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CHIEF JUDGE ADVOCATE

Australian Defence Force

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PRACTICE NOTE 9 — WITNESSES WARRANTING SPECIAL REQUIREMENTS (VERSION 2)

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
 - 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 sections³
 - c. witnesses in relation to any other offence who may be vulnerable due to a current or previous relationship with an accused.

Evidence (Miscellaneous Provisions) Act 1991 (ACT) proceedings

4. 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.⁴
5. 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.⁵

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 4.

³ 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.

⁴ See E(MP)A, ss. 38–41.

⁵ Note particularly E(MP)A. s. 50 and where and how it applies.

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6. **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 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 videolink⁶
- b. if giving evidence in person, wants the accused to be screened from view⁷
- c. wants to have a support person in the hearing⁸
- d. wants to give evidence in an open or closed hearing.⁹

Other proceedings

7. **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.

8. **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 audio/video link, the party proposing to call the witness is to raise the matter as a pre-trial application.¹⁰

Miscellaneous

9. **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 judge advocate or Defence Force magistrate those persons whom counsel wish to remain present and the reasons for each person's presence.

10. **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.

⁶ E(MP)A, s. 68(3)(a).

⁷ E(MP)A, s. 47(1).

⁸ E(MP)A, s. 49(1).

⁹ E(MP)A, s. 50(2)(a).

¹⁰ Court Martial and Defence Force Magistrate Rules, r. 34(l).

11. **Pre-trial directions 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 directions hearing, and to have submitted a written application prior to the hearing.

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