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CHIEF JUDGE ADVOCATE

Australian Defence Force

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PRACTICE NOTE 3 — SUMMONSES (VERSION 4)

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 Registrar of Military Justice (RMJ) maintains a suite of summons templates. These templates also appear in the Court Martial and Defence Force magistrate Rules 2024. 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)
 - (2) specified as a particular date and time (ie, not a range of days or times)
- c. must comply with the timeframes in the Court Martial and Defence Force magistrate Rules 2024,
- d. can require appearance of the witness by audio visual means or telephone only where:
 - (1) the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) provisions dealing with sexual or violent offences apply (audio visual only); or
 - (2) there has been a ruling by the president of a court martial, the judge advocate (JA) or Defence Force magistrate (DFM) prior to the issuing of the summons,
- e. 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)

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- (2) if requiring protected confidence material (per the *Evidence (Miscellaneous Provisions) Act* (Division 4.4.3 sections 79 to 79M) provisions dealing with sexual offence proceedings, an application for leave must be in writing setting out the leave sought and setting out the applicant's arguments in support of the application. The applicant must also set out briefly the nature of the protected confidence evidence (if known) and set out, or be accompanied by, a copy of any relevant documents. The application for leave must be addressed to the relevant JA or DFM for determination whether to give or refuse leave to disclose.
- (3) should follow consideration (if applicable) of Division 1.10.1A *Evidence Act 2011* (ACT) – professional confidential relationship privilege. Counsel should be prepared to assist the tribunal with information relevant to the Division (notably s. 126B, s. 126E, s. 131A and s. 132).
- (4) may be made returnable either at a pre-trial hearing or during the trial,
- (5) 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. A summons for a witness to give evidence must be served on that person at least 15 working days prior to the date of the appearance at trial of that person.

8. A summons for a witness to appear and produce documents must be served on the person at least 15 working days prior to the date requiring the production of documents.

9. A pre-trial hearing for the return of a summons for a witness to produce documents must be held at least 5 working days prior to the date of the trial.

10. If a party is unable to comply with the requirements of paragraphs seven to nine they may apply for an abridgement of time on application:

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.

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- a. to the RMJ; or
- b. to the JA or DFM.

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 RMJ should be advised so this can be taken into account when selecting a date, time and venue for a pre-trial hearing or the trial.

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 the Court Martial and Defence Force magistrate Rules 2024, 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.
14. The RMJ will provide a copy of a signed summons for a witness to appear and produce documents to the parties to the proceedings. If an objection to this is raised it must be done so at the time of providing the summons to the RMJ; the RMJ will list the matter before a JA or DFM for determination.
15. The party who requested the summons is responsible for service on the witness and compliance with the Court Martial and Defence Force Magistrate Rules 2024.
16. 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).
17. **Third party notification.** It is for the party seeking to issue the summons for documents to advise the person whose documents are the subject of the summons that they may seek independent representation.

Return of summons (documents)

18. 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

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- b. advising the Registry that the summonsed person has no documents within their possession or control per the Schedule(s) to the summons.²
- 19. If a party requires the witness to appear as well as the production of documents, this must be made clear to the RMJ when requesting the issue of a summons and then also made clear to the witness.
- 20. 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.
- 21. **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).
- 22. 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.

M Cowen, AM, KC
Major General
Chief Judge Advocate

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² See Note 1 to the template summons.

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