

South Australia



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CRIMINAL LAW (LEGAL REPRESENTATION) ACT 2001

No. 36 of 2001

[Assented to 3 August 2001]

An Act to ensure that legal representation is available for persons charged with serious offences; and for other purposes.

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The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Criminal Law (Legal Representation) Act 2001*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Object

3. The objects of this Act are—

- (a) to ensure that legal representation is available to persons charged with serious offences; and
- (b) as a consequence of the provision made for legal representation—to limit the application of the rule under which the trial of a person charged with a serious offence may be stayed on the ground that the trial would be unfair for want of legal representation; and
- (c) to ensure, as far as practicable, that trials are not disrupted by adjournments arising because the defendant lacks legal representation; and
- (d) to ensure that defendants who obtain legal representation under this Act pay for it to the extent their means allow.

Interpretation

4. (1) In this Act—

"assisted person" means a person for whom legal assistance is, or has been, provided in connection with the trial of a serious offence (whether or not the case actually proceeds to trial);

"associated proceedings", in relation to a trial, means proceedings that are preliminary or ancillary to the trial (including proceedings in which the validity of the charge is challenged), but does not include—

- (a) any such proceedings that commence before the first directions hearing after arraignment; or
- (b) an appeal; or
- (c) proceedings under this Act;

"category 1"—see subsection (2);

"category 2"—see subsection (2);

"Commission" means the Legal Services Commission;

"court" means the court before which the defendant is arraigned;

"**date**" of a relevant offence means the date on which the offence is alleged to have been committed;

"**defendant**" means a person charged with an offence;

"**financially associated**"—a person is financially associated with an assisted person if—

- (a) a financial association exists between them under criteria generally applied by the Commission for determining whether a financial association exists; and
- (b) the Commission has determined that a financial association exists between them;

"**legal assistance**" means legal assistance under the LSC Act;

"**LSC Act**" means the *Legal Services Commission Act 1977*;

"**relevant offence**" means the offence with which an assisted person is charged;

"**serious offence**" means an indictable offence under the law of the State that is to be tried in the Supreme Court or the District Court, and includes any summary offence that is to be tried together with such an offence in the same proceedings;

"**trial**" means a trial of a serious offence before the Supreme Court or the District Court.

(2) Assisted persons are divided into 2 categories as follows:

- (a) those who are, apart from this Act, eligible for legal assistance under the LSC Act (**category 1**); and
- (b) those who are not (**category 2**).

Territorial application of Act

5. (1) This Act applies to—

- (a) property within or outside the State; and
- (b) transactions occurring within or outside the State.

(2) This Act applies outside the State to the full extent of the extra-territorial legislative capacity of the Parliament.

PART 2
ENTITLEMENT TO LEGAL ASSISTANCE

Entitlement to legal assistance

6. (1) If an application is made to the Commission for legal assistance by a person charged with a serious offence, the Commission must (subject to the qualifications that appear below) grant legal assistance by way of—

- (a) legal representation for the trial; and
- (b) legal representation for associated proceedings—
 - (i) that are not initiated by the defendant; or
 - (ii) that are initiated by the defendant and have, in the Commission's opinion, sufficient merit to justify being brought within the ambit of the legal assistance.

(2) The LSC Act applies, subject to this section, to an application for, or grant of, legal assistance under this section.

(3) In particular, the Commission's obligation to grant legal assistance does not prevent it from imposing conditions under the LSC Act on the grant of legal assistance.

Examples—

1. The Commission might impose a condition requiring the assisted person to do either or both of the following:
 - to make payments in advance to the Commission towards the cost of providing legal assistance;
 - to indemnify the Commission in full for the cost of providing legal assistance.
2. The Commission might impose a condition requiring the assisted person to authorise a bank or other third party to disclose to the Commission information relevant to the assisted person's financial affairs.
3. The Commission might impose a condition limiting the ambit of the assistance so that it does not extend to the funding of forensic strategies that have, in the Commission's opinion, no reasonable prospect of success.

(4) The Commission must not terminate legal assistance granted under this section unless—

- (a) the assisted person—
 - (i) obtains privately funded legal representation for the trial or an associated proceeding; or
 - (ii) notifies the Commission of an intention to do without legal representation at the trial; or
- (b) the assisted person contravenes or fails to comply with a condition on which the legal assistance was granted and the court authorises the Commission to terminate legal assistance on that ground; or

- (c) the assisted person refuses or fails to cooperate with the legal practitioner assigned to provide the legal assistance and the court authorises the Commission to terminate the legal assistance on that ground; or
- (d) the defendant is charged with a minor indictable offence and legal assistance was granted on the basis that the defendant was to be tried in the Supreme Court or the District Court but it now appears that the trial is to proceed before the Magistrates Court.

(5) If legal assistance has been terminated under subsection (4) and a further application for legal assistance is made—

- (a) the Commission has an absolute discretion whether to grant or refuse the further application and is under no obligation to grant it; and
- (b) if the Commission grants the application, it has an absolute discretion to terminate the legal assistance on any ground it considers sufficient (and a decision to do so cannot be challenged in any way).

Commission to choose legal practitioner by whom legal assistance is to be provided

7. (1) The Commission is to choose the legal practitioner by whom legal assistance is to be provided for a category 2 assisted person.

(2) If the assisted person has expressed a preference on the subject, the Commission may have regard to the expressed preference but is not bound by it.

(3) No inference is to be drawn from this section about the rights of category 1 assisted persons.

PART 3
REPRESENTATION PROCEDURES

Procedures to be followed at directions hearing

8. (1) At the first directions hearing to be held after the defendant's arraignment, the court—

- (a)* must consider the question whether a direction is required under this section; and
- (b)* must determine the question at that hearing or as soon as practicable afterwards.

(2) If the defendant is represented by a lawyer, the lawyer must, at least 7 days before the day fixed for the first directions hearing, file in the court a certificate certifying that—

- (a)* the defendant is an assisted person; or
- (b)* the lawyer undertakes that the defendant will be provided with legal representation for the duration of the trial; or
- (c)* the defendant is not an assisted person and the lawyer is not prepared to give an undertaking under paragraph *(b)*.

(3) The court must direct the defendant to make an application to the Commission for legal assistance unless—

- (a)* the defendant is an assisted person; or
- (b)* the defendant's lawyer has given an undertaking to the court that the defendant will be provided with legal representation for the duration of the trial; or
- (c)* the court is satisfied, on the basis of a written assurance given by the defendant, that the defendant does not want legal representation at the trial.

(4) A direction under this section must fix a reasonable time within which the direction is to be complied with.

Representation of certain defendants

9. (1) This section applies to a defendant who—

- (a)* is not an assisted person; and
- (b)* either—
 - (i)* has given the court a written assurance that the defendant does not want legal representation at the trial; or
 - (ii)* has been directed by the court to make an application for legal assistance and has failed to comply with the direction.

(2) A defendant to whom this section applies may only be represented by a lawyer at the trial or in an associated proceeding if the lawyer, or some other lawyer on whose instructions the lawyer is acting, files in the court a certificate certifying that the lawyer undertakes that the defendant will be provided with legal representation for the duration of the trial.

(3) A lawyer who provides legal representation, advice or other legal services in connection with the trial or an associated proceeding for a defendant to whom this section applies between the relevant dates is not entitled to any fee for those services.

(4) The relevant dates are as follows:

(a) the first date is—

- (i) for a defendant who has given the court a written assurance that he or she does not want legal representation at the trial—the date of that assurance;
- (ii) for a defendant who has been directed by the court to make an application for legal assistance—the date of the direction;

(b) the second date is the date on which a lawyer files in the court a certificate certifying that the lawyer undertakes that the defendant will be provided with legal representation for the duration of the trial.

Certain costs may be awarded against defendant personally

10. If—

- (a) the court adjourns a trial or associated proceedings in order to allow the defendant to make an application for legal assistance or to obtain legal representation in some other way; and
- (b) the adjournment is attributable to the defendant's failure to make proper arrangements for legal representation in advance of the proceedings or to a change of mind on the part of the defendant about legal representation,

the court may make an order against the defendant personally for the costs of the adjournment and the costs of the proceedings thrown away by the adjournment.

PART 4
MODIFICATION OF COMMON LAW RIGHTS

Modification of common law

11. The fairness of a trial (or a prospective trial) cannot be challenged (and a trial or prospective trial cannot be stayed) on the ground of lack of legal representation unless—

- (a) the Commission has, contrary to this Act, refused or failed to provide legal assistance for the defendant; or
- (b) the Commission has withdrawn legal assistance for the defendant on the ground that it has been unable to reach agreement with the Attorney-General on a case management plan.¹

¹ For the Commission's power to withdraw legal assistance on this ground, see section 18.

PART 5
RECOVERY OF COSTS OF LEGAL ASSISTANCE

DIVISION 1—INVESTIGATIONS AND INQUIRIES INTO ASSETS

Commission's powers of investigation

12. (1) The Commission may conduct an investigation into the financial affairs of an assisted person, a financially associated person or a person who may be a financially associated person.

(2) For the purposes of an investigation under this section, the Commission may, by notice in writing, require any person who may be in a position to provide information about the financial affairs of the person under investigation—

- (a) to provide written answers to questions put by the Commission; or
- (b) to produce documents for inspection by an officer of the Commission; or
- (c) to attend before an officer of the Commission at a nominated time and place to answer questions about the financial affairs of the person under investigation.

(3) A person who is required to answer questions under subsection (2)(a) must not refuse or fail to answer the questions within the time allowed in the notice.

Maximum penalty: \$2 500 or imprisonment for 6 months.

(4) A person who is required to produce documents for inspection under subsection (2)(b) must not refuse or fail to produce the documents at the time and place nominated in the notice.

Maximum penalty: \$2 500 or imprisonment for 6 months.

(5) A person who is required to attend before an officer of the Commission under subsection (2)(c) must not—

- (a) refuse or fail to attend before an officer of the Commission as required in the notice; or
- (b) refuse or fail to answer a question relevant to the financial affairs of the person under investigation put by an officer of the Commission.

Maximum penalty: \$2 500 or imprisonment for 6 months.

(6) A person may not refuse to answer a question on the ground that the answer to the question would tend to incriminate the person but, if the person objects to answering the question on that ground, the answer is not admissible in criminal proceedings against the person (other than proceedings in which the answer is alleged to be false).

(7) Subject to an order of the court to the contrary, the costs of an investigation under this section related to a category 2 assisted person (including an investigation into the financial affairs of a person who is or may be financially associated with the assisted person) are to be paid by the assisted person.

(8) The court may, on application by an assisted person, relieve the person from a liability to pay costs under subsection (7).

DIVISION 2—CONTRIBUTION BY FINANCIALLY ASSOCIATED PERSON**Contribution by financially associated person**

13. (1) This section applies only where the assisted person is a category 2 assisted person (but no limitation is to be inferred from this section on the Commission's powers—apart from this Act—to recover contribution for legal assistance from a person financially associated with a category 1 assisted person).

(2) The court may, on application by the Commission or any other interested person, determine the extent to which it is reasonable that a person who is financially associated with an assisted person should contribute to the costs of providing legal assistance for the assisted person.

(3) The court may make consequential orders for either or both of the following purposes:

- (a) providing for contribution by the financially associated person reflecting the determination;
- (b) dealing with the assets of the financially associated person under this Part.

DIVISION 3—POWER TO DEAL WITH ASSETS AND TRANSACTIONS**Power to deal with assets**

14. (1) This section applies to the following:

- (a) assets of a category 2 assisted person;
- (b) assets of a person who is financially associated with a category 2 assisted person,

(and assets include a future asset, such as a future right to superannuation).

(2) The court may, on application by the Commission, make orders of one or more of the following kinds in relation to an asset to which this section applies:

- (a) an order in the nature of an injunction to prevent dealing with or disposal of the asset;
- (b) if the court identifies the asset as being available for application towards the costs of legal assistance—
 - (i) an order for partition;
 - (ii) an order that the asset be held subject to trusts determined by the court;
 - (iii) an order vesting the asset in the Commission;
 - (iv) an order for sale of the asset or its conversion into money;
 - (v) an order that the proceeds of the sale of the asset or its conversion into money be dealt with in a particular way;
 - (vi) an order creating, or providing for the creation of, a charge over the asset.

(3) If an assisted person or a financially associated person is an object of a discretionary trust, the court may, on application by the Commission, make an order appropriating the trust property, or any part of the trust property, for application towards the costs of legal assistance.

Power to set aside transactions

15. (1) An **examinable transaction** is a transaction involving a disposition of property entered into after the relevant date by—

- (a) an assisted person; or
- (b) a person who is financially associated with—
 - (i) an assisted person of category 2; or
 - (ii) an assisted person who would fall into category 2 if it were not for the transaction or a series of transactions of which the transaction is one.

(2) The relevant date is a date falling 5 years before the date of the relevant offence (and, if there are 2 or more of them, the earliest of them).

(3) An examinable transaction is liable to be set aside under this section unless the parties to the transaction satisfy the court that the transaction was entered into in good faith and for value.

(4) The court may, on application by the Commission—

- (a) set aside a transaction that is liable to be set aside under this section; and
- (b) make any consequential or ancillary orders that may be just in the circumstances.

PART 6
MISCELLANEOUS

Exercise of jurisdiction

16. (1) The court's jurisdiction under this Act may be exercised by a Master or a Judge.

(2) However, a Judge who exercises the court's jurisdiction under Part 5 before the trial commences is not to preside in substantive proceedings and the trial Judge is not to exercise that jurisdiction before the conclusion of the trial.

(3) In subsection (2), **substantive proceedings** means the trial and associated proceedings in which any of the following issues is raised:

- (a) the validity of the charge;
- (b) the court's jurisdiction to hear the charge;
- (c) if defendants are jointly charged—whether they should be tried separately;
- (d) if multiple offences are charged—whether the offences should be tried separately;
- (e) whether separate charges should be tried together;
- (f) the admissibility of evidence at the trial;
- (g) any other issue that could result in the striking out of a charge or seriously affect the nature or extent of the trial.

(4) A person who is dissatisfied with a decision of a Master in proceedings under Part 5 may, within 14 days after the date of the decision, apply to the court to have the decision reviewed by a Judge.

(5) On an application under subsection (4), the court must review the Master's decision and may confirm, vary or reverse it.

Periodic accounts and final accounts

17. (1) The Commission must give periodic accounts to a person who is financially associated with an assisted person and liable to contribute to the costs of the legal assistance (a **contributory**) showing the total cost of the legal assistance provided to the date the account is made up.

(2) At the conclusion of the assignment, the Commission must give a final account to the contributory setting out the total cost of the legal assistance.

Reimbursement of Commission

18. (1) The Commission is entitled to be reimbursed by the Treasurer an amount by which the net cost of providing legal assistance for an assisted person exceeds the funding cap.

(2) However, the Commission's right to reimbursement is contingent on—

- (a) the Attorney-General's approval of a case management plan in relation to the relevant trial under the *Expensive Criminal Cases Funding Agreement*; and
- (b) compliance by the Commission with the approved plan.

(3) If a case management plan complies with the criteria for approval fixed in the *Expensive Criminal Cases Funding Agreement*, the Attorney-General must approve the case management plan.

(4) If the Commission, after making reasonable attempts to reach agreement with the Attorney-General on a case management plan for the trial of an assisted person, fails to obtain the Attorney-General's approval, the Commission may, by notice in writing to the assisted person, withdraw legal assistance.

(5) The Commission must, in each of its annual reports, publish the text of the *Expensive Criminal Cases Funding Agreement* as in force at the end of the year to which the report relates.

(6) In this section—

"*Expensive Criminal Cases Funding Agreement*" means the agreement to be made between the Commission and the Attorney-General governing the approval of management plans for cases to which this section applies, and includes that agreement as amended from time to time;

"**funding cap**" means an amount fixed as the funding cap for criminal cases by the Commission for a particular financial year;

"**net cost**" of providing legal assistance means the gross cost of providing the legal assistance less the amount of the contribution the Commission has received or has a reasonable prospect of recovering from the assisted person or a financially associated person.

Protection for Commission against orders for costs

19. An order for costs cannot be made against the Commission in proceedings under this Act.

Service

20. A notice or document required or authorised by this Act to be given to a person may—

(a) be given personally; or

(b) be given by post; or

(c) be transmitted—

(i) by fax to a fax number provided by the person; or

(ii) by e-mail to an e-mail address provided by the person.

Transitional provision

21. This Act applies to a person committed for the trial of an offence on or after the commencement of this Act whether the offence is alleged to have been committed before or after the commencement of this Act.

Regulations

22. (1) The Governor may make regulations for the purposes of this Act.

(2) A regulation may provide that contravention of a regulation is a summary offence punishable by a fine not exceeding \$10 000.