

NEW ZEALAND  
**DEFENCE FORCE**  
TE OPE KAATUA O AOTEAROA



DM 69 (2 ed) **Volume 2**

# MANUAL OF ARMED FORCES LAW

**Volume 2**

The Court Martial  
Handbook



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

1. This amendment added direction for sentencing sexual offending and added te reo renditions of the NZDF core values into Annex B.
2. Delete and replace the listed pages in DM 69 (2 ed) Volume 2, as indicated below.

**Contents**

Remove Pages			Insert New Pages		
i	through	iv	i	through	iv

**Chapter 1: Court Martial Procedure**

Remove Pages			Insert New Pages		
1-15	reverse	1-16	1-15	reverse	1-16
1-19	reverse	1-20	1-19	reverse	1-20
1-21	reverse	1-22	1-21	reverse	1-22
1-23	reverse	1-24	1-23	reverse	1-24
1-39	reverse	1-40	1-39	reverse	1-40
1-41	reverse	1-42	1-41	reverse	1-42

Dated at WELLINGTON this 2 day of August 2021



L.M. Ferris  
Brigadier  
Director Defence Legal Services



■	<b>CONTENTS</b> .....	<b>i</b>
	Amendment Sheet.....	iii
	DM 69 (2 ed) Manual of Armed Forces Law, Volume 2 – The Court Martial Handbook .....	iv
■	<b>CHAPTER 1: COURT MARTIAL PROCEDURE</b> .....	<b>1-1</b>
	Section 1 – Preliminary procedure.....	1-2
	Section 2 – Interlocutory procedure.....	1-2
	Section 3 – Bail procedure.....	1-2
	Section 4 – Commencement of trial .....	1-2
	Section 5 – Arraignment .....	1-2
	Section 6 – Proceedings on a plea of guilty.....	1-2
	Section 7 – Proceedings on a plea of not guilty .....	1-3
	Section 8 – Proceedings on conviction .....	1-4
	Section 9 – Sentencing.....	1-5
	Section 10 – Conclusion of trial proceedings.....	1-8
	Annex A – Change sheet example .....	1-9
	Annex B – Armed Forces Discipline Committee Sentencing Guidelines .....	1-10
■	<b>CHAPTER 2: SUMMARY APPEAL COURT PROCEDURE</b> .....	<b>2-1</b>
	Section 1 – Preliminary procedure.....	2-2
	Section 2 – Written submissions.....	2-2
	Section 3 – Oral hearing of appeal.....	2-2
	Section 4 – Hearing of appeal on the papers.....	2-2
	Section 5 – Judgment.....	2-2
	Section 6 – Abandonment of appeal.....	2-2
■	<b>CHAPTER 3: OFFENCES AND CHARGES IN THE COURT MARTIAL</b> .....	<b>3-1</b>
■	<b>CHAPTER 4: IMPRISONMENT AND DETENTION</b> .....	<b>4-1</b>
	Section 1 – General.....	4-3
	Section 2 – Committal procedure.....	4-5
	Section 3 – Detention served as field punishment.....	4-8
	Section 4 – Reconsideration of sentences of imprisonment or detention .....	4-8
	Section 5 – Remission for good work and conduct.....	4-11
	Section 6 – Transfer of service prisoners and detainees .....	4-11
	Section 7 – Temporary custody of service prisoners or detainees .....	4-11
	Section 8 – Release of service prisoners or detainees .....	4-11
■	<b>CHAPTER 5: LEGAL AID AND REMUNERATION OF COUNSEL</b> .....	<b>5-1</b>
	Section 1 – Legal aid in the Summary Appeal Court .....	5-2
	Section 2 – Legal aid in the Court Martial.....	5-2
	Section 3 – Legal aid in the Court Martial Appeal Court .....	5-4
	Section 4 – Remuneration of counsel.....	5-6

Annex A – Acknowledgement of debt.....	5-10
Annex B – Sentencing guidelines of the armed forces discipline committee – 20 May 2019 .....	5-11
■ <b>CHAPTER 6: DISCIPLINE FORMS .....</b>	<b>6-1</b>
Section 1 – Forms.....	6-2
■ <b>CHAPTER 7: ARMED FORCES DISCIPLINE COMMITTEE .....</b>	<b>7-1</b>
Section 1 – Armed Forces Discipline Committee .....	7-2
Section 2 – Purpose and functions .....	7-5
Section 3 – Procedure.....	7-7

## AMENDMENT SHEET

Amdt No	Inserted		Amdt No	Inserted	
	Date	Initials		Date	Initials
1	30 Aug 2010		23		
2	09 Jul 2012		24		
3	08 May 2018		25		
4	16 Oct 2019		26		
5	08 Jun 2020		27		
6	30 Jul 2021		28		
7			29		
8			30		
9			31		
10			32		
11			33		
12			34		
13			35		
14			36		
15			37		
16			38		
17			39		
18			40		
19			41		
20			42		
21			43		
22			44		

**DM 69 (2 ED) MANUAL OF ARMED FORCES LAW**  
**VOLUME 2 – THE COURT MARTIAL HANDBOOK**

1. This volume of the Manual of Armed Forces Law is designed primarily for use by lawyers, Judges and court staff who serve in the Court Martial of New Zealand and the Summary Appeal Court of New Zealand. It is initially issued as an interim volume, supplemented by the legislation reproduced in Volume 3.
2. This volume does not contain any detailed material relating to the Court Martial Appeal Court. Material relating to that Court is to be found in the volume entitled *New Zealand Court Martial Appeal Reports*.
3. The contents of this volume are Defence Force Orders issued pursuant to the Armed Forces Discipline Act 1971 (AFDA). These orders come into force on the date of signature. The text is authoritative to the extent that it is consistent with the provisions of the AFDA, the Court Martial Act 2007 (CMA), and other Acts of Parliament, statutory instruments and relevant judicial decisions. In the event of any inconsistency, the Act, statutory instrument or judicial decision prevails. The AFDA, CMA, and other relevant statutory instruments are reproduced in Volume 3.
4. No non-statutory provision in this volume is to be construed as prevailing over any applicable Act of Parliament or any regulations or rules made under it. In the event of conflict between the provisions of the Manual of Armed Forces Law and any other orders or procedures issued within the New Zealand Defence Force, this manual is to prevail. Any such conflict is to be reported through service channels to the Chief of Defence Force, for the attention of the Director General of Defence Legal Services, without delay. Any other errors or omissions are to be similarly reported.
5. Terms used in the Manual of Armed Forces Law take their meanings from AFDA s 2 and s 2 of the Defence Act 1990 (DA) unless otherwise indicated. A glossary of terms is prescribed in Volume 1 at p 1–4. The meanings of abbreviations used are prescribed in Volume 1 at p 1–3. Unless the context otherwise requires, any reference to a paragraph in this volume refers to a paragraph within this volume.
6. The Manual of Armed Forces Law is administered by the Directorate of Legal Services, Headquarters New Zealand Defence Force, Wellington.

31 August 2009

By order of



J. MATEPARAE  
Lieutenant General  
Chief of Defence Force



# COURT MARTIAL PROCEDURE

■ SECTION 1 – PRELIMINARY PROCEDURE.....	1-2
■ SECTION 2 – INTERLOCUTORY PROCEDURE.....	1-2
■ SECTION 3 – BAIL PROCEDURE .....	1-2
■ SECTION 4 – COMMENCEMENT OF TRIAL .....	1-2
■ SECTION 5 – ARRAIGNMENT.....	1-2
■ SECTION 6 – PROCEEDINGS ON A PLEA OF GUILTY .....	1-2
■ SECTION 7 – PROCEEDINGS ON A PLEA OF NOT GUILTY .....	1-3
■ SECTION 8 – PROCEEDINGS ON CONVICTION.....	1-4
■ SECTION 9 – SENTENCING .....	1-5
■ SECTION 10 – CONCLUSION OF TRIAL PROCEEDINGS.....	1-8
■ ANNEX A – CHARGE SHEET EXAMPLE .....	1-9
■ ANNEX B – SENTENCING GUIDELINES OF THE ARMED FORCES DISCIPLINE COMMITTEE .....	1-10

### SECTION 1 – PRELIMINARY PROCEDURE

- 1.1.1** The DMP is to prepare and certify charge sheets which are to be laid before the Registrar in accordance with the format exemplified in the Annex.<sup>1</sup>
- 1.1.2** The statement of offence of each charge is to be recorded in capital letters, in words sufficient to give the accused notice of the offence, including the title in full of the Act(s) against which the offence is alleged to have been committed and the provision(s) which prescribe both the offence and the maximum penalty.<sup>2</sup>
- 1.1.3** The Registrar is to give notice of each sitting of the Court Martial in form MD 614.<sup>3</sup>
- 1.1.4** The Registrar is to give the accused notice of the assignment of military members of the Court Martial in form MD 615.<sup>4</sup>
- 1.1.5** If the accused wishes to object to the assignment of one or more military members, he or she is to do so in form MD 616.<sup>5</sup>
- 1.1.6** Further text to come.

### SECTION 2 – INTERLOCUTORY PROCEDURE

- 1.2.1** An accused remanded for trial by the Court Martial who wishes to plead guilty to a charge before trial may do so at a hearing before a Judge sitting alone.<sup>6</sup> This is the first opportunity that the accused has to plead guilty in the Court Martial, which may be a factor relevant to sentence. An accused who wishes to make such a request is to do so in form MD 612.
- 1.2.2** Further text to come. In the interim, see form MD 623A.

### SECTION 3 – BAIL PROCEDURE

- 1.3.1** Text to come. In the interim, see form MD 623A.

### SECTION 4 – COMMENCEMENT OF TRIAL

- 1.4.1** Text to come. In the interim, see forms MD 623 and MD 619.

### SECTION 5 – ARRAIGNMENT

- 1.5.1** Text to come. In the interim, see forms MD 623 and MD 619.

### SECTION 6 – PROCEEDINGS ON A PLEA OF GUILTY

- 1.6.1** Text to come. In the interim, see forms MD 623 and MD 619.

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1 RP 57(1).  
 2 RP 60(1)(e) and (f).  
 3 CMA s 43.  
 4 CMA s 26 and RP 63(1).  
 5 CMA s 27 and RP 63(2).  
 6 RP 89.

## SECTION 7 – PROCEEDINGS ON A PLEA OF NOT GUILTY

**1.7.1** The Judge must record the finding(s) of the Court Martial in respect of the charge(s) and announce them in open court.<sup>7</sup> The findings open to the Court Martial are as follows:

- a. **Not guilty of all charges.** *The Court Martial finds that the accused, [insert service description], is not guilty of the charge(s).*
- b. **Guilty of some charges.** *The Court Martial finds that the accused, [insert service description], is not guilty of charge(s) \_\_\_\_\_ but is guilty of charge(s) \_\_\_\_\_.*
- c. **Guilty of all charges.** *The Court Martial finds that the accused, [insert service description], is guilty of the charge(s).*
- d. **Special finding(s).** *The Court Martial finds that the accused, [insert service description] is guilty of charge(s) \_\_\_\_\_ [with the exception that \_\_\_\_\_]<sup>8</sup> [with the variation that \_\_\_\_\_].<sup>2</sup>*
- e. **Findings on alternative charges.**
  - (1) **Guilty of first alternative charge and no findings on other alternative charges.** *The Court Martial finds that the accused, [insert service description] is guilty of charge \_\_\_\_\_ and the Court Martial records no finding on alternative charge(s) \_\_\_\_\_.*
  - (2) **Guilty of final alternative charge.** *The Court Martial finds that the accused, [insert service description] is not guilty of alternative charge(s) \_\_\_\_\_ but is guilty of alternative charge \_\_\_\_\_.*
  - (3) **Guilty of alternative charge other than the first or final alternative charge(s).** *The Court Martial finds that the accused, [insert service description] is not guilty of alternative charge(s) \_\_\_\_\_ but is guilty of alternative charge \_\_\_\_\_. The Court Martial records no finding on alternative charge(s) \_\_\_\_\_.*
- f. **Finding on fitness to stand trial.** *The Court Martial finds that the accused, [insert service description] is [not] unfit to stand trial.*
- g. **Not guilty on account of insanity.** *The Court Martial finds that the accused, [insert service description] is not guilty on account of insanity.*

**1.7.2** Further text to come. In the interim, see forms MD 623 and MD 619.

<sup>7</sup> CMA s 66(1)(a) and RP 110(2).

<sup>8</sup> Insert the appropriate alternative. See CMA ss 56 to 59 and RP 109.

**SECTION 8 – PROCEEDINGS ON CONVICTION**

- 1.8.1** The prosecutor is to call evidence as to the accused's age, rank and service record, according to the following procedure:
- a.** Call the accused's CO or another appropriate witness.
  - b.** Ask the witness:
    - (1)** *Do you produce a written statement containing a summary of the relevant entries in the service record of the accused?*
    - (2)** *Is the accused the person named in the statement?*
    - (3)** *Have you compared the statement with the service record of the accused?*
    - (4)** *Do the entries on the statement correspond with the entries in the service record of the accused and do they constitute a fair and true summary of that service record?*
  - c.** Ask the witness to:
    - (1)** Read aloud the form MD 613 Particulars of the Accused's Service; and then
    - (2)** Produce the form MD 613 as an exhibit.
  - d.** Ask the witness whether he or she wishes to give any further evidence. If the witness is the accused's CO, it is normally appropriate for the CO to offer the Court Martial his or her impressions of the accused as a member of his or her unit.
  - e.** Normal rights of cross-examination and re-examination apply to the witness's evidence.<sup>9</sup>
- 1.8.2** If a restorative conference has been held, the prosecutor is to report the outcome of that conference to the Court Martial.
- 1.8.3** Further text to come. In the interim, see forms MD 623 and MD 619.

## SECTION 9 – SENTENCING

**1.9.1** The Armed Forces Discipline Committee have produced Sentencing Guidelines to assist with sentencing members of the Armed Forces.<sup>10</sup> These Guidelines are located at Annex B of this Chapter.<sup>11</sup> The Court Martial must ensure that any sentence passed is consistent with these Guidelines to the extent that they are relevant to the offender's case, unless it would be contrary to the interests of justice to do so.<sup>12</sup>

**1.9.2** The Judge must record the sentence (and any order) of the Court Martial and announce it in open court.<sup>13</sup> The announcement is to commence with the following words:

*The Court Martial sentences the accused, [service description]...*

**1.9.3** The sentences open to the Court Martial are as follows:

- a. Imprisonment (officer).** *To be imprisoned for [insert period<sup>14</sup>] and deemed to be dismissed from Her Majesty's Service. The dismissal does not take effect until the expiration of the period for lodging an appeal to the Court Martial Appeal Court against the conviction or sentence, or, if an appeal to that Court, the Court of Appeal, or the Supreme Court is pending, until the appeal is determined.*
- b. Imprisonment and dismissal.** *To be imprisoned for [insert period<sup>5</sup>] and to be dismissed from Her Majesty's Service. The dismissal does not take effect until the expiration of the period for lodging an appeal to the Court Martial Appeal Court against the conviction or sentence, or, if an appeal to that Court, the Court of Appeal, or the Supreme Court is pending, until the appeal is determined.*
- c. Imprisonment (NCO).** *To be imprisoned for [insert period<sup>5</sup>] and deemed to be reduced to the rank of [insert rank] with seniority of [insert date].*
- d. Imprisonment.** *To be imprisoned for [insert period<sup>5</sup>].*
- e. Detention (NCO).** *To undergo detention for [insert period<sup>5</sup>] and deemed to be reduced to the rank of [insert rank] with seniority of [insert date].*
- f. Detention.** *To undergo detention for [insert period<sup>5</sup>].*
- g. Detention to be served as field punishment.**<sup>15</sup> *To undergo detention for [insert period<sup>5</sup>]. The Court Martial orders that the punishment of detention imposed by it be served as field punishment for [insert number of days] days.*

10 AFDA s 162(1)(a).

11 AFDA s 163.

12 CMA s 65.

13 CMA s 66 and RP 118(3).

14 A term of less than six months is to be expressed in days. A term of one or more complete years is to be expressed in years. Other terms are to be expressed in years, months and days, as appropriate.

15 This sentence can only be imposed on a soldier or airman who is on active service, or on a rating attached to the Army or Air Force who is on active service: AFDA s 168(3)(c).

- h. **Reduction in rank.** *To be reduced to the rank of [insert rank] with seniority of [insert date].*
- i. **Forfeiture of seniority.** *To forfeit [insert period] seniority in the rank of [insert rank] by taking precedence as if his/her seniority in that rank was [insert date].*
- j. **Stay of seniority.** *To remain in the rank of [insert rank] with seniority of [insert date] for a period of [insert period].*
- k. **Fine.** *To be fined \$ [insert amount].*
- l. **Severe reprimand.** *To be severely reprimanded.*
- m. **Reprimand.** *To be reprimanded.*

**1.9.4** The orders which may be made by the Court Martial in addition to, or in lieu of sentence, and the manner of their expression are as follows:

- a. **Compensation.** *In accordance with section 86(1) of the Armed Forces Discipline Act 1971, the Court Martial orders [insert service description of offender] to pay the sum of \$ [insert amount] to [insert the Crown or other person to be compensated] by way of compensation.*
- b. **Compensation from fine.** *In accordance with section 186A of the Armed Forces Discipline Act 1971, the Court Martial orders that the sum of \$ [insert amount] from the fine imposed on [insert service description of offender] by it be paid to [insert the Crown or other person to be compensated] by way of compensation.*
- c. **Restitution.** *In accordance with section 87( )<sup>16</sup> of the Armed Forces Discipline Act 1971, the Court Martial orders [insert service description of offender] to deliver [insert description of property] to [insert the Crown or other person to receive restitution] by way of restitution.*
- d. **Restitution by pawnbroker.** *In accordance with section 87(4) of the Armed Forces Discipline Act 1971, the Court Martial orders [insert name and address of pawnbroker] to deliver [insert description of property] to [insert the Crown or other person to receive restitution] by way of restitution [without payment of the loan.] [on payment of the sum of \$ [insert amount] by [service description of offender] in [full] [partial] satisfaction of the loan.]*
- e. **Restitution with compensation.** *In accordance with section 87(4) of the Armed Forces Discipline Act 1971, the Court Martial orders [service description of offender or other person acting on his or her behalf] to deliver [insert description of property] to [insert the Crown or other person to receive restitution] by way of restitution and in accordance with section 87(3) of the Act further orders [service description of offender] to pay the sum of \$ [insert amount] to [insert the Crown or other person to be compensated] by way of compensation.*

- f. **Forfeiture.** *In accordance with section 99(1)(b) of the Armed Forces Discipline Act 1971, the Court Martial orders that [insert description of property] be forfeited to the Crown.*
- g. **Order to come up for sentence if called on.** *In accordance with section 62(1) of the Court Martial Act 2007, the Court Martial orders [service description of offender] to come up for sentence if called on within the period of [insert period of 12 months or less] from the date of his/her conviction.*
- h. **Detention as special patient.** *In accordance with section [191(1)] [194(1)(a)] of the Armed Forces Discipline Act 1971, the Court Martial orders [service description] to be detained in a hospital as a special patient.*
- i. **Detention as patient.** *In accordance with section 191(2)(a) of the Armed Forces Discipline Act 1971, the Court Martial orders [service description] to be detained in a hospital as a patient.*
- j. **Mental health release.** *In accordance with section 191(2)(b) of the Armed Forces Discipline Act 1971, the Court Martial orders [service description] to be released immediately.*
- k. **Mental health custodial order.** *In accordance with section 191(2)(c) of the Armed Forces Discipline Act 1971, the Court Martial decides not to make an order under section 191 because [service description] is subject to a sentence of [imprisonment] [detention].*
- l. **Mental health inpatient order.** *In accordance with section 194(1) (b) of the Armed Forces Discipline Act 1971, the Court Martial instead of passing sentence, orders that [service description] be treated as a patient and that the treatment shall be as an inpatient.*

**1.9.5 Consecutive sentence.** The Court Martial may order that a sentence of imprisonment imposed begins to run from the expiration of a sentence of imprisonment which is already being served.<sup>17</sup> In such a case, the Judge is to record and announce as follows:

*The Court Martial orders that the sentence of imprisonment imposed in these proceedings runs from the expiry of the sentence of [insert period] imprisonment imposed by [this Court][insert name of other court] on [insert date].*

**1.9.6 Mercy.** The Court Martial may recommend the accused to mercy.<sup>18</sup> In such a case, the Judge is to announce as follows:

*The Court recommends the accused, [service description] to mercy upon the following grounds, [insert grounds].*

**1.9.7** Further text to come. In the interim, see forms MD 623 and MD 619.

<sup>17</sup> AFDA s 178.

<sup>18</sup> RP 118(4).

**SECTION 10 – CONCLUSION OF TRIAL PROCEEDINGS**

- 1.10.1** After the sentence has been announced or, as the case may require, the accused has been found to be unfit to stand trial or acquitted (whether on account of insanity or otherwise), the Judge must announce that the trial is concluded.<sup>19</sup> The Judge will then discharge the military members.<sup>20</sup>
- 1.10.2** Before declaring that the division of the Court Martial over which he or she presides is adjourned, the Judge will consider whether orders in respect of any of the following matters are necessary or appropriate:
- a.** The suppression of names or other particulars.<sup>21</sup>
  - b.** The disclosure and distribution of any victim impact statement.<sup>22</sup>
  - c.** The payment of the expenses of witnesses who are not members of the Armed Forces.<sup>23</sup>
  - d.** Whether the accused should continue to be held in close arrest.<sup>24</sup>
- 1.10.3** Further text to come. In the interim, see forms MD 623 and MD 619.

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19 RP 119.

20 CMA s 48(1)(b).

21 See CMA ss 39 to 42 and section 139 to 141 of the Criminal Justice Act 1985, as applied to proceedings under the AFDA by AFDA s 145. Note the effect of section 28 of the Victims' Rights Act 2002 if an order is sought under section 140 of the Criminal Justice Act.

22 See section 27 of the Victims' Rights Act 2002.

23 RP 154.

24 CMA s 8(2).



**ANNEX A****CHARGE SHEET EXAMPLE****CHARGE SHEET**

The accused, U48976 Private Carl Robert FRYER, of Trentham Regional Support Battalion, New Zealand Army Logistic Regiment, a soldier of the Regular Force of the New Zealand Army, being subject to the Armed Forces Discipline Act 1971 under section 6(2)(b) is charged with having committed the following offences:

**FIRST CHARGE**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 74(1) OF THE ARMED FORCES DISCIPLINE ACT 1971 NAMELY WOUNDING WITH INTENT CONTRARY TO SECTION 188(1) OF THE CRIMES ACT 1961

in that he, at Trentham Military Camp, on 7 March 2008, with intent to cause P43577 Private G.S. Dando, RNZIR grievous bodily harm, wounded him.

**SECOND CHARGE**

(Alternative to the First Charge)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 74(1) OF THE ARMED FORCES DISCIPLINE ACT 1971 NAMELY ASSAULT WITH A WEAPON CONTRARY TO SECTION 202C(1) (a) OF THE CRIMES ACT 1961

in that he, at Trentham Military Camp, on 7 March 2008, assaulted P43577 Private G.S. Dando, RNZIR with a weapon namely an adjustable spanner.

Certified for trial and laid before the Registrar of the Court Martial of New Zealand at Wellington on 6 October 2009.

**J.A. POOLEY**

Brigadier

Director of Military Prosecutions

## ANNEX B

SENTENCING GUIDELINES OF THE  
ARMED FORCES DISCIPLINE COMMITTEE – 20 MAY 2019

## CONTENTS

<b>1. INTRODUCTION TO THE SENTENCING GUIDELINES .....</b>	<b>1-11</b>
a. Purpose of the Guidelines.....	1-11
b. Primary Importance of Consistency and Transparency.....	1-11
<b>2. PURPOSES OF SENTENCING .....</b>	<b>1-11</b>
a. Introduction.....	1-11
b. The Purposes .....	1-11
<b>3. PRINCIPLES OF SENTENCING .....</b>	<b>1-12</b>
a. Introduction.....	1-12
b. The Principles.....	1-12
<b>4. STRUCTURING A SENTENCE, AND REQUIREMENTS WHEN ISSUING A SENTENCING DECISION.....</b>	<b>1-14</b>
a. Introduction.....	1-14
b. Arriving at a Sentencing Starting Point .....	1-14
c. The Starting Point Should be Announced .....	1-20
d. Matters Relating to the Offender are Identified.....	1-20
e. Law of Armed Conflict Considerations.....	1-23
f. The Effect of a Guilty Plea .....	1-23
g. NZDF-specific Considerations .....	1-24
<b>APPENDIX A – SENTENCING GUIDE – SUMMARY TRIALS.....</b>	<b>1-25</b>
<b>APPENDIX B – SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A COMMANDING OFFICER, DETACHMENT COMMANDER, OR SUBORDINATE COMMANDER ACTING AS DISCIPLINARY OFFICER .....</b>	<b>1-30</b>
<b>APPENDIX C – SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A SUPERIOR COMMANDER ACTING AS DISCIPLINARY OFFICER .....</b>	<b>1-32</b>
<b>APPENDIX D(1) – TEMPLATE FOR CONSTRUCTING SENTENCES WITH EXAMPLES.....</b>	<b>1-33</b>
<b>APPENDIX D(2) – TEMPLATE FOR CONSTRUCTING SENTENCES.....</b>	<b>1-40</b>

## 1. Introduction To The Sentencing Guidelines

### a. Purpose of the Guidelines

These Sentencing Guidelines (**Guidelines**) must be considered by the Court Martial in sentencing offenders under the Armed Forces Discipline Act 1971 (**AFDA**) to the extent that they are relevant. The Court Martial must ensure that any sentence is consistent with these Guidelines unless it would be contrary to the interests of justice to do so. These Guidelines also assist prosecutors and defence counsel/defenders in preparing submissions. They may be useful for advising the accused on expected sentences in the event of conviction.

The Guidelines are issued by the Armed Forces Discipline Committee (the **Committee**) under section 162 of the AFDA. The Committee is made up of the Chief of Defence Force (**CDF**), the Vice Chief of Defence Force (**VCDF**), the Chiefs of the Navy (**CN**), Army (**CA**) and Air Force (**CAF**), the Commander Joint Forces New Zealand (**COMJFNZ**), the Judge Advocate General, the Director of Military Prosecutions and a representative of the Armed Forces Defence Counsel Panel appointed by the Judge Advocate General.

### b. Primary Importance of Consistency and Transparency

The joint ideals of *consistency* and *transparency* should underlie all sentencing decisions. This applies in civil courts, the Court Martial, or sentencing by a disciplinary officer. People who are sentenced in a *transparent* and *consistent* manner are more likely to accept the decision, and much less likely to have any grounds of appeal.

Accordingly, following these Guidelines will serve the interests of all parties and help to promote an effective military justice system that is respected by those who participate in it.

## 2. Purposes of Sentencing

### a. Introduction

It is important in sentencing that the purposes underlying the particular sentencing exercise are actively considered and identified. There are multiple purposes of sentencing, each of which is set out below. In some cases, there will be only one real purpose underlying sentencing. In other cases, there may be several purposes, each of which requires consideration.

### b. The Purposes

There are eight primary purposes for imposing sentences or otherwise disposing of a conviction. They are as follows:

- i To hold the offender accountable (i.e. to punish the offender) for harm done to the victim and the community by the

offending. This may include the wider New Zealand community or simply the military community.

- ii To promote in the offender a sense of responsibility for, and an acknowledgment of, that harm.
- iii To provide for the interests of the victim of the offence.
- iv To provide reparation for harm done by the offending.
- v To denounce the conduct in which the offender was involved.
- vi To deter the offender or other persons from committing the same or a similar offence.
- vii To protect the community from the offender. Depending on the circumstances, this could incorporate only the military community, or the wider community.
- viii To assist in the offender's rehabilitation and reintegration back into the armed forces.

To avoid doubt, there is no rule that implies that any one principle must be given greater weight than any other principle.

### 3. Principles of Sentencing

#### a. Introduction

Just as it is important to consider, and articulate, the purposes underlying a particular sentence, it is also important to be principled in imposing a sentence. Consideration of the general principles of sentencing before arriving at a sentence will act as a guide to ensure that a sentence is neither disproportionately severe nor disproportionately lenient, and is appropriate to the case. This will help make a sentence consistent and transparent.

It is likely that more than one of the principles identified below will apply in each sentencing exercise.

#### b. The Principles

There are nine primary principles listed below that should be considered when a person is sentenced. They are as follows:

- i The sentencer must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender. In general terms, the graver the offence and the greater the involvement of the offender in that offence, the more severe the penalty will be.

- ii** The sentencer must take into account the seriousness of the offence in comparison with other offences, as indicated by the maximum penalties prescribed by the offences. Accordingly, offences carrying more significant maximum penalties will attract more significant sentences.
- iii** The sentencer must consider imposing a penalty at or near to the maximum prescribed for the offence, if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate.
- iv** The sentencer must take into account the desirability of consistency with appropriate sentencing levels and other outcomes in respect of similar offenders committing similar offences in similar circumstances.
- v** The sentencer must take into account any information properly provided to the court concerning the effect of the offending on the victim.
- vi** The sentencer should generally impose the least severe outcome that is appropriate in the circumstances. Accordingly, if two sentences are available for an offence, both of which would appropriately achieve the purposes of sentencing, the least restrictive sentence should be preferred.
- vii** The sentencer must take into account any particular circumstances of the offender that meant that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe. For example, it is important that the sentencer be aware of the financial consequences, if any, of the sentence to be imposed.
- viii** The sentencer must take into account the offender's personal family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.
- ix** The sentencer must take into account any outcomes of restorative justice processes that have occurred, or that the sentencer is satisfied are likely to occur, in relation to the particular case.

Again, to avoid doubt, there is no rule that implies that any principle must be given greater weight than any other principle.

It is important that the sentencer should not take into account matters learned external to the proceedings. This would undermine the principle of transparency. This is particularly important in an armed force the size of the NZDF.

#### 4. Structuring a Sentence, and Requirements When Issuing a Sentencing Decision

##### a. Introduction

This section is designed to assist in constructing sentencing decisions. It is a statutory requirement for reasons to be given outlining why a particular sentence is imposed.

A sentencing decision must be transparent and consistent. Therefore, the reasons for a decision must be clearly articulated so that everyone involved understands the reasons for the sentence.

Fortunately, there is now very clear methodology that should be followed in deciding on an appropriate sentence. It is important that this methodology, or chain of reasoning, is evident in the sentencing decision.

Appendix D(1) is a template that, if followed, should ensure that the correct approach is adopted, and the various requirements are met. Version D1 includes examples of the types of statements that might be included. The examples given are illustrative only and should not be repeated verbatim unless they are exactly applicable to the offender's situation. A blank template sheet is at Appendix D(2).

##### b. Arriving at a Sentencing Starting Point

The first step in arriving at an appropriate sentence is to adopt what is known as a starting point. Essentially, this is the appropriate sentence for the particular offending, bearing in mind the aggravating and mitigating features relating to that offending. Aggravating and mitigating features are discussed in paragraphs b.iii. through v.

###### i Purposes and Principles of Sentencing

In coming to a starting point, the relevant purposes and principles of sentencing must be considered.

###### ii The Role of Previous Sentences in Setting a Starting Point

In setting a starting point, it is important to consider previous sentences that have been imposed in similar cases. This helps ensure consistency. Guidance may be drawn from decisions both in the civilian and military justice systems.

The Court Martial will, in the course of sentencing, be referred to precedents that have been established by the civil courts, in particular the Court of Appeal. The Judge will advise the military members on comparable punishments in the civilian jurisdiction, the significance of such sentences, and the extent to which these precedents are of assistance to the Court. Where the underlying basis of the offending is essentially the same whether committed by a member of the Armed Forces or

a civilian, the sentence awarded will usually be guided by that awarded in the civil courts, except when the nature of military discipline provides a good reason not to do so. A punishment that is markedly lower than that which would be imposed in the criminal jurisdiction should not be awarded without very good reason, which should be expressed clearly in the sentencing decision.

It will not be unusual, however, for the Court to impose a punishment that is proportionately higher than that awarded in civilian courts. This is because the Armed Forces are, by definition, disciplined. The people of New Zealand are entitled to expect a higher standard of behaviour from Service personnel than is demanded of the general populace.

The Judge will also advise the military members of the sentences imposed in comparable cases in the Court Martial.

Appendix A is a Sentencing Guide setting out ranges of sentences drawn from previous summary hearings. However, each case has to be decided on its own facts and in accordance with the general principles set out in these Guidelines.

Further, modern societal attitudes and standards within the Armed Forces evolve over the years. In such cases, although it might be appropriate to acknowledge the previous decisions, it is important to provide for the present requirements of the Service and community when fixing and explaining sentences. From time to time these Guidelines may be amended when the Committee perceives that a change in approach is necessary.

### **iii General Aggravating Features Relating to the Offending**

In arriving at a starting point, aggravating features relating to the offending must be taken into account. The following is a non-exhaustive list of such features. If they apply to a particular case, they must be considered, and should be mentioned in the reasons for a sentencing decision. The aggravating features are as follows:

- (i)** The offence involved actual or threatened violence or the actual or threatened use of a weapon.
- (ii)** The offence involved unlawful entry into, or unlawful presence in, a dwelling place, including a barrack room or any other private space allocated to a fellow member of the Armed Forces or the community.
- (iii)** The extent of any loss, damage or harm resulting from the offence.

- (iv) Particular cruelty in the commission of the offence.
- (v) The offender was abusing a position of trust or authority in relation to the victim.
- (vi) The victim was particularly vulnerable because of his or her age, health or any other factor known to the offender.
- (vii) The offender committed what is commonly referred to as a ‘hate crime’ (the offence was committed partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability), and
  - a. the hostility is because of a common characteristic; and
  - b. the offender believed that the victim had that characteristic.
- (viii) The offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002).
- (ix) Premeditation on the part of the offender and, if so, the level of premeditation involved.
- (x) The offence involved making, publishing, importing, exporting or selling an intimate visual recording.
- (xi) The offence involved strangulation, strikes to the back of the victim’s head, or kicks to the victim while he/she was on the ground.

#### iv **Aggravating Features Relating to the Armed Forces**

The following matters must be regarded as being of particular importance in respect of Service discipline. They pertain to the core values of Courage | Tū Kaha, Commitment | Tū Tika, Comradeship | Tū Tira and Integrity | Tū Maia:

- (i) **Abuse of rank.** The relationship of rank should be regarded as a strongly aggravating factor in respect of any offence involving violence to, or ill-treatment of, a subordinate by a superior officer.

The relationship of rank is also a strongly aggravating factor in respect of any offence in which the respect for superior officers generally is likely to be undermined by the offender’s behaviour.



If an officer's or non-commissioned officer's (NCO) offending was witnessed by subordinates, the effect on discipline is necessarily much worse than if the same behaviour had been demonstrated by someone of lower rank.

The relationship of rank is a strongly aggravating factor in respect of any offence involving sexual violence to, or sexual exploitation of, a subordinate. An officer or NCO who uses the power inherent in rank to obtain sexual gratification should be punished much more severely than would be the case for a civilian found guilty of the underlying offence (eg indecent assault).

Dismissal from Her Majesty's Service should be considered an appropriate start point for sentencing in all cases where ill-treatment of a subordinate demonstrates an abuse of the privileges or rank, particular cruelty, or lack of respect for the values and ethos of the NZDF. Because misuse of rank is destructive of trust and demonstrates a failure of leadership, if the offender is retained, reduction in rank should be imposed in all but exceptional circumstances. Whenever the victim has suffered serious harm as a result of the offending, imprisonment should be considered or if detention is awarded, dismissal should be considered as well.

Where a period of detention or imprisonment is considered, a loss of seniority or a fine is regarded as the appropriate starting point for an underlying offence (eg indecent assault). The effect of an abuse of rank should be regarded as aggravating the offence by 20–25 per cent.

- (ii) **Disrespect for authority.** Many Service offences are specifically addressed to disrespect for authority (eg mutiny, disobeying a lawful command, striking a superior officer etc.). Because disrespect is inherent in the nature of the offence and the maximum punishment set for it, it is not usually necessary to deal with it as a separately aggravating feature. However, in some cases a very particular disrespect is displayed by the offender's actions. For example, a refusal to comply with an order directed specifically at the offender should be regarded as more serious than a failure to comply with a very general order of a routine nature. An act of insubordination carried out in front of subordinates is much more serious than one carried out in a less obvious environment.

An offence against a member of the NZDF performing a particular function (eg Orderly Officer/ NCO, Military Police or master-at-arms,) if not already reflected in the charge, should be regarded as an aggravating factor.

- (iii) **Abusing the trust of comrades.** Abuse of trust is always a strongly aggravating feature. In a Service environment, however, it has unique aspects. If the offender's conduct has exposed his or her comrades to unnecessary danger, this should be reflected in the sentence. For example, a person who is appointed to duty responsibilities and leaves the ship or unit orderly room unattended places the safety of his or her comrades at risk if there is an emergency. This is destructive of the trust that must exist between all members of the Armed Forces.

A member of the NZDF who steals from comrades should always be punished more severely than would be appropriate for a member of the civilian population carrying out a similar theft.

- (iv) **Self-interest.** It is an aggravating feature if the offender's conduct demonstrates a willingness to place self-interest ahead of the interests of the Service or fellow members of the NZDF. An offender who steals from a welfare fund has profited at the expense of fellow Service members. The same is true of a member of the Armed Forces who shirks a duty that is dangerous, unpleasant or unrewarding. The member has disregarded the principles of comradeship and commitment. Furthermore, another Service member must do the job that the offender has neglected or refused to do.
- (v) **Offences in uniform/on duty.** The fact that an offence was committed while the offender was in uniform or on duty may, in some circumstances, be an aggravating circumstance. This is particularly so when the offending is witnessed by members of the public, or involves behaviour that is an affront to the ethos and values of the NZDF (eg sexual harassment or bullying).
- (vi) **Offences against civilians.** It is an aggravating feature when a member of the NZDF commits an offence against civilians in circumstances where he or she is clearly identifiable as a member of the NZDF. This is particularly so when offences of violence or dishonesty are committed against citizens of the foreign country in which the NZDF is operating. Such offences not only harm the reputation of the NZDF, but also undermine trust

between NZDF and the local population. They may inspire retaliation and put the safety of other members of the NZDF at risk, as well as undermining the mission.

- (vii) **Misuse of drugs or psychoactive substances.** All persons in the Armed Forces must be able to rely on their comrades not to be under the influence of drugs or psychoactive substances. Use of such drugs or substances is regarded as grave offending in a military context. This is a major area in which comparisons with civilian sentences are of limited value. Drug and psychoactive substance use is regarded as intolerable in the NZDF. Dismissal from Her Majesty's service should be considered as an appropriate starting point in all but the most extraordinary circumstances.
- (viii) **Supply of drugs or psychoactive substances.** Supply of drugs or psychoactive substances, particularly to other members of the NZDF, is more serious by far. It offends against all of the values and ethos of the NZDF. It creates a danger not only to the physical and mental well-being of fellow Service members, but also to the cohesion and effectiveness of the NZDF as a whole. In addition to dismissal from Her Majesty's service, an appropriate starting point should include a period of imprisonment or detention. The appropriate sentence of incarceration will be governed by the nature and amount of the drug or substance supplied, together with the extent of the nexus between the offending and the offender's position in the NZDF. The closer the connection between the offending and the NZDF, particularly where drugs or psychoactive substances are supplied to other members of the NZDF, the more likely it is that a period of imprisonment will be necessary in order to achieve sufficient general deterrence.
- (ix) **Sexual offending.** Sexual offending in the military context is more serious than in the civil jurisdiction. It offends against all of the values and ethos of the NZDF and undermines CDF's priorities under Operation Respect. It creates a danger not only to the physical and mental well-being of fellow Service members, but also to the cohesion and effectiveness of the NZDF as a whole. While acknowledging that the category of sexual offending spans a variety of conduct, in sentencing an offender, the Court is required in every case to consider whether it is realistic and tolerable to retain the offender in the Service.

**v Mitigating Features Relating to the Offending**

In arriving at a starting point, mitigating features relating to the offending must be taken into account. The following is a non-exhaustive list of such features. If they apply to a particular case, they must be considered, and should be mentioned in the reasons for a sentencing decision. The mitigating features include:

- (i) the conduct of the victim, and
- (ii) a limited involvement in the offence on the offender's part.

**c. The Starting Point Should be Announced**

At this point, the starting point should be set and announced to the offender. This makes it clear that the Court Martial has identified all of the aspects relating to the offence itself that are relevant to punishment.

**d. Matters Relating to the Offender are Identified**

The Court Martial now turns to matters particular to the offender that may cause the sentence identified in the starting point to be increased or decreased.

**i Aggravating Features Relating to the Offender**

Once a starting point has been identified, the sentence may be increased in severity, if there are particular aggravating features relating to the offender. The following is a non-exhaustive list of such features. If they apply to a particular case, they must be considered, and should be mentioned in the reasons for a sentencing decision. If the sentence is increased because of the existence of such a factor, the amount of the increase must be articulated. Aggravating features may be that:

- (i) the offence was committed while the offender was on bail or subject to a sentence for some other offence;
- (ii) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and/or
- (iii) the number, seriousness, date, relevance and nature of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

The Court Martial will have before it as an exhibit the **MD 613 Particulars of the Accused's Service**. Previous offending by the offender should be reflected in an 'uplift' in sentence. However, the relevance of previous offending must be carefully assessed. A series of purely disciplinary offences committed while on basic training, for example, can have little effect on a charge of dishonesty some years later.

## ii **General Mitigating Features Relating to the Offender**

Once a starting point has been identified, the sentence may be decreased in severity if there are particular mitigating features relating to the offender. The following is a non-exhaustive list of potential such features. If they apply to a particular case, they must be considered and should be mentioned in the reasons for a sentencing decision.

If the sentence is reduced (sometimes known as a discount) because of the existence of such a factor, the amount of that reduction or discount must be articulated. Mitigating features may be:

- (i) the age of the offender;
- (ii) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding;
- (iii) any remorse shown by the offender;
- (iv) any genuine offer by the offender to make amends, whether that be financially or in some other way;
- (v) any evidence of previous good character and service that is before the sentence; and/or
- (vi) the conduct of the offender when confronted with the allegation, including any assistance given in resolving associated criminal activity.

For the avoidance of doubt, and despite (ii) above, the sentencer must not take into account, by way of mitigation, the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

## iii **Mitigation Particular to the Armed Forces**

The following features may be considered as mitigating factors particular to service in the Armed Forces:

- (i) **Good behaviour/exemplary conduct.** The offender's service record must be considered by the Court Martial in arriving at an appropriate sentence. The effect on sentencing of previous good behaviour and exemplary conduct or distinguished service is, however, not straightforward. The Court should bear in mind that having no previous convictions is not the same thing as good character or conduct. The absence of any recordable offence should be regarded as the norm for members of the Armed Forces – not a factor of mitigation in itself. There must also be evidence that the behaviour of the offender is above and beyond that which is demanded of every member of the Armed Forces.
- (ii) The offender may bring evidence to show that the offence is out of character or a rare slip-up. The more serious the offence, the less the weight that should normally be attributed to this factor.
- (iii) Where previous good character or exemplary conduct has been used to facilitate the offence, this should not normally be allowed to mitigate the offence and may even constitute an aggravating factor. For example, an officer who takes on additional mentoring duties in respect of young Service members would ordinarily be regarded as having displayed good behaviour. When that relationship is abused to perpetrate indecent assaults, however, the action should be regarded as aggravating the offence since it demonstrates an abuse of trust. The same is true where a person consistently volunteers to perform duties in respect to a non-public fund, but uses the opportunity to steal from that fund.
- (iv) **Medallic Recognition.** Where the offender has been decorated for bravery or gallantry, or has been recognised for distinguished or meritorious service, such recognition must be accepted and considered by the Court. The effect on sentence must, however, be carefully weighed. Clearly the award of a medal, however high, is not a licence for the recipient to subsequently commit offences with impunity. Truly exemplary service or gallantry may, however, be relevant to the question of whether the offender is retained in the service, if that issue is in the balance. The further removed in time and circumstance the service or gallantry is from the offending, the less relevant it becomes. Medals for long service and good conduct merely recognise the type of service that is expected of senior members of the Armed Forces and can have only a modest effect, if any, on the sentence.

**e. Law of Armed Conflict Considerations**

The case of prisoners of war (**PWs**) demands special mention. If the Court Martial is sentencing a PW, it must take the following into account:

- i** PWs do not owe any duty of allegiance to New Zealand,
- ii** PWs are detained because of circumstances beyond their own will,
- iii** minimum penalties prescribed for various offences do not apply to PWs, and
- iv** PWs cannot be sentenced to reduction in rank.

**f. The Effect of a Guilty Plea**

Once an otherwise-appropriate sentence is settled upon, consideration must be given to applying a reduction in recognition of any guilty plea, if that is appropriate. An offender who pleads guilty is generally entitled to have the severity of the otherwise-appropriate sentence reduced.

This recognises that those who take responsibility for offending save time, effort and resources. The victims of offending are also spared the trauma of having to give evidence. Importantly, it also indicates that the offender has acknowledged the offending and taken responsibility for it. The extent of the reduction on account of a guilty plea depends on all the circumstances including when the plea was indicated and the strength of the prosecution case. Generally, the earlier it is indicated, the larger the reduction.

The fact that a reduction has been applied for a guilty plea, and the amount of that reduction, must be recorded in the reasons for the sentence ultimately adopted.

The maximum reduction for a guilty plea is 25 per cent of the otherwise appropriate sentence. Where there is a combination of punishments in the one sentence, the discount should be applied equitably across all elements. It is not enough, for example, to apply a 25 per cent reduction to a fine alone, if the offender has also been sentenced to a 12 month stay of seniority.

Some sentences are not capable of a reduction to take account of a guilty plea. For example, if the offending is such that dismissal from Her Majesty's Service is required in order to meet the principles set out in these Guidelines, that sentence cannot be reduced in the same way that applies to a fine or custodial sentence.

That said, there might be circumstances where a guilty plea, along with the implicit recognition of fault, is such that a less severe type of sentence is appropriate. For example, a person who would otherwise

have been a marginal case for dismissal might appropriately be dealt with by a reduction in rank in light of an early guilty plea. This is a matter of judgment.

**g. NZDF-specific Considerations**

Having considered all of these matters, the Court will arrive at its sentence. There may still be a choice of punishments available. If dismissal from service or reduction in rank is in issue, the Court must consider the following critical questions to the extent that they are relevant to the offender:

- i** First, bearing in mind the offending, is it tolerable and realistic for the NZDF to retain the services of the individual? This will depend on the nature of the offence, and the circumstances in which it occurred. Simply put, there is some offending that is so contrary to the ethos and values of the NZDF that it would be intolerable for the person to remain. In such cases, the person will have to be dismissed from Her Majesty's Service. One example of potentially requiring dismissal is where the offending involves a fundamental breach of trust between members of the NZDF such that members of the offender's unit or Service could not, or should not, be expected to work or live with the offender again.
- ii** Second, bearing in mind the offending, is the person fit to command? This is particularly relevant if the person holds rank such that they are, or might be, in a position of command. If the person is not fit to command, then the holding of rank, or a particular rank, is likely to be untenable. Accordingly, the person will likely have to be reduced in rank, possibly to a level where they will not be in a position of command.
- iii** Third, what does the offending demonstrate about the individual's adherence to the core values of the NZDF: Courage | Tū Kaha, Commitment | Tū Tika, Comradeship | Tū Tira and Integrity | Tū Maia?



**APPENDIX A**  
**SENTENCING GUIDE**  
**SUMMARY TRIALS**

**Introduction**

The attached table has been prepared as a guidance tool. It does not purport to set a tariff. The principles of sentencing set out in the earlier sections of this booklet should be applied at all times.

In addition to the matters set out in the table, when considering whether to remand an individual for trial in the Court Martial, disciplinary officers are encouraged to consider the core values that apply to their Service.

**Table for Use by Disciplinary Officers**

Section	Offences	Punishment Ranges for Summary Trials	Disciplinary Officer to Consider Remand to Court Martial
<b>Armed Forces Discipline Act 1971</b>			
34(2)	Guard Duty (Sleeping/ Drunk/Leaves Post/ Abandoning)	Fine (1–7 days pay) and/or Confinement (7–21 days) Detention (1–7 days) (serious)	For serious cases or during Ops (or where the maximum punishment for offence exceeds seven years imprisonment)
35	Violence to Superior Officer	Detention (7–20 days) Reduction (for NCOs)	All cases
36(a)	Insubordination (Threatening)	Detention (1–7 days) Reduction (for NCOs) Confinement (14–21 days) and/or Fine	All cases
36(b)(c) and (d)	Insubordination (insulting/Contempt)	Reduction (for NCOs) Confinement (14–21 days) and/or Fine	On operations or if accused is an officer or SNCO
37	Obstruction of Service Police	Detention (1–7 days) Reduction (NCOs) Confinement (14–21 days) (minor cases)	Serious cases
38	Disobeying Lawful Command	Detention Reduction (NCOs) Confinement (7–21 days) and/or Fine	On operations or if disobedience affects safety or security
39	Written Orders	Minor Violations: (Quarters/inspections/shaving) Reprimand Confinement (2–10 days) and/or Fine (1–10 days) Stoppage of Leave (minor)  More Serious: (Alcohol in quarters, harassment, possession of firearms/ammunition, etc.) Reduction (NCOs) Confinement (14–21 days) and/or Fine (up to 28 days)	Not unless serious (harassment, official information) and involving officers/SNCOs

Section	Offences	Punishment Ranges for Summary Trials	Disciplinary Officer to Consider Remand to Court Martial
41	Ill treatment (Lower Rank)	Reduction (NCOs) Reprimand and/or Fine (up to 28 days pay)	Recommended, except for minor cases
42	Cruelty/Disgraceful Conduct	Detention (7–14 days) Reduction (NCOs) Reprimand and/or Fine (minor)	Recommended, except for minor cases
43	Fighting/Disturbance	Detention (1–14 days) (serious) Confinement (14–21 days) and/or Fine	Serious cases or involving officers / SNCOs
44	Resisting Arrest	Detention (7–14 days) Reduction (NCOs)	Serious cases or involving officers / SNCOs
45	Escaping Custody	Detention (14–28 days) Reduction (NCOs)	All except very minor cases
46	Permitting Escape	Detention (14–28 days) Reduction (NCOs)	All except very minor cases
47	Desertion	N/A	All cases
48	AWOL	Confinement (14–21 days) and/or Fine (for minor cases only) Detention (2–3 days for every day AWOL)	Serious cases
49	Avoidance of duty	Stoppage of leave (minor cases) Confinement (7–21 days) and/or Fine	On operations or otherwise serious
50	Malingering	Reprimand Confinement (7–14 days) and/or Fine Extra Work and Drill (minor cases)	On operations or otherwise serious
51	Drunkenness or Drugs	Drunkenness: Detention (7–14 days) Confinement (14–21 days) and/or Fine Reduction (NCOs)  Influence of Drugs: Detention (14–28 days) Confinement (14–21 days) and/or Fine Reduction (NCOs)	Cases involving Class A or B controlled drugs
52	Possession of Alcohol	Confinement (14–21 days) and/or Fine (1–7 days pay)	Serious cases on operations
55	Falsify Documents	Detention (7–14 days) (serious) Reduction (NCOs) and/or Fine Confinement (14–21 days) and/or Fine (up to 28 days pay)	Serious cases
56	False Statement for Benefit	Detention (14–28 days) Reduction (NCOs) and/or Fine Confinement (14–21 days) and/or Fine (up to 28 days pay) (minor cases)	Serious cases

Section	Offences	Punishment Ranges for Summary Trials	Disciplinary Officer to Consider Remand to Court Martial
57	Stealing Property	Detention (14–28 days) Reduction and/or Fine (NCOs) Confinement (21 days) and/or Fine (minor)	All cases involving stealing property of a comrade, otherwise only for serious cases
58	Receiving Property	Detention (7–28 days) Reduction and/or Fine (NCOs) Confinement (21 days) and/or Fine (minor)	All cases
59	Unlawful Possession	Detention (7–28 days) Reduction and/or Fine (NCOs) Confinement (21 days) and/or Fine (minor)	Serious cases
60	Conversion of Vehicles	Confinement (14–21 days) and/or Fine (minor cases under s 60(2)) Detention (14–28 days) Reduction and/or Fine (NCOs)	Recommended for all but minor cases
61	Destroy/Damage Property	Confinement (14–21 days) and/or Fine Detention (7–14 days) Reduction and/or Fine (NCOs)	Serious cases
62	Loss of Service Property	Stoppage of Leave (minor case) Confinement (14–21 days) and/or Fine Reduction and/or Fine (NCOs)	Serious cases
67(1)(a)	Reckless/Dangerous driving	Confinement (14–21 days) and/or Fine Reprimand	Serious cases
67(1)(b)	Drives While Under the Influence of Alcohol or Drugs	Detention (14–21 days) Reduction and/or Fine (NCOs)	All cases involving drugs
67(2)(a) and (b)	Driving Carelessly	Confinement (7–14 days) and/or Fine Reprimand	Serious cases
67(3)	Uses a Service Vehicle for an Unauthorised Purpose	Confinement (7–14 days) and/or Fine Reprimand	Serious cases
68	False Accusations	Reprimand and/or Fine Confinement (14–21 days) Reduction	Serious cases
72	Endanger Health	Reprimand Reduction and/or fine	Serious cases

Section	Offences	Punishment Ranges for Summary Trials	Disciplinary Officer to Consider Remand to Court Martial
73	Conduct Prejudicial	Harassment/Sexual Misconduct: Detention (7–14 days) Reprimand and/or Confinement (14–21 days) and/or Fine Reduction (NCOs)  Negligent Discharge: Fine (7–14 days pay) or Confinement (7–14 days)  Inspection/Dirty Rifle: Stoppage of Leave Confinement (1–14 days) Fine (up to 3 days pay)	Serious cases
<b>Crimes Act 1961 (via section 74 AFDA)</b>			
Part VII (ss 123–144C)	Sexual Offences	Reprimand Stay of Seniority Detention (7–14 days)	All cases involving officers/SNCOs. All cases involving more junior ranks except for low level indecent assault and nuisance charges (Remand to the Court Martial mandatory if charge carries a maximum punishment exceeding seven years imprisonment)
Part VIII (ss 150A–210A)	Against the Person:		All cases except those listed below (or where serious) (Remand to the Court Martial mandatory if charge carries a maximum punishment exceeding seven years imprisonment)
196	Common Assault	Confinement (14–21 days) (Minor) Detention (7–28 days) Reduction	Where serious (Note: also a charge under s 9 of Summary Offences Act 1981)
202A	Offensive Weapon	Detention (7–14 days) Reduction	All but minor cases
Part X (ss 217–298B)	Property:		All cases except those listed below (or where serious) (Remand to the Court Martial mandatory if charge carries a maximum punishment exceeding seven years imprisonment)
223	Theft/Conversion (see definitions in s 219)	Detention (7–28 days)	All but minor cases
227	Instrument for Conversion	Detention (7–28 days)	All but minor cases
228	Documents to Defraud (Pecuniary Advantage)	Detention (7–28 days) Reduction and/or Fine (NCOs)	All but minor cases
231	Burglary	N/A	Remand to the Court Martial is mandatory
240	False Pretences	Confinement (21 days) and Fine (Minor) Detention (7–14 days)	All but minor cases (See also ss 15, 16 and 20 of Summary Offences Act 1981)

Section	Offences	Punishment Ranges for Summary Trials	Disciplinary Officer to Consider Remand to Court Martial
246	Receiving Property	Detention (7-28 days)	For serious cases or involving
Officers/ SNCOs			
255-265	Forgery Offences	N/A	Remand to the Court Martial is mandatory
269	Intentional Damage	N/A	Remand to the Court Martial is mandatory
Part IV (ss 66-72)	Parties to Offences		As per principal offender for actual offence (see also AFDA s 75)
<b>Misuse of Drugs Act 1975 (via s 74 AFDA)</b> <b>Remand all cases except those listed below (or where serious)</b>			
6	Dealing	N/A	All cases
7	Possession and Use	Detention (7-14 days) (1 <sup>st</sup> time)	All cases involving officers and SNCOs and all cases involving Class A or B controlled drugs
9	Cultivation	Detention (7-14 days) (1 <sup>st</sup> time)	All cases
12	Use of Premises	Detention (7-14 days) (1 <sup>st</sup> time)	All cases
13	Miscellaneous Offences	Detention (7-14 days)	Serious cases

## APPENDIX B

**SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A COMMANDING OFFICER, DETACHMENT COMMANDER, OR SUBORDINATE COMMANDER ACTING AS DISCIPLINARY OFFICER**

Clause	Column 1: Rank of offender	Punishments and jurisdictional circumstances	
		Column 2: If offender was given right to elect trial by Court Martial	Column 3: If offender was not given right to elect trial by Court Martial
1	Officer or WO	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days basic pay A reprimand	A fine, not exceeding 7 days basic pay A reprimand
2	SNCO	Reduction in rank (this punishment may be imposed only on a petty officer or a sergeant who, at the time of the disposal of the charge, is on active service or sea service) Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days basic pay A reprimand Stoppage of leave, not exceeding 21 days	A fine, not exceeding 7 days basic pay A reprimand Stoppage of leave, not exceeding 21 days
3	JNCO	Reduction in rank A fine, not exceeding 28 days basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution	A fine, not exceeding 7 days basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution
4.	A rating of able rank, a private, or a leading aircraftman, or a rating, soldier, or airman of lower rank.	Detention for a period not exceeding 60 days (this punishment may be imposed only in respect of an offence committed on active service or sea service) Detention for a period not exceeding 28 days A fine, not exceeding 28 days basic pay A reprimand Confinement to ship or barracks for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution	A fine, not exceeding 7 days basic pay A reprimand Confinement to ship or barracks for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution

**Explanatory Note**

For the purposes of clause 1, a disciplinary officer is not empowered to impose a punishment on an officer if the disciplinary officer holds a rank of less than two rank grades above that of the officer.

For the purposes of clause 2, a SNCO is one who holds the rank of:

- a.** Chief petty officer or petty officer in the Navy;
- b.** Staff sergeant or sergeant in the Army; or
- c.** Flight sergeant or sergeant in the Air Force.

For the purposes of clause 3, a JNCO is one who is:

- a.** A rating of leading rank in the Navy;
- b.** A bombardier, corporal, lance bombardier, or lance corporal in the Army; or
- c.** A corporal in the Air Force.

For the purposes of this Annex, a person is on sea service if that person is a member of the crew of a ship that is at sea or of a ship whose CO has been ordered to keep the ship at less than 48 hours notice for sea.

## APPENDIX C

SUMMARY PUNISHMENTS THAT MAY BE IMPOSED BY A SUPERIOR  
COMMANDER ACTING AS DISCIPLINARY OFFICER

Punishments and jurisdictional circumstances		
Column 1: Rank of offender	Column 2: If offender was given right to elect trial by Court Martial	Column 3: If offender was not given right to elect trial by Court Martial
Officer	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days basic pay A reprimand	A fine, not exceeding 7 days basic pay A reprimand

**Explanatory Note**

For the purposes of this Annex, a superior commander is not empowered to impose a punishment on the officer if the superior commander holds a rank of less than two rank grades above that of the officer.



**APPENDIX D(1)****TEMPLATE FOR CONSTRUCTING SENTENCES WITH EXAMPLES**

This is a template for constructing a sentencing decision. It is a formula which, if followed, should ensure that the appropriate considerations are taken into account. The examples given are illustrative only and should not be repeated verbatim unless they are exactly applicable to the offender's situation. A blank template sheet is at Appendix D(2).

**1. Introduction**

- a.** State the offender's name and service description.
- b.** State the offence(s) for which the person is being sentenced and the maximum available sentence.

*eg 'You have been found guilty of stealing service property contrary to section 57 of the Armed Forces Discipline Act 1971, which is punishable by a maximum of seven years' imprisonment.'*

If the person pleaded guilty, it is usual to acknowledge this.

*eg 'You have pleaded guilty to striking your superior officer contrary to section 35(1)(a) of the Armed Forces Discipline Act 1971...etc.'*

Set out any aspect of the charge that has an effect on punishment.

*eg 'You have been found guilty of sleeping at your post contrary to section 34(2)(a) and (4) of the Armed Forces Discipline Act 1971 and since this offence took place while you were on active service, this means that the maximum punishment is imprisonment for a term not exceeding 10 years.'*

**2. Facts**

- a.** Briefly outline the facts that have been proven, or admitted, and on which the sentence is based.
- b.** If an agreed statement of facts was accepted, it should be relied upon.
- c.** In other cases, a very brief statement of the facts that have been found by the military tribunal to prove the charge should be restated.
- d.** It is important that no material is included that has not been admitted by the offender or proven by evidence (or reasonable inference). If extraneous comments are included, it may affect the validity of the sentence.

### 3. Purposes and Principles of Sentencing

- a. State the principles of the sentence that are applicable to the particular case;

*eg “In sentencing you it is necessary for [me/the Court] to hold you accountable for what you did, promote in you a sense of responsibility for your actions, denounce your conduct, and deter you and others from acting in a similar way in the future.”*

*“If possible a sentence should be imposed that will allow your successful retention in the Armed Forces.”*

- b. State the purposes of sentence that are applicable to the particular case.

*eg “[/the Court] must take into account the gravity of your offending and the degree of your culpability.”*

*“[/the Court] must take into account the seriousness of the offence(s) as indicated by the maximum penalty available. It is important that the punishment imposed is consistent with those imposed in similar circumstances.”*

*“[/the Court] must take into account the effect of your offending on the victims of your offending, as well as your circumstances and background. [I/the Court] must also consider what attempts you have made to make amends including the outcome of any restorative justice process.”*

### 4. Limits on Sentencing

- a. State any relevant limits on sentencing powers.

#### i Summary Trial

*eg “I was required at the outset to decide whether I have sufficient powers of punishment to deal with you or whether the matter should be remanded to trial by the Court Martial. I decided to deal with the matter myself. I offered you the election to be tried by Court Martial. You elected to be tried by me. Those decisions and your rank define the punishments that are available to me. The available punishments are [insert from Fourth or Fifth Schedule to the AFDA].”*

#### ii Court Martial

*eg “Because you are an officer you cannot be sentenced to detention.”*

## 5. Establishing a Starting Point

- a. It is necessary to establish a starting point for the sentence. The starting point does not prejudice the eventual outcome of the sentencing. The starting point is based on:

- i **Previous sentences imposed** (if there are helpful comparisons).

*eg “Previous examples of punishments for offences of this type have been considered. In most cases, offenders have been sentenced to reduction in rank by one or two rank grades. It is important that consistency in punishment is maintained while accepting that no two offences are exactly the same.”*

*eg “Previous examples of punishments for offences of this type have been considered. None of those cases resemble the facts of this case so they cannot be regarded as particularly helpful.”*

- ii Reference to specific guidance in the **Sentencing Guidelines**.

*“The Court has looked at the Sentencing Guidelines issued by the NZDF Disciplinary Committee. That guidance states that the offender’s dismissal from Her Majesty’s Service should be considered an appropriate starting point for sentencing in all cases where ill-treatment of a subordinate demonstrates an abuse of the privileges or rank, particular cruelty, or lack of respect for the values and ethos of the NZDF. The Court must consider the guidelines but is not bound to follow that guidance if that would produce a result that is not just.”*

*eg “[I/the Court] have/has looked at the Sentencing Guidelines issued by the NZDF Disciplinary Committee. In respect of failing to comply with written orders, the guidelines suggest in a serious case (which this is) a reduction in rank and a fine of up to 28 days’ pay. For the offence of drunkenness, the guidelines suggest a fine or reduction in rank. I need to consider the guidelines but I am not bound to follow that guidance if I think the result is not just.”*

- iii Any of the **purposes and principles of sentencing** that have particular relevance to the case.

*eg “As this case is near to being the most serious of those to which the penalty applies, a punishment near the maximum available must be considered.”*

*eg “There are two possible types of punishment that would be appropriate for a case like this, namely detention or imprisonment. In such cases, as a general rule, the less restrictive punishment should be imposed, which is detention.”*

eg *“It is apparent that offending of this type is becoming prevalent and it is essential that the punishment imposed acts as a deterrent not only to you, but to all other members of the NZDF who might feel inclined to behave in this manner.”*

- iv** Outline any **aggravating features relating to the offending**. Details of any effect on the victim of the offending (if any) should be included and reference made to any victim impact report.

eg *“In continuing to kick the victim while he was unconscious on the ground you demonstrated considerable cruelty and cowardice.”*

eg *“You stole this property while you were in a particular position of trust. The welfare fund was left empty as a result.”*

eg *“It is clear that the offence was premeditated. This was not a spur-of-the-moment lapse of judgment but rather a part of an ongoing plan.”*

eg *“The victim suffered significant facial injuries and was so badly concussed that she was unable to carry out her duties for several days. We have heard the Victim Impact Report, and it is clear that the damage you have done to the victim goes far beyond her physical injuries.”*

eg *“There is no real victim in this case as no-one was hurt as a result of your offending. The victim of this type of behaviour is service discipline itself. Offences like this undermine respect for rank and damage the mana of the Service.”*

eg *“You are two ranks higher than the victim who was required to obey you and expected to respect you. The relationship of rank is a strongly aggravating factor in respect of any offence involving sexual violence to, or sexual exploitation of, a subordinate by a superior officer.”*

eg *“The fact that you supplied drugs to fellow soldiers is an aggravating feature. Persons in the Armed Forces must be able to rely on their comrades not to be under the influence of drugs or psychoactive substances. This makes such offending particularly grave in the military context.”*

- v** Outline any **mitigating features relating to the offending**.

eg *“It is clear that the victim had been taunting you for some time and that his actions and language were intended to cause you to overreact. This does not excuse your actions, but it does go some way towards explaining them.”*

eg *“It is accepted that you were the lowest ranked and least experienced of the offenders and that you played only a minor part in the attack.”*

## 6. Announce the Starting Point

- a. The starting point should then be announced.

eg *“Having considered the factors set out above, the appropriate starting point is reduction in rank from sergeant to corporal.”*

eg *“The clear expectation is that a person who has acted as you have acted is not to be retained in the Armed Forces, so the starting point must be dismissal from Her Majesty’s Service.”*

## 7. Adjusting the Starting Point

- a. Outline any **aggravating features relating to the offender**.

eg *“This is the third time that you have faced disciplinary action for offences of this type in the last two years. You need to be sent a message that this type of behaviour is to stop and therefore it is considered appropriate to increase your sentence above the starting point by 25 per cent.”*

eg *“I have also looked at your conduct sheet and I see only a few minor offences in the last seven years. Because they are not similar to the current offending, I do not intend to take them into account.”*

eg *“You have expressed absolutely no remorse for your actions and even today you maintain that this entire affair was not your fault but rather the fault of the victims of your offending.”*

- b. Outline any **mitigating features relating to the offender**.

eg *“It is accepted that you are genuinely remorseful. Since the offence, you have written letters of apology to your Officer Commanding, to CPL X and LCPL Y. You have repeated those apologies today.”*

eg *“Although you have expressed remorse, it is apparent that this remorse comes very late in the proceedings and only after it was apparent to you that you would be found guilty. Even now it seems that your regret over this incident is not very great. In such circumstances only a very modest reduction from the starting point is appropriate.”*

eg *“I am aware that your recent deployment overseas was a particularly tough one. You have also stated that you have found it hard to adjust to life back in New Zealand and that this has caused problems between you and your partner.”*

eg *“Your platoon commander gave evidence that you are an NCO who generally takes on duties over and above those required of you. You are not regarded within the unit as a ‘shirker’, indeed quite the opposite.”*

eg *“You have made an offer of amends and have indicated that you are able to pay each of the victims \$1,200.”*

eg “You have commenced an alcohol-dependency course and have undertaken to attend counselling for your anger management issues.”

eg “The fact that you were, during this time, awarded the Meritorious Service Decoration has been taken into account. The award of this medal does not lessen your responsibility for your actions, but it does inform the Court that your service is otherwise held in high esteem.”

- c. If there are matters raised by the offender that are rejected as mitigation, they should be mentioned here too.

eg “The fact that you were drunk when the offence was committed is not mitigation. Being drunk on duty is itself an offence, of which you have also been found guilty, and I must award a punishment that covers both offences.”

## 8. Reduction for Personal Mitigating Features and Guilty Plea

- a. State the reduction given for personal mitigating features.
- b. State the reduction given for pleading guilty, if the person has done so.

## 9. NZDF-specific Considerations

Having considered all of these matters, the Court will arrive at its sentence. There may still be a choice of punishments available. If dismissal from service or reduction in rank is in issue, the Court should consider the following critical questions to the extent that they are relevant to the offender.

Where the sentencer has the power to award dismissal from service:

- a. Can the NZDF tolerate the inclusion within its ranks of a person who has acted in this way, or is the offending so wholly inconsistent with the NZDF’s ethos and values that removal from the Service is the least restrictive appropriate punishment?

eg “Your defence counsel has argued that despite the fact that you abused the relationship between yourself and your subordinates, it is not necessary to dismiss you from the Service. Rather, it would only be necessary to reduce you in rank by one grade. The Court rejects this. Your actions are such that the NZDF cannot tolerate your inclusion within its ranks at any level. Removal from the Service is the only appropriate punishment.”

Where the sentencer has the power to award a reduction in rank:

- b. After committing this offence is the person fit to command others?

eg “Although the Court has considered punishments such as a stay of seniority, it considers it necessary to make it clear that a person who acts as you have done is not fit to exercise command. Reduction in rank will be a physical demonstration of this fact.”

In all cases:

- c. What does the offending demonstrate about the offender’s adherence to the core values of the NZDF: Courage | Tū Kaha, Commitment | Tū Tika, Comradeship | Tū Tira and Integrity | Tū Maia?

The answer to these questions should be carefully stated in the reasoning.

**10. Other Matters**

Consider whether it is appropriate to impose a compensation order or reparation order to the victim or forfeiture of property.

**11. Final Sentence**

Announce the final sentence.

## APPENDIX D(2)

### TEMPLATE FOR CONSTRUCTING SENTENCES

This is a template for constructing a sentencing decision. It is a formula that, if followed, should ensure that the appropriate considerations are taken into account.

#### 1. Introduction

- a. State the offender's name and service description.
- b. State the offence(s) for which the person is being sentenced and the maximum available sentence.

If the person pleaded guilty, it is usual to acknowledge this.

Set out any aspect of the charge which has an effect on punishment.

#### 2. Facts

#### 3. Purposes and Principles of Sentencing

- a. State the purposes of sentencing that are applicable to the case.
- b. State the principles of sentencing that are applicable to the case.

#### 4. Limits on Sentencing

- a. State any limits on sentencing that are applicable to the case.

#### 5. Establishing a Starting Point

- a. **Previous sentences imposed** (if there are helpful comparisons).
- b. Reference to specific guidance in the **Sentencing Guidelines**.
- c. Any of the **purposes and principles of sentencing** which have particular relevance to the case.
- d. Outline any **aggravating features relating to the offending**. Details of any effect on the victim of the offending (if any) should be included and reference made to any Victim Impact Report.
- e. Outline any **mitigating features relating to the offending**.



**6. Announce the Starting Point****7. Adjusting the Starting Point**

- a. Outline any **aggravating features relating to the offender**:
- b. Outline any **mitigating features relating to the offender**:
- c. If there are matters raised by the offender which are rejected as mitigation, they should be mentioned here too.

**8. Reduction for Personal Mitigating Features and Guilty Plea**

- a. State the reduction given for personal mitigating features.
- b. State the reduction given for pleading guilty, if the person has done so.

**9. NZDF-specific Considerations**

Consider the following critical questions to the extent that they are relevant to the offender:

- a. Can the NZDF tolerate the inclusion within its ranks of a person who has acted in this way, or is the offending so wholly inconsistent with the NZDF's ethos and values that removal from the Service is the least restrictive appropriate punishment?
- b. Having committed this offence, is the person fit to command others?
- c. What does the offending demonstrate about the offender's adherence to the core values of the NZDF: Courage | Tū Kaha, Commitment | Tū Tika, Comradeship | Tū Tira and Integrity | Tū Maia?

The answer to these questions should be carefully stated in the reasoning.

**10. Other Matters**

Consider whether it is appropriate to impose a compensation order or reparation order to the victim or forfeiture of property.

**11. Final Sentence**

Announce the final sentence.

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# SUMMARY APPEAL COURT PROCEDURE

■ SECTION 1 – PRELIMINARY PROCEDURE .....	2-2
■ SECTION 2 – WRITTEN SUBMISSIONS .....	2-2
■ SECTION 3 – ORAL HEARING OF APPEAL .....	2-2
■ SECTION 4 – HEARING OF APPEAL ON THE PAPERS .....	2-2
■ SECTION 5 – JUDGMENT .....	2-2
■ SECTION 6 – ABANDONMENT OF APPEAL .....	2-2

## SECTION 1 – PRELIMINARY PROCEDURE

- 2.1.1** The Registrar of the Summary Appeal Court<sup>1</sup> is to give notice of each sitting of the SACNZ in form MD 617.<sup>2</sup>
- 2.1.2** Further text to come.

## SECTION 2 – WRITTEN SUBMISSIONS

- 2.2.1** All written submissions and authorities bundles filed in the Registry of the SACNZ by a lawyer are to comply with Part 5 of the High Court Rules, unless otherwise directed or authorised by the SACNZ.
- 2.2.2** Written submissions and authorities bundles filed in the Registry of the SACNZ by an appellant who is unrepresented do not need to comply strictly with paragraph 2.2.1. An appellant who is unrepresented is entitled to assistance from an officer or warrant officer from his or her unit in preparing such documents. The CO of the appellant is to assign the officer or warrant officer requested by the appellant, unless the exigencies of the Service do not allow this.
- 2.2.3** A legal officer may not be assigned to assist an unrepresented appellant under paragraph 2.2.2.
- 2.2.4** Further text to come. In the interim, see form MD 625 for oral appeals, in conjunction with Volume 1 Chapter 10, Part 5A of the AFDA and Part 3 of the RP.

## SECTION 3 – ORAL HEARING OF APPEAL

- 2.3.1** Text to come. In the interim, see form MD 625 in conjunction with Volume 1 Chapter 10, Part 5A of the AFDA and Part 3 of the RP.

## SECTION 4 – HEARING OF APPEAL ON THE PAPERS

- 2.4.1** Text to come. In the interim, see Volume 1 Chapter 10, Part 5A of the AFDA and Part 3 of the RP.

## SECTION 5 – JUDGMENT

- 2.5.1** Text to come. In the interim, see Volume 1 Chapter 10, Part 5A of the AFDA and Part 3 of the RP.

## SECTION 6 – ABANDONMENT OF APPEAL

- 2.6.1** An appellant may abandon an appeal by filing with the Registrar a notice in form MD 609 advising that he or she:<sup>3</sup>
- a.** Does not further intend to prosecute the appeal; and
  - b.** Abandons all further proceedings concerning that appeal.

<sup>1</sup> Referred to in this chapter as **the Registrar**.

<sup>2</sup> RP 35.

<sup>3</sup> RP 43.

- 2.6.2** The form MD 609 must be signed by the appellant personally or by the appellant's lawyer.<sup>4</sup>
- 2.6.3** If the form MD 609 is signed by the appellant personally, the appellant's signature must be witnessed and the witness must add the witness's address and description after the witness's signature.

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Chapter 3:

# OFFENCES AND CHARGES IN THE COURT MARTIAL

Text to come

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## Chapter 4:

# IMPRISONMENT AND DETENTION

■ <b>SECTION 1 – GENERAL</b> .....	<b>4-3</b>
Definitions .....	4-3
Expression of sentence .....	4-3
Restrictions on imposition of detention .....	4-3
Time in custody not taken into account .....	4-3
Imprisonment and detention normally served in New Zealand .....	4-4
Services Corrective Establishment .....	4-5
■ <b>SECTION 2 – COMMITTAL PROCEDURE</b> .....	<b>4-5</b>
□ <b>PART A: COMMITTAL PROCEDURE WHEN SENTENCE IMPOSED IN NEW ZEALAND</b> .....	<b>4-5</b>
Notification of arrival .....	4-5
Time of admission .....	4-5
Committal order .....	4-5
Escort and documents required for admission .....	4-6
Clothing and necessities when committed .....	4-6
Notification and movement of detainees to SCE Burnham in peacetime .....	4-6
□ <b>PART B: COMMITTAL PROCEDURE WHEN SENTENCE IMPOSED OUTSIDE NEW ZEALAND</b> .....	<b>4-6</b>
Committal to overseas service prison or detention quarter .....	4-6
Removal to New Zealand .....	4-6
Forms .....	4-7
Duties of escort .....	4-7
■ <b>SECTION 3 – DETENTION SERVED AS FIELD PUNISHMENT</b> .....	<b>4-8</b>
■ <b>SECTION 4 – RECONSIDERATION OF SENTENCES OF IMPRISONMENT OR DETENTION</b> .....	<b>4-8</b>
Reconsidering Authority .....	4-8
Functions and powers of the Authority .....	4-8
Petition for reconsideration .....	4-9
Grounds for remitting custodial sentence .....	4-9
Procedure of the Authority .....	4-9
Action by the Authority .....	4-10

■ SECTION 5 – REMISSION FOR GOOD WORK AND CONDUCT .....	4-11
■ SECTION 6 – TRANSFER OF SERVICE PRISONERS AND DETAINEES .....	4-11
■ SECTION 7 – TEMPORARY CUSTODY OF SERVICE PRISONERS OR DETAINEES .....	4-11
■ SECTION 8 – RELEASE OF SERVICE PRISONERS OR DETAINEES .....	4-11
□ PART A: NOTICE OF REMOVAL .....	4-11
Notice of removal .....	4-11
□ PART B: TEMPORARY RELEASE .....	4-11
Definitions .....	4-11
Authority to grant temporary release .....	4-12
Circumstances justifying release .....	4-12
Conditions applicable during temporary release .....	4-13
Currency of sentence during temporary release .....	4-13
□ PART C: PERMANENT RELEASE .....	4-13
When service prisoner or detainee may be released .....	4-13
Timing of release .....	4-14

## SECTION 1 – GENERAL

### DEFINITIONS

**4.1.1 Custody** means:<sup>1</sup>

- a. Detention in civil custody or under close arrest; but
- b. Does not include open arrest.

**4.1.2 Custodial sentence** means a sentence of imprisonment or detention imposed by the Court Martial.

**4.1.3 Detainee** means a person under a sentence that includes the sentence of detention.<sup>2</sup>

**4.1.4 Prison** means any prison established or deemed to be established under the Corrections Act 2004.<sup>3</sup>

**4.1.5 Service prisoner** means a person under a sentence that includes imprisonment under this Act imposed by the Court Martial.<sup>4</sup>

### EXPRESSION OF SENTENCE

**4.1.6** Custodial sentences are to be expressed as follows:

- a. Less than six months in days;
- b. Terms of one or more complete years, in years; or
- c. Other terms in years, months and days as appropriate.

### RESTRICTIONS ON IMPOSITION OF DETENTION

**4.1.7** The Court Martial must not pass a sentence of detention exceeding two years<sup>5</sup> and must not impose the sentence of detention on an officer (including a midshipman or an officer cadet).<sup>6</sup>

### TIME IN CUSTODY NOT TAKEN INTO ACCOUNT

**4.1.8** In determining the length of any custodial sentence to be imposed, the Court Martial must not take into account any period during which the offender has been held in custody but must specify any such period on the committal order.<sup>7</sup> The period so specified may be taken into account in determining the date on which the sentence is to be reconsidered or on which the detainee will become eligible for remission or release.

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1 AFDA s 81A(3).  
 2 AFDA s 2(1).  
 3 AFDA s 2(1).  
 4 AFDA s 2(1).  
 5 AFDA s 83.  
 6 AFDA s 80(3).  
 7 AFDA s 81A(1).

**4.1.9** Paragraph 4.1.7 does not apply in respect of any time spent in custody that is unrelated to any charge before the Court Martial.<sup>8</sup>

#### **IMPRISONMENT AND DETENTION NORMALLY SERVED IN NEW ZEALAND**

**4.1.10** A service prisoner may serve his or her sentence:<sup>9</sup>

- a.** In a prison;
- b.** In a service prison;
- c.** In a detention quarter; or
- d.** In service custody.

**4.1.11** A detainee may serve his or her sentence:<sup>10</sup>

- a.** In a detention quarter;
- b.** In service custody; or
- c.** In the case of a detainee who is:
  - (1)** For the time being attached to any part of the Army or Air Force which is on active service; or
  - (2)** A soldier or airman on active service;
 as field sentence if so ordered by the Court Martial.

**4.1.12** A service prisoner or detainee may serve his or her sentence partly in one form as described above and partly in another, but a detainee who has been transferred to a detention quarter after serving part of the term of his or her sentence as field sentence is not to be subsequently required to serve as field sentence:

- a.** Any further part of that term of sentence; or
- b.** The term or part of the term of a concurrent or consecutive sentence of detention.

**4.1.13** Where a service prisoner or detainee has been sentenced outside New Zealand, he or she is to be removed to New Zealand to serve the sentence unless:

- a.** There is a place in that other country declared by CDF to be a service prison or detention quarter;<sup>11</sup> or

8 AFDA s 81A(2).

9 AFDA s 168(1).

10 AFDA s 168(3).

11 AFDA s 175(1).

- b. There is a place in that other country declared by the officer appointed to command that part of the Armed Forces in which the detainee is serving (**the force commander**) to be a service prison or detention quarter;<sup>12</sup>

and the force commander directs, or is directed by his or her superior commander, that the detainee is to serve his or her sentence in that place.

## SERVICES CORRECTIVE ESTABLISHMENT

- 4.1.14** Subject to paragraph 4.1.15, a detainee who is to serve his or her sentence in New Zealand is normally to be committed to the services Corrective Establishment, Burnham (**SCE Burnham**). If SCE Burnham is at any time closed or unable to be operated, the detainee is to be committed to any temporary detention quarter that may have been duly established.
- 4.1.15** If it is not practicable to send a detainee sentenced in New Zealand to SCE Burnham, e.g. because the sentence is of short duration and suitable transport is not available, the sentence is to be served in a unit detention quarter.

## SECTION 2 – COMMITTAL PROCEDURE

- 4.2.1** This Section is to be read together with Defence Force Orders (Discipline) for the Operation of Detention Quarters in New Zealand and Volume 1 Chapter 9 Section 2.

### PART A: COMMITTAL PROCEDURE WHEN SENTENCE IMPOSED IN NEW ZEALAND

#### NOTIFICATION OF ARRIVAL

- 4.2.2** Before a service prisoner or detainee is committed to a prison or detention quarter, as appropriate, the officer responsible for committing him or her is to ensure that the prison manager or officer commanding the detention quarter is given reasonable notice of the arrival of the prisoner or detainee.

#### TIME OF ADMISSION

- 4.2.3** Where a service prisoner is to be committed to a prison, the time of admission is to be ascertained from the prison concerned.
- 4.2.4** The time of admission for detainees is as prescribed by Volume 1 paragraphs 9.2.3 and 9.2.4.

#### COMMITTAL ORDER

- 4.2.5** See Volume 1 paragraphs 9.2.5 and 9.2.6 for the preparation of committal orders.

<sup>12</sup> AFDA s 176. See also paragraph 1.2.10.

- 4.2.6** Despite paragraph 4.2.5, if a person has been convicted by the Court Martial and sentenced to imprisonment or detention, CDF may order that that person be imprisoned or detained by warrant under his or her hand.<sup>13</sup>

#### **ESCORT AND DOCUMENTS REQUIRED FOR ADMISSION**

- 4.2.7** A service prisoner or detainee committed to a detention quarter is to be accompanied from his or her unit by an escort in accordance with Volume 1 paragraph 3.2.9.
- 4.2.8** A detainee's CO is to ensure that the senior member of the escort is in possession of the documents prescribed by Volume 1 paragraph 9.2.7.
- 4.2.9** A service prisoner's CO is to ensure that the senior member of the escort is in possession of the documents prescribed by Volume 1 paragraph 9.2.7a, d and e.

#### **CLOTHING AND NECESSARIES WHEN COMMITTED**

- 4.2.10** A service prisoner is to be wearing and in possession of civilian clothing only when committed to a prison. The prisoner's CO is to ensure that service kit on issue or on loan to the prisoner is withdrawn into store prior to his or her committal. The CO is also to ensure that appropriate arrangements are made for the safe custody of the prisoner's uniforms and personal effects.
- 4.2.11** Volume 1 paragraphs 9.2.8 and 9.2.9 prescribe clothing and necessities of a detainee when committed to a detention quarter.

#### **NOTIFICATION AND MOVEMENT OF DETAINEES TO SCE BURNHAM IN PEACETIME**

- 4.2.12** See Volume 1 paragraphs 9.2.10 and 9.2.11.

### **PART B: COMMITTAL PROCEDURE WHEN SENTENCE IMPOSED OUTSIDE NEW ZEALAND**

#### **COMMITTAL TO OVERSEAS SERVICE PRISON OR DETENTION QUARTER**

- 4.2.13** A service prisoner or detainee who is to be committed to a service prison or detention quarter outside New Zealand is to be committed in the same manner as if he or she were being committed to a prison or detention quarter in New Zealand.
- 4.2.14** Paragraph 4.2.2 and paragraphs 4.2.5 to 4.2.11 apply subject to any modifications contained in orders issued under AFDA s 176 by the officer appointed to command the part of the force to which the detention quarter belongs.

#### **REMOVAL TO NEW ZEALAND**

- 4.2.15** A service prisoner or detainee who is to be removed to New Zealand to serve his or her sentence or the balance of his or her sentence is either:

- a. To be committed direct to a prison or SCE Burnham, as appropriate, and, where necessary pending committal, to be held in interim custody pursuant to AFDA s 174; or
- b. To be committed to a local service prison or detention quarter and then subsequently transferred to a prison or SCE Burnham by order of a competent service authority.<sup>14</sup>

**4.2.16** In any such case, paragraphs 4.2.5 to 4.2.11 apply in the same manner as if the service prisoner or detainee had been sentenced in New Zealand. When the prisoner or detainee is removed to New Zealand, the competent service authority authorising the removal is to make arrangements for his or her custody while in transit.

## FORMS

**4.2.17** The forms to be used in cases to which paragraph 4.2.15a applies are:

- a. The appropriate committal order; and
- b. The order in form MD 629A for interim custody and transfer from one form of custody to another.

**4.2.18** The original committal order is to be given to the prison or SCE Burnham and shown where necessary to any place of interim custody used while in transit. Sufficient signed copies of form MD 629A are required for distribution to each place of interim custody.

**4.2.19** The forms to be used in cases to which paragraph 4.2.15b applies are:

- a. The appropriate committal order; and
- b. The order transferring the service prisoner or detainee in form MD 629 (which includes provision for interim custody under AFDA s 174).

**4.2.20** The original committal order is to be taken by the escort to the new place of imprisonment or detention and shown where necessary to any place of interim custody used while in transit. Sufficient copies of form MD 629 are required for distribution to each place of interim custody.

**4.2.21** Forms may be modified where necessary to meet the circumstances of the case.

## DUTIES OF ESCORT

**4.2.22** The senior member of the escort for a service prisoner or detainee removed to New Zealand is to carry the forms specified above together with the applicable documents listed in paragraphs 4.2.7 to 4.2.9. On arrival in New Zealand, the escort is to accompany the prisoner or detainee to the prison or detention quarter and complete the formalities of admission.

### SECTION 3 – DETENTION SERVED AS FIELD PUNISHMENT

**4.3.1** A detainee who is:

- a.** For the time being attached to any part of the Army or the Air Force which is on active service; or
- b.** A soldier or airman on active service;

may be ordered by the Court Martial to serve the term of his or her detention as field punishment.<sup>15</sup>

**4.3.2** Volume 1 Chapter 9 Section 3 prescribes orders governing detention when served as field punishment.

### SECTION 4 – RECONSIDERATION OF SENTENCES OF IMPRISONMENT OR DETENTION

#### RECONSIDERING AUTHORITY

**4.4.1** The Reconsidering Authority (**Authority**) was established on 1 July 2009.<sup>16</sup> The Authority consists of:<sup>17</sup>

- a.** A Judge appointed by the Chief Judge of the Court Martial; and
- b.** Two or more superior commanders appointed by or on behalf of the JAG.

#### FUNCTIONS AND POWERS OF THE AUTHORITY

**4.4.2** The Authority must reconsider every custodial sentence that is for a term of six months or more and may reconsider any other custodial sentence so imposed.<sup>18</sup>

**4.4.3** The Authority must reconsider a custodial sentence at least every six months while it is being served.<sup>19</sup> The first such period is to be calculated including any period during which the offender was held in custody in respect of the offence.<sup>20</sup>

**4.4.4** After reconsidering a custodial sentence, the Authority may remit the whole or any part of the sentence that remains to be served on any of the grounds set out in paragraph 4.4.6.<sup>21</sup>

15 AFDA s 168(3)(c).

16 AFDA s 151(1), as amended by the Armed Forces Discipline Amendment Act (No 2) 2007.

17 AFDA s 151(2).

18 AFDA s 152(1).

19 AFDA s 152(2).

20 AFDA s 152(4).

21 AFDA s 158(1).



## PETITION FOR RECONSIDERATION

**4.4.5** The Authority must also reconsider a custodial sentence if the service prisoner or detainee petitions the Authority to do so.<sup>22</sup> Any such petition must be lodged in form MD 621 with the officer in charge of the place where the service prisoner or detainee is confined.<sup>23</sup> That officer must then forward the petition to the Authority (c/- Registrar of the Court Martial) as soon as practicable.<sup>24</sup>

## GROUNDS FOR REMITTING CUSTODIAL SENTENCE

**4.4.6** The grounds on which the Authority may remit the whole or any part of a custodial sentence that remains to be served are as follows:<sup>25</sup>

- a. Good conduct by the service prisoner or detainee during the term of the sentence;
- b. Compassionate grounds; and
- c. Any other grounds that the Authority thinks proper.

**4.4.7** A service prisoner committed to a prison is not eligible for parole under the Parole Act 2002<sup>26</sup> and is not entitled to remission for good work and conduct under Volume 1 Chapter 9 Section 4. The Authority may take this into account in reconsidering such a sentence.

## PROCEDURE OF THE AUTHORITY

**4.4.8** The Authority must give a service prisoner or detainee whose sentence is to be reconsidered at least 14 days written notice of the reconsideration.<sup>27</sup>

**4.4.9** The service prisoner or detainee may request a hearing before the Authority and be legally represented at the hearing.<sup>28</sup>

**4.4.10** If the service prisoner or detainee requests a hearing under paragraph 4.4.9, the DMP must be given reasonable prior written notice of the date and time of the hearing and may attend and be heard at the hearing (whether personally or through an agent).<sup>29</sup>

**4.4.11** If the service prisoner or detainee does not request a hearing, the Authority must conduct the reconsideration of the sentence on the papers.<sup>30</sup>

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22 AFDA s 154(1).  
 23 AFDA s 153(2) and RP 141.  
 24 AFDA s 153(3).  
 25 AFDA s 158(1).  
 26 AFDA s 168(2).  
 27 AFDA s 155(1).  
 28 AFDA s 155(2).  
 29 AFDA s 155(3).  
 30 AFDA s 155(4).

**4.4.12** The Authority may:<sup>31</sup>

- a. Call for any written reports that it thinks fit in respect of a service prisoner or detainee serving a custodial sentence that is before it for reconsideration; and
- b. Hear evidence if a hearing is held.

**4.4.13** Subject to the preceding paragraphs, the Authority may regulate its own procedure as it sees fit, except that if it is necessary for the Authority to vote on any matter, each member has one vote and the matter is to be determined by a majority of votes.<sup>32</sup>

#### **ACTION BY THE AUTHORITY**

**4.4.14** The Authority is to enter its decision in form MD 624B using one of the following forms of words:<sup>33</sup>

- a. **Full remission.** *All of the sentence of [imprisonment][detention] remaining to be served is remitted, on the grounds that [insert grounds].*
- b. **Partial remission.** *The following part, namely [insert period], of the sentence of [imprisonment][detention] remaining to be served is remitted, on the grounds that [insert grounds].*
- c. **No remission.** *No part of the sentence of [imprisonment][detention] remaining to be served is remitted, on the grounds that [insert grounds].*

**4.4.15** The Authority must send the completed form MD 624B to the accused's CO or, if the accused is in custody, the person in charge of the place in which the accused is confined.<sup>34</sup>

**4.4.16** The CO or the person in charge of the place in which the accused is confined must:<sup>35</sup>

- a. Inform the accused of the decision;
- b. Note the details of that promulgation on the form; and
- c. Return the form to the Authority (c/- the Registrar of the Court Martial).

**4.4.17** The completed form MD 624B is to be attached to and form part of the record of proceedings of the relevant trial.<sup>36</sup>

31 AFDA s 156.

32 AFDA s 157.

33 AFDA s 158(2) and RP 142(1).

34 RP 142(2).

35 RP 142(3).

36 RP 142(4).

- 4.4.18** If the Authority remits the sentence remaining to be served, the Authority is to arrange for the release of the prisoner or detainee in accordance with Section 8 Part C, ensuring that the remission is from such a date as will permit the actual release of the prisoner or detainee from custody on the date on which it is intended that the sentence should cease. The manager or officer is to enter the date of the release on form MD 624B before returning it to the Authority.

### **SECTION 5 – REMISSION FOR GOOD WORK AND CONDUCT**

- 4.5.1** As a general rule, a detainee serving a sentence of more than 24 days is entitled by good work and conduct to have one third of the sentence remitted. See Volume 1 Chapter 9 Section 4 for the detailed rules relating to this.

### **SECTION 6 – TRANSFER OF SERVICE PRISONERS AND DETAINEES**

- 4.6.1** See Volume 1 Chapter 9 Section 5, which applies to the transfer of service prisoners and detainees sentenced by the Court Martial, with any necessary modifications.

### **SECTION 7 – TEMPORARY CUSTODY OF SERVICE PRISONERS OR DETAINEES**

- 4.7.1** See Volume 1 Chapter 9 Section 6, which applies to the temporary custody of service prisoners and detainees sentenced by the Court Martial, with any necessary modifications.

### **SECTION 8 – RELEASE OF SERVICE PRISONERS OR DETAINEES**

#### **PART A: NOTICE OF REMOVAL**

#### **NOTICE OF REMOVAL**

- 4.8.1** If it is necessary to remove a service prisoner or detainee from a service prison or detention quarter prior to the expiry of his or her sentence, one day's notice of the day and hour of removal is, when practicable, to be given to the officer commanding the prison or detention quarter by the officer authorising the removal.

#### **PART B: TEMPORARY RELEASE**

#### **DEFINITIONS**

- 4.8.2** For the purposes of this Section:
- a.** **Spouse** means the wife, husband, or civil union partner of, or a person living in a relationship in the nature of a marriage with, the service prisoner or detainee.
  - b.** **Father** means a service prisoner or detainee who is or is to be the birth father or adoptive father of the relevant child or children.

**AUTHORITY TO GRANT TEMPORARY RELEASE**

**4.8.3** On the recommendation of the manager, commandant or CO, a superior commander may grant a temporary release for compassionate reasons to a service prisoner or detainee for a period not exceeding seven days. The order for temporary release is to be in form MD 631B. If the circumstances so warrant, he or she may grant an extension for a further period not exceeding seven days, but further extensions beyond that may only be granted with the prior approval of the Chief of the service to which the prisoner or detainee belongs.

**4.8.4** The period of temporary release is to be taken as annual leave.

**CIRCUMSTANCES JUSTIFYING RELEASE**

**4.8.5** Temporary release for compassionate reasons may be granted only for the following reasons:

- a.** Death or critical illness of spouse or near relative if the superior commander is satisfied that:
  - (1)** The presence of the service prisoner or detainee is essential; and
  - (2)** Compassionate leave would have been granted were he or she not serving a sentence;
- b.** Damage to the home of the family or near relative of the service prisoner or detainee if the superior commander is satisfied that his or her presence is essential;
- c.** Confinement of the spouse prior to or subsequent to the birth of a child if the superior commander considers that the service prisoner or detainee's presence as the father or principal caregiver is essential to enable domestic arrangements to be made;
- d.** Urgent domestic difficulties such as making arrangements for the care of children deserted by the service prisoner or detainee's spouse if the superior commander is satisfied that his or her attendance is essential; or
- e.** In any other circumstances if the superior commander considers those circumstances require the prompt attendance of the service prisoner or detainee and his or her attendance cannot be postponed until the expiry of the sentence.

## CONDITIONS APPLICABLE DURING TEMPORARY RELEASE

- 4.8.6** The superior commander granting temporary release may place any conditions on the service prisoner or detainee which he or she considers to be necessary or prudent, e.g. conditions as to custody during the period of temporary release or restrictions on the place or places where the prisoner or detainee may go. Escorts will not normally be provided. The prisoner or detainee is to be handed form MD 631C, informing him or her of the terms of the release.
- 4.8.7** If the service prisoner or detainee fails to comply with any conditions subject to which he or she was temporarily released, the period of his or her temporary release is thereby terminated.
- 4.8.8** If the service prisoner or detainee fails to comply with any of the conditions or fails to return on the due date, he or she may be arrested without warrant by any member of the Police under AFDA s 91(2),<sup>37</sup> or taken into service custody pending his or her return to the prison or service penal establishment. The prisoner or detainee may be charged with an offence against the AFDA or, where applicable, dealt with for a breach of establishment discipline under orders made under the AFDA.

## CURRENCY OF SENTENCE DURING TEMPORARY RELEASE

- 4.8.9** If a service prisoner or detainee is temporarily released, the period of his or her release is not to be counted as time spent serving his or her sentence. For the purposes of this paragraph, the period of his or her release commences at the beginning of the day on which he or she is released from custody and ends at the beginning of the day on which he or she returns to custody or on which his or her release is otherwise terminated, whichever is the earlier.

## PART C: PERMANENT RELEASE

### WHEN SERVICE PRISONER OR DETAINEE MAY BE RELEASED

- 4.8.10** A service prisoner or detainee who has been sentenced by the Court Martial is not to be permanently released from a prison or service penal establishment otherwise than:
- a.** Pursuant to an order of the Court Martial, the Court Martial Appeal Court, or a civil court of competent jurisdiction; or
  - b.** On the normal expiration of the prisoner or detainee's sentence, taking into account any remission for good work and conduct awarded under Volume 1 Chapter 9 Section 4.

## TIMING OF RELEASE

- 4.8.11** Subject to paragraph 4.8.13 and the exigencies of the service, a service prisoner or detainee who is serving his or her sentence in a service penal establishment is to be released at 1400 on the day on which his or her sentence expires after allowing for any remission or reduction (**release date**), unless the commandant authorises his or her being kept in custody until the expiration of the sentence on the ground that his or her conduct and work while under sentence were unsatisfactory.
- 4.8.12** Notwithstanding paragraph 4.8.11, a service prisoner or detainee may be detained until the close of his or her release date, i.e. until midnight on that day.
- 4.8.13** If the day on which the sentence expires is a Sunday, Christmas Day, Good Friday, or, in New Zealand or Australia, Anzac Day, or any other statutory holiday and the service prisoner or detainee cannot commence his or her journey to his or her unit or home destination on that day, the prisoner or detainee is to be released at 1400 on the last preceding day on which he or she can commence his or her journey.

## Chapter 5:

# LEGAL AID AND REMUNERATION OF COUNSEL

■ <b>SECTION 1 – LEGAL AID IN THE SUMMARY APPEAL COURT</b> .....	<b>5-2</b>
■ <b>SECTION 2 – LEGAL AID IN THE COURT MARTIAL</b> .....	<b>5-2</b>
Right to representation .....	5-2
Object of the Armed Forces Legal Aid Scheme .....	5-2
Application for legal aid .....	5-2
Authority to approve legal aid .....	5-3
Assignment of counsel .....	5-3
Contribution by accused .....	5-3
Waiver of contribution .....	5-4
Recovery of contribution .....	5-4
Fees .....	5-4
Action where accused engages counsel independently .....	5-4
■ <b>SECTION 3 – LEGAL AID IN THE COURT MARTIAL APPEAL COURT</b> .....	<b>5-4</b>
Right to representation .....	5-4
Object of the Armed Forces Legal Aid Scheme .....	5-5
Application for legal aid .....	5-5
Authority to approve legal aid .....	5-5
Assignment of counsel .....	5-5
Contribution by appellant .....	5-5
Fees .....	5-5
Action where appellant engages counsel independently .....	5-5
■ <b>SECTION 4 – REMUNERATION OF COUNSEL</b> .....	<b>5-6</b>
Introduction .....	5-6
Armed Forces Defence Counsel Panel .....	5-6
Classification of counsel .....	5-7
Certifying officers .....	5-7
Submission of claims .....	5-8
Approval of a lesser fee .....	5-8
Claims in excess of the certified scale of fees .....	5-8
Payment of claims .....	5-8
Certified scale .....	5-9
■ <b>ANNEX A – ACKNOWLEDGEMENT OF DEBT</b> .....	<b>5-10</b>
■ <b>ANNEX B – CERTIFIED SCALE OF FEES</b> .....	<b>5-11</b>

## SECTION 1 – LEGAL AID IN THE SUMMARY APPEAL COURT

- 5.1.1** The rules for obtaining a grant of legal aid in respect of an appeal to the SACNZ are prescribed in Volume 1 Chapter 10 Section 4.

## SECTION 2 – LEGAL AID IN THE COURT MARTIAL

### RIGHT TO REPRESENTATION

- 5.2.1** An accused who is to be tried by the Court Martial or who wishes to apply to the Court Martial for bail has the right to be represented by a lawyer.<sup>1</sup> Such a lawyer may be either:
- a.** Counsel assigned by the Registrar from the Armed Forces Defence Counsel Panel, in response to an application for Armed Forces legal aid; or
  - b.** Counsel of the accused's own choice employed by the accused at his or her own expense.
- 5.2.2** Alternatively, an accused may choose to:
- a.** Be represented by a member of the Armed Forces (**defender**); or
  - b.** Represent himself or herself.
- 5.2.3** If the accused wishes to be represented by a defender, he or she is to send a request to his or her CO in writing. The request is to state the service description and unit of the member requested. The member requested is to be released for duty as the accused's defender if he or she is reasonably available. If the member requested is not reasonably available, the CO may appoint an alternative member as the accused's defender.

### OBJECT OF THE ARMED FORCES LEGAL AID SCHEME

- 5.2.4** The object of the Armed Forces Legal Aid Scheme (**Scheme**) in the Court Martial context is to ensure that any accused who is to be tried, or have an application for bail determined, by the Court Martial has the opportunity of being represented by counsel of suitable skill and experience if he or she applies for legal aid.
- 5.2.5** The Scheme does not provide for the accused to be represented by counsel of the appellant's own choice.

### APPLICATION FOR LEGAL AID

- 5.2.6** If an accused wishes to be represented in the Court Martial by counsel on legal aid, the person must complete an application for legal aid in form MD 610<sup>2</sup> and send it to the Registrar of the Court Martial.

<sup>1</sup> CMA s 68.

<sup>2</sup> See Volume 1 Chapter 7 paragraph 7.9.5 and Chapter 13 Section 2.



- 5.2.7** If the accused wishes to establish that he or she is unable to pay a 3% legal aid contribution, he or she must include with his or her application a statement of means in form MD 610A.<sup>3</sup>

#### **AUTHORITY TO APPROVE LEGAL AID**

- 5.2.8** The Registrar of the Court Martial is to approve legal aid for every accused whose case is to be heard by the Court Martial and who applies for legal aid.

#### **ASSIGNMENT OF COUNSEL**

- 5.2.9** Once the Registrar has made a grant of legal aid, he or she is to:
- a.** Assign counsel from the Armed Forces Defence Counsel Panel;
  - b.** Notify the appellant's CO of the assignment and the contribution required under paragraph 5.2.12; and
  - c.** Notify the counsel assigned and invite him or her to contact the unit to arrange a meeting with the appellant. In some circumstances, contact with the appellant may be limited to electronic communications due to operational circumstances.
- 5.2.10** If, in the course of preparing for the proceeding, the counsel assigned concludes that the case is both so exceptionally complex and so serious that it warrants briefing senior counsel, and informs the Registrar accordingly, the Registrar may authorise the briefing of senior counsel.
- 5.2.11** Selection of senior counsel is a matter for the Registrar, but in reaching his or her decision the Registrar must consult with the JAG.

#### **CONTRIBUTION BY ACCUSED**

- 5.2.12** Subject to paragraphs 5.2.13 and 5.2.14, the accused is ordinarily required to contribute towards the cost of legal aid:
- a.** If the appellant is a member of the regular forces or the Civil Staff, 3% of his or her gross taxable pay for the 12 months immediately before the commencement of the relevant proceedings in the Court Martial;
  - b.** If the accused is a member of the territorial forces, a sum similarly calculated but on the basis of pay for notional continuous service for 365 days prior to the commencement of the proceedings; or
  - c.** In any other case, a comparable sum based on the Registrar's assessment of the accused's Service equivalent for pay purposes.
- 5.2.13** When the sum calculated in accordance with paragraph 5.2.12 is greater than the sum actually paid to the accused's counsel, the excess is to be refunded to the appellant.

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3 See Volume 1 Chapter 13 Section 2.

## WAIVER OF CONTRIBUTION

- 5.2.14** The Registrar may waive in whole or in part recovery of the accused's contribution when he or she is satisfied that it is impracticable or would cause undue hardship to order recovery of the standard contribution.

## RECOVERY OF CONTRIBUTION

- 5.2.15** On receipt of the Registrar's notification of the grant of legal aid, the accused's unit is to take the following action:
- a.** **Accused is a member of the regular forces or the Civil Staff.** Instruct the appropriate pay office to arrange payment, in accordance with the accused's election in the application, of his or her contribution of:
    - (1)** Three percent of the accused's gross taxable pay for the 12 months immediately before the commencement of the proceedings in the Court Martial; or
    - (2)** Such lesser sum as the Registrar has determined under paragraph 5.2.14; or
  - b.** **In any other case.** Instruct the appropriate pay office to recover as an immediate cash payment as much of the contribution as is practicable and, in respect of the balance, to require the accused to sign an acknowledgement of debt and undertaking to pay the money owing by regular fortnightly payments. A specimen form of acknowledgement of debt is set out at Annex A.

## FEES

- 5.2.16** The fees payable to members of the Armed Forces Defence Counsel Panel are prescribed by the Part 2 of the AFDR and Section 4 of this Chapter.

## ACTION WHERE ACCUSED ENGAGES COUNSEL INDEPENDENTLY

- 5.2.17** Where the accused engages counsel independently, the accused is solely responsible for the payment of his or her fees.

## SECTION 3 – LEGAL AID IN THE COURT MARTIAL APPEAL COURT

### RIGHT TO REPRESENTATION

- 5.3.1** A person (**appellant**) who wishes to appeal to the Court Martial Appeal Court (**CMAC**) has the right to be represented by a lawyer<sup>4</sup> who may be either:
- a.** Counsel assigned by the Registrar of the Court Martial from the Armed Forces Defence Counsel Panel, in response to an application for Armed Forces legal aid; or
  - b.** Counsel of the appellant's own choice employed by the appellant at his or her own expense.

**5.3.2** Alternatively, an appellant may choose to conduct his or her own appeal.

### **OBJECT OF THE ARMED FORCES LEGAL AID SCHEME**

**5.3.3** The object of the Armed Forces Legal Aid Scheme (**Scheme**) in the CMAC context is to ensure that any person who wishes to appeal to the CMAC against a determination of the Court Martial has the opportunity of being represented by counsel of suitable skill and experience if he or she applies for legal aid.

**5.3.4** The Scheme does not provide for the accused to be represented by counsel of the appellant's own choice.

### **APPLICATION FOR LEGAL AID**

**5.3.5** If a person wishes to appeal a determination of the Court Martial to the CMAC and be represented by counsel on legal aid, the person must complete an application for legal aid in form MD 610<sup>5</sup> and send it to the Registrar of the Court Martial.

**5.3.6** If the person wishes to establish that he or she is unable to pay a 3% legal aid contribution, he or she must include with his or her application a statement of means in form MD 610A.<sup>6</sup>

### **AUTHORITY TO APPROVE LEGAL AID**

**5.3.7** The Registrar of the Court Martial is to approve legal aid for every person who wishes to appeal to the CMAC against a determination of the Court Martial and who applies for legal aid.

### **ASSIGNMENT OF COUNSEL**

**5.3.8** Once the Registrar of the Court Martial has made a grant of legal aid, he or she is to proceed in accordance with paragraphs 5.2.9 to 5.2.11, with any necessary modifications.

### **CONTRIBUTION BY APPELLANT**

**5.3.9** The contribution of an appellant towards the cost of his or her legal aid is to be calculated and recovered in accordance with paragraphs 5.2.12 to 5.2.15, with any necessary modifications.

### **FEEES**

**5.3.10** The fees payable to members of the Armed Forces Defence Counsel Panel are prescribed by the Part 2 of the AFDR and Section 4 of this Chapter.

### **ACTION WHERE APPELLANT ENGAGES COUNSEL INDEPENDENTLY**

**5.3.11** Where the appellant engages counsel independently, the appellant is solely responsible for the payment of his or her fees.

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5 See Volume 1 Chapter 13 Section 2.

6 See Volume 1 Chapter 13 Section 2.

## SECTION 4 – REMUNERATION OF COUNSEL

### INTRODUCTION

- 5.4.1** Part 2 of the Armed Forces Discipline Regulations 2008 (**AFDR**) prescribes the fees and allowances payable for professional legal services rendered by civilian counsel in connection with the administration of military law.
- 5.4.2** The AFDR do not provide for the remuneration of any person who holds appointment as a Judge under the Court Martial Act 2007 or the Court Martial Appeals Act 1953. The remuneration of such judicial officers is administered separately under those Acts.

### ARMED FORCES DEFENCE COUNSEL PANEL

- 5.4.3** The Registrar of the Court Martial is to maintain an Armed Forces Defence Counsel Panel (**Panel**), consisting of counsel who are suitably qualified and experienced to appear in the SACNZ, the Court Martial and the CMAC.
- 5.4.4** Before making an appointment to the Panel, the Registrar is to make such enquiries as he or she considers appropriate in order to be satisfied that the person to be appointed is suitably qualified and experienced in the area of military law and advocacy, and is in all other respects a fit and proper person to be appointed to the Panel.
- 5.4.5** The following persons are eligible for appointment to the Panel:
- a.** Suitably qualified and experienced officers on an active list of the territorial forces;
  - b.** Suitably qualified and experienced officers on an active list of the reserve forces; and
  - c.** Such other suitably qualified and experienced persons as the Registrar considers necessary to supplement those persons appointed under subparagraphs a and b.
- 5.4.6** Appointments to the Panel are to be for such a term (not exceeding five years) as the Registrar may determine. A person may be re-appointed to the Panel at the discretion of the Registrar.
- 5.4.7** All members of the Panel are to:
- a.** Comply with the duties and responsibilities of counsel set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; and
  - b.** Comply with the duties and responsibilities of counsel set out in the Manual of Armed Forces Law.
- 5.4.8** An appointment may be suspended or terminated by the Registrar if the Registrar is satisfied that the person:

- a. No longer meets the criteria for appointment; or
- b. Has failed to comply with paragraph 5.4.7; or
- c. Has otherwise conducted himself or herself in a manner which would make it inappropriate for him or her to remain as a member of the Panel.

**5.4.9** Nothing in the above provisions precludes a regular force or territorial force legal officer appearing as counsel in the SACNZ, Court Martial or CMAC.

**5.4.10** A member of the Panel may accept instructions to appear as counsel for the DMP in a proceeding if he or she has not first been instructed in the same proceeding by the Registrar. The DMP may also instruct civilian counsel who are not members of the Panel, at his or her discretion.

### CLASSIFICATION OF COUNSEL

**5.4.11** For the purposes of remuneration under the AFDR, the Registrar is to classify counsel in accordance with the following classifications and qualifying criteria:<sup>7</sup>

- a. **Senior counsel.** Counsel who have practised at the bar for a continuous period of more than seven years, including appearances:
  - (1) In criminal trials and litigation involving complex legal issues; or
  - (2) As lead counsel in more than 10 trials in the Court Martial<sup>8</sup>; or
  - (3) As lead counsel in proceedings before courts of inquiry, the SACNZ or the CMAC.
- b. **Intermediate counsel.** Counsel who have practised at the bar for a continuous period of more than four years, including appearances:
  - (1) In criminal trials; or
  - (2) As lead counsel in more than five trials in the Court Martial<sup>8</sup>; or
  - (3) As lead counsel in proceedings before courts of inquiry, the SACNZ or the CMAC.
- c. **Junior counsel.** Counsel who do not satisfy the criteria for senior counsel or intermediate counsel.

### CERTIFYING OFFICERS

**5.4.12** For the purposes of the AFDR:

- a. The Registrar, or a person nominated by him or her, is designated the certifying officer for legal services provided by any counsel assigned or appointed by the Registrar to appear in the SACNZ, the Court Martial, or the CMAC;

<sup>7</sup> AFDR 17.

<sup>8</sup> This includes appearances before courts-martial conducted under the law as it was prior to 1 July 2009: AFDR 17(4).

- b. The DMP, or a person nominated by him or her, is designated the certifying officer for legal services provided by any counsel assigned or appointed by the DMP to appear in the SACNZ, the Court Martial, or the CMAC; and
- c. DGDLS, or a person nominated by him or her, is designated the certifying officer for any claims by lecturers pursuant to AFDR 20.

### SUBMISSION OF CLAIMS

- 5.4.13** Any person providing legal services to which the AFDR apply is to submit any claim for fees and allowances payable under the AFDR to the appropriate certifying officer.<sup>9</sup>
- 5.4.14** Subject to AFDR 26, certifying officers are to certify claims in accordance with the criteria set out in AFDR 25.

### APPROVAL OF A LESSER FEE

- 5.4.15** Where a certifying officer approves a lesser fee in accordance with AFDR 16, the certifying officer is to inform the claimant of the reasons for the lesser fee.

### CLAIMS IN EXCESS OF THE CERTIFIED SCALE OF FEES

- 5.4.16** Where in the opinion of counsel appointed to appear in the SACNZ, the Court Martial or the CMAC, that counsel's fee is likely to exceed the maximum allowed by the certified scale of fees, counsel is to promptly advise the relevant certifying officer.
- 5.4.17** Claims which exceed the certified scale of fees are to be forwarded to the certifying officer together with a memorandum setting out the exceptional circumstances (if any) which justify such a claim. If the certifying officer considers that a fee in excess of the certified scale of fees is justified by reason of exceptional circumstances, the certifying officer is to refer the claim to the Solicitor-General.<sup>10</sup>

### PAYMENT OF CLAIMS

- 5.4.18** Certifying officers are to forward certified invoices to the following officers for payment:
- a. **Services performed for Naval units.** Financial Controller (Navy), Naval Support Command.
  - b. **Service performed for Army units.** Director of Finance (Army), Army General Staff.
  - c. **Services performed for Air Force units.** Financial Management Director (Air Force), Air Staff.

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9 AFDR 24.

10 AFDR 28.

- d. **Services performed for HQ JFNZ.** J9, HQ JFNZ.
- e. **Services performed for HQ NZDF.** Manager Headquarters Finance, HQ NZDF.

**5.4.19** The persons named above are authorised to certify that the services charged for have been duly performed and to arrange payment for those services.<sup>11</sup>

#### **CERTIFIED SCALE**

**5.4.20** CDF is required to issue, prior to 1 July each year, a certified scale fixing the fees and allowances payable under the AFDR for work done in the coming year.<sup>12</sup>

**5.4.21** The certified scale also fixes travelling allowances and expenses payable under the AFDR. The base hourly rate of remuneration is the same as the senior hourly rate of remuneration determined by the Solicitor-General under the Crown Solicitors Regulations 1994. The scale of fees is available on the NZDF intranet on the [Defence Legal Services](#) website or at:  
[http://org/dls/PLD/Scale\\_of\\_Fees\\_For\\_External\\_Legal\\_Counsel.doc](http://org/dls/PLD/Scale_of_Fees_For_External_Legal_Counsel.doc).

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11 AFDR 17.

12 AFDR 15.

**ANNEX A**

**ACKNOWLEDGEMENT OF DEBT**

To: The Commanding Officer

\_\_\_\_\_  
(Unit)

**I ACKNOWLEDGE** that I owe the Crown the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, being the balance of my contribution in respect of a grant of legal aid made to assist me in obtaining representation in the Court Martial\*/Court Martial Appeal Court\*.

**AND I AGREE** to pay the said sum by equal fortnightly instalments of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, the first of such instalments being due on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

**AND I ACKNOWLEDGE** that, in the event of my defaulting in payment of any one such instalment, the whole of the balance then outstanding is immediately payable and may be recovered by process of law.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_  
(Signature of accused\*/appellant\*)

\_\_\_\_\_  
(Full name of accused\*/appellant\*)

Witness: \_\_\_\_\_

Occupation: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\*Delete words which are inapplicable



## ANNEX B

### CERTIFIED SCALE OF FEES

The Certified Scale of Fees has been removed from this manual and transferred to the NZDF intranet and is available on the NZDF intranet on the [Defence Legal Services](#) website or at: [http://org/dls/PLD/Scale\\_of\\_Fees\\_For\\_External\\_Legal\\_Counsel.doc](http://org/dls/PLD/Scale_of_Fees_For_External_Legal_Counsel.doc).

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# DISCIPLINE FORMS

■ SECTION 1 – FORMS ..... 6-2

**SECTION 1 – FORMS**

**6.1.1** The following forms are prescribed for use in connection with proceedings before the SACNZ and the Court Martial.<sup>1</sup>

<b>MD 609</b>	Notice of Abandonment of Appeal to the Summary Appeal Court
<b>MD 612</b>	Request to Be Brought Before the Court Martial to Enter Plea of Guilty
<b>MD 614</b>	Court Martial Notice of Sitting
<b>MD 615</b>	Notice of Assignment of Military Members
<b>MD 616</b>	Notice of Objection to Assignment as Military Member
<b>MD 617</b>	Summary Appeal Court Notice of Sitting
<b>MD 618</b>	Court Martial Witness Summons
<b>MD 618A</b>	Summary Appeal Court Witness Summons
<b>MD 619</b>	Guide for Military Members of the Court Martial of New Zealand
<b>MD 621</b>	Petition to Reconsidering Authority
<b>MD 623</b>	Guide to Trial Procedure of the Court Martial of New Zealand
<b>MD 623A</b>	Guide to Procedure of the Court Martial of New Zealand: Interlocutory and Bail Proceedings before a Judge alone
<b>MD 624</b>	Record of Trial Proceedings of the Court Martial of New Zealand
<b>MD 624A</b>	Record of Interlocutory/Bail Proceedings of the Court Martial of New Zealand
<b>MD 624B</b>	Record of Reconsideration of Custodial Sentence
<b>MD 625</b>	Guide to Procedure of the Summary Appeal Court of New Zealand

<sup>1</sup> Some forms relating to the SACNZ and to bail proceedings in the Court Martial are located in Volume 1 Chapter 13 Section 2.

**NOTICE OF ABANDONMENT OF APPEAL**  
*Rule 43 of the Armed Forces Discipline Rules of Procedure 2008*

**IN THE SUMMARY APPEAL COURT OF NEW ZEALAND**

To the Registrar of the Summary Appeal Court  
C/- Headquarters New Zealand Defence Force, Wellington

I, \_\_\_\_\_,  
*Full name or Service description of appellant*

having sent to the Summary Appeal Court a notice of appeal or application for leave to appeal against:

\_\_\_\_\_  
*Set out the determination of the disciplinary officer against which you are appealing*

now wish to give you notice that:

- a I do not intend further to prosecute my appeal; and
- b As from the date of this notice, I abandon all further proceedings concerning that appeal.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
*Signature of appellant*

\*Witness to signature of \_\_\_\_\_  
*Full name or Service description of appellant*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Address*

\_\_\_\_\_  
*Description*

\*Signature of the appellant must be witnessed only if the appellant signs the notice in person.

**REQUEST TO BE BROUGHT BEFORE THE COURT MARTIAL TO ENTER PLEA OF GUILTY**  
*Rule 89 of the Armed Forces Discipline Rules of Procedure 2008*

**IN THE COURT MARTIAL OF NEW ZEALAND**

R v \_\_\_\_\_  
*Full name or Service description of accused*

To the Registrar of the Court Martial  
C/- Headquarters New Zealand Defence Force, Wellington

I, \_\_\_\_\_  
*Full name or Service description of accused*

having been remanded for trial in the Court Martial on a charge of:

\_\_\_\_\_  
*Specify charge(s)*

now wish, of my own free will, to plead guilty to that charge. I therefore request that I be brought before the Court Martial as soon as practicable so that I may plead guilty to that charge and be sentenced accordingly.

My full address (if not in custody) is:

\_\_\_\_\_  
*Signature*

The above written request was signed before me, after having been read over to me by the accused person on \_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

Counsel\*/Defender\* for the accused

\* Select one.



COURT MARTIAL OF NEW ZEALAND

**NOTICE OF SITTING**

*Sections 21 and 43 of the Court Martial Act 2007*

Given by \_\_\_\_\_, Registrar of the Court Martial of New Zealand

Take notice that the Court Martial of New Zealand, comprising the Judge (and military members\*) listed

below, is to sit at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

at \_\_\_\_\_ in order to try\* / hear an application in respect of\*:

\_\_\_\_\_  
\_\_\_\_\_

Judge: \_\_\_\_\_

Military members:\* \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Officers under instruction:\* \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Clerk of the Court: \_\_\_\_\_

Court Orderly:\* \_\_\_\_\_

Counsel for the Director of Military Prosecutions: \_\_\_\_\_

Counsel for the accused \*/applicant\*:

\_\_\_\_\_  
\_\_\_\_\_

\* Delete if not applicable.

The senior military member is a competent service authority for the purpose of issuing any orders pursuant to sections 169 or 174 of the Armed Forces Discipline Act 1971 which are required should the Court Martial sentence the accused to imprisonment or detention.\*

Any officer or warrant officer may seek the leave of the Judge to attend a trial by the Court Martial as an officer or warrant officer under instruction by giving notice of his or her application to do so to the Registrar of the Court Martial not later than 24 hours prior to the commencement of the trial.\*

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_

\_\_\_\_\_

**Registrar**

\* Delete if not applicable.





COURT MARTIAL OF NEW ZEALAND

**NOTICE OF ASSIGNMENT OF MILITARY MEMBERS<sup>1</sup>**

*Section 26(1)(b), Court Martial Act 2007*

TO: \_\_\_\_\_  
*Service description of accused*

**WHEREAS** the Director of Military Prosecutions had laid before me a charge sheet alleging that you have committed an\* offence(s\*) against section(s\*) \_\_\_\_\_

of the Armed Forces Discipline Act 1971

**AND WHEREAS** the Court Martial is to sit at \_\_\_\_\_ on \_\_\_\_\_  
*Place*  
*Date* to hear the charge(s)

**NOW THEREFORE** take notice that I have assigned the following persons to hear the charge(s\*) against you as military members of the Court Martial:<sup>2</sup>

**AND FURTHERMORE** take notice that you have the right under section 27 of the Court Martial Act 2007 to serve on me a written notice in form MD 616 that you object to the assignment of any of the abovementioned persons as a military member, on the grounds that the person might not act, or is not in a position to act, impartially, or that the person is not qualified to sit as a military member under section 22 of the Court Martial Act. Any such notice must be served on me within 14 days after this notice is delivered to you.<sup>3</sup>

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
**Registrar**

\*Delete if not applicable

1 This notice is to be sent to the CO of the accused, by email, fax, post, or any other means of communication customary in the Armed Forces. The CO of the accused must cause the notice to be personally delivered to the accused: RP 63(1).

2 Insert service descriptions of military members

3 RP 63(2).



COURT MARTIAL OF NEW ZEALAND

**NOTICE OF OBJECTION TO ASSIGNMENT AS MILITARY MEMBER<sup>1</sup>**

*Section 27, Court Martial Act 2007*

TO: The Registrar of the Court Martial of New Zealand

I, \_\_\_\_\_,  
*Service description of accused*

**HAVING BEEN GIVEN NOTICE** of the persons that you have assigned as military members of the Court Martial to hear the charge(s\*) against me at my trial at \_\_\_\_\_ on \_\_\_\_\_  
*Place* *Date*

**HEREBY OBJECT** to the assignment as a military member of:<sup>2</sup>

on the ground(s\*) that:<sup>3</sup>

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
*Signature of accused*

\*Delete if not applicable

1 This notice is to be sent to the Registrar of the Court Martial by personal delivery, email, fax or registered post, within 14 days after the form MD 615 is delivered to the accused: RP 63(2).

2 Insert service descriptions of person(s) to whom accused objects as military members

3 The lawful grounds for objecting are that the person assigned might not act, or is not in a position to act, impartially; or that the person assigned is not qualified to sit as a military member under section 22 of the Court Martial Act 2007.



SUMMARY APPEAL COURT OF NEW ZEALAND

**NOTICE OF SITTING**

*Rule 35 of the Armed Forces Discipline Rules of Procedure 2008*

Given by \_\_\_\_\_, Registrar of the Summary Appeal Court of  
New Zealand

Take notice that the Summary Appeal Court of New Zealand, comprising the Judge listed below, is to

sit at \_\_\_\_\_ on the \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

at \_\_\_\_\_ in order to hear the appeal of:

\_\_\_\_\_

Judge: \_\_\_\_\_

Clerk of the Court: \_\_\_\_\_

Court Orderly:\* \_\_\_\_\_

Counsel for the Director of Military Prosecutions: \_\_\_\_\_

Counsel for the appellant: \_\_\_\_\_

Signed at \_\_\_\_\_ on this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_

**Registrar**

\* Delete if not applicable.



COURT MARTIAL OF NEW ZEALAND  
**WITNESS SUMMONS<sup>1</sup>**  
*Section 45 of the Court Martial Act 2007*

**IN THE COURT MARTIAL OF NEW ZEALAND**

*R v* \_\_\_\_\_  
*Full name or Service description of accused*

To \_\_\_\_\_, of \_\_\_\_\_  
*Name Place of residence, occupation*

You are ordered to attend before the Court Martial at \_\_\_\_\_ on  
*Place/Ship*  
\_\_\_\_\_ at \_\_\_\_\_ am/pm\* and from day to day after that until you are discharged, to  
*Date Time*  
give evidence in the proceedings named above.

And you are ordered to bring with you and produce at the same time and place the following:<sup>2</sup>

**Failure to Attend**

If you fail without reasonable excuse to comply with this summons, the Court Martial may order that you be arrested and taken before the nearest District Court, which may find you guilty of contempt of a military tribunal under the Armed Forces Discipline Act 1971. The penalty for contempt of a military tribunal under that Act is imprisonment for a term not exceeding 1 month or a fine not exceeding \$1,000, or both.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

**Judge\* /Registrar\* of the Court Martial**

\* Select one.

1 This form is to be completed in duplicate. The original is to be served on the witness in accordance with CMA s 46. After the original has been served, the duplicate is to be completed on the reverse with the details of service and then returned to the Registrar of the Court Martial.

2 Specify the papers, documents, records or things in the person's possession or under the person's control to be produced.

STATEMENT OF SERVICE

I \_\_\_\_\_  
*Service description and unit*

state that on \_\_\_\_\_ I served \_\_\_\_\_  
*Date* *Name of witness*

with a summons, a true copy of which appears on the reverse of this statement:

\*by delivering it to him\*/her\* personally at \_\_\_\_\_

\* by posting it to him\*/her\* by registered letter addressed to him\*/her\* at his\*/her\* usual place of residence, namely \_\_\_\_\_

Dated at \_\_\_\_\_ on \_\_\_\_\_ 20 \_\_\_\_\_.  
*Place* *Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

\_\_\_\_\_  
*Rank*

Person who effected service

\* Delete inapplicable options.



SUMMARY APPEAL COURT OF NEW ZEALAND

**WITNESS SUMMONS<sup>1</sup>**

*Section 150C of the Armed Forces Discipline Act 1971*

**IN THE SUMMARY APPEAL COURT OF NEW ZEALAND**

Name of appellant: \_\_\_\_\_  
*Full name or Service description*

To \_\_\_\_\_, of \_\_\_\_\_  
*Name Address*

You are ordered to attend at the Summary Appeal Court at \_\_\_\_\_  
*Place/Ship*

on \_\_\_\_\_ at \_\_\_\_\_ am/pm\* to give evidence for the purposes of proceedings  
*Date Time*  
concerning the appellant named above.

And you are ordered to bring with you and produce at the same time and place the following:<sup>2</sup>

**Failure to Attend**

If you fail without reasonable excuse to comply with this summons, the Summary Appeal Court may order that you be arrested and taken before the nearest District Court, which may find you guilty of contempt of a military tribunal under the Armed Forces Discipline Act 1971. The penalty for contempt of a military tribunal under that Act is imprisonment for a term not exceeding 1 month or a fine not exceeding \$1,000, or both.

Dated at \_\_\_\_\_ on \_\_\_\_\_  
*Place Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*  
**Judge\* /Registrar\* of the Summary Appeal Court**

\* Select one.

1 This form is to be completed in duplicate. The original is to be served on the witness in accordance with AFDA s 150D. After the original has been served, the duplicate is to be completed on the reverse with the details of service and then returned to the Registrar of the Summary Appeal Court.

2 Specify the papers, documents, records or things in the person's possession or under the person's control to be produced.

STATEMENT OF SERVICE

I \_\_\_\_\_  
*Service description and unit*

state that on \_\_\_\_\_ I served \_\_\_\_\_  
*Date* *Name of witness*

with a summons, a true copy of which appears on the reverse of this statement:

\*by delivering it to him\*/her\* personally at \_\_\_\_\_

\* by posting it to him\*/her\* by registered letter addressed to him\*/her\* at his\*/her\* usual place of residence, namely \_\_\_\_\_

Dated at \_\_\_\_\_ on \_\_\_\_\_ 20 \_\_\_\_ .  
*Place* *Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

\_\_\_\_\_  
*Rank*

Person who effected service

\* Delete inapplicable options.



**NEW ZEALAND DEFENCE FORCE**

**Guide for**  
**Military Members**  
**of the**  
**Court Martial of New Zealand**

*Issued pursuant to section 43(2)(c) of the Court Martial Act 2007*





## CONTENTS

### Introduction

Purpose of this Guide

### Chapter 1 – Roles and Responsibilities

Commanding Officer	0101
Avoiding delay	0102
Legal Services	0103
Director of Military Prosecutions	0104
Registrar of the Court Martial	0105
Legal Aid	0106
Court facilities	0107
Dress	0108

### Chapter 2 – Composition of the Court Martial of New Zealand

The Judge	0201
The military members	0202
Prosecutor	0203
Defence counsel	0204
Recorder machine operator and typists	0205
Interpreter	0206
Clerk of the court	0207
Escort to the accused	0208

### Chapter 3 – Procedures for a trial by the Court Martial of New Zealand

#### Section 1 – General

Fairness and impartiality: The fundamentals	0301
---------------------------------------------	------

#### Section 2 – Preliminaries

Arrival at the courtroom	0302
Courtroom layout	0303
Pre-trial hearings	0304

#### Section 3 – Opening and Assembly of the Court

Opening and assembly of the court	0305
Swearing of the military members and other formalities	0306
Arraignment	0307

#### Section 4 – Plea of Guilty

Procedure on plea of guilty	0308
Sentencing hearing	0309
Sentence	0310
Announcement of sentence	0311

#### Section 5 – Plea of Not Guilty

Adequate time to prepare defence	0312
Opening addresses and the course of evidence	0313

Closing addresses and summing up	0314
Deliberations	0315
Recording and announcement of finding	0316
Sentencing	0317

### **Section 6 – Adjournments and Conclusion of Trial**

Adjournments	0318
Discharge of military members	0319
Post-trial administration	0320

### **Section 7 – Appeals**

Appeals against conviction and/or sentence	0321
Appeals against rulings	0322

### **Appendices:**

1. Court facilities
2. Courtroom layout
3. Duties of the clerk of the court

## SCHEDULE OF ABBREVIATIONS AND GLOSSARY

<b>Abbreviation or term</b>	<b>Explanation</b>
AFDA	Armed Forces Discipline Act 1971
CM	Court Martial of New Zealand
CMA	Court Martial Act 2007
CMAC	Court Martial Appeal Court
CO	Commanding Officer
DMP	Director of Military Prosecutions
Guide	Guide for Military Members of the Court Martial of New Zealand
HQJFNZ	Headquarters Joint Forces New Zealand
HQNZDF	Headquarters New Zealand Defence Force
JAG	Judge Advocate General
RMO	Recording Machine Operator
RP	Armed Forces Discipline Rules of Procedure 2008

## INTRODUCTION

1. Discipline is a fundamental tool of command. Therefore it is principally a matter for commanders to charge those persons under their command who are alleged to have committed offences and decide whether disciplinary action can be dealt with at their level or must be taken higher. In most cases, there is the option of trying the case summarily. However, a member of the Armed Forces has the right to elect trial by the Court Martial of New Zealand (CM) if his or her CO<sup>1</sup> intends to impose a summary punishment prescribed in Column 2 of Schedule 4 (or 5) to the AFDA, and sometimes the seriousness of the offence or the rank of the accused requires that it can only be tried in the Court Martial.

2. The Court Martial of New Zealand is a standing court of criminal jurisdiction, similar to the High Court or the District Court. It is presided over by a Judge. The findings of fact and, to a degree, any sentence imposed, are determined by the military members of the Court Martial. The military members are assigned by the Registrar of the Court Martial, who is independent of the chain of command. Most officers and warrant officers will serve as military members of the CM at some time during their service; this Guide is intended primarily for their instruction.

### Purpose of this Guide

5. This Guide describes all aspects of the CM and provides instructions for the guidance of certain officials of the CM. It is issued pursuant to section 43(2)(c) of the Court Martial Act 2007, but does not prevail over any provision in DM 69 (2 ed). It does not provide guidance on the law for the military members of the CM. The military members of the CM will be directed on all on questions of law and procedure by the Judge presiding and must comply with those rulings. Any official appointed to the CM must also comply with the directions of the Judge.

6. All officers and warrant officers assigned as military members of the CM are to read this Guide prior to the CM sitting and are to ensure that they understand their duties and responsibilities. Each military member is to sign a certificate to that effect, which is enclosed within the administrative pack-up, and to return it to the Registrar of the Court Martial prior to the commencement of the trial.

7. A copy of this Guide is to be provided to all civilian defence counsel who are to appear in the CM.



**J. MATEPARAE**  
Lieutenant General  
Chief of Defence Force

31 August 2009

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<sup>1</sup> If the accused is a senior officer, some of the role of the CO may be filled by a superior commander.

## CHAPTER 1

### ROLES AND RESPONSIBILITIES

#### 0101 Commanding Officer

1. The CO plays a pivotal role in New Zealand's military justice system. He or she decides whether a case should be tried summarily or must be remanded for trial by the CM. His or her command responsibility is to ensure that the rules and procedures of military law are scrupulously adhered to and applied fairly and honestly, without fear or favour, and in the interests of good order and Service discipline. In deciding whether or not to refer matters outside the unit, the CO bears a heavy personal responsibility for which he or she remains accountable. Before reaching a decision, which may require him or her to consider the impact of any decision on the alleged victim, the CO will often be wise to seek legal advice.

2. Prior to remanding the accused for trial in the Court Martial and referring the charge to the DMP, the CO must be satisfied that:<sup>2</sup>

- a. There is a prima facie case (ie that there is sufficient evidence for a reasonable disciplinary officer, properly directed, to convict); and
- b. The CO does not have sufficient powers of punishment or is otherwise not empowered to try the charge summarily.

3. A superior commander<sup>3</sup> will always give his or her view as to whether prosecution is in the interests of the Service, before the referral is forwarded to the DMP.

4. When the DMP considers whether a charge should be laid before the CM, he or she will consider a number of issues, including those mentioned above at paragraph 2. The DMP may refer the charge back to the CO if he or she is not satisfied that those tests are met.

#### 0102 Avoiding delay

The nature of military service means that delays can happen. However, delay incurred through faulty or negligent administration is unacceptable. There must be a clear and justifiable reason for any delay. If a Judge considers it is impossible for the accused to have a fair trial because of inordinate delay, he or she can stop the trial.

#### 0103 Legal Services

The NZDF has legal advisers at major bases, camps and higher headquarters, including HQNZDF and HQJFNZ. Legal officers are responsible for providing advice to commanders at all levels on matters of pre-trial military law. They can be contacted 24 hours a day, either directly or via duty officers.

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<sup>2</sup> If the charge alleges an offence by a senior officer, a superior commander may take this step, in which case the referral is sent directly to the DMP. If the referral is made by a CO, it must be sent through the CO's superior commander.

<sup>3</sup> **Superior commander** means CDF, VCDF, CN, CA, CAF, COMJFNZ, or an officer of the rank of colonel (E) or above appointed a superior commander by one of the officers previously mentioned.

#### **0104 Director of Military Prosecutions**

1. The DMP is outside the chain of command and is not under the control of the Minister of Defence. He or she acts under the general supervision of the Solicitor-General.
2. If the DMP decides that a trial by the CM is justified on the evidence on the charge referred or any other charge, he or she will:
  - a. Certify a charge sheet;
  - b. Give a copy of the certified charge sheet to the accused;
  - c. Lay the charge sheet before the Registrar of the Court Martial; and
  - d. Appoint a prosecutor.
2. The DMP may direct the Service Police to conduct further investigation into any charge referred to him or her. The DMP also has power to grant a stay of proceedings, which may be temporary or permanent.

#### **0105 Registrar of the Court Martial**

1. The Registrar is appointed by the Chief Judge of the Court Martial, who is the JAG. The Registrar is statutorily independent of the NZDF.
2. Once the DMP lays a charge before him or her, the Registrar must:
  - a. Arrange for the Chief Judge to appoint a Judge to preside over the case;
  - b. Assign the military members of the CM;
  - c. Provide the military members with a copy of the charge sheet and this Guide;
  - c. Determine any objection to a military member by the accused;
  - d. Fix a date, time and place for the trial;
  - e. Issue a Notice of Sitting in the prescribed form; and
  - f. Ensure that all other administrative matters connected with the proceedings are taken care of.

#### **0106 Legal aid**

1. Applications for legal aid are to be forwarded to the Registrar in form MD 610, in accordance with DM 69 (2 ed) Volume 2. If legal aid is sought, a member of the Armed Forces Defence Counsel Panel will be appointed by the Registrar to represent the accused. The scheme does not necessarily guarantee counsel of choice.
2. Unless exceptional circumstances exist, an accused who is granted legal aid must contribute a sum equivalent to three per cent of his or her annual salary towards the cost of his or her defence. Full details regarding the provision of legal aid in respect of proceedings in the CM are provided in DM 69 (2 ed) Volume 2.

## **0107 Court facilities**

The officers in charge of defence areas are to provide a suitable venue and associated facilities for the conduct of proceedings by the CM on request by the Registrar. The minimum standard of facilities to be provided in normal circumstances is indicated at Appendix 1. The CM can however conduct its proceedings wherever the operational situation or special circumstances demand. The clerk of the court is responsible to the Registrar and the Judge presiding for all co-ordination and administrative action.

## **0108 Dress**

1. The following order of dress applies at trials by the CM:

	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
Participant (other than accused)	No 2 or 2W	No 1A with Sam Browne belt or 8A	No 3 SD with medals
Accused	No 3 or 3W	No 1B or 8B	No 3 SD
Spectator	No 3 or 3W	No 1B or 8B	No 3 SD

2. The senior military member is to ensure that all military members and officials of the CM maintain the highest standard of dress. The Registrar or the Judge presiding may change the order of dress if operational circumstances require. All personnel attending trials by the CM are to be correctly dressed. Administrative support staff who are not required to enter the courtroom in the execution of their duties are to wear normal working dress.
3. All counsel appearing before the CM who are members of the Armed Forces are to wear the prescribed uniform.



## CHAPTER 2

### COMPOSITION OF THE COURT MARTIAL OF NEW ZEALAND

#### 0201 The Judge

1. The Judges of the CM are civilian judicial officers appointed by the Governor-General and have the same judicial independence as a Judge of the High Court.
2. The Judge presides in all proceedings of the CM in accordance with the CMA. He or she decides on all questions of law, practice and procedure. The Judge's rulings and directions are binding on the military members. The Judge is also responsible for ensuring that a proper record of the proceedings is made. Judges are to be addressed as 'Your Honour', 'Sir' or 'Ma'am'.

#### 0202 The military members

1. The Registrar will normally assign three military members for a trial, although five may be assigned in particularly serious cases. The military members are officers if the accused is an officer. If the accused is a rating, soldier or airman, one of the military members may be a warrant officer.
2. The military members must defer to the Judge on all matters regarding trial procedure. However, the most senior military member has the responsibility of ensuring that ceremonial requirements are properly observed during the proceedings and reporting on any command issues to the superior commander who referred the charges that are the subject of the proceedings to the DMP.
3. The roles and functions of the Judge and the military members are different, but both contribute directly to the outcome of the trial. As such they are complementary and their separate functions are therefore indispensable. The military members of the court will hear, assess, deliberate on, and (if applicable) arrive at a finding on the facts of the case. In addition to being aware of the evidence produced in the trial, the Judge will have seen the trial papers and will have heard any legal arguments (held in the absence of the military members). The Judge will guide the members through the trial at all stages. The military members are therefore to concentrate on the task of listening to, assessing and analysing the evidence presented to them in court.
4. The military members decide the guilt or innocence of the accused based on the evidence as presented to them. While the Judge sums up the evidence after the closing of the prosecution and defence cases, he or she takes no part in the finding. Matters discussed by the military members in closed court may never be revealed, except where required in due course of law, and this is underlined by the oath or affirmation taken by the military members at the outset of each trial. It is most important that the military members do not consider sentences or sentencing options when deliberating on finding or at any time before a finding has been made.
5. If a guilty finding has been recorded, the Judge and the military members deliberate to determine the appropriate sentence for the offence. The Judge will direct the military members on the applicable law and any sentencing precedents that may apply. Irrespective of rank, the worth or value of the opinion and vote of every military member is entirely equal, although the military members must accept the Judge's directions on what are lawful sentences and the legal principles of sentencing. If the CM cannot arrive at a

sentence by consensus, the sentence is determined by the majority of the votes of the Judge and the military members. If there is an equality of votes on this issue, the Judge has a casting vote.

### **0203 Prosecutor**

The prosecutor will normally be a legal officer, but may sometimes be civilian counsel, appointed by the Director of Military Prosecutions. It is the task of the prosecutor to present the case to the court. In any criminal trial the burden of proving the guilt of an accused is on the prosecution who must prove the case to the required standard by satisfying the military members of the accused's guilt beyond reasonable doubt.

### **0204 Defence counsel**

The accused may represent him or herself or be represented by a general list officer, but it is more usual to be represented at court by a lawyer from the Armed Forces Defence Counsel Panel or a civilian lawyer engaged at the accused's own expense. A presumption of innocence always applies in respect of an accused who pleads not guilty. Therefore, the defence is required to prove nothing, but may respond to and endeavour to raise doubts about the prosecution's case. In the event of a guilty plea or guilty finding by the CM, the defence will then present a plea in mitigation on behalf of the accused prior to the CM retiring to decide on sentence.

### **0205 Recording machine operators and typists**

1. The Registrar will make arrangements for the recording and transcription of all that is said and discussed during a trial by the CM. Proceedings before the Judge in the absence of the military members are also to be recorded. In addition, if the Judge discusses any matters in chambers with the prosecutor and defence counsel, the staff may be required to record those meetings. Should the need arise to refer back to an item of evidence the recording machine operator (RMO) will repeat the appropriate part of the recording in open court. If the outcome of the trial is the subject of an appeal to the CMA, then the transcript of the trial will be one of the principal documents used.

2. The RMO is required to set up and maintain his or her recording equipment for the duration of the court. Therefore the RMO may require additional access to the courtroom, both prior to the court opening and after it adjourns. The RMO is not present when the court is deliberating.

### **0206 Interpreter**

It is the responsibility of the prosecutor or the defence to notify the Registrar beforehand if any of their witnesses or the accused require an interpreter. The matter may also be raised with the Judge some time before the trial and be the subject of a direction by the Judge. An interpreter will usually be sworn immediately prior to his or her first use, but may for convenience be sworn at the outset of the trial.

### **0207 Clerk of the court**

1. The clerk of the court is a key court official; he or she is appointed by the Registrar for the duration of the trial pursuant to section 79(2) of the CMA and is responsible to both the Registrar and the Judge presiding for ensuring the smooth running of the court. He or she will be a junior officer nominated by the superior commander who referred the charge to the DMP. He or she will normally be responsible for setting up the

courtroom and will normally be assisted by a Court Orderly who will be a warrant officer or SNCO. The principal duties of the clerk of the court are prescribed in DM 69 (2 ed) Volume 2. Further guidelines are included at Appendix 3.

2. Once a trial has begun the clerk of the court is the only link permitted between the military members of the court and anyone else involved with the trial, other than the Judge.

#### **0208 Escort to the accused**

The accused is to be kept under close arrest except for the period of any adjournment, during which time the Judge may direct that the accused be held under open arrest. While under close arrest, the accused must be accompanied at all times by a member of the Armed Forces who holds equal or higher rank. The escort will be seated behind the accused.

## CHAPTER 3

### PROCEDURES FOR A TRIAL BY THE COURT MARTIAL OF NEW ZEALAND

#### SECTION 1

#### GENERAL

##### **0301 Fairness and impartiality: The fundamentals**

1. Every trial by the Court Martial of New Zealand must be conducted in a way that is, and is seen to be, absolutely independent, impartial and fair. The integrity, credibility and continuance of the military justice system depend on this. An accused is assumed to be innocent until found guilty of an offence. The interests of justice must take priority over all other considerations.

2. Officers and warrant officers who are appointed as military members of the CM are to perform their duties independently and impartially in accordance with the evidence and the law. They are not to be subjected to any external influence or pressure prior to, during or after the trial. Such influence or pressure may amount to the criminal offence of attempting to pervert the course of justice contrary to section 117(e) of the Crimes Act 1961 or the Service offence of doing an act likely to prejudice Service discipline contrary to AFDA s 73(1)(a). Any military member who feels that he or she has been the subject of improper influence or pressure is to report the matter to the Registrar without delay.

3. The performance of a military member is not to be considered or evaluated in the preparation of any personal report, assessment or other document used in whole or in part for the purpose of determining whether a member is qualified to be promoted, or is qualified or suited for particular appointments or training. Section 35 of the CMA prohibits the Service authorities from taking into account the performance of an officer or warrant officer as a military member in any decision which may affect that officer's or warrant officer's conditions of service.

4. The most important task of the Registrar is to ensure that those officers and warrant officers who are assigned as military members of the CM meet the eligibility criteria and that they are suitably qualified. Prior to the trial, any military member who believes him or herself ineligible or disqualified for the duty, or who knows details about the case which may affect the outcome, or who knows the accused or a potential witness or anyone else involved in the case should immediately inform the Registrar. If similar concerns arise once at court, (eg a member knows the accused or a witness well), then he or she should immediately arrange to speak to the Judge without mentioning the matter to anyone else. A casual acquaintance with such a person does not necessarily preclude an officer or warrant officer from sitting as a military member, but the issue must be identified and considered if and when it arises. Once selected, the manner in which the military members subsequently conduct themselves and carry out their duties throughout a trial is equally as important. They are to follow the basic principles or rules set out below:

- a. For the duration of the trial, the military members' only Service duty is that of court business. They are not to engage in any other duties until they are discharged by the Judge, without the prior permission of the Judge.

- b. The military members may take notes to aid their recollection of the evidence, although the Judge will summarise the main points of the evidence in his or her summing up. However, taking notes is not to be allowed to divert the military members' attention from watching the witnesses when they give evidence. Any notes or records that are made by the military members are not to be taken from the courtroom, and are to be gathered up by the clerk of the court at the end of the trial and destroyed.
- c. If a military member feels sleepy or ill he or she is to pass a note to the Judge immediately; the Judge will normally call an adjournment. It is most important in the context of any post-trial appeal action that no military member should allow himself or herself to be accused of having lacked concentration at any stage of the trial.
- d. Other than when the Judge is sitting alone, the military members are not to leave the courtroom during the trial, except to go to the toilet or for any adjournment. In particular, military members are not to independently visit the scene of the crime. If the Judge deems a visit necessary the whole court will conduct such a visit.
- e. The military members are not to associate with other members of the Armed Forces from the command of the accused until the trial is over. Refreshments are to be provided to the military members and the Judge in a location separate to and out of earshot of all other persons.
- f. Throughout the trial the military members must have no contact whatsoever with the prosecutor, defence counsel, witnesses, or any other persons involved directly or indirectly with the proceedings, other than in open court within the courtroom. The only exceptions to this rule are that the members may have contact with the clerk of the court and the Court Orderly on routine administrative matters and may dine with the Judge, but are forbidden from discussing any aspect of the case with them.
- g. The military members are not to attempt to discover any details about the trial prior to or during the case. They must rely solely on the evidence adduced in open court and any other matter of which they may take judicial notice, as directed by the Judge. Similarly, the military members are, as far as is practicable, to avoid contact with their unit or others while a trial is in progress, other than in an emergency or on a critical matter and only with the approval of the Judge. Where such a need does arise, the clerk of the court is to provide access to a telephone. The military members are not to bring their mobile telephones, own notebooks, reference documents (including this Guide) or similar into the courtroom. They are not to remove any material from the courtroom during or at the end of the trial except those exhibits which the Judge has said may be removed to their room during deliberations. They must avoid entering any room used for court administration so that they do not inadvertently see or hear any matters relating to the current or any other case.
- h. When away from the courtroom the military members are not to discuss any aspect of a trial in progress. In any event, even within the court facilities, no discussion of a trial in progress is to take place unless all

members are present. That includes not talking to family, friends, work associates, the prosecutor, defence counsel, the accused and anyone who may be a witness. Even after a trial is completed, only factual matters that came out in evidence in open court may be discussed, although this should be done with due care.

- i. No discussion whatsoever of sentencing options or implications, no matter how general or hypothetical, is to take place before or during any trial before a finding of guilty has been arrived at and announced, or in the absence of the Judge.
- j. The Judge may bring to the courtroom many papers and documents that he or she will use during the trial and that will not be made available to the military members. Similarly, the Judge will take notes throughout the trial. The military members are not to read any of this material at any time, whether in open or closed court.

## **SECTION 2**

### **PRELIMINARIES**

#### **0302      Arrival at the courtroom**

The military members should arrive at the courtroom at least one hour before the planned start time for the trial. On arrival they should contact the clerk of the court. They will then inspect the courtroom, facilities and resources with the clerk of the court. The senior military member should then make the Judge aware of their presence. This should be done both as a matter of courtesy and to permit the Judge to speak with the military members prior to the trial in order to clarify procedural matters and any queries regarding the forthcoming hearing. If the military members have queries that they wish to raise with the Judge then this should be indicated. The military members should avoid talking to anyone else in case they inadvertently find themselves conversing with, for example, a witness, or a lawyer involved in the case.

#### **0303      Courtroom layout**

1.            The approved courtroom layout for the CM is in DM 69 (2 ed) Volume 2. It is reproduced in this Guide at Appendix 2.
  
2.            The military members should have no need to go anywhere within the courtroom other than to their table, to their retiring room and to use the directly associated facilities. To that end, whenever possible, the layout of the court facility should ensure that the Judge and military members are effectively segregated from all others throughout the trial. Access to and movement within the court facility is controlled by the clerk of the court while a trial is in progress.

#### **0304      Pre-trial hearings**

Ordinarily, any pre-trial hearings will be conducted by the Judge some time before the trial commences. However, the Judge may conduct such hearings with prosecutor and defence counsel on the first day of the trial, which may delay the start of the trial.

## SECTION 3

### OPENING AND ASSEMBLY OF THE COURT

#### 0305 Opening and assembly of the court

1. When the military members of the CM have assembled with the Judge in their retiring room, the prosecutor, defence counsel, the accused and escort should assemble outside the courtroom. The RMO, interpreter (if applicable), members of the public and press will have already entered the courtroom and taken their places. All should sit down. Uniformed military personnel will keep their headdress on at this stage.
2. Just prior to the entry of the Judge, the clerk of the court will announce in a suitably loud voice "All Stand". All present will stand and the Judge will enter the courtroom.
3. The Judge will take his or her place and direct the clerk of the court to call upon the military members to enter and take their places.
4. The senior military member will enter first, followed by the other military members. The military members take their places and then the Judge will instruct all present to be seated. The Judge will declare that the Court Martial of New Zealand is in session.
5. On a signal from the clerk of the court, counsel march into the courtroom with the prosecutor leading and halt before the Judge. Counsel salute the Judge or bow if they are not members of the Armed Forces. They then take their seats.
6. On a signal from the clerk of the court, the escort will march the accused into the courtroom and halt before the Judge. The accused will salute the Judge and then be seated behind his or her table with the escort seated to his or her rear.

#### 0306 Swearing of the military members and other formalities

1. The Judge will order hats to be removed.
2. The Judge will administer the oath or affirmation to the military members by asking them to read the appropriate words from a card; in the case of the oath, while holding the New Testament or other religious book. Each military member will swear or affirm individually. Should a military member wish to swear using a religious book other than the New Testament it would be useful if this requirement were made known to the clerk of the court before the court opens in order that any necessary arrangements can be made.
2. Once the military members of the Court have been sworn or affirmed, the Judge will administer the oath or affirmation to the RMO, typists and any interpreter(s) or officers/warrant officers under instruction.
3. The clerk of the court will lay the medical certificate and the charge sheet before the Judge. The Judge will mark them **Exhibit A** and **Exhibit B** respectively and sign them.



4. The Judge will then make an order excluding witnesses other than expert witnesses from the courtroom until they are called to give evidence.
5. The Judge will usually publicly warn the military members not to talk to anyone else about the case for as long as it continues.
6. If electronic media are present in the courtroom, the Judge will deal with any questions arising in line with the Chief Justice's In-Court Media Coverage Guidelines 2003. Normally, at this time, the Judge will deal with any applications for name suppression orders that have not been dealt with pre-trial.

### **0307 Arraignment**

1. The Judge will direct the accused to stand and ask the accused to acknowledge that his or her number, rank, name and unit as set out in the charge sheet are correct and that he or she is the person named.
2. The accused may offer a plea to the jurisdiction of the court or in bar of trial, apply for severance of trials or separation of charges, or object to any of the charges. Any such pleas, applications, or objections are determined pursuant to RP 77 to 82.
3. The Judge reads each charge to the accused and asks him or her to plead to each charge in turn. The Judge will then invite the accused to take his or her seat.

## SECTION 4

### PLEA OF GUILTY

#### **0308 Procedure on plea of guilty**

1. If the accused is not represented by a lawyer, the Judge explains to the accused:
  - a. The nature of the offence to which the plea relates;
  - b. The general effect of the accused's plea; and
  - c. The difference in procedure that must be followed according to whether an accused pleads guilty or not guilty.
2. If the accused is represented by a lawyer, the Judge does not need to comply with the above paragraph if the Judge is satisfied that the accused understands the nature of the offence and the consequences of the plea.
3. The CM (ie the Judge and the military members) considers whether or not to accept the plea of guilty. If the CM does not accept the plea of guilty, the Judge enters and records a plea of not guilty. If the CM accepts the plea, a finding of guilty is recorded and announced in open court by the Judge.
4. The CM may substitute a plea of not guilty at any time during the proceeding if it appears that the accused did not understand the nature of the offence or the consequences of the plea.
5. The prosecutor reads the summary of facts. The CM may hear evidence on any facts relevant to sentence which are asserted by the prosecutor and disputed by the accused.
6. If the Judge considers that there is a matter relevant to sentence that requires clarification, the Judge may call or recall a witness on that matter.

#### **0309 Sentencing hearing**

1. If the accused is convicted of a charge, the court will then hear evidence about the accused's service record and previous convictions (if any) (form MD 613). The prosecutor may call evidence on any other matters relevant to sentence.
2. If a victim impact statement has been prepared, that will be produced by the prosecutor.
3. The accused may give evidence and/or call evidence in mitigation of punishment or as to character. Psychiatric, medical or other reports may be produced through a witness or with the consent of the prosecution.
4. The Judge may call evidence on any matter relevant to sentence that requires clarification.
5. The prosecutor and defence counsel will usually address the court on the appropriate sentence – the prosecutor will normally go first.

### **0310 Sentence**

1. When appropriate, the Judge will announce that the court is closing to deliberate on sentence. The only persons present during these deliberations will be the military members, officers and warrant officers under instruction and the Judge. The Judge will direct the members on the legal principles of sentencing and the range of punishments available.
2. If the Armed Forces Discipline Committee has produced any relevant sentencing guidelines, the CM must pass a sentence consistent with those guidelines, unless the Court is satisfied that it would be contrary to the interests of justice to do so.
3. Sentence will be determined by a majority of the votes of the military members and the Judge. The opinions of the military members will be given orally in ascending order of seniority, commencing with the junior member. In the case of an equality of votes, the Judge has a casting vote. The Judge will enter the sentence in the record of proceedings and sign that record.

### **0311 Announcement of sentence**

1. When the clerk of the court has announced that the court is open and all except the accused and escort are assembled wearing their headdress, the accused will be marched in front of the Judge, who will read the sentence as it appears in the record of proceedings and give reasons. If the sentence includes dismissal from Her Majesty's Service, the Judge will announce that this does not take effect until the expiry of the time allowed for lodging an appeal to the CMAC or, if such an appeal is lodged, until that appeal (or a subsequent appeal to the Court of Appeal or Supreme Court) is determined.
2. If a custodial sentence is imposed, the senior military member must sign the committal order as a competent Service authority, and the Judge will then order the escort to march out the accused. The clerk of the court is to ensure that arrangements are in place to ensure the accused's smooth transfer to the place of detention or imprisonment.

## SECTION 5

### PLEA OF NOT GUILTY

#### **0312 Adequate time to prepare defence**

1. If the accused pleads not guilty, the Judge will ask the accused if he or she wishes to apply for an adjournment on the grounds that:
  - a. Any of the rules relating to the procedure before trial have not been complied with, and that he or she has been prejudiced by this; or
  - b. He or she has not had sufficient time to prepare a defence.
2. Any application for an adjournment is determined pursuant to RP 93.

#### **0313 Opening addresses and the course of evidence**

1. The prosecutor will make an opening address. The defence counsel may make a brief opening statement in reply, with the leave of the Judge. The prosecutor will then call witnesses. Military witnesses are to salute the Judge before removing their headdress to take the oath or affirmation. The clerk of the court will administer the oath or affirmation to each witness. The Judge will then invite the witness to sit at the witness table. The prosecutor will conduct his or her examination of the witness; the defence may then cross-examine that witness, after which the prosecutor may re-examine on matters arising out of the cross-examination. The military members may wish to take brief notes of important points in the evidence. The important thing is to watch and listen to witnesses giving their evidence and follow the trial properly. The Judge will summarise the main points of the evidence in his or her summing up.
2. The Judge and any military member may ask the witness further questions to clarify any matter. From time to time the Judge may be required to decide matters of law, such as the admissibility of a particular piece of evidence. When he or she does so, the military members are to withdraw so that they do not hear inadmissible evidence or other matters that are prejudicial or irrelevant in the course of legal argument.
3. The military members may, at any time after the prosecutor has presented all his or her evidence, find the accused not guilty. This will usually follow a submission of no case to answer from the defence or the Judge may direct the military members to acquit the accused. If the case proceeds, defence counsel may call the accused, if he or she decides to give evidence, and may also call witnesses – the accused has no obligation to call any evidence. The prosecutor may cross-examine any witness called for the defence and the defence counsel may re-examine on matters arising out of cross-examination as before.

#### **0314 Closing addresses and summing up**

After all the evidence has been given, the prosecutor and defence counsel will make their closing addresses. The Judge will then sum up the case and direct the court on the law relating to it. When the Judge has finished he or she will leave the courtroom in full view of the public. All will rise when he or she leaves. The military members will then retire to their room to deliberate. Again, everyone in court will rise when they leave. Alternatively, the senior military member may indicate to the clerk of the court that the members intend to

deliberate in the courtroom. In such a case, once the Judge has left, the clerk of the court is to announce "Clear the Court". All apart from the military members and any officers or warrant officers under instruction must vacate the courtroom if this direction is given.

### **0315 Deliberations**

1. The military members must not ask the Judge questions during, or immediately before or after, his or her summing up. However, if a military member has a question which is not resolved during deliberations, the Judge may be asked for further directions, but the court must be re-opened and those directions must be given in open court. The senior military member should write down the further directions sought and instruct the clerk of the court to convey the note to the Judge, providing the Judge an opportunity to consider the matter first with the prosecutor and defence counsel alone. The Judge will then invite the military members back into court.

2. While the military members are deliberating on their findings, no one other than the officers or warrant officers under instruction may be present. The military members are to remain together until the finding has been reached, unless the Judge directs that they may disperse. No officer or warrant officer under instruction is to express an opinion to the military members on any matter relating to the trial before the Judge has announced the findings, nor on sentence before the Judge has announced the sentence. If any military member has to leave the room for personal reasons, the senior military member must order that member not to speak to anyone. No one is to arrange for anything to be taken into the military members' room without the Judge's knowledge.

3. A finding must be reached in respect of each charge individually, although in some circumstances no finding need be made on an alternative charge when a finding of guilty has been made on the principal charge. The Judge will direct the military members about this and, as with all other matters of law, practice or procedure, they must follow his or her directions.

4. The senior military member will normally initiate the discussion on the issue of guilt/innocence. He or she should ensure that each military member gives his or her opinion on finding in respect of each charge separately, in ascending order of seniority commencing with the junior member. The finding must be unanimous. If, after any further deliberations that are required, the military members are unable to reach a finding on which they are unanimous, they report this to the Judge in open court in the presence of the accused. The Judge will discharge the military members and refer the charge back to the Director of Military Prosecutions by way of a memorandum under seal covering the charge sheet, with an information copy to the Registrar of the CM.

5. If the military members reach a unanimous finding, the senior military member will write a handwritten note to the Judge, indicating their finding on each charge. The military members will then assemble in their retiring room if they are not already there and the clerk of the court will ascertain when the Judge, prosecutor and defence counsel are assembled in the courtroom. Once the clerk of the court has confirmed that they are present, the military members will march back to their positions and the accused will be marched in front of the Judge by the escort.

### **0316 Recording and announcement of finding**

When everyone is in the courtroom (wearing headdress) the Judge will read the senior military member's note and, if satisfied the findings are lawful, will record the findings in

accordance with DM 69 (2 ed) Volume 2 and announce the finding on each charge separately. If the Judge is not satisfied, he or she will give the military members further directions in open court, after which he or she will leave and the military members will retire again to reconsider their findings.

**0317 Sentencing**

See paragraphs 0309 to 0311.

## SECTION 6

### ADJOURNMENTS AND CONCLUSION OF TRIAL

#### **0318 Adjourments**

1. The Judge will adjourn the proceedings of the CM from time to time. If the Judge does so, the clerk of the court will announce "All Stand" and the Judge will retire, followed by the military members. Counsel are to salute (or bow to) the Judge when entering or leaving the courtroom for the first time each day and when the CM adjourns overnight.
2. When the Judge and military members return from an adjournment, the accused is to be seated with counsel.

#### **0319 Discharge of military members**

1. Once any sentencing is completed, the Judge will announce that the trial is concluded and discharge the military members. Before doing so, the Judge may remind the military members of their oath of confidentiality.
2. The clerk of the court will announce "All Stand" and the military members will march out of the courtroom or to their retiring room. All persons present may resume their seats when the military members have departed.
3. The Judge asks counsel whether there are any further matters to be brought before the CM. If there are none, the Judge declares that this division of the Court Martial of New Zealand stands adjourned. Normally, the Judge will consider matters concerning name suppression and the arrest state of the accused at this point.
4. The clerk of the court will announce "All Stand". Counsel salute or bow to the Judge, as appropriate. The Judge retires.

#### **0320 Post-trial administration**

1. Once the proceedings have been concluded, the clerk of the court is to burn or shred all scrap paper, subject to the directions of the Judge or the Registrar.
2. Irrespective of whether the finding is guilty or not guilty, the Judge must:
  - a. Complete the form MD 624 Record of Proceedings; and
  - b. Initial each page of the transcript and attach it to the record.
3. The clerk of the court is to forward the form MD 624 and transcript to the Office of the Judge Advocate General as soon as possible.

## **SECTION 7**

### **APPEALS**

#### **0321 Appeals against conviction and/or sentence**

1. Any person convicted by the CM may appeal against the conviction, the sentence, or both the conviction and the sentence to the Court Martial Appeal Court (CMAC), which is an appellate court that sits specifically to hear appeals from the CM. An appeal to the CMAC must be made within 21 days of the CM finding being announced. The appeal must be forwarded to the Registrar of the CMAC in the High Court at Wellington. A further appeal may be made to the Court of Appeal and/or the Supreme Court, with the leave of the court appealed to.

2. Legal aid is available for appeals to the CMAC by applying to the Registrar of the CM under the Armed Forces Legal Aid Scheme. See DM 69 (2 ed) Volume 2.

#### **0322 Appeals against rulings**

1. In addition to the right to appeal against a conviction or sentence, either the DMP or a person who is being tried by the CM may appeal to the CMAC against a ruling given by the Judge during the trial.

2. An appeal against a ruling is made with the leave of the CMAC and must be made within 10 days after the ruling has been given.

3. The trial Judge may or may not adjourn the proceedings of the CM pending the decision of the CMAC on the appeal.



## **APPENDIX 1**

### **COURT FACILITIES**

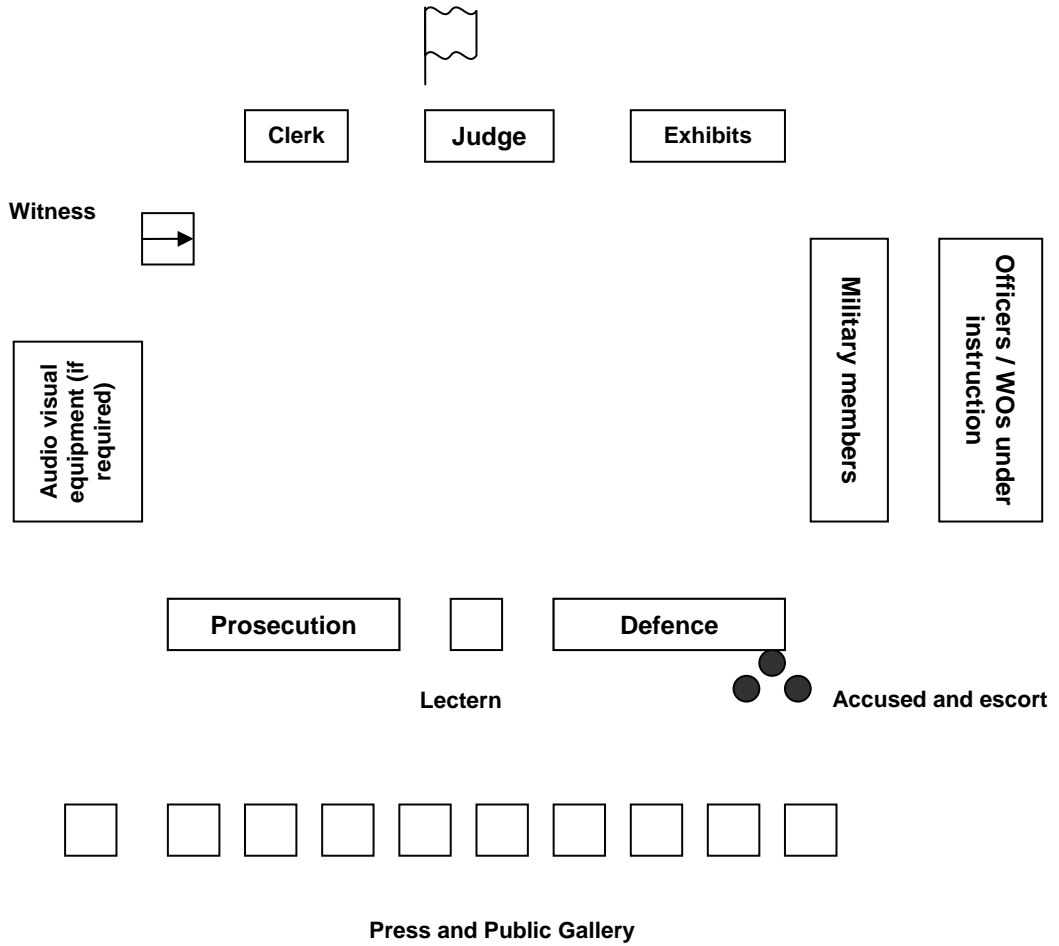
A court facility<sup>4</sup> provided for the Court Martial of New Zealand is to include the following office accommodation, rooms and facilities. This is a minimum requirement (unless the proceedings are to be conducted in an area of operations):

- The courtroom, which should comply with the layout in Appendix 2.
- Judge's chambers, including a large desk or table, at least three chairs (or five if junior counsel have been appointed), adequate clothes hanging space for the Judge's requirements. The Registrar may require additional facilities in consultation with the Judge.
- Members' retiring room (out of earshot of the courtroom).
- Registry (for use of the Registrar, clerk of the court and administration staff). This space must include a telephone, fax and photocopying equipment as well as sufficient computers with appropriate e-mail communications.
- Prosecutor's room, including a desk or table and at least three chairs.
- Defence counsel's room, including a desk or table and at least three chairs.
- Prosecution witnesses' room.
- Defence witnesses' room.
- Toilets (separate facilities are to be provided for the Judge and military members unless this is not practicable).

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<sup>4</sup> If necessary, the courtroom facility may be spread over adjacent buildings.

**APPENDIX 2  
COURTROOM LAYOUT**



## **APPENDIX 3**

### **DUTIES OF THE CLERK OF THE COURT**

The clerk of the court is appointed by and acts under the superintendence of the Registrar of the Court Martial of New Zealand. The clerk of the court is to ensure that all the administrative arrangements for the CM prescribed in DM 69 (2 ed) Volume 2 have been or are made. In addition, the clerk of the court is to:

- Ensure that the accused and escort view the courtroom before the trial commences and that they understand the court routine and their places when seated in the courtroom.
- Follow the guidance in Chapter 3 for the opening and assembly of the court.
- Act as the link between the prosecutor, the defence counsel, witnesses, the Judge and the court when it is necessary to circulate documents, written notes or exhibits within the courtroom. Any note or message passed into the courtroom for a military member must be passed to the Judge in the first instance.
- Move about the courtroom, without prior permission from the Judge, to facilitate the smooth running and administration of the activity in the courtroom.
- Remain in the courtroom whenever the Court Martial is sitting. Use the court orderly and other support staff for all external tasks.
- At the end of the trial, collect all of the papers, photographs and any other items from the courtroom which have not been exhibited and supervise their destruction in accordance with the Judge's directions.
- Ensure that the arrangements for refreshments during adjournments and water in the courtroom are in place. The clerk of the court must ensure that, where a central messing or self-service facility is used, the Judge and military members are separated from all other people involved with the trial.
- Noise outside the courtroom will affect both the recording and the ability of those in court to hear the evidence. In conjunction with Service Police and/or relevant command staff, he or she will ensure that any such noise is halted as quickly as possible, as far as possible. The court may need to adjourn while this is organised.
- Ensure that the ambient temperature of the courtroom is maintained at a comfortable working level.
- Ensure that all Service personnel are aware of the need to pay appropriate compliments on entering and leaving the courtroom when the Judge is present.
- Brief and supervise the other members of the administrative team.

The above list is not exhaustive, and requirements may vary between different trial venues.

**PETITION TO THE RECONSIDERING AUTHORITY**  
*Section 153 of the Armed Forces Discipline Act 1971*

To the Reconsidering Authority

C/- Registrar of the Court Martial

Headquarters, New Zealand Defence Force, Wellington

Name of petitioner: <sup>1</sup>	
Offence(s) of which convicted:	Sentence:
Date of conviction by the Court Martial:	Date when sentence passed:

I, the petitioner named above, petition you against the sentence imposed on me by the Court Martial on the grounds set out below:<sup>2</sup>

Dated at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_\_\_ .  
*Place* *Date*

\_\_\_\_\_  
*Signature*

Petitioner

\_\_\_\_\_  
1 Full name.

2 Set out the grounds for your petition, which should be supported by relevant details. See DM 69 (2 ed) Volume 2 Chapter 4 Section 4.



COURT MARTIAL OF NEW ZEALAND

GUIDE TO TRIAL PROCEDURE OF  
THE COURT MARTIAL OF NEW ZEALAND

The sequence of procedure and the relevant provisions relating to a trial by the Court Martial of New Zealand are as follows. This sequence is a guide only and reference must be made to the CMA and the RP for the detailed provisions. The Court Martial may direct, authorise or accept a departure from the RP for reasons of urgency or for any other reason. If a matter is not expressly provided for in the RP, the Court Martial may give any direction that it thinks best calculated to carry out the purposes of the AFDA or the CMA. Furthermore, in addition to the jurisdiction and powers specially conferred on the Court Martial by the CMA (or any other Act), the Court Martial has all the powers inherent in a court of record.

*RP 135(1)*

*RP 138*

*CMA s 8(2)*

1. If the Judge is satisfied that the Court Martial is constituted in accordance with law and has jurisdiction over the accused, the Judge enters the courtroom. The clerk orders all persons present to stand.
2. The Judge takes his or her place and directs the clerk to call upon the military members to enter and take their places. *RP 71(1)(a)*
3. The Judge declares that the Court Martial of New Zealand is in session. All persons present may be seated. *RP 71(1)(b)*
4. The Judge directs the clerk to require counsel to take their places. Counsel who are serving officers march to their places and salute the Judge. Civilian counsel move to their places and bow to the Judge. The Judge acknowledges salutes and bows. These marks of respect are paid at the beginning and end of each day on which the Court Martial sits. Counsel who are serving officers follow the motion of the senior military member of the Court in wearing hats. Civilian counsel wear robes. *RP 71(2)(a)*
5. The Judge orders that the accused be brought before the Court Martial. The escort marches the accused into the courtroom and halts before the Judge. The accused salutes the Judge and then takes a seat at the defence table with the escort seated to his or her rear. *RP 71(2)(b)*
6. The Judge orders hats to be removed in court. The Judge swears in: *RP 72 and 73(2)*
  - a. The military members;
  - b. Any officers or warrant officers under instruction;
  - c. Every person responsible for recording or transcribing the proceedings; and
  - d. Every interpreter attending the proceedings.

Each person is to stand while being sworn.

7. The clerk lays the medical certificate before the Judge after showing it to counsel, if they so require. The Judge marks the certificate **Exhibit A** and signs it.

## THE TRIAL COMMENCES

8. The Judge marks the charge sheet **Exhibit B** and signs it.
9. Witnesses other than expert witnesses should not be present in the courtroom when the trial commences. The prosecutor or the accused may apply now or at any time during the trial for an order that all or any witnesses be excluded from the courtroom until called to give their evidence. Unless it is likely that a witness may be required to give further evidence, the witness should be permitted to remain in court as a member of the public after the witness's examination is concluded, provided that neither the prosecutor nor the accused make a successful application for the witness's exclusion. *RP 99*
- Note:** The Court Martial has power to direct that certain persons, including witnesses, be excluded from the proceedings without an application being made by the prosecutor or the accused. *CMA s 39(1)*
10. The Judge directs the accused to stand and then asks the accused to acknowledge that his or her number, rank, name and unit as set out in the charge sheet are correct and that he or she is the person named in the charge sheet. The accused so acknowledges. The Judge may correct any errors which are discovered. *RP 76*  
*RP 58(2)*
11. The Judge asks the accused whether he or she wishes to offer a plea to the jurisdiction of the Court or in bar of trial, apply for separation of trials or severance of charges, or object to any of the charges. Any such pleas, applications, or objections are determined in the absence of the military members in accordance with the prescribed procedure. *RP 77 to 82*
12. The Judge reads the charges to the accused and requires him or her to plead to each charge in turn except as provided in the case of alternative charges. The Judge permits the accused to be seated on completion. *RP 83*
13. Where the accused pleads not guilty to any charge, he or she may change that plea to guilty at any time before the military members retire to deliberate on their finding. *RP 92*
14. If the Judge adjourns the proceedings, the clerk orders all persons present to stand and then the Judge retires, followed by the military members. At the conclusion of any such adjournment, the Judge returns to his or her place followed by the military members. *CMA s 37(4)*

## PROCEDURE ON PLEA OF GUILTY

15. If the accused is not represented by a lawyer, the Judge explains to the accused : *RP 84(1)(a)*
- a. The nature of the offence to which the plea relates;
  - b. The general effect of the accused's plea; and
  - c. The difference in procedure that must be followed according to whether an accused pleads guilty or not guilty.
16. If the accused is represented by a lawyer, the Judge does not need to comply with paragraph 15 if the Judge is satisfied that the accused understands the nature of the offence and the consequences of the plea. *RP 84(2)*

17. The Court considers whether or not to accept the plea of guilty. If the Court does not accept the plea of guilty, the Judge enters and records a plea of not guilty. If the Court accepts the plea, a finding of guilty is recorded and announced in open court by the Judge. *RP 85(2)(c)*  
*RP 86(1)*

18. The Court may substitute a plea of not guilty at any time during the proceeding if it appears that the accused did not understand the nature of the offence or the consequences of the plea. *RP 92(3)*

19. The prosecutor reads the summary of facts to the Court. The Court may hear evidence on any facts relevant to sentence which are asserted by the prosecutor and disputed by the accused. *RP 111*  
*RP 112*

20. If the Judge considers that there is a matter relevant to sentence that requires clarification, the Judge may call or recall a witness on that matter. *RP 115*

#### PROCEDURE ON PLEA OF NOT GUILTY

21. The Judge asks the accused whether he or she wishes to apply for an adjournment on the ground that: *RP 93*

- a. Any of the rules relating to the procedure before trial have not been complied with and that the accused has been prejudiced by that non-compliance; or
- b. The accused has not had adequate time or facilities to prepare a defence.

Any application for an adjournment is determined by the Court in the prescribed manner.

22. The prosecutor makes an opening address to the Court if he or she wishes or if the Court requires. *RP 95(1)*

23. The accused may make a brief opening statement in reply, with the leave of the Judge. *RP 95(2).*

24. The evidence for the prosecution is adduced. Witnesses who give evidence orally are examined, cross-examined, re-examined and questioned by the Judge and the military members. *Evidence Act 2006, s 84*  
*CMA ss 29 to 31,*  
*RP 100*

25. If the prosecutor calls evidence that has not been disclosed to the accused a reasonable time before the commencement of the trial, the accused may apply for an adjournment or a postponement of the cross-examination. *RP 96*

26. The case for the prosecution is closed.

27. The accused may submit there is no case to answer in respect of any charge. If the accused does so submit the submission will be determined by the Judge in the absence of the military members following the prescribed procedure. *RP 101 and 102*

28. The Judge informs the accused as follows unless there has been a successful submission of no case in respect of all charges: *RP 103(1)*

- a. If the accused wishes, he or she may give evidence as a witness but is not bound to do so.

- b. If the accused does give evidence, he or she will be liable to be cross-examined by the prosecutor, and questioned by the military members and the Judge.
- c. Whether or not the accused gives evidence, the accused may call witnesses on his or her behalf.
29. If the accused wishes to give evidence or call any witnesses:
- a. The accused may make an opening address. *RP 103(3)*
- b. The evidence for the defence is adduced. Witnesses who give evidence orally are examined, cross-examined, re-examined and questioned by the military members and the Judge. *Evidence Act 2006, s 84  
CMA ss 29 to 31,  
RP 100*
- c. The prosecutor may call witnesses in rebuttal with the leave of the Judge. *RP 104*
30. The prosecutor sums up the prosecution and then the accused sums up the defence. *RP 105*
31. The Court may call or recall any witness if it considers it is in the interests of justice to do so. *RP 106(1)*
32. The prosecutor or the accused may recall any witness with the leave of the Judge. *RP 106(3)*
33. The Judge sums up in open court and then withdraws. *RP 107*
34. The military members assemble in closed court to deliberate on their finding. If further advice is required from the Judge, the military members suspend their deliberations and ask for and receive the advice in open court. *RP 108(1) and (4)*
35. When they have completed their deliberations, the military members give their opinion on the finding orally in closed court, in order of seniority commencing with the most junior member. The finding must be unanimous. If, after any further deliberations that are required, the military members are unable to reach a finding on which they are unanimous, they report this to the Judge in open court in the presence of the accused. The Judge discharges the military members and refers the charge back to the Director of Military Prosecutions by way of a memorandum under seal covering the charge sheet, with an information copy to the Registrar. *RP 108(2)  
CMA s 55*
36. If a unanimous finding is reached, the military members reassemble with the Judge in open court. The accused is brought before the Court again. The Judge is informed of the finding by the senior military member. The Judge may advise the military members to reconsider their finding if the Judge considers it is contrary to law. *RP 110(1)  
RP 110(3)*
37. The Judge records the finding in the form prescribed in DM 69 (2 ed) Volume 2 and then announces the finding in open court. *CMA s 66(1)(a)  
RP 110(2)*

#### PROCEDURE ON MIXED PLEA

38. A mixed plea situation exists where either:
- a. The accused has pleaded guilty to one or more charges and not guilty to one or more other charges (not being alternative charges) in the same charge sheet; or



- b. Two or more accused being tried jointly face the same charge or charges and one or more of them have pleaded not guilty, and one or more of them have pleaded guilty to the same charge or charges.

39. The Court follows the procedure in paragraphs 15 to 18 on the charges to which a plea of guilty has been entered. *RP 88*

40. The Court follows the procedure in paragraphs 21 to 37 on the charges to which a plea of not guilty has been entered.

41. The Court follows the procedure in paragraphs 19 and 20 in respect of those charges on which a plea of guilty was accepted and a finding of guilty recorded so far as it is necessary to do so.

#### PROCEDURE WHERE MORE THAN ONE CHARGE SHEET

42. Where the accused is liable to be tried on charges in more than one charge sheet, the Court follows the procedure in paragraphs 8 to 41 as appropriate in respect of each charge sheet in sequence except that, where the court accepts a plea of guilty on one or more charges, it defers proceeding in accordance with paragraphs 19 and 20 until the accused has been arraigned and tried on the charges in the subsequent charge sheet or sheets. *RP 76(3)*

43. The Court does not proceed to the sentencing phase in respect of any offences of which it convicts the accused until a finding has been made in respect of all charges before the Court. *AFDA s 79*

#### PROCEDURE ON CONVICTION

44. The prosecutor calls evidence as to the accused's age, rank, and service record. The MD 613 is produced. The accused may insist on production of his or her actual service record and correction of any errors in the MD 613. The MD 613 is marked as an exhibit and signed by the Judge. *RP 113 and 114*

45. The prosecutor may call evidence on any other matters that are relevant to sentence. The accused may cross-examine any witnesses called by the prosecutor.

46. If the offence has a victim, the prosecutor produces a victim impact statement to the Court. *Victims' Rights Act 2002, ss 17 to 21*

47. The accused gives evidence if he or she wishes and may call witnesses in mitigation of punishment or as to character. *RP 114(4)*

48. The accused may request the Court to take into consideration any other similar offences which the accused admits having committed. Where the accused does so request the following procedure is adopted: *CMA s 64*  
*RP 117 and 138*

- a. The accused specifies the offences which he or she requests be taken into consideration.
- b. The prosecutor addresses the Court if he or she wishes and the accused may reply to the prosecutor's address.
- c. The military members assemble in closed court with the Judge to deliberate on the request.

- d. The Court reassembles in open court and the accused is brought before it again. The Judge informs the accused which offences the Court agrees to take into consideration and asks the accused whether he or she admits having committed them. The accused indicates which offences he or she admits having committed.
- e. A list of those offences is prepared by the Judge. The list is signed by the accused, marked as an exhibit and signed by the Judge.

49. The prosecutor and the accused may address the Court on the question of sentence. The prosecutor will ordinarily be required by the Judge to address the Court first. There is no right of reply, except by special leave of the Court.

*RP 116*

## SENTENCE

50. The Court Martial assembles in closed court to deliberate on sentence. The Court determines the sentence by majority vote of the Judge and the military members, except that the Judge has a casting vote if there is an equality of votes.

*CMA ss 38(1)(c)  
and 61  
RP 118*

51. If the Armed Forces Discipline Committee has produced any relevant sentencing guidelines, the Court Martial must pass a sentence consistent with those guidelines, unless the Court is satisfied that it would be contrary to the interests of justice to do so.

*CMA s 65*

52. The Judge records the sentence and any orders made in the form prescribed in DM 69 (2 ed) Volume 2 and records any recommendation to mercy. Where the accused is sentenced to imprisonment or detention and the senior military member is a competent Service authority, the senior military member signs the necessary committal order and other orders where appropriate. The Court then re-assembles in open court and the accused is brought before it again.

*RP 118(3)*

53. The Judge announces the sentence and any orders made or recommendation to mercy in open court. If the sentence is dismissal from Her Majesty's Service, or imprisonment involving dismissal, the Judge states that the dismissal does not take effect until the expiry of the time allowed for lodging an appeal to the Court Martial Appeal Court or, if such an appeal is lodged, until that appeal (or a subsequent appeal to the Court of Appeal or Supreme Court) is determined. The Judge gives reasons for the sentence passed.

*CMA s 66*

## CONCLUSION OF TRIAL

54. After the sentence has been announced or, as the case may require, the accused has been found to be unfit to stand trial or acquitted (whether on account of insanity or otherwise), the Judge announces the trial is concluded. The Judge discharges the military members.

*RP 119*

55. The clerk orders all persons present (except the Judge) to stand. The military members march out of the courtroom. All persons present may resume their seats when the military members have departed.

56. The Judge asks counsel whether there are any further matters to be brought before the Court. If there are none, the Judge declares that this division of the Court Martial of New Zealand stands adjourned.

57. The clerk orders all persons present to stand. Counsel salute or bow to the Judge, as appropriate. The Judge retires.

58. As soon as practicable after the conclusion of the trial, the Judge dates and signs the completed record of proceedings. The Judge forwards the record of proceedings to the Registrar of the Court Martial. *RP 131(2)*  
*RP 133*

#### **PROCEDURE ON QUESTION OF LAW OR PROCEDURE UNDER CMA s 44**

59. Where the prosecutor or the accused raises any matter of law or procedure for determination by the Judge during the trial, the following procedure is to be adopted if no alternative procedure is specifically prescribed in the RP: *RP 74*

- a. The party raising the matter does so briefly;
- b. The party raising the matter may adduce evidence in support where necessary and the other party may adduce evidence in rebuttal;
- c. The other party may address the Judge on the matter which has been raised;
- d. The party raising the matter may reply; and
- e. The Judge rules on the matter and gives his or her reasons.

60. To avoid doubt, the Judge may sit alone to determine a question of law or procedure even if the question is raised during a trial, rather than an interlocutory proceeding. If the question is raised during a trial, the Judge ensures that the military members do not see the record of the proceedings relating to the question of law or procedure prior to the conclusion of the trial. *CMA s 44(2)*  
*RP 74(3)*



COURT MARTIAL OF NEW ZEALAND

**GUIDE TO PROCEDURE OF  
THE COURT MARTIAL OF NEW ZEALAND:  
INTERLOCUTORY AND BAIL PROCEEDINGS BEFORE A JUDGE ALONE**

The sequence of procedure and the relevant provisions relating to interlocutory or bail proceedings before a Judge alone in the Court Martial of New Zealand are as follows. This sequence is a guide only and reference must be made to the CMA and the RP for the detailed provisions. (See, in particular, RP 145 in the case of an application for bail.) The Court Martial may direct, authorise or accept a departure from the RP for reasons of urgency or for any other reason. If a matter is not expressly provided for in the RP, the Court Martial may give any direction that it thinks best calculated to carry out the purposes of the AFDA or the CMA. Furthermore, in addition to the jurisdiction and powers specially conferred on the Court Martial by the CMA (or any other Act), the Court Martial has all the powers inherent in a court of record.

*RP 135(1)*

*RP 138*

*CMA s 8(2)*

**WRITTEN SUBMISSIONS**

1. The applicant is to file with the Registrar full written submissions supporting the application not later than 14 days before the day fixed for the hearing of the application in form MD 614. If the applicant proposes to call evidence, affidavits are to be annexed to the submissions. A copy of the submissions and any affidavits are to be served on the respondent within the same period. *RP 136*  
*RP 137*
2. The respondent is to file with the Registrar written submissions in reply not later than seven days before the day fixed for the hearing of the application in form MD 614. If the respondent proposes to call evidence, affidavits are to be annexed to the submissions. A copy of the submissions and any affidavits are to be served on the respondent within the same period. *RP 136*  
*RP 137*
3. A Judge may excuse the parties to a bail application from complying with the requirements as to time in paragraphs 1 and 2 if compliance is impracticable because of the urgency with which the application is made.

**ORAL HEARING**

4. Counsel take their places in the courtroom. If the accused wishes to attend the proceedings, the accused is under escort and is seated with his or her counsel. Serving members of the Armed Forces wear the appropriate uniform dress order for proceedings in the Court Martial. Civilian counsel wear robes.
5. The Judge enters the courtroom. The clerk orders all persons present to stand.
6. The Judge takes his or her place. Counsel who are serving officers salute the Judge. Civilian counsel bow to the Judge. The Judge acknowledges salutes and bows. These marks of respect are paid at the beginning and end of each day on which the Court Martial sits.
7. The Judge declares that the Court Martial of New Zealand is in session. All persons present may be seated. Hats are removed. Counsel for the applicant stand and the senior counsel introduces counsel to the Judge. Counsel for the respondent stand and the senior counsel introduces counsel to the Judge.

8. The Judge swears in: *RP 72*
- a. Every person responsible for recording or transcribing the proceedings;  
and
  - b. Every interpreter attending the proceedings.

Each person is to stand while being sworn.

9. If a witness other than an expert witness may be called, the witness should not be present in the courtroom when the proceeding commences. The applicant or the respondent may apply now or at any time during the proceeding for an order that all or any witnesses be excluded from the courtroom except when called to give their evidence. *RP 99*

**Note:** The Court Martial has power to direct that certain persons, including witnesses, be excluded from the proceedings without an application being made by either party. *CMA s 39(1)*

10. The Judge calls on the applicant to speak to his or her written submissions. The applicant may adduce evidence in support where necessary.

11. The Judge calls on the respondent to reply. The respondent may adduce evidence in support where necessary.

12. Any witnesses who give evidence orally are examined, cross-examined, re-examined and questioned by the Judge. *Evidence Act 2006, s 84  
CMA s 29  
RP 100*

13. The Judge offers the applicant a right of reply.

14. The Judge: *RP 74(2)*
- a. Rules on the matter and gives his or her reasons;
  - b. Rules on the matter and reserves his or her reasons for a written judgment at a later date; or
  - c. Reserves his or her ruling and reasons for a written judgment at a later date.

## CONCLUSION OF PROCEEDING

15. After the Judge has delivered his or her ruling, or announced his or her intention in accordance with paragraph 14, the Judge announces that the proceeding is concluded.

16. The Judge asks counsel whether there are any further matters to be brought before the Court. If there are none, the Judge declares that this division of the Court Martial of New Zealand stands adjourned.

17. The clerk orders all persons present to stand. Counsel salute or bow to the Judge, as appropriate. The Judge retires.

18. As soon as practicable after the conclusion of the proceeding, the Judge dates and signs the completed record of proceedings, including the Judge's ruling and reasons. The Judge forwards the record of proceedings to the Registrar of the Court Martial. *RP 131*

## INDEX OF PROCEEDINGS

	Page
1. Proceedings including arraignment	
2. Proceedings on plea of guilty	
3. Proceedings on plea of not guilty	
4. Compliance with RP 111	
5. Proceedings on conviction	
6. Sentencing	
7. Conclusion of proceedings	
8. Exhibits	



COURT MARTIAL OF NEW ZEALAND

RECORD OF TRIAL PROCEEDINGS OF THE COURT MARTIAL OF NEW ZEALAND

Proceedings of a trial held at/on board \_\_\_\_\_ on \_\_\_\_\_ 20\_\_\_\_\_

Judge

\_\_\_\_\_

Military Members

Service description	Unit	Service

Clerk of the Court: \_\_\_\_\_

Counsel appearing for the Director of Military Prosecutions:

_____	_____	_____
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>
_____	_____	_____
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>

Counsel appearing for the accused:

_____	_____	_____
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>
_____	_____	_____
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>

Trial of:

_____	_____	_____
<i>(Service description)</i>	<i>(Unit)</i>	<i>(Service)</i>

## INDEX OF PROCEEDINGS

	Page
1. Argument (and evidence) for the applicant	
2. Argument (and evidence) for the respondent	
3. Reply by the applicant	
4. Judgment	
5. Other final orders	
6. Conclusion of proceedings	





**COURT MARTIAL OF NEW ZEALAND**  
**RECORD OF INTERLOCUTORY\*/BAIL\* PROCEEDINGS OF**  
**THE COURT MARTIAL OF NEW ZEALAND**

Proceedings held at/on board \_\_\_\_\_ on  
 \_\_\_\_\_ 20\_\_\_\_\_

**Judge**

Clerk of the Court: \_\_\_\_\_

Counsel appearing for the Director of Military Prosecutions:

<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>

Counsel appearing for the accused:

<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>
<i>(Name)</i>	<i>(Service)</i>	<i>(Qualifications)</i>

Proceedings in respect of:

<i>(Service description)</i>	<i>(Unit)</i>	<i>(Service)</i>
------------------------------	---------------	------------------

\* Delete inapplicable words



**RECORD OF RECONSIDERATION OF CUSTODIAL SENTENCE**  
*Rule 142(1) of the Armed Forces Discipline Rules of Procedure 2008*

**IN THE RECONSIDERING AUTHORITY**

To the Manager\*/Commandant\*/Officer Commanding\*/Commanding Officer\*<sup>1</sup>

---

*Name of prison, service penal establishment, or unit (if the offender is not in custody)*

Service description of service prisoner/detainee:	
Offence(s) of which convicted:	Custodial sentence:
Date of conviction by the Court Martial:	Date of sentencing:

Under section 158 of the Armed Forces Discipline Act 1971, the Reconsidering Authority has reconsidered the sentence of imprisonment\*/ detention\* imposed on the person named above by the Court Martial and has decided that:<sup>2</sup>

You are to inform the service prisoner\*/detainee\* of this decision in accordance with rule 142(3) of the Armed Forces Discipline Rules of Procedure 2008.

Dated at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_\_\_ .  
*Place Date*

---

Judge of the Court Martial  
Chair, Reconsidering Authority

\*Delete any inapplicable option

---

1 The person to whom this record is addressed must inform the service prisoner or detainee of the decision of the Reconsidering Authority, acknowledge that he or she has done so on the reverse of the record and return the record to the Reconsidering Authority, C/- The Registrar of the Court Martial, Headquarters New Zealand Defence Force, Wellington.  
2 Insert appropriate form of words prescribed in DM 69 (2 ed) Volume 2 Chapter 4 Section 4 paragraph 4.4.14.

To the Reconsidering Authority  
C/- Registrar of the Court Martial  
Headquarters New Zealand Defence Force  
WELLINGTON

The service prisoner\*/detainee\* mentioned in this record was informed of the decision of the

Reconsidering Authority at \_\_\_\_\_  
*Place*

on \_\_\_\_\_ 20 \_\_\_\_\_.  
*Date*

Dated at \_\_\_\_\_ on \_\_\_\_\_ 20 \_\_\_\_\_.  
*Place* *Date*

\_\_\_\_\_  
*Name*

\_\_\_\_\_  
*Appointment*

\*Delete any inapplicable option



## SUMMARY APPEAL COURT OF NEW ZEALAND

## GUIDE TO PROCEDURE OF THE SUMMARY APPEAL COURT OF NEW ZEALAND

The sequence of procedure and the relevant provisions relating to an oral appeal in the Summary Appeal Court of New Zealand are as follows. This sequence is a guide only and reference must be made to Part 5A of the AFDA and the RP for the detailed provisions. The Summary Appeal Court may direct, authorise or accept a departure from the RP for reasons of urgency or for any other reason. If a matter is not expressly provided for in the RP, the Summary Appeal Court may give any direction that it thinks best calculated to carry out the purposes of Part 5A of the AFDA. Furthermore, in addition to the jurisdiction and powers specially conferred on the Summary Appeal Court by the AFDA (or any other Act), the Summary Appeal Court has all the powers inherent in a court of record.

*RP 22(1)*  
*RP 51*

*AFDA s 118(2)*

### WRITTEN SUBMISSIONS

1. The appellant is to file with the Registrar two copies of full written submissions supporting the appeal no less than 15 working days before the day fixed in form MD 615 for the hearing of the appeal. The appellant must also file two copies of an authorities bundle. A copy of the submissions and authorities bundle is to be served on the Director of Military Prosecutions within the same period.

*RP 36*

*RP 34*

2. The Director of Military Prosecutions is to file with the Registrar two copies of his or her written submissions on the appeal no less than 10 working days before the day fixed in form MD 615 for the hearing of the appeal. The Director must also file two copies of an authorities bundle. A copy of the submissions and authorities bundle is to be served on the appellant within the same period.

*RP 36*

*RP 34*

### ORAL HEARING

3. Counsel take their places in the courtroom. If the Court has granted the accused leave to attend the proceedings, the accused is under escort and is seated with his or her counsel. Serving members of the Armed Forces wear the appropriate service dress with medals. Civilian counsel wear robes.

4. The Judge enters the courtroom. The clerk orders all persons present to stand.

5. The Judge takes his or her place. Counsel who are serving officers salute the Judge. Civilian counsel bow to the Judge. The Judge acknowledges salutes and bows. These marks of respect are paid at the beginning and end of each day on which the Summary Appeal Court sits.

6. The Judge declares that the Summary Appeal Court of New Zealand is in session. All persons present may be seated. Hats are removed. Counsel for the appellant stand and the senior counsel introduces counsel to the Judge. Counsel appearing for the Director of Military Prosecutions stand and the senior counsel introduces counsel to the Judge.

7. The Judge calls on the appellant to speak to his or her written submissions.

8. The Judge calls on counsel appearing for the Director of Military Prosecutions to reply.

9. The Judge offers the appellant a right of reply.

10. The Judge:

*RP 41*

a. Delivers the Court's judgment orally; or

b. Reserves the Court's judgment for delivery at a later date either in open court or through the Registrar.

#### **CONCLUSION OF PROCEEDING**

11. After the Judge has delivered his or her judgment, or announced his or her intention in accordance with paragraph 10, the Judge announces that the proceeding is concluded.

12. The Judge asks counsel whether there are any further matters to be brought before the Court. If there are none, the Judge declares that this division of the Summary Appeal Court of New Zealand stands adjourned.

13. The clerk orders all persons present to stand. Counsel salute or bow to the Judge, as appropriate. The Judge retires.

# ARMED FORCES DISCIPLINE COMMITTEE

■ <b>SECTION 1 – ARMED FORCES DISCIPLINE COMMITTEE</b> .....	<b>7-2</b>
Constitution .....	7-2
Membership of committee .....	7-2
Appointed member .....	7-3
Remuneration of members .....	7-4
■ <b>SECTION 2 – PURPOSE AND FUNCTIONS</b> .....	<b>7-5</b>
Purpose of Discipline Committee.....	7-5
Functions of Discipline Committee .....	7-5
Chief of Defence Force must publish sentencing guidelines.....	7-6
■ <b>SECTION 3 – PROCEDURE</b> .....	<b>7-7</b>
Procedure of Discipline Committee generally .....	7-7
Quorum for meetings.....	7-7
Other procedure at meetings .....	7-7
Voting at meetings .....	7-7
Protection from liability.....	7-7

## SECTION 1 – ARMED FORCES DISCIPLINE COMMITTEE

### CONSTITUTION

**7.1.1** The Armed Forces Discipline Committee (AFDC) is a statutory body established under the AFDA.<sup>1</sup> The AFDC was specifically created during the select committee phase of the military justice reform to fill what was seen as a gap in the command oversight of the disciplinary system left by the disappearance of the now defunct Board of Review.<sup>2</sup> While the AFDC has no power to overturn the findings of the Court Martial or adjust its sentences, it has a clear statutory function under AFDA s162 to provide guidance on sentencing – a power which is unique in New Zealand law.

**7.1.2** In addition to its statutory powers, the AFDC's meetings also provide a forum for examining questions of discipline more widely. In this regard the reports of the JAG on the conduct, rulings and results of particular trials before the Court Martial, and the reports of the senior military member from each trial, provide the opportunity to address issues which have arisen with the intention of avoiding similar problems in future.

**7.1.3** Administrative support for the AFDC is provided by the Office of the Chief of Defence Force, and Defence Legal Services. The Assistant Director of Military Prosecutions coordinates legal and administrative support to the AFDC.

### MEMBERSHIP OF COMMITTEE

**7.1.4** The membership of the AFDC consists of the following nine persons:

- a.** the Chief of Defence Force (CDF), who will be the chairperson of the AFDC;
- b.** the Vice Chief of Defence Force;
- c.** the Chief of Navy;
- d.** the Chief of Army;
- e.** the Chief of Air Force;
- f.** the Commander Joint Forces New Zealand;
- g.** the Judge Advocate General (JAG);
- h.** the Director of Military Prosecutions;
- i.** a representative of the Armed Forces Defence Counsel Panel who is appointed by the JAG (appointed member).

**7.1.5** The representative of the Armed Forces Defence Counsel Panel will be appointed by written notice. A copy of the notice will be provided to the CDF. The presence

<sup>1</sup> AFDA s 160.

<sup>2</sup> The Board of Review was a committee comprising the deputy chief of each of the Services, advised by the JAG. It had the ability to overturn the decisions of a court-martial, something which was inconsistent with the principle of an independent and impartial court under NZBORA s 25(a).

of this representative ensures that any problems relating to the provision of fair trial procedures, or perceptions of unfairness by service personnel who have been tried before a military tribunal, can be brought to the attention of commanders.

**7.1.6** The notice must state the date on which the appointment takes effect, which must not be retrospective and must state the term of the appointment.<sup>3</sup>

**7.1.7** The powers of the AFDC are not affected by any vacancy in its membership.<sup>4</sup>

**7.1.8** CDF may also choose to invite other persons with an interest or expertise in disciplinary matters to attend the meetings of the AFDC as CDF thinks fit. This may include any of the following persons:

- a. Deputy Chiefs of Service;
- b. Component Commanders;
- c. Deputy Judge Advocate General;
- d. Provost Marshal;
- e. Registrar of the Court Martial/Inspector of Service Corrective Establishments; and
- f. Warrant Officer of the Defence Force.

**7.1.9** Invited attendees may offer expert advice and comments at the direction of the Chair, but have no formal say on the sentencing guidelines and do not have a vote. The Inspector of Service Corrective Establishments may report, as he/she thinks fit, on issues relating to the compliance of the NZDF with international and domestic standards relating to the custody of persons deprived of liberty.

## **APPOINTED MEMBER**

**7.1.10** A person who is appointed to be a member of the Discipline Committee holds office for a term of up to five years as stated in the notice of appointment.<sup>5</sup> An appointed member may be reappointed for one further term, but the total of the further term together with the initial term must not exceed seven years.

**7.1.11** An appointed member continues in office despite the expiry of their term of office until:

- a. the member is reappointed; or
- b. the member's successor is appointed.

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3 AFDA s 160(3).

4 AFDA s 160(4).

5 AFDA s 164, For appointment see AFDA s 160(2)(i).



- 7.1.12** An appointed member may resign from office by written notice to the JAG.<sup>6</sup> He/she may at any time be removed from office by written notice from the JAG for inability to perform the functions of office, neglect of duty, or misconduct.

#### **REMUNERATION OF MEMBERS**

- 7.1.13** A person who is a member of the AFDC because of his or her office is not entitled to receive any fees, allowances, or expenses for services as a member in addition to his or her remuneration in respect of that office.<sup>7</sup> However an appointed member is entitled to receive the fees, allowances, and expenses for services as a member that are fixed or determined.<sup>8</sup>

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6 AFDA s 164(4).

7 AFDA s 165.

8 Fees are set in AFDR made under AFDA s 205(1)(c).

## SECTION 2 – PURPOSE AND FUNCTIONS

### PURPOSE OF DISCIPLINE COMMITTEE

**7.2.1** The purpose of the Discipline Committee is to produce sentencing guidelines for offences against this Act in order to ensure consistency in the sentencing practice of the Court Martial.

### FUNCTIONS OF DISCIPLINE COMMITTEE

**7.2.2** The primary function of the AFDC is to produce sentencing guidelines in relation to offences against the AFDA. The Guidelines must include:

- a. sentencing principles;
- b. sentencing levels;
- c. particular types of sentences;
- d. other matters relating to sentencing practice; and
- e. grounds for departure from the sentencing guidelines.

**7.2.3** The AFDC also has any functions that are incidental and related to, or consequential on, any of the functions set out in paragraph **7.2.2**.

**7.2.4** In performing its functions, the AFDC must ensure that any sentencing guidelines it produces are, to the extent that they are applicable, consistent with the following:

- a. the Sentencing Act 2002; and
- b. any guidelines published by the Sentencing Council established under the Sentencing Council Act 2007.<sup>9</sup>

**7.2.5** The AFDC must carry out its functions independently of the Minister.

**7.2.6** In addition to these statutory functions, the functions of the AFDC in relation relating to the good order and discipline of the Armed Forces include:

- a. Receiving and considering preliminary inquiry statistics, trends and procedures;
- b. Receiving and considering reports on statistics, trends and areas of concern in relation to the disposal of charges by military tribunals;
- c. Receiving and considering reports on appellate decisions and on any petition to the JAG;
- d. Considering Defence Force Orders in as much as they relate to the good order and discipline of the Armed Forces and recommending any necessary amendments; and

<sup>9</sup> Although the Sentencing Council Act 2007 was enacted by Parliament, a change of policy by Government has meant that no council was appointed and no guidelines currently exist.

- e. Considering the framework for complaints by members of the Armed Forces under s 49 of the Defence Act 1990 and recommending any necessary amendments.

### **CHIEF OF DEFENCE FORCE MUST PUBLISH SENTENCING GUIDELINES**

**7.2.7** CDF is required to publish any sentencing guidelines produced by the AFDC as Defence Force Orders.<sup>10</sup> This requirement is met by publication of the guidelines in this manual.

## SECTION 3 – PROCEDURE

### PROCEDURE OF DISCIPLINE COMMITTEE GENERALLY

**7.3.1** The AFDC regulates its own procedures.<sup>11</sup>

### QUORUM FOR MEETINGS

**7.3.2** No business may be transacted at a meeting of the AFDC if a quorum is not present. A quorum:

- a.** is the number that is half the number of members; and
- b.** must include the CDF and the JAG.<sup>12</sup>

### OTHER PROCEDURE AT MEETINGS

**7.3.3** Every written report submitted by the senior military member of the Court Martial<sup>13</sup> must be presented to the Discipline Committee at its next meeting after the date of the report.<sup>14</sup>

### VOTING AT MEETINGS

**7.3.4** Each member of the Discipline Committee has one vote. In addition to his or her general vote, the CDF, as chairperson has, in the case of an equality of votes, a casting vote.

**7.3.5** A decision whether or not to finalise any sentencing guidelines must be decided by a majority vote of the CDF, the JAG, and any other members present.<sup>15</sup>

### PROTECTION FROM LIABILITY

**7.3.6** No member of the AFDC is personally liable for any act done or omitted to be done by the Committee in good faith in the performance or intended performance of its functions.<sup>16</sup>

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11 AFDA s 164.  
 12 AFDA s 166A.  
 13 CMA s 34.  
 14 AFDA s 166B.  
 15 AFDA s 166C.  
 16 AFDA s 166D.

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