

Appendix


41st Annual Report 2018-19

Legal Services Commission of South Australia

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State Expensive Criminal Cases Funding Agreement

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CSO 55888 / 0820743 / Final	
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DATED 2nd DAY OF December 2004
DEED OF AMENDMENT
BETWEEN
THE HONOURABLE MICHAEL ATKINSON, ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA ("Attorney-General")
-AND-
THE LEGAL SERVICES COMMISSION ("Commission")
 CROWN SOLICITOR Level 9, 48 Pitt Street, Adelaide SA 5000

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2. RECITALS

The parties hereto agree that the matters referred to in the recitals of this Deed are true and correct in every particular and that the recitals shall form part of this Deed.

3. OPERATION OF AMENDMENTS

This Deed shall have effect from and including the date hereof, and is supplementary to and shall be read in conjunction with the Principal Agreement.

4. AMENDMENT TO CLAUSE 6

The Principal Agreement shall be amended by adding the following two clauses after clause 6.4:

"6.4A Except where a Case Management Plan expressly provides that this clause does not apply, a Case Management Plan shall be deemed to be varied automatically to take account of any new scale of fees approved by the Commission pursuant to section 19(2) of the Legal Services Commission Act, 1977 (S.A.). Such a variation of a Case Management Plan shall take effect from the date that the Commission approves that the new scale of fees shall become operative. This clause 6.4A shall apply to all new scales of fees which are operative on or from 1 September 2004."

6.4B The Commission shall, as soon as practicable after approving a new scale of fees, inform the Attorney-General in writing of the financial impact on each Case Management Plan to which a new scale of fees applies."

5. COSTS AND STAMP DUTY

- 5.1 Each party hereto shall bear its own costs incurred in respect of the negotiation, preparation and execution of this Deed.
- 5.2 The Commission shall be responsible for and pay any stamp duty assessed or charged in respect of this Deed.

THIS DEED is made the SECOND day of DECEMBER 2004.

BETWEEN:

THE HONOURABLE MICHAEL ATKINSON, ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA of 45 Pine Street, Adelaide, 5000, in the State of South Australia (the "Attorney-General")

AND

THE LEGAL SERVICES COMMISSION a body corporate pursuant to the Legal Services Commission Act 1977 of 82-98 Wakefield Street, Adelaide, 5000, in the State of South Australia (the "Commission")

RECITALS:

- A. The Attorney-General and the Commission entered into a deed dated 29 January 2003 (the "Principal Agreement"), and described as the Expensive Criminal Cases Funding Agreement, a copy of which is annexed hereto.
- B. The parties have agreed to vary certain of the terms and conditions of the Principal Agreement and to record the same in this Deed.

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 Words and expressions defined in the Principal Agreement have the same meanings in this Deed unless the contrary is clearly intended.
- 1.2 Rules for the construction and interpretation of the Principal Agreement also apply in the construction and interpretation of this Deed.

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EXPENSIVE CRIMINAL CASES FUNDING AGREEMENT **COPY**

AGREEMENT dated 29th January 2002

BETWEEN:

THE HONOURABLE MICHAEL ATKINSON, ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA of 45 Pine Street, Adelaide, 5000, in the State of South Australia (the "Attorney-General") (Attorney-General)

AND

THE LEGAL SERVICES COMMISSION a body corporate pursuant to the Legal Services Commission Act 1977 of 82-98 Wakefield Street, Adelaide, 5000, in the State of South Australia (the "Commission")

RECITALS:

A. The State of South Australia has enacted the Criminal Law (Legal Representation) Act 2001 ("the Act") to ensure that legal representation is available for persons charged with serious offences, and for other purposes.

B. Section 18 of the Act provides that an Expensive Criminal Cases Funding Agreement is to be made between the Commission and the Attorney-General governing the approval of case management plans for cases to which the Act applies.

C. The parties wish to enter into this Agreement in order to give effect to section 18 of the Act.

15 November 2001

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6. **CONFIRMATION OF PRINCIPAL AGREEMENT**

Subject only to the amendments contained in this Deed, the parties hereto confirm the terms and conditions of the Principal Agreement in all other respects.

EXECUTED by the parties unconditionally as a deed.

SIGNED by THE HONOURABLE MICHAEL ATKINSON, ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA in the presence of:

Witness

[Print Name: Susan Dene]

THE COMMON SEAL of THE LEGAL SERVICES COMMISSION

was hereto affixed in the presence of:

MICHAEL CARLISLE JACOBS, B.L.S.C.

Chairperson, Commission

[Print Name:]

Director

[Print Name: Helen James Curran]

Director, Solicitors

[Print Name:]

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AGREED TERMS:

1. DEFINITIONS

In this Agreement unless a contrary intention is evident:

- 1.1 "Act" means the Criminal Law (Legal Representation) Act 2001;
- 1.2 "Agreement" means this Expensive Criminal Cases Funding Agreement and includes the Schedules;
- 1.3 "approved case management plan" means a case management plan, including any variations to that plan, which has been approved by the Attorney-General in accordance with clause 5 of this Agreement;
- 1.4 "case management plan" or "plan" means a case management plan prepared by the Commission in accordance with clause 6 of this Agreement;
- 1.5 "certificate of commitment" or "certificate" means a certificate, incorporating an invoice, issued by the Commission to the defendant's lawyer, authorising him or her to provide a level of legal assistance up to the gross cost specified in the certificate;
- 1.6 "Commencement Date" means the date upon which the Act came into operation;
- 1.7 "Commission" means the Legal Services Commission, established pursuant to the Legal Services Commission Act 1977;
- 1.8 "defence proposal" means the report prepared by the defendant's lawyer on the scope and nature of the proposed defence containing the information described in Schedule 1;
- 1.9 "Treasurer" means the Treasurer of the State of South Australia.

2. INTERPRETATION

- 2.1 In this Agreement unless a contrary intention is evident:
 - 2.1.1 words and expressions defined in the Criminal Law (Legal Representation) Act 2001 shall have the same respective meanings herein;
 - 2.1.2 the clause headings are for convenient reference only and they do not form part of this Agreement;

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- 2.1.3 a reference to a clause number is a reference to all of its sub-clauses;
- 2.1.4 a reference to a clause, sub-clause, schedule or annexure is a reference to a clause, sub-clause, schedule or annexure of this Agreement;
- 2.1.5 a word in the singular includes the plural and a word in the plural includes the singular;
- 2.1.6 a word importing a gender includes any other gender;
- 2.1.7 a reference to a person includes a partnership and a body corporate;
- 2.1.8 a reference to legislation includes legislation repealing, replacing or amending that legislation; and
- 2.1.9 where a word or phrase is given a particular meaning other parts of speech or grammatical forms of that word or phrase have corresponding meanings.
- 2.2 This Agreement incorporates the attached schedule.
3. **TERM**
The term of this Agreement commences on the Commencement Date and shall continue to operate for so long as an Expensive Criminal Cases Funding Agreement is required under section 18 of the Act.
4. **AGREEMENT OPERATES AS A DEED**
This Agreement operates as a deed between the Attorney-General and the Commission.
5. **APPROVAL OF A CASE MANAGEMENT PLAN**
 - 5.1 For the purposes of section 18 of the Act, the Attorney-General shall approve a case management plan or a proposal to vary a case management plan if it complies with this Agreement.
 - 5.2 Approval is effected by the Attorney-General returning a signed copy of the approved plan or approved variations to the plan to the Commission.

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6. CASE MANAGEMENT PLANS

6.1 A case management plan must be submitted to the Attorney-General by the Commission in writing as soon as possible after the Commission becomes aware that the costs of the case may exceed the legal aid funding cap AND as soon as practicable either after the defendant has been arraigned or after a direction of the court pursuant to section 8(3) of the Act.

6.2 A case management plan must contain:

- 6.2.1 the names of the legal representative(s) (solicitors, lead counsel, junior counsel (if one is to be engaged) to whom the Commission has assigned this case;
- 6.2.2 a defence proposal in the terms set out in Schedule 1;
- 6.2.3 a statement that it is anticipated that the costs of legal assistance will exceed the legal aid funding cap and identifying those parts of the defence proposal which the Commission proposes to be funded under the plan;

6.2.4 a memorandum:

- (a) identifying measures taken or to be taken to minimise costs or reduce the length of the trial; and
- (b) addressing any part of the defence proposal which might make the proposed plan non-compliant in terms of clause 6.3;

6.2.5 the Commission's estimate, on the information reasonably available to it, of:

- (a) the cost of each separate item proposed to be funded, including solicitors' fees, counsel fees, disbursements for expert evidence, disbursements for travel, fees for pre-trial applications, other disbursements, including how each is calculated; and
- (b) the extent to which these estimated costs will in total exceed the legal aid funding cap and require reimbursement under the Act.

6.3

A case management plan will not comply with this Agreement if it proposes:

- 6.3.1 to use expert evidence from outside Australia; or
- 6.3.2 to require repeat forensic testing or examination of evidence already so tested or examined; or

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6.3.3 to proof distant expert witnesses other than by telephone, video-link, email or other methods of long distance communication; or

6.3.4 to prove formally any aspect of the defence case which the prosecution will agree, or

6.3.5 to call evidence in person where the prosecution will agree to the tender of documentary evidence to the same effect, and this is permitted by the rules of evidence,

unless the Attorney-General is satisfied, on the basis of the explanations given in the defence proposal, that this course of action is necessary for the defence and is a responsible use of public funds.

6.4 The Commission may from time to time submit in writing to the Attorney-General a proposal to vary an approved case management plan to reflect developments in the case which may affect its cost.

6.5 While the Attorney-General may approve expenditure retrospectively, the Commission is to use its best endeavours to avoid this by presenting proposals for variation as soon as possible after it becomes apparent that variation is necessary.

6.6 A proposal to vary a plan will:

6.6.1 describe how the plan is proposed to be varied, and the reasons for the proposed variation(s);

6.6.2 if any aspect of the proposed variation might be thought to make the plan non-compliant in terms of clause 6.3, include a memorandum to the Commission from defence counsel giving the reasons why this is necessary for the defence;

6.6.3 include an estimate, on the information reasonably available to the Commission, of the cost of each separate new item proposed to be funded, including counsel fees, disbursements for expert evidence, disbursements for travel, other disbursements, and solicitor's fees, including how each is calculated; and

6.6.4 if the variation proposes a change in defence counsel, a written undertaking from the new defence counsel in terms of clause 5 of Schedule 1.

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7. COMMISSION'S OBLIGATIONS

- 7.1 The Commission shall manage each case for which a case management plan is approved, efficiently and effectively, and shall ensure that the management and cost of the case are kept under constant review.
- 7.2 The Commission shall make it a term of the assignment of a serious criminal case that should the case become subject to a case management plan, the assisted person's assigned solicitor (whether a legal practitioner in private legal practice or employed by the Commission) will provide to the Commission, on a monthly basis following approval of the plan:
- 7.2.1 an indication of and explanation for any current or anticipated expenditure that may exceed the estimates of expenditure in the approved case management plan; and
- 7.2.2 any information that may suggest that the trial will last longer than the estimated time given in the approved case management plan.
- 7.3 Where the Commission has terminated legal assistance in accordance with section 6(4) of the Act, all obligations pursuant to the case management plan will cease to exist and the Commission may seek reimbursement of the cost of providing legal assistance prior to the termination of that assistance.

8. REIMBURSEMENT OF COSTS

- 8.1 If the Commission seeks reimbursement of the cost of providing legal assistance, it shall submit to the Attorney-General:
- 8.1.1 a copy of the relevant invoices signed by the defendant's lawyer;
- 8.1.2 a memorandum explaining any increase in the costs of the case from the estimates provided in the approved case management plan;
- 8.1.3 a report detailing the outcome of any investigation or enquiry into the financial affairs of the assisted person or a financially associated person, and the contribution that the Commission has received or has a reasonable prospect of recovering from the assisted person or a financially associated person.
- 8.2 In the case of an exceptionally long trial, the Commission may seek interim reimbursements of the cost of providing legal assistance.

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9. APPLICATION OF CONTRIBUTIONS

A contribution received or recovered by the Commission from the assisted person or a financially associated person shall be applied as follows:

- 9.1 the Commission shall be entitled to retain the contribution up to the amount of the funding cap, plus the amount of any costs incurred by the Commission in investigating the financial affairs of an assisted or financially associated person, plus the amount of any costs incurred by the Commission in recovering any contribution, including court costs;
- 9.2 the balance of the contribution received (if any) or recovered shall be paid by the Commission to the Treasurer.

10. CONFIDENTIALITY

- 10.1 The Attorney-General may disclose the anticipated cost of the case, including legal fees, expert's fees, and any other associated costs, in order to secure funding for the trial under the terms of an approved case management plan.
- 10.2 Except as provided in Clause 10(1), the Attorney-General must not disclose any information received pursuant to this Agreement without the consent of the assisted person.

11. AUDIT

Nothing in this Agreement derogates from the powers of the Auditor-General under the Public Finance and Audit Act 1987 (South Australia).

12. NO ASSIGNMENT

The Commission must not assign or encumber any of its rights and obligations under this Agreement.

13. SURVIVAL

The clauses of this Agreement relating to confidentiality survive the expiry or termination of this Agreement and continue to apply unless the Commission notifies

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SCHEDULE 1

Contents of Defence Proposal

A defence proposal shall contain the following material:

1. A copy of the Information upon which the defendant has been arraigned.
2. The name of the court in which the matter is to be heard.
3. The following information:
 - (a) the number of witnesses who have provided declaration statements;
 - (b) whether any expert testing and evidence will be needed, and if so, in relation to what issues and for what purpose;
 - (c) if it is proposed to use an expert witness whose fees or expenses exceed Commission scale fees and expenses, or who is from outside South Australia, the reasons why this is necessary;
 - (d) if the case entails the use of an expert witness from outside Australia, an account of the enquiries made to identify any expert within Australia and the reasons why any identified expert is not available to the defence;
 - (e) where documentary evidence is significant, an indication of its volume;
 - (f) a preliminary estimate as to the length of pre-trial proceedings and the trial;
 - (g) any legal issues which are considered likely to impact upon the length of the trial;
 - (h) if the case requires senior or multiple counsel, the reasons;
 - (i) whether the case requires travel, additional reading time, conference time and viewing time or has any other features likely to add to the cost; and
 - (j) if the case entails travel outside South Australia, the reasons.
4. If it is proposed:
 - (a) to use expert evidence from outside Australia; or
 - (b) to require repeat forensic testing or examination of evidence already so tested or examined; or

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- (c) to proof distant expert witnesses other than by telephone, video, fax, email or other methods of long distance communication; or
- (d) to prove formally any aspect of the defence case which the prosecution will agree; or
- (e) to call evidence in person where the prosecution will agree to the tender of documentary evidence to the same effect, and this is permitted by the rules of evidence;

transcript of anything said by the court about this course of action, and the reasons why such course of action is necessary for the defence.

5. A written undertaking by defence counsel to the Commission that he or she will:
 - (a) present the defendant's case as quickly and simply as may be consistent with its advancement;
 - (b) avoid unnecessary delay or unnecessary complication or prolongation of the proceedings;
 - (c) inform the defendant about the reasonably available alternatives to fully contested adjudication of the case;
 - (d) advise the defendant to agree matters as to which the prosecution case is overwhelming and the defence has no countervailing evidence, or matters which are purely formal;
 - (e) encourage consultation between defence and prosecution experts with a view to defining and confining the issues in dispute.

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