

**EXPLANATORY MEMORANDUM TO  
THE  
COSTS IN CRIMINAL CASES (GENERAL) (AMENDMENT) REGULATIONS 2009**

**2009 No. 2720**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations make changes relating to the payment of costs and expenses paid from central funds in criminal cases.

- 2.2 These Regulations, which amend the Costs in Criminal Cases (General) Regulations 1986 (S.I. 1986/1335) (the 1986 Regulations), make a number of changes to the 1986 Regulations. In particular, they provide that the amount to be paid from central funds under a defendant's costs order made pursuant to section 16 of the Prosecution of Offences Act 1985 (except in the Supreme Court) will not exceed the applicable legal aid rates. The Lord Chancellor is exercising the power given to him under sections 20(1) and (3) of the Act to set rates and scales for payments from central funds, which he has not previously done.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

4. **Legislative Context**

- 4.1 These amendments are being made following a consultation on the award of costs from central funds in criminal cases, in which the Government set out its proposals to limit the amount of costs available from central funds.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The Costs in Criminal Cases (General) Regulations 1986 sets out how the provisions relating to costs in criminal cases in the Prosecution of Offences Act 1985 are to be applied. These regulations amend the 1986 regulations by providing rates and scales for the payment of defendant's costs orders. A defendant's costs order can be made by a court where a defendant is not proceeded against in respect of an offence, is acquitted of an offence, or successfully appeals a conviction or sentence. In the case of a defendant who pays privately for legal representation, the order can cover the costs of this legal representation. Currently, the defendant would receive such amount as considered reasonably sufficient to compensate him or her for any expenses properly incurred. The response to the consultation paper referred to above set out the Government's intention to save between £22-25 million annually by limiting the costs that can be allowed to legal aid rates. The regulations also remove the procedural parts of the 1986 regulations, which have now been incorporated into the Criminal Procedure Rules. A technical amendment has also been made to update a reference to the legislation under which medical reports are ordered by a court, as a result of amendments to the Criminal Justice Act 1967 and the Prosecution of Offences Act 1985 by the Armed Forces Act 2006. Finally, the recent creation of the Supreme Court has necessitated amendments to replace references to the House of Lords with the Supreme Court (regulation 9).

7.2 Regulation 8 provides for a new regulation 7, which in turn provides that the Lord Chancellor may set rates and scales, which will be set out in a document separate from the regulations.

7.3 Regulations 3, 4, 5, 6 and 7 remove references to procedure relating to costs orders, which are now contained in the Criminal Procedure Rules.

7.4 Regulation 10 updates a reference in regulation 25(1) of the 1986 Regulations to the legislation under which a court orders a medical report for the purposes of sentencing, by removing a reference to legislation which was repealed by the Armed Forces Act 2006 and replacing it with a reference to current legislation. The 1986 Regulations currently refer to section 32(2) of the Criminal Justice Act 1967, and will now refer to section 19(3B) of the Prosecution of Offences Act 1985.

## **8. Consultation outcome**

8.1 Full public consultation was undertaken on the policy behind the major changes in these Regulations. A total of 93 responses to the consultation paper were received. Of these, 46 were from individual solicitors, 18 were from professional bodies, 12 were from members of the public, five were from barristers, four were from members of the judiciary, the magistracy and associated bodies, three were from companies and one each were received from a law costs draftsman, a human rights and law reform organisation, a self-help group and a trade association. We also received a combined response from the prosecuting authorities (Crown Prosecution Service (CPS), Attorney General's Office (AGO), Serious Fraud Office (SFO) and Revenue and Customs Prosecutions Office (RCPO)).

8.2 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.

8.3 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.

8.4 The Government believes that public funding should be prioritised on those who cannot afford to pay for their own representation and those who can afford to pay towards the costs of their defence should do so. The Government has introduced means testing in both the magistrates' court and the Crown Court with this principle in mind. The Government believes that the award of costs from Central Funds must complement means testing policy in both the magistrates' and Crown Courts.

8.5 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 are not proceeding with option 2, which would have meant that in certain circumstances defendants would no longer receive any legal costs from Central Funds. However, we are proceeding with option 3, namely capping Central Funds payments to equivalent legal aid rates for all defendants, including companies.

8.6 Although we did not specifically refer to the Court of Appeal or the High Court in the consultation paper, it became apparent during consultation that, because the same principles apply, it would be appropriate to have a consistent approach, so that where, for example, a privately represented defendant is convicted in the Crown Court, but has his conviction quashed in the Court of Appeal, his costs would also be subject to these reforms. These proposals do not only apply to costs orders made on

acquittal, but also, for example, where a defendant is successful on appeal against sentence.

## **9. Guidance**

9.1 The document setting out rates and scales will contain guidance for practitioners.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies was set out in the final Impact Assessment that was published with the response to consultation which can be found at <http://www.justice.gov.uk/consultations/award-costs-central-funds.htm>

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 The impact on firms employing up to 20 people is minimal, as the number of prosecutions against such firms resulting in defendant's costs orders is very small, and also because insurance is available to businesses to cover the costs of legal expenses.

## **12. Monitoring & review**

12.1 We will review the effect of these regulations in 12 months.

## **13. Contact**

David Carter at the Ministry of Justice, 4th Floor (4.42) 102 Petty France, London SW1H 4AJ, telephone 020 3334 4211, or email [David.Carter@justice.gsi.gov.uk](mailto:David.Carter@justice.gsi.gov.uk) who can answer any queries regarding the instrument.