

EXPLANATORY STATEMENT

Issued by authority of the Judge Advocate General

Defence Force Discipline Act 1982

Summary Authority Rules 2019

The *Defence Force Discipline Act 1982* (the Act) makes provision for a mechanism, by creating a discipline system, for the maintenance and enforcement of good order and discipline in the Defence Force.

Section 149 of the Act provides that the Judge Advocate General may make rules, to be known as the Summary Authority Rules, providing for the practice and procedure to be followed by summary authorities.

The purpose of the *Summary Authority Rules 2019* (the Rules) is to prescribe the rules and processes that are to be undertaken by a summary authority in conducting a summary authority proceeding under the Act. The Rules consist of eight Parts that address preliminary matters, charging and summoning an accused person, general provisions for summary authority proceedings, evidence before summary authority proceedings, exhibits, procedure for imposing punishment and orders, recording summary proceedings, and general summons provisions. The new Rules will also repeal the *Summary Authority Rules 2009* before they sunset on 1 October 2019.

The Rules replace this sunset instrument in substantially different format, having regard to summary discipline reform which is intended to simplify and streamline summary proceedings, in order to enhance natural justice for an accused person. They also update the previous Rules with modernised language and drafting compliance.

Details of the Rules are set out in [Attachment A](#).

The Act specifies no condition that must be met before the power to make the Rules may be exercised.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

The Rules would commence on the day after it is registered on the Federal Register of Legislation. Commencement of the Rules contemplates that the existing Rules remain in force until 9 March 2020, when the new Rules will then apply to any charges preferred after that date.

Regulatory Impact Statement

The Office of Best Practice Regulation advised that no regulatory impact statement was required (OBPR ID 25136).

Human Rights Statement

Human rights statement is at Attachment B.

Consultation

Military Justice Steering Group, Australian Defence Force

Authority: Section 149 of the *Defence Force Discipline Act 1982*

Details of the Rules are as follows:

Part 1 – Preliminary

Rule 1 – Name of Rules

This Rule provides that the title of the instrument is the *Summary Authority Rules 2019* consistent with the requirements of section 149 of the *Defence Force Discipline Act 1982* (the Act).

Rule 2 – Commencement

This Rule provides for the Rules to commence on the day after the instrument is registered.

Rule 3 – Repeal

This section repeals the *Summary Authority Rules 2009*.

This Rule provides clarification as to the transition from the *Summary Authority Rules 2009* ('old Rules') to the *Summary Authority Rules 2019* ('new Rules').

Specifically, this Rule provides that proceedings are to be conducted under the old Rules, if the proceedings occur, or the charges were preferred, prior to 9 March 2020. This provides a six month transitional window for Australian Defence Force personnel to apply the old Rules until such time as training has occurred on the new Rules, accounting for the exigencies of service, such as operational deployment rotations.

To ensure clarity in the application of the Rules during this transition period, the old Rules will continue to apply if charges were preferred under the old Rules (if that occurred prior to 9 March 2020); so that any new charges preferred after the commencement date of 9 March 2020 will be completely handled under the new Rules and all charges will be dealt with under only one regime of Rules.

Rule 4 – Authority

This Rule outlines the legislative authority under which the Rules are made by the Judge Advocate General under section 149 of the *Defence Force Discipline Act 1982*.

Rule 5 – Definitions

This Rule provides definitions of words and phrases used in the Rules. The Rules no longer duplicate terms that have been defined in the Act, but include those terms that are specific to the conduct of a summary authority proceeding.

Of note are inclusion of the terms of prosecuting and defending officer. The role and function of these positions reflect the requirements of Chapter 2 of the *Criminal Code* to apply to all service offences. That is, section 10 of the Act requires the conduct of trials to accord with the burdens of proof as articulated in that Chapter of the *Criminal Code* which implies roles for a prosecution and defence in the conduct of all service tribunals. Further, the obligations of the 'prosecution' as referred to in various sections of the Act, are tasked in summary proceedings through the Rules to the 'prosecuting officer'.

The use of the title ‘prosecuting officer’ continues current practice under the Australian military discipline system and makes clear the role and functions of that person, in relation to the prosecution of a service offence, appearing before a summary authority.

The role of the defending officer is created to ensure that the accused person is provided support during the proceedings; and creates a summary authority version of section 137 of the Act, which creates a representation regime for accused persons before a court martial or by a Defence Force magistrate.

Although other military discipline jurisdictions, such as Canada and the United Kingdom, refer to defending officers as an accused person’s representative or assisting officer, the use of the term ‘defending officer’ continues current practice under the Australian military discipline system, including the appointment of defending officers under the superior tribunal system. The term makes clear what the role and functions of that person are during the summary proceeding.

The process for the appointment of these personnel, and their roles and functions, are articulated in subsequent Rules.

The meaning of ‘reasonably available’ is include to provide guidance on what that term means, when referred to in Rule 7 *Representation of an accused person*. This definition provides further clarification to aid a summary authority in making a decision about the availability of a person to represent an accused member in summary proceedings as a defending officer.

Part 2 Charging and summoning accused person

Rule 6 – Charging and summons to accused person

This Rule provides for the procedure to charge and summons an accused person.

It provides a process for the charging of an accused person that aligns with the requirement, pursuant to section 146A of the Act, that summary authority proceedings be conducted with as little legal formality or technicality as possible, while ensuring that the accused person is made aware of the substance and detail of the service offence or offences it is alleged they have committed.

The purpose of this Rule is to enhance fairness to the accused person by including not only the statement of service offence and general particulars of the service offence as required under the old Rules, but clearly link the facts alleged to have occurred to the elements of the service offence alleged to have been committed. This ensures that the accused person fully understands the basis of the allegations, how the offence is alleged to have been committed, and provides full disclosure of the substance of the allegations at the time of charging.

This Rule also streamlines the process for disclosure of the prosecution case, in Subrule 6(2), by requiring reference to the evidence being used to support the offences alleged to have been committed to be provided to the person being charged.

This Rule is considered to provide an effective balance between reducing legal technicality in proceedings while ensuring fairness to the accused person. It provides a greater level of detail in respect of the outline of the prosecution case against a person who is charged, compared to the information a person would receive if they were charged based only upon the criteria specified in the Act. It is considered that this additional information provides accused persons more information to aid any decision to undertake a plea, if the matter progresses to a hearing.

It also ensures that prior to an authorised member preferring charges, the prima facie case against the person is assessed, and this case is disclosed to that person at the time of charging. This has the result of creating a check and balance in safeguarding that only offences for which there is a prima facie case will be preferred against members.

This process provides that the prosecution case only requires a summary of the case to be provided. This aligns the summary discipline system with the arraignment process of civilian criminal proceedings, which will enable the benefits of an early plea to be properly harnessed by the Australian Defence Organisation. Specifically, when faced with a prima facie case, articulating what the accused person is alleged to have done by reference to the specific facts alleged and how the prosecution intends to prove them, there is a greater likelihood of an informed plea, and in the case of guilty pleas, with a commensurate a reduction in the requirement to then conduct complete and detailed disciplinary investigation for minor disciplinary matters.

The Rule refers to the requirements for a summary authority only to dispose of a charge as outlined in Rule 9, which outlines how a summary authority may deal with a charge. This ensures that once an accused person has been charged with a service offence the charge may only be dealt with as prescribed under the Act or the Rules. That is, it makes clear there is no authority to withdraw the charge other than prescribed. This ensures the proper use of the authorised member's powers to prefer charges, and prevents the misuse of the charging procedure, ensuring the proper disposition of the charge upon consideration by a summary authority.

Rule 7 – Representation of an accused person

This Rule clarifies the process of representation of the accused person before a summary authority and the right of an accused person to be represented by a defending officer. It reflects the requirement that summary tribunals are meant to be conducted with as little legal formality or technicality as possible simple while ensuring fairness to an accused person.

This Rule precludes representation of an accused person by a legal officer at a subordinate summary authority. In the case of superior summary authority and commanding officer proceedings, an accused person may only be represented by a legal officer upon approval by the superior summary authority or commanding officer conducting the proceeding.

This Rule places a limitation upon representation of a member before a subordinate summary authority, on the basis that representation by a legal officer is not considered appropriate before summary authority, given the requirements of section 146A of the

Act that specifies this level of service tribunal is conducted with as little legal technicality as practicable.

The requirement for permission for representation by a legal officer before a commanding officer and superior summary authority is also specified in this Rule, and is further limited by reference to the reasonable availability of the legal officer.

The impact of this limitation is moderated through the existing election regime and also through the mandatory review process, whereby a reviewing authority must not commence a review of summary authority proceedings (which have resulted in a conviction or a direction in relation to a finding of unsoundness of mind of an accused person) without a legal report on the proceedings pursuant to section 154 of the Act. Both the election regime and the provision of a legal report on summary authority proceedings ensure that any unfairness to an accused person, either perceived or actual, is remedied.

This Rule also includes the requirement of reasonableness for availability of a selected defending officer, which prevents the unreasonable delay of a trial based upon defending officer availability. It also reflects the general legal principle that representation before a civilian court or tribunal does not equate to a right to demand a particular representative, and is not absolute. Rather this Rule reflects the selection of a defending officer being bound by reasonableness, and results in a balancing of the exigencies of service and the member's right to representation to ensure that proper functioning of the military discipline system and that matters are concluded without undue delay.

This Rule introduces subrule (4), which provides a procedure for command to assist a member in the procurement of the services of a defending officer, if the defending officer selected is not reasonably available. This provides assurance that the accused person will not suffer any potential detriment to their defence and assist them in making a defence member available to assist them in their defence.

Subrule (5) outlines that the member may elect to represent themselves, thus making it clear that the member is not obliged to take up the services offered to them, in the event they are allocated a defending officer.

This Rule also makes clear that an accused person must be treated with fairness regardless of whether or not the accused person avails themselves of the services of a defending officer and that the accused person must not be disadvantaged as a result of a decision to represent themselves.

Part 3 – Summary authority proceedings – general provisions

Rule 8 – General procedures for summary authority proceedings

This Rule outlines the general procedures for running a summary authority proceeding.

Subrule (1) outlines the summary authority's primary duty in decision making in the conduct of a summary authority proceeding. It replicates the standards and duties of the judicial officer's oath, which makes it clear that the summary authority is required to approach their task with an open mind and with fairness to the accused person.

Subrule (2) reinforces the requirements of section 146A of the Act, having regard to the need for simplicity during the summary proceedings.

Subrule (3) provides the overarching guidance for a summary authority in the event something arises during the proceedings that are not expressly contained in either the Act or the Rules, namely, that they must deal with that issue according to the interests of justice.

This Rule reinforces that the primary consideration for the summary authority having regard to procedures during a summary authority proceeding is fairness to the accused person.

Subrules (4) and (5) simplifies the process to enable evidence to be given under oath or affirmation during proceedings. These subrules outline the process for a summary authority to have evidence, or interpretations given under oath or affirmation having regard to a form that the person taking the oath or affirmation declares to be binding on their conscience. Noting that there is no capacity for unsworn evidence to be given before a summary authority proceeding, this also makes it clear that in cases where a person lacks capacity that evidence cannot be admitted in the proceedings. For example, were a child required to give evidence, then the matter could either be referred to another summary authority and subsequently referred to the Director of Military Prosecutions to consider; or, if the evidence was to be led by the prosecution, alternative evidence must be adduced. This is a deference to simplification of proceedings before lay decision makers, without detriment to the accused person's ability to properly defend themselves.

Subrule (6) creates a system of confidential communication between the prosecuting officer, defending officer and the accused person. Personnel engaged in summary proceedings can be any Defence Force member, and thus will not have any special privilege attached to communications conducted during the accused person's preparations for their defence, or during negotiations with the prosecution prior to the summary proceedings. This subrule creates a regime to protect the accused person from disclosure of communications that would prejudice their ability to properly engage with their defending officer to prepare their defence, or from communications between the defending officer and prosecuting officer that would be considered protected were the communications conducted during a civilian criminal trial or Defence Force magistrate of court martial proceeding. This subrule does not extend to protect communications such as documents signed by the accused person and the prosecuting officer prior to the proceedings, and thus represents a balanced approach to creating this confidential communications regime.

Subrule (7) articulates when a summary authority must give reasons for making their decision during proceedings. When read in conjunction with subrule (2), results in a summary authority providing an accused person a simple explanation of the decisions provided at each major step of a summary authority proceeding.

Rule 9 – Dealing with charge

This Rule outlines the procedure as to how the summary authority must decide to dispose of a charge or charges. The process loosely follows how an arraignment may occur during a criminal proceeding, in that the Rule outlines how the summary authority determines the complexity of the matter, the jurisdiction of the matter, and how to then proceed with the matter, including referral elsewhere or a trial. This Rule enables the summary authority to scope the issues that remain in dispute through seeking submission on points of agreement in relation to facts associated with elements of the offence(s), in the event any had been made. It also facilitates the scheduling of any trial, and requisite preparation needed by the parties prior to the trial.

It outlines at subrule (1) that the summary authority can seek the prosecution outline provided to the accused person when they were charged with the offence. This provides an opportunity for the summary authority to understand the details of the offence charged and its circumstances so that the summary authority can make a properly informed decision about whether or not the matter should be proceeded with.

Subrule (2) provides the summary authority the authority to seek information from the prosecuting officer and the accused person or their defending officer to assist in establishing which facts remain in issue in the proceedings. This subrule enables the summary authority to gauge the complexity of the matter, and to assist in identifying how much time will be appropriate to allow the prosecution and defending officer or accused person to prepare for the trial.

Subrule (3) makes clear the accused person may continue to exercise their right to silence and is not obliged to answer any questions put to them by the prosecuting officer during pre-trial negotiations. This subrule makes it clear that agreement of facts is not an obligation upon the accused person, but an option available to them should they wish to narrow the issues for trial (whether or not any facts are contested during the subsequent hearing).

Subrule (4) outlines the procedure for the decisions that the summary authority is required to make in determining how to deal with the offence(s) charged and reflects the decision making criteria for the summary authority by reference to the relevant sections of the Act (and in particular those that relate to establishing jurisdiction and dealing).

Subrule (5) provides direction to the summary authority about the notice requirements to the accused person and their defending officer in the event that a decision is made to proceed to trial.

Rule 10 – Withdrawal of election to be heard by court martial or Defence Force magistrate referred back to summary authority by Director of Military Prosecutions

Rule 10 is a procedural rule that prevents a circular application of the election regime pursuant to section 111C of the Act. This Rule is in place to make clear that the right to election once exercised, may not be exercised again after the Director of Military

Prosecutions has exercised their discretion under section 111C of the Act. This Rule acts as a circuit breaker from a potential loop of elections being taken by the accused person under section 111C if the accused person has exercised their right for election and the member subsequently withdraws that application and the matter has been referred back to a summary authority by the Director of Military Prosecutions. This Rule provides that the member is not then provided a new opportunity to elect for hearing by court martial of Defence Force magistrate in that circumstance.

Rule 11 – Trial by summary authority

Rule 11 outlines the procedure to be undertaken during the trial of a summary authority proceeding. This Rule outlines the steps to be taken to obtain a plea from the accused person in respect of the offence(s) charges and the subsequent procedure should the accused person plead not guilty, or not enter a plea.

Subrule (1) requires the summary authority to read the charges to the accused person at the commencement of the trial.

Subrule (2) specifies that the accused person must be asked to enter a plea in respect of each individual offence charged. This includes any alternative charges that the person had been charged with.

Subrule (3) provides the requirements for the summary authority procedure in the event the accused person pleads not guilty or does not enter a plea when called to do so, or pleads guilty but the summary authority is not satisfied that the accused person understand the effect of their plea.

Subrule (4) requires the summary authority to give the accused person, their defending officer and prosecuting officer notice of the date time and location of the hearing of evidence during the trial. This subrule specifies that the summary authority must ensure that the time given is reasonable to enable the accused person to prepare for the case against them.

Subrule (5) makes the disclosure of the prosecution evidence to the accused person a pre-condition to proceeding with the trial. This subrule specifies that the materials to be provided to the accused person includes all relevant materials, which includes documents, whether statements, notes exhibits or records of the Australian Defence Force. The result of this subrule is that any material to be relied upon by the prosecuting officer in making their case to the summary authority, as well as copies of any other materials that may assist the accused person is provided. This extends the provision of material to potentially exculpatory materials that the prosecuting officer may hold that could assist the accused person in their case.

Rule 12 – Order of witnesses and submissions

Rule 12 outlines the order for the proceedings.

Subrule (1) specifies that the prosecution case, and its evidence, must go first, with the defence case to follow it. It clarifies that despite mandating this order of proceedings, the accused person is under no obligation to give or call evidence.

Subrule (2) provides the order of closing addresses from the prosecuting officer and the accused person or their defending officer, if either party chooses to make one.

Rule 13 – Consultation during trial proceedings

This Rule has been introduced to make clear the process by which a summary authority is authorised to seek guidance on legal or procedural matters during the conduct of a proceeding.

The Rule states that this authority only extends to seeking advice on matters of practice or procedure and therefore does not authorise the summary authority to undertake any evidence collection or admission activities themselves.

The Rule makes provision for how this advice may be obtained, and that the accused person, their defending officer and the prosecuting officer must be present during this consultation process.

Part 4 Evidence in summary proceedings

Rule 14 – Admission of evidence in summary proceedings

This Rule outlines the procedures relating to the admission of evidence during a summary authority proceeding.

Subrule (1) specifies that a summary authority may only accept evidence that is of assistance and relevant to the hearing.

Subrules (2) to (4) describe how a summary authority may determine if something is relevant or not.

Subrule (5) specifies that if evidence is not relevant to either an issue or credibility, or is otherwise specifically excluded by the Act or the Rules, then that evidence may not be admitted in the summary proceedings.

Rule 15 – Weighing of evidence in summary proceedings

Rule 15 provides guidance to a summary authority as to how to then weigh evidence once it has been admitted into proceedings.

It provides what considerations the summary authority should have regard to when undertaking this determination.

Rule 16 – Discretion to exclude evidence that is unfair, misleading or time wasting

Rule 16 gives effect to the provisions of the *Evidence Act 1995*, section 135 - General discretion to exclude evidence and section 137 - Exclusion of prejudicial evidence in criminal proceedings. The distinction is drawn between evidence that may be unfairly

prejudicial to an accused person which must be excluded; and those kinds of evidence that may be misleading or result in a waste of time the exclusion of which is left to the discretion of the summary authority.

Subrule (2) gives examples of the kind of evidence that should not be admitted based upon unfair prejudice to an accused person.

Although summary authority proceedings are not strictly criminal proceedings, the application of the criminal evidence rule found in section 137 of the *Evidence Act 1995* is consistent with section 146A of the Act in ensuring fairness to an accused person, while retaining little legal formality and technicality

Rule 17 – Admissions

This Rule relates to admissions. A party to a summary authority proceeding may admit a matter of fact or conclusion of a fact even if the matter is not within the party's personal knowledge. This Rule links to subrule 14(2) in that it specifies what can be the subject of an admission. Following such admissions, the summary authority must then determine issues that have not been admitted.

Rule 18 – Character evidence

This Rule provides a simplified regime for the acceptance of *character evidence* during a summary authority proceeding.

It provides guidance on when a witness may have evidence of their character admitted during a proceeding; and guidance on when the character of the accused person may be considered during the proceeding.

Subrule (2) provides that the accused person may give evidence of their good character for the purposes of credibility, and that there is a general prohibition on bad character evidence the accused person. It provides exceptions to this provision by allowing the submission of bad character evidence if that evidence is a central part of the offence, that is, necessary to prove an element of the offence; or if the accused person has given good character about themselves, then the prosecuting officer may then rebut that evidence; and finally, if the issue is relevant to punishment.

Subrule (3) contemplates that the bad character of a witness (other than the accused person) is relevant provided it relates to the credibility of that witness. It does not provide any permission for provision of good character evidence (to certify) the witness.

Rule 19 – Hearsay evidence

This Rule explains that *hearsay evidence* is evidence of a statement made by a person who is not called as a witness, for the purpose of proving that the statement is true (excluding documentary evidence or an admission made by an accused person). This Rule explains that *hearsay evidence* may not be admitted during summary authority proceedings for the purposes of proving a fact. This allows *hearsay evidence* to be admitted for the purposes of proving that the statement was made, but not for the purposes of proving what was said during the conversation.

Rule 20 – Documentary evidence

This rule explains *documentary evidence*. A document (or a copy of a document) is admissible if it is produced from a record kept by the Australian Defence Force, a government Department or agency of a government, an authority or a business. However, any record created in the course of an investigation under Part VI of the Act, by a civilian police force or any other investigation or inquiry (for example an administrative inquiry under the *Defence (Inquiry) Regulations 2018*) will not be admissible as documentary evidence under this Rule.

This Rule does not prevent the summary authority hearing from witnesses about the authenticity of the truth of those documents outlined in subrule (2), or having such documents and their contents admitted by consent of the parties, however, such evidence requires authentication through admission in the usual way.

Rule 21 – General and service knowledge

This Rule imports the rules of evidence relating to judicial knowledge, to allow a summary authority to accept matters of common knowledge in the locality in which the proceeding is being held or generally, as matters of fact without requiring proof of those matters. It largely mirrors the provisions of section 144 of the *Evidence Act 1995*.

Subrule (3) outlines that although a matter may be accepted by the summary authority on the basis that it forms part of the summary authority's general or service knowledge, having reference to the general knowledge rule articulated in subrules (1) and (2), and the general service knowledge rule articulated in section 147 of the Act, the parties may make submissions or applications in respect of those facts, if it is necessary to prevent unfair prejudice to a party.

Rule 22 – Evidence of general orders

This Rule creates a regime to enable a general order to be admitted into evidence without having to tender the document through a witness, provided that copy of the general order is certified by an officer of the rank of Lieutenant Commander, Major, Squadron Leader, or above.

This Rule is substantially the same as Rule 39 of the *Summary Authority Rules 2009*, however, has expanded the class of persons who can certify the order to any officer of the rank of Lieutenant Commander, Major, Squadron Leader, or above. This amendment has been introduced to enable this provision to be implemented in all Defence areas, particularly where there may be only one commanding officer appointed in a geographic region. This is generally the case on operational activities, exercises and accounts for units that are geographically isolated.

The rank of Lieutenant Commander, Major, Squadron Leader, or above has been used as this represents the rank of person typically appointed as a Subordinate Summary Authority, and fulfilling a sufficiently senior appointment to be given this certification power.

Rule 23 – Certificate of analyst in respect of prohibited drugs

This Rule provides for the evidentiary status of a certificate, signed by an analyst, setting out the results of an analysis in respect of an offence under section 59 of the

Act (prohibited drugs). The certificate will be admissible as evidence of the matters it contains.

Rule 24 – Accused person — right to silence

This Rule provides an accused person with the right to remain silent. An accused person’s failure to answer questions or to give evidence is not relevant and must be disregarded.

Rule 25 – Competence of witness to give evidence

This Rule explains the *competence* of a witness. If a person cannot comprehend the proceedings or is unable to communicate to the satisfaction of a summary authority, then the person is not competent and must not give evidence.

Rule 26 – Compellability of witnesses — general

This Rule outlines the persons who are not *compellable* to give evidence at a summary trial. These are:

- the accused person;
- the spouse, defacto partner, parent or child of the accused person;
- the prosecuting officer; and
- the defending officer.

Rule 27 – Compellability of witness — self-incrimination

This Rule provides that a witness (other than the accused person) may object to giving evidence on the grounds that it may incriminate them or expose them to a penalty. A summary authority must not require the witness to give evidence if it considers that there are reasonable grounds for the objection.

Rule 28 – Witnesses — evidence by telephone or telecommunications device

This Rule articulates that prior to evidence being given via a telecommunications device that specific approval must be given by the summary authority. It also includes the criteria a summary authority is to consider prior to approving the giving of witness testimony via telecommunications device. This term has been left general so as to capture any technological advancements that may occur.

The decision making criteria specified in the Rule includes the requirement to consider the interests of the witness having regard to the type of evidence the witness is anticipated to provide or the character of the witness. This requires the summary authority to consider such issues as whether or not the witness is a vulnerable person, or the victim of the alleged offending. This criteria has been left broad so that the summary authority will take account of each witness’s circumstances on a case-by-case basis. This general discretion is consistent with the nature of summary authority proceedings requiring little legal technicality, and also balancing the likelihood of a vulnerable witness appearing before summary proceedings. Specifically, the types of conduct that falls within a summary authority jurisdiction that may invoke considering vulnerability of the witness includes assaults or dishonesty, particularly when the witness may have a pre-existing relationship with the accused person.

Rule 29 – Examination of witnesses

This Rule outlines the procedures for the examination of witnesses, that is, examination-in-chief, cross-examination and re-examination. It also provides for the admissibility of prior inconsistent statements. Furthermore, the Rule enables a summary authority to put questions to a witness and if they answer, the prosecution and the accused person may put questions to that witness arising from the answer.

Rule 30 – Recalling of witnesses and calling of further witnesses

This Rule provides for the recalling of witnesses. The recall of a witness may only occur before a summary authority makes a finding on the charge.

Rule 31 – Witness statement – exhibit when witness not available

This Rule provides the basis for the submission of witness evidence via written statements when the witness is not available to provide their evidence in person.

This Rule provides that the primary consideration for submission of evidence in writing is the consent of the parties to the proceedings.

Rule 32 – Witness statement — exhibit when witness is available

This Rule provides the basis for the submission of witness evidence via written statements when the witness is available to attend the hearing, however creates an additional process to that of Rule 31 by which the statement of the witness can be tendered if the witness testifies to its truth.

This Rule provides that the primary consideration for submission of evidence in writing is the consent of the parties to the proceedings, and that the statement is tendered in the form of a statutory declaration.

Rule 33 – Securing appearance of witness on behalf of accused person

This Rule requires a summary authority to take the necessary steps to secure the appearance of persons at a proceeding who are required by the accused person to either give evidence or produce documents.

Rule 34 – Exclusion of witness from proceedings

This Rule requires witnesses to be excluded from the proceeding except when under examination. It empowers the summary authority to direct a witness to withdraw when a discussion arises on a question of law relevant to that witness' evidence. The Rule uses the generic term 'room' to describe the place where the summary authority proceedings are taking place, notwithstanding that a summary trial may be held in the open, for example, in the field or on a ship. The Rule excludes from its ambit the accused person, the defending officer and the prosecuting officer.

Rule 35 – Payment of witness expenses

This Rule provides for the payment of witness expenses in accordance with the scale of witnesses' fees and allowances provided by the *Public Works Committee Regulations 2016*.

Part 5 Exhibits

Rules 36 – Exhibits; Rule 37 – Inspection and copying of exhibits before proceedings and Rule 38 – Inspection of exhibits during proceedings

These Rules outline the procedures for dealing with exhibits, including their inspection by the parties both before and during the summary authority proceedings.

Part 6 Procedure for imposing punishment or making orders

Rule 39 – Imposition of punishment or order in case of breach of undertaking to be of good behaviour

This Rule retains the substance of the former rules on the impositions of punishment or orders in case of a breach of an undertaking to be of good behaviour.

Although this Rule combines what were previously two rules under the 2009 *Summary Authority Rules*, this Rule does not substantially change, and has merely been updated to update cross-references in the new Rules.

Rule 40 – Submissions and evidence under Part IV of the Act

This Rule provides a non-exhaustive list of what materials the prosecuting officer is to provide to the summary authority to aid the summary authority making their decision under Part IV of the Act, in the event of conviction of the accused person. It also provides a non-exhaustive list of matters that the accused person may wish to provide the summary authority in mitigation of their summary authority may have regard to, to inform the summary authority making decisions on the imposition of punishment and orders under Part IV of the Act.

Part 7 Record of summary authority proceedings

Rule 41 – Recording of summary authority proceedings

This Rule outlines the additional recording requirements for a hearing, in the event a not guilty plea is entered by the accused person. Rule 8 specifies that decisions relating to the proceedings must be recorded in writing by the summary authority. This Rule creates an additional obligation to create an audio recording to accompany the records of the proceedings already made, commencing at the point of hearing contested evidence. This will typically occur after an adjournment for the prosecuting officer and defending officer to prepare their case, as outlined in Rule 11.

This rule creates benefit in two significant ways:

1. It provides a greater level of fidelity in recording the decisions undertaken by a summary authority during a contested hearing, which will enhance the ability of a reporting legal officer and reviewing authority under section 154 of the Act to undertake a more fulsome and detailed review of the proceedings if there are any irregularities observed in the written record of proceedings.
2. It removes the requirement for a recorder to create a written record of proceedings containing details of the oral submissions, which are inevitably inaccurate due to the manual nature of such transcriptions undertaken under the 2009 *Summary Authority Rules*.

It does not, however, require that this audio recording is transcribed, although this remains a course of action available to the summary authority, reporting legal officer or reviewing authority should they consider such transcription necessary to assist in the completion and review of the proceedings.

This Rule is intended to streamline the recording of proceedings and enhance the available information available on a review of a not guilty plea, which is where the greatest risk of procedural or material irregularity to an accused person may occur.

Part 8 General summons provisions

Rule 42 – Summons to witness

This Rule outlines the requirements for a summons to a witness, issued under subsection 138(2) of the Act. For example, the name, employee identification number and rank of the person, the purpose for their appearance and the time and place at which the witness is required must be included.

Rule 43 – Instrument to summons a witness to attend a summary proceeding

This Rule outlines the requirements for the manner of service of a summons of a person by reference to the procedures outlined in the *Defence Force Discipline Regulations 2018*.

Rule 44 – Personal service of summons on witness

This Rule provides that personal service of the original or a copy of the summons will be effective service. However, leaving the summons in the presence of the witness will be sufficient, if the witness refuses to accept personal service.

Rule 45 – Time for service of summons on witness

This Rule outlines that a summons must be served in sufficient time for the attendance of the witness to be arranged and (subject to the exigencies of service) to allow the witness reasonable time to make arrangements for their attendance.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The *Summary Authority Rules 2019* (the Rules) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Rules is to prescribe the rules and processes that are to be undertaken by a summary authority in conducting a summary authority proceeding which is authorised under the *Defence Force Discipline Act 1982* (the Act). The Rules consist of eight Parts that address preliminary matters, charging and summoning an accused person, general provisions for summary authority proceedings, evidence before summary authority proceedings, exhibits, procedure for imposing punishment and orders, recording summary proceedings, and general summons provisions. The Rules consist of 45 Rules, which are broken into the eight Parts described above. They provide detailed practice and procedural guidance to a summary authority who is hearing a disciplinary offence preferred against an ADF member. The jurisdiction of summary authorities is limited by the Act to those offences that are not prescribed offences, and is further limited based upon the type of summary authority. Jurisdiction over particular classes of person, and the limits upon punishments available to a summary authority to issue to a convicted person are mandated by the Act and are therefore not canvassed in the Rules.

Human rights implications

This Legislative Instrument engages the following rights:

- Right to liberty and security of the person – Article 9 of the International Covenant on Civil and Political Rights (ICCPR)
- Right to a fair trial and fair hearing – Article 14 of the ICCPR

Right to liberty and security of the person

Article 9 of the ICCPR provides that everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Disciplinary proceedings are unique in character and are distinct from criminal proceedings. However, the rights conferred by Article 9 of the ICCPR as they relate to criminal proceedings are also given application to disciplinary proceedings by the framework created by the Act itself, the *Defence Force Discipline Regulations 2018* (the Regulations), and the Rules. The function of the Rules is to do no more than amplify the practice and procedure available to the summary authority in order to give

effect to the rights and protections already afforded under the discipline framework, within the limits of powers already authorised by that framework.

Article 9 is engaged because the Act makes provisions for members of the ADF to be issued punishments of detention, and other punishments that restrict liberty, such as restriction of privileges or extra duties. However, ADF members will not be subject to these punishments arbitrarily. There are applicable measures in the discipline system that address the manner in which this punishment can be issued and then enforced.

The Rules do not provide any positive authority, or provide summary authorities any ability to deviate from the requirements of the Act as they relate to the issuance of the punishment of detention, or other punishments that restrict liberty. Specifically all measures that ensure that ADF members will not be subject to arbitrary arrest or detention, that they will be informed of the reason for arrest and any charges, that they will be brought promptly before a court and tried within a reasonable period, and can challenge the lawfulness of detention are contained in the Act or the Regulations or the *Defence Force Discipline (Consequences of Punishment) Rules 2018*.

The measures restricting liberty of an ADF member who has been convicted by a summary authority (such as a punishment of restriction of privileges or extra duties) are made more robust through the requirement specified in these Rules for a summary authority to provide a statement of reasons for their decision to impose that punishment upon an ADF member. It is our view that the addition of this measure of transparency, combined with the robust review system already enshrined in the Act, the rights and privileges of detainees already afforded under the Regulations, the details provided in the *Consequences of Punishment Rules*, and the relatively short period of time spent serving these disciplinary punishments (as already limited under the Act), ensures the Rules remain consistent with Human Rights provisions.

Consequently, the Rules do not limit the right to liberty and security of the person.

Right to fair trial and fair hearing

Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Disciplinary proceedings are unique in character and are distinct from criminal proceedings. However, the rights conferred by Article 14 of the ICCPR as they relate to criminal proceedings are also given application to disciplinary proceedings by the framework created by the Act itself, the *Defence Force Discipline Regulations 2018* (the Regulations), and the Rules. The function of the Rules is to do no more than amplify the practice and procedure available to the summary authority in order to give effect to the rights and protections already afforded under the discipline framework, within the limits of powers already authorised by that framework.

Article 14 is engaged/promoted because the practice and procedure set out under the Rules requires discipline proceedings to be conducted in a manner that affords the

accused person all of the usual rights and protections associated with criminal proceedings in Australian jurisdictions.

Rule compliance with the minimum safeguards articulated in Article 14(3) of the ICCPR as they relate to fair trial and hearing rights are outlined below:

- to be informed promptly of the charge: these Rules require that a person is informed of a charge early during investigation of the service offence. In addition to merely being notified of the charges against them, the Rules mandate that the accused person is provided a prosecution outline of the case against them, by reference to the elements of the offence.
- to have adequate time and facilities to prepare a defence and to communicate with counsel: the Rules mandate that prior to giving a plea, and prior to the conduct of a contested hearing, the summary authority is required to confirm how much preparation time is required by the accused person and their defending officer or to scheduling the hearing, and schedule an adjournment based upon a reasonable period of time. As a matter of extant ADF policy, legal advice is then available to members if a legal officer is reasonably available. If the services of the requested person is not available, the summary authority must, with the consent of the accused person, direct a defence member to defend the accused person.
- to be tried without undue delay: the Act already provides for maximum time limits between charging a member and hearing the charges preferred. These Rules reinforce this requirement by establishing a regime that encourages the charging process to be commenced when sufficient evidence has been gathered to support a prima facie case against the accused person (notably higher than charging based only upon a reasonable suspicion), striking a balance between efficiency and fairness.
- to be tried in person: the Rules require attendance by the accused person at a hearing both at the time of ascertaining jurisdiction by the summary authority (referred to as dealing in the Act); and during the hearing which includes obtaining the member's plea, hearing any contested evidence, determining whether to acquit or convict the member, and in the event of convictions, hearing submissions on punishments and decisions on punishment. The Rules also make provision for the application of the accused person not to be in attendance at the hearing if they request, in accordance with section 139 of the Act.
- to legal assistance and to have legal assistance assigned to the accused person, where the interests of justice so require, and without payment if the accused person is unable to pay for it: the provision of legal assistance is contemplated in the Rules, although it is not mandated. Although the Rules preclude the representation of an accused person by a legal person without express permission of the summary authority, this does not preclude the accused person or their defending officer obtaining legal advice prior to the conduct of the hearing. Alternatively, given this is a lay proceeding before a lay summary

tribunal, and with lay prosecuting and defending officers, a regime is established to ensure that the accused person is able to request the assistance of a reasonably available ADF member as a defending officer, and in the event that the accused person is unable to secure a defending officer themselves, to oblige the summary authority to assist the accused person in identifying one.

- to cross-examine prosecution witnesses and to obtain the attendance and examination of witnesses on behalf of the accused person on the same conditions as the prosecution: the Rules provide for the procedure to be applied in examining and re-examining witnesses; and make provisions for attendance at proceedings that apply equally to both prosecuting officers and the accused person or their defending officer. This includes provisions to summons witnesses to attend, and schedule.
- to have the assistance of an interpreter: specific Rules have not been included in respect of making an interpreter available, as the Rules have been drafted to comply with the requirement of section 146A of the Act, to ensure that proceedings occur with as little legal technicality or formality as possible. However, the Rules contemplate the attendance of a translator, by mandating that a person translating proceedings must do so after taking an oath or affirmation. As the summary authority is directed to ensure that the proceedings are conducted in a manner that is fair to the accused person, and the accused person, their defending officer and the prosecuting officer are authorised to make applications and objections at any time, the Rules support assistance of an interpreter, if necessary.
- to be free from self-incrimination: the hearing procedures outline Rules against self-incrimination in respect of both the accused person, and any witness to the proceedings. These Rules are consistent with civilian criminal models for protections against self-incrimination.
- to have a conviction and sentence reviewed by a higher court: although the Rules do not specifically address the review rights that support this principle (which are enshrined in the Act), the Rules do provide detailed guidance on the standard and content of records of the hearings to be kept. In the case of contested hearings, after a plea of not guilty is entered, an audio recording is required to be kept of the hearing in addition to the written record of decisions made by the summary authority. This provides the best evidence to support the mandatory review of summary proceedings undertaken by a reviewing authority under section 154 of the Act, and any further petition or appeals of the conviction.
- to be paid compensation where a criminal conviction has been overturned or where a person has been pardoned in situations involving a miscarriage of justice: these Rules do not apply to criminal convictions, nor to the establishment of a pardoning regime.
- not to be tried or punished more than once: these Rules do not expressly address this issue, as this prohibition is mandated in section 144 of the Act.

However, these Rules provide the vehicle for submissions and applications were a person to have been charged with the same offence, in that applications and submissions can be made on any grounds to the summary authority when considering whether or not they have jurisdiction to hear the matter. An application that the member has been convicted or acquitted for the same matter would be the type of application or submission to be made to the summary authority at this time.

As a result, the measure promotes the right to a fair trial and a fair hearing.

Conclusion

The Rules are compatible with human rights and to the extent that it may limit human rights, these limitations are reasonable, necessary and proportionate.

Authorised by the Judge Advocate General

