

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 136

Senator Barnett asked the following question at the hearing on 8 February 2010:

In relation to the Expensive Commonwealth Criminal Cases Fund:

- a. What is this fund and how much money is in it?
- b. How is it decided which cases or individuals will be supported? Who decides?
- c. Provide examples of other cases it has been used to support?
- d. Is there an emphasis on any particular type of case: corporate, terrorism, human rights etc?
- e. How much has been distributed by the fund since its inception?
- f. Is money spent through this fund included in the tally of overall Government legal spending?
- g. What main factors have contributed to an increase in spending through this fund?

The answer to the honourable senator's question is as follows:

- a. The Expensive Commonwealth Criminal Cases Fund (ECCCF) was established in 2000 and is available to reimburse costs arising from high cost Commonwealth criminal matters. The ECCCF is separately funded to ensure that Commonwealth criminal trials do not impact on the ability of legal aid commissions to provide legal assistance for other Commonwealth legal aid priorities. As at 8 February 2010, an amount of \$4.761 million remains in the ECCCF for 2009-10.
- b. The ECCCF is administered by the Department and the allocation of monies from the ECCCF is at the discretion of the Department. Applications to the ECCCF may only be made by legal aid commissions. Applications are assessed in accordance with the following criteria:
 - i. the likely cost of the case is high, and is likely to significantly affect the capacity of a commission to provide assistance for other Commonwealth legal aid priorities
 - ii. in estimating the likely cost of the case, a commission consulted with the Commonwealth Director of Public Prosecutions about the likely direction of the trial
 - iii. a commission has taken or will take all necessary steps to manage the case
 - iv. a commission has made a reasonable estimate of likely expenditure on the case for the relevant financial year
 - v. there is potential for a court to grant a stay of the matter in accordance with *Dietrich's case* if funds are not allocated from the ECCCF for the case
 - vi. a commission does not hold Commonwealth legal aid monies in excess of the allowed surplus which are available to fund the matter, and
 - vii. before the date of a commission's application, a commission has been managing its funding in accordance with the legal aid agreement.

Officers within the Attorney-General's Department assess funding applications from legal aid commissions to determine whether applications meet the guidelines and the level of funding, if any, to be provided from the fund. A complete copy of the ECCCCF guidelines is at **Attachment A**.

- c. Examples have been drawn from cases funded since the commencement of the 2007-08 financial year to date. It was considered that this timeframe would provide a reasonable coverage of the types of cases funded through the ECCCCF. In that time payments relating to 44 cases have been made to legal aid commissions from the ECCCCF. The breakdown of these cases by primary matter is as follows:
 - i. drug related – 21
 - ii. fraud – 11
 - iii. terrorism related – 4
 - iv. other – 8

Other includes matters such as money laundering, dealing with proceeds of crime and slavery.

- d. The emphasis of the ECCCCF is on the potential impact of a matter which meets any of the Commonwealth's criminal law guidelines to impact on a legal aid commission's capacity to provide assistance in other Commonwealth law matters. Criminal law guideline 11.1(2) provides that a legal aid commission may apply to the ECCCCF if the commission does not consider it can fund a criminal law trial without significantly impacting on its ability to provide assistance in other Commonwealth law matters in accordance with the legal aid agreement. Applications by legal aid commissions to the ECCCCF must include sufficient information to satisfy the criteria listed above at b. The guideline states that cases for which an application may be made include:
 - i. cases where a potential stay of a Crown criminal prosecution may be granted in accordance with the High Court's decision in *Dietrich's case*
 - ii. criminal conspiracy cases
 - iii. criminal cases arising under the *Corporations Act 2001*
 - iv. drug importation cases, or
 - v. a class of criminal cases that are similar in nature to each other.

The list above contains examples, and is not an exhaustive list, of the types of matters that the Commonwealth is prepared to consider for applications for allocations from the ECCCCF.

- e. Expenditure from the ECCCCF from 2000 to February 2010 totals \$31.756 million.
- f. Expenditure from the ECCCCF is reflected in legal aid expenditure. It does not form part of Government legal services costs.

- g. Historical expenditure figures for the ECCCCF do not indicate a trend of increasing expenditure. Funding for the terrorism trials was a one-off exception to normal expenditure patterns. Additional funds were appropriated for the cost of these trials. The high costs reflected the complexity of the matter, the volume and nature of the material used in evidence and the number of witnesses called. The main factor which influences the amount of funding spent is the nature of the cases involved.

Guideline 12 Commonwealth Criminal Law — Expensive Cases Fund

12.1 Purpose of Fund

The Commonwealth Criminal Law — Expensive Cases Fund (the *Fund*) has been established to assist Commissions to cater for high, one-off costs associated with providing assistance for a particular criminal law matter.

12.2 Administration of Fund

- (1) The Fund is administered by the Attorney-General's Department and the allocation of funds from the Fund is at the discretion of the Department.
- (2) In determining an application for an allocation from the Fund, the Attorney-General's Department must have regard to:
 - (a) the circumstances of the application
 - (b) the likely impact that approval of the application will have on the resources of the Fund, and
 - (c) other applications to the Fund.

12.3 Application for funds

- (1) An application to the Attorney-General's Department for an allocation from the Fund may only be made by the Commission.
- (2) A separate application must be made to the Attorney-General's Department for each criminal law matter for which an allocation from the Fund is sought by the Commission.
- (3) Cases for which an application may be made include:
 - (a) cases where a potential stay of a Crown criminal prosecution may be granted in accordance with the High Court's decision in *Dietrich's case*
 - (b) criminal conspiracy cases
 - (c) criminal cases arising under the *Corporations Act 2001*
 - (d) drug importation cases, or
 - (e) a class of criminal cases that are similar in nature to each other.

Note Guidelines 12.3(3)(a) to (d) are examples, and not an exhaustive list, of the types of matters that the Commonwealth is prepared to consider for applications for allocations from the Fund.

- (4) An application may be made before commencement of criminal law proceedings, or at any time during proceedings.
- (5) The Commission must include sufficient information in an application to satisfy the Attorney-General's Department that:
 - (a) the likely cost of the case is high, and is likely to significantly affect the capacity of the Commission to provide assistance for other Commonwealth Legal Aid Priorities
 - (b) in estimating the likely cost of the case, the Commission consulted with the Commonwealth Director of Public Prosecutions about the likely direction of the trial
 - (c) the Commission has taken or will take all necessary steps to manage the case in accordance with guideline 11 of this Part 3

- (d) the Commission has made a reasonable estimate of likely expenditure on the case for the relevant Financial Year
- (e) there is potential for a court to grant a stay of the matter in accordance with *Dietrich's case* if funds are not allocated from the Fund for the case
- (f) the Commission does not hold Commonwealth Legal Aid Monies in excess of the Allowed Surplus which are available to fund the matter, and
- (g) before the date of the Commission's application, the Commission has been managing its funding in accordance with the Agreement.

12.4 Terms and conditions of allocations from the Fund

An allocation from the Fund may be made on any terms and conditions that the Attorney-General's Department considers appropriate, including that:

- (a) the Commission must provide the Commonwealth with the following reports:
 - (i) at the end of each Financial Year, a report of the expenditure of funds allocated to the Commission from the Fund, and
 - (ii) at the completion of each matter for which funds have been allocated to the Commission from the Fund, a report of the expenditure of those funds, and
- (b) on the completion of a matter, any funds allocated from the Fund to the Commission for a particular matter but not spent on providing legal assistance for that matter must be returned to the Commonwealth, unless otherwise directed in writing by the Commonwealth.