

DEFENCE FORCE REMUNERATION TRIBUNAL

LEGAL OFFICERS' SPECIALIST STRUCTURE

DECISION

1. The Australian Defence Force (ADF) has sought the introduction of a specialist structure and salary scale for Legal Officers.

Background

2. Since the introduction of the Post-War Pay Code in 1947, Legal Officers have been remunerated according to the Common Scale for officers. The Common Scale provides salaries for all officers based on rank and with no reference to specialist skills or Corps. The only exceptions to the Common Scale are the specialist structures for Medical and Dental Officers and Chaplains.
3. The ADF has now identified a need to reward selected professional groups for their special skills and work through the introduction of specialist salary structures. The Legal Officer group is the first to be brought to the Tribunal for consideration.
4. There have been various reviews which have examined the role of ADF Legal Officers and made recommendations as to changes in the method of remuneration and career progression of these members. The reviews range from the *Defence Legal Services Committee of Review* in 1970 (the Whitmore Report) to the Skippon Review in 1997.
5. The Whitmore Report considered the legal requirements of the Department of Defence and the Armed Services. The recommendations in the Report include that ADF Legal Officers should receive pay loadings to recognise their professional status. In this regard, it is suggested that legal officers in the Commonwealth and State Public Services, with comparable experience and responsibility, should be used as pay comparisons. The Report also proposed a rationalisation of military legal services.

6. The *Review of Defence Legal Services* carried out by Brigadier J H Robbins in 1993 examined the structure, efficiency and effectiveness of the Defence Legal Service. The Review found that there was a broad and increasing requirement for legal services across the ADF. It recommended the rationalisation of ADF legal services through the formation of a single Defence Legal Services Organisation based in Canberra.

7. Implementation of the Defence Efficiency Review of 1997 resulted in significant structural efficiencies through the integration of ADF and civilian lawyers in Canberra. The Legal Services Branch, the Naval Legal Services Directorate, the Australian Army Legal Corps Directorate and the RAAF Legal Services were integrated into a single Defence legal service, the Defence Legal Office (DLO). The DLO is responsible for the provision of in-house legal services to the entire Defence Organisation.

8. In 1997 a review was carried out by Ms P Skippon and Captain H Marks into the services delivered by ADF Legal Officers at the major commands, bases and centres outside Canberra. The *Report on the Delivery of Legal Services in the Regions* made recommendations regarding the re-ranking of positions and the training and legal resources for Legal Officers. The Report identified problems with the current training provided to direct entry officers and the lack of training for experienced officers which resulted in the narrowing of career opportunities.

Submissions

ADF

9. The ADF submitted that changes in the work, skills and responsibilities of experienced ADF Legal Officers, as well as attraction and retention considerations, support the introduction of the following structure:

<u>Competency Level</u>	<u>Qualification & Skill</u>
Legal Officer – Level One	Admitted as a Barrister/Solicitor Undertake Distance Education
Legal Officer – Level Two	Legal Officers Initial Course Specialist Courses
Legal Officer – Level Three	Graduate Diploma of Military Law Legal Officers Advanced Course Specialist Courses
Legal Officer – Level Four	Master of Military Law Staff College Strategic Studies Course Magistrates Course
Director/Judge Advocate	
Director General DLO	

10. The ADF submitted that a separate career and remuneration structure is needed for Legal Officers employed on specialist legal work to address “deficiencies in the ADF’s ability to recruit, retain and manage specialist Legal Officers”. The proposed structure will provide a process for the professional development of Legal Officers at each level within the Defence Legal Office.
11. The key features of the proposed Legal Officer structure are:
- “a. it recognises that the existing rank-based salary structure for Legal Officers no longer has appropriate application to either the individual officers or to the ADF;
 - b. it recognises the different work value, qualifications and skill through remuneration according to competency levels;

- c. it provides a direct correlation with the skill levels and competencies outside the ADF;
- d. the salary rates have some reference to community standards, thereby making recruiting and retention easier;
- e. recruitment and training are in accordance with clearly identified legal competency standards;
- f. all Legal Officers, not already on a fixed period of engagement, who elect to transfer to the new Legal Officers' Specialist Career Structure, will be offered a fixed period of engagement in accordance with the Flexible Career Management System, prior to moving on to the new structure; and
- g. Legal Officers will predominately serve within the legal system except for approved out-of-stream work which may be required to provide the knowledge and skills base necessary for more effective service as an ADF Legal Officer.”

12. The evidence presented in support of the new structure included testimony from the following persons:

Major General K P Duggan RFD, Judge Advocate General of the ADF, provided evidence as to the role of the Judge Advocate General and the current role of Legal Officers. He also gave evidence about changes in the work and work value of Legal Officers.

Commodore G J Early AM RAN, Director-General Defence Legal Office, testified to the need for a new structure and described the nature and benefits of the proposed structure.

Colonel J A Harvey, Head of the Defence Legal Office Review Implementation Team, presented evidence regarding the responsibilities of Legal Officers, their workload and problems in retaining Legal Officers in the ADF. He provided detailed evidence as to the operation of the proposed structure and the proposed sunset provision.

Phillip H Bell, Senior Consultant DESS International, gave evidence regarding the remuneration proposed at each level of the structure.

13. Written statements were provided by the following ADF Legal Officers:

Colonel I D Westwood
Lieutenant Colonel C M Mathewson
Lieutenant Colonel M J Kelly
Wing Commander S J Harvey
Lieutenant Commander D G Stephens
Lieutenant M G Fallens
Lieutenant D S Swanson

Commonwealth

14. The Commonwealth agreed with the proposed structure and rates. The Commonwealth noted the special expertise and increased workload of ADF Legal Officers. It was submitted that the operational environment for Legal Officers has become more complex and that there is a need to reduce turnover. The Commonwealth recognised that the concept of a specialist pay structure is not unique as Medical and Dental Officers have been remunerated by reference to a specialist structure for some time and accepted the case put by the ADF for the creation of a specialist structure for Legal Officers.

Returned and Services League of Australia and Armed Forces Federation of Australia

15. The Returned and Services League of Australia and the Armed Forces Federation of Australia supported the proposed structure and remuneration for ADF Legal Officers.

Consideration

16. The ADF has sought to introduce a specialist salary scale for Legal Officers which recognises changes in their skills and responsibilities and the specialised nature of their work. Currently remuneration for Legal Officers is as provided in the Officers' Common Scale.
17. The present Legal Officer structure is at Attachment A.
18. It was submitted that the current structure is inappropriate for the recognition of the specialist skills of Legal Officers. It was said that the emphasis on rank rather than skills has caused the following problems in relation to ADF Legal Officers:
 - rank blockage;
 - difficulty in recruiting;
 - difficulty in workforce planning;
 - inappropriate career development;
 - inadequate and inappropriate remuneration; and
 - an inability to attract and retain Legal Officers.
19. Evidence was given by Commodore G Early that the ADF is experiencing difficulties in retaining Legal Officers due to a number of factors. These are:
 - dissatisfaction with the career and promotion opportunities available;
 - dissatisfaction with the growing disparity in remuneration between permanent Legal Officers in the ADF and lawyers in other sectors, both private and public;
 - dissatisfaction with the lack of attention to professional development, training and education opportunities in the ADF; and
 - a perception by Legal Officers that their contribution is generally undervalued by the Defence organisation.

20. Commodore Early testified that failure to properly address the retention problems relating to experienced Legal Officers would have serious implications for the ADF. He also said that there is a need to encourage ADF lawyers to become expert in subjects specific to ADF requirements.

21. Colonel Harvey said that wastage rates over the last three years have increased and that these rose to 26 per cent in 1998/9. He stated that the ADF needed to ensure that its operational effectiveness is not further impaired and that the inability to retain permanent ADF Legal Officers represented a significant loss of expertise. That expertise cannot be easily found from sources other than the permanent ADF. Some of the consequences of the loss of ADF Legal Officers were said to be:

- a reduction in competency levels and legal proficiency;
- junior Legal Officers being posted to billets where they are required to advise Commanders, despite their limited ADF experience;
- difficulty in maintaining legal professional standards and the effects of this on operational areas;
- difficulty in providing properly structured and supervised professional development and career planning for Legal Officers; and
- the high cost of replacing separated Legal Officers.

22. Major General Duggan testified that the work of ADF Legal Officers has become more diversified and that “the acceptance of the proposed structure will provide a viable career structure for permanent Legal Officers and remunerate them appropriately for the specialist skills they possess”.

23. It was submitted by the ADF that the proposed specialist career and salary structure will provide a more appropriate remuneration and career structure for Legal Officers and will assist in addressing the retention problems being experienced. It was further submitted that the volume and complexity of legal issues dealt with by Legal Officers have significantly increased. In particular, ADF Legal Officers are now involved in military operations and are required to have the knowledge and skills to understand and apply international law, military administrative law, prosecutions, contract law, environment law and training. These are all areas where previously there was minimal Legal Officer involvement.

24. In relation to training and career development, Commodore Early said that “until recently there have been no properly documented training standards or objectives for military lawyers and no formal requirement for continuing legal education” and suggested that the proposed structure would rectify the situation. He also said that the new structure provides for closer supervision of the professional development, and management, of Legal Officers through the Career and Professional Development Committee. This Committee is responsible for formulating and assisting in the implementation of career and professional development policies and procedures including the determination of promotional requirements and timing and procedures for the recognition of pay and seniority. The Committee also assesses competency levels, seniority, rank and pay applicable to Legal Officers transferring within the ADF and to officers recruited from outside the ADF.
25. The proposed Legal Officer structure is at Attachment B. The proposed rates are at Attachment C.
26. The following explanations were given by the ADF as to the levels in the proposed structure.

Legal Officer – Level One

Legal Officers will normally be appointed at this level at the rank of Lieutenant (and equivalent). Members will be appointed for 6 years and must be admitted to practice as a Barrister or Solicitor. During an initial training period of up to 12 months the Legal Officer Level One will undertake Initial Entry Officer Training, on-the-job-training, military familiarisation and distance education in legal specialisations. On successful completion of this training members will progress to Level Two.

Legal Officer – Level Two

Direct appointments may be made to Legal Officer – Level Two positions where appointees have an appropriate level of legal or military experience.

Level Two members will normally be of Captain (and equivalent) rank. They will complete the Legal Officers Initial Course and on-the-job training in one of three legal employment specialisations. These members will gain a qualification of Graduate Diploma of Military Law or equivalent through the University of Melbourne and the Military Law Centre, Canberra or another approved university. After completion of these courses, and normally with four years service as an ADF Legal Officer, members will progress to Legal Officer – Level Three and will be eligible for pay at the top Captain increments as well as consideration for promotion to Major (and equivalent).

Legal Officer – Level Three

At this level members complete the Legal Officer Advanced Course and on-the-job training in another one of the legal employment specialisations. The additional training and experience will lead to the qualification of Master of Military Law or equivalent. After completion of this training and experience, and having about 10 years service as a Legal Officer, members will progress to Legal Officer – Level Four. They will receive specialist pay increments at the top of Major (and equivalent) rank and will be considered for promotion to Lieutenant Colonel (and equivalent).

Legal Officer – Level Four

At this level members acquire qualifications or develop skill and gain experience in a third legal employment specialisation. With appropriate skills, qualification and experience, and the capacity to manage subordinates as part of a legal team, officers at this level will be considered for promotion to Colonel (and equivalent) where they will become a Director or Judge Advocate Administrator.

Director/Judge Advocate Administrator

Directors are responsible for the management of one of the core ADF legal functions and the provision of specialist legal advice. They are also responsible for the career development and training of Legal Officers in their Directorate. The Judge Advocate Administrator is a Legal Officer appointed to the panel of Judge Advocates and Defence Force Magistrates.

Director General Defence Legal Office

This is a Brigadier (or equivalent) position and the Director General is the head of the Defence Legal Office.

27. The proposed Legal Officer structure is described by the ADF as being “formed on competency levels with a rank overlay”. The ADF explained that the remuneration at the lower levels of the proposed structure is aligned with the rates in the Officers’ Common Scale but that at Level Three and above specialist salary scale rates apply. This is because at Level Three members are considered to be experienced Legal Officers and it is at this level where retention problems exist. The rate for the Brigadier (and equivalent) in the proposed structure has been set so as not to intrude on the salary of Major General (and equivalent).
28. A feature of the proposed structure is that it is to be consistent with flexible career management and is based on short service commissions of six years. It will be necessary for Legal Officers with more than 6 years service remaining on a permanent commission to elect to move to a short service commission if they wish to access the specialist pay arrangements.
29. The ADF proposal includes a ‘sunset provision’ whereby a member posted out of the Legal Officer stream, to a position recognised by the Career and Professional Development Committee as providing the knowledge, skills and experience for more effective service as a Legal Officer, will be entitled to retain specialist pay for up to three years. If the member does not return to the Legal Officer stream within the requisite period, his/her pay will revert to the appropriate Officer Common Scale rate. The small number of members (four or five members only) currently posted out of the Legal Officer stream will be part of the new structure and allowed three years in which to return to the Legal Officer stream.
30. The new Legal Officer structure will also apply to members of the Reserve Forces. However it will take longer for these members to progress through the structure because of the nature of Reserve employment.
31. The ADF indicated that ADF Legal Officers have been consulted about the features of the proposed structure and that the “vast majority” supported the structure.

Conclusions

32. Having considered the submissions and evidence presented, we have decided that the introduction of a new specialist structure for ADF Legal Officers is appropriate.
33. The proposed structure has been considered taking into account the recommendations and suggestions from previous reviews of ADF legal services. There has long been a recognition of the special skills required of ADF Legal Officers and the special nature of their service in the ADF.
34. In the course of the proceedings, considerable attention was directed to the proposed rates of pay in the new structure. We note that the proposed rates do not extend up to or beyond the current salary level of Major General (and equivalent) in the Common Scale. The Tribunal sought further information regarding the proposed remuneration levels for Legal Officers noting that there were serious deficiencies in the material provided at the hearing. The survey material presented in respect to private industry lawyers related only to New South Wales. The salary components and size of the sample were not specified and the rates were not current. We were therefore not prepared to place reliance on that material.
35. The subsequent material provided by the ADF deals with salaries for lawyers with the Australian Government Solicitor, civilian legal officers in the Defence Legal Office and corporate lawyers in the private sector. This has assisted in establishing that the proposed remuneration for ADF Legal Officers is appropriate and that reference to market considerations is relevant.
36. On the basis that this is an agreed matter, with the Commonwealth and the interveners supporting the ADF's proposals, we have decided to approve the new structure and rates for ADF Legal Officers.

37. In respect to the proposed three year sunset provision, where it is a decision of ADF management that a Legal Officer be posted out of stream for a specific requirement and a specific period of time that Legal Officer may continue to be remunerated according to the Legal Officer structure. We accept that those members currently posted out of stream may be placed in the new Legal Officers structure, if they so elect, and may therefore be entitled to be paid according to that structure for the duration of their posting. We note that all Legal Officers are required to make an election and to accept the new commissions in order to have access to the new structure. Members should not be translated into the new structure until they have acquired the necessary skills and qualifications to satisfy the relevant level in the structure.
38. Having considered the submissions and evidence, the Tribunal approves the introduction of the Legal Officer structure and rates as proposed by the ADF and agreed by the Commonwealth. The new structure recognises the significant increase in the work value of Legal Officers including the expansion of their roles and responsibilities. The introduction of the structure will enhance the ability of the ADF to retain and provide career development for dedicated and experienced Legal Officers.
39. The structure for Legal Officers is the first ‘specialist’ officer structure to come before the Tribunal and has been considered on its merits and appropriateness to address the special and unique requirements of ADF Legal Officers. Although the possibility of the development and introduction of further ADF specialist structures was raised in the proceedings, no specific detail or identification of other ‘specialists’ was provided to the Tribunal. Accordingly we note that the structure for Legal Officers has no relative position to the structure or rates for any other category of ADF Officer.
40. The Tribunal will make a determination to give effect to this decision. As sought by the ADF, the new structure and rates for Legal Officers will apply on and from 16 March 2000.

Appearances: R Kenzie QC, Defence Force Advocate, with Lieutenant Commander M Duncan, for the Australian Defence Force

A O'Brien with L Cullen for the Commonwealth

J Dainer for the Returned and Services League of Australia

G Howatt for the Armed Forces Federation of Australia

Dates and Place of Hearing

10 – 11 February 2000 Canberra