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CHIEF JUDGE ADVOCATE

Australian Defence Force

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PRACTICE NOTE 7 — WITNESS AVAILABILITY (VERSION 2)

1. **Purpose.** This Practice Note sets out the practice to be adopted by counsel when advising the RMJ, JA or DFM about witness availability for superior service tribunal proceedings.
 - a. This Practice Note applies at both the initial referral stage from the Director of Military Prosecutions (DMP) to the RMJ and on all subsequent occasions.
 - b. For the purposes of this Practice Note, witness availability includes the availability of the accused regardless of whether the accused will be giving evidence or not.
2. **Commencement.** This Practice Note commences forthwith.
3. **Listing window.** The RMJ endeavours to list a matter for commencement of the hearing within a five to nine week window from the date of referral by the DMP to the RMJ. A pre-trial directions hearing may be listed at any time, but usually four weeks after the referral. If a witness is available inside these date ranges, or on such other date(s) as indicated by the RMJ or the JA or DFM, then there is no need to comply with the following paragraphs.¹
4. **ADF witnesses.** Where counsel intend to indicate to the RMJ or the JA or DFM that any ADF witness has limited availability due to factors that are within or partly within the control of command (eg, exercise, deployment, courses, leave), counsel must also advise that the witness's availability has been discussed with command and advise command's position on the issue. This applies for each witness with limited availability.
 - a. For this purpose, 'command' means a one-star officer or above in the operational command chain of the witness; and includes officers below one-star who are acting in a one-star role or above in the command chain.
 - b. Where an ADF witness does not have a one-star or above in the operational command chain, but the witness's supervisory chain does include a SES APS supervisor, counsel is to ensure consultation has occurred between the relevant senior APS supervisor and the relevant Superior Authority for the proceeding.
5. **APS witnesses.** Where counsel intend to indicate to the RMJ or the JA or DFM that an APS witness has limited availability due to factors that are within or partly within the control of the witness's employer, counsel must also advise that the witness's availability has been discussed with a suitably senior supervisor or other relevant employer representative and

¹ For example, where a witness is not available for the hearing until seven weeks after the DMP's referral, there is no need to comply with paragraphs 4 and 5.

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2

his or her position on the issue.² As a separate matter, an APS employee's supervisor should be made aware in all cases where an APS member is being called as a witness.

6. **Consultation process.** It is matter for counsel as to how and who consults with command prior to counsel complying with paragraphs 4 and 5.

M Cowen, QC
Brigadier
Chief Judge Advocate

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² This paragraph is intentionally less prescriptive due to the inherent differences and wide variety of employment arrangements in the APS compared with the service obligations in the ADF.