



## JUSTICE

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Ministry of Justice  
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3 February 2009

Dear Ms Cowell,

**Re: Consultation Paper CP28/08 – The Award of Costs from Central Funds in Criminal Cases**

Thank you for sending this consultation paper to JUSTICE and for giving us a short extension of time to respond.

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

The right to adequate legal representation in criminal proceedings is a key constituent part of the right to a fair trial as protected at common law and by Article 6 of the European Convention on Human Rights (ECHR). Article 6(3) ECHR provides that everyone charged with a criminal offence has the right **‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’**. There are two issues arising from this right that should be given careful attention in the context of this consultation paper. First, what constitute ‘sufficient means to pay for legal assistance’? Secondly, what are the government’s responsibilities towards a person who has private legal assistance but is then acquitted or the charges against him are discontinued?

We take no specific position in relation to the negotiations between the profession and the Legal Services Commission about the level of remuneration. However, we are concerned at the trend in recent years for criminal legal aid rates to be driven down to a level where quality of provision seems highly likely to suffer. We are very aware that other factors will drive the legal aid budget. There has been the rapid creation of ever more criminal offences – and civil orders with criminal sanctions for breach. There are increasingly complicated procedural provisions relating, for example, to bad character evidence. This will have an inevitable impact on the legal aid budget if detection and prosecution rates remain constant.

Legal aid costs are inevitably influenced by the government's policies on criminal justice. We would recommend that, instead of continuing to reduce criminal legal aid rates to the point that the work is of marginal profitability to many lawyers, the government should increase targeted investment in services and rehabilitative schemes that would lower the number of offences and prosecutions. We are pleased that the 'offences brought to justice' targets for police have been abandoned, and hope that a culture of proportionality can prevent excessively trivial incidents, often involving children, from ending up in the criminal courts.

Similarly, we echo concerns voiced by the Law Society in their response to this consultation<sup>1</sup> that a small number of very expensive cases have significantly affected the figures for costs awards, and that these costs might have been saved by better prosecution decision-making at the outset. Seeking a ruling on a point of law at an early stage would be a more efficient alternative to speculative prosecution where it is unclear that the ingredients of the offence can be made out by the prosecution case at its highest.

We understand the desire to impose market pressures on legal aid providers. However, markets, as is all too clear at the present time, do not always produce desirable results. We are concerned that current levels of remuneration mean that criminal legal practitioners, particularly solicitors, find the rates uneconomic. The significance and complexity of many criminal cases is such that it is in the public interest for them to be prosecuted and defended by practitioners of the highest quality. Poor quality representation has a severe impact on the public interest, leading to inappropriate convictions and inappropriate acquittals; wrongful imprisonment; increasing the number of appeals against conviction and sentence; and contributing to inefficiency and expense in the court system. In some cases, it may result in the violation of the right to a fair trial. The government has set its face against a salaried

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<sup>1</sup> *The Award of Costs from Central Funds in Criminal Cases* Ministry of Justice consultation paper, Law Society response, January 2009, paras 24-28.

public defender scheme. In that case, it has to pay levels of remuneration that will attract reasonable levels of quality from private practitioners.

The more public and private rates of remuneration diverge, the more the government has to recognise the consequences. A person seeking to fund his own defence, or a corporate defendant who is ineligible for legal aid, has to pay the market rate. There can be no logical alternative. Thus, if he is acquitted, the government should pay his legal costs reasonably and properly incurred. Otherwise, the defendant will suffer – and, in some cases, very severely. It is completely wrong to seek to limit recompense to the publicly funded rate when that is so much lower than that which the defendant will actually have to pay.

A person acquitted of a charge is innocent in law and should not suffer financially because of a misguided prosecution against him. The consultation paper's analogy with private schooling was particularly ill chosen, since private schooling is always voluntary and defendants do not usually choose to be prosecuted. Further, for corporate defendants, private representation is the only type available. The existing regime for the award of costs from central funds in criminal cases contains safeguards to prevent unreasonable rates of recovery.<sup>2</sup> We therefore recommend that it be left in place and the proposed reform rejected as extremely unattractive.

Yours sincerely,

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JUSTICE

*Chairman of Council* **Baroness Kennedy of The Shaws QC** *Director* **Roger Smith**

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<sup>2</sup> See Joint Response by the Criminal Bar Association and the Bar Council to the consultation paper, November 2008, paras 13-26.