

Professional Rules for Defence Legal Officers

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Preamble

- A. These rules formulate a code of professional conduct for Defence Legal Officers.
- B. The main source of Rules 4 to 13 is the NSW Solicitors' Rules. The NSW Solicitors' Rules are not inconsistent with, but do go into considerably more detail than, other State Solicitors' rules, such as those of the Law Institute of Victoria and the Queensland Law Society.
- C. Many of the Solicitors' Rules have been excluded on the basis that they have no application to the work of Defence Legal Officers.
- D. The main source of Rules 15 to 26 is the ABA Model Rules.
- E. Certain of the ABA Model Rules are not included, having no application to the work of Defence Legal Officers.
- F. Military specific rules of professional conduct are intended to be further to, rather than in derogation of, those rules applicable to lawyers generally. A primary source of concepts has been the rules of professional conduct of the US Army, Navy and Air Force Judge Advocate General's Corps.

Part A – Interpretation and Application of the Rules

1 Interpretation

1.1 Except where the context otherwise requires, the following definitions apply to these Rules:

- (a) “act for” means to represent before a court or service tribunal or to provide advice to in a professional legal capacity but does not include providing legal information under an amicus arrangement.
- (b) “ADF” means the Australian Defence Force, including any arm of the Defence Force constituted under the *Defence Act 1903* (Cth).
- (c) “amicus” means a provider of legal information that does not give rise to or arise from a lawyer-client relationship.
- (d) “APS” means the Australian Public Service constituted under the *Public Service Act 1999* (Cth).
- (e) “authorised official” is a Defence person acting in an official capacity.
- (f) “Court of Inquiry” has the same meaning as under the Defence (Inquiry) Regulations 1985 (Cth).
- (g) “Defence” means the Department of Defence and the ADF.
- (h) “Defence Legal Officer” means a legal practitioner working as part of Defence and includes APS employees who are legal practitioners and any legal practitioner who is a defence member within the meaning of the DFDA but does not include a legal practitioner working in Defence on secondment from one of the Legal Services Panels nor a legal practitioner working in the Defence Materiel Organisation.
- (i) “Defence person” means an APS employee working in Defence, or a defence civilian or defence member, each as defined in the DFDA.
- (j) “DFDA” means the *Defence Force Discipline Act 1982* (Cth).
- (k) “DGADFLS” means the Director General Australian Defence Force Legal Services.
- (l) “HDL” means the Head of Defence Legal.

- (m) “Legal Office” means any Defence Legal Officer or group of Defence Legal Officers within an office in Defence.
 - (n) “legal practitioner” has the same meaning as in the DFDA.
 - (o) “Professional Rules Committee” means the committee established under Rule 28 of these rules.
 - (p) “Regulations” means the Defence (Inquiry) Regulations 1985.
 - (q) “Service Tribunal” means a court or tribunal established under the DFDA or a Court of Inquiry.
 - (r) “Supervising Defence Legal Officer” means a Defence Legal Officer to whom another Defence Legal Officer reports or is otherwise responsible within the professional supervisory chain in Defence.
 - (s) “tasked” means directed or otherwise authorised by a supervising DLO to act for a client.
- 1.2 Terms not otherwise defined in these Rules have the same meaning as in the *Defence Act 1903* (Cth) and the DFDA. In the event of any conflict between those two Acts, the latter shall prevail over the former.
- 1.3 These Rules are not, and should not be read as, a complete or detailed code of conduct for Defence Legal Officers. Other standards for, requirements of and sanctions concerning the conduct of Defence Legal Officers are to be found, *inter alia*, in the DFDA in the case of an ADF member, the *Public Service Act 1999* (Cth) in the case of an APS employee, and in the general law (including the law relating to contempt of court).¹
- 1.4 These Rules should be read and applied so as most effectively to attain the objects and uphold the values expressed herein.²
- 1.5 General provisions of these Rules should not be read or applied in a limited way by reason of any particular or illustrative provisions.³
- 1.6 Headings in these Rules shall be read as part of these Rules, but shall not be used so as to read or apply any of the Rules in a more limited way than would have been so if the headings were not part of the Rules.⁴

¹ See ABA Model Rule 9.

² See ABA Model Rule 10.

³ See ABA Model Rule 11.

- 1.7 Except where otherwise required expressly or by the context in which the words appear, words in the singular shall include the plural, and words in the plural shall include the singular.

2 Application of Rules

- 2.1 These Rules shall, subject to this Rule 2, apply to all Defence Legal Officers.
- 2.2 These Rules do not apply to any military judge, or to the Registrar of the Australian Military Court when any of those officers are exercising any statutory function or power pursuant to the provisions of the *Defence Force Discipline Act*.
- 2.3 These Rules do not apply to the exercise of a statutory function or power by the Director of Military Prosecutions or his or her delegate.

3 Conflicts of Rules

- 3.1 These Rules shall, subject to this Rule 3, apply concurrently with any rules of professional conduct applicable to a Defence Legal Officer by virtue of his or her enrolment or admission in a federal court or a court of a State or Territory.
- 3.2 Subject to Rule 3.4, to the extent that a conflict exists between these Rules and the laws (including any rules made pursuant to such laws) of other jurisdictions that regulate the professional conduct of a Defence Legal Officer, to the extent permitted by law these Rules will govern the conduct of the Defence Legal Officer providing professional legal services in Defence.
- 3.3 Specific and significant instances of conflict between these Rules and the rules of other jurisdictions shall be reported promptly to the Professional Rules Committee.
- 3.4 To the extent that a conflict exists between these Rules and the Legal Services Directions issued by the Attorney-General under the *Judiciary Act 1903* (Cth), the Legal Services Directions will govern the conduct of the Defence Legal Officer providing professional legal services in Defence.

⁴ See ABA Model Rule 12.

Part B – The Client

4 Identification of the Client

- 4.1 Unless tasked to act for any person other than the Commonwealth, a Defence Legal Officer's client is the Commonwealth, acting through its authorised officials.
- 4.2 For the purposes of Rule 4.1, where a Defence Legal Officer is tasked to act for the Commonwealth in a particular matter, a lawyer-client relationship exists between the Defence Legal Officer and the Commonwealth as represented by its authorised officials, and the authorised officials may invoke the lawyer-client privilege or the rule of confidentiality for the benefit of the Commonwealth.
- 4.3 Any emergency or exigency of the service excepted, a Defence Legal Officer may not act for a person other than the Commonwealth unless tasked by a Supervising Defence Legal Officer or other authorised official.⁵ Where, by reason of any emergency or exigency of the service, it is necessary for a Defence Legal Officer to so act, the Defence Legal Officer shall seek ratification of that decision at the first available opportunity.
- 4.4 Where a Defence Legal Officer is tasked to act for a person other than the Commonwealth, the Defence Legal Officer owes to that person the duty to act in accordance with these Rules.
- 4.5 Where a Defence Legal Officer is tasked to act for a person other than the Commonwealth, the subject matter scope of a Defence Legal Officer's representation will be limited to any matter reasonably connected with the terms of the tasking. A Defence Legal Officer shall inform the individual client at the earliest opportunity of any limitations on representation and professional responsibilities of the Defence Legal Officer towards the client.⁶
- 4.6 A Defence Legal Officer shall not be taken to act for a person other than the Commonwealth if he or she is providing advice under an *amicus* arrangement, provided that he or she informs the person that he or she is not acting for that individual before providing any advice or accepting any confidential information (unless such information is provided before the Defence Legal Officer has an opportunity to warn the person).

⁵ See US Navy Rules, Preamble para 6(b).

⁶ See US Navy Rule 2.1.

5 Duties of Competence and Diligence

Duty of Competence

- 5.1 A Defence Legal Officer must act honestly, fairly, and with competence when acting for a client. Competence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the task.⁷ A Defence Legal Officer should not undertake, accept or be tasked with the requirement to act for a client if these requirements cannot be met.

Duty of Diligence

- 5.2 A Defence Legal Officer must act with reasonable diligence and promptness when acting for a client.⁸ A Defence Legal Officer should not accept a task to act for a client if these requirements can not be met.

Duties of Supervising Defence Legal Officers

- 5.3 A Supervising Defence Legal Officer must not task another a Defence Legal Officer to act for a client unless the Supervising Defence Legal Officer is satisfied that the Defence Legal Officer can competently perform the task. Defence Legal Officers may consult with supervisors concerning competence in any particular case.⁹

6 Duty of Confidentiality

General Rules

- 6.1 A Defence Legal Officer must not disclose (except as compelled by law) or use in any way in the course of their duties or otherwise confidential information obtained by the Defence Legal Officer concerning any person to whom the Defence Legal Officer owes some duty or obligation to keep such information confidential unless or until:¹⁰
- (a) prevent any serious physical harm to the client or to a third party;
 - (b) the information has been published; or

⁷ See NSW Solicitors' Rule, 1.1 and US AF Rule 1.1.

⁸ See US AF Rule 1.3.

⁹ See US Navy Rule 1.1.

¹⁰ See ABA Model Rules, rule 103.

(c) the person has consented to the Defence Legal Officer disclosing or using the information generally or on specific terms.

- 6.2 A Defence Legal Officer must not disclose (except as compelled by law) or use confidential information under Rule 6.1 in any way other than as permitted by the specific terms of the person's consent.¹¹
- 6.3 A Defence Legal Officer will not have breached Rules 6.1 or 6.2 simply by showing a brief or advice to, or disclosing information contained in a brief or advice to, any legal practitioner assisting in the preparation of the case or the provision of the advice.¹²
- 6.4 A Defence Legal Officer who is shown a brief or advice to assist another Defence Legal Officer is bound by the same duties of confidentiality that bind the Defence Legal Officer whose brief or advice it is, including the duties imposed by Rules 6.1 and 6.2.¹³
- 6.5 A Defence Legal Officer who has accepted a task to act for a client must inform his or her Supervising Defence Legal Officer as soon as possible after the Defence Legal Officer becomes aware that he or she has information confidential to a person other than the client that may, as a real possibility, be helpful to the client's case or to the advancement of the client's interests, being information which the Defence Legal Officer is prohibited from disclosing or using by Rules 6.1, 6.2 or 6.4, unless the person entitled to the confidentiality consents to the Defence Legal Officer disclosing or using the information as the Defence Legal Officer thinks fit.¹⁴ The Supervising Defence Legal Officer shall endeavour to withdraw the tasking and task the matter to another Defence Legal Officer.
- 6.6 A Defence Legal Officer's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the Defence Legal Officer and client.

Clients other than the Commonwealth

- 6.7 Where a Defence Legal Officer is acting on behalf of a client in accordance with Rule 4.3, Rule 6.1 shall not apply to prevent disclosure of confidential information to the extent that the Defence Legal Officer reasonably believes is necessary to:

¹¹ See ABA Model Rules, rule 104.

¹² Adapted from ABA Model Rules, rule 105.

¹³ See ABA Model Rules, rule 106.

- (a) prevent the client from committing (in the future) a criminal act that the Defence Legal Officer believes is likely to result in imminent death or substantial bodily harm to any person, significant property damage,¹⁵ or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system;¹⁶ or
- (b) establish a claim or defence on behalf of the Defence Legal Officer in respect of any public accusation by the client against the Defence Legal Officer based upon conduct in which the client was involved, establish a defence to a criminal or disciplinary charge or civil claim against the Defence Legal Officer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the Defence Legal Officer's representation of the client.¹⁷

6.8 Where a Defence Legal Officer is tasked to act for the Commonwealth, and the Defence Legal Officer reasonably believes that any Defence person is acting, intends to act or refuse to act in an official matter in a way that is either adverse to the legal interests or obligations of the Commonwealth or in violation of Australian law which reasonably might be imputed to the Commonwealth, the Defence Legal Officer shall, notwithstanding Rule 6.1, proceed as is reasonably necessary in the best interest of the Commonwealth.¹⁸

6.9 In determining how to proceed, the Defence Legal Officer shall give due consideration to the seriousness of the violation or potential violation and its consequences, the scope and nature of the Defence Legal Officer's representation, the apparent motivation of the person involved, the policies of Defence concerning such matters, and any other relevant considerations.¹⁹

6.10 Any measures taken by the Defence Legal Officer shall be designed to minimise prejudice to the interests of the Commonwealth and the risk of revealing information relating to the representation to persons outside the Commonwealth. Such measures may include:²⁰

¹⁴ See ABA Model Rules, rule 107.

¹⁵ See US Navy Rule 1.6 "Confidentiality of Information".

¹⁶ See US Navy Rule 1.6 "Confidentiality of Information".

¹⁷ See US AF Rule 1.6.

¹⁸ See US Navy Rule 1.6(b) and US AF Rule 1.13(b).

¹⁹ Ibid.

²⁰ Ibid.

- (a) asking the relevant Defence person to reconsider;
- (b) advising the relevant Defence person to obtain separate legal opinion;
- (c) advising the relevant Defence person that his, her or their personal legal interests are at risk and he, she or they should seek further advice;
- (d) seeking guidance from higher authority in the professional supervisory chain of the Defence Legal Officer; and
- (e) if warranted by the seriousness of the matter, referring the matter to the Defence Legal Officer advising the relevant Defence person superior in the chain of command or, in the case of an APS employee, of higher classification.²¹

6.11 If, despite the Defence Legal Officer's efforts under Rule 6.10, the highest authority that can act concerning the matter insists upon action or refuses to act, in what the Defence Legal Officer believes is clear violation of the law, the Defence Legal Officer shall terminate representation with respect to the matter in question and shall:

- (a) report such termination of representation, and the reasons thereof, to the Defence Legal Officer's Supervising Defence Legal Officer or a superior Supervising Defence Legal Officer; and
- (b) not participate or assist in the illegal activity.²²

6.12 Nothing in this Rule 6 shall prevent the dissemination of legal opinions or advices for training purposes or contributing to the corporate knowledge of Defence Legal Officers provided such dissemination does not disclose confidential information of a client or the identity of that client.

7 Conflicts of Interest

General Rule

7.1 A Defence Legal Officer must not, in any dealings with a client allow the interests of the Defence Legal Officer to conflict with those of the client.²³

7.2 Notwithstanding anything in this Rule 7, a Defence Legal Officer shall not be taken to have a conflict of interest because he or she is acting for a client and, at the same

²¹ See US AF Rule 1.13(b)(4).

²² See US Navy Rule 1.6(c).

²³ See NSW Solicitors' Rules, Rule 10.1.

time, provides information under an *amicus* arrangement to a person other than the Commonwealth in accordance with Rule 4.6.

Acting for persons other than the Commonwealth

7.3 Where a Defence Legal Officer is tasked to act for a client other than the Commonwealth, the Defence Legal Officer is not prohibited by Rule 7.1 from acting for that client whose interests conflict with those of the Commonwealth, provided that the Defence Legal Officer is tasked to act for that individual in accordance with these rules.

7.4 Where a Defence Legal Officer is tasked in accordance with these rules to act for a person other than the Commonwealth, a lawyer-client relationship exists between the Defence Legal Officer and that client limited to the terms of the tasking and the Defence Legal Officer shall, within the scope of his or her tasking, and subject to these Rules and the law, exercise unfettered loyalty to and professional independence in respect of that individual client.

Prohibition on accepting unauthorised benefits or duties

7.5 A Defence Legal Officer shall not accept any financial or other benefit (whether present or contingent) from acting for a client in accordance with these rules other than the lawfully authorised remuneration of a Defence Legal Officer acting in his or her official capacity or as authorised by any Chief Executive Instructions made under the *Financial Management and Accountability Act 1997* (Cth), DI(G) PERS 25-6 *Conflict of Interest and Acceptance of Offers of Gifts and Hospitality* or other similar instructions as promulgated from time to time.

7.6 A Defence Legal Officer shall not, while engaged in official duties, accept any duties under a power of attorney or any instrument, including any duty to act as trustee, executor, nominee, custodian or other duty unless authorised to do so by a Supervising Defence Legal Officer or other Defence person.

Use of Information

7.7 A Defence Legal Officer shall not use any information arising from a lawyer-client relationship to the disadvantage of the client, or to the advantage of the Defence Legal Officer, unless the client consents after full consultation, except as permitted or required by these Rules or the law.

Acting against former Clients

- 7.8 A Defence Legal Officer who has formerly acted for a client must not thereafter:
- (a) represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
 - (b) use information relating to the representation to the disadvantage of the former client, except as Rule 6.1, Rule 6.7 and Rule 17.1 would permit with respect to a client or when the information has become generally known.²⁴

8 Remuneration and Referral Fees

- 8.1 Subject to Rule 7.5, as a general rule, Defence Legal Officers shall not accept any remuneration for acting for a client in the course of their official duties or employment other than authorised pay.²⁵
- 8.2 A Defence Legal Officer may not receive any direct or indirect compensation or benefit for referring to a private practitioner (including him or herself) a matter the Defence Legal Officer first became involved with as a result of having been tasked with the matter.²⁶
- 8.3 A Defence Legal Officer in the reserve forces may, subject to Rule 8.4, accept a referral of a person other than the Commonwealth to him or her in their private practitioner capacity from another Defence Legal Officer if:
- (a) the fact that the private practitioner will charge a fee for acting for that service member is communicated to the client at the outset; and
 - (b) the client consents to the private practitioner so acting for a fee.
- 8.4 Remuneration shall not be accepted for acting for a person other than the Commonwealth where such service²⁷ may be provided by a Defence Legal Officer at the expense of the Commonwealth, unless the client is advised that the

²⁴ See US AF Rule 1.9.

²⁵ See US Navy Rule 1.5(a).

²⁶ See US Navy Rule 1.5 (Comment), US Army Rule AR 27-3, para. 4-5 and 4-7. Where a Defence Legal Officer has referred a matter to a spouse or a member of that Defence Legal Officer's household, the Defence Legal Officer shall seek ratification of that decision at the first available opportunity from a Supervising Defence Legal Officer

²⁷ Compare US Navy Rule 1.5(b).

Commonwealth would provide that service, the client consents and Rule 8.1 does not apply.

9 Prohibited Transactions

A Defence Legal Officer shall not accept by way of bond, trust, pledge, deposit or loan any property for and on behalf of a client.

10 Termination of Tasking

General Rule

10.1 Except as otherwise permitted by these Rules, a Defence Legal Officer may not cease to act for a client unless authorised or required to do so by a service tribunal or a Supervising Defence Legal Officer or other authorised Defence person.

10.2 A Defence Legal Officer must complete the work or legal service required by the Defence Legal Officer's tasking, unless:²⁸

- (a) the Defence Legal Officer and the Defence Legal Officer's client have otherwise agreed;
- (b) the Defence Legal Officer is discharged from completing the task for the client by the client;
- (c) the Defence Legal Officer's physical or mental condition materially impairs his or her ability to complete the task for the client;
- (d) withdrawal can be accomplished without material adverse effect on the interests of the client²⁹; or
- (e) the exigencies of the Defence Legal Officer's service obligations make it impractical for the Defence Legal Officer to complete the work or the legal service within a reasonable period.

Transfer and Posting

10.3 Notwithstanding Rules 10.1 and 10.2, a Defence Legal Officer may cease to act for a client other than the Commonwealth if he or she is posted or transferred to another

²⁸ See NSW Solicitors' Rules, Rule 5.1.

²⁹ See US AF Rule 1.16(b).

command or to other duties by a Supervising Defence Legal Officer or other Defence person. Where this occurs, and it is practicable to do so, the client should be informed in writing.

Part C – Communications with Others

11 Relations with other Defence Legal Officers, Private Lawyers and Clients

- 11.1 In all of their dealings with other Defence Legal Officers and legal practitioners, Defence Legal Officers should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings.³⁰
- 11.2 A Defence Legal Officer, in all of the Defence Legal Officer's dealings with other lawyers, must take all reasonable care to maintain the integrity and reputation of the Commonwealth and Defence Legal by ensuring that the Defence Legal Officer's communications are courteous and that the Defence Legal Officer avoids offensive or provocative language or conduct.³¹
- 11.3 A Defence Legal Officer who is acting on behalf of a client in any transaction or proceedings must not communicate directly with any other party for whom, to the Defence Legal Officer's knowledge, another Defence Legal Officer or lawyer is currently acting about that transaction or proceedings, unless:³²
- (a) notice of the Defence Legal Officer's intention to communicate with the other party, in default of a reply from the other Defence Legal Officer or lawyer, has been given to that Defence Legal Officer or lawyer, who has failed, after a reasonable time, to reply; or
 - (b) the communication is made for the sole purpose of informing the other party that the Defence Legal Officer has been unable to obtain a reply from that party's Defence Legal Officer or lawyer, and requests that party to contact the Defence Legal Officer or lawyer, and the Defence Legal Officer, thereafter, notifies the other Defence Legal Officer or lawyer of the communication.
- 11.4 A Defence Legal Officer shall not transfer representation of a person other than the Commonwealth to another Defence Legal Officer or lawyer unless authorised or directed to do so by a Supervising Defence Legal Officer or other authorised official. Where such authorisation and direction is given, the Defence Legal Officer shall, subject to such direction as he or she may be given, ensure the prompt and effective transfer of the matter to that other Defence Legal Officer or lawyer.

³⁰ See NSW Solicitors' Rules, Statement of Principles for Rules 25-31A.

³¹ See NSW Solicitors' Rules, Rule 25.

12 Relations with Third Parties

12.1 Defence Legal Officers should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.³³

12.2 In general Defence Legal Officers should avoid giving personal undertakings where the client is capable of giving such undertakings. However, a Defence Legal Officer who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the Defence Legal Officer to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time,³⁴ unless:

- (a) authorised or directed not to do so by a Supervising Defence Legal Officer; or
- (b) because of the exigencies of the Defence Legal Officer's service obligations it is impractical to do so.

13 Communications Generally

A Defence Legal Officer must not, in any communication with another person on behalf of a client.³⁵

- (a) represent either directly or by necessary implication to that person that anything is true which the Defence Legal Officer knows, or reasonably believes, is untrue;
- (b) make any statement that is calculated to mislead or intimidate the other person, and which significantly exceeds the legitimate assertion of the rights or entitlement of the Defence Legal Officer's client;

³² See NSW Solicitors' Rules, Rule 31.1.

³³ See NSW Solicitors' Rules, Statement of Principles for Rules 32-36.

³⁴ See NSW Solicitors' Rules, Rule 33.

- (c) threaten the institution of disciplinary proceedings against the other person in default of the person's satisfying an alleged civil liability to the Defence Legal Officer's client; or
- (d) a representation of the type referred to in paragraph (a) of this Rule includes a knowingly false or misleading representation that evidence will be led from a witness who is not present or is unlikely to be present at any proceedings to give such evidence.

³⁵ See NSW Solicitors' Rules, Rule 34.

Part D – Advocacy Rules

14 Interpretation and Application

14.1 Rules 14 to 26 shall apply where a Defence Legal Officer is tasked to act in relation to proceedings before a Service Tribunal.

14.2 For the purposes of Part D of these Rules the following definitions apply:

- (a) “allege” includes conduct constituted by settling or opening on pleadings, affidavits or witness statements, and reading or tendering affidavits or witness statements filed or prepared for the client (whether or not they were drawn or settled by the Defence Legal Officer).
- (b) “case” means the litigation or proceedings in which the Defence Legal Officer in question is tasked to appear, or the dispute in which the Defence Legal Officer is advising, as the case may be.
- (c) “compromise” includes any form of settlement of the case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.
- (d) “current proceedings” means proceedings which have not been determined, including proceedings in which there is still a real possibility of an appeal, review or other challenge to a decision being filed, heard or decided.
- (e) “forensic judgements” do not include decisions as to the commencement of proceedings, the joinder of parties, admissions or concessions of fact, amendments of pleadings or undertakings to a court, a plea in proceedings before a Service Tribunal, but do include advice given to assist the client to make such decisions.
- (f) “instructing Defence Legal Officer” means the Defence Legal Officer who is instructing another Defence Legal Officer in a case, but does not include a Defence Legal Officer appearing with another Defence Legal Officer as a joint advocate.
- (g) “legal advice” includes assistance at or presiding over meetings.
- (h) “legislation” includes all kinds of delegated legislation.
- (i) “opponent” means the Defence Legal Officer or other lawyer appearing for the party opposed to the client, or the party opposed to the client if that party is unrepresented.

- (j) “order” includes a judgement, decision or determination.
- (k) “potential proceeding” means proceedings which have not been commenced but where there is information which has been publicised that such process is imminent or where there is a very real likelihood that process will be instigated.³⁶
- (l) “professional” when used as a noun means a person actively engaged in an occupation generally recognised as being a profession, and includes accountants, architects, engineers, surveyors, town planners and valuers.

15 Duty to client

- 15.1 A Defence Legal Officer must seek to advance and protect the client’s interests to the best of the Defence Legal Officer’s skill and diligence, uninfluenced by the Defence Legal Officer’s personal view of the client or the client’s activities, and notwithstanding any threatened unpopularity or criticism of the Defence Legal Officer or any other person, and always in accordance with the law including these Rules.³⁷
- 15.2 A Defence Legal Officer shall at all times continue to represent his client’s interests to the utmost regardless of any express or implied threat or pressure from any person higher in the chain of command or (in the case of an APS employee) of higher classification, whether that threat or pressure is directed at the Defence Legal Officer or the client.
- 15.3 A Defence Legal Officer must seek to assist the client to understand the issues in the case and the client’s possible rights and obligations, if the Defence Legal Officer is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.³⁸
- 15.4 A Defence Legal Officer must inform the client or any instructing Defence Legal Officer about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the Defence Legal Officer believes on reasonable grounds that the client already has such an understanding of those

³⁶ This definition was also included at the April 2002 meeting of the ABA at the same time as the amendments to rule 59 were adopted – see footnote 2 above.

³⁷ See ABA Model Rules, rule 16.

³⁸ See ABA Model Rules, rule 17.

alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.³⁹

- 15.5 A Defence Legal Officer must advise a client who is charged with an offence under the DFDA about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.⁴⁰

16 Disinterestedness

- 16.1 A Defence Legal Officer must not act as the mere mouthpiece of the client and must exercise the forensic judgements called for during the case independently, after the appropriate consideration of the client's instructions where practicable.⁴¹

- 16.2 A Defence Legal Officer will not have breached the Defence Legal Officer's duty to the client, and will not have failed to give reasonable consideration to the client's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgements called for during the case so as to:⁴²

- (a) confine any hearing to those issues which the Defence Legal Officer believes to be the real issues;
- (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
- (c) inform the service tribunal or court of any persuasive authority against the client's case.

- 16.3 A Defence Legal Officer must not make submissions or express views to a service tribunal or court on any material evidence or issue in the case in terms that convey or appear to convey the Defence Legal Officer's personal opinion on the merits of that evidence or issue.⁴³

³⁹ See ABA Model Rules, rule 17A.

⁴⁰ See ABA Model Rules, rule 17B.

⁴¹ See ABA Model Rules, rule 18.

⁴² See ABA Model Rules, rule 19.

⁴³ See ABA Model Rules, rule 20.

17 Frankness before a Service Tribunal

- 17.1 A Defence Legal Officer must not knowingly make a misleading statement to a Service Tribunal on any matter.⁴⁴
- 17.2 A Defence Legal Officer must take all necessary steps to correct any misleading statement made by the Defence Legal Officer to a Service Tribunal as soon as possible after the Defence Legal Officer becomes aware that the statement was misleading.⁴⁵
- 17.3 A Defence Legal Officer seeking any relief in an *ex parte* application must disclose to the service tribunal all relevant matters which:
- (a) are within the Defence Legal Officer's knowledge;
 - (b) are not protected by legal professional privilege; and
 - (c) the Defence Legal Officer has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.⁴⁶
- 17.4 A Defence Legal Officer who has knowledge of matters which are within Rule 17.3(c):⁴⁷
- (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the Defence Legal Officer to disclose those matters under Rule 17.3; and
 - (b) if the client does not waive the privilege as sought by the Defence Legal Officer:
 - (1) must inform the client of the client's responsibility to authorise such disclosure and the possible consequence of not doing so; and
 - (2) must inform the service tribunal that the Defence Legal Officer cannot assure the service tribunal that all matters which should be disclosed have been disclosed to the service tribunal.
- 17.5 A Defence Legal Officer must, at the appropriate time in the hearing of the case and if the service tribunal has not yet been informed of that matter, inform the service tribunal of:⁴⁸

⁴⁴ See ABA Model Rules, rule 21.

⁴⁵ See ABA Model Rules, rule 22.

⁴⁶ See ABA Model Rules, rule 24.

⁴⁷ See ABA Model Rules, rule 24A.

⁴⁸ See ABA Model Rules, rule 25.

- (a) any binding authority;
 - (b) any authority decided by the Defence Force Discipline Appeals Tribunal or a federal court in Australia;
 - (c) any authority on the same or materially similar legislation as that in question in the case, which has not been disapproved; or
 - (d) any applicable legislation,
- of which the Defence Legal Officer is aware and has reasonable grounds to believe to be directly in point, against the client's case.

17.6 A Defence Legal Officer is not required to inform the service tribunal of matters within Rule 17.5 at a time when the opponent tells the service tribunal that the opponent's whole case will be withdrawn, unless the appropriate time for the Defence Legal Officer to have informed the service tribunal of such matters in the ordinary course has already arrived or passed.⁴⁹

17.7 A Defence Legal Officer who becomes aware of a matter within Rule 17.2 or 17.5 after judgement or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the service tribunal of that matter by:⁵⁰

- (a) where the opponent consents, a letter to the service tribunal, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or
- (b) in any other case, requesting the service tribunal to re-list the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

17.8 A Defence Legal Officer will not have made a misleading statement to a service tribunal simply by failing to disclose facts known to the Defence Legal Officer concerning the client's antecedents, when the Defence Legal Officer makes other statements concerning those matters to the service tribunal, and those statements are not themselves misleading.⁵¹

⁴⁹ See ABA Model Rules, rule 26.

⁵⁰ See ABA Model Rules, rule 27.

⁵¹ See ABA Model Rules, rule 29.

- 17.9 A Defence Legal Officer who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.⁵²
- 17.10 A Defence Legal Officer who knows that his or her client has prior convictions and who is aware that the prosecutor and the Service Tribunal is unaware of such prior convictions must not make any submission to the Service Tribunal that would lead the Service Tribunal to conclude that his or her client did not have any prior convictions.

18 Delinquent or guilty clients

- 18.1 A Defence Legal Officer whose client informs the Defence Legal Officer, during a hearing or after judgement or decision is reserved and while it remains pending, that, upon an issue which may be material, the client has lied to the service tribunal or has procured another person to lie to the service tribunal or has falsified or procured another person to falsify in any way a document which has been tendered:⁵³
- (a) must refuse to take any further part in the case unless the client authorises the Defence Legal Officer to inform the service tribunal of the lie or falsification; and
 - (b) must promptly inform the service tribunal of the lie or falsification upon the client authorising the Defence Legal Officer to do so
- but must not otherwise inform the service tribunal of the lie or falsification.
- 18.2 A Defence Legal Officer tasked to appear in proceedings before a Service Tribunal whose client confesses guilt to the Defence Legal Officer but maintains a plea of not guilty⁵⁴ may **not**⁵⁵ on that account refuse to continue to act, but:
- (a) must not falsely suggest that some other person committed the offence charged;
 - (b) must not set up an affirmative case inconsistent with the confession;

⁵² See ABA Model Rules, rule 30.

⁵³ See ABA Model Rules, rule 32.

⁵⁴ See ABA Model Rules, rule 33.

⁵⁵ See ABA Model Rules, rule 33(a) permits the barrister to return the brief. For a Legal Officer, this cannot be done.

- (c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
- (d) may argue that for some reason of law the client is not guilty of the offence charged; and
- (e) may argue that for any other reason not prohibited by (a) or (b) the client should not be convicted of the offence charged.

19 Responsible use of service tribunal process privilege

19.1 A Defence Legal Officer must, when exercising the forensic judgements called for throughout a case, take care to ensure that decisions by the Defence Legal Officer or on the Defence Legal Officer's advice to invoke the coercive powers of a service tribunal or to make allegations or suggestions under privilege against any person:⁵⁶

- (a) are reasonably justified by the material then available to the Defence Legal Officer;
- (b) are appropriate for the robust advancement of the client's case on its merits;
- (c) are not made principally in order to harass or embarrass the person; and
- (d) are not made principally in order to gain some collateral advantage for the client or the Defence Legal Officer outside of the service tribunal.

19.2 A Defence Legal Officer must not allege any matter of fact in:⁵⁷

- (a) any service tribunal document settled by the Defence Legal Officer; or
- (b) any submission during any hearing;

unless the Defence Legal Officer believes on reasonable grounds that the factual material already available provides a proper basis to do so.

19.3 A Defence Legal Officer must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the Defence Legal Officer believes on reasonable grounds that:⁵⁸

- (a) available material by which the allegation could be supported provides a proper basis for it; and

⁵⁶ See ABA Model Rules, rule 35.

⁵⁷ See ABA Model Rules, rule 36.

⁵⁸ See ABA Model Rules, rule 37.

(b) the client instructs the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

- 19.4 A Defence Legal Officer must not make a suggestion in cross-examination on credit unless the Defence Legal Officer believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.⁵⁹
- 19.5 A Defence Legal Officer may regard the opinion of any instructing Defence Legal Officer that material which is available to that instructing Defence Legal Officer is credible, being material which appears to the Defence Legal Officer from its nature to support an allegation to which Rules 19.3 and 19.4 apply, as a reasonable ground for holding the belief required by those rules.⁶⁰
- 19.6 A Defence Legal Officer who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the Defence Legal Officer believes on reasonable grounds that such disclosure is necessary for the robust and proper defence of the client.⁶¹

20 Efficient administration of justice

- 20.1 A Defence Legal Officer must seek to ensure that:⁶²
- (a) the Defence Legal Officer does work which the Defence Legal Officer is tasked to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or instructions of the service tribunal; and
 - (b) warning is given to the client, and to the opponent, as soon as the Defence Legal Officer has reasonable grounds to believe that the Defence Legal Officer may not complete any such work on time.

⁵⁹ See ABA Model Rules, rule 38.

⁶⁰ See ABA Model Rules, rule 39.

⁶¹ See ABA Model Rules, rule 40.

⁶² See ABA Model Rules, rule 41.

20.2 A Defence Legal Officer must seek to ensure that work which the Defence Legal Officer is tasked to do in relation to proceedings is done so as to:⁶³

- (a) confine the proceedings to identified issues which are genuinely in dispute;
- (b) have the proceedings ready to be heard as soon as practicable;
- (c) present the identified issues in dispute clearly and succinctly;
- (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests in the proceedings ;
and
- (e) occupy as short a time in the service tribunal as is reasonably necessary to advance and protect the client's interests in the proceedings.

21 Integrity of evidence

21.1 A Defence Legal Officer must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence that the witness should give at any stage in the proceedings.⁶⁴

21.2 A Defence Legal Officer will not have breached Rule 21.1 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.⁶⁵

21.3 Except in special circumstance, a Defence Legal Officer must not confer with, or condone another Defence Legal Officer conferring with, more than one non-expert witness including a party or client at a time, about any issue:⁶⁶

- (a) as to which there are reasonable grounds for the Defence Legal Officer to believe may be contentious at a hearing; and
- (b) which could be affected by, or could affect, evidence to be given by any of those witnesses

⁶³ See ABA Model Rules, rule 42.

⁶⁴ See ABA Model Rules, rule 43.

⁶⁵ See ABA Model Rules, rule 44.

⁶⁶ See ABA Model Rules, rule 46.

- unless the Defence Legal Officer believes on reasonable grounds that special circumstances require such a conference.
- 21.4 A Defence Legal Officer must not confer with any witness including a party or client called by the Defence Legal Officer on any matter related to the proceedings while that witness remains under cross-examination, unless:⁶⁷
- (a) the cross-examiner has consented beforehand to the Defence Legal Officer doing so; or
 - (b) the Defence Legal Officer:
 - (1) believes on reasonable grounds that special circumstances require such a conference; and
 - (2) has informed the cross-examiner and the service tribunal beforehand of the Defence Legal Officer's intention to do so.
- 21.5 A Defence Legal Officer must not take any step to prevent or discourage prospective witnesses from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.⁶⁸
- 21.6 A Defence Legal Officer will not have breached Rule 21.5 simply by telling a prospective witness or a witness that the witness is not the property of either side and need not agree to confer or to be interviewed.⁶⁹

22 Duty to opponent

- 22.1 A Defence Legal Officer must not knowingly make a false statement to the opponent in relation to the proceedings [GLOBAL] (including its compromise).⁷⁰
- 22.2 The Defence Legal Officer must take all necessary steps to correct any false or materially incorrect statement unknowingly made by the Defence Legal Officer to the opponent as soon as possible after the Defence Legal Officer becomes aware that the statement was false or materially incorrect.⁷¹

⁶⁷ Compare ABA Model Rules, rule 48. There is no provision made for informing the cross-examiner after the fact, and (b)(2), unlike the ABA Model Rules, includes a requirement to inform the tribunal.

⁶⁸ See ABA Model Rules, rule 49.

⁶⁹ See ABA Model Rules, rule 50.

⁷⁰ See ABA Model Rules, rule 51.

⁷¹ See ABA Model Rules, rule 52.

- 22.3 A Defence Legal Officer will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the Defence Legal Officer by the opponent.⁷²
- 22.4 A Defence Legal Officer must not deal directly with the opponent's client unless:⁷³
- (a) the opponent has previously consented; or
 - (b) the Defence Legal Officer believes on reasonable grounds that -
 - (1) the circumstances are so urgent as to require the Defence Legal Officer to do so;
 - (2) the dealing would not be unfair to the opponent's client; and
 - (3) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.
- 22.5 A Defence Legal Officer must not, outside an *ex parte* application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the service tribunal concerning any matter of substance in connection with current proceedings.⁷⁴

23 Integrity of hearings

- 23.1 Subject to Rule 23.2, a Defence Legal Officer must not publish or take any step towards the publication of any material concerning any current or potential proceeding which:⁷⁵
- (a) is inaccurate;
 - (b) discloses any confidential information; or
 - (c) appears to or does express the opinion of the Defence Legal Officer on the merits of the current or potential proceeding or on any issue arising in the proceeding, other than in the course of genuine educational or academic discussion on matters of law.

⁷² See ABA Model Rules, rule 53.

⁷³ See ABA Model Rules, rule 54.

⁷⁴ See Compare ABA Model Rules, rule 56, which includes two exceptions – where the tribunal has itself communicated with the lawyer or the opponent has consented beforehand. As such, ABA Model Rules 57 and 58 have also been excluded.

- 23.2 A Defence Legal Officer shall not publish or assist the publishing of material concerning a current proceeding before a Service Tribunal.⁷⁶
- 23.3 A Defence Legal Officer will not have breached Rule 23.2 simply by advising the client about whom there has been published a report relating to the case, and who has sought the Defence Legal Officer's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.⁷⁷
- 23.4 A Defence Legal Officer must not in the presence of any of the parties or their assigned Defence Legal Officers deal with a service tribunal, or deal with any Defence Legal Officer appearing before him or her when he or she is a service tribunal member, on terms of informal personal familiarity which may reasonably give the appearance that the Defence Legal Officer appearing has special favour with the service tribunal.⁷⁸

24 Prosecutor's duties

- 24.1 This Rule 24 applies in disciplinary proceedings before any service tribunal.
- 24.2 A prosecutor must fairly assist the service tribunal to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the service tribunal, and must seek to assist the service tribunal with adequate submissions of law to enable the law properly to be applied to the facts.⁷⁹
- 24.3 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.⁸⁰
- 24.4 A prosecutor must not, by language or other conduct, seek to inflame or bias the service tribunal against the accused.⁸¹
- 24.5 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.⁸²

⁷⁵ See ABA Model Rules, rule 59(a).

⁷⁶ Note that this is a departure from ABA Model Rules, rule 59(b) which regulates what can and cannot be said to the press.

⁷⁷ See ABA Model Rules, rule 60.

⁷⁸ See ABA Model Rules, rule 61.

⁷⁹ See ABA Model Rules, rule 62.

⁸⁰ See ABA Model Rules, rule 63.

⁸¹ See ABA Model Rules, rule 64.

24.6 Subject to an order or instruction from a Service Tribunal, a prosecutor must, as soon as practicable, disclose to the opponent all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:⁸³

- (a) such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person;
- (b) the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a Defence Legal Officer, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person; and
- (c) the material, and the reasons for its non-disclosure, is provided to the Director of the Defence Counsel Services and the Director of Military Prosecutions.

24.7 A prosecutor who has not disclosed material to the opponent under Rule 24.6 must consider whether:⁸⁴

- (a) the defence of the accused could suffer by reason of such non-disclosure;
- (b) the charge against the accused to which such material is relevant should be withdrawn; and
- (c) the accused should be faced only with a lesser charge to which such material would not be so relevant.

24.8 A prosecutor must either call as part of the prosecution's case or make available for cross-examination all witnesses:⁸⁵

- (a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;
- (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

⁸² See ABA Model Rules, rule 65.

⁸³ See ABA Model Rules, rule 66.

⁸⁴ See ABA Model Rules, rule 66A.

⁸⁵ See ABA Model Rules, rule 66B.

(c) whose testimony or statements were used in the service tribunals of any preliminary or summary authority hearing in the same case; and

(d) from whom statements have been obtained in the preparation or conduct of the prosecution's case,

unless the opponent consents to the prosecutor not calling a particular witness.

24.9 A prosecutor who has reasonable ground to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:⁸⁶

(a) inform the opponent if the prosecutor intends to use the material; and

(b) make available to the opponent a copy of the material if it is in documentary form.

24.10 A prosecutor must not confer with or interview any accused except in the presence of the legal representative of the accused.⁸⁷

24.11 A prosecutor must not inform the service tribunal or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.⁸⁸

24.12 A prosecutor who has informed the service tribunal of matters within Rule 24.11, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the service tribunal of it when the proceeding is next before the service tribunal.⁸⁹

24.13 Where invited to address the service tribunal on an appropriate sentence, a prosecutor must not seek to persuade the service tribunal to impose a vindictive sentence or a sentence of a particular magnitude, but:⁹⁰

(a) must correct any error made by the opponent in address on sentence;

(b) must inform the service tribunal of any relevant authority or legislation bearing on the appropriate sentence;

⁸⁶ See ABA Model Rules, rule 67.

⁸⁷ See ABA Model Rules, rule 68.

⁸⁸ See ABA Model Rules, rule 69.

⁸⁹ See ABA Model Rules, rule 70.

⁹⁰ See ABA Model Rules, rule 71.

- (c) must assist the service tribunal to avoid appellable error on the issue of sentence;
- (d) may submit that a custodial or imprisonment sentence is appropriate; and
- (e) may inform the service tribunal of an appropriate range of punishments both generally and within specific punishments, including a period of imprisonment, by reference to relevant sentencing guidelines and reviewing or appellate authority.

25 Allocation of Tasking

- 25.1 Subject to Rule 25.2, a Defence Legal Officer must not refuse to accept a tasking to act for a client including a person other than the Commonwealth.
- 25.2 Where a Defence Legal Officer is offered, or invited to apply for, a tasking to act for a person other than the Commonwealth in proceedings before a Service Tribunal, the Defence Legal Officer must refuse to accept that offer and must not make that application if:⁹¹
- (a) the Defence Legal Officer has information which is confidential to any other person in the proceeding other than the prospective client, and:
 - (i) the information may, as a real possibility, be helpful to the prospective client's case; and
 - (ii) the person entitled to the confidentiality has not consented to the Defence Legal Officer using the information as the Defence Legal Officer thinks fit in the case;
 - (b) the tasking is to appear on an appeal or at a rehearing and the Defence Legal Officer was a witness in the case at first instance;
 - (c) the Defence Legal Officer has a material financial or property interest in the outcome of the case;
 - (d) the tasking is to appear in a contested hearing before the Defence Legal Officer's parent, sibling, spouse or child or a member of the Defence Legal

⁹¹ Compare ABA Model Rules, rule 87. Some parts of rule 87, such as those dealing with former judges etc. appearing in the same court, are not applicable to the ADF. It is the experience of the ADF legal services that a Supervising Legal Officer would not assign a matter or client to a Legal Officer if any of these conflicts arose. As such, no provision is made for refusing assignments that a Legal Officer is otherwise required to accept.

Officer's household, or before a service tribunal of which such a person is a member;

- (e) the tasking may, as a real possibility, require the Defence Legal Officer to cross-examine or criticise a friend or relation;⁹²
- (f) the Defence Legal Officer has reasonable grounds to believe that there is a real possibility that the Defence Legal Officer may cease to be a disinterested advocate by either:
 - (i) becoming a witness in the case; or
 - (ii) having to defend his or her personal or professional conduct against criticism;⁹³
- (g) the Defence Legal Officer is appearing in a contested hearing before a service tribunal constituted by a person whose relationship with the Defence Legal Officer is such as may give rise to a reasonable apprehension of bias; or
- (h) the Defence Legal Officer is tasked to appear for two or more parties in any case, and has determined (which determination must be made by the Defence Legal Officer as soon as possible) that the interests of the clients may, as a real possibility, conflict.⁹⁴

25.3 Where a Defence Legal Officer has been tasked to act for a client and becomes aware of any of the facts or circumstances set out in Rule 25.2, the Defence Legal Officer must inform a Supervising Defence Legal Officer of those facts (subject to any duty of confidentiality), and may not continue to act unless authorised to do so in writing by a Supervising Defence Legal Officer.

25.4 A Supervising Defence Legal Officer shall not consent to the retasking of the matter to another Defence Legal Officer if it involves a charge of a disciplinary offence, unless:⁹⁵

- (a) the Supervising Defence Legal Officer believes on reasonable grounds that:
 - (i) the circumstances are exceptional and compelling; and

⁹² See ABA Model Rules, rule 91(d).

⁹³ See ABA Model Rules, rule 101.

⁹⁴ See ABA Model Rules, rule 108.

⁹⁵ See ABA Model Rules, rule 93, adapted here to reflect the fact that briefs are assigned.

(ii) there is enough time for another Defence Legal Officer to take over the case properly before the hearing; or

(b) the client has consented after the Defence Legal Officer has clearly informed the client of the circumstances in which the Defence Legal Officer seeks to return the brief and of the terms of this Rule 25.4.

25.5 Where a Supervising Defence Legal Officer is informed by a Defence Legal Officer of facts falling under Rule 25.2(e), the Supervising Defence Legal Officer shall endeavour to withdraw the tasking and task the matter to another Defence Legal Officer unless he or she is satisfied that:

(a) allegations which involve the Defence Legal Officer in that way have been raised in order to remove the Defence Legal Officer from the case; and

(b) those allegations can be met without materially diminishing the Defence Legal Officer's disinterestedness.

25.6 A Defence Legal Officer must promptly inform a Supervising Defence Legal Officer as soon as the Defence Legal Officer has reasonable grounds to believe that there is a real possibility that the Defence Legal Officer will be unable to appear or to do the work required by the tasking in the time stipulated by the tasking or within a reasonable time if no time has been stipulated.⁹⁶

26 Supervising Defence Legal Officers & Legal Offices

Compliance of Subordinates with Rules

26.1 A Supervising Defence Legal Officer with direct professional supervisory authority over another Defence Legal Officer shall make reasonable efforts to ensure:

(a) that the other Defence Legal Officer conforms to the Rules;⁹⁷ and

(b) that non-lawyers under supervision,⁹⁸ do not act so as to further any breach of, the Rules

⁹⁶ See ABA Model Rules, rule 98.

⁹⁷ See US AF Rule 5.1(b)

⁹⁸ See US Navy Rule 5.3.

Supervisor Responsibility

- 26.2 A Supervising Defence Legal Officer will be responsible for a subordinate Defence Legal Officer's violation of these Rules if that Supervising Defence Legal Officer:⁹⁹
- (a) orders or, with specific knowledge of the specific conduct, ratifies the conduct involved; or
 - (b) knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.¹⁰⁰
- 26.3 Subordinate Defence Legal Officers may seek assistance and advice from Supervising Defence Legal Officers on ethical issues arising under these Rules.
- 26.4 If the question confronting a subordinate Defence Legal Officer under Rule 26.3 can be answered in only one way, the subordinate Defence Legal Officer must comply with the Rules even if a Supervising Defence Legal Officer directs a contrary course of conduct, and remains bound by the Rules, including the need to exercise unfettered loyalty and professional independence in respect of a client other than the Commonwealth to whom the Defence Legal Officer is tasked in accordance with Rule 4.3.¹⁰¹
- 26.5 A Defence Legal Officer may seek advice from the Professional Rules Committee. Notwithstanding Rule 26.4, where a Defence Legal Officer gives full disclosure of all relevant facts and reasonably relies on such advice, no adverse action under these Rules will be taken against the Defence Legal Officer.

⁹⁹ See US Navy Rule 5.1.

¹⁰⁰ See US AF Rule 5.1(c).

¹⁰¹ US Navy Rule 5.4.

Part E – Committees

27 Professional Standards Committee

The Professional Standards Committee

- 27.1 A Professional Standards Committee (PSC) shall be appointed in accordance with and for the purposes set out in this Rule 27.
- 27.2 The PSC will consist of:
- (a) a chairperson, being such person as the HDL may appoint;
 - (b) as Secretary of the committee, the National Practice Manager (NPM); and
 - (c) such other person as the HDL may appoint from time to time as a member of the PSC.
- 27.3 The senior military officer holding the position of HDL or DGADFLS, as Appointing Officer under the Regulations, may by instrument of appointment under Regulation 70A:
- (a) appoint the Chairperson of the PSC as an Inquiry Officer under Regulation 69(1):
 - (i) to investigate and report as directed by the instrument of appointment on, *inter alia*, compliance by Defence Legal Officers with these Rules including where such members are the subject of a complaint as outlined in Rule 29; and
 - (ii) to deal with any question referred to the PSC as to the interpretation or application of the Rules otherwise than arising from a complaint under Rule 29; and
 - (b) appoint each other member of the PSC as an inquiry assistant under Regulation 69(2).
- 27.4 Where a Defence Legal Officer when in the Office of the Director of Military Prosecutions, the Office of the Australian Military Court or Judge Advocate General or the Office of the Inspector General of the ADF or when performing Defence Counsel Services is the subject of a complaint as outlined in Rule 29 the Appointing Officer shall not appoint the PSC to inquire into the complaint without the express

written authority of the relevant Supervising Defence Legal Officer as outlined in Rule 27.16 (a)-(d).

- 27.5 When appointed under the Regulations the PSC shall conduct itself in accordance with the Regulations.
- 27.6 During the course of their appointment, the Chairperson of the PSC shall report on the outcome of any inquiry into complaints of non-compliance by Defence Legal Officers with these Rules.
- 27.7 The report of the PSC in respect of any complaint against a Defence Legal Officer shall comply with Regulation 75 and shall, in particular:
- (a) subject to subparagraphs (b) and (c), set out any factual findings and the basis of those findings;
 - (b) not make a finding that any person has committed a criminal offence or disciplinary offence;
 - (c) where it is considered that a disciplinary or criminal offence may have been committed, the report shall¹⁰²:
 - (i) refer to the facts which support that belief;
 - (ii) recommend no more than that the conduct of the person or persons under consideration should be considered by the Appointing Officer for referral to the Service or civilian police for investigation; and
 - (iii) not recommend that a particular charge or charges be preferred ; and
 - (d) make recommendations as to how the complaint should further be dealt with, including no further action, counselling, a warning, other administrative action or, subject to subparagraphs (b) and (c), a criminal or disciplinary investigation.
- 27.8 The Chairperson shall make recommendations in a report under Rule 27.7 consistent with the majority of the members of the PSC (which majority may but need not include the chairperson). Where no majority of the members of the PSC can agree as to the recommendations to be made, the Chairperson shall report the recommendations of each of the members of the PSC.

¹⁰² See ADFP 6.1.4, 6F-3, para k.

The Complaints Sub-Committees

- 27.9 The PSC may, from time to time, appoint and delegate its functions to a three person sub-committee to be known as the Complaints Sub-Committee (CSC), for the purposes of evaluating any complaint lodged against a Defence Legal Officer under Rule 29 and reporting on that complaint to the Professional Standards Committee in accordance with Rule 27.7.
- 27.10 Nothing in Rule 27.9 shall relieve the Chairperson or other members of the PSC of their obligations under this Rule.
- 27.11 The senior military officer holding the position of HDL or DGADFLS as Appointing Officer under the Regulations , may by instrument of appointment under Regulation 70A:
- (a) appoint any member of the CSC as an inquiry assistant under Regulation 69(2);
 - (b) to assist the Chairperson of the PSC as the Chairperson may direct.
- 27.12 The members of any CSC shall be in such number as the PSC may direct.
- 27.13 There may be more than one CSC constituted at any given time.

Dealing with Reports from the PSC to the Appointing Authority

- 27.14 HDL or DGADFLS as Appointing Authority, as the case may be, shall deal with any report from the PSC in accordance with the Regulations.
- 27.15 In addition to such persons to whom the Appointing Authority may be required to provide a copy of the report of the PSC in relation to an individual complaint, the Appointing Authority may, subject to Regulation 63, provide a copy of the report to:
- (a) the Defence Legal Officer the subject of the complaint; and
 - (b) the Supervising Defence Legal Officer responsible for the Defence Legal Officer at the time the report is provided to the Defence Legal Officer under paragraph (a).
- 27.16 For the purposes of Rule 27.15(b), the Supervising Defence Legal Officer shall be deemed to be:
- (a) in relation to Defence Legal Officers within the Office of the Director of Military Prosecutions, the Director of Military Prosecutions;

- (b) in relation to Defence Legal Officers not performing judicial functions within the Office of the Australian Military Court or Judge Advocate General, the Chief Military Judge;
- (c) in relation to Defence Legal Officers within the Office of the Inspector General of the ADF, the Inspector General of the ADF;
- (d) in relation to Defence Legal Officers performing Defence Counsel Services, the Director of Defence Counsel Services; and
- (e) in any other case, the relevant Supervising Defence Legal Officer.

28 Rules Committee

- 28.1 There shall be a Professional Rules Committee (PRC) that must monitor and review these rules, receive and process such comments and suggestions made by Defence Legal Officers and other legal organisations and individuals as may from time to time be made to it and recommend appropriate amendments including discussion as to possible amendments as may be required for approval by HDL.
- 28.2 The PRC is to comprise 3 persons as appointed in writing from time to time by the HDL.
- 28.3 Any Defence Legal Officer or Supervising Defence Legal Officer may request from the PRC an opinion on the interpretation or application of these Rules (the 'request'), other than where:
- (a) a complaint has been made under Rule 29 in relation to the conduct of that Defence Legal Officer, the Defence Legal Officer is aware that such a complaint is to be made, or the Defence Legal Officer has advised a person in accordance with Rule 29.15 in relation to certain conduct; and
 - (b) the request is made in relation to such conduct.
- 28.4 The PRC may in its discretion provide an advice in answer to the request:
- (a) at all; or
 - (b) to the Defence Legal Officer alone; or
 - (c) by way of a general advice to all Defence Legal Officers for publication or dissemination by the NPM, which advice shall not, except where the Defence

Legal Officer consents, identify the Defence Legal Officer requesting the advice.

Part F – Complaints

29 Complaints

29.1 Any complaint of a breach of these Rules shall be made or referred to the NPM and shall be made in or substantially in the form scheduled to these Rules.

29.2 No complaint of a breach of these Rules may be dealt with other than in accordance with this Rule 29, except by way of any Quick Assessment.

Dealing with a complaint

29.3 Upon receipt of a complaint, the NPM shall:

- (a) conduct a Quick Assessment, whether or not such a Quick Assessment has already been conducted; and
- (b) subject to Rule 29.4, notify any Defence Legal Officer the subject of the complaint of the name of the complainant and the details of the complaint.¹⁰³

29.4 The NPM shall not be required to notify any Defence Legal Officer the subject of the complaint if the NPM is of the opinion that such notification may:¹⁰⁴

- (a) prejudice the investigation of the complaint; or
- (b) prejudice an investigation by the Service or Civilian Police, or other law enforcement body of any matter with which the complaint is concerned, or
- (c) place the complainant or another person at risk of intimidation or harassment, or
- (d) be contrary to any part of the Defence Whistleblower Scheme; or
- (e) prejudice pending Service Tribunal or civilian court proceedings,

but the NPM may:

¹⁰³ *Legal Profession Act 2004* (NSW), s 508(1); *Legal Profession Act 2004* (Vic), s 4.2.8.

¹⁰⁴ *Legal Profession Act 2004* (NSW), s 508(3)-(4). Note that the Victorian LPA does not contain this provision. Compare *Legal Profession Act 2004* (Qld), s 261.

(f) delay provision of the complaint until such time as the NPM decides it is appropriate to do so; and/or

(g) notify any such Defence Legal Officer merely of the general nature of the complaint.

- 29.5 Where, upon conducting a Quick Assessment, the NPM is of the opinion and belief that an offence under the DFDA or civil law has been committed, subject to the Regulations, the NPM shall refer that matter or that part of the matter to the Service or Civilian Police, as appropriate.
- 29.6 Where, upon conducting a Quick Assessment, the NPM is of the opinion and belief that the complaint, or part thereof, does not give rise to an offence under the DFDA or civil law, the NPM shall, subject to Rule 29.7, refer the complaint to the Professional Standards Committee (PSC) established under Rule 27.
- 29.7 Where a Defence Legal Officer when in the Office of the Director of Military Prosecutions, the Office of the Australian Military Court or Judge Advocate General or the Office of the Inspector General of the ADF or when performing Defence Counsel Services is the subject of a complaint as outlined in Rule 29 the NPM shall not refer the complaint to the PSC to inquire into the complaint without the express written authority of the relevant Supervising Defence Legal Officer as outlined in Rule 27.16 (a)-(d).
- 29.8 Where the relevant Supervising Defence Legal Officer as outlined in Rule 27.16 (a)-(d) does not give written authority to refer the complaint to the PSC the NPM is to notify the person who lodged the complaint accordingly.
- 29.9 Prior to forming his or her opinion or belief the NPM may seek advice from the Defence General Counsel or another person nominated by the Defence General Counsel.
- 29.10 Where, upon conducting a Quick Assessment, the NPM is of the opinion that it is appropriate to do so, the NPM may require the complainant to do either or both of the following:¹⁰⁵
- (a) give further information about the complaint; and
 - (b) verify the complaint, or any further information, by statutory declaration.

¹⁰⁵ *Legal Profession Act 2004* (NSW), s 507; *Legal Profession Act 2004* (Vic), s 4.2.9; *Legal Profession Act 2004* (Qld), s 257.

*Time Limitation*¹⁰⁶

- 29.11 A complaint may be made about conduct of a Defence Legal Officer irrespective of when the conduct is alleged to have occurred.
- 29.12 A complaint cannot be dealt with (otherwise than to refer it to the Service or Civilian Police as appropriate, but including referring the complaint to the PSC) if the complaint is made more than 3 years after the conduct is alleged to have occurred, unless a determination is made under this Rule that:
- (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
 - (b) the complaint involves an allegation of a serious breach of these Rules and it is in the public interest to deal with the complaint.
- 29.13 A determination under Rule 29.12 is to be made by the HDL on advice from the NPM.

*Withdrawal of complaint*¹⁰⁷

- 29.14 If notice of withdrawal of complaint is given to the HDL, DGADFLS, NPM or the PSC, as the case may be, which notice must be in writing or, if not in writing, by a note or record evidencing such notice a copy of which is to be provided to the complainant, the HDL, DGADFLS, NPM or PSC may, on its own initiative, continue to deal with the complaint.

Advice by Defence Legal Officer to clients in respect of complaints procedure

- 29.15 Where a complaint is made to a Defence Legal Officer by a client that the Defence Legal Officer is in breach of these Rules, the Defence Legal Officer shall refer the client or the client's authorised representative to this Rule.

¹⁰⁶ *Legal Profession Act 2004* (NSW), s 506 (3 years). Cf. *Legal Profession Act 2004* (Vic), s 4.2.7 (6 years); *Legal Profession Act 2004* (Qld), s 258 (3 years).

¹⁰⁷ *Legal Profession Act 2004* (Qld), s 259. Under the NSW legislation, the investigation comes to an end: s 512. The Victorian legislation is silent.

Schedule

STAFF – IN -- CONFIDENCE (WHEN COMPLETED)

FORMAT FOR REFERRAL OF A BREACH OF PROFESSIONAL RULES BY DEFENCE LEGAL OFFICER

I, (insert full name and, if a member of the ADF or APS, include your service number and rank or position) of (insert full address and phone number) in the State of (insert state of residence) state:

(Insert details of referral. When describing the referral please see notes below. Attach any supporting documentation if relevant)

(Signature of person making the referral)
(Print name of person making the referral)

(Signature of Witness)
(Print Name of Witness)

Insert Date

NOTES:

- (1) The referral should be expressed in plain English in a clear and logical manner.
- (2) The referral should be specific as to the grounds of concern, rather than being general in nature.
- (3) The referral should, where available and relevant be accompanied by any supporting documentation.
- (4) Emotive statements should be avoided.
- (5) Events should be recorded in chronological order.
- (6) While there is no absolute time frame for the submission of a referral, preferably it should be submitted as soon as practicable after the event(s) which gave rise to the referral.
- (7) A referral in this form will not be handled as a Redress of Grievance under DI (G) PERS 34-1. A referral made of a beach of professional standards must be marked with the privacy caveat 'STAFF-IN-CONFIDENCE' and forwarded to the National Practice Manager, Defence Legal RGC-3-114, Department of Defence, Canberra ACT 2600.
- (8) On receipt of the referral the National Practice Manager shall acknowledge receipt of the referral within 14 days.
- (9) The referral shall be considered within 28 days of the sending of the acknowledgement.