



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 12**

**Payment Of Costs in  
Criminal Cases**

**REPORT**

**AUGUST 1972**



**REPORT ON**

**PAYMENT OF COSTS IN CRIMINAL CASES**

To: The Hon. T. D. Evans, M.L.A.,  
ATTORNEY GENERAL

**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”.

**GOVERNMENT POLICY**

2. Before the Committee had settled a working paper, the Premier announced at a press conference on 14 April 1971 that the Government intended to introduce legislation making the Crown liable to pay costs when it failed in a prosecution.

3. Following this announcement the Committee submitted a draft working paper to the then Attorney General, Mr. R. E. Bertram, for his instructions. The Committee felt that the Government might not wish it to take the matter further in view of the Premier’s announcement. On 2 March 1972 the Under Secretary for Law informed the Committee that you wished the working paper to be issued in the ordinary way and accordingly this was done on 21 March. A copy of the working paper as issued is attached.

4. You have since indicated that the Government intends to confine the scheme initially to summary trials and within that area costs would be awarded to acquitted persons except in special circumstances. The Committee has assumed that you mean this rule to apply to all offences (simple offences and indictable offences triable summarily) dealt with in Courts of Petty Sessions and Children’s Courts. You asked the Committee to set out in its report how it thought that this policy could best be implemented. You also invited the Committee to give its views on the possible application of the scheme to trials in the Supreme Court and District Court.

5. Although possibly not now of major significance in view of the Government's intention as expressed by you, it may nevertheless provide a useful background to outline the features of the working paper and to summarise the comments received, before going on in paragraphs 15 to 30 below to give the Committee's views on how to implement the Government's policy.

## **WORKING PAPER AND COMMENTS THEREON**

6. The present law and practice in Western Australia is summarised in paragraphs 3 to 11 of the working paper. Put briefly, the law is that, subject to provisions such as s.72 of the *Traffic Act* (which in effect gives an immunity to certain officials against payment of costs), in summary trials the court has a discretion to award costs to acquitted persons. In practice it does not award costs in cases where a police officer is the complainant. On appeals from summary trials the appellate court has a discretion to award costs, except against a police officer. In trials on indictment the law is that the Crown neither receives nor pays costs.

Thus in fact the cases where acquitted persons are reimbursed the legal costs of their defence are very few, and are largely confined to unsuccessful prosecutions by officers of statutory bodies who are not protected by statutory immunity and to the rare case of a private prosecution. An accused person may in some circumstances qualify for payment out of the Suitors' Fund.

7. In the working paper (paragraph 39) the Committee set out its tentative views as follows —

“At this stage the Committee is of the view that ideally an accused should be awarded his costs on every charge on which there is no conviction but that this right of the accused should be subject to the discretion of the court limited along the lines laid down for the awarding of costs in civil cases...”.

8. Because the Premier's announcement could be construed as including a proposal for the payment of costs by convicted persons, the Committee briefly discussed this question in paragraphs 46 to 48 of the working paper.

9. Comments on the working paper were received from -

The Hon. Mr. Justice Wallace

The Hon. Mr. Justice Zelling (Chairman of the South Australian Law Reform Committee)

The Solicitor General

The State Crown Solicitor

Mr. E. G. F. Stewart, Q.C., a member of the Scottish Law Commission (his letter did not express any attitude to the proposals and related only to the law in Scotland)

Mr. R. Iddison, S.M.

Mr. B. G. Tennant (State President of the Miscellaneous Workers Union)

The Law Society

The Police.

10. No commentator disagreed with the broad view that costs should be awarded to acquitted persons in a wider range of circumstances than at present. The Law Society, Mr. Justice Wallace, Mr. Justice Zelling and Mr. Tennant agreed with the proposals expressed in paragraph 39 of the working paper. On the other hand the Solicitor General and the Crown Solicitor urged that greater limitations be placed on the awarding of costs than those proposed in that paragraph.

11. The Solicitor General's views can be summarised as follows -

- (a) In the case of trials on indictment the court should be given an unfettered discretion to award costs to those acquitted, but for offences tried summarily, particularly traffic and regulatory offences, costs should "follow the event" in cases in which the accused was summoned to appear, but should only be awarded when the court considered it just and reasonable to do so in cases following arrest. In the case of appeals from courts of petty sessions as a general rule costs should follow the event.
- (b) The question was not one of the availability of finance but of principle. The question whether the accused was guilty of an offence and the question whether he should be reimbursed his costs were quite separate. He said -

“The importance of a criminal prosecution not resulting in a conviction is that the accused person is not liable to suffer any prescribed disability or penalty in respect of the charge. It is quite irrelevant whether he is in fact innocent or merely fortunate not to have been found guilty. The significance of an acquittal or a conviction is confined to the consequences. When one comes to consider the question of costs, it is really a question of compensation that is to be determined. This necessarily requires a consideration of the merits of the particular case. I cannot see that it is irrelevant in considering this question to recognise that many verdicts of acquittal in trials on indictment are sympathy verdicts, or verdicts which depend on a reasonable doubt albeit attended with grave suspicion, or verdicts which are plainly perverse. It must be remembered that having regard to the committal procedure, no one is required to stand trial on indictment unless there is evidence on oath which if believed would justify a conclusion of guilt beyond reasonable doubt. Another aspect of the matter is that referred to briefly in paragraph 1 hereover, namely, the truth that very few accused persons have anyone but themselves to blame for the charges made against them”.

- (c) He quoted the view of Virtue J. in *Q v. Jackson* [1962] W.A.R. 130 at 133, which he said represented the correct approach to the exercise of a judicial discretion as to costs in favour of an acquitted person in so far as trials on indictment were concerned -

“I may say that even if I had taken a different view of the legal position I would have concluded that this was not a proper case to award costs. The view which I expressed to the jury and to which I still adhere is that the case against the accused was a weak one. Nevertheless there is no doubt that it was a prima facie case and there would have been no justification for taking it away from the jury. There was no absence of reasonable cause for this prosecution. There was no suggestion of want of good faith or oppression or any wrongful motive in launching it and, under the circumstances, I would accordingly have had no hesitation in rejecting this application on its merits if I had not concluded that it was in any event insupportable in law”.

- (d) He also approved of the English Practice Direction (see paragraph 17 of the working paper) but would prefer that the criteria were laid down in a statute, as in New Zealand (see paragraph 21 of the working paper).
  - (e) He did not give any reason for his view that in summary trials of summons cases, and in appeals from courts of petty sessions, costs should “follow the event”. However he said that the award of costs on successful appeals from courts of petty sessions would “go a long way to meeting the public concern that gave rise to the initial reference of the matter to the Committee”.
12. The State Crown Solicitor’s views are as follows -
- (a) He noted that the estimated costs would be substantial and would compete with other demands on public money such as housing and hospitals, and was concerned that this extra burden would by and large be caused by the wrongful or improper, whether or not criminal, conduct of the accused which attracted police attention in the first place. Generally speaking accused persons are the authors of their own misfortune. He gave the example of a person acquitted of the offence of causing death by failing to use reasonable care in the use of a motor vehicle. In his view there is “always some highly negligent driving on the part of the accused which warrants his being indicted” and it is “impossible to predict whether any particular jury will be satisfied that the negligence amounted to criminal negligence”.
  - (b) He cannot agree with the suggestion that costs in criminal proceedings should be awarded “as in the trial of a civil action”. Acquittal is not a matter of the accused establishing his innocence but is a result of the prosecution failing to satisfy the court of the accused’s guilt beyond reasonable doubt.
  - (c) However, he considers that “where an entirely innocent man has been the victim of unfortunate circumstances resulting in his being wrongly charged with an offence, or where the Police have acted negligently or injudicially in the initiation of charges against an innocent person ... the community owes it to the acquitted person to bear the burden of his legal costs”. To accomplish this the courts should be empowered to

award payment of costs to an acquitted person out of funds appropriated for that purpose.

13. One commentator appeared to have mistaken the Committee's intention. He assumed that it involved the awarding of costs against police officers and traffic inspectors personally. However the Committee suggested that such a step was undesirable. Paragraph 30 of the working paper states -

“On principle it may be argued that costs should not be awarded personally against officers of the Crown or the police and other statutory authorities acting pursuant to a duty to lay complaints and prosecute ... 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”.

The Committee emphasises that its view is that if costs are to be awarded they should not be awarded against police officers or other officials acting in the course of their duty.

### **IMPLEMENTING THE GOVERNMENT'S DECISION**

14. In the following paragraphs the Committee discusses suggestions to implement the Government's decision as expressed in paragraph 4 above.

#### **Criteria**

15. In the Committee's view the accused should be entitled to his costs if he is acquitted, and the court should be required to order costs in his favour. However the court should be empowered to deny an accused all or part of his costs in the following circumstances -

(a) If the charge was dismissed under s.669 of the *Criminal Code* dealing with first offenders.

Section 669 operates if the accused pleads guilty or the court thinks the offence is proven and it would seem no injustice to deny the accused his costs in such a case.



- (b) If an accused has done or omitted to do something (other than an act or omission the subject of the charge) which was unreasonable in the circumstances and which contributed to the institution or continuation of the proceedings.

This qualification is broadly similar to that contained in s.3(1) (b) of the *Costs in Criminal Cases Act 1967* of New South Wales (see paragraph 24 of the working paper).

An acquitted person might be denied his costs under this head for example if he had deliberately provoked his arrest or had confessed to the offence and had later retracted the confession or had in some other way misled the police in their investigation.

The exception of conduct which is itself the subject of the charge seems necessary if an award of costs is to be the general rule rather than the exception. It is commonly held (see paragraph 12(a) above) that in most cases the conduct of the accused although not found to constitute an offence, is nevertheless blameworthy.

- (c) If the accused has done or caused to be done some act during the course of proceedings or in the conduct of the defence calculated to prolong the proceedings unnecessarily or cause unnecessary expense.

An accused who obstructs or unnecessarily lengthens the proceedings, for example by adducing false evidence as to an alibi, should have to accept the additional costs incurred by his action, and the court should therefore be empowered to deprive him of part or all of his costs of defending the charge.

16. A strict application of these criteria so as to deny an accused his costs may operate harshly, and the legislation should leave the court with a residual discretion to award him all or part of his costs, notwithstanding that any of the above grounds have been established.

17. You asked the Committee to consider whether the dismissal of a charge on a technical point should constitute a ground for denying costs. In the Committee's opinion there would be danger in such a course, due to the wide meaning of "technical point". On the one hand it would cover the situation in which the prosecution fails because of the neglect to establish some matter requiring only formal proof (e.g. the proof of relevant regulations). In such a case it may seem improper to allow an accused his costs. On the other hand the term could include a situation where an acquittal is obtained because it has been sought to establish some element

of the offence by evidence which is inadmissible. There seems no reason why the accused should be denied his costs in this sort of case.

The Committee is of the view that it would be very difficult if not impossible to define precisely those circumstances in which an accused should be denied his costs because of the failure of the prosecution on a technicality. It would therefore recommend that this should not be made a ground for denial of costs.

### **Funds for paying defence costs**

18. Under s.152 of the *Justices Act* any order for costs in favour of an acquitted person must be made against the complainant personally. The Committee suggested in paragraph 30 of its working paper that in the case of official prosecutions the award should be made directly against the Crown or other authority employing the complainant.

19. The Committee now thinks the better course would be to establish a special statutory fund and to empower the court to order that an accused's costs be paid directly from that fund in cases where it is feasible to do so. The English *Costs in Criminal Cases Act 1952* (as amended by the *Courts Act 1971*) and the *Costs in Criminal Cases Act 1967* of New Zealand both make provision for a statutory fund.

20. There may however be administrative difficulties in including all statutory bodies within the ambit of the statutory fund suggested in the previous paragraph, particularly if, as would seem desirable, these bodies were required to reimburse the fund for payments made in respect of their unsuccessful prosecutions. It may be advisable therefore to confine the statutory fund to prosecutions by the police and officers of Government departments and State instrumentalities and, in the case of other official prosecutions, to provide that costs are to be awarded against the authority concerned and recoverable as a debt.

21. It would also be necessary to enact legislation ensuring that any existing statutory immunity as to costs (see for example s.72 of the *Traffic Act*, s.61 of the *Transport Commission Act* and s.365 of the *Health Act*) did not prevail against an award of costs out of the statutory fund or, where applicable, against a statutory body.

## Appeals

22. The Committee is of the view that it would be desirable to extend the Government's proposal to include appeals from summary trials by giving the appellate court the same power to award costs as is given the court of first instance. The appellate court's power should also extend to awarding costs in proceedings in the court below.

23. Section 219 of the *Justices Act* provides that no costs can be allowed against any justice or police officer in respect of any appeal under that Act. There is no reason why this prohibition should not remain if the statutory fund suggested by the Committee in paragraph 19 is established.

24. It is suggested that the proviso to s.219 of the *Justices Act* should be amended if the statutory fund is established. The cases where the acquittal is confirmed on appeal would be covered by the proposals in this paper and in a case where the acquittal is not confirmed but the respondent is nevertheless awarded costs it would seem simpler for payment to be made out of the statutory fund, rather than the Consolidated Revenue Fund.

## Scale of costs

25. It would seem desirable for the legislation to empower the Governor in Council to prescribe a scale of costs, which would include provision for a solicitor's fee and for any necessary disbursements including court fees and witnesses expenses. There should however be provision for the court to depart from the scale whenever it thought fit. The Committee has been informed that the Law Society is preparing a scale of costs for legal aid for accused persons under the *Legal Contribution Trust Act 1967*. This scale could probably be adapted to provide a scale for payment of costs to acquitted persons.

## Consequential matters

26. The following consequential questions arise -

- (1) One question relates to the payment of costs in certain circumstances to a person notwithstanding that he has been convicted. This was adverted to in

paragraph 32 of the working paper although it was not strictly within the Committee's terms of reference. No comments dealing with this point were received but the tenor of the remarks of the Solicitor General and the Crown Solicitor suggests that they would not approve of the Committee's views in that paragraph. However if these cases are to be covered, the following provisions would be necessary -

- (a) A provision enabling the court to grant the accused part of his costs notwithstanding that he has been convicted of a lesser offence than that with which he was charged if he can satisfy the court that additional costs were incurred in defending the more serious charge.
- (b) Similarly, in cases in which the accused is charged with several offences in the one complaint and acquitted of one or more of the charges and can prove that additional costs were incurred in defending the charges on which he was acquitted, the court should be given a discretion to award the accused the extra costs incurred in defending such charges.

These situations are unlikely to occur frequently in summary trials, but they can occur (see for example s.94B(7) of the *Police Act* and s.43 of the *Justices Act*).

- (2) A further question relates to the hearing of applications for costs. The Solicitor General suggested that applications should be heard in chambers after an appropriate period after the trial had elapsed. It is desirable to keep the procedure as simple as possible. Accordingly the application for costs should generally be dealt with by the magistrate as soon as the trial has ended. In most cases the question would be disposed of by simply applying the scale of costs (see paragraph 25 above). The magistrate should however be empowered, if he thinks necessary, to adjourn the application to chambers and grant leave to adduce further evidence, whether by affidavit or orally.

- (3) Finally, paragraphs 15 to 25 above refer to persons who are acquitted of a charge. There is no reason why the Government's proposal should not extend to cases where a charge is not proceeded with or is withdrawn and the Committee recommends accordingly.

### **Supreme Court**

27. You asked the Committee to include in its report a discussion of whether the proposals should extend to persons acquitted in the Supreme or District Courts. In paragraph 40 of its working paper the Committee expressed the tentative view that if insufficient finance was available the scheme should be limited in the first instance to indictable offences. The reason for this suggestion was that the number of indictable offences is much less than that of summary offences, but that the cost of a successful defence against a charge of an indictable offence is likely to be much greater, and so bear more harshly upon the individual concerned. The first line of the table in paragraph 43 of the working paper gives an estimate of the cost.

28. The Committee is still of the view that the proposals should include acquittals on indictment. It is true as the Solicitor General points out that apart from the rare case of an *ex officio* information a person is not indicted unless there has been a preliminary hearing at which the prosecution established a *prima facie* case. However the Committee thinks that this point cannot be pressed too far since it is usual for the accused to reserve his defence until the trial, when the prosecution's case may wear a different aspect. On the other hand the Committee would agree that some jury verdicts are sympathy verdicts which would make an award of costs seem unjustified.

29. Broadly speaking there are four ways in which the question of costs following an acquittal on indictment can be dealt with.

- (1) The court could be given an unfettered discretion to award costs (this is the position in England - see paragraph 17 of the working paper).
- (2) The court could be given a discretion to award costs but guide lines laid down to which the court would have regard (this is the position in New Zealand - see paragraph 21 of the working paper).

- (3) The court could be empowered in certain circumstances to award a certificate as to costs, but the decision as to whether or not any payment is made would rest with a Minister (this is the position in New South Wales - see paragraphs 24 and 25 of the working paper).
- (4) The court could be required to award costs except in limited circumstances (this is the recommendation in paragraph 15 of this report in relation to summary trials).

While the Committee is agreed that it would not recommend the New South Wales system in (3) above, it has no combined view on which of the other alternatives should be adopted.

### **Costs on conviction**

30. Whatever is done about payment of costs to acquitted persons, the Committee is of the opinion that there should be no extension of the power to order that a convicted person pay the costs of the prosecution (the Committee's views are set out in paragraphs 46 to 48 of the working paper).

### **Draft legislation**

31. The Committee has not attempted to draft legislation to give effect to the Government's proposals, but will be happy to co-operate with the Parliamentary Counsel in the preparation of legislation.

E. J. Edwards  
CHAIRMAN

B. W. Rowland  
MEMBER

C. le B. Langoulant  
MEMBER

24<sup>th</sup> August, 1972