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DGADFLS DIRECTIVE NO: 3/2008

**EMPLOYMENT OF RESERVE LEGAL OFFICERS – PERSONAL ELIGIBILITY
FOR WORK AT SESSIONAL FEE RATES**

Introduction

1. This directive applies to Reserve Legal Officers (RLOs) who are eligible to claim sessional fees. This directive also applies to Permanent Legal Officers (PLOs) and Defence Legal (DL) civilian staff who approve or administer the payment of sessional fees. DGTDLs Memorandum 2001/1 is rescinded and replaced by this directive.

Purpose

2. This directive deals with the criteria and eligibility requirements for the receipt of sessional fees and the process applying to RLOs making initial application or re-applying for endorsement of their eligibility to receive sessional fees.

Annual Review

3. In 2008, I will introduce a system of annually reviewing individual eligibility for the receipt of sessional fees. The annual review is required because individual employment circumstances change over time and this can change individual RLOs' eligibility to receive sessional fees. RLOs whose circumstances, as they relate to their eligibility to receive sessional fees, change during the year are to advise the Deputy Finance Manager, Defence Legal whose contact details are in paragraph 13 of this directive.

General Eligibility for Sessional Fees

4. In general, entitlement to the sessional fee is limited to legal practitioners who are self-employed, either as barristers or solicitors. This reflects the purpose of the provision, which is to compensate RLOs for their absence from their practice or chambers.

General ineligibility for Sessional Fees

5. A RLO is not eligible to be paid sessional fees where that RLO:
 - a. is an employee of a firm of solicitors (an employee includes salaried lawyers irrespective of the employer); or
 - b. where 90% or more of the RLO's professional income is sourced from Reserve work, unless it can be established that exceptional circumstances exist; for example the previous year the RLO had been exclusively tasked as Counsel for one CDF Commission of Inquiry.

Eligibility for Specific Categories of Legal Practitioners

6. **Salaried in-house legal adviser in the public service or a statutory authority.** Legal officers employed by the Commonwealth or a State Government or by Statutory Authorities are not eligible to be paid sessional fees, unless they can demonstrate that they 'would otherwise be engaged in a private professional capacity as a barrister or solicitor'. (I note that their employer may be eligible to make a claim under the Employer Support Program if they release their employee to undertake duties that do not attract sessional fees.)

7. **Employed solicitors in law firms.** Employed solicitors in law firms are not eligible to receive sessional fees. (I note that their employer may be eligible to make a claim under the Employer Support Program if they release their employee to undertake duties that do not attract sessional fees.)

8. **Persons in private practise as a barrister or as a sole practitioner, partner or associate in a law firm.** Barristers and sole practitioners or partners (who have an entitlement to share in the profits or otherwise in the revenues derived by the firm from its provision of professional services) in law firms are eligible to receive sessional fees.

9. **Associates.** Associates may also eligible to receive sessional fees where they have a real interest in the income generated by the firm; for example as a result of profit-sharing or incentive payments linked to their linked to their billings.

10. Noting that the above guidance is not exhaustive, a RLO who wishes to have their eligibility to receive sessional fees assessed is to provide the following information.

11. **Sole practitioner:** A sole practitioner must demonstrate that engagement on RLO duties would result in a loss of income from their private legal practice. Evidence in this regard includes:

- a. a description of their practice,
- b. a certified statement that the portion of their income attributable to RLO work in the last Financial Year is less than 90% of their income from their practice (cf. para 5b),
- c. the address of their office or chambers premises, and
- d. the number and date of their practising certificate.

12. **Partner in law firm:** A partner in a law firm must demonstrate that engagement on RLO duties would result in a loss of income from their usual private legal practice. Evidence in this regard includes:

- a. a description of their practice and confirmation that they are not engaged on a salary,
- b. a certified statement that the portion of their income from RLO work for the last Financial Year is less than 90% of their income from the practice (cf. para 5b),
- c. the address of their partnership premises, and
- d. the number and date of their practising certificate;

13. **Senior associate in law firm:** A senior associate must demonstrate that engagement on RLO duties would necessarily result in a loss of income from their private legal practice. Evidence in this regard includes:

- a. a description of their practice and confirmation that they are not solely remunerated by salary;
- b. a description of their financial interest in the firm, for example evidence of:
 - i) profit-sharing or incentive payments linked to billings,
 - ii) the financial impact of the senior associate's absence from work on their 'budget', or
 - iii) their business development activity and the consequences flowing from this with respect to the income generated by the firm;
- c. a certified statement that the portion of their income from RLO work for the last Financial Year is less than 90% of their income from the practice (cf. para 5b);
- d. the address of their office premises; and
- e. the number and date of practicing certificate.

14. **Part time Private Legal Practice.** A person who engages in eligible private practice on a part-time basis must demonstrate that engagement on RLO duties would result in a loss of income from their usual private legal practice. Evidence in this regard includes:

- a. the evidence listed above in relation to the practice of a sole practitioner, partner or senior associate as applicable; and
- b. A full description of the part time arrangement, including information on:
 - i) the number of days normally worked in each type of practice during each week, and
 - ii) the specific days (eg Monday and Wednesday) the RLO is engaged in eligible practice.

15. Any payments of Sessional Fee Claims would be adjusted on the basis of the above information so that the applicant would only be compensated for those periods they would have otherwise been engaged in eligible private practice. For example, a RLO who is employed for the same two days every week and carries on a sole practice for the other three days each week would be personally eligible for sessional fees only on those three days in which they were engaged in sole practice.

Initial Application for Eligibility for Sessional Fees – To be Completed by Eligible RLOs by 1 December 2008

16. All eligible RLOs must complete the Statutory Declaration (Enclosure 1) by 1 December 2008. Before doing so they are to read the Legal Officer Sessional Fee Determination. The additional documentation detailed in paragraphs 11-14 must also be attached. The completed Statutory Declaration together with a copy of your practising certificate and any other documentation should be returned to the Deputy Finance Manager, Defence Legal, CP2-4-037, Campbell Park offices, Canberra ACT 2600 or faxed to (02) 62664795. If you are endorsed as being eligible to be compensated by sessional fees, your name will be placed on a list of RLOs who are eligible to receive sessional fees which will be circulated within Defence Legal.

Subsequent Annual Renewal of Eligibility for Sessional Fees

17. With effect from Financial Year 2009/10, all eligible RLOs will need to re-apply for recognition of their eligibility on an annual basis at the commencement of the new Financial Year. This is done by submitting a completed Statutory Declaration together with a copy of your practising certificate by the 1st of July each year. If any of your professional circumstances relevant to your eligibility change during the year you must advise the Deputy Finance Manager.

18. If you do not submit the Statutory Declaration for Sessional Fees you will not be eligible to receive sessional fees for duties undertaken and your name will not be placed on the list of RLOs approved to undertake Sessional Fee duties to be published in December 2008. The list will be circulated within Defence to those areas that task personnel for duties which attract the sessional fee.

Original signed

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25 September 2008

Enclosures:

1. Statutory Application Form (for completion by RLO)
2. DGADFLS Directive 2/2008 (revised with enclosures)

Distribution:

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All Defence Legal Paralegals and Defence Legal Finance Office Staff
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