

# Departmental Disclosure Statement

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Military Justice Legislation Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the New Zealand Defence Force.

The New Zealand Defence Force certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

26 July 2017

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## Part One: General Policy Statement

This Bill is an omnibus Bill introduced in accordance with Standing Order 263(a). The amendments in this Bill deal with an interrelated topic that can be regarded as implementing a single broad policy.

The principal purpose of this Bill is to update the military justice system and to align it with the criminal justice system in certain respects, including by enhancing victims' rights. To achieve that purpose, this Bill amends the Armed Forces Discipline Act 1971, the Court Martial Act 2007, and the Court Martial Appeals Act 1953.

### Victims' rights

Part 3 of the Victims' Rights Act 2002 confers rights on victims of certain serious offences of a sexual nature or that involve violence (**specified offences**), including the right to be kept informed and the right to be consulted in respect of decisions such as bail. One of the rights, namely, the right to be consulted on the accused's release on bail, is already incorporated into the military justice system. However, the remaining rights are not. Amendments made by this Bill ensure that victims of specified offences have rights and protections in the military justice system that are equivalent to those that they would receive in the criminal justice system.

### Notice of judicial appointments

Section 15 of the Court Martial Act 2007 requires the Chief of Defence Force (**CDF**) to arrange for notice of any judicial appointments to the Court Martial to be published in the Gazette. However, the CDF is not responsible for judicial appointments, so requiring the CDF to arrange for the notice to be published is anomalous. Notice of a judicial appointment to any other court is published in the Gazette on behalf of the person appointing the Judge without the need for such a legislative provision. This Bill repeals section 15 for consistency.

### Court martial procedure

The Bill amends some aspects of the procedure of the Court Martial of New Zealand.

#### *Fitness to stand trial*

The Bill aligns the provisions governing whether an accused is unfit to stand trial in the military justice system, and the steps associated with that determination, with the provisions of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

#### *Objection to military member*

Currently, there is no legislative provision for the Director of Military Prosecutions or the prosecutor to object to the assignment of a military member to the Court Martial. It is possible that the Director of Military Prosecutions or the prosecutor may be aware of circumstances that would make it untenable for a particular person to be assigned or to sit as a military member. However, in the absence of a formal process for raising such matters with the Court, there is the potential for a miscarriage of justice. The Bill amends the Court Martial Act 2007 to remedy this anomaly.

### *Substitute military member*

Section 28(1) of the Court Martial Act 2007 gives the Registrar of the Court Martial the power to assign an officer or a warrant officer to act as a substitute military member. A substitute military member may be assigned to the Court Martial if a military member—

- dies or becomes seriously ill before or during the trial;
- is absent or found to be disqualified from sitting as a military member;
- retires from the Court Martial as a result of an objection; or
- is found guilty of contempt of the Court Martial.

Under section 28, the power to appoint a substitute military member persists after the start of the trial. However, after a trial has started and the hearing of evidence has begun, appointing a substitute military member is not practicable, because the substitute military member has no opportunity to assess the credibility of any witness who has given evidence before the substitute's appointment. This Bill amends the Court Martial Act 2007 to provide that a substitute military member cannot be appointed after the accused has entered a plea.

### **Onus of proof**

Section 3(2) of the Armed Forces Discipline Act 1971 provides that the onus is on the accused to prove, on the balance of probabilities, any excuse, exception, exemption, or qualification that the accused relies on as a defence to a charge. Provisions placing the onus of proof on the accused have largely been removed from the criminal justice system following the decision of the Supreme Court in *R v Hansen* [2007] NZSC 7. There is no good reason for members of the Armed Forces who are tried under the military justice system to have an onus of proof imposed on them that is not imposed in the criminal justice system. Accordingly, the Bill repeals section 3(2) of the Armed Forces Discipline Act 1971.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>
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### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
Regulatory Impact Statement for Armed Forces Law Reform Bill by the New Zealand Defence Force, dated 22 August 2016, which was forwarded to the Cabinet Economic Growth and Infrastructure Committee (EGI-16-MIN-0214). The RIS can be made publicly available at <a href="http://www.treasury.govt.nz/publications/informationreleases/ris">http://www.treasury.govt.nz/publications/informationreleases/ris</a>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
Advice was sought from the RIA Team. The team advised that the Bill did not reach the threshold warranting an independent assessment.	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
(a) the size of the potential costs and benefits?	<b>NO</b>
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	<b>NO</b>

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	<b>NO</b>

<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>
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## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

**3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?**

Independent legal advice has been sought.

### Consistency with the government's Treaty of Waitangi obligations

**3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?**

Independent legal advice has been sought.

### Consistency with the New Zealand Bill of Rights Act 1990

**3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?**

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

### Offences, penalties and court jurisdictions

**3.4. Does this Bill create, amend, or remove:**

**(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?**

NO

**(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?**

YES

Clause 9 empowers a victim to make submissions to the Reconsidering Authority in respect of the reconsideration of a sentence of imprisonment or detention imposed on the offender who offended against that victim.

Clause 19 inserts a new Part into the Armed Forces Discipline Act 1971, which will give a victim the right to have his or her view taken into account in military bail hearings, and also by the Immigration and Protection Tribunal in the case of a military offender is not a New Zealand citizen and may be liable for deportation. Clause 28 inserts equivalent provisions into the Court Martial Act 2007 in respect of bail hearings.

Clauses 32 and 33 grant expanded rights of appeal to the Court Martial Appeal Court by persons who are found fit, or unfit, to stand trial and/or who are subject to various orders equivalent to those which may be made under the Criminal Procedure (Mentally Impaired Persons) Act 2003.

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
A policy paper was forwarded to the Ministry of Justice for comment. The Ministry's comments were taken into account in finalising the policy settings. The Ministry has been asked to vet the Bill.	

### Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
Clauses 10 and 19 contain provisions which create rights for victims of offences to obtain information about the person who offended against them.	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>
The provisions are essentially a mirror image of equivalent provisions in the Victims' Rights Act 2002, with the modifications necessary to make them fit for purpose in the military context.	

### External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
A policy paper was circulated for comment by the Chief Judge of the Court Martial, the New Zealand Law Society and Victim Support, Inc. Feedback from these persons or organisations was taken into account by the Minister in deciding the final policy settings for the Bill.	

### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>NO</b>
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## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES
Under section 3(2) of the Armed Forces Discipline Act 1971, the “usual” burden of proof in respect of certain matters is imposed on the accused, rather than the prosecution as is usual in the civilian judicial system. The Bill remedies this anomaly by repealing section 3(2).	

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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### Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
A number of provisions in the Bill amend the powers of the Court Martial of New Zealand and the Court Martial Appeal Court. These powers are exercisable only by Judges following submissions by counsel.	

### Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>Clause 20 amends the existing power in section 206 of the Armed Forces Discipline Act 1971 to make Defence Force Orders, by (a) permitting those orders to authorise warrant officers to attend the proceedings of the Court Martial for instruction in Court procedures and (b) removing the power to make such orders in respect of the appointment, duties and functions of officers of the Court Martial (which should be made by Order-in-Council to preserve the separation of powers).</p>	

#### **Any other unusual provisions or features**

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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