



## Acquitted defendants: recovery of legal costs from central funds

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This note outlines the provisions under which an acquitted defendant may be entitled to recover his legal costs from central funds.

In particular, it considers the introduction of a “cap” on the amount that may be recovered. The cap, introduced in October 2009, provides that an acquitted defendant who paid for private legal representation will only be able to recover his costs at legal aid rates, even where these are lower than the commercial rates his private lawyers actually charged. The defendant will be responsible for meeting any difference.

In January 2010 the Law Society brought judicial review proceedings against the cap, arguing that the Lord Chancellor had acted unlawfully in implementing pay rates that did not adequately compensate defendants. In June 2010 the High Court handed down its judgment; it accepted the Law Society’s argument and ruled that the pay rates set in October 2009 were unlawful. The Ministry of Justice has 14 days to decide whether to appeal against this decision.

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## 1 Defence costs: reimbursement out of central funds

Under section 16 of the *Prosecution of Offences Act 1985*, the courts may order that an acquitted defendant who has privately funded his legal representation should have his legal costs reimbursed out of central funds. A defendant's costs order may be made by magistrates where:

- (a) an information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with;
- (b) a magistrates' court inquiring into an indictable offence as examining justices determines not to commit the accused for trial;
- (c) a magistrates' court dealing summarily with an offence dismisses the information.<sup>1</sup>

A defendant's costs order may be made by the Crown Court where:

- (a) any person is not tried for an offence for which he has been indicted or committed for trial; or
- (aa) a notice of transfer is given under a relevant transfer provision but a person in relation to whose case it is given is not tried on a charge to which it relates; or
- (b) any person is tried on indictment and acquitted on any count in the indictment.<sup>2</sup>

Orders may also be made following a successful appeal against conviction or sentence.

The order will be "of such amount as the court considers reasonably sufficient to compensate [the defendant] for any expenses properly incurred by him in the proceedings".<sup>3</sup>

There are two ways of ascertaining the amount to be reimbursed. The first is for a court to specify the amount to be paid when it makes a costs order at the time of the hearing; if the acquitted defendant agrees to that figure, this is the amount paid from central funds. The second (and more common) way is for the amount to be determined by a court officer in accordance with the procedure set out in the *Criminal Cases (General) Regulations 1986, SI 1986/1335*.

## 2 The 1986 Regulations: determining the reimbursement amount

### 2.1 The pre-October 2009 position

Until October 2009, regulation 7 of the 1986 Regulations read as follows:

7. (1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 and shall allow such costs in respect of—
- (a) such work as appears to it to have been actually and reasonably done; and
  - (b) such disbursements as appear to it to have been actually and reasonably incurred,

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<sup>1</sup> *Prosecution of Offences Act 1985*, s16(1)

<sup>2</sup> *Ibid*, s16(2)

<sup>3</sup> *Ibid*, s16(6)

as it considers reasonably sufficient to compensate, the applicant for any expenses properly incurred by him in the proceedings.

(2) In determining costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved.

(3) When determining costs for the purpose of this regulation, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.

Under section 20 of the 1985 Act, the Lord Chancellor has the power to make regulations governing the award of costs in criminal cases. He is specifically authorised to fix:

the scales or rates of payments of any costs payable out of Central Funds in pursuance of any costs order, the circumstances in which and conditions under which such costs may be allowed and paid and the expenses which may be included in such costs.<sup>4</sup>

Prior to October 2009, this power had never been exercised and no prescribed rates for the recovery of defence costs were in place. There was, therefore, no “cap” on the amount that could be recovered from central funds: the appropriate amount was entirely in the court’s discretion.

## **2.2 The Ministry of Justice consultation**

However, in November 2008 the Government launched a consultation to examine ways of restricting access to central funds, as payments out were consistently exceeding the budgeted amount. The consultation presented a number of options, the third of which was the introduction of a “cap” under which acquitted privately funded defendants would only be able to recover costs at legal aid rates, rather than at the commercial rates their private lawyers had actually charged:

4. Since private rates for legal representation are much higher than legal aid rates, if a privately funded individual or company has recourse to Central Funds, the cost to the taxpayer can be significant. This is particularly true in complex cases involving charges against a company and on occasion claims from Central Funds under private rates can run into several million pounds for a single case. The Lord Chancellor may by regulation fix the scales or rates of these payments and set conditions, but this power has not been used except in relation to personal incidental expenses.

(...)

7. (...) We believe that it is now the time to consider whether it is counterintuitive to pay privately funded rates in criminal cases when the legal aid system pays both sustainable fee levels for practitioners and ensures a sufficient level of quality for clients. We believe that there is a strong case for reforming the current payment of legal costs from Central Funds to ensure that we are balancing effectively the need to pay fair rates in criminal cases to practitioners whilst using taxpayers’ money effectively and responsibly.

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<sup>4</sup> *Prosecution of Offences Act 1985*, section 20(1)(a)

8. There are 3 options that we are currently considering for the reform of Central Funds payments:

Option 1 – no change to the present system.

Option 2 – restrict access to Central Funds. This would mean that individuals who fail to apply for legal aid in Crown Court cases would no longer be eligible for Central Funds payments if acquitted. To clarify, this would mean that private paying individuals in the Crown Court could no longer claim from Central Funds. We are also considering in this option whether it would be appropriate that individuals who fail the Interests of Justice test in magistrates' court cases, but subsequently obtain legal advice and/or representation, could no longer claim back their costs from Central Funds.

Option 3 – cap Central Funds payments in all cases for acquitted defendants, including companies, to the relevant legal aid rates.<sup>5</sup>

The draft Impact Assessment provided at Annex 1 of the consultation document suggested that implementing option 3 would result in savings of approximately £20 million a year to the central funds budget.

The consultation closed on 29 January 2009 and the Ministry of Justice published a summary of responses on 8 June 2009.<sup>6</sup> The summary indicated that respondents favoured continuing with the existing system:

Overall, respondents to the proposals were in favour of maintaining the current system whereby defendants are entitled to claim their legal costs if they are acquitted. Respondents considered that the existing approach for awarding the costs of privately paying clients, determined on a case by case basis, is both fair and transparent.<sup>7</sup>

The consultation's first question, described by the Criminal Bar Association as "a leading question of the most obvious type ... in a form that would be permitted by no judge because it so firmly suggests the answer desired",<sup>8</sup> had elicited the following responses:

**1. Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?**

The majority view was that existing private rates were not disproportionately high. Most respondents argued that rates reflected the market price for private work and are subject to a process of assessment that allows guideline rates set by the Supreme Court Costs Office to award 'reasonable' costs. Several respondents made comparisons with the civil guideline rates and questioned why the Government was not considering proposing changes to be in line with criminal rates.

A number of respondents argued that legal aid rates were disproportionately low and that solicitor firms were subsidising their publicly funded criminal work with income generated through private work. A minority agreed that in principle, where legal aid was available, the taxpayer should not have to pay unreasonably high private rates,

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<sup>5</sup> Ministry of Justice, *The Award of Costs from Central Funds in Criminal Cases: Consultation Paper CP28/08*, 6 November 2008, pp4-5

<sup>6</sup> Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009

<sup>7</sup> Ibid, p5

<sup>8</sup> Criminal Bar Association, *Response to the Consultation Paper concerning the Award of Costs from Central Funds in Criminal Cases*, 19 January 2009, para 3

with one respondent suggesting that costs should be capped at existing rates, with another suggesting an hourly fee of £250. Beyond the points raised about private rates, a number of respondents believed that proposals would unduly impact upon individuals who wished to pay privately to ensure a higher quality service.<sup>9</sup>

In response to the question on capping payments from central funds at legal aid rates, the summary said:

**4. Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for individuals who have failed the means test in the magistrates' court or on appeal to the Crown Court? Please provide supporting reasons for your answer.**

66 respondents disagreed with this suggestion. Only six agreed. This proposal was attacked as being very unfair to those who were deemed to need representation by reason of passing the interests of justice test, but having failed the means test would have no option but to obtain legal services in the open market. Respondents said that the level at which the means test was set excluded many workers on average incomes from legal aid. Solicitors would not be able to provide the same level of service if working to legal aid rates, which are able to be as low as they are due to volume of work and guaranteed payment. Defendants would either have to pay higher than legal aid rates and forfeit the difference if acquitted, or try to persuade lawyers to conduct work at legal aid rates, when they were in no position to negotiate lower rates.<sup>10</sup>

And in response to the question on suggested amendments to the Government's proposed options:

**6. What amendments, if any, would you make to any of the options outlined should we decide to progress with the reform of Central Funds payments? Please provide supporting reasons for your answer.**

The majority view was that the current system was fair and worked in practice. Any changes were commonly seen as unjust, and potentially counter-productive in terms of increased unrepresented defendants, which might involve additional costs in terms of longer hearings and increased instances of miscarriages of justice. Some respondents agreed that the system could be changed, but suggested waiting until the results of the National Taxing Team taking over responsibility for magistrates' courts Central Funds claims were known, as this might reduce the costs to Central Funds. Many proposed transferring the cost of defendant's costs orders from Central Funds to the prosecutors themselves, which, it was said, would improve the prosecutors' decision-making processes in terms of only bringing prosecutions where there was a realistic prospect of conviction, and it was in the public interest to prosecute. Other respondents asked what legal aid rates we would use, as there are different schemes for different types of cases.<sup>11</sup>

The *Times* quoted Rodney Warren, the director of the Criminal Law Solicitors' Association, as saying the change "would be the "final nail in the coffin" of criminal legal aid":

He warned that miscarriages of justice could occur because people accused of crimes would have to rely on junior and inexperienced lawyers who were paid legal aid rates.

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<sup>9</sup> Ministry of Justice, [The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08](#), 8 June 2009, p6

<sup>10</sup> Ibid, p7

<sup>11</sup> Ibid, p8

Those who do not qualify for legal aid might even plead guilty when they were not, said Ian Kelcey, chairman of the Law Society's criminal legal aid committee.<sup>12</sup>

However, despite the opposition expressed by the majority of consultation respondents, the Government indicated that it nevertheless intended to proceed with the introduction of a cap:

Following this consultation, the Government's position remains that there is a compelling case for reforming the award of costs from Central Funds, while maintaining the principle that those who have been acquitted should be entitled to claim the reasonable cost of their defence. Having considered all the responses ... we intend to proceed with option 3, namely to cap Central Funds payments to equivalent legal aid rates for all defendants, including companies.

(...)

Because private rates vary enormously on a case by case basis, this makes the Government's ability to predict and control spend from Central Funds difficult. Paying private rates from public funds also creates a two-tiered system. It remains entirely at the discretion of individual law firms as to the rates they charge to their private clients. However, individuals who can afford to pay private rates are relying on the taxpayer to refund these costs where they are acquitted. The Government believes therefore that awarding costs from Central Funds at legal aid rates is fair, reasonable and proportionate.<sup>13</sup>

The changes were introduced by the [Costs in Criminal Cases \(General\) \(Amendment\) Regulations 2009, SI 2009/2720](#), which came into force on 31 October 2009; an overview is set out in the associated [Explanatory Memorandum](#).

### 2.3 The post-October 2009 position

The 2009 Regulations introduced a cap on the amount recoverable from central funds by amending regulation 7 of the 1986 Regulations. As of 31 October 2009, regulation 7 (as amended) now reads:

7. (1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 and shall allow costs in respect of—

(a) such work as appears to it to have been actually and reasonably done; and

(b) such disbursements as appear to it to have been actually and reasonably incurred.

(2) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.

(3) The costs awarded shall not exceed the costs actually incurred.

(4) The Lord Chancellor shall, with the consent of the Treasury and for the purposes of this regulation, determine the rates and scales of costs in respect of work and disbursements payable out of central funds.

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<sup>12</sup> "Cost ceiling means defendants who win their cases may face a big bill", *Times*, 17 July 2009

<sup>13</sup> Ministry of Justice, [The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08](#), 8 June 2009, pp7 and 12

The new provision in regulation 7(4) enabling the Lord Chancellor to determine the rates and scales of costs was derived from his existing statutory power under section 20 of the 1985 Act, as referred to in section 2.1 of this note. No new primary legislation was therefore needed in order to implement this change. The rates and scales the Lord Chancellor has prescribed under regulation 7(4), which apply to costs orders made in respect of proceedings commenced on or after 31 October 2009, were issued on 30 October 2009 and are available on the HM Courts Service website.<sup>14</sup>

Press coverage has drawn particular attention to the impact of the change on people who bring court proceedings to challenge fixed penalty notices for minor motoring offences. Such defendants are not usually eligible for legal aid and therefore have limited options other than to pay privately for legal representation:

Defendants in criminal cases can normally expect to receive legal aid, unless they are disqualified because of their income. Those who choose – or are obliged to – pay for their own defence will also be out of pocket as a result of the new arrangements. But it will hit motorists particularly hard because a far lower proportion receive legal aid in the first place.

(...)

Andrew Howard, the [AA's] head of road safety, said: "While we hold little sympathy for those who escape conviction through 'technical' defences, we are only too aware of people who are pursued for offences that they did not commit. Often these are caused by misidentification of vehicles, perhaps through the cloning of their car, or other 'technical' errors.

"We feel that it is wrong that people in this situation could end up paying more to be found not guilty than they would have to pay if they had accepted the original fixed penalty."<sup>15</sup>

In response, a Ministry of Justice spokesman was quoted as saying:

"The Government is committed to ensuring that those who are most in need of legal representation or advice receive it. However, we must do so in a way that makes best use of taxpayers' money," a spokesman said.

"Publicly funded legal support has been one of the fastest growing areas of public sector spending over the last 25 years and currently stands at around £2 billion per year. This is not sustainable. We have no intention of preventing someone from challenging what they believe to be an unfair prosecution in court, but it must be done at a fair and sustainable rate.

"To ensure best value for the tax payer this change will ensure that anyone who pays privately for their legal representation and is acquitted of their motoring offence will be reimbursed at the rates payable under legal aid."<sup>16</sup>

## 2.4 The Law Society's challenge

In January 2010, the Law Society filed a judicial review application that sought to overturn the 2009 Regulations, arguing that they were "unlawful and grossly unfair":

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<sup>14</sup> Ministry of Justice, *Rates and scales in respect of defendant's costs orders*, 30 October 2009

<sup>15</sup> "Innocent motorists to be asked to pay court costs", *Telegraph*, 28 September 2009

<sup>16</sup> *Ibid*

Robert Heslett, President of the Law Society says: "The Law Society's view is that the new regulations are unlawful and that successful defendants are entitled to reasonable compensation for costs that they have properly incurred. This is the test set out in the Prosecution of Offences Act 1985. Payment on this basis can work out at much more than legal aid rates."

(...)

Noted criminal law firm Kingsley Napley has been instructed to act on behalf of the Law Society. Senior partner Stephen Parkinson says:

"People do not choose to be prosecuted. Where they are prosecuted and then acquitted, it is grossly unfair that under the new scheme they only get back a fraction of their costs. By contrast, successful prosecutors are entitled to recover their "just and reasonable costs" which can work out at much more than legal aid rates. This underlines the inequality of the new scheme."

The Law Society's Judicial Review is backed by the Police Federation of England and Wales who say the nature of police work results in police officers more frequently being the subject of criminal proceedings compared to other members of society.<sup>17</sup>

The High Court handed down judgment on 15 June 2010, finding in the Law Society's favour and ruling that the 2009 Regulations were unlawful:

The new regulations involve a decisive departure from past principles. They jettison the notion that a defendant ought not to have to pay towards the cost of defending himself against what might in some cases be wholly false accusations, provided he incurs no greater expenditure than is reasonable and proper to secure his defence. Any change in that principle is one of some constitutional moment. It means that a defendant falsely accused by the state will have to pay from his own pocket to establish his innocence. Whatever the merits of that principle, I would be surprised if Parliament had intended that it could properly be achieved by sub-delegated legislation which is not even the subject of Parliamentary scrutiny.<sup>18</sup>

A Law Society press release said:

The point at issue in the litigation was relatively simple: can the Lord Chancellor in setting rates or scales decide what is "reasonable" to allow the defendant, even if as a consequence the amount that will be recovered falls well short of the amount the defendant actually incurred?

In his judgment given today, Lord Justice Elias made it clear that the statute does not allow the Lord Chancellor to decide what is reasonable. In setting out a scheme of rates and scales, he has to respect the statutory purpose set out in the Prosecution of Offences Act. The Act was intended to provide reasonable compensation for successful defendants. By implementing rates and scales which did not compensate defendants the Lord Chancellor had acted unlawfully.<sup>19</sup>

It has also published a practice note for solicitors representing criminal defendants who have been acquitted, who have had the charges discontinued, or who have successfully appealed,

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<sup>17</sup> Law Society press release, [Law Society issues groundbreaking legal action to overturn unfair Government regulation](#), 11 January 2010

<sup>18</sup> [R \(on the application of the Law Society of England and Wales\) v The Lord Chancellor](#) [2010] EWHC 1406 (Admin), at para 56

<sup>19</sup> Law Society press release, [Law Society hails High Court victory against plans to make the innocent pay their own defence costs](#), 15 June 2010

and who have incurred legal costs as a result. It advises practitioners that costs determined after the date of the judgment should be assessed using the 1986 Regulations rather than the 2009 Regulations, and that clients whose costs were assessed under the 2009 Regulations may wish to seek re-determination of their awards.

The Administrative Court determined that the provision limiting the recoverable costs to what would have been paid using legal aid rates made the New Scheme unlawful.

This means that determinations in cases completed after the judgment should be assessed under the Costs in Criminal Cases (General) Regulations 1986. In other words, the court or National Taxing Team should provide reasonable compensation for the expense incurred.

It follows that any defendant's costs orders purporting to have been made under or in accordance with the new Regulations are likely to be unlawful. An award should have been made of such amount as is considered reasonably sufficient to compensate the defendant for any expenses properly incurred by him or her in the proceedings.

It will therefore normally be in the client's interests to seek re-determination of such awards. You should inform your client that you propose to do this, and seek any necessary instructions.<sup>20</sup>

The Ministry of Justice has 14 days to decide whether to appeal against the ruling. A spokesman indicated that it was considering its next steps:

The Ministry of Justice said it was "disappointed" and was now considering "the appropriate next steps".

A spokesman said: "It is crucial for government to achieve value for public money, particularly in the current economic climate.

"The scheme was designed to prevent spiralling legal costs while still ensuring access to appropriate legal support, and so we are disappointed with the ruling that the scheme cannot continue."<sup>21</sup>

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<sup>20</sup> Law Society, *Practice note: defendants' costs orders*, 17 June 2010

<sup>21</sup> "High Court says defendant funding scheme legally flawed", *BBC News website*, 15 June 2010