

Criminal procedure - Costs orders

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Summary

Purpose

This chapter outlines:

- [when costs orders may be made](#)
- procedures when [making and responding to applications](#) for costs orders
- procedures [when costs orders are made](#) against Police
- requirements for [appealing costs orders](#).

Legislative references

Unless otherwise stated, references in this chapter to:

- sections, are to the [Criminal Procedure Act 2011](#) (CPA)
- rules, are to the [Criminal Procedure Rules 2012](#) ("the rules").

When can costs orders be made?

The court may make a costs order where there has been a significant [procedural failure](#) in the course of a prosecution, and there is no reasonable excuse for that failure.

([s364](#))

Costs can be ordered following an application from either party, or on the judge's own motion. Costs may be ordered against the defendant, the defendant's lawyer, or the prosecutor. The prosecutor includes the person who commenced the proceeding (i.e., [QC](#) Case) and any constable or other Police employee authorised by the Commissioner of Police to conduct proceedings (i.e., [PPS](#) Prosecutor).

([s10](#))

Costs ordered against Police as the prosecutor must be paid by Police direct to the party indicated in the order, which may be the court, the defence counsel, the defendant or to the consolidated fund.

What is a procedural failure?

A procedural failure includes a failure or refusal to comply with a requirement of the Criminal Procedure Act 2011 or the Criminal Disclosure Act 2008, and any associated Rules or Regulations.

Awards are made at the judge's discretion

An award of costs under section 364 CPA is discretionary, and there are no specific considerations listed in the legislation.

Quantum

The quantum of the award is within the judge's discretion, but it must be no more than is 'just and reasonable' in light of the costs incurred by the court, the victims, witnesses and any other person.

([s364\(3\)](#))

Other criminal procedure-related chapters

These related criminal procedure chapters deal with the various stages of the criminal process:

- Criminal procedure - [Introduction and jurisdiction](#)
- Criminal procedure - [Commencement of proceedings](#)
- Criminal procedure - [Administration stage](#)
- Criminal procedure - [Review stage \(CMM process\)](#)
- Criminal procedure - [Trial stage](#)
- Criminal procedure - [Disposition](#)
- [Criminal disclosure](#)

Making and responding to applications

Applications for costs orders

Applications from parties for costs must be made in writing, and follow the notice of application/response procedure and timelines set under rules [2.12 - 2.15](#) Criminal Procedure Rules 2012. However, the judicial officer or Registrar to whom the costs order application is to be made may direct that it be made orally.

Applications for orders must cover the matters detailed in r2.13 and be served on the other party.

Before the Court can make a costs order, the party against whom it is to be made must be given a reasonable opportunity to be heard (s364(5)). It is likely that a separate costs hearing will be scheduled for the parties to make submissions and the decision to be made.

Responding to an application or motion for costs

If a PPS prosecutor is presented with an application for costs pursuant to section 364 Criminal Procedure Act 2011, follow these steps:

Step	Action
1	A written application from defence complying with r2.13 must be served on Police.
2	If counsel presents an unannounced and unanticipated application for costs, remind them and/or submit to the court that any application under section 364 CPA must be made in writing and follow the notice of application/response procedure under the Criminal Procedure Rules 2012 (rules 2.12 - 2.15).
3	If the court permits an oral application from the defence, or the court proposes to make an order on the court's own motion, the prosecutor must seek an adjournment in order to consider the application and prepare a response. (Section 364(5) CPA provides that the responding party must be given a 'reasonable opportunity to be heard'. You should submit that in order to give effect to natural justice, principles of fairness and section 364(5) an adjournment of 10 working days is required to investigate the claim, take advice, consider the legitimacy of the application and formulate a response.)
4	Contact the <u>PPS</u> Legal Adviser before responding to any application for costs.
5	Prepare a response in accordance with r2.14.
6	Serve the response no later than 10 working days after the service of the application. (r2.14(1))
7	The matter will then be dealt with in accordance with the procedure in r2.15.

If a costs order is made against Police

Initial action when a cost order is made

If a costs order is made, follow these steps:

Step	Action
1	<p>The prosecutor must take thorough notes of the costs decision made in court, including the exact details of the order, who is to pay, what amount, and to whom.</p> <p>(The court will produce an "order" document informing the party required to pay the costs, who the order has been made to (s364(8) CPA). However, a copy of the decision may not be received from court in time for an internal analysis).</p>
2	<p>On return to the office:</p> <ul style="list-style-type: none"> - advise the District Prosecution Manager (DPM) that a costs order has been made - add a NIA case memo to the DOCLOC case stating that a costs order has been made.
3	<p>The DPM must immediately notify the PPS Legal Adviser at PNHQ, and the relevant District Commander.</p> <p>The District Commander will advise the DPM which relevant senior manager in the line of command the DPM should engage with for the review (e.g. Area Commander, District Crime Manager, Prevention Manager, Operations Manager).</p>
4	<p>The prosecutor must file a POL 258 report to their DPM within three working days about the judge's decision, including:</p> <ul style="list-style-type: none"> - the judge's reasons given when making the order - the details of the order itself - a summary of the case and the submissions made by both parties - a timeline of when key actions took place with the investigation and prosecution, including the date of disclosures - comment on the standard of the prosecution file and whether all matters from a prosecution perspective have been complied with (refer to the prosecutor notes, copies of NIA tasks sent, POL case memos, Disclosure Index, the CMM discussion and document etc). <p>If the prosecutor thinks the costs order made ought to be appealed, they must also include in the POL 258 why they think the judge's decision to award costs was plainly wrong, and/or that the judge had erred. (See 'Appealing a costs order').</p>
5	<p>Depending on the anticipated time required to carry out an internal review of where the perceived fault lies and who must pay the order, the DPM may ask Police prosecutors to seek an extension of time for payment. This request may or may not be granted by the courts</p>

Carrying out the review of the order

Follow these steps when considering the costs order.

Step	Action
1	<p>The District Prosecution Manager (DPM) must:</p> <ul style="list-style-type: none"> - read the prosecutors report and the prosecution file, and have regard to what the judge said while giving the decision - draw their own conclusion as to why costs were awarded against the Police and where in the prosecution process the fault or accountability lies - i.e. was it primarily caused by a failure of <u>PPS</u> or district staff? (In order to form this view, discussion may be required with the relevant district senior manager).
2	<p>Based on the cause of the failure that led to the costs order, the <u>DPM</u>:</p> <ul style="list-style-type: none"> - makes a recommendation on whether <u>PPS</u> or the District should pay the order, or whether costs should be apportioned across the two cost centres - provides this report and a copy of the file to the relevant senior manager in the District, copied to the supervisor of the <u>OC</u> case.
3	<p>Once the District senior manager has had an opportunity to analyse the file and the costs order, they must meet with the <u>DPM</u> to discuss and conclude who is responsible to pay the order: District or <u>PPS</u>. (Costs must usually be paid within 28 days so it is essential that agreement is reached as soon as possible).</p> <ul style="list-style-type: none"> - If the failure was caused by <u>PPS</u>, the <u>DPM</u> should make recommendations about how to address and resolve the issues that caused the failure/s so that they do not occur again. That may be via training, review of policy/practice, legal issues to be addressed and individual performance issues. - If the failure was caused by the District, the District senior manager is responsible for making these recommendations.
4	<p>If unable to agree on the cause of the failure (and therefore who should pay), the file and reports from both the <u>DPM</u> and District senior manager, must be forwarded to the <u>PPS</u> Regional Manager for resolution with the District senior manager.</p>
5	<p>If responsibility for costs is still unable to be resolved, the reports must be escalated to the District Commander and Director:<u>PPS</u> for final decision.</p> <p>Note: Any costs orders greater than \$10,000 must be escalated to the District Commander and Director:<u>PPS</u> due to financial delegations.</p>

Payment of the costs order

The party against whom the costs order has been made must contact the Ministry of Justice Collections Department within 28 days to pay the order unless the judge specifies otherwise

Coding invoices

Invoices must be coded to 32160 (Legal Expenses), with a project code of either:

- 555623 (Costs ordered for failure to comply with Criminal Procedure Act 2011), or
- 555624 (Costs ordered for failure to comply with Criminal Disclosure Act 2008).

Appealing a costs order

Requirements for successful appeals

Any appeal against a costs decision is an appeal against a judge's exercise of their discretion. There are no specific guidelines on what a judge must or must not consider when determining whether to order costs. Thus to successfully appeal, the appellant must show that the decision made was plainly wrong, or the judge erred in some way.

Appeals by the Police against costs orders must always be made by the Solicitor General. Police must seek Crown Law approval before proceeding to filing an application to appeal.

Procedure when an appeal is indicated

On receipt of a [POL 258](#) indicating that an appeal against a costs order may be warranted, follow these steps:

Step	Action
1	The DPM advises the District senior manager of the potential appeal, and that the post-order review process is on hold until any appeal process is complete.
2	The DPM forwards the POL 258 report and discusses it with their Regional Manager, who in turn forwards the file to the PPS legal adviser for consideration.
3	PPS : Legal Adviser reviews the report and determines whether to seek approval from Crown Law to appeal.
4	If Crown Law approve, the PPS Legal Adviser prepares a Notice of Application within 20 working days of the order being made.

For more information on appeals refer to Appeal Provisions in the '[Criminal Procedure - Disposition](#)' chapter.

Costs orders in Crown Prosecutions commenced by Police

Some prosecutions commenced by Police will be conducted by the Crown Solicitor as a Crown prosecution. Costs may be ordered during these proceedings, which could be the result of Police failures. If a costs order is made against the prosecutor whilst the Crown is conducting the proceedings, the Crown Solicitor is responsible for the payment of those costs unless agreed otherwise with Police (refer to 'Schedule E' of the [Memorandum of Understanding between Crown Law and Police](#)).

Where the Crown seeks agreement to have some or all of the costs order paid by Police, an internal review process should be followed, the outcome of which should feed into the discussions with the Crown. Subject to when the Crown assumed responsibility for the prosecution, the review may be led by the relevant District senior manager rather than the PPS District Prosecution Manager.