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Corporate Services &
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Minute
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WGCDR D.C.Malcolmson 8140187 RAAFSR (Legal)
A/DDG Reserves

DGADFLS DIRECTIVE 02/2005

DIRECTIVE TO DDG RESERVES TO DEVELOP A NEW PAYMENT SCHEME FOR RESERVE LEGAL OFFICERS

References:

- A. Joint Directive No. 30/2002 by Chief of the Defence Force and Secretary, Department of Defence to Director General, The Defence Legal Service
- B. Defence Determination 2003/21
- C. Acumen Alliance – Board of Inquiry Management Audit, dated Oct 03
- D. Independent Review of the Defence Legal Service (McClelland Report), dated 31 Mar 03
- E. DGADFLS e-mail to TDLS-National of 3 Nov 04
- F. Defence Determination 2002 (Employer Support Payments), dated 1 Jul 03
- G. DI(G) PERS 05-37 *Australian Defence Force Reserves Employer Support Payment Scheme – revised arrangements* of 27 Jun 03

1. Consistent with Ref A, I direct you to evaluate, draft, develop an implementation plan and gain approval for a new payment scheme for Reserve legal officers. The new scheme will replace the current legal officer sessional fee scheme established by Defence Determination 2003/21 (the Determination) (Ref B).

Background

2. Currently Reserve legal officers are paid either at training day rates or at sessional rates depending on the type of work performed and the eligibility of the Reserve legal officer.

3. There are a number of problems with the current scheme that support the introduction of a new system. This approach is also supported by recent reviews (Refs C and D). By way of example, the Determination limits the categories of eligible 'sessional' work, the categories of Reserve legal officers eligible to claim 'sessional' rates, and the circumstances in which eligible Reserve legal officers can claim

‘sessional’ rates. More specifically, the Determination does not satisfy Defence and Reserve legal officers’ needs for the reasons outlined below.

4. Inequitable application to Reserve legal officers. The Determination effectively limits the pool of specialist legal officers that can be engaged in taskings that warrant payment of a sessional fee. It is limited to partners, sole practitioners, senior associates, and barristers. Many other Reserve legal officers (private, government and corporate) who do not fit into those categories are not entitled to claim the rate and the Reserve training day rate does not adequately compensate them for their qualifications, skills and experience. For those other Reserve legal officers who are not in receipt of paid military leave, the Reserve training day rate does not adequately compensate them or their employer for the interruptions to their on-going work commitments, loss of leave entitlements, and loss of salary and benefits. These issues are problematic because these other Reserve legal officers often hold specialist skills in advocacy, corporate governance, government policy development and administration and administrative law - skills that are often in great demand for short periods of time and for specific specialist projects and tasks. The Acumen Alliance report on the Board of Inquiry Management Audit (Ref C) noted at page 11: "*...the current determination also allows for two members with similar skills and experience, but in different employment situations, to be paid significantly different rates to perform the same role. This fact creates friction. The inequities inherent in the determination also appear to dissuade some eligible reserve members from participating in non sessional fee paying activities...*".

5. Facilitation of professional development. A role of Defence Legal is to encourage professional development of Reserve legal officers. The limiting nature of the Determination does not facilitate release of Reserve legal officers from their employment to gain the experience and expertise required to confidently perform their military duties.

6. Inflexibility of application. The Determination is inflexible in its application because it does not permit the undertaking of sessional work outside of the normal working week, Monday to Friday, and during the hours of 0900 to 1700. These restrictions have proven to be problematic and do not reflect the realities of modern legal practice. For example, they discourage Reserve legal officers from working on weekends, public holidays and out of hours. This is not just a quality of life issue as many Reserve legal officers have high overheads and consequently need to take additional work during those periods. They may be attracted to more lucrative work rather than payment at the Reserve training day rate as required under the Determination. Moreover, the Determination does not recognise the current operational imperative of the ADF, which often requires matters to be completed in the shortest possible time and therefore needs full commitment from the member outside the prescribed 0900 to 1700 period. Examples of problems created by this artificial construct are commonplace.

7. Expanding role of Reserve legal officers. The Determination fails to accommodate a number of new and emerging demands on legal officers. Those roles include the use of legal officers as specialist advisers to investigating officers, as inquiry assistants, and as mediators and negotiators in Alternative Dispute Resolutions. Another developing trend is to employ legal officers as investigators in sensitive and high profile investigations which involve matters which may ultimately be the subject of legal dispute including harassment complaints, fraud allegations, and matters of a complex and difficult nature. These roles are emerging as a direct result of the ADF command structure demanding more participation of legal officers in a wide range of activities.

8. Preparation work. The Determination does not allow for the remuneration of preparation time in relation to trials and Boards of Inquiry. This does not reflect the current fee practice employed in all jurisdictions in Australia, whereby barristers may be paid for preparation work.

9. Independence of JA/DFM/s154 reporting officers. There has been a heightened awareness of the need for staff performing functions for the Judge Advocate General (JAG) to be free of any perception of command control. The Determination involves approval processes associated with command control and, therefore, requires a change.

10. Ease and transparency of administration. The uncertain, unclear and inflexible nature of the Determination has created considerable friction in the administration of Reserve legal officers. It has led to criticism, complaints of inconsistent application and unfairness, as well as creating a perception of cronyism. This has resulted in an enormous administrative overload for Defence Legal personnel, including both permanent and Reserve legal officers. The requirement to seek AGD advice in setting sessional rates for duty in excess of five days has proven particularly problematic due to the delay and workload with which it is associated.

11. Disincentive to gain experience in other areas. The nature of the Determination acts to discourage Reservists from undertaking work in those areas which do not attract a sessional fee payment. The cost of maintaining chambers and staff acts as a significant financial disincentive for some Reserve legal officers to undertake training day work.

12. Attorney-General's Department advice. Recent advice from the Attorney-General's Department is that rates of pay for work exceeding five days in duration should be discounted by 40% to account for taxation and GST.¹ This has created a significant difference in rates of pay under the Determination for work of less than five days duration and that of work exceeding five days. This has acted as a disincentive for Reserve legal officers to perform work on longer projects. Many of these projects, such as the BOI in respect of the recent Sea King accident, are complex and high profile matters that by their very nature demand the engagement of our more experienced Reserve legal officers.

¹ DL is in the process of seeking a review of this decision

13. Defence Legal convened a workshop on 29 Oct 04 to discuss the alleviation of these problems by way of the introduction of a new payment scheme for Reserve legal officers that would meet the needs of both Defence and Reserves. The workshop was attended by DGADFLS, DDGRES(ADFLS), Heads of Corps, the National Practice Manager, General Counsel and the Special Adviser to DGADFLS. After much deliberation it was determined by all present that Defence Legal should further investigate the introduction of a new payment scheme for Reserve legal officers. In the meantime, the existing Determination 2003/21 is to remain extant but with clearer guidelines and guidance for more effective administration. All legal officers have been informed of the proposed new scheme (Ref E).

New Scheme

14. Any new payment scheme for Reserve legal officers must provide an equitable, transparent, fair and financially responsible means of payment for Reserve legal officers. As discussed and decided at the workshop, the preferred option was for the scheme to be similar to the Employer Support Payment Scheme (Refs F and G) but with the following major differences:

- a. Compensation entitlement would arise upon one day of service, rather than five days of continuous service;
- b. A qualifying period for payment of compensation will remain (probably 14 days) but will be applied in a manner that is conducive to the nature and frequency of work performed by Reserve legal officers. The qualifying period days could be based on the previous year of service, rather than the current year. In addition, the requirement that work needs to be in blocks of five days of continuous service could be removed; and
- c. It would require a separate Determination by the Minister and, therefore, necessary approvals from stakeholders external to Defence Legal.

15. In particular, the new scheme is to apply to employers and the self-employed, whether as sole practitioner or partner. Provisions permitting payment above the Employer Support Payment Scheme rate, currently about \$950 per week, must be available. In particular the new scheme must deliver fair compensation for Reserve legal officers which recognises the economic costs to them of performing ADF service. It must also comply with Commonwealth policy requirements on payment for legal services, including aspects related to the taxation of such payments.

Scope of Project

16. The project for a new scheme of payment for Reserve legal officers has five stages as follows:

a. Stage 1 – Initial Planning

- (1) devising a plan for communicating with permanent and Reserve legal officers on the development of the new scheme; and
- (2) identification of potential parties to comprise a working group to assist in the development of the new scheme.

b. Stage 2 - Evaluation

- (1) with the assistance of a working group, representing the interests of the Reserve and Defence Legal, analyse other payment schemes in Defence and develop options for a new payment scheme for Reserve legal officers;²
- (2) using the problems with the current system (identified above in paragraphs 3-12) as criteria against which to evaluate the options (including a preferred option) for the proposed new scheme, evaluate the options;
- (3) assess the financial and human resource implications of the various options (including a preferred option) of a new payment scheme;
- (4) identify and confirm the means of funding the various options (including the preferred option) for the proposed new scheme, including the transfer of funds from the existing scheme or fund sites for this purpose;
- (5) carry out the communication plan developed during Stage 1; and
- (6) develop a strategy for gaining support of the proposed new scheme from relevant stakeholders.

c. Stage 3 - Drafting

Draft a section 58B determination on the proposed new scheme in consultation with Directorate Military Salary and Allowances – Policy (DMSA-P). A DI(G) or detailed guidelines on the new scheme should also be drafted, whichever is deemed most appropriate.

² The scheme described in para 14 above is to be one of the models formally evaluated

d. Stage 4 – Development of Implementation Plan

Develop an implementation plan that will facilitate a smooth transition from the sessional fee payment scheme to the new scheme at some future date (for example, 1 Jul 06). This will include a plan for communication of the new scheme to stakeholders external to Defence Legal, as well as a training plan for Defence Legal personnel. An evaluation package should also be developed for the purpose of assessing effectiveness of the preferred option twelve months after its introduction.

e. Stage 5 – Approval

Seek, on my behalf, all necessary approvals for the preferred option.

Consultation/Liaison

17. During the scope of the project you are to consult appropriately with at least the following:

- a. Head Reserve Policy (HRP);
- b. DMSA-P (POC MAJ S. Wilson, LCDR H. Cameron);
- c. stakeholders external to Defence Legal, including Service Chiefs or their representatives in the personal area, CFO, CSIG–CM and JAG (CJA);
- d. those permanent and Reserve legal officers representing the Bar, private practice and employed practitioners identified in the communication plan developed during Stage 1;
- e. Heads of Corps, DMJ, DAL and NPM in respect to nature of work performed by Reserve legal officers and administration of Reserve payment; and
- f. Attorney-General’s Department (Office of Legal Services Coordination) in respect to the Commonwealth’s counsel fee policy,

in order to ensure that their interests are canvassed and reflected where appropriate in the new payment scheme that is developed.

Resources

18. Administrative and financial support for the project will be provided by Defence Legal. Ms Lucinda Whitwell will provide you with administrative and research

support. Subject to the approval of the relevant HOC, you may engage Reserve legal officers to assist in the project as required.

Completion Date

19. You are to complete the stages of the project, and submit a written report to me on each stage, according to the following timeline:

- a. Stage 1 – Initial Planning – 27 May 05;
- b. Stage 2 - Evaluation - 28 Jul 05 (including an interim report that should seek to obtain my ‘in principle’ agreement to a preferred option);
- c. Stage 3 – Drafting – 29 Sep 05;
- d. Stage 4 – Development of Implementation Plan – 17 Nov 05; and
- e. Stage 5 – Approval – 02 Feb 06.

Progress Reporting

20. You are to report progress on this matter at regular intervals, namely at each CPDC meeting.

Variation of Directive

21. If you form the opinion that this directive should be varied, you are invited to make a written submission to me stating your reasons in justification of the variation. If you are unable to complete any stage of the project on time, you are to submit a written brief to me one week prior to the relevant deadline, explaining the delay and requesting an extension.

Original signed

S.J. HARVEY

AIRCDRE

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