

Rural Needs Impact Assessment

Title of Policy: Proposals to amend the Recovery of Defence Costs Order Scheme

Step 1: Define the Issue

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.

In its report entitled “Managing Legal Aid”, published in June 2016, the Northern Ireland Audit Office (NIAO) recommended that the Department of Justice (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 has also been identified as one of three significant risks which led the NIAO to certify the Legal Service Agency’s (LSA’s) financial statements for 2015/16 with a qualified audit opinion. That qualification remains in place.

In response to the issues highlighted by the NIAO, the DoJ undertook to complete a review of the arrangements governing RDCOs and deliver any recommended remedial actions in 2017/18.

The objectives of the review were to:

- establish the original policy intent upon which the 2012 Rules are based;
- assess the extent to which the 2012 Rules are being implemented effectively by the LSA;
- analyse the extent to which the 2012 Rules currently allow the LSA reliably to identify and pursue cases which could usefully be subject to an order to recover defence costs;
- identify any new or revised processes, procedures or controls and/or amendments to the 2012 Rules which need to be put in place to enable the

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LSA reliably to identify and thoroughly investigate cases which could usefully be subject to an order to recover defence costs; and

- introduce secondary legislation to give effect to any required amendments to the 2012 Rules, if necessary.

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 cases through regular requests for information 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). The review has decided that RDCO cases should not be identified on the basis of the underlying offence (acquisitive or otherwise) as this mechanism does not focus on the key issue of the assisted person's ability to contribute to their legal aid costs;
- 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.

As a consequence of the findings of the review, the DoJ proposes to amend the operation of the RDCO scheme to introduce a reliable mechanism for identifying all possible Crown Court cases which may be subject to an RDCO.

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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.)

DoJ is also proposing that, whilst RDCOs should continue to apply only to assisted persons found guilty at the Crown Court, the 2012 Rules be amended to allow the LSA to recover the cost of legal aid throughout the lifetime of the case, if the assisted person's assets are considered sufficient to do so i.e. any legal aid expenditure incurred in connection with preliminary hearings at the magistrates' court, as well as the expenditure incurred during the course of the trial at the Crown Court.

In order to further improve the effectiveness of the RDCO scheme, a number of additional amendments are proposed to the 2012 Rules, including:

- introducing a statutory application form for an RDCO to be submitted by the LSA to the Crown Court;
- amending the 2012 Rules to allow the LSA to vary the amount of the RDCO administratively in circumstances where the cost of legal aid incurred under the legal aid certificate was lower than the amount ordered to be paid under the RDCO; and
- amending the 2012 Rules to allow the LSA to recover the costs of obtaining an RDCO. These costs would include the cost of engaging Counsel and any administrative cost incurred by the LSA during the course of the investigation.

As a consequence of the findings of the Review, DoJ also intends to introduce two other amending rules, in order to:

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- amend and update the statement of means form submitted by applicants for criminal legal aid; and
- introduce a time-based standard fee to prepare for, and represent an assisted person at, the hearing of an application for an RDCO at the Crown Court.

Step 2: Understand the situation

There is no data collected about the geographical distribution of assisted persons, but it is assumed that their rural and urban distribution ought to be proportionate to the Northern Ireland population. It is also important to note that the responses to the 2012 consultation prior to the introduction of the policy did not raise any issues relating specifically to rural communities.

Therefore, the following data has been considered in order to gauge the impact of the amended scheme:

- Northern Ireland Multiple Deprivation Measure 2010¹
- DAERA Rural/Urban Statistics Infographic²
- NICTS Judicial Statistics 2016³
- NICTS Consultation on proposals for the rationalisation of the court estate⁴
- The Northern Ireland Benefits Statistics Summary (May 2017)⁵
- Statement of Means Form dip sample, completed by PLSD in May/June 2017⁶
- Northern Ireland Labour Force Survey: Urban – Rural Statistics⁷
- Households Below Average Income Report: Urban-Rural Statistics⁸

¹ https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/NIMDM_2010_Report_0.pdf

² <https://www.daera-ni.gov.uk/sites/default/files/publications/daera/AE1%2017%20755475%20%2017.18.093%20Rural%20Statistics%20Infographic%20Final.pdf>

³ <https://www.courtsni.gov.uk/en-GB/Services/Statistics%20and%20Research/Documents/Judicial%20Statistics%202016.pdf>

⁴ http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Consultation%20on%20proposals%20for%20the%20rationalisation%20of%20the%20court%20estate/Final%20Consultation%20Document%20Rationalisation%20of%20the%20Court%20Estate%20updated.pdf

⁵ <https://www.communities-ni.gov.uk/sites/default/files/publications/communities/benefit-statistics-summary-may-2017.pdf>

⁶ HPE 17/115091

⁷ <https://www.daera-ni.gov.uk/publications/northern-ireland-labour-force-survey-urban-rural-statistics>

⁸ <https://www.daera-ni.gov.uk/publications/households-below-average-income-report-urban-rural-statistics>

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- Annual Survey of Hours and Earnings: Urban-Rural Statistics⁹
- Housing: Urban-Rural Statistics¹⁰

Whilst the data above has been of assistance, it must be noted that the absence of available data in relation to the geographical location of assisted persons limits the ability of the DoJ to accurately assess the rural impact of this revised policy.

An RDCO can only be granted against an assisted person who is convicted at the Crown Court, and cannot be granted if that person is under the age of 18, or is directly or indirectly in receipt of -

- income support;
- income-based jobseeker's allowance;
- guarantee state pension credit; or
- income-related employment and support allowance.

An RDCO also cannot be granted unless the assisted person has one of the following assets:

- capital over £3,000;
- equity in that person's personal residence over £100,000;
- a gross annual income of over £22,235 (which equates roughly to £428 per week)

When taking into account the financial resources of the assisted person, the amount or value of every source of income and every resource of a capital nature available to the assisted person shall be taken into account. The financial resources of the assisted person's partner are also accounted for in a similar way, unless the partner has a contrary interest in the criminal proceedings before the court. Where the assisted person's principal residence is the family home, equity in that family home shall not be included as an asset of the assisted person¹¹.

The DoJ is not proposing any amendment to the thresholds above following the review. However, it is important to consider whether the continued application of

⁹ <https://www.daera-ni.gov.uk/publications/annual-survey-hours-and-earnings-urban-rural-statistics>

¹⁰ <https://www.daera-ni.gov.uk/publications/housing-urban-rural-statistics>

¹¹ Rule 9 of the 2012 Rules

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these thresholds will have a disproportionate impact on assisted persons as a consequence of where they live.

The DAERA Rural/Urban Statistics Infographic breaks down median weekly income as follows:

- Urban - £373
- Rural (more than one hour from Belfast) - £343
- Rural (within an hour from Belfast) - £409

The Infographic also shows that average house prices vary between locations as follows:

- Urban - £119,508
- Rural (more than one hour from Belfast) - £130,809
- Rural (within an hour from Belfast) - £145,333

This data would suggest that assisted persons living in rural locations within an hour of Belfast are most likely to qualify for an RDCO on the basis of their income and equity in a residence. In this regard, it is important to remember the existing safeguards within the scheme that are designed to ensure that an RDCO will not be granted against an assisted person where it would involve undue financial hardship in respect of the assisted person, their dependents or immediate family.

Data collected as part of PLSD's Statement of Means Form dip sample demonstrated that almost three quarters of applicants for criminal legal aid (73.4%) were in receipt of some form of benefits. The Northern Ireland Benefits Statistics Summary collects some geographical data on benefit claimants, but it is broken down by Assembly Area and Local Government District rather than rural/urban location. It is therefore difficult to determine from the available benefits data whether or not the RDCO scheme is likely to have a differential impact dependent upon rural or urban location.

It is also worth noting that two of the three RDCOs granted to date have been made in respect of a person whose principal occupation is farming and whose residence was in a rural area. From this relatively small sample size, it would be unreliable to

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conclude that the eligibility criteria would mean that persons living in rural are more likely to be subject to an RDCO. Furthermore, RDCOs are designed to target assisted persons who are in receipt of criminal legal aid and possess sufficient assets to fund the cost of their own defence – the discriminating factor is the assisted person's assets, not the location in which they live or work, or their mode of employment.

The DoJ is of the view that the available evidence does not demonstrate that the amended RDCO policy will have a negative or disproportionate impact on assisted persons located in rural locations. Where a potential differential impact has been identified, existing safeguards within the scheme are available in order to provide mitigation.

Step 3: Develop and appraise options

The review considered amendments to the scope of the scheme, and determined that it should continue to apply only to those individuals convicted at the Crown Court. However, as outlined above, the scheme will also be amended to allow the LSA to recover the cost of legal aid throughout the lifetime of the case if the assisted person's assets are considered sufficient to do so i.e. any legal aid expenditure incurred in connection with preliminary hearings at the magistrates' court, as well as the expenditure incurred during the course of the trial at the Crown Court.

The options considered for enhancing the operation of the RDCO scheme, in particular the mechanism for identifying cases, were as follows:

1. **Option 1: Status Quo** - LSA is currently attempting to identify cases through regular requests for information being issued to prosecuting authorities. Cases are also occasionally reviewed as a result of media reports.
2. **Option 2: Repeal the 2012 Rules** - Repeal the 2012 Rules with a view to the long-term reform of means testing for criminal legal aid.
3. **Option 3: Fully implement the original policy** - This option would enhance the scheme by expressly including investigation of all cases involving acquisitive crimes. It would require an agreed definition of acquisitive crimes

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and a clear mechanism by which the LSA could identify those cases. However, this approach would not do anything else to address the NIAO's concerns about the completeness of income.

- 4. Option 4: Assess every award of criminal legal aid at the Crown Court, awards identified by relying on statement of means forms** – the application of the RDCO scheme remains unchanged and continues to only apply to assisted persons convicted at the Crown Court. However, all assisted persons granted criminal legal aid at the Crown Court would be investigated by the LSA for an RDCO. In order to introduce a reliable mechanism for identifying Crown Court cases, a fresh, revised, prescribed statement of means form should be completed by the assisted person and submitted to the magistrates' court at committal stage. If the case is returned to the Crown Court, then this form is forwarded by Northern Ireland Courts and Tribunals Service (NICTS) to the LSA for consideration of an RDCO. This would ensure that all cases returned to the Crown Court are reviewed by the LSA for an RDCO. The 2012 Rules would also be amended to allow for the recovery of any legal aid claimed by an assisted person convicted at the Crown Court during the preliminary stages of proceedings at the magistrates' court.
- 5. Option 5: Assess every award of criminal legal aid at the Crown Court, awards identified by relying on NICTS notifications** – the application of the RDCO scheme remains unchanged and continues to only apply to assisted persons convicted at the Crown Court. However, as with Option 4, all assisted persons granted criminal legal aid at the Crown Court would be investigated by the LSA for an RDCO. In order to reliably identify assisted persons who may be eligible for an RDCO, the LSA will investigate all cases for which it receives notification from the NICTS that criminal legal aid has been granted for Crown Court proceedings. 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

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eligible for an RDCO. As with Option 4, the 2012 Rules would also be amended to allow for the recovery of any legal aid claimed by an assisted person convicted at the Crown Court during the preliminary stages of proceedings at the magistrates' court.

Options 1-3 were not considered viable as they would not meet the key project objectives, particularly the requirement to address the concerns expressed by the NIAO. Options 4 and 5 were shortlisted for consideration as each of these options met the objectives of the project. **Option 5** was chosen as the preferred option on the basis that it represented a proportionate and value for money approach.

The DoJ intends to implement this option by amending the 2012 Rules, and the Crown Court legal aid fee scheme rules to add a new time-based standard fee to prepare for, and represent an assisted person at, the hearing of an application for an RDCO. The DoJ also intends to amend the rules prescribing the statement of means form completed by applicants for criminal legal aid, in order to address some issues identified with the form during the course of the review.

DoJ does not consider that there are any barriers to, or additional costs associated with, delivery of the revised RDCO scheme in rural areas, nor that any of the policy options has any negative impact on people living in rural communities. The policy is intended to impact upon all individuals equally, with the discriminating factor being an assisted person's capability to repay the cost of legal aid incurred during the course of their case, rather than the area in which they are located. As stated above, it is important to remember the existing safeguards within the scheme that are designed to ensure that an RDCO will not be granted against an assisted person where it would involve undue financial hardship in respect of the assisted person, their dependents or immediate family.

Step 4: Prepare for Delivery

Delivery of the scheme is uniform throughout the jurisdiction, and it not considered necessary to employ different solutions in different areas.

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Step 5: Implementation & Monitoring

Statistics in respect of the RDCO scheme will continue to be collected in order to gauge the impact of the scheme. However, the DoJ does not propose to put in place any specific monitoring arrangements or to factor rural needs into the evaluation process.

Step 6: Evaluation & Review

Following public consultation, and in particular if any amendments are made to the policy, the rural impact of the RDCO scheme will be reconsidered, alongside the other impact assessments completed for the policy.

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Date completed:	19 January 2018

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