

Court Martial Bill

Government Bill

As reported from the committee of the whole House

This bill was formerly part of the Armed Forces Law Reform Bill as reported from the Foreign Affairs, Defence and Trade Committee. The committee of the whole House has further amended the bill and divided it into the following bills:

- The Armed Forces Discipline Amendment Bill (No 2), comprising Part 1 and Schedules 1 and 2
 - The Court Martial Appeals Amendment Bill, comprising Part 2 and Schedule 3
 - The Defence Amendment Bill (No 3), comprising Part 3
 - This bill, comprising Parts 4 to 6 and Schedules 4 and 5.
-

Key to symbols used in reprinted bill

As reported from a select committee

New (unanimous)

Subject to this Act,

Text inserted unanimously

As reported from the committee of the whole House

Struck out

Subject to this Act,

Text struck out

Hon Phil Goff

Court Martial Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Court Martial Act **2007**.

- 2 Commencement**
This Act comes into force on a date to be appointed by the Governor-General by Order in Council, and 1 or more orders may be made appointing different dates for different provisions. 5

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New (unanimous)

	Part 4	
	Preliminary provisions relating to Court Martial	10
	Subpart 1—Preliminary	
115	Purpose of Parts 4 to 6 The purpose of Parts 4 to 6 is—	
	(a) to establish a permanent court of record, called the Court Martial of New Zealand, as a replacement for the	15

New (unanimous)

	ad hoc courts-martial provided for under Part 6 of the Armed Forces Discipline Act 1971; and	
(b)	to provide for the Court Martial's jurisdiction and related matters; and	
(c)	to repeal Part 6 of the Armed Forces Discipline Act 1971.	5
116	Overview of Parts 4 to 6	
(1)	Part 4 deals with preliminary matters, establishes the Court Martial, provides for the appointment of Judges of the Court Martial, sets out the composition of the Court Martial for proceedings (including the procedure for the assignment of military members), and states the duties of members of the Court.	10
(2)	Part 5 relates to the jurisdiction of the Court Martial, the procedural requirements for the Court, and the Court's powers in relation to proceedings (for example, the power to grant bail).	15
(3)	Part 6 sets out various miscellaneous and administrative provisions (including provisions for transitional matters, the repeal of Part 6 of the Armed Forces Discipline Act 1971, and consequential amendments to other enactments).	20
(4)	This section is only a guide to the general scheme and effect of Parts 4 to 6 .	
117	Interpretation	
(1)	In Parts 4 to 6 , unless the context otherwise requires,—	25
	1971 Act means the Armed Forces Discipline Act 1971	
	Chief Judge means the Chief Judge of the Court Martial appointed under section 124	
	Court Martial means the Court Martial of New Zealand established under section 120	30
	defender means a member of the Armed Forces who undertakes the defence of the accused at the Court Martial	
	Deputy Chief Judge means a Deputy Chief Judge of the Court Martial appointed under section 125	

New (unanimous)

Director of Military Prosecutions means the person appointed under section 101D of the 1971 Act	
Discipline Committee means the Armed Forces Discipline Committee established under section 160 of the 1971 Act	
Judge—	5
(a) means a Judge of the Court Martial; and	
(b) includes the Chief Judge and a Deputy Chief Judge	
member of the Court Martial means a Judge or a military member	
military member , in relation to the Court Martial, means an officer or a warrant officer who is assigned by the Registrar to be a member of that Court	10
Registrar means the Registrar of the Court Martial	
rules of procedure means rules of procedure made under section 150 of the 1971 Act	15
sentencing guidelines means sentencing guidelines produced by the Discipline Committee and published by the Chief of Defence Force as Defence Force Orders	
serious offence has the meaning given by section 133(1)(b)(i)	
substitute military member has the meaning given by section 139 .	20
(2) Any term or expression that is defined in the 1971 Act and used, but not defined, in Parts 4 to 6 has the same meaning as in the 1971 Act.	
118 Parts 4 to 6 to be read with 1971 Act	25
(1) Parts 4 to 6 are to be read in conjunction with the 1971 Act.	
(2) Unless the context otherwise requires, the provisions of the 1971 Act and any regulations made under that Act apply to the extent that they are applicable and with any necessary modifications.	30
(3) However, if there is any inconsistency between the provisions of Parts 4 to 6 and any provisions of the 1971 Act or any regulations made under that Act, Parts 4 to 6 prevail.	
(4) This section applies in addition to, and does not limit, section 117(2) .	35

New (unanimous)**119 Parts 4 to 6 bind the Crown****Parts 4 to 6** bind the Crown.

Subpart 2—Establishment of Court Martial

*Court Martial established***120 Court Martial of New Zealand established** 5

(1) A court of record called the Court Martial of New Zealand is established.

(2) In addition to the jurisdiction and powers specially conferred on the Court Martial by this or any other Act, the Court has all the powers inherent in a court of record. 10

121 Court Martial must sit in divisions

(1) For the purposes of any proceedings in the Court Martial, the Court must sit in divisions each comprising 1 Judge.

(2) Each division of the Court Martial may exercise all the powers of the Court. 15

(3) A division of the Court Martial may exercise any powers of the Court even though 1 or more divisions of the Court are exercising any powers of the Court at the same time.

*Judges of Court Martial***122 Judges of Court Martial** 20

(1) The Court Martial comprises—

(a) 1 Judge who is to be the Chief Judge of the Court Martial; and

(b) at least 6 other Judges.

(2) The Court Martial's jurisdiction is not affected by a vacancy in the number of its Judges. 25

123 Eligibility for appointment as Judge

(1) A person must not be appointed as a Judge unless he or she—

(a) has held a practising certificate as a barrister or solicitor of the High Court for at least 7 years; or 30

(b) is a District Court Judge.

New (unanimous)

- (2) A District Court Judge who is appointed as a Judge of the Court Martial may sit as, or exercise any of the powers of, a District Court Judge.

124 Appointment of Chief Judge

- (1) The Governor-General may, by warrant, appoint a person as the Chief Judge. 5
- (2) A person must not be appointed as the Chief Judge unless he or she—
- (a) is appointed to, or holds, the office of Judge Advocate General; or 10
- (b) if the office of Judge Advocate General is vacant, is eligible for appointment as a Judge under **section 123**.

125 Appointment of Deputy Chief Judges

- (1) The Governor-General may, by warrant, appoint 1 or more Deputy Chief Judges. 15
- (2) A person must not be appointed as a Deputy Chief Judge unless he or she—
- (a) is appointed to, or holds, the office of Deputy Judge Advocate General; or
- (b) if the office of Deputy Judge Advocate General is vacant, is eligible for appointment as a Judge under **section 123**. 20
- (3) A Deputy Chief Judge may act in place of the Chief Judge if,—
- (a) because of illness or absence from New Zealand, or for any other reason, the Chief Judge is unable to exercise the duties of that office; or 25
- (b) the office of Chief Judge is vacant.
- (4) While acting in place of the Chief Judge, a Deputy Chief Judge— 30
- (a) may perform the functions and duties of the Chief Judge; and
- (b) may for that purpose exercise all the powers of the Chief Judge.

New (unanimous)

126 Appointment of other Judges

- (1) The Governor-General may, by warrant, appoint a person as a Judge.
- (2) Judges who are appointed under this section have seniority among themselves according to the dates of their appointment. 5

127 Notice requirement for appointment of Chief Judge, Deputy Chief Judges, or other Judges

The Chief of Defence Force must arrange for notice of an appointment under any of **sections 124 to 126** to be published in the *Gazette* as soon as practicable after the appointment. 10

128 Protection of Judges against removal from office

- (1) A Judge may not be removed from office except by the Sovereign or the Governor-General, acting upon the address of the House of Representatives. 15
- (2) An address under **subsection (1)** may be moved only on the ground of—
- (a) the Judge's misbehaviour; or
 - (b) the Judge's incapacity to discharge the functions of the Judge's office. 20

129 Judges must not hold other offices

- (1) A Judge must not undertake any other paid employment or hold any other office (whether paid or not) unless the Governor-General is satisfied that the employment or other office is compatible with judicial office. 25
- (2) **Subsection (1)** is subject to **section 123(2)**.

130 Judges to have immunities of High Court Judges

A Judge has all the immunities of a Judge of the High Court.

131 Age of retirement

- (1) Each Judge, except the Chief Judge, must retire from office on attaining the age of 70 years. 30

New (unanimous)

- (2) The Chief Judge must retire from office on attaining the age of 75 years.

132 Salaries and allowances of Judges

- (1) Each Judge is to be paid, out of public money, without further authority than this section,— 5
- (a) a salary at the rate that the Remuneration Authority determines; and
- (b) any allowances that are determined by the Remuneration Authority; and
- (c) any additional allowances (being travelling allowances or other incidental or minor allowances) that may be determined by the Governor-General. 10
- (2) In the case of the Chief Judge or a Deputy Chief Judge, the rate of salary and the allowances determined may be higher than those for the other Judges. 15
- (3) The salary of a Judge is not to be reduced while the Judge holds office.
- (4) The salary and allowances payable for a period during which a Judge acts on a part-time basis must be calculated and paid on a pro rata basis as a proportion of the salary and allowances for a full-time equivalent position. 20
- (5) For the purpose of **subsection (3)**, the payment of salary and allowances on a pro rata basis under **subsection (4)** is not a reduction of salary.
- (6) Any determination made under **subsection (1)**, and any provision of the determination, may be made so as to come into force on a date specified in the determination, being the date of the making of the determination or any other date, whether before or after the date of the making of the determination or the date of the commencement of this section. 25 30
- (7) Every determination made under **subsection (1)**, and every provision of the determination, for which no date is specified under **subsection (6)** comes into force on the date of the making of the determination.

New (unanimous)

Subpart 3—Constitution of Court Martial
for proceedings*Composition of Court Martial***133 Composition of Court Martial**

- (1) For the purpose of any trial in the Court Martial and of any proceedings under **section 175**, the Court must consist of— 5
- (a) 1 Judge; and
 - (b) either of the following:
 - (i) 5 military members if the proceedings relate to an offence for which the maximum penalty is life imprisonment or a term of imprisonment of 20 years or more (a **serious offence**); or 10
 - (ii) 3 military members in any other case.
- (2) For the purpose of any other proceedings in the Court Martial, the Court may consist of 1 Judge. 15
- (3) The Chief Judge must assign the Judge for the proceedings.
- (4) The Registrar must assign the military members in accordance with **sections 134 to 138** and, as the case may be, **section 140**.

*Assignment of military members of Court Martial***134 Qualifications for membership** 20

- A person is qualified to sit as a military member only if he or she—
- (a) is a member of the Armed Forces; and
 - (b) has served in the Armed Forces for a period of more than 3 years (whether continuously or in aggregate); 25
 - and
 - (c) is not disqualified under **section 135**.

135 Disqualifications for membership

- A person is disqualified to sit as a military member if he or she— 30
- (a) has been the commanding officer of the accused at any time between the date on which the accused was charged and the date of the trial; or
 - (b) is the prosecutor or a witness for the prosecution; or

New (unanimous)

- (c) has investigated the charge against the accused or was the officer who made the preliminary inquiry into the case; or
- (d) was the disciplinary officer who acted under **Part 5** of the 1971 Act in respect of the charge against the accused; or 5
- (e) was a member or judge advocate of a previous court that tried the accused in respect of the same offence; or
- (f) has held, or was one of the persons holding, an inquiry under the 1971 Act into matters relating to the subject matter of the charge against the accused; or 10
- (g) has a personal interest in the case.

136 Registrar must consider other factors in assigning military members

- (1) In any proceedings in the Court Martial where the accused is an officer, the Registrar must assign— 15
 - (a) 5 officers to be military members if the proceedings relate to a serious offence; or
 - (b) 3 officers to be military members in any other case.
- (2) In any proceedings in the Court Martial where the accused is a rating, soldier, or airman, the Registrar may assign— 20
 - (a) any of the following to be military members if the proceedings relate to a serious offence:
 - (i) 5 officers; or
 - (ii) 4 officers and 1 warrant officer; or
 - (iii) 3 officers and 2 warrant officers; or 25
 - (b) either of the following to be military members in any other case:
 - (i) 3 officers; or
 - (ii) 2 officers and 1 warrant officer.
- (3) Unless the Registrar is of the opinion that it is not reasonably practicable to do so, the Registrar— 30
 - (a) must assign military members whose ranks reflect—
 - (i) the seniority of the accused; and
 - (ii) the seriousness of the charge against the accused; and 35
 - (b) must assign at least 1 military member who belongs to the same component of the Navy, Army, or Air Force, as the case may be, as the accused; and

New (unanimous)

- (c) must not assign officers or warrant officers who are all—
- (i) from the same ship or unit as the accused; or
 - (ii) from 1 ship or unit.
- 137 Officers of other forces may be assigned as military members in certain circumstances** 5
- (1) This section applies if—
 - (a) it is necessary to try an accused at a particular place or under particular circumstances; and
 - (b) because of that place or those circumstances, the Registrar considers that the minimum number of officers required by **section 136(1) or (2)** cannot, having regard to the operational requirements of the Armed Forces, be assigned as military members. 10
 - (2) The Registrar may assign an officer of a force of another State to be a military member if that State has been declared to be serving together with a New Zealand force under section 23B of the Defence Act 1990. 15
 - (3) However, only 1 officer may be assigned as a military member under **subsection (2)**, and that person may not be assigned unless he or she has served as an officer for a period of more than 3 years (whether continuously or in aggregate). 20
- 138 Procedure for assigning military members**
- (1) The Registrar must give written notice to—
 - (a) each person who is assigned as a military member; and 25
 - (b) the accused in the proceedings.
 - (2) The notice under **subsection (1)(a)** must state that—
 - (a) the person has been assigned as a military member; but
 - (b) the assignment is to be confirmed pending any objections made by the accused in accordance with **section 139**. 30
 - (3) The notice under **subsection (1)(b)** must—
 - (a) set out the names and particulars of the persons who have been assigned as military members; and
 - (b) state that the accused has the right to object to the Registrar in accordance with **section 139**. 35

New (unanimous)

139 Accused may object against assignment of person as military member

- (1) The accused may object to the Registrar about the assignment of any person as a military member on the ground that the person— 5
- (a) might not act, or is not in a position to act, impartially; or
 - (b) is not qualified to sit as a military member under **section 134**.
- (2) An objection under **subsection (1)** must— 10
- (a) be in writing; and
 - (b) specify the ground of the objection; and
 - (c) be made within the time prescribed in the rules of procedure; and
 - (d) be served on the Registrar. 15
- (3) On receiving an objection made in accordance with **subsection (2)**, the Registrar must—
- (a) consider the objection; and
 - (b) decide whether to accept or reject the objection.
- (4) If the Registrar accepts the objection, the Registrar must— 20
- (a) assign another person (a **substitute military member**) in accordance with **sections 134 to 138 and 140**; and
 - (b) give written notice of that assignment to— 25
 - (i) the substitute military member; and
 - (ii) the person whose assignment was objected to by the accused (the **impugned person**); and
 - (iii) the accused.
- (5) To avoid doubt, the impugned person must be treated as if that person had retired from the Court Martial on the date on which the notice under **subsection (4)(b)(ii)** is given. 30
- (6) If the Registrar rejects the objection,—
- (a) the impugned person is confirmed as a military member; and
 - (b) the Registrar must give written notice of that fact to the impugned person and the accused. 35

140 Substitute military members

- (1) The Registrar may assign—

New (unanimous)

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| <ul style="list-style-type: none"> (a) an officer to act as a substitute military member for another officer; or (b) a warrant officer to act as a substitute military member for another warrant officer. | 5 |
| <ul style="list-style-type: none"> (2) A substitute military member may be assigned to fill a vacancy in the military membership of the Court Martial if a military member— <ul style="list-style-type: none"> (a) dies or becomes seriously ill before the beginning, or in the course, of the trial; or (b) is absent or is found to be disqualified to sit as a military member; or (c) retires from the Court as a result of an objection under section 139; or (d) is found guilty of contempt of the Court Martial under section 144. | 10
15 |
| <ul style="list-style-type: none"> (3) The accused may object to the Registrar about the assignment of any person as a substitute military member and the provisions of section 139 apply, with all necessary modifications, to that substitute military member. | 15 |

Subpart 4—Duties of members of Court Martial	20
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*Duties of Judge***141 Duties of Judge: general**

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| <ul style="list-style-type: none"> (1) A Judge must act impartially at all times. | |
| <ul style="list-style-type: none"> (2) A Judge must be present whenever the Court Martial is sitting, whether in open or closed court, except when the Court is deliberating on its findings at a trial or on a reconsideration of its findings. | 25 |
| <ul style="list-style-type: none"> (3) A Judge must (without prejudice to the Judge's duty under the rules of procedure) take all necessary steps to ensure that the defence of the accused is not prejudiced by the ignorance of the accused, or by any incapacity of the accused to state his or her case intelligibly or to question witnesses, or in any other way. | 30 |
| <ul style="list-style-type: none"> (4) A Judge may call or recall any witness that he or she considers should be questioned on any matter that the Judge considers requires clarification. | 35 |

New (unanimous)

- (5) A Judge must ensure that a proper record of any proceeding is made and is kept in safe custody in accordance with the rules of procedure.

142 Duties of Judge at trial

- (1) A Judge must ensure that a trial is conducted— 5
- (a) in accordance with **Parts 4 to 6**, the 1971 Act, and the rules of procedure; and
 - (b) in a manner that is appropriate for a court of justice.
- (2) In particular, a Judge must act as follows: 10
- (a) rule on any informality or defect in— 10
 - (i) the charge sheet; or
 - (ii) the constitution of the Court Martial; or
 - (iii) any other matter relating to the proceeding:
 - (b) ensure that the prosecutor and the defender or counsel conduct themselves in accordance with the rules of procedure: 15
 - (c) ensure that justice is administered and that the accused has a fair trial:
 - (d) afford the accused every reasonable opportunity to make his or her defence: 20
 - (e) ensure that the accused refrains from making remarks contemptuous of, or disrespectful towards, the Court Martial and from using insulting language:
 - (f) ensure that no officer under instruction who is present expresses an opinion to a member of the Court Martial on any matter relating to the trial before the Court has announced its findings, nor on sentence before the Court has passed sentence: 25
 - (g) after the final addresses on behalf of the prosecution and the accused, sum up the evidence and advise the military members on the application of the law to the case before they retire to deliberate on their findings: 30
 - (h) if the military members declare a finding of guilty (including any finding authorised by **sections 168 to 171**) and the Judge is of the opinion that the finding is contrary to law, advise the military members once (but only once) more of the findings that are, in the Judge's opinion, open to them in law. 35

New (unanimous)

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| (3) | For the purposes of subsection (2)(d) , a Judge— | |
| | (a) must not unnecessarily restrict the accused in the manner in which the accused makes the defence; and | |
| | (b) must not stop the presentation of the defence on the ground of irrelevance except in extreme cases (although the Judge may caution the accused to avoid the defence becoming irrelevant). | 5 |
| (4) | Despite subsection (2)(e) , a Judge must not prevent the accused from impeaching the evidence or motive of any witness, or charging any other person with any blame or criminality, if to do so is a part of the case for the defence (although the Judge may caution the accused of his or her liability to cross-examination if he or she follows that course). | 10 |

Duties of military members

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|------------|--|----|
| 143 | Duties of military members | 15 |
| (1) | A military member must at all times— | |
| | (a) act in a manner that is consistent with achieving a fair trial for the accused; and | |
| | (b) behave in a manner that is appropriate for a member of a court of justice. | 20 |
| (2) | In particular, a military member— | |
| | (a) must consider all the evidence admitted by the Judge at the trial; and | |
| | (b) must vote impartially on the finding and, if necessary, on the sentence; and | 25 |
| | (c) must not disclose any opinion of a member of the Court Martial or how that member voted on the finding or sentence, or both. | |
| (3) | A military member may ask questions to clarify any matters at the trial. | 30 |
| 144 | Failure to attend Court Martial is contempt of Court | |
| (1) | A military member commits a contempt of the Court Martial if that person fails, without reasonable excuse, to— | |
| | (a) attend all the sittings of the Court in respect of the proceedings for which the military member was assigned; and | 35 |

New (unanimous)

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|-------|---|----|
| (b) | perform the functions or duties of a military member of the Court during the period of that person's membership of the Court. | |
| (2) | For the purposes of subsection (1) , the period of a person's membership of the Court Martial— | 5 |
| (a) | begins on the date on which the person receives the written notice referred to in section 138(1)(a) or 139(4)(b)(i) , as the case may be; and | |
| (b) | ends on the date on which the person— | |
| (i) | retires from the Court as a result of an objection under section 139 ; or | 10 |
| (ii) | is released from the Court on the discharge of the military members under section 160 ; or | |
| (iii) | is discharged by the Judge from his or her functions and duties as a military member on the completion of the proceedings concerned. | 15 |
| (3) | If a military member is alleged to have committed a contempt of the Court Martial under subsection (1) , the Judge— | |
| (a) | must inquire into the alleged contempt; and | |
| (b) | may find the military member guilty of the contempt after hearing— | 20 |
| (i) | any witness against or on behalf of the military member; and | |
| (ii) | any statement that may be offered in defence. | |
| (4) | The penalty for contempt of the Court Martial under this section is imprisonment for a term not exceeding 21 days or a fine not exceeding \$1,000. | 25 |
| (5) | To avoid doubt, a military member found guilty of contempt of the Court Martial under this section must be treated as if that person had retired from his or her membership of the Court on the date of that finding. | 30 |

*Other provisions relating to role of military members***145 Seniority of military members**

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|-----|--|----|
| (1) | The most senior officer assigned by the Registrar as a military member is to be the senior military member of the Court Martial. | 35 |
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New (unanimous)

- (2) The other persons assigned by the Registrar as military members have seniority among themselves according to their rank and according to their seniority within that rank.

146 Senior military member must submit report on command issues

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- (1) The senior military member must submit a written report on any command issues that arise in the course of any proceedings before the Court Martial to the superior commander who referred the charges that are the subject of those proceedings to the Director of Military Prosecutions.

10

- (2) The superior commander must forward a copy of a report under **subsection (1)** to—

- (a) the Chief of the relevant service; and
 (b) in the case of units under joint command, the commander of any joint force; and
 (c) the Discipline Committee.

15

- (3) This section is subject to **section 147**.

147 Prohibition on taking into account information about conduct of military members

- (1) This section applies to information about the way in which a military member, in the course of any proceedings before the Court Martial,—

20

- (a) conducted himself or herself as a member of the Court; or
 (b) performed his or her functions or duties in that capacity.

25

- (2) Any information to which this section applies must not be taken into account in any decision that affects, or is likely to affect, the conditions of service within the Armed Forces of the military member to whom that information relates.

- (3) **Conditions of service** includes prospects of promotion, postings, or career enhancements.

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New (unanimous)

Part 5 Jurisdiction, procedures, and powers

Subpart 1—Jurisdiction and sittings of Court Martial

General jurisdiction

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|------------|---|----|
| 148 | Jurisdiction of Court Martial | 5 |
| (1) | The Court Martial has the jurisdiction conferred by section 78 of the 1971 Act. | |
| (2) | In addition, the Court Martial must sit to hear and determine— | |
| | (a) every charge laid before the Registrar by the Director of Military Prosecutions: | 10 |
| | (b) every application made by the Director of Military Prosecutions under section 175(2) : | |
| | (c) every other application made to the Court under Parts 4 to 6 (for example, an application for bail) or the 1971 Act. | 15 |

Sittings of Court Martial

- | | | |
|------------|--|----|
| 149 | Requirements for sittings of Court Martial | |
| (1) | The Court Martial— | |
| | (a) must sit in open court unless section 150 or 151 applies; and | 20 |
| | (b) must sit in the presence of the accused; and | |
| | (c) may sit in any place, whether in New Zealand or elsewhere; and | |
| | (d) may conduct its proceedings by teleconference or by any means of communication that allows individuals a reasonable opportunity to participate in the proceedings. | 25 |
| (2) | Despite subsection (1)(b) , the Court Martial may sit in the absence of the accused if the accused misconducts himself or herself by so interrupting the proceedings as to render the continuation of those proceedings in his or her presence impracticable. | 30 |
| (3) | Subsection (1)(b) and (d) are subject to the rules of procedure. | |

New (unanimous)

- (4) A sitting of the Court Martial may be adjourned from time to time and from place to place.

150 When Court Martial must hold proceedings in closed court

- (1) The Court Martial must hold its proceedings in closed court while— 5
- (a) the Judge sits alone to rule on any question of law or procedure in accordance with **section 156**;
 - (b) the military members deliberate on the finding in accordance with **section 167**; 10
 - (c) the Judge and the military members deliberate on the sentence in accordance with **section 173**.
- (2) The Court Martial may hold its proceedings in closed court on any other deliberation.
- (3) When the Court Martial holds its proceedings in closed court, 15 only the following persons may be present:
- (a) the members of the Court referred to in **subsection (1)(a), (b), or (c)** (as the case requires);
 - (b) in the case of proceedings referred to in **subsection (1)(a)**, the persons referred to in **section 151(2)(c)(iii) to (vii)**; 20
 - (c) any other persons authorised by the Judge.

151 Judge may limit scope of open court

- (1) In any proceedings in the Court Martial, the Judge may make any of the orders specified in **subsection (2)** limiting the scope of open court if the Judge considers that— 25
- (a) a statement may be made or evidence given in the course of those proceedings that might lead to the disclosure of information that would or might—
 - (i) be directly or indirectly useful to the enemy or any foreign country; or 30
 - (ii) be otherwise harmful to New Zealand; or
 - (b) the making of the order—
 - (i) is necessary in the interests of justice; or
 - (ii) is desirable in the interests of public morality; or

New (unanimous)

	(iii) is necessary for the protection of the reputation of a victim of an alleged sexual offence or offence of extortion.	
(2)	The orders referred to in subsection (1) are as follows:	
	(a) an order forbidding publication of any report or account of the whole or any part of the proceedings, including any evidence adduced or submissions made:	5
	(b) an order forbidding the publication of the name of any person connected, whether as a witness or otherwise, with the proceedings or of any name or particulars likely to lead to the identification of that person:	10
	(c) an order excluding all or any persons, except the following:	
	(i) a military member:	
	(ii) an officer under instruction:	15
	(iii) the Director of Military Prosecutions or any person acting on behalf of the Director:	
	(iv) the accused and any escort of the accused:	
	(v) the accused’s counsel or defender:	
	(vi) the Registrar or any other officer of the Court Martial:	20
	(vii) an interpreter required in the proceedings:	
	(viii) a person expressly permitted by the Judge to be present.	
(3)	However, the Judge may make an order specified in subsection (2)(c) that has the effect of excluding any accredited news media reporter from the proceedings only on the grounds specified in subsection (1)(a) , but not on any of the grounds specified in subsection (1)(b) .	25
152	Duration of order limiting scope of open court	30
	An order specified in section 151(2) limiting the scope of open court—	
	(a) may be made for a limited period or permanently; and	
	(b) if made for a limited period, may be renewed for a further period or periods or made permanent by the Court Martial at any time; and	35
	(c) if made permanently, may be reviewed by the Court Martial at any time.	

New (unanimous)**153 Application of section 154**

Section 154 applies to any proceedings under the 1971 Act (**a case involving sexual violation**) in which a person is charged with, or is to be sentenced for, an offence against—

- (a) section 74 of that Act, where the corresponding civil offence is—
 - (i) sexual violation: 5
 - (ii) attempted sexual violation:
 - (iii) assault with intent to commit sexual violation:
 - (iv) an offence against section 129A of the Crimes Act 1961 (sexual conduct with consent induced by certain threats): 10
 - (v) an offence against section 142A of the Crimes Act 1961 (compelling indecent act with an animal): 15
- (b) section 75 of that Act, where the offence is one of aiding, abetting, inciting, counselling, procuring, or conspiring with any person to commit any offence referred to in **paragraph (a)(i) to (v)**.

154 Special provisions in cases involving sexual violation 20

- (1) While the complainant in a case involving sexual violation is giving oral evidence (whether in chief or under cross-examination or on re-examination), no person may be present except the following:
 - (a) the Judge for the proceeding: 25
 - (b) a military member:
 - (c) an officer under instruction:
 - (d) the Director of Military Prosecutions or any person acting on behalf of the Director:
 - (e) the accused and any escort of the accused: 30
 - (f) the accused's counsel or defender:
 - (g) the Registrar or any other officer of the Court Martial:
 - (h) an interpreter required in the proceedings:
 - (i) an accredited news media reporter:
 - (j) a person whose presence is requested by the complainant: 35
 - (k) a person expressly permitted by the Judge to be present.

New (unanimous)

- (2) Before the complainant in a case involving sexual violation commences to give evidence, the Judge must—
 - (a) ensure that no person other than one referred to in **subsection (1)** is present; and
 - (b) advise the complainant of the complainant’s right to request the presence of any person under **subsection (1)(j)**. 5
- (3) If, in a case involving sexual violation, the Judge is of the opinion that the interests of the complainant so require, he or she may make an order forbidding publication of any report or account giving details of the criminal acts alleged to have been performed on the complainant or of any acts that the complainant is alleged to have been compelled or induced to perform or consent to or acquiesce in. 10
- (4) This section does not limit or affect the powers of the Judge to make an order specified in **section 151(2)** that excludes any person from, or forbids the publication of any report or account of, the proceedings. 15

Subpart 2—Procedures

- 155 Preliminary procedure**
- (1) The Registrar must— 20
 - (a) fix the time and place for each sitting of the Court Martial; and
 - (b) give written notice of the time and place fixed to—
 - (i) the accused; and
 - (ii) the Director of Military Prosecutions; and 25
 - (iii) the Judge for the proceedings; and
 - (iv) the military members for the proceedings.
 - (2) At the beginning of the trial, the notice under **subsection (1)(b)** must—
 - (a) be accompanied by a copy of the charge sheet certified by the Director of Military Prosecutions in accordance with **section 101E(c)** of the 1971 Act and laid before the Registrar in accordance with **section 101E(e)** of that Act; and 30
 - (b) in the case of a notice to the accused, be accompanied by a copy of all documents submitted to the Judge by 35

New (unanimous)

	the Director of Military Prosecutions in relation to the charge; and	
(c)	in the case of a notice to the military members, be accompanied by an information sheet that—	
	(i) describes the functions and duties of military members; and	5
	(ii) is in the prescribed form.	
156	Judge may sit alone to rule on question of law or procedure	
(1)	The Judge for the proceedings must—	10
	(a) rule on every question of law or procedure that arises during any trial in the Court Martial; and	
	(b) sit in the absence of the military members to determine the question of law or procedure if the Judge considers it would be desirable in the interests of justice to do so.	15
(2)	To avoid doubt, the Judge may sit alone under subsection (1)(b) before or after the appointment of the military members.	
(3)	A ruling under subsection (1) must be followed by the military members.	
(4)	In this section, question of law includes any question arising in respect of—	20
	(a) a plea to the general jurisdiction of the Court Martial:	
	(b) a plea in bar of trial:	
	(c) an application for the separation of trials:	
	(d) an application for the severance of charge sheets:	25
	(e) an application for the severance of charges:	
	(f) a submission that there is no case to answer:	
	(g) the admissibility of evidence:	
	(h) an application for a ruling referred to in section 142(2)(a) :	
	(i) an application for an order specified in section 151(2) :	30
	(j) an order under any of sections 139 to 141 of the Criminal Justice Act 1985 (as applied to proceedings under the 1971 Act by section 145 of the 1971 Act):	
	(k) an application for discovery:	
	(l) the fitness of the accused to stand trial.	35

New (unanimous)

157 Power to summon witnesses

- (1) The Judge for the proceedings or the Registrar may issue a summons requiring any person to—
- (a) attend at the time and place specified in the summons; and 5
 - (b) give evidence; and
 - (c) produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the subject of the relevant proceedings. 10
- (2) A summons—
- (a) must be in the prescribed form; and
 - (b) may be issued— 15
 - (i) on the initiative of the Judge or Registrar; or
 - (ii) on the application of the Director of Military Prosecutions or the accused.

158 Service of summons

- (1) A summons to a witness may be served—
- (a) by delivering it to the person summoned; or
 - (b) by posting it by registered letter addressed to the person summoned at that person's usual place of residence. 20
- (2) The summons must,—
- (a) if it is served under **subsection (1)(a)**, be served at least 24 hours before the attendance of the witness is required;
 - (b) if it is served under **subsection (1)(b)**, be served at least 10 days before the date on which the attendance of the witness is required. 25
- (3) If the summons is posted by registered letter, it is deemed for the purposes of **subsection (2)(b)** to be served at the time when the letter would be delivered in the ordinary course of post. 30

159 Administration of oaths

- (1) An oath in the prescribed form must be administered to—
- (a) every military member;
 - (b) every officer under instruction in the Court Martial;
 - (c) every person responsible for recording or transcribing the proceedings in the Court: 35

New (unanimous)

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|-----|--|----|
| (d) | every interpreter attending the Court. | |
| (2) | Every witness before the Court must be examined on oath administered in the prescribed form. | |
| (3) | If the Court considers that a child who is called as a witness does not understand the nature of an oath, the child's evidence may be received even though it is not given on oath, so long as the Court is of the opinion that the child— | 5 |
| (a) | has sufficient intelligence to justify the reception of the evidence; and | |
| (b) | understands the duty of speaking the truth. | 10 |
| (4) | If any person referred to in subsection (1) or (2) objects to being sworn, or it is not reasonably practicable to administer an oath to that person in a manner appropriate to his or her religious belief, the person may be permitted to make a solemn affirmation instead of swearing an oath. | 15 |
| (5) | The making of an affirmation under subsection (4) has the same force and effect and has the same consequences as the taking of an oath. | |
| (6) | Every oath or affirmation required to be administered under Parts 4 to 6 must be administered in accordance with the rules of procedure. | 20 |

*Discharge of military members***160 Discharge of military members**

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|-----|---|----|
| (1) | The Judge— | |
| (a) | must discharge the military members if they are unable to reach a unanimous decision on the charge; or | 25 |
| (b) | may discharge the military members if, before or after the beginning of a trial, the Judge considers it to be necessary or expedient in the interests of the administration of justice. | 30 |
| (2) | Section 167(2) applies if subsection (1)(a) applies. | |
| (3) | If, after the beginning of a trial, the Judge dies or is otherwise unable to attend,— | |
| (a) | the Chief Judge must assign another Judge to be the Judge of the Court Martial; and | 35 |
| (b) | that Judge must discharge the military members. | |

New (unanimous)

- (4) If the military members are discharged under this section, they are released from their functions and duties to the Court.

Subpart 3—Bail

General

- 161 Judge may grant bail pending trial** 5
- (1) This section applies to a person who—
- (a) is accused of committing an offence against the 1971 Act; and
- (b) is being held in custody under that Act.
- (2) The accused is not entitled to bail as of right. 10
- (3) A Judge may, on application by the accused,—
- (a) grant bail to the accused;
- (b) impose any conditions of bail that the Judge thinks fit.
- (4) In determining whether to grant bail under this section, the Judge— 15
- (a) must take into account the considerations set out in section 8(1) and (3) of the Bail Act 2000 and all of the following considerations:
- (i) the seriousness of the offence;
- (ii) whether there are urgent and exceptional circumstances that favour the granting of bail; 20
- (iii) the effect on service discipline of releasing the person on bail; and
- (b) may take into account the considerations set out in section 8(2) of the Bail Act 2000; and 25
- (c) must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.
- (5) The onus is on the accused to show cause why bail should be granted. 30
- 162 Judge may grant bail pending appeal**
- (1) This section applies to a person (the **appellant**) who—
- (a) has been convicted of an offence against the 1971 Act; and
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New (unanimous)

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|--|--|
| <p>(b) is serving a sentence of imprisonment or detention under that Act in respect of the conviction pending the determination of his or her appeal against conviction or sentence, or both, to—</p> <p style="padding-left: 2em;">(i) the Summary Appeal Court; or</p> <p style="padding-left: 2em;">(ii) the Court Martial Appeal Court.</p> <p>(2) The appellant—</p> <p style="padding-left: 2em;">(a) is not entitled to bail as of right; and</p> <p style="padding-left: 2em;">(b) may not go at large without bail.</p> <p>(3) A Judge may, on application by the appellant,—</p> <p style="padding-left: 2em;">(a) grant bail to the appellant;</p> <p style="padding-left: 2em;">(b) impose any conditions of bail that the Judge thinks fit.</p> <p>(4) In determining whether to grant bail under this section, the Judge—</p> <p style="padding-left: 2em;">(a) must take into account all of the following considerations:</p> <p style="padding-left: 4em;">(i) the seriousness of the offence;</p> <p style="padding-left: 4em;">(ii) whether there are urgent and exceptional circumstances that favour the granting of bail;</p> <p style="padding-left: 4em;">(iii) the effect on service discipline of releasing the person on bail; and</p> <p style="padding-left: 2em;">(b) may take into account the considerations set out in section 14(3) of the Bail Act 2000; and</p> <p style="padding-left: 2em;">(c) must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.</p> <p>(5) The onus is on the appellant to show cause why bail should be granted.</p> | <p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> |
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| <p>163 Time on bail pending appeal does not count as time served</p> <p>Any time during which an appellant is released from imprisonment or detention on bail pending an appeal against conviction or sentence, or both, does not count as time served under any sentence.</p> | <p>30</p> |
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New (unanimous)

*Other provisions relating to bail***164 Procedure for bail generally**

- (1) If an application for bail is made under **section 161(3) or 162(3)**, the Registrar must forward a copy of the application to the Director of Military Prosecutions. 5
- (2) The Director of Military Prosecutions—
- (a) must be the respondent to the application; and
 - (b) may make recommendations to the Judge who is considering the application.
- (3) Before making a decision, the Judge must consider any recommendations that the Director of Military Prosecutions has made, including any recommendations on measures to prevent the escape of the person concerned should bail be granted. 10

165 Issue of warrant to arrest person absconding or breaching bail condition 15

- (1) A Judge may issue a warrant in the prescribed form for the arrest of a person who has been released on bail under **section 161 or 162** if— 20
- (a) the Judge is satisfied by evidence on oath that—
 - (i) the person has absconded or is about to abscond for the purpose of evading justice; or
 - (ii) the person has contravened or failed to comply with any condition of bail; or
 - (b) the person— 25
 - (i) does not attend personally at the time and place specified in the grant of bail; or
 - (ii) does not attend personally at any time and place to which during the course of the proceedings the hearing has been adjourned. 30
- (2) The warrant—
- (a) must be directed to every provost officer and every member of the police; and
 - (b) may be executed by— 35
 - (i) a provost officer:
 - (ii) a person lawfully exercising authority under or on behalf of a provost officer:

New (unanimous)

- (iii) a member of the police.
- (3) For the purpose of executing the warrant, a person referred to in **subsection (2)(b)** may, at any time, enter on to any premises, by force if necessary, if he or she has reasonable grounds to believe that the person against whom the warrant is issued is on those premises. 5
- (4) The person executing the warrant—
- (a) must have the warrant with him or her; and
 - (b) must produce it on initial entry and, if requested, at any subsequent time; and 10
 - (c) if he or she is not in uniform, produce evidence that he or she is 1 of the persons referred to in **subsection (2)(b)**.

166 Person arrested under warrant for absconding or breaching bail condition must be brought before Judge

- (1) A person who is arrested under a warrant issued under **section 165** must be brought before a Judge as soon as possible. 15
- (2) The Judge must reconsider the question of bail if satisfied that the person—
- (a) had absconded or was about to abscond; or
 - (b) had contravened or failed to comply with any condition of bail. 20

Subpart 4—Findings of Court Martial*Finding on charge***167 Finding of Court Martial**

- (1) The finding of the Court Martial on a charge must be determined by the unanimous vote of the military members. 25
- (2) If the military members are unable to reach a unanimous decision on the charge, the Judge must refer the charge back to the Director of Military Prosecutions after discharging the military members in accordance with **section 160(1)(a)**. 30
- (3) The Director of Military Prosecutions may then—
- (a) decide not to proceed with the charge; or
 - (b) lay the charge sheet again, or an amended version of the charge sheet, before the Registrar.

New (unanimous)

- (4) If **subsection (3)(b)** applies, the Registrar must assign new military members in accordance with **sections 134 to 138** and, as the case may be, **section 140**.

168 Power to convict of offence other than that charged

- (1) This section applies if a provision of the 1971 Act provides that— 5
- (a) an act or omission, if done or made with a certain specified intent or in certain specified circumstances, is an offence punishable by a specified punishment; and
- (b) the same act or omission, if done or made otherwise than with that intent or in those circumstances, is an offence punishable by a less severe punishment. 10
- (2) An accused charged with having committed an offence with the intent or in the circumstances involving the more severe punishment may be convicted of the offence that relates to the less severe punishment. 15

169 Accused may be convicted of attempting to commit offence

- (1) An accused charged with an offence may, if the circumstances warrant it, be convicted of attempting to commit that offence. 20
- (2) An accused charged with attempting to commit an offence may be convicted of the attempt even though it is proved that he or she actually committed the offence.

170 Accused may be convicted of corresponding offence

An accused charged with an offence (**offence A**) specified in the first column of **Schedule 4** may be convicted of the corresponding offence (**offence B**) specified in the second column of that schedule in relation to offence A. 25

171 Accused may be convicted of offence even though facts proved in evidence differ from those alleged in particulars of charge

An accused may be convicted of an offence even though the facts proved in evidence differ from the facts alleged in the particulars of the charge, if the Court Martial considers that— 30

New (unanimous)

- (a) the facts proved in evidence are sufficient to prove the commission of the offence to which the charge relates; and
- (b) the difference is not so material as to have prejudiced the accused in his or her defence.

5

172 Recording of finding on alternative charges

If the Court Martial records a conviction on a charge laid in the alternative, the Court must—

- (a) find the accused not guilty of any charge laid in the alternative to it that is placed before it on the charge sheet; and
- (b) record no finding on any alternative to it that is placed after it on the charge sheet.

10

*Sentence of Court Martial***173 Sentence of Court Martial**

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- (1) The sentence of the Court Martial (if any) must be passed by the majority of the votes of the Judge and the military members.
- (2) However, if there is an equality of votes on the sentence, the Judge has a casting vote.

20

174 Order to come up for sentence if called on

- (1) If the accused is convicted of an offence, the Court Martial may, instead of passing sentence, order the accused to appear for sentence, if called on to do so within the period specified in **subsection (2)**.
- (2) The period referred to in **subsection (1)** is a period not exceeding 1 year, commencing with the date of conviction, that the Court Martial may specify in the order.
- (3) If the Court Martial makes an order under **subsection (1)**, the Court must record and attach to the record of proceedings a statement of its findings of fact in relation to the charge.
- (4) The Court Martial may make orders under section 86 or 87 of the 1971 Act in combination with an order under **subsection (1)**.

25

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New (unanimous)

175 Offender to come up for sentence

- (1) This section applies if an offender for whom an order is made under **section 174**—
- (a) is convicted or found guilty summarily of a subsequent offence against the 1971 Act or any other Act; or 5
 - (b) fails to comply with any other order referred to in **section 174(4)**; or
 - (c) fails to comply with any agreement, or fails to take any measure or action, of a kind referred to in section 10(1)(b), (d), or (e) of the Sentencing Act 2002 that was brought to the attention of the Court Martial at the time the Court Martial made the order under **section 174**. 10
- (2) The Director of Military Prosecutions may, at any time within the period specified in the order, apply to the Court Martial to have the offender brought before the Court Martial to be dealt with for the original offence. 15
- (3) On an application under **subsection (2)**, the offender is to be placed in close arrest and brought before the Court Martial at the time and place directed by the Registrar.
- (4) If a person appears before the Court Martial under this section and the Court Martial is satisfied of any of the matters specified in **subsection (1)**, the Court Martial— 20
- (a) must inquire into the circumstances of the original offence and the conduct of the offender since the order was made (including, if appropriate, the circumstances and seriousness of the subsequent offence (if any)); and 25
 - (b) may sentence the offender for the original offence.

176 Other offences may be taken into account in passing sentence

- (1) A person who is found guilty by the Court Martial of an offence may request the Court to take into account any other offence that the person admits to having committed, if the other offence— 30
- (a) is similar to that of which the person has been found guilty; and 35
 - (b) is not an offence that is punishable by imprisonment for life.

New (unanimous)

- | | | |
|-----|---|----|
| (2) | If a request is made under subsection (1) , the Court may take the other offence into account in sentencing the accused. | |
| (3) | If the Court takes the other offence into account, it must not, in passing sentence, impose a punishment of greater severity than the maximum punishment that it may impose for the offence of which the accused was found guilty. | 5 |
| (4) | The Court may exercise, in respect of any other offence taken into account under this section, any of the powers to order payment of compensation under section 86 of the 1971 Act or the restitution of property under section 87 of that Act. | 10 |

177 Court Martial must adhere to sentencing guidelines

When sentencing an offender, the Court Martial must pass a sentence that is consistent with any sentencing guidelines that are relevant in the offender's case, unless the Court is satisfied that it would be contrary to the interests of justice to do so. 15

*Announcement of finding and sentence***178 Announcement of finding and sentence**

- | | | |
|-----|---|----|
| (1) | The Judge must announce in open court— | |
| (a) | the finding of the Court Martial on each charge tried by the Court; and | 20 |
| (b) | any sentence passed by the Court. | |
| (2) | The Judge must give reasons for the sentence (if any) passed by the Court. | |
| (3) | Subsection (4) applies if the Court Martial sentences a person— | 25 |
| (a) | to be dismissed from Her Majesty's service; or | |
| (b) | to a term of imprisonment involving dismissal from Her Majesty's service. | |
| (4) | In delivering a sentence, the Judge must state that the dismissal does not take effect— | 30 |
| (a) | until the expiration of the period for lodging an appeal to the Court Martial Appeal Court against the conviction or sentence; or | |

New (unanimous)

- (b) if an appeal to that Court, the Court of Appeal, or the Supreme Court is pending, until the appeal is determined.

Part 6
Miscellaneous and administrative provisions 5

Subpart 1—Miscellaneous provisions

Miscellaneous

- 179 Court must take judicial notice of certain matters**
- (1) The Court Martial must take judicial notice of— 10
- (a) all matters of common knowledge; and
- (b) all other matters of which judicial notice would be taken by the High Court.
- (2) The Court Martial may also take judicial notice of matters that may fairly be regarded as being within the general service knowledge of members of the Court. 15
- 180 Defence of accused**
- Any accused to be tried by the Court Martial may be defended—
- (a) by a lawyer; or
- (b) by a defender. 20
- 181 Proceedings not invalid for want of form, etc**
- No proceedings before the Court Martial may—
- (a) be held invalid by reason only of want of form; or
- (b) be liable to removal into any court by means of any prerogative writ or order; or 25
- (c) be liable to review by any court under the Judicature Amendment Act 1972 or otherwise.
- 182 Application of provisions of Evidence Act 2006 relating to jury trials to proceedings under Parts 4 to 6 or 1971 Act** 30
- (1) The provisions of the Evidence Act 2006 that relate to a trial before a jury apply, to the extent that they are applicable and

New (unanimous)

- subject to all necessary modifications, to proceedings of the Court Martial under **Parts 4 to 6** or the 1971 Act that involve military members as if those proceedings were proceedings that involve a jury.
- (2) The provisions of the Evidence Act 2006 referred to in **subsection (1)**—
- (a) include sections 32(2)(b), 45(3)(e) and (f), 76, 82, 83(1), 98(5)(a), 105(1)(b), 109(2) and (3), 121(2), and 122 to 127; but
- (b) do not include sections 101 and 128.
- 183 Evidence in proceedings under Parts 4 to 6 or 1971 Act**
- (1) The rules of evidence that apply in the High Court for criminal proceedings (including the rules of evidence contained in the Evidence Act 2006 and in any other enactment containing any rule of evidence) are the rules of evidence to be followed in proceedings of the Court Martial.
- (2) Accordingly, a person is not required to answer any question or to produce any document in proceedings of the Court Martial that he or she could not be required to answer or produce in criminal proceedings before the High Court.
- (3) This section is subject to **sections 184 to 186**.
- 184 Limits on application of section 183: evidence of general matters**
- (1) Despite **section 183, subsections (2) to (12)** apply with respect to evidence in all proceedings under **Parts 4 to 6** or the 1971 Act.
- (2) The attestation paper purporting to be signed by a person on his or her being attested as a rating, soldier, or airman in the Armed Forces of New Zealand or in any Commonwealth force, and the declaration purporting to be made by any person upon his or her re-engagement in any of the Armed Forces of New Zealand or in any Commonwealth force, is evidence of that person having given the answers to questions that he or she is represented as having given in the paper or declaration.
- (3) The enlistment of a person in any of the Armed Forces of New Zealand or in a Commonwealth force may be proved by the production of a copy of his or her attestation paper purporting

New (unanimous)

- to be certified to be a true copy by the officer or record officer having the custody of the attestation paper without proof of the handwriting of that officer, or of his or her having the custody of the paper.
- (4) A letter, return, or other document with respect to a person, if purporting to be issued by or on behalf of the Chief of Defence Force, or by a person authorised by the Chief of Defence Force, or by the commanding officer or the officer or record officer having the custody of the records of any portion of a Commonwealth force, or of any ship of a Commonwealth naval force to which that person appears to have belonged, or alleges that he or she belongs or had belonged, is evidence of the facts stated in that letter, return, or other document of the person—
- (a) having or not having at any time or times served in, or been discharged from, any Commonwealth force; or
 - (b) having or not having held any rank or appointment in, or been posted or transferred to, any Commonwealth force, or having or not having served in any particular country or place; or
 - (c) being or not being authorised to use or wear any service decoration, ribbon, badge, wound stripe, or emblem, the use or wearing of which by an unauthorised person is under any other Act an offence.
- (5) Copies purporting to be printed under the authority of the New Zealand Government of regulations, rules, or orders made under **Parts 4 to 6**, the 1971 Act, the Defence Act 1990, or any other Act are evidence of those regulations, rules, or orders.
- (6) Any list of members of the Armed Forces published by or under the authority of the Chief of Defence Force, or published in the *Gazette*, is evidence of the status and rank of the members mentioned in the list or *Gazette*, and of any appointment held by any of those members, and of the ship, corps, or battalion or arm or branch of the service to which any of those members belongs.
- (7) Any warrants or orders made under **Parts 4 to 6**, the 1971 Act, or the Defence Act 1990 by any service authority are deemed to be evidence of the matters and things that are directed to be

New (unanimous)

- stated in those warrants or orders by or under **Parts 4 to 6**, the 1971 Act, or the Defence Act 1990, and any copies of any of those warrants or orders purporting to be certified to be true copies by the officer alleged to be authorised by the Chief of Defence Force to certify them, are admissible in evidence. 5
- (8) If an entry is made in, or a document is filed with, any service record pursuant to **Parts 4 to 6**, the 1971 Act, or the Defence Act 1990 or pursuant to a service duty, and that entry or document purports to be signed by the commanding officer or by the officer or record officer whose duty it is to make the entry or file the document, as the case may be, that entry or document is evidence of the facts stated in them. 10
- (9) A copy of any entry or document (including the signature of any person who has signed it) forming part of a service record and purporting to be certified to be a true copy by the officer or record officer stated in the certificate to have the custody of the record is evidence of that entry or document. 15
- (10) A certificate purporting to be signed by the commanding officer of any accused, or signed by any other officer authorised by that commanding officer to give the certificate, and stating the contents of any Defence Force Order, or any general, standing, daily, or routine order, or any part of the order, made in respect of any service, force, command, or formation, or any defence area or ship, or any unit, detachment, or other part of the Armed Forces, is, in the proceedings against the accused, evidence of the matters stated in the certificate. 20 25
- (11) A certificate purporting to be signed by the commanding officer of any accused, or signed by any other officer authorised by that commanding officer to give the certificate, and stating the contents of any part of any Defence Manual, is, in the proceedings against the accused, evidence of the matters stated in the certificate. 30
- (12) If the issue or one of the issues in the proceedings relates to the navigation of one of Her Majesty's New Zealand ships, a navigation report prepared by a competent officer or officers appointed in accordance with the rules of procedure is evidence of the matters stated in the report. 35

New (unanimous)

185 Limits on application of section 183: evidence of custody at police station

- (1) Despite **section 183, subsections (2) and (3)** apply with respect to evidence in all proceedings under **Parts 4 to 6** or the 1971 Act against a member of the Armed Forces who has been arrested by, or who has surrendered to, the New Zealand Police. 5
- (2) If the member has been taken to a police station in any place in New Zealand or elsewhere or has on surrender been taken into custody at any police station, then, for the purposes of any proceedings against that member, a certificate purporting to be signed by the member of the police in charge of that police station, and stating the fact, date, and place of the arrest or surrender, is evidence of the matters so stated. 10
- (3) Any certificate given under **subsection (2)** may include a statement as to whether, at the time of the arrest, or surrender, the member was wearing the uniform of the service to which he or she belongs or civilian clothes; and that certificate is evidence of the matters so stated. 15

186 Limits on application of section 183: evidence of surrender, arrest, or delivery to service custody in relation to charge of desertion or absence without leave

- (1) Despite **section 183, subsections (2) to (5)** apply with respect to evidence in all proceedings under **Parts 4 to 6** or the 1971 Act against a member of the Armed Forces on a charge of being a deserter or an absentee without leave. 20
- (2) If the member has surrendered himself or herself into the custody of a provost officer or a person lawfully exercising authority under or on behalf of a provost officer, or of any other officer of any New Zealand or allied force, a certificate purporting to have been signed by that provost officer, or person, or other officer, and stating the fact, date, and place of the surrender, is evidence of the matters so stated. 30
- (3) If the member has been arrested and taken into the custody of a provost officer or a person lawfully exercising authority under or on behalf of a provost officer, or of any other officer of any New Zealand or allied force, a certificate purporting to have been signed by that provost officer, or person, or other 35

New (unanimous)

- officer, and stating the fact, date, and place of the arrest, is evidence of the matters so stated.
- (4) If the member has been delivered into service custody by a member of the police, a certificate purporting to be signed by that member of the police, and stating the fact, date, and place of the surrender of the member, is evidence of the matters so stated. 5
- (5) Any certificate given under **subsections (2) to (4)**, or any 1 or more of those subsections, may include a statement as to whether, at the time of the surrender, arrest, or delivery into service custody, as the case may be, the member was wearing the uniform of the service to which he or she belongs or civilian clothes; and that certificate is evidence of the matters so stated. 10
- 187 Records of Court Martial proceedings** 15
- (1) A person who has custody of any record of the proceedings of the Court Martial held under **Parts 4 to 6** or the 1971 Act must deliver it as soon as practicable after the trial to the Judge Advocate General.
- (2) The Judge Advocate General may give directions as to how the record must be kept (including directions as to how long it must be kept, which must be for a period of not less than 6 years from the conclusion of the trial). 20
- (3) A person who has been tried by the Court Martial (**person A**), or if person A is dead, his or her personal representative (**person B**), is entitled to be supplied with a copy of the record of the proceedings of the Court if person A or B— 25
- (a) applies to the Judge Advocate General within,—
- (i) in the case of person A, 5 years after the conclusion of the trial; or 30
- (ii) in the case of person B, 12 months after the death of person A; and
- (b) pays the prescribed fee (if any).
- (4) Despite **subsection (3)**, if the Minister certifies that it is necessary for reasons of security that the record of the proceedings of the Court Martial, or any part of them, should not be disclosed, the Judge Advocate General may direct that an 35

New (unanimous)

applicant for a copy of the record is not to be supplied with the record, or that part of the record, to which the certificate relates.

(5) In this section,—

personal representative, in relation to deceased person A, 5
means—

- (a) person A's legal personal representative; or
- (b) any other person whom the Judge Advocate General considers should, for the purposes of this section, be regarded as the personal representative of person A 10

record of the proceedings of the Court Martial includes the record of any reconsideration of the sentence of the Court.

188 Evidence of proceedings of Court Martial

(1) **Subsection (2)** applies to every original record of any proceedings of the Court Martial that— 15

- (a) appears to have been signed by the Judge of the Court for those proceedings; and
- (b) is in the custody of—
 - (i) the Judge Advocate General; or
 - (ii) any person lawfully having custody of any original record. 20

(2) On its being produced from the custody of a person referred to in **subsection (1)(b)**, the original record to which this subsection applies is admissible in evidence in all proceedings under **Parts 4 to 6** or the 1971 Act and in all courts in New Zealand. 25

(3) **Subsection (4)** applies to a document that appears—

- (a) to be a copy of the original record (including a transcript of an audio recording of the proceedings) of any proceedings of the Court Martial or of part of that record; and 30

- (b) to be certified by the Judge Advocate General, or by any person lawfully having custody of the original record, as being a true copy of that record or part of that record.

(4) A document to which this subsection applies is admissible as evidence of the original record or part of the original record, as the case may be, in all proceedings under **Parts 4 to 6** or the 1971 Act and in all proceedings in civil courts in New Zealand 35

New (unanimous)

on its being produced in those proceedings, without proof of the signature of the Judge Advocate General or other person lawfully having custody of the original record.

Subpart 2—Administrative provisions

Seal

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189 Seal of Court Martial

The Court Martial is to have a seal, which is to be judicially noticed by all courts and for all purposes.

*Delegation by Chief Judge***190 Chief Judge may delegate functions, duties, or powers to Deputy Chief Judge or Registrar**

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(1) The Chief Judge may, either generally or particularly, delegate—

(a) to a Deputy Chief Judge any of the Chief Judge's functions, duties, and powers (except the power of delegation); or

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(b) to the Registrar the Chief Judge's duty under **section 133(3)** to assign a Judge for any proceedings of the Court.

(2) A delegation—

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(a) must be in writing; and

(b) may be made subject to any restrictions that the Chief Judge thinks fit; and

(c) is revocable at any time, in writing; and

(d) does not prevent the performance or exercise of a function, duty, or power by the Chief Judge.

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(3) A Deputy Chief Judge or the Registrar may perform any functions, duties, or powers delegated under **subsection (1)** in the same manner and with the same effect as if they had been conferred on him or her directly by **Parts 4 to 6** and not by delegation.

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(4) If a Deputy Chief Judge or the Registrar appears to act under **subsection (1)**, that person is presumed to be acting in accordance with the terms of delegation in the absence of evidence to the contrary.

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New (unanimous)*Appointment of Registrar, clerks, and other officers of Court Martial*

- 191 Appointment of Registrar, clerks, and other officers of Court Martial**
- (1) The Chief Judge must appoint a person to act as the Registrar. 5
- (2) The Registrar may appoint clerks or any other officers of the Court Martial as may be required.
- (3) An appointment under this section must be made by giving written notice to the person concerned.
- (4) A person appointed under this section must not undertake any other paid employment or hold any other office (whether paid or not) unless the Chief Judge or the Registrar (as the case may be) is satisfied that the employment or other office is compatible with that person's appointment. 10
- 192 Registrar to be Inspector of Service Penal Establishments** 15
- (1) The Registrar, because of his or her office, is to be the Inspector of Service Penal Establishments.
- (2) The Inspector of Service Penal Establishments performs the functions of National Preventive Mechanism under the Crimes of Torture Act 1989 in respect of service penal establishments (within the meaning of section 2(1) of the 1971 Act). 20
- Attendance of clerk, etc, at sittings of Court Martial*
- 193 Attendance of clerk, etc, at sitting of Court Martial** 25
- (1) The Registrar must arrange for the attendance at every sitting of the Court Martial of—
- (a) a clerk of the Court Martial; and
- (b) a person responsible for recording or transcribing the proceedings; and 30
- (c) if necessary, a competent interpreter.
- (2) The clerk of the Court Martial must—
- (a) liaise with the officer in command or the person in control of the place where the Court is to sit on matters

New (unanimous)

regarding the provision of administrative support to the Court; and

- (b) perform any other functions or duties that are conferred or imposed on him or her by or under **Parts 4 to 6** or any other enactment.

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*Delegation by Registrar***194 Registrar may delegate functions, duties, or powers to clerk or other officer of Court Martial**

- (1) The Registrar may, in writing, either generally or particularly, delegate to a clerk or any other officer of the Court Martial appointed under **section 191(2)** any of the Registrar's functions, duties, and powers, except—
- (a) any function, power, or duty delegated to the Registrar by the Chief Judge; and
- (b) this power of delegation.
- (2) A delegation—
- (a) must be in writing; and
- (b) may be made subject to any restrictions and conditions that the Chief Judge or the Registrar thinks fit; and
- (c) is revocable at any time, in writing; and
- (d) does not prevent the performance or exercise of a function, duty, or power by the Registrar.
- (3) A clerk or any other officer of the Court Martial to whom any functions, duties, or powers are delegated may perform and exercise them in the same manner and with the same effect as if they had been conferred on him or her directly by **Parts 4 to 6** and not by delegation.
- (4) A clerk or any other officer of the Court Martial who appears to act under a delegation is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.

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New (unanimous)

Subpart 3—Transitional provisions, repeal, and consequential amendments

Transitional provisions

- 195 Transitional provision relating to Chief Judge** 5
 Despite anything to the contrary in **section 124**, the person holding office as the Judge Advocate General immediately before the commencement of this section must be treated as if that person had been appointed as the Chief Judge in accordance with **section 124**.
- 196 What happens if court-martial has not yet been convened on commencement of Parts 4 to 6** 10
- (1) This section applies if—
- (a) proceedings under the 1971 Act have been commenced before the commencement of **Parts 4 to 6** and have not been completed before that commencement; and 15
 - (a) before that commencement, the accused elects to be tried by court-martial and does not withdraw that election in the prescribed manner or is otherwise remanded for trial by court-martial; but
 - (b) the court-martial has not been convened before that commencement. 20
- (2) If this section applies,—
- (a) the charge must be referred to the Director of Military Prosecutions; and
 - (b) the accused may be remanded for trial in the Court Martial (as established by **Parts 4 to 6**); and 25
 - (c) the charge must then be dealt with in accordance with the 1971 Act (as amended by **Part 1 of the Armed Forces Law Reform Act 2007**) and **Parts 4 to 6**; and
 - (d) **sections 117ZF to 117ZI** of the 1971 Act (as substituted by the Act) apply with all necessary modifications for the purpose of giving effect to **paragraphs (a) to (c)**. 30
- 197 What happens if court-martial has been convened on commencement of Parts 4 to 6**
- (1) This section applies to courts-martial under the 1971 Act— 35

New (unanimous)

- (a) that were convened before the commencement of **Parts 4 to 6**; and
 - (b) that have not been dissolved before that commencement.
- (2) Proceedings before courts-martial to which this section applies are to be continued and completed under the 1971 Act as if **Parts 4 to 6** had not been enacted. 5

Repeal

198 Part 6 of 1971 Act repealed 10
 Part 6 of the 1971 Act is repealed.

Consequential amendments

199 Consequential amendments to other enactments
 The enactments specified in **Schedule 5** are amended in the manner indicated in that schedule.

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New (unanimous)

Schedule 4

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Alternative offences under 1971 Act of which accused may be convicted by Court Martial

Offence charged under 1971 Act	Alternative offence under 1971 Act	
1 Section 23(1) (aiding the enemy with intent to assist the enemy).	Section 23(2) (aiding the enemy knowingly and without lawful excuse).	5
2 Section 24(1) (communicating with, giving intelligence to, or failing to report information about the enemy, with intent to assist the enemy).	(a) Section 24(2) (communicating with or giving intelligence to the enemy without authority, or failing to report information about the enemy without lawful excuse); or (b) Section 25 (disclosing information without authority).	10
3 Section 24(2) (communicating with or giving intelligence to the enemy without authority, or failing to report information about the enemy without lawful excuse).	Section 25 (disclosing information without authority).	15
4 Section 29(1)(b) (when before the enemy, using words which to his or her knowledge are likely to create despondency or unnecessary alarm).	Section 29(2) (the corresponding offence without knowledge).	20
5 Section 34(5)(a) (striking a person on guard duty or on watch).	Section 34(5)(b) (using force against a person on guard duty or on watch otherwise than by striking him or her).	25
6 Section 35(1)(a) (striking his or her superior officer)	(a) Section 35(1)(b) (using violence to his or her superior officer otherwise than by striking); or (b) Section 35(1)(c) (offering violence to his or her superior officer).	30
7 Section 35(1)(b) (using violence to his or her superior officer, other than by striking).	Section 35(1)(c) (offering violence to his or her superior officer).	35
8 Section 35(1)(c) (offering violence to his or her superior officer).	Section 36(1)(a) (using threatening language to his or her superior officer).	40
9 Section 36(1)(a) (using threatening language to his or her superior officer).	(a) Section 36(1)(b) (using insubordinate language to his or her superior officer); or (b) Section 36(1)(c) (using insulting language to his or her superior officer).	45

New (unanimous)

	Offence charged under 1971 Act	Alternative offence under 1971 Act	
10	Section 36(1)(b) (using insubordinate language to his or her superior officer).	Section 36(1)(c) (using insulting language to his or her superior officer).	
11	Section 41(a) (striking another person subject to this Act who is of inferior rank).	Section 41(b) (ill-treating such a person otherwise than by striking him or her).	5
12	Section 44(2)(a) (striking a member of the Armed Forces ordering offender into arrest).	(a) Section 44(2)(b) (using violence to a member of the Armed Forces ordering offender into arrest otherwise than by striking); or (b) Section 44(2)(c) (offering violence to any such member of the Armed Forces).	10
13	Section 44(2)(b) (using violence to a member of the Armed Forces who has ordered offender into arrest).	Section 44(2)(c) (offering violence to any such member of the Armed Forces).	15
14	Section 44(3)(a) (striking person who is apprehending an offender or who is holding him or her in custody).	(a) Section 22(3)(b) (using violence to any such person otherwise than by striking); or (b) Section 44(3)(c) (offering violence to any such person).	20
15	Section 44(3)(b) (using violence to any person who is apprehending an offender or who is holding him or her in custody).	Section 44(3)(c) (offering violence to any such person).	25
16	Section 46(1) (permitting the escape of prisoners and other persons in custody wilfully and without authority).	Section 46(2) (doing certain specified acts with intent to facilitate escape).	30
17	Section 47 (desertion).	Section 48 (absence without leave).	
18	Sections 47 and 76 (attempting to desert).	Section 48 (absence without leave).	35
19	Section 57(1)(a) (stealing service property or property belonging, etc, to a person subject to service law).	Section 57(1)(b) (fraudulently misapplying any such property).	
20	Section 58 (receiving service property or property belonging, etc, to a person subject to service law).	Section 59 (being in possession of any such property without lawful excuse).	40
21	Section 61(1) (wilful destruction of or damage to property).	Section 61(2) (negligent destruction of or damage to property).	45

New (unanimous)

	Offence charged under 1971 Act	Alternative offence under 1971 Act
22	Section 64(1) (losing or hazarding a ship, aircraft, or armoured fighting vehicle wilfully and without authority).	Section 64(2) (losing or hazarding a ship, aircraft, or armoured fighting vehicle negligently).
23	Section 67(1)(a) (reckless or dangerous driving).	Section 67(2) (careless or inconsiderate driving).

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New (unanimous)

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Schedule 5

Consequential amendments to other enactments

Part 1

Amendments to other Acts

Corrections Act 2004 (2004 No 50)	5
Paragraph (g) of the definition of attendance for judicial purposes in section 3(1): repeal.	
Paragraph (b) of the definition of legal adviser in section 3(1): omit “at a court-martial” and substitute “in the Court Martial”.	
Crimes Act 1961 (1961 No 43)	10
Section 9(b): omit “any Court Martial” and substitute “the Court Martial”.	
Crimes of Torture Act 1989 (1989 No 106)	15
Paragraph (d) of definition of National Preventive Mechanism in section 16: repeal and substitute:	
“(d) the Registrar of the Court Martial of New Zealand appointed under section 191 of the Armed Forces Law Reform Act 2007 :”.	
Defamation Act 1992 (1992 No 105)	20
Definition of Court in Part 3 of Schedule 1: omit “a court martial” and substitute “the Court Martial of New Zealand established under section 120 of the Armed Forces Law Reform Act 2007 ”.	
Electronic Transactions Act 2002 (2002 No 35)	25
Item (8) in Part 4 of the Schedule: repeal and substitute:	
“(8) the Court Martial of New Zealand established under section 120 of the Armed Forces Law Reform Act 2007 :”.	

Struck out

Evidence Amendment Act (No 2) 1980 (1980 No 27)	30
Definition of court-martial in section 22: repeal and substitute:	
“ Court Martial means the Court Martial of New Zealand established under section 120 of the Armed Forces Law Reform Act 2007 ”.	

New (unanimous)

Part 1—*continued***Geneva Conventions Act 1958 (1958 No 19)**

Definition of **Court** in section 2(1): repeal.

Section 3(8): repeal.

Habeas Corpus Act 2001 (2001 No 31)

Section 14(2)(a): repeal and substitute:

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“(a) a conviction of an offence by a court of competent jurisdiction, the Court Martial of New Zealand established under **section 120 of the Armed Forces Law Reform Act 2007**, or a disciplinary officer acting under **Part 5** of the Armed Forces Discipline Act 1971; or”.

10

Judicature Act 1908 (1908 No 89)

Section 58D(4)(c): omit “Courts” in each place where it appears and substitute in each case “Court”.

Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (2004 No 38)

15

Definition of **Head of Bench** in section 5: insert after paragraph (d):

“(ea) in relation to the Court Martial, the Judge Advocate General:”.

Paragraph (e) of the definition of **Head of Bench** in section 5: omit “Courts” and substitute “Court”.

20

Paragraph (a) of the definition of **Judge** in section 5: insert the following subparagraph after subparagraph (iv):

“(iva) a Judge of the Court Martial; or”.

Lawyers and Conveyancers Act 2006 (2006 No 1)

Section 47(b): repeal and substitute:

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“(b) **section 180 of the Armed Forces Law Reform Act 2007**; or”.

Mental Health (Compulsory Assessment and Treatment) Act 1992 (1992 No 46)

Definition of **Court** in section 2(1): repeal and substitute:

“**Court** means—

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“(a) a District Court; or

“(b) as the case may be, the Court Martial of New Zealand established under **section 120 of the Armed Forces Law Reform Act 2007** when acting under Part 10 of the Armed Forces Discipline Act 1971”.

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New (unanimous)

Part 1—*continued***Oaths and Declarations Act 1957 (1957 No 88)**

Section 22(2): insert after paragraph (a):

“(aaa) in the case of a Judge of the Court Martial, by the Judge Advocate General or a Judge of the High Court:”.

Schedule 2: insert after the item relating to the Judges of the High Court: 5

The Judges of the Court Martial.

Prisoners’ and Victims’ Claims Act 2005 (2005 No 74)

Section 4: insert in its appropriate alphabetical order:

“**Court Martial** means the Court Martial of New Zealand established under **section 120 of the Armed Forces Law Reform Act 2007**”. 10

Paragraph (a) of the definition of **service prisoner** in section 4: omit “a court-martial” and substitute “the Court Martial”.

Section 5(1) and (2): omit “court-martial” in each place where it appears and substitute in each case “the Court Martial”. 15

Heading to section 25: omit “**court-martial**” and substitute “**Court Martial**”.

Section 30(5): repeal and substitute:

“(5) However, the Chief District Court Judge must consult with the Judge Advocate General before designating a Tribunal under this section if a claim to which the designation relates involves an offender convicted by the Court Martial, or found guilty by a disciplinary officer, under the Armed Forces Discipline Act 1971.” 20 25

Section 35(1)(a): repeal and substitute:

“(a) relate to criminal proceedings, proceedings of a disciplinary officer under the Armed Forces Discipline Act 1971, or proceedings of the Court Martial; and”.

Section 35(2)(c): omit “court-martial” and substitute “Court Martial”. 30

Section 35(2)(c): omit “section 145 of the Armed Forces Discipline Act 1971” and substitute “**section 187 of the Armed Forces Law Reform Act 2007**”.

Heading to section 36: omit “**court-martial**” and substitute “**Court Martial**”. 35

New (unanimous)

Part 1—*continued***Prisoners' and Victims' Claims Act 2005 (2005 No 74)—***continued*

Heading to section 37: omit “**court-martial**” and substitute “**Court Martial**”.

Remuneration Authority Act 1977 (1977 No 110)

Section 12B(1): insert after paragraph (b):

“(ba) the Chief Judge of the Court Martial and the other
Judges of the Court Martial; and”.

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Schedule 4: add the following item:

The Registrar of the Court Martial

Supreme Court Act 2003 (2003 No 53)

Definition of **New Zealand court** in section 4: omit “a court-martial constituted under Part 6 of the Armed Forces Discipline Act 1971, the Courts Martial Appeal Court constituted by the Courts Martial Appeals Act 1953” and substitute “the Court Martial of New Zealand established under **section 120 of the Armed Forces Law Reform Act 2007**, the Court Martial Appeal Court constituted by the Court Martial Appeals Act 1953”.

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Part 2

Amendments to regulations

Corrections Regulations 2005 (SR 2005/53)

Regulation 191(2): omit “section 166” and substitute “**Part 8**”.

Electoral Regulations 1996 (SR 1996/93)

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Regulation 46(5): insert “the” before “Court Martial”.

Legislative history

10 October 2007

Divided from Armed Forces Law Reform Bill (Bill 108–2) by committee of the whole House as Bill 108–3D