ASSESSMENT OF THE NEW ZEALAND DEFENCE FORCE PROSECUTION FUNCTION 2021

Te Tari Ture o te Karauna
Crown Law

CONTENTS

Reviewer: Ian Murray, Barrister.

EXECUTIVE SUMMARY

1. This assessment, carried out by the Public Prosecution Unit within the Crown Law Office (PPU), considered the operation of the New Zealand Defence Force (NZDF) prosecution function, with particular emphasis on trials in the Court Martials and the role of the Director of Military Prosecutions (DMP). A cross section of interested parties were spoken to during the assessment and this report summarises the findings of that process.

2. Our ultimate conclusion is that overall military justice prosecutions appear to be conducted well. Some areas for possible improvement have been identified with recommendations for possible changes suggested.

3. During the course of the assessment, we reached the following conclusions:

   3.1. At the time of the assessment there was a relatively low number of cases dealt with in the Court Martial system, so that some participants, in particular staff from the DMP's office, can have relatively few opportunities to develop and hone certain advocacy skills.

   3.2. The combined role of DMP and the Director of Legal Services (DLS) does have potential for an actual or perceived conflict of interest.

   3.3. The "well-founded" test that is applied at the commencement of a prosecution under the military justice system is necessary and appropriate for summary cases, because of the unique system operated by the military with participants that are not independent. However, charging decisions made by the DMP are different. We consider that applying the well-founded test would be inconsistent with the DMP's equivalents in the civilian system and that the Solicitor-General's Prosecution Guidelines (the Prosecution Guidelines) should be applied. Presently, the DMP and her staff consider that she is required to apply the Prosecution Guidelines' test. But that view did not appear to be uniformly held by all participants in our assessment. Therefore, we consider it should be made explicit that anyone exercising the power to lay charges[1] must apply the Prosecution Guidelines.

   3.4. There are some cases which, because of their circumstances (in particular their seriousness), must be heard in a trial in the Court Martial. However, these cases must still be first considered by the Commanding Officer (CO), applying the well-founded test, even though the DMP will ultimately make the prosecution decision.

   3.5. Certain pre-trial hearings are provided for by the legislation governing trials in the Court Martial. However, during the assessment we noted a degree of inconsistency about whether pre-trial decisions were applied for prior to the convening of the trial in the Court Martial. In some cases, the fact that pre-trial hearings were not applied for appears to have delayed the commencement of trials in the Court Martial which caused

[1] This is primarily the DMP but can also be legal officers delegated to carry out the DMP's functions.

inconvenience to witnesses and the military members who were required to wait until these issues were resolved.

3.6. The interplay between the military justice system and the civilian justice system appeared to operate smoothly but that was, at least to a degree, because of the common sense and pragmatism of those involved in making decisions about where cases should be heard.

3.7. The inability for the prosecution to appeal against manifestly inadequate sentences in summary cases may hinder the DMP's ability to ensure that proper penalties are imposed in the summary jurisdiction and is inconsistent with appeal rights in other equivalent appellate systems.

3.8. It can be difficult to get complete and accurate information about outcomes in summary cases in the military justice system.

3.9. Service members who are convicted of serious offences leave their military service with no record of those convictions following them into civilian life. This has consequences for employers, the community, and the wider justice system, and is one of the less justifiable aspects of the military justice system.

4. We have not closely examined the summary process but note that because summary hearings do not involve lawyers, or an independent and impartial judicial officer, members of the military hierarchy overseeing the system for the NZDF should pay careful attention to ensuring fairness and consistency are maintained within that system. We also stress the importance of regular and thorough training to ensure fairness.

5. The data is not clear, but it is likely there are a few hundred summary prosecutions each year, and approximately ten Court Martial trials.

SUMMARY OF RECOMMENDATIONS

6. We make the following recommendations:

6.1. When there are low numbers of trials in the Court Martials, consideration should be given to creating opportunities for members of the DMP's office to hone advocacy skills used in trials in the Court Martials by offering secondments through the Crown Solicitor network, or public prosecuting agencies with a significant prosecution function, such as the Police Prosecution Service. This closely aligns with the purposes of the GLN People Plan which is intended to maximise opportunities for lawyers in the public service.

6.2. With respect to cases that have to be heard in a trial in the Court Martial, we recommend that these cases follow a different pathway and go directly to the DMP for review rather than through the usual route of consideration by the CO. This will streamline the process and align it more closely with the way in which serious cases are dealt with in the civilian courts.

6.3. There should be explicit reference to the Solicitor-General's Prosecution Guidelines applying to decisions made by the DMP, either in the relevant legislation or in the

Guidelines themselves. The DMP's role is broadly analogous to that of a Crown Solicitor and, as an independent decision maker, he or she should apply the same decision-making process as a Crown Solicitor would.

6.4. That the DMP and her staff promote the use of preliminary and pre-trial procedures for trials in the Court Martial when possible to improve efficiency and reduce delays in the process.

6.5. There is real value in facilitating better access to information about the military justice system. This will assist proper monitoring of the operation of the system. An important aspect is that a finding of guilt in a trial in the Court Martial should be treated the same as convictions in the civilian system to avoid service members leaving the service without a record of their misconduct in the military justice system following them into civilian life.

7. We do not recommend that changes are necessary with respect to the dual role of DMP and DLS, however the situation should be monitored to ensure that any potential for conflicts of interest continues to be well managed.

8. We also do not see a pressing need for changes to the rules around whether the civilian or military justice system hears a case but do note the risk involved where, like here, the rules are not prescriptive and rely on the strengths of the individuals rather than the system itself.

BACKGROUND

9. In 2012, the PPU was set up within Crown Law to oversee public prosecutions. This was in part due to a Cabinet direction arising from the 2011 *Review of Public Prosecution Services*[2]. The PPU assists the Solicitor-General in the oversight of the quality and conduct of public prosecutions across government.

10. Mechanisms for enabling oversight include a reporting framework, and an assessment of prosecuting agency prosecution functions. The Public Prosecutions Reporting Framework (PPRF) was launched in 2013, and in 2018 the PPU launched the prosecution function assessment. This assessment of the NZDF prosecution function is the first to be conducted by the PPU.

11. The NZDF has participated in the PPRF since July 2015, submitting monthly reports to the PPU. It also reports annually to the Attorney-General (through the Solicitor-General) with regards to the performance of the functions of the DMP.[3]

[2] John Spencer *Review of Public Prosecution Services* (September 2011).
[3] As required by section 101J of the Armed Forces Discipline Act 1971 (AFDA).

12. The relationship between the DMP and Solicitor-General is unique among public prosecuting agencies because the Solicitor-General also has specific responsibilities under the AFDA to supervise the DMP to the same extent as a Crown Solicitor is supervised. This contrasts with the oversight responsibility that the Solicitor-General has generally over public prosecution agencies. The NZDF has agreed to the PPU carrying out this assessment of its prosecution framework, procedures and policies with a view to enhancing the quality and effectiveness of its prosecutorial functions.

13. The objectives of this assessment are to:

    13.1. improve Crown Law's understanding of the process for making decisions to prosecute within the military justice system;

    13.2. improve Crown Law's understanding of the way in which military prosecutions are conducted and reported;

    13.3. identify areas for improving prosecution processes;

    13.4. ensure the rule of law is reflected in prosecution decisions and processes; and

    13.5. identify whether there are ways in which the Solicitor-General could offer support or guidance with the prosecution system.

14. While the assessment considered all of the NZDF prosecution functions, there were some topics of particular interest identified in the process of preparing for the assessment. These were:

    14.1. Whether and how the current interpretation of the "well-founded" test is adversely affecting prosecutions;

    14.2. The interrelationship between military prosecutions and prosecutions commenced by the New Zealand Police in respect to service members;

    14.3. The effect, if any, of having the same person carrying out the dual role of DMP and DLS;

    14.4. The effectiveness of the DMP's participation in the Court Martial system;

    14.5. The role of the DMP in the SACNZ; and

    14.6. The data collected about military prosecutions, any conclusions that can be drawn about efficiency and effectiveness from that data, and any suggestions about improvements to the type of data collected and the way it is collected.

15. The process for the assessment was:

    15.1. An initial information gathering process, designed to collate existing policies, procedures, legislation and guidelines, bolstered by scoping interviews with relevant parties.

15.2. Conducting a 360-degree assessment and talking to people involved in all aspects of the military justice system. This involved interviewing internal and external parties to test our understanding of systems and gain valuable insight into the system. A list of interviewees is set out in the Appendix.

15.3. While this assessment was being undertaken, the Ministry of Defence itself was conducting a separate and unrelated review. We met with members of a Ministry of Defence review team to ascertain the scope of their review, to see how we could assist each other and to ensure that there was no unnecessary cross over and doubling up of effort.

15.4. Following the completion of the interviews, the information gathered was assessed to identify common findings, including whether processes or policies could be improved (and if so how), and identifying whether the Solicitor-General could provide additional guidance or support to NZDF or the DMP.

15.5. The draft report including recommendations was circulated to NZDF for comment and their feedback has been incorporated in the final report.

15.6. Once finalised, the report was sent to NZDF and other key stakeholders.

THE MILITARY JUSTICE CONTEXT

16. There are agreed to be seven essential elements of the military justice system. These are "to maintain discipline, consistency in all strategic environments, portability, expeditiousness, fairness, efficiency, and simplicity".[4] While the civilian system has some of the same purposes, some are different. The civilian criminal law also seeks fairness, efficiency, simplicity, and expeditiousness when deciding whether or not the defendant is guilty, but the first three elements do not apply. When the offender is convicted under either system, a number of purposes of sentencing, designed to prevent reoffending and protect the public, crystallise. The purposes[5] set out for the civilian system, many of which will also apply to the military system, are:

16.1. to hold the offender accountable for harm done to the victim and the community by the offending;

16.2. to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm;

16.3. to provide for the interests of the victim of the offence;

16.4. to provide reparation for harm done by the offending;

[4] Honourable Phil Goff during the first reading of the Armed Forces Law Reform Bill 2007 (108-2) (15 March 2017) 637 NZTD 8063.
[5] Sentencing Act 2002, s 7.

16.5. to denounce the conduct in which the offender was involved;

16.6. to deter the offender or other persons from committing the same or a similar offence;

16.7. to protect the community from the offender; and

16.8. to assist in the offender's rehabilitation and reintegration.

17. Context in the military justice system is important. It is necessary to look at the system through the proper lens in order to understand its underlying principles. As just noted, the military justice system has different elements to the civilian justice system but some of its aims and purposes are also different. Underpinning the military justice system is the need to preserve discipline and good order in the armed forces. This provides valuable context for assessing the efficacy of the system. When considering the need for a separate military justice system, a majority of the Supreme Court in Canada noted:[6]

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

18. With that in mind, it is worth reflecting further on the unique aspects of the military justice system. In the ordinary course of events, civilian Courts sit in designated locations. Military Courts do not. Military Courts sit wherever and whenever required. That may include sitting on military bases domestically or on deployments overseas and even in active conflict zones (theatre). Not all comparable countries have portable military justice processes. Some systems return the personnel home to face punishment.[7] However, we consider that the ability to see justice done where the transgression allegedly occurred is rightly seen as a strength of the New Zealand military justice system.

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[6] *R v Genereux* [1992] 1 SCR 259.

[7] For example, France only holds military trials for their service personnel at home.

19. Next, the scope of potential charges is different. Charges may encompass service offences[8] and civilian criminal offences[9]. Service offences may be breaches of service orders, offences under the AFDA or breaches of military custom. The Manual of Armed Forces Law – Commander's handbook on military law[10] (the Commander's Manual) sets out many of the rules governing military law.

20. The subject matter of military justice ranges from behaviour that would simply result in disciplinary action from an employer in the civilian world, through to the most serious of criminal offences. The military justice system is focussed on the individual, not the location of the offending. By that we mean it is focussed on actions of a particular class of person (service members) wherever they occur around the world, rather than the civilian system which is (largely) focussed on offending in New Zealand, whether the person committing the offence is a New Zealander or a visitor from another country.

21. As a result, offences by service personnel committed overseas can be prosecuted by the NZDF, with the effect that the military justice system has a potentially wide extraterritorial jurisdiction. This aligns with the purpose of maintaining service discipline wherever transgressions occur. Teamwork and trust are essential in the military context, possibly more so than anywhere else, given the life and death situations involved in service. For that reason, behaviour that would be seen in a more benign light in civilian life can take on greater significance in the military context. An example is being late which, while considered rude in the civilian world, is not ordinarily treated as being particularly significant. However, in the military context being late in the Navy (for example) may mean that a service member's ship has sailed, and they have not only missed a lengthy deployment, but the vessel could be forced to operate with a reduced complement of personnel. Another example is running away from danger, which in the civilian world is seen as common-sense behaviour, but in the military is seen as cowardice and treated seriously.

22. Because criminal offences committed by service members can include offences in both the military and the civilian justice system, a mechanism is required to decide which jurisdiction should prosecute the particular offence. These rules need to cover decisions about offending within New Zealand as well as overseas. The Commander's Manual includes a section regarding concurrent jurisdiction between the New Zealand Police and the military justice system, providing guidance as to the appropriate system for prosecuting the alleged offending.[11]

23. The Commander's Manual identifies some offences as being so serious that, if committed in New Zealand in peacetime, they should normally be prosecuted by the New Zealand Police. These offences are treason, murder, manslaughter, sexual violation, or bigamy; or any serious sexual assault (which is defined as offending that could lead to a charge of sexual violation).

[8] Offences that would not necessarily be criminal if committed in the civilian world.
[9] Section 74(4) of the AFDA requires the consent of the Attorney General for certain criminal offences to be prosecuted.
[10] DM 69 (2 ed) Volume 1.
[11] DM69 (2ed) Volume 1 at 2.7.1 to 2.7.13.

24. Outside these serious offences, the general rule for domestic offending is that if the offending is prevalent in civilian life and alleged to have been committed by the member of the armed forces in their capacity as an ordinary citizen or the offending has affected the community at large, then it should be dealt with by the civilian authorities. However, if the offending is of a particular concern to the discipline or efficiency of the armed forces or occurred in a defence area or in relation to service property, then it should be investigated and prosecuted under military law.

25. So how are offences prosecuted within the military justice system? The Commanding Officer (CO) in charge of the suspected service member's unit plays a central role in the process.[12] Again, this relates to the underlying purpose of maintaining discipline within the unit where the person is stationed. The CO is directly responsible for maintaining discipline, so for that reason is at the centre of the military justice process.

26. COs become aware of potential breaches (offending) through different channels. In some cases, junior officers may bring allegations directly to the CO to consider charges. In others, Military Police (MPs) may become independently aware of alleged wrongdoing and will seek approval from the CO to investigate. Unlike the civilian world, MPs do not have any independent authority to investigate. This is consistent with the underlying premise that it is the CO's responsibility to maintain discipline within his or her own unit.

27. If the CO becomes aware of a potential breach, then he or she will order a preliminary inquiry to get to the bottom of what has taken place. The allegation can be investigated by the unit, or serious cases can be referred to the MPs by the CO. The CO has discretion as to whether the matter is dealt with by the unit or by MPs. Unless a CO authorises MPs to investigate, they will be unable to do so.

28. Ultimately decisions whether to investigate, whether to charge, and what charges should be laid, are made at the CO's sole discretion.[13] If the decision is made to charge, then the charge is either brought before a disciplinary officer (DISCO) at the appropriate level or referred to the DMP.[14] Charges can be either heard in a summary process or in a trial in the Court Martial.

Summary process

29. The summary trial process resembles a Judge-alone trial in the civilian system, but with the DISCO as the judicial officer. The potential penalties available are restricted compared with the jurisdiction of the Court Martial.[15]

[12] The CO is a commissioned officer up to the rank of Colonel (army), Captain (navy) or Group Captain (air force)
[13] A form called an MD601 is used to record the charge.
[14] See Commanders Manual 7.2.4.
[15] The available punishments in the summary jurisdiction are set out in annexures contained in the Commanders Manual.

30. The first step is for the CO to decide if the allegation is well-founded. If not, then no charge will be laid against the service member. The well-founded assessment involves no qualitative analysis of the evidence and COs carry out a purely quantitative analysis to decide whether the information they have (unchallenged and untested at that stage), could satisfy the elements of the particular offence. If that is the case, then the CO is required (without any real discretion) to proceed with a disciplinary hearing. Limited information is provided to the CO at this stage, to avoid tainting him or her, because the CO may ultimately have to determine the service member's guilt.

31. This process can be juxtaposed with the prosecutor's discretion in the civilian justice system,[16] in which the prosecutor has to conduct an evidential analysis in deciding whether there is a reasonable prospect of conviction, and then separately consider public interest factors in deciding whether the prosecution should be commenced (or continue, as the case may be). This is the gold standard of independent prosecution decision making.

32. There are a number of reasons for the differences between the civilian prosecution decision making process, and that adopted in the military. Commanders need to be able to command, so it is essential that they can control their unit's morale and discipline. As mentioned above, there are some offences which only exist in the military justice system and are focused on maintaining good order. An example is conduct to the prejudice of service discipline This offence is specifically designed to cover conduct which undermines discipline in the military and has no obvious civilian equivalent.

33. Another important reason for the lack of discretion is to prevent the possibility of decisions appearing to be partisan. The CO will likely have some degree of previous knowledge of the service members involved so that the decision cannot be truly an independent one. As a result, there is the possibility of at least the appearance of the decision being a partisan one. The appearance of such bias could undermine morale and military discipline.

34. If the charge is a Court Martial only offence, then it is referred to the DMP and will be heard during a trial in the Court Martial.

35. The DISCO must decide whether the penalty might include detention; reduction in rank; or a fine. If the DISCO considers one of those specified penalties might be imposed, then the file must be referred to a legal officer for the completion of a specified certificate. A specified certificate means a certificate issued by a legal officer that certifies that, in the opinion of the legal officer, the charge:

    35.1. discloses an offence against the AFDA;

    35.2. is drawn in accordance with the Armed Forces Discipline Rules of Procedure 2008 (RP); and

[16] Under the Solicitor-General's Prosecution Guidelines, the prosecutor has a discretion to prosecute. The prosecutor must first assess the evidential sufficiency to establish the charge, and then assess whether a prosecution is required in the public interest.

35.3. is otherwise correct in law.

36. When assessing the possible penalty if found guilty, the DISCO must consider whether the likely penalty is outside the available penalty that can be imposed by the DISCO. If it is, then the case is transferred to the DMP and will be heard in a trial in the Court Martial.

37. If the charge is well-founded, the service member can plead guilty or not guilty. If a guilty plea is entered, then the DISCO proceeds to impose a sentence. If the service member pleads not guilty then DISCO hears the evidence and decides the outcome. Lawyers are not involved, either as prosecutors or defence counsel. Members of the unit who have specialised training act as prosecuting and defending officers. After hearing from the witnesses called for the prosecution, the CO decides whether a prima facie case has been made out. This essentially means that if the evidence presented by the prosecution is accepted, the charge will be established. If a prima facie case is not made out, the charge is dismissed. If a prima facie case is made out, then there are two possibilities: either the case continues in the summary process with the CO continuing to hear the charge, including any evidence presented by the defendant, or the case is transferred to the Court Martial.

38. Trial before the Court Martial is offered by the DISCO if, having heard all the evidence in support of the charge (following a not guilty plea), or having accepted a guilty plea and having heard the summary of facts, the DISCO considers that, the seriousness of the misconduct might require a certain level of punishment.[17] The member can decline the election. If declined, then the case summary trial proceeds to its conclusion with either a finding of whether or not the charge is proven. If proven, then sentencing occurs. But if the election is accepted, then the case proceeds to a trial in the Court Martial and the case is transferred to the DMP to prosecute, engaging the Court Martial process.

39. If the DISCO considers that the punishment will be higher than the available punishment, then the case is referred to the DMP and trial in the Court Martial will be required given the level of likely penalty.

Court Martial

40. The Court Martial is an independent Court of record created by the Court Martial Act 2007. Like the jury trial in the civilian system, trial in the Court Martial is intended to hear more serious cases. Trial by the Court Martial is offered or directed if the CO decides that the punishment options available to him or her may be inadequate to meet the seriousness of the alleged conduct. A case can be transferred to the Court Martial at different stages of the process. If trial by the Court Martial is not offered, or offered but not accepted, then the summary process runs its course. If trial in the Court Martial is accepted/elected, then the case moves out of the summary process altogether. Where the DISCO has insufficient penalty options for the seriousness of the offence, the case is also transferred to the Court Martial without the service member being given an election. There are also offences of such seriousness that they must be heard in a trial

[17] These are the punishments available in column 2 of Schedule 4 to the AFDA (see s 117W of the AFDA).

in the Court Martial.[18] The underlying rationale is that only the independent Court Martial should impose sanctions involving terms of imprisonment, substantial financial penalties or loss of a military career.

41. If trial in the Court Martial is either elected, directed or required because of the nature of the offence, then the DMP becomes responsible for prosecuting the case. He or she will decide whether the case continues, and if so, what charges the service member will face. After the charges are finalised, the case proceeds through to trial in the Court Martial. Military or civilian lawyers represent both parties, and a judicial officer[19] presides.

42. Trials in the Court Martial are similar to a jury trial, but with high-ranking members of the military acting as a three (or in some cases, five) person panel ("the Military Members") to determine guilt or innocence. As in a jury trial, the Judge plays the role of referee during the guilt determination phase, essentially as a legal adviser to the Court Martial. Unlike a jury trial, however, the Military Members play a role at the penalty phase in combination with the Judge, who has the casting vote in the case of deadlock. In some cases, military members in training sit in to learn the process, but they do not play any active part in the deliberations.

Judge Advocate-General

43. The Judge Advocate-General (JAG) is the head Judge of the military justice system and plays an important independent role which is part statutory and part convention. The JAG is also the Chief Judge of the Court Martial.

Appeals

44. Both the summary and the Court Martial processes include rights of appeal. A determination in the summary process can be appealed to the Summary Appeal Court of New Zealand (SACNZ). Judges of the Court Martial preside at these appeal hearings. Court Martial decisions can be appealed to the Court Martial Appeal Court, which sits as panel of three judges comprised of one or two High Court Judges and at least one appointed Judge.

45. There is also a review process available for summary cases as a safeguard to ensure that the summary trial process is fair. This stems from the power of the JAG to receive petitions and make a special reference to the Summary Appeal Court for consideration by that Court. This is a part of the independent role of the JAG. Anyone can petition the JAG to refer a case where a person has been found guilty in a summary hearing. This allows, for example, friends, colleagues or family members to ask for review of a case by the Summary Appeal Court where the service member does not want to do so, perhaps because they do not want to go outside their unit and challenge the authority of their CO. The JAG can also act on his or her own initiative. If the JAG considers invalidity exists, and it is in the interests of justice or discipline to do so, the JAG will refer the case to the Summary Appeal Court for consideration. The Court

[18] These are defined in Service Orders as either specified offences or any offence with a maximum penalty of 7 years imprisonment or more. See Commanders Manual at 4.3.1.
[19] The Chief Judge of the Court Martial assigns Judges to trials.

will then review the finding of guilt, the punishment imposed and any order of compensation or restitution.

Legal aid

46. Legal aid is available for service members. This can be granted to instruct counsel for either a trial in the Court Martial or an appeal. It will only partially fund the cost of the lawyer and the member will be required to contribute to the legal costs. The service member's contribution is based on a portion of the service member's salary. Pre-charge free legal advice is also available.

GENERAL COMMENTS

47. Our overall impression is that prosecutions in the military justice system are reasonably efficient and effective. Our primary focus has been on the prosecution function of the DMP with respect of the Court Martial rather than the summary trial process, for two principal reasons. First, the statutory connection between the Solicitor-General and the DMP elevates the relevance of the Court Martial for this assessment. Second, the Ministry of Defence is conducting an extensive review of the summary process and we consider that review is the better forum in which to closely analyse that system. In addition, it is difficult to obtain accurate information about the summary system. We have therefore treated the summary procedure as essentially being beyond the scope of this assessment, and will not make any recommendations about it, other than noting three things:

    47.1. The importance of making information about the summary system more readily available to ensure adequate oversight.

    47.2. Careful oversight is necessary to ensure fairness in the system (see the recommendations for further comments).

    47.3. Regular and thorough training is essential, to ensure cases are dealt with properly and fairly.

48. A useful method of assessing the military justice system is against the yard stick of its seven essential elements of maintaining discipline, consistency, portability, expeditiousness, fairness, efficiency, and simplicity.

49. The elements most heavily promoted by the system are, maintaining discipline, portability, expeditiousness and simplicity. The remaining three elements (consistency, fairness and efficiency) perhaps require more close attention to ensure they are properly promoted by the system, given the lack of involvement of legally trained personnel in the vast majority of the cases.

50. We were not able to obtain sufficient information about the summary process to be able to draw firm conclusions about this, but equally, we saw no real evidence of any serious problems. However, we have noted the importance of proper oversight, training and support of

participants in the summary system. Further, better access to information will also assist in the proper oversight of the summary system.

51. One of the essential features of the military justice system is the prominent role played by the CO to enable the maintenance of discipline within the unit. However, a necessary consequence, as noted earlier, is that MPs do not have the same independence to investigate as their civilian counterparts. Equally, the prosecution decision is not made by an independent and objective prosecutor.

52. An independent constabulary and prosecutor are important checks on the arbitrary use of power. The *Lawrence* case[20] illustrates the dangers in not having independent participants (although once the erroneous decision was made, the system worked effectively to ultimately remedy the situation). The lack of independence in the investigation and prosecution decision is a potential risk to the system that must be kept under careful watch.

53. Recent changes in creating an independent investigation service within the military justice system should assist in this regard. The Provost Marshal now has a dedicated team of investigators who are trained to investigate more serious charges. It will be important to continue with this process to ensure that the quality of investigations continues to improve. However, true independence is not achieved because these investigations are still under the oversight of the CO.

THE INITIATION OF THE SUMMARY PROCESS AND THE "WELL FOUNDED" TEST

54. A fundamental difference between the military justice system and the civilian system is the lack of discretion. COs have a duty to prosecute rather than a discretion. This addresses any concern that a CO might not charge in cases where they should. In New Zealand, the process for commencing a summary prosecution is simple and straightforward. The CO simply looks at whether the charge is well-founded. If it is, then the charge proceeds.[21]

55. Some context to the position of the CO is relevant to understand the differences between the military justice system and the civilian one. The CO considering the well-founded test will, in most cases, be the same person who finally determines whether the charge is established or not. He or she will be, in almost every case, in the direct chain of command for the service member. So, the CO is in quite a different position to an independent civilian prosecutor who is detached from the offending and the people involved. By comparison, a civilian prosecutor must act independently, applying the Solicitor-General's Prosecution Guidelines to decide whether a prosecution is necessary in the public interest. In our view, this reinforces the value of applying the Solicitor-General's Prosecution Guidelines to the decisions made by the DMP.

[20] *Lawrence* (1999) 17 CRNZ 152, (1999) 1 NZCMAR 341 (HC), 369 (CA).
[21] Other systems have more prescriptive systems, for example the United Kingdom.

56. Recognising the role of the CO as both the officer in command of the service member and the ultimate prosecution decision maker, the lack of discretion is understandable. It would be potentially problematic and difficult if the same person who was going to finally determine guilt were to exercise something akin to prosecutorial discretion.[22]

57. The lack of discretion is also designed to ensure that alleged breaches of military rules are formally dealt with, within the structure of the military justice system rather than informally. The concern is that informal punishment can be arbitrary and unfair. The intention is that there is a transparent and uniformly applied system to deal with all allegations, whether they are breaches of service orders, offences under the AFDA or breaches of military custom. This is consistent with the elements of the military justice system and helps fulfil its purposes, in particular the maintenance of military discipline.

58. The effect is that there is no filter right at the start of the process, as there is in the civilian system. This can lead to a larger proportion of cases going through the system as compared to the civilian system.

59. None of the feedback from participants during this assessment indicated this is causing significant problems. Much in the same way as different civilian prosecutors apply a slightly different approach to the Solicitor-General's Prosecution Guidelines, undoubtedly there will be differences in the way that the well-founded test is applied. That is an inevitable consequence of the process being operated by human beings. But there appears to be adequate guidance in the Commander's Manual to ensure sufficiently broad consistency of approach so that the system operates essentially fairly.

60. Further, there are safeguards built into the system. If the offending is serious with potentially significant consequences, then the member has the option of trial in the Court Martial. In addition, any imperfections can be remedied in the appeal process. The high level of buy-in to the military justice system by service members, and the primary goal of promoting service discipline, mean these imperfections may not be seen as so problematic by those subject to service discipline as would perhaps be the case in the civilian justice system.

61. It is important in the military that commanders maintain command control. There are a number of issues that a CO must deal with on a daily basis. Some of the issues are more akin to employment issues rather than criminal behaviour. The CO must decide if a problem needs to go to summary hearing for unit discipline and morale to be maintained. Some participants considered that if a service member's conduct is called into question within the unit, then it is important to have a transparent hearing to ventilate those issues. A key strength of the summary process is that an issue can be dealt with on the spot so everyone in the unit can move on. This is especially important on deployments overseas. The summary hearing is an inquisitorial

[22] There is an issue about how much information can properly be provided to that ultimate decision maker at the preliminary stage, because of the risk of tainting the decisions that may need to be made later in the process.

process, so COs can use the trial as an investigative tool and make it a truth-seeking process, which helps promote the purpose of maintaining discipline in the military.

62. An unusual feature of the summary process is that no lawyers are involved, and the decision maker is not a judge. There is, therefore, a real need to ensure there is thorough training of the participants. The potential risks of a lack of legal training are mitigated, in part, because there are legal officers available to COs, who we understand routinely seek legal advice before deciding whether the well-founded test is met. The advice sought may relate to strength of the case or the proper charge(s).

63. Entry into the disciplinary structure is governed by the AFDA. If there is an allegation of potential wrongdoing against a member of the NZDF then that member's CO is responsible for deciding what happens in the first instance. The CO must either record a charge against the member or refer that person to the civilian authorities, unless he or she decides the complaint "is not well-founded".[23]

64. The well-founded test is an integral part of the disciplinary process under military law. The essence of the well-founded test is discussed in the Commander's Manual. When the review commenced, the manual provided the following guidance:[24]

> Well-founded means that the alleged facts logically support every element that must be proved before the accused could be found guilty. If there is a conflict of evidence between witnesses, the CO does not need to resolve the conflict but must find that the allegation is well-founded if there is one version of events which is capable of belief and, if believed by the disciplinary officer or Court Martial, would result in a finding of guilt.

65. The well-founded test was changed during the course of review and is currently worded in the following way:[25]

> 4.2.3 An allegation is well founded if:
>
> a. There is a reasonable prospect of a finding of guilty on a charge; and
>
> b. It is in the interests of service discipline that the allegation is recorded in the form of a charge.
>
> 4.2.3A A reasonable prospect of a finding of guilty exists only when:
>
> a. The alleged facts logically support every element that must be proved before the accused could be found guilty and there is some evidence to support each element. If there is a conflict of evidence between witnesses, the proper place to resolve this is at summary trial. The CO must find that the allegation is well-founded if there is one

[23] AFDA, s 102.
[24] Commanders Manual at para 4.2.2.
[25] Commanders Manual at para 4.2.3

version of events which is supported by evidence and, if believed by the disciplinary officer or Court Martial, may result in a finding of guilty; and

b. The alleged facts do not raise a defence allowing no reasonable prospect of a finding of guilty.

4.2.3B It will not be in the interests of service discipline to record the allegation in the form of a charge or to refer it to the appropriate civil authority if:

a. The allegation did not cause harm which the law is intended to prevent;

or

b. The allegation is:

(1) Of a minor or trivial nature, except where that allegation presents a challenge to Service discipline; and

(2) The allegation can be better dealt with through mechanisms such as additional training or duties, except where such mechanisms circumvent the disciplinary system.

66. On its face there could be the appearance that a significant change has been made to the well-founded test. However, because the current version of the Commanders Manual provides that where there "is a conflict of evidence between witnesses, the proper place to resolve this is at summary trial", in our view, the current version of the well-founded test continues the previous position that the CO retains little discretion.[26] This means that a CO must hear the charge against the service member if there is an evidential foundation for the charge.[27]

67. Such an approach is obviously and fundamentally different to the approach of a civilian prosecutor applying the Solicitor General's Prosecution Guidelines. Because the summary process does not have an independent prosecutor or judge, we consider the well-founded test is appropriate and necessary.

[26] The CO has some discretion in relation to the interests of service discipline part of the test.

[27] There is a real risk of unfairness if the CO goes too deeply into the evidence before the hearing. As the ultimate decision maker, he or she should not be tainted by knowledge of the untested allegations. If the CO becomes aware of too much information at a preliminary stage, then he or she would be in the difficult situation of putting all of that information out of his or her mind in order to hear the case afresh. Fairness and natural justice issues could arise if witnesses subsequently do not come up to brief and the CO knows too much of their earlier statement. However, if the CO does become aware of information that makes it unfair for him or her to consider the case, then there is the possibility of the case being referred to a different disciplinary officer.

INTERRELATIONSHIP BETWEEN MILITARY AND CIVILIAN PROSECUTIONS

68. The essence of the process of deciding whether the military system is the right one to deal with an offence, is that a CO considers whether the offending has a military justice context, such that it could impact on service morale and discipline. If so, then the correct system for the charge would be the military justice system. But, if the offending involves a member of the military who was otherwise acting in their civilian capacity, and the impact of the offending was on civilian members of the public, then the correct prosecuting agency would be the Police (or other applicable civilian prosecuting agency).

69. There are no legislative provisions to dictate whether one or other of the justice systems should be preferred in any particular situation, although the AFDA does provide that if a military offence has been proven, then a charge cannot proceed through the civilian justice system:[28]

> **21 Person may not be tried under this Act and under the civil law in respect of same act or omission**
> (1) Where under this Act a person—
> (a) has been charged with an offence before the Court Martial and has been acquitted or convicted of the offence; or
> (b) has been charged with an offence before a disciplinary officer and the charge was, on investigation, dismissed, or he was acquitted or found guilty of the offence; or
> (c) has had an offence taken into consideration by the Court Martial in sentencing him for another offence—
> he shall not subsequently be charged before a civil court with having committed any offence that is substantially the same as the offence of which he was acquitted, convicted, or found guilty or that is substantially the same as the offence contained in the charge that was dismissed, or that is substantially the same as the offence taken into consideration, as the case may be.

70. The guidance for COs looking at charging a member of the NZDF, and deciding whether that is best done within the military justice system or the civilian justice system, is set out in Chapter 2, section 7 of the Commander's Manual:

> 2.7.1 If an allegation is made which could constitute a civil offence,[57] jurisdiction is shared with the New Zealand Police or another New Zealand law enforcement agency (civil authority). In such cases, the member's CO is to decide whether a charge will be laid under the AFDA or whether the matter will be referred to the civil authority acting under the civil law. In making this decision the officer is to be guided by this Section. If he or she is in any doubt as to whom should exercise jurisdiction, he or she is to consult with higher authority and, where necessary, the civil authority.
>
> 2.7.2 If it is decided that the allegation should be referred to the civil authority, the CO of the member against whom the allegation is made is to request the civil authority to investigate the allegation, giving the member's name and unit, particulars of the alleged offence and, if

[28] AFDA, s 21(1).

possible, the names of any witnesses. Once an allegation has been referred to the civil authority the matter passes out of the hands of the Armed Forces unless the civil authority decides not to prosecute, in which event the allegation may, if deemed advisable, still be investigated under the AFDA.

2.7.3 Without limiting the discretion conferred on a CO by paragraph 2.7.1, the guidelines to be applied in deciding whether or not to refer an allegation to the civil authority are:

a. If the alleged offence is of a type which is prevalent in civil life and which is alleged to have been committed by the member in his or her capacity as an individual citizen, or if the alleged offence is likely to have affected the community at large in the same degree whether it was committed by a member of the Armed Forces or a civilian, then the allegation should be investigated by the civil authority; or
b. If the alleged offence is of a type which is of particular concern to the discipline or efficiency of the Armed Forces (e.g., an offence by one member of the Armed Forces against another) or is alleged to have been committed in a defence area or in relation to Service property, the allegation should be investigated under the AFDA.

2.7.4 This means that in peacetime in New Zealand allegations of the following offences should normally be investigated by the civil authority and the CO should report them to the civil authority at the earliest possible moment in accordance with paragraph 2.7.2:

a. Treason, murder, manslaughter, sexual violation, or bigamy;[58]
b. Any serious sexual assault which may afford grounds for a charge of sexual violation;
c. Any serious assault or injury which may result in the death of a person and thus lead to a charge of murder or manslaughter;
d. Any offence relating to the property or person of a civilian committed outside a defence area;
e. Any offence to which a civilian is also alleged to be a party committed outside a defence area;
f. Any offence initially reported to the Police and over which the Police do not waive jurisdiction; and
g. All traffic offences committed off duty outside a defence area.

71. In our view, for the interplay between the two systems to work effectively, there needs to be a good working relationship between the military personnel and civilian police. Information we received during the assessment strongly suggested that this was the case, and that in the ordinary run of cases, civilian police work constructively with members of the military to decide how individual cases will be managed. There seem to be common sense applications of the principles in the Commander's Manual in order to work out the best system to deal with any particular alleged breach of the law.

72. That said, there may well be cases where it could be argued that the offence was better dealt by the other system rather than the one that dealt with it.[29] But that is hardly surprising given the rules are more evaluative rather than prescriptive.

[29] For example, the prosecution of a non-commissioned officer who stole air force property (*Police v Graham* [2017] NZHC 3299 and *Graham v Police* [2018] NZCA 172). It could be argued there was a clear military dimension to the case. Another example is the

73. We acknowledge that without governing legislation setting out clear rules as to how, by whom, and when the decision is made as to which authority has jurisdiction over a case, there remains a theoretical possibility of conflict between the two regimes. We also recognise there are potential implications for fairness and consistency for both the offender and the victim depending on whether the case is dealt with in one jurisdiction or the other. For the offender, that is largely a consequence of their decision to join the military. Recent changes, including amendments to the AFDA, have demonstrated greater recognition of the interests of victims which should help ameliorate some of the concerns arising from potentially different treatment of victims between the two systems.

74. Recently, the military have instituted Operation Respect to better manage allegations of sexual offending. The complainant can now either make a formal complaint that will be investigated in the ordinary way, or an informal, confidential complaint, that is not. Informal complaints are for information purposes only and they enable the complainant to access support services. This is part of a move to better recognise and respect the interests of victims which reduces differences between the two systems.

75. We saw no evidence that there was any real tension between Police and service personal which required codification of the interplay between the two systems. The uniform feedback we received was that the interrelationship between the civilian system and the military system worked well.

76. Further, the double jeopardy rules operate so that there is no risk of double punishment.

77. In our view, the present rules appear to work well in practice but that does appear to be at least in part because of the application of pragmatism and common sense. So, while we saw no immediate and pressing need for change to the rules, there could be merit in greater certainty so that the system was not so reliant on the character of the people making the decisions.

78. One issue raised during the assessment was the potential for overreach by the military system too far into the private lives of service personnel. Under the AFDA, disciplinary action can be taken in respect of conduct that occurs while the service member is on leave, with no direct connection to the military, even if civilian Police (either in New Zealand or overseas) do not consider prosecution necessary.

79. We consider this is beyond the scope of this assessment, but in any event the AFDA and the Commander's Manual clearly envisage this situation, allowing for the charging of service members if the behaviour has implications for military discipline. Therefore, while there is a risk of overreach of the military justice system which needs to be recognised and guarded against, there appear to be inbuilt protections to ensure such overreach does not occur (as well as reasons why the military retains oversight of "off-duty" activities).

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prosecution of Commodore Fred Keating who filmed colleagues at the New Zealand embassy in New York where he was posted as Defence Attaché. Again, it could be argued there was a clear military dimension.

THE DUAL ROLE OF THE DIRECTOR OF MILITARY PROSECUTIONS AND DIRECTOR OF LEGAL SERVICES

80. The roles of DMP and DLS for the NZDF are currently undertaken by the same person. The DLS is the principal legal adviser to the military hierarchy across a broad spectrum of legal issues. The DMP oversees military prosecutions, makes charging decisions and represents the prosecution of trials in the Court Martial. This duality has existed for some time. We have considered whether that has a potential negative impact on decision making by the DMP.

81. The role of DMP is an independent statutory role appointed by the Governor-General and which must be exercised free from the influence of others in the chain of command. As the DLS, the officer is squarely within the command structure of the military and is therefore required to report to superior officers right up to the Chief of Defence Force.

82. The holding of dual roles in this way is not unique in the public sector. There are other statutory officers within the public service who have to exercise decision making in an aspect of their job independently and free of influence from superiors.[30] Further, independent prosecution decisions are also required from other prosecution decision makers within the public service.

83. The issue is perhaps more acute here because of the hierarchical nature of the military and the fact it has its own unique justice system with the DMP playing a central role in it. So, there is at least a theoretical risk of either an actual or perceived conflict of interest.

84. However, there are systems in place to limit any possible conflicts of interest. The legal officers in the DMP's office and the DMP herself are outside the ordinary chain of command. Legal officers in the DMP's office are accountable to the DMP who in turn is only accountable to the Chief of Defence Force. As lawyers they also have obligations as officers of the Court. The DMP is also required to report to the Solicitor-General.

85. To manage any actual or perceived conflicts of interest which may arise, the DMP may delegate his or her powers to another person under s 71 of the AFDA. Such delegations can be used to manage situations such as where the DMP has been involved in giving advice to her superiors on a particular set of circumstances, which then leads to prosecution under the military justice system. We understand this has been done on occasion in the past.

86. There is an obvious practical impediment to separating out the roles. The person taking on the DMP role would likely need to have a military background and be a senior lawyer with experience of prosecutions, so the potential pool of appointees would be limited. Further, the role would not be full-time because of the volume of duties for the DMP which, given the number of trials in the Court Martial, is variable and at times low. The person who took on the role, if it were filled externally, would most likely be a barrister possibly already doing work for

[30] An example of statutory officers of health was commented on in the Havelock North Water Inquiry. See Report of the Havelock North Drinking Water Inquiry - Stage 2 at [273], [285] and [302].

the military (to ensure they understand the context) and so would also have to manage any conflicts with other work they did.

87. We note that in overseas jurisdictions such as the UK, the Director of Military Prosecutions is not a serving member of the military but is instead a civilian (ordinarily with a military background) who exercises the powers of the office independent of the command structure of the military. However, the UK is a country of 66 million people, approximately 12 times New Zealand's size. In New Zealand it would be difficult to find someone who has the military expertise and capacity to take on the role of full-time Director of Military Prosecutions, while also being independent of the military. So, the issue really becomes whether the potential for conflict of interest is sufficiently significant to warrant a change to the current model.

88. In our view, the system is working satisfactorily, and we have seen no evidence that the DMP is not adequately managing any potential for conflicts of interest. There does not appear to be any need for a change to the system, nor is it obvious how such a change would work, and whether having someone performing the DMP role on its own would be practical given the limited nature of the role.

89. So, in our view, the situation is not ideal and there remains the potential for conflict, but we do not consider any changes to the current system are necessary. Any possible conflicts are presently theoretical and are adequately managed.

90. In a perfect world there may be a case for following the UK and Canadian models and have a separate equivalent to the DMP.[31] However, given we have seen no evidence of any unmanaged conflicts, and the potential cost implications of such a change, we do not recommend change but suggest that the situation continue to be monitored.

EFFECTIVENESS OF THE PARTICIPATION OF THE DMP IN THE COURT MARTIAL SYSTEM

91. This section is focused on the involvement of the DMP in the Court Martial system. The Court Martial is the centrepiece of the military justice system.[32] Because the summary trial system does not have lawyers involved, nor an independent legally trained judge presiding, the military justice system has an inbuilt protective measure: the right to elect trial by Court Martial in specified circumstances[33].

92. Some offences are so serious that they can only be tried by the Court Martial.[34] In other cases, the service member has the right to elect trial by Court Martial if the likely penalty reaches a particular threshold of seriousness. In that case, the service member is given the right of election

[31] In the United Kingdom, the role is known as the Director of Service Prosecutions.
[32] The Court Martial is still ritualistic and traditional e.g., a cannon is still fired on the morning of a Court Martial at Devonport Navy base. They also fly the New Zealand Jack as well as the White Ensign to signify the Court Martial.
[33] This is where the punishment is truly punitive rather than administrative.
[34] These are either specified offences or otherwise those with a maximum penalty of at least seven years imprisonment. This is set out at paragraph 4.3.1 of the Commanders Manual.

to Court Martial. Once the election is made, the service member has 24 hours to reflect on the election. The service member then confirms or withdraws the election.

93. Also, if the DISCO is of the view that the nature of the offence exceeds the powers of punishment available to him or her, then he or she must refer the case to the DMP, and it will be heard by a trial in the Court Martial.

94. If a case is transferred to the Court Martial, then the file is transferred to the DMP who at that stage operates analogously to a Crown Solicitor, reviewing the file and making an independent decision about the case and the charges that should proceed to trial in the Court Martial. This means that the most serious charges in the military context have the benefit of independent prosecutorial decision making. This conforms with best practice. Presently the DMP applies the Solicitor-General's Prosecution Guidelines.

95. In the Court Martial, the prosecution is represented by the DMP, a lawyer from her office, or external instructed counsel. The accused may be represented by a lawyer from a panel of experienced external lawyers[35] who are well versed in military justice, or by counsel of his or her choice, or may self-represent, or may ask for a lay defender to be appointed. Pre-charge free legal advice is also available.

96. Military Members will in all likelihood have experience in the summary system either as a DISCO or by acting as a presenting or defending officer.[36] The decision-making process in the summary process is broadly similar to the one used by the Court Martial.

97. The Senior Military Member is required to make a report to the military hierarchy on any command issues arising out of the trial, which eventually goes to the Armed Forces Disciplinary Committee. This is a valuable tool for informing the military hierarchy of wider issues brought into focus by a particular case.

98. We were informed during the assessment that Military Members universally took the job seriously and applied excellent analytical skills. We understand that there are often robust deliberations. They also had good specialist knowledge of the military which was seen as an advantage as it takes time to understand how the military works.

99. Unlike juries, Military Members often ask questions. Because of the hierarchical nature of the military, there can be a power imbalance between the Military Members and the witnesses. Feedback indicated that Judges were alive to the appropriateness of managing questioning by the Military Members of subordinates who are giving evidence. In some cases, this meant that questions from senior military members were put in writing, and reviewed by the Judge and counsel, before being asked. This approach should be sufficient to prevent witnesses feeling overawed by suddenly being asked questions by very senior officers.

[35] The accused may apply for legal aid to pay for lawyers from the panel.

[36] Non-commissioned officers will not have acted as a DISCO whereas commissioned officers may well have.

100. In our view, prosecutions in Court Martial seem conducted appropriately by the DMP and represent an efficient mechanism for dealing with serious allegations against service members. Although beyond the scope of this assessment, all participants we spoke to were highly complimentary of the efficiency and effectiveness of the system as a whole.

101. There were some issues raised about the DMP's involvement in the Court Martial process during the assessment. There are sometimes lengthy delays between complaint and Court Martial. Delays in the investigation phase were particularly noted.

102. Another comment made was in respect of the inconsistent use of pre-trial procedures by the DMP. There is provision for the hearing of certain applications prior to the commencement of the Court Martial.

103. The relevant provisions are found in the Armed Forces Discipline Rules of Procedure 2008 (RP) (rules 74 and 79) and the Court Martials Act 2007 (section 44).

> **74 Rulings by Judge on question of law or procedure**
>
> (1) This rule applies when a Judge is required to rule on a question of law or procedure in accordance with section 44 of the 2007 Act.
>
> (2) The Judge must hear the arguments and evidence relevant to the question of law or procedure and must give his or her ruling on the question, together with the reasons for the ruling.
>
> (3) If the Judge sits in the absence of the military members, the Judge must ensure that the military members do not see the record of proceedings relating to the question of law or procedure until the trial has been completed.
>
> **79 Application for separation of trials**
>
> (1) This rule applies if 2 or more persons are—
> (a) charged jointly; or
> (b) charged in the same charge sheet with offences alleged to have been committed by them separately.
> (2) Any of the accused may, before pleading to the charge, apply to the Court Martial to be tried separately on the ground that he or she would be unduly prejudiced in his or her defence if that course were not followed.
> (3) The Judge must hear and determine the application in the absence of the military members.
> (4) The prosecutor may address the Judge in opposition to the application and the accused may reply to the prosecutor's address.
> (5) If the Judge rules against the application, the Judge must order the trial to proceed.
> (6) If the Judge rules in favour of the application, the Judge may make any orders and give any directions that he or she thinks necessary in the interests of justice.
>
> **44 Judge may sit alone to rule on question of law or procedure**

> (1) The Judge for the proceedings must—
> (a) rule on every question of law or procedure that arises during any trial in the Court Martial; and
> (b) sit in the absence of the military members to determine the question of law or procedure if the Judge considers it would be desirable in the interests of justice to do so.
> (2) To avoid doubt, the Judge may sit alone under subsection (1)(b) before or after the appointment of the military members.
> (3) A ruling under subsection (1) must be followed by the military members.
> (4) In this section, question of law includes any question arising in respect of—
> (a) a plea to the general jurisdiction of the Court Martial:
> (b) a plea in bar of trial:
> (c) an application for the separation of trials:
> (d) an application for the severance of charge sheets:
> (e) an application for the severance of charges:
> (f) a submission that there is no case to answer:
> (g) the admissibility of evidence:
> (h) an application for a ruling referred to in section 30(2)(a):
> (i) an application for an order specified in section 39(2):
> (j) an order under subpart 3 of Part 5 of the Criminal Procedure Act 2011 (as applied to proceedings under the 1971 Act by section 145 of the 1971 Act):
> (k) an application for discovery:
> (l) the fitness of the accused to stand trial.

104. The combined effect of these provisions, in particular section 44(2) of the CMA, is that applications listed in section 44(4) of the CMA can be heard and determined pre-trial by the Judge presiding at the Court Martial.[37] This is broadly analogous with the types of applications that can be heard pre-trial in a jury trial.

105. Some participants in the assessment, who had been involved in Court Martial hearings, advised that these types of issues were determined after the Court Martial commenced with the result that the early stages of the hearing were taken up with pre-trial matters. This meant that witnesses and the Military Members waited while these procedural and evidential issues were resolved.

106. We acknowledge that it is also not uncommon in the jury trial jurisdiction of the civilian criminal Courts for similar issues to be dealt with at the start of jury trials notwithstanding the availability of pre-trial processes. We appreciate that there can be practical difficulties in organising a pre-trial hearing before the commencement of the trial in the Court Martial, especially in a year that has been dominated by a global pandemic. As a result, there will always be cases where, for whatever reason, issues are not able to be dealt with pre-trial despite the availability of pre-trial processes. So, we simply suggest that the DMP, and prosecutors representing her, attempt as far as possible to resolve as many of these issues as they can prior to the commencement of trials in the Court Martial.

[37] *Bannister-Plumridge v R* [2019] CMAC NZHC 1909 is an example.

107. Feedback about the DMP and her staff was generally positive. However, two related themes came out of our interviews where we see improvements could be made. These related to late instructions of the lead prosecutors and some of the trial and tactical advocacy skills of DMP staff.

108. There were comments about the way charges were framed by officers working for the DMP, and that in some cases, the prosecutor who was instructed to prosecute at the Court Martial was instructed relatively late in the piece. Further, there were comments about some of the tactical decisions and trial advocacy of some of the prosecutors. This is not surprising given the relatively limited numbers of trials in the Court Martial at the time of the assessment,[38] resulting in relatively limited opportunities for DMP staff to refine trial and tactical skills (compared, for example, to a busy Crown Solicitor's office). However, we understand that since the assessment was undertaken, the number of trials in the Court Martial has increased which means some of these comments may now be historical rather than current. We also emphasise that any negative comments about the DMP office staff were minor and heavily outweighed by the positive feedback. The universal feedback about that office was that the staff are professional, competent and, with these minor points noted, doing a good job in respect of the cases they handle.

109. Another point we noted was that there are cases which will inevitably be heard by a Court Martial. We do not see why such cases should still undergo initial consideration by the CO. In our view, it would make sense for these cases to go directly from the Military Police to the DMP, eliminating the stage where the CO applies the well-founded test. In cases of this kind, the system has decided that the independent processes of the Court Martial should be engaged, so in our view, the DMP is best placed to make the charging decision. We recommend that consideration be given as to whether there is still a need for the CO to consider and apply the well-founded test in this class of cases.

110. A further comment is that, in our view, the framework for making charging decisions in Court Martial cases is not explicitly set out. The test for prosecution in the Solicitor-General's Prosecution Guidelines is presently applied by the DMP.

111. The test for prosecution in the Prosecution Guidelines is a two-stage test. The first stage is the evidential test, which is an assessment of the evidence to determine whether there are reasonable prospects of conviction on the particular charge. The prosecutor must assess the quality of the evidence and draw conclusions about likely outcomes when the evidence is finally tested. If the evidential test is not met, the prosecutor goes no further, and must not commence a prosecution. If the evidential test is met, the prosecutor continues to the second stage.

112. The second stage is the public interest test, which involves a prosecutor considering whether a prosecution is required in the public interest. This involves the assessment and balancing of a range of factors, to determine whether a prosecution should be commenced. In general, if the

[38] During the military justice reforms the estimate was around ten trials in the Court Martial per year, anecdotally it appears in practice there have generally been fewer.

charge is serious, and the evidential test is met, decisions not to charge will be rare. It will therefore be rare to determine not to prosecute where the case involves serious violence, is premeditated, there has been significant loss caused, it is a hate crime or there are personal aggravating features such as previous convictions or offending on bail. Cost is also a relevant factor in assessing the public interest, as is whether the alleged offender was in a position of trust. The range of factors that may inform the public interest are very wide and will be informed by the nature of the prosecution.

113. In our view, applying anything other than the Solicitor-General's Prosecution Guidelines by the DMP could have unintended negative consequences.

114. The current DMP considers that she is bound to apply the Prosecution Guidelines as a result of s 101K of the AFDA. We consider that the interpretation taken by the DMP is a sensible one and results in the application of the proper approach to serious prosecutions of military personnel. Use of the Guidelines has also been recognised by the Court Martial Appeal Court.[39]. These Guidelines are more appropriate for an independent decision maker such as the DMP. It means that critical analysis of the prospects of success and an assessment of the public interest in the case going to trial in the Court Martial. This can weed out weak cases so that resources are not deployed where there is little realistic likelihood of a finding of guilt. It also means that service members do not go through the disruptive process of answering a charge which will likely fail. It ensures that the same approach is taken in relation to serious charges in the military system as is taken in the civilian criminal justice system.

115. But, in our view, this is not the only possible interpretation. It requires a purposive interpretation rather than the more literal interpretation. There is no explicit reference to the Prosecution Guidelines in the AFDA or the Court Martial Act although the AFDA does provide:

> In performing functions or duties, or exercising powers, imposed or conferred by this Act, by the Court Martial Act 2007, or by the Court Martial Appeals Act 1953, the Director of Military Prosecutions must act under the general supervision of the Solicitor-General in the same manner and to the same extent as a Crown Solicitor.

116. While we understand why the DMP presently interprets this provision as meaning that she must apply the Prosecution Guidelines, that interpretation was not universally held by participants in our assessment. So, we consider there is value in explicitly recording that the Prosecution Guidelines must be applied.

THE ROLE OF THE DMP IN THE SACNZ

117. This section is focused on the role of the DMP in the SACNZ. In order to ensure independent judgment was brought to bear on decisions in the summary system, the Summary Appeal Court of New Zealand (SACNZ) was created. The SACNZ is established under Part 5A of the AFDA

[39] *Bannister-Plumridge* v R [2019] CMAC NZHC 1909.

and is a court made up of Judges of the Court Martial who consider appeals against determinations made in the summary trial process. The SACNZ has a supervisory review function over cases determined in the summary jurisdiction. The SACNZ conducts appeals by way of rehearing. The convicted member can appeal against the finding of guilt or against the sentence. There is no right for the prosecution to appeal against either an acquittal or the penalty imposed. The inability of the prosecution to appeal against a sentence is a notable difference to the civilian justice system.

118. Often the appeal is heard on the papers and the service member files their own appeal paperwork. The service member may be entitled to legal aid, which partially funds the cost of a lawyer to file submissions. An oral hearing may also be held.

119. As with trials in the Court Martial, there are relatively few summary appeal decisions in any one year (no more than 10 to 20 appeals) from summary trials. The precise number of summary hearings that take place is not easy to ascertain,[40] but it appears likely that it ranks in the hundreds per year.

120. The appeal process outcomes and decisions from the SACNZ are available from the Registrar of the Court. But in an era where decision of Courts and Tribunals are freely available online, there could be a place for doing so with SACNZ decisions. We would invite the DMP to consider whether there is any way she can assist with making decisions available in this way.

121. The DMP has no right of appeal to the SACNZ and the Court cannot increase punishments on appeal. When determining appeals against sentence, the SACNZ can only vary a punishment imposed by a disciplinary officer if the Judge is of the view that the punishment was either *ultra vires* or excessive (AFDA s 133(1)(b)). The sentence imposed on appeal cannot be more severe than the original sentence imposed by the disciplinary officer (AFDA s 133(2)(b)). By comparison, the Court Martial Appeal Court can substitute a sentence from the Court Martial with a more or less severe sentence.[41] The same applies in civilian Courts exercising their criminal jurisdiction. Under s 253 of the Criminal Procedure Act 2011 a first appeal in the civilian jurisdiction can increase or reduce any sentence on appeal whether or not the appeal is made by the prosecution or the defence.

THE DATA COLLECTED ABOUT MILITARY PROSECUTIONS

122. There is a reasonable amount of information available about what goes on in the Court Martial and SACNZ processes. However, information about the summary trial process is generally not readily available. To provide some context it must be remembered that summary hearings can include charges that would not amount to criminal offences in the civilian criminal justice system. Disciplinary offences can include being late, being poorly dressed, ignoring or refusing to accept the order of a superior or being drunk while undertaking duties. That is a key difference between the military justice system and the civilian system because there is no bright

[40] As we understand it, there is no database kept of outcomes although there are records of convictions of service members.
[41] Court Martial Appeals Act 1953, s 9AB.

line between what would amount to a workplace employment issue and something that is criminal, except for offences that are dealt with in the Court Martial (which are truly criminal).

123. That said, the absence of readily available information about what goes on in the summary process is unhelpful and is not best practice. It limits the oversight and proper scrutiny of the system. Service members going through the summary system can be subject to significant penalties such as detention, loss of their wages and moderate compensation orders. Therefore, it would be preferable if more data were collated about findings in that system. It is noted that the hearings of disciplinary matters are transcribed and the CO overseeing the hearing provides a report of the outcome and any sentence, but access to such information is difficult. While administratively it may require additional resources to collate and analyse this data, it would be preferable if this information was better recorded and more readily available.

124. One issue that was raised by a number of participants is how a charge proven in the military justice system feeds into the civilian system. The simple answer is that it does not. A proven charge, even before Court Martial (which can include offences of significant seriousness) do not result in criminal convictions for a member of the military once they are leave the military and enter civilian life.

125. Because military convictions do not appear on the person's civilian criminal history, once the member leaves the service, they become essentially a first offender. No DNA samples or fingerprints will have been taken as a possible investigatory tool in relation to future offending. It will be difficult to use the information as propensity evidence if the service member does something similar in civilian life because civilian police and other prosecuting agencies will not know about it. Equally, it will not be disclosed when professional organisations request a certificate of character and may not come up as part of employment checks unless the person volunteers it.

126. This aspect has previously been the subject of adverse comment. In our view, it is surprising that findings of the Court Martial, which is a court of record equivalent to the District Court, in respect to offending the equivalent of some serious civilian criminal offences, are effectively hidden once that person leaves the military. We recommend that consideration is given as to how this can be remedied.

CONCLUSIONS AND RECOMMENDATION

127. Overall, prosecutions in the military justice system appear to be conducted well. Some areas of possible improvement have been identified with recommendations for possible changes suggested.

128. Our conclusions and recommendations from the assessment are:

    128.1. Many important advocacy skills develop gradually over time through experience and repetition. Historically, there have been times when there were relatively few trials in the Court Martial annually, which meant some participants have infrequent

opportunities to develop and practice certain advocacy skills. We are of the view that when there are low numbers of trials in the Court Martial it may be advantageous to provide staff with opportunities to maintain and improve their skills. One possibility for doing that is to organise secondments either through the Crown Solicitors network or public prosecuting agencies with a major prosecution function such as the Police Prosecution Service. This closely aligns with the purposes of the GLN People Plan which is intended to maximise opportunities for lawyers in the public service. We consider if this is done it will raise the level of advocacy in trials in the Court Martial.

128.2. The combined role of DMP and DLS does have the potential for actual or perceived conflicts of interest, however, this is appropriately managed at present. We suggest that the situation should continue to be monitored to ensure any potential conflicts of interest continue to be well managed.

128.3. The use of the well-founded test rather than the test for prosecution in the Solicitor-General's Prosecution Guidelines is necessary and appropriate for summary cases because of the unique system operated by the military with participants that are not independent.

128.4. While the DMP is currently applying the Solicitor-General's Prosecution Guidelines to her prosecution decisions, we are not sure that the rules sufficiently make clear that is the proper approach. We have concerns that the legislative framework is not sufficiently clear that this is the correct test rather than the well-founded test. In our view, there is value in making it explicit that the DMP is to apply the Prosecution Guidelines to prosecution decision in Court Martial cases.

128.5. Some cases will inevitably be heard by a trial in the Court Martial due to their seriousness, but must still be considered first by the CO, even though the DMP will ultimately make the prosecution decision. We consider these cases should go straight to the DMP rather than through the usual route of consideration by the CO. This will streamline the process. It will also better mirror the way that serious cases are dealt with in the civilian courts. Independent judgement will be brought to bear early, and we believe that that will speed up the process and lead to better decision making.

128.6. A trial in the Court Martial is not convened until the Military Members and the Judge are present on the first day of the Court Martial hearing. While there is provision to hear pre-trial applications before the Court Martial is convened, this did not appear to always be used. As a result, some issues are not decided until the first day of the Court Martial hearing when the Military Members, and witnesses, are left waiting. In some cases, this has caused delays to the commencement of the hearing and caused inconvenience to the witnesses and military members. Better awareness and use of preliminary and pre-trial procedures by prosecutors in Court Martial trials could improve efficiency and reduce delays in the process. This will prevent inconvenience and allow the parties to understand the shape of the case in advance of the Court Martial hearing.

128.7. We saw no obvious problems in the way the interplay between the civilian and criminal justice system operates, but we do see a risk there because its smooth operation relies on the pragmatism of the participants rather than the certainty of the rules.

128.8. In carrying out this assessment, we found it was difficult to get complete and accurate information about what goes on in summary hearings in the military justice system. The CO does report the findings back, but it does not appear that this information is collated and analysed in any meaningful way.

128.9. Service members who are convicted of serious offences depart military service with no record of those convictions following them into civilian life. This has consequences for employers, the community, and the justice system as a whole. It is a unique feature of the military justice system which is not readily justifiable. Consideration should be given to making finding of guilt the equivalent of findings of guilt in the civilian system to avoid the negative consequences of service members leaving the service without a record of their misconduct in the military justice system staying with them.

129. We have not closely examined the summary process, in part because of the difficulty in accessing information about that system, in part because the Ministry of Defence was carrying out a comprehensive review and because our focus was primarily on the Court Martial process. But we do note that in summary hearings, given the absence of lawyers or an independent and impartial judicial officer, those overseeing the system for the NZDF should pay careful attention to ensuring fairness and consistency is maintained within the system. Proper training and oversight are important. The appeal process, and the ability of the JAG to independently refer a case for review by an appellate court, helps to ameliorate the risk of unfairness.

APPENDIX - LIST OF PARTICIPANTS

This appendix sets out a list of the people spoken to during this assessment.

Brigadier Lisa Ferris

LTCDR Jonathan Rowe

Robert Bywater-Lutman (Retired Registrar of the Court Martial)

Judge Advocate General Kevin Riordan

Judge Tom Gilbert

Judge Charles Blackie

Judge Heemi Taumaunu

David McGregor (Judge of the Court Martial Appeal Court)

Pip Hall (retired Court Martial Judge)

Commander Christopher Griggs

Colonel Craig Ruane

Gillian Warren, Murray Sim and Timothy Wood (Ministry of Defence review team)

Lieutenant Colonel Jonathan Fiu

Lieutenant Colonel Dean Paul

Provost Marshal Peter Cowan