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CHIEF JUDGE ADVOCATE

Australian Defence Force

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PRACTICE NOTE 3 — SUMMONSES (VERSION 3)

1. **Purpose.** This Practice Note sets out the superior service tribunal practice for seeking the issue of a summons under section 138(2) of the DFDA, the service of a summons and, in the case of summons to produce documents, the leave to inspect and copy any returned documents.
2. **Commencement.** This Practice Note commences forthwith.

Requesting the issue of a summons

3. **Templates.** The RMJ maintains a suite of summons templates. Copies of the templates have been provided to the Office of the Director of Military Prosecutions (ODMP) and Defence Counsel Services (DCS), and are otherwise available upon request by emailing registrarof.militaryjustice@defence.gov.au. A summons is to be requested using one of the templates.
4. **Form of summons.** A summons:
 - a. must be addressed to a person (even if only by a title or function)
 - b. must have the return date and time:
 - (1) 'inside' tribunal hours (eg, 0930 on the first day of a proceeding, not 0830; or 1300 on the third day of a proceeding)
 - (2) specified as a particular date and time (ie, not a range of days or times)
 - c. can require appearance of the witness by video-conference (VTC) or telephone only where:
 - (1) the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) provisions dealing with sexual or violent offences apply (VTC only); or
 - (2) there has been a ruling by the president of a court martial, the JA or DFM prior to the issuing of the summons
 - d. for the production of documents:
 - (1) must specify the documents with sufficient particularity and, where relevant, be limited by a date range (to reduce the risk of being set aside as being oppressive)
 - (2) if requiring protected confidence material (per the *Evidence (Miscellaneous Provisions) Act* provisions dealing with sexual or violent offences), may be requested only where a JA or DFM has granted leave to issue the summons

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- (3) may be made returnable either at a pre-trial directions hearing or during the trial
- (4) in the case of a summons to produce Department of Defence documents, should be addressed to the Secretary of Defence.¹

5. **Jurisdiction.** Counsel should consider jurisdiction pursuant to section 9 of the DFDA when requesting a summons.

6. **Appropriate authority.** Prior to the commencement date of a court martial or DFM proceeding, the prosecution and defence should direct any request for the issue of a summons to the RMJ. During a proceeding, the RMJ remains the preferable authority for the issuing of a summons; however, the agreement of the president and JA, or the DFM should be obtained before contacting the RMJ.

Timing

7. In general, a request for issue of summons should occur no later than **12** working days before the return date so that the summons can be signed and returned for service with at least **ten** working days' notice to the witness.

8. Any request for a 'short service' summons is to be accompanied by either an:

- a. indication that the witness is aware of the return date and will be in a position to comply with the summons; or
- b. explanation as to why a short service summons should be issued.

9. The RMJ may agree to the issuing of a short notice summons or may schedule a pre-trial directions hearing for the matter to be determined by the JA or DFM.

10. **Return date.** When requesting documents, consideration is to be given to the requested return date such that there is sufficient time for the parties to receive and review returned material, in order to reduce the risk an adjournment may be required. This is particularly the case when summoning a large volume of material or when summoning material from a source external to Defence. A pre-trial directions hearing can be listed for a return of summons to produce documents. Practice Note 5 – *Pre-Trial Directions Hearings (extant version)* provides guidance on requesting a pre-trial directions hearing.

11. When a requesting party knows or believes that a summonsed party may seek orders from the tribunal (eg, closed hearing or non-publication orders) or raise objections to production or inspection of documents, the Registry should be advised so this can be taken into account when selecting a date, time and venue for a pre-trial directions hearing or the trial.

¹ This applies to all Departmental documents (including emails, notes, official diary entries etc), including but not limited to, an ADF member's personnel, disciplinary or health records; documents prepared by ADF and APS members in the course of their duties; and documents prepared by a contractor to the Department of Defence and held or stored by the Commonwealth. A summons to the Secretary of Defence should be served on the Secretary via the Directorate of Litigation.

Requesting and serving a summons

12. To request the issue of a summons by the RMJ, a party should:
- a. complete the relevant summons template
 - b. email a pdf copy of that summons to registrarof.militaryjustice@defence.gov.au.
13. Subject to being in a proper form, meeting the requirements of this Practice Note, and prima facie being a proper use of the superior service tribunal's power, the RMJ will sign the summons and return a signed pdf copy by email to the requesting party.
14. The party who requested the summons is responsible for service on the witness and compliance with the Court Martial and Defence Force Magistrate Rules 2020. Where a summons is for the production of documents, the requesting party is to provide a copy of the summons to the other parties.
15. If the summons is not served, is withdrawn or is otherwise no longer required (eg, the matter becomes a plea or the production of documents is no longer required), then the party who sought the summons is to notify the:
- a. witness (unless the summons was never served)
 - b. Registry
 - c. other parties (only in the case of a summons for production of documents).
16. **Third party notification.** It is for the person upon whom a summons for documents has been served to determine whether a third party should be notified of the summons (eg, a summons to the Secretary of Defence for the health records of a particular individual).

Return of summons (documents)

17. The DFDA does not explicitly provide for a summons to only produce documents (as opposed to appear and produce). As a matter of practicality, unless a party specifically requests otherwise, it is the practice to accept that compliance with the summons has been fulfilled and without the summonsed person appearing on the return date by either:
- a. returning documents without objection to the Registry, or
 - b. advising the Registry that the summonsed person has no documents within his or her possession or control per the Schedule(s) to the summons.²
18. If a party requires the witness to appear as well as the production of documents, this must be made clear to the Registrar when requesting the issue of a summons and then also made clear to the witness.
19. Where the scope of the Schedule(s) of an issued summons for production of documents has been narrowed by agreement of the requesting party, this should be identified by the witness in covering correspondence when returning the documents to the Registry.

² See Note 1 to the template summons.

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20. **Usual form of orders.** Where documents are returned without objection, the usual form of orders are:
- a. Each party is granted leave to inspect and copy the documents.
 - b. The RMJ will arrange access to the documents by assigned counsel and administrative staff at the ODMP and DCS being granted relevant privileges to a folder on Objective.
 - (1) Where assigned counsel do not have Objective access, the administrative staff at ODMP and DCS may make the documents available to counsel in either hard copy or electronic form, but remain subject to the conditions below.
 - c. The documents are not to be further copied nor are copies to be left in the custody of the accused.
 - d. The documents are to be used only for the purposes of the proceedings and are not to be disclosed to any person for any other purpose.
 - e. At the conclusion of the proceedings (inclusive of reviews, petitions and appeals):
 - (1) any original documents are to be returned to the person who produced that document (unless agreed otherwise)
 - (2) all copies are to be destroyed (hard copies) or deleted (digital copies).
21. A JA or DFM may make the above orders by simply stating they make the usual form of orders. The usual form of orders may be varied on application by either a party, at the request of or to resolve an objection raised by the witness who produced the documents, or at the initiative of the JA or DFM.

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