

For discussion

On 27 January 2003

**LegCo Panel on Administration of Justice and Legal Services
Law Amendment and Reform (Miscellaneous Provisions) Bill
Amendments to the Costs in Criminal Cases Ordinance (Cap. 492)**

This paper considers issues raised in relation to the costs in criminal cases at the AJLS Panel meeting of 13 December 2002.

Wasted costs

2. At the 13 December 2002 meeting of the Panel, the Chairman noted that a member had expressed concern that the scope of the provisions on wasted costs in section 18 of the Costs in Criminal Cases Ordinance was too narrow.

3. The issue of wasted costs was noted in the Interim Report and Consultative Paper (2001) issued by the Chief Justice's Working Party on Civil Justice Reform. The consultation period has closed and the Working Party is considering the views collected during the consultation period. The Judiciary indicated in July 2002 that it will submit a Final Report for the consideration of the Chief Justice in early 2003. Although the Consultative Paper focuses on wasted costs incurred in civil proceedings, the outcome will be relevant for the consideration of wasted costs in the criminal regime. In the Administration's view it is appropriate for consideration of section 18 of the Costs in Criminal Cases Ordinance to await the issue of the Final Report.

Rule 6 of the Costs in Criminal Cases Rules

4. In a letter dated 12 December 2002, the Law Society noted that practitioners encounter practical difficulties in complying with the time limit stipulated under rule 6 of the Costs in Criminal Cases Rules.

5. Rule 6 is modelled on the UK's Costs in Criminal Cases (General) Regulations 1986, regulation 6(1). Since there is a right to apply for an extension of time under rule 9, it does not appear that there is a need to review the time limit. The Law Society said that the extension would only be granted in exceptional circumstances and might not cover complex commercial cases. The Prosecutions

Division reports that it has not had such experience. The Administration is liaising with the Law Society for more information on this matter with a view to considering whether any amendment is necessary.

Policy on costs

6. The Panel requested the Administration to consider whether a comprehensive review of the statutory provisions on costs should be undertaken so that the winning party would be entitled to costs in criminal proceedings.

7. The general principle is that defence costs follow the acquittal unless there are positive reasons to the contrary. Such reasons include (1) the accused's own conduct has brought suspicion on himself; (2) the accused's own conduct has misled the prosecution into thinking that the case against him is stronger than it is; or (3) there is ample evidence to convict but the accused is acquitted on technicalities that have no merit.

8. However, whether the prosecution should be entitled to costs is a different matter. This hinges on the fundamental right of the accused to be presumed innocent. It is the duty of the prosecution to tender evidence and to prove beyond reasonable doubt that a defendant is guilty. The defendant will be deprived of this fundamental right indirectly if he is penalised by costs because he does not plead guilty and the prosecution has tendered evidence to prove the case, or because he raises a defence that is not accepted by the court. A magistrate is required to ascertain whether there were special circumstances which led the prosecution to incur extra expenses, such as the defence deliberately causing difficulties for prosecution witnesses, intentionally delaying the case, or insisting that the prosecution prove unimportant or undeniable facts.

9. For the above reasons, costs do not necessarily go to the winning party. The Administration therefore considers that a comprehensive review for this purpose is unnecessary.

**Legal Policy Division
Department of Justice
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