



Client Alert

7 July 2009

The New Cost of Proving Innocence:

Government set to restrict access to Central Funds for acquitted defendants

"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."¹

In June 2009, the Government published its response² ("Response") to its consultation on 'The award of costs from Central Funds in Criminal Cases'³ ("Consultation Paper"). The Response sets out important plans to reform the way in which an acquitted defendant in criminal proceedings is awarded costs from the public purse. The reforms are likely to have a major impact on those who insure against regulatory risk, not least providers of directors' and officers' ("D&O") liability insurance.

In summary, a successful defendant will only be entitled to claim for costs at legal aid rates. Unlike the present system which permits an acquitted defendant (whether an individual or a company) to claim all of the reasonable defence costs incurred in the proceedings, in future any costs in excess of legal aid rates will have to be borne by the defendant or, as is often the case, the defendant's legal expenses insurer.

Need for Reform?

Until now, those found innocent of charges brought by the State have been compensated for the costs they have incurred in defending themselves. Under the Prosecution of Offences Act 1985, if any individual pays for their defence privately, they can usually reclaim their "reasonable" costs and expenses from Central Funds if they are acquitted. Companies, which do not currently qualify for representation under legal aid, can similarly claim from the Central Funds allocation held by the Ministry of Justice. D&O insurance providers, who frequently fund the defence of insureds accused of criminal wrongdoing were, therefore, in a good position to recover most of the costs associated with a successful defence from public funds.

According to the Ministry of Justice, the financial pressure this puts on resources is too great to sustain. Indeed, it is claimed that in 2007/08, the compensation for acquitted defendants accounted for approximately £41 million of Central Funds costs, which represented two-thirds of the total expenditure in that year. The Government believes that, by capping costs recoveries from Central Funds to legal aid rates, it can generate some £20 million worth of savings to the Central Funds budget.

The Government has therefore argued that "there is a compelling case for reforming the award of costs from Central Funds", and on 6 November 2008 the Ministry of Justice published its Consultation Paper proposing reforms.

The Consultation Paper

The Consultation Paper proposed three options to reform the way in which costs are awarded to acquitted defendants in criminal cases in England and Wales, as follows:

- **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 individuals paying privately in the Crown Court could no longer claim from Central Funds on acquittal; and
- **Option 3** – cap Central Funds payments in all cases for acquitted defendants, including companies, to the relevant legal aid rates.

The Response

The Ministry of Justice received 93 responses to the Consultation Paper, including a response prepared by DLA Piper. On 8 June 2009, the Ministry of Justice published its Response in which it summarised its findings and set out the next steps for implementation of reform.

Despite the fact that the Ministry of Justice acknowledged in the Response that "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", the Government has decided to proceed with reform by implementing Option 3, namely to cap Central Funds payments to equivalent legal aid rates for all defendants, including companies. The Government intends to implement these reforms by October 2009.

The Impact

Although the Response states that legal aid rates are "fair, reasonable and proportionate", in reality legal aid rates fall significantly behind the fee rates charged by lawyers in private practice. Indeed, a number of responses to the Consultation Paper (including that submitted by DLA Piper) argued that legal aid rates were disproportionately low and ultimately unsustainable. Indeed, in real terms legal aid rates have declined in recent years, and many law firms have been forced to close their doors to publicly funded work on the grounds that it is not economically viable. A number of consultees made the point that many more solicitors effectively subsidise their publicly funded criminal work with income generated through private work.

This is particularly true in criminal prosecutions involving companies or complex fraud, which tend to be factually complex and involve significant issues of law. Lawyers are unlikely to be willing to act for defendants in such cases at legal aid rates. Although the Government intends to use graduated fee rates and higher recovery rates where permitted by the legal aid rules, such rates are still well below those set by the market.

Prominent amongst those who will be affected by the reforms are legal expenses insurers, and in particular those providing D&O cover. The extent to which insurers will be able in acquittal cases to recover their outlay from Central Funds will inevitably be even more limited than previously. The result will no doubt be upward pressure on insurance premiums, although the Government professes its confidence that "any increase [in premiums] should not be substantial". In a commercial environment of ever-increasing regulatory and criminal risk, this assumption may prove optimistic. At the same time, small and medium-sized companies finding themselves more exposed to the costs of criminal litigation will be looking to insurers to plug the gap.

Critics suggest that the future may see an increase in defendants pleading guilty to offences simply to avoid the costs of defending a prosecution. In addition, acquitted defendants (backed by their insurers) may be encouraged to pursue the prosecution to recover costs in cases where the prosecution case has failed because of the unnecessary or improper conduct of the prosecution or its lawyers. Notwithstanding the difficulty of proving the requisite degree of deficient conduct on the part of the prosecution, such action has up to now largely been unnecessary, but may in time become a regular feature of any major criminal litigation.

How can we help?

DLA Piper's Insurance and Reinsurance team provides a truly international perspective to advising and representing the worldwide insurance and reinsurance industries. We believe in taking a commercial view in order to identify innovative solutions to client issues. We act for many of the major international insurance and reinsurance companies, as well as Lloyd's syndicates and insurance/reinsurance intermediaries, with experience in a wide range of classes of insurance business, including directors' and officers' liabilities.

In addition, DLA Piper's Corporate Crime & Investigations team can provide valuable advice and assistance to companies and individuals on fraud and corruption matters - whether that be training your staff, running risk and compliance audits, managing negotiations with the regulators, or defending you in court. We have experienced corporate and criminal defence lawyers and trained investigators. Many of the team have worked for regulators, prosecution agencies and the Big 4 accountancy firms. Two of our most recent joiners are the former Director of the Serious Fraud Office, Robert Wardle, and Duncan Wiggetts, former Legal Counsel for PricewaterhouseCoopers' Assurance businesses across Europe.

We are, therefore, well equipped to advise our clients on all aspects of insurance, compliance, investigations and how to co-operate with the regulators to achieve the best possible outcome.

If you would like to discuss any of the issues raised in this bulletin in respect of the reforms of recovery of costs from Central Funds, please contact us:

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End Notes

1. Statement made by the Ministry of Justice in its Response to Consultation CP R 28/08: www.justice.gov.uk/consultations/docs/award-costs-central-funds-response.pdf
2. Response to Consultation CP R 28/08: www.justice.gov.uk/consultations/docs/award-costs-central-funds-response.pdf
3. Consultation Paper CP28/08: www.justice.gov.uk/consultations/docs/award-costs-central-funds.pdf

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