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**A Joint System of Summary Disposals
for the New Zealand Armed Forces
of the 21st Century**

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Abstract

The vast majority of charges under New Zealand military law are tried or dealt with summarily by commanders. There are currently two summary disposal systems, one for the Navy and one for the Army and Air Force. Those systems, which have evolved separately in line with the separate origins of New Zealand's naval and military forces, have fundamentally different conceptual bases. The naval system is quasi-adversarial in that it projects the appearance of an adversarial trial in the ordinary sense of the term, while retaining some inquisitorial elements such as the wide power of the officer exercising summary powers to call and question witnesses. The military system on the other hand is entirely inquisitorial, with no prosecutor or defending officer.

This thesis proposes a joint system of summary disposals, in the sense that it would apply to all three Services, which takes account of the demands of human rights law as reflected in the New Zealand Bill of Rights Act 1990 and adopts initiatives to improve the efficiency and effectiveness of the existing systems.

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Preface

Currently, there are two separate though related systems of summary discipline operating within the New Zealand Armed Forces; one for the Navy and another for the other two Services. The Navy customarily refers to its summary disposals as ‘Tables’ or summary trials, while the Army and Air Force refer to theirs as ‘orderly rooms’. This thesis examines the differences between the two systems and the reasoning underlying them, proposing the development of one joint system for all three Services. Furthermore, changes in our understanding of domestic and international human rights law since the making of the Armed Forces Discipline Rules of Procedure 1983¹ give rise to questions as to whether or not certain aspects of the current systems are sustainable in law, particularly in the light of overseas developments. The thesis also grapples with this issue and proposes substantive reforms.

The examination of the summary disposal of charges in the New Zealand Armed Forces is conducted in the light of the New Zealand Bill of Rights Act 1990 and associated jurisprudence. The comparative systems operating in Australia, Canada, the United Kingdom and the United States are also taken into account.

As part of the research underpinning this thesis, and for the first time since the enactment of the Armed Forces Discipline Act 1971 (‘AFDA’), a major survey has been conducted involving all officers exercising summary powers and other key stakeholders. Throughout the remainder of the text, this survey will be referred to as the ‘Joint Summary Disposals Survey’. The Joint Summary Disposals Survey was distributed to 193 members of the Armed Forces across all three Services, in both regular and non-regular components, at home and abroad. The results of this survey, which are recorded in the appendix to this thesis and are incorporated in the text, tell us a lot about the system and where we should be heading.

¹ Hereinafter referred to as ‘the RPs’. Individual rules will be referred to as ‘RP’ followed by the rule number, eg rule 6 of the Armed Forces Discipline Rules of Procedure 1983 translates as RP 6.

The chapters which follow address the following key questions:

- (a) How have New Zealand's summary disposal systems evolved into what they are today?
- (b) What is the composition of New Zealand's two summary disposal systems and what are the differences between them?
- (c) Why are the two systems different?
- (d) Should there be a joint system?
- (e) Are there any aspects of either system or both systems which are problematic from a human rights law perspective?
- (f) Are there any aspects of either system² or both systems which could be improved in the interests of the efficient administration of justice and discipline in the Armed Forces?
- (g) Can the two systems be harmonised into one system which:
 - (1) Can be applied in the joint context of New Zealand's operational forces in the 21st Century; and
 - (2) Is compatible with New Zealand's modern human rights law framework?

Chapter 1 examines the rationale underpinning the summary jurisdiction in military law, encompassing an analysis of the need for such a system from a command and leadership perspective and a review of its historical evolution in the New Zealand context. Chapter 2 describes the two summary disposal systems which are currently operating within the New Zealand Defence Force following a thematic sequence. Chapter 3 sets out the argument for a joint approach in the area of summary disposals. Chapter 4 examines whether the New Zealand Bill of Rights Act 1990 applies to the summary disposal of charges and, if so, to what extent. Chapter 5 examines three of the key rights guaranteed by the New Zealand Bill of Rights Act and assesses the impact of those rights on the existing summary disposal systems, drawing conclusions about what would be required of a joint summary disposals system for it to comply. Chapter 6 addresses two specific aspects of the current systems from a policy perspective, with a view to identifying potential efficiencies and

improvements. Chapter 7 summarises the conclusions drawn in the preceding chapters and makes recommendations about the shape of a future joint system.

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Glossary of Abbreviations

Abbreviations

Definitions

AFDA	Armed Forces Discipline Act 1971
AFDEMO	Armed Forces Discipline (Exemptions and Modifications) Order 1983
BR 11	<i>Manual of Naval Law</i> , 3 vols (change 12), The Stationery Office, United Kingdom, September 2000.
cl	clause
CAS	Chief of Air Staff
CDF	Chief of Defence Force
CGS	Chief of General Staff
CMAC	Courts Martial Appeal Court
CNS	Chief of Naval Staff
CO	Commanding Officer
DFO(D)	Defence Force Orders (Discipline)
DFO(N)	Defence Force Orders (Navy)
DFO(A)	Defence Force Orders for the Army
DFO(F)	Defence Force Orders for the Air Force
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICCPR	International Covenant on Civil and Political Rights
NZBORA	New Zealand Bill of Rights Act 1990

QR&Os	<i>The Queen's Regulations and Orders for the Canadian Forces, 1994 rev</i>
RCM	Rules(s) for Courts-Martial (US)
RNZAF	Royal New Zealand Air Force
RNZN	Royal New Zealand Navy
The RPs	Armed Forces Discipline Rules of Procedure 1983
RP	rule of the Armed Forces Discipline Rules of Procedure 1983
s	section (of an Act)
UCMJ	Uniform Code of Military Justice (US)
XO	Executive Officer

Glossary of Terms

Terms	Definitions
Commanding Officer	See definition in AFDA s 2(1).
Detachment commander	See definition in AFDA s 2(1).
European Court	European Court of Human Rights.
Executive Officer	See definition in RP 2(1).
Investigating officer	An officer delegated power to investigate charges under the AFDA pursuant to AFDA s 115.
Officer exercising summary powers	See definition in AFDA s 2(1).
Orderly room	An investigation or summary disposal in the New Zealand Army or the RNZAF.
Military law	The law relating to the discipline of the New Zealand Armed Forces, incorporating the AFDA, the Courts Martial Appeals Act 1953 and the subordinate legislation made thereunder.
Military system	The summary disposals system which applies to the New Zealand Army and the RNZAF.
Naval system	The summary disposals system which applies to the New Zealand Naval Forces.
Non-XO delegate	A naval officer exercising delegated powers of punishment, who is not an XO.
Subordinate commander	See definition in RP 2(1).
Superior commander	See definition in AFDA s 2(1).
Table	An investigation or summary trial in the New Zealand Naval Forces.

Chapter 1

Rationale and History

The fundamental purpose of a military justice system is to foster and promote the discipline and self-control required for the maintenance of the capability to act as an efficient fighting force...

Air Chief Marshal Sir Anthony Bagnall, 12 July 2001¹

This chapter examines the rationale underpinning the summary jurisdiction in military law, encompassing an analysis of the need for such a system from a command and leadership perspective and a review of its historical evolution in the New Zealand context.

Rationale

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 a 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 unit 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 a man's resistance to fear. All these sources

¹ *R v Boyd* [2002] UKHL 31, [51].

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 generalize. 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; alone, 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.²

This raises the question as to how this ‘exclusion of the alternative’ or, as it is sometimes called, ‘fighting spirit’ can be achieved. John Keegan and Richard Holmes provide the answer:

The fighting spirit that enables the soldier to meet the stress of battle must be built and sustained: training, comradeship, leadership and discipline all play their parts in its creation.³

The instilling of discipline in constituent members of a military unit is necessary, alongside these other factors, to imbue the unit with the fighting spirit necessary to achieve its mission. As retired US Army Colonel William Henderson notes⁴, this is as much a requirement for the ‘operations other than war’ which have typified the employment of the New Zealand Armed Forces in recent times, as it is for traditional warfare. In fact, it is arguably even more critical in certain peace support operations where the use of force has to be particularly tightly constrained, despite the presence of significant threats to the unit’s or an individual’s safety.

Military discipline

Having established that discipline is essential to the development and maintenance of cohesive and effective fighting forces, the next step is to define ‘discipline’ and examine the methodologies by which it may be developed and maintained.

² General Sir John Hackett, *The Profession of Arms*, Sidgwick and Jackson, 1984, pp. 221 – 222.

³ John Keegan and Richard Holmes, *Soldiers: A History of Men in Battle*, Hamish Hamilton, 1985, p. 39.

⁴ William D. Henderson, ‘Military Law and Combat Effective Military Units’ in *Summary Trial Working Group Report*, vol II, Office of the Judge Advocate General, Canada, January 1994, p. 7.

One formulation of the term 'discipline' is apparent in an excerpt from the 1960 report on the Uniform Code of Military Justice prepared by Lieutenant General Herbert Powell:

Discipline – a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed – is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity.⁵

While obedience to lawful commands is a key component of discipline, Henderson indicates that it goes beyond that. He describes the development and maintenance of discipline as a process of gaining and maintaining:

...control of individual soldiers through a process of internalizing values and codes of behavior that cause the isolated soldier to act as a reliable and disciplined member of his unit in combat.⁶

The validity of this observation is amply demonstrated by the scope of the offences which are covered by military law, which include, in addition to disobeying a lawful command, offences as diverse as behaving in a cowardly manner when before the enemy⁷ and doing or omitting an act likely to prejudice service discipline.⁸

Having defined discipline, the next question relates to how discipline is best to be maintained. Powell and Henderson agree that there must be powers to sanction the Service member who fails to maintain the standards set and that those powers must be in the hands of the Service member's commander. As will be noted in Chapter 5, the placing of judicial powers in the hands of commanders rather than judges may be problematic from the standpoint of contemporary views of human rights. This raises a fundamental question as to why it is necessary in the context of the military. Henderson explains:

The significance of the small group or unit which influences much of the soldier's behavior, the leader's ability to control the group, and the leader's ability to utilize military legal powers in the creation and maintenance of unit cohesion cannot be overstated. This approach views the military commander's legal powers functionally, as a means of increasing his influence within his unit in order to build a cohesive and combat-effective unit. The immense advantages in warfighting that accrue to an army that fields highly motivated soldiers fighting under superb small-unit leaders can be reliably measured through the concept of cohesion...⁹

⁵ Cited in David A Schlueter, 'The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's – A Legal System Looking for Respect' 133 *Military Law Review* 1, 11 (1991).

⁶ *Ibid.*

⁷ AFDA s 28.

⁸ AFDA s 73(1)(a).

⁹ *Ibid.*, p. 8.

Looked at this way, it is clear that the argument sometimes made¹⁰ for a full or partial suspension of military law during peacetime is fundamentally flawed; the development and maintenance of discipline is an ongoing process. As Canadian Forces Lieutenant Colonel K W Watkin explains:

In terms of the level of discipline which must be maintained in order to ensure operational effectiveness there can be no distinction between times of peace and war. The role of the Canadian Forces, when not actually deployed on operations, is to train for those operations. As discipline is the trained obedience to orders it is not something which can be suddenly acquired when a unit is sent into an operational setting. Good discipline is the result of habit. The attainment of the appropriate level of discipline is a gradual process. Once the proper discipline is attained it must be constantly reinforced. In some respects 'discipline' can be equated to an insurance policy. The premiums are paid through training and constant reinforcement. When the time comes to cash in on the policy the return is directly related to the price paid prior to the occasion of its required use.¹¹

These sentiments have now received support from the House of Lords in the recent decision, *R v Boyd*:

...the maintenance of discipline essential to the effectiveness of a fighting force is as necessary in peacetime as in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war.¹²

Lord Bingham opined that this was a principle which 'would now, I think, command acceptance in any liberal democracy governed by the rule of law'.¹³

Even if that were not true, as Watkin goes on to point out, it is nugatory to attempt to identify conditions for the application or non-application of military law in the modern era. Rather than only being called upon to fight in formal declared inter-state wars, armed forces are now required to intervene in a vast range of different circumstances. These may include civil aid tasks such as disaster relief, peacekeeping in a great variety of different

¹⁰ For examples, see R Ho, 'A World That Has Walls: A Charter Analysis of Military Tribunals' (1996) 54 *University of Toronto Faculty of Law Review* 177; and Cheryl Simes, 'Not Your Average Trial: The Statutory Unfairness of Courts-martial in New Zealand' in *Electronic Journal of Military History*, vol 1, issue 2, September 1998. These arguments may draw some support from the fact that France, for example, does not maintain courts-martial in peacetime: *No 34: La réforme du code de justice militaire en temps de paix: assurer l'égalité des justiciables et respecter la spécificité militaire*, <http://www.defense.gouv.fr/sga/sga_sup_4/affaijuri_s4/texte/meptexteajegalispesifici_s4.html>.

¹¹ Lieutenant Colonel K W Watkin, 'The Role of Summary Proceedings: The Maintenance of Discipline' in *Summary Trial Working Group Report*, vol II, Office of the Judge Advocate General, Canada, January 1994, pp. 33 - 34.

¹² [2002] UKHL 31, paragraph [4], per Lord Bingham of Cornhill.

¹³ *Ibid.*

security settings, and finally armed combat operations in an equally broad array of circumstances. Each and every one of these situations demands the high standards of discipline which are created and maintained by the factors discussed above, including the application of summary discipline by commanders. Furthermore, modern transport and communications have led to the situation where forces stationed in New Zealand for training may find themselves deployed operationally anywhere in the world in a matter of weeks or days – there is no time to change the military law operating paradigm.

It follows from the foregoing analysis that the principal justification for a summary jurisdiction in the hands of military commanders is the need for the law to directly empower those commanders in the exercise of their duty to develop and maintain cohesion in their units. This will be referred to as the principle of command empowerment. The application of this principle is particularly important in the New Zealand context. When a state, like New Zealand, can only field relatively small and lightly armed forces, those forces must be all the more highly trained and disciplined to have any chance of success against numerically and/or technologically superior forces.

Another important factor gravitating in favour of the enforcement of summary discipline by commanders is the need for breaches of discipline to be dealt with expeditiously. Watkin expresses the view that:

In terms of discipline the old adage ‘justice delayed is justice denied’ can be rephrased as ‘discipline delayed is discipline destroyed’.¹⁴

The reasoning underlying this maxim is connected to Henderson’s observations as to the influence upon individual and group behaviour by Service members of the conduct of individual unit members and the command’s perceived ability to control that conduct. Put simply, a delay in dealing with an infraction of military law may be interpreted both by the alleged offender and his or her comrades as either informal condonation of the offence or weakness on the part of the commander. Either perception has the potential, if not corrected, to deleteriously affect the maintenance of discipline in the unit. Accordingly, it is desirable that, in most cases, the interval between the infraction and the imposition of the

¹⁴ Watkin, p. 14.

sanction (if warranted) is measured in days rather than weeks or months. This will be referred to as the principle of expedition. For this reason, the placing of powers of summary discipline in the hands of commanding officers and their immediate subordinates is a practical measure which removes the delays which are increasingly evident in the criminal justice system and, to a lesser extent, the system of trials by courts-martial.

Empirical data

The desirability of retaining this power as a tool necessary for the proper exercise of command in the New Zealand Armed Forces is reinforced by the results of the Joint Summary Disposals Survey. Among other questions, every officer who exercises summary powers under the AFDA was asked:

How important to the maintenance of discipline do you consider it is that commanders (as opposed to military magistrates, civilian judges or some other judicial body) retain the ability to try or deal summarily with personnel under their command?

76 per cent of respondents stated that it was very important and 17 per cent considered it important. Only seven per cent considered that it was not important or irrelevant.¹⁵

Interestingly, officers exercising delegated powers of punishment¹⁶ on average thought it was marginally more important to maintain this capability than commanding officers and superior commanders.¹⁷ Many of the respondents also provided more detailed written comment on this issue, and a representative sample of those comments is reproduced below by Service.

In the Navy, the following comments by two separate commanding officers were representative of the vast majority of the 25 responses from naval officers:

Commanding Officer A:

The whole essence of command is being able to influence aspects of your people's activities be they negative or positive influences. The maintenance of proper order and regularity is one of a CO's

¹⁵ The sample size chosen was 100 per cent of the target group. 130 members, or just over 67 per cent, of the target group responded to the survey. The margin of error is plus or minus 4.92 per cent. Source: American Research Group, Inc, *Margin of Error Calculator*.

¹⁶ Executive officers in the Navy and subordinate commanders in the Army and Air Force.

¹⁷ The four possible responses to this question were given a numerical value. Hence, 'very important' = 1; 'important' = 2; 'not important' = 3; 'irrelevant' = 4. The mean value assigned to this question by commanding officers and superior commanders was 1.34. This is as compared with the mean value assigned by officers exercising delegated powers: 1.31.

important responsibilities and also setting your individual flavour of how this is to be maintained. In part this is done by punishment by summary trial. Also you are best placed to determine what the impact will be on morale and perception of your people.

Commanding Officer B:

The issue is expediency. For a deployed ship to have a case go unanswered until RTNZ¹⁸ so that a magistrate could hear it is unacceptable, especially if the case was one of say disgraceful behaviour between two ratings which is a source of antagonism. Similarly repatriating ratings + witnesses is too expensive, as would flying a magistrate around the area to join ships, although cheaper than the 1st option! I believe most officers + ratings see it as an important role for the CO as it reinforces his vision + mission for the ship.

The final sentence of Commanding Officer B's comment is borne out by this typical comment by an executive officer:

Executive Officer A:

Perhaps the most important part of maintaining discipline is having the commanders speak to their own personnel – how much value a civilian body with a technical approach only, no firm appreciation of the culture and no real empathy and/or ability (for the accused) to feel that they understand the wider issues and/or have an impact on their wider career/welfare.

Notwithstanding these views, it is important to note the comment of one naval superior commander that:

I would sooner we only had to do this on operations. The aim is to get behaviour aligned with organisational values so that 'discipline' fades into the contextual background.¹⁹

68 Army officers responded to the Joint Summary Disposals Survey. Among those responses, the comments of the following three commanding officers were typical:

Commanding Officer C:

Officers are responsible for maintaining discipline and therefore need to be able to dispense the punishment. Some punishments are 'heavier' than might normally be awarded as you are also trying to maintain discipline within a unit, not just punish the accused. Many charges in the NZDF are for offences that civilians would see as trivial (absent from place of parade, untidiness, insubordinate language, even use of marijuana) and our high standards would therefore not be able to be enforced. Presumably we would generate enough Ord[erly] Rooms to clog up the judicial system in NZ even further! Imagine if you had to wait 3 months to hear an offence for a UD²⁰ or for insubordinate language etc.

Commanding Officer D:

Some offences, we are out of step with society esp[ecially] drug use/supply and minor theft of [a] comrade's property, these ones attack the fabric of our ethos and values. We must retain the ability to deal with offences.

¹⁸ A standard NZ military abbreviation for 'return to New Zealand'.

¹⁹ It should be noted however that this superior commander rated the retention of summary powers in the hands of commanders as important.

²⁰ The term UD (unauthorised discharge) refers to any occasion when a weapon under the control of a member of the Armed Forces fires a round except as authorised.

Commanding Officer E:

As someone who could be ultimately responsible for decisions that could affect life and death, a commander must have the legal power and authority to back his decisions. We are not civilians.

Commanding Officer E's comment underlines the point made by Henderson about the primary reason for placing summary powers in the hands of commanders. The point is best illustrated by this subordinate commander:

Subordinate Commander A:

Such maintenance of discipline is the very framework of how we hold people together in demanding situations. I have commanded soldiers on operations and in training. I have been a [subordinate commander] now for over 5 years. An OC²¹ has an intimate knowledge of his/her [command]. Many magistrates have no or little understanding of the demands of service life let alone the demands of battlefield command where a breach in military discipline can result not only in the loss of life but also the loss of many lives by the non-achievement of military objectives.

The Air Force presents an interesting case study when compared to the other Services from the perspective of this among other discipline issues. 37 Air Force officers responded to the survey.²² Only 54 per cent of the sample thought that the retention of the commander's summary powers was very important, 24 per cent considered it important, and 19 per cent were of the view that it is not important. While there is an overwhelming majority in the RNZAF in favour of retaining these powers, what is significant is that the percentage of Air Force officers who consider this matter very important is more than 20 per cent lower than that in respect of respondents across all three Services. A similar anomaly appears at the other end of the spectrum. The percentage of Air Force officers who consider this matter not important or irrelevant is more than two and a half times greater than that in respect of the whole Defence Force sample.

That having been said, it should be noted that, of the Air Force officers who provided comment on this aspect of the survey, the vast majority of the comments were very much in line with those provided by naval and Army officers, as exemplified above. For that reason, further examples are not provided. However, given the relatively high number of Air Force officers who considered the retention of summary powers unimportant, the

²¹ Officer Commanding. The term used in the Army to describe the officer who commands a sub-unit, eg an infantry company.

²² This represents 50 per cent of the total RNZAF target group of 74 officers.

following comprehensive comment by an Air Force commanding officer is useful as a typical explanation of the reasoning underlying that view:

Commanding Officer F:

It may have been important historically, and it may be important under some operational or field conditions (perhaps where expedient access to a military magistrate isn't possible?) but under normal circumstances it is not important in the modern Air Force.

The problem with Air Force commanders dealing summarily with personnel is the rarity with which this occurs. As a subordinate commander I heard 3 charges in 10 years – a not unusual average. On each occasion, substantial time and effort is taken to re-learn a process you have not been through in years. Invariably, you call a legal officer to discuss (in advance of the orderly room) how you should go about conducting the orderly room and investigating the charge and ultimately what is the 'going rate' of punishment for the offence should it be proven. It all seems like a very amateurish approach to a serious subject, and by their nature, officers don't like feeling like amateurs in their jobs. They are left wondering why the legal officer (or similar) who is a professional in this area, doesn't just hear the charge and make the entire process faster, easier, and more accurate.

As a commanding officer, I find myself at the 'next level' but still with a career experience of only 3 orderly rooms behind me. Due to the gravity of offences that reach the CO level I also find that personnel remanded to CO level are bringing professional legal counsel with them – who are skilled in the military justice system. Recent experience has illustrated how a primary strategy of such counsel is to exploit the lack of legal experience of subordinate commanders and CO's by concentrating on finding errors in procedure that will result in charges having to be dismissed or findings overturned. It would seem far more professional and 'just' to have experienced legal personnel hearing a charge and so eliminating the potential for an outcome to be influenced more by procedure than by the facts of the case.

The law is complex, and more so than historically, the process and outcome of summary proceedings is open to question. I don't believe the majority of Air Force officers have the experience or currency in this specialist area to carry out the task professionally.

In terms of whether a change would affect the maintenance of discipline? No:

1. In 2002 we rely on formal discipline far less to control our personnel – certainly in the RNZAF – than perhaps we did in the past (hence the rarity of orderly rooms).
2. The 'power' of the discipline procedure lies in the threat and ability to bring charges, not in who hears them. A troop will be motivated by the fact that his W/O²³ may charge him if he doesn't modify his behaviour, whether SQNLDR Smith or SQNLDR Jones eventually hears it isn't relevant to him.

Every OC or CO who has discussed this questionnaire with me, or made comment about their own experiences have expressed how uncomfortable they are with the summary disposals system, and how much time they spend prior to a charge trying to learn enough, quickly, to 'get them through'.

Clearly the concerns of Air Force officers like Commanding Officer F and others cannot and should not be overlooked in any review of the summary disposals systems of the New Zealand Armed Forces. However, these concerns have to be seen in the context of the fact that 93 per cent of respondents to the survey considered that the retention of summary

²³ Warrant Officer.

powers of discipline by commanders was important or very important. Perhaps more significantly, the comments provided by the officers exercising these powers within New Zealand's forces are broadly consistent with and certainly supported by the research undertaken by Henderson and Watkin in the United States and Canada respectively. The case for the retention of such powers is compelling.

History

As this thesis is not a review of military legal history, this section outlines the origins of New Zealand's current summary disposal systems from the outbreak of World War II and focuses primarily on the events which shaped the current systems between 1975 and 1981.

The development of the law of summary disposals

The law regulating the discipline of Her Majesty's forces has, for the greater part of its history, been divided into two streams; military law, that is the law which applied to the land forces; and naval law. Thus it is no surprise that the discipline law of New Zealand's own forces developed along the same lines as they evolved from and gradually loosened their ties with their parent Services in the United Kingdom. For its part, when the Royal Air Force was constituted by the Air Force (Constitution) Act 1917 (UK), the discipline of its officers and airmen was provided for by the Air Force Act (Imp.) which formed the Second Schedule to the former Act. The Air Force Act was basically a re-wording of the provisions of the Army Act 1881 (Imp.)²⁴ to comply with air force terminology.²⁵ New Zealand followed suit by adopting the Imperial Air Force Act for the discipline of the Royal New Zealand Air Force when it became a separate Service pursuant to the Air Force Act 1937.²⁶

²⁴ The statute which regulated the discipline of the British Army at that time. The Army Act 1881 also regulated the discipline of New Zealand's land forces from its enactment until 1950.

²⁵ Lieutenant Colonel K W Watkin, 'History of Summary Proceedings' in *Summary Trial Working Group Report*, vol II, Office of the Judge Advocate General, Canada, January 1994, p. 13.

²⁶ Section 17 of the Air Force Act 1937. For further background on these developments, see Lieutenant Colonel G B M Law, 'The History of Air Force Law' in DM 69 *Manual of Armed Forces Law*, vol I, New Zealand Defence Force ('*Manual of Armed Forces Law*').

Thus when the New Zealand Government declared war against the Government of the Third Reich on 3 September 1939, the discipline of all three Services was governed by Imperial statutes, subject to local modifications made by subordinate legislation authorised under the New Zealand Acts which incorporated the various Imperial Acts into New Zealand law.²⁷

The discipline laws of the Army and Air Force were given a New Zealand source and flavour in the post-war period following the enactment of the New Zealand Army Act 1950 and the Royal New Zealand Air Force Act 1950. These two enactments, which were eventually repealed and replaced by the AFDA on 1 December 1983,²⁸ were essentially identical, reflecting their common origins in military law. New Zealand naval law, however, remained of British origin until it too came under the AFDA's tri-Service umbrella in 1983.²⁹

The separate evolution of military and naval law had perhaps its greatest implications in respect of the summary disposal systems of the Navy on the one hand, and the Army and Air Force on the other. As Captain E D Deane, RNZN, notes:

One important difference in this area was that the Navy had, under the [Naval Discipline Act 1957 (UK)], developed its summary trial procedure along the lines of that applying in the then Magistrates' Courts whereby the Captain heard evidence adduced by opposing prosecuting and defending officers and did not himself prosecute the charge.³⁰

While it derived its mandate from section 49 of the Naval Discipline Act, the Navy's summary trial system was prescribed largely by Navy Instructions issued pursuant to the Navy Act 1954 and the Navy Regulations 1958. Under this system, the officer of the day or watch would investigate a charge against a junior rating at first instance to determine

²⁷ The discipline of the New Zealand Naval Forces, which at that time consisted principally of the New Zealand Division of the Royal Navy, was regulated by the Naval Discipline Act 1866 (Imp.), as incorporated and modified pursuant to the Naval Defence Act 1913. As mentioned above, Army discipline was dealt with under the Army Act 1881 (Imp.), which was incorporated by and subject to modifications made under section 17 of the Defence Amendment Act 1912. The position in respect of the RNZAF was as has been previously mentioned in the main body of the text.

²⁸ The date on which the AFDA came into force: clause 2 of the Armed Forces Discipline Act Commencement Order 1983 (SR 1983/232).

²⁹ The Naval Discipline Act 1957 (UK), as incorporated by and modified pursuant to section 15(1) of the Navy Act 1954 and the Navy Regulations 1958.

³⁰ Captain E D Deane, 'The History of Naval Law' in *Manual of Armed Forces Law*, p. 1-14.

whether it should proceed. If he was so satisfied, the charge would be remanded to the executive officer or the commanding officer (depending on the seriousness of the allegation) to be tried summarily.³¹ At such trials, the officer of the day would invariably prosecute the case he had investigated, while the accused would be defended by his divisional officer.

By contrast, minor charges against corporals and below in the Army³² would generally be dealt with by a subordinate commander utilising an entirely inquisitorial procedure.³³ The soldier would be brought before the subordinate commander who would investigate the charge to determine whether it should proceed.³⁴ If the subordinate commander decided that the charge should not proceed, he would dismiss it. If he decided that it should proceed, he would decide whether he had sufficient powers of punishment to deal with the offence and, if so, would make a finding and impose a punishment as appropriate.³⁵ There was no provision for the appointment of either a prosecuting or defending officer. The witnesses would be questioned by the subordinate commander directly and although the accused had 'full liberty to cross-examine any witness against him',³⁶ he had no assistance in performing this task.

The struggle for a common code

On 4 March 1971, the Minister of Defence, Hon David Thomson, rose in Parliament to move the introduction of the Armed Forces Discipline Bill, the culmination of a significant

³¹ Provided that the commanding officer had sufficient powers of punishment. Under sections 43(1) and 49(3) of the Naval Discipline Act, a commanding officer could impose the punishment of dismissal from Her Majesty's service and up to three months' imprisonment or detention.

³² This passage also reflects the position under air force law which, as mentioned above, was virtually identical to that pertaining under military law.

³³ Subordinate commanders could not be delegated authority to deal summarily with sergeants: section 82 of the New Zealand Army Act 1950.

³⁴ A charge should not proceed and be dismissed if 'the evidence does not show that some offence under the Army Act has been committed, or if the accused has previously been acquitted or convicted of the alleged offence, or if, in his discretion, he thinks that the charge ought not to be proceeded with': rule 7(1) of the Army Rules of Procedure 1951.

³⁵ Sections 75(1) and 81(1) of the New Zealand Army Act 1950 and rule 6(1) of the Army Rules of Procedure 1951. Given the limited jurisdiction and powers of punishment of subordinate commanders under the New Zealand Army Act, many more charges were referred to Commanding Officers' orderly rooms for disposal than is the case under the AFDA.

policy development and drafting project which had begun at the instance of the Defence Council on 23 August 1966.³⁷ The Minister remarked that:

In line with the Government's policy of developing greater unity of administration and procedures throughout the armed forces it has been decided to produce a single code to apply to all the services.³⁸

The AFDA received Royal assent on 12 November 1971, however this was to mark the beginning, not the end, of a process of evolution in respect of the law of summary disposals in New Zealand. At that stage, in line with the overall aim of providing a common code, sections 104 and 105 of the Act provided for a single system of summary disposals. Under that system, there would be an investigation for the purposes of deciding whether the charge should proceed. If the decision was made that the charge should proceed, the commanding officer would either remand the matter for trial by court-martial or:

- (a) in the case of warrant officers and junior officers, forward the charge to a superior commander to be dealt with summarily; or
- (b) in the case of accused persons below the rank of warrant officer, deal summarily with the charge.

Where a commanding officer or superior commander intended to deal summarily with a charge by imposing one of the more severe punishments in the second column of the Fourth Schedule to the AFDA, he was required to offer the accused the right to elect trial by court-martial. Finally, wherever the charge was to be dealt with summarily, the commanding officer or superior commander would decide whether the accused was guilty and make the appropriate finding. Thus the system envisaged by the AFDA when it was enacted in 1971 clearly bore a greater resemblance, both in terms of format and terminology, to the summary disposals conducted by the Army and Air Force at that time and, indeed, to those conducted in the Army and Air Force today.

That having been said, while the AFDA contained a skeleton for what was clearly intended

³⁶ Rule 6(1) of the Army Rules of Procedure 1951.

³⁷ See Anon, 'The History of the Armed Forces Discipline Act 1971' in *Manual of Armed Forces Law*, p. 1-38.

³⁸ *New Zealand Parliamentary Debates*, vol. 371, 4 March 1971, p. 110.

to be a joint summary disposals system, contemporary archival material indicates that the task of arriving at a tri-Service consensus on the precise format of this system was to prove rather more difficult. Indeed, in April 1973 the Assistant Chief of Defence Staff (Personnel), Commodore R T Hale, RNZN, noted that:

... a committee consisting of the disciplinary staff officers from each Service, plus Legal Officers Drafting and Advisory from the Directorate of Legal Services, has since 13th November 1972, been meeting each week between 1000 and 1230 hours on Monday to Thursday (Friday has been reserved for reporting and consultation) to check the draft Rules of Procedure prepared by Legal Services... The Rules covering Summary Disposal (about 20) are proving controversial with 20 hours of discussion having taken place without any agreement having been reached.³⁹

However, by September 1973 a draft set of RPs had been prepared and they were then circulated to the single Service staffs for comment.⁴⁰ The draft procedure provided for the accused to be represented by an assisting officer but did not provide for the appointment of an officer to prosecute or present the prosecution evidence. In this way, the 1973 proposal may be seen as a compromise between the then existing summary procedures under naval and military/air force law. Nevertheless, the Naval Staff expressed reservations about the removal of the officer of the day ('OOD')⁴¹ from his role as the prosecutor under naval law.⁴² The *Manual of Armed Forces Law* Project Officer, Lieutenant Colonel G B M Law, records that:

... a point of particular concern to Navy arising from the absence of provision in the draft rules of a prosecutor or presenter of facts is that whereas under the present Naval system the OOD/OOW, as the CO's representative, makes preliminary inquiries into incidents (either on the spot or as the result of receiving reports about them) then, after formally investigating them, acquires valuable knowledge and reaches informed conclusions about the incidents which, as prosecutor, he is able to put before the CO, under the draft rules this knowledge must remain with him. Judged by the criteria of a trial under British justice, this is exactly what should happen – unless there is evidence that the OOD/OOW can give as a witness...⁴³

Despite Lieutenant Colonel Law's reservations, on 14 July 1975, the Chief of Defence Staff ('CDS'), Lieutenant General R J M Webb, wrote to the Judge Advocate General ('JAG') seeking his opinion of a compromise option which he had agreed with the Service Chiefs of Staff, under which:

³⁹ Assistant Chief of Defence Staff (Personnel) ['ACDS (Pers)'] minute Def 50/5/40 to Chief of Defence Staff ['CDS'] dated April 1973.

⁴⁰ ACDS (Pers) minute Def 50/5/40 dated 28 September 1973.

⁴¹ Alternatively, the officer of the watch ('OOW') at sea.

⁴² MAFL Project Officer minute Legal/53 to Deputy Chief of Naval Staff dated 14 April 1975.

⁴³ *Ibid*, paragraph 8b.

- (a) the accused would ‘in all cases, other than those involving minor infringements, and attracting only minor penalties (e.g. the classic 3 days CB⁴⁴ or leave stoppage for “dirty boots” type offences) have the absolute right to require an officer to appear on his behalf as an assisting officer’⁴⁵; and
- (b) ‘provision [would] be made for investigation of the case to be assisted by the appointment of a presenting officer where the operational circumstances allow and where this course will, in the view of the officer hearing the case, lead to a more full exposition of the relevant facts.’⁴⁶

Lieutenant General Webb’s letter was followed by comment to the JAG on the compromise option by both Lieutenant Colonel Law and the Director of Legal Services (‘DLS’), which was then a Territorial Force appointment held by the Solicitor-General, Colonel R C Savage.⁴⁷ Lieutenant Colonel Law’s lengthy memorandum⁴⁸ was highly critical of both the provision of an option to appoint a presenting officer and, to a lesser extent, the way in which the provision of assisting officers was dealt with by the compromise draft.⁴⁹ The criticism was founded on a number of grounds. For present purposes, it is sufficient to note that, in respect of the optional presenting officer provision, he remarked:

The officer [exercising summary powers] would be disadvantaged because every time he had a charge before him, he would have to stop and make a choice as to procedure before he could get on with the case itself and because the rule affords him no tests to guide him in that choice.⁵⁰

He went on to state that:

In my mind, only a fundamentally unsound system would leave its authorities (let alone the accused) without a single clear method of investigating a charge...⁵¹

Lieutenant Colonel Law was clearly wedded to the idea of retaining an inquisitorial summary procedure following very closely the Army and Air Force antecedents. He

⁴⁴ Confinement to barracks.

⁴⁵ CDS letter 50/5/40/CDS to JAG dated 14 July 1975, paragraph 3a.

⁴⁶ *Ibid*, paragraph 3c.

⁴⁷ Subsequently appointed a judge of the High Court in 1980 and JAG in 1986.

⁴⁸ Lieutenant Colonel Law memorandum Def 50/5/40/MAFL PO to JAG dated 4 September 1975.

⁴⁹ The principal criticism of the assisting officer provision was that the officer exercising summary powers would need to assess the probable level of punishment before hearing the evidence, in order to determine whether an assisting officer should be appointed: *ibid*, paragraph 40.

⁵⁰ *Ibid*, paragraph 4.

⁵¹ *Ibid*, paragraph 38.

continually referred to the quasi-adversarial approach followed by the RNZN under the Naval Discipline Act as ‘novel’ and ‘experimental’, concluding that:

...there is a positive advantage for any Service summary procedure which does not have an independent magistrate not seeking to identify more closely with the civil procedure when for good reason it has developed differently to meet very different conditions from those prevailing in the community. The superficial likeness between the naval adversarial systems and the corresponding civil procedure has encouraged both some subject to it and observers to ignore that its “magistrate” is the employer and provider of all who come before him, is the law enforcement agency for his command and so controls the “police force” and all other supervisory agencies, and acts as the local government.⁵²

DLS, on the other hand, took the view that the traditional Army and Air Force inquisitorial procedure should be adopted by subordinate commanders, while a procedure which followed as closely as possible the adversarial paradigm should be adopted by commanding officers and superior commanders. The rationale underpinning this view was that a higher standard of due process should be accorded where the accused is in jeopardy of a more severe punishment. In Colonel Savage’s view:

... it is important ... when considering these points to ask the following question:

Is the summary disposal of charges directed at achieving full and impartial justice or maintaining reasonably fair and effective discipline?

No doubt these two objectives are not mutually exclusive but I doubt if they can be combined throughout the whole of military justice. The Armed Services are ordered disciplined bodies whose real purpose is to be effective and efficient fighting instruments of the State. Full and impartial justice requires time, adequately skilled advisers and independent adjudicators, and is not concerned with any effects upon discipline. On the other hand, reasonably fair and effective discipline does not require a great deal of time nor skilled advisers and independent adjudicators. All this, however, must be considered along with the strong sense of justice that the individual serviceman has. He demands that the system, whatever it be, gives him a ‘fair go’. In my view, however, the concept of a fair go is a practical one in the eyes of those that are subject to the system, as indeed most of us have been. It does not expect minor charges to be disposed of in the same way as serious ones. To use the illustration referred to by CDS the ‘dirty boots’ charge does not require the procedure that must be invoked when the charge is striking a superior officer or theft from a fellow serviceman.

In my view, as is referred to later in this memorandum, a distinction should be made between the procedure to be applied to minor charges and major charges. A convenient yardstick would be the degree of punishment that may be imposed at the two levels.⁵³

Colonel Savage’s proposal was approved by the JAG, the Honourable Justice J C White,⁵⁴ on 20 January 1976 as the basis for a compromise system of summary disposals.⁵⁵

⁵² *Ibid*, paragraph 11.

⁵³ Director of Legal Services memorandum to JAG dated 24 November 1975.

⁵⁴ Justice White was also Judge Advocate of the Fleet at this time, as well as JAG of the Army and RNZAF.

⁵⁵ JAG letter to CDS dated 20 January 1976.

Nine days later, on 29 January, CDS held a meeting with the JAG, the Assistant Chief of Defence Staff (Personnel) ('ACDS (Pers)') and Lieutenant Colonel Law. The purpose of the meeting was to settle a framework for the new summary disposals system. Following that meeting, CDS advised the Service Chiefs of Staff that 'I believe the way is clear for us to settle on a system along the lines envisaged by JAG and DLS...'.⁵⁶ The one caveat which was applied to Colonel Savage's proposal was however that:

Our rules should allow for the situation in which, for example, a detachment commander is required to exercise the powers of a commanding officer, and must, through the exigencies of the Service, do so without presenting or assisting officers.⁵⁷

This was the basis for a draft prepared by Parliamentary Counsel, which was received by the Ministry of Defence on 20 March 1980. Clause 16(2) of that draft provided that:

If the commanding officer is of the opinion that the services of an assisting officer cannot reasonably be made available to the accused, having regard to the exigencies of the service, or the strength or location of the unit to which the accused belongs, no assisting officer shall be appointed.

Part V of the draft RPs accordingly provided for subordinate commanders to conduct inquisitorial hearings only, but provided two procedures at the commanding officer level – an inquisitorial process without representation and a quasi-adversarial process with representation. However, this compromise option was not to be adopted.

The turning point in the Defence establishment's policy towards summary disposals may be regarded as the letter written by Captain E D Deane, RNZN on 17 July 1980, which he forwarded to ACDS (Pers) one week later. For reasons which may assume some significance, it should be noted that by this time the appointment of ACDS (Pers) was also held by a naval officer, Commodore E R Ellison, RNZN. In his forwarding letter, Captain Deane remarked:

...I thought I had better let you know that in my view, and in the view of all those I have consulted up here, the summary trial system proposed in the draft Rules of Procedure is a major disaster for the Navy. As you know the British and Australians have abandoned any attempt to enforce unification at the summary level for the very good reason that the system should suit the operations and not the other way round. Also in those countries the Navies were not willing to set aside a highly developed system for a crude one.⁵⁸

⁵⁶ CDS minute Def 50/5/40/CDS to Service Chiefs of Staff dated 2 March 1976, paragraph 9.

⁵⁷ *Ibid*, paragraph 8b(4).

⁵⁸ Captain Deane letter to Commodore Ellison dated 24 July 1980.

In passing, it should be noted that it is difficult to see how a quasi-adversarial system is any more or less suited to naval operations as compared with land or air operations. This is especially so when one considers that ‘the Navy had, before the Naval Discipline Act 1957, employed a summary trial procedure very similar to that in the Army and the Air Force’.⁵⁹ When one examines Captain Deane’s letter, it soon becomes evident that his real concern was the sacrifice of ‘a highly developed system for a crude one’, as indicated above. His principal concern related to the exclusion of divisional officers⁶⁰ from their customary role as assisting officers at the Executive Officer’s Table. Captain Deane expressed the opinion that ‘over 90% of naval trial and punishment would fall to be handled in this fashion’ and pointed out that an executive officer would be able to impose ‘quite severe punishments’. He complained that the proposed system accordingly ‘fails the Navy totally ... in its rejection of the Naval Divisional system at the Executive Officer (called ‘Subordinate Commander’) level.’⁶¹ He concluded that the remedy required was:

A summary trial procedure for Naval Sub Cdrs and CO’s which retains the existing safeguards of the accused especially the right to be assisted by his Divisional Officer. The Army and Air Force should be provided with a system which suits their operating pattern. There is no requirement for a unified system.⁶²

Commodore Ellison responded to what he termed this ‘alarming’⁶³ letter by writing to the Chief of Naval Staff (‘CNS’). However, his response evidenced that he wished to maintain ‘a foot in both camps’ on the issues raised by Captain Deane:

Firstly, Capt Deane infers very specifically that the rules of procedure need not be the same for all three Services. That, of course, is an absolutely fundamental objection and if sustained, would make a nonsense of a substantial amount of work [the Deputy Director of Legal Services] and other staff officers have been doing for many years. Those gentlemen have been going about their business on the firm understanding that from 1970 onwards, the Minister of Defence, the Defence Council, the CDS and the three Chiefs of Staff required a common disciplinary code incorporating common rules of procedure.

...

⁵⁹ Anon, ‘The History of the Armed Forces Discipline Act 1971’ in *Manual of Armed Forces Law*, p. 1-40.

⁶⁰ Every rating in the Navy has a divisional officer (‘DO’), who is responsible for the rating’s welfare, discipline and career management. On board one of HMNZ ships, the rating’s DO will be his head of department (in the case of senior ratings) or the assistant/deputy head of department (in the case of most junior ratings).

⁶¹ Captain Deane letter to Director of Administration (Navy) dated 17 July 1980, paragraph 4.

⁶² *Ibid*, paragraph 13a.

⁶³ ACDS (Pers) minute to CNS dated 11 August 1980, paragraph 2.

Speaking now as a Naval officer, I certainly share some of Capt Deane's concern. In particular, I personally deplore any restriction at all on Divisional officers at an investigatory type of hearing; I believe it is an article of faith that Naval ratings are encouraged from entry to look to the Divisional system to assist them and to put any encumbrance in the way of that is absolutely inconsistent with Naval requirements.⁶⁴

Commodore Ellison questioned whether, notwithstanding these concerns, 'it is reasonable some four years later to try and overturn decisions made by the Chiefs of Staff... [in March 1976], at which my views (or something akin to them) were no doubt put forward.'⁶⁵

CNS, Rear Admiral K M Saull, was however clearly of the view that the issue could and should be revisited.⁶⁶ In a paper which he submitted for the consideration of the Defence Executive Committee ('DXC'),⁶⁷ he stated that:

For the past 33 years sailors charged with offences have been assisted in detail at their trials by their DOs. The divisional system is central to Naval personnel management because the Division is the basic unit of organisation. Centuries of experience have demonstrated that if the divisional system breaks down or is weakened, trouble results.

...

In my view, if the Executive Officers of the Navy are delegated the powers listed in [the third column of the Fourth Schedule to the AFDA], and those are exercised in seagoing ships without the involvement of the DO, then it can be guaranteed that personnel problems will arise. The right to be assisted by the DO is now so entrenched in Naval justice that its removal will be regarded as a forfeiture of a hard-won right.⁶⁸

CNS proposed that DOs be permitted to continue representing ratings at the Executive Officer's Table. The minutes of the meeting of the DXC which considered this proposal in October 1980 evidence that the cracks in the common approach were starting to widen. In particular:

Chief of Air Staff stated that Air had already made concessions in the interests of uniformity and did not see any need for the adversary system. The single judge system worked well for Air and was an expeditious one. He did not wish to see a more complex system introduced and stated that Air was not prepared to make any more concessions in this area.⁶⁹

⁶⁴ *Ibid*, paragraphs 3 and 5.

⁶⁵ *Ibid*, paragraph 5.

⁶⁶ CNS minute NA 67/6/5 to CDS dated 24 September 1980.

⁶⁷ This committee, while subordinate to the Defence Council, included as members the Secretary of Defence, the Chief of Defence Staff and the three single Service chiefs.

⁶⁸ Enclosure to CNS minute NA 67/6/5 to CDS dated 24 September 1980, paragraph 7.

⁶⁹ *Item 1 of the Minutes of the Meeting of the Defence Executive Committee (DXC (80) M20) Held on 14 October 1980*, paragraph 7.

Nevertheless, the Navy had its way, and the DXC directed ACDS (Pers) 'in conjunction with Navy to rewrite the Rules of Procedure at subordinate commander level for Navy so as to allow them to continue the adversary system.'⁷⁰ It is interesting to note that the principal advisers to the DXC in this matter, DLS and ACDS (Pers), were by that time both naval officers.⁷¹ Furthermore, in addition to the influence of CNS, the CDS appointment was also held by a naval officer, Vice Admiral N D Anderson.

Then, following a meeting of the Defence Council on 20 February 1981, the Chief of Air Staff, Air Vice Marshal D E Jamieson, wrote to CDS advising him that:

[During the discussion of the AFDA by the Defence Council ('DC')]... it appeared to be accepted that Army and the RNZAF would retain their traditional investigatory procedure at all levels of summary trial. My staff, in collaboration with Army General Staff were in the process of preparing a case to be put through DXC to DC seeking this adjustment. It now seems that that will be unnecessary.⁷²

While the decision to abandon the attempt to adopt a common summary procedure was not formally made at the 20 February Defence Council meeting,⁷³ on 9 March 1981 ACDS (Pers) forwarded a memorandum to the Defence Council which squarely raised that as one of two options for the resolution of the issue.⁷⁴ The matter was considered by the members of the Defence Council out of session and, on 15 April 1981, the Secretary of Defence circulated a memorandum recording that:

Defence Council's decision is to adopt Option B of the Reference, ie, the option which abandons a common summary disposal procedure, and allows separate summary disposal procedures for the Navy on the one hand and the Army and RNZAF on the other, based on existing procedures.⁷⁵

With that decision, the dream of a joint system of summary disposals was shattered. The struggle for a single system had absorbed countless man-hours for over eight years from November 1972 until April 1981. At the end of it, all the Defence establishment had to show for its efforts were two summary disposal systems which reflected very closely the

⁷⁰ *Ibid*, paragraph 16b.

⁷¹ Captain Deane and Commodore Ellison respectively.

⁷² CAS Minute No 20/1981 (Air 210/1/33) to CDS dated 23 February 1981.

⁷³ ACDS (Pers) minute to CDS dated 9 March 1981.

⁷⁴ The alternative option was to proceed with the compromise option along the lines proposed by the then DLS in November 1975: ACDS (Pers) memorandum Def 50/5/40 for Defence Council dated 9 March 1981.

⁷⁵ Secretary of Defence memorandum Def 50/5/40 dated 15 April 1981. Section 15(2) of the Armed Forces Discipline Amendment Act 1981 subsequently amended AFDA s 150 by adding subsection (3), which provides: 'The rules of procedure may make different provision for different services of the Armed Forces.'

status quo ante. It meant that, for the next 20 or more years, discipline in the New Zealand Armed Forces would be enforced using what were essentially the old naval and military forms of summary disposal, with the mere cosmetic change that those systems were now contained in a single piece of subordinate legislation. Those systems are described and compared in the following chapter. For much of the period during which the separate naval and military forms of summary disposal have been in operation under the AFDA, they have been administered in three Services which have also conducted their military operations separately to a great degree. However, on 1 July 2001 this era came to an end. The operational elements of the New Zealand Defence Force ('NZDF') were placed under permanent joint command for the first time, in accordance with the Government's commitment to 'a joint approach to structure and operational orientation'.⁷⁶ Given the fact that the maintenance of discipline is a key component of command, it is therefore to be hoped that the cause of a joint system of summary discipline can be revived, and that is the purpose of this thesis.

⁷⁶ *Government Defence Statement: A Modern, Sustainable Defence Force Matched to New Zealand's Needs*, New Zealand Government, 8 May 2001, p. 2.

Chapter 2

The Summary Disposal Systems of the New Zealand Armed Forces in 2002

This chapter describes the two summary disposal systems which are currently operating within the NZDF following a thematic sequence. To facilitate the analysis of the systems' several strengths and weaknesses in subsequent chapters, it draws comparisons between the two systems and raises some legal issues, which are dealt with more fully later. For the sake of convenience, the two systems are referred to as 'the naval system' and 'the military system', the latter of which refers to the system operated by the Army and the RNZAF.¹

The starting point in any prosecution under military law is the commanding officer's ('CO') consideration of whether the allegation is well-founded and, if so, whether pursuant to AFDA s 103 the accused should be charged under military law; by the civil authorities; or not at all. The procedure followed under s 103 is joint in the sense that all three Services follow the same process. For that reason, this chapter focuses on the process which follows once it has been decided that an allegation is well-founded and the accused should be prosecuted.

The Investigation

Once an allegation has been recorded in the form of a charge under the AFDA, the next stage in the process is the investigation. The investigation is a feature common to both the naval and military systems. It does not describe a process followed by law enforcement officials to seek and obtain evidence, as might be understood from

¹ Summary hearings conducted under the naval system are customarily known as 'Tables' while under the military system they are known as 'orderly rooms'. These terms will also be used in this and following chapters where appropriate.

the ordinary usage of the term.² Rather, an investigation under military law is a hearing conducted by an officer to determine whether, *inter alia*, there is a *prima facie* case, required before any charge may proceed to be tried or dealt with summarily. This process is a mandatory first step in any military prosecution.³

Under both the naval and military systems, the accused is brought before the officer investigating the charge, who ensures that the accused is correctly described in the record of proceedings,⁴ reads out the charge or charges and makes sure that the accused understands what he or she has been charged with. After this, the officer explains in prescribed terms⁵ the purpose of the investigation, determines whether the evidence will be heard on oath,⁶ and proceeds to hear the evidence in support of the charge.

However, this is where the common approach to investigations under military law begins and ends. The classes of officers authorised to conduct investigations in the naval and military systems are different, as is the method of investigation and the manner in which charges may be disposed of on completion of the investigation. The characteristics of each system are described below.

The naval system

In most cases, a charge against a rating below the rank of chief petty officer⁷ will be investigated by the officer of the day ('OOD'). RP 2(1) provides that:

² This process is known as the 'preliminary inquiry' in military law: *see* the reference to this in AFDA s 122(d).

³ *See* AFDA s 104(1), but note that, while that provision states that the commanding officer *shall* investigate, AFDA s 115(1) authorises commanding officers to delegate this function to any one or more officers under his or her command.

⁴ (Navy) Rules 16(2)(a) and 19(2)(a) of the Armed Forces Discipline Rules of Procedure 1983 (SR 1983/236) [hereinafter 'RP(s)']; (Army/Air) RP 33(2)(a). This entails reading out the accused's service description from the form MD 601 Charge Report and enquiring from the accused as to whether it is correct.

⁵ (Navy) RPs 16(2)(c) and 19(2)(c); (Army/Air) RP 33(2)(c).

⁶ This is optional at the accused's discretion: RP 9(1).

⁷ For a table setting out this and other military ranks and their equivalents, *see* the Armed Forces Table of Equivalent Ranks Order 1983 (SR 1983/233).

“Officer of the day”, in relation to the Navy, means the officer of the day in the ship or establishment to which the accused belongs; and includes the officer of the watch in that ship or establishment.

The OOD is not a disciplinary appointment as such – the OOD is responsible, as the CO’s representative, for running all the ceremonial, emergency, security and other duty routines in the ship or establishment. In a ship at sea, many of the OOD’s functions are subsumed by the officer of the watch on the bridge. These officers may be as junior in rank as an ensign. Furthermore, an OOD is not an officer exercising summary powers, as defined by AFDA s 2(1), because he or she cannot impose punishment.⁸

There are two exceptions to this general rule. The first relates to any naval organisation whose commander, while not a CO in his or her own right and not an executive officer (‘XO’), has been delegated powers of punishment pursuant to AFDA s 115 by his or her CO.⁹ There are currently only two naval organisations which fit this description, both within the Royal New Zealand Naval College. They are the Officer Training School and the New Entry School. The second exception is detachment commanders. In relation to the Navy, AFDA s 2(1) defines a detachment commander as:

...an officer who is for the time being posted, or authorised by his commanding officer to be, in command of–

- (i) A tender or boat; or
- (ii) A body of persons stationed or employed at a distance from the ship or establishment to which they belong:

A tender is defined as:

A ship or vessel whose officers and ratings are posted additional to a parent ship for duty in the former.¹⁰

One example of a tender is the RNZN’s diving support vessel, HMNZS *Manawanui*, which is a tender to the naval shore establishment, HMNZS *Philomel*.

⁸ See note 16 to AFDA s 2 in the *Manual of Armed Forces Law*. See also contextual support for this interpretation in RP 14(1), where ‘officer of the day’ is specified as a category in addition to ‘officer exercising summary powers’.

⁹ Hereinafter referred to as a ‘non-XO delegate’.

¹⁰ NZBR 23 – *Defence Force Orders (Navy)*, Royal New Zealand Navy, September 2001, p. 15.

Where a rating below the rank of chief petty officer or a midshipman¹¹ is under the disciplinary jurisdiction of a non-XO delegate, that officer investigates the charge in lieu of an OOD.¹² A similar rule applies in respect of ratings or midshipmen who have a detachment commander, except that detachment commanders must investigate charges against all ratings under their command who hold a rank below warrant officer.¹³

In the majority of naval units (ie excepting tenders and other detachments), chief petty officers are in a class of their own in the matter of investigations under the AFDA. RP 22(1) provides that the investigation shall be conducted by the XO.¹⁴ Every naval ship and establishment has an XO, and it is to this appointment which the RP refers.¹⁵ Again, the appointment of XO in the Navy is not solely a disciplinary one:

The Executive Officer has three separate functions, as follows:

- a. ***Executive Officer:*** The Executive Officer is accountable to the Commanding Officer for the organisation, training, discipline and welfare of the ship's company. All ship's officers are subject to [the] authority of the XO except on matters in which Heads of Department have a direct responsibility to the Commanding Officer.
- b. ***Operational Organisation:*** The Executive Officer is to superintend the completion of the watch and station bill by specialist and departmental officers. The XO is also responsible under the Commanding Officer for the [nuclear, biological and chemical defence] organisation of the ship and seamanship matters.
- c. ***Second in Command:*** In the capacity as the next in seniority to the Commanding Officer among the officers entitled to exercise sea command, the XO is liable to assume command under some circumstances.¹⁶

¹¹ Charges against a midshipman are investigated and tried summarily as if the midshipman were a rating of able rank: clause 9(1) of the Armed Forces Discipline (Exemptions and Modifications) Order 1983 (SR 1983/234) ('AFDEMO').

¹² RP 19(1)(a).

¹³ RP 19(1)(b).

¹⁴ Notwithstanding this requirement, the XO must be the holder of a delegation from his or her commanding officer pursuant to AFDA s 115(1) to be able to perform this role.

¹⁵ See RP 2(1) definition of 'executive officer'.

¹⁶ NZBR 9 – *Royal New Zealand Naval Command, Management and Divisional Manual*, Royal New Zealand Navy, 1998, paragraph 02009.

Finally, charges against officers and warrant officers are investigated by the commanding officer of the accused.¹⁷

Turning now to the method of investigation under the naval system. With the exception of investigations conducted by detachment commanders and non-XO delegates, investigations under this system are conducted under what may be described as a quasi-adversarial model. The adversarial system is that adopted by the criminal trial systems of common law countries such as New Zealand. This is in contrast to the inquisitorial system that we will examine in the context of the military system, which is prevalent in countries which have adopted the Romano-Germanic system of civil law. The two systems mandate quite different approaches. As McDowell and Webb explain:

In simplistic terms an adversarial system involves the parties being placed in opposition to each other, with an impartial Judge who determines a “winner”. In reaching a determination, the issues in question at trial are clarified, and each of the parties submits their argument in support of their own case (in accordance with an established procedure and evidential rules). The neutral Judge determines who is the successful party, having regard to the merits of, and law that relates to, the case. The system may be criticised for being competitive, and for engendering bad feeling between its participants. Furthermore, it places significant emphasis on the ability of one’s lawyer – particularly in the higher Courts, where legal argument tends to be more difficult and complicated.

The adversarial system can be contrasted with the inquisitorial system. The latter method is employed in many European countries, and involves the adjudicator and Court participating actively in the fact-finding process. That is, they inquire into the truth of a matter, or guilt or innocence of an accused. As the fact-finder, the Court may itself, or through various personnel, undertake research.¹⁸

So, true to the adversarial system, in cases investigated by an OOD, XO or CO, ‘an officer or rating is assigned to assemble the evidence in support of the charge and to prosecute the case in support of the charge’ in every case.¹⁹ By Service custom, the prosecutor at most investigations is the Master at Arms or other rating who made the preliminary enquiry into the allegation. Balancing the adversarial equation, the accused must be assigned an officer or rating ‘to assist the accused in the preparation

¹⁷ RP 27(1).

¹⁸ Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory*, 2 ed, Butterworths of New Zealand Ltd, 1998, p. 242. See also Christian Dadomo and Susan Farran, *The French Legal System*, Sweet and Maxwell, 1993, p. 151.

¹⁹ RP 15(1).

and presentation of his case and, where necessary, to act on behalf of the accused', unless:

- (a) the accused states in writing that he or she does not require such assistance; or²⁰
- (b) the investigating officer is 'of the opinion that the services of an officer or rating cannot reasonably be made available to the accused, having regard to the exigencies of the service or the strength or location of the unit or establishment to which the accused belongs'.²¹

As is apparent from Chapter 1, by Service custom the role of assisting officer is almost invariably performed by the accused's divisional officer.

As a general rule, the evidence at such an investigation is adduced in much the same manner as it would be in the ordinary criminal courts of New Zealand. The prosecutor calls his or her witnesses, leads their evidence and then, after any cross-examination by the assisting officer, has the opportunity to re-examine.²² If the OOD, XO or CO finds that there is a *prima facie* case at the close of the prosecution case,²³ the same procedure applies, *mutatis mutandis*, to any witnesses called on behalf of the accused.²⁴

Under this system, then, the OOD, XO or CO is cast in the role of McDowell and Webb's 'neutral' and 'impartial Judge'. However, they are vitally interested and involved in the affairs of their ships – it is their duty to be so – and therefore such officers do not satisfy this criterion, if one applies the benchmark of a civilian Judge. Furthermore, RP 16 mandates a far greater role for the investigating officer than that of a mere 'umpire'. The officer may 'put such questions to each witness as he considers necessary',²⁵ and 'may call or recall any witness if he considers that it is in

²⁰ RP 14(1).

²¹ RP 14(2).

²² RP 16(2)(d).

²³ This may include consideration of any written statements admitted with the consent of the accused: RPs 11 and 16(2)(e).

²⁴ RP 16(8).

²⁵ RP 16(2)(d) [prosecution witnesses]; RP 16(8)(b) [defence witnesses].

the interests of justice to do so'.²⁶ This exceeds the proper role of a common law Judge in an adversarial trial. The leading case in New Zealand on judicial intervention is *E H Cochrane Ltd v Ministry of Transport*.²⁷ In that case, Cooke P held that:

... even under the adversary system the Judge is entitled, provided that he avoids descending into the arena, to engage in what was called by Jeffries J in *McClellan v Ministry of Transport* (Auckland, M 722/83, 16 September 1983) "a lively and active participation in the trial process". Of course, the more lively his activity, the more wary the Judge has to be of the pitfall. We would put it that he should avoid any appearance of taking on an adversary role himself or of espousing a cause, but that he can rightly be constructive, particularly in clarifying issues or eliminating irrelevancies.²⁸

The controls on the questioning of witnesses by investigating officers in the naval system are effectively non-existent when compared with those on Judges in the adversarial system. Furthermore, the ability of such a Judge to call a witness is far more tightly constrained than the power conferred by RP 16(9). In *R v Bishop*, Henry J, delivering the judgment of the Court of Appeal, held that:

There is no provision relating to the right of a trial Judge to call a witness. That the right exists nevertheless is not in dispute (*R v Mokokoko* (1904) 23 NZLR 829, 831; *R v Harris* [1927] 2 KB 587, 594; *R v Tregear* [1967] 2 QB 574, 582). The authorities make it abundantly clear that the right is to be exercised only sparingly and where the interests of justice clearly so require. It may for example be exercised for the purpose of remedying a slip, as in *R v Nash* [1958] NZLR 314 where the trial Judge recalled a Crown witness following the conclusion of all evidence to remedy an omission in the witness's earlier evidence. It may also be appropriate when some unforeseen matter arises and such a course is necessary to avoid an injustice.

It must however require a truly exceptional set of circumstances for a trial Judge to take that course when neither prosecution nor defence intend to call the witness and it is also inappropriate to make an order under s 368(2).²⁹ Here the Crown made a deliberate and proper decision not to call the victim of the offending, one which was endorsed by the Judge. The defence did not propose to call her. It is difficult to see how the interests of justice then required the intervention of the Court. The reason given, namely that the Crown should have the right to cross-examine on facts in its possession (presumably the prior statements of the complainant), and that coupled with the defence right to cross-examine would give the jury "the best view of the facts" is not in our view able to be supported.³⁰

²⁶ RP 16(9).

²⁷ [1987] 1 NZLR 146 (CA).

²⁸ *Ibid*, 150. This formulation of the law was adopted by the Court of Appeal in the more recent case of *R v Loumoli* [1995] 2 NZLR 656, 669. See also Donald L Mathieson (ed), *Cross on Evidence*, looseleaf NZ ed, Butterworths of New Zealand Ltd, paragraph 9.5 [hereinafter '*Cross on Evidence*'].

²⁹ Under section 368(2) of the Crimes Act 1961, the Court may make an order requiring the prosecution to call a witness.

³⁰ [1996] 3 NZLR 399, 401 (CA).

The power conferred by RP 16(9) clearly goes further than this. Thus, for present purposes, it suffices to note that, for these and other reasons,³¹ the form of investigation followed by OODs, XOs and COs can best be described as quasi-adversarial.

Perhaps the most interesting aspect of the naval system, however, is the procedure prescribed for investigations by detachment commanders and non-XO delegates by RP 19. While the conditional requirement for the accused to be assisted by an officer or rating is also a feature here, there is no authority for the appointment of a prosecutor.³² Accordingly, instead of 'call[ing] upon the prosecutor to adduce the oral evidence in support of the charge',³³ as is the case at an OOD's Table, the detachment commander or non-XO delegate 'hear[s] the oral evidence in support of the charge'.³⁴ There is no mention of a prosecutor and, in fact, the procedure prescribed is in identical terms to that provided for in the military system.³⁵ In short, despite the assertion that the retention of a prosecutor at the summary level was 'a point of particular concern to Navy'³⁶ in 1975, the summary disposals system which was established for the Navy's tenders, new entry and officer training schools in 1983 is an inquisitorial system without a prosecutor. Indeed, at the investigation stage, this system is virtually identical to that operated under the military system, with the exception of the role of the assisting officer.

The military system

The structural architecture of investigations under the military system is markedly less complex than that under the naval system. That does not necessarily mean that

³¹ Including the question mark over the independence of any assisting officer appointed pursuant to RP 14(1).

³² See RP 15(1).

³³ RP 16(2)(d).

³⁴ RP 19(2)(d).

³⁵ RP 33(2)(d).

³⁶ MAFL Project Officer minute Legal/53 to Deputy Chief of Naval Staff dated 14 April 1975, paragraph 8b.

it is better, but neither does it mean that the military system is necessarily less fair to the accused.

In cases involving soldiers and airmen below the rank of warrant officer (and officer cadets³⁷), investigations under the military system are generally conducted by ‘subordinate commanders’. Like a naval XO, a subordinate commander is an officer exercising delegated powers of punishment under AFDA s 115. The delegation is held from the subordinate commander’s commanding officer. Most officers commanding sub-units in the Army (eg infantry company commanders) are subordinate commanders. In the RNZAF, subordinate commanders are generally flight lieutenants or squadron leaders. Their command appointments vary depending on, *inter alia*, whether they are serving in a flying or ground squadron.³⁸ The important difference between this approach and that in the Navy is however that the appointment of a subordinate commander is entirely discretionary on the part of the CO and could theoretically be conferred or removed with little difficulty, independently of the officer’s appointment in command. Furthermore, a CO under the military system has complete discretion as to which of his or her officers will be subordinate commanders. In the Navy, if an XO did not hold a delegation under AFDA s 115(1) the naval system would not function, at least in respect of charges against chief petty officers.³⁹

Returning to the military system, RP 33(1) provides that:

Where an allegation has been recorded in the form of a charge and the accused is below the rank of warrant officer and has a subordinate commander who is empowered to investigate and dispose of the charge, he shall be brought before his subordinate commander who shall investigate the charge in accordance with the succeeding provisions of this rule.

RP 33(1) is interesting for two reasons. First, as a general principle, it assigns the role of investigating officer to one authority, the subordinate commander, for all

³⁷ See AFDEMO cl 9(1).

³⁸ Conversation with Squadron Leader Michael Bain, Air Staff, May 2002. See also *Defence Force Orders for the Air Force*, Royal New Zealand Air Force, 24 June 2002, paragraph 5.113 [hereinafter ‘DFO(F)’].

³⁹ There is no provision under the naval system for a commanding officer to investigate a charge him or herself.

soldiers and airmen below the rank of warrant officer. Furthermore, this investigating officer, in contrast with the Navy's OOD, is an officer exercising summary powers in the sense that, as we shall see, he or she has the power to punish a soldier or airman of the rank of sergeant or below. The implication of this is that, in the vast majority of disciplinary cases involving relatively minor infractions by junior personnel, the accused may only need to appear at one hearing for the matter to be disposed of. The OOD's role under the naval system effectively precludes this.

Second, RP 33(1) contemplates that there may be cases involving a soldier or airman below the rank of warrant officer which a subordinate commander will not be empowered to investigate. This reflects the CO's residual discretion under AFDA s 115(6) to 'carry out the initial investigation instead of the delegate'.⁴⁰ While the *Manual of Armed Forces Law* cautions that this 'power should be used sparingly and not without good reason',⁴¹ it provides a further degree of flexibility not present in the naval system.⁴²

In common with the naval system, COs and detachment commanders may also conduct the investigation of charges in certain circumstances. However, the investigative jurisdiction of these two appointments under the military system is broader than that of their naval counterparts. As indicated above, a CO under the military system may conduct the initial investigation of a charge against any soldier or airman under his or her command if that accused 'has no subordinate commander or detachment commander who is empowered to investigate and dispose of the charge'.⁴³ Furthermore, where a subordinate commander has investigated the charge

⁴⁰ Note 7 to AFDA s 115 in the *Manual of Armed Forces Law*.

⁴¹ *Idem*.

⁴² The absence of any provision for a naval CO to take over the investigation of a charge against a rating below the rank of warrant officer arguably raises an argument that, to that extent, the naval system is *ultra vires* the AFDA. While the RPs which constitute the naval system are made pursuant to AFDA s 150(2)(a), the *ultra vires* doctrine looks beyond the empowering provision and holds that '[d]elegated legislation will exceed Parliament's delegation if it permits/prohibits that which the enabling statute expressly or impliedly prohibits/permits: Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2 ed, Brookers Ltd, 2001, p. 919. To the extent that the naval RPs do not appear to permit the CO to exercise a power reserved to him or her by AFDA s 115(6), it is arguable that they are *ultra vires*.

⁴³ RP 37(1)(b).

but has decided, for one of the reasons discussed below, that he or she is not able to deal with it summarily, the accused will be remanded to the CO (or detachment commander⁴⁴), who must investigate the charge, again, him or herself.⁴⁵ Finally, and in common with their naval counterparts, COs under the military system usually conduct the investigation of charges against warrant officers and officers.

A further difference between the naval system and the military system appears on the question of whether a detachment commander can also perform this role in respect of warrant officers and officers, in lieu of the CO. AFDA s 114 provides:

Subject to such limitations or restrictions as may be imposed by or in accordance with orders of the Chief of Defence Force, a detachment commander may exercise all or any of the powers conferred on commanding officers in the same service by or in accordance with this Part of this Act.

In line with this mandate, where under the military system a charge is recorded against a warrant officer or officer who has a detachment commander, that detachment commander investigates it.⁴⁶ However, a naval detachment commander has no equivalent power under Part V of the RPs. In view of the fact that no limitation or restriction has been imposed on naval detachment commanders in this respect by or in accordance with orders of the Chief of Defence Force,⁴⁷ it would appear that this may be a defect in the naval RPs.

The power of detachment commanders under the military system to investigate charges against warrant officers and officers under their command is, of course, supplementary to their power, in common with naval detachment commanders, to investigate charges against soldiers and airmen holding a lower rank.⁴⁸

⁴⁴ RPs 34(7) and 36(a).

⁴⁵ RP 37(1)(a). A similar process follows the investigation of a charge against a warrant officer or junior officer by a CO, where the CO decides that the charge should proceed and his or her superior commander is empowered to deal with it summarily. In such cases, once the accused has been remanded, the superior commander is required to conduct his or her own investigation: RP 44.

⁴⁶ RP 40.

⁴⁷ See Section 10 of *Defence Force Orders (Discipline)* in the *Manual of Armed Forces Law* [hereinafter 'DFO(D)'].

⁴⁸ RP 36.

Investigative procedure in the military system

Having dealt with the jurisdictional aspects of investigations under the military system, it is now necessary to examine the procedure followed in such investigations. As mentioned above, the investigation under the military system is inquisitorial in nature. At the beginning of the orderly room, the accused is marched before the investigating officer under escort.⁴⁹ In addition, *Defence Force Orders for the Army* require that private soldiers 'be deprived of their headdress and any articles they could use as missiles during the investigation or hearing of any charge'.⁵⁰ The 'missile' most commonly removed is the accused's corps belt. While the significance of these customary aspects of an orderly room may be largely lost on the uninitiated, they have the effect of further humiliating the accused soldier.

In both the Army and the Air Force, the witnesses are brought into the orderly room to hear the charge read. The exact procedure for this is not laid down in the *Manual of Armed Forces Law*, and thus there is some variation, but *Defence Force Orders for the Air Force* provide that:

Officer, warrant officer and civilian witnesses are to be invited into the orderly room and take up position alongside the officer's desk. The unit warrant officer⁵¹ is then to march in the escort, accused and other witnesses and halt them two paces in front of the officer's desk, standing at attention and facing the officer. The unit warrant officer then stands two paces behind the accused, announces those present and salutes.⁵²

Once the accused, escort and witnesses are present, the investigating officer carries out the preliminaries, such as reading out the charge, which are discussed above at page 24. Once those preliminaries are completed, all witnesses other than the first witness in support of the charge are led out of the orderly room. RP 33(2)(d) then directs the investigating officer to:

⁴⁹ NZ P3 *Defence Force Orders for the Army*, vol 3, New Zealand Army, 13 March 2002, paragraph 31041; DFO(F) paragraph 5.127.

⁵⁰ *Ibid*, paragraph 31042. The accused is required to remove his or her headdress only in the RNZAF: DFO(F) paragraph 5.127.

⁵¹ The Army equivalent of the unit warrant officer is the company or regimental sergeant major.

⁵² DFO(F) paragraph 5.128. The witnesses referred to here include any defence witnesses.

Hear the oral evidence in support of the charge, put such questions to each witness as he considers necessary, and give the accused an opportunity to question each witness.⁵³

Thus the evidence of each witness customarily commences with the investigating officer asking, 'Could you give me your evidence please', or some question along those lines, at which point the witness is expected to tell his or her story in narrative form. Following any clarifying questions by the investigating officer, the accused is given an opportunity to question the witness. Although the RP does not call it cross-examination, that is in effect what the accused is expected to be able to do, without any assistance. It is questionable whether this is within the capabilities of many junior personnel, especially in more complicated cases. This raises a substantial question regarding the fairness of the investigation under the military system, which will be examined in depth in Chapter 5.

In common with their naval counterparts, once they have heard all the evidence in support of the charge,⁵⁴ investigating officers under the military system decide whether or not there is a *prima facie* case. If there is a *prima facie* case, any witnesses called to give evidence by the accused, including the accused if he or she elects to give evidence, are questioned in very much the same manner as are witnesses in support of the charge. The one difference may be that, while the accused is entitled to cross-examine a witness in support of the charge, presumably he or she could not ask leading questions of a witness called in his or her own behalf.⁵⁵ Again, in common with their naval counterparts, investigating officers under the military system have a discretion to call further witnesses on their own initiative, before deciding whether the charge should proceed.⁵⁶

⁵³ While this RP is directed at subordinate commanders, it applies to COs (RP 37(2)), detachment commanders (RPs 36 and 40) and superior commanders (RP 41(2)) also.

⁵⁴ This may include written statements with the consent of the accused: RPs 11 and 33(2)(e).

⁵⁵ See *Cross on Evidence*, paragraph 9.12. Although the relevance of such rules, which apply to and have evolved in the context of, adversarial proceedings, is dubious in an inquisitorial proceeding, the rules of evidence in an orderly room are 'the same as those that are followed in the High Court when exercising its criminal jurisdiction': AFDA s 147(1) and RP 12(1).

⁵⁶ RP 33(9).

It will be seen from the above that there appear to be two categories of evidence which are adduced before an investigating officer under the military system: oral evidence given by witnesses in the orderly room and written statements admitted with the consent of the accused pursuant to RP 11. This is the same as applies in the Navy's quasi-adversarial investigation and is certainly the rule in investigations conducted by a subordinate commander or superior commander. However, the military system provides COs and detachment commanders with an additional method of receiving evidence.

Under RP 37(3):

If at any time during the course of his investigation of the charge the commanding officer considers that, on the evidence so far put forward,—

- (a) He will, in all probability, determine that the charge should proceed and that he should remand the accused for trial by court-martial; or
- (b) The evidence relevant to the charge involves or is likely to involve complex issues of fact or law or both, and that the investigation would be materially assisted by having the evidence committed to writing,—

he may adjourn the proceeding to enable the evidence (including the evidence already put forward) to be committed to writing in accordance with rule 47 of these rules; and, if he does so, he shall inform the accused of the purpose of the adjournment.⁵⁷

While RP 47(1) provides a choice of format for the recording of evidence under this rule, as a general rule COs and detachment commanders in the Army and Air Force order the preparation of a summary of evidence in accordance with RP 48.

Essentially, this involves appointing another officer⁵⁸ to:

Hear each of the ... witnesses in support of the charge give his evidence in the presence of the accused, put such questions to each such witness as he considers necessary, and give the accused an opportunity to question each such witness.⁵⁹

This evidence is recorded in writing and signed by the witnesses.⁶⁰ Once the

⁵⁷ While this RP applies to the investigation of charges by a CO against a soldier or airman below the rank of warrant officer, it also applies to such an investigation conducted by a detachment commander: RP 36. Furthermore, COs and detachment commanders have a power in almost identical terms in respect of the investigation of charges against officers and warrant officers: RPs 40 and 41(3).

⁵⁸ RP 48(1) permits the CO or detachment commander to take the summary of evidence himself, but this is rarely done, if ever, at least by COs.

⁵⁹ RP 48(6)(b). There is also provision for the admission written statements in some circumstances: RP 48(4).

⁶⁰ RP 48(2) and (3).

evidence in support of the charge has been recorded, the accused is given an opportunity, under caution, to give or call any evidence which he or she wishes included in the summary of evidence.⁶¹

The most interesting aspect of a summary of evidence is the use to which it may be put by the CO or detachment commander once it has been completed. He or she is effectively permitted to use the evidence in the summary as the basis for his or her decision as to whether or not the charge should proceed, thus avoiding the need to hear that evidence orally.⁶² Thus the order to another officer to take a summary of evidence is in effect a delegation of the investigative function. While this is a concept foreign to the common law, it has its equivalent in the criminal procedures of major civil law jurisdictions. In France, before an accused is committed for trial, there must be an *instruction préparatoire* (judicial investigation), during which a *juge d'instruction* (investigating judge) performs a very similar function to the investigation conducted under New Zealand military law.⁶³ Article 151 of the French *Code de procédure pénale* provides that a *juge d'instruction* may delegate, *inter alia*, many of his or her powers to hear evidence to any judge of his court, another *juge d'instruction* or, more commonly, a police officer.⁶⁴

Notwithstanding the parallels with French criminal procedure, there is a significant point of difference between the role of a *commission rogatoire* and the use of a summary of evidence by a CO or detachment commander under the military system. This is that an accused whose case is investigated by a *commission rogatoire* can only, at worst, be committed for trial by the *juge d'instruction* based on the evidence adduced. This is in sharp contrast with the position under RPs 37 to 39, where the accused is in jeopardy of being found guilty and punished based entirely on evidence which the officer exercising summary powers has not heard but only read. This raises a question under the New Zealand Bill of Rights Act 1990, which will be dealt

⁶¹ RP 48(7).

⁶² See RPs 36, 37(4), 40 and 41(4).

⁶³ See Dadomo and Farran, p. 192.

⁶⁴ *Ibid*, p. 196. The person carrying out this delegated role is known as a 'commission rogatoire'.

with in Chapter 5, namely whether such a process is consistent with the right to a fair hearing.

The Summary Disposal

Under both the naval and military systems, the question before every investigating officer at the conclusion of the investigation is whether the charge ‘should proceed’.⁶⁵ If the investigating officer decides that the charge should not proceed, he or she is required to dismiss it. Once a charge under the AFDA has been dismissed by an investigating officer, a subsequent charge alleging that the accused committed that offence⁶⁶ may not be tried or dealt with by any New Zealand military tribunal⁶⁷ or laid before a New Zealand civil court.⁶⁸

Interestingly, the *Manual of Armed Forces Law* provides different definitions of the test for whether a charge should proceed; one for the naval system and one for the military system. In respect of the naval system, the *Manual* states:

As a rule the charge should proceed if, at the close of the investigation, the evidence is sufficient to enable a reasonable officer properly directed to convict either in the absence of an answer or explanation from the accused or, if the accused has given an answer or explanation, after taking into account that answer or explanation. For convenience this is often referred to loosely as meaning that there is still a *prima facie* case. In some cases, however, notwithstanding that there is still a *prima facie* case, the officer may decide that there are other reasons why the charge should not proceed, e.g., because the charge is out of time (see AFDA s 20) or the accused is able to rely upon AFDA ss 21 or 22 as a bar to the proceedings.⁶⁹

In contrast, the *Manual* explains that an investigating officer under the military system should not decide that the charge should proceed unless he or she ‘considers that the charge has been proved beyond reasonable doubt’.⁷⁰ In the absence of judicial authority for these differing interpretations, the contrast is problematic.

⁶⁵ See RPs 17(1), 20(1), 22(2), 25(2), 27(2), 34(1), 38(1) and 42(1).

⁶⁶ This would include another offence relating to the same or substantially the same facts: *R v Z* [2000] 2 AC 483 (HL), followed in *R v Degnan* [2001] 1 NZLR 280 (CA).

⁶⁷ AFDA s 22(1)(a).

⁶⁸ AFDA s 21(1)(b).

⁶⁹ Note 1 to RP 17 in the *Manual of Armed Forces Law*.

⁷⁰ Note 1 to RP 34 in the *Manual of Armed Forces Law*.

There is a rebuttable presumption of law that words and expressions used in a piece of legislation mean the same thing throughout:

While there is no general rule that the same meaning must be given to an expression in every part of a statute... it is reasonable to suppose that the meaning will be the same throughout.⁷¹

This presumption has added strength when the relevant word or expression is used many times in the legislation,⁷² as, it is submitted, is the case with the expression, 'he shall determine whether or not it should proceed' in the RPs.⁷³

With great respect to the learned authors of the *Manual of Armed Forces Law*, it is submitted that the interpretation put on the aforementioned test in respect of the military system is in error. 'Beyond reasonable doubt' is the criminal standard which is applied when one is deciding whether the accused is guilty or not guilty.⁷⁴ However, that is not the issue before the officer when he or she has completed the investigation. The issue is whether there is sufficient evidence to warrant transferring the charge to another authority for it to be dealt with or, indeed, to warrant the officer exercising his or her own powers to deal with it summarily. For example, if a subordinate commander decides that the charge should proceed and finds that he or she (a) has sufficient powers of punishment, and (b) is otherwise empowered to deal with the offence summarily,⁷⁵ RP 35(a) requires the subordinate commander to find the accused guilty 'if he is satisfied on the evidence before him that the accused is guilty'. If the latter interpretation of the test for when a charge should proceed following the investigation were correct, there could be no question of whether the subordinate commander was so satisfied; he or she would necessarily be satisfied that the accused was guilty by virtue of having decided that the charge should proceed. Applying commonly understood principles of statutory interpretation, an interpretation should not be put on one RP which renders all or

⁷¹ *New Zealand Breweries Ltd v Auckland City Corporation* [1952] NZLR 144, 158 per F B Adams J.

⁷² *R v Dunn* [1973] 2 NZLR 481, 483 per McCarthy J, cited in J F Burrows, *Statute Law in New Zealand*, Butterworths of New Zealand, 1999, p. 151.

⁷³ As noted above, the expression is used no less than eight times in the same or similar context.

⁷⁴ *R v Hepworth and Fearnley* [1955] 2 QB 600, 603, cited in *Cross on Evidence*, paragraph 5.4.

⁷⁵ RP 34(6).

part of another RP meaningless.⁷⁶ For the foregoing reasons, it is submitted that a consistent test should be applied on every occasion that an investigating officer has to decide whether or not a charge should proceed; namely, the test applied under the naval system at present.

The procedure to be followed when the investigating officer has decided that a charge should proceed is another area of substantial difference between the naval and military systems. Accordingly, the two systems must again be considered separately.

The naval system

In the naval system, the vast majority of cases which proceed beyond the investigation stage are resolved by summary trial. Where the charge has been investigated by an OOD, the OOD must remand the accused to the XO if he or she considers that the XO has sufficient powers of punishment⁷⁷ and is otherwise empowered⁷⁸ to try the offence summarily.⁷⁹ In all other cases, the OOD is required to remand the accused to his or her CO.⁸⁰ While the issue as to whether or not the XO is 'otherwise empowered' is a simple question of law, which the OOD should be able to resolve relatively easily, the question of sufficient punishment places him or her in a dilemma. RP 17(3) provides that 'he shall consider whether, in his opinion, the executive officer has sufficient powers of punishment'. This requires OODs to make a subjective judgment about a matter which is not within their province, namely what range of punishment is appropriate in a particular case to maintain discipline in the ship. Furthermore, the OOD's decision can have an enormous

⁷⁶ Burrows, p. 150.

⁷⁷ As a general rule, the XO will have sufficient powers of punishment if he or she could adequately punish the alleged offender by imposing one or more of the punishments specified in the third column of the Fourth Schedule to the AFDA.

⁷⁸ The XO will be 'otherwise empowered' unless the offence is one which the XO is prohibited from trying summarily, or trying summarily without prior approval, by DFO(D) 1101 or 1103; or the XO's delegation does not permit him or her to try the accused or the particular offence charged.

⁷⁹ RP 17(5).

⁸⁰ RP 17(4). All charges which are to proceed against chief petty officers must also be remanded to the CO by the XO: RP 22(4).

effect on the disposition of the proceedings – it can in fact prevent a case being remanded for trial by court-martial which should otherwise have been tried in that forum. This is because, once the accused has been remanded to the XO, the XO must try him or her.⁸¹ The XO does not have a power to remand the accused to the CO for an investigation with a view to trial by court-martial. The most the XO can do, if he or she finds the accused guilty of an offence which warrants the imposition of a punishment more severe than those permitted under his or her delegation,⁸² is remand the offender to the CO for punishment.⁸³

Where a detachment commander or a non-XO delegate has decided that a charge should proceed, he or she must decide whether ‘in his opinion, he has sufficient powers of punishment and whether he is otherwise empowered to try summarily the offence with which the accused is charged.’⁸⁴ The test applied by a detachment commander or non-XO delegate in such cases is thus essentially the same as that applied by OODs in respect of XOs. If the charge is too serious for his or her jurisdiction, the accused must be remanded to the CO.⁸⁵ If, on the other hand, the detachment commander or non-XO delegate does have sufficient powers, he or she will conduct a truncated form of the normal naval summary trial.⁸⁶ This ‘trial’ consists solely of the officer providing the accused with an opportunity to put forward evidence in reply and then making a finding followed, if necessary, by the punishment phase.⁸⁷ This truncated procedure recognises the futility of the

⁸¹ RP 18.

⁸² This may permit the imposition of any punishment or combination of punishments from the third column of the Fourth Schedule to the AFDA, but may also restrict the maximum permissible punishment further: AFDA s 115(2).

⁸³ AFDA s 115(4A) and RP 18(18). The CO would not, however, be permitted to impose one of the more severe punishments from the second column of the Fourth Schedule to the AFDA, because the offender would have been found guilty without being given the option of electing trial by court-martial: AFDA s 104(3).

⁸⁴ RP 20(3).

⁸⁵ RP 20(4). This rule also applies in respect of charges which would not be so remanded, were it not for the fact that they arise out of the same incident or series of incidents which form the factual basis of a charge which must be so remanded, or the fact that another accused jointly charged with the offence must be so remanded: RP 20(4A).

⁸⁶ This normal form of trial is discussed below.

⁸⁷ The punishment phase is discussed below.

detachment commander or non-XO delegate re-hearing the evidence in support of the charge, when he or she has just done so as part of the investigation.

It will be evident from the foregoing discussion that an accused may be brought before his or her CO in one of two ways. If the accused is a midshipman or a rating below the rank of warrant officer, he or she may be remanded to the CO by an OOD, XO or some other delegate. Alternatively, if the accused is a warrant officer or an officer, he or she will be brought before the CO at first instance. In the former situation, the CO must decide at the outset, without hearing any evidence, whether to try the charge summarily or investigate it with a view to trial by court-martial.⁸⁸ The test applied by the CO in reaching this determination is essentially the same as that applied by a detachment commander in determining whether to try the charge summarily or remand the accused to his or her CO.⁸⁹ If the CO does not have sufficient powers of punishment or is not empowered to try the offence summarily, he or she will investigate the charge with a view to trial by court-martial.⁹⁰ However, even if the CO is empowered and does have sufficient powers of punishment to properly dispose of the offence if the accused is found guilty, the level of punishment anticipated may require the CO to give the accused the right to elect trial by court-martial. AFDA s 104(3) provides that:

No commanding officer shall impose one or more of the punishments of an amount exceeding that or those authorised by the third column of the Fourth Schedule to this Act unless the accused has been given the right to elect trial by court-martial in accordance with, and in the manner prescribed by, the rules of procedure.

If the accused elects to be tried by a court-martial and does not withdraw that election during the subsequent 24-hour 'cooling off' period,⁹¹ the CO must investigate the charge with a view to trial by court-martial.⁹² Thus, in the case of an

⁸⁸ RP 24(1).

⁸⁹ RP 24(2).

⁹⁰ RP 24(3). If, however, after investigating the charge, the CO decides that he or she does have sufficient powers of punishment and is otherwise empowered to try the offence summarily, the CO may do so: RP 25(5).

⁹¹ RP 24(7). The accused may still withdraw his or her election after the 24-hour period, with the leave of the CO or, if the accused has been remanded for trial by court-martial, the leave of the convening officer.

⁹² RP 24(8).

accused remanded to his or her CO,⁹³ the CO will only try the charge against the accused summarily if:

- (a) The CO decides that he or she has sufficient powers of punishment and is otherwise empowered; and
- (b) The CO does not need to give the accused the right to elect trial by court-martial; or
- (c) The CO has given the accused the right to elect trial by court-martial, but the accused has elected to be tried summarily.

In contrast, when a warrant officer or officer is brought before the CO, the CO has no summary trial option. The CO will investigate the charge to determine if it should proceed but, if the charge is to proceed, he or she must remand the accused to a higher authority. In the case of a chaplain or a naval officer of or above the rank of lieutenant commander, there is in fact no summary trial option; officers in this category can only be tried by a general court-martial.⁹⁴ However, in less serious cases a superior commander⁹⁵ may try charges against warrant officers and officers below the rank of lieutenant commander. Thus the CO is put in a similar position to an OOD once he or she has decided that a charge should proceed against a warrant officer or junior officer; the CO must determine whether the superior commander has sufficient powers of punishment⁹⁶ and is otherwise empowered to try the charge summarily.⁹⁷ If the superior commander is not so empowered, in the opinion of the CO, then he or she must remand the accused for trial by court-martial.⁹⁸

⁹³ This relates to midshipmen and ratings below the rank of warrant officer.

⁹⁴ AFDA s 118(3)(a) and RP 27(4)(a).

⁹⁵ In the naval context in normal peacetime conditions, a naval superior commander is an officer who holds the rank of captain or above and holds a warrant to convene general courts-martial, or who is authorised by CNS or the Chief of Defence Force ('CDF') to summarily try charges against junior officers and warrant officers: AFDA s 2(1).

⁹⁶ The powers of punishment of a superior commander are contained in the Fifth Schedule to the AFDA. These powers do not include any custodial punishment or option to reduce the offender in rank. The superior commander may however impose a substantial fine.

⁹⁷ RP 27(5).

⁹⁸ RP 27(6).

The naval summary trial

A naval summary trial may be conducted by an XO, a CO or a superior commander,⁹⁹ depending on the rank of the accused and the gravity of the alleged offence as measured by the severity of punishment which would be warranted following a finding of guilt. The form of trial adopted by COs and superior commanders is expressed to be materially the same as that followed by XOs pursuant to RP 18,¹⁰⁰ and accordingly the following explanation is restricted to the procedure at an XO's Table.

Up until the point where the XO must make a finding of guilty or not guilty, the procedure at a naval summary trial is in large measure the same as that followed by an OOD in investigating the charge. There are three differences however; two relatively minor and one which is very significant. The first minor point is that the prosecutor at a naval summary trial is required to outline the case in support of the charge, before calling any evidence;¹⁰¹ much in the same vein as a prosecutor in a civilian criminal court, who makes an opening address. The second minor point is that there is provision for the calling of rebuttal witnesses by the prosecutor:

Where the accused puts forward evidence in reply, the prosecutor may, at the conclusion of the evidence on behalf of the accused, with the leave of the executive officer, call or recall any witness to give evidence on any matter raised by the accused in his defence that the prosecutor could not properly have put before the executive officer before the accused disclosed his defence or that the prosecutor could not reasonably have foreseen.¹⁰²

The major difference however is that the accused is asked to plead guilty or not guilty to the charge.¹⁰³ The plea in a naval summary trial is significant for two reasons; one conceptual and one practical. On a conceptual level, the plea reinforces the quasi-adversarial nature of the procedure. There is a contest between the

⁹⁹ The truncated form of summary trial conducted by detachment commanders and non-XO delegates is discussed above.

¹⁰⁰ RPs 26(1) and 30(1).

¹⁰¹ RP 18(6)(a).

¹⁰² RP 18(13). Rebuttal evidence might include, for example, evidence of the accused's bad character, which could not properly be put before the XO before the accused put his or her character in issue.

¹⁰³ RP 18(1)(c).

prosecutor and the accused: the prosecutor alleges by way of the charge that the accused committed the offence and the ‘umpire’ wishes to determine at the outset whether the accused contests this allegation. It is difficult to reconcile this with the inquisitorial model, which would have the XO more concerned with finding the facts and inquiring into the guilt or innocence of the accused than with whether the accused contests the allegation. On the other hand, a remnant of the inquisitorial model persists here also. Pursuant to RP 18(16), even if the accused does plead guilty, the XO may still hear all or any part of the evidence, if he or she considers that it is in the interests of justice to do so. There is no equivalent to this power in New Zealand’s purely adversarial criminal justice system.¹⁰⁴ The more usual practice in the case of guilty pleas at a naval summary trial, however, as in the ordinary criminal courts, is for the XO to be apprised of the circumstances of the offence by way of a summary of facts submitted by the prosecutor.¹⁰⁵

On a practical level, the opportunity to plead to the charge is significant because of the efficiency which it can lend to the disposal of offences where the accused does not dispute his or her guilt. In these cases, the plea of guilty is beneficial to both the accused and the command. From the accused’s perspective, it normally abbreviates the duration of the summary disposal. Furthermore, it provides the accused with an opportunity to tangibly take responsibility for his or her own actions at an early point in the proceedings. The officer exercising summary powers can of course take this into account when deciding on the appropriate penalty.¹⁰⁶ From the command’s perspective, most importantly the commander does not spend time hearing evidence to establish facts which the accused does not dispute. Time not spent in this way can be devoted to the commander’s other primary duties.

¹⁰⁴ See section 371 of the Crimes Act 1961.

¹⁰⁵ RP 18(16).

¹⁰⁶ *R v Strickland* [1989] 3 NZLR 47, 51 (CA).

In common with the procedure which must be followed by courts-martial,¹⁰⁷ an XO may not accept a plea of guilty unless certain safeguards have first been observed. RP 18(2) provides that the XO must first satisfy himself or herself that the accused:

- (a) understands the nature of the charge;
- (b) has made the plea voluntarily; and
- (c) understands the consequences of the plea.

Furthermore, if at any time during the proceeding it appears to the XO that he or she should not have accepted the guilty plea, the XO may substitute a plea of not guilty and proceed on that basis as for a contested trial.¹⁰⁸

The vast majority of guilty findings under the naval system result from guilty pleas. In 2001, 195 findings of guilty were recorded in circumstances where the accused had the opportunity to plead guilty (ie excluding summary trials by detachment commanders and non-XO delegates). Of those 195 guilty findings, 165 followed pleas of guilty.¹⁰⁹

The finding stage of a naval summary trial represents another significant point of departure from the investigation under the military system. This is because the XO is directed to make a finding of guilty or not guilty¹¹⁰ without first considering whether he or she:

- (a) is empowered to try the offence summarily;
- (b) has sufficient powers of punishment; or
- (c) should dismiss the charge on any of the grounds specified in AFDA ss 20 to 22, such as that the charge is out of time or that the accused can raise a defence of condonation or a plea of *autrefois acquit*.

¹⁰⁷ RP 89.

¹⁰⁸ RP 18(20).

¹⁰⁹ While, as discussed in Chapter 5, the Joint Summary Disposals Survey indicates less than wholehearted enthusiasm for an adversarial system of summary disposals on the part of Army and Air Force officers, the benefits of providing for pleas are more readily accepted. 65 per cent of Army and Air Force respondents either agreed or strongly agreed that pleas should be taken, 15 per cent were neutral, and only 20 per cent either disagreed or strongly disagreed.

¹¹⁰ RP 18(15).

There is no provision for an XO to take such matters into account at this, or indeed at any stage of the summary trial. This may be explained by the fact that such matters are to be canvassed at the conclusion of the investigation which precedes every such trial. What this means, however, is that the XO must rely on the OOD to identify and deal correctly with what are, in the main, matters affecting the XO's jurisdiction to try the accused summarily. It is true that, for example, if an XO decided that he or she was not empowered to try the offence, the XO could possibly remand the accused to the CO pursuant to the remedial provision of RP 4.¹¹¹ However, it is suggested that this is hardly a satisfactory basis for the resolution of a reasonably foreseeable procedural issue.

The military system

As in the naval system, the vast majority of cases within the military system which proceed beyond the investigation stage are resolved summarily. As mentioned above, most charges against soldiers and airmen below the rank of warrant officer¹¹² are investigated by a subordinate commander. If the subordinate commander decides that such a charge should proceed, he or she must:

- (a) remand the accused to the CO if the accused is a staff sergeant in the Army or a flight sergeant in the Air Force; or
- (b) in every other case, decide whether he or she can deal summarily with the offence.

The latter determination is governed by the same considerations as apply to a detachment commander or non-XO delegate under the naval system. However, if a subordinate commander decides that he or she can deal summarily with the offence,

¹¹¹ RP 4 provides:

'Where, in respect of any case, any matter arises that is not expressly provided for in these rules, every person concerned shall adopt the course that seems to him best calculated to do justice.'

¹¹² This includes officer cadets for disciplinary purposes: AFDEMO cl 9(1).

he or she does not then give the accused another opportunity to put forward evidence in reply. RP 35(a) provides that:

If he is satisfied on the evidence before him that the accused is guilty of the offence charged, [he shall] record a finding of guilty, and inform the accused of that finding...

This procedure is essentially the same for a detachment commander, CO or superior commander who has decided to deal summarily with an offence.¹¹³

The punishment phase

The punishment phase of a summary disposal is very similar, whether it is conducted under the naval or military systems. The common elements are that the officer exercising summary powers must:¹¹⁴

- (a) ascertain details of any period during which the accused was held in custody prior to the charge being tried or dealt with summarily;¹¹⁵
- (b) examine the accused's conduct sheets;¹¹⁶
- (c) if the accused wishes, hear the accused and any witnesses called by the accused in mitigation of punishment;
- (d) impose an authorised punishment or punishments, or discharge the accused without imposing a punishment;
- (e) in the case of detachment commanders,¹¹⁷ COs and superior commanders, make any restitution or compensation orders which are authorised and appropriate; and

¹¹³ See RPs 36, 39(1) and 46(1).

¹¹⁴ See RPs 18(17), 21(5), 26(4), 30(4), 35, 39(2) and 46(2).

¹¹⁵ This may not be taken into account in determining the period of any punishment or detention to be imposed, but must be specified on the committal order for a detainee, as it will affect the date on which he or she becomes eligible for remission of his or her punishment: AFDA ss 102(5A) and 177A.

¹¹⁶ 'Conduct sheets' consist of the form MD 602, which is a cardboard folder containing records of any convictions, civil or military, and commendations which are prescribed to be held in accordance with DFO(D) Section 13.

¹¹⁷ Subject to limitations imposed on them pursuant to AFDA s 114.

- (f) record the details of any forfeitures¹¹⁸ incurred by or under the AFDA, and any cancellation of the whole or any part thereof, and inform the accused.

There are only two elements of the punishment phase which differ according to Service. In the Navy and the Army, mitigation evidence and submissions are presented by an officer representing the accused. While this function is a natural extension of the naval assisting officer's duty under RP 14(1), it is not specifically provided for by the military system. Platoon commanders in the Army provide this service to their soldiers by Service custom. There is no equivalent custom in the RNZAF.

Finally, and in addition to providing details of any period during which the accused was held in custody awaiting trial, naval prosecutors are obliged to provide a report on:

the accused's record and general conduct in the service, ... and details of any information in the possession of the service authorities relating to the accused's circumstances that may be relevant in considering punishment.¹¹⁹

As a matter of practice, the prosecutor is not often called upon to provide such information, as it is usually a constituent part of the assisting officer's address in mitigation.

¹¹⁸ AFDA s 202(1) provides for the mandatory or discretionary forfeiture of pay, depending on the length of absence, by absentees or deserters. Regulations 6 to 8 of the Armed Forces Discipline Regulations 1990 (SR 1990/79) provide for the mandatory or discretionary forfeiture of pay, depending on the circumstances, while a Service member is in service or civil custody or is suspended from duty.

¹¹⁹ RP 18(17)(a).

Review of Summary Findings and Punishments

AFDA s 117(2) provides that:

Where any member of the Armed Forces tried summarily or dealt with summarily is found guilty of an offence against this Act, the finding and any punishment imposed on him may be reviewed—

- (a) By a reviewing authority on application made by him or on his behalf within 6 months after the date of the finding; or
- (b) By a reviewing authority within the meaning of paragraph (b) or paragraph (c) or paragraph (d) of subsection (1) of this section¹²⁰ at any time on its own initiative without any such application; or
- (c) By the Board of Review¹²¹ on being referred to the Board at any time by the Chief of Defence Force or the Chief of Staff of any service.

AFDA s 117(1) prescribes a number of different possible reviewing authorities. However, in accordance with single Service orders, the reviewing authority for a charge is invariably the next superior commander in the chain of command of the unit in which the charge was heard.¹²²

The purpose of such a review is to examine the legality and justice of the finding, punishment and any orders made in respect of that summary disposal. The reviewing authority is able to wield significant remedial powers,¹²³ however a review can best be described as an administrative rather than a judicial process.¹²⁴ It is conducted ‘on the papers’ only – there is no specific provision for a Service member or his or her representative to appear before the reviewing authority for the purpose of making oral submissions.¹²⁵ This may be significant as, although the reviewing authority is required to seek legal advice before making his or her

¹²⁰ This refers to any reviewing authority except the Board of Review.

¹²¹ The Board of Review is constituted by AFDA s 151(1)(b) and consists of a commodore, a brigadier and an air commodore, each appointed by his or her respective single Service Chief of Staff.

¹²² DFO(N) 3001; DFO(A) vol 3, paragraph 31067; DFO(F) paragraphs 5.106 and 5.107.

¹²³ AFDA s 117(4) to (11).

¹²⁴ The distinction between a ‘judicial’ and an ‘administrative’ body is somewhat blurred in modern public law. Joseph states that: ‘Use of the term “judicial” was once explained by looking to the legal consequences of calling a particular function “judicial” rather than “administrative”. Availability of the prerogative writs of certiorari and prohibition and the principles of natural justice once depended on a function being classified “judicial”. When the courts developed the concept “quasi-judicial” for extending the protections, they placed the notion of judicial power on a continuum’: Joseph, p. 241. It is questionable whether the categorisation of reviewing authorities as judicial or administrative adds anything from the perspective of administrative law.

¹²⁵ See DFO(D) Section 15.

decision,¹²⁶ the only record of proceedings which is generally available to inform that legal advice is the form MD 601 Charge Report. This gives little indication as to what evidence was adduced or the manner in which the proceeding was conducted. In the absence of a fuller record, it is incumbent on the Service member to bring evidential or procedural irregularities to the notice of the reviewing authority. Without legal advice, this may be an onerous task for many Service members; particularly the junior ratings, soldiers and airmen who make up the bulk of those who might wish to seek a review.

From the point of view of developing a joint approach, the present review system is unobjectionable as it already is common to both the naval and military systems. However, given that Service members tried or dealt with under the summary systems have, at present, no recourse to an appellate body, it will be important to consider the adequacy of the review system in the context of relevant human rights law.¹²⁷

Pathway to a Joint Approach

It is submitted that a close examination of the two systems set out above reveals that, while they draw on different paradigms and have many substantial differences, they also share a great deal of commonality. In many ways, it can be said that, in this respect, they reflect the relationship between the Services in a broader context.

The current systems have worked well for what is now almost 20 years. Given this fact, one might be forgiven for questioning the value of a shift to a joint system. Change for change's sake is certainly not in the interests of the efficient and effective maintenance of discipline in the Armed Forces. There is inevitably a period of 'settling in' following the establishment of any new system where more mistakes will be made and more time taken in processing charges than would

¹²⁶ DFO(D) 1505.

¹²⁷ This exercise is undertaken in Chapter 5.

otherwise be the case. That having been said, the Armed Forces are certainly moving towards a more joint approach to command, and there is a certain inconsistency between that movement and the retention of a bipartite approach to discipline at the summary level. The case for a joint system is discussed in the next chapter.

Chapter 3

Why a Joint System?

The joint force, because of its flexibility and responsiveness, will remain the key to operational success in the future... To build the most effective force for 2020, we must be fully joint: intellectually, operationally, organizationally, doctrinally, and intellectually.

Chairman of the Joint Chiefs of Staff, Joint Vision 2020, June 2000

In a recent address to the New Zealand Institute of International Affairs, the CDF, Air Marshal B R Ferguson, noted that:

If conflicts have become more complex, military forces have embarked upon modernisation paths to be effective in responding to them. Again, the most attention gets focused upon developments in weaponry and military equipment. But attention also needs to be paid to the initiatives to develop joint ways of carrying out military operations and preparing military forces. Developing common approaches to tasks and reducing the boundaries between military services have opened up opportunities for innovative combinations of capabilities and contributions of different services. Quite simply, more can be achieved when previously separated resources and structures are brought together.

...

The future NZDF will be a 'tailored' joint force. This does not mean one unified military service. It will contain three single services with their specialist competencies in the land, maritime and air components of military operations, particularly at the tactical level. It does mean that, particularly at the operational and strategic levels, the future NZDF will be overwhelmingly joint in its organisation, work practices, staffing arrangements, responsibilities, and management systems.¹

In Chapter 1 I identified that the policy underlying the AFDA when it was introduced was 'to produce a single code to apply to all the services'.² The fact that this could not be achieved in the period between 1971 and 1983 does not make the goal any less valid or worthwhile. In my view, given that 'a joint approach to structure and operational orientation' is now formally a 'key component of the NZDF',³ it seems anomalous that the disciplinary powers wielded by New Zealand commanders exercising and operating under

¹ Air Marshal B R Ferguson, 'Defence: The Way Ahead' in *New Zealand International Review*, vol XXVII, no 6, November/December 2002, pp. 4 and 6.

² See footnote 38 to Chapter 1 and accompanying text.

³ *Government Defence Statement: A Modern, Sustainable Defence Force Matched to New Zealand's Needs*, New Zealand Government, 8 May 2001, p. 2.

joint command are not common to all three Services. The existence of two separate summary disposal systems must be seen as ‘unfinished business’ in the context of the struggle for a common disciplinary code which commenced in the mid 1960s.

Putting the historical antecedents to one side, there are compelling practical reasons for adopting a joint system of summary disposals. Members of the Army or Air Force have been posted for duty in the Navy, and *vice versa*, for many years. A useful example is the posting of Air Force technicians to maintain naval helicopters on board HMNZ ships, a practice which has continued since the beginning of organic rotary aviation in the RNZN in the mid to late 1960s. A Service member posted to a unit belonging to another Service is deemed to be attached to that Service⁴ and is ‘treated as if he or she were a member of that Service holding an equivalent rank’.⁵ As a consequence, the Air Force technicians referred above would fall to be tried summarily under the naval system if they committed an offence while posted to the ship.

This system has worked well where ‘jointness’ has been manifested solely in the form of single Service units receiving personnel augmentation from another Service. However, the NZDF now has a joint unit, in the form of Headquarters Joint Forces New Zealand (‘HQ JFNZ’), which may in time be the template for other joint units established to achieve synergies in the utilisation of scarce Defence Force resources. The difference between HQ JFNZ and other ‘joint’ units which have been established earlier is that it does not belong to any one Service. In the past, units such as the Defence Communications Unit were placed under the command of a single Service – in that case the Air Force – for the benefit of all three. In such cases, sections 19 and 20 of the Defence Act 1990 operated to make discipline of the ‘joint’ unit’s members a matter for the host Service in the same way as if they were posted to an entirely single Service unit.⁶ HQ JFNZ, on the other hand, is a ‘joint force’ for the purposes of section 12 of the Defence Act 1990:

⁴ Section 19 of the Defence Act 1990.

⁵ Section 20(b) of the Defence Act 1990.

⁶ See, for example, section 19(5)(c) of the Defence Act which provides that members of the Navy and Army are deemed attached to the Air Force when ‘serving in a joint service organisation that is primarily an air force responsibility’.

- (1) The Chief of Defence Force may from time to time establish a joint force comprising members of 2 or more Services...
- (2) Where a joint force is established under this section, this Act and the Armed Forces Discipline Act 1971 shall apply to any member of the Armed Forces serving in the joint force, subject to the following modifications:
 - (a) Anything required or authorised by or under this Act or the Armed Forces Discipline Act 1971 to be done by, to, or before the Chief of Staff of the Service to which the member belongs or is attached, may be done by, to, or before the Chief of Defence Force or, where the Chief of Defence Force has placed the joint force under the command of a Chief of Staff, that Chief of Staff:
 - (b) Such other modifications as may be prescribed.

It will be apparent from the foregoing discussion and the description of the two summary disposal systems in Chapter 2 that the system of summary disposals which applies to a particular case is dictated by the parent Service of the unit to which the accused belongs or is attached. For example, the formal investigation of a charge against a rating below the rank of chief petty officer under the naval system is normally to be conducted by the OOD, an appointment which is unknown outside of naval units. In the Army and Air Force, such investigations are conducted by subordinate commanders, an appointment which is equally unknown in the Navy.⁷ In the case of a unit which is entirely joint – having no particular single Service affiliation – the choice of summary system is therefore problematic. Section 12 of the Defence Act indicates that the short term solution may be for CDF to prescribe that:⁸

- (a) the system to be adopted in a case heard in a joint unit is the system which applies in the accused's parent Service; or
- (b) a particular system (ie the naval or military system) applies to all cases heard in joint units or a particular joint unit.

Currently there is no such prescription. In any case, neither solution is desirable in the long term. The first option would require the CO of the joint unit to master and comply with the procedural rules for two systems.⁹ This is a recipe for needless complexity and confusion. The second option sends the wrong signal about whether the unit is truly joint. Inevitably members of one or more Services may view the adoption of the naval or military system as

⁷ See the definition of 'subordinate commander' in RP 2(1).

⁸ This would have to be done by way of a Defence Force Order: see AFDA s 2(1) as to the meaning of 'prescribed'.

⁹ For example, the CO would need to appoint an XO for the naval system and at least one subordinate commander for the military system.

an indication of single Service 'capture' of the joint command. The long term solution must be the adoption of one system which can be embraced by all three Services as the collective property of the NZDF as a whole. While this could not be achieved 20 years ago, the Armed Forces have since moved on and so has the law.

In 2002 the compromise which must be inherent in any unification of the two summary disposal systems is complicated by the role which domestic and international human rights law has to play in modern military criminal procedure throughout the world. In New Zealand and elsewhere in the Commonwealth, the traditional reluctance of civilian courts to intervene in the administration of military law has palpably reduced during the 20th Century, and there is no reason to suppose that this trend will not continue.¹⁰ Any joint system of summary disposals which is developed must accordingly take into account the impact of, in particular, the New Zealand Bill of Rights Act 1990. That is the focus of the next two chapters.

¹⁰ Cdr Gordon Hook, 'Civilian Supervision of New Zealand Military Tribunals' [2001] *New Zealand Armed Forces Law Review* 10; G R Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Jurisdiction' (2002) 65 *The Modern Law Review* 36.

Chapter 4

The Application of the New Zealand Bill of Rights Act 1990

It is one of the cardinal features of the law of England that a person does not by enlisting in or entering the armed forces thereby cease to be a citizen, so as to deprive him of his rights... under the ordinary law of the land.

41 *Halsbury's Laws of England* (4th ed), paragraph 3; cited in *R v Jack* [1999] 3 NZLR 331, 339 (CMAC).

This chapter examines whether the New Zealand Bill of Rights Act 1990 ('NZBORA') applies to the summary disposal of charges under military law and, if so, to what extent.

Relevance of the New Zealand Bill of Rights Act

In the initial period after the enactment of the NZBORA, there was considerable skepticism as to whether it would have any tangible effect on New Zealand's legal landscape.

Rishworth reports that:

Public reaction was less than overwhelming. The *New Zealand Herald* gave passage of the New Zealand Bill of Rights Act 1990 two column inches on page 5, but gave much more prominence to the Smoke Free Environments legislation enacted on the same day. The editor of the *Capital Letter*, a weekly account of legislative and judicial developments in New Zealand, put the matter thus:

So New Zealand has a Bill of Rights, but will it be as useful as the 1688 English one, or be the precursor of an entrenched Bill as was the 1962 (sic) Canadian one? ...

Unless an expansive view is adopted by the Courts, this Bill of Rights will be only a shorthand for the courts and fodder for the primary schools. It may found an entrenched Bill of Rights in 2010; if not, what was the point?¹

However, lawyers working in the criminal justice system were soon to appreciate that the NZBORA had considerably more to offer than the skeptics suggested. In *Ministry of Transport v Noort; Police v Curran*, a Court of Appeal decision which considered the

¹ Paul Rishworth, 'The Birth and Rebirth of the Bill of Rights' in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Brooker's Ltd, 1995, p. 25.

applicability of NZBORA s 23(1)(b) to evidential breath and blood alcohol tests in road traffic cases, Cooke P opined:

As Barker J pointed out in *Re S* [1992] 1 NZLR 363 the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law where necessary. Such a measure is not to be approached as if it did no more than preserve the *status quo*. That it envisaged change is implicit in the allowance of a 28-day interval before it came into force. In approaching the Bill of Rights Act it must be of cardinal importance to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218.²

Military lawyers were left to ponder what this could mean for military law, especially given that a large part of the military justice system, notably summary disposals, had evolved in the context of a different paradigm to that of the criminal justice system. The relevance of the NZBORA for the military justice system first fell for the consideration of the Courts Martial Appeal Court in 1992. Delivering its judgment in *Froggatt v R*, the Court noted that:

At the commencement of the hearing of the appeal Mr Brewer, senior counsel for the respondent, informed us that on this appeal the respondent did not contend that the Bill of Rights did not apply to proceedings under the Armed Forces Discipline Act... We record that we heard no argument on the question of whether the Bill of Rights applied to proceedings under the Armed Forces Discipline Act. We therefore expressly leave that point open for discussion at some future date.³

The unwillingness of counsel for the Crown to directly challenge the applicability of the NZBORA to military proceedings is perhaps unsurprising, given the strong contextual indications to the contrary within the Act itself. Section 3 of the NZBORA provides that:

This Bill of Rights applies only to acts done—
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

It is trite law that the armed forces are part of the executive branch of government. Furthermore, in administering military law, Service members are performing a public function conferred on them by law. Thus, as a general point of interpretation, the administration of military law must certainly be an act to which the NZBORA applies. Even if it were possible to mount an argument of purposive interpretation⁴ that the special

² [1992] 3 NZLR 260, 270 (CA).

³ (1992) 9 CRNZ 181, 184 (CMAC).

⁴ See section 5(1) of the Interpretation Act 1999.

nature of the armed forces and the military justice system imply that Parliament could not have intended the NZBORA to apply to proceedings under the AFDA, such an argument must be virtually impossible to sustain in the face of Parliament's clear contextual indication that it intended the NZBORA to apply to such proceedings:

Everyone who is charged with an offence—

...

- (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months...⁵

Furthermore, the willingness of modern New Zealand courts to entertain a submission that the NZBORA does not apply to armed forces discipline must always have been in serious doubt. Even before the enactment of the NZBORA, in *Bradley v Attorney-General*,⁶ Tompkins J stated that he agreed with the observation of Jacobs J in the Supreme Court of South Australia that:

Unless constrained by authority to hold otherwise, I am disposed to think, with Professor Nettheim (5 Fed LR 200) that courts in the late 20th century should now 'show the same concern for the rights of members of the forces as they strive to do in the case of civilians', more particularly as many of the older cases invoke perceptions of prerogative power and Crown immunity that have since been seriously questioned, if not eroded.⁷

In 1999, the Courts Martial Appeal Court put the matter beyond doubt in the case of *R v Jack*:

In *Froggatt* at p 184 this Court expressly left open the point as to whether the NZBORA applied to proceedings under the AFDA because the Court heard no argument on that question. Although the Court in these proceedings heard no argument on that issue either, it was accepted by both counsel that the NZBORA did apply, and we believe this is a correct assumption. The NZBORA is to receive a purposive construction and is not to be construed narrowly or technically (*R v Butcher* [1992] 2 NZLR 257 at p 264 and *R v Goodwin* [1993] 2 NZLR 153). Furthermore, because the purpose of the NZBORA is to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights 1966, it would be virtually impossible to conclude that the Act did not apply to members of the armed forces unless such an exclusion was specified in the general provisions of the NZBORA. When s 21 of the NZBORA states that 'Everyone has the right to be secure against unreasonable search' (emphasis added), it does mean 'everyone', whether they are members of the armed forces or not. As was noted in *Froggatt* at p 193 the learned authors of 41 *Halsbury's Laws of England* (4th ed) para 3 stated:

⁵ NZBORA s 24(e).

⁶ [1986] 1 NZLR 176, 188.

⁷ *Coutts v Commonwealth of Australia* (1983) 49 ALR 649, 659. Compare *Fitzgerald v MacDonald* [1918] NZLR 769 (CA), which was followed in *Maxey v Attorney-General* [1954] NZLR 1092.

‘It is one of the cardinal features of the law of England that a person does not by enlisting in or entering the armed forces thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land. . . . He does, however, in his capacity as a member of those forces, incur additional responsibilities, for he becomes subject to a code of naval, military or air force law.’

Section 5 of the NZBORA deals generally with the constraints upon the application of the NZBORA by providing that:

‘. . . The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

In the context of the armed forces the rights and freedoms contained in the NZBORA will be subject to the reasonable limits which can be demonstrably justified in relation to the efficient and disciplined operation of the armed forces...

....

We conclude that although the NZBORA has a place in the law relating to armed forces discipline, the proper exercise of powers arising from statute, or preserved in relation to service custom, will not ordinarily create circumstances in which the NZBORA can be pleaded.⁸

While it is difficult to fault the Court’s conclusion that the NZBORA does apply to proceedings under the AFDA, the *obiter* comment that ‘the proper exercise of powers arising from statute, or preserved in relation to service custom, will not ordinarily create circumstances in which the NZBORA can be pleaded’ may overstate the position somewhat. The argument before the Court was confined to the application of NZBORA s 21 to a naval preliminary enquiry. It did not canvass the application of the NZBORA to military proceedings and procedure generally. In particular, the argument did not touch upon the question as to what impact the NZBORA may have on summary disposals. That question has yet to be addressed by the New Zealand courts. However, as will be shown in Chapter 5, it is possible to draw conclusions about what the impact of some of the key rights might be on the shape of a joint system, based on related developments both in New Zealand and overseas.

⁸ [1999] 3 NZLR 331, 339 (CMAC).

Rights and Minimum Standards

There are 16 specific rights, affirmed by the NZBORA,⁹ contained in NZBORA ss 24 and 25, which affect the conduct of criminal proceedings. Many of these rights are consistent with summary disposals under either the naval or military systems, or both. However, some of the rights may conflict with existing summary procedure and thus dictate to some extent the shape of a future system. In particular, this thesis will examine the rights to consult and instruct a lawyer, the right to a fair hearing¹⁰ and the right to appeal. The first step, however, is to determine whether those specific rights apply to summary disposals. That is the purpose of the next section of this chapter.

Defining ‘Offence’

The qualifying criterion for a person to enjoy the specific rights guaranteed by NZBORA ss 24 and 25 is that the person has been ‘charged with an offence’. The first key question that must be addressed in determining the application of these specific rights is therefore whether a person who is to be tried or dealt with summarily has been ‘charged with an offence’.

It seems readily apparent that, at the very latest, an accused facing disciplinary proceedings under the AFDA is ‘charged’ when he or she is brought before the investigating officer.¹¹ While the allegation will be ‘recorded in the form of a charge’¹² at an earlier point, the investigation is the first occasion at which the Service authorities are required by military law to inform the accused of the particulars of that charge.¹³ However, whether an accused who has been brought before an investigating officer is charged with an *offence* is a more vexed question.

⁹ NZBORA s 2.

¹⁰ Including subsidiary rights relating to the preparation and presentation of a defence.

¹¹ See *dictum* of Goddard J as to the meaning of ‘charged’ in *R v Gibbons* (1997) 14 CRNZ 552, 562.

¹² See AFDA s 103(a).

¹³ See Chapter 2 for further detail regarding this requirement under the naval and military systems.

The Canadian interpretation

The Canadian interpretation of the term ‘offence’ is important, because until relatively recently it certainly represented the law in New Zealand, having been adopted by the High Court in *Drew v Attorney-General*.¹⁴ The leading case in this respect is the Supreme Court of Canada’s decision in *R v Wigglesworth*.¹⁵ That decision turned on whether a civilian conviction recorded against a member of the Royal Canadian Mounted Police, following disciplinary proceedings under the Royal Canadian Mounted Police Act which dealt with the same facts, violated section 11(h) of the Canadian Charter of Rights and Freedoms (‘the Charter’), which provides *inter alia*:

Any person charged with an offence has the right... if finally found guilty and punished for the offence, not to be tried or punished for it again...

The principal matter which the Court had to decide was whether the ‘major service offence’ under the Royal Canadian Mounted Police Act of which Wigglesworth was found guilty was an offence within the meaning of section 11(h) of the Charter. Wilson J, delivering the judgment of the majority, held that a matter would constitute an offence for the purposes of section 11 ‘either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.’¹⁶ She found that an offence would satisfy the ‘by nature’ test if:

... a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity... This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity...¹⁷

If an offence did not satisfy the ‘by nature’ test, it might nevertheless be covered by section 11 if it involved the ‘imposition of true penal consequences’.¹⁸

¹⁴ [2000] 3 NZLR 750, 763 per John Hansen J.

¹⁵ (1987) 45 DLR (4th) 235.

¹⁶ *Ibid*, 251.

¹⁷ *Idem*.

¹⁸ *Ibid*, 252. It is not necessary to consider the meaning of this term for the purposes of the current analysis.

Wigglesworth and summary trials in the Canadian Forces

In 1992, the Supreme Court of Canada applied the *Wigglesworth* test in the context of Canada's military justice system in *R v Généreux*.¹⁹ In delivering the judgment of the majority, Lamer CJC held that a General Court Martial satisfied the 'by nature' test in a ruling which seems to extend beyond courts-martial:

Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline ... relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline... Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*). For these reasons, I find that the appellant, who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court Martial, may invoke the protection of s. 11 of the Charter.²⁰

While Lamer CJC did not specifically mention summary trials, 'service tribunal' is a defined term under Canadian military law which includes 'a person presiding at a summary trial'.²¹ Furthermore, the reasoning he gave applies to summary trials as much as it does to courts-martial. Given that *Généreux* was a case which concerned a General Court Martial, Lamer CJC's *dictum* is of course *obiter*. Nevertheless, in 1994 Canada's Office of the Judge Advocate General concluded that '[a] summary trial is therefore "by nature" a criminal proceeding' and that '[o]nce the "by nature" test is passed it is irrelevant if the summary trial awards penal sanctions'.²² It follows that, under Canadian military law, an offence against the Code of Service Discipline which is tried summarily is still an offence which triggers the protections in section 11 of the Charter.

¹⁹ (1992) 70 CCC (3d) 1.

²⁰ *Ibid*, 16 - 17.

²¹ Section 2 of the National Defence Act.

²² *Summary Trial Working Group Report*, vol I, Office of the Judge Advocate General, Canada, 2 March 1994, p. 51.

The New Zealand position

There are a number of indications that offences under the AFDA are included within the term ‘offence’ in NZBORA ss 24 and 25, even when they are tried or dealt with summarily. As mentioned above, NZBORA s 24(e) guarantees the right to trial by jury ‘except in the case of an offence under military law tried before a *military tribunal*’ [emphasis added]. The use of the term ‘military tribunal’ is significant, in my view. If section 24(e) did not extend to summary disposals on the ground that matters brought before officers exercising summary powers are not ‘offences’, there would have been no need to use such a generic term, which is novel in New Zealand law. The term ‘court-martial’ could have been used. The fact that the term ‘military tribunal’ is used is in my view a strong contextual indication that the exception in section 24(e) is intended to include summary disposals. It follows from this, as a matter of statutory interpretation, that section 24, and thus the term ‘offence’, applies to summary disposals *subject to this exception*. When one adds to this the rebuttable presumption of law that words and expressions used in a piece of legislation mean the same thing throughout,²³ one is led to the conclusion that the word ‘offence’ in NZBORA ss 24 and 25 is intended to include offences tried or dealt with summarily.

In addition to the foregoing contextual argument, in *Drew v Attorney-General* the Court of Appeal gave an indication that is not totally wedded to the ‘disciplinary exception’ approach espoused in *Wigglesworth*:

We have not found it necessary to determine whether prison disciplinary offences under the Act fall within the expression “offence” in ss 24 and 25 of the Bill of Rights. The Canadian authorities to which the High Court Judge referred suggest they do not, but, as Mr Shaw submitted, something can be said the other way.²⁴

An international perspective

In determining the meaning of the word ‘offence’ in NZBORA ss 24 and 25, a New Zealand court would no doubt also look to decisions of international human rights tribunals. As Cooke P said in *R v Goodwin (No 2)*:

²³ See discussion of this rule of law in Chapter 2.

²⁴ [2002] 1 NZLR 58, 74.

The long title of the New Zealand Bill of Rights Act states in para (b) that it is an Act “To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”. Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority.²⁵

Regrettably, the Human Rights Committee has yet to give a view which provides a definitive test for what constitutes a ‘criminal charge’ under article 14 of the International Covenant on Civil and Political Rights (‘ICCPR’). However, McGoldrick notes that aspects of the Human Rights Committee’s work contain ‘strong echoes’ of the jurisprudence of the European Court of Human Rights (‘the European Court’) under the equivalent article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’).²⁶ It may therefore be anticipated that the Committee would follow the leading case on this matter in the jurisprudence of the European Court, *Engel v The Netherlands (No 1)*.²⁷

In the Netherlands, as in many European states, military law is divided into disciplinary and criminal law. Article 6 of the ECHR guarantees a number of rights in respect of ‘criminal charges’, and in *Engel* the European Court was called on to decide whether those rights applied to charges brought under Dutch military law. At paragraph 82 of its judgment, the Court held that:

...the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given “charge” vested by the State in question – as in the present case – with a disciplinary character nonetheless counts as “criminal” within the meaning of Article 6.

In this connection, it is first necessary to know whether the provision(s) defining the offence belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law ...

²⁵ [1993] 2 NZLR 390, 393 (CA).

²⁶ Article 6: Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford University Press, 1991, p. 414.

²⁷ (1976) 1 EHRR 647. The *Engel* decision has been followed faithfully by the European Court in subsequent decisions, eg *Öztürk v Germany* (1984) 6 EHRR 409; *J B v Switzerland* (3 May 2001, Application no. 31827/96).

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental.

Conclusion as to the ‘nature’ of summary disposals

As the learned authors of *Adams on Criminal Law* comment, ‘the Court of Appeal [has thrown] some doubt on the future acceptance of [the *Wigglesworth*] line of argument.’²⁸ This is despite the persuasive value of *Engel*, which appears to be very much in line with the law as stated in Canada. In my view, it may comfortably be asserted that the New Zealand Court of Appeal is less prepared to oust the application of NZBORA ss 24 and 25 on the basis of a ‘disciplinary exception’ than the Supreme Court of Canada. This is perhaps unsurprising in view of New Zealand’s traditional unitary view of offences.²⁹ The Court of Appeal’s reluctance does however make the *dictum* of Lamer CJC in *Généreux* even more significant in addition to its high persuasive value. In common with the position he describes in Canada, many of the offences with which an accused may be tried or dealt with summarily under the AFDA relate to matters which are of a public nature.³⁰ Just as in Canada, New Zealand’s Parliament has implicitly recognised the criminal nature of summary disposals by providing that a person whose case has been disposed of by an officer exercising summary powers cannot be charged with that or a substantially similar offence before a civil court.³¹ These are substantial points on which summary disposals under the AFDA can be distinguished from disciplinary hearings in New Zealand’s prisons³² and the Police³³ among other bodies. Without expressing any concluded view in respect of the latter two disciplinary jurisdictions, in my view the foregoing analysis

²⁸ Hon J Bruce Robertson (ed), *Adams on Criminal Law*, Brookers, 1992, Ch10.13.03(2).

²⁹ See *Zimmerman v Inland Revenue Commissioner* [1960] NZLR 8; and discussion of this tradition in Andrew S Butler ‘Regulatory Offences and the Bill of Rights’ in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Brooker’s Ltd, 1995, p. 347 *et seq.*

³⁰ For example, any act or omission which is, or would be if committed in New Zealand, an offence against any Act other than the AFDA, is also an offence against the AFDA: AFDA s 74(1).

³¹ AFDA s 21(1)(b). To the extent that AFDA s 21(1)(b) reflects the double jeopardy protection under NZBORA s 26(2), *Daniels v Thompson* [1998] 3 NZLR 22, 33 (CA) provides support for the proposition that this is an indicator of the criminal nature of summary proceedings under the AFDA.

³² See the Penal Institutions Act 1954 and Schedule 4 to the Penal Institutions Regulations 2000.

³³ See Part II of the Police Regulations 1992.

presents a strong argument that summary disposals are ‘by nature’ criminal proceedings which are caught by NZBORA ss 24 and 25.

The implication of this is that it may not matter whether or not a summary disposal can impose ‘true penal consequences’. This may seem strange in the light of the structure of, in particular, orderly rooms in the Army and Air Force, which do not resemble civilian notions of a criminal trial within the adversarial model. It is however somewhat circular to argue that, because the procedure of a summary disposal does not fit the mould of what is normally understood by a criminal trial in civilian life, that it is not ‘by nature’ criminal. As the Canadian Summary Trial Working Group put it:

The military justice system has as rich a history as its civilian counterpart, and has developed as it has for reasons unique to that society. Civilian courts will have to be urged to avoid the temptation to recreate the military justice system in [their] own image simply because that is the system with which those courts are most comfortable.³⁴

There is a strong argument that summary disposals under the AFDA fall within the ambit of NZBORA ss 24 and 25 because they are ‘by nature’ criminal proceedings, even if *Wigglesworth* represents the law of New Zealand on this point, which is by no means settled.³⁵ Only one New Zealand case has directly examined the applicability of these provisions to military proceedings to date – the High Court decision in *van der Ent v Sewell*. In that case, McGechan J held:

I have no doubt that s 24 and that paragraph apply in relation to military disciplinary proceedings. It is not a question which has been decided in finite terms to this point, but all the indications so favour, not least of those is s 24(e) which makes a specific exception in relation to jury trials for offences under military law tried before a military tribunal. That would hardly be necessary if s 24 did not include matters military.³⁶

It follows from the above that, while the law is not entirely settled as to whether NZBORA ss 24 and 25 apply to summary disposals, there are sufficient indications that they do for prudence to require a careful analysis of the impact of the key rights guaranteed by those

³⁴ *Summary Trial Working Group Report*, vol I, Office of the Judge Advocate General, Canada, 2 March 1994, p. 64.

³⁵ If *Wigglesworth* is not good law in New Zealand, then there can be no question that an offence against the AFDA is also an offence for the purposes of the NZBORA.

³⁶ [2000] 3 NZLR 125, 127. As in Lamer CJC’s *dictum* in *Généreux*, McGechan J’s *dictum* appears to apply equally to summary disposals as it does to courts-martial, but can only be regarded as *obiter* to the extent that Major van der Ent was facing a trial by court-martial.

provisions on any summary disposal system which might be developed. This will be undertaken in the next chapter.

Chapter 5

The Impact of the New Zealand Bill of Rights Act 1990

Chapter 4 concluded that the NZBORA, and specifically NZBORA ss 24 and 25, does apply to summary disposals conducted under the AFDA. Any joint system of summary disposals which is developed must therefore be able to withstand a challenge under the NZBORA for two reasons:

- (a) The Armed Forces need to have confidence that their discipline system or substantial parts of it will not be struck down or declared non-compliant by a civilian court; and
- (b) A system which unreasonably violates the Service member's rights will promote discord and dissatisfaction, the enemies of good discipline.

This chapter examines three of the key rights guaranteed by NZBORA ss 24 and 25 and assesses the impact of those rights on the summary disposal systems of 2002, drawing conclusions about what would be required of a joint summary disposals system for it to comply.

The Right to Consult and Instruct a Lawyer

NZBORA s 24(c) provides that everyone charged with an offence has the right to consult and instruct a lawyer. The scope of the right to consult and instruct a lawyer was considered by the Court of Appeal in the context of NZBORA s 23(1)(b) in *Ministry of Transport v Noort*¹ and again in *R v Mallinson*. In *Mallinson*, the Court held that:

The relevant interests which s 23(1)(b) protects are the ascertaining of one's legal rights and obligations and representation by an independent adviser.²

Once a person who has been charged with an offence indicates a desire to consult and instruct a lawyer, the relevant law enforcement officials have an obligation to facilitate

¹ [1992] 3 NZLR 260.

² [1993] 1 NZLR 528, 530.

access to a lawyer.³ The right also carries with it the implicit right to consult with and instruct one's lawyer in private.⁴

The *Manual of Armed Forces Law* is silent on the issue of legal representation at and in respect of summary disposals, save for an observation in note 2 to RP 13 that the principle of open justice,⁵ which it states should be applied in respect of summary disposals:

... extends to barristers or solicitors retained by the accused: they may attend to witness the proceedings but not to represent the accused therein.

While a policy of prohibiting legal representation at summary disposals may have merit in view of the premium placed on expedition in such proceedings and the fact that the officer investigating, trying or dealing summarily with the case will invariably lack formal qualifications in law, the question remains whether such a policy is sustainable in the light of the NZBORA.

The proper approach to apparent conflicts with the NZBORA was set out by the Court of Appeal in *Moonen v Film and Literature Board of Review*. This case concerned the relationship between the freedom of expression⁶ and the classification of a publication as 'objectionable', and thus its censorship, pursuant to section 3 of the Films, Videos, and Publications Classification Act 1993. The Court held that:

[17] Although other approaches will probably lead to the same result, those concerned with the necessary analysis and application of ss 4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights. After determining the scope of the relevant right or freedom, the first step is to identify the different interpretations of the words of the other Act which are properly open. If only one meaning is properly open that meaning must be adopted. If more than one meaning is available, the second step is to identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt. Having adopted the appropriate meaning, the third step is to identify the extent, if any, to which that meaning limits the relevant right or freedom.

[18] The fourth step is to consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s 5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s 4, the inconsistent statutory provision nevertheless stands and must be given effect. In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question.

³ *Noort*, 274; *Mallinson*, 531.

⁴ *Police v Kohler* [1993] 3 NZLR 129, 132 (CA).

⁵ See AFDA s 131(1).

⁶ NZBORA s 14.

The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

[19] The fifth and final step which arises after the Court has made the necessary determination under s 5, is for the Court to indicate whether the limitation is or is not justified. If justified, no inconsistency with s 5 arises, albeit there is, *ex hypothesi*, a limitation on the right or freedom concerned. If that limitation is not justified, there is an inconsistency with s 5 and the Court may declare this to be so, albeit bound to give effect to the limitation in terms of s 4.⁷

Applying the *Moonen* approach to the present issue, the scope of the right guaranteed by NZBORA s 24(c) has been examined above. Note 2 to RP 13 is unambiguously a total ban on legal representation at summary disposals. It does not specifically prevent the accused from consulting with a lawyer before or during the proceedings and thus that portion of the s 24(c) right is preserved. In my view, however, the note cannot properly be interpreted consistently with the right to instruct a lawyer.⁸

The next step is to consider whether the total ban on legal representation at summary disposals is a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'. The current limitation does not reach this standard on the ground that it is not 'prescribed by law', without the need to further consider whether it is 'reasonable'. As Cooke P observed in *Noort*:

... when s 5 does arise for consideration the phrase "prescribed by law" will be important. A leading exposition of the phrase is by Le Dain J delivering the judgment of the Supreme Court of Canada in [*R v Thomsen*]⁹ at p 10:

"The limit will be prescribed by law within the meaning of s 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or

⁷ [2000] 2 NZLR 9, 16 – 17 (CA).

⁸ As note 2 to RP 13 is not an 'enactment' as defined by section 29 of the Interpretation Act 1999, NZBORA s 6 is not strictly applicable. However, the note still falls to be interpreted consistently with the NZBORA, where possible, in accordance with general principles of administrative law and paragraph 4 of the promulgation certificate of the *Manual*, issued by CDF under the Royal prerogative: 'No non-statutory provision in this manual is to be construed as prevailing over any applicable Act of Parliament...'.
⁹ (1988) 63 CR (3d) 1 (SCC).

regulation or from its operating requirements. The limit may also result from the application of a common law rule.”¹⁰

...I do not explore the matter further beyond noting that Le Dain J’s “operating requirements” would be seen in New Zealand as a form of implication from the enactment necessary to make the enactment work.¹¹

Given that the note is part of neither a statute nor regulation and can hardly be said to arise by necessary implication from the terms of either the AFDA or the RPs, this leaves the question whether it arises by necessary implication from the ‘operating requirements’ of these enactments. While, as discussed below, it would create difficulties for the operations and discipline of the Armed Forces if the accused had a right to legal representation at a summary disposal in every case, it is stretching the point somewhat to argue that the total ban put in place by the note is therefore ‘necessary to make the enactment work’.

As a consequence of my conclusions that note 2 to RP 13 is neither an enactment nor prescribed by law, it follows that the purported total ban is repugnant to NZBORA s 24(c) and is accordingly invalid.¹² This leaves the question as to whether a reformed summary disposals system for the 21st Century could or should place a limit on legal representation at summary disposals.

Returning to the five-step process stipulated in *Moonen*, the first step which the Court would take if called upon to assess whether such a limit, prescribed by law, was reasonable would be to seek to ‘identify the objective which the legislature was endeavouring to achieve by the provision in question’. The Court would then assess ‘the importance and significance of that objective’. The Courts Martial Appeal Court identified the objective which must lie at the core of any military provision which validly departs from a right enshrined in the NZBORA in *R v Jack*:

In the context of the armed forces the rights and freedoms contained in the NZBORA will be subject to the reasonable limits which can be demonstrably justified in relation to the efficient and disciplined operation of the armed forces...¹³

¹⁰ Section 1 of the Charter is the Canadian equivalent of NZBORA s 5, and is in substantially similar terms.

¹¹ [1992] 3 NZLR 260, 272 (CA).

¹² See Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2 ed, Brookers Ltd, 2001, p. 920.

¹³ [1999] 3 NZLR 331, 339 (CMAC).

It is apparent from the decision in *van der Ent v Sewell* that, notwithstanding the erosion of civilian judicial deference to the military justice system in recent decades,¹⁴ the civilian courts still attach great importance to the objective identified in *Jack*. As McGechan J put it:

due regard, and it should be anxious regard, must be paid to the military context and the need to maintain discipline within military forces.¹⁵

The difficult questions in this area are:

- (a) whether there is a rational connection between the objective cited and the total or partial exclusion of the right to be legally represented at a summary disposal; and if so
- (b) whether any limit proposed represents the least possible interference with the right or freedom affected; and
- (c) whether any limit proposed is ‘in reasonable proportion to the importance of the objective’.

Rational connection

In the context of substantially the same issue of rational connection under section 1 of the Charter, Canada’s Summary Trial Working Group asserted that:

The decision to not provide a right to counsel at a summary trial is rationally connected to the objective of enforcing discipline effectively and efficiently thereby maintaining an operationally ready armed force. The lack of counsel helps in keeping the proceedings uncomplicated, avoids delays in proceeding with the hearing and assists in ensuring the trials can be conducted world wide and in remote areas of Canada.¹⁶

The Summary Trial Working Group drew support for this view from a decision of the United States Supreme Court in respect of a complaint that summary courts-martial¹⁷

¹⁴ See *Bradley v Attorney-General* [1986] 1 NZLR 176, per Tompkins J.

¹⁵ [2000] 3 NZLR 125, 127.

¹⁶ *Summary Trial Working Group Report*, vol I, Office of the Judge Advocate General, Canada, 2 March 1994, pp. 143 – 144.

¹⁷ ‘A [summary court-martial] is a one-officer court, which may try only enlisted personnel, and only with their consent, for non-capital offences, wherein the summary court officer plays the roles of trial counsel, defence counsel, judge and jury. Punishments are limited to 30 days confinement, 45 days hard labour without confinement, and monetary penalties of two-thirds of one month’s pay’: Capt Kevin J Barry, ‘The Cox Commission: Recommendations for the Modernisation of the US Military Justice System’ [2001] *New Zealand Armed Forces Law Review* 42, 43. See also article 20 of the UCMJ.

convened under the Uniform Code of Military Justice ('UCMJ')¹⁸ violated the right to counsel under the Sixth Amendment to the US Constitution. In *Middendorf v Henry*, Mr Justice Rehnquist held that:

As we observed in *Gagnon v Scarpelli*, [411 US 778 (1973)] at 787:

The introduction of counsel into a . . . proceeding will alter significantly the nature of the proceeding. If counsel is provided for the [accused], the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views.

In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.

As we observed in *United States ex rel Toth v Quarles*, 350 US 11, 17 (1955):

[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

However, the Court of Appeals did not find counsel necessary in all proceedings but only, pursuant to *Daigle v Warner*, where the accused makes

a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances.

490 F.2d at 365.

But if the accused has such a claim, if he feels that, in order to properly air his views and vindicate his rights, a formal, counseled proceeding is necessary he may simply refuse trial by summary court-martial and proceed to trial by special or general court-martial at which he may have counsel.¹⁹

While it is important not to place too much reliance on decisions such as *Middendorf* given the exceptional reluctance of the US Supreme Court to interfere in matters of military justice,²⁰ the reasoning of Mr Justice Rehnquist is useful. Also useful is the indication that

¹⁸ Pub L No 81-506, 64 Stat 107 (1950); 10 USC §§ 801 – 846.

¹⁹ 425 US 25, 45 – 47 (1976).

²⁰ *Ibid*, 43; followed by the Supreme Court in *Weiss v United States* 510 US 163, 177 (1994). Cf *Bradley v Attorney-General*, *op cit*; and discussion of the evolving role of civil courts in supervising New Zealand

the existence of a right to trial by a court-martial which accords the right to counsel may be a sufficient waiver of the right if the option of trial by court-martial is not taken up. This issue of waiver is considered at the end of this section.

The greatest practical difficulty with the grant of a full right of legal representation at summary disposals is the fact that many of these proceedings are necessarily held in trying environmental conditions, at sea or in an area of operations. There is already some New Zealand authority which indicates that the right to consult and instruct a lawyer may be limited by operational requirements. In *Noort*, the Court of Appeal examined the interface between the breath/blood-alcohol testing regime of the Transport Act 1962 and the right to consult and instruct a lawyer guaranteed by NZBORA s 23(1)(b). Richardson J observed:

What I think is implicit in the breath/blood-alcohol regime is that there should be no unreasonable delay in carrying through the statutory processes. For the reasons referred to earlier I am satisfied that underlying that regime is the perceived need to get motorists suspected of having consumed drink off the roads as quickly as reasonably possible. It is also in the public interest to limit the time during which citizens are so detained and to allow enforcement officers as much road duty time as is consistent with the carrying out of other responsibilities under the breath/blood-alcohol regime. It must follow in my view that there are limits imposed by the operating requirements of the legislation on the manner and extent of the exercise of the right to a lawyer.

... While a total denial of any right to a lawyer could not be justified either as a reasonable limit or one which is demonstrably justified in a free and democratic society, a partial limitation dictated by the operational requirements of the breath/blood-alcohol legislation would satisfy those stringent tests... Whether the curtailment of the right in a particular case is justified in terms of s 5 must depend on an assessment of the operational requirements of the breath/blood-alcohol legislation in that regard, and of the acts of the particular enforcement officer in the performance of the powers conferred under that legislation.²¹

The AFDA is extra-territorial²² and summary disposals are specifically designed as easily portable tribunals to facilitate the maintenance of discipline in comparatively large or very small forces which may be deployed anywhere in the world in environments as diverse as the Southern Ocean, a South East Asian jungle, or a Middle Eastern desert. In its report to Parliament for the year ended June 2002, the NZDF reported that it had contributed naval, land and air forces to ‘operations in Afghanistan [as well as] ... peace support operations in 13 other missions in the Middle East, Africa, Europe, South East Asia, East Timor and

military justice in Cdr Gordon Hook, ‘Civilian Supervision of New Zealand Military Tribunals’ [2001] *New Zealand Armed Forces Law Review* 10.

²¹ [1992] 3 NZLR 260, 284 – 285 (CA).

²² AFDA s 4(1).

Bougainville.²³ The relatively small size of New Zealand's forces in most of these operations, coupled in many cases with their geographical isolation and difficult environmental conditions, make Mr Justice Rehnquist's remark about the burden of permitting a right to legal representation even more pertinent.

Least possible interference and proportionality

In recognition of the implications for the maintenance of discipline of the right to consult and instruct a lawyer pursuant to NZBORA s 23(1)(b) during naval operations, in December 1999 the Maritime Commander New Zealand issued a policy which, *inter alia*, provides for the facilitation of the right subject to limitations.²⁴ This policy has now been 'prescribed by law' by virtue of its promulgation as article 3007 of *Defence Force Orders (Navy)* ('DFO(N)'), which is subordinate legislation made by CNS pursuant to a delegation from CDF under section 27(2) of the Defence Act 1990. The relevant part of article 3007 provides:

2. If the suspect decides to exercise his or her right to consult and instruct a lawyer before or during the interview, the following action is to be taken to satisfy the legal requirements of that right:
 - a. *In all cases.* The suspect is to be given the contact details of all the non-regular force military lawyers in NZ who may be able to assist him or her...; and
 - b. *In shore establishments and HMNZ ships alongside.* The suspect is to be provided with access to a shore telephone in a private compartment. The cost of the suspect's first telephone call is at public expense. If the suspect wishes to meet with his or her lawyer in private and/or be attended by his or her lawyer during the interview, all reasonable requests are to be facilitated. Any costs associated with attendances of or advice given by the suspect's lawyer are the suspect's responsibility alone. This is to be explained to the suspect. Once the suspect has decided to exercise his or her right, no further questions are to be asked until he or she has been given a reasonable opportunity to obtain legal advice.
 - c. *In HMNZ ships at sea with an unrestricted EMCON²⁵ plan.* If it is practicable and consistent with the maintenance of discipline, the interview is to be stood over until the ship returns alongside, at which time the action in para b of this rule is to be taken. If the interview must proceed while the ship is at sea, the suspect is to be provided with access to INMARSAT or a mobile phone (if the ship is within the coverage area) in a compartment with as great a degree of privacy as is possible in the circumstances. The cost of the suspect's first telephone call is at public expense. Any costs associated with advice given by the suspect's lawyer are the suspect's responsibility alone. This is to be explained to the suspect. Once the suspect has asserted his or her right, no further questions are to be asked until he or she has been given a reasonable opportunity to obtain legal advice.

²³ *Report of the New Zealand Defence Force for the Year Ended 30 June 2002*, New Zealand Defence Force, 16 October 2002, p. 9.

²⁴ *New Zealand Fleet Temporary Memorandum 63/99*.

²⁵ Emission Control Plan. This is a naval procedure whereby all or some emitters (eg communications equipment) are shut down to evade detection by the electronic warfare capabilities of a hostile or potentially hostile force.

d. *In HMNZ ships at sea with a restricted EMCON plan.* If it is practicable and consistent with the maintenance of discipline, the interview is to be stood over until:

(1) *First choice.* The ship returns alongside, at which time the action in para b of this rule is to be taken; or

(2) *Second choice.* The ship adopts an unrestricted EMCON plan, at which time the action in para c of this rule is to be taken.

(3) If the interview must proceed while the ship is operating a restricted EMCON plan, the suspect is to be advised as follows: 'Due to the operational requirements of the ship, your right to consult and instruct a lawyer cannot be afforded at this time, although you may exercise that right later. I remind you that you may still seek advice and assistance from your divisional officer or some other member of the ship's company and may have that person present during this interview unless that person is not available due to the exigencies of the Service.'

3. If the suspect is unable to contact a lawyer having attempted to do so [in accordance with] para b or c of Rule 10, the suspect is to be advised that he or she may telephone Staff Officer Legal (SOL)... The cost of any telephone call is at public expense. SOL is to ensure that the suspect is provided with access to legal advice at the suspect's expense.

4. If the suspect decides to waive his or her right to consult and instruct a lawyer, that decision is to be recorded in writing on any statement that the suspect may give, and is to be initialled by the suspect. The suspect is to be informed that he or she may still assert his or her right to consult and instruct a lawyer at any time during the interview.

The above policy may be considered to represent the least possible interference with the right to consult and instruct a lawyer pursuant to NZBORA s 23(1)(b), which is consistent with the requirements of the AFDA in a naval context. It could be readily adapted to an assertion of the right, pursuant to NZBORA s 24(c), by a Service member who has been charged with an offence. In an Army or Air Force context, the 'ship at sea with an unrestricted EMCON plan' can be equated to a unit which is deployed outside New Zealand. A 'ship at sea with a restricted EMCON plan' can be equated to a unit which is deployed outside New Zealand and has restricted communications for pressing operational reasons. The key issue must be the practical and operational viability of permitting the access to a lawyer, either in person or by some form of communications link. The implication of this is that, presuming that the right is not validly waived *in toto*,²⁶ legal representation would be restricted to summary disposals conducted ashore in New Zealand. In most other cases, there would be opportunities for obtaining legal advice, but those opportunities would be limited by military necessity.

In addition to this, the availability of an assisting officer, as in the naval system, is a key component of any summary disposal system which limits the right to consult and instruct a lawyer pursuant to NZBORA s 5, whether or not the right is validly waived. In addition to

²⁶ This possibility will be examined later in this chapter.

the New Zealand Naval Forces, assisting officers are now a feature of the summary disposal systems operated by the armed forces of Australia²⁷ and Canada,²⁸ and by the Royal Navy.²⁹

In considering the viability of a reasonable limit to the right to counsel at a summary trial pursuant to section 1 of the Charter, Canada's Summary Trial Working Group remarked that:

The provision of a right to an assisting officer provides the accused with a "friend" who has the education, rank, and to the extent it is [a] superior officer, the obligation to assist the accused. Since the officer is a service member, and can be a member of the unit there should be no delay in providing advice to the accused. The use of [an] assisting officer provides a reasonable means of providing assistance to an accused at summary proceedings while still maintaining the goals of maintaining discipline...

In weighing the importance of the qualified right to counsel against the objective of maintaining an efficient and effective disciplinary system it appears that the present regulations allowing only for the right to an assisting officer should support a s. 1 defence.³⁰

The Joint Summary Disposals Survey posed two questions relating to the provision of assisting officers; one which asked naval officers their opinion of the *status quo*, and one which asked Army and Air Force officers for their views on a proposal that assisting officers be introduced in orderly rooms. Officers exercising summary powers in the Navy were asked how important they considered the role of divisional officers in defending naval personnel appearing at a Table. 92 per cent of the respondents stated that it was either important or very important, but a number pointed out that proper training was required for the assisting officer to be effective and questioned the adequacy of the training currently provided. One CO remarked upon the value of the rating being given 'the feeling of being represented', and an XO observed that 'effective cross-examination often exposes the real situation'.

²⁷ Rule 24 of the Defence Force Discipline Rules 1985 (Cth).

²⁸ Article 108.14 of QR&Os.

²⁹ Regulation 4 of the Naval Summary Discipline Regulations 2000 (UK). This regulation also provides that: 'No lawyer may act as the accused's friend at a summary trial, save where the lawyer is a naval barrister and is the accused's Divisional Officer.'

³⁰ *Summary Trial Working Group Report*, vol I, Office of the Judge Advocate General, Canada, 2 March 1994, pp. 144 and 146.

Officers exercising summary powers in the Army and Air Force were asked for their views on the following statement:

‘Orderly rooms would be more fair if the accused was defended by his or her platoon commander, flight commander or another Service member requested by the accused.’

37 per cent of the respondents either agreed or strongly agreed, 47 per cent either disagreed or strongly disagreed, and 16 per cent were neutral. It seems clear that there is a fairly even division of opinion on this issue among Army and Air Force officers, although on balance the majority would prefer to retain the *status quo*. This is perhaps unsurprising. As the Summary Trial Working Group noted:

This report recommends changes to the summary trial system. For some members of the military the changes may be seen as being too great, or perhaps not necessary at all. Traditionally and perhaps somewhat unfairly, the military has been seen as an organization that is resistive to change. As B H Liddell Hart once commented “The only thing harder than getting a new idea into the military mind is to get an old one out.” A reluctance to change can be the result of a number of factors: comfort with the *status quo*, fear of the unknown, or perhaps even resentment that “civilian” values are being forced on military society.

The reality is, however, that the summary trial system will be adjudicated upon by a civilian court. That court will apply the principles of fairness set out in the legal rights contained in the Charter. As this report will establish significant portions of the present system of summary trials may not survive that scrutiny and therefore will have to rely on a s. 1 Charter argument or a waiver of constitutional rights. If civilian criminal standards are stringently applied change will be imposed on the [Canadian Forces]... It is the ability to control change, rather than simply be resistive to it, which offers the most effective way for the [Canadian Forces] to ensure the summary trial system meets the requirements of discipline.³¹

The Court of Appeal has already given an indication as to what its approach might be to the issue of legal representation in the context of New Zealand’s summary disposal systems.

This ‘warning shot’ should not go unheeded. In *Drew v Attorney-General*, Blanchard J, delivering the judgment of the majority, noted that:

The ability of an inmate to put forward an adequate defence to a disciplinary charge ... is also of relevance. An inmate of mature years and of average intellectual ability (i.e. average for the general population) can ordinarily be expected to cope with the task of defending himself against a charge when the facts are relatively straightforward (for example, where the decision will turn on two versions of an incident) and no question of legal interpretation or point of evidence arises ...

On the other hand, an immature ... inmate may have difficulty in putting forward even a simple defence to a straightforward charge ...

Where the facts relating to the charge or the legal issues are complicated, even inmates of above average intellect may fail to present their cases adequately unless the disciplinary regime provides proper assistance for them ...

³¹ *Ibid*, p. 59.

Where, without legal representation, inmates are out of their depth in conducting cross-examination because of the complexity of the evidence or the particular inmate's intellectual limitations, the right to cross-examine... is effectively denied...

It would also, in our view, be asking too much of an inmate... to expect him to be able, on receiving notification of the case against him, to prepare an adequate defence on the basis of advice from a lawyer about what might transpire at the hearing, including advice about how cross-examination might be conducted to good effect. As is well-known, lawyers themselves are frequently caught by surprise at the way evidence emerges in the witness box. And many prisoners, even if advised in advance by a lawyer, simply do not have the ability to absorb and follow that advice when actually engaged in an adversarial or semi-adversarial hearing, particularly when under the pressure which comes from a realisation of the consequences if the defence fails. We are speaking here, we should emphasise, not of inmates with disabilities..., but of inmates of average intelligence without forensic experience.³²

It is a fact that the vast majority of accused ratings, soldiers and airmen who face charges at summary disposals are quite young and inexperienced, and may therefore lack the maturity spoken of by Blanchard J. It is also a fact that those same accused have been trained to obey and demonstrate deference to their superior officers in a regimented Service environment. Given this and the nature of summary disposals, in particular some of the aspects noted in Chapter 2 in respect of Army orderly rooms, many of the Court of Appeal's observations in *Drew* may be justifiably applied to summary disposals also.

Some form of representation for, in particular, the young ratings, soldiers and airmen who make up the majority of accused at summary disposals would seem to be critical in many cases and advisable in the remainder. For the reasons given above, representation by lawyers will not always be practicable in the military context. Nor is it desirable for the reasons described by the US Supreme Court in *Middendorf*. For this reason, the provision of properly trained assisting officers in any future joint summary disposals system is a core component of prescribing reasonable limits on the right to consult and instruct a lawyer which will satisfy the requirements of NZBORA s 5. It should also be regarded as a desirable evolution in the interests of fairness, which can do nothing but promote unit cohesion – the ultimate goal of the system.

³² [2002] 1 NZLR 58, 69 – 72 (CA).

Right to elect trial by court-martial

While the vast majority of charges under military law are tried or dealt with summarily, there is long-standing recognition in the military law of New Zealand and similar countries that certain offences and certain offenders ought to be tried by a court-martial, or at least have that option. Provided that a trial by that court-martial constitutes a fair and public hearing by an independent and impartial court,³³ an argument can be mounted that an accused who elects to be tried summarily after being given the option of trial by court-martial waives certain rights, including the right to legal representation.³⁴ At the same time, however, there is an argument that providing the option to elect trial by court-martial ('the right of election') for minor service offences would introduce unnecessary complexity. In addition to this, Chapter 1 concludes that:

... the principal justification for a summary jurisdiction in the hands of military commanders is the need for the law to directly empower those commanders in the exercise of their duty to develop and maintain cohesion in their units.

This principle of command empowerment is undermined to a certain extent when the right of election is provided, as is the principle of expedition also referred to in Chapter 1. This raises the question as to whether the right of election should be given in every case or, if not, in which cases.

Waiver

The waiver argument in the context of the right of election is that, by refusing the offer of a trial which offers the various rights guaranteed by NZBORA ss 24 and 25 and choosing a trial in which those rights are limited, the accused waives the rights in question.

³³ This is open to question in the New Zealand context, but that is a matter beyond the scope of this thesis.

³⁴ See *Middendorf v Henry*, *op cit*.

A waiver of a right or rights may be express or implied. However, for the waiver to be effective, it must be communicated clearly, voluntarily and with full knowledge of the right or rights being waived.³⁵

Given the rational connection between the exclusion of legal representation from summary disposals and the objective of promoting the efficient and disciplined operation of the armed forces, there is significant merit in seeking to shield the current policy from the impact of the NZBORA by providing for the waiver of the right to legal representation if the right of election is not taken up. Given the strict approach to construing alleged waivers evident in the cases, the current provisions regarding the right of election would be inadequate to achieve this.³⁶ In any case where the right of election is given under a reformed joint system of summary disposals, the following measures should be adopted:

- (a) It should be prescribed by law that, once the right of election has been given, a decision to elect summary trial constitutes a waiver of the right to legal representation.
- (b) The implications of the election should be fully explained to the accused by his or her assisting officer, including specifically that a decision to elect summary trial constitutes a waiver of the right to legal representation.³⁷
- (c) The accused should be given the right to consult a lawyer in respect of the right of election wherever it is reasonably practicable. The discussion above of the manner in which the right to consult and instruct a lawyer may be subjected to the 'least possible interference' may provide a useful starting point for a policy in this respect.
- (d) The accused's decision should be recorded in writing and signed by the accused, preferably on the record of proceedings of the summary trial.

³⁵ *R v Taylor* [1993] 1 NZLR 647, 653 (CA); *R v Dobler* [1993] 1 NZLR 431, 442 per Smellie J; *Miranda v State of Arizona* 384 US 436, 444 – 445 (1996), approved by Cooke P in *R v Goodwin* [1993] 2 NZLR 153, 176 (CA); *R v LeBar* [1987] 1 FC 585, 603 – 604, per Muldoon J, approved by Hammond J in *Manga v Attorney-General* [2000] 2 NZLR 65, 73.

³⁶ *Idem* and see also *R v Manninen* (1987) 41 DLR (4th) 301 (SCC).

³⁷ To ensure that this occurs in every case, the NZDF would be well advised to prescribe the content of this advice. The training of assisting officers would also need to be addressed.

When should the right of election be given?

From a policy perspective, for the reasons mentioned above, it would not be desirable for the right of election to be given to an accused facing a minor charge. It is also doubtful that it is necessary to do so in law. An argument can be put forward that the exclusion of legal representation from summary disposals in respect of minor charges can be demonstrably justified in a free and democratic society, without the necessity for a waiver of rights by the accused. The question arises therefore as to when it is necessary to give the right of election.

Before examining the New Zealand position, it is worthwhile looking at the equivalent laws which apply to similar armed forces. Such a comparative approach assumes however that foreign forces have not sacrificed efficiency and discipline in the name of compliance with human rights.

Canada

Officers exercising summary trial jurisdiction in the Canadian Forces potentially have jurisdiction over a similar range of service offences as their New Zealand counterparts, but are quite limited in respect of the civil offences which they can try.³⁸ The powers of punishment of such officers are prescribed by articles 108.24 to 108.26 of QR&Os. As to the option to elect trial by court-martial in lieu of a summary trial, article 108.17(1) of QR&Os provides:

An accused person triable by summary trial in respect of a service offence has the right to be tried by court martial unless:

(a) the offence is contrary to one of the following provisions of the *National Defence Act*:

85 (*Insubordinate Behaviour*),

86 (*Quarrels and Disturbances*),

90 (*Absence Without Leave*),

97 (*Drunkenness*),

129 (*Conduct to the Prejudice of Good Order and Discipline*), but only where the offence

³⁸ Article 108.07 of QR&Os.

relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment; and

- (b) the circumstances surrounding the commission of the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction over the accused concludes that a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted if the accused were found guilty of the offence.

United Kingdom

In respect of the Royal Navy, section 52D of the Naval Discipline Act 1957 (UK)³⁹ provides in part:

- (1) This section applies where a charge is to be tried summarily.
- (2) If the charge is against a rating and the commanding officer considers that, if the charge were proved, he would award a punishment –
 - (a) in the case of a warrant officer, of disrating, a fine or stoppages;
 - (b) in the case of any other rating, of dismissal from Her Majesty's service, detention⁴⁰ or disrating, he shall afford the accused the opportunity of electing court-martial trial.
- (2ZA) If the charge is against an officer, the appropriate superior authority shall afford the accused the opportunity of electing court-martial trial.

In respect of the British Army, section 76AA(1) of the Army Act 1955 (UK) provides:

Before dealing summarily with a charge, the commanding officer or appropriate superior authority shall afford the accused the opportunity of electing court-martial trial in relation to that charge.

The Air Force Act 1955 (UK) is essentially identical to the Army Act in this respect.

United States of America

The UCMJ provides for two separate methods of disposing of minor offences which approximate summary disposals in the Commonwealth, summary courts-martial and non-judicial punishment.⁴¹ No accused may be tried by a summary court-martial if he or she

³⁹ As amended by section 17 and Schedule 1 of the Armed Forces Act 2001 (UK).

⁴⁰ Chief petty officers, petty officers, leading ratings and ratings wearing good conduct badges may not be sentenced summarily to detention unless the offence falls within the class prescribed by regulation 39 of the Naval Summary Discipline Regulations 2000 (UK).

⁴¹ See discussion of these fora in Capt Kevin J Barry, 'The Cox Commission: Recommendations for the Modernisation of the US Military Justice System' [2001] *New Zealand Armed Forces Law Review* 42.

objects to trial in that forum.⁴² In respect of non-judicial punishment, article 15(a) of the UCMJ provides in part:

...except in the case of a member attached to or in embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.

This means that the punishments of confinement on bread and water or diminished rations ('confinement') and correctional custody may be imposed as non-judicial punishment on Service members who are embarked in or attached to US naval vessels, without the option of electing trial by court-martial.⁴³ These punishments, while not exact equivalents, both involve the deprivation of liberty and may thus be equated with the punishment of detention which is used in Commonwealth forces.⁴⁴ Confinement and correctional custody may not however be imposed on a sailor or marine of or above the grade of E-4.⁴⁵ This grade is equivalent to leading rank or the rank of corporal in the New Zealand Armed Forces. The maximum period of confinement which can be imposed is three days, but the maximum period of correctional custody which can be imposed is 30 days.⁴⁶ Reduction to the next inferior pay grade, the equivalent of the Commonwealth punishment of reduction in rank, may also be imposed on sailors below the grade of E-7⁴⁷ and marines below the grade of E-6⁴⁸, provided that the officer imposing it has the power to promote the offender to his or her current rank.⁴⁹

⁴² Article 20 of the UCMJ. See observation of the US Supreme Court in *Middendorf v Henry*, *op cit*, in respect of the effect of this right as a waiver of the right to counsel. It should also be noted that officers may not be tried by a summary court-martial.

⁴³ Article 15(b)(2)(A), (B) and (H)(i) and (ii) of the UCMJ.

⁴⁴ MCM, Part V, ¶15.c.

⁴⁵ Paragraph 0111.b and c of *The Judge Advocate General's Manual*, United States Navy ('JAGMAN').

⁴⁶ Article 15(b)(2)(H) of the UCMJ.

⁴⁷ The RNZN equivalent of an E-7 in the US Navy is a petty officer.

⁴⁸ The New Zealand Army equivalent of an E-6 in the US Marine Corps is a corporal.

⁴⁹ Although article 15(b)(2)(H)(iv) authorises the punishment of reduction to the lowest inferior grade, the use of this punishment is prohibited by the JAGMAN, paragraph 0111.e.

Australia

As in New Zealand, the option to elect trial by court-martial or Defence Force Magistrate⁵⁰ is given when the officer hearing the charge considers that one of the more serious summary punishments should be imposed. These punishment are known as ‘elective punishments’.⁵¹ In respect of the summary jurisdiction of COs, Australian military law provides that:

720. ... Elective punishments are those which may be imposed by a Commanding Officer where an accused:

- a. pleads guilty to a charge, is convicted and elects to be punished by a Commanding Officer rather than by a court martial or DFM, or
- b. pleads not guilty to a charge, elects to be tried by the Commanding Officer, instead of by a court martial or DFM and is subsequently convicted.

720A. Where an accused pleads guilty and is convicted, the right of election is given after the Commanding Officer has convicted the accused if the Commanding Officer considers that an elective punishment should be imposed (section 131(2A) [of the Defence Force Discipline Act]).

720B. Where an accused enters a plea of not guilty the accused is given the right of election where, in the course of a summary trial before the Commanding Officer, the Commanding Officer is of the opinion that the prosecution evidence is sufficient to support the charge and that in the event of convicting the accused, the Commanding Officer is likely to impose an elective punishment.

720C. Where the accused elects to be tried or punished by court martial or DFM, the CO is required, *subject to the exigencies of the Service*, to refer the charge to a Convening Authority. [Emphasis added.]⁵²

The table of punishments available to COs, indicating ‘elective punishments’ and ‘other punishments’,⁵³ is set out in Table B to Schedule 3 of the Defence Force Discipline Act. A copy of this table is annexed to this chapter. A number of parallels may be observed between the military law of Australia and New Zealand in this area. For example, both Australian and New Zealand military law recognise naval service⁵⁴ and active service as special categories which justify more severe maximum punishments both with and without the option to elect trial by court-martial (or DFM). However, there are some important differences in the way the right of election is administered:

⁵⁰ The Australian Defence Force Magistrate (‘DFM’) has no equivalent in New Zealand but is similar to the Canadian Standing Court Martial.

⁵¹ See section 3(1) of the Defence Force Discipline Act 1982 (Cth).

⁵² ADFP 201, *Discipline Law Manual*, vol 1, Australian Defence Force, paragraphs 720 – 720C (‘ADFP 201’).

⁵³ Punishments which may be imposed summarily without a right of election being given.

⁵⁴ In New Zealand this is restricted to ‘sea service’, which is defined later.

- (a) An Australian CO conducting a summary trial may accept a plea of guilty and convict the accused before offering him or her the right of election. A New Zealand CO under the naval system must offer the accused the right before taking the accused's plea, if one of the more severe punishments in the second column of the Fourth Schedule to the AFDA is to be imposed.⁵⁵
- (b) An Australian CO may try or punish an accused summarily even if that accused has elected to be tried by court-martial or DFM, if the CO considers that the 'exigencies of service' do not permit the right to be extended.⁵⁶ A New Zealand CO must apply for a court-martial to be convened if an accused elects trial by court-martial.⁵⁷

New Zealand

As discussed above and mentioned briefly in Chapter 2, summary punishments under the AFDA are currently divided into two columns in the Fourth Schedule to the AFDA.⁵⁸ The more severe punishments are grouped in the second column of the Schedule and the less severe punishments appear in the third column. A CO may not impose a 'second column punishment' without giving the accused the right of election.⁵⁹

The maximum punishments which may be awarded with or without a right of election vary according to whether the accused is on active service or sea service. The term 'active service' is defined by AFDA s 5. In practical terms, a force will only be on active service when it is 'engaged in operations against the enemy'⁶⁰ or is 'in armed occupation of any foreign country'.⁶¹ As a general rule, a Service member would be on active service when

⁵⁵ RP 24(4). As no plea is taken under the military system, there is no direct equivalent in the New Zealand Army and RNZAF.

⁵⁶ See section 131(2)(b) and (2B)(b) of the Defence Force Discipline Act.

⁵⁷ AFDA s 104(4).

⁵⁸ The same applies in respect of the punishments available to a superior commander under the Fifth Schedule. The powers of a superior commander are similar to those of a CO in this respect, and are not dealt with here to avoid undue complexity.

⁵⁹ AFDA s 104(3).

⁶⁰ AFDA s 5(1)(b).

⁶¹ AFDA s 5(1)(c).

he or she is serving with or visiting a New Zealand force which is on active service.⁶² Given that the definition of 'enemy' is restricted to persons associated with an entity with which New Zealand, or a combined force including New Zealand forces, 'is at war or is engaged in armed combat operations',⁶³ there have been very few occasions when New Zealand forces have been on active service since the enactment of the AFDA.⁶⁴ This is despite the fact that New Zealand forces have been involved in a wide range of peace support operations in the last decade, including a number where they were confronted with potentially or actively hostile forces.

The term 'sea service' is defined by note § in the Fourth Schedule to the AFDA:

... a person is on sea service if that person is a member of the crew of a ship that is at sea or of a ship whose commanding officer has been ordered to keep the ship at less than 48 hours' notice for sea.

Given the readiness requirements of New Zealand's naval forces, the effect of this provision is that officers and ratings who are serving in HMNZ ships are on sea service most of the time, whether they are at sea, in a foreign port or alongside Devonport Naval Base.

Currently, if an offence is committed on active or sea service, the following maximum punishments can be imposed by an officer exercising summary powers without giving the accused the right of election:

- (a) In the case of a senior non-commissioned officer, a fine not exceeding 14 days' basic pay; and
- (b) In the case of a junior non-commissioned officer, reduction in rank and/or a fine not exceeding 14 days' basic pay; and
- (c) In the case of a rating, soldier or airman of or below able rank, private, or leading aircraftman, detention for a period not exceeding 14 days and/or a fine not exceeding 14 days' basic pay.

⁶² AFDA s 5(2)(b).

⁶³ Section 2(1) of the Defence Act 1990.

⁶⁴ One example of a force which would have been on active service is the logistical and medical support detachment which took part in the 1991 Gulf War.

In all other circumstances, the maxima when the right of election has not been given are as follows:

- (a) In the case of a non-commissioned officer, a fine not exceeding seven days' basic pay; and
- (b) In the case of a rating, soldier or airman of or below able rank, private, or leading aircraftman, a fine not exceeding seven days' basic pay and/or 21 days' confinement to ship or barracks.

Analysis

The following observations can be made based on the survey of major common law military justice systems undertaken above:

- (a) With the exception of the Canadian Forces and the Royal Navy, detention⁶⁵ is a summary punishment reserved for ratings, soldiers and airmen below the rank of corporal or equivalent.⁶⁶
- (b) In the Canadian Forces and the United Kingdom armed forces, detention may only be imposed summarily if the accused has been given the right of election.
- (c) The COs of warships serving in the navies of the United States, Australia and New Zealand may impose periods of detention on ratings below leading rank without giving the rating the right of election. In the US Navy the maximum period of correctional custody is 30 days, in the Royal Australian Navy ('RAN') the maximum period of detention is 42 days, and in the RNZN the maximum period of detention is 14 days.
- (d) Except in the ADF, detention may not be imposed on soldiers or airmen summarily unless they have been given the right of election or are participating in armed combat operations.
- (e) The punishment of reduction in rank may not be imposed summarily in the armed forces of Australia, Canada and the United Kingdom unless the accused has been given the right of election.

⁶⁵ This is taken to include confinement and correctional custody under the UCMJ for present purposes.

⁶⁶ See section 76C(2)(a) of the Army Act 1955 in respect of the British Army, and the equivalent provision in the Air Force Act 1955 (UK) in respect of the Royal Air Force.

- (f) A fine exceeding seven days' basic pay may not be imposed summarily unless the accused has been given the right of election in the Canadian Forces, the British Army, the Royal Air Force, the Royal Navy (in the case of warrant officers and officers), the Australian Army and the RAAF.
- (g) A fine exceeding seven days' basic pay may be imposed summarily when the accused has not been given the right of election in the navies of Australia, New Zealand,⁶⁷ the United Kingdom (in the case of ratings below the rank of warrant officer) and the United States.

Conclusions with respect to level at which right to elect should be given

A number of conclusions may be drawn about the level of punishment at which the accused in a New Zealand summary disposal should be given the right of election, in order that the NZDF may substantiate a claim that a summary disposal conducted without a waiver constitutes the 'least possible interference' with the right to legal representation. To begin with, the principled basis on which COs and XO's in HMNZ ships have had greater summary powers of punishment than their non-active service counterparts in the other two Services for many years is a substantial point which should not be departed from lightly. In the context of a 1971 paper, *Why the Navy Needs At Least 60 Days Detention in the Summary Punishment Scale*, it was pointed out that:

Warships operate to a tight, arduous programme in an effort to keep themselves at operational readiness at all times. The men on board look to their short periods in harbour for rest, leave and recreation. The necessity to appear as witnesses in gruelling courts-martial, which often require many witnesses would seriously impair the leave arrangements of the crew and be a cause of discontent.

When a ship has a court-martial, so many key personnel are involved that routine maintenance and replenishment becomes much more difficult and it is rare that a ship's next sailing target is met. The Navy's current ability to award summarily up to 90 days detention, dismissal from the Service and disrating reduces the number of such disruptions to about 2-3 a year. Any significant increase in this number must be paid for in terms of ability to meet sea-going commitments.

The frequency of serious offences is greater in the Navy than in either of the other 2 Services. The reason is thought to be the nature of life in ships. Here hundreds of men are packed for 24 hours a day into a highly complex mobile dangerous machine. Great stresses are imposed on the men some of whom react in anti-social ways especially when away from home port.

⁶⁷ The offence must have been committed on sea service.

There is a need for such behaviour to be corrected and to be seen to be corrected effectively as quickly as reasonably possible, and it would be unwise to wait many weeks for determination of such questions by court-martial.⁶⁸

There is much to be said for this assessment even in 2002. The relativity between naval offending and that in the other two Services which is asserted is substantiated by the fact that, in 2001, the percentage of naval offences which resulted in the imposition of a period of detention was three times greater than that in the Army or the Air Force.⁶⁹ Similar observations can also be made in respect of many peace support operations conducted by land and air forces in the modern era – and yet most of those operations do not qualify as active service. There is certainly an argument that the definition of ‘active service’ should be expanded to cover such missions.

However, of the states whose military law is compared above, only two have a comparable legal environment in the area of human rights law – the United Kingdom and Canada.⁷⁰ The armed forces of both states are organised along similar lines to those of New Zealand and have similar operational tempos in relative terms. In both cases, the punishments of detention and reduction in rank may not be imposed summarily unless the accused has been given the right of election. In Canada, the right of election must also be given before a fine exceeding 25 per cent of one month’s pay – roughly equivalent to seven days’ basic pay – can be imposed summarily. These limitations can be traced back to the issue of whether a punishment constitutes a ‘true penal consequence’.⁷¹ While a New Zealand court would not need to examine whether officers exercising summary powers could impose a ‘true

⁶⁸ Unpublished paper, 4 March 1971, located in Defence file Def 50/5/40, paragraphs 4 to 7.

⁶⁹ In the Navy in 2001, detention was imposed in respect of 7.7 per cent of offences where a finding of guilty was recorded. In the Army, the equivalent statistic was 2.6 per cent, while in the Air Force it was 2.8 per cent.

⁷⁰ While the UCMJ must sit within the framework of the United States Constitution, the palpable reluctance of the US Supreme Court to impose the standards of the Bill of Rights on the US military justice system reduces its comparative value for New Zealand purposes: see, for example, *Weiss v United States*, *op cit*. Australia does not have a law which is comparable with the NZBORA. Furthermore, while Australia is a party to the ICCPR, in *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, the High Court of Australia demonstrated that it will take a similar view of such matters as the New Zealand courts did prior to the enactment of the NZBORA. Again, this reduces the value of the Defence Force Discipline Act’s comparative value for New Zealand purposes.

⁷¹ The combined authorities of *Engel* and *Wigglesworth*, *op cit*, indicate that any deprivation of liberty, including detention, is certainly a ‘true penal consequence’, and, per Wilson J in *Wigglesworth*, some fines may also be, depending on the circumstances.

penal consequence' to conclude that NZBORA ss 24 and 25 apply to summary disposals, the court would be less likely to find that a limit on due process rights constituted 'the least possible interference' if the accused stood in jeopardy of a 'true penal consequence'. If it were possible, consistently with the objective of promoting the efficient and disciplined operation of the armed forces, to confer that right on an accused through the right of election when he or she faced a 'true penal consequence', that should be done. A system which failed to do so would not constitute the 'least possible interference' with the right. Given the Canadian and British examples, it is reasonable to assert that, in addition to detention, any punishment involving reduction in rank⁷² or a fine exceeding seven days' basic pay⁷³ may constitute a 'true penal consequence'. Given the fact that most members of the armed forces of Canada and the United Kingdom are entitled to a right of election before such a punishment is imposed on them summarily, it is difficult to argue that the same measure could not be adopted in New Zealand's forces without undermining the efficient and disciplined operation of the armed forces to an unreasonable extent. If a joint summary disposals system which does not permit legal representation is to avoid a declaration that it constitutes an unreasonable limit on that right, it is suggested that the right of election should be given in all cases where the punishments mentioned above are within contemplation.

While the objective may be undermined to a certain extent even by the reform proposed here because of the reduced recognition of the principles of command empowerment and expedition discussed above, these principles and thus the objective must be balanced against the importance of the right in question. It is considered that the reform proposed represents a more proportionate limit on the right than the *status quo*. On the other hand, where the punishment falls below the proposed threshold, the absence of a right of election

⁷² Reduction in rank is more severe than a fine as a matter of law: see the Third Schedule to the AFDA and particularly paragraph 2. While this peculiarly military punishment is directed at the rank and therefore status of the offender, the direct link between rank and salary in the NZDF means that a reduction in rank entails a serious and potentially ongoing financial penalty. See the decision of the British Courts-Martial Appeal Court in *R v Cooney; R v Allam; R v Wood* [1999] 3 All ER 173 regarding the importance of financial consequences when assessing military punishments. On the other hand, in *Landry v Gaudet* (1992) 95 DLR (4th) 289, 297, Joyal J decided that the penalty of 'demotion' which was available in RCMP disciplinary proceedings was not a penal consequence.

⁷³ Joyal J held that a 'forfeiture of pay for a period not exceeding ten working days' would not constitute a penal consequence: *Landry v Gaudet, op cit.*

can be justified as ‘the least possible interference’ with the right consistent with the abovementioned objective. The contrary argument would entail the possibility that Service members could elect trial by court-martial or demand legal representation at a summary disposal every time they were charged for a minor disciplinary offence which could not possibly warrant a ‘true penal consequence’ – the cases referred to by a former Chief of Defence Staff as ‘dirty boots’ type offences.⁷⁴ That would undermine the principles referred to above to an extent which attaches insufficient importance to the objective.

A Fair Hearing

NZBORA s 25(a) provides that everyone charged with an offence has, in relation to the determination of the charge, the right to a fair and public hearing by an independent and impartial court. In 1975, the then *Manual of Armed Forces Law* Project Officer, Lieutenant Colonel G B M Law, noted that:

The CO’s command responsibilities ensure that under any command-orientated Service system of administering summary justice, he is seldom able to investigate cases from a position approaching independence and this cannot be cured by simply instructing him to be impartial.⁷⁵

It follows that, with the rights to consult and instruct a lawyer and appeal to a higher court, this right presents the greatest difficulty for the summary disposals systems as they are currently structured. An officer exercising summary powers could never be an independent court. The *status quo* is protected by NZBORA s 4,⁷⁶ but it is open to question whether that *status quo* constitutes a reasonable limit which is demonstrably justifiable in a free and democratic society. That issue is however left for others. This thesis will focus on an examination of the right to a fair hearing.

A ‘fair hearing’ may be viewed to a large degree as a hearing which accords the various specific rights guaranteed by NZBORA ss 24 and 25.⁷⁷ This section will focus on three aspects of the right to a fair hearing, two of which are guaranteed by more specific rights:

⁷⁴ See Chapter 1.

⁷⁵ MAFL Project Officer minute Legal/53 to Deputy Chief of Naval Staff dated 14 April 1975.

⁷⁶ The jurisdiction of commanding officers and superior commanders to investigate and try or deal summarily with charges is unequivocally provided for by AFDA ss 104 and 105. Equally, AFDA ss 114 and 115 unequivocally authorise the delegation of those powers to detachment commanders and other delegates.

⁷⁷ *Adams on Criminal Law*, Ch10.14.01.

- (a) The right to adequate time and facilities to prepare a defence;
- (b) The right to be present at the trial and to present a defence; and
- (c) The question as to whether the conduct of an inquisitorial hearing can constitute a fair hearing in relation to the determination of a criminal charge.

Adequate time and facilities to prepare a defence

NZBORA s 24(d) provides that everyone charged with an offence has the right to adequate time and facilities to prepare a defence. It is a reflection of article 14(3)(b) of the ICCPR. To some extent this right overlaps with the right to consult and instruct a lawyer, because, as Muhammad notes in respect of article 14(3)(b), '[t]he term "facilities"... also includes the opportunity and means for identifying and engaging counsel, and for personal communication between the accused and his counsel'.⁷⁸ This only serves to strengthen the argument that assisting officers should be provided. In this respect, it is interesting to note that a soldier or airman who states a complaint under section 49 of the Defence Act 1990 does have a qualified right to assistance from a Service member requested by him or her.⁷⁹ This includes the right to be represented by that member at any oral presentation or investigation of the complaint.⁸⁰ It can only be viewed as anomalous that the same soldier or airman does not enjoy this right in an orderly room situation.

The question as to whether or not the accused has had adequate time to prepare a defence depends on the facts of the case.⁸¹ In assessing whether the accused has had adequate time in the context of a summary disposal, the necessary emphasis on expedition in the summary disposal of charges needs to be borne in mind. The naval system deals with the potential

⁷⁸ Haji N A Muhammad, 'Due Process of Law for Persons Accused of Crime' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, 1981, p. 152. See also paragraph 9 of the UN Human Rights Committee's General Comment 13 on article 14 of the ICCPR in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI\GEN\1\Rev 1, 14 (1994) ('UN Human Rights Committee General Comment 13').

⁷⁹ DFO 4 *Defence Force Orders for Personnel Administration*, New Zealand Defence Force, 18 June 2002 (AL 6), paragraph 12.36.

⁸⁰ *Ibid.*, paragraph 12.38.

⁸¹ Muhammad, *ibid.*; UN Human Rights Committee General Comment 13, paragraph 9.

for breaches of NZBORA s 24(d) through inadequate time in RP 18(5)(b). If the accused pleads not guilty to the charge, the officer exercising summary powers is required to:

Ask the accused if he has had sufficient time to prepare his defence and, where necessary, adjourn the proceeding to provide sufficient time for the accused to prepare his defence.

In *R v Holdgate*, the Court of Appeal held that:

It will be a rare case in which an allegation of insufficient time for preparation will succeed [on appeal] when no adjournment has been sought.⁸²

The military system has no equivalent to RP 18(5)(b). Any joint system developed for the Armed Forces should therefore reflect the naval system in this respect.

In addition to adequate provision for advice, the other major component of the right to adequate facilities to prepare a defence is the disclosure to the accused of all relevant evidence against the accused prior to the investigation. In *Simpson v Ministry of Agriculture and Fisheries*, Fisher J held that the rights guaranteed by NZBORA ss 24(d) and 25(a) 'implicitly require full pretrial criminal disclosure'.⁸³ This means that, as a general rule, a copy of the charge report and all witness statements, records of interviews and other relevant material should be disclosed to the accused a reasonable time before the investigation.⁸⁴ The *Manual of Armed Forces Law* contains no explicit direction to this effect. In this respect, New Zealand military law is out of step with the summary disposal systems of Australia,⁸⁵ Canada,⁸⁶ the United Kingdom⁸⁷ and the United States.⁸⁸

Right to be present at the trial and to present a defence

NZBORA s 25(e) provides that everyone charged with an offence has, in relation to the determination of the charge, the right to be present at the trial and to present a defence.

⁸² Unreported, 24 May 2001, CA 466/00, paragraph 13.

⁸³ (1996) 3 HRNZ 342, 354.

⁸⁴ See *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 400 (CA) per Cooke P.

⁸⁵ See paragraph 739 of ADFP 201.

⁸⁶ See article 108.15 of QR&Os.

⁸⁷ See article 0833 of BR 11 and regulation 24 of the Custody and Summary Dealing (Army) Regulations 2000 (UK).

⁸⁸ Rule 1304(b)(1) of the Rules for Courts-Martial ('RCM') in *Manual for Courts-Martial*, 2000 ed, United States of America ('MCM'), in respect of summary courts-martial. MCM, Part V, paragraph 4a, in respect of non-judicial punishment.

Presence at trial

In the context of a summary disposal, all the RPs which govern such proceedings under both the naval and military systems imply that the accused must be present for the proceeding to commence.⁸⁹ For example, before a subordinate commander may investigate a charge, RP 33(1) provides that the accused ‘shall be brought before [him or her]’.

Right to present a defence

If one takes a literal approach, the RPs in respect of both summary disposal systems permit the accused to present a defence as they stand.⁹⁰ However, as the Courts Martial Appeal Court noted in *R v Jack*, ‘[t]he NZBORA is to receive a purposive construction and is not to be construed narrowly or technically’.⁹¹ In the discussion of the right to consult and instruct a lawyer, it has already been noted that:

an immature ... [accused] may have difficulty in putting forward even a simple defence to a straightforward charge...

and that:

[w]here the facts relating to the charge or the legal issues are complicated, even [accused] of above average intellect may fail to present their cases adequately unless the disciplinary regime provides proper assistance for them...⁹²

The conclusion reached by this thesis is that the accused should be provided with an assisting officer in all cases. This will be particularly important if the right to legal representation is excluded by way of a waiver or as a reasonable limit in the case of minor offences. However, the provision of an assisting officer will not adequately guarantee the right to present a defence in a real sense unless assisting officers:

- (a) receive adequate training to perform their role; and
- (b) have some measure of independence from the officer exercising summary powers.

⁸⁹ The only provision in the AFDA which appears to permit a form of ‘trial *in absentia*’ is AFDA s 201, which contemplates the assembling of a court of inquiry to inquire into the unlawful absence of a Service member. A finding by such a court of inquiry that the Service member is absent has ‘the legal effect of a conviction by court-martial for desertion’ if the Service member remains absent for six months: AFDA s 201(3).

⁹⁰ See also discussion of NZBORA s 24(d) above.

⁹¹ [1999] 3 NZLR 331, 339.

⁹² *Drew v Attorney-General*, per Blanchard J, *op cit*.

As the Human Rights Committee has stated in respect of article 14(3)(d) of the ICCPR, the equivalent to NZBORA s 25(e):

The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.⁹³

It will therefore be necessary for the NZDF to review the current status of assisting officers within the naval system and, drawing on this precedent, provide for adequate protections for assisting officers, to the extent that this is possible consistent with the integrity of the chain of command. As mentioned above, the adequacy of these protections will also have a bearing on whether a summary disposal can legitimately be viewed as a ‘fair hearing’ for the purposes of NZBORA s 25(a).

A fair hearing implies an adversarial trial

There is strong authority for the proposition that, in a criminal matter, the right to a fair hearing dictates an adversarial trial and the observance of the principle of ‘equality of arms’. In the recent Privy Council decision, *Brown v Stott (Procurator Fiscal, Dunfermline)*, Lord Bingham of Cornhill held:

Equality of arms between the prosecutor and defendant has been recognised by the court as lying at the heart of the right to a fair trial. The scope and implications of this principle have been considered in many cases, and recently in *Fitt v UK* (2000) 30 EHRR 480 at 510–511 where the court said:

‘44. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v Austria* (1991) 15 EHRR 378 at 413–414 (paras 66–67))...’⁹⁴

⁹³ UN Human Rights Committee General Comment 13, paragraph 11.

⁹⁴ [2001] 2 All ER 97, 107. See also the earlier decision of the European Court of Human Rights, establishing this rule: *Barberà, Messegué and Jabardo v Spain*, 6 December 1988, Application no. 00010590/83; and the affirmation of the rule by the European Court in *Komanicky v Slovakia*, 4 June 2002, Application no. 00032106/96, paragraph 46.

The decision in *Brown v Stott* is either binding or very persuasive in New Zealand⁹⁵ and, indeed, Lord Bingham's *dictum* was followed by the Court of Appeal in *R v Griffin*,⁹⁶ at least to the extent that it acknowledges the principle of 'equality of arms'. In view of the fact that, even in the European states in which the inquisitorial model first developed, criminal procedure has become and is becoming more adversarial,⁹⁷ I conclude that a New Zealand court would follow *Brown v Stott*, and thus also *Fitt v United Kingdom* (among other European authorities), in finding that 'a fair trial ... [in respect of] criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial'.

Applying these principles to summary disposals under New Zealand military law, it is apparent that the naval system is less vulnerable to criticism in this respect than the military system. There are clearly questions relating to the institutional independence of officers exercising summary powers under both systems (and the independence of naval prosecutors and assisting officers) which may impinge on this issue, but these are beyond the scope of this thesis. Putting those issues to one side, and notwithstanding the fact that naval officers

⁹⁵ '[S]ubject only to the exceptional need to take account of the local development of some aspect of law which otherwise is common to sister Commonwealth countries, a decision of the Privy Council given in respect of an appeal from the one would be binding upon the Courts of the others': *Breuer v Wright* [1982] 2 NZLR 77, 83 (CA). The rule in *Breuer v Wright* has however been left open to question in subsequent decisions. See *United States of America v Wong* [2001] 2 NZLR 472, 481 per Chambers J.

⁹⁶ [2001] 3 NZLR 577, 586 – 587 (CA), per Richardson P, Blanchard and Tipping JJ. But note the strong dissents of Gault and Thomas JJ.

⁹⁷ As a result of judgments such as *Brandstetter v Austria* and *Barberà, Messegué and Jabardo v Spain*, cited above. For example, in Germany, while section 238(1) of the *Strafprozeßordnung* (Code of Criminal Procedure) provides that 'The presiding judge shall conduct the hearing, examine the defendant and take the evidence', section 239 of the Code provides:

'(1) The presiding judge shall leave the examination of witnesses and experts named by the public prosecution office and by the defendant to the public prosecution office and defense counsel upon concurring application by both. Witnesses and experts named by the public prosecution office shall first be examined by the public prosecution office, those named by the defendant shall first be examined by defense counsel.

(2) After this examination the presiding judge shall also ask the witnesses and experts such questions as he deems necessary for further clarification in the case.'

In respect of the development of French criminal procedure towards a more adversarial model, see François Falletti, 'Equality of Arms in French Criminal Procedure', a speech which he delivered as General Prosecutor at the Court of Appeal in Lyon, at the Fifth Annual Conference of the International Association of Prosecutors in September 2000: <http://www.iap.nl.com/speeches/2000_h.html>.

trying charges summarily retain some vestiges of the inquisitorial system,⁹⁸ the system of naval summary trials satisfies the requirements of an adversarial ‘fair trial’ in principle.

The Joint Summary Disposals Survey sought the views of Army and Air Force officers exercising summary powers on the major procedural change which would follow a shift to an adversarial or quasi-adversarial model: the presentation of the evidence against the accused by a prosecutor. Army and Air Force respondents were asked their views of the following statement:

So that the CO or subordinate commander can focus on resolving any conflicts between the prosecution evidence and the accused’s case in an impartial manner, it would be better if the prosecution case were presented by another officer or NCO.

27 per cent of respondents agreed with the statement, but 55 per cent either disagreed or strongly disagreed. 18 per cent were neutral. Interestingly, of the 56 Army and Air Force officers who either disagreed or strongly disagreed with the above statement, nine stated that the prosecution case is already presented by the non-commissioned officer who lays the charge.⁹⁹ One CO stated that ‘[t]he adversarial approach would overly complicate what is already a simple, fair investigation’. This was typical of a number of comments. In addition, one Army subordinate commander asserted that:

Firstly, there [are] not enough NCO[s] or officers without prejudice in a small sub-unit to do this. It would fracture the cohesion of a [company], more so on operations...

This raises the question as to whether a joint summary disposals system could adopt the inquisitorial model as an exception to the right to a ‘fair trial’. It could only do so if the inquisitorial system was clearly enshrined in the AFDA. Currently, the procedures followed by both the naval and military systems are prescribed in the RPs made pursuant to AFDA s 150(2)(a) and (b), which provide that:

- ... [the rules of procedure] may make provision of all or any of the following matters:
- (a) The procedures to be observed in the bringing of charges before officers exercising summary powers[; and]
 - (b) The manner in which charges so brought are to be investigated, and the taking of evidence (whether orally or in writing, whether or not on oath and whether in full or in summary or abstract form)...

⁹⁸ See Chapter 2.

⁹⁹ While this may be the practice in some units, it is not mandated by the relevant RPs: see Chapter 2.

It is apparent that no particular system of investigation, either inquisitorial or adversarial, is prescribed by this empowering provision. However, as the quote from *Moonen* indicates above, it is necessary to 'identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt'. Given that the right to a fair hearing implies a right to an adversarial trial, and that AFDA s 150(2) does not exclude or limit this right, s 150(2) must be taken to only authorise RPs which provide for such a procedure. To that extent, there is a strong argument that the RPs providing for the inquisitorial approach used by the military system are *ultra vires* AFDA s 150(2).

If however the inquisitorial model were specifically prescribed by the AFDA as the method for determining charges at the summary level, the above problem would be solved. The question as to whether such a prescription amounts to 'a reasonable limit ... as can be demonstrably justified in a free and democratic society' would also become largely moot within New Zealand's domestic courts, because of NZBORA s 4. However, as Tipping J stated in *Moonen*, despite the undoubted effect of NZBORA s 4 in respect of a provision in an Act of Parliament:

...the Court [has] the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.¹⁰⁰

The implication of the foregoing is that, if the AFDA provided that summary disposals were to be conducted following the inquisitorial model and the Court found that that was not a reasonable limit on the right to a fair hearing, then notwithstanding the protection afforded by NZBORA s 4, the matter could become the subject of a communication to the Human Rights Committee on the basis that the provision violated article 14(1) of the ICCPR. At the very least, it would have significant potential to embarrass the Government in the House of Representatives. This is a live issue because, while it may be possible to establish a 'rational connection' between the use of the inquisitorial model and the avoidance of undue complexity in the interests of the expeditious maintenance of discipline

¹⁰⁰ [2000] 2 NZLR 9, 17 (CA).

by commanders, it would be very difficult to substantiate a claim that such an approach constitutes the 'least possible interference' with the right or that it is proportionate to the importance of the objective mentioned. Any court considering the matter could not ignore the fact that an adversarial or quasi-adversarial model is already used for the summary disposal of charges by:

- (a) the New Zealand Naval Forces;
- (b) the Royal Navy;¹⁰¹ and
- (c) the Australian Defence Force ('ADF').¹⁰²

The argument that the adversarial model, while suitable for navies, is not suitable for armies or air forces, is unconvincing when one takes into account the fact that both the Australian Army and the Royal Australian Air Force ('RAAF') have used this model since 1985.¹⁰³ Furthermore, as mentioned in Chapter 2, by Service custom in the New Zealand Army the accused's platoon commander already attends the orderly room to provide mitigation. There does not appear to be any good reason why he or she could not take on a fuller role as the accused's assisting officer, and every reason to believe that such would promote cohesion within the platoon. The company or regimental sergeant major also attends the orderly room and he or she plays a significant role in bringing evidence before the officer exercising summary powers. It would be a relatively small step for this warrant officer to be given a formal role in the proceedings as the prosecutor.

Similar observations may be made in respect of the RNZAF. If the unit warrant officer is to collect and bring the evidence before the officer exercising summary powers, there seems no reason why he or she should not take on the formal role of prosecutor. Currently, the accused's flight commander does not appear at the orderly room, but it is suggested that, were he or she to be assigned the role of assisting officer, this could only promote unit cohesion. Naturally, the adoption of additional roles in summary disposals will require

¹⁰¹ BR 11, vol I, article 0832.

¹⁰² ADFP 201, vol 1, Chapter 7, Section 2.

¹⁰³ The adversarial system of summary hearings was introduced for the whole ADF by section 130 of the Defence Force Discipline Act, which came into force on 3 July 1985.

additional training. However, that is not a sufficient ground for removing the right to an adversarial trial.

Conclusions with respect to right to a fair hearing

It follows from the foregoing examination that two conclusions can be drawn regarding the compatibility of New Zealand's summary disposal systems with the right to a fair hearing. First, subject to concerns about the independence of the officer exercising summary powers, prosecutor and assisting officer, naval summary trials in many respects meet the international standard for a 'fair hearing'. Second, orderly rooms conducted under the military system do not meet the international standard for a 'fair hearing'.

The Right to Appeal

NZBORA s 25(h) provides that everyone charged with an offence has, in relation to the determination of the charge, the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both. This is the third of the trinity of rights which have major implications for any joint system of summary disposals which might be developed.

The right of appeal is closely allied to the right guaranteed by NZBORA s 25(a), in that an appeal which meets the requirements of NZBORA s 25(h) must be given 'a fair and public hearing by an independent and impartial court'. As the UN Human Rights Committee has noted in respect of the equivalent ICCPR provision, article 14(5):

not enough information has been provided concerning the procedures of appeal, in particular ... the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.¹⁰⁴

Any examination of the current review system discussed in Chapter 2 against the requirements of NZBORA s 25(h) must inevitably lead to the conclusion that a reviewing authority appointed pursuant to AFDA s 117(1) is not an 'independent court', although

¹⁰⁴ UN Human Rights Committee General Comment 13, paragraph 17.

again this is left for others. The issue of impartiality is also not dealt with here. As to the remaining requirements of NZBORA s 25(a) and (h), the following conclusions may be drawn.

Appeal against conviction and/or sentence

AFDA s 117(2)(a) does provide for an appeal against both the finding and punishment imposed by an officer exercising summary powers, if the term ‘appeal’ is given a broad interpretation consistent with article 14(5) of the ICCPR.¹⁰⁵

Fair and public hearing

Neither the AFDA nor the RPs provide for any particular procedure in respect of the review of summary findings and punishments. Section 15 of DFO(D) indicates that the review is conducted in private and ‘on the papers’ only. However, that section of DFO(D) has no specific statutory authority, being made pursuant to the general empowering provision in AFDA s 206(1)(h). Pursuant to NZBORA s 6, AFDA s 206(1)(h) must be interpreted as authorising only a review process which complies with the ‘fair and public hearing’ requirements of NZBORA s 25(a) and (h).¹⁰⁶ To the extent that DFO(D) Section 15 does not satisfy those requirements, it is arguably *ultra vires* AFDA s 206(1)(h). As a result, a reviewing authority is left with no lawfully prescribed process governing the conduct of his or her review. In such circumstances, the law would require that he or she adopt a procedure which provides the convicted Service member with a fair and public hearing, pursuant to RP 4.

¹⁰⁵ Article 14(5) provides that: ‘Everyone convicted of a crime shall have the right to his conviction and sentence being *reviewed* by a higher tribunal according to law’ [emphasis added]. See also *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669, in which the Court of Appeal held that a review amounted in substance to an appeal.

¹⁰⁶ See discussion of these requirements above in the section which deals with the right to a fair hearing.

A new appellate jurisdiction?

It follows from the foregoing that the principal problem posed by NZBORA s 25(h) for the existing review system is that none of the reviewing authorities constitute a higher court. The other requirements are either satisfied or may be satisfied by operation of law or, preferably, by the prescription of an appropriate body of rules. The implication of this is that, subject to those modifications, the current review system could stand as a matter of domestic law. That is because, while the reviewing authorities are not courts, they are unambiguously prescribed and given their jurisdiction by AFDA s 117. That section cannot be properly interpreted to require a court in lieu of the specified reviewing authorities, and it enjoys the protection of NZBORA s 4 as against the impact of NZBORA s 25(h).

However, this approach overlooks two complicating factors; one of law and one of policy. First, the maintenance of the *status quo* risks a declaration from the court that the exercise of review jurisdiction by superior commanders instead of a court constitutes an unreasonable limit on the right.¹⁰⁷ Second, it may not be desirable from the perspective of superior commanders to retain this jurisdiction, given the adversarial procedural requirements which they will have to meet when they are examining a case brought before them by way of an application for review pursuant to AFDA s 117(2)(a).

Putting the second factor aside and examining the current structure within the *Moonen* framework, there is a real doubt that there is a rational connection between the *status quo* and the objective of promoting the efficient and disciplined operation of the armed forces. It is difficult to sustain an argument that 'unit cohesion' requires the review of charges from a unit by a commander who is not a member of that unit. It may be that the principle of command empowerment might encompass a broader need for 'command cohesion',¹⁰⁸ but the link between a superior commander and a unit in any normal chain of command begins and ends with the CO. There must be a strong bond of loyalty, confidence and respect

¹⁰⁷ See discussion of the implications of this above in the section dealing with the right to a fair hearing.

¹⁰⁸ This term is used in the sense of the cohesion of a command consisting of a number of units.

between the superior commander and CO, but it is difficult to see how it is necessary for this cohesion to extend between the superior commander and an individual accused within the unit, provided that the unit has the requisite cohesion and there is cohesion between the CO and the superior commander. Even if a rational connection based on a broader interpretation of the principle of command empowerment can be fashioned, the connection is so tenuous that the *status quo* could not possibly constitute the ‘least possible interference’ with the right to appeal to a higher court. Furthermore, the loss of this important right could not be proportionate to the limited impact, if any, on the aforementioned objective of granting the right. The current review structure should therefore be replaced by an appellate jurisdiction conferred on a court because:

- (a) to do otherwise risks an adverse declaration by the court pursuant to NZBORA s 5 and, potentially, an adverse view from the Human Rights Committee; and
- (b) the promotion of enhanced fairness within the summary disposals system provides benefits in terms of the morale of the armed forces; and¹⁰⁹
- (c) the examination of the legality of summary findings and punishments, which constitutes the majority of the existing jurisdiction pursuant to AFDA s 117, would be more effectively conducted by a judge rather than a commander.

While it would be possible for the NZDF to retain the current structure for automatic reviews in tandem with the proposed jurisdiction, that is not necessary. The system of automatic reviews reflects a more inquisitorial approach which, as mentioned above, must be abandoned to a large degree in any new system. The concern that injustices may be done in circumstances where the accused might not have the knowledge and skills to seek redress will be assuaged by the provision of properly trained assisting officers and adequate legal aid at the appellate level.

¹⁰⁹ For this reason, while it would be possible to exclude the application of NZBORA s 25(h) by a waiver in cases where the right of election is given, in my view that is not in the best interests of the just administration of discipline in the Armed Forces. Furthermore, offenders who have not been given the right of election equally have the right to appeal to a higher court. An attempt to deal with this matter by way of a waiver would accordingly provide only a partial solution, unless all accused were given the right of election.

What kind of court?

The establishment of a court to hear appeals from summary disposals is not without precedent. Section 14 of the Armed Forces Discipline Act 2000 (UK) inserted provisions in the Naval Discipline Act 1957 (UK), Army Act 1955 (UK) and Air Force Act 1955 (UK) ('the British Service Discipline Acts') establishing a Summary Appeal Court ('SAC') for each of the Royal Navy, British Army and Royal Air Force. A SAC consists of one judge advocate and two officers who have held a commission for a period or periods amounting in the aggregate to not less than two years in the case of the Army and Air Force SACs and three years in the case of the Naval SAC.¹¹⁰ Any person who has been found guilty summarily may appeal against his or her conviction or punishment or both.¹¹¹ Appeals against the finding in a summary disposal are dealt with by way of a rehearing of the charge.¹¹² Appeals against a summary punishment only are dealt with by way of a rehearing in relation to the award of punishment.¹¹³

The reason that the United Kingdom Government decided to introduce a measure establishing summary appeals by way of a rehearing as opposed to a conventional appeal on questions of law was 'concerns that summary proceedings, on their own, might not be compliant with the European Convention on Human Rights'.¹¹⁴ The measure is accordingly aimed primarily at the question of the compatibility of summary disposals with the European equivalent of NZBORA s 25(a), and brings British summary disposals into

¹¹⁰ Section 52FH of the Naval Discipline Act and section 83ZC of the Army and Air Force Acts. Officers who sit as members of the Naval SAC must also hold the rank of lieutenant or above. The summary appeal court rules for each of the three Services provide that officers from the other two Services may be appointed as members of the relevant SAC, if insufficient officers of the accused's parent Service are available and the nominated officers hold equivalent qualifications to those required under the parent Service Discipline Act: r 23 of the Summary Appeal Court (Navy) Rules 2000 (UK) (which is substantially similar to the equivalent rule in the Summary Appeal Court (Army) Rules 2000 (UK) and the Summary Appeal Court (Air Force) Rules 2000 (UK).

¹¹¹ Section 52FK(1) of the Naval Discipline Act and section 83ZE(1) of the Army and Air Force Acts.

¹¹² Section 52FL(1) of the Naval Discipline Act and section 83ZF(1) of the Army and Air Force Acts.

¹¹³ Section 52FL(2) of the Naval Discipline Act and section 83ZF(2) of the Army and Air Force Acts.

¹¹⁴ *Explanatory Notes to Armed Forces Discipline Act*, Her Majesty's Stationery Office, 2000, paragraphs 34 and 41.

line to a large degree with the Dutch system to the extent that it was implicitly approved by the European Court in *Engel*.¹¹⁵

It is unnecessary for an appellate jurisdiction to be established which conducts appeals by way of a rehearing in New Zealand. The grounds of review and the powers of reviewing authorities provided for in AFDA s 117 provide a very good template for the grounds of appeal and powers of any future court exercising appellate jurisdiction in respect of summary disposals. It may however be worthwhile considering the addition of powers similar to those of the Courts Martial Appeal Court, including that contained in section 9A of the Courts Martial Appeals Act 1953:

(1) This section applies where an appellant has been convicted of an offence and the court martial by which he was tried could lawfully have convicted him of some other offence, and it appears to the Court that the court martial must have been satisfied of facts which proved him guilty of that other offence.

(2) The Court may, instead of allowing or dismissing the appeal, substitute for the conviction recorded by the court martial a conviction for the other offence, and may pass on the appellant, in substitution for the sentence passed on him by the court martial, such sentence as it thinks proper, being a sentence warranted by the Armed Forces Discipline Act 1971 for that other offence, but not a sentence of greater severity.¹¹⁶

Given that it would consider points of law only, there would be no requirement for officers to be appointed as members of this court. The appellate jurisdiction could, for example, be conferred on courts-martial consisting of a judge advocate alone.¹¹⁷ This would have the advantage of simplicity and would not require the creation of a new tribunal as such. Judge advocates already sit without the members of a court-martial when considering and determining questions of law and procedure.¹¹⁸ Such a court would also be easily deployable, perhaps even more so than the British SACs. It would however require that some of the current law relating to the procedure and status of courts-martial be revisited, at least as it would apply to appellate courts.

¹¹⁵ Article 6(1) of the ECHR. The European equivalent of NZBORA s 25(h) is article 2 of Protocol No 7 to the ECHR, which the United Kingdom had not ratified as of 30 October 2002. The UK is however a party to the ICCPR which, as mentioned above, guarantees the right in article 14(5).

¹¹⁶ Consideration could also be given to the question as to whether an appellate court-martial should have the power to order a new summary trial. This would entail a significant policy change and is beyond the scope of this thesis.

¹¹⁷ The independence of judge advocates and courts-martial in general would need to be addressed as part of this reform. That issue however is beyond the scope of this thesis.

Another matter which would need to be addressed if summary appellate jurisdiction were conferred on courts-martial would be the Service member's right to legal representation. A Service member whose case is to be heard by a court-martial in its appellate jurisdiction should be put in the same position in this respect as he or she would have been had the court-martial tried the case at first instance. This would imply the extension of the Armed Forces Legal Aid Scheme to provide contributory legal aid to Service members who wish to lodge an appeal against their summary conviction or punishment.¹¹⁹

Conclusion

While it is axiomatic that a summary disposals system which is not compatible with the efficient and disciplined operation of the armed forces would be self-defeating, it is equally true that, in the modern era, there is little point in promoting a system which does not accord adequate weight to the requirements of domestic and international human rights law. Such a system would be simply unsustainable in the long term. With this in mind, it follows from the foregoing analysis that any joint system of summary disposals which is developed for the New Zealand Armed Forces of the 21st Century must exhibit the following features:

- (a) There must be proper disclosure of the evidence against the accused prior to the commencement of any proceedings.
- (b) Every accused must have the opportunity to be represented by an assisting officer.
- (c) Assisting officers must be provided with adequate training and protections to ensure that they have the 'right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair'.
- (d) The form of disposal must be an adversarial trial with a prosecutor.

¹¹⁸ AFDA s 134(3).

¹¹⁹ See DFO(D) Section 16 for the existing rules. In my view, the entitlement to legal aid should take effect when the Service member lodges his or her appeal. However, in fairness consideration should be given to approving legal aid for advice given and preparation undertaken by counsel in respect of the appeal before the formal notice of appeal was lodged. The current breadth of the Armed Forces Legal Aid Scheme is a matter which may deserve further examination, but that is beyond the scope of this thesis.

- (e) The right of election must be given when a punishment of detention, reduction in rank or a fine exceeding seven days' basic pay is in contemplation. Provision must be made for the non-exercise of this right to constitute a valid waiver of the right to legal representation.¹²⁰
- (f) An accused who is given the right of election must be given the right to consult a lawyer subject to the unavailability of suitable communications for pressing operational reasons.
- (g) The accused must enjoy 'equality of arms' with the prosecutor in respect of the obtaining of witnesses and gathering of evidence.

Furthermore, while it may be possible in law to retain the current review structure for a joint system, the better view is that it should be converted into an appellate structure, with jurisdiction conferred on judge advocates sitting alone as appellate courts-martial. An appellant appearing before such a court has the right to legal representation and the Armed Forces Legal Aid Scheme should be extended to embrace such hearings also.

The foregoing conclusions lend significant shape to the joint system which is desirable for the Armed Forces of the future. The next chapter explores some further areas of the current naval and military systems which could be improved upon or removed in order to enhance the system's capacity to promote the efficient and disciplined operation of the armed forces.

¹²⁰ It may be that such a waiver could also be made effective in respect of the right to a hearing by an independent court, but that is beyond the scope of this thesis.

**TABLE B TO SCHEDULE 3 OF THE DEFENCE FORCE DISCIPLINE ACT 1982
(Commonwealth of Australia)**

TABLE B—COMMANDING OFFICER

Column 1	Column 2	Column 3
Convicted person	Elective punishment	Other punishment
Officer of or below the rank of lieutenant in the Navy, captain in the Army or flight lieutenant or warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
Non-commissioned officer of the Australian Navy	Reduction in rank by not more than one rank Forfeiture of seniority	Fine not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Stoppage of leave for a period not exceeding 21 days Reprimand
Non-commissioned officer of the Australian Army or the Australian Air Force	Reduction in rank by not more than one rank or, in the case of a corporal of the Australian Army, reduction in rank by one or 2 ranks Forfeiture of seniority Fine not exceeding the amount of the convicted person's pay for 7 days Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
Member below non-commissioned rank in the Navy		Detention for a period not exceeding 42 days Reduction in rank Forfeiture of seniority Fine not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Restriction of privileges for a period not exceeding 14

		<p>days</p> <p>Stoppage of leave for a period not exceeding 21 days</p> <p>Extra duties for a period not exceeding 7 days</p> <p>Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days</p> <p>Reprimand</p>
<p>Member below non-commissioned rank in the Army or the Air Force who, at the time he or she committed the service offence of which he or she has been convicted, was on active service</p>	<p>Detention for a period exceeding 14 days but not exceeding 42 days</p> <p>Fine exceeding the amount of the convicted person's pay for 14 days but not exceeding the amount of the convicted person's pay for 28 days</p>	<p>Detention for a period not exceeding 14 days</p> <p>Fine not exceeding the amount of the convicted person's pay for 14 days</p> <p>Severe reprimand</p> <p>Restriction of privileges for a period not exceeding 14 days</p> <p>Extra duties for a period not exceeding 7 days</p> <p>Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days</p> <p>Reprimand</p>
<p>Member below non-commissioned rank in the Army or the Air Force who, at the time he or she committed the service offence of which he or she has been convicted, was not on active service</p>	<p>Detention for a period exceeding 7 days but not exceeding 28 days</p> <p>Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 28 days</p>	<p>Detention for a period not exceeding 7 days</p> <p>Fine not exceeding the amount of the convicted person's pay for 7 days</p> <p>Severe reprimand</p> <p>Restriction of privileges for a period not exceeding 14 days</p> <p>Extra duties for a period not exceeding 7 days</p> <p>Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days</p> <p>Reprimand</p>
<p>Person who is not a member of the Defence Force</p>	<p>Fine exceeding \$100 but not exceeding \$250</p>	<p>Fine not exceeding \$100</p>

Chapter 6

Potential Efficiencies and Improvements

As was the case in the 1970s, if the New Zealand Armed Forces are to adopt a common approach to summary discipline in the 21st Century, there must be compromise between the two existing systems. That compromise should be based on the application of law and sound policy. The impact of the law, and specifically the New Zealand Bill of Rights Act 1990, has been canvassed in the previous two chapters. In this chapter, two specific aspects of the current systems will be addressed from a policy perspective; the utility of filters such as the Officer of the Day's Table and the law of evidence in its application to summary disposals.

Filters

There are a number of circumstances under the current summary disposal systems where an accused is brought before an officer for an investigation of the charge, where that officer has no power to try or deal with the charge summarily. This observation applies to Tables conducted by OODs under the naval system, but also, *inter alia*, to investigations conducted by subordinate commanders into charges against staff sergeants and flight sergeants. These investigations may be described as 'filters', since their purpose is to ensure that a case is not brought before a more senior officer unless there is a *prima facie* case.

From a policy perspective, there is a real question as to whether the current system of filters is in the best interests of the efficient maintenance of discipline. To take the case of OOD's Tables, if the OOD finds a *prima facie* case and remands the accused to the XO, the XO must in effect repeat the hearing which the OOD has already conducted as part of the summary trial. Thus the system provides for the duplication of effort. Efficiency calls for the minimisation of such duplication. This raises a question as to whether the filters actually deliver a significant reduction in caseload to the more senior officers whom they

are designed to shield. In the Joint Summary Disposals Survey, naval officers were asked how often in their experience OODs dismiss charges. 67 per cent responded that OODs dismissed charges rarely or very rarely, and 33 per cent said that OODs dismissed charges sometimes. This could be explained on the basis that most charges are supported by evidence which is sufficient to constitute a *prima facie* case. If that is the case, it is nugatory to conduct two hearings to determine that there is such a case. Alternatively, there may be a certain degree of reluctance among the junior officers who conduct OOD's Tables to dismiss charges in any except the clearest cases of evidential insufficiency. Anecdotal evidence suggests that the latter tendency may have developed as a response to XOs who have expressed disapproval of certain decisions to dismiss a charge or charges. It needs to be borne in mind that the XO is an officer superior in rank to the OOD, who has a significant degree of influence over the OOD's career prospects.

Given these factors, the limited utility which a joint system of summary disposals could derive from replicating the current system of filters does not warrant the duplication of effort which it demands. While 60 per cent of naval respondents to the Joint Summary Disposals Survey considered that the retention of the OOD's Table was important or very important, the comments provided with those responses indicate that they were motivated by concern that junior officers should receive adequate training and experience in the operation of the summary disposals system prior to appointment as an XO. This valid concern can however be dealt with in other ways, such as formal training and on-the-job training.

The practical implications of removing the filters would be that:

- (a) All ratings, soldiers and airmen below the rank of sergeant or equivalent who are charged with an offence would make their first appearance before an XO or subordinate commander; and
- (b) All Service members holding the rank of staff sergeant or equivalent who are charged with an offence would make their first appearance before their CO.

It is not suggested here that the filters should be removed in respect of charges which would need to be remanded to a superior commander or to a court-martial for trial. The level at which charges should be so remanded and the authority which should be charged with conducting the investigation are beyond the scope of this thesis.

Law of Evidence

RP 12(1) provides that:

Subject to these rules, the rules of evidence to be followed in proceedings before an officer of the day, an officer exercising summary powers, or an officer preparing a summary of evidence or an abstract of evidence shall be the same as those that are followed in court-martial proceedings.

AFDA s 147(1) provides in part that:

Subject to subsection (2) of this section, the rules of evidence to be followed in court-martial proceedings shall be the same as those that are followed in the High Court when exercising its criminal jurisdiction (including the rules of evidence contained in the Evidence Act 1908 and in any other enactment containing any rule of evidence)...¹

While AFDA s 147(1) and RP(1) appear to produce a workable basis for the application of the law of evidence in summary disposals, they impose unrealistic expectations on officers exercising summary powers, who are of course on the whole without qualifications in law. The law of evidence is voluminous and extremely complex, despite attempts to codify it in the Evidence Act 1908 and other statutes. It is not even well understood by some members of the legal profession, particularly those who do not practice regularly in the courts. The Joint Summary Disposals Survey asked all officers exercising summary powers how important rules of evidence are in summary disposals in their experience. 98 per cent of respondents considered that such rules are very important or important. A staff officer responsible for discipline in the Air Force observed that '[m]ost summary disposals involve clear cut situations where evidence is relatively straightforward', and this seems a reasonable assessment. However, a number of officers exercising summary powers across all three Services commented that the rules are difficult to understand. It was noted that

¹ AFDA s 147(2) provides for a number of specific exceptions to, *inter alia*, the rule against hearsay and the best evidence rule which are necessary to prove matters connected with military service. It is not necessary to consider those matters in detail in the present context.

this leads to uneven and, at times, incorrect application of the rules. No data exists on the basis of which it is possible to assess the size of this problem, but one may surmise that the admission of inadmissible evidence in summary disposals is not uncommon.² At present, there is no requirement for a record of proceedings, so the reviewing authority cannot normally ascertain whether the law of evidence has been breached.³ The implication of this is that the confidence which the command has, and must have, in the validity of findings within the summary disposal system may not be borne out by the reality. There is a real likelihood of injustices occurring on the basis of inadmissible evidence because of the complexity of the current rules and the fact that such irregularities will usually not be apparent on the face of the record.

One Army CO proposed a solution to this problem which merits consideration:

They [the rules of evidence] need to be expressed more clearly and be procedurally more simple.

The current New Zealand position can be traced to the approach taken under British naval and military law,⁴ and is similar to that which applies under Australian military law.⁵

Canada and the United States however take different approaches to this matter in summary proceedings, which are worthy of closer examination.

United States

As was mentioned in the previous chapter, US military law provides for two methods of disposing of minor charges which approximate summary disposals, summary courts-martial and non-judicial punishment ('NJP') imposed pursuant to article 15 of the UCMJ. RCM 1304(b)(2)(E)(i) provides that the Military Rules of Evidence ('MRE'), prescribed in Part III of the MCM, apply to summary courts-martial. Thus a summary court-martial has an evidence code which has been designed specifically for use in the military context. This is

² The reverse is also probably true, ie the rejection of evidence based on a misunderstanding of an exclusionary rule.

³ It may be that it is time to reconsider this aspect in view of the ready availability of compact recording technology in the modern era, particularly if appeals against summary findings are to be facilitated.

⁴ See, for example, BR 11, article 1201.

⁵ See section 146(1) of the Defence Force Discipline Act.

an advantage over the present position in New Zealand. That having been said, the MRE are not notable for their simplicity and it may be doubted whether codifying the rules of evidence for summary disposals in New Zealand to a similar level would yield a significant benefit in terms of the concerns which have been expressed above. The codification option is nevertheless worthy of consideration.

The position is much simpler in respect of NJP. Subparagraph 4c(3) of Part V of the MCM provides that:

The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. *Any relevant matter may be considered*, after compliance with subparagraphs 4c(1)(C) and (D) of this Part. [Emphasis added.]⁶

Canada

Canada also has Military Rules of Evidence, which are made by the Governor-in-Council pursuant to section 181(1) of the National Defence Act. However, in common with the American position in respect of NJP, article 108.21(1) of QR&Os prescribes that those rules do not apply at a summary trial. Instead, article 108.21 provides that, *inter alia*:

(2) The officer presiding at a summary trial may receive any evidence that the officer considers to be of assistance and relevant in determining whether or not the accused committed any of the offences charged and, where applicable, imposing an appropriate sentence.

(3) The presiding officer may receive any evidence that is sufficient to establish any relevant fact, either taken alone or considered with other evidence, but the officer shall only give it the weight that is warranted by its reliability.

The succeeding paragraphs of article 108.21 provide for limited circumstances in which evidence may be given by way of a telephone or other telecommunications device. Given the limited legal education of the participants, the Canadian approach to evidence at summary trials is one which strongly recommends itself from a pragmatic perspective. It is therefore more consistent with the efficient and effective maintenance of discipline in the Armed Forces. It is questionable whether the removal of strict rules of evidence from the summary context would be a source of grave injustice *per se*, and if there were an injustice

⁶ Subparagraphs 4c(1)(C) and (D) require full disclosure of the evidence against the accused prior to the hearing. The most important privilege referred to in subparagraph 4c(3) is the privilege against self-incrimination: see MRE 301.

caused by the unfair admission of evidence in a particular case, the matter would be amenable to an appeal under the system proposed in the previous chapter. Furthermore, under the system proposed, all but those accused charged with very minor offences would be given the opportunity to avail themselves of the fuller rights of due process offered by a trial by court-martial.

Conclusion

Chapter 5 noted the comment of Canada's Summary Trial Working Group that '[t]raditionally and perhaps somewhat unfairly, the military has been seen as an organization that is resistive to change'. Despite this observation, New Zealand's military law has changed gradually over the last 50 or so years. As with any successful battle-tested military doctrine or procedure, the Armed Forces are quite rightly cautious about revolutionary changes which may prove to be a mistake in that most unforgiving of environments – armed conflict. However, that does not mean that the 'continuous improvement journey' of New Zealand's military justice system should end with the coming into force of the AFDA in 1983. In the previous chapter we saw that the law has moved on, and thus so must the summary disposals system adopted for the future. This chapter has examined two areas where improvements could be made which are not dictated by law, but rather indicated by sound policy. There are other improvements in the same category which the available space precludes me from exploring here. The next chapter will bring together my conclusions about the shape of a new summary disposals system for the New Zealand Armed Forces of the 21st Century. However, even that can only be a milestone on the path to providing New Zealand's forces with the system of summary discipline which they deserve in the new millennium.

Chapter 7

Conclusions and Recommendations

This chapter summarises the conclusions drawn in the preceding chapters and makes recommendations about the shape of a future joint system.

In the Preface, the following key questions are posed:

- (a) How have New Zealand's summary disposal systems evolved into what they are today?
- (b) What is the composition of New Zealand's two summary disposal systems and what are the differences between them?
- (c) Why are the two systems different?
- (d) Should there be a joint system?
- (e) Are there any aspects of either system or both systems which are problematic from a human rights law perspective?
- (f) Are there any aspects of either system or both systems which could be improved in the interests of the efficient administration of justice and discipline in the Armed Forces?
- (g) Can the two systems be harmonised into one system which:
 - (1) Can be applied in the joint context of New Zealand's operational forces in the 21st Century; and
 - (2) Is compatible with New Zealand's modern human rights law framework?

Evolution and Composition

Chapters 1 and 2 explain that the summary disposal systems operated within the New Zealand Defence Force today are in large part a reflection of the systems which had evolved separately under naval law on the one hand and military/air force law on the other, culminating in the systems provided for by the Naval Discipline Act 1957 (UK) and the New Zealand Army and Royal New Zealand Air Force Acts of 1950. Those systems had

and still have fundamentally different conceptual bases. The naval system is quasi-adversarial in that it projects the appearance of an adversarial trial in the ordinary sense of the term, while retaining some inquisitorial elements such as the wide power of the officer exercising summary powers to call and question witnesses. The military system on the other hand is entirely inquisitorial, with no prosecutor or assisting officer. There are also a number of other less fundamental differences between the two systems, such as the officers who are responsible for investigating offences allegedly committed by various ranks and the use of summaries of evidence by commanding officers under the military system.

Chapter 1 records that the Defence establishment spent over eight years from November 1972 until April 1981 attempting to produce a joint system of summary disposals in accordance with the then Government's commitment to 'a single code [of discipline] to apply to all the services'. In the end however, the attempt was abandoned by the Defence Council when the Navy would not compromise the role of the divisional officer in representing ratings appearing before an executive officer in every case, and the other two Services would not accept the adoption of an adversarial system.

Why a Joint System?

Chapter 3 reflects that the Chief of Defence Force's vision for the future Defence Force is a 'tailored' joint force which can produce synergies through 'innovative combinations of capabilities and contributions of different services'. There is therefore a greater likelihood of new joint units, such as the Headquarters Joint Forces New Zealand established in July 2001. The current bipartite approach to summary disposals will inhibit the exercise of command through the maintenance of discipline in such units. Accordingly, it may be concluded that the adherence to the *status quo* which typified the approach of some key stakeholders to this matter in the 1970s is no longer a valid response for 'Team Defence Force'. Chapter 3 concludes that a joint summary disposals system is crucial if the three Services are to move forward as one force in the manner envisioned by their commander.

The Impact of Human Rights Law

If it is accepted that a joint system of summary disposals represents the best way forward, the question remains as to what kind of joint system. The law provides a significant part of the answer to this question. Chapter 4 concludes that, if the test stipulated by the Supreme Court of Canada in *R v Wigglesworth* represents the law of New Zealand, summary disposals are ‘by nature’ criminal and therefore the minimum standards of criminal procedure guaranteed by sections 24 and 25 of the New Zealand Bill of Rights Act 1990 do apply. That having been said, it is not settled that *Wigglesworth* is good law in New Zealand. If it is not, the statutory context also indicates that the aforementioned rights apply. In either case, sections 24 and 25 of the New Zealand Bill of Rights Act provide an important benchmark for any joint system – the starting point for developing such a system must be to identify what the scope of those rights is and what implications they have for summary disposals.

While sections 24 and 25 raise a number of important issues for summary disposals, Chapter 5 confines its enquiry to the right to consult and instruct a lawyer, the right to a fair hearing, and the right to appeal according to law to a higher court against the conviction or against the sentence or against both. It finds that the exclusion of legal representation from summary disposals is a valid and worthwhile objective from a policy perspective and concludes that this could be achieved by legal prescription as a reasonable limit which can be demonstrably justified in a free and democratic society in the case of charges which will be subject to minor summary punishments. In all other cases, the same result could be achieved by providing the right to elect trial by court-martial and ensuring that there is an effective waiver of the right if the accused elects summary trial. In conjunction with this and the right to a fair hearing, Chapter 5 concludes that it is essential that any joint system provides for the appointment of assisting officers to represent the accused.

Chapter 5 also concludes that, as a matter of law, the right to a fair hearing dictates an adversarial trial and the observance of the principle of ‘equality of arms’. This means that any joint system of summary disposals will need to bear a greater resemblance to the

current naval system, although not all aspects of that system should be retained in their present form. Furthermore, while it may be possible as a matter of domestic law to retain the current review system, Chapter 5 concludes that a better approach on both policy and legal grounds would be to replace it with an appellate system administered by courts-martial comprising a judge advocate sitting alone.

Potential Efficiencies and Improvements

Having established the elements of a joint summary disposals system which are dictated or indicated by the law, the next step is to examine whether there are any aspects of the current systems which could be improved by a joint system from a policy perspective. Chapter 6 examines two specific aspects – the system of ‘filters’ such as the Navy’s Officer of the Day’s Table and the law of evidence. It concludes that filters such as the Officer of the Day’s Table should not be replicated in a joint system because the utility which such a system could derive from them does not warrant the duplication of effort which they entail. In respect of the application of the law of evidence in summary disposals, Chapter 6 concludes that a more realistic approach may be that of the equivalent Canadian provisions. These provide that an officer exercising summary powers may admit any relevant evidence subject to caution regarding the weight to be given to it if there is some question as to its reliability.

Conclusion and Recommendations

Of the key questions set out in the Preface and repeated above, the most important is whether the current naval and military systems of summary disposals can be harmonised into one system which can be applied in the joint context of New Zealand’s operational forces in the 21st Century and which is compatible with New Zealand’s modern human rights law framework. It will be apparent from the foregoing text that they can. In order to achieve this transformation, all parties will need to approach the matter in the spirit of inter-Service co-operation and with a preparedness to depart from the *status quo* where that is required. The following recommendations provide a starting point for this process:

- (a) To the greatest extent possible, an accused should always be brought before an officer who has the power to dispose of the charge against him in the first instance.
- (b) It should be provided that there must be proper disclosure of the evidence against the accused prior to the commencement of any proceedings.
- (c) The accused should be given the opportunity to plead guilty or not guilty to each charge and the existing naval procedure regarding guilty pleas should be adopted.
- (d) Summary disposals should be conducted by way of adversarial summary trials.
- (e) A prosecutor should be appointed for every summary trial.
- (f) The accused must enjoy 'equality of arms' with the prosecutor in respect of the obtaining of witnesses and gathering of evidence.
- (g) An assisting officer should be appointed to represent the accused at every summary trial, unless the accused declines the option in writing.
- (h) Assisting officers should receive adequate training to perform their role and have some measure of independence from the trying officer in the performance of their role.
- (i) It should be provided that the accused in a summary trial may not be represented by a lawyer.
- (j) Before the trial commences, the trying officer should be required to comply with a joint equivalent of RP 18(5)(b).
- (k) At the close of the prosecution case, every trying officer should decide:
 - (1) whether there is a case to answer; and if so
 - (2) whether he or she has sufficient powers of punishment and is otherwise empowered to try the accused.
- (l) At the close of the prosecution case, the accused should be offered the right to elect trial by court-martial, if the trying officer considers that there is a case to answer and he or she might impose a punishment of detention, reduction in rank, or a fine exceeding seven days' basic pay.
- (m) It should be provided that the decision to elect summary trial when one has been offered the right to elect trial by court-martial constitutes a waiver of the rights to legal representation and to a trial by an independent court.

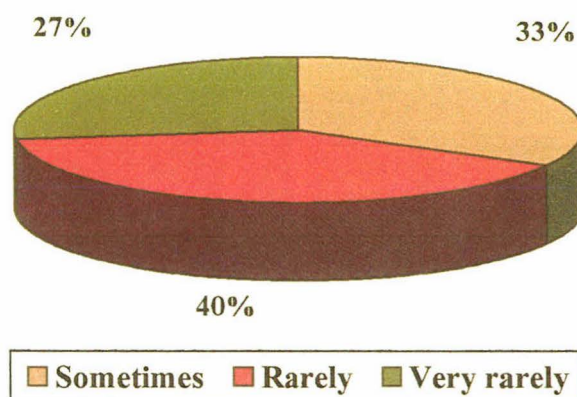
- (n) The accused should be provided with the opportunity to seek legal advice regarding the right to elect trial by court-martial unless suitable communications are unavailable for pressing operational reasons, and should also be provided with advice by his or her assisting officer.
- (o) The trying officer should be permitted to admit any relevant evidence, subject to caution regarding the weight to be attached to evidence where its reliability is in question.
- (p) Consideration should be given to permitting evidence to be given by way of a telephone or other telecommunications device.
- (q) Consideration should be given to whether it is desirable to retain the option of ordering a summary of evidence instead of calling all evidence orally at a summary trial.
- (r) The proceedings of summary trials should be recorded and then transcribed if an appeal is lodged.
- (s) The existing review system should be replaced with an appellate system administered by courts-martial comprising a judge advocate sitting alone.
- (t) Appellants should be legally represented and the Armed Forces Legal Aid Scheme should be extended to cover appeals from summary trials.

The Joint Summary Disposals Survey

The Joint Summary Disposals Survey questionnaire was sent to 193 members of the New Zealand Defence Force during the week commencing 20 May 2002. The target group was all officers exercising summary powers and, in addition, a small number of staff officers with specific responsibility for discipline. Over the succeeding three months, 130 members, or just over 67%, of the target group responded to the survey. The statistical data obtained from the respondents is presented in graphical form below. The margin of error for these results is plus or minus 4.92 per cent.¹ The research was approved by the Assistant Chief (Personnel) in the New Zealand Defence Force and the Massey University Human Ethics Committee.²

Navy Questions

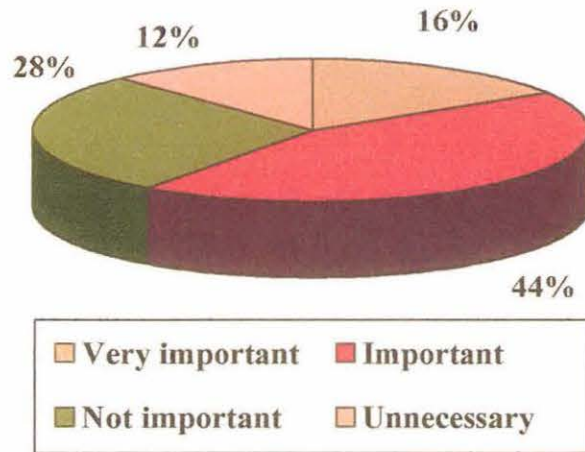
Question 1: The role of the Officer of the Day is to formally investigate the charge to determine whether there is a prima facie case. If there is a prima facie case, the OOD refers the charge to the CO's or XO's Table. If there is no prima facie case, the OOD dismisses the charge. In your experience, OOD's dismiss charges:



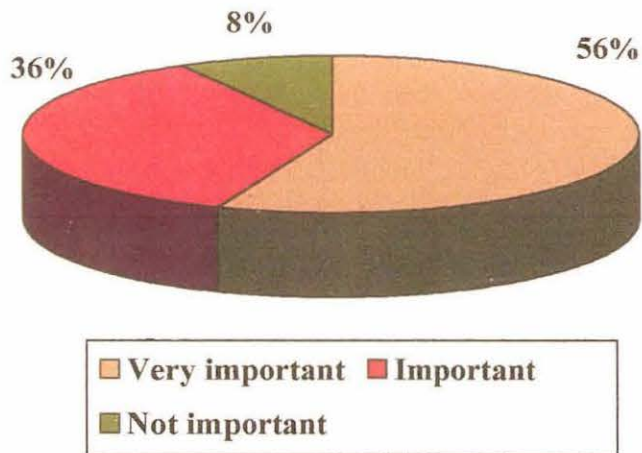
¹ Source: American Research Group, Inc, *Margin of Error Calculator*.

² PN Protocol 02/22.

Question 2: You consider that the retention of the Officer of the Day as a 'filter' prior to the XO's or CO's Table is:

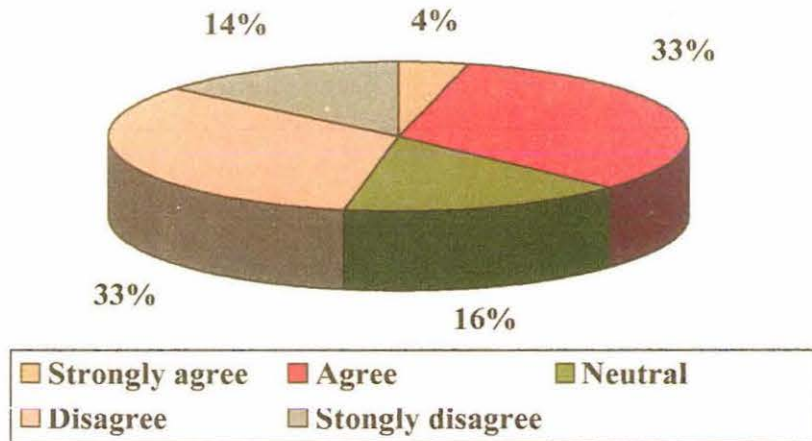


Question 3: You consider that the role of Divisional Officers in defending naval personnel appearing at a Table is:

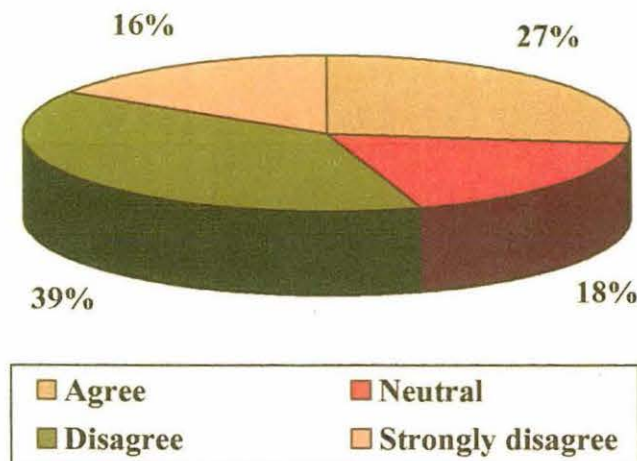


Army and Air Force Questions

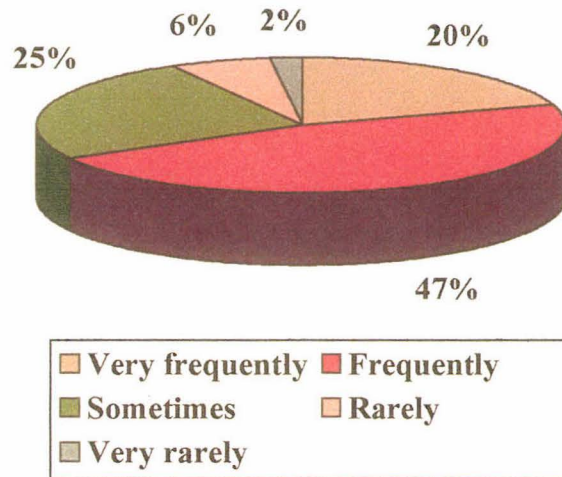
Question 4: “Orderly rooms would be more fair if the accused was defended by his or her platoon commander, flight commander or another Service member requested by the accused.” What is your view of this statement?



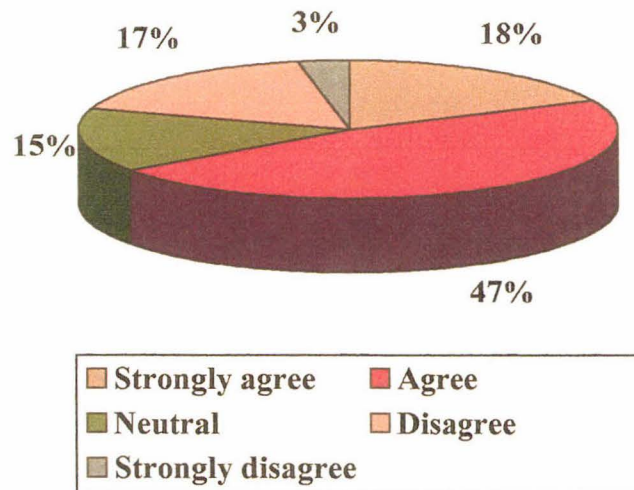
Question 5: “So that the CO or subordinate commander can focus on resolving any conflicts between the prosecution evidence and the accused’s case in an impartial manner, it would be better if the prosecution case were presented by another officer or NCO.” What is your view of this statement?



Question 6: In your experience, given the opportunity, accused Service members would be prepared to admit guilt at an orderly room:

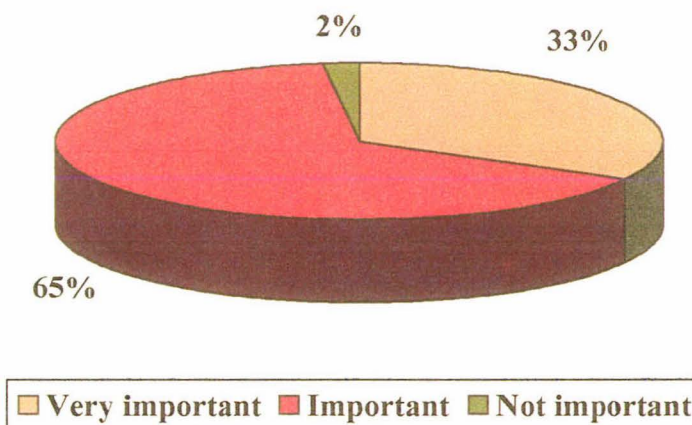


Question 7: “If the accused is defended by an officer or NCO, he or she should be able to plead guilty (or not guilty), thus removing the need to prove guilt if a plea of guilty is accepted.” What is your view of this statement?

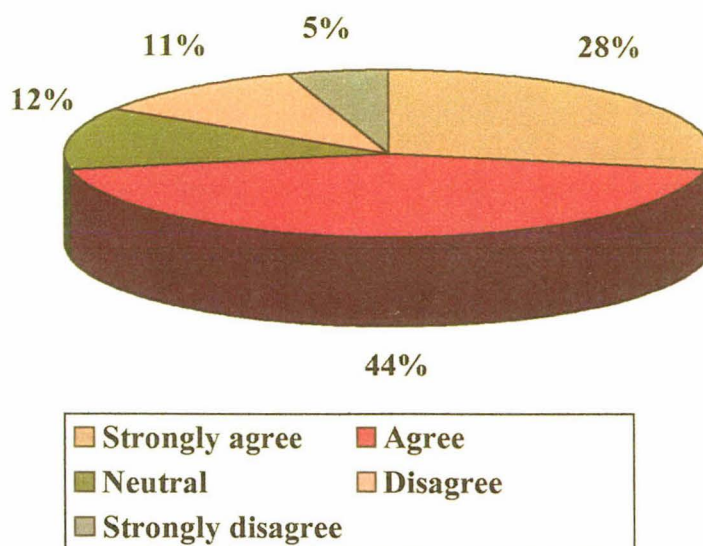


General Questions

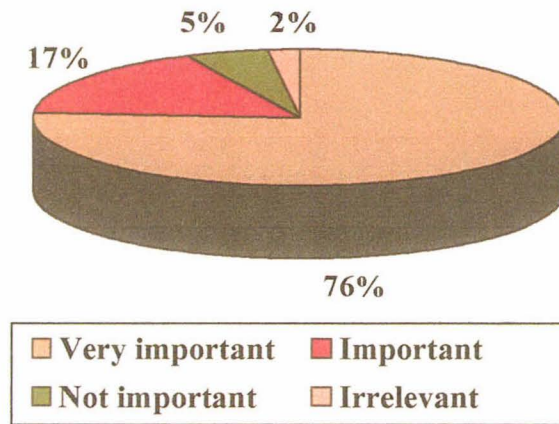
Question 8: The Rules of Procedure provide that the law of evidence in summary disposals is to be the same as that followed in trials by court-martial. From your experience in summary disposals, rules of evidence are:



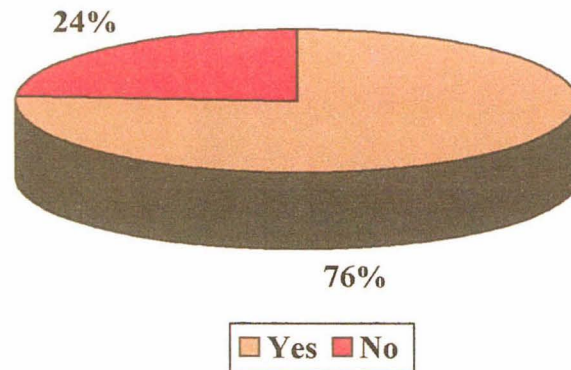
Question 9: At present, executive officers in the Navy and subordinate commanders in the Army and Air Force cannot make compensation or restitution orders. As it is considered that such a power should be within the competence of such officers, it is proposed that they should be permitted to do so, subject to the monetary limits to which they are subject as officers exercising delegated powers under the Third Column of the Fourth Schedule to the AFDA. What is your view of this proposal?



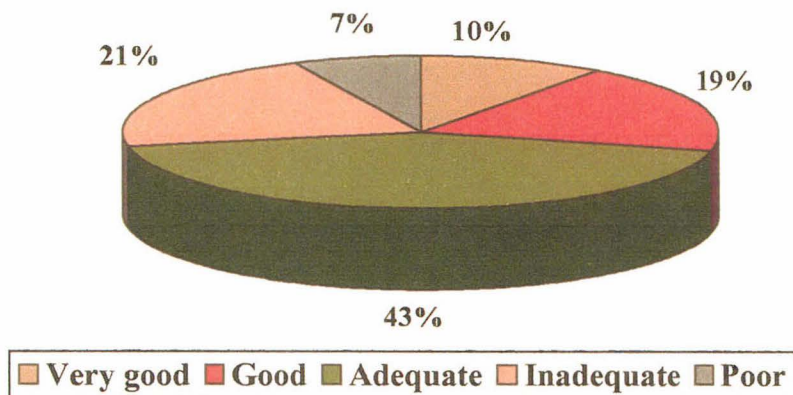
Question 10: How important to the maintenance of discipline do you consider it is that commanders (as opposed to military magistrates, civilian judges or some other judicial body) retain the ability to try or deal summarily with personnel under their command?



Question 11: If you are (or have been) an officer exercising summary powers, did you receive specialist training for that role?



Question 12: In your view, the specialist training provided to officers in your Service to prepare them for a role as an officer exercising summary powers is:



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