

PRESENTATION

NZDF Military Justice System and Serious Offending

Tena koutou, tena koutou, tena koutou katoa

Mā te rongo, ka mōhio, mā te mōhio, ka mārama, mā te marama, ka mātau,
mā te mātau, ka ora

Distinguished participants, it is my pleasure as Director of Defence Legal Services to be able to discuss with you the New Zealand Defence Force military justice system. As indicated by the title, the emphasis of this presentation is on serious offending in the context of modern military operations.

I am conscious that I stand between you and morning tea and that my presentation is likely to be the most dry of the presentations you will hear today – please bear with me.

Before I begin my presentation, like CDF has done, I wish to travel back in time to the classical era. I have not chosen Socrates for his philosophical pronouncements rather I have chosen him for his approach to philosophical examination – Victoria University Law School is well known for adopting his approach as part of their lecturing framework and as an alumni of that institution I think it only fitting that I begin my presentation with what is called the Socratic Method - for those of you that are unfamiliar with this approach it

essentially involves the presenter asking questions and the audience supplying the answers.

At Victoria this is usually done by calling upon named individuals to answer questions. I am not going to be so particular in this workshop – the questions will be provided under the veil of anonymity if you wish.

What will follow – and please allow a little time for the technology to work is a brief quiz consisting of three questions. These questions have been drawn from our Law of Armed Conflict exam that is issued to every soldier, sailor, and air personnel before they are able to deploy. It is focussed on the Law of Armed Conflict.

Now unfortunately the quiz will be limited to those of you that have a smartphone – I imagine that many of you will have one of these [hold up phone].

Please give me a few moments for the technology to work

In your browser head to the website www.menti.com and enter the following code 51 88 34.

I will give you a few moments to do this.

Just to give a bit further explanation – it's only three questions, you will only be given 15 seconds to answer each one. They are yes or no questions. They will

not have all of the information you would like but I am still requesting that you make a decision in the absence of complete information. Although the questions were designed for our 17/18 year old recruits I have modified them slightly given the experience and expertise of the audience. Note passing this course and test is a requirement for deployment.

[DO QUIZ] – 10 Minutes

Turning now to the focus of this presentation – as CDF stated in his opening remarks it is intended to provide an overview for you as participants to enable you to fully participate in the panel discussion this afternoon. Before we can look at oversight, we must first examine the current system. I will then discuss our approach to serious offending within the NZDF, and look briefly at current oversight mechanisms.

Before I start though, I just want to do a bit of advertising for a little known unit of the Defence Force – that is Defence Legal Services.

For those members of the public that are aware of the existence of lawyers within the armed forces (and you would be perhaps surprised about the number that express a level of shock at the concept of a lawyer in uniform), the perspective is often skewed due to films such as this [CLICK] and TV shows such as this [CLICK] when the reality is actually this [CLICK], actually like this –

although yes, hmmm, I can see how myths are created! Defence Legal Services is an independent unit within the NZDF, we have been independent since 2011 (we were a little slow adopting the requirements of the Lawyers and Conveyancers Act 2006). There are currently 24 regular force officer positions spread around the country and they represent all three Services - Navy, Army, and Air Force. We are what is called a 'joint' unit. All legal officers report through their legal command chains to me as the Director. I report to CDF through the Chief of Staff. All legal officers are barristers and solicitors of the High Court of New Zealand and hold current practising certificates. So why am I emphasising the role of legal advisers within the military justice system?

Essentially the position of legal officers is required by international law which New Zealand has (helpfully for our job security) enshrined in domestic law. Article 82 of Additional Protocol I requires that legal advisers are available to advise military commanders. Indeed, there has been increasing demand for legal advisers over the last 15 years, particularly since we deployed to Timor Leste, Solomon Islands and more recently Afghanistan and Iraq. There has been an increasing emphasis on advice to command in the area of Law of Armed Conflict, including specific advice on targeting, detention, and use of force in various situations. We have deployed lawyers to most major

deployments of the armed forces including most recently to Iraq to support Brig McAslan in his role as the Deputy Commanding General.

I would ask you as the workshop participants to keep in mind the role of the legal adviser when considering oversight mechanisms and I would emphasise that the concept of command responsibility does not exist in a vacuum.

Now turning to the military justice system itself. I would highlight from the outset that no system operated by human beings is perfect, but I think one of the things to examine here is whether the system is effective for the maintenance of discipline in modern operations. To give some context, until 2009 this represented the military justice system. From 2009, the military justice system was significantly overhauled and updated (we had thought that we had better start complying with the New Zealand Bill of Rights Act 1990) and now we have some shiny binders that represent our current system.

Rather than take you through line by line inundate you with a whole lot of legislation, I am going to attempt to explain the military justice system pictorially.

First, when considering offending, there must first be some form of allegation - that allegation can come to the attention of the armed forces in various ways, but usually comes through individual units, or is made to the Military Police.

Sometimes allegations are made to senior officers, or other times the New

Zealand Police will refer allegations to us. In the context of allegations arising in respect of operations, allegations can also arise from other armed forces, and other international organisations such as United Nations. This is not too dissimilar to the civilian system, the characteristic is that an allegation must be made.

Next, for serious offending, the NZDF MPS Serious Investigation Branch (SIB) will likely investigate the matter and make recommendations to the CO. Note that the Military Police are not an independent unit within the NZDF and are subject to command. That may be a further point for discussion this afternoon. Unlike some of our other military counterparts and unlike the New Zealand Police, the New Zealand Military Police have no specific statutory functions and powers. The power to arrest, search, seizure and other matters connected to investigating offending – which we call a **'preliminary inquiry'** are vested in the command chain and members of the armed forces generally. The aim of a **'preliminary inquiry'** conducted by the Military Police is to collect evidence to assist the Commanding Officer to determine whether there is a well-founded allegation under Armed Forces Discipline Act.

Third, we have the Commanding Officer – irrespective of the seriousness of the allegation – whether or not it is for dirty boots or for murder – it is the Commanding Officer that is the formal entry point into the military justice

system. At this juncture, the Commanding Officer makes a decision as to whether or not an allegation is “well-founded”. As lawyers, we in DLS are continually interrogated by this phrase which is not defined in law – after a series of discussions involving Crown Law, guidance was produced for Commanding Officers to assist them with the decision as to whether an allegation was well founded. That Guidance looked suspiciously like the Solicitor General’s guidelines for prosecution but with the bar set slightly lower. If the Commanding Officer determines that the allegation is well founded then they have two options, to either investigate the matter or to refer the matter to the appropriate civilian authority.

In the case of the former, the matter will progress to a summary trial in front of the Commanding Officer as the Disciplinary Officer, or another disciplinary officer. This is a lawyer free zone where a Presenting Officer (usually an officer non-commissioned officer) essentially prosecutes the case and the accused is represented by a Defending Officer (also usually an officer or non-commissioned officer – they can also represent themselves).

All serious allegations that reach this threshold must be referred to the Director of Military Prosecutions (and I will talk about what constitutes serious offending shortly). That picture may look familiar to you, because not only am I the Director of Defence Legal Services but I am also appointed by warrant as

the Director of Military Prosecutions, a statutorily independent position that determines whether or not a matter should be put before the Court Martial of New Zealand. I make that decision using the same Solicitor's General guidelines as civilian prosecutors do in civilian courts and I am subject to Solicitor General oversight in this role.

If the matter passes the Solicitor General's guidelines, then I lay a charge or charges before the Court Martial of New Zealand.

The Court Martial of New Zealand is a court of record and since 2009 exists as an independent entity from the NZDF. I as Director of Military Prosecutions appoint a prosecutor (usually one of the Defence Legal Services legal officer), defence counsel are civilians selected from a panel by the Registrar of the Court Martial and military members (similar in function to a jury) are chosen at random by the Registrar of the Court Martial. For the most part the Criminal Procedure Act 2011 does not apply to court martial proceedings, the Court Martial has its own procedure for the most part. The proceedings are presided over by the Judge of the Court Martial, a civilian who is either an experienced barrister or a district court judge.

The Court Martial determines guilt, and if so, punishment. The punishments available for the Court Martial include imprisonment in a civilian prison (which comes with an automatic punishment of dismissal), dismissal from the Armed

Forces, detention, fines, and cautions. There are appeal options to the Court Martial Appeal Court and then onward through to the civilian appeal courts.

And for those that work better in list form, here are the broad steps in the process.

Let's now turn to modern military operations and offending.

First we have to recognise that the military justice system is not an exact replica of the criminal justice system. The military justice system is a complex hybrid of a criminal, administrative, and disciplinary tribunals.

Inside the military justice system there are three broad categories of offences:

1. Purely disciplinary offences that have no corollary to the civilian criminal system, i.e. absence without leave, breaching a written order, and conduct prejudicial to service discipline. Not going to be concerned about allegations involving dirty boots or being late to work in respect of this workshop
2. Those offences that are hybrid in nature – such as indecent and disgraceful acts, threatening language, and striking a superior – again for the most part not going to focus on this.

3. Those offences that are purely criminal in nature as wider society understands, for example those offences contained in the crimes act and others. This is the emphasis of the presentation.

Focus of this brief is to give more of an insight into the military justice system as it relates to serious offending and focussing in the context of operations, i.e. matters that are similar to civilian criminal matters that occur outside New Zealand.

Section 74 of the Armed Forces Discipline Act 1971 provides that the NZDF has jurisdiction in respect of offending regarding service members irrespective of where in the world an allegation occurs.

We must now consider what is meant by serious offending. That can mean different things to different people. Helpfully CDF has dictated a list of offences that must be tried in the Court Martial of New Zealand. That list, includes a mixture of service offences such as offences relating to capture by the enemy but also includes any offence for which the maximum punishment is life imprisonment or a term of imprisonment exceeding seven years.

There are some key offences that apply in respect of the conduct of the armed forces on operations – those are the offences that allege war crimes under the International crimes and Criminal Court Act 2000, the offence of a ‘grave

breach' under the Geneva Conventions Act 1958, and those serious offences under the Crimes Act 1961 such as murder.

I note that many of these offences will also require the permission of the Attorney-General in order to prosecute. I think it is also important to point out here is that there are overlapping offences and that the experience from other armed forces suggests that most prosecutions have taken place in accordance with the local criminal code rather than under the umbrella of war crimes or grave breaches.

Paradigms are important to consider at this juncture - as there may be different approaches whether an allegation arises from a non-international armed conflict, an international armed conflict, or an operation outside of the paradigm of armed conflict. Offences under the International Crimes and Criminal Court and Geneva law will generally only be applicable in the event of an armed conflict being in existence, and in some respects a certain types of armed conflict. Offences pursuant to the crimes act and other offences under domestic law may be applicable across the paradigms.

As discussed above, the NZDF has its own internal justice system and the primary entry point is section 102 which is the start point irrespective of how serious the allegation is, the decision is for the Commanding Officer.

I would also highlight that the New Zealand police has concurrent jurisdiction in relation some serious offending, for example war crimes. However, an element of pragmatism should in my view prevail – the New Zealand Police may not have the capacity to investigate offending in areas that may still constitute a war zone. Any justice system must be able to cope with the reality of investigating matters where the security situation may be uncertain.

Despite the fact that we have an internal discipline system, it is not without oversight, actions of the armed forces and the justice system do not act in a vacuum.

First and foremost, as I have previously highlighted Legal advisers are required to provide command with advice at all levels under international law – AP I incorporated into domestic law.

I as the DMP am a form of independent oversight and of course as discussed this role is subject to supervision from the Solicitor General.

The Judge Advocate General who you will hear from later by video as part of the panel discussion also has a role to play and is dual hatted as the Chief Judge of the Court Martial of New Zealand.

Ministry of Defence has an audit function in respect of the NZDF – this is an independent function, and their programme of that they audit is determined

separately from the NZDF. This is a statutorily proscribed function under the Defence Act is necessarily broad – they can assess and audit any ‘function, duty or project’ of the NZDF.

Similarly the Auditor General has an oversight role and some of these audits have connected with the military justice system – the investigation into overpayments made to senior officers of UN allowances is one example.

The Ombudsman in addition to their role in the Official Information Act 1982 can also investigate administrative decisions, including those made by the NZDF – there is an exemption – they cannot investigate matters that affect the terms and conditions of members of the Armed Forces but that still leaves a range of matters that the Ombudsman may inquire into.

Clearly international organisations such as the International Criminal Court provide an oversight role – noting that of course the complementarity principle applies and I am sure that Professor Dunworth will discuss this further in her presentation.

The United Nations, the International Committee of the Red Cross (other organisations) – also provide a level of review and oversight for the conduct of armed forces particularly while deployed.

And that is the sum total of our system and current oversight mechanisms – I am happy to take questions.