



30 October 2018

Ms Sarah McNaughton SC
Commonwealth Director
of Public Prosecutions
GPO Box 21
MELBOURNE VIC 3001

Dear Ms ~~McNaughton~~ *Sarah*

CDPP review of fees paid to Counsel

Thank you and the Commonwealth Solicitor for Public Prosecutions for meeting with me on 20 August 2018. Following our meeting, I advised members of the NSW Bar of the outcome and invited members to submit any views they wished for the Association to put forward on their behalf regarding fees paid to Counsel by the Commonwealth Director of Public Prosecutions ("CDPP"). In the interests of transparency and keeping members informed, I intend on publishing a copy of this letter in the New South Wales Bar Association's daily email circular.

Members have remarked that the briefs received from the CDPP are interesting, complex and at times includes a unique combination of criminal and commercial elements to a case. Members indicated that they find the subject matter rewarding and intellectually challenging which has encouraged members to continue to accept briefs from the CDPP. The Association also understands that the length of time within which the CDPP pays Counsels' fees has been substantially reduced, which is welcomed by members. However, there remains some concern and frustration amongst members that fees paid to Counsel by the CDPP are inadequate.

While, the CDPP continues to pay fees to members of the private bar as little as \$800.00 per day, the CDPP purports to operate at a profit, reporting a surplus of \$1.582 million at the end of the 2017-2018 financial year. After three years call to the Bar, Counsel can move up a pay level where CDPP fee rates to counsel increase by just \$300.00 to \$1,100.00 per day. An additional \$300.00 per day after three years call to the Bar is a poor reflection of the value add a barrister provides in the prosecution of Commonwealth matters. These fees are unacceptable and not viable.

The submissions received raised four main issues with respect to fees paid to Counsel, which are as follows:

1. Counsel are not paid for jury deliberations unless counsel is required to attend court to answer a question from the jury;
2. Preparation time estimated by the CDPP for matters is grossly inadequate;

3. Generally, the fee rates (preparation fees, conference fees, day and hourly rates) are not reflective of the market for legal costs, nor does it reflect the unique complexity associated with CDPP matters; and
4. The CDPP does not pay cancellation fees.

Fees during jury deliberations

Paragraph 11 of the CDPP's New National Letter of Engagement ("Engagement Letter") for Counsel provides:

As a general rule, no appearance fee will be chargeable during jury deliberations unless counsel is required at court. Consideration may be given to payment of a daily fee during deliberations, in exceptional matters with long deliberation periods, due to the disruption that such matters can have on counsel's practice. Where counsel is required to attend court in relation to jury deliberations by way of a short mention of the matter (an hour or less), counsel will be paid a flat fee as per paragraph 3, namely, \$250.00 for junior counsel and \$500.00 for senior counsel. Longer appearances in court during jury deliberations will attract payment of a daily fee.

While the terms of the Engagement Letter stipulate that Counsel for the CDPP will not be paid an appearance fee during jury deliberations, they are expected to be available and ready to attend court at a moment's notice should the jury have a question. The Association understands that a jury in a CDPP matter can take up to two weeks to deliberate and deliver a verdict and have been known to take periods of up to six weeks or three months, particularly in longer more complex trials such as those for white collar, large-scale drug importation or terrorism offences. The expectation that Counsel be available and ready to attend court at a moment's notice can result in large blocks of time in which Counsel is waiting near or within the vicinity of the Court without being remunerated for his or her time. Where a trial has been conducted in a regional Court, Counsel is required to remain away from chambers until verdict and may not be able to undertake alternative work in the meantime.

Under the current arrangements, where a jury asks a question, Counsel may physically be in Court to answer the query for an hour or less which means they will only be paid a flat fee of \$250.00 for junior counsel and \$500.00 for senior counsel. This is the case even though Counsel may have been available or will continue to be available for the remainder of the day.

The Association submits that Counsel continues to carry out work for the CDPP while a jury is deliberating as they must be available and ready to appear should the jury have a question and to assist the Court with appropriate submissions in a timely manner, which may include submissions about the evidence in the trial. Additionally, the expectation of availability may prevent Counsel from working on other matters including accepting briefs during the period of jury deliberation. This expectation places undue burden on members of the private Bar who choose to undertake CDPP work.

Estimated preparation time allocated

Members have indicated that CDPP matters are often complex and can at times include large volumes of evidence and multiple defendants who are well resourced. Estimated preparation times/days that have been offered to Counsel in matters have been grossly inadequate. Members have indicated that preparation time estimates generally do not reflect the complex nature of the prosecution, subject matter and volume of evidence. Members have indicated that while the CDPP encourages Counsel to ask for more preparation time at the outset, matters may progress in a manner which requires more preparation and additional tasks and may involve greater complexity than accounted for in the original estimate.

The Association requests that the CDPP reconsider the manner in which it calculates preparation time allocated to briefs and/or Counsel in matters including consideration given to building flexibility for more preparation days to be allocated as a matter progresses.

Fee rates

The issue of fee rates (preparation fees, conference fees, day and hourly rates) was raised by a number of members. In particular, it was submitted that the CDPP rates do not reflect market rates for legal costs and fees and that other Commonwealth agencies such as the Australian Securities Investment Commission and the Australian Taxation Office generally pay Counsel 30% more than the CDPP for pre-brief advice in a matter that will later be prosecuted by the CDPP.

Members have also indicated that the rates of pay offered to Counsel often do not reflect their seniority at the Bar or their experience with CDPP matters.

Cancellation fees

Lastly, submissions received by the Association raised the issue of cancellation fees in the context where a matter is vacated or the defendant/s plead guilty. Paragraph 10 of the Engagement Letter outlines the following:

The CDPP does not pay cancellation fees. If counsel is briefed for a matter that does not proceed, counsel is paid only for work performed, such as conferences and any agreed payments for preparation. If counsel has set aside a long period of time for a hearing that does not eventuate, the CDPP will endeavour to brief counsel in other matters to minimise inconvenience to counsel. Please note, in the event this matter resolves via a guilty plea ahead of trial, this Office will consider whether to retain counsel for sentencing submissions.

As you may appreciate, matters may be vacated or defendant/s enter a plea of guilty as late as the first day of trial. Where a matter has been listed for a five-day hearing, Counsel may be in a position to fill their diary with other short matters or undertake written advice work. However, there are some occasions where matters are set down with an estimated duration of months. Where such matters are vacated or the defendant/s plead guilty, Counsel are left in a position where their anticipated income (ie, a scheduled CDPP hearing) evaporates. There have also been occasions where the CDPP has secured dates in Counsel's diary well in advance of a trial but has not provided a brief until much closer to the trial date. Sometimes, the matter resolves prior to the brief actually

arriving and Counsel is not advised. This can result in Counsel declining other work, which might not have been necessary had they been advised of what was happening in a more timely manner.

Notwithstanding the unpredictable income stream which comes with being a barrister, members continue to experience financial pressures of day to day living and practise expenses. The CDPP's policy on the non-payment of cancellation fees places members of the private Bar in a position of vulnerability. In some cases, the vulnerability can have long term and significant effects on whether a barrister, particularly barristers from the junior ranks, will continue to practise at the Bar.

The Association hopes this information is of assistance to the CDPP's review of fees scheduled to occur in December 2018.

If you have any questions please do not hesitate to contact the Association's Executive Director, Mr Greg Tolhurst on 02 9232 4055 or by email at gtolhurst@nswbar.asn.au.

Yours sincerely



Arthur Moses SC
President