

EXPLANATORY STATEMENT

Issued by authority of the Judge Advocate General

Defence Force Discipline Act 1982

Court Martial and Defence Force Magistrate Rules 2020

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 149A of the Act provides that the Judge Advocate General may make rules, to be known as the *Court Martial and Defence Force Magistrate Rules*, providing for the practice and procedure to be followed by a court martial or Defence Force Magistrate.

The purpose of the *Court Martial and Defence Force Magistrate Rules 2020* (the Rules) is to prescribe the rules and processes that are to be undertaken by a *court martial and Defence Force Magistrate* proceeding under the Act. The Rules consist of 10 Parts that address preliminary matters, charging and summoning an accused person, general trial provisions for superior disciplinary tribunal proceedings, evidence before superior disciplinary tribunal proceedings, and procedure for recording of proceedings and dealing with exhibits. New Rules have been introduced to deal with tendency/coincidence evidence and procedure, as well as pre-trial hearings on the application of a party or on the direction of the Judge Advocate or Defence Force Magistrate. The new Rules change the requirement to swear or affirm a recorder as most proceedings are electronically recorded. The new Rules will also repeal the *Court Martial and Defence Force Magistrate Rules 2013* before they sunset on 1 April 2020.

The Rules replace this sunset instrument in substantially the same format with some procedural and evidential changes, having regard to superior tribunal discipline reform which is intended to simplify and streamline proceedings. 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 commence on 1 April 2020.

Regulatory Impact Statement

The Office of Best Practice Regulation advised that no regulatory impact statement was required (OBPR ref ID 26361).

Human Rights Statement

Human rights statement is at [Attachment B](#).

Consultation

Military Justice Steering Group, Australian Defence Force

Part One: preliminary

Rule 1 – Name of rules

This rule provides that the title of the instrument is the Court Martial and Defence Force Magistrate Rules 2020.

Rule 2 – Commencement

This rule provides for the commencement of the Rules on 1 April 2020.

Rule 3 – Authority

This rule provides that this instrument is made under section 149A of the *Defence Force Discipline Act 1982*.

Rule 4 – Interpretation

This rule provides interpretation of words and phrases used in the Rules.

Rule 5 – Cases not covered by the Act, these Rules or the Regulations

Where a case arises for which no provision is made in the Act or Rules the established course adopted in a trial by jury in a civil court in the Jervis Bay Territory in its criminal jurisdiction will apply. Where there is no established course, such course shall be adopted as the interests of justice require.

Rule 6 – Summons to an accused person

This rule provides for the content of a summons

Rule 7 – Service of summons to appear

This rule provides the means by which a summons may be served.

Rule 8 – Instrument for purposes of section 194A of the Act

This rule details how the requirement of section 194A of the Act will be met for production of a prisoner.

Part 2 Charge sheets and charges

Rule 9 – Charge sheets

This rule details how charge sheets are to be signed, charge sheets may be joined, charges against different members may be heard together, the form of charges must comply with Schedule 2, and how different charge sheets may be heard.

Rule 10 - Charges

This rule details the forms charges shall take. A charge will consist of statement of offence and particulars of the act or omission alleged.

Rule 11 – How charges to be construed

This rule confirms the statement of offence and particulars must be read together.

Rule 12 – Amendment of charge sheets by judge advocate or Defence Force magistrate

This rule provides for amendment by a judge advocate or Defence Force magistrate of a charge where it appears there is clerical error.

Rule 13 – Withdrawal of charges

This rule allows a prosecuting officer to withdraw a charge or charge sheet before arraignment.

Part 3 Witnesses

Rule 14 – Securing appearance of witness on behalf of accused person

This rule defines the meaning of relevant authority and provides the relevant authority to secure the appearance of persons reasonably required by the accused person to give evidence or produce documents.

Rule 15 – Disclosure and notification by the Director of Military Prosecutions or prosecuting officer

This rule provides for the prosecution's disclosure obligations in the proceedings and for the provision by the Registrar of Military Justice of certain information to the judge advocate.

Rule 16 – Exclusion of witness from tribunal hearing

This rule provides that a witness shall not be present in the hearing room until called to give evidence and for the witness to withdraw from the hearing room whilst an objection is heard.

Rule 17 – Examination of witnesses

This rule details the order of examination of a witness and process by which members of a court martial may ask a question.

Rule 18 – Calling and recalling witnesses

This rule details that the witness may be recalled or how evidence in rebuttal given.

Rule 19 – Witnesses to reply forthwith

This rule details that a witness shall reply forthwith unless privilege is claimed.

Rule 20 – Expenses for witnesses

This rule details how witness expenses shall be paid

Part 4 Registrar

Rule 21 – Registrar may liaise with certain persons

This rule provides that the Registrar of Military Justice may liaise or consult about the conduct of proceedings.

Rule 22 – Registrar may consult with services about administrative support for trial proceedings

This rule provides that the Registrar of Military Justice may consult with the services concerning the administration of proceedings.

Rule 23 – Registrar may consult with services about administrative support for trial proceedings

This rule provides that the Registrar of Military Justice may consult with the services concerning the nomination and appointment of staff to perform the administrative duties and functions of a proceeding before a court martial or defence force magistrate.

Rule 24 – Order referring charge or case to Defence Force magistrate

This rule provides when the Registrar of Military Justice refers a charge for specification of the Defence Force magistrate and for the fixing of the time and place for the hearing of the charge or any pre-trial hearing.

Rule 25 – Registrar to provide certain documents

This rule details the documents the Registrar of Military Justice must provide to each party to the proceedings.

Rule 26 – Inspection of exhibits before trial

This rule provides for inspection of exhibits before trial.

Part 5 Courts martial

Rule 27 – Function of President

This rule provides that a President of a court martial, in addition to any other functions, is to speak on behalf of the court martial in announcing sentence or any other decision, and in requesting any advice from the judge advocate.

Rule 28 – Functions of Judge advocate

This rule lists the functions of the judge advocate; to be present at all sittings of a court martial; to ensure the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice, to ensure a self-represented defendant does not suffer any undue disadvantage, and to ensure a proper record of proceedings is kept and exhibits properly safeguarded.

Rule 29 – Manner of voting of court martial

This rule provides for the order of voting by members of a court martial.

Rule 30 – Objections to members of court martial

This rule provides for the process by which objection can be taken to a member of a court martial.

Rule 31 – Swearing of court martial

This rule provides for a members of a court martial to be sworn or affirmed and for the form of words to be used.

Part 6 Defence Force magistrate

Rule 32 – Functions of Defence Force magistrate

This rule provides for the functions of a Defence Force magistrate.

Part 7 Pre-trial proceedings

Rule 33 – Application for pre-trial hearing

This is a new rule providing for pre-trial hearings on the application of any party or the judge advocate of Defence Force magistrate.

Rule 34 – Nature of pre trial proceedings

This rule provides for a non-exhaustive list of the matters which could be raised in pre-trial.

Part 8 Evidence

Rule 35 – Time for service of Notice of previous representation or Tendency/Coincidence notice

This is a new rule providing for the timing of service of a tendency/coincidence/background notice under section 65 of the *Evidence Act 2011 (ACT)*.

Rule 36 – Notice of previous representation and notices of tendency/coincidence evidence

This is a new rule providing for compliance with the Evidence Regulation 2012 (ACT) in relation to tendency or coincidence evidence.

Part 9 Trial provisions

Rule 37 – Employment of, objections to, and swearing of recorders and interpreters

This rule removes the need to swear a recorder where the proceedings are recorded electronically, and provides for electronic recording as the usual means of recording. The rule retains the requirements to swear a recorder in other circumstances, together with the requirement to swear and interpreter.

Rule 38 – Administration of oaths

This rule permits a judge advocate or Defence Force magistrate to permit a person to make an oath or affirmation.

Rule 39 – Application by accused person or prosecuting officer for adjournment of proceedings

This rule provides for a party to make an application for an adjournment on any reasonable grounds.

Rule 40 – Right of accused person and prosecuting officer to argue and adduce evidence on matter to be decided

This rule provides for a party to argue and adduce evidence on any question to be determined in the proceeding.

Rule 41 – Pleading to charges and arraignment

This rule establishes the procedure for an accused person pleading to charges and arraignment.

Rule 42 – Opening address by prosecution

This rule provides that before the first prosecution witness is called to give evidence at a trial, the prosecuting officer shall make an opening address to the tribunal.

Rule 43 – Opening address by the defence after opening address by the prosecution

This rule provides, that with leave of the judge advocate or Defence Force magistrate, the accused person may make a brief opening address after the prosecuting officer.

Rule 44 – Judge advocate or Defence Force magistrate may direct substitution of plea of not guilty

This rule permits a judge advocate or Defence Force magistrate to substitute a plea of guilty with one of not guilty at any time during a trial if it appears that an accused person does not understand the effect of that plea.

Rule 45 – Submission of no case to answer

This rule provides that at the close of the prosecution case, an accused person may submit to the judge advocate or Defence Force magistrate that the evidence adduced in respect of a charge is insufficient to support the charge.

Rule 46 – Opening address by defence

This rule allows the accused person to make an opening address, if they wish, before he or she adduces any evidence in their case.

Rule 47 – Closing addresses

This rule establishes the order for closing addresses, if any, after all of the evidence has been given in a trial.

Rule 48 – Summing up

This rule provides that after the closing addresses, if any, at a trial by court martial, the judge advocate shall sum up the evidence and direct on matters of law relating to the case.

Rule 49 – Evidence as to material facts after conviction on plea of guilty

This rule makes provision for a factual dispute after an accused person is convicted on a plea of guilty.

Rule 50 – Convicted person’s record etc and plea in mitigation

This rule provides that after the conviction of a person by a court martial or Defence Force magistrate, the prosecuting officer shall cause evidence to be adduced of convicted person’s service record, any previous convictions, other such matters relevant to punishment and the manner in which a convicted person may choose to present a plea in mitigation of punishment.

Rule 51 – Imposition of punishment or order in case of breach of undertaking of good behaviour

This rule provides for the imposition of punishment or an order in the case of convicted person breaching a previous undertaking of good behaviour.

Part 10 Record of proceedings and exhibits

Rule 52 – Record of proceedings before court martial or Defence Force magistrate

This rule provides for the recording of proceedings before a court martial or Defence Force magistrate

Rule 53 – Inspection of record of proceedings etc during trial

This rule provides for the accused person or the prosecuting officer to have a particular part of the record of proceedings replayed and for the inspection of an exhibit.

Rule 54 – Loss of original record of proceedings

This rule provides for a copy of proceedings to be made by a prescribed person in the event that the whole or any part of the original record of proceedings before a court martial or Defence Force magistrate is lost.

Rule 55 – Exhibits

This rule provides for the admission of exhibits during a trial by a court martial or Defence Force magistrate.

Rule 56 – Relief from Rules

This rule provides that a judge advocate or Defence Force magistrate may dispense with any of the requirements of the Rules, before or after the occasion for compliance arises.

Schedule 1 – statement of offences

Part 1 Offences against *Defence Force Discipline Act 1982*

Part 2 Offences against Defence Force Discipline Regulations 2018

Part 3 Offences against *Criminal Code Act 1995*

This Schedule provides the sufficient manner of setting out the statement of an offence as required in Rule 10(4).

Schedule 2 – Form of a charge sheet

This Schedule provides the manner in which a charge sheet must be set out as required in Rule 9(4).

Statement of Compatibility with Human Rights

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

The *Court Martial and Defence Force Magistrate Rules 2020* (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 court martial and Defence Force Magistrate proceeding under the *Defence Force Discipline Act 1982*. The Rules consist of 10 Parts that address preliminary matters, charging and summoning an accused person, general trial provisions for superior disciplinary tribunal proceedings, evidence before superior disciplinary tribunal proceedings, and procedure for recording of proceedings and dealing with exhibits. New rules have been introduced to deal with tendency/coincidence evidence and procedure, as well as pre-trial hearings on the application of a party or on the direction of the Judge Advocate or Defence Force Magistrate. The Rules change the requirement to swear or affirm a recorder where proceedings are electronically recorded. The Rules will also repeal the *Court Martial and Defence Force Magistrate Rules 2013* before they sunset on 1 April 2020.

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/her 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 court martial or Defence Force magistrate 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 imprisonment and detention. 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 these punishments can be issued and then enforced.

The Rules do not provide any positive authority, or provide the court martial or Defence Force magistrate any ability to deviate from the requirements of the Act as they relate to the issuance of the punishment of imprisonment or detention. 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 imprisonment or detention are contained in the Act or the Regulations or the *Defence Force Discipline (Consequences of Punishment) Rules 2018*.

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 court martial or Defence Force magistrate 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: the Rules mandate how a person is to be informed of a charge of the service offence. In addition to merely being notified of the charges against them, the Rules mandate that the accused person is by the prosecution with copies of all witness statements and evidence to be led by the prosecution, and a list of exhibits to be relied upon.
- 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 Registrar of Military Justice is required to confirm how much preparation time is required by the accused person and their defending officer or to

schedule the hearing 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 Director of Defence Counsel Services must, with the consent of the accused person, direct a defence member to defend the accused person. An accused person may apply for an adjournment under the Act.

- to be tried without undue delay: The Rules encourage the parties to deal with legal issues by introducing pre-trial hearings to ensure the trial proceeds without delay. This is consistent with civilian criminal court practice.
- to be tried in person: the Act requires attendance by the accused person at the hearing and the Rules do not alter this.
- to legal assistance and to have legal assistance assigned to the accused person without payment. The Act states the Chief of the Defence Force is to provide legal representation from a legal officer. The Rules are drafted to assume legal representation, but mandate where an accused is unrepresented they are not to be prejudiced by that fact.
- 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 to give evidence, and (if so required) produce documents. The Rules also provide for the costs of witnesses to be met.
- 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. 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 court martial or Defence Force magistrate 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: These Rules are consistent with civilian criminal models for protections against self-incrimination. The Rules confirm the *Evidence Act 2011* (ACT) applies which contains 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. The Rules mandate a record to be made of all proceedings. This provides the best evidence to support the mandatory review of 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. 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 tribunal 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.