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Chris

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Dear Chris

I refer to your email of 29 November 2022 requesting, under the Official Information Act 1982 (OIA), the following:

- 1) *Since the beginning of Operation Respect, how many charges has the Director of Military Prosecutions decided not to prosecute?*
- 2) *What are the facts surrounding those matters?*
- 3) *What happened to those charges?*
- 4) *I would like any notes or correspondence about those charges or the Director of Military Prosecution's decisions, including the decisions themselves. If there is an NZDF committee for discipline, I request any reference to those decisions made in the meeting minutes.*

On 5 December 2022, you clarified your request, stating:

I am interested in which cases the Director of Military Prosecutions decided not to take to trial regardless of what the charge was, and I assumed there would be an easily accessible record of that as a decision made by someone appointed by law.

It is surprising to learn that there are so many charges in six years that it involves too much work to review, given how small NZDF is. My assumption was that most matters would go to trial and the ones that didn't would be a small number. If there are too many matters that did not go ahead, I will limit the dates to 2019 onwards.

Since 2019, there were 22 cases (involving 24 military personnel) handled by the Office of the Director of Military Prosecutions (DMP) that did not result in charges being laid in the Court Martial. A summary of the facts concerning those cases is provided at Enclosure One. Regarding the 22 decisions by the DMP, only some have been mentioned in minutes of the Armed Forces Discipline Committee meetings or DMP reports to the Attorney-General, as outlined below.

The following are excerpts from relevant minutes of the Armed Forces Discipline Committee meetings of 2 August 2021 and 12 September 2022 respectively:

It was noted that some recent referrals to the DMP in fact should have been dealt with at a unit level – although the DMP applies the Solicitor-General's prosecution guidelines, which is not expected of commanders. [concerns File ID 2176]

Three applications for a waiver of the requirement to refer a matter to the DMP were granted so the matters could proceed, if well-founded, to summary trial. [concerns File IDs 2936, 2393, and 3055]

The following are relevant excerpts from DMP reports to the Attorney-General for the years ending 30 June 2019, 2021 and 2022 respectively. Redactions have been made under section 9(2)(a) of the OIA to protect the privacy of individuals:

Exercise of powers

Stay of proceedings

I exercised my power under AFDA s 101H(1) to stay one proceeding for six months during the reporting period. This was in respect a New Zealand Army Lance Corporal who was charged in the summary jurisdiction with one charge of consuming a Class B controlled drug and one charge of attempting to procure a Class B controlled drug. These charges were determined by the accused's Commanding Officer (CO) to be well founded in January 2019. At that time, the accused was receiving ongoing support from a clinical psychologist following the death of her young son in a vehicle accident in September 2018, while the accused was deployed on operations overseas. As a result, the accused's CO applied to me to stay the proceeding on the basis that continuation of the proceeding {including the further investigation that would be required) while the accused was going through the grieving process would be oppressive. A letter from the accused's clinical psychologist supported the CO's application for a stay on the basis that continued prosecution would risk undermining the accused's psychological progress to date by exposing her to external stressors and would be likely to have a detrimental impact on her wellbeing and mental health. In exercising my power to order a stay of proceedings, AFDA s 101K requires me to act under the general supervision of the Solicitor-General in the same manner and to the same extent as a Crown Solicitor. In this regard I am required to have regard to the Solicitor-General's Prosecution Guidelines. In exercising my power in respect of the accused in this case, I balanced the interests and well-being of the accused, the interests of Service discipline and the public interest and decided to issue an order to stay proceedings in respect of these charges for a period of six months. [concerns File ID 306]

Exercise of powers

Stay of proceedings

AFDA s 101H(1) empowers me to stay proceedings. AFDA s 101K requires me to act under the general supervision of the Solicitor-General in the same manner and to the same extent as a Crown Solicitor. In deciding whether to grant any (stft) this requires me to have regard to the Solicitor-General's Prosecution Guidelines. I exercised this power once over the reporting period in respect of an Aircraftman from the Royal New Zealand Air Force who faced minor charges relating to possession of cannabis, possession of alcohol in a defence area without authority and vaping in barracks (which constituted a breach of written orders). The Aircraftman in question had a significant mental health episode and I determined that it would be oppressive to continue with these charges. [concerns File ID 2176]

Referral of charges back to the disciplinary officer

AFDA s 117ZH provides that if a charge is referred by a disciplinary officer to me, I may refer the charge back to the disciplinary officer with a direction that the officer must either continue to act as disciplinary officer in relation to the charge(s) or dismiss the charge(s). I exercised this discretion on one occasion during the reporting period:

1. *Leading Aircraftman [redacted under s. 9(2)(a) of the OIA] - It was alleged that following a night out, [redacted under s. 9(2)(a) of the OIA] entered the room of a Corporal and got into his bed. She did not touch him and when he asked her to leave, she did. The Corporal was clear he did not wish to make a complaint. The Military Police nevertheless investigated but concluded there was insufficient evidence to recommend disciplinary action against LAC [redacted under s. 9(2)(a) of the OIA]. Despite this, her unit carried out an additional*

investigation and her Commanding Officer determined that a charge of behaving in a disgraceful and indecent manner (with an alternative of doing an act likely to prejudice Service discipline) was well-founded. At summary trial LAC [redacted under s. 9(2)(a) of the OIA] elected trial by Court Martial. Chief of Air Force's opinion was that the prosecution of the charges was not in the interests of the Service and he recommended that charges not be laid before the Court Martial. I concurred. I did not consider that LAC [redacted under s. 9(2)(a) of the OIA]'s behaviour met the high threshold for disgraceful and indecent conduct, nor did I consider there was a sufficient Service nexus to warrant a charge of conduct prejudicial. I declined to lay charges in the Court Martial on the basis that neither the evidential test nor the public interest test were satisfied. I referred the charge back to the Disciplinary Officer with a direction that it be dismissed. [concerns File ID 2936]

Previously, the discretion to refer a charge back to a disciplinary officer could only be exercised in respect of charges referred to me by a disciplinary officer from summary trial; there was no equivalent power for charges which are reserved as Court Martial only offences. However, in August 2021 the AFDC approved amendments to Defence Force Orders which allow me to waive the requirement for certain offences to be heard at Court Martial. The effect of this is that low level allegations of offending that would otherwise trigger a mandatory Court Martial are able to be dealt with at summary trial. Any exercise of this discretion is informed by an application of the evidential and public interest tests, as outlined in the Solicitor-General's Prosecution Guidelines. I have exercised this discretion on three occasions over the reporting period:

1. *Corporal [redacted under s. 9(2)(a) of the OIA] - one charge of indecent assault and one charge of behaving in a disgraceful and indecent manner were referred to me in relation to Corporal [redacted under s. 9(2)(a) of the OIA] who allegedly touched the leg and back of a Squadron Leader at a formal dinner and made some inappropriate comments. Having considered all the evidence, I formed the view that the criminality of the conduct could be adequately dealt with by a charge of common assault and one of behaving in a disgraceful and indecent manner (with alternatives of doing an act likely to prejudice Service discipline) and that it should be dealt with at summary trial. This accorded with the views of the complainant. [concerns File ID 2393]*
2. *Trooper [redacted under s. 9(2)(a) of the OIA] - It was alleged that on one occasion TPR [redacted under s. 9(2)(a) of the OIA] consumed MDMA and split the pill with other troopers. The amount of the substance supplied was small and the other troopers involved had been dealt with at summary trial over a year previously. If TPR [redacted under s. 9(2)(a) of the OIA] was found guilty at Court Martial, I considered it unlikely that he would receive a punishment greater than that available at summary trial. I therefore waived the requirement for the recommended charge to be heard at Court Martial. This course of action was endorsed by Chief of Army. My decision to waive the requirement for the allegation to be heard in the Court Martial was without prejudice to the Commanding Officer's ability to subsequently refer the charge to me if they considered that, having heard the evidence at summary trial, they had insufficient powers of punishment. [concerns File ID 2393]*
3. *[redacted under s. 9(2)(a) of the OIA] - Three allegations of indecent assault in relation to [redacted under s. 9(2)(a) of the OIA] were referred to me. I was of the view that the Court Martial was unlikely to impose a punishment that would be unavailable to the Commanding Officer at summary trial. As the alleged offending occurred on sea service, the Commanding Officer was empowered to impose a punishment of up to 60 days' detention and a fine of up to 28 days' pay. I had the file reviewed by the Office of the Crown Solicitors in Auckland and was advised that in the civilian jurisdiction, the likely sentence would be one of supervision together with community work. Though I considered the offending to be serious, I waived the requirement for the recommended charges to be heard [sic] at Court Martial as I am of the opinion that the potential punishments were within the power of the Commanding Officer to*

award. At summary trial, however, [redacted under s. 9(2)(a) of the OIA] exercised her right [to] elect trial by Court Martial. The trial is set down for hearing on 22 August 2022.

Your request for *notes or correspondence about charges or the DMP's decisions, including the decisions themselves*, is declined in accordance with section 18(f) of the OIA as it would require a significant collation and research effort to identify relevant emails and prepare them for release.

You have the right, under section 28(3) of the OIA, to ask an Ombudsman to review this response to your request. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Responses to official information requests are proactively released where possible. This response to your request will be published shortly on the NZDF website.

Yours sincerely



AJ WOODS
Air Commodore
Chief of Staff HQNZDF

Enclosure:

1. Summary of cases to the Office of the DMP that did not result in Court Martial

Released under the Official Information Act 1982

Since 2019, there have been 22 cases (involving 24 members of the Armed Forces) handled by the Office of the Director of Military Prosecutions that did not result in charges being laid in the Court Martial.

File ID 306

Evidence was discovered upon examination of electronic devices and by conducting interviews that the accused (a Lance Corporal) had allegedly used MDMA on one known occasion and there was evidence of attempting to procure MDMA on another occasion. She was charged by her Commanding Officer with one charge of using a Class B controlled drug and one charge of procuring a Class B controlled drug.

The CO applied to the DMP for a temporary stay of proceedings. While the accused was deployed overseas on operations, her child had been killed in a traffic accident. The DMP agreed that continuing with the prosecution during this difficult period would be unjust and oppressive and a temporary stay of six months was issued. At the expiration of the stay, the CO held a summary trial where the accused was convicted and sentenced to a reduction in rank to Private.

File ID 3389

The offender (a Sapper) and the complainant were in the Sapper's barrack room when he approached the complainant and kissed her on the lips. Despite her resistance, he continued to kiss her neck and rub his pelvic area against her leg. She pushed him away and left the room.

Three charges were referred to the DMP – one of indecent assault, one of failure to comply with written orders, and one of common assault. The DMP considered that the Commanding Officer had sufficient powers of punishment and referred the charges back to the CO. A summary trial was conducted, the Sapper was found guilty and was sentenced to 10 days confinement to barracks.

File ID 800

The offender (a Lance Corporal) confessed to possession of a class B controlled drug but denied that he offered the same class B controlled drug to another member of the Armed Forces.

The DMP determined that there was insufficient evidence in relation to the offer to supply. She considered that the CO had sufficient powers of punishment in relation to the possession charge and this was referred back to the CO. At summary trial the LCPL was found guilty and sentenced to a reduction in rank and a fine of \$1088.08.

File ID 2335

The offender (a Private) touched the complainant's buttocks and breasts while on the dance floor at a nightclub. Charges of indecent assault and common assault were referred to the DMP.

The DMP considered that the CO had sufficient powers of punishment and referred the charges back to the CO. The Private was convicted at summary trial and sentenced to 14 days' confinement to barracks and an \$800.00 fine.

File ID 2501

The accused (an Aircraftman) allegedly posted to Instagram a photograph depicting a sexual act between himself and a female civilian. This gave rise to two charges (making and publishing an intimate visual recording). Electronic data extracted from his phone allegedly revealed messages indicating that he was involved in the supply, offer to supply, procuring, attempting to procure,

Released under the Official Information Act 1982

possession and use of controlled drugs. This gives rise to sixteen drug-related charges. An additional three charges related to alleged consumption of alcohol in barracks and vaping in non-designated areas.

The majority of the charges were referred by the NZDF to New Zealand Police. The Aircraftman faced summary trial and plead guilty to two charges of failure to comply with a written order, one charge of wilfully damaging service property, one charge of disobeying a lawful command and one charge of common assault. He received a sentence of 14 days' confinement to barracks, a fine of two days' pay, and was ordered to pay a compensation order of \$287.00.

File ID 494

Military Police became aware of potential drug offending and conducted an investigation which implicated multiple people in the supply, procurement and use of drugs. The accused (a Lance Corporal) was allegedly implicated via evidence obtained through a cell phone as having potentially supplied drugs. Four charges were referred to the DMP – two charges of supplying a class B controlled drug and two charges of offering to supply a class B controlled drug.

The DMP declined to lay charges in the Court Martial because she was not satisfied there was a reasonable prospect of conviction based on the evidence.

File ID 2507

Charges were referred against the accused (an Acting Sergeant) in relation to a fighting incident that he allegedly instigated. The charges were one charge of fighting, one charge of common assault, and one charge of using threatening, insulting or provocative language contrary to the AFDA.

Having determined that the public interest test was not met, the DMP declined to lay charges in the Court Martial. The charges were referred back to the CO and a summary trial was conducted. The accused was found not guilty.

File ID 3055

The offender (a Trooper) was alleged to have consumed MDMA and to have split the pill with other members of the Armed Forces. Two charges were referred to the DMP – one of supplying a Class B controlled drug and one of consuming a Class B controlled drug.

The DMP considered that the CO had sufficient powers of punishment and referred the charges back to the CO. The Trooper was found guilty at summary trial and sentenced to 22 days' detention in the Services Correctional Establishment.

File ID 1840

The accused (a Private) was found with GBL in his possession and his urine tested positive for MDMA. Twenty charges were referred to the DMP (Five of using a Class A controlled drug, six of using a Class B controlled drug, five of attempting to procure a Class B controlled drug and four of offering to supply a Class B controlled drug).

These charges were referred to New Zealand Police in December 2021.

File ID 3278

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The accused (an Aircraftman) allegedly kissed two members of the AFDA on the face and neck without their consent in situations that involved an element of physical control. Two charges of indecent assault were referred to the DMP.

The DMP considered that the CO had sufficient powers of punishment and referred the charges back to the CO. At summary trial the accused was found not guilty.

File ID 2251

The accused (a Chief Petty Officer) was accused of slapping another member of the Armed Forces on the buttocks and making objectionable comments about appearances and other inappropriate comments to subordinates. Three charges were referred to the DMP (one of indecent assault, one of ill-treating a subordinate, and one of behaving in a disgraceful and indecent manner).

The DMP considered that the CO had sufficient powers of punishment and referred the charges back to the CO. At summary trial the accused faced charges of common assault, striking a subordinate, doing an act likely to prejudice service discipline, and behaving in a disgraceful and indecent manner. The accused was sentenced to a \$250.00 fine and a reprimand.

File ID 2936

The accused (a Leading Aircraftman) got into bed with another Serviceperson following a night out. The accused did not touch the other person and when asked to leave immediately did so. Two charges were referred to the DMP – one of behaving in a disgraceful and indecent manner and one of conduct prejudicial to service discipline.

The DMP found that on the basis of available evidence, neither of the charges were made out. She declined to lay charges in the Court Martial.

File ID 791

During a cell phone search, data was found suggesting the accused (a rating) was involved in the procurement and use of a Class B controlled drug and prescription only medicine. Four charges were referred to the DMP – one charge of supplying a Class B controlled drug, one of possessing a Class B controlled drug and two of procuring a Class B controlled drug.

The DMP found there was insufficient evidence for the charge of supplying a class B controlled drug and determined that the CO has sufficient powers of punishment to hear to remaining charges, which were referred back to the CO. The accused's CO determined that the remaining charges would not be brought to summary trial.

File ID 3342

The accused (a Private) consumed a Class C controlled drug and disobeyed an order to hand over his cell phone. He was to be charged with one charge of using a Class C controlled drug and one charge of disobeying a lawful command. However, his CO applied to the DMP for an indefinite stay of proceedings based on the accused mental health state.

The accused was found to be medically unfit to stand trial and the DMP determined that continuation of the prosecution would be oppressive. She ordered an indefinite stay of proceedings and a medical release from the Army was commenced for the accused.

File ID 2393

Released under the Official Information Act 1982

The accused (a Corporal) allegedly touched another member of the Armed Forces on the back and leg a number of times during an event and also made some sexualised comments. Two charges (indecent assault and behaving in a disgraceful and indecent manner) were referred to the DMP.

The DMP determined that the evidence was insufficient to meet the thresholds for the referred charges and the charges were discontinued.

File ID 1028

The accused (a Private) forced entry into the barrack room of another member of the AFDA, took a set of car keys and drove the vehicle multiple times. Two charges (burglary and unlawfully taking a motor vehicle) were referred to the DMP.

The DMP determined that the CO had sufficient powers of punishment and the charges were referred back to the CO. At summary trial the offender plead guilty to the burglary charge and was sentenced to 12 days' detention in the Services Correctional Establishment.

File ID 1985

Five RNZN ratings were part of a Facebook group chat that was found to contain potential objectionable material. Two of the ratings were tried summarily and three were referred to the DMP on charges of possessing an objectionable publication contrary to the Films, Videos, and Publications Classification Act 1993.

The DMP considered that the CO had sufficient powers of punishment and it was not in the public interest to lay charges in the Court Martial. The charges was referred back to the CO. One of the ratings had been released from service. The remaining two were issued with cautions.

File ID 2176

The accused (an Aircraftman) was found to have a Class C drug in their possession. When their cell phone was searched, footage was discovered of the accused vaping and drinking in barracks contrary to orders. The CO charged the accused with eight charges (one for possession of a Class C controlled drug, and the rest were for failure to comply with written orders).

These charges would have been heard at summary trial had the CO not applied for an indefinite stay of proceedings, which the DMP granted. It was considered that it would be unjust and oppressive to continue with prosecution. The accused suffered from severe mental health problems and his medical discharge from service was already underway.

File ID 1579

The accused (a Private) was discovered with a bottle of urine taped to his leg during a routine unit drug test. His phone was seized which indicated multiple counts of use, possession and procurement of LSD, MDMA and marijuana. It also indicated an offence of offering to supply marijuana and MDMA. The phone also indicated evidence he had tried to hack the wi-fi at his barracks. He had also obtained physical tools that are used for hacking.

Forty-one charges were referred to the DMP. The majority were for drug-related offending, one charge was for disobeying lawful command, one was for possessing software for committing a crime and one was for accessing a computer system for a dishonest purpose.

The majority of the charges were referred to New Zealand Police. The charge for disobeying a lawful command was referred back to the CO but by this time it was outside the statute of limitations.

File ID 3103

The accused (an Aircraftman) was allegedly extremely intoxicated when he entered the barrack room of another member of the AFDA and got into bed with them. It is alleged that he committed an indecent assault. He also allegedly lied to his chain of command about being unwell the following day. Three charges were referred to the DMP (two of indecent assault and one of malingering).

The DMP declined to lay charges in the Court Martial. The complainant was reluctant to have any involvement or give evidence. DMP preferred to respect complainant's wishes. The malingering charge was referred back to the CO and is yet to be heard at summary trial.

File ID 1830

During the search of a phone belonging to another member of the Armed Forces, Military Police uncovered evidence that the accused (a Lance Corporal) had supplied Cannabis and Morphine to a subordinate and had procured MDMA from this same subordinate. There was also evidence indicating the accused had supplied MDMA to civilian friends.

Six charges were referred to the DMP (two of attempting to procure a Class B controlled drug, three of supplying a Class C controlled drug and one of procuring a Class B controlled drug). The charges in relation to Class B drug supply were referred to New Zealand Police. The remaining charges were referred back to the CO. A summary trial was conducted and the accused plead guilty to two charges of attempting to procure a Class B substance and guilty to one charge of supplying a Class C substance. He was sentenced to reduction in rank to Private and a reprimand.

File ID 2453

Military Police seized the phone of the accused (a Private) along with three other phones belonging to a fellow PTE. These phones revealed the alleged procurement and use by the accused of cocaine, LSD, MDMA, GBL or GHB, meth, and DMT. Thirty-one drug-related charges were referred to New Zealand Police.