

# **ADF LEGAL SERVICES**

## **LEGAL TASK JOURNAL**

### **DISCIPLINE LAW**

#### **LEVEL – COMPETENT**

# ADF LEGAL SERVICES

## LEGAL TASK JOURNAL QUALIFICATION CRITERIA

### DISCIPLINE LAW - COMPETENT

#### Qualification

1. The Legal Task Journal qualification criteria for advancement in CL in Discipline law at the competent level are:

#### QUALIFICATION CRITERIA - DISCIPLINE LAW - COMPETENT

	<b>Total Tasks</b>	<b>Self-Assessed</b>	<b>Assessor</b>	<b>Senior Assessor</b>
		Minimum number of tasks in each part	Minimum number of tasks in each part	Minimum number of tasks in each part
<b>Competent</b>	<b>55</b>			
Competent – Part A		6	6	N/A
Competent – Part B		14	14	N/A
Competent – Part C		8	8	N/A
Competent – Part D		22	22	N/A

#### Competent Standard

2. A Legal Officer who has attained a ‘competent’ standard in Discipline law has a sound grasp of and can correctly apply the *Defence Force Discipline Act 1982* and ADFP 06.1.1 Discipline Law Manuals and directly related policy as drafted.

3. In addition, such a Legal Officer can identify ‘novel’ issues (that are beyond the confines of the Discipline Law Manuals) and obtain the necessary assistance for resolution.

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#### Part A – Basic Principles

#### DFDA and Related Legislation

1. Demonstrate application of knowledge of the law and policy of the scope, nature and effect of Discipline law. Where relevant this should include:
  - a. the history of discipline law;
  - b. the source of discipline law;
  - c. the reason for discipline law in the ADF; and
  - d. the ‘service connection test’ as applied by the High Court of Australia.

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2. Demonstrate application of knowledge of the content and effect of the:
  - a. Defence Force Discipline Act 1982;
  - b. Defence Force Discipline Regulations 1985;
  - c. Court Martial and Defence Force Magistrate Rules 2009;
  - d. Summary Authority Rules 2009; and
  - e. Defence Force Discipline (Consequences of Punishment) Rules 1986.

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#### Discipline Law Manual Volumes 2 & 3

3. Demonstrate application of knowledge of the content and effect of Discipline Law Manual Volume 3 in the areas of:
  - a. jurisdiction of service tribunals;
  - b. prosecution of charges and offences;
  - c. summary proceedings and election for trial by a court martial or Defence Force magistrate.

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4. Demonstrate application of knowledge of the contents and effect of Discipline Law Manual Volume 3 in the areas of:

- a. investigation of service offences;
- b. criminal responsibility;
- c. the law of evidence applicable in a trial by court martial or Defence Force magistrate ; and
- d. the simplified rules of evidence in Summary Authority proceedings.

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5. Demonstrate application of knowledge of the contents and effect of Discipline Law Manual Volume 3 in the areas of:

- a. rights of the accused;
- b. duties of a prosecutor at summary proceedings; and
- c. duties of a defending officer at summary proceedings.

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6. Demonstrate application of knowledge of the content and effect of Discipline Law Manual Volume 3 in the areas of:

- a. jurisdiction and powers of a court martial or Defence Force magistrate;
- b. roles of the Registrar of Military Justice and the DMP in convening a court martial or Defence Force magistrate trial;
- c. functions of the president of a court martial;
- d. functions of a judge advocate on a court martial panel;
- e. functions of members of a court martial panel; and
- f. functions of a Defence Force magistrate.

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7. Demonstrate application of knowledge of contents and effect of Discipline Law Manual Volume 3 in the areas of:

- a. punishments and orders;
- b. reviews of and appeals from Summary proceedings;
- c. the discipline officer scheme.

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8. Demonstrate application of knowledge of the law and policy in Discipline Law Manual Volume 3 applicable to Territory Offences at unit level.

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#### Part B – Jurisdiction and Charges

##### Jurisdiction Determination

9. Demonstrate application of knowledge of the contents and effect of DI(G) PERS 45-1 *Jurisdiction under the Defence Force Discipline Act – Guidance for Military Commanders* including:

- a. the initial determination of jurisdiction;
- b. notification procedures when military jurisdiction is exercised;
- c. procedures for cases where jurisdiction is unclear; and
- d. the role of reviewing Service legal officers.

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10. Demonstrate application of knowledge of the law and policy relevant to the test for the application of jurisdiction under the DFDA within Australia. This should include an explanation of the current position - 'can proceedings reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline'.

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11. Demonstrate application of knowledge of the application of DI(G) ADMIN 45-2 *Reporting/Investigation of Alleged Offences*. Where relevant this should include an explanation of:

- a. the definition of notifiable incidents;
- b. the roles and responsibilities of Defence Investigative Authorities;
- c. the role of the Inspector-General Division;
- d. when investigations should be ceased or suspended; and
- e. how an investigation is to be dealt with if civil authorities decline to act.

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## ADF prosecution policy

12. Demonstrate application of knowledge of the contents and effect of DI(G) PERS 45-4 *Australian Defence Force Prosecution Policy* and the Director of Military Prosecutions' (DMP) published Prosecution Policy.

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## Service Investigations

13. Demonstrate application of knowledge of the law and policy on service investigations in the areas of:

- who may be appointed an investigating officer under s 101(1) DFDA; and
- when an investigating officer may question persons.

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## Analysis of DFDA Investigative Material

14. Demonstrate application of knowledge of the analysis of investigative material produced by a non-Service police DFDA investigation. Where relevant this should include an explanation of:

- whether there was jurisdiction to investigate the matter in the first instance;
- whether the investigation was conducted IAW Part VI of the DFDA;
- reference to relevant Defence Instructions, for example DI(G) PERS 35-4 *Management and Reporting of Sexual Offences*;
- whether the investigative material will be admissible taking into account rules of evidence relevant to service tribunals.

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## Offences, charges and their prosecution

15. Demonstrate application of knowledge of what a prescribed offence is. Where applicable, this should include an explanation of the relevance of a prescribed offence.

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16. Demonstrate application of knowledge of the difference between a statutory alternative charge and ‘in the alternative’ charge. Where relevant this should include an explanation of when an alternative charge or a statutory alternative charge may be relied upon.

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17. Demonstrate application of knowledge of drafting a charge. This should include:

- limitations on charging service offences;
- an explanation of the concept of multiplicity/parallel pleading;
- how to draft the particulars of a charge; and
- an explanation of the concept of duplicity.

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18. Demonstrate application of knowledge of the procedure for preferring a charge. Where relevant this should include:

- preparation of charge sheet (Form C2);
- who is authorised to prefer a charge;
- when the member is to be cautioned;
- what paperwork is to be provided to the accused (depending on method of charging); and
- time limitations if the member is in custody.

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19. Demonstrate application of knowledge of whether a charge sheet can be amended.

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20. Demonstrate application of knowledge of whether a charge can be withdrawn once it has been preferred at summary level.

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21. Demonstrate application of knowledge of the law and policy at the unit level on the prosecution's legal burden of proof. Where relevant, this should include an explanation of:

- the requirement to prove every element of the offence; and
- what is meant by 'beyond reasonable doubt'.

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22. Demonstrate application of knowledge of the defence evidential burden (to adduce evidence).

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23. Demonstrate application of knowledge of the defence legal burden of proof. Where relevant this should include an explanation of:

- when the defence would bear the legal burden; and
- statutory defences available under the DFDA.

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24. Demonstrate application of knowledge of general principles of criminal responsibility. Where relevant this should include an explanation of:
- the relevance of the Criminal Code (Cth) to DFDA offences;
  - the concept of physical elements; and
  - the concept of fault elements.

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25. Demonstrate application of knowledge of the concept of elements of offences. This should include:
- the application of DLM Vol 3 Chapter 6; and
  - an explanation of the relationship between physical and fault elements.

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26. Demonstrate application of knowledge of the concept of a strict liability offence.

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27. Demonstrate application of knowledge of the concept of an absolute liability offence.

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### **Discipline Officer Proceedings**

28. Demonstrate application of knowledge of the purpose of the Discipline Officer scheme. This is to include an explanation of:
- the appointment of relevant officers and discipline officers; and
  - the jurisdiction of discipline officers.

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#### Part C – Evidence

#### Rules of Evidence

29. Demonstrate application of knowledge of the laws of evidence applicable to court martial and Defence Force magistrate proceedings and the simplified rules of evidence applicable to Summary Authority proceedings.

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30. Demonstrate application of knowledge of how the Rules of Evidence apply to DFDA investigations. This should include an explanation of:

- a. the evidence required to 'prove' an offence;
- b. proof of commission of the offence;
- c. proof of identity; and
- d. the relevance rule.

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31. Demonstrate application of knowledge of what the onus of proof is for the prosecution and defence in a service tribunal.

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32. Demonstrate application of knowledge of what is meant by proof beyond reasonable doubt.

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33. Demonstrate application of knowledge of what is meant by proof on the balance of probabilities.

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34. Demonstrate application of knowledge of whether or not the accused is competent to give evidence.

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35. Demonstrate application of knowledge of the types of evidence that may be used to prove facts in a service tribunal, such as oral, real, documentary evidence.

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36. Demonstrate application of knowledge of the examination of witnesses. Where relevant this should include an explanation of:

- a. the fact that a witness is to be sworn in;
- b. the order that witnesses may be called; and
- c. the general outline of procedure for receiving testimonial evidence.

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37. Demonstrate application of knowledge of examination in chief. This should include an explanation of:

- a. the object of examination in chief;
- b. the use of leading questions; and
- c. when a party can cross examine their own witness.

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38. Demonstrate application of knowledge of cross-examination. This should include an explanation of:

- a. the object of cross examination;
- b. the use of leading questions; and
- c. the disallowance of improper questions.

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39. Demonstrate application of knowledge of re-examination. This should include an explanation of:

- a. the purpose of re-examination; and
- b. the use of leading questions.

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#### Part D – Procedure

#### Conduct of Summary Authority Proceedings

40. Demonstrate application of knowledge of the distinction between ‘dealing with’ and ‘trying’ a charge.

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41. Demonstrate application of knowledge of the law and policy applicable to subordinate summary authorities (SUBSA). This should include an explanation of:

- a. how a SUBSA is appointed;
- b. the jurisdiction of a SUBSA;
- c. revocation of appointment as a SUBSA; and
- d. punishments available to a SUBSA.

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42. Demonstrate application of knowledge of the options available to a SUBSA at a hearing. This should include an explanation of:

- a. jurisdiction to try a charge, including consideration of jurisdiction;
- b. whether a SUBSA has power to direct that the charge not be proceeded with if the SUBSA does not have jurisdiction to try the charge; and
- c. whether a SUBSA has power to refer a charge to a CO or another SUBSA, whether or not the charge is within the jurisdiction of the SUBSA.

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43. Demonstrate application of knowledge of the law and policy applicable to commanding officer summary tribunals. This should include an explanation of:
- a. the jurisdiction of a CO;
  - b. the appointment of a CO *per se*, or for disciplinary purposes only;
  - c. revocation of appointment as a CO for disciplinary purposes; and
  - d. punishments available to a CO.

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44. Demonstrate application of knowledge of the options available to a CO at a hearing. This should include an explanation of:
- a. jurisdiction to try a charge, including consideration of jurisdiction;
  - b. power to direct that the charge not be proceeded with if the CO does not have jurisdiction to try the charge;
  - c. power to refer a charge to another CO whether or not the charge is within the jurisdiction of the CO;
  - d. power to refer a charge to a superior summary authority (SUPSA);
  - e. power to refer a charge to the DMP; and
  - f. when a CO is required to refer a charge to the DMP.

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45. Demonstrate application of knowledge of the law and policy applicable to superior summary authority (SUPSA) tribunals. This should include an explanation of:
- a. the jurisdiction of a SUPSA;
  - b. the appointment of a SUPSA;
  - c. revocation of appointment as a SUPSA;
  - d. punishments available to SUPSA.

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46. Demonstrate application of knowledge of the options available to a SUPSA at a hearing. This should include an explanation of:
- a. jurisdiction to try a charge, including consideration of jurisdiction; and
  - b. power to refer a charge to the DMP.

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47. Demonstrate application of knowledge of election for trial by court martial or Defence Force magistrate, and elective punishments. This should include an explanation of:
- a. for what charges a right of election for trial by court martial or Defence Force magistrate exists;
  - b. when the election must be given to an accused;
  - c. when an elective punishment can be imposed;
  - d. the differences in procedures depending upon the plea;
  - e. what documentation is required to be furnished to the accused on either election.

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48. Demonstrate application of knowledge of when a legal officer may act as defending officer in summary proceedings.

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49. Demonstrate application of knowledge of the recording of summary proceedings including preparation of the Record of Proceedings (Form D4). This is to include certification of the records, and the form.

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**Role and Functions of the Director of Military Prosecutions (DMP) in commencing proceedings before a court martial or Defence Force magistrate**

50. Demonstrate application of knowledge of the roles of the DMP in laying charges.

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51. Demonstrate application of knowledge of the courses open to the DMP when charges are referred to DMP. Where relevant this should include an explanation of:

- a. whether or not a charge is to be proceeded with;
- b. whether or not the charge may be referred to a Commanding Officer, superior summary authority, or the Registrar of Military Justice for trial by court martial or Defence Force magistrate.

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**Court martial and Defence Force magistrate Proceedings**

52. Demonstrate application of knowledge of court martial and Defence Force magistrate trials under the DFDA. This should include an explanation of the different types of courts martial trial, the applicability of each type of trial depending on class of offence, joinder of charges of different classes and joint trial of accused persons.

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**Sentencing Principles, the Scale and Consequences of Punishments at Service Tribunals**

53. Demonstrate application of knowledge of the basis of sentencing principles in the DFDA. This should include an explanation of the principles of sentencing applied by civil courts and the need to maintain discipline in the Defence Force.

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54. Demonstrate application of knowledge of the scale of punishments table contained in the DFDA. Where applicable, this should include the relevant limitations on the punishment.

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55. Demonstrate application of knowledge of the consequences of punishments.

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56. Demonstrate application of knowledge of suspended sentences.

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57. Demonstrate application of knowledge of the circumstances in which restitution orders may be made. This should include an explanation of what a restitution order is.

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58. Demonstrate application of knowledge of the circumstances in which a reparation order may be made. This should include an explanation of what a reparation order is and the maximum amount payable.

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## Legal Review Process

59. Demonstrate application of knowledge of the disciplinary review process for a summary hearing including an explanation of when a legal review is required for summary authority hearings under s 152 DFDA.

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60. Demonstrate application of knowledge of the preparation of a legal report for a legal review under s 152 DFDA. Where relevant this should include an explanation of:

- a. grounds for quashing (or revoking) a conviction (or order) or punishment;
- b. grounds for ordering a new trial; and
- c. substitution of conviction of alternative offence.

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61. Demonstrate application of knowledge of a review on a petition under s 153 DFDA. Where relevant this should include an explanation of:

- a. when a petition may be lodged;
- b. time limitations on lodging petitions;
- c. what information is required to be included in a petition; and
- d. timeframe for reviewing authority to complete the review.

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62. Demonstrate application of knowledge of a further review under s 155 DFDA. Where relevant this should include an explanation of:

- a. when a further review may be lodged;
- b. who may review a further review;
- c. time limitations on lodging a further review;
- d. whether a legal report from the Judge Advocate General or Deputy Judge Advocate General is required, and if so, at what time of the review;
- e. when CDF or a Service Chief are bound by opinions set out in a report; and
- f. what information is required to be included in a request for further review.

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### **Punishments and Orders – Commencement and subject to approval**

63. Demonstrate application of knowledge of the commencement of punishments and orders under s 171 DFDA. Where relevant this should include an explanation of:

- a. when a punishment takes effect;
- b. whether a summary authority may delay commencement of punishment;
- c. impact of punishment of dismissal on custody; and
- d. the commencement of cumulative punishments.

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64. Demonstrate application of knowledge of the requirement for approval of certain punishments and orders. This is to include the powers and duties of the reviewing authority in respect of punishments imposed by a summary authority or a court martial or Defence Force magistrate under s 172 DFDA.

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## The appeal process

65. Demonstrate application of knowledge of the effect on reviews of appeals to the Defence Force Discipline Appeal Tribunal. Where relevant this should include an explanation of:

- a. who may appeal to the Defence Force Discipline Appeal Tribunal;
- b. what impact does an appeal have on a review;
- c. where the DFDAT dismisses the appeal, or application for leave to appeal, what affect does this have on any review;

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## Discipline Officer Proceedings

66. Demonstrate application of knowledge of Discipline Officer proceedings. Where relevant this should include an explanation of:

- a. what members are subject to DO proceedings;
- b. for what offences;
- c. the issue of infringement notices;
- d. the right of election by the member;
- e. powers of the discipline officer;
- f. commencement of punishments; and
- g. the destruction of discipline officer records.

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## Advocacy Knowledge

67. Demonstrate application of advocacy knowledge in summary proceedings by either appearing or briefing either a Prosecutor or Defending Officer on basic advocacy obligations.

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## Management of DFDA Authorisation

68. Demonstrate application of knowledge of the appointment of DFDA authorised officers.

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69. Demonstrate the management of DFDA authorisation appointment forms.

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## Discipline Case Flow Management

70. Demonstrate application of knowledge of the contents of DI (G) ADMIN 10-8 *Discipline Tracking and Case Flow Management*.

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## Miscellaneous (Civil Law)

71. Demonstrate application of knowledge of the steps to be taken when a defence member or unit is served with a civil court issued subpoena (for attendance to give evidence or to produce documents).

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72. – 76. Blank (Removed from Amendment 3).