

Terms of Engagement

Effective: 19 September 2022

Private Legal Practitioner (Independent Counsel)

These Terms of Engagement as amended from time to time apply to all engagements of counsel from the independent Bar (Counsel) to provide legal services (Services) authorised by the Crown Solicitor under Treasurer's Instruction 10, unless otherwise agreed in writing by the Crown Solicitor.

1. Instructions and communications

While Counsel is being engaged by the South Australian Government Agency to which it is providing Services, unless otherwise approved in writing by the Crown Solicitor:

- 1.1. Counsel will take instructions only from the Crown Solicitor;
- 1.2. Counsel will promptly bring to the attention of the Crown Solicitor any actual or attempted communications with or from any other SA Government department or agency in relation to the Services; and
- 1.3. Counsel's point of contact with the Crown Solicitor is the solicitor nominated for that purpose in the letter from the Crown Solicitor recording the approval of the engagement.

2. Standard of services

Counsel will perform all Services:

- 2.1. personally;
- 2.2. professionally, carefully, skilfully and competently;
- 2.3. in a timely and efficient manner; and
- 2.4. in the interests of the State of South Australia without favour to any other person.

3. Probity

- 3.1. Counsel must not do anything which is prejudicial to the goodwill, reputation or overall public image of the State of South Australia or puts at risk the probity of any transaction or agreement related to the Services.
- 3.2. In addition, Counsel must at all times act in accordance with the "Model Litigant" principles.
- 3.3. The duties of the model litigant are set out in Legal Bulletin No. 2, which is published on the Crown Solicitor's Office website as amended from time to time (at www.agd.sa.gov.au).

4. Conflict of interest

- 4.1. Counsel warrants that he/she does not have any conflict of interest or potential conflict of interest in relation to the subject matter of the Services.
- 4.2. If Counsel becomes aware that he/she has or may have a conflict of interest or potential conflict of interest, Counsel must immediately inform the Crown Solicitor, in writing, with full details of that conflict of interest or potential conflict of interest.
- 4.3. Counsel will comply with all directions of the Crown Solicitor in relation to any conflict of interest or potential conflict of interest.

5. No exclusivity of engagement

- 5.1. Counsel acknowledges that other service providers may also be engaged by the Crown Solicitor in relation to the Services.
- 5.2. The provision of legal services by any party other than Counsel (including by the Crown Solicitor's Office) does not reduce any liability that Counsel may have in relation to or arising out of Counsel's performance or non-performance of the Services.
- 5.3. The Crown Solicitor does not make any representation as to any minimum level of work under this engagement.

6. Rates

- 6.1. The fees payable to Counsel for the Services will be calculated at a rate or rates that are no higher than the maximum rate specified in the Schedule of

Rates published on the Crown Solicitor's Office website as amended from time to time (which maximum rate is for time spent on professional legal work only).

- 6.2. The day rates for Senior Counsel and Junior Counsel specified in the Schedule of Rates represent the maximum amount which Counsel may charge for work performed in a day.
- 6.3. The day rates for Senior Counsel and Junior Counsel specified in the Schedule of Rates will be applied in calculating the charges for work performed when Counsel has performed eight hours or more of work in a day. In all other cases the hourly rate will apply.
- 6.4. The web address at which the Schedule of Rates is published at the time of issue of these terms of engagement is www.agd.sa.gov.au.

7. External fees and disbursements

- 7.1. Counsel may charge for the following disbursements:
 - 7.1.1. external search fees, registration fees and stamp duty at cost; and
 - 7.1.2. court and transcript fees at cost (but not in jurisdictions where such costs do not apply to the State of South Australia, such as State Courts pursuant to section 15 of the *Crown Proceedings Act 1992*).
- 7.2. Counsel must not charge for typing, secretarial services, administrative services, telephone services, rounds services, fax, e-mail, printing, photocopying, car parking, travel and accommodation, data storage software licencing or other overhead costs.

8. Cancellation fees of counsel

- 8.1. If a matter listed for trial settles six weeks or more before the first day of trial, no cancellation fee applies; and
- 8.2. If a matter with a trial listed for five days or more is settled less than six weeks prior to the first hearing day of the listing, then a cancellation fee may be paid of up to a maximum of one day for every week for which the trial had been listed for hearing.

9. Variation to standard terms

Any departure from any of these terms of engagement, including allowing extra reading time over and above the day rate and /or a different cancellation fee regime, must have prior Treasurer's Instruction 10 approval from the Crown Solicitor.

10. Tax invoices

- 10.1. Unless by agreement in special circumstances, Counsel must submit tax invoices for Services as follows:
 - 10.1.1 at the end of the month where work in progress is \$1000 or more in value, to the Crown Solicitor or to the Private Legal Practitioner who engaged Counsel with the approval of the Crown Solicitor pursuant to Treasurer's Instruction 10.
 - 10.1.2 for matters which are finalised, regardless of the value of work in progress;
 - 10.1.3 for all work, regardless of the value of work in progress, at the end of each quarter (September, December, March and June).
- 10.2. Tax invoices must:
 - 10.2.1. be addressed and sent to the South Australian Government Agency that requested the Services;
 - 10.2.2. identify the particular matter by name and file number;
 - 10.2.3. contain an entry for each separate cost and/or time record identifying the date, units or time incurred, item cost and approved rate, and a sufficient description of the work item to allow assessment of the reasonableness of the work item and associated charge, consistent with the requirements in Attachment 1;
 - 10.2.4. contain details of disbursements and attach copies of accounts for disbursements paid to third parties;
 - 10.2.5. provide the bank details for electronic payment.
- 10.3. The South Australian Government's standard payment terms are 30 days from date of invoice. The Crown Solicitor's Office will use best endeavours to promptly certify invoices to enable payment by the South Australian Government Agency within 30 days. Certification will be delayed in respect of invoices which do not comply with these terms.

- 10.4. Counsel acknowledges that it is the relevant South Australian Government Agency as identified by the Crown Solicitor that is responsible for payment of tax invoices, not the Crown Solicitor.

11. GST

- 11.1. The rates specified in the Schedule of Rates are exclusive of GST (unless specified otherwise).
- 11.2. Counsel represents and acknowledges that:
 - 11.2.1. he/she is registered under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act);
 - 11.2.2. he/she is registered under the *A New Tax System (Australian Business Number) Act 1999* and the ABN notified on each tax invoice is Counsel's ABN;
 - 11.2.3. the supply of Services will be a taxable supply within the meaning of the GST Act; and
 - 11.2.4. no tax invoice is payable unless it is a valid tax invoice for the purposes of the GST Act.

12. Management of whole of government issues and mandatory reporting

- 12.1. Although the Services being provided may be referable to the operations of a specific South Australian Government Agency, Counsel must provide the Services in a manner which takes into account and does not compromise the interests of other South Australia Government Agencies and the State of South Australia as a whole.
- 12.2. From time to time it will be necessary for the Crown Solicitor to brief the Attorney-General and/or other officers within the South Australian public sector on issues relating to or arising in the course of providing the Services including where the Services involve Significant Issues.
- 12.3. Counsel must at all times in providing the Services, consider whether the Services or their subject matter raise any Significant Issue and advise the Crown Solicitor's Office as soon as practicable, and immediately upon Counsel becoming aware of any Significant Issue which could require urgent action by the State of South Australia.

- 12.4. For the purposes of this clause “Significant Issue” means an issue arising in the course of providing, or which relates to, the Services which:
- 12.4.1. raises whole of government concerns (for example, an issue which will or is likely to involve or impact more than one South Australian Government Agency);
 - 12.4.2. requires advice to be provided or submissions to be made on a question of statutory construction, the constitution Acts of Australia or South Australia and/or the jurisdiction of a court or tribunal; or
 - 12.4.3. otherwise is of significant public interest (for example, an issue which has or is likely to have a significant financial or other impact on the State of South Australia or its citizens) or which raises or is likely to raise media interest.

13. Records, file-sharing and audit

- 13.1. Counsel will keep proper records in relation to performance of the Services including the provision of oral or written advice (Records) and, promptly upon request, supply a copy of any requested Record to the Crown Solicitor.
- 13.2. Should Counsel wish to use an online mechanism for collaboration on documents and file-sharing, Counsel must liaise in advance with the Crown Solicitor as to the mechanism proposed. The Attorney-General's Department may not be able to support Counsel's product of choice.
- 13.2. Counsel will, promptly on request, permit the Crown Solicitor (or his or her agent) to carry out an audit of the Services and provide the Crown Solicitor (or his or her agent) with reasonable assistance in this regard.

14. Intellectual property rights

- 14.1. The State of South Australia owns all intellectual property rights in all things produced by Counsel in the course of performance of the Services. For the purposes of this clause “intellectual property rights” means any patent, copyright, trademark, trade name, design, trade secret, know how or other form of intellectual property right whether arising before or after commencement of the Services and the right to registration of these rights.
- 14.2. The State of South Australia owns all documents including electronic records produced by or for Counsel arising out of or in connection with the Services and

Counsel must upon request deliver them to the Crown Solicitor in such form as the Crown Solicitor requests.

15. Insurance

- 15.1. Subject to subclause 15.3, Counsel must effect and maintain professional indemnity insurance in his/her name for the term of their engagement for an amount not less than \$20 million for any one event and in the aggregate in any one policy period or such other amount as the Crown Solicitor may require. Counsel will ensure that the policy is renewed and maintained for a period of six years after the expiration or termination of the engagement.
- 15.2. Subject to subclause 15.3, Counsel must effect and maintain public liability insurance in his/her name for not less than \$20 million for any one event or such other amount as the Crown Solicitor may reasonably require.
- 15.3. Where Counsel is a sole practitioner, Counsel is not required to comply with subclauses 15.1 or 15.2 where, for the term of the engagement, Counsel:
- 15.3.1. is a participant of the Legal Practitioners Professional Indemnity Insurance Scheme operated by the Law Society of South Australia; and
- 15.3.2. does not, in the provision of services pursuant to the engagement, employ any staff or allow others on to Counsel's premises.

16. Liability

Where a scheme approved under the *Professional Standards Act 2004* (SA) applies, Counsel's liability to the South Australian Government for any loss or causes of action arising in relation to the provision of Services, including for negligence and any indemnity, is limited in the manner provided by that scheme.

17. Confidentiality

- 17.1. In this clause "Confidential Information" means information disclosed by or on behalf of the State of South Australia that:
- 17.1.1. is confidential by its nature or by the circumstances in which it is disclosed; or
- 17.1.2. is designated by the Crown Solicitor as confidential or identified in terms connoting its confidentiality, but does not include information which is or becomes public knowledge other than by a breach by the Contractor of

an obligation of confidentiality to the Crown Solicitor or State of South Australia.

17.2. Counsel may only disclose Confidential Information in the following circumstances:

17.2.1. with the prior written consent of the Crown Solicitor or the client agency;

17.2.2. if and to the extent that Counsel is legally compelled to disclose the Confidential Information; or

17.2.3. to the Counsel's instructing solicitor or a member of staff of the instructing solicitor, but only if that person:

- a) needs the Confidential Information to perform the Services; and
- b) if required by the Crown Solicitor, has first signed a confidentiality undertaking in the form required by the Crown Solicitor.

18. Termination of engagement

The Crown Solicitor may terminate the engagement of Counsel without cause at any time. Counsel will be entitled to payment for any Services authorised by the Crown Solicitor and performed by Counsel up to the date of termination, subject to the certification of those Services as reasonable by the Crown Solicitor under Treasurer's Instruction 10.

19. Publicity

Counsel must not make or permit to be made a public announcement (other than in the course of submissions in a court) or media release about any aspect of the Services or their subject matter unless the Crown Solicitor has informed Counsel that approval has been given in accordance with South Australian Government policy.

20. Modification

Any modification of these terms of engagement can only be effected with the written approval of the Crown Solicitor.

21. Jurisdiction

These terms of engagement are governed by the laws of South Australia. The courts of South Australia and the courts exercising appellate jurisdiction over them have non-exclusive jurisdiction in relation to these terms of engagement and any dispute under them.

22. Disclosure

22.1. The State of South Australia may disclose these Terms of Engagement and/or information in relation to the engagement of Counsel (including any letter of engagement and details of fees paid under the engagement) in either printed or electronic form and either generally to the public or to a particular person as a result of a specific request.

22.2. Nothing in this clause derogates from:

22.2.1. Counsel's obligations under any provisions of these Terms of Engagement; or

22.2.2. the provisions of the *Freedom of Information Act 1991* (SA).

23. Auditor general

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

24. National Model Framework Addressing Sexual Harassment for the Australian Legal Profession

Counsel commits to adhere to the principles underpinning the Law Council of Australia National Model Framework Addressing Sexual Harassment for the Australian Legal Profession (the National Model Framework) and has a sexual harassment policy in place which:

- a. fully adopts the National Model Framework and its appendices; or
- b. has been reviewed and amended as required in accordance with the National Model Framework in order to implement that Framework as far as practicable within their particular legal practice, in accordance with the Law Council of Australia Guidance Note 1: Information for organisations implementing the Model Framework.

Attachment 1 - Invoice requirements

1. Invoices should identify the charge out rate charged.
2. Each time entry should record the time spent and the charge for that item.
3. Entries relating to telephone attendances should contain a description of the person involved in the call and sufficient details of the topic of the conversation.
For example, *Telephone attendance on Mr Smith re medical reports of Dr X.*
4. Entries relating to drafting or perusing emails should contain a description of the person to whom the email is sent or from whom the email is received and sufficient details of the topic of the email.
For example, *Perusing email from Mr Smith re draft submissions.*
5. Entries relating to drafting should contain a sufficient description of the document drafted.
For example, *Drafting statement of Mr Smith.*
6. Entries relating to meetings and personal attendances should contain a description of the person(s) attending the meeting/personal attendance and sufficient detail of the subject matter of the meeting/personal attendance.
For example, *Meeting with Mr Smith re amendments to draft statement.*
7. It is acceptable to record a number of separate items in one block entry (for example, Perusing medical reports; perusing pleadings; drafting submissions). However, where block entries contain multiple different kinds of work such as telephone attendances, drafting and perusing, it may be appropriate to include a notation next to each individual item to show the time spent on that item.
For example, *Telephone attendance on Mr Smith re medical reports (1); perusing medical reports (20); drafting letter to Mr John re-medical reports (5).*
8. The description of "attending file" is not sufficient to enable the assessment of the reasonableness of the entry.
9. Administrative work such as file opening and time spent on printing/photocopying/collating/binding documents or rounds/filing documents should not be charged.