial or officers of the NZDF to try common law offences. There are no common law offences to which this would apply.
- u. Delete anachronistic provision in s 30(2)(h) of the CMA for Judge’s direction to military members that a finding of guilt is contrary to law. This was an oversight at the time of the 2007 reforms.
- v. Delete anachronistic elaboration of duties of Judge at trial in s 30(2), (3) and (4) of the CMA. This was an oversight at the time of the 2007 reforms.
- w. Remedy anomalies in the conditions disqualifying a person from sitting as a military member of the Court Martial specified in s 23 of the CMA by:
  - i. Extending the exclusion in s 23(a) to include the time between the commission of the alleged offence and the date of trial.
  - ii. Extending the exclusion in s 23(b) to include any person acting as defence counsel or a witness for the defence.
  - iii. Extending the exclusions in ss 23(d) and 23(e) to include the situation where the person has previously served as a disciplinary officer or military member in respect of *any* charge against the accused.
  - iv. Deleting the anachronistic reference to “judge advocate” in s 23(e).
  - v. Aligning s 23(g) with s 16(3)(b) of the Juries Act 1980.
  - vi. Inserting a new exclusion for any person who is qualified as a lawyer or a member of the NZDF Joint Military Police Unit.
- x. Amend s 150 of the AFDA to authorise the process for access to Court Martial documents to be set out in the Rules of Procedure, as is the case with the District Court.
- y. Clarify confusion about the meaning of “investigation” under s 102 and Part 5 of the AFDA. At present “investigation” is used in the AFDA to mean both the process of gathering evidence in relation to offending and the summary trial process. This causes significant confusion in practice. It is proposed to amend the provisions of the AFDA to consistently use “investigate/investigation” to mean the process of gathering evidence in



relation to a charge and “dispose/disposal” to mean the process of hearing and determining a charge.

- z. Repeal anachronistic reference in s 13(c) of the AFDA to sentences against spies being “carried out”. This reference was relevant only to the imposition of the death penalty, which no longer exists.
- aa. Repeal the provision in s 101F(c) and (e) of the AFDA and s 44(4)(d) of the CMA for DMP to lay multiple charge sheets before the Court Martial. This is unnecessary and has the potential to be unwieldy and inefficient if it is used.
- bb. Correct out of date reference in s 44(4)(k) of the CMA to “discovery” rather than “disclosure”.
- cc. Clarify that under s 44(4) of the CMA an objection by the accused to the legal basis of a charge is a question of law that may be heard by Judge alone.

Released by the Minister of Defence