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Summary Report on Military Justice

Review of the summary trial system

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TŪ AROMATAWAI
INDEPENDENT REVIEW

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Tū Aromatawai *Independent Review* is a division of the Ministry of Defence. Tū Aromatawai provides assurance to the Minister of Defence by reviewing performance of the Defence system and identifying opportunities for improvement. The reviews take the form of assessments or audits as set out in section 24(2)(e) of the Defence Act 1990.

Report on Military Justice (Summary Trial)

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Contents

Executive Summary **5**
Recommendations 6
What is the context for this review? **8**
What is the key question asked in this review? **8**
How did we do this review? **8**
The purpose of military justice **9**
The origin of NZ's military justice system **10**
How the summary trial works **10**
Key roles in the summary trial 10
Perspectives on performance of the system **13**
Purpose of military justice 13
Is the system used consistently across different services and units? 13
Room for improvement 14
The decision to record a charge 18
Hearings 19
Consistency of punishment 21
Other issues 22
Assessment of issues **25**
Issues affecting system effectiveness 25
The balance between discipline and fairness 25
Complexity is affecting use of the system 26
Delays affect disciplinary purpose 27
Expectation that human rights standards apply 27
System portability 47
Summary and recommendations **49**
Bibliography **58**

Executive Summary

The summary trial system is the primary means by which discipline is achieved in the New Zealand Defence Force (NZDF). The summary trial has been operating in its current form since 2009, after being established by a 2007 amendment to the Armed Forces Discipline Act 1971 (AFDA). This is the first review of the system since it was introduced 10 years ago.

The summary trial is the first stage of the military justice system and is run by military personnel. The trial process imitates a court setting, with officers fulfilling the role of the judge (the disciplinary officer), and officers or non-commissioned officers fulfilling the roles of the prosecutor (the presenting officer) and the defence lawyer (the defending officer). Lawyers are not allowed to be present at a summary trial but can give advice outside the hearing process. The system is designed to address all levels of offending – from serious offences through to minor disciplinary infractions.

The key question addressed by this review is whether the summary trial system effectively maintains discipline while also ensuring fairness to victims and those charged with offences.

Overall the system is working reasonably well. In particular, we were impressed with the dedication and professionalism shown by officers who do their best to apply the system in a fair and effective way. A number of the officers we met displayed quite exceptional knowledge, proficiency and commitment.

The summary trial system appears to work best for the middle range of offences (such as disobeying a lawful command, drunkenness, and avoidance of duty). However, we identified problems at both the higher and lower end of the offence spectrum. Summary trial processes are not sufficiently fair to either the victim or the accused in respect of serious offences (such as sexual assault and grievous bodily harm), given the inherent lack of independence and the lack of specialised expertise of those running the process. And the system is too complex and time-consuming for the numerous, minor disciplinary infractions (such as “dirty boots” or being late for parade).

Despite the ability to remand serious criminal offences to the Court Martial (or cause the matter to be referred to the civil authorities – e.g. the Police), these types of cases are sometimes still being heard at summary trial. Officers who have been involved in such trials expressed serious discomfort about not being well equipped to deal with such matters - in terms of achieving fairness but also in terms of dealing with their own and others’ emotional welfare. We concluded that all serious, complex or sensitive matters should be consistently remanded to the Court Martial or, where appropriate, referred to the civil authorities.

Flexibility of the system is also an issue, as the commanding officer is required to record a charge and commence investigation if they consider an allegation is well founded. This makes it difficult to deal with minor infractions in a less burdensome way.

Delays are a generic problem, and affect the disciplinary purpose of the summary trial as well as fairness to those involved. We propose changes that should help to reduce delays, such has having the unit lead preliminary investigations into minor disciplinary offence, instead of military police.

Improving the level of skill of those preparing preliminary investigations or running trials would help to improve expertise and reduce delay.

We analysed whether the summary trial process meets internationally accepted human rights standards. Domestic as well as international human rights law places importance on the right to an independent and impartial court and the adherence to a number of fair trial rights. Summary trial, by design and the necessity of the military structure, limits those rights. Even though those limitations were justified in accordance with section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA) at the time of the scheme's enactment in 2007, international scholarship and jurisprudence has since moved towards adopting measures and practices that are less limiting of rights.

We recommend some changes to further enhance the fairness of the system and bring New Zealand closer to some of its counterparts overseas. They include adding safeguards where detention may be imposed as a punishment; making the right to elect a trial by Court Martial available to all; ensuring consistent decisions to transfer serious offences to the civil court or Court Martial; and requiring a service connection for offences heard by summary trial.

Issues were raised in relation to the search powers under the AFDA. On an initial assessment, the search provisions are extremely out of date (having been enacted in 1971) and should be urgently reviewed given they are relied on to examine personal electronic devices.

Recommendations

1. Allow more flexibility in the decision of whether to record a charge by seeking amendment to section 102 of the AFDA. Any such change should be accompanied by a mechanism to prevent misuse, and guidance as to when it is appropriate not to record a charge.

2. Enable an officer independent of the chain of command to record a charge and commence an investigation in serious, complex or sensitive cases, and seek amendment to the AFDA as required.

3. Enable extra duties or similar responses to be imposed administratively as a response to minor offending that avoids the complexity of a summary trial, and seek amendment to the AFDA as required.

4. Conduct preliminary inquiries into minor disciplinary incidents within the accused's unit as a matter of standard practice across NZDF, rather than referring such matters to military police. (Policy analysis will be required to clearly define minor disciplinary incidents. Minor incidents should not include offences that have a criminal element such as dishonesty or violence.)

5. Develop training material to support units undertaking preliminary investigations of minor disciplinary incidents, such as taking statements from witnesses, collecting and recording other evidence, and preparing files; and incorporate this into the military justice training programme.

6. Develop guidelines for reducing sentences and staying proceedings where delay has been unreasonable. Consider imposing a limit of six months, particularly for bringing a minor disciplinary incident to summary trial.

7. Review existing rules on when to refer matters to the civil court or Court Martial, and monitor compliance with those rules to improve the consistency of such decision-making.

8. Require a stricter service connection test to be met before allowing a civil offence (under s 74 of the AFDA) to be tried summarily.

9. Consider whether it is appropriate to continue to retain detention as a punishment option at summary trial. In the short term, consider options for improving procedural fairness, for example, by automatically referring every sentence of detention to the Judge Advocate General or by introducing other procedural safeguards.

10. Extend the right to elect trial by Court Martial to all persons facing a charge under AFDA.

11. In respect of search powers:

    a. Review current guidance for commanding officers on the reasonableness requirement when authorising searches using legislative or customary powers;

    b. Consider whether the search provisions in the AFDA should be relied on to interrogate personal electronic devices (including seeking Crown Law advice if appropriate);

    c. Review the AFDA search provisions to update them in light of technological changes.

12. Issue a clear and unequivocal statement on the unlawfulness of command influence, whether by Defence Force Order or some other means, to reinforce the importance of impartial command behaviour.

13. Issue a Defence Force Order to address when compensation orders may or may not be used.

14. Consider policy options for maintaining consistency with the rights afforded to minors in the NZBORA as far as practicable.

15. Review existing reporting mechanisms to improve visibility and to enable better governance of the disciplinary system by NZDF senior command.

16. Develop clear guidance and communications to ensure that defendants are made aware of the right to a fair hearing and legal advice.

17. Report the outcomes of summary trials.

What is the context for this review?

1. The core values of the NZDF are courage, commitment, and comradeship. They are instilled in all members of the military through training, leadership and by example. The military uses the military justice system to enforce these values both when training in New Zealand and when operating abroad.

2. The military justice system runs parallel to, but does not supplant the civil justice system.

3. The military justice framework is set out in the Armed Forces Discipline Act 1971 as well as secondary legislation[1]. The military offences contained in the AFDA set the standards of behaviour expected in the armed forces. The legislation also sets out the systems and processes by which such standards are enforced. The summary trial is the first level of the system and the bulk of decisions made in the military justice system are made at summary trial.

4. The current summary trial process, which is the subject of this review, was introduced in July 2009 (by the Armed Forces Discipline Amendment Act (No 2) 2007).

What is the key question asked in this review?

5. This review asks whether the system effectively maintains discipline while also ensuring fairness to victims and those charged with offences.

How did we do this review?

6. We undertook a desktop review of relevant material describing the military justice system and its purpose. We examined relevant NZDF policy and reports, including drawing on the analysis in the inquiry into historic sexual offending conducted by Frances Joychild QC. We reviewed relevant cases and reviews of comparative jurisdictions overseas. (Canada, Australia and the United Kingdom).

7. We collected and analysed a range of performance data from the summary trial system, including summary trial records and statistical data.

8. We sought feedback on the how the system was working from a variety of participants including disciplinary officers, presenting officers, defending officers, investigators, legal officers, victims and persons charged with offences. In total we spoke with over 100 officers and non-commissioned officers, visiting eight bases in the process. We spoke to the Judge Advocate General of the Armed Forces, who is also the Chief Judge of the Summary Appeal Court, the Director of Defence Legal Services / Director of Military Prosecutions and military lawyers. We also spoke to the Provost Marshall and military police. Our coverage was not as

[1] The Armed Forces Discipline Rules of Procedure 2008, and DM69 Manual of Armed Forces Law Vol 1 (2nd Ed). Further provisions relating to bail and trial before the Court Martial are set out in the Court Martial Act 2007.

extensive as we would have liked in respect of victims and persons charged with offences. But we gained considerable insights from the officers and non-commissioned officers interviewed who were intensively involved in the summary trials. They were familiar with the impact of cases and many also had the experience of being charged with an offence themselves.

9. We invited comments through the NZDF intranet page and received 18 written submissions.

10. We reviewed all judgments of the Summary Appeal Court since 2009.

11. We evaluated the disciplinary purpose and the fairness and rights principles that support effective justice systems.

The purpose of military justice

12. The following quote from Christopher Griggs encapsulates the rationale for military justice[2]:

> *Many aspects of warfare have changed through the ages, but there is one immutable truth. One of the fundamental tasks of members of the profession of arms is to kill other human beings and, by necessary extension, to face the prospect of terrible death oneself. This is not a natural condition. Battle, in whatever environment, is likely to produce fear on the part of the participating combatants. And fear itself is perhaps as great an enemy to the military commander as the opposing forces. It has the potential to undermine the cohesiveness of the fighting force and, as the Roman army demonstrated vividly on many occasions when confronted by 'barbarians', a force which fights as one cohesive until will generally overcome a looser collection of warriors, even if the latter is numerically superior.*

So the exclusion or minimisation of fear as a factor affecting the performance of one's subordinates must be regarded as pivotal to successful military command. As General Sir John Hackett explains:

> *Everybody gets frightened. This is basic. I do not believe that many soldiers are frightened of death. Most people are frightened of dying and everybody is frightened of being hurt. The pressures of noise, of weariness, of insecurity lower the threshold of man's resistance to fear. All these sources of stress can be found in battle, and others too – hunger, thirst, pain, excess of heat or cold and so on. Fear in war finds victims fattened for the sacrifice.*
>
> *Men often get quite expert in managing themselves in relation to fear. Some also get quite good at managing others. Everyone knows how he has handled this problem himself and it is not easy to generalise. But it is perhaps true to say that one of the most effective ways of overcoming fear is what might be called the exclusion of the alternative.*
>
> *A man suddenly faced with a terrifying situation – such as the appearance of a strong party of the enemy on patrol when he is a sentry in an outpost; along, far from his friends and at night – may feel strongly inclined to run away. He will only do this if running away is a possible alternative to staying there. If this alternative does not exist for him, he not only will not run away: he cannot. The complete rejection of the possibility of any alternative course to the prescribed one is a great source of strength.*[3]

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[2] CJ Griggs, *A Joint System of Summary Disposals for the New Zealand Armed Forces of the 21st Century* (2002) Thesis, Massey University.

[3] General Sir John Hackett, *The Profession of Arms,* Sidgwick and Jackson, 1984, at 221-222.

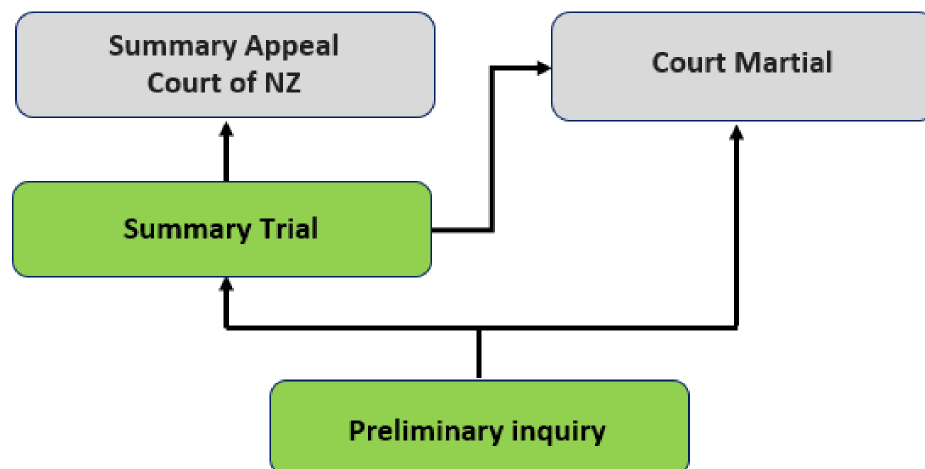
The origin of NZ's military justice system

13. Until the end of the Second World War, New Zealand's military law mirrored the Imperial Statues governing discipline in the British Services. From 1950, New Zealand's military law began to diverge from that of Great Britain with the New Zealand Army Act 1950 and the Royal New Zealand Air Force Act 1950. New Zealand's Naval system of discipline remained closely aligned, however, to the Imperial statute.

14. Complete severance from the UK occurred in 1983 with the enactment of the Armed Forces Discipline Act 1971 (which came into force in 1983).[4] The AFDA covered all three New Zealand services; the New Zealand Army, Royal New Zealand Air Force, and Royal New Zealand Navy. At this point the three services had separate systems of military tribunals. At the summary level, the Army and Air Force used the "Orderly Room". The Navy used the "Captains Table".

How the summary trial works

15. The summary trial[5] is not a trial by a court. It is a process run by officers in the chain of command to respond to offending by service personnel. The trial is conducted without the formality of a court and without lawyers. The place of the summary trial in the military justice system is shown below.



Key roles in the summary trial

Preliminary investigation

16. When an offence is reported, Service authorities commence a preliminary investigation. The investigators are usually military police, but they may also be officers or senior non-commissioned officers directed to conduct preliminary investigations by their commanding

[4] Armed Forces Discipline Act Commencement Order 1983 (SR 1983/232).

[5] The process for summary trials is set out in part 5 of the AFDA.

officers. Preliminary investigations involve collecting and examining evidence which leads to a determination whether or not there is evidence to support a charge under the AFDA.

Disciplinary officer

17. The disciplinary officer presides over the summary trial. The disciplinary officer is an officer in the chain of command of the person charged with the offence, and must be at least two ranks higher than the accused. The disciplinary officer decides whether the case can be tried summarily, makes a finding and, if the finding is guilty, imposes punishment. Four categories of officer can be disciplinary officers: superior commanders, commanding officers, detachment commanders, and subordinate commanders.

Defending officer

18. The accused is assigned a defending officer who will represent them in proceedings. The defending officer is usually an officer or non-commissioned officer with responsibility for the accused in the chain of command.

Presenting officer

19. The presenting officer presents the evidence in support of the charge. The disciplinary, presenting and defending officers must be certified under the NZDF's military justice training programme.

Arraignment

20. The first step in the summary trial process is for the suspect to be arraigned. The disciplinary officer confirms that the accused is the person identified in the charge report, ensures the individual understands the charge, ensures that the evidence has been disclosed, and takes the person's plea.

Guilty plea

21. If the plea is guilty and the disciplinary officer is satisfied the person understands the plea, the presenting officer will provide a summary of evidence in support of the charge.

Not guilty plea

22. If the accused enters a not guilty plea, the presenting officer presents the evidence in support of the charge. The defending officer may cross examine witnesses. The disciplinary officer decides if there is a case to answer. At this point the charge can be dismissed (if there is no case to answer). If the disciplinary officer is satisfied that there is a prima facie case, they will consider whether they have sufficient powers of punishment and are able to act as a disciplinary officer in relation to the charge. If so, they will try the accused summarily. The disciplinary officer will then ask the defending officer to outline their case and to present evidence on behalf of the accused.

Referring a matter to Court Martial

23. If the punishment appropriate to the offence (if proved) is imprisonment or dismissal, the matter must be remanded to the Court Martial.[6] The charges are referred to the Director of Military Prosecutions to decide whether a charge sheet is to be laid before the Court.

24. The matter may also be remanded to Court Martial if the disciplinary officer considers that a more serious punishment may need to be imposed than those prescribed in Schedules 4 and 5 of the AFDA.

25. An accused person will be given the right to elect a trial by Court Martial if the disciplinary officer considers they may need to impose a serious punishment, such as detention.

Inquisitorial or adversarial

26. The summary trial process is designed to have both inquisitorial and adversarial aspects, with the disciplinary officer asking any questions needed to get to the truth. In practice, however, the structure of the summary trial process - including the presentation of prosecution and defence cases, and cross-examination of witnesses –means it operates more like the adversarial process used in the civilian courts.

27. After the defending officer presents the defence, the disciplinary officer makes a finding. If the accused is found guilty, the disciplinary officer will impose a sentence (called a punishment under the summary trial provisions of the AFDA). Punishment in the most serious cases may include detention in the Services Corrective Establishment for personnel below the rank of Lance Corporal (or equivalent). The disciplinary officer can also decide to impose no punishment, make a compensation or restitution order, or order that the offender come up for punishment if called upon.

Safeguards

28. The system includes measures designed to enhance the fairness of the summary trial. Those running the summary trial must be certified as competent; serious charges must be certified by legal advisors; and legal advisors address conflicts of interest and matters that are too complex for a disciplinary officer. There are limits on the powers of punishment of a disciplinary officer. Before an accused expressly waives their right to a Court-Martial if facing a serious punishment, they are offered the opportunity to obtain legal advice about that decision.

29. A person found guilty has the right to appeal to the Summary Appeal Court Any person may also petition the Judge Advocate General in respect of a summary trial.

[6] There are also other punishments that a disciplinary officer cannot impose, which depend on rank. Those cases must be referred to the Court Martial.

Perspectives on performance of the system

Purpose of military justice

30. This section sets out the perspectives of officers interviewed in the course of this review.

31. As described above, the overarching rationale for military justice includes ensuring cohesion in combat situations so that military personnel are protected to the greatest extent possible and the military objectives are achieved. Officers consistently said that the core purpose of the military justice system was to hold NZDF members to account for their behaviour. One officer described the purpose of the system being to protect, maintain and nurture the military environment. Another Army officer described it as the "*key way that soldiers 'learn the rules'*." Discipline was identified as a foundation pillar of operational effectiveness. The behaviour of service personnel, their discipline and adherence to orders were seen as the building blocks of an effective military.

32. The summary trial system was seen as being important to prevent the use of informal and inconsistent responses to misconduct. It was an important means to protect personnel from injustice and to provide them with a fair process. Interviewees said the summary trial process needed to produce fair outcomes. One of the potential strengths of the current system is that the summary trial enabled discipline to be dealt with in a visible and fair manner.

33. Interviewees felt that the military needed a different system from the civilian courts. The civilian law has no equivalent offences for many types of charges that can be brought under the AFDA. The military has a lower tolerance for misconduct than the civilian employment environment. Many matters dealt with by summary trial would not be dealt with as a disciplinary issue in the civil system. For example, cannabis use might attract only a warning in the civil system, but has more serious implications in the military.

34. Interviewees said NZDF needed to hold its members to a higher standard, and so it required its own system. To this end, justice needed to be seen to be done. And those administering punishment need to be in a position to assess the impact of such punishment on the functioning of their units.

Is the system used consistently across different services and units?

35. The summary trial process is not consistently used by the three services to respond to disciplinary issues. Navy and Army tend to use the system more than the Air Force. Army officers in particular described the summary trial as a critical enabler of operational readiness.

36. Differences also arise between units as to how the summary trial is used. Training units use the summary trial more frequently than operational units. For training units, it is a key method for instilling behavioural norms in new recruits.

Room for improvement

37. We asked interviewees to comment on whether the summary trial system effectively maintains discipline and achieves fairness. In a general sense, the system is perceived to be fairly effective. However, there is room for improvement.

Current system is complex and time-consuming

38. Summary trials are seen as being overly complex. Interviewees said the system achieves better fairness compared to the previous Orderly Room and Captain's Table processes. But the additional fairness comes at the cost of increased complexity and resourcing. One officer described the system as "a sledgehammer trying to open a walnut". The use of complex summary trial processes to address minor misconduct is seen as particularly problematic.

39. The complexity has two impacts: increasing the time and resources required to prepare for hearings; and greater difficulty navigating both the procedural requirements of the AFDA and questions of law.

40. Interviewees said that preparing for trial can be time-consuming and often seems out of proportion to the nature of the charge to be heard. (This arose in relation to less serious offences that are purely disciplinary in nature (such as being late or failing to perform a duty) and which did not involve criminal conduct (such as dishonesty or violence). Interviewees said the process could be simplified for less serious disciplinary offences. Logistical difficulties can also arise, including finding time to conduct trials and have military justice-qualified staff available to present and defend. Additionally there is the frustration of officers being drawn off other duties to prepare for hearings, which can require many days work in more complex cases. Others described the difficulty of having to prepare for and run trials before and after normal working hours. This substantial resourcing requirement was felt to be one of the main problems associated with the summary trial system.

41. Defending, presenting and disciplinary officers at times struggle with the procedures they must follow and the legal questions that arise. One submitter summed up a common sentiment: that personnel running and supporting the trial process are not trained lawyers. They cannot be expected to be competent in legal areas even after completing the military justice training programme. For serious offending, or where legal complexities arise, they have insufficient expertise to ensure fair and just outcomes, and sometime have difficulty accessing the advice they felt they needed. Interviewees did say, however, that disciplinary officers deal competently with less serious offending.

42. The views on procedural and legal difficulties expressed by officers interviewed were supported by our analysis of the Summary Appeal Court judgments. A number of appeals succeed because disciplinary officers fail to apply correct legal tests or rules of evidence. In one case, a disciplinary officer hearing an assault charge did not understand where the burden of proof lay when self-defence was raised. In another case, the presenting officer and disciplinary officers failed to recognise that the defendant had been charged with the wrong offence, meaning argument at trial centred on the wrong legal tests. In another example, the intention element of an offence was omitted from the charge.

43. It also emerged from the interviews that procedural errors occur reasonably often. Difficulties include matters such as failing to adhere to a two rank separation between the accused and the disciplinary officer presiding at the trial; failing to provide statutorily prescribed timeframes to consider election rights; amending charges without hearing submissions; imposing punishments not available to them (i.e. not listed on the applicable AFDA schedules); having officers involved in hearings who did not hold certificates of competency; failing to have jurisdiction because the accused is not under the command of the disciplinary officer; not allowing a defendant to lead evidence; and many other examples.

Preliminary investigations

44. Interviewees identified that training should be improved with guidance on conducting preliminary investigative tasks, such as interviewing witnesses or collecting other evidence. Many identified this as a gap. Better guidance would support more preliminary inquiries being undertaken by officers and non-commissioned officers within the command unit.

45. Interviewees identified that difficult cases can require frequent recourse to legal advice when preparing for trial. They acknowledged the high standard of advice provided and particularly found it helpful when legal advisers were located on base or accompanied deployments. There was a general call for greater availability of legal advice.

Timeliness

46. We received considerable feedback on the time taken to complete many summary trials. At the extreme, one summary trial involving a charge of unlawful discharge took 18 months from the time of the incident to the date of the trial. Typical times to complete the discipline process were said to be several months.[7]

47. Interviewees said the delays undermine the effectiveness of the discipline system, are unfair for people accused of offences and are unfair for victims. The previous system of Orderly Room and Captain’s Table was said to have resolved less serious disciplinary offences on the same day the incident occurred. We note that lengthy delays also occur in the civil criminal court system, but should not be used to justify delays in the military summary trial system - for which a key focus is the timely resolution of behavioural issues so as to achieve unit cohesion.

48. Delays were often attributed to the timeliness of military police investigations. Interviewees said that referring matters to military police can result in preliminary investigations that are excessively complex for addressing minor and mid-range disciplinary issues. Military police for their part said that minor matters were routinely referred to them for investigation when they need not be, and this affected their ability to conduct investigations in a timely way.

49. Interviewees said that major, centrally led, national investigations (e.g. the current Operation WAIKATO) put considerable pressure on military police resources, which prevented them from

[7] No data was available to allow us to corroborate the delays, but they were almost universally cited by those interviewed.

making timely progress on other disciplinary inquiries. This was not a criticism of the work of the military police, but reflected trade-offs made to balance limited resources.

50. Interviewees also said that military police investigations often expanded beyond the initial alleged offending. They saw this as 'scope creep', which caused unnecessary delay in resolving the original incident.

51. Interviewees said that investigation files prepared by local military police were reviewed by Headquarters military police and lawyers, which added to the time needed to finalise preliminary investigations. This 'quality control' element was felt at times to be unnecessary and conducted out of sight of the chain of command by Wellington-based military police and lawyers.

52. Some interviewees expressed frustration that responsibility for preliminary investigations is taken completely out of the hands of the chain of command. A number of interviewees said that military police should not be involved in relatively minor disciplinary matters, allowing them to focus on more serious offending.

53. Interviewees said the reconfiguring of the military police into a tri-service police force had affected the way preliminary investigations are now conducted, and they perceived that many operational units have lost the skills, mandate and incentive to conduct these investigations themselves.

54. A common view expressed was that Army units are more likely than Navy or Air Force units to conduct their own preliminary inquiries using junior officers or non-commissioned officers within the chain of command.

55. Some commanding officers expressed frustration at losing control of the disciplinary process. They were sometimes not kept informed that a person under their command was being investigated by military police, one saying: *"Military police are technically investigating on behalf of the commanding officers, but I don't think the military police see it that way".* The military police *"see themselves as an independent police force, not serving the commanders"*. These commanding officers said that the loss of accountability for preliminary investigations affects how they resolve misconduct. This in turn could undermine command responsibility for discipline and morale.

Other causes of delays

56. Other causes of delays were situation-specific:

    a. Delays caused by technical or logistical difficulties that could not be easily controlled. For example, serious incidents occurring overseas may involve witnesses scattered across different countries and vessels and bases.

    b. Where a matter has been initially detected or investigated by civilian police and it has taken time to transfer the matter to the military police.

c. When a subordinate commander needs to obtain permission from their commanding officer to hear a charge.

Impact of lengthy investigations on discipline

57. There was a consensus that delays have a negative effect. They inhibit the effectiveness of the summary trial system as a disciplinary tool which underpins the effectiveness of the armed forces. It is now perceived as being too slow and unresponsive to use on a day to day basis for maintaining discipline. One non-commissioned officer commented, *"we try and avoid summary trials as much as we can. I think it often doesn't add any value."*

58. Sometimes delays completely undermine the benefit of running a summary trial. One officer described a 13 month delay hearing a charge arising from an alcohol-related incident. The summary trial was abandoned.

59. Lengthy investigations often impact on operational effectiveness. For example if drug use or possession charges are pending, members will be prevented from working on certain duties due to health and safety risks if they were in fact using drugs. Such situations undermine unit effectiveness for extended periods if they cannot be resolved swiftly.

60. Delays also impact the availability of punishments. For example, one disciplinary officer identified *"if the schedule of punishments identifies a stay of seniority, then I shouldn't really issue that punishment that because he has already had that applied to him 'unofficially' in that I've chosen not to promote him"* [during the period of waiting for the summary hearing to be completed].

Fairness and welfare

61. Lengthy investigations cause stress to those accused of offences, victims, and others involved in trials. One officer said: *"our people are ending up going to our base support team with depression and anxiety. They have had an axe hanging over their head for 6 to 9 months".*

62. Another officer described the effect on a person with a charge pending: *"this affects him and his family. He will not get a posting that he wants. The guy is eligible for promotion, but I can't promote him knowing that this is hanging over his head. In the interests of justice, we should be hearing matters within much shorter timeframes."*

63. Lengthy investigations can also be unduly punitive on people who simply wish to resign from service. *"We have people waiting for their charges to be heard who want to get out of the Army, but they can't get out until the charge is heard."*

64. Cases involving lengthy delay before trial are regularly commented on by the Summary Appeal Court. A lengthy delay will breach an accused's rights under section 25(b) of NZBORA unless

the delay can be justified in the individual case.[8] Even where an incident happens overseas it should not be assumed that a subsequent delay can necessarily be justified.

Skills of presenting and defending officers

65. The quality of summary trial outcomes depends on the skills and experience of the people involved. Interviewees said those performing the presenting and defending officer roles do so to a high standard and have a high level of professionalism. Officers felt that the competence of the presenting and defending officers are key to the quality of the trial process.

66. Consistency in the quality can be an issue, however. A defending officer commented that the Level 2 qualification does not give officers sufficient training to deal competently with difficult cases. Nor does the training equip officers to deal appropriately with interviewing people in sensitive cases, such as sexual assault.

67. Interviewees said that when cases are complex, the defending and presenting roles need to be performed by people with relevant expertise. Complex cases with multiple charges, offshore components, drugs, and similar elements take both considerable work and require a level of experience beyond the capability of many officers.

The decision to record a charge

Minor disciplinary offences

68. The requirement to record a charge and investigate where an allegation is well-founded is mandatory, but not consistently followed. Section 102 of the AFDA requires the commanding officer either to record a charge and to investigate in a summary trial or to refer the matter to the civilian authorities. Although the decision to charge should be based on whether the allegation is well-founded, we were told by almost all interviewees that this requirement is not strictly observed. Commanding officers on many occasions deal with minor matters through administrative action instead of laying a charge. Issuing a warning or imposing corrective training were seen as more suitable and effective than a summary trial. This approach, however, is problematic when it is applied inconsistently to trivial issues, or when it is used as a response to non-trivial matters.

Just culture

69. Air Force officers said a tension exists between the military justice system and their Just Culture framework. Just Culture is a health and safety approach that seeks to encourage an atmosphere of trust within the Air Force. It encourages staff to self-report safety-related information, including their own acts or omissions, without fear of retribution for honest mistakes. The Just Culture approach does not prevent the parallel use of disciplinary processes to hold people accountable for wilful unlawful acts or acts of gross negligence.

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[8] See *Martin v District Court at Tauranga* [1995] 2 NZLR 419 (CA). A 15 month delay in the civil system violated the Act where the delay was caused by the prosecutor unilaterally vacating the fixture.

However a tension arises when unintentional incidents are prosecuted through a summary trial.

70. The environment created by Just Culture encourages members to take responsibility for their actions and this affects the way Air Force commanders respond to purely disciplinary matters (as opposed to health and safety related).

71. Opting for alternative methods to resolve disciplinary matters is not confined to the Air Force. An Army non-commissioned officer identified their unit's reluctance to use summary trials to address relatively minor matters: *"To be honest, things like that are just wasting our time – using summary trials for minor infractions stuff us around."* Instead, verbal warnings and corrective training are seen as an appropriate response.

72. An officer noted that when commanding officers do not have a discretion whether to charge, it can force them to commence a trial when they know doing so is not in the best interests of an individual's welfare. A commander will often know about welfare and related issues.

73. Officers expressed the view that the commanding officer is best placed to determine whether a matter is well-founded and whether prosecuting the matter will be in the interests of service discipline. Several officers expressed frustration at being pressured by legal advisors and/or military police to lay charges when they believed another course of action would have been more appropriate.

A less complex system for minor offences?

74. Many interviewees and submitters believed that a less complex and time-consuming system should be available for minor offences. A lower tier disciplinary process could be used to address less serious conduct that is purely disciplinary in nature. One non-commissioned officer commented: *"I don't think we need all the work of a summary trial for something as simple as dirty boots. We should have a simpler system to impose punishments such as extra duties."*

75. One officer felt that it would be useful to have a lower level disciplinary system based on a commander's punishment. They thought that commanding officers are well equipped to run a fair process without substantial formality.

76. Some interviewees did not see the need for a lower tier system. One commanding officer felt that New Zealand's summary trial system has better safeguards than systems in other militaries. He did not think that subordinate commanders should be given wider discretion to impose punishment without the full due process associated with a summary trial.

Hearings

Independence

77. The fairmindedness of the disciplinary officer is seen as an important factor in giving people a fair hearing. In the majority of interviews, officers felt disciplinary officers strived to provide a

fair hearing. However, some raised concerns about the lack of impartiality and independence of the summary trial and potential for bias and unfairness.

78. Impartiality was seen as an issue because the disciplinary officer is in the chain of command of the accused. Interviewees also raised concerns about the relationship between the defending officer and accused, identifying that the command relationship can introduce bias into the way the personnel approach the task of preparing a defence.

79. Other officers said the benefit of a completely independent court was not as important as having a system where commanding officers have responsibility for discipline in their own units and a swift and pragmatic process to resolve misconduct issues. They said some fundamental principles of justice had to be traded off against the need for an effective military operating environment.

80. Summary Appeal Court judgments confirmed that issues of bias or unfairness do arise through commanding officer involvement, but are not the norm. For example, a disciplinary officer was said to have indicated prior to one trial that he did not accept the appellant's explanation for his absence (in a case about being absent without leave), effectively rejecting his defence before the hearing. In another example, a disciplinary officer admonished an accused for their behaviour prior to trial. That these defects were picked up and rectified through the appeal process does, however, illustrate the effectiveness of this safeguard.

81. A number of interviewees gave examples of the summary trial being influenced by officers senior to the disciplinary officer. Examples were cited of two types of command influence: senior officers communicating their views generally about matters directly relevant to the trial, or by giving direction (both implicit and explicit) to disciplinary officers.

82. General communications about a current case on base can affect impartially where a senior officer expresses a view about the guilt or innocence of an individual, or makes statements about their tolerance for the type of behaviour that is the subject of an upcoming trial.

83. In one example, an officer in the chain of command was described as having unrealistically raised victim expectations. In another instance a senior officer was felt to have applied 'pressure' by expressing interest in a trial outcome prior to a hearing. In another example, a subordinate commander identified that he was 'pulled off a case' that he was a disciplinary officer for. He felt that this was because he had *'indicated that I wasn't going to find someone guilty and the commanding officer wanted them found guilty'.* In a more concerning case of influence, a number of interviewees referred to an example of interference with the way a serious allegation was being investigated and heard. The reasons for interference were reportedly based on good intentions: the senior officer was motivated by the welfare of the accused. But a number of interviewees expressed concern about command influence on both the process and the outcome given the seriousness of the offence. We have therefore found it necessary to make a recommendation in respect of command influence.

Propensity to plead guilty

84. A very high proportion of accused plead guilty. This could lead to the conclusion that the system is unfair. Interviewees observed that many of those pleading guilty appeared to have a reasonable defence or there were questions about the evidence that should be tested.

85. One effect of the high rate of guilty plea is that those who plead not guilty are perceived by some as 'gaming' the summary trial process. Some interviewees said that people who do not plead guilty are "playing the system" and make matters more complicated for everyone. However, the fact that people are prepared to plead not guilty can be seen as a measure of success of the system given it was designed to introduce rights and fairness including the presumption of innocence.

86. Summary Appeal Court cases reveal that sometimes the accused person initially pleads guilty and regrets it later, particularly after receiving legal advice at a later date. This suggests that defending officers may not always be sufficiently well-equipped to assist an accused person to understand if the charges they face are well founded.

Consistency of punishment

87. Allowing commanding officers to have flexibility in imposing punishment is seen as important as, *"it allows commanders to take circumstances into account"*. However, the lack of consistency of punishment was raised as an issue. Most disciplinary officers felt that it would be useful to publish more data on how other disciplinary officers have punished offenders. One senior commander said they had started a register of punishments for units under their command to ensure that disciplinary officers within their units did not issue more or less severe punishments compared to another unit.

88. The Summary Appeal Court records show that excessive punishment or procedural errors in awarding punishment are relatively common grounds for appeal. Common mistakes include disciplinary officers not clearly setting out the reasons for their sentencing decision, disciplinary officers acting outside their authority, and failing to take account of all matters – such as examining conduct sheets. In one case of excessive punishment, the Disciplinary Officer said if he had been aware of the level of punishments from previous incidents, he would have imposed a less severe punishment.

89. Sentencing guidelines are published. However, they do not cover the full range of circumstances that may need to be considered by disciplinary officers, for example to address differences in the seriousness of each type of offence.

90. Several officers felt that punishment is effectively "doubled" when administrative action is coupled with a punishment at summary trial. They questioned the utility of holding summary trials in situations where a NZDF member has already indicated that they will leave NZDF voluntarily following a disciplinary incident.

Other issues

91. The timeliness, complexity, fairness, and consistency issues identified above were the main matters raised by officers, submissions and other sources. Other issues also arose, and are described below.

Welfare

92. Concerns were raised about the level of welfare support available for accused persons. Facing charges can be extremely stressful for both the accused and their family. Stress is exacerbated if there are long periods waiting for charges to be heard. Systems for supporting an accused person and their family are available. However, a chaplain noted that the need for welfare support is often not notified to the right people. And the person accused will often keep the fact they are under investigation quiet. Military justice processes tend to have priority over member welfare at times.

93. A senior commander raised concerns about the welfare of staff supporting summary trials – particularly presenting and defending officers. Certain types of cases are particularly traumatic for all parties. They felt that training and other support does not adequately prepare officers for the stress involved.

Powers of search

94. Questions were raised by officers and by some military police about whether the powers of search and seizure available under the AFDA have kept pace with New Zealand's civilian search and surveillance legislation. Particular concerns were expressed about fairness, and the legislation and processes relied on for seizing and examining personal electronic devices given the intrusiveness of such searches.

Different legal advisors

95. There was a perception by some of those interviewed that legal officers can be asked to provide advice to all parties involved in a summary trial (to the presenting, defending and disciplinary officers). This would give rise to a potential conflict of interest. In fact, legal officers may only advise and represent NZDF, so a conflict should not arise. However, this does touch on another issue dealt with later in this report, which is whether defending officers have adequate access to legal support.

De facto insurance scheme

96. Officers raised concerns about whether it was fair to use of the summary trial as a method of obtaining payments from drivers who damage military vehicles. They felt the core disciplinary purpose of the military justice system was being distorted by using it as a de facto "NZDF insurance scheme".

Half pay when detained

97. A submitter raised a concern about the policy of placing offenders on half pay while detained at the Services Corrective Establishment. Reduced pay significantly impacts the wellbeing and welfare of dependant family members. While this impact is noted, we have not recommended changes to the military justice punishment schedules. Welfare issues, such as financial penalties affecting family members, should be addressed separately. It is noted that in United Kingdom Armed Forces, detained personnel receive no pay at all, but a "welfare allowance" may be paid to the person's family.

Complaint process unclear

98. A submitter said a more accessible and victim-focussed reporting process is needed. How to report or complain about offending can be unclear to victims and witnesses. Service members normally report complaints through their chain of command, but this may not provide a suitable pathway for victims. Civilians also lack a clear process to report offences involving military personnel.

99. A similar issue was raised Frances Joychild QC in her report about historical sexual offending in the Air Force.

Review of military police

100. A submitter suggested an independent review of the military police function addressing effectiveness, powers and procedures. They identified that the investigative powers of military police have not kept pace with developments in civilian policing. They also identified shortcomings in search powers and in other aspects of investigative capability.

Military Justice training

101. A number of comments were received about the quality of military justice training. On the whole, the training given to presenting defending and disciplinary officers was seen to be of good quality. However, many said the online course was superficial. The residential training was described as good, but insufficient in both time and content to cover all types of cases that participants could find themselves involved in.

102. Some interviewees suggested focusing training on how defending officers and presenting officers approach their roles. Another officer felt that there needed to be more practical advice on the boundaries of what presenting and defending officers may ask, and the extent to which they may coach witnesses. There is also an opportunity to develop better supporting materials such as flow-charts and videos.

103. Some suggested that residential courses be followed up with more in depth refresher training and better support systems. Actually being assigned to work on presenting or defending provided the best skill development. Junior officers felt there should be more opportunities given to understudy or observe trials and to assist defending and presenting officers preparing for hearings.

Portability

104. Interviewees expressed a range of views on the portability of the summary trial system. Portability includes both domestic application on base as well as on exercises and overseas deployments. The system was considered generally to work well when units were deployed on operations – with the caveat that it was difficult to apply when there are only a limited number of key people available in a unit to conduct a trial. In other cases, the system was felt to work better overseas than domestically because of the presence and availability of key personnel, and the motivation to resolve matters quickly given welfare and operational considerations.

105. Tri-service operations were identified as creating challenges for summary trials. It was felt problems could arise because of the different service cultures.

106. Some officers said chain of command issues could arise with exercises and while on courses in New Zealand because of the different way each of the services place their staff on these activities. This can make it difficult to resolve disciplinary issues expeditiously, resulting in matters being returned to the home unit for investigation.

Assessment of issues

Issues affecting system effectiveness

107. The previous section summarises personnel perspectives on the effectiveness of the summary trial system in maintaining discipline. They raised issues including the time it takes to conduct investigations, the lack of flexibility in dealing with minor offences, insufficient expertise when dealing with complex and sensitive cases, and issues concerning the collection of electronic evidence.

108. Interviewees raised a number of concerns about the fairness of the system for both accused and victims. They ranged from the impartiality of summary trials, to procedural difficulties, cross-examination skills (especially in sensitive cases), disproportionately harsh punishments, delays in proceedings affecting victims and offenders, and investigative shortcomings. Questions of fairness raised by some included inconsistency with accepted international standards of human rights.

109. The next section assesses performance of the New Zealand system against comparable military justice systems in Australia, Canada and the United Kingdom as well as international human rights standards as they apply to armed forces.

The balance between discipline and fairness

110. Discipline and fairness are intertwined qualities. Effective use of the discipline system relies on staff maintaining their respect for the system itself, which is influenced to a great extent by the fairness of the system.

111. Discipline is key to the ability of a military unit to act as an effective fighting force.[9] Successfully achieving this state requires a system of command and discipline. Commanding officers are responsible for the behaviour of those under their command and so lie at the centre of this system. The military justice system gives them powers to deal summarily with a wide range of misconduct. To successfully maintain discipline, however, commanding officers must deal both fairly and promptly with misconduct and with the wider interests of unit effectiveness in mind.

112. Justice L'Heureux-Dubé of the Canadian Supreme Court identified that both fairness and justice are required for military law to achieve discipline:[10]

> *Discipline can be defined as an attitude of respect for authority which is developed by leadership, precept and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed. …. It is the responsibility of*

[9] Lord Rodger of Earlsferry quoting a statement by Air Chief Marshal Sir Anthony Bagnall, the Vice Chief of the Defence Staff in *R v Boyd* [2002] UKHL at 51.

[10] L'Heureux-Dubé J. in *R v Genereux* [1992] 1 R.C.S. 259 at 325.

those who command to instil discipline in those they command. In doing so there must be the correction and the punishment of individuals. Fairness and justice are indispensable.

113. While justice and fairness are critical to discipline, these interests can at times conflict. Systems of military justice must strike a balance between principles that support discipline (thereby protecting the lives and well-being of service members and others) and principles critical to achieving fairness.

114. The summary trial in a military justice system strikes a balance between the needs of the military unit and the interests of justice.[11] The summary trial process places greater emphasis on the expeditious resolution of alleged misconduct than on rights and justice for individuals. They focus on factual rather than legal guilt. They use inquisitorial rather than adversarial procedures, use preliminary investigative processes to screen out cases where the accused is clearly not guilty, and place the public interest ahead of individual interests and rights.

115. The summary trial process empowers commanders to maintain the cohesion of their unit. It allows them to consider wider unit interests when deciding how to resolve matters, including what punishment is appropriate, rather than solely focussing on the guilty party and those immediately affected by their offending. Having commanders dispense discipline allows for swifter resolution of issues than referring the matter to a more remote authority. Delays in dealing with infractions can be perceived as condonation of misconduct or weakness in command, hence the need for breaches of discipline to be dealt with expeditiously.[12]

116. Our interviews with commanders and junior officers disclosed that the current NZDF summary trial system is not satisfying the efficiency, expeditiousness and simplicity requirements. As such, it is not providing an effective tool for maintaining discipline, particularly when a commander needs to respond to relatively minor misconduct.

117. The fairness of the system has markedly improved compared to the preceding orderly room and captain's table systems. However, the procedural complexity that came with providing improved fairness and rights has imposed a burden on officers who support and administer the system.

Complexity is affecting use of the system

118. The procedural complexity of the summary trial system is driving certain behaviours, including avoiding use of the system. Commanders often look for other ways of addressing minor misconduct. Sometimes they choose to ignore minor misconduct. Or they issue warnings or impose additional work on offenders, so as to avoid undertaking formal

[11] D Schlueter, *The Military Justice Conundrum: Justice Or Discipline?* Military Law Review. Vol 215 (2013) at 47. Citing Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

[12] C Griggs, *A Joint System of Summary Disposals for the New Zealand Armed Forces of the 21st Century* A thesis presented in partial fulfillment of the requirements for the degree of Master of Arts in Defence and Strategic Studies at Massey University, Palmerston North, New Zealand. (2002) at 5.

preliminary investigations and holding hearings. The use of less formal approaches has advantages and disadvantages.

119. A less formal response can provide the first level of a graduated response to offending. Warnings and minor impositions or corrective actions are a legitimate way of reinforcing disciplinary values. However, administrative responses should ideally form part of a coherent disciplinary framework and integrate with the summary trial system.

120. Adopting a less formal response does not comply with section 102 of AFDA. If an allegation is considered to be well-founded, the only option provided by section 102 is to record a charge and commence an investigation. There is no flexibility in the charging decision once certain conditions are met.

121. We encountered many examples of "working around" section 102 to avoid using complex summary trial process for very minor disciplinary offences. This does result in inconsistency between different units, and different services.

122. The lack of flexibility also makes it difficult to make disciplinary processes compatible with other approaches, such as Just Culture. In a similar vein, the question of how to manage sexual offending in a sensitive and appropriate way, as raised by Frances Joychild QC, would also require more flexibility.

Delays affect disciplinary purpose

123. The other area where the system fails to achieve disciplinary objectives stems from problems with timeliness. Disciplinary processes need to be applied in a timely manner to be effective. The need for effective and efficient discipline is one of the core reasons why a summary trial process exists at all. It is why the process centres on the commanding officer, who is expected to resolve problems expeditiously.

124. Lengthy investigations, which in some cases run to many months even in simple cases, prevent commanders from holding offenders to account in a timely manner. Depending on the offence, long delays have the potential to affect the fairness and welfare interests of offenders, of victims, and undermine morale and unit discipline. Delays amount to an infringement of the soldier's fair trial rights unless there is a good justification. (Inefficiency in bringing matters to trial does not provide a sufficient justification.) Unjustified delays affect the expediency of summary discipline and need to be resolved.

Expectation that human rights standards apply

125. We have considered recent developments in human rights jurisprudence in conducting this review. We have also considered the Attorney-General's conclusion in 2007 that the Armed Forces Law Reform Bill appeared to be consistent with the NZBORA[13]. In the view of some, the Attorney General's conclusion together with the effect of section 4 of the NZBORA (which

[13] Attorney-General, *Legal Advice: Consistency of the Armed Forces Law Reform Bill with the New Zealand Bill of Rights Act 1990*. 23 February 2007.

protects legislation even if it is inconsistent with the NZBORA) means we should consider the scheme remains consistent with the NZBORA. We acknowledge this as a valid legal position, but we also need to take into account the fact that human rights standards do not remain static. As we noted from our research of relevant military justice systems overseas, those jurisdictions are continuing to evolve their military justice systems to reflect current human rights standards. We suggest New Zealand take a similar same approach and consider what additional safeguards can be provided where possible.

126. A wide range of fairness and rights concerns were raised in interviews, submissions and by the analysis of Summary Appeal Court decisions.

127. In June 2005, Special UN Rapporteur, Emmanuel Decaux, submitted a report to the United Nations Economic and Social Council on the issue of the administration of justice through military tribunals.[14] The report set out a framework of universally acceptable rules for military justice based on 19 draft principles. These principles have been debated internationally and transmitted to the General Assembly with the recommendation that they be formally adopted.[15]

128. In 2018, a new Special Rapporteur and military justice experts conducted a workshop at Yale Law School to review the Decaux Principles and determine whether any changes should be made to facilitate their approval by the Human Rights Council and the General Assembly. A refined version of these principles, now numbering 20, was agreed. These principles provide a useful framework for evaluating issues relating to the fairness of New Zealand's summary trial system. These Principles are not New Zealand law and are not binding on our Courts. They do, however, provide a systematic way of assessing alignment of New Zealand's system with accepted international human rights standards.

129. The rights set out in the NZBORA protect all New Zealanders, civilians as well as Defence Force personnel. These rights, together with the international rights frameworks and international case law, set the context for how human rights are considered by New Zealand courts:

> "*In case after case, particularly in the human rights field, Courts have affirmed the necessity and utility of interpreting the domestic human rights provisions in the light of equivalent international provisions and jurisprudence developed thereunder*."[16]

130. Section 5 of the NZBORA recognises that the rights enshrined in the Act can be reasonably limited as can be demonstrably justified in a free and democratic society. International jurisprudence as well as commentary recognises that the military context can provide justification for a reasonable limit to the rights of its personnel.[17] Military effectiveness and

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[14] Emmanuel Decaux, Administration of justice, rule of law and democracy. Issue of the administration of justice through military tribunals. Retrieved from https://digitallibrary.un.org/record/553975?ln=en.

[15] The recommendation was transmitted on 7 August 2013 in a thematic report by Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers.

[16] A Butler & P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington 2005), at 3.6.6 62.

[17] McIntyre J in *MacKay v the Queen [1980] 2 R.C.S. at 408.*

the need to safeguard a soldier's right to life in military deployment, as well as the safety and security of others, mean that other rights may have to be limited to achieve those purposes. In summary, it is acknowledged that the military disciplinary context can provide a justifiable limitation under section 5 of NZBORA.[18]The question becomes one of balance - determining when and to what extent military justice processes can justifiably infringe on individual rights. With that in mind, the Yale Principles are considered further below.

Military tribunals must be established by law

131. The first Yale Principle states that military tribunals must be established by the constitution or the law, to be consistent with the separation of powers. Military tribunals must be an integral part of the general judicial system.[19]. Yale Principle 15 specifically addresses the status of the summary tribunal and provides for it to exist within the chain of command structure.[20]

Military courts have functional authority

132. Yale Principle 3 identifies that the civilian courts should have primary jurisdiction over civilian criminal offences committed by persons subject to military jurisdiction.[21] The Principle identifies that the purpose of military tribunals is to contribute to the maintenance of military discipline. The Yale Principle states that military tribunals should only try cases that have a direct and substantial connection with that purpose, unless the accused is deployed overseas and it would not be appropriate (or possible) to subject them to the jurisdiction of the ordinary courts, either in New Zealand or in the host country.

133. Interviews and submitters raised concerns about some serious civil matters being heard at summary trial instead of being referred to the civil system. This issue was also raised in the Joychild report, which identified serious sexual offending should be referred to the police for charging in the civilian court unless, for an exceptional reason, the Attorney-General grants a request for the matter to be tried at Court Martial.[22] Officers said decisions to refer criminal conduct to civilian authorities were not made consistently, and more guidance was required for such decisions. In our view, hearing serious civil charges at summary trial could over-step what is justifiable. Serious civil matters (as opposed to disciplinary matters and less serious criminal matters) ought to be heard by tribunals with clear judicial independence.

Competent, independent and impartial tribunal

134. A number of interviewees raised concerns about the lack of independence of a summary trial. Officers felt it was a fundamental human right to have a hearing by an impartial and fair tribunal. Others felt that there should be a greater safeguards of impartiality, without

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[18] For example, see *Jack v R* (1999) CMACNZ, AP51/99, at 18.

[19] Emmanuel Decaux, Administration of justice, rule of law and democracy. Issue of the administration of justice through military tribunals. Retrieved from https://digitallibrary.un.org/record/553975?ln=en, at 7.

[20] At 62.

[21] Yale Principle 3.

[22] F Joychild QC, *Report to Chief of Airforce* 14 July 2017, at 764.

necessarily achieving full independence. They suggested disciplinary officers not be in same the chain of command as the person charged with the offence. This was particularly so in respect of some examples of senior officers in the chain of command undercutting the independent exercise of powers by disciplinary officers.

135. Calls for independence and impartiality came from the expectation of a right to a trial by a fair and impartial court. The right to a trial by an independent and impartial tribunal is juxtaposed against the need for commanders to directly manage the discipline of their forces. This gives rise to an inherent tension in the design of the disciplinary system.

136. Section 25(a) of the NZBORA provides the right to a hearing by an independent and impartial court. The summary trial limits this right because an officer in the accused person's chain of command presides over the trial, meaning the matter is not being heard by an independent court. This naturally raises the question of actual or perceived bias. This is not a reflection of commanding officers or of the military justice system but simply a factor of the human condition. It is difficult to safeguard against perceived or actual bias in such a situation, regardless of any safeguards in place.

137. Limiting this right (section 25(a)) can only be justified under the NZBORA[23] if the least infringing measure is chosen. It is technically possible in the military context to have an "independent" commanding officer conduct the summary trial (i.e. from a different unit or service). This is not the design, however, of the current system. Further consideration should be given to whether this derogation (in 2019 as opposed to 2007) continues to be a justified limitation of the right.[24] In our view, it could potentially be challenged on the basis that less infringing measures could be chosen.

138. The current design of the system assumes that effective operation of the Defence Force requires the section 25(a) right to be limited. We note that the international trend toward greater rights where possible may create risk to this aspect of the design of the system in future given its limitation of the right to a hearing by an independent and impartial court.

139. Despite this, we are not recommending that this fundamental aspect of the summary trial system be changed. The NZDF's objective of making commanding officers responsible for the discipline of their units was important to the many disciplinary officers we interviewed. We were left in no doubt that they strive to exercise their responsibilities fairly as possible. Even though at times officers might disapprove on a personal level of those found in breach, they are also likely to appreciate that to convict and punish those who are not guilty of offences is not in the interests of maintaining good discipline and high morale.[25]

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[23] Section 5 of NZBORA.

[24] We understand that the objective in limiting the right must be more than a general goal of protection from harm common to legislation; it requires a specific purpose so pressing and substantial that it warrants the imposition of a limit. The way in which the objective is statutorily achieved must be I n reasonable proportion to the importance of the objective. The means used must also have a rational relationship with the objective. In achieving the objective there must be as little interference as possible with the right or freedom affected. The limitation involved must also be justifiable in light of the objective.

[25] A similar sentiment was noted in *R v Boyd* [2002] UKHL 31, at 14.

140. In light of the foregoing analysis, lack of impartiality is a feature of the system. We do sound a note of caution, however, that influence from more senior members in the chain of command has the potential to seriously undermine the impartiality of the disciplinary officer (either directly or indirectly). A number of interviewees raised concerns about influence from officers in the chain of command who are senior to the disciplinary officer. See the examples above under the heading "Independence".

141. The characteristics of independence and impartiality are closely linked. On the matter of independence, tribunals as far as possible need to be free from the influence of the chain of command, *"especially superior officers who might wish to secure some particular result, supposedly in the interests of the morale or discipline of the Service or of some particular unit".*[26]

142. In respect of impartiality there is no expectation that members of a military tribunal *"should not share the values of the military community to which they belong any more than it requires that the judge or members of the jury in a civil court should be divorced from the values of the wider community of which they form part*".[27] What is more important, in achieving objectivity, is that the officers presiding over disciplinary matters are seen to act independently and impartially when they decide a case. For this reason, it is important that the disciplinary officer act free from any influence of the more senior members of their command.

Limits on the scope of summary trials

143. There is no doubt that the system requires the commanding officer to play a central role in the disciplinary process and this is legally permissible. The critical question is the appropriate scope of their jurisdiction, particularly in relation to disposing of offences that have criminal as well as disciplinary elements.

144. In our view, the mandate to conduct summary trials for the purpose of maintaining discipline should not extend to hearing offences that are purely criminal in nature (and have no connection to service discipline). This principle reflects a well-established constitutional basis for military tribunals: they are disciplinary and not judicial in nature. In comparative jurisdictions, the scope of summary trials is limited in two ways. First, by limiting powers of punishment. Second, by limiting the types of offences a summary tribunal may hear. Accompanying these limitations is the right to have matters heard by a higher tribunal (e.g Court Martial) and rights of appeal (e.g. Summary Appeal Court).

Punishment limits in the AFDA

145. The AFDA limits the seriousness of punishments that can be imposed by a disciplinary officer. This is the key mechanism managing the tension between the right to a trial by a fair and impartial court for any criminal charge, and the statutory power that enables officers to deal with discipline. The prescribed punishment options available to commanding officers ensure

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[26] *R v Boyd* [2002] UKHL, at 31.

[27] *R v Boyd* [2002] UKHL, at 57.

they are only empowered to resolve matters at the lower end of the offence range, which is a proxy for keeping trials confined to matters that are disciplinary in nature. Serious offending ought to be dealt with by a civil court or by a Court Martial. Only those systems have the power to impose a substantial punishment.

146. A person charged with an offence at summary trial may only be issued with a punishment listed in Schedule 4 or Schedule 5 of the AFDA. For most offences, the maximum punishment is 28 days detention. The maximum punishment extends to 60 days detention if the offence was committed on active service or sea service. If the charge is considered by the disciplinary officer to require a more serious punishment, the matter must be referred to the Director of Military Prosecutions for the charge to be heard by Court Martial.

147. In addition, the AFDA requires a charge to be escalated to a Court Martial in several circumstances. Where the accused pleads guilty, section 117F requires the disciplinary officer to consider if their powers of punishment are sufficient. If they consider their power of punishment is not sufficient, they must remand the accused for trial by Court Martial and refer the charge to the Director of Military Prosecutions. Section 117K has a similar requirement. If the accused pleads not guilty, the disciplinary officer must consider whether they have sufficient powers of punishment and therefore whether they can act as a disciplinary officer to hear the charge.

148. As noted above, the most serious punishment that can be imposed at summary trial is detention. Punishment akin to detention has been held by the European Court on Human Rights to be a deprivation of liberty.[28] This is also a limit on the right not to be arbitrarily arrested or detained under section 22 NZBORA. Having detention available as a punishment option at a summary trial means that summary proceedings can become criminal in nature rather than disciplinary.

149. The foregoing analysis is supported by the European Court of Human Rights (ECtHR) in *Bell v UK*.[29] The ECtHR, in an appeal from the United Kingdom[30], held that a summary trial would be dealing with a matter of a criminal nature if the potential punishment was a significant deprivation of liberty. A criminal characterisation occurs even if the offence itself has a purely disciplinary character: in that case, the charge related to using insubordinate language to a superior officer, which is an offence unique to the military. The potential punishment for such an offence at summary trial is up to 28 days detention. This potential penalty was sufficient for the European Court to hold that the soldier had been charged with a criminal offence.[31] He was therefore entitled to a trial by an independent court.

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[28] *Engel v Netherlands,* at 70. The punishment held to be inconsistent with the ECHR was “aggravated arrest”. This has features akin to detention, including confinement to a punishment room.

[29] *Bell v UK* (2007) 45 EHRR 24.

[30] The matter was appealed directly to the EctHR from the decision of Bell’s Commanding Officer. Aspects of Bell’s complaints to the EctHR were rejected because domestic remedies were not exhausted. However the ECtHR allowed his complaints about lack of independence and impartiality of his CO, about proceedings being consequently unfair, the hearing not being held in public, the CO not constituting a tribunal “established by law” and about a lack of legal representation.

[31] At 42-43.

Right to elect Court Martial as a procedural safeguard

150. Limiting the range of punishment that can be imposed provides a procedural safeguard. Other safeguards include the right to elect a trial by Court Martial (the "election right") and the right to appeal a finding of guilt or punishment.

151. The election right provides a safeguard relating to the potential imposition of detention. Detention is a Column 2 punishment in Schedule 4 of the AFDA. Any accused person facing a possible Column 2 punishment must be provided with the option to elect a trial by Court Martial instead of a summary trial.[32]

152. If the accused elects to have the matter heard by their commanding officer, section 117ZB provides that they specifically waive their right to an independent court (section 25(a) of the NZBORA). They also waive their right to legal representation under section 24(c) of the NZBORA. Before choosing between a summary trial and trial by Court Martial, the accused may consult a lawyer and must be given 24 hours to consider their election decision.

153. The Attorney General's section 7 report into the Armed Forces Law Reform Bill addressed the waiver of rights in this way:[33]

> *123. We further note that some of the rights and freedoms protected by the Bill of Rights Act may be waived by the individual holding those rights. The jurisprudence of the European Court, for instance, has identified four conditions which must be satisfied in order for waiver to be established,[34] namely:*
>
> - *the election must be voluntary and not constrained;*
> - *the defendant must be aware that he or she has the protection of the human rights which is to be waived;*
> - *the waiver must not fundamentally disadvantage the accused; and*
> - *the right must be capable of being waived: that is, it cannot be an absolute right.*
>
> *124. We consider that the rights to legal representation and trial by an independent court are capable of being waived and note that the following safeguards are built into the election process:*
>
> - *the implications of the election must be explained to the accused by his or her defending officer (new section 117ZC(1));*
> - *the accused must be given a reasonable time and not less than 24 hours to consider his or her decision, if he or she wishes it (new section 117ZM(2));*
> - *the accused must be given the opportunity to consult a lawyer in respect of the right of election if it is reasonably practicable to so (new section 117M(1)(c)); and*

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[32] If the disciplinary officer considers that the punishment likely to be imposed on the accused if guilty would be a Column 2 punishment, they must consider whether the accused should be given the right to elect trial by the Court Martial (under section 117W AFDA).

[33] Attorney-General, *Legal Advice: Consistency of the Armed Forces Law Reform Bill with the New Zealand Bill of Rights Act 1990*. 23 February 2007.

[34] P W Ferguson, *Trial in Absence and Waiver of Human Rights*, [2002] Crim. L. R. 554, at 559.

- *the decision of the accused must be recorded in writing (new section 117ZC(3)).*

125. In light of these factors and safeguards, we consider that the election process set out in the Bill is reasonable and, consequently, is not prima facie inconsistent with the rights and freedoms protected by the Bill of Rights Act.

154. Despite the Attorney-General's conclusion in 2007 that the waiver was considered *not prima facie inconsistent* with the NZBORA, wecannot assumed it continues to provide a justified limit in 2019 on the right to a trial by independent court where detention is a potential punishment. An election decision is heavily weighted. So much so that the right of election may not be an effective safeguard on its own. The election decision has the potential to be influenced by factors such as the accused own perception that they are located within a chain of command, and the difference in potential penalty at summary trial compared to Court Martial. While persons who come before the civil courts also have to make decisions about how they wish to proceed, which can affect their sentence, these do not usually involve making a choice between an independent court and one that is not. These deficiencies in the election safeguard resulted in amendment of the United Kingdom's legislation to provide that a person found guilty at summary trial must have the right of an appeal to the Summary Appeal Court to allow a complete rehearing of any charge.

155. What is justified in a free and democratic society has changed over the last 10 years. Recent jurisprudence and the Yale Principles suggest that a justification needs to pass a higher threshold than when the current AFDA framework was established. It is arguable that international human rights standards regarding the right to an impartial court, to legal advice, and the right not to be subject to a criminal sanction at summary trial, have now been set somewhat higher than exists in the AFDA.

156. Limiting the penalties that may be imposed at summary trial is one way of confining it to disciplinary matters. Overseas appellate courts, however, have determined this is an insufficient safeguard where detention is available as a punishment. This presents an issue for the New Zealand system, which includes detention in the punishment schedule. The election safeguard has also been held internationally to be an insufficient way to compensate for the derogation from this fundamental right. This raises a question as to whether detention should remain available as a punishment at summary trial.

157. We acknowledge that the right to elect a trial by a Court Martial is an important safeguard in that it provides the right to a trial by an impartial court. As such, it would be useful to provide this right of election to all persons facing a summary trial, not just those persons facing the possibility of a more serious punishment.

The power to hear charges relating to civil offences

158. Yale Principle 15 identifies that the summary trial should not be used as a means to circumvent criminal prosecution. Summary proceedings must never be used to shield military personnel from criminal prosecution for serious offences.[35] The AFDA does not prevent

[35] The Yale Draft, at 62.

charges relating to the civil criminal law being laid in a civil court. Section 21(2) confirms the jurisdiction of a civil court to hear charges against military personnel in relation to any Act other than the AFDA.

159. A range of submitters and interviewees raised concerns about the use of summary trials to deal with serious criminal matters. Frances Joychild QC also raised concerns about the use of summary trials to hear serious sexual assault offences. Her report recommended such sexual assault charges only be heard by a Court Martial or by a civil court. Interviewees identified that occasionally serious charges are still being heard at summary trial.

160. In other countries, the summary trial jurisdiction is limited in the types of offences it can hear. More serious offences or those that are criminal in character cannot be heard by summary trial. The limits are imposed either by case law - the courts have determined that a service connection is required – or by the offences being defined in legislation. Canada, for example, is proposing to remove all civilian-equivalent offences from the summary trial jurisdiction. (In New Zealand, this would be like removing all offences under the Crimes Act and other statutes – which are currently expressly included by section 74 of AFDA - as well as requiring that all serious military offences be only dealt with by a Court Martial).

161. Overseas, the courts have made important findings about the jurisdiction of military tribunals, resulting in changes to the law.

162. In Canada, the scope of the Court Martial was challenged in *R v Moriarity* before the Supreme Court. The Court found that the Court Martial could deal with offences that do not necessarily have a distinct military service connection.[36] Section 130 of the Canadian National Defence Act is similar to section 74 of the AFDA, allowing the prosecution of other statutory offences in the military justice system.[37] The Supreme Court held that the purpose of maintaining military discipline, efficiency and morale can be connected to criminal behaviour even if a military member is not on duty or the offending does not occur on a military base – because it could affect discipline, efficiency and morale. For example, the conduct may call into question a member's capacity to be disciplined and respect military authorities.[38] The Court did curtail this finding by stating that the military justice system does *not* have a broad function to punish conduct that threatens public order and welfare.[39]

163. Subsequent to *Moriarity*, similar challenges have arisen.[40] The Court observed an emerging international consensus to restrict the scope of military jurisdiction consistent with Article 14

[36] *R v Moriarity*, 2015 SCC 55, [2015] 3 S.C.R.

[37] National Defence Act s130: Service trial of civil offences.

[38] At 52.

[39] At 47.

[40] *R v Déry* at 33 and 36. In *R v Déry* the Court said that the question of the consistency of punishing civil offences in the military courts with the *Charter* was left open in *Moriarity*.

of the ICCPR.[41] They also noted that United Nations reports have proposed restricting military courts to hearing offences of a strictly military nature.[42]

164. As a result of the Supreme Court's decisions in *Moriarity* and *Dé*ry, the Canadian government reduced the scope of summary trials to a short list of purely disciplinary offences. More recently, the government has proposed to completely remove the ability of the summary trial to hear *any* criminal offence. This means that civil offences imported into the military jurisdiction by s 130 of the National Defence Act will no longer be able to be heard at a summary trial.

165. In light of these overseas trends, we have assessed New Zealand's summary trial framework against New Zealand's rights framework. We have concluded that although the AFDA itself is not necessarily inconsistent with human rights, some problems do arise in practice. The AFDA framework does detract from the right to a trial by a fair and impartial court, but this is ameliorated by the limits on punishments at summary trial and the availability of rights of appeal and Court Martial election (in some circumstances). The main concern is the occasional practice of hearing apparently serious criminal charges at summary trial. This concern can potentially be addressed by tightening the rules around serious charges that ought to be referred to the Director of Military Prosecutions.

166. By not following the more liberal paths of the United Kingdom and Canada, however, New Zealand may come under increasing pressure to change its framework. Canada in particular is significantly curtailing the jurisdiction of the summary trial by removing criminal offending.

167. To maintain alignment with international standards, NZDF could consider removing civil offences that do not have a strong service connection from the summary trial jurisdiction. This would go further than the existing guidance in DM 69 (2 ed) Volume 1 Chapter 2 Section 7. Simply ensuring existing guidelines are consistently followed would help to ensure referral of civil criminal offences to civilian courts in most cases.

Jurisdiction over civilians

168. Military courts should not have jurisdiction to try civilians except in exceptional circumstances.[43] The AFDA extends jurisdiction over civilians with a slightly wider net than is now accepted internationally. The Yale Principles limit jurisdiction to a civilian serving with or accompanying a force deployed overseas. The AFDA extends jurisdiction domestically to all passengers in NZDF ships, aircraft, and vehicles.[44]

169. This is not a matter that arose from interviews or submissions, but we note we did not specifically seek comment from civilians who might be subject to the AFDA. But we note that the current position is not consistent with the relevant Yale principle.

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[41] At 66.

[42] At 67 – the *Decaux Principles.*

[43] Yale Principle 6.

[44] Section 15 of the AFDA.

Minors

170. Under the Yale principles, special care and additional protection is afforded to minors.[45] Minors fall within the category of vulnerable persons. Strict respect for the guarantees provided in the United Nations Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the International Covenant on Civil and Political Rights govern the prosecution and punishment of minors.

171. In 2018, it was announced that the youth justice age in New Zealand would be raised to 18 years. From 1 July 2019, all persons under 18 years old will be dealt with in the Youth Court, unless they are entitled to a jury trial for certain serious criminal offences. The Oranga Tamariki Act 1989 governs proceedings in the Youth Court. The purpose of that legislation is to ensure that the welfare and interests of the young person are the first and paramount consideration in the administration or application of proceedings.

172. The AFDA makes no provision for the jurisdiction of the Youth Court on any matter relating to an NZDF member who is under 18 years of age. The minimum age of recruitment is 17 years.

173. The only specific provision for a person under 18 years old who faces a charge at a summary trial is a limit on the maximum punishment.[46] A disciplinary officer cannot impose a punishment of detention on anyone under the age of 18 years without the prior approval of a superior commander. There are no other modifications to the summary trial system for minors.

174. We recommend that NZDF consider adjusting procedures in the summary trial to ensure they are consistent with changes to youth justice in the civil system as far as practicable.

Habeas corpus and service custody

175. Any person who is detained has the right to habeas corpus proceedings before a court. This is a right that exists in the NZBORA and is also one of the Yale Principles.[47] We have no concern regarding the ability to take habeas corpus proceedings. The matter was addressed in *Van der Ent v Sewell* prior to the 2007 amendments to the AFDA.[48]

176. We noted from our visits to some bases that individuals can be detained in holding cells for several days on the authority of commanding officers. We note that sections 101 and 101A of the AFDA combined with Part 2 Subpart 3 of the Court Martial Act 2007 make provision for the availability of bail to any person held in service custody in connection with an alleged offence under the AFDA. Section 101(4) requires the commanding officer of any member of

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[45] Yale Principle 8.

[46] Section 117Y of the AFDA.

[47] Section 23(1)(c) NZBORA. Yale Principle 12.

[48] *Van der Ent v Sewell* [2000] 3 NZLR 125.

the Armed Forces who is held in service custody for more than four days after arrest to write to the Judge Advocate General advising of that fact and the reasons for it.

177. It was beyond the scope of this review to inquire into arrest and detention. Given the basic nature of some of the NZDF facilities used as holding cells, however, it is appropriate to raise the risks to prisoner welfare that may arise. We recommend that this issue be examined in more detail by NZDF.

Public nature of hearings

178. Hearings should be held in public, with legal exceptions possible.[49] Interviewees said that disciplinary officers do sometimes open hearings to the public, including to the media at times. However, this is not standard practice. Most trials are only open to those persons directly involved in proceedings.

179. This is a challenging issue. Disciplinary proceedings in the military justice system can be similar in nature to employment cases. For example, an unauthorised absence. But then they address criminal behaviours in others. For example, a charge of theft from a comrade. In the second example the trial clearly addresses criminal behaviour. A hearing in public, required by section 25(a) of NZBORA, ensures that justice is seen to be done. In the first example, however, it is less clear that a public hearing should outweigh privacy interests (particularly if the reasons for absence are personal).

180. A particular concern was raised about access to the hearing of person(s) supporting victims in sexual offence cases. There have been instances where support person(s) have found it difficult to gain access.

181. The status quo gives the commanding officer discretion to open or close a hearing. The policy seems appropriate but clear guidance for commanding officers would assist them to determine the right decision in each case. The guidance should also cover attendance of victim support at trial.

Judgments made public

182. The AFDA does not address whether summary trial judgments should be made public.

183. As described above, a summary trial is not an independent and impartial court. This means, for policy reasons, that a person's right to a fair trial is affected in this very important respect. In such circumstances, there is a policy argument for not making public the summary trial decisions, even though this infringes section 27 NZBORA (the right to open justice).

184. However, there is also the disciplinary purpose to consider. The broader purpose of maintaining discipline and morale within the unit has resulted in practices that essentially parade or highlight that an individual is being punished. For example, requiring offenders to

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[49] Section 25(a) of the NZBORA provides the right to a public hearing. Section 145 of the AFDA addresses whether or not hearings should be public by applying the Criminal Procedure Act 2011. Principle 13: the public nature of hearings.

wear a punishment belt, and to occupy a designated punishment area in a mess. These practices are not prescribed in the AFDA, but are part of the culture and practice of the military.

185. In order not to infringe on human rights, these practices should extend no wider than the disciplinary purpose requires. Consideration also needs to be given to the requirements of the Privacy Act 1993.

Specific fair trial rights

186. Military tribunals must afford rights to a fair trial.[50] This includes the rights guaranteed by Article 14 of the International Covenant on Civil and Political Rights. This is also aligned with Decaux's fourteenth principle, which is the guarantee of the right to a defence and the right to a just and fair trial.

187. The information collected from interviews, our review of Summary Appeal Court rulings, submissions and other sources, revealed a range of specific issues regarding fairness. They are addressed under the subheadings below:

188. The right to a fair trial is a fundamental principle of justice. Sections 24 and 25 of the NZBORA require tribunals to observe fair trial rights, and protect other rights, obligations or interests protected or recognised by law.

189. As addressed already, a summary trial is not independent by design, given it is presided over by the disciplinary officer. It therefore departs in a fundamental way from an independent tribunal. This starting point, however, does not affect the entitlement to the other rights identified in the New Zealand Bill of Rights Act 1990.

Presumption of innocence

190. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[51] The principle is reflected in s 24(a) of the NZBORA, which provides the right to be presumed innocent until proven guilty.

191. This right is support by section 102(1) AFDA which requires a well-founded allegation to be investigated by the disciplinary officer before a finding of guilt can be made. The requirement for an investigation implies there must be a fair basis for making a guilty finding. Additionally, the basis for making a guilty finding is the criminal standard, requiring proof beyond reasonable doubt.

192. Interviewees gave examples of cases that suggest the right to be presumed innocent is at times being infringed. They included alleged bias and senior command influence. There were also comments on variability in the level of objectivity and skills across disciplinary officers.

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[50] Yale Principles 2 and 14.

[51] Principle 14(a).

Summary Appeal Court judgments did reveal a number of examples of disciplinary officer bias or unfairness.

193. The potential for bias is inevitable in a system where a commanding officer presides over the trial. Commanding officers may be influenced by their prior knowledge of the character of an accused person, or by known opinions of others under their command about that person or the incident at hand. The safeguard against the potential for bias includes the right of appeal to the Summary Appeal Court on the substantive finding or on the punishment imposed by a disciplinary officer.

194. Unless the fundamental design of the summary trial system were to be changed, and we are not suggesting that is required, the existing safeguards appear sufficient. However, if an additional measure to safeguard against bias were to be considered, having another commanding officer preside over a trial may be an option worth exploring. The circumstances governing referral of a matter to another commanding officer would need to be tightly prescribed in order not to undermine the authority of commanding officers for the discipline of their own units.

Rights necessary for defence

195. A person must be promptly informed of any charges they face and must be guaranteed all the rights and facilities necessary for his or her defence.[52] There are two aspects to this principle. First, the right to be promptly informed. Second, the rights associated with preparing a defence.[53]

196. The system requires matters to be dealt with promptly[54] and specifically provides for the person accused of an offence to be informed of the charges they will face at summary trial.[55]

197. Interviewees gave examples, however, where suspects were not formally told they were under preliminary investigation and potentially facing charges. Whilst there is no legal obligation in either the civilian or military system to inform a person that he or she is under investigation, the fact of an investigation is likely to become apparent in a close-knit military community. Interviewees identified that uncertainty creates stress and anxiety for the individuals concerned, with people not knowing whether or when they may be called to face a commanding officer. Obviously, however, investigative integrity may have to prevail in certain circumstances.

198. The issue of delay in laying charges is related to the substantial time required to complete preliminary investigations. This is an important procedural safeguard, which is reflected in the legislation, but which could be improved in practice. NZDF could consider issuing

[52] Principle 14(b).

[53] Section 24(a) of the NZBORA provides the right to be informed of the nature and cause of the charge.

[54] Section 69(1) of the AFDA.

[55] Section 116(c) of the AFDA.

additional guidance requiring prompt notification of preliminary investigations or of potential charges, together with measures to address the broader issue of investigation timelines.

Adequate time and facilities to prepare defence

199. An accused person must have the rights and facilities necessary for their defence.[56] The AFDA framework provides for this by requiring summary proceedings to be adjourned until that right has been fulfilled.[57] The accused must also be given a defending officer to assist them to prepare their case.[58]

200. Interviewees gave examples of occasional failures in providing an accused person enough time to prepare their defence. They seemed to be isolated cases, however. Some examples were also given of inadequate time to consider whether to elect trial by Court Martial.[59]

201. A number of interviewees criticised the level of support given to the accused. They questioned the competence of defending officers. The competence of defending officers does raise the question of whether adequate facilities were provided. Interviewees were particularly concerned about those cases involving complex charges, such as offences against the civil law or disciplinary offences that raised complex questions of law. This issue could be addressed by expanding the circumstances for access to the Armed Forces Defence Counsel Panel to give defending officers easier access to legal support.

202. The quality of support that a defendant receives at a summary trial from the defending officer is of central importance. In our assessment, the system of defending officers does not need an overhaul, but there may be benefit in reviewing the training and support that they receive to discharge their duty to the level required, noting the different types of cases that they are required to support. This is not with a view towards increasing the amount of training that these officers receive, but to ensure that it covers the skills and knowledge needed to perform the summary trial roles effectively.

Individual criminal responsibility

203. A person should not be punished except on the basis of criminal responsibility.[60] Section 26(1) of the NZBORA provides the right not to be convicted on account of any act or omission that does not constitute an offence under the law of New Zealand at the time it occurred.

204. We have seen some occasions of persons being charged with offences with retrospective effect or mistakenly charged with an offence that did not exist. For example, where a Defence Force Order was held not to apply because it was issued for a different unit. Such shortcomings appear to be very uncommon.

[56] Section 24(a) of the NZBORA.
[57] Section 117I(2) of the AFDA.
[58] Section 114(1) of the AFDA.
[59] Section 117D of the AFDA.
[60] Principle 14.

205. Interviewees and Summary Appeal Court decisions suggest, however, that people are sometimes being punished using compensation orders. Summary trials are being used to obtain a contribution from individuals for damage they have caused to military vehicles. This practice suggests a criminal process is being used to achieve civil recovery, which may be inappropriate. There have been instances of excessive compensation awards. Compensation awards should not be equivalent to repaying the full amount of damage, nor are they a punishment.[61]

206. We recommend policy be reviewed to ensure the recording of charges following vehicle incidents are focussed on discipline, not cost recovery. This issue can be addressed by Defence Force policy. Persons affected by these problems also have the safeguards of appeal and complaint procedures.

Right to be tried without undue delay

207. A person charged with a criminal offence has the right to be tried without undue delay.[62]

208. Interviewees' main concerns with the current performance of the system focussed on the delays which arise from extended preliminary inquiries, operational circumstances (e.g. exercises), and preparing for trial. Problems associated with delay have also been a frequent feature of Summary Appeal Court judgments.

209. The key cause for delay is the preliminary inquiry process. It simply takes too long to complete in most cases. This includes investigations of less serious offences, where a long and involved preliminary investigation of the facts is not necessary. Simple disciplinary matters should only require evidence of a small number of witnesses and perhaps some documentary evidence. Yet even simple preliminary investigations appear to be prolonged. The problem is partly caused by the limited capacity of the military police to assist commanding officers with inquiries, which in large part is caused by a perception that preliminary investigations should always be conducted by military police rather than by the unit.

210. Section 69(1) of the AFDA requires an investigation as soon as practicable where a person accused of an offence has been arrested or is in service custody. There is no general obligation in the AFDA to complete summary trial investigations in a timely manner. Nor is there any limitation period within which a charge must be laid, apart from a general 3 year limitation period that applies to all military tribunals (section 20 of the AFDA). Timely disposal of charges is consistent with both the rights of persons accused of an offence and with the disciplinary purpose of summary trials.

211. Other countries have placed limits on the time within which matters must be dealt at summary trial. For example, Section 11(b) of the Canadian Charter has a similar requirement to section 25(b) of the NZBORA - a person must be tried without undue delay. The Canadian

[61] For example see *F v R*, SACNZ, 3 June 2015, Wellington.

[62] Section 25 of the NZBORA provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay. Principle 14 of the Yale Principles.

military regulations covering summary trials require charges under the Code of Service Discipline to be dealt with as expeditiously as the circumstances permit.[63] The Canadians have also experienced problems with delays in summary trials and are proposing to amend their legislation to include a six month limitation period within which a disciplinary charge must be laid.

212. We recommend NZDF consider a similar response of a shorter, fixed limitation period for recording a charge, particularly for minor disciplinary offences.

Right to choose method of legal assistance

213. A person accused of an offence has the right to choose their defence. They have the right to defend themselves in person if desired or to have legal assistance of their own choosing. The principle also extends to the right to be given legal assistance if they do not have sufficient means to pay for it themselves.

214. Section 24(c) of the NZBORA provides the right to a person charged with an offence to consult and instruct a lawyer.

215. The AFDA does not provide a person accused of a charge with the right to a lawyer in a summary hearing. Section 117ZB of the AFDA specifically waives the right to legal representation in the summary trial if they elect to not have the matter heard by a Court Martial. Instead, the accused person has the right to a defending officer to assist in the preparation of their defence and in support of the accused at the hearing. Section 114(3)(b) specifically provides that the defending officer must not be a lawyer.

216. Interviewees and Summary Appeal Court judgments revealed some procedural failures to inform accused person of their right to consult with a lawyer. This did not seem to be a regular occurrence. Generally officers demonstrated a high level of knowledge and skills. But concern was expressed that defending officers assigned to assist the accused did not always have the requisite skills or aptitude to provide proper support. Summary Appeal Court judgments also reveal some shortcomings in support by defending officers. On the other hand, interviewees said that the exclusion of lawyers from summary trials is fair to both sides.

217. We note that if summary trials were confined to disciplinary offences, and serious offences are referred to Court Martial or the civil system, the need for a lawyer at trial is less acute. Provided this step is taken, we would not recommend changing this aspect of the system.

218. We suggest NZDF stay abreast of overseas trends, as New Zealand is out of step with Canada and the United Kingdom in respect of the right to choose legal assistance. In Canada, the accused person may be represented by a lawyer at summary trial. In the United Kingdom, the right to legal representation is built into the re-hearing of a charge by the Summary Appeal Court.

[63] The National Defence Act and the Queens Regulations and Orders.

Being compelled to testify or to confess guilt

219. It is a fundamental principle of justice that a person accused of a criminal offence has the right to remain silent and not be compelled to give evidence in proceedings against them. Likewise a person has the right to be presumed innocent and may not be compelled to admit their own guilt.[64] Section 25(d) of the NZBORA provides the right to not to be compelled to testify or to admit guilt.

220. The summary trial system protects the right of an accused to not be compelled to confess guilt: the disciplinary officer must be satisfied that any guilty plea has been made voluntarily.[65]

221. Interviewees said that a high proportion of accused plead guilty when charged at summary trial.[66] Interviewees identified that the practice of discounting any punishment creates an incentive to plead guilty. We also heard that it is a cultural norm in the military to “accept your punishment”. Summary Appeal Court judgments revealed that sometimes those who initially take a plea of guilty change their mind.

222. Addressing the propensity to make guilty pleas is not simple given the drivers. If the propensity to plead guilty causes concern, it may be useful to consider dissuading disciplinary officers from providing substantial discounts for guilty pleas.[67] Further protections do not appear to be required in the Act. Any shortcomings in the application of these rights may be addressed by improving training or guidance.

223. On a related note, defending officers ought not to give evidence at trial. This is a conflict of interest. One example was given of a defending officer being instructed by a disciplinary officer to give evidence at a summary trial. This is not consistent with section 150B(b) of the AFDA.

Examine and call witnesses

224. An accused person has the right to call and examine witnesses.[68] Section 25(f) of the NZBORA provides a right to examine witnesses for the defence under the same conditions as the prosecution.

225. Interviews highlighted questions of procedural fairness with mistakes occasionally being made by disciplinary officers in allowing witnesses to be called on behalf of the defence or allowing cross-examination of prosecution witnesses. These concerns were not common.

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[64] Principle 14.

[65] Section 117(1)(b) of the AFDA. Section 150B(b) of the AFDA addresses the requirement that a defending officer should not provide evidence against the accused by providing privileges and immunities to persons appearing as presenting officer and defending officers.

[66] Data to differentiate guilty from not guilty pleas was not available. However, data indicates that 96% of persons charged are found guilty at summary trial.

[67] It is noted that sentencing practice in the civilian courts system includes taking account of guilty pleas in mitigation (s9 of the Sentencing Act 2002).

[68] Principle 14(g).

Summary Appeal Court judgements revealed one example where a defendant was not allowed to cross-examine a more senior officer.

226. The right to call and cross-examine witnesses is addressed in the Act and no changes to the framework appear to be necessary to ensure these rights are provided in all circumstances. Any occasional shortcomings are matters to consider for improving training or guidance, rather than requiring policy changes.[69]

Evidence obtained through illicit means

227. No statement or item of evidence obtained by illicit means may be used as evidence in a proceeding.[70] The NZBORA provides protection in section 21 against unreasonable search and seizure. Section 30 of the Evidence Act 2006 addresses the handling of improperly obtained evidence at trial.

228. On the subject of unreasonable search and seizure, interviewees raised a range of concerns about the outdated search powers used by military police under the authority of commanding officers. Both investigative effectiveness and human rights concerns were raised.

229. Some interviewees commented on the inability to obtain authority which prevented certain types of searches from being carried out. On the rights side, some were concerned that the search powers were outdated, and authorisations providing access to modern electronic devices were not justified for disciplinary offences as opposed to serious criminal matters. The concerns arise because of the considerable intrusion into an individual's privacy by searching a personal electronic device. New Zealand's civilian framework was updated by the Search and Surveillance Act 2012, which specifically addresses new technologies. Significant differences exist between this legislation and the AFDA search powers (enacted in 1971).

230. On a preliminary assessment, the issues raised by interviewees and submitters are valid. The existing framework is seriously out of date and creates risks for NZDF and those relying on out-dated statutory powers. We recommend reviewing the search and seizure powers in the AFDA to take into account technological changes that increase the level of intrusion, and that proper consideration be given in every case to whether reasonable grounds exist for such a search. Modernising the framework should improve operational effectiveness and as well as ensuring modern standards of fairness are incorporated into the framework.

[69] The AFDA addresses rights to examine witnesses in several sections. Section 117O(2) of the AFDA addresses the right of the accused to call witnesses to provide oral evidence on behalf of the accused. Section 117J(2) of the AFDA provides the right for witnesses who give evidence in support of the charge to be cross examined by the defence. Section 117R(1) of the AFDA provides the accused with the right to call witnesses prior to punishment being decided by a disciplinary officer.

[70] Principle 14(h).

Right to have conviction and sentence reviewed

231. Every person convicted of an offence has the right to have their conviction and sentence reviewed by a higher tribunal.[71] Section 25(h) of the NZBORA provides the right to appeal to a higher court against conviction and/or sentence if convicted of an offence.

232. Section 118 of the AFDA establishes the Summary Appeal Court as a court of record. Section 124 provides the right of any person found guilty at a summary trial to appeal the finding of guilt, the punishment, or any orders that were made, to the Summary Appeal Court.

233. This review did not focus on the Summary Appeal Court. It will be addressed a second phase of the review of the military justice system.

Right to be informed of remedies

234. Persons found guilty should be informed of their rights to judicial and other remedies.[72] Section 117S of the AFDA makes provision for a person convicted of an offence to be advised of their appeal right.

235. Summary Appeal Court judgments reveal that a number of appeals are made out of time. This may be a matter that could be emphasised in updates to training and guidance provided to disciplinary officers.

Victim rights

236. Victims have the right to report offences to military authorities, to be kept informed and protected from reprisal, and to be heard on matters such as disposition of charges, and the impact of offending on them.[73]

237. Victims' rights in the context of sexual offending are the main focus of the Joychild report. The Joychild report identifies the following main concerns in respect of the summary trial system as it relates to this type of offending:

- Complainants have to report offences to the commanding officer;
- Trial processes are not victim-centric;
- The mandatory requirement in section 102 of the AFDA to charge and investigate does not allow properly qualified and independent investigation and decision making concerning serious sexual offending.

238. Interviewees gave some examples of victims themselves being charged with disciplinary offences in relation to the sexual assault incidents. (In at least two cases, the victims were in areas they were not authorised to be in, and were charged accordingly). Interviewees generally expressed concerns about victims' rights, including that some investigative and trial

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[71] Principle 14(j).

[72] Principle 14(k).

[73] Principle 16.

processes re-traumatised victims. Lengthy investigations were also described as affecting victims' welfare. It is notable that similar issues regarding victims' rights were recently raised in a report on the UK military justice system by National Council for Civil Liberties.[74]

239. Submitters in this review highlighted a lack of clarity for victims about how to report offences. Another concern expressed was the inability to initiate inquiries independently of a commanding officer for a person outside the chain of command. This links back to issues identified in the Joychild report regarding the need for investigations to be conducted independently of the chain of command given past instances of failing to investigate sexual assault allegations.

240. The AFDA was amended in 2018 to address victims' rights, including some of the matters raised above. New procedures require the commanding officer to advise victims when they record certain offences. This triggers access to victims' rights set out in Part 10A of the AFDA.[75] Victims of specified offences may express views on offender bail (s198D), have a representative and receive notice of matters such as the release or escape of the offender. A victim impact statement may be provided at the punishment phase of a summary hearing.[76] There is also provision in s 117ZA for disciplinary officers to make orders for compensation and restitution.

241. Significant shortfalls remain, despite these changes. The AFDA does not provide for investigations independent of the chain of command, nor does it provide flexibility in charging decisions. Changes to the AFDA are recommended to address the latter issue with appropriate safeguards. Changes could be made to ensure independence of investigations in certain cases, as a matter of policy.

System portability

242. Most interviewees and submitters commented favourably on the portability of the system. In fact, a number said the system functions better overseas than it does domestically. For example, military police officers are more available to conduct preliminary investigations when on deployment as they are not distracted with other inquiries when in New Zealand.

243. Some said issues arise where a serious offence is alleged to have been committed overseas, and the accused needs to be returned to New Zealand. This appeared to be appropriate, however, and did not reflect a shortcoming in the summary trial system. It is simply a reflection of the consequences that flow from serious offending.

244. Another issue relating to portability is the difficulty in completing summary trial proceedings in the time available on short deployments or exercises. Charges transferred back to home units after an exercise appear to reflect the short time span of exercises rather than a problem with the timely completion of summary trials. That said, sometimes there are

[74] E Norton, *Military justice*, Liberty. January 2019. Retreived from: https://www.libertyhumanrights.org.uk/sites/default/files/LIB%2010%20Military%20Justice%20Report%2020_01_19.pdf

[75] These align with part 3 of the Victims Rights Act.

[76] AFDA 117R(1)(b).

problems resolving disciplinary issues on exercises or training courses. It may be useful to consider providing authority to officers commanding lengthy training courses with the authority to impose discipline on course attendees.

Summary and recommendations

245. The summary trial system appears to be working reasonably well. Some issues are arising in respect of how meets the core purposes of a military justice system. The summary trial system was designed to address all levels of offending – from serious offences to minor disciplinary infractions. However, the procedural complexity of the process (important for dealing with offending at the serious end of the spectrum) is proving to be an inefficient way of responding to minor disciplinary infractions.

246. We have described the system as being inflexible because of section 102 which requires a commander to lay a charge if an allegation is well founded.

247. But even if the barrier in section 102 AFDA did not exist, the system does not provide a sufficiently graduated system of responses. In the United Kingdom, for example, commanders have additional administrative options available to them, including the imposition of extra duties. This response is only accessible using a summary trial in New Zealand.

Allow a discretion not to record a charge

248. The inflexibility of section 102 is also creating inconsistency. Some commanding officers are "working around" the charging decision while others approach it strictly. Those who work around the charging decision use administrative responses for minor or trivial disciplinary offending.

249. The lack of flexibility in the charging decision also creates a barrier to improving responses to issues like sexual offending and building a safety culture in the Air Force. When the interests of discipline require, more flexibility would enable commanding officers to choose alternative methods of resolving disciplinary incidents. When issues of victims' rights and justice require, the system requires decision making that is independent of the chain of command (e.g. cases of sexual offending).

250. We **recommend** amending section 102 of the Armed Forces Discipline Act 1971 to allow more flexibility in the decision of whether to record a charge. Any such change should be accompanied by a mechanism to prevent misuse, and guidance as to when it is appropriate not to record a charge.

251. As noted above, the charging decision rests solely with the commanding officer of the accused under section 102 AFDA. This is a potential problem for investigations that should be placed outside the chain of command.

252. Consideration needs to be given as to whether charges should be able to be laid by other officers. This would be contrary to the central premise of the summary trial framework, and the responsibility for unit discipline, being centred on the commanding officer. It is clearly more appropriate, however, in some circumstances to enable independent decision-making, such as in the case of sexual offending. Any extension of authority to record a charge beyond

the commanding officer would need to be carefully circumscribed, with appropriate checks and balances to prevent misuse.

253. We **recommend** enabling an officer independent of the chain of command to record a charge and commence investigation in serious, complex or sensitive cases, and that NZDF seek amendment to the Armed Forces Discipline Act 1971 accordingly.

Allow extra duties (or similar) to be imposed administratively

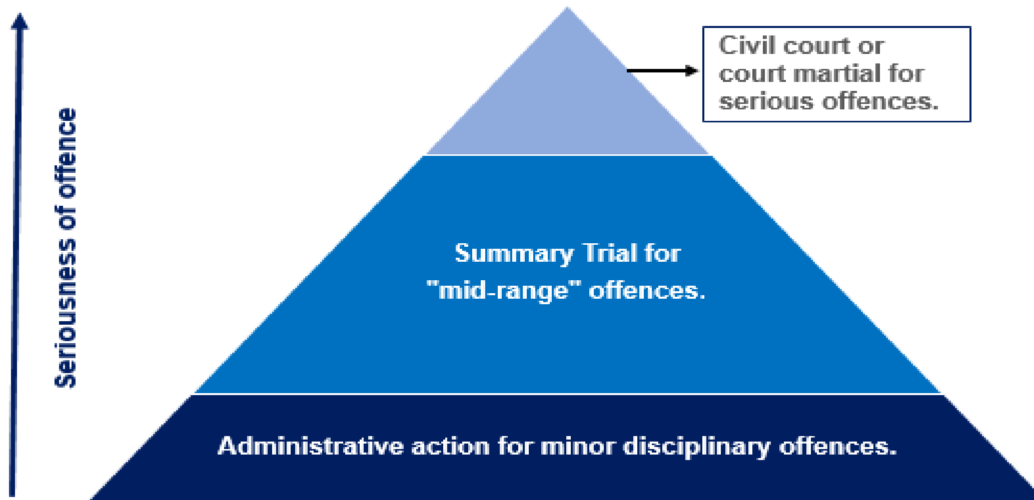
254. If administrative action is to be available to commanders, they will need a wider range of options for managing minor disciplinary issues. Few options exist beyond warnings and corrective training.

255. In the United Kingdom, extra duties can be imposed using minor administrative action, without the need to hold a summary trial. The administrative action decision can be challenged if the person 'punished' considers the decision is unfair or unjust. An approach of this nature would enable the significant volume of offences at the lower end of the spectrum, to be resolved outside the summary trial process (see diagram below)

256. In Australia, the system of minor disciplinary response is much more elaborate and formalised. These systems have some similarity to New Zealand's former Captain's Table and Orderly Room processes. The Australian infringement system has procedural checks and balances, including the right for a person who is accused of an infringement to choose to have a matter dealt with by way of summary trial instead of in a more abbreviated infringement hearing.

257. The United Kingdom approach seems preferable to the Australian approach. It is less procedurally cumbersome. Rights can be dealt with by carefully limiting the impositions available administratively and by providing the right to have a matter heard at a summary trial.

258. Any change introducing a more formalised and broader administrative response will need to be accompanied by measurement and monitoring to ensure there is no procedural of substantive unfairness introduced into the disciplinary system.



259. We **recommend** adopting the United Kingdom approach of enabling extra duties or similar responses to be imposed administratively as a response to minor offending that avoids the complexity of a summary trial, and that NZDF seek amendment to the Armed Forces Discipline Act 1971 as required.

Improving the timeliness of investigations

260. Substantial delays in completing preliminary investigations are having a number of impacts: the timely resolution of discipline issues; the rights of those facing charges; and operational capability. There is also a risk that the summary trial system could become dysfunctional in some circumstances.

261. Being able to deal with less serious issues in a less formal manner (as recommended above) would reduce pressure on the military police by removing any requirement to complete fully developed preliminary investigation files into minor or trivial incidents.

262. Pressure would also be relieved by commanding officers taking more responsibility for conducting disciplinary investigations within their own units. Commanders can assign their own officers and non-commissioned officers to complete investigations into simple disciplinary matters that do not raise complex evidence. They should not, as a first response, refer minor investigations to the military police. Many units do undertake preliminary investigations effectively, particularly in the Army. Internal unit-led preliminary investigations appear to be less favoured by Navy and Air Force units.

263. One of the drivers for commanding officers referring preliminary disciplinary investigations to military police appears to be to access their investigative skills. More preliminary investigations are likely to be retained within command units if the skill level among senior non-commissioned officers and junior officers can be improved. We note that the current

military justice guidance and training focuses almost entirely on the summary trial process and does not provide much assistance on conducting preliminary investigations.

264. We **recommend** conducting preliminary inquiries into minor disciplinary incidents within the accused's unit as a matter of standard practice across NZDF, rather than referring such matters to military police. (Policy analysis will be required to define minor disciplinary incidents. Minor incidents should not include offences that have a criminal element such as dishonesty or violence).

265. We **recommend** developing training material to support units undertaking preliminary investigations of minor incidents, such as taking statements from witnesses, collecting and recording other evidence, and preparing files; and incorporating this into the military justice training programme.

266. Canada has found that procedural and policy responses were ineffective at reducing delays in summary trials. They are now taking the step of introducing a six month time limit on bringing a charge to summary trial. We suggest NZDF consider similar options for addressing delay, - particularly in relation to charges under the AFDA that relate to less serious disciplinary matters. Such options could include guidelines for discounting sentences for delay; and perhaps a policy for staying proceedings where delays are unreasonable.[77] For minor disciplinary offences, for example, a stay of proceedings should be considered if bringing the matter to trial has taken longer than six months and there are no particular circumstances in the case that would justify the delay.

267. We **recommend** developing guidelines for discounting sentences and staying proceedings where delay has been unreasonable. Consider imposing a limit of six months, particularly for bringing a purely disciplinary matter to summary trial.

Civil court or Court Martial for certain offences

268. Charges for serious criminal offences are occasionally being heard at summary trial. The commanding officer has discretion to decide whether to lay a charge under the AFDA or to refer the matter to the civil authority. While the NZDF has guidance in place for the commanding officer in making the decision, serious criminal matters are on occasion still being heard at summary trial despite the obvious strong community interest in such a matter being dealt with in the civil system.

269. First, presenting and defending officers are not sufficiently skilled in legal and procedural matters to successfully dispose of serious charges consistently and fairly. The AFDA requirement for disciplinary officers to refer a matter to a higher authority if they consider that they are insufficiently equipped to deal with the case seems to be infrequently invoked.

270. Secondly, serious offences often require consideration of the most serious punishments permitted on the AFDA schedules. If detention is a likely outcome, fairness and impartiality in hearing the charge will be extremely important. It is arguable that a Court Martial is a more

[77] For example, for stay of proceedings see *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).

appropriate tribunal for hearing a charge that could result in a detention. This is the path that other jurisdictions are taking (Canada for instance).

271. In circumstances where a charge relates to a serious criminal offence, the best way of achieving justice for all parties will usually be to refer the matter to the civil authorities.[78] This also applies to sexual offences which are sufficiently serious to be brought before a civil court and where civil authorities' processes may also be more adept at dealing with such offences (including treatment of the victim). Referring matters to the civil authorities may not be possible in some circumstances. For example, the civil courts do not have jurisdiction for offences committed overseas. A change to the AFDA would be required to change the position.

272. Consideration should be given to developing clearer rules regarding the referral of specified types of charges to civil courts or Court Martial in all circumstances. Both pathways (to civil court or Court Martial) already exist, and should be used for appropriate cases (as described above).

273. We **recommend** NZDF review existing rules on when to refer matters to the civil court or Court Martial, and monitor compliance with those rules, to improve the consistency of such decision-making.

Service connection test

274. In addition to ensuring that certain offences are dealt with by a court rather than summary trial, a stricter service connection test could be required before a civil offence (under section 74 of the AFDA) is heard at summary trial. This could be set out in Defence Force Orders. The service connection test would need to be framed broadly enough to cover the conduct and discipline interests of NZDF. There is currently insufficient clarity and a lack of consistency in how this decision is made across different units/commanding officers.

275. We **recommend** requiring a stricter service connection test to be met before allowing a civil offence (under s 74 of the AFDA) to be tried summarily.

Safeguards when imposing detention

276. The way in which detention is carried out at the Service Correctional Establishment at Burnham has evolved to be more rehabilitative in nature. However, detention is still a punishment that severely restricts an individual's liberty. As such, the summary trial process is effectively being used to apply a criminal sanction. This raises the expectation of fair trial rights. The option provided to the accused person to elect a trial by Court Martial may not provide a sufficient safeguard when liberty is at stake. This has certainly been held to be the case by the European Court of Human Rights in respect of the United Kingdom's summary trial system. Canada has also recently moved away from allowing any summary trial to

[78] The Joychild report recommended that serious sexual offending should be referred to the police for charging in the civilian court unless, for an exceptional reason, it was considered that a request to the Attorney-General to allow them to be heard before a Court Martial was appropriate.

restrain individual liberty, by removing both the punishment of confinement to a ship or barracks as well as the punishment of detention from the options available to disciplinary officers.

277. In light of developments in these overseas military justice systems, NZDF may wish to consider whether it is appropriate to continue to retain detention as a punishment option at summary trial. In the short term, procedural fairness may be improved by automatically referring every sentence of detention to the Judge Advocate General. This would allow the reasonableness and legality of the finding, and the severity of the sentence, to be reviewed. Recourse to the Summary Appeal Court continues to be available for challenging a sentence of punishment and, where appropriate, suspended, quashed or varied by the that Court. We note that if a commanding officer considers offending may warrant an extended period of detention, they may declare their punishment powers are inadequate and refer the matter to a Court Martial.

278. We **recommend** NZDF consider whether it is appropriate to continue to retain detention as a punishment option at summary trial. In the short term, consider options for improving procedural fairness, for example, by automatically referring every sentence of detention to the Judge Advocate General or by introducing other procedural safeguards.

Extend the election right to all persons facing a charge under the AFDA

279. One of the key safeguards in the summary trial is that persons who face a more serious punishment (column 2) are given the right to elect a trial by Court Martial.

280. All persons facing a charge under the AFDA are entitled to a fair trial, not just those facing a more severe column 2 punishment. In order to protect that right, all persons facing a charge should be provided the opportunity to choose a Court Martial instead of a trial by their commanding officer.

281. There are many potential scenarios where a person may feel that they would not receive a fair hearing in front of their commander. An unfair hearing is problematic even where less severe punishment options exist (such as fines and confinement) because of their impact on human rights.

282. The flipside of electing trial by Court Martial is that it opens up the possibility of more severe penalties. As a result, it is unlikely that providing an election right would be frequently exercised. Providing this option to persons facing summary trials is unlikely to place a substantial burden on the Court Martial system. It would provide an additional safeguard, however, to the accused.

283. We **recommend** extending the right to elect trial by Court Martial to all persons facing a charge under AFDA.

Review powers of search under the AFDA and customary powers

284. While not a core focus of the review of the summary trial system, many people interviewed highlighted concerns about the outdated powers of search available under the AFDA. This has the potential to impact on the effectiveness of investigations. It also raises the potential for some searches to be inconsistent with the right to be free from unreasonable search under s 21 of the NZBORA. It is recommended that the current guidance for commanding officers should be reviewed to ensure that they understand the requirements for reasonableness when authorising searches using customary powers or under the AFDA.

285. Many people interviewed highlighted concerns about the AFDA search powers being out-dated. In particular, the search powers were drafted before the advent of mobile phones. In addition to the risks noted above, out-dated search powers can raise other risks, and may place NZDF personnel at risk of criminal liability if reliance on such powers to interrogate electronic devices is the subject of a successful challenge in the future.

286. In respect of the search powers, we **recommend** that NZDF**:**

   a. Review current guidance for commanding officers on the requirements for reasonableness when authorising searches using legislative or customary powers;

   b. Consider whether the search provisions in the AFDA should be relied on to interrogate personal electronic devices (including seeking Crown Law advice if appropriate);

   c. Review the AFDA search provisions to update them in light of technological changes.

Independence of disciplinary officers and command influence

287. We identified a number of instances of command influence: either by senior officers communicating their views about matters directly relevant to the subject matter of a current summary trial, or by directing or suggesting particular courses of action to disciplinary officers.

288. We **recommend** that the Chief of Defence Force issue a clear and unequivocal statement on the unlawfulness of command influence, whether by Defence Force Order or some other means, to reinforce the importance of appropriate command behaviour to the effectiveness of the summary trial.

Compensation orders as de facto insurance

289. Compensation orders appear to be being used as a tool to recover contributions toward damage to service vehicles. Where the matter is not disciplinary, the summary trial system should not be used as a method of recovery.

290. We **recommend** that NZDF issue a Defence Force Order to describe the circumstances where compensation orders may and may not be used.

Policy review (persons under 18 year of age)

291. The AFDA makes no provision for the jurisdiction of the Youth Court relating to a person who is under 18 years of age but who is subject to military law.

292. We **recommend** considering policy options for maintaining consistency with the rights afforded minors in the NZBORA as far as practicable.

Improved reporting and senior command ownership of the summary trial system

293. This is the first comprehensive review of disciplinary system performance since the ADFA was amended in 2007. Senior NZDF commanders have some insight into various aspects of disciplinary system performance through current reporting. This includes biannual crime statistics reports from the Provost Marshall and annual reports from the Judge Advocate General. However, there is no regular, comprehensive reporting of the disciplinary system as a whole. In particular, we expect senior command should seek ongoing reporting that will enable them to understand whether the summary trial system is continuing to meet the needs of the military.

294. This review identifies system performance problems in some key respects: timeliness, complexity and fairness issues, and tension with other systems such as Just Culture and Operation Respect processes. These are matters that should be regularly monitored by senior commanders, who are best placed to make overall system improvements – whether through policy, resourcing or other responses.

295. Current reporting by certain groups is effective for management of their respective areas of responsibility. The gap appears to be a lack of insight into the integration of, and the overall effectiveness, the system. Overarching reporting would enable senior command to have oversight of the end-to-end processes including investigative, legal, operational discipline and command elements.

296. We **recommend** NZDF review its reporting mechanisms to improve visibility and to enable better governance of the disciplinary system by NZDF senior command.

Improved guidance and communication

297. The high propensity for guilty pleas is potentially indicative of inherent incentives, both cultural and practical, to accept punishment, even in circumstances where the evidence may not be sufficient to prove guilt. The high proportion of undefended hearings should not therefore be seen as a measure of success of the preliminary investigation process or the summary trial. Ongoing education and support is required to make defendants aware of their fair hearing rights and to ensure that they seek access to legal advice when required.

298. We **recommend** developing clear guidance to ensure that defendants are made aware of the right to a fair hearing and legal advice.

More transparency of summary trials across NZDF

299. There is some suggestion that summary trials have less visibility than was the case a decade ago when the current system was established. Interviewees said there used to be a practice of publishing summary trial outcomes in base newsletter, but that has ceased.

300. Disseminating outcomes provides transparency as to the nature of offences being charged, punishments imposed, and reinforces standards of behaviour. It also serves to confirm that the summary discipline system applies equally to officers, non-commissioned officers and to lower ranks. Because summary trials are not frequently held in many operational units, there is less visibility of these matters than could be achieved by communicating information broadly across bases, services, or NZDF as a whole.

301. We **recommend** reporting the outcomes of summary trials.

Bibliography

This Bibliography has three sections: (1) books and book chapters, journal articles, guides, manuals, papers and reports, as well as Defence Force Orders and charge sheets; (2) selected relevant legislation; and (3) selected relevant case law. The legislation section refers to selected relevant legislation from New Zealand, the United Kingdom, Australia, and Canada, as well as to an international covenant and an international convention. The case law section refers to selected case law from New Zealand, the United Kingdom and the European Court of Human Rights, Australia and Canada, as well as to three US Supreme Court cases.

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LEGISLATION

This section refers to selected relevant legislation from New Zealand, the United Kingdom, Australia, and Canada, as well as to an international covenant and an international convention.

New Zealand

Armed Forces Discipline Act (No. 53) 1971 (available at http://legislation.govt.nz/act/public/1971/0053/latest/DLM401063.html), especially:

s35: Violence to a superior officer

s42: Cruel or disgraceful conduct

s44: Resisting arrest (with violence)

s45: Escape from custody

s46: Permitting the escape of prisoners (wilfully)

s47: Desertion

s64: Losing or hazarding a ship, aircraft, or armoured fighting vehicle (negligently)

s65: Dangerous acts or omissions (negligently)

s69: Delay or denial of justice)

s106 (Disposal of charged by subordinate commanders)

s108 (Officer is empowered to act as disciplinary officer)

s117: Plea of guilty

s118: Summary Appeal Court of New Zealand established

s119: Constitution of Summary Appeal Court

s120: Summary Appeal Court must sit in divisions

s124: Right of appeal

s129: Special references to Summary Appeal Court

s131: Appeals to proceed by way of rehearing and general power of Summary Appeal Court

s134: Power of Summary Appeal Court in respect of orders for compensation and restitution and orders to come up for punishment if called on

s136: Decisions of Summary Appeal Court final

s138: When Summary Appeal Court must hold proceedings in closed court

s139 Summary Appeal Court may limit scope of open court

s140: Right of appellant to present his or her case in writing and restricted right of appellant to be present

s141: Defence of appeals and representation of appellant

Armed Forces Discipline Amendment Act (No 2) 2007. Available at http://www.legislation.govt.nz/act/public/2007/0098/17.0/DLM1034008.html

Armed Forces Discipline Act Commencement Order 1983 (SR 1983/232). Available at http://www.legislation.govt.nz/regulation/public/1983/0232/latest/DLM90841.html

Armed Forces Discipline Rules of Procedure 2008, especially r 7(1)(g)(iii). Available at http://www.legislation.govt.nz/regulation/public/2008/0237/latest/whole.html#DLM14555879.

Evidence Act (no 69) 2006, especially s30(2)(b). Available at http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html

Human Rights Act (No 82) 1993. Available at http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html

New Zealand Bill of Rights Act (No 109) 1990 (NZBORA), especially s25. Available at http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html

Sentencing Act (No 9) 2002, especially s9. Available at http://www.legislation.govt.nz/act/public/2002/0009/latest/whole.html

The Court Martial Act (No 101) 2007, especially s30. Available at http://www.legislation.govt.nz/act/public/2007/0101/latest/DLM1001890.html

Victims' Rights Act (No 39) 2002, especially Part 3. Available at http://www.legislation.govt.nz/act/public/2002/0039/46.0/DLM157813.html

United Kingdom

The Armed Forces Act 2006, renewed every five years (so, Armed Forces Act 2011 and Armed Forces Act 2016). The 2006 Act brought together disciplinary law for all three military services, and replaced the four separate Service Discipline Acts: the Army Act 1955, the Air Force Act 1955, and the Naval Discipline Act 1957.

Bill of Rights 1689: An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.

Human Rights Act 1998. Available at http://www.legislation.gov.uk/ukpga/1998/42/contents

Protection from Harassment Act 1997. Available at https://www.legislation.gov.uk/ukpga/1997/40/contents

Other statutes providing the structure for the military justice system

Armed Forces Act 2006, especially Schedule 2 about Serious Offences. Available at http://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpga_20060052_en.pdf

Court-Martial (Appeals) Act 1968. Available at https://www.legislation.gov.uk/ukpga/1968/20

Ministry of Defence Police Act 1987. Available at http://www.legislation.gov.uk/ukpga/1987/4/contents

Queen's Regulations. First published in 1731 (known as the King's Regulations when the United Kingdom has a king) as one volume. A set of collection of orders and regulations in force in the Navy, Army, Air Force (and Commonwealth Forces where the Queen is Head of State). Now each UK Service has its own volume. The Regulations provide guidance for officers of these Services in all matters of discipline and personal conduct.

Reserve Forces Act 1996 (which creates offence provisions in sections 95–109). Available at http://www.legislation.gov.uk/ukpga/1996/14/contents

The Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. Available at http://www.legislation.gov.uk/uksi/2009/2055/contents/made

Visiting Forces Act 1952. Available at http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/67/contents

Visiting Forces (British Commonwealth) Act 1933. Available at http://www.legislation.gov.uk/ukpga/Geo5/23-24/6/contents

Australia

Australian Government, Department of Defence website has links to external legal Acts and Regulations focused on Defence: see http://www.defence.gov.au/legal/dllinks.asp

Commonwealth of Australia Constitution Act 1900, especially s68 (Command of naval and military forces), s51 (Legislative powers of the Parliament), and Chapter III, especially s80 (Trial by jury), s73 (Appellate jurisdiction of High Court). Available at http://www.legislation.gov.uk/ukpga/Vict/63-64/12/contents/enacted

Crimes Act 1914. Available at https://www.legislation.gov.au/Series/C1914A00012

Criminal Code Act 1995. Available at https://www.legislation.gov.au/Details/C2017C00235

Defence Act 1903. Available at https://www.legislation.gov.au/Details/C2017C00342

Defence Force Discipline Act 1982 established the current Australian military justice system, including the Defence Force Discipline Appeal Tribunal. Available at https://www.legislation.gov.au/Details/C2016C00811

> Regulations made under the Defence Force Discipline Act 1982. Part XII of the Act provides for powers to make Regulations (197 Regulations).
>
> The Discipline Officer Scheme was established under Part IXA of the Defence Force Discipline Act 1982 and introduced in 1995.
>
> The Australian Military Court (AMC), created by an amendment to the Defence Force Discipline Act 1982, took effect on 1 October 2007.

Defence Force Discipline Appeals Act 1955 established the Defence Force Discipline Appeal Tribunal. Available at https://www.legislation.gov.au/Details/C2016C01016

Defence Force Discipline Regulations 2018. Available at https://www.legislation.gov.au/Details/F2018L00265

Military Justice (Interim Measures) Act (No. 2). Available at https://www.legislation.gov.au/Details/C2009A00092

Summary Authority Rules 2009, especially s12 (Defence of accused person at summary hearing). Available at https://www.legislation.gov.au/Details/F2009L03638

Traffic Act 1949, Queensland. This Act was repealed on 1 August 2000 by the Road Transport Reform Act 1999. Available at http://lexisweb.lexisnexis.com.au/read-legislation.aspx?s=qld&f=qld_act_1949-26&t=home.aspx

Canada

Criminal Code. This law codifies most criminal offences and procedures in Canada. Its official title is ‘An Act respecting the criminal law’ (R.S.C. 1985, c. C-46, as amended). Section 91(27) of the Constitution Act, 1867 establishes the sole jurisdiction of Parliament over criminal law in Canada. Available at https://laws-lois.justice.gc.ca/eng/acts/c-46/

National Defence Act, 1985. Available from https://lois-laws.justice.gc.ca/eng/acts/N-5/FullText.html. Also, Part III of the National Defence Act, 1985 (the Code of Service Discipline) created the Canadian military justice system.

Bill C-25, passed in 1998, enacted amendments to the National Defence Act. It reformed the military justice system. Bill C-25 is reviewed every five years. Amendments enacted in 2013 made changes to the summary trial system. Available at https://www.parl.ca/DocumentViewer/en/42-1/bill/C-25/royal-assent

Bill C-29, passed in 2008, permits an accused person, in certain circumstances, to choose the type of court martial convened (s 165.193). Full title: An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act, S.C. 2008, c. 29. Available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2008_29/FullText.html

Bill C-77, amends provisions of the Act that governs the military justice system. . The House of Commons passed the Bill on its third reading on 28 February 2019. Available at https://www.parl.ca/DocumentViewer/en/42-1/bill/C-77/third-reading

Senate Committee report on Legal and Constitutional Affairs, 2009. This report recommended reforming the courts martial system. This led to work on Bill C-15.

Bill C-15: *Strengthening Military Justice in the Defence of Canada Act* to amend the *National Defence Act*. Introduced in 2011, Bill C-15 received Royal Assent in 2013. Regulations brought legislative changes into effect over the next five years, with the final changes taking effect in late 2018.

Queen's Regulations and Orders (QR&O). Came into effect on 1 January 2006; the most recent modifications came into effect on 1 September 2018. Sets out administrative, financial and discipline rules and standards for the Canadian military. Volume II of the Regulations (Chapters 101 to 119) set out the rules governing the disciplinary system. Available at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-2-disciplinary.html

The Constitution Act, 1982 (supreme law of Canada). Available from https://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38. Part 1 of the Constitution is the Canadian Charter of Rights and Freedoms. The Charter has primacy over the laws of Canada, including the National Defence Act. Section 11 of the Charter identifies that a system of military justice exists. Available at https://laws-lois.justice.gc.ca/eng/const/page-15.html

The Narcotic Control Act, 1961. One of Canada's national drug control statutes, the Act was repealed by the 1996 Controlled Drugs and Substances Act.

International: a covenant and a convention

European Convention on Human Rights (ECHR), European Court of Human Rights, Council of Europe, Strasbourg. Formal title: The Convention for the Protection of Human Rights and Fundamental Freedoms. Opened for signature in Rome on 4 November 1950. Came into force in 1953. Available at https://www.echr.coe.int/Pages/home.aspx?c=&p=basictexts

International Covenant on Civil and Political Rights (ICCPR), Office of the Human Rights Commissioner, United Nations. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) on 16 December 1966. Came into force on 23 March 1976. Available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

CASE LAW

This case law section refers to selected case law from New Zealand, the United Kingdom and the European Court of Human Rights, Australia and Canada, as well as three US Supreme Court cases.

New Zealand

Cases are listed by date, with the most recent cases listed first.

2018 cases

S v R, 29 March 2018, Wellington.

T v R, SACNZ, 24 April 2018, Linton Camp.

H v R, 24 August 2018, Wellington.

R v R, 5 October 2018, Wellington.

2017 cases

M v R, 28 March 2017, Wellington.

H v R, 16 May 2017, Wellington.

R v R, 11 August 2017, Wellington.

M v R, 22 August 2017, Wellington.

R v R, 2 November 2017, Wellington.

2016 cases

R v R, 27 April 2016, Wellington.

M v R, 22 July 2016, Wellington.

A v R, 5 October 2016, Wellington.

2015 cases

F v R, SACNZ, 6 March 2015, Wellington.

K v R, SACNZ, 8 April 2015, Wellington.

F v R, 3 June 2015, Wellington.

S v R, 14 July 2015, Wellington.

F v R, SACNZ, 21 September 2015, Wellington.

M v R, 24 November 2015, Wellington.

2014 cases

O v R, 30 January 2014, Wellington.

B v R, 3 February 2014, Wellington.

D v R, 14 February 2014, Wellington.

M v R, 8 April 2014, Wellington (Case A).

M v R, 8 April 2014, Wellington (Case B).

P v R, 8 April 2014, Wellington.

H v R, 17 April 2014, Wellington.

P v R, 17 April 2014, Wellington.

N v R, SACNZ, 29 April 2014.

W v R, 9 July 2014, Wellington.

B v R, SACNZ, 30 July 2014, Wellington.

T v R, SACNZ, 20 August 2014, Wellington.

M v R, 27 August 2014, Wellington.

D v R, 17 November 2014, Wellington.

2013 cases

P v R, 10 April 2013, Wellington.

J v R, 11 June 2013, Wellington.

F v R, 8 August 2013, Wellington.

N v R, 13 September 2013, Wellington.

M and other v R, 17 September 2013, Wellington.

E v R, 11 October 2013, Wellington.

2012 cases

S v The Director of Military Prosecutions, 21 February 2012, Wellington.

W v R, 23 February 2012, Wellington.

D v R, 28 March 2012, Wellington.

D and S v R, 20 April 2012, Wellington.

I v R, 20 April 2012, Wellington.

L v R, 14 May 2012, Wellington.

M v R, 20 August 2012, Wellington.

T v R, 27 September 2012, Wellington.

W v R, 1 November 2012, Wellington.

C v R, 28 November 2012, Wellington.

2011 cases

M v R, 16 March 2011, Wellington.

B v R, 25 November 2011, Wellington.

S v R, 15 December 2011, Ohakea.

2010 cases

W v R, 16 March 2010, Wellington.

R v R, 26 May 2010, Wellington.

V v R, 6 October 2010, Burnham.

H v R [2010] NZSC 135.

2009 case

T v R, 23 September 2009, Wellington.

2000 case

Van der Ent v Sewell [2000] 3 NZLR 125.

1999 case

R v Jack [1999] 3 NZLR 331.

1994 case

R v Sullivan 1 NZCMAR 207, 20 December 1994, NZCMAR is New Zealand Courts Martial Appeal Reports

1972 case

R v Smith [1972] 1 NZCMAR 60.

United Kingdom and the European Court of Human Rights

Cases are listed in alphabetical order.

Grant v. Sir Charles Gould (1792) 2 H. Bl. 69

Selected cases that have shaped the design of the military justice system

Baines v Army Prosecuting Authority & Anor (2005) EWHC 1399. The High Court of Justice in England is one of the Senior Courts of England and Wales. Its name is abbreviated as EWHC for legal citation purposes. Available from https://www.casemine.com/judgement/uk/5a8ff74f60d03e7f57eab258

Bell v the United Kingdom (2007) 45 EHRR 24. European Human Rights Reports available from judgments on the European Court of Human Rights (HUDOC) website: https://hudoc.echr.coe.int/eng-press#%20

Cooper v the United Kingdom (2004) 39 EHRR 8.

Engel and Ors v The Netherlands [1976] ECHR.

Findlay v the United Kingdom (1997) 24 EHRR 221. European Human Rights Reports available from judgments on the European Court of Human Rights (HUDOC) website: https://hudoc.echr.coe.int/eng-press#%20

Grieves v the United Kingdom (2004) 39 EHRR 3.

Morris v the United Kingdom (2002) 34 EHRR 52.

Regina v Boyd [2002] UKHL 31. Available at https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd020718/boyd-1.htm

Regina v Boyd and others 2003 1 AC 734 (In *R v Boyd* House of Lords).

Thompson v the United Kingdom (2005) 40 EHRR 11. Reports available from judgments on the European Court of Human Rights (HUDOC) website: https://hudoc.echr.coe.int/eng-press#%20

Australia

Cases are listed in alphabetical order.

Groves v Commonwealth [1982] HCA 21; 150 CLR 113; 40 ALR 193.

Haskins v The Commonwealth [2011] HCA 28. Available at http://eresources.hcourt.gov.au/showCase/2011/HCA/28

Lane v Morrison [2009] HCA 29. Available at http://eresources.hcourt.gov.au/showCase/2009/HCA/29

McWaters v Day [1989] HCA 59. Available at http://eresources.hcourt.gov.au/showbyHandle/1/11822

Re Colonel Aird; Ex parte Alpert [2004] HCA 44. Available at http://eresources.hcourt.gov.au/showCase/2004/HCA/44

Re Nolan; Ex parte Young [1991] HCA 29, (1991) 172 CLR 460; 100 ALR 645.

Re Tracey; Ex parte Ryan [1989] HCA 12; 166 CLR 518. Available at http://eresources.hcourt.gov.au/showbyHandle/1/9281

Re Tyler; Ex parte Foley [1994] HCA 25; 172 CLR 460; 100 ALR 645. Available at http://eresources.hcourt.gov.au/showbyHandle/1/9873

White v Director of Military Prosecutions [2007] HCA 29. Available at http://eresources.hcourt.gov.au/showCase/2007/HCA/29

Canada

To show how the *Généreux* line of cases and *MacKay* line of cases developed, the cases are listed by date, with the earliest cases in each line listed first.

Généreux line of cases

Historically the *Généreux* line of cases addressed whether the court martial is an independent and impartial tribunal.

R. v. Généreux [1992] 1 S.C.R. 259. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/836/index.do

R. v. Forster [1992] 1 S.C.R. 339. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/838/index.do

R. v. Trépanier 2008 (CMAC) [Court Martial Appeal Court of Canada].

MacKay line of cases

The *MacKay* line of cases deal with the jurisdiction of the military justice system to try civil offences.

MacKay v. Rippon [1978] 1 F.C. 233 (T.D.).

MacKay v. The Queen [1980] 2 S.C.R. 370.

R. v. Larouche (R.) (2014), 460 N.R. 248 (CMAC).

R. v. Moriarity, 2015 SCC 55, [2015] 3 S.C.R. 485. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15628/index.do

R. v. Royes 2016 (CMAC) 1. Available at https://www.canlii.org/en/ca/cmac/doc/2016/2016cmac1/2016cmac1.html

R. v. Déry 2017 (CMAC) 2. Available at https://www.canlii.org/en/ca/cmac/doc/2017/2017cmac2/2017cmac2.html

R. v. Beaudry 2018, Court Martial Appeal Court of Canada, Number CMAC-588, 2018 CMAC 4, dated 19 September 2018 and heard by Supreme Court on 14 January 2019, with judgement on 15 January 2019.

United States

Cases are listed in alphabetical order.

Three US Supreme Court cases that have influenced the Canadian courts in their consideration of the jurisdictional scope of the military justice system. They are

O'Callahan v. Parker, 395 U.S. 258 (1969). For details of the case, see https://supreme.justia.com/cases/federal/us/395/258/

Relford v. Commandant, 401 U.S. 355 (1971). For details of the case, see https://supreme.justia.com/cases/federal/us/401/355/

Solorio v. United States, 483 U.S. 435 (1987). For details of the case, see https://supreme.justia.com/cases/federal/us/483/435/