



17 August 2011

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Ministry of Justice  
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Dear Briget

### **High Cost Case Management Consultation**

Thank you for the opportunity to comment on the *High Cost Case Management* consultation paper.

The Law Society's comments have been prepared with assistance from the Criminal Law Committee.

#### **1. Identification**

*Do you agree/disagree with the list of offences proposed for automatic inclusion within HCC?*

The Law Society agrees that the following offences should be automatically included within HCC, namely:

- Homicide Offences;
- Serious Fraud Offences;
- Class A Drugs Offences (where part of a police operation);
- Conspiracy Charges (relating to s 98A Crimes Act 1961);
- Criminal Compensation Claims; and
- Retrial/Appeal matters (where the original case was managed under HCC).

It is unclear whether homicide offences extend to charges such as careless/dangerous driving causing death. If not, it probably should, because these cases can be complex and time consuming.

It is unclear why Class A drugs offences have to be part of a police operation to justify being included in HCC regime. The maximum penalty for a Class A dealing offence is still life imprisonment, whether the charge arises from a police operation or not.

The consultation paper states that "other possible attributes which could lead to inclusion within HCC might include all cases where there are 3 or more accused (irrespective of the charges faced)". It is unclear as to why, in the case of joint accused, the threshold for possible discretionary inclusion in HCC has been set at three accused rather than two. Defence lawyers are just as likely to have a substantive cut-throat argument, or applications for severance, or for joinder, or "mixed charging" (where some charges are jointly laid, and others not) on their hands with two accused as with three.

*Do you agree/disagree with the list of characteristics to identify cases for inclusion with HCC?*

The Law Society agrees with the list of characteristics in the consultation paper, namely:

- All criminal cases where the overall cost is likely to exceed \$30,000;
- All criminal cases which are likely to generate intense media interest or scrutiny; and
- All criminal cases associated with an existing case, which has been placed under the HCC framework (i.e. all co-defendant files or cases associated with a Police Operation).

*Are there any additional offences or characteristics, which you think should be used to identify cases, which should be managed under HCC?*

- All criminal cases where there are a large number of witnesses;
- All criminal cases where witnesses require interpreters or clients require interpreters;
- All criminal cases where there is a significant amount of disclosure; and
- All criminal cases where trial is expected to last more than two weeks.

## **2. Inclusion**

*Do you agree with the principle that cases need to be able to be transferred into HCC at any stage? If not, how would you better identify cases needing to be placed under HCC at the outset?*

Yes, cases need to be able to be transferred into HCC at any stage. There needs to be as much flexibility as possible.

## **3. Case Plan**

*Are there specific matters which you think should be included in the case plan document?*

It is questionable whether a case plan would assist at all in anything other than a fixed fee estimate situation.

Suggestions for content to be included in the case plan document:

- Outline of the Crown case (could simply be a summary of facts if one is available);
- Strengths and weaknesses of the Crown case;
- Tick boxes for likely defences, for example self defence, property defence, alibi, identity etc;
- Are the following evidentiary issues likely to arise: character, propensity mode of evidence etc;
- Custodial status;
- Likely pre-trials (again with prompts or tick boxes);
- Possibilities for resolution;
- Issues of Fitness to Plead;
- Disclosure: Volume of documents whether third party disclosure likely;
- Evidence likely to be called;
- Number of trial days likely to be necessary;
- Second Counsel;
- Estimate of Trial Cost (possibly broken down to various steps for example committal, pre trial, trial but as few as possible);
- Likely disbursements, for example experts, investigators.

Disclosure: Most HCC cases would have a large amount of material that has to be read. This can be time consuming and is necessary to determine the progress of the case. Sometimes simply just

watching a video interview can take two hours plus additional time considering potential issues which may arise from the interview.

Bail: Awaiting trial there may be multiple changes of addresses by a defendant each requiring a memorandum. This normally needs to be done the same day so needs to be part of the case plan as there is insufficient time available to await approval for funding.

Trial callovers: It is not clear how these are to be dealt with. It is becoming more common for cases involving multiple defendants to have special trial callovers (sometimes lasting half a day) in order to deal with bail issues, sentencing indicators etc. These are callovers directed by the Court and not at the request of the client, and it is difficult to foresee (show on a case plan) what may happen that day. Often the client is adamant they do not want to change their plea, or have a sentencing indicator until they see the result for other accused.

It would be sensible for the case plan to require defence counsel to meet with prosecuting counsel and provisionally agree to the extent that they are able. For example, an hour presentation by a forensic accountant about what the theory of a case is, with key SFO numbered documents identified, gives all counsel in a SFO prosecution a head start to constructively work through what are essentially case management issues. This type of consultation always happens too late and too close to date of trial to be of any assistance in reducing pre-trial preparation costs. The consultation paper envisages that the case plan be a "living document". There could be a number of consultative meetings appropriate to the circumstances of a particular high cost case.

*Do you have any suggestions which would make the case plan document easy to use?*

It would be useful if it was an electronic "prompt" document with options that could be included or excluded rather than having to create from scratch. A document designed to be used from committal through to trial verdict that only needs to be added to would be preferable rather than having to update the case plan every step. The case plan should be used as the living working document which can be looked at to immediately ascertain how costly the case is likely to be (as difficult as this may be) to ascertain at the starting point.

The more times the case plan has to be added to or a form filled out the more likely it is that work will progress without the case plan being filled in. Counsel's priority is the client's case rather than administration and significant amounts of work can be required very quickly and unexpectedly particularly at the pre-trial application stage.

Providing copies of all material filed or issued by the Court can result in a large amount of copying so the ability to scan in documents or email them would be useful. Alternatively, since this is all under the Ministry of Justice perhaps the Ministry could scan these documents into the legal aid file.

#### **4. Staged Funding**

*Do you agree with the proposal that funding be approved on a staged basis as outlined? If not, how would you set the stages within which funding could be managed?*

We agree with the proposal that funding should be approved on a staged basis. There needs to be flexibility as progress or work required is often outside the control of the defence and is based upon action taken by the Crown or Court.

## **5. Alignment with Court Processes**

*The proposed stages have been set to align with key Court events and/or activities. Do you agree with the suggested stages? If not, which Court event and/or activities would you base the stages upon?*

There is specific concern in relation to the "Substantive Pre-Trial" and the "Trial Phase" stages. If a new issue arises during the Pre-Trial or Trial phase and the Court advises it is being dealt with in two days it can be very difficult to fill out a new estimate when the priority is dealing with the application.

## **6. Retrospective decisions**

*All funding requests are to be presented in advance of work being undertaken by counsel. In what circumstances do you think an exception should be made?*

Exceptions should be made when work could not be foreseen and no estimate was previously provided. If work is completed it should be paid for, particularly if done on an emergency basis.

## **7. Expert Costs/Additional Counsel**

*All costs associated with expert witnesses and/or additional counsel must be sought in advance, with full justification being outlined at the earliest possible stage. In what circumstances do you think an exception should be made?*

If an issue arises during Trial it can be very difficult (especially when a junior is not even allowed on a *pro bono* basis) to fill out a new estimate. For example, the Crown's expert witness departs from his brief requiring defence to unexpectedly have to call defence expert witness. There needs to be a recognition that some matters are simply outside Counsel's control and cannot necessarily be foreseen.

On the issue of additional counsel, it is artificial to break down the hours the junior is going to spend on the file and the hours the senior is going to spend in an estimate. If a senior uses a junior the hours should be able to be split in whichever way the senior feels is necessary. For example, a junior may have to prepare almost single handedly the submissions for a pre-trial as their senior is in Court, but then that cost is unable to be recovered because more hours were allocated to the senior than the junior when an estimate was provided in the expectation the senior would do more work on the pre-trial. If the work is completed it should not matter who did it (when it is work outside the Courtroom), subject only to the correct cost being submitted.

The "extraordinary circumstances" threshold for the approval of additional counsel is too high. We will never see any juniors on cases if this is required.

## **8. Invoicing**

*Do you think that invoices should be subject to the three-month invoice rule, or do you prefer the proposal that invoices be presented on a staged basis?*

The staged invoicing process seems sensible. However, the Law Society is not opposed to the 3-month rule in principle.

## **9. General**

*Are there any additional comments or suggestions you would like to have considered which relate to the overarching HCC framework?*

If estimates are required then the Ministry should make them easier to complete, for example a pre-trial application estimate with prompts, an expert witness estimate with prompts etc.

At the moment Counsel has to work out how many hours are left, look at the manual to see how many hours might be available, work out which step the work required comes under and this can all be extremely time consuming. There should be an online invoicing system with user name and passwords that allows all this information to be collated instantly.

The Law Society hopes that the above comments are of assistance to the Ministry of Justice.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm  
**President**