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CHIEF JUDGE ADVOCATE

Australian Defence Force

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PRACTICE NOTE 9 — WITNESSES WARRANTING SPECIAL REQUIREMENTS (VERSION 4)

1. **Purpose.** This Practice Note sets out the practice to be adopted in superior service tribunal proceedings when dealing with witnesses who may warrant special requirements.
2. **Commencement.** This Practice Note commences forthwith.

Witnesses to whom the Practice Note applies

3. Witnesses who may warrant special requirements in superior service tribunal proceedings are:¹
 - a. witnesses to whom *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (E(MP)A), chapter 4 applies² or if leave is granted a legal representative appearing on their behalf³
 - b. complainants and similar act witnesses for offences comparable in nature to those listed in E(MP)A, ss. 38–41 but nonetheless falling outside of those sections⁴
 - c. witnesses in relation to any other offence who may be vulnerable due to a current or previous relationship with an accused.
 - d. A witness who has a reasonable expectation of privacy and who may require separate representation, including any person who may reasonably be affected by Division 3.10.1A Evidence Act 2011 (ACT) – Professional confidential relationship privilege.

Evidence Act 2011 Act (ACT)

4. Counsel are to consider Division 3.10.1A Professional confidential relationship privilege if applicable and be prepared to assist the tribunal with information required under s126B, 126E, 131A, and s132.

Evidence (Miscellaneous Provisions) Act 1991 (ACT) proceedings

¹ Other classes of witnesses that warrant special requirements are children, the intellectually impaired and the disabled. Due to the nature of superior service tribunal proceedings, it is rare for such witness to appear. However, counsel should nonetheless be alert to the possibility and be ready to raise any special consideration requirements with the Registrar of Military Justice and the judge advocate or Defence Force magistrate.

² See para 5.

³ See for example Division 4.4.3 – protection of counselling communications.

⁴ For example, a complainant in a charge under section 33A of the DFDA Assault occasioning actual bodily harm; or section 61(3) of the DFDA and *Crimes Act 1900* (ACT), s. 72C Non-consensual distribution of intimate images.

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5. Chapter 4 of the E(MP)A sets out a number of special requirements concerning various classes of witnesses depending upon the nature of the proceedings. These E(MP)A provisions will apply when certain, but not all, offences under Australian Capital Territory legislation are charged as territory offences under section 61 of the DFDA.⁵

6. Counsel are to familiarise themselves with E(MP)A, chapter 4 so as to be ready to assist the tribunal with its application during a proceeding.⁶ Counsel should also consider whether a witness will be entitled, or have a reasonable expectation to separate representation on a specific privacy issue.

7. **Enquiries of witnesses.** Where counsel propose to call a witness to whom provisions of E(MP)A, chapter 4 apply, counsel are to have made enquiries of that witness and are to inform the Registrar of Military Justice (RMJ) not less than three weeks prior to the first day of proceedings if the witness, where applicable:

- a. wants to give evidence in person or via audio visual means⁷
- b. if giving evidence in person, wants the accused to be screened from view⁸
- c. wants to have a support person in the hearing⁹
- d. wants to give evidence in an open or closed hearing¹⁰
- e. whether they wish to have their evidence recorded.¹¹

Other proceedings

8. **Orders under sections 140, 148 and 148A of the DFDA.** Where a proceeding involves a witness who may warrant special requirements but nonetheless falls outside of E(MP)A, chapter 4, counsel calling the witness shall consider whether the proceeding is an appropriate case in which to make an application under sections 140, 148 and/or 148A of the DFDA.

9. **Remote witnesses.** The prosecution shall, and defence counsel are encouraged to, discuss with the other party potential applications under section 148A of the DFDA prior to the hearing. If the parties cannot agree on whether a witness will be called in person or by

⁵ See E(MP)A, ss. 38–41.

⁶ Note particularly E(MP)A, s. 50 and where and how it applies.

⁷ E(MP)A, s. 68(3)(a).

⁸ E(MP)A, s. 47(1).

⁹ E(MP)A, s. 49(1).

¹⁰ E(MP)A, s. 50(2)(a).

¹¹ E(MP) A, s 69 (3) and (4).

OFFICIAL

3

audio visual link, the party proposing to call the witness is to raise the matter as a pre-trial application.¹²

Miscellaneous

10. **Orders for closed hearings.** Regardless of the legislative head of power under which a hearing is ordered to be closed, counsel are to identify to the JA or DFM those persons whom counsel wish to remain present and the reasons for each person's presence.

11. **Media presence.** Members of the media are requested to make themselves known to the prosecutor and tribunal officials so that the legitimate interest of the media can be considered by the tribunal when making various orders that affect the conduct and publication of the proceedings.

12. **Pre-trial hearing.** If any party wishes to call a witness who warrants special requirements, they should be in a position to make such application at the first pre-trial hearing, and to have submitted a written application prior to the hearing.

M Cowen, AM, KC
Major General
Chief Judge Advocate

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¹² Court Martial and Defence Force Magistrate Rules, r. 34(l).