

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 248

Issued by the authority of the Acting Judge Advocate General

Defence Force Discipline Act 1982

Summary Authority Rules

Section 149 of the *Defence Force Discipline Act 1982* (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 Rules reflect the amendments made to the Act by the *Military Justice (Interim Measures) Act (No. 1) 2009* and continue to reflect certain amendments made by the *Defence Legislation Amendment Act 2006* (DLAA06) and the *Defence Legislation Amendment Act 2008* (DLAA08). The changes made by DLAA06 and DLAA08 were designed to simplify the summary proceedings system under the Act (including a revised evidentiary framework applicable in a summary trial).

The Rules continue to not only reflect various amendments made by the DLAA06 and DLAA08, they also reflect current drafting protocols to make them more 'user friendly' and informative so that all participants in the summary discipline system can use them with certainty and confidence. Furthermore, these Rules remove the provisions relating to reopening of proceedings by a summary authority, which reflects the repeal of these provisions in the Act by the *Military Justice (Interim Measures) Act (No. 1) 2009*.

Details of the Rules are outlined in the [Attachment](#).

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

The Rules commence on 22 September 2009.

There has been no consultation in the making of this instrument as it relates to the management and service of members of the Australian Defence Force.

ATTACHMENT

Details of the Summary Authority Rules

Part 1 Preliminary

Rule 1 identifies these Rules as the Summary Authority Rules.

Rule 2 provides that the Rules commence on 22 September 2009.

Rule 3 provides for the repeal, application and transitional arrangements for the Summary Authority Rules made on 17 September 2008.

Rule 4 provides for the interpretation of certain words and terms used within the Rules.

Rule 5 provides that if a matter is not adequately covered by the Act or associated Rules or Regulations, then the matter may be dealt with according to the interests of justice.

Rule 6 provides that an instrument made under section 194A of the Act may be issued by a summary authority and also provides for the contents of the instrument. Where a prisoner serving a sentence in a State or Territory is summoned to appear as a witness before a summary authority in another State or Territory, section 194A has the effect of ensuring that there is adequate power to detain that prisoner.

Part 2 Charging and summoning an accused person

Rule 7 outlines how a charge of a service offence is to be entered in a charge sheet. A charge sheet may contain more than 1 charge but only one person may be charged on the 1 charge sheet. A summary authority may, however, direct that 2 or more accused persons be dealt with or tried jointly in accordance with the rules.

Rule 8 specifies the manner in which a charge of a service offence is to be set out, including a statement of the offence and the particulars of the act or omission which constitutes the offence, so that the accused knows what is intended to be proved against them.

Rule 9 requires the statement of an offence (that is, the description of the offence, for example, theft) and the particulars of the offence (that is, a description of the alleged act or omission by the accused that constituted the commission of the offence) must be read and interpreted together.

Rule 10 outlines the requirements of a summons under subsection 87(5) of the Act, including the name of the accused, the reason for the accused person to appear and the time and place that the accused must appear. The accused's employee ID number and rank may also be required (if the accused is a serving defence member).

Rule 11 outlines how a summons must be served. In the first instance it must be by personal service, however, if the person refuses to accept personal service, service will be satisfied by leaving it in his or her presence.

Part 3 Representation of an accused person

Rule 12 deals with the representation of an accused person in summary authority proceedings. This rule provides for the representation of an accused person by a specified member of the Defence Force. Legal officers are excluded from representing an accused person in relation to subordinate summary authority proceedings. However, in respect of superior summary authority or commanding officer proceedings, the superior summary authority or the commanding officer may grant leave for a legal officer to represent the accused person provided that the legal officer is reasonably available – this ensures that, for example, operational imperatives are factored into the summary authority’s decision to permit representation.

Rule 13 allows an accused person to represent themselves, noting that a summary authority must ensure that the accused has been informed of his or her right to representation under rule 12 and that an accused person would not be disadvantaged by the proposed self representation.

Part 4 Disclosure of prosecution case

Rule 14 identifies the information and documents that must be given to an accused person at the time they have been charged. If a person has been charged or summoned in accordance with the Act, prior to appearing before the summary authority, they must be given a copy of from each prosecution witness statement.

Part 5 Summary authority proceedings – general provisions

Rule 15 outlines the general responsibilities of a summary authority in the conduct of its proceedings. At the outset, it is made clear that a summary authority must administer justice according to law without fear or favour, affection of ill-will. More specific responsibilities are outlined in the rule. These responsibilities reflect the importance of a transparent and fair summary discipline system.

Rule 16 outlines what the Director of Military Prosecutions (DMP) must do when he or she refers a charge or a case to a superior summary authority or commanding officer. A referral must specify the summary authority to whom the charge or case is to be referred. To align this requirement with the new election regime in section 111B and 111C of the Act, where a charge has been referred to a summary authority in accordance with paragraph 111C(7)(b) of the Act, because an election for an AMC trial has been previously offered, the summary authority is not required to offer the accused another election.

Rule 17 provides that a summary authority may allow a person to take an oath or affirmation in any manner that the person declares to be binding on him or her.

Rule 18 enables the accused person or the prosecuting officer to apply to the summary authority for an adjournment. This may be done at any time, but on reasonable grounds.

Rule 19 allows a summary authority to amend a charge sheet to correct mistakes or clerical errors (for example, a mistake in a name or description of the accused or a clerical error or omission).

Rules 20, 21 and 22 provide for recorders (defined to mean a person who records the spoken word in the manner provided in rule 4). Specifically, these rules provide for

the administration of an oath or affirmation to the recorder and also the ability of an accused or prosecuting officer to object to the recorder on the grounds of bias or their inability to record the proceedings properly.

Rules 23, 24 and 25 set out the requirements in respect of interpreters in the same terms as rules 20-22 for recorders.

Part 6 – Summary authority proceedings – dealing with a charge

Rule 26 outlines what happens in the ‘dealing’ phase of a summary proceeding. At the outset, the prosecuting officer must read the charge to the accused person. Thereafter, the summary authority must consider its options, which may include, whether it will try the charge, refer the charge to the DMP or to another summary authority or direct that the charge not proceed. In deciding which of these courses of action should be taken, the summary authority may ask the prosecuting officer to provide an outline of the case against the accused. This must state –

- the elements of the offence;
- the alleged facts;
- the nature of the evidence.

The summary authority may then hear evidence in relation to the charge, pursuant to section 111A of the Act.

Part 7 – Summary authority proceedings – trying a charge

Rule 27 makes it clear that Part 7 applies to the trial of a charge. It will set out the procedural requirements for a summary trial.

Rule 28 provides that if there is more than 1 charge against an accused person, they must plead separately to each charge.

Rule 29 provides that where an accused pleads guilty to a charge, the summary authority must call on the prosecuting officer to provide an outline of the material facts which show the nature and gravity of the offence.

Rule 30 obliges the prosecuting officer to make an opening address. This must be done before the first prosecution witness is called. The address should contain –

- the elements of the offence;
- the alleged facts;
- the nature of the evidence to be presented.

Rule 31 enables the accused person to make a submission to the summary authority (after the prosecution has adduced the evidence) that the prosecution evidence is insufficient to support the charge against him or her.

Rule 32 provides that the accused person or their representative may make an opening address which outlines the nature and effect of the evidence to be relied upon in his or her defence.

Rule 33 outlines the requirements for the closing address by the prosecution and accused person (or by a person on his or her behalf). If 2 or more persons are tried jointly, the summary authority must determine the order of the closing addresses by the accused persons or their representatives. If 2 or more persons are represented by the same person, that person may make only 1 closing address.

Rule 34 outlines what a summary authority may have regard to in making a finding as to whether a charge or an alternative offence is proved. These are, matters within the summary authority's general service knowledge and the evidence produced at the trial.

Rule 35 requires a summary authority to give reasons for its decision to convict the accused person and, where the summary authority makes any order after finding the accused person guilty, reasons for the order.

Part 8 – Imposition of punishments and making of orders

Rule 36 provides that if an accused person pleads guilty and is convicted, the prosecution must inform the summary authority of the material facts which show the nature and gravity of the offence. The convicted person may dispute these facts and may give evidence in respect of these disputed facts (as can the prosecution).

Rule 37 outlines what evidence may be adduced in relation to proposed sentencing action by a summary authority. Following the conviction of a person, the prosecution must give evidence about the convicted person's service in the Defence Force, particulars of previous convictions and other matters relevant to determining action under Part IV of the Act. The convicted person may also give evidence in relation to his or her character and in respect of factors in mitigation of punishment. The same rules that apply in respect of the examination of witnesses (rule 48) apply to a witness under this rule.

Rule 38 requires a summary authority to provide reasons for punishments or orders imposed after it has found the accused person guilty.

Part 9 – Rules of evidence

Rule 39 provides that, in proceedings before a summary authority, a document that is certified by a commanding officer to be a copy of a general order is evidence of that order.

Rule 40 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 41 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 42 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 43 outlines the persons who are not *compellable* to give evidence at a summary trial. These are –

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

Rule 44 outlines what constitutes *confidential communications* in respect of summary proceedings. These are communications between–

- the accused and his or her representative;
- the accused and a person who has advised him or her before the commencement of the proceedings about a charge that could have formed part of the proceedings;
- the prosecuting officer and an accused person (or a person representing the accused) in respect of any discussion of a charge or plea.

However, a communication will not be confidential if the parties have consented to the disclosure of the communication or they did not intend that the communication be confidential.

Rule 45 provides that a witness (other than the accused) 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 46 provides for the provision of evidence via audio-visual or audio link.

Rule 47 requires a person to give sworn evidence. However, if the summary authority considers that a person is incapable of understanding his or her legal obligation to give truthful evidence, the person may instead give unsworn evidence, but only if the summary authority is satisfied that the person can understand the difference between a truth and a lie. This rule also sets out the wording of an oath or affirmation.

Rule 48 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 he or she answers, the prosecution and the accused may put questions to that witness arising from the answer.

Rule 49 provides for the recalling of witnesses, but this may only occur before a summary authority makes a finding on the charge.

Rule 50 requires a witness to reply immediately to each question put to them unless the question is objected to or they claim that they are not compellable in accordance with the *Evidence Act 1995* or the Rules. However, if the objection is overruled, the witness must answer the question.

Rules 51 and 52 outline the procedures to be followed in respect of the tendering and acceptance of witness statements. The general rule is that a party may tender a witness statement as an exhibit, unless the other party requires the witness to testify and the witness is reasonably available to give evidence. The rule outlines the requirements for the form of a notice of intention to tender a statement, the time within which the

notice must be served and the procedures for when a witness is available to give evidence.

A summary authority must have regard to certain matters when it is considering whether to accept a witness statement into evidence or require the attendance of the witness (including the overarching consideration that no injustice will be suffered by the opposing party and the exigencies of service). These include –

- the foreshadowed evidence of the witness;
- the reasons for requiring the witness to testify;
- whether the witness gives primary or secondary evidence of relevant facts;
- whether the credibility of the evidence can be assessed;
- the weight of the evidence;
- any other matter that the summary authority considers relevant.

A witness statement made by a person who is present to give oral testimony must not be tendered as an exhibit unless the person testifies that the contents are true, verifies by statutory declaration that the contents are true and the other party does not object to the statement being tendered (rule 52).

Rule 53 outlines what constitutes *relevant* evidence, namely –

- a fact is relevant if it makes proof of an issue more or less probable;
- a fact is relevant to the credibility of a witness if the fact makes the evidence of the witness more or less credible;
- evidence that is relevant to an issue or credibility is admissible (unless excluded by the Rules) and evidence that is not relevant is not admissible.

Rule 54 outlines the factors to be considered in assessing the *credibility* of a witness. A witnesses' credibility is primarily determined by considering the truthfulness and reliability of the witnesses' testimony. The following factors are those which a summary authority may have regard to in determining whether the testimony of a witness is truthful or reliable (these are not exhaustive and a summary authority may consider other matters):

Truthfulness

- a motive for being untruthful;
- a lack of objectivity;
- inconsistent oral or written statements;
- any previous convictions for perjury or dishonesty; and
- the witness is evasive, vague, equivocal or argumentative in answering questions.

Reliability

- the time that has elapsed since the subject of the testimony occurred;
- the ease or difficulty the witness has in recollection; and
- any disability or impairment of a witness that could affect observations made by the witness.

Rule 55 explains that *primary evidence* means evidence of the perceptions of a witness.

Rule 56 explains that *secondary 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). There are certain matters that the summary authority must have regard to in assessing secondary evidence, including the credibility of the witness repeating the statement, the possibility that the witness misheard or misunderstood the statement or the possibility that the person who made the statement was not being truthful.

Rule 57 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 1985*) will not be admissible as documentary evidence under this rule.

Rule 58 explains *opinion evidence*. Generally, opinion evidence is not admissible unless –

- the opinion is based on what the person saw, heard or otherwise perceived about a matter or event and the opinion is necessary to obtain an account of the person's perception;
- the opinion is expressed by a person who has specialised knowledge based on that person's training, study or experience and the opinion is based on that knowledge.

However, the summary authority is not required to accept opinion evidence where –

- it is not satisfied that the person has the appropriate training, study or experience;
- the person's opinion is based on assumptions that the summary authority does not find proven;
- the opinion is contradicted by another person who has specialised knowledge; or
- the opinion does not accord with other evidence in the case.

Rule 59 explains *character evidence*. Evidence of the good character of the accused is admissible. Evidence of bad character or a prior conviction is also admissible, but only if it satisfies the rule pertaining to related misconduct evidence (discussed in rule 60) or it is relevant to the punishment of the accused. In no other circumstances is evidence of bad character or prior convictions admissible.

Rule 60 outlines what constitutes *related misconduct evidence*. In summary proceedings, evidence tending to show that the accused has engaged in misconduct other than the commission of an offence is not admissible unless the evidence has a specific connection to an issue before the summary authority. It will not be sufficient to merely show that the accused had a history of committing the offence in the charge sheet or engaging in particular misconduct.

Rule 61 explains that *tangible evidence* is evidence that can be directly examined by a summary authority. This includes equipment, printouts, photographs, charts and

diagrams. The rule also outlines what a summary authority must consider in considering the weight to be given to the tangible evidence.

Rule 62 allows a summary authority to exclude evidence that would otherwise be admissible if the accused person can demonstrate that the evidence was obtained unlawfully or it would be otherwise unfair to him or her if it was admitted.

Rule 63 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.

Rule 64 requires a summary authority to assess all the evidence in the proceedings according to its probative value, credibility and weight. The rule goes on to explain what these terms mean. The summary authority must, in assessing the particular evidence, have regard to the evidence as a whole.

Part 10 - Witnesses

The Note to this Part connects the Part to Part 9 which deals with the competence and compellability of witnesses, the calling of witnesses to testify and when witness statements can be tendered in evidence.

Rule 65 requires a summary authority to take the necessary steps to secure the appearance of persons at a proceeding who are required by the accused to either give evidence or produce documents.

Rule 66 outlines the requirements for a summons to a witness, issued under subsection 138(2) of the Act. For example, the name, employee ID 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 67 outlines the requirements for the manner of service of a summons of a person. A summons will be effectively served if it is served personally, by post, fax, email or by leaving the summons at a private or business address of the person.

Rule 68 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 69 makes it clear 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 his or her attendance.

Rule 70 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 as to that witness' evidence. The rule also allows for the fact that a summary trial may be held in the open (other than a 'hearing room'), for example, in the field or on a ship. The rule excludes from its ambit the accused, the accused's representative and the prosecutor.

Rule 71 provides for the payment of witness expenses in accordance with the scale of witnesses' fees and allowances provided by the *Public Works Committee Regulations 1969*.

Part 11 – Exhibits

Rules 72, 73 and 74 outline the procedures for dealing with exhibits, including their inspection by the parties both before and during the summary authority proceedings.

Part 12 – Procedure for imposing punishment or making an order in case of breach of undertaking to be of good behaviour

Under section 75 of the Act, a service tribunal may, instead of imposing a punishment, make an order that a conviction be recorded as a conviction without punishment and may impose a condition that the convicted person be of good behaviour for 12 months.

Rule 75 applies Part 12 to summary proceedings (that is, in respect of imposing a punishment or an order) in accordance with section 75 of the Act.

Rule 76 outlines what action must be taken in respect of proceedings in accordance with section 75 of the Act (that is, hearing evidence of material facts, the convicted person's record and any mitigating factors provided by the accused, in accordance with rules 36 and 37).

Part 13 – Record of summary authority proceedings

Rule 77 sets out the requirements for recording proceedings before a summary authority. For example, the record of proceedings must contain –

- the substance of the evidence;
- an explanation of any additional matter that will assist in determining the merits of the case;
- the findings of the summary authority;
- any punishment imposed;
- any order made; and
- the reasons for the conviction, punishment or order.

This rule also deals with the authentication (by the recorder of the proceedings) of a transcript from a summary authority proceeding. Where that proceeding was recorded in shorthand or sound recording apparatus and the proceeding resulted in a referral to the DMP or was in respect of a conviction on 1 or more charges, it must be authenticated in accordance with the rule.

Rule 78 obliges the summary authority to ensure that the record of proceedings is appropriately secured.

Rule 79 entitles a party to the proceedings to have part of the record of proceedings read, played or related back to them.

Rule 80 provides that in the event of the loss, in whole or in part, of the original record of proceedings, a valid and sufficient record may be made by attaching the signature of the summary authority to a copy of the record.