

Issued on 20 July 2020

LEGAL BULLETIN 5
REIMBURSEMENT OF LEGAL FEES

1. This Legal Bulletin prescribes the circumstances in which an *ex gratia* payment for a reimbursement (either in full or in part) of costs associated with the engagement of an independent legal practitioner may be considered for approval by the Attorney-General in accordance with *Treasurer's Instruction 14: Ex Gratia Payments*.
2. In accordance with this Legal Bulletin and *Treasurer's Instruction 14: Ex Gratia Payments*, Government employees, Government Board appointees, Ministers or Members of Parliament may be reimbursed for costs they have incurred associated with their engagement of an independent legal practitioner for the purpose of responding to or participating in:
 - 2.1. certain civil or criminal proceedings, including coronial inquiries, or
 - 2.2. certain investigations undertaken by or on behalf of the Independent Commissioner Against Corruption,
arising out of or connected with the performance of their duties.
3. This Legal Bulletin also prescribes the process by which Government employees, Government Board appointees, Ministers or Members of Parliament may seek to have such reimbursement considered for approval by the Attorney-General.
4. This Legal Bulletin, as approved by Cabinet, is intended to be an exhaustive statement as to South Australian Government policy in relation to the payment from public money of costs associated with the engagement of independent legal practitioners, and replaces:
 - 4.1. Legal Bulletin 19 – Reimbursement of Legal Costs to Ministers, Members of Parliament and Government Employees incurred in respect of ICAC investigations (issued May 2016)
 - 4.2. Legal Bulletin 20 – Reimbursement of Legal Costs to Government Employees (updated and reissued May 2016).

Interpretation and Definitions

5. Subject to the below, this Legal Bulletin should be interpreted and applied in accordance with *Treasurer's Instruction 1: Interpretation and Application*.

6. In this Legal Bulletin:

“Government employee” means:

- (a) a public sector employee as defined in the *Public Sector Act 2009*,
- (b) a person who is appointed to any office under an Act, or
- (c) a volunteer within the meaning of the *Volunteers Protection Act 2001* where the work carried out by the volunteer is directed or coordinated by a public authority,

and includes a former Government employee where the investigation or proceeding concerns conduct that occurred at a time when that person was a Government employee;

“Government Board appointee” means a member of a full-time or part-time board, committee, tribunal, trust, commission, council, authority, panel, taskforce, forum, working party or group:

- (a) established by or under an Act of Parliament of South Australia (excluding the *Local Government Act 1999*) and having a majority of members appointed by either a Minister or the Governor, or
- (b) established by a Minister or legal instrument such as a constitution or charter, having a majority of members appointed by a Minister, and having at least one member in receipt of remuneration,

and includes a former Government Board appointee where the investigation or proceeding concerns conduct that occurred at a time when that person was a Government Board appointee;

“ICAC Act” means the *Independent Commissioner Against Corruption Act 2012*;

“Member of Parliament” or “Member” includes a former Member where the investigation concerns conduct that occurred at a time when that person was a Member of Parliament;

“Minister” includes a former Minister of the Crown where the investigation or proceeding concerns conduct that occurred at a time when that person was a Minister of the Crown;

“relevant criminal or civil proceedings” means:

- (a) a criminal prosecution of a Government employee, Government Board appointee or Minister for alleged offending arising out of the performance of their duties,
- (b) a civil action brought against a Government employee, Government Board appointee or Minister arising out of the performance of their duties, or

- (c) a coronial inquest where a Government employee, Government Board appointee or Minister is required to give evidence connected with the performance of their duties, but does not include:
 - (d) a recovery action by or on behalf of the State under section 74(4) of the *Public Sector Act 2009*,
 - (e) any proceeding or action (or part thereof) for the suppression of the name or any identifying information of the Government employee, Government Board appointee or Minister,
 - (f) any proceedings of a Royal Commission,
 - (g) any disciplinary proceeding or action against the Government employee, Government Board appointee or Minister,
 - (h) any proceeding or action arising out of an application pursuant to the *Freedom of Information Act 1991*, or
 - (i) any proceeding or action arising out of the exercise by the Ombudsman of powers or functions under the *Ombudsman Act 1972*.

“relevant ICAC Investigation” means:

- (a) an investigation by the Independent Commissioner Against Corruption under section 24(1)(a) of the ICAC Act into a matter raising potential issues of corruption in public administration,
- (b) an investigation by the Independent Commissioner Against Corruption under section 24(2)(b) or (c) of the ICAC Act whilst exercising the powers of an inquiry agency in dealing with a matter raising potential issues of serious or systemic misconduct or maladministration in public administration, or
- (c) an investigation by an inquiry agency (following referral by the Independent Commissioner Against Corruption) under section 24(2)(a) of the ICAC Act into a matter raising a potential issue of misconduct or maladministration in public administration, but does not include:
 - (d) an investigation by South Australia Police or another law enforcement agency,
 - (e) an investigation by a public authority, following a referral by the Independent Commissioner Against Corruption; or
 - (f) an investigation undertaken by the Ombudsman pursuant to the *Ombudsman Act 1972*, unless referred in accordance with (c) above.

Criteria for reimbursement

7. A Government employee, Government Board appointee or Minister may be reimbursed for costs they have incurred associated with their engagement of an independent legal practitioner where:
 - 7.1. the Government employee, Government Board appointee or Minister has been the subject of or required to participate in relevant civil or criminal proceedings arising out of the performance of their duties; and
 - 7.2. the additional criteria for reimbursement set out in this Legal Bulletin are satisfied.

8. A Government employee, Government Board appointee, Minister or Member of Parliament may be reimbursed for costs they have incurred associated with their engagement of an independent legal practitioner where:
 - 8.1. the Government employee, Government Board appointee, Minister or Member of Parliament has been the subject of or required to participate in a relevant ICAC investigation, and
 - 8.2. the additional criteria for reimbursement set out in this Legal Bulletin are satisfied.

9. The additional criteria for reimbursement are:
 - 9.1. no material adverse finding against the Government employee, Government Board appointee, Minister or Member of Parliament has been made, nor has any material dereliction of duty been revealed, as a result of the relevant proceedings or investigation;
 - 9.2. the Crown Solicitor (or some other person authorised by the Crown Solicitor) has, in writing:
 - 9.2.1. advised the Government employee, Government Board appointee, Minister or Member of Parliament that they will not be represented by the Crown Solicitor for the purposes of responding to or participating in the relevant proceedings or investigation (or the Crown Solicitor considers that it was appropriate in all the circumstances for the Government employee, Government Board appointee, Minister or Member of Parliament not to approach the Crown Solicitor before obtaining legal representation), and
 - 9.2.2. agreed that the legal representation of the Government employee, Government Board appointee, Minister or Member of Parliament for the purposes of responding to or participating in the proceedings or investigation is or was reasonably required;

- 9.3. the Crown Solicitor (or some other person authorised by the Crown Solicitor) has, in writing, certified that the costs to be reimbursed are reasonable;
 - 9.4. the Government employee, Government Board appointee, Minister or Member of Parliament is not indemnified in relation to those costs (including by the State of South Australia (through SAICorp or another agency), or under a policy of insurance) and is not entitled to assistance pursuant to the Department of Health Professional Indemnity (Medical Malpractice) Program;
 - 9.5. the Government employee, Government Board appointee, Minister or Member of Parliament has assigned to the Crown in right of the State of South Australia any right to recover the costs to be reimbursed from any other party; and
 - 9.6. the Attorney-General (or their nominee) has approved the reimbursement.
10. The Crown Solicitor (or some other person authorised by the Crown Solicitor) will only certify that costs to be reimbursed are reasonable where satisfied that:
- 10.1. the costs claimed have been reasonably incurred in order to allow the Government employee, Government Board appointee, Minister or Member of Parliament to appropriately respond to or participate in the relevant proceedings or investigation;
 - 10.2. the costs claimed have been calculated consistently with the applicable Crown Solicitor's rates for private solicitor fees as published on the Attorney-General's Department website from time to time;
 - 10.3. in the case of costs associated with the briefing of Senior Counsel or Queen's Counsel, and including where costs associated with the briefing of junior counsel in the same matter are also sought, the exceptional circumstances of the matter justify such expenditure;
 - 10.4. in the case of costs associated with any review or appeal proceedings arising out of the relevant proceedings or investigation instigated or joined by the Government employee, Government Board appointee, Minister or Member of Parliament, the exceptional circumstances of the matter justify such expenditure;
 - 10.5. any costs or expenses recovered by the Government employee, Government Board appointee, Minister or Member of Parliament from other sources have been appropriately deducted from the costs claimed; and
 - 10.6. the Government employee, Government Board appointee, Minister or Member of Parliament has provided all information reasonably requested to allow the costs claimed to be assessed in accordance with this Legal Bulletin.

11. A Government employee's union or professional association that has paid legal costs on behalf of the Government employee in respect of their participation in relevant civil or criminal proceedings or a relevant ICAC investigation may seek reimbursement in accordance with this Legal Bulletin subject to the same restrictions and conditions as if the Government employee had made the claim.
12. The amount to be reimbursed under this Legal Bulletin shall include GST on the legal costs to be reimbursed if the Government employee, Government Board appointee, Minister or Member of Parliament or, in the case of a Government employee, their union or professional association, is not able to recover the GST as an input tax credit.

Procedure for reimbursement

13. In the event that it is necessary for the Independent Commissioner Against Corruption to authorise the provision of information to another person for the purposes of this Legal Bulletin, the Government employee, Government Board appointee, Minister or Member of Parliament will seek the Commissioner's authorisation as appropriate.
14. A Government employee, Government Board appointee, Minister or Member of Parliament seeking reimbursement of legal fees in accordance with this Legal Bulletin must:
 - 14.1. obtain as soon as practicable the necessary written agreement from the Crown Solicitor as required by clause 9.2;
 - 14.2. await the finalisation of the relevant civil or criminal proceedings (including any appeals therefrom) or the relevant ICAC investigation, unless seeking an interim payment in accordance with this Legal Bulletin, and
 - 14.3. submit a written claim for certification of the reasonableness of the costs for reimbursement to the Crown Solicitor, including:
 - 14.3.1. an assignment of rights as contemplated by clause 9.5 of this Legal Bulletin in a form approved by the Crown Solicitor, and
 - 14.3.2. all relevant information in support of the eligibility of the claim pursuant to this Legal Bulletin, including any additional information reasonably requested by the Crown Solicitor.
15. If the costs claimed (or part thereof) are certified as reasonable, the Crown Solicitor will forward the claim to the Attorney-General (or their nominee) for consideration as to approval.

16. If a reimbursement is approved by the Attorney-General (or their nominee), the Attorney-General (or their nominee) may further approve the reimbursement to be paid by the Attorney-General's Department.

Interim payments

17. Prior to the finalisation of relevant civil or criminal proceedings or a relevant ICAC investigation, a Government employee, Government Board appointee, Minister or Member of Parliament may be reimbursed on an interim basis for costs they have incurred associated with their engagement of an independent legal practitioner, where:

17.1. the Government employee, Government Board appointee, Minister or Member of Parliament enters into a legally enforceable agreement with appropriate security for repayment of any reimbursement in the event that a material adverse finding against the Government employee, Government Board appointee, Minister or Member of Parliament is later made, or a material dereliction of duty is later revealed, as a result of the relevant proceedings or investigation, and

17.2. the criteria for reimbursement set out in this Legal Bulletin are otherwise satisfied.

18. A Government employee, Government Board appointee, Minister or Member of Parliament seeking an interim payment of legal fees must do so in accordance with the procedure for reimbursement set out in this Legal Bulletin.

19. A refusal by the Attorney-General (or their nominee) to approve an interim payment does not prevent a Government employee, Government Board appointee, Minister or Member of Parliament from seeking reimbursement in accordance with this Legal Bulletin following the finalisation of the relevant civil or criminal proceedings or relevant ICAC investigation.



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