



Department of  
**Justice**  
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## **Recovery of Defence Costs Orders**

**Consultation on proposed amendments to the  
scheme and draft legislation**

**January 2018**

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**Annexes (attached separately)**

- A Draft Regulations – The Criminal Legal Aid (Recovery of Defence Costs Orders) (Amendment) Rules (Northern Ireland) 2018**
- B Draft Regulations – The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2018**
- C Draft Regulations – The Legal Aid in Criminal Cases (Statement of Means) Rules (Northern Ireland) 2018**

## 1. INTRODUCTION

- 1.1. The Recovery of Defence Costs Orders (RDCO) scheme was commenced on 15 October 2012, through the Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012 (“the 2012 Rules”), as a means of recovering such part of the cost of legal aid incurred under a criminal legal aid certificate for the defence of a convicted individual in the Crown Court, as was reasonable in all the circumstances of the case, including the financial resources of the defendant.
- 1.2. The majority of cases investigated to date have been referred for consideration by the PSNI, with others referred by the judiciary and HMRC. In addition, a small number of investigations have been commenced based on media reporting of individual Crown Court cases. The cases investigated by the Legal Services Agency (LSA) relate to a wide range of offences, the most common being false accounting, money laundering and theft.
- 1.3. To date, three RDCOs have been applied for by the LSA and granted by the Crown Court, as follows:
  - The first RDCO was granted in November 2015 to recover £100,487.51;
  - In April 2017, a second RDCO was granted to recover just under £3,000; and
  - In October 2017, a third RDCO was granted to recover the sum of £8,425.25. The court specified that this amount will be paid back in monthly instalments, set at £351.00 over 24 months.

Enforcement of all three RDCOs is ongoing.

- 1.4. In its report entitled “Managing Legal Aid”, published in June 2016, the Northern Ireland Audit Office (NIAO) recommended that the DoJ “examine the existing arrangements governing [the 2012 Rules], in order

to determine how they can be enhanced to achieve greater impact.” Ineffective implementation of RDCOs was identified as one of three significant risks which led the NIAO to certify the LSA’s financial statements for 2015/16 with a qualified audit opinion. In respect of RDCOs, the NIAO was of the view that insufficient evidence was available to provide assurance that a material amount of income had not been excluded in respect of the scheme. That qualification remains in place.

- 1.5. In response to the issues highlighted by the NIAO, the DoJ undertook to complete a review of the arrangements governing RDCOs by March 2017 and deliver any recommended remedial actions in 2017/18. The findings of this review, as well as the proposed amendments to the RDCO scheme arising from it, are set out in section 4 and 5 of this consultation document.

## **2. PURPOSE OF THE CONSULTATION**

- 2.1 This consultation is being carried out in order to progress the policy, and to fulfil the DoJ's statutory obligations as required by Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. It provides consultees with the opportunity to identify any issues which the DoJ should consider in finalising the policy.
- 2.2 Following consideration of responses to this consultation exercise, the draft legislation will be finalised and advanced through the legislative process.

### 3. RESPONDING TO THIS CONSULTATION

3.1 The DoJ invites views on any issues raised by this consultation document including the accompanying impact screenings. Responses are welcome from organisations and individuals. If responding on behalf of an organisation, please make it clear who the organisation represents and, where appropriate, how the views of the members were assembled.

3.2 Please submit your response to this consultation to:

Consultation Co-ordinator

Public Legal Services Division

Department of Justice

Massey House

Stormont Estate

Belfast

BT4 3SX

Email: [plsdresponses@justice-ni.x.gsi.gov.uk](mailto:plsdresponses@justice-ni.x.gsi.gov.uk)

Tel: 028 9016 9559

Text phone: 028 9052 7668

3.3 Responses must be received by **21 March 2018**.

3.4 A copy of this consultation will be placed on the DoJ website at <https://www.justice-ni.gov.uk/consultations>.

3.5 You may make additional copies of this report without seeking permission - we would invite you to access the document through our website and print or make copies yourself. If you do not have access to the internet or, if it would assist you to access the document in an alternative format or a language other than English, please let us know and we will do our best to assist you. Please contact the Consultation Co-ordinator with your specific request.

## 4. REVIEW FINDINGS

4.1. The review found that the RDCO scheme is largely working according to the policy intention in that any Crown Court cases which come to the attention of, or are referred to, the LSA are being investigated. However, whilst the number of cases investigated per year for an RDCO by the LSA is in line with the estimates in the original business case, the projected level of recovery has not been achieved. In addition, a number of gaps or deficiencies have been identified in the original policy intent and/or how the policy has been implemented by means of the 2012 Rules:

- The absence of a reliable mechanism for identifying all cases which may reasonably be subject to an RDCO. In the absence of such a mechanism, the LSA currently attempts to identify potentially suitable cases through regular requests for information issued to prosecuting authorities and occasionally reviews cases as a result of media reports;
- The lack of a clear legislative provision or operational mechanism in place to address the other declared policy intention of the scheme – investigating all Crown Court cases involving acquisitive crimes (a term which is not clearly defined);
- Cases often come to the attention of the LSA at an advanced stage, and it is therefore unable to conduct a thorough investigation of the assisted person's means before the relevant court proceedings have concluded; and
- This difficulty is further compounded by the restrictive nature of the drafting within the 2012 Rules, which prevents the LSA from applying for an RDCO after the conclusion of the relevant proceedings.

- Q1. Do you agree with the findings of the review? If not, please explain why.**
- Q2. Do you have any additional feedback regarding your experience of Recovery of Defence Costs Orders to date?**



## 5. PROPOSALS

5.1. In accordance with the issues identified by the Review, the DoJ's proposed amendments fall into five categories:

- I. Introduction of a reliable mechanism for identifying suitable cases;
- II. Adjustments to the scope of the RDCO scheme;
- III. Miscellaneous amendments to the 2012 Rules;
- IV. The introduction of remuneration arrangements for defence against an RDCO: and
- V. Amendments to the Statement of Means Form for criminal legal aid.

### *I. Mechanism*

5.2. The analysis concluded that it is not efficient to identify potential RDCO cases on the basis of the underlying offence (acquisitive or otherwise), as this does not focus on the key issue of the assisted person's ability to contribute to their legal aid costs.

5.3. In order to reliably identify assisted persons who may be eligible for an RDCO, it is proposed that the LSA should be able to review all cases for which it receives notification from the Northern Ireland Courts and Tribunals Service (NICTS) that criminal legal aid has been granted for Crown Court proceedings, and not just those cases brought to its attention as meriting investigation e.g. following a referral from the PSNI or a prosecuting authority. Before notifying the solicitor of the legal aid certificate number, the LSA will check if the assisted person is on a means-tested benefit and, if not, issue a financial means form along with the notification. This financial means form will be returned to the LSA by the assisted person in order to determine if their income or assets make them eligible for an RDCO. (Should the financial means form not be returned to the LSA then an application for an RDCO may be made.)

- 5.4. The proposed amendment to Rule 3(1) is relevant to the operation of this mechanism, as it will allow the LSA to investigate all Crown Court cases for an RDCO without having to satisfy the requirement that the financial means of the assisted person must first come to its attention. To date, this requirement has meant that the LSA has only been able to investigate assisted persons referred to it by prosecuting authorities or identified through media reports. The removal of this requirement enables the introduction and operation of a much more reliable mechanism for identifying cases. It is expected that there will be a significant increase in the number of assisted persons whose benefit status and other finances are investigated to determine their potential eligibility for an RDCO. It is estimated that the numbers will rise from an average of 10 a year to an estimated 950 a year.
- 5.5. DoJ is of the view that this operational approach – enabled by the amendment to Rule 3(1) – will provide a reliable mechanism for all identifying Crown Court cases which may be subject to an RDCO, at an early stage of the relevant proceedings, thus addressing two of the shortcomings identified within the existing scheme by the review.

**Q3. Do you agree with the proposed mechanism for identifying cases which may be subject to an RDCO? If not, do you have any alternative suggestions for how cases should be identified?**

*II. Scope*

- 5.6. DoJ is of the view that the RDCO scheme should continue to apply to assisted persons who are in receipt of criminal legal aid for Crown Court proceedings and are subsequently convicted. However, as outlined above, in order to address the findings of the review, as well as the NIAO's concerns in respect of completeness of income recovered by the RDCO scheme, the DoJ proposes that all assisted persons in receipt of criminal legal aid at the Crown Court should be investigated for an RDCO.

5.7. In addition, the DoJ also proposes that the scheme should be amended so that, when an RDCO is granted in respect of an assisted person convicted at the Crown Court, the LSA will also be able to apply to recover any legal aid expenditure incurred during the preliminary stages of the criminal proceedings at the magistrates' courts. Currently only legal aid expenditure in connection with a Crown Court certificate can be recovered by an RDCO. The amendments which give effect to this change in scope are to Rules 4, 6(1), 10, 12 and 14(c).

**Q4. Do you agree that RDCOs should continue to apply to persons convicted at the Crown Court?**

**Q5. Do you agree that the LSA should also be able to apply to recover any legal aid expenditure incurred during the preliminary stages of the criminal proceedings at the magistrates' courts?**

### *III. Miscellaneous Amendments*

5.8. The Review has also identified a number of further miscellaneous amendments to improve the operation of the 2012 Rules, as follows:

- Amending the Rules to replace references to the “Northern Ireland Legal Services Commission” with “the Department of Justice”, in order to reflect the dissolution of the Commission and establishment of the LSA in 2015;
- An amendment to Rule 4 and a new Schedule, to insert an application form for an RDCO, to be submitted to the relevant court by the LSA;
- An amendment to Rule 13(2) to allow the LSA to reduce the amount of an RDCO administratively, in circumstances where the actual legal aid bill is less than the original estimate; and

- Amending Rule 17 to allow the LSA to add any costs incurred in connection with obtaining the RDCO to the amount to be paid by the assisted person. These costs would include the cost of engaging Counsel and any administrative costs incurred by the LSA during the course of the investigation.

**Q6. Do you agree that the application form for an RDCO should be included in the 2012 Rules?**

**Q7. Do you agree that the LSA should be able to reduce the amount of an RDCO administratively, in circumstances where the actual legal aid bill is less than the original estimate?**

**Q8. Do you agree that the LSA should be able to add any costs incurred in connection with obtaining an RDCO to the amount of legal aid to be recovered from the assisted person?**

**Q9. Do you have any other suggestions for amendments to the 2012 Rules?**

#### *IV. Remuneration arrangements*

5.9. At present, no specific provision is in place to remunerate representatives advising an assisted person regarding an RDCO application, or for appearing at the hearing of such an application at the Crown Court. The DoJ is of the view that a legal aid fee should be introduced to remunerate legal representatives representing assisted persons in respect of hearings for RDCO applications.

5.10. In order to do so, DoJ is proposing to amend paragraph 13 to Schedule 1 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (“the Crown Court Rules”). This amendment – the detail of which is set out in **Annex B** to this paper – will make provision for a

time-based standard fee, appropriate to the representative, for the hearing of RDCO applications.

**Q10. Do you agree that a legal aid fee should be introduced to remunerate legal representatives representing assisted persons in respect of hearings for RDCO applications?**

**Q11. Do you agree with the time-based standard fee proposed by the DoJ for the hearing of RDCO applications?**

*V. Statement of means forms*

5.11. During the course of the Review, it became clear that the statement of means form as was out of date. The opportunity is being taken to repeal and replace the Legal Aid in Criminal Cases (Statement of Means) Rules (Northern Ireland) 1999, in order to amend and update the two statement of means forms for criminal legal aid. Draft legislation to achieve this aim - the Legal Aid in Criminal Cases (Statement of Means) Rules (Northern Ireland) 2018 – is included at **Annex C** to this paper for consideration.

5.12. The key changes are to Form 1, which is the statement of means form for Criminal Legal Aid.

5.13. DoJ is proposing to amend the explanatory section of the form in order to clarify that the statement of means form may be shared with the LSA by the NICTS, if requested, in order to assist with any subsequent investigation into a claimant's means for the purposes of determining their eligibility for an RDCO. New paragraph (vii) in the explanatory section sets out the DoJ's proposed wording in this regard.

5.14. In Section B ("Case Details"), the DoJ proposes to add a second question, which will require the applicant to specify at which stage of the criminal proceedings they are applying for criminal legal aid.

5.15. The DoJ has also amended Form 1 to ensure that all applicants, who aren't in receipt of the four benefits listed at question 9, are required to complete Sections D and E of the form.

5.16. Currently, applicants in receipt of any benefit – whether or not it is means-tested – do not have to complete Sections D and E. However, some applicants in receipt of certain benefits, such as Attendance Allowance or Disability Living Allowance, may also be in receipt of earnings or possess sufficient assets so as to allow them to fund the cost of their own defence. The amendments to Sections D and E of Form 1 ensure that applicants in receipt of these benefits must provide financial details, as well as details relating to any property and savings, if applicable, when applying for criminal legal aid, in order to allow the court to take full account of their circumstances when considering their application.

5.17. Questions 6 and 22 of Form 1, and Question 7 of Form 2 (which is the statement of means form for Diversionary Youth Conferences), have also been amended to include “civil partnership” as a potential answer. A reference to the Rates Agency has also been updated to reflect that this agency is no longer in existence.

**Q12. Do you agree with the DoJ's proposed wording regarding the sharing of statement of means forms between the NICTS and LSA?**

**Q13. Do you agree that applicants should have to specify on the statement of means form the proceedings for which they are applying for criminal legal aid?**

**Q14. Do you agree that applicants in receipt of “other benefits” should have to supply information regarding finances, property and savings on the statement of means form?**

**Q15. Do you agree that the statement of means forms should be amended to include “civil partnership” as a potential answer?**

## **6. IMPACT ASSESSMENTS**

- 6.1 The DoJ has completed screening exercises for the equality, rural needs, regulatory, human rights, and privacy impact of the proposed revisions to the RDCO policy. In respect of each impact, the policy has been screened out at this stage of the development process. These decisions will be reviewed following the completion of the consultation exercise, taking account of any additional evidence received.

## **7. NEXT STEPS**

- 7.1 Following the consultation exercise, the DoJ will finalise its proposals and amending legislation in order to introduce changes to the RDCO scheme. The amending legislation will then be subject to the relevant legislative process before it is commenced.



**ANNEXES (ATTACHED SEPARATELY)**

**ANNEX A** – The Criminal Legal Aid (Recovery of Defence Costs Orders) (Amendment) Rules (Northern Ireland) 2018

**ANNEX B** – The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2018

**ANNEX C** – The Legal Aid in Criminal Cases (Statement of Means) Rules (Northern Ireland) 2018