



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 12

Payment of Costs in Criminal Cases

WORKING PAPER

MARCH 1972

INTRODUCTION

The Law Reform Committee has been asked to review the law relating to the payment of costs in criminal cases.

The Committee has now completed its first consideration of the matter and issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by 22 May 1972.

Copies of the paper are being forwarded to –

The Chief Justice and Judges of the Supreme Court,

The Judges of the District Court,

The Law Society,

The Magistrates Institute,

The Law School,

The Solicitor General,

The Crown Law Department,

The Commissioner of Police,

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

A notice has been placed in *The West Australian* inviting those interested to obtain a copy of this paper.

The research material on which this paper is based is at the offices of the Committee and will be made available on request.

ANALYSIS OF WORKING PAPER

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TERMS OF REFERENCE

1. "To consider whether any alteration is desirable in the law relating to payment of costs to persons acquitted in prosecutions for criminal offences".

2. Although these terms refer only to the costs of persons acquitted, the legislation in some other jurisdictions provides for the payment of costs by those who are convicted, and some of the statements reported in the press (see *The West Australian* 15th April, 1971) as having been made by the Premier Mr. Tonkin could be interpreted to indicate that he had in mind that the accused also could be made liable for costs. The Committee has therefore dealt with this aspect of the question as well (see paragraphs 46 to 48 below).

PRESENT LAW AND PRACTICE IN WESTERN AUSTRALIA

Summary trials

3. In summary trials the court is given a general discretion by the *Justices Act 1902-1971*, ss.151 and 152, to order the complainant to pay the accused his costs if the complaint is dismissed and to order the accused to pay the complainant's costs if the accused is convicted.

4. This general discretion is modified by several statutes which grant immunity (including immunity from costs of unsuccessful prosecutions) to officials carrying out their duties under them. For example, the *Health Act 1911-1970*, s.365; the *Road and Air Transport Commission Act 1966-1970*, s.61; and the *Traffic Act 1919-1971*, s.72 (as to which see *Hitchins v. Martin* [1964] W.A.R. 144 and *Gibbons v. Oliver* [1969] W.A.R. 112).

5. The general discretion is further modified by the established practice under which costs are not awarded against the police (for amplification see the Appendix).

6. Subject to these exceptions referred to in paragraphs 4 and 5, costs are normally awarded against unsuccessful complainants, even if they are officers of local authorities or statutory bodies acting in the course of their official duties, though, in such cases, the authority or body concerned generally pays the costs.

7. On appeals from summary trials either by way of appeal or by way of order to review, the appellate court is empowered to make such order as to costs as it deems just (*Justices Act 1902-1971*, ss.190 & 206) but no order for costs may be made against a justice or a police officer (*ibid.*, s.219). However, if on an appeal by a police officer the decision appealed against is confirmed, or if not confirmed, has involved a point of law of exceptional importance, the court may allow costs (to be paid out of the Consolidated Revenue Fund) to the defendant (respondent) (*ibid.*, s. 219).

Legal aid and costs in criminal cases

11. The *Legal Contribution Trust Act 1967-1969* established the Legal Assistance Fund to be administered by the Law Society, which is made responsible for providing legal advice and legal aid as determined by the Society (see s.14 and Part V, ss.33 to 50 of the Act) and the *Legal Assistance Rules 1971* (Government Gazette, No.40 of 26 May 1971, pp. 1761-1769). The questions arising from the relationship of legal assistance to costs in criminal cases are dealt with in paragraph 49 below.

THE MOVEMENT FOR REFORM

12. On numerous occasions over the past few years there have been demands for reform. In 1965 the Parliamentary Country Party passed a resolution that it was a grievous injustice that an acquitted person was not compensated and urging that this state of affairs be not permitted to continue. In September 1967 the Country Women's Association of Western

that he thinks that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them."

(See [1959] 3 ALL E.R. 471; see also *R. v. Sansbury* [1959] 3 ALL E.R. 472).

18. The Court of Appeal, Criminal Division, has also issued a direction on the quantum of costs to be paid to an acquitted person. Once the judge has exercised his discretion in favour of making an award, the "proper approach " said Lord Parker C.J., speaking for the court, "is to assume the defendant to be of adequate but not abundant means and to ask oneself whether the expenses were such as a sensible solicitor in the light of his then knowledge would consider reasonable to incur in the interests of his client, the defendant" ([1968] 1 ALL E.R.778).

19. The statutory provisions in the United Kingdom also empower the courts to order a convicted person to pay the whole or a part of the prosecution costs including the costs of preliminary committal proceedings. There must however, be evidence of an accused's ability to pay before an order is made (see *R. v. Pottage* (1922) 17 Cr. App. R. 33) and imprisonment may not be ordered in default of payment (see *R. v. McCluskey* (1921) 15 Cr. App. R. 148). See also *R. v. Davis* [1962] 1 ALL E.R. 490 (reduction of amount by Court of Criminal Appeal); *R. v. Simmonds and others* [1967] 2 ALL E.R. 399 (matters to be considered in ordering costs when there are several accused) and *R. v. Judd* [1971] 1 ALL E.R. 127 and *R. v. Gaston* [1971] J. ALL E.R. 128 (length of sentence and means to be taken into account before making order).

New Zealand

20. In New Zealand the *Costs in Criminal Cases Act 1967* came into force on 1st April 1968.

21. The Act gives all courts exercising jurisdiction in criminal cases a wide discretion to grant costs to accused persons who have been acquitted and even to convicted persons in special circumstances when argument on a difficult point of law has arisen. There are no presumptions for or against the granting of costs. The courts, in the case of acquittals, are directed (by s.5) to "have regard to all the relevant circumstances and in particular (where appropriate) to -

- (a) whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
- (c) whether the prosecution took proper steps to investigate any matter coming into its which suggested that the defendant might not be guilty;
- (d) whether generally the investigation into the offence was conducted in a reasonable and proper manner;
- (e) whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;
- (f) whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;
- (g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence".

The Act binds the Crown (s.3) and if the prosecution was conducted by or on behalf of the Crown the accused's costs are payable "out of money appropriated by Parliament for the purpose" (s. 7).

22. The Act also empowers the court to order a convicted person "to pay such sum as it thinks just and reasonable towards the costs of the prosecution " (s. 4).

23. The Committee has been informed that the courts in New Zealand seem reluctant to award costs to acquitted persons. This statement appears to be supported by the low cost of operating the scheme (see para. 45 below).

New South Wales

24. New South Wales in 1967 enacted the *Costs in Criminal Cases Act*. The Act empowers the court to grant a person who has been acquitted, whether on summary trial or on indictment, or after an appeal has been quashed, a certificate as to costs, but only if the court is satisfied that -

- "(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
- (b) any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances."

The Act was amended in 1971 to enable an applicant for a certificate to adduce evidence of further relevant facts not established in the original proceedings. The amendment also sets out the methods by which the prosecution may challenge such evidence.

25. Upon being granted a certificate, the accused can apply to the Under Secretary of Justice for payment of his costs out of the Consolidated Fund. The Under Secretary is required to report to the Treasurer who has the final decision as to whether or not payment is made.

26. The Act does not provide for orders for costs to be made against the accused.

South Australia

27. In South Australia though the provisions are similar to what they are in Western Australia, the practice regarding costs in summary trials has recently changed as a result of the case of

that in summary trials there was a "deeply rooted" (p.401) practice "whereby costs are ordered against unsuccessful defendants almost as a matter of course while costs are only ordered against unsuccessful complainants, at all events those complainants who happen to be police officers, in unusual circumstances, such as, for example, if the police have acted unreasonably in laying or proceeding with the complaint" (pp. 399-400) nevertheless concluded that it was "wrong in principle and ought to be abandoned" (p.401). The Court recognised that in criminal trials on indictment "neither party pays costs to the other no matter what the result of the proceedings" (p.402) but pointed out that s.77(1) of the South Australian *Justices Act 1921-1969* (sections 151 and 152 of the Western Australian *Justices Act 1902-1971* are to the same effect) gives the court a discretionary power to award costs to successful complainants or successful defendants. The Court then went on to say (at p.402) that courts of summary jurisdiction should "in a general way, exercise their discretion as to costs in the way in which

lay complaints and prosecute (and see *Berry v. British Transport Commission* [1961] 3 ALL E.R. 65). If costs are to be paid to accused persons in such cases they should be awarded to be paid out of State funds or the funds of the authority concerned.

31. Under the present system, on a criminal charge, the issue precisely before the court is not whether the accused is innocent but whether the prosecution has proved his guilt beyond a reasonable doubt. The system does not draw any distinction between an innocent accused and an accused whose guilt has not been proven. In the Committee's view a system of awarding costs to accused persons which tended to create such a distinction and in effect introduced degrees of "not guilty", should, if possible, be avoided.

32. In some cases the real issue is not whether the accused is guilty or not guilty, but whether he is guilty of the offence charged or some lesser offence. The defence may in fact be directed essentially to obtaining a verdict on a lesser offence (see *Criminal Code*, ss.594-596A, 601; and note also wide powers of amendment under the *Justices Act*, s.46). This could occur for example when the accused charged with wilful murder has indicated to the prosecution that he would be willing to plead guilty to manslaughter. If after the trial on the wilful murder charge, a verdict of manslaughter is returned, it may be argued that the defence has succeeded, and that the accused should be entitled to the costs incurred in defending the more serious charge.

33. In devising a statutory scheme for the awarding of costs in criminal cases, consideration should be given to -

- (a) whether the costs should be awarded as of course or whether they should be left in the discretion of the court; and
- (b) whether the provisions should apply to all offences or whether they should be limited to particular types of offences or particular types of circumstances.

34. If the costs are to be left in the discretion of the court, the further question arises as to whether the discretion should be -

- (a) unfettered, as in the United Kingdom; or

- (b) with directions that the court should have regard to certain circumstances, as in New Zealand (see paragraph 21 above); or
- (c) subject to conditions, as in New South Wales (see paragraph 24 above); or
- (d) along the lines laid down for the awarding of costs in civil cases (see W.A. R.S.C. Order 66, rule I, also the U.K. *Supreme Court Practice* (1970), Pt. 1 p.824) - i.e. the court will order that the accused against whom a charge has been dismissed, recover his costs unless of opinion that his conduct before or after the commencement of the case has resulted in costs being unnecessarily or unreasonably incurred, in which event it may deprive him of part of his costs.

35. If discretion is to be given to the courts of summary jurisdiction in Western Australia, care will need to be taken to ensure that the sta7h82;rve him pCrve hi989.0115 Tw (Working Pcare32) Tj 1

- (b) if the Attorney General files a *nolle prosequi* or the prosecution withdraws the

provide a general idea of the possible financial burden based on the limited statistical material available and on several assumptions. It should also be borne in mind that if costs are awarded to accused persons, more charges will probably be defended.

42. The assumptions referred to in the previous paragraph are -

- (1) that each charge referred to in the statistics involved a separate trial (this is manifestly, not so, but the assumption has been made to allow for any increase in defended cases, cases in which two counsel may be allowed, etc.);
- (2) that the accused is represented in each case in which he is acquitted;
- (3) that the average time for each case tried on indictment is two days (one and a half days for the trial and half for the preliminary committal proceedings);
- (4) that the average time for each case tried summarily is half a day; and
- (5) that the costs of an accused are \$200 for each day in court (and see para 18 above).

43. The possible annual financial burden will be as follows -

Type of Offence	Number In which no conviction	Length of trial at \$200 a day	Cost
Tried on indictment	60	two days	\$24,000
Indictable offences tried summarily	29	half day	\$ 2,900
Summary offences punishable with imprisonment	300	half day	\$30,000
Other summary offences	1050	half day	<u>\$105,000</u>
			<u>\$161,900</u>

- NOTES: 1. Only those offences for which the accused is not at present entitled to costs have been included. "
2. The above figures are estimates only based on material supplied to the Committee in 1970 by the Commonwealth Bureau of Census and Statistics, and supplemented by figures obtained from a limited survey of Perth Courts.
 3. Costs are likely to be higher before any scheme comes into operation, and may even be higher now.

Costs and legal aid

49. A large number of accused persons receive legal aid. Consequently a substantial amount of the money paid to successful defendants for costs in criminal cases will find its way into the legal aid fund. The more extensive the scheme adopted (see para. 36 above) the greater this amount will be. As a result the legal aid scheme will be able to provide more extensive aid and this will come closer to achieving the ideal that every accused person has a right to legal representation when prosecuted by the State.

APPENDIX

Practice relating to costs against the Police

Extract from an opinion of the Solicitor General to the Under Secretary for Law, dated 22 March 1962.

"(1) Magistrates, when dismissing a complaint, have the power to award costs against the complainant whether he is a Police or other public officer or a private complainant. (*Justices*

- (a) It would soon become the practice for successful defendants to seek reimbursement of legal costs, and unless such reimbursement should be made automatically in all cases, the Government would be faced with the rather impossible task of making decisions on the merits of each case on the materials before the Government, without seeing the witnesses or hearing their evidence and cross-examination. Governments are not as well equipped as Courts to determine the weight to be given to the evidence of witnesses. If reimbursement to successful defendants should be made automatically, not would considerable expense be involved, but many quite undeserving defendants would be reimbursed.

- (b) A reimbursement of costs in some cases and not in others must often involve a slur on the Police evidence in the former cases and some inference or stigma against the defendants in the latter cases.

(5) I understand that the Police, in fairness to defendants, and jealous of the privilege which the Courts have extended to Police complainants on the matter of costs, normally require the complaint to be made by a private complainant wherever the case has not been investigated by the Police or it is not clearly the duty of the Police to make the complaint. However, while no distinction in principle is made by the Police between traffic and other offences, in practice, the Police prosecute for traffic offences only on the complaint of a Police officer.