



MINISTRY OF
JUSTICE
Tāhū o te Ture

High Cost Case Management (HCC)

Policy and procedure

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Contents

Introduction	4
Legislation and Regulations	4
The HCC framework	4
Inclusion Criteria	5
The case plan	6
Stages approach	6
Case management and decisions	8
Policies relating to HCC	9
Interim Grants	9
Standard Grants	9
Automatic inclusion	9
Discretionary inclusion	9
All grants	10
Assignment	10
Amendments	10
Disbursements	10
Expert Witnesses	11
Additional Counsel	11
Re-assignment	11
Invoicing	12
Multiple charges / charges added to a grant	12
Withdrawing Aid	13
Reconsideration/Review	14

Introduction

High Cost Case Management (HCC) aims to more closely manage from the outset criminal grants of legal aid which have the potential to become high cost. It seeks to reduce expenditure via transparent case management practices, with all funding decisions being approved on a staged basis in advance of work being undertaken. The management of these grants will be restricted to suitably qualified staff who will make decisions with the guidance of the National Specialist Adviser (NSA) team.

The HCC framework will apply to all criminal grants of legal aid approved from 3 October 2011 where specific criteria are met, and may apply to grants of aid approved prior to this date which will be considered for inclusion on a case by case basis.

The information which follows is a quick guide to the key policies and procedures which will apply to grants of legal aid managed under HCC.

Legislation and Regulations

The provisions of the Legal Services Act 2011 apply to criminal grants of legal aid managed under HCC, with specific reference being made to the following provisions:

Section 4 of the Legal Services Act 2011 – relating to the definition of “Commissioner”, “cost of services”, “prescribed manner”

Section 16 of the Legal Services Act 2011 – making decisions on an application for legal aid

Section 18 of the Legal Services Act 2011 – setting conditions on a grant of legal aid

Section 21 of the Legal Services Act 2011 – setting the repayment payable

Section 23 of the Legal Services Act 2011 – setting the maximum grant

Section 28 of the Legal Services Act 2011 – relating to requests for an amendment to grant

Section 29 of the Legal Services Act 2011 – withdrawal of legal aid – criminal matters

Section 75 of the Legal Services Act 2011 – provide legal aid services

Section 97 of the Legal Services Act 2011 – making a claim for payment

Section 98 of the Legal Services Act 2011 – timeframe in which to make a claim for payment

The HCC framework

The key legal aid granting policies and procedures relating to HCC are summarised in this section of the information pack for providers. Additional detail of policies and procedures can be found later in this document, or by reading the Legal Aid Provider Manual which is available on our [website](#).

Inclusion criteria

1. Grants may be placed under the HCC framework either from the outset, or after a grant of aid has been approved. Once placed under this management system, the grant will remain there until the case has been concluded.
2. Grants will be automatically placed under HCC (where no plea or a not guilty plea has been indicated) if the case relates to one of the following matters:
 - 2.1. homicide offences (including charges of Infanticide) – s158-181 Crimes Act 1961
 - 2.2. serious fraud offences – being all cases involving prosecution by the Serious Fraud Office, or other fraud offences which are likely to cost in excess of \$30,000 (excluding GST)
 - 2.3. class A drugs offences (except charges under s 7(1)(a) of the Misuse of Drugs act 1975)
 - 2.4. sexual violation cases where more than two complainants allege a sexual violation offence against the aided person
 - 2.5. class A drugs offences (where the case is a principle target of a Police Operation)
 - 2.6. criminal compensation matters relating to wrongful imprisonment/ applications to the Governor General to exercise the Prerogative of Mercy – s406 Crimes Act 1961
 - 2.7. retrial matters and/or appeal matters where the original grant of aid was managed under the HCC framework.
3. Grants may be placed under HCC if the following characteristics are present:
 - 3.1. the lead provider indicates that individual overall case cost is likely to exceed \$30,000 (excluding GST)
 - 3.2. Legal Aid Services determines that the individual case cost is likely to exceed \$30,000 (excluding GST)
 - 3.3. the case is likely to generate intense public interest or scrutiny based upon the nature of the criminal charges faced or defence to be raised, whereby inclusion will be considered on an individual basis for inclusion where appropriate. Such decisions will be made on an assessment of the specific facts of the case, and law which applies in each instance, with direct dialogue taking place with the lead provider
 - 3.4. cases where an associated case has been placed under HCC. However, minor players' in a Police operation will be bundled with the operation and dealt with by the HCC grants officer, but as a fixed fee or complex case as appropriate. This has been done to ensure consistency.

4. In addition, there will be occasions where either counsel or Legal Aid Services considers that upon the individual facts of the case that transfer into HCC is appropriate – such decisions will be based upon the complexity of the facts and the law applying in each instance.

The case plan

5. A key requirement for HCC grants is that information relating to the case is provided at the earliest possible stage, with a case plan document required to be regularly updated with each new request for legal aid funding. The case plan is a document which is used to accurately forecast the amount of legal aid funding sought in a timely and transparent manner.
6. The appellate case plan is required for Court of Appeal cases that are being managed under the HCC framework and the standard HCC plan is required for all other HCC grants.
7. In some instances an existing grant will be transferred into HCC, based upon its links to another case already managed under HCC. In some such cases, funding already approved may prove sufficient to manage the case –when this occurs a case plan will not be required. A case plan will only be required prior to any additional funding being approved. This is to recognise concerns that additional material/work should not be required of counsel unnecessarily.
8. The case plan document enables counsel to outline all funding sought for future attendances in the relevant stage of the case, and to highlight the need for funding for specific tasks or disbursements (eg, if an expert witness is to be required, counsel should advise as soon as possible and seek an estimate of cost to enable a timely decision on funding to be approved).
9. An accompanying covering letter is not necessary if full and complete information is provided in the case plan.

Stages approach

10. Once under the HCC framework, all legal aid funding approved will be on a staged basis to complete specific tasks or activities. The stages have been set to align with court events and/or activities, with the lead provider needing to present an updated case plan document with each new request for funding. The stages can be described as follows:
 - 10.1. Identification phase – Committal/Case Review phase
 - 10.2. Committal/Case Review – Substantive call-over phase
 - 10.3. Substantive pre-trial phase
 - 10.4. Trial phase

11. A standard initial pre-case plan grant of 40 hours preparation time (in addition to any bail grant) will be approved immediately for all cases entering the HCC framework. Any further funding by amendment must be supported by the case plan. The case plan must include the 40 hours to enable a full analysis of the case by the Specialist Advisors. If the grant is made post committal or post case review, 40 hours will be applied to whatever step the case is up to.
12. The 40 hours initial grant will not apply to cases that have been transferred into the HCC framework after aid has been approved. These cases would already have a grant.
13. Hearing and waiting time will be available at the provider's hourly rate. Time should be claimed based on the actual time spent by the provider in a hearing or waiting.
14. Waiting time includes when counsel is:
 - required to be in the courtroom
 - is able to leave the courtroom, but the Judge requires counsel to be able to return to the courtroom at short notice (eg, during jury deliberations).
15. Waiting time excludes:
 - periods when the Judge has excused counsel
 - periods when counsel is able to attend to other matters
 - scheduled breaks in hearings (eg, lunch breaks).
16. Where a client fails to attend a scheduled appearance, the provider can claim reasonable and actual time for waiting for the client, up to one hour. No evidence is required. Waiting time in addition to one hour in situations where a client fails to attend a hearing can be claimed via an amendment to grant.
17. Counsel is required to present a detailed breakdown of all foreseeable costs at the earliest possible time. This means that when the case plan is first presented, counsel will be required to complete a comprehensive funding request to cover all foreseeable tasks up until the completion of the trial, with the grant of legal aid amended only where there is a demonstrable unforeseen activity required for which funding is needed.
18. All costs associated with the grant or legal aid (including expert witness and/or additional counsel costs) must be sought in advance of engagement, with full justification/an explanation as to the need for such funding being presented. Providers who do not follow this process should not expect to be reimbursed unauthorised expenditure amounts.
19. While Legal Aid Services accepts that there may be unexpected or unforeseen events which require the immediate/undivided attention of counsel, such instances

are limited. Retrospective funding will not be approved unless extraordinary reasons for the delay are satisfactorily outlined and accepted by legal aid. Administrative delays/oversight will not satisfy this requirement as legal aid's expectation that all approvals will be sought in advance of work being undertaken is explicit.

20. When assessing retrospective applications, counsel will be required to provide the following basic information alongside any other details pertinent to the issue at hand:
 - 20.1. the total amount of funding sought
 - 20.2. the nature of the activity/reason why funding is required
 - 20.3. why such funding was not able to be sought in advance or work being undertaken/ what was the unforeseen event necessitating work by counsel outside of the funding already approved?
 - 20.4. confirmation as to whether funding for this activity/disbursement has already been approved, either in whole or part? (ie, has there been an error in calculation relating to GST/ currency conversion rates?).
21. Additional information may be required of counsel, to be assessed on a case by case basis – however, the onus is expressly placed on counsel to provide sufficiently detailed information so as to enable the nature of the unforeseen event to be understood.
22. Invoices must be presented at the end of each stage (or at agreed points in the case). In the majority of cases, due to the time between set stages in the case being completed this will mean invoicing in line with the six month invoice period applying to all other grants of legal aid. However, there may be instances where due to timing or a delay in the substantive trial being heard, invoicing on a case may need to be managed outside of the six month billing requirements, in reliance on the express permission allowable by virtue of s98 Legal Services Act 2011. If this occurs, and a request to invoice outside of the six month rule is made by counsel, an assessment of the individual circumstances of the case will be considered, and a decision clearly outlined to counsel in writing if an exception is to be approved.

Case management and decisions

23. Cases will be managed on a day to day basis by specifically approved staff selected based upon their understanding of criminal granting policies and procedures. These staff will be responsible for conveying decisions on the case to the lead provider, and for all day to day management tasks.
24. Approved staff who will manage HCC grants are currently located in the Wellington Legal Aid Office and the Auckland Legal Aid Office. Grants of legal aid that fall under the HCC framework will be transferred to these staff and counsel will be contacted

in writing to confirm who their case manager and point of contact is on an individual file basis.

25. Decisions as to the amount of funding approved in a specific case rest with the NSA team or a panel set up by this group in conjunction with the assigned case manager. In most instances a panel of NSAs will be set up at some point over the life of the grant to consider the funding requests put forward, however, this will not always be necessary.
26. Providers will be able to communicate directly with specialist advisers in appropriate cases.
27. Grants officers now have increased discretion to consider funding applications without specialist adviser input in some cases.
28. The case manager will issue the final decision when they process the decision, and will convey this to the lead provider.

Policies relating to HCC management

Interim grants

29. The current policy in relation to interim grants applies, whereby all interim grants approved must comply with s16 Legal Services Act 2011.

Standard grants

30. The current policies in relation to eligibility decisions apply, with all applicants needing to show that they meet the financial eligibility criteria/ or an exception to this, and that their case requires legal representation as per the provisions of the Legal Services Act 2011.

Automatic inclusion

31. When an automatic selection criterion is triggered before a grant has been approved or a maximum grant set, counsel should submit a case plan document for consideration along with an estimate of the amount of funding required to complete the initial stage(s) of the case. If this is not completed, counsel may be asked to submit this before the amount of the maximum grant is confirmed.

Discretionary inclusion

32. Due to the nature of the criteria under which grants may be transferred into HCC, it is anticipated that a number of grants may already have funding approved prior to the case being characterised as falling within the framework.
33. Where an existing grant is to be transferred into HCC, counsel will be advised of this as soon as possible. Funding already approved will remain available to counsel, in line with existing policy regarding setting of the maximum grant; however, no additional funding will be approved until the completed case-plan is presented.

All grants

34. In all instances, the maximum grant approved pursuant to s23 Legal Services Act 2011 will be considered on a case by case basis, in reliance upon the information presented by counsel, and the experience of legal aid staff in managing similar cases.

Assignment

35. The current assignment policy applies, with grants able to be assigned only to those persons who are approved to provide legal aid services in accordance with s75 Legal Services Act 2011.
36. Cases will be assigned to a provider based upon the information presented on the application form, and/or in line with any applicable rotational policy assignment.
37. In exception to the general rotational assignment policy, applicants in Serious Fraud Office prosecutions may nominate preferred counsel.

Amendments

38. The current amendment policy applies, with all amendments to grant needing to comply with the legislative provisions set out at s28 Legal Services Act 2011.
39. To seek an amendment, the lead provider must complete an amendment to grant form and present an up-to-date case plan along with their request for additional funding.
40. The amendment to grant must cover all foreseeable funding required in order to complete the next stage of the case, and any anticipated/associated disbursement costs.
41. All funding is to be sought in advance of work being undertaken, with there being an expectation that retrospective funding will be approved only in extraordinary circumstances outside of the control of counsel.
42. Where unexpected court events require the immediate/undivided attention of counsel which requires tasks to be completed outside of funding already approved, an email should be sent to the case manager briefly outlining the nature of the event, to be followed by full details at a later date. This is to enable Legal Aid Services to be put on notice that an amendment to the maximum grant may be required, and will assist in any assessment of retrospective funding presented.
43. Where an amendment is presented and there is insufficient information to support the funding request made, further information may be sought from the provider. This may include a request that the case plan document be updated, prior to a decision on the amendment to grant being able to be made. Where this occurs, the gaps in information provided will be specifically outlined to counsel.

Disbursements

44. The current disbursements policy applies.

Expert witnesses

45. In relation to expert witnesses, the following will be considered:
 - 45.1. the nature and scope of the expert evidence to be provided, along with an assessment as to their proposed involvement in the case (ie, is a specialist report to be produced and/or appearance at trial)
 - 45.2. the need to engage the specific person proposed (ie, is such expertise available locally/ nationally/ in Australia/ or is an international expert required)
 - 45.3. any costs related to their involvement/ appearance (ie, related travel costs and/or the availability of AVL equipment).

Additional counsel

46. In relation to additional counsel, the following will be considered:
 - 46.1. whether additional counsel is sought in relation to the completion of a specific task (ie, as an agent to appear in relation to a specific event), and if so what the specific breadth of tasks proposed will be
 - 46.2. whether additional counsel is sought in relation to the completion of specific tasks (ie, a division of labour within the overall preparation funding sought) and if so what the specific breadth of tasks proposed will be
 - 46.3. whether such counsel is sought to assist with the presentation of the defence case before the court, and if so what the specific breadth of tasks will be, along with their proposed level of involvement in the case.

Re-assignment

47. The current reassignment policy continues to apply. However, due to the large costs which can be associated with the reassignment of a HCC matter, the current policy will be strictly applied, with additional steps needing to be completed by counsel before a reassignment decision is approved.
48. These additional steps are to ensure that a “clean slate” approach to funding is achieved, and that there is transparency as to the exact position of funding/ pre-trial applications/ relevant disclosure requirements/ court fixture dates etc before the re-assignment is approved.
49. In limited occasions a nominal amount of funding may be approved to enable re-assignment between providers, which will ensure that a case is transferred in a timely and organised fashion. Such funding will be considered only at the request of incoming counsel, with the assessment being made on the individual facts of the case.
50. Where such funding is approved, payment of the final invoice to original counsel will take place only when effective transfer has taken place. If effective transfer has not been completed, the Commissioner may examine the claim in accordance with s89(c) Legal Services Act 2011.

Invoicing

51. The current invoicing policy applies, with the lead provider being responsible for presenting all invoices for payment in the prescribed manner, as per the legislative requirements outlined at s97 Legal Services Act 2011. The invoice form to be used by the lead provider remains the same as for other criminal matters.
52. Once a case is deemed to be within the HCC framework, agreement will be reached as to the specific time frame within which invoices are to be presented for consideration/payment. This timeframe will be specified with reference to particular stages, in line with the requirements governing when an amendment is to be presented. The requirements can be summarised as follows:
 - 52.1. an invoice must be presented at the end of each stage, alongside an updated case plan and request for future funding for the next stage in proceedings (if such funding has not already been approved)
 - 52.2. an invoice may be presented outside of these stages where it relates to a specific disbursement cost or activity which needs to be reimbursed (where funding has already been approved)
 - 52.3. an invoice may be presented outside of these stages and outside of the six month invoice rule if there is significant delay between the end of the previous stage and the beginning of another (ie, where there is an extended period between committal and the scheduled trial fixture date) where prior agreement from Legal Aid Services has been sought and obtained. When this occurs, an updated case plan needs to be presented in order to inform legal aid as to the progress of the case alongside the invoice presented
 - 52.4. a final invoice must be presented for consideration within eight weeks of a final disposition/a sentencing decision being issued by the court. This allows counsel four weeks within which to focus upon any merits of an appeal, and four additional weeks within which any outstanding disbursement costs are to be invoiced by experts/additional counsel.
53. Where there has been a significant delay in a matter progressing before the courts, and no invoice has been presented for consideration, legal aid may contact counsel directly to request that an invoice be presented for all activities completed up to a specified date. This is to enable accurate forecasting of costs by Legal Aid Services.

Multiple charges / charges added to a grant

54. Current policy will continue to apply as to whether:
 - 54.1. new charges are added to an existing grant because the charges relate to the same incident/s or
 - 54.2. a new grant is established for the new charges because they are unrelated and to be separately dealt with by the court.
55. Where additional charges are added to an existing HCC case, this must be accompanied by an up-to-date case plan and may be accompanied by an

amendment to grant. This is because the addition of another or alternative charge may impact the funding levels approved, and may influence decisions regarding approvals in relation to additional counsel.

Transfer triggers to move case to HCC

56. Where a case has already had funding approved, it may need to be transferred in the HCC framework based upon one of the following situations:
 - 56.1. additional charges are added which related to one of the automatic inclusion criteria or
 - 56.2. the cost of the grant is likely to exceed the financial trigger threshold or
 - 56.3. a co-accused grant is being managed under HCC therefore all linked grants of legal aid must be viewed collectively (based on charges faced or links to a specific Police Operation) and managed under the one payment framework or
 - 56.4. either legal aid or counsel has sought inclusion based upon an assessment of the individual facts of the case, and after consideration of all relevant matters, this has been approved by Legal Aid Services.
57. When this occurs, counsel must be notified that the case will be transferred into HCC, and the name of their case manager confirmed.
58. The case manager must provide details of the HCC framework, and confirm what documentation counsel will be required to complete at which points in the case. This includes:
 - 58.1. presenting an invoice for all work completed to date under the existing maximum grant
 - 58.2. completing an amendment to grant to cover future activities
 - 58.3. completing a case plan document outlining the future funding required for consideration¹.

Withdrawing aid

59. The current requirements relating to the withdrawal of legal aid apply, and must comply with s29 Legal Services Act 2011.
60. Where aid is to be withdrawn, counsel will be asked to present a final invoice for all work completed up until the withdrawal date, at which point the case will be closed and any repayment payable calculated in accordance with s21 Legal Services Act 2011.

¹ Note - In some cases, (such as where a co-accused grant has led to the present case being managed under HCC), the level of funding already approved under the maximum grant may be sufficient to manage the case. In such instances counsel will not be required to complete the case-plan document unless or until additional funding is sought.

Reconsideration/Review

61. The current policies and procedures in relation to reconsiderations and review apply.