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CHIEF JUDGE ADVOCATE

Australian Defence Force

BH284316

PRACTICE NOTE 5 — PRE-TRIAL DIRECTION HEARINGS (VERSION 2)

1. **Purpose.** This Practice Note sets out the practice for pre-trial direction hearings (PTDH).
2. **Commencement.** This Practice Note commences forthwith.
3. **Conduct.** Counsel are to attend each PTDH prepared to address all relevant matters.

Scheduling PTDH

4. **When.** A PTDH may be scheduled:
 - a. at the request of either counsel
 - b. for a return of summons to produce documents that are required prior to the hearing date
 - c. for general case management, current RMJ practice is to set a PTDH in each matter approximately 4 weeks after the referral.
5. **Format.** A PTDH may be either ‘in person’ (for both contested and uncontested rulings) or by telephone (only for uncontested rulings and general case management). The publication of the listing of a PTDH conducted ‘in person’ will be managed in accordance with Practice Note 1 – *Publication (extant version)*.
 - a. **Appearance by counsel.** For an ‘in person’ PTDH, counsel may request to appear by way of VTC from a Defence VTC site or via audio visual link such as WebEx remote from the hearing room. Any such request should be raised with JA or DFM via the Registrar of Military Justice (RMJ) at the earliest opportunity.
 - b. **Attendance by accused.** Section 139(1) of the DFDA provides that hearings by Superior service tribunals shall, subject to the service tribunal ordering the accused’s removal due to disorderly behaviour, be held in the presence of the accused. Accordingly, an accused is required to attend a PTDH.
 - (1) Where the PTDH is being held in person, the accused will be required to also attend in person — noting this may also include attending by way of VTC from a Defence VTC site or via audio visual link such as WebEx remote from the hearing room if that has similarly been approved for Defence counsel (see paragraph 5.a).
 - (2) Where the PTDH is being held by telephone, the accused can either be present with his or her counsel or be on a separate line.

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6. To assist the JA or DFM and counsel, the Registry maintains and provides a PTDH checklist, which is to be used at each PTDH.
7. **Requesting a PTDH.** Counsel should notify the RMJ of the need for a PTDH where, among other things there will be:
- a. an application or objection under section 141(1)-(4) of the DFDA
 - b. an application by either party under section 148A of the DFDA to call a witness is contested
 - c. an application under the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) is contested
 - d. a return of summons for the production of documents prior to the hearing, see Practice Note 3 – *Summonses (extant version)*.
8. **Scheduled PTDH.** If requested by the JA or DFM, the RMJ will schedule a PTDH (usually four weeks after receiving the referral from the Director of Military Prosecutions) to deal with, among other things:
- a. indication of the intended plea(s)
 - b. whether either party requires the other side to call a witness (eg, an investigating officer or a character witness at sentencing)
 - c. whether any witness to be called can appear by audio/visual link
 - d. whether there may be any classified evidence (testimony or exhibits) or other security issues
 - e. confirmation of the expected duration of the proceedings, inclusive of an allowance for DFDA, Part IV action.
9. **Defence witnesses.** The Defence remain under no obligation to notify the Prosecution or JA or DFM if they intend to call any witnesses; and if so, whom. However, where the Defence are in a position to foreshadow that there are witnesses who might conveniently be called by audio or video link (eg, a character witness if the matter proceeds to sentencing), a PTDH is an opportunity to obtain a preliminary ruling from the JA or DFM. The JA or DFM may give a preliminary ruling in relation to witnesses either by name or by class of evidence (ie, the purpose for which the witness might be called).

Outline of submissions

10. For a contested PTDH, a written outline of submissions regarding the intended applications and/or objections is required in all cases.
11. **Content.** The outline should:
- a. contain a brief outline of the nature of the application and/or objection

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- b. include the relevant legal authority (legislation or cases)¹
 - c. if required, and with consent of the other party, contain case exhibits annexed to the outline
 - d. include the name, and if applicable rank and PMKeyS, of any witness to be called at the PTDH — if defence counsel wish the prosecution to call a witness at the PTDH, the outline should state so.
12. **Format.** The outline should be lodged in the following type of format: .doc or docx (MS Word) or .pdf (Portable Document Format).
13. **Date of lodgement.** Unless directed otherwise by the JA or DFM, a written outline of submissions is required to be filed and served as follows:
- a. outline of applications and/or objections by either party — **ten** working days before the PTDH date
 - b. outline in reply — **five** working days before the PTDH date.
14. **Filing and serving.** The outline should be filed via email to the Registrar at registrarof.militaryjustice@defence.gov.au and served on each party in accordance with the guidance outlined in the Practice Note 2 – *Filing of material, and tendering and handing up documents (extant version)*.

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¹ See Practice Note 2 — *Filing of material, and tendering and handing up documents (extant version)*, [9]–[11].

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