



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 49 – Part B

**The Suitors' Fund Act
Part B : Criminal Proceedings**

REPORT

MAY 1977

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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TERMS OF REFERENCE

1.1 The Commission was asked "to enquire into the operation of the *Suitors' Fund Act 1964*, for the purpose of determining whether the purposes for which the Act was introduced are being fulfilled, and if not, for the purpose of rendering the Act more effective".

1.2 The *Suitors' Fund Act* at present applies to both criminal and civil proceedings. The Commission reached the conclusion that the civil side should be funded separately from the criminal side, and accordingly decided to submit its report on this project in two parts. Part A, dealing with civil proceedings, was submitted on 16 March 1976. This part (Part B) deals with criminal proceedings.

WORKING PAPER

2.1 The Commission issued a working paper on 12 March 1975. The names of those who commented on it are set out in Appendix I, and the paper itself is reproduced as Appendix IV.

SUITORS' FUND ACT

3.1 The Suitors' Fund was established by the *Suitors' Fund Act 1964*.¹ The Fund is financed by a levy of 10c on the issue of a writ of summons in the Supreme and District Courts, on the entry of plaint in the Local Court, and on the issue of a summons to a defendant on complaint in a Court of Petty Sessions. The Fund is administered by the Appeal Costs Board, consisting of three members appointed by the Governor, of whom one is the Chairman, one a nominee of the Barristers' Board, and one a nominee of the Law Society.²

Eligible claims

3.2 In criminal proceedings, the Fund covers the same broad areas as in civil proceedings, namely appeals and abortive or discontinued proceedings. There are, however, significant differences as to who can claim and the circumstances in which claims can be made.

¹ Suitors' Fund Act, s.5.

² Ibid., s.8.

3.3 In the case of criminal appeals, the Fund is available to assist in the payment of costs incurred by -

- (a) An unsuccessful respondent in an appeal which succeeds on a question of law: s.10(1). This provision was added in 1969. Compensation is subject to a maximum of \$2,000.
- (b) A successful appellant in an appeal in which a conviction for an indictable offence is quashed without a new trial being ordered: s.12A(1). This provision was added in 1971. Compensation is subject to a maximum of \$1,000.
- (c) A successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court does not order the respondent to pay the costs of the appeal: s.12A(2). This provision was added in 1971. Compensation is subject to a maximum of \$1,000.
- (d) A successful appellant in an appeal on a question of law against a conviction for an offence, on indictment or complaint, where a new trial is ordered: s.14(1) (b). This provision originally covered only convictions on indictment. Summary convictions were added in 1969. There is no limit to the amount of compensation payable.

3.4 In the case of abortive, discontinued and adjourned proceedings, the Fund is available to assist in the payment of costs incurred by the accused -

- (a) In trials rendered abortive by -
 - (i) the death or protracted illness of the presiding judicial officer, or
 - (ii) disagreement of the jury: s.14(1) (a) .This provision was included in the original Act. There is no limit to the amount of compensation payable.
- (b) In trials where the hearing is discontinued through no fault of the accused or his legal adviser and a new trial is ordered: s.14(1) (c). This provision was

included in the original Act. There is no limit to the amount of compensation payable.

- (c) Where proceedings in a court are adjourned by the prosecution through no fault of the accused or his legal adviser: s.14(1) (d). This provision was added in 1971. There is no limit to the amount of compensation payable.

Procedure

3.5 In cases falling within paragraph 3.3(a) above, the respondent cannot obtain any reimbursement from the Fund unless the Supreme Court, in its discretion, grants him an indemnity certificate.³ In cases within paragraph 3.3(b) and (c), the appellant must obtain a costs certificate from the Supreme Court before payment can be made.⁴ In cases within paragraph 3.3(d), application is made direct to the Appeal Costs Board. In those within paragraph 3.4(a), (b) and (c), application is also made direct to the Board, though in the case of (b) and (c), the applicant must produce a certificate from the court concerned as to the facts.⁵

3.6 Under paragraph 3.3(a), an unsuccessful respondent is entitled (subject to the limit) to reimbursement of his own costs of the appeal in addition to those of the appellant he is ordered to pay.⁶ If the unsuccessful appeal is the final appeal in a series of appeals he is entitled to compensation for the costs of all the appeals in the series (subject to the limit).⁷ He is not, however, entitled to the costs of the original proceedings from which the appeal is brought. In cases within paragraph 3.3(b) and (c), if the successful appeal is the final appeal in a series, it appears that the appellant can be reimbursed only for his costs in the final appeal, and not for the others in the series.⁸

³ Ibid., s.10.

⁴ Ibid., s.12A(1) and (2).

⁵ Ibid., s.14.

⁶ Ibid., s.11.

⁷ Ibid.

⁸ Ibid., s.12A(1) and (2).

3.7 Under paragraph 3.3(d), reimbursement is made for the costs of "the proceedings" before the conviction was quashed, which presumably would include the costs of the appeal or appeals.⁹

Amount paid out of Fund

3.8 The total amount paid out of the Suitors' Fund in respect of criminal proceedings is not very large. From the date of the inception of the scheme in 1965 until 31 December 1975, the total amount awarded in respect of criminal proceedings was \$12,789, made up as follows -

Amount	Awarded under
\$3,801	s.10(1) - see paragraph 3.3(a) above
\$1,719	s.12A(2) - see paragraph 3.3(c) above
\$150	s.14(1) (b) - see paragraph 3.3(d) above
\$4,523	s.14(1) (a) - see paragraph 3.4(a) above
\$2,146	s.14(1) (c) - see paragraph 3.4(b) above
\$450	s.14(1) (d) - see paragraph 3.4(c) above

No payment was made under s.12A(1) -see paragraph 3.3(b) above.

3.9 In no case was the amount claimed greater than the present maximum (that is, \$2,000 under s.10(1) and \$1,000 under s.12A). In the case of claims under s.14, where no maximum applies, the largest amount claimed was \$1,175 (trial aborted due to death of judge).

3.10 By contrast, the total amount awarded for the same period in respect of civil proceedings was \$31,696 - about 2½ times as much as for criminal proceedings.

⁹ Ibid., s.14; and see *Perry v R.* [1975] WAR 33 at 35.

LEGISLATION ELSEWHERE

4.1 Part A of Appendix II to this report sets out in tabulated form the main features of legislation in Australian jurisdictions of a similar type to the *Suitors' Fund Act* of this State, insofar as criminal proceedings are concerned. Part B of Appendix II also tabulates the salient features of legislation elsewhere which is designed to achieve a purpose similar to the *Official Prosecutions (Defendants' Costs) Act 1973* of this State.¹⁰

¹⁰ See also paragraphs 5.25 to 5.31 below.

DISCUSSION AND RECOMMENDATIONS

GENERAL

5.1 As the Commission pointed out in Part A of this report, the Suitors' Fund is simply a pool of money made up of contributions of litigants, together with interest accruing from investment of any sums not immediately required, which can be drawn on by litigants in certain circumstances where decisions are upset on appeal or proceedings are rendered abortive or are discontinued. The Commission described the Fund as being in the nature of a compulsory insurance scheme whereby on payment of what is in effect a premium, parties are insured against expenses arising out of certain miscarriages of court proceedings. This description of the Fund is consistent with a statement made by the Minister in charge of the Suitors' Fund Bill in the Legislative Assembly, who described the purpose in those terms.¹¹

5.2 In Part A of this report, the Commission said it considered that this approach was appropriate for civil proceedings,¹² and it made a number of recommendations designed to ensure that, in regard to those proceedings, the Act fully and consistently reflected its basic purpose.

5.3 In addition to proposing that the classes of proceedings covered by the Fund should be widened and that the levels of compensation, where they applied, should be raised, the recommendations in Part A were aimed at ensuring that -

- (a) the Fund was made up of contributions by all those at risk;
- (b) the amount of a litigant's contribution bore some relationship to the risk involved and the maximum amount of compensation payable;
- (c) the levy was paid by all those who might become eligible for relief from the Fund;
- (d) all those who contributed to the Fund were eligible for its benefits.

5.4 The Commission considers that in relation to criminal proceedings also, the *Suitors' Fund Act* is too restrictive as to the classes of proceedings covered and the levels of

¹¹ 168 WA *Parl Deb* (1964) 1621.

¹² See *Report on the Suitors' Fund Act : Part A: Civil Proceedings*, paragraph 9.

compensation provided.¹³ These matters are discussed in paragraphs 5.45 to 5.111 below. However, unlike civil proceedings, the Commission is of the view that it would be undesirable merely to introduce amendments to cure these defects while leaving the basic legislative structure unchanged. In the Commission's view, the *Suitors' Fund Act* is not an appropriate means of providing compensation for the payment of costs in criminal proceedings.

INAPPROPRIATENESS OF SUITORS' FUND ACT TO CRIMINAL PROCEEDINGS

Contribution requirements

5.5 The reason why the *Suitors' Fund Act* is inappropriate to deal with compensation for the payment of costs in criminal proceedings lies in the nature and purpose of the Fund itself. The Suitors' Fund is designed as a compulsory insurance scheme.¹⁴ However, the provision as to contributions to the Fund ("the " premium") in criminal proceedings is at variance with this concept. The Act obliges a complainant to pay 10c on a summons to a defendant upon complaint under the *Justices Act*,¹⁵ but does not require any contribution from a complainant where the prosecution is commenced by arrest and charge. Accused persons are, not required to make any contribution at all. It could be argued that accused persons in fact contribute to the Fund indirectly, because of the fact that in summary trials, if a person is convicted and fined, an order is sometimes made that he also pay the complainant's costs. If the proceedings had been commenced by way of summons, the complainant would have paid a levy of 10c under the *Suitors' Fund Act*, and this amount would therefore be included in the costs payable by the convicted defendant. However, a convicted person ordinarily is not ordered to pay the costs of the prosecution if he is given a prison sentence, nor if he is convicted on indictment¹⁶ and, of course, he is not required to pay the complainant's costs if he is acquitted, unless the acquittal is pursuant to s.669 of the *Criminal Code* and the court orders that he pay such costs.

¹³ For example, certain appeals on fact, appeals against sentence and certain classes of abortive and discontinued proceedings are not covered: see paragraphs 5.45, 5.48, 5.79 to 5.82 below. As to maxima, see paragraph 5.60 below.

¹⁴ See paragraph 5.1 above.

¹⁵ s.5.

¹⁶ See paragraph 5.13 below.

5.6 Even if the payment by some convicted defendants of the complainant's court costs could be considered as an indirect contribution to the Fund, such a contribution clearly would discriminate against this particular class of accused.

5.7 It would be possible to provide that complainants must pay the levy in every case, irrespective of the mode of commencing proceedings. However, the Commission considers that it would be wrong in principle to require accused persons to contribute to a compensation fund, even if as a practical matter such a scheme could be fully implemented. The effect of such a provision would be to require accused persons as a whole to contribute to the costs of such of their number as qualify for compensation.

5.8 An accused person in criminal proceedings is in a different position from a defendant in civil proceedings. Civil proceedings are a means of settling disputes which ordinarily would have arisen out of some dealing or transaction between the parties - for example, out of an intention to contract. Recourse to court proceedings may be of direct benefit to the defendant in that he may have a set-off or counterclaim which he wishes the court to resolve. But even where he has not, by undertaking a defence he is in effect submitting himself to the jurisdiction of the court in the hope that it will decide in his favour. It does not seem unreasonable that defendants in civil proceedings should be obliged to contribute to a Suitors' Fund to which they can have recourse if mistakes occur in that process.

5.9 An accused person, however, is not in this situation. In no sense could he be said to be submitting himself to the jurisdiction of the court. He has not come to court to resolve a dispute arising out of a transaction with the complainant, nor has he chosen court proceedings as a way of determining an issue which could otherwise have been settled privately.

5.10 The Commission therefore considers that if accused persons are to be entitled to reimbursement of their costs in certain cases, the scheme of reimbursement should not require that they contribute to it. This principle has already been established in Western Australian law in the case of summary trials. The *Official Prosecutions (Defendants' Costs) Act 1973* provides for the payment of the costs of defendants who are acquitted in summary trials, or in appeals therefrom, without any contribution being required from them.¹⁷

¹⁷ See paragraph 5.25 below.

The history of the Suitors' Funds Act in its application to criminal proceedings

General rules as to costs in criminal proceedings

5.11 In its application to criminal proceedings, the Suitors' Fund legislation can be seen largely as an attempt by the legislature to provide some relief to accused persons in respect of their legal costs in the absence of adequate provisions elsewhere providing directly for accused persons to be awarded costs. However, before sketching the history of the legislation, it is necessary to outline the rules governing the payment of costs in criminal cases as between the parties.

5.12 In civil proceedings costs generally follow the event, that is, the losing party must pay the costs of the winning party. In criminal proceedings, however, the situation in regard to costs is quite different.

5.13 In trials on indictment and appeals therefrom, the common law rule applies that the Crown neither receives nor pays costs.¹⁸ Thus in these proceedings each party must bear his own costs, whether he wins or loses. The court has power to award costs against a private informant in a trial on indictment,¹⁹ but the possibility of a private information proceeding to trial is very remote.²⁰

5.14 In summary proceedings the prosecution is not in the name of the Crown but in the name of the individual complainant. Leaving aside the operation of the *Official Prosecutions (Defendants' Costs) Act 1973*,²¹ the court has a statutory discretion to award costs against the losing party, whether at the trial or on appeal.²² However, this general discretion is modified by several statutes which grant immunity from being ordered to pay costs²³ to officials carrying out their duties under them. Examples of such statutes are s.101 of the *Road Traffic Act 1974*, s.365 of the *Health Act 1911* and s.61 of the *Transport Commission Act 1966*. In addition, it appears that the general practice of magistrates when dismissing a complaint has

¹⁸ *R. V Jackson* [1962] WAR 130.

¹⁹ Code, ss.675 and 728.

²⁰ *Gouldham v Sharrett* [1966] WAR 129.

²¹ See paragraphs 5.25 to 5.31 below.

²² *Justices Act 1902*, ss.151, 152, 190 and 206.

²³ See *Hitchins v Martin* [1964] WAR 144; *Gibbons v Oliver* [1969] WAR 112.

been not to award costs against a police officer complainant unless the complaint was made "wantonly and contrary to justice".²⁴

5.15 In the case of appeals from summary trials (either by way of ordinary appeal or by way of order to review), the appellate court is prohibited by statute²⁵ from making an order for payment of costs against police officer complainants. This provision is subject to a proviso to the effect that if a police officer appeals, and the decision appealed against is confirmed (that is, the police officer loses the appeal) or if not confirmed, has involved a point of law of exceptional public importance, the court may allow costs, to be paid out of the Consolidated Revenue Fund, to the accused. However, as its terms indicate, this proviso applies only where the accused is the respondent in the appeal. It does not apply at all where the accused successfully appeals.

5.16 The general position therefore is that the provisions in the *Justices Act* empowering the court to award costs in favour of the defendant are restricted in their ambit, and are circumscribed by other statutory provisions or rules of practice which further limit their operation.

5.17 Apart from the *Suitors' Fund Act*,²⁶ there are no statutory provisions covering the award of costs in criminal proceedings which are abortive or are discontinued. In civil proceedings, if the discontinuance was caused by the fault of a party, that party must pay the costs involved. In criminal proceedings each party must bear his own costs, even though the discontinuance was due to the fault of one of them.

Amendments to the Suitors' Fund Act covering criminal proceedings

5.18 As originally enacted in 1964, the *Suitors' Fund Act* had very limited application to criminal proceedings. From the outset, the Act enabled an accused to claim relief in respect of abortive or discontinued proceedings,²⁷ but the only class of appeal covered was where the accused successfully appealed on a question of law against his conviction on indictment and a

²⁴ See the Appendix to the Law Reform Committee's working paper *Payment of Costs in Criminal Cases* (1972).

²⁵ *Justices Act*, s.219.

²⁶ See paragraph 3.4 above.

²⁷ See paragraph 3.4(a) and (b) above.

new trial was ordered.²⁸ This provision was included in s.14 of the Act, which also deals with abortive proceedings, possibly because it was seen as analogous to that type of proceeding.

5.19 There have been two amendments to the *Suitors' Fund Act*, one in 1969 and one in 1971. Each widened the range of criminal proceedings covered by the Act. The amendment in 1969 extended s.10 to enable unsuccessful respondents in criminal proceedings, as well as those in civil proceedings, to claim relief from the Fund²⁹ and extended s.14(1)(b) to cover successful appeals on law from summary convictions,³⁰ as well as convictions on indictment.³¹

5.20 The amendment in 1971 enacted s.12A(1), thereby enabling relief to be granted to an accused who successfully appealed against his conviction for an indictable offence without a new trial being ordered.³² A new s.12A(2) was introduced to cover the case where a successful appellant is unable, because of some Act or law, to obtain an order for costs against the respondent.³³ The amendment in 1971 also extended s.14 to enable an accused to obtain compensation from the Fund for the costs of an adjournment.³⁴

5.21 In the case of both amending Acts, the Government of the time justified the extensions on the pragmatic ground that cases had occurred where the accused had had to pay legal expenses and the Fund had sufficient surplus to accommodate the extensions. The policy underlying the legislation was not examined.³⁵

5.22 The question of compensation for the legal costs of the prosecution does not seem to have been contemplated by the legislature, either as regards the original Act or as regards the amendments. The provisions outlined in paragraphs 3.3(b) and (d), and 3.4(a), (b) and (c) above are expressly limited to the accused. Although the provision referred to in paragraph 3.3(c) above is not in terms so restricted, it is apparent from *Hansard* that the measure was introduced to provide for the case where an accused successfully appealed on a point of law from a summary conviction, but could not obtain an order for costs against the complainant

²⁸ See paragraph 3.3(d) above.

²⁹ See paragraph 3.3(a) above.

³⁰ See paragraph 3.3(d) above.

³¹ This amendment also clarified the position in regard to appeals from summary trials by making the Act apply expressly to appeals by way of order to review under s.197 of the *Justices Act*.

³² See paragraph 3.3(b) above.

³³ See paragraph 3.3(c) above.

³⁴ See paragraph 3.4(c) above.

³⁵ See 183 *WA Parl Deb* (1969-70) 731-733; 190 *WA Parl Deb* (1971) 939-940.

because the complainant had a statutory immunity of the sort referred to in paragraph 5.14 above.³⁶

5.23 The effect of extending s.10³⁷ to cover criminal proceedings is largely to benefit the accused rather than the prosecution, though its effect is in any case more limited than might be supposed.³⁸ This is because s.10 only applies where the unsuccessful respondent is ordered to pay the appellant's costs.³⁹ Accordingly, a provision giving immunity to the prosecution against being ordered to pay costs⁴⁰ has the indirect effect that the prosecution cannot in those cases claim against the Fund for its own costs where it is the unsuccessful respondent.

5.24 Section 10 does not apply at all to appeals from trials on indictment, either as regards the prosecution or as regards the defence. The Crown cannot take advantage of the section because s.13(3) of the *Suitors' Fund Act* bars the Crown from the benefits of the section.⁴¹ Because of the rule that the Crown does not receive costs,⁴² an accused who is an unsuccessful respondent in an appeal in respect of a trial on indictment cannot claim his own costs from the Fund under s.10.⁴³ The speeches in *Hansard* are silent on the reason for extending s.10 to cover criminal proceedings, so that it is not possible to say whether the limited effect of the amendment was intended.

Official Prosecutions (Defendants' Costs) Act

5.25 The position as to the payment of costs to accused persons changed radically when Parliament enacted the *Official Prosecutions (Defendants' Costs) Act* in 1973. This legislation is based firmly on the principle that an accused who has been acquitted of the charge against him, whether at first instance or on appeal, is entitled to his costs, except in special cases.⁴⁴

³⁶ See 190 WA *Parl Deb* (1971) 939-940.

³⁷ See paragraph 3.3(a) above.

³⁸ See paragraph 5.33 below.

³⁹ See s.11(3) (a). This provides that the total of the respondent's own costs payable out of the Fund cannot exceed those of the appellant's he is ordered to pay.

⁴⁰ See paragraph 5.14 above.

⁴¹ Of course, even if s.13(3) were repealed, the Crown still could not take advantage of s.10 in the case of trials on indictment, or appeals therefrom. This is because the Crown does not pay costs in those cases (see paragraph 5.13 above) and therefore, because of the operation of s.11(3) (a), could not claim its own costs from the Fund where it was an unsuccessful respondent.

⁴² See paragraph 5.13 above.

⁴³ See n.39 above.

⁴⁴ See 200 WA *Parl Deb* (1973) 3386, 3680-87, 3886-87, 3951-53.

The Act is reproduced as Appendix III. Paragraphs 5.26 to 5.31 below summarise its main features.

5.26 The Act provides that costs are to be awarded to an accused in a trial in a Court of Petty Sessions or a Children's Court where the charge against him is dismissed, withdrawn or struck out, or a conviction is quashed on appeal. Costs are payable to an accused notwithstanding the provisions of any other Act which gives immunity to a prosecutor. The Act does not apply to trials on indictment, or appeals therefrom.

5.27 The operation of the Act is confined to cases where the accused is charged with an offence in an "official prosecution", which is defined as a prosecution " ...on a complaint by a public official acting or purporting to act by virtue of his office..."⁴⁵. A public official is defined as:

"A Minister of the Crown, a person employed in the Public Service of the State, a member of the Police Force, or a person employed by a municipality within the meaning of the *Local Government Act*, 1960 or any other statutory body and includes any person acting as agent of or under the instructions of such a person or body."⁴⁶

It was not necessary to extend the Act beyond official prosecutions because it was only in these cases that accused persons had been denied their costs. In private prosecutions, costs normally follow the event and no special statutory provision is needed.

5.28 The amount of the costs payable under the Act, other than court fees, is in accordance with the scale prescribed in the *Official Prosecutions (Defendants Costs) Regulations 1974*, unless the court is satisfied that, in regard to any item in that scale, "having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs for that item is desirable".⁴⁷

5.29 There are certain limitations on the right of a successful defendant to obtain costs. He may be denied costs if:

"(a) the Court -

⁴⁵ s.4.

⁴⁶ Ibid.

⁴⁷ s.5(5).

- (i) under section 669 of the *Criminal Code*, section 26, 34, or 34B of the *Child Welfare Act, 1947*, or section 137 of the *Police Act, 1892* dismisses the charge against him: or
 - (ii) under subsection (1a) of section 16, or subsection (3) of section 17A, of the *Education Act, 1928* refrains from recording a conviction against him;
- (b) he has done or caused to be done or has omitted or caused to be omitted 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: or
- (c) he has done or caused to be done or has omitted or caused to be omitted something during the course of proceedings or in the conduct of the defence or appeal calculated to prolong the proceedings unnecessarily or cause unnecessary expense".⁴⁸

5.30 Costs are also not awarded as of right if the accused is acquitted of a major charge, but convicted of a lesser charge, or if he is acquitted only on some charges in the one complaint.⁴⁹

5.31 It is important to note that, where costs are ordered to be paid under the Act, they are not payable by the complainant personally. Where the complainant is a Minister of the Crown, a public servant, a police officer or a person acting as agent of or under the instructions of any of these persons, payment of the costs is made out of the Consolidated Revenue Fund upon the production of a certificate to the Treasurer.⁵⁰ Where the complainant is employed by a municipality or other statutory body or is a person acting as agent of or under the instructions of such a body, the costs are payable by that body.⁵¹

Comparison between the two schemes

5.32 Western Australia has two schemes for the payment of costs to accused persons - a scheme under the *Suitors' Fund Act* and a scheme under the *Official Prosecutions (Defendants' Costs) Act*.

5.33 Both schemes are limited in their scope and there is also some overlap between them. The overlap occurs in the area of appeals, and Part I of the following table sets out the

⁴⁸ s.6. The provisions referred to in (a) empower the court to dismiss the charge even though the offence is proved.

⁴⁹ s.7.

⁵⁰ s.9.

⁵¹ Ibid.

entitlement of an accused who is a successful appellant under either scheme. Part II of the table sets out the eligibility of an accused who is an unsuccessful respondent in an appeal. It will be seen that the only source of compensation available in such cases is the *Suitors' Fund Act*. The *Official Prosecutions (Defendants' Costs) Act* applies only to accused persons who are acquitted of a charge, either at first instance or on appeal. It does not apply to accused persons who are unsuccessful respondents in an appeal brought by the prosecution.

I. ELIGIBILITY FOR COSTS WHERE ACCUSED IS A SUCCESSFUL APPELLANT⁵²

Origin of Appeal	Nature of Appeal	Whether accused is eligible for costs	
		Suitors' Fund Act	Official Prosecutions (Defendants' Costs) Act
From summary trial	1. On fact against conviction where new trial not ordered	No (unless indictable offence tried summarily under s.12A (1) ⁵³)	Yes, if official prosecution
	2. On law against conviction where new trial not ordered.	Yes (under s.12A(2) and under s.12A(1) if indictable offence tried summarily) ⁵³)	Yes, if official prosecution
	3. On fact against conviction where new trial ordered.	No	Yes, if official prosecution ⁵⁴
	4. On law against conviction where new trial ordered.	Yes (under s.14(1)(b) and s.12A(2))	Yes, if official prosecution ⁵⁴
	5. Against sentence	No	No
From trial on indictment	1. On fact against conviction where new trial not ordered	Yes (under s.12A(1))	No
	2. On law against conviction where new trial not ordered.	Yes (under s.12A(1)) ⁵⁵	No
	3. On fact against conviction where new trial ordered.	No	No
	4. On law against conviction where new trial ordered.	Yes (Under s.14(1)(b)) ⁵⁵	No
	5. Against sentence	No	No

⁵² The table is intended to indicate general eligibility only. Even where the table indicates “yes” an accused may be denied his costs in particular circumstances: see paragraphs 5.29 above and 5.52 to 5.54 below.

⁵³ Assuming that an indictable offence tried summarily retains its character as such: see *Code*, s.1, but cf. *Justices Act*, s.4.

⁵⁴ Assuming that a defendant is entitled to the costs of the appeal even though convicted on the charge on the retrial.

⁵⁵ S.12A(2) – see paragraph 3.3(c) above – cannot be availed of in relation to appeals from trials on indictment: see *Perry v R*. [1975] WAR 33. The decision is referred to in paragraph 51 of the working paper.

II. ELIGIBILITY FOR COSTS WHERE ACCUSED IS AN UNSUCCESSFUL APPELLANT

Origin of Appeal	Nature of Appeal	Whether accused is eligible for costs	
		Suitors' Fund Act	Official Prosecutions (Defendants' Costs) Act
From summary trial	1. On fact against conviction where new trial not ordered	No	No
	2. On law against conviction where new trial not ordered.	Yes (under s.10(1))	No
	3. On fact against conviction where new trial ordered.	No	No
	4. On law against conviction where new trial ordered.	Yes (under s.10(1))	No
	5. Against sentence	No	No
From trial on indictment	1. On fact against conviction where new trial not ordered	No	No
	2. On law against conviction where new trial not ordered.	No (see paragraph 5.24 above)	No
	3. On fact against conviction where new trial ordered.	No	No
	4. On law against conviction where new trial ordered.	No (see paragraph 5.24 above)	No
	5. Against sentence	No	No

5.34 A number of significant features emerge from the table. In regard to successful appeals by the accused against conviction, the *Suitors' Fund Act* can provide relief only in some cases where the appeal is from a summary conviction, whereas all such appeals are covered by the *Official Prosecutions (Defendants' Costs) Act*, provided the prosecution is an "official prosecution". On the other hand, the *Official Prosecutions (Defendants' Costs) Act* does not apply at all to successful appeals against conviction from trials on indictment, whereas the Suitors' Fund covers all such cases, with the exception of successful appeals on fact where a new trial is ordered.

5.35 Part II of the table shows the narrow range of cases where costs are available to an accused who is the unsuccessful respondent in an appeal. The *Official Prosecutions (Defendants' Costs) Act* does not apply at all, and the *Suitors' Fund Act* applies only where the appeal is on a point of law from a summary trial. The accused has no right to claim against the Suitors' Fund where the appeal is from a trial on indictment. As explained in paragraph 5.24 above, this is due to the combination of the rule that the Crown does not receive costs, and of s.11(3) of the *Suitors' Fund Act*, which provides that an unsuccessful respondent can claim for his own costs only to the extent that he is ordered to pay those of the appellant.

5.36 An award of costs under the *Official Prosecutions (Defendants' Costs) Act* must generally be in accordance with the prescribed scale⁵⁶ which limits the amount that can be claimed for solicitors' costs to a maximum amount per day. The scale has remained unchanged since it was first promulgated in January 1974⁵⁷ although legal costs have risen substantially since then. There is no limit prescribed on the daily amount that can be claimed under the *Suitors' Fund Act*⁵⁸ and the consequence has been that in those cases where a person can claim under either Act, claims are usually made under the *Suitors' Fund Act*.

5.37 Neither Act provides relief in regard to appeals against sentence. The *Official Prosecutions (Defendants' Costs) Act* is expressly confined to successful appeals against conviction.

As regards the *Suitors' Fund Act*, the Western Australian Court of Criminal Appeal has recently held in *R. v Lawlor* that an appeal against sentence is not ordinarily an appeal on a

⁵⁶ See paragraph 5.28 above.

⁵⁷ *Gazette*, 25 January 1974, at 189.

⁵⁸ The only limits are those on the total amount: see paragraphs 3.3 to 3.4 above.

question of law, with the consequence that such appeals are excluded from that Act.⁵⁹ In *R. v Lawlor* the accused, who had been convicted on indictment of robbery, was discharged upon his entering into a bond to keep the peace and be of good behaviour for three years. The Crown successfully appealed against the inadequacy of the sentence under s.688(2)(d) of the *Code*, which had been amended in 1975 to give the Crown power to appeal against any punishment or order imposed or made on the conviction of a person tried on indictment. The Court of Criminal Appeal substituted a sentence of two years imprisonment.

5.38 In that case the unsuccessful respondent (that is, the accused) applied for an indemnity certificate under s.10 of the *Suitors' Fund Act*, but the Court rejected the application. Jackson C.J., who delivered the judgment of the Court, said:

"...where there is a successful appeal by the Crown under s.668(2) (d) of the *Criminal Code*, although there may in some circumstances be a question of law involved,⁶⁰ the circumstances of this case, where the appellate court upon the grounds taken by the Crown held that the discretion of the trial judge as to the nature and extent of the penalty....had miscarried, does not involve upon the appeal a question of law..."

He went on to say that the question need not be described necessarily just as a question of fact, and said:

"It is, I believe, one of those matters...which really involves a discretionary judgment on the part of a primary judge and in the circumstances where, in the absence of an error of law on his part, the appeal court considers that the discretion has for any of the other matters mentioned by Kitto J.⁶¹ miscarried, then the appeal is allowed but not on a question of law."

5.39 The accused in *R. v Lawlor* could not have qualified for relief even if the Court had held that an appeal against sentence was an appeal on a question of law. This is an indirect effect of the rule that in trials on indictment the Crown neither receives nor pays costs.⁶²

5.40 The ruling that an appeal against sentence is not ordinarily an appeal on a question of law would also preclude an accused who successfully appealed against the severity of the

⁵⁹ *R. v Lawlor*, unreported judgment, delivered on 18 March 1976.

⁶⁰ Where, for example, the court imposed a sentence which it had no power to impose.

⁶¹ In *Australian Coal & Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621.

⁶² See paragraph 5.24 above.

sentence from obtaining his costs under the *Suitors' Fund Act*. The only relevant provision in this regard is s.12A(2), which is confined to successful appeals on law.⁶³

PROVISIONS OF THE SUITORS' FUND ACT WHICH APPLY TO CRIMINAL PROCEEDINGS SHOULD BE REPEALED

5.41 In the Commission's view, it is unsatisfactory that there should exist two separate pieces of legislation both directed towards the same end, namely the payment of the legal costs of accused persons, but with different criteria, different procedures and different limits. For the reasons given in paragraphs 5.5 to 5.10 above, the Commission considers that the compulsory insurance concept, which is the basis of the *Suitors' Fund Act*, makes it inappropriate as a means of providing for the reimbursement of the legal costs of accused persons. As was suggested above,⁶⁴ the *Suitors' Fund Act* appears to have been utilized as a means of reimbursing accused persons their costs, not because of any deliberate commitment by Parliament to the compulsory insurance concept in criminal proceedings, but because of the absence, at that time of any general acceptance of the principle that the Crown or the prosecution should accept that obligation directly. However, the passing of the *Official Prosecutions (Defendants' Costs) Act* in 1973 shows that this principle is now accepted at least in so far as summary proceedings are concerned.

5.42 The Commission accordingly recommends that the *Suitors' Fund Act* should be amended so as to make it no longer apply to criminal proceedings, and that the *Official Prosecutions (Defendants' Costs) Act* should be extended so as to make further provision for payment of the costs of accused persons to the extent, and in the manner, recommended in paragraphs 5.44 to 5.111 below.

5.43 A corollary of the recommendation that the *Suitors' Fund Act* should no longer apply to criminal proceedings is the recommendation that the 10c levy should no longer be imposed on summonses to defendants in Courts of Petty Sessions. The levy produced \$4,686 in 1974 and \$4,690 in 1975. The repeal of the levy requirement would free the Crown Law Department from the obligation under s.6 of the *Suitors' Fund Act* of arranging for special quarterly returns from each Court of Petty Sessions, a requirement which causes a good deal of administrative inconvenience, particularly as regards courts in country areas.

⁶³ s.12A(2) cannot, in any case, be availed of at all in appeals from trials on indictment: see note 55 above.

⁶⁴ See paragraph 5.11 above.

RECOMMENDATIONS AS TO EXTENSIONS WHICH SHOULD BE MADE TO THE OFFICIAL PROSECUTIONS (DEFENDANTS' COSTS) ACT

Accused persons as successful appellants

General

5.44 The Commission recommends that the *Official Prosecutions (Defendants' Costs) Act* should be extended so as to make provision for the payment of the legal costs of accused persons who are successful appellants in those cases at present covered only by the *Suitors' Fund Act*: see Part I of the table in paragraph 5.33 above. This recommendation is subject to the qualification that, for the reasons given in paragraphs 5.55 and 5.56 below, only official prosecutions should be covered. Paragraphs 5.52 to 5.54 and 5.59 to 5.63 below contain the Commission's recommendations as to the criteria for determining payment, the maximum amounts and the sources of payment.

Successful appeals on fact against conviction

5.45 Implementation of the recommendation in paragraph 5.44 would enable compensation to be paid under the *Official Prosecutions (Defendants' Costs) Act* to accused persons who successfully appeal against conviction in all cases but one. Neither that Act, nor the *Suitors' Fund Act*, provides for payment of the legal costs of an accused who successfully appeals on a point of fact from a conviction on indictment where a new trial is ordered: see Part I of the table in paragraph 5.33 above.

5.46 There seems no reason why provision should not be made for the payment of an accused's legal costs in such a case. The exclusion of the category seems in fact to have been the inadvertent result of piecemeal amendment to the *Suitors' Fund Act*. The reason for the exclusion could not have been the application of a policy to exclude appeals on fact altogether from the Act, since successful appeals on fact where a new trial was **not** ordered are included. Nor could it have been because the decision of the appellate court would not amount to an absolute acquittal (in as much as it led to a new trial), since successful appeals on law where a new trial **was** ordered are included.

5.47 The Commission accordingly recommends that successful appeals against conviction on indictment on a question of fact where a new trial is ordered should also be covered by the *Official Prosecutions (Defendants' Costs) Act*. The number of cases involved is unlikely to be large. In the three years 1973, 1974 and 1975 there were only eight successful appeals against conviction on indictment where a new trial was ordered (three from the Supreme Court and five from the District Court) and it is almost certain that most of these would not be classified as appeals on fact at all.⁶⁵

Successful appeals against sentence

5.48 As Part I of the table in paragraph 5.33 above shows, under the present law successful appeals by accused persons against the severity of the sentence imposed on them are not covered by the legislation. The *Official Prosecutions (Defendants' Costs) Act* is expressly confined to appeals against conviction. The *Suitors' Fund Act* is also unavailable. The only relevant provision is s.12A(2), which is confined to successful appeals on law, and as was pointed out in paragraph 5.37 above, the Court of Criminal Appeal has held that appeals against sentence are ordinarily appeals on law.

5.49 There are few successful appeals against sentence, whether from trials on indictment or from summary trials. In the three years 1973, 1974 and 1975 there were only twenty-four successful appeals against sentences imposed after conviction on indictment. Four were in respect of sentences imposed by the Supreme Court, and the remainder were in respect of sentences imposed by the District Court.⁶⁶ Successful appeals by accused persons against sentences imposed by summary courts are, of course, more numerous because of the far greater number of charges determined by these courts, but still the number is not very large. In 1974 there were thirty-five such appeals (a number of these concerned similar offences committed by the one defendant), and in 1975 there were thirteen.

5.50 In the Commission's view, an appellant who successfully appeals against sentence should be able to obtain reimbursement of his legal costs, in the same way, from the same source,⁶⁷ and under the same circumstances, as if he had successfully appealed against his

⁶⁵ The Commission considers the total amount payable annually under this head would be less than \$1,000. See also paragraphs 5.63 and 5.112 to 5.114 below.

⁶⁶ By contrast, the number of unsuccessful appeals against sentence after conviction on indictment in the same period was fifty-eight.

⁶⁷ See paragraph 5.63 below.

conviction. An appellate court does not lightly interfere with the sentence imposed by the trial court. In particular, it will not intervene merely because it would itself have imposed a lighter sentence if the matter had come before it originally. In *Gibbs and Jones v R.*,⁶⁸ McMillan C.J. stated the principles upon which an appellate court would intervene as follows:

"This court [that is, the Court of Criminal Appeal] is not likely to interfere with the sentence imposed by the judge at the trial, who has much better opportunity of arriving at a just conclusion as to the nature of the sentence which the case requires than we have sitting in this court. It is not enough for us to be able to say that the sentence does seem somewhat severe, but we must come to the conclusion that there has been some mistake or some wrong principle adopted, or something which we can say renders it inequitable that the sentence should be allowed to remain."

If, under these principles, the accused has managed to satisfy the appellate court that the sentence imposed by the court below was unjust, it would seem to accord with the general philosophy of both the *Suitors' Fund Act* and the *Official Prosecutions (Defendants' Costs) Act* that he should be eligible for reimbursement for the costs of so doing. The Commission recommends that provision be made in the latter Act accordingly.⁶⁹

5.51 In 1970, the *Appeal Costs Fund Act 1964* of Victoria was amended to permit an accused person to be awarded his costs out of the Suitors' Fund in cases where the Attorney General appealed against the inadequacy of the sentence imposed by the trial court. Though limited to cases where the accused was the respondent in the appeal,⁷⁰ it can be seen as the recognition by Victoria that the payment of compensation to accused persons in respect of the costs involved in appeals against sentence accords with the philosophy of the Suitors' Fund legislation, and that such appeals are not essentially different from the other kinds of appeals which are already covered by that legislation.

Basis for granting relief

5.52 The question arises whether successful appellants against conviction or sentence should be entitled to an award of costs in every case, or whether costs should be denied in some circumstances. The present position under the *Suitors' Fund Act* is that the making of an

⁶⁸ (1916) 19 WALR 12 at 16; see also *Reynolds V Wilkinson* (1948) 51 WALR 17 which concerned an appeal against a sentence imposed by a Court of Petty Sessions.

⁶⁹ In the Commission's view, the total amount of costs payable annually under this head would be about \$5,000, although this cannot be taken as a precise estimate. See also paragraphs 5.63 and 5.112 to 5.114 below.

⁷⁰ See paragraphs 5.68 and 5.72 to 5.74 below.

award is discretionary, but there are no guidelines laid down in the Act for the exercise of that discretion: see ss.10, 12A and 14. The Full Court has held that the discretion is one to grant, not one to refuse, and that the applicant must show some ground calling for the exercise of the discretion in his favour.⁷¹ The case before the Full Court concerned an application under s.10, but it would seem that the same rule would apply to cases under ss.12A and 14.

5.53 By contrast, under the *Official Prosecutions (Defendants' Costs) Act*, the accused has a general right to an award of costs which may be denied only if certain prescribed circumstances exist.⁷² If those circumstances which have relevance only in the case of first instance acquittals are put on one side, it can be seen that in the case of appeals the accused may be denied his costs only if he so conducted his case as to prolong the proceedings unnecessarily or cause unnecessary expense. In substance, this is a similar test to that which the Commission recommended in Part A of this report should apply to an award of costs out of the Suitors' Fund in the case of civil appeals.⁷³ The Commission can see no difference in this respect between civil and criminal appeals. It may, for example, be held to be unreasonable to prolong the trial by advancing fanciful defences, or by adding unnecessarily to the number of witnesses.

5.54 The Commission accordingly considers that the provisions in the *Official Prosecutions (Defendants' Costs) Act* as to the circumstances when costs will be granted to a successful appellant, and as to the circumstances in which costs may be denied to him, are satisfactory and recommends that they should remain unchanged.⁷⁴ This would mean that the appeals which the Commission recommends in this report should be transferred from the *Suitors' Fund Act* to the *Official Prosecutions (Defendants' Costs) Act*, and the new classes of appeals it recommends should be covered by that latter Act, would be dealt with in accordance with those provisions.

Private prosecutions

5.55 At present, the Suitors' Fund is available in respect of private prosecutions, as well as prosecutions by or on behalf of the Crown or a public body. On the other hand, the *Official*

⁷¹ *Richards v. Faulls Pty. Ltd.* [1971] WAR 129.

⁷² See ss.5 and 6; see also paragraph 5.29 above, where the relevant parts of s.6 are reproduced.

⁷³ See Report on the *Suitors' Fund Act Part A : Civil Proceedings*, Paragraph 52.

⁷⁴ See paragraph 5.29 above.

Prosecutions (Defendants' Costs) Act applies only to official prosecutions. If the Commission's recommendation that the *Suitors' Fund Act* should no longer apply to criminal proceedings is adopted, an accused who successfully appealed against a conviction in a private prosecution in those cases at present covered by the Suitors' Fund would no longer have access to that Fund.

5.56 The question therefore arises whether the *Official Prosecutions (Defendants' Costs) Act* should be extended to accommodate private prosecutions. The possibility of a private prosecution on indictment can be virtually discounted,⁷⁵ so that the only real question relates to private prosecutions in summary trials. In the Commission's view it is unnecessary to do so. As the Commission explained in paragraph 5.27 above, in private prosecutions in summary trials or in appeals therefrom, costs normally follow the event, so that a successful appellant would normally be able to obtain his costs both in respect of successful appeals against conviction and in respect of successful appeals against sentence, by virtue of the existing provisions of the *Justices Act*.⁷⁶

Monetary limits on compensation

5.57 Under the *Suitors' Fund Act*, if a conviction for an indictable offence is quashed without a new trial being ordered, the maximum payment that can be made from the Fund to the successful appellant for the costs of the appeal is \$1,000.⁷⁷ A similar limit is imposed on the payment that can be made to a successful appellant in an appeal where, because of some Act or law, the court does not order the respondent to pay the costs of the appeal.⁷⁸ However, there is no limit to the compensation that may be paid to a successful appellant in an appeal on a question of law against a conviction where a new trial is ordered.⁷⁹ In this last case, compensation is also payable for the costs of the first trial thrown away, as well as the costs of the appeal. The justification for this is that if the accused had to incur fresh costs in defending himself all over again, it is proper that he should be compensated not only for the costs incurred in satisfying the appellate court that the first trial was defective, but also for the costs thrown away in respect of that trial.

⁷⁵ See paragraph 5.13 above.

⁷⁶ See *Justices Act* s.190 (ordinary appeal) and s.206 (appeal by way of order to review).

⁷⁷ s.12A(1).

⁷⁸ s.12A(2).

⁷⁹ s.14(1) (b).

5.58 Under the *Official Prosecutions (Defendants' Costs) Regulations*,⁸⁰ although there is no total maximum imposed in respect of the costs that are recoverable, there is a limit placed on the amount of solicitors' costs that can be claimed for each day of the trial. In the case of an appeal, the maximum amount in respect of solicitors' costs that can be claimed for the first day of the hearing "including preparation of case for appeal and counsel fee" is \$150, and for each succeeding day it is \$75. Section 5(5) of the *Official Prosecutions (Defendants' Costs) Act* empowers the court to make an order in excess of the amount prescribed, but only if it is satisfied that "having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs for that item is desirable".

5.59 The Commission has considered whether the approach of the Suitors' Fund to the question of costs, under which the limits imposed are those for the total amount, is preferable to the approach of the *Official Prosecutions (Defendants' Costs) Act*, under which the limit imposed is on the daily amount. On balance, the Commission is of the view that the Suitors' Fund approach is to be preferred, and recommends that the *Official Prosecutions (Defendants' Costs) Act* be amended accordingly. The setting of a total limit, providing it is sufficiently high,⁸¹ has the consequence that in most cases applicants would be fully compensated for their costs, a situation which surely is desirable. Under the *Official Prosecutions (Defendants' Costs) Act*, the daily limits prescribed have quickly become inadequate because of inflation, with the result that no applicant is fully compensated. Sufficient control is imposed under the *Suitors' Fund Act* approach by the requirement that the costs that can be claimed must be reasonable.

5.60 In Part A of this report, the Commission recommended that the limits of compensation in respect of civil appeals should be raised to amounts which would provide a substantial reimbursement, if not a complete indemnity, having regard to the amounts of money that can be at risk,⁸² and recommended that the limit in respect of an appeal to the Supreme Court should be \$3,000; to the High Court, \$5,000; to the Privy Council, \$7,000, and for other appeals, \$3,000. However, these limits are in respect of the costs of an unsuccessful respondent who, in addition to paying his own costs, has been ordered to pay the costs of the successful appellant (which is the usual position in regard to civil appeals). In those civil cases where the unsuccessful respondent is not required to pay the appellant's costs, the

⁸⁰ See paragraph 5.28 above.

⁸¹ See paragraph 5.61 below.

⁸² Part A of report, paragraph 13.

Commission recommended that the limit in respect of a claim by the appellant should be set at half the above amounts.⁸³ The same considerations apply to criminal appeals. Accordingly, the Commission recommends that the limit for a successful appellant in criminal proceedings be set at \$1,500 in respect of an appeal from a Court of Petty Sessions or a Children's Court to the Supreme Court; \$2,500 to the High Court and \$3,500 to the Privy Council. In the context of criminal proceedings the only other classes of appeal are those; from the District Court and the Supreme Court to the Court of Criminal Appeal, and the limit here should be \$1,500. These limits would cover cases where the appeal concerned was the last in a series of appeals. For example, an appellant may have been convicted in the Supreme Court, been unsuccessful in his appeal to the Court of Criminal Appeal, but finally successful in the High Court. The proposed limit of \$2,500 in respect of the appeal to the High Court would also compensate for the costs of the unsuccessful appeal to the Court of Criminal Appeal, should an order for compensation be made in respect of it.⁸⁴ It would also compensate for the costs of the first trial thrown away, in a case where the appellate court ordered a new trial.⁸⁵

5.61 The Commission would expect that only in very rare cases would the amount claimed exceed the proposed limit. To the end of 1975, the amounts claimed under the *Suitors' Fund Act* in respect of criminal appeals have never been greater than the present maxima of \$2,000 under s.10(1) and \$1,000 under s.12A.⁸⁶ In the case of appeals under s.14(1)(b), where there is no maximum at present, only one claim has ever been made, the amount awarded being \$150. Nevertheless, monetary data based on figures of previous years can quickly become misleading, and the Commission considers that the limits which are set should be capable of standing for a reasonable time.

5.62 The Commission regards it as anomalous that there is no monetary limit imposed in respect of successful appeals under s.14(1) (b)⁸⁷ of the *Suitors' Fund Act*. It is implicit in the Commission's recommendations as to limits set out in paragraph 5.60 above that they should apply in respect of all successful appeals by the accused and the Commission recommends accordingly.

⁸³ Part A of report, paragraph 43.

⁸⁴ See paragraph 5.106 below.

⁸⁵ See paragraphs 3.7 above and 5.108 below.

⁸⁶ See paragraph 3.8 above.

⁸⁷ See paragraph 3.3(d) above.

Source of relief

5.63 At present, under the *Official Prosecutions (Defendants' Costs) Act*, the costs of successful appeals by accused persons are payable out of the Consolidated Revenue Fund if the prosecution was on behalf of the Crown, or by the municipality or other statutory body if the prosecution was undertaken on behalf of such a body.⁸⁸ The Commission considers that this should also be the position in relation to the classes of successful appeals by accused persons which the Commission has recommended in paragraph 5.44 above should be transferred from the *Suitors' Fund Act* to the *Official Prosecutions (Defendants' Costs) Act*, and in relation to the additional classes of successful appeals which the Commission has recommended in paragraphs 5.47 and 5.50 above should be covered. It recommends accordingly.

Accused persons as unsuccessful respondents

General

5.64 Under s.10 of the *Suitors' Fund Act*, the present position is that an accused who is an unsuccessful respondent in an appeal on a point of law may in some cases obtain relief from the Fund of his legal costs. However, the accused cannot claim against the Fund in any case where the Crown successfully appeals against a decision on law in a trial on indictment.⁸⁹ Such appeals would, however, be rare, because of the limited grounds on which an appeal may be made,⁹⁰ particularly since it has been held that an appeal against sentence is not ordinarily an appeal on a point of law. The main area involved therefore is that of a successful appeal by the complainant on a point of law from a decision of a magistrate or justices, although the actual numbers of such appeals are not very great.

5.65 In 1974, there were twenty-one successful appeals by the complainant against the dismissal of the charge against the defendant, and twenty-one successful appeals by the complainant against sentence. The circumstances in connection with these appeals against sentence were somewhat unusual. All arose out of police action in prosecuting a number of

⁸⁸ See paragraph 5.31 above.

⁸⁹ Because of the rule in s.11 of the *Suitors' Fund Act* that a respondent can claim relief for his own costs only to the extent that he has been ordered to pay those of the appellant: see paragraph 5.24 above.

⁹⁰ See Code, s.688(2)

news agents under the *Indecent Publications Act*. All the defendants were represented by the same counsel and the complaints were heard together. The complainants' appeals against the inadequacy of the sentence (which was a "caution" in each case) were also heard together.⁹¹ In 1975, there were nineteen successful appeals by the complainant against dismissal of the charge, but in contrast to the previous year, there was no successful appeal by a complainant against sentence.

5.66 The Commission recommends that provision should continue to be made to enable an accused, who is an unsuccessful respondent, to claim his own costs and those of the appellant he is ordered pay, and that provision should also be made for an accused to be able to claim for his own costs even though he had not been ordered to pay those of the appellant.⁹² The court's decision not to make an order against the respondent that he pay the appellant's costs would not imply that the respondent was in some way blameworthy. In the context of civil appeals, the court may decline to make such an order, for example, in a case where the appeal succeeds on one ground but fails on others.⁹³ The Commission considers that the same principle should apply in the context of criminal appeals, both in those cases where the court has power to order that the respondent pay the appellant's costs, but does not do so, and also where the court has no such power (that is, in respect of appeals from trials on indictment). There is no valid reason for distinguishing in this regard between jury trials and summary proceedings, and if an accused is eligible for relief in the latter case so should he be in the former.

Appeals on fact and against sentence

5.67 At present, an accused who is an unsuccessful respondent in an appeal cannot claim against the Suitors' Fund if the appeal succeeded on a question of fact, not of law.⁹⁴ In Part A of this report dealing with civil appeals,⁹⁵ the Commission recommended that an unsuccessful respondent in an appeal which succeeded on a question of fact, as distinct from a question of law, should also be eligible for relief, on the grounds that the making of an error of fact by the court of first instance need be no more the fault of the party in whose favour it was decided

⁹¹ See *Walsh v Giumelli* [1975] WAR 114. This was one instance where an appeal against sentence was an appeal on law: see paragraph 5.38 above. The Full Court held that a summary court has no power to impose a caution.

⁹² This recommendation parallels that in paragraphs 44 to 45 of Part A of this report.

⁹³ See Part A of report, paragraph 45.

⁹⁴ See paragraph 3.3(a) above.

⁹⁵ Paragraph 19.

than an error of law. The Commission considers that the same argument applies in the context of criminal appeals. A court's function is to evaluate the evidence, as well as to apply the law, and an accused should be compensated for the costs involved in the appellate court correcting an error of fact by the trial court to the same extent as if it had corrected an error of law.

5.68 The same considerations also apply to cases where the accused is an unsuccessful respondent in an appeal by the prosecution against the inadequacy of the sentence.⁹⁶ Paragraph 5.50 above sets out the principles under which the appellate court acts in correcting a sentence. In the Commission's view accused persons should be eligible for relief in these cases also.

Source of relief

5.69 At present, the source of relief in respect of an unsuccessful respondent's costs is the Suitors' Fund, which is made up of contributions of certain litigants, and operates in essence as a compulsory insurance scheme. The Commission has already set out arguments against providing for payment of an accused person's costs by way of the Suitors' Fund.⁹⁷ In the case of accused persons who are successful appellants, the Commission has recommended that the present provisions in the *Official Prosecutions (Defendants' Costs) Act* as to the source of relief should be retained.⁹⁸ This means that, in such cases, payment would be made out of the Consolidated Revenue Fund where the prosecutor is a Minister, public servant, a police officer or person acting for any of such persons.⁹⁹ But where the prosecutor is employed by a municipality or other statutory body, or a person acting on its behalf, payment would be made by that body.¹⁰⁰ The Commission, however, does not consider that this solution is appropriate in respect of the costs of accused persons as unsuccessful respondents. It would be inappropriate to require a municipality or other statutory body to pay the costs of an accused in a case where the person acting on its behalf had successfully appealed against a decision in favour of the accused. In the Commission's view, it would not be unreasonable for the legal costs of an accused who is an unsuccessful respondent to be met out of the Consolidated

⁹⁶ The Full Court has held that such appeals do not normally involve questions of law: see paragraph 5.38 above.

⁹⁷ See paragraphs 5.5 to 5.10 above.

⁹⁸ See paragraph 5.63 above.

⁹⁹ See paragraph 5.31 above.

¹⁰⁰ See paragraph 5.31 above.

Revenue Fund in all cases where he qualified for relief.¹⁰¹ Such costs would have been incurred because of what turned out to have been, in the broad sense, an error in the administration of justice.¹⁰² It does not, therefore, seem inappropriate that the State should bear the costs of the accused in such a case.¹⁰³

5.70 Section 219 of the *Justices Act* already makes provision, for the costs of an accused who is an unsuccessful respondent, although it is very limited in extent. The section provides for the payment out of the Consolidated Revenue Fund of the costs of an accused who is the unsuccessful respondent in an appeal by a police officer from a summary trial if, in the opinion of the appellate court, the appeal involved a "point of law of exceptional public importance". The Commission has already adverted to the arbitrary nature of the distinction between "point of law" and "point of fact"¹⁰⁴ and it does not seem just that compensation for an accused's costs should be granted only if the point at issue was of "exceptional public importance". From the point of view of the accused, the cost to him is the same irrespective of whether the point at issue was of general importance. In a sense, of course, no aspect of criminal law is unimportant, since the proper working of criminal justice is fundamental to every civilized society.

5.71 The Commission accordingly recommends that the *Official Prosecutions (Defendants' Costs) Act* should be amended so as to empower the appellate court to order that the costs of an accused who is an unsuccessful respondent be met out of the Consolidated Revenue Fund.¹⁰⁵ Costs would not necessarily be awarded in every case. The criterion should be whether the accused acted reasonably in relation to the proceedings.¹⁰⁶ The monetary limits on compensation should be as for a successful appeal by an accused (see paragraph 5.60 above), except that, where the court has power to order that the respondent pay the appellant's costs (that is, in certain appeals from decisions of Courts of Petty Sessions), and has done so, the limit should be doubled in that case.¹⁰⁷

¹⁰¹ See paragraph 5.54 above.

¹⁰² In the sense that, ideally, the trial court should have come to the correct decision itself.

¹⁰³ The Commission estimates that the total amount that would be paid out annually under this head is about \$7,400 (including \$400 representing payments out of the Fund under the present narrow range of cases). See also paragraphs 5.112 to 5.114 below

¹⁰⁴ See paragraph 5.67 above.

¹⁰⁵ See paragraph 5.107 below.

¹⁰⁶ Cf. paragraph 5.54 above.

¹⁰⁷ It would be very rare for such an appeal to be pursued beyond the Supreme Court.

Accused persons as successful respondents

5.72 The *Suitors' Fund Act* makes no provision for payment of the costs of an accused who is the **successful respondent** in an appeal by the prosecution. In civil proceedings the costs of a successful respondent are normally met by the unsuccessful appellant. However, in criminal proceedings, where trials on indictment are concerned, an accused who on appeal successfully defends a decision made in his favour by the trial court cannot be awarded the costs of so doing.¹⁰⁸ An example of such a case would be where an accused successfully argued in the Court of Criminal Appeal that the sentence passed upon him by the trial judge was adequate, and should not be increased.¹⁰⁹

5.73 As far as appeals from decisions of summary courts are concerned, the situation is that under ss.190 and 206 of the *Justices Act*, the appellate court has a general power to award costs against an unsuccessful appellant.¹¹⁰ However, this power is qualified by provisions giving certain officials statutory immunity against the payment of costs.¹¹¹ Section 219 of the *Justices Act* is capable of providing some relief in this context. Although that section provides that no costs may be awarded against a police officer complainant who unsuccessfully appeals, it also provides that the court in such a case may allow the respondent his costs, to be paid out of the Consolidated Revenue Fund.

5.74 The Commission recommends that accused persons should be able to obtain compensation for the costs of successfully defending the decision of the trial court, whether the appeal is against acquittal or against sentence, and whether on fact or on law, and that this should be achieved by extending the *Official Prosecutions (Defendants' Costs) Act* to cover such cases. This would involve enacting a provision to authorise the appellate court, whether on appeal from a trial on indictment or a summary trial, to order that the costs of an accused be payable out of the Consolidated Revenue Fund when the prosecutor is a government official, and payable by a municipality or other statutory body when the prosecutor is employed by, or is the agent of, such a body. The maxima should be as specified in paragraph 5.60 above for a successful appellant.¹¹² Section 219 of the *Justices Act* would then need to be

¹⁰⁸ Because of the rule that the Crown neither receives nor pays costs: see paragraph 5.13 above.

¹⁰⁹ See Code, s.688 (2) (d).

¹¹⁰ The *Official Prosecutions (Defendants' Costs) Act* applies only to cases where an accused is a successful appellant. It does not apply where an accused is a successful respondent.

¹¹¹ See paragraph 5.14 above.

¹¹² As a very general estimate, the Commission considers that the annual cost would be no more than \$1,000.

repealed. Unsuccessful appeals by the prosecution are rare. In the four years 1973 to 1976, there were only three such appeals from trials on indictment. The Commission has no precise figures in respect of unsuccessful appeals by the prosecution in respect of summary trials, but it understands that they would be also very few.

5.75 It would not be necessary to make any special provision in the case of unsuccessful appeals by private prosecutors. The chances of a private prosecution proceeding to indictment are very remote¹¹³ and, in respect of appeals from summary trials where the complainant is a private person, ss.190 and 206 of the *Justices Act* already empower the appellate court to award costs against him.

Abortive, discontinued and adjourned proceedings

General.

5.76 Section 14(1) of the *Suitors' Fund Act* enables the accused to obtain compensation for his legal costs in respect of proceedings which were -

- (a) rendered abortive by the death or protracted illness of the judge or by disagreement of the jury;
- (b) discontinued without fault of the accused or his counsel or solicitor; or
- (c) adjourned without fault of the accused or his counsel or solicitor.¹¹⁴

If the accused incurs additional costs as a consequence of the new trial made necessary because of any of the events referred to in (a) or (b) above, or as a consequence of the event referred to in (c), the Appeal Costs Board may pay the accused -

"The costs, or such part thereof, as the Board may determine, incurred by the...accused...in the proceedings before they were rendered abortive or were adjourned or...discontinued".¹¹⁵

The policy of the Board is to pay compensation for the costs which were thrown away. There is no statutory limit to the amount that can be awarded.¹¹⁶

¹¹³ See paragraph 5.13 above.

¹¹⁴ See paragraph 3.4 above.

¹¹⁵ *Suitors' Fund Act*, s.14(1).

5.77 The rationale of s.14, which appears in Suitors' Fund legislation elsewhere,¹¹⁷ is that it is unfair that the accused should bear not only the costs of defending himself, but also the extra costs involved if the proceedings are aborted or discontinued (so that they have to be recommenced) or are adjourned (so that fresh arrangements have to be made to continue them). If the *Suitors' Fund Act* were amended so that it no longer applied to criminal proceedings, as the Commission has recommended,¹¹⁸ accused persons would be without redress unless some other provision was made. In a broad sense, the State is responsible for the administration of criminal justice, and it does not seem unreasonable that it should reimburse an accused for the costs that have been thrown away as the result of a discontinuance or interruption of the proceedings. Of course no reimbursement would be made to the accused if the discontinuance or interruption were his fault.

5.78 If the Commission's recommendations that the *Official Prosecutions (Defendants' Costs) Act* be amended to make provision for the costs of an accused person in connection with appeals is adopted,¹¹⁹ it would seem convenient also to include in that Act a provision that an accused may apply¹²⁰ for payment out of the Consolidated Revenue Fund for the costs thrown away as a result of proceedings being rendered abortive, discontinued or adjourned. Compensation would, as now, be dependent upon fresh proceedings taking place and upon additional costs being incurred by the accused. The Commission recommends accordingly.

Classes of proceedings

5.79 The Commission pointed out in paragraph 38 of the working paper that the provision in the *Suitors' Fund Act* dealing with abortive or discontinued proceedings applies only if a "new trial" takes place.¹²¹ Proceedings other than trials, for example, appeals and committal proceedings, are sometimes rendered abortive, or are discontinued, and it would be inequitable to deny relief merely because such proceedings were not "trials".

¹¹⁶

Ibid.

¹¹⁷

See Appendix II below.

¹¹⁸

See paragraph 5.42 above.

¹¹⁹

See paragraphs 5.44, 5.71 and 5.74 above.

¹²⁰

To the Master of the Supreme Court: see paragraph 5.85 below.

¹²¹

s.14(1).

5.80 The problem in the previous paragraph does not arise in connection with proceedings which are adjourned, since relief in those cases is apparently not confined to "trials".¹²² However, in order to qualify for relief, the adjourned proceedings must be in a "court", a restriction which may exclude coroners' inquests, as may the fact that relief is confined to an "accused", since it could be argued that there is no "accused" at that stage.

5.81 The Commission recommends that the amendment should be drawn widely enough to cover appeals, committal proceedings and coroners' inquests (but only in the last case where a question at issue is whether a person should be committed for trial). The Appeal Costs Board has in fact been prepared to treat appeals as trials, but, as was suggested in Part A of this report,¹²³ it would be preferable to provide specifically for them. A recent instance where committal proceedings were discontinued was that involving the defendants Galland, Pinn, Lindquist, Murray and Deloughery in 1975. They had been charged with conspiracy to defraud (the proceedings being popularly known as "The Mogul case"). During the course of the committal proceedings the magistrate disqualified himself on the ground that the defendants alleged that he had made a biased statement concerning the case at a social function, and it would have been improper to continue. The committal proceedings were recommenced under another magistrate. The defendants must have been put to considerable expense in having the proceedings start all over again. Some expenses, of course, would not have been incurred again (for example, those relating to the initial preparation of the case) but those involved in paying for the appearance of counsel would have been lost.

Inability of judge to continue

5.82 There are three further matters to be dealt with under the heading of abortive, discontinued or adjourned proceedings. Under the *Suitors' Fund Act*, litigants can be reimbursed their costs in respect of proceedings rendered abortive by reason of "the death or protracted illness" of the presiding judicial officer, but not if he is unable to continue for any other reason. In Part A of this report the Commission recommended that the legislation should provide expressly that compensation should be available in all cases where the presiding judicial officer was unable to continue.¹²⁴ There is no difference in this respect between civil

¹²² *Suitors' Fund Act*, s.14(1) (d).

¹²³ Paragraph 47.

¹²⁴ Report Part A, paragraph 46. A judge or magistrate may be unable to continue for personal reasons other than illness, or he may have been appointed to some other position, or he may have reached retirement age.

and criminal proceedings, and the Commission accordingly recommends that the same rule should apply in criminal proceedings.

Limit on compensation

5.83 The next matter concerns the question whether there should be any limit on the amount of compensation that may be awarded to an accused in respect of criminal proceedings which are rendered abortive, or are discontinued or adjourned. Under the *Suitors' Fund Act* at present there is no limit prescribed.¹²⁵ In Part A of this report, the Commission recommended that there should continue to be no limit for civil proceedings. However, this was on the basis that the administrator of the Suitors' Fund would be able to insure against the risk of the judge or magistrate being unable to continue. Under the Commission's proposal in paragraph 5.78 above, the State would assume direct responsibility for compensating accused persons in those cases, and the Commission considers that it would be unreasonable for the State to assume liability in the absence of a limit. Up until 31 December 1975, the Appeal Costs Board paid out a total of approximately \$7,000 in respect of abortive, discontinued or adjourned criminal proceedings, the largest single sum being \$1,175 for an aborted trial.¹²⁶ However, it is not difficult to imagine cases where the costs involved would be much more than that, for example, the case referred to in paragraph 5.81 above. The Commission recommends that the limit should be \$1,500 in respect of anyone accused. This amount is the same as that proposed in respect of successful appeals to the Supreme court,¹²⁷ and should be sufficient to provide full compensation for all but the most exceptional cases.¹²⁸

Procedure for determining claims

5.84 The final matter concerns the question of the procedure for determining claims in respect of abortive, discontinued or adjourned criminal proceedings. At present, application is made direct to the Appeal Costs Board. In Part A of this report, the Commission

¹²⁵ See paragraph 3.4 above.

¹²⁶ See paragraph 3.9 above.

¹²⁷ See paragraph 5.60 above.

¹²⁸ The average amount paid out of the Suitors' Fund annually under this head has been about \$700: see paragraph 3.8 above. Following from the proposed extensions under this head, the Commission estimates that the average amount payable annually would increase by about \$800.

recommended that the functions of the Appeal Costs Board should be taken over by the Master of the Supreme Court, on the ground of simplicity of administration.¹²⁹

5.85 If this recommendation were implemented, it would, of course, mean that a decision would be required as to the appropriate body or person to determine questions of compensation in respect of criminal proceedings which were rendered abortive, or were discontinued or adjourned. The Commission considered whether this should be the responsibility of the court in which the proceedings took place. However, it decided against recommending such a solution. Consistency of policy is important, and this may be difficult to achieve if the responsibility for determining compensation lay with the particular judge, magistrate or justice concerned. The function is primarily a taxing one, and in the view of the Commission could appropriately be given to the Master of the Supreme Court, as the Commission has recommended in the case of civil proceedings. It should also be necessary, as at present, for the presiding judicial officer to certify in the case of discontinued or adjourned proceedings that the event was not due to the fault of the accused or his legal advisers. The Commission recommends accordingly.

Costs of the prosecution

5.86 The Commission has pointed out above¹³⁰ that the *Suitors' Fund Act* in its application to criminal proceedings is principally designed to provide relief to the accused, not the prosecution. The Act does not contain any provision which would enable the prosecution to obtain compensation for the legal costs involved in respect of abortive, discontinued or adjourned proceedings, nor for the legal costs of conducting a successful appeal.¹³¹

5.87 It is true that s.10 of the *Suitors' Fund Act* may permit a prosecutor who was an unsuccessful respondent to obtain compensation from the Fund where the appeal has succeeded on a question of law,¹³² but the cases where a prosecutor could in fact avail himself of the section would be very few. The Crown is excluded altogether from the benefits of the

¹²⁹ Paragraph 57.

¹³⁰ See paragraph 5.11 above.

¹³¹ It may, however, benefit indirectly in cases where an unsuccessful respondent has been granted an indemnity certificate under s.10 in respect of his costs and those of the appellant he is ordered to pay, and refuses or neglects or is unable through lack of means to pay the appellant. In such a case the appellant himself may apply under s.11(2) of the *Suitors' Fund Act* to the Appeal Costs Board for reimbursement of his costs.

¹³² See paragraph 3.3(a) above.

Act, and prosecutors who are protected by statutory immunity against being ordered to pay the costs of the accused¹³³ are also ineligible, since a respondent can obtain compensation from the Fund for his own costs only to the extent that he has been ordered to pay those of the appellant. The fact that an order for the payment of costs has been made in favour of an accused under the *Official Prosecutions (Defendants' Costs) Act* cannot be taken into account, since the order would not have been made against the complainant personally, but against the Consolidated Revenue Fund or the municipality or other statutory body employing him, as the case may be.¹³⁴ Relief would be available under s.10 of the *Suitors' Fund Act* to a complainant only if he was an officer of a statutory body not protected by statutory immunity and had been ordered to pay the accused's costs, or was a private person who had initiated a private prosecution.

5.88 The effect of the Commission's recommendation that the Suitors' Fund should no longer apply to criminal proceedings would mean that the prosecution would not be able to claim against the Fund in those limited cases where it can do so at present, unless legislative provision were to be made elsewhere.

5.89 The Commission considers that it would be unnecessary to provide a source of funds against which a prosecutor should be able to claim compensation for the legal costs involved in a prosecution, either directly or indirectly.¹³⁵ In all but the rare case of a private prosecution, criminal proceedings are undertaken either by the Crown or a statutory authority, and in the Commission's view the costs of so doing should be borne by those bodies.

5.90 This leaves the question of private prosecutions. As already noted, the chances of a private prosecutor being given leave to proceed in a trial on indictment are remote¹³⁶ and for practical purposes the ambit of private prosecutions is confined to summary trials. Even here, they are comparatively rare. The Commission considers that the *Justices Act* contains adequate provisions to provide for the payment of a complainant's costs in appropriate cases. On appeals from summary trials the appellate court has a wide discretion to order that one party pay the costs of the other.¹³⁷ It could, therefore, award costs not only to a complainant

¹³³ See paragraph 5.14 above.

¹³⁴ See *Official Prosecutions (Defendants' Costs) Act*, s.9.

¹³⁵ That is, if the defendant has been ordered to pay the costs of the prosecution and does not, or cannot, do so: see paragraph 5.86 above.

¹³⁶ See paragraph 5.13 above.

¹³⁷ ss. 190 and 206.

who was the successful appellant, but also, if it thought fit, to a complainant who was an unsuccessful respondent.

5.91 In the circumstances, therefore, the Commission considers that the exclusion of the prosecution from the proposed scheme is justified.

Legal aid

5.92 The question arises whether an accused who is legally aided should be disqualified from obtaining compensation under the proposals recommended in this Part of this report. There would probably be little argument that where the legal aid is only partial, the accused should be entitled to compensation for the portion of the costs he is obliged to pay personally. The more difficult question is whether compensation should be payable in respect of the costs incurred by the administrators of the relevant legal aid scheme, and for which reimbursement is not sought from the accused.

5.93 The Appeal Costs Board has determined that it has no power under the *Suitors' Fund Act* to pay the costs of an accused who is legally aided in a case where he had made an application for compensation in respect of a mistrial, on the ground that s.14 of the *Suitors' Fund Act* provides for compensation to be payable only if the accused personally incurred additional costs. Presumably the same argument would apply in respect of claims by accused persons under other sections of the *Suitors' Fund Act*.¹³⁸

5.94 In paragraph 67 of the working paper the Commission put forward the view that there was no reason why legally aided litigants should be in any different position with regard to the Suitors' Fund than others. All the commentators agreed. It was not, of course, intended that legally aided persons should make a profit, but that the relevant legal aid scheme should be reimbursed the legal costs it had incurred on the accused person's behalf.

5.95 At present there are three legal aid schemes operating in this State -

- (a) that administered by the Law Society of Western Australia, which is funded partly by State Government grant, partly by Commonwealth Government grant

¹³⁸ ss.10 and 12A.

and partly by the Legal Contribution Trust under the *Legal Contribution Trust Act 1967* from money derived from the investment of the prescribed portion of legal practitioners' trust accounts;¹³⁹

- (b) the Australian Legal Aid Office, a Commonwealth instrumentality, funded by the Commonwealth Government;
- (c) the Aboriginal Legal Aid Service in Western Australia, funded by the Commonwealth Government.

5.96 The *Legal Aid Commission Act 1976* provides for the establishment of a body called "The Legal Aid Commission of Western Australia", whose function will absorb schemes (a) and (b) above. The activities of the Commission will be funded by State and Commonwealth Government grants and from the Legal Contribution Trust, in the same way as (a) is now funded. The Aboriginal Legal Aid Service will remain separate and will continue to be funded by the Commonwealth Government.

5.97 In Part A of this report,¹⁴⁰ dealing with civil proceedings, the Commission recommended that a legally aided litigant should not be excluded from the Suitors' Fund, and that a provision should be included in the *Suitors' Fund Act* empowering the authority controlling the Fund to make payment direct to the relevant legal aid body.

5.98 The reason the Commission gave in relation to civil proceedings was that, since a contribution would have been made to the Suitors' Fund through payment of the court fees of the legally aided person, it was equitable that the Fund should reimburse the relevant legal aid body for the costs it had incurred on that person's behalf, should he otherwise qualify for relief. If the Commission's recommendation in paragraph 5.42 above that the *Suitors' Fund Act* should no longer apply to criminal proceedings is adopted, this argument for reimbursing the Legal Aid Commission or the Aboriginal Legal Aid Service would not be relevant. Nevertheless, the Commission considers that these bodies should be reimbursed. Denial of the reimbursement might inhibit the capacity of the relevant legal aid body for providing the level of assistance which the Legal Aid Commission or the Aboriginal Legal Aid Service would otherwise be able to offer.

¹³⁹ *Legal Contribution Trust Act 1967*, s.14(1) (c) (ii).

¹⁴⁰ Paragraph 55.

5.99 The Commission accordingly recommends that the fact that an accused person is legally aided should not of itself be a bar to compensation of legal costs incurred on his behalf, and that provision should be made to permit reimbursement to be made direct to the relevant legal aid body. Power should also be given to apportion the reimbursement as between the accused and the legal aid body, to provide for cases where legal aid was only partial.

Industrial magistrate

5.100 In paragraph 28 of the working paper, the question was raised whether the Suitors' Fund should be extended to cover appeals from decisions of an industrial magistrate under the *Industrial Arbitration Act 1912*, so as to enable unsuccessful respondents in such appeals to claim against the Fund under s.10 of the *Suitors' Fund Act*.¹⁴¹ An industrial magistrate has jurisdiction to enforce an industrial award or agreement by imposing a penalty for non-compliance¹⁴² and to impose fines for offences under the *Industrial Arbitration Act* where a maximum penalty of not more than \$200 is provided.¹⁴³ An appeal lies from his decision to the Industrial Appeal Court.¹⁴⁴ Since such proceedings before an industrial magistrate are in the nature of criminal proceedings, it could be argued that they should be covered by the proposals recommended in this Part of this report. The Commission has given careful consideration to this question, and considers that, on balance, they should not be so included. The cases heard by an industrial magistrate are in a special category, which may involve as parties the Industrial Registrar, unions, employers or workers. It would unduly complicate the scheme proposed in this Part of this report (which is designed for criminal proceedings in the ordinary sense) if it was extended to them.

Acquittals at first instance in trials on indictment

5.101 It has been suggested from time to time that statutory provision should be made to enable an accused person to obtain reimbursement of his costs where he is acquitted on a trial on indictment. At present there is no statutory provision covering such a case. The *Official*

¹⁴¹ See paragraph 3.3(a) above.

¹⁴² *Industrial Arbitration Act*, s.99.

¹⁴³ *Ibid.*, s.100.

¹⁴⁴ *Ibid.*, s.103A,

Prosecutions (Defendants' Costs) Act covers only acquittals in summary trials or appeals therefrom, and in trials on indictment the common law rule applies that the Crown neither receives nor pays costs.¹⁴⁵ The accused cannot obtain relief from the Suitors' Fund since that scheme only covers acquittals on appeal.

5.102 The Commission does not consider it should make a recommendation on this matter, since the question only arises incidentally, and the working paper did not allude to it. Nevertheless, the question is important and the Commission considers that it should draw attention to the fact that the matter had been considered by the Commission's predecessor, the Law Reform Committee.¹⁴⁶

5.103 The then Government had announced that a scheme for payment of costs to acquitted persons would be introduced, confined to summary trials in the first instance, and asked the Committee to advise how the proposal should be implemented. The then Attorney General asked the Committee to include in its report its views as to the payment of costs to persons acquitted in trials on indictment.

5.104 In its report, the Committee said that it was of the opinion that the scheme for payment of costs in criminal proceedings should include acquittals on indictment. The Committee pointed out that the costs of a successful defence against a charge of an indictable offence was likely to be much greater, than of a summary offence, and so bear more harshly upon the individual concerned. It acknowledged that, in contrast to summary trials, a person generally¹⁴⁷ is not indicted unless there has been a preliminary hearing at which the prosecution established a prima facie case, and that some jury verdicts are sympathy verdicts which would make an award of costs seem unjustified. However, it thought that these factors could be taken into account by properly fashioned criteria. It suggested a number of ways in which a scheme for payment of costs to persons acquitted on indictment could be implemented which would take account of these special features.

¹⁴⁵ See paragraph 5.13 above.

¹⁴⁶ See paragraphs 27 to 29 of the Committee's report, *Payment of Costs in Criminal Cases* (1972).

¹⁴⁷ That is, apart from ex officio informations.

Other matters

5.105 There are certain other matters for which the Commission considers provision should be made in the proposed revision of the *Official Prosecutions (Defendants' Costs) Act*.

Series of appeals

5.106 Under s.10 of the *Suitors' Fund Act*, an accused may be compensated not only for the final appeal in a sequence of appeals, but also for the other appeals in the sequence. The same position would appear to apply to appeals under s.14(1)(b).¹⁴⁸ However, s.12A¹⁴⁹ appears to contemplate only one appeal, and not a series. The *Official Prosecutions (Defendants' Costs) Act* also appears to contemplate one appeal only. The Commission is of the view that an accused should be eligible for compensation in respect of all the appeals in a series. In Part A of this report, the Commission recommended that each appeal in a series be considered separately, so that, if appropriate, an applicant could be granted his costs in respect of, say, the first appeal, and denied his costs in respect of the second.¹⁵⁰ The Commission considers that the same principle should apply to criminal appeals, and it recommends accordingly.

5.107 One further aspect should be provided for in regard to a series of appeals. If the appeal is to the High Court, it would seem that the State cannot invest that court with power to order that the accused be paid his costs out of the Consolidated Revenue Fund or by the prosecutor's employer or principal.¹⁵¹ The better course would therefore appear to be to empower the Supreme Court to make the necessary orders in the case of appeals to either the High Court or the Privy Council. This is the position under the *Suitors' Fund* in relation to indemnity certificates. The Commission recommends accordingly.

New trials

5.108 The Commission pointed out in Part A of this report that under the *Suitors' Fund Act*, where an appeal succeeds on a point of law and a new trial is ordered, there is no power to award costs to an unsuccessful respondent for the costs thrown away in respect of the first

¹⁴⁸ see paragraph 3.7 above.

¹⁴⁹ See paragraph 3.3(b) and 3.3(c) above.

¹⁵⁰ See paragraphs 36 to 39.

¹⁵¹ See *Gumett v The Macquarie Stevedoring Co. Pty. Ltd. (No.2)* (1956) 95 CLR 106. The same rule would presumably also apply to the Privy Council. See the working paper, paragraph 48.

trial.¹⁵² A similar position would appear to obtain under s.12A(2) in relation to a successful appeal where a new trial is ordered.¹⁵³ On the other hand, it appears that the costs of the first trial which were thrown away, as well as the costs of the appeal, are compensable under s.14(1)(b), that is, where an accused succeeds on a point of law against conviction and a new trial is ordered.¹⁵⁴ The Commission considers that it is anomalous that where a new trial is ordered, the costs of the first trial thrown away are compensable in some cases and not in others. The Commission accordingly recommends that whenever the court is empowered to award an accused his costs on appeal, it should also be empowered to award him compensation for the costs of the first trial thrown away, should it order a new trial.

Companies

5.109 Under the *Suitors' Fund Act*, as a consequence of the application of ss.13(3), 14(2) and 15A, companies having a paid up capital of \$200,000 or more, and their subsidiaries, are excluded from the benefits of the Act. However, the *Official Prosecutions (Defendants' Costs) Act* has no such exclusion. Criminal proceedings may be taken against companies in the same way as against individuals. See, for example, *W.A. Pines Pty. Ltd. v Registrar of Companies* [1976] WAR 149, which was a case where a company successfully appealed against its conviction for an offence under the *Companies Act*.

5.110 In the Commission's view, there is no reason why companies having more than a certain amount of paid up capital should be excluded from the proposals contained in this report. The Commission does not consider that an individual who is an accused should be excluded from the legislation merely because he possesses assets of a certain value. Equally, for the same reasons as it put forward in paragraph 53 of Part A of this report dealing with civil proceedings, the Commission does not consider that companies which have assets of a certain value should be excluded either, and recommends accordingly.

Payment to a person other than the accused

5.111 In paragraph 58(b) of Part A of this report, the Commission recommended that the administrator of the Suitors' Fund should be authorised, if he thought fit, to make an award

¹⁵² See Report, Part A: paragraph 40.

¹⁵³ See paragraph 3.3(c) above.

¹⁵⁴ See paragraph 3.3(d) above.

payable to a person other than an actual litigant. The Commission considers that the same facility should be given in the case of awards in respect of criminal proceedings. Accordingly it recommends that the determining authority should be able to order that, for example, the accused's solicitor be paid direct. The Commission has already recommended that, where the accused was legally aided,¹⁵⁵ the relevant legal aid fund should be able to obtain direct reimbursement.

Costs of implementation

5.112 As the figures in paragraph 3.8 above show, claims in respect of criminal proceedings under the *Suitors' Fund Act* have been comparatively small, and the total amount paid out from the beginning of the scheme in 1965 until 31 December 1975 was only \$12,789. In respect of claims under the *Official Prosecutions (Defendants' Costs) Act*, the total amount paid out of the Consolidated Revenue Fund was \$30,257 in the year ending 30 June 1975 and \$36,314 in the year ending 30 June 1976. These amounts do not, of course, represent the total sums paid under that Act, since amounts awarded in respect of unsuccessful prosecutions by complainants acting on behalf of municipalities and other statutory bodies are not included. There are no figures available in respect of these latter amounts, but the Commission believes that the annual total in respect of them would be substantially less than that paid out of the Consolidated Revenue Fund.

5.113 The Commission has recommended in this report that the *Official Prosecutions (Defendants' Costs) Act* should be extended so as to make provision for cases where an accused may at present be awarded his legal costs under the *Suitors' Fund Act* but not under the *Official Prosecutions (Defendants' Costs)*,¹⁵⁶ and that the latter Act should also be extended so as to make provision for the payment of the legal costs of an accused person in the following additional cases -¹⁵⁷

¹⁵⁵ See paragraph 5.99 above.

¹⁵⁶ See paragraphs 3.3 and 3.4 above (but see also paragraph 5.44 where there is a qualification as to private prosecutions). The overlap occurs in the area of successful appeals against conviction in an official prosecution: see the table in paragraph 5.33 above.

¹⁵⁷ Including, where applicable, the costs of the first trial thrown away, and the costs of intermediate appeals in a series of appeals: see paragraph 5.106 and 5.108 above.

- (a) Where he successfully appeals on fact against conviction on indictment and a new trial is ordered;¹⁵⁸
- (b) Where he successfully appeals in an official prosecution against sentence;¹⁵⁹
- (c) Where he is an unsuccessful respondent in an appeal by the prosecutor on fact or on sentence;¹⁶⁰
- (d) Where he is an unsuccessful respondent in an appeal by the prosecutor and no order for the payment of costs has been made against him;¹⁶¹
- (e) Where he is a successful respondent in an appeal by the prosecutor in an official prosecution;¹⁶²
- (f) Where an appeal, committal proceeding or coroner's inquest is aborted or discontinued, and where proceedings are rendered abortive due to the judge, magistrate or justice being unable to continue for any reason.¹⁶³

5.114 While the Commission is unable to give a precise estimate of the additional amounts that would be involved in extending compensation to the accused in the manner set out in (a) to (f) above, it expects that the annual amount payable under (a) would be no more than \$1,000; under (b) \$5,000; under (c) and (d) together, \$7,000; under (e) \$1,000, and under (f) \$800. The total additional payments would therefore be \$14,800 annually. If there is added to this the sum of \$1,300, being the average annual amount paid out of the Suitors' Fund in respect of criminal proceedings under the present law, and the average annual amount of \$33,300 paid out of the Consolidated Revenue Fund in respect of claims under the *Official Prosecutions (Defendants' Costs) Act*, it can be seen that the total amount that would be paid out of the Consolidated Revenue Fund annually in respect of all claims by accused persons in

¹⁵⁸ See paragraph 5.47 above.

¹⁵⁹ See paragraph 5.50 above.

¹⁶⁰ See paragraphs 5.67 and 5.68 above.

¹⁶¹ See paragraph 5.66 above.

¹⁶² See paragraph 5.74 above.

¹⁶³ See paragraphs 5.79 to 5.82 above.

respect of legal costs would be no more than \$49,400.¹⁶⁴ The abolition of the levy on summonses to defendants in Courts of Petty Sessions would result in a saving of about \$4,700 annually.¹⁶⁵

SUMMARY OF RECOMMENDATIONS

6.1 The Commission recommends that -

- (a) The *Suitors' Fund Act* be amended so as to make it no longer apply to criminal proceedings and the relevant levy payable under it be no longer payable.

(paragraphs 5.42 and 5.43)

- (b) The *Official Prosecutions (Defendants' Costs) Act* be amended so as to provide that the legal costs of accused persons which are at present payable out of the Suitors' Fund (see paragraphs 3.3 and 3.4), but not under the *Official Prosecutions (Defendants' Costs) Act*, be payable under that latter Act.¹⁶⁶

(paragraphs 5.44, 5.66 and 5.78)

- (c) The *Official Prosecutions (Defendants' Costs) Act* be also amended to provide for payment of the costs incurred by an accused -

- (i) where he successfully appeals on fact against conviction on indictment where a new trial is ordered;

(paragraph 5.47)

- (ii) where he successfully appeals against sentence in an official prosecution;

(paragraph 5.50)

- (iii) where he is an unsuccessful respondent in an appeal where no order for costs has been made against him;

(paragraph 5.66)

¹⁶⁴ It is likely that municipalities or other statutory bodies would become liable for a small part of this amount, since under the Commission's proposals, such a body would become liable for costs awarded to an accused person under (b) or (e) if the prosecution was on its behalf.

¹⁶⁵ See paragraph 5.43 above. Some of this would be saved by municipalities and other statutory bodies.

¹⁶⁶ Except where the accused successfully appeals in a private prosecution: see paragraph 5.44 above.

(iv) where he is an unsuccessful respondent in a successful appeal by the prosecutor on fact or on sentence;

(paragraphs 5.67 to 5.68)

(v) in an official prosecution, where he is the successful respondent in an unsuccessful appeal by the prosecutor;

(paragraph 5.74)

(vi) where an appeal, a committal proceeding or a coroner's inquest is aborted, discontinued or adjourned without his fault or that of his legal advisers, and where proceedings are rendered abortive due to the presiding judicial officer being unable to continue for any reason.

(paragraphs 5.79 to 5.82)

(d) Where an accused who is a successful appellant or who is a successful respondent qualifies for relief, his costs should be payable from the same source as costs are now payable under the *Official Prosecutions (Defendants' Costs) Act*.

(paragraphs 5.63 and 5.74)

(e) In all other cases where an accused qualifies for relief (that is, as unsuccessful respondent or in relation to aborted, discontinued or adjourned proceedings) his costs should be payable out of the Consolidated Revenue Fund.

(paragraphs 5.71 and 5.78)

(f) The criteria for granting relief where an accused is -

(i) a successful appellant,

(ii) an unsuccessful respondent,

(iii) a successful respondent,

should be in accordance with the present provisions of the *Official Prosecutions (Defendants' Costs) Act*.

(paragraphs 5.54, 5.71 and 5.74)

- (g) The criteria for granting relief to an accused in the case of abortive, discontinued or adjourned proceedings should be in accordance with the present provisions of the *Suitors' Fund Act* relating to those proceedings.

(paragraphs 5.77 to 5.78)

- (h) Whenever an accused is entitled to his costs in respect of an appeal, the court should be empowered, should it order a new trial, to award him the costs of the first trial thrown away.

(paragraph 5.108)

- (i) Where the accused is eligible for relief in respect of a final appeal in a series of appeals, the court should be empowered to award him his costs in respect of all or any of the intermediate appeals.

(paragraph 5.106)

- (j) The maximum amount payable to an accused person in respect of an appeal should be as specified in paragraphs 5.60, 5.62, 5.71 and 5.74.

- (k) The maximum amount payable to an accused person in respect of abortive, discontinued or adjourned proceedings should be as specified in paragraph 5.83, and the actual amount should be determined by the Master of the Supreme Court.

(paragraphs 5.83 and 5.85)

- (l) Compensation in respect of appeals to the High Court or the Privy Council should be determined by the Supreme Court.

(paragraph 5.107)

- (m) Claims should be able to be made in respect of accused persons who are legally aided.

(paragraph 5.99)

(n) No company should be excluded from the scheme.

(paragraph 5.110)

(o) Payment should be able to be made to a person other than the accused, for example, his solicitor or the relevant legal aid body.

(paragraph 5.111)

(Signed) ERIC FREEMAN
Chairman

NEVILLE H. CRAGO
Member

DAVID K. MALCOLM
Member

2 May 1977

APPENDIX I

List of those who commented on the working paper

Institute of Legal Executives (W.A.) (Inc.)

Law Society of Western Australia

Treasury Department

Burton R.H., S.M.

Temby I.D.

QLD Appeal Costs Fund Act 1973	Appeal Costs Board (composed as in W.A.)	(a) \$2 on orig. proc. in Sup. Ct. (b) \$1.50 on orig. proc. in District Court. (c) 25c on orig. proc. in Mag. Ct.	(a) An accused who - (i) successfully appeals against conviction on indictment where new trial ordered (ii) incurs additional costs by reason of abortive or discontinued proceedings (b) an unsuccessful respondent in an appeal on law to District Court, Supreme Court, High Court, Privy Council (c) A successful appellant in an appeal on law to Supreme Court or District Court where respondent is not ordered to pay appellant's costs	(a) Yes unlimited (b) No unlimited \$4,000 \$200
TAS Appeal Costs Fund Act 1968	Master of Supreme Ct.	(a) \$2 on writ of summons in Sup Ct. (b) 10c on filing of plaint in court of requests or gen. Sess. (c) Addit. 10c where fine for simple offence imposed	(a) An accused who - (i) successfully appeals against conviction on indictment where new trial ordered (ii) incurs additional costs by reason of abortive or discontinued proceedings (b) an unsuccessful respondent in an appeal on law to Supreme Court, Full Court, High Court, Privy Council (c) a successful appellant in an appeal on law to Supreme Court where respondent is not ordered to pay appellant's costs	(a) Yes unlimited (b) No unlimited \$2,000 \$120

<p>VIC Appeal Costs Fund Act 1964</p>	<p>Appeal Costs Board (composed as in W.A.)</p>	<p>(a) \$2 on writ of summons in Sup Ct. (b) \$2 on orig. summons in County Ct. (c) 10c on complaint or orig. summons in summary Ct.</p>	<p>(a) An accused who - (i) successfully appeals against conviction on indictment where new trial ordered (ii) successfully appeals against conviction on indictment where new trial not ordered (iii) incurs additional costs by reason of abortive, discontinued or adjourned proceedings (iv) is respondent in an appeal by Attorney General to Full Court or Country Court against sentence (b) A successful appellant in an appeal on law to Supreme Court, Court of General Sessions, High Court, Privy Council (c) A successful appellant in an appeal on law to Supreme Court where respondent is not ordered to pay appellant's costs</p>	<p>unlimited \$200 unlimited \$4,000 \$4,000 \$200</p>	<p>(a) Yes (b) No</p>
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APPENDIX II**PART B – OTHER LEGISLATION PROVIDING FOR PAYMENT OF COSTS TO ACCUSED PERSONS**

Jurisdiction	Proceedings covered by Act	Circumstances Applicable	Whether Award as of Right or Discretionary	From What Source Payable	Whether Amount Subject to Limit
W.A. Official Prosecutions (Defendants' Costs) Act 1973	Summary trials and appeals therefrom in cases of "official prosecution" (a)	Where charge is dismissed, withdrawn, struck out or conviction quashed	As of right if successful unless prescribed circumstances apply; discretionary if partly successful (b)	(a) Consolidated Revenue Fund (b) Funds of municipality or statutory body, depending on nature of official prosecution	Yes
N.S.W. Costs in Criminal Cases Act 1967	(a) Summary trials (b) Trials on indictment (c) Appeals from (a) or (b)	Where accused is acquitted or discharged, whether at trial or on appeal, and court certifies that prosecution unreasonable if all facts had been known	Discretionary	Consolidated Revenue Fund	No
TAS. Costs in Criminal Cases Act 1976	(a) Summary trials (b) Trials on indictment (c) Appeals from (a) or (b)	Where accused is acquitted or discharged, or charge dismissed or withdrawn	Discretionary	Consolidated Revenue Fund in proceedings on indictment or summary prosecution by public official; otherwise statutory body or private complainant, as appropriate	Yes

ENGLAND (c) Costs in Criminal Cases Act 1973	(a) Indictable offence tried summarily (b) Trials on indictment (c) Appeals from (a) or (b)	Dismissal or acquittal, whether at trial or on appeal	Discretionary	Central Funds	No
N.Z. (d) Costs in Criminal Cost Act 1967	(a) Summary trials (b) Trials on indictment (c) Appeals from (a) or (b)	(a) Where accused is acquitted, or charge dismissed or withdrawn. (b) Where accused is convicted but difficult point of law involved	Discretionary	By Crown if prosecution by or on behalf of it; otherwise bv informant	Yes

(a) i.e. on complaint by a public official – a person acting on behalf of the Government, a municipality or a statutory body.

(b) Charge dismissed under s.669 of Code or its equivalent; “partly successful” means where the defendant is convicted of a lesser offence than that with which he is charged, or is charged with several offences on the same complaint and is successful on one or some of them.

(c) This Act also deals with orders as to costs as between the parties.

(d) This Act also deals with orders as to costs as between the parties.

APPENDIX III

THE OFFICIAL PROSECUTIONS (DEFENDANTS' COSTS) ACT 1973

OFFICIAL PROSECUTIONS (DEFENDANTS' COSTS)

No.46 of 1973.

As amended by No.7 of 1974.

AN ACT to amend the law relating to the Payment of Costs to Defendants in Official Prosecutions and for incidental purposes.

[Assented to 6th November, 1973.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:-

- Short title. 1. This Act may be cited as the *Official Prosecutions (Defendants' Costs) Act, 1973-1974*.
- Commencement. 2. This Act shall come into operation on a date to be fixed by proclamation.
- Application. 3. (1) Except as otherwise provided by this section, this Act applies notwithstanding the provisions of or under any other Act, or of or under any rule of court practice.
- "this Act"
see s.4
Act No.30
of 1918 (2) To the extent of any inconsistency between of a provision of this Act and a provision of or under any other Act, or of or under any rule of court practice, the provision which is more favourable to the defendant prevails.
- (3) This Act binds the Crown
- Interpretation 4. (1) In this Act unless the contrary intention appears -
"appeal" means an appeal against a decision of a Summary Court given in an official prosecution;
"Appeal Court" means a Court hearing an appeal against a decision of a Summary Court given in an official prosecution;
"costs " means any expenses that -
(a) are properly incurred by a defendant in an official prosecution; and
(b) are due and payable, or paid, by the defendant to another person or

as Court fees;

"Court" includes a Summary Court and an Appeal Court;

"defendant" means a person charged with an offence in an official prosecution;

"official prosecution" means proceedings in a Summary Court against a person charged with an offence on a complaint by a public official acting or purporting to act by virtue of his office, and includes proceedings on appeal therefrom;

"public official" means a Minister of the Crown, a person employed in the Public Service of the State, a member of the Police Force, or a person employed by a municipality within the meaning of the Local Government Act, 1960 or any other statutory body and includes any person acting as agent of or under the instructions of such a person or body;

" section " means a section of this Act; and

"Summary Court" means a Court of Petty Sessions, or a Children's Court established under the *Child Welfare Act, 1947*.

(2) A defendant -

- (a) is successful if the charge is dismissed, withdrawn , or struck out, or a conviction thereon is quashed;
- (b) is partly successful if -
 - (i) he is convicted of a lesser offence than that with which he was charged; or
 - (iii) he is charged with several offences on the same complaint and is successful in respect of one or some of them.

Successful defendant entitled to his costs.

5. (1) Subject to this Act, a successful defendant is entitled to his costs.

(2) Where a defendant is successful by reason of a decision of the Summary Court only, the Summary Court shall make an order as to the amount of his costs therein but the defendant is not entitled to those costs unless and until the time for appeal therefrom has expired or an appeal therefrom is resolved in his favour.

(3) Where a defendant is successful by reason of a decision of the Appeal Court, the Appeal Court shall make an order as to the amount of his costs in the Appeal Court.

(4) Where a defendant is successful by reason of the Appeal Court reversing a decision of the Summary Court, the Appeal Court shall make an order as to the amount of the costs in the Appeal Court and in the Summary Court.

(5) The amount of the costs ordered, other than Court fees, shall be in

accordance with the scale prescribed under this Act but nevertheless the Court may make an order for payment of costs including an amount in excess of the amount for any item in that scale if the Court is satisfied that having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs for that item is desirable.

Saving.

6. The Court may order that a successful defendant is not entitled to his costs or part thereof if -

- (a) the Court -
 - (i) under section 669 of the *Criminal Code*, section 26, 34, or 34B of the *Child Welfare Act, 1947*, or section 137 of the *Police Act, 1892* dismisses the charge against him; or
 - (ii) under subsection (1a) of section 16, or subsection (3) of section 17A, of the *Education Act, 1928* refrains from recording a conviction against him;
- (b) he has done or caused to be done or has omitted or caused to be omitted 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; or
- (c) he has done or caused to be done or has omitted or caused to be omitted something during the course of proceedings or in the conduct of the defence or appeal calculated to prolong the proceedings unnecessarily or cause unnecessary expense.

Discretionary power to award costs to a partly successful defendant.

7. (1) Subject to this Act, where a partly successful defendant satisfied the Court that he incurred additional costs by reason of being charged with an offence or offences in respect of which he was successful, the Court may order that he is entitled to those costs.

(2) Before exercising the discretion conferred by subsection (1) of this section, the Court may have regard to any of the circumstances referred to in paragraphs (a) to (c) inclusive of section 6 that exist in the case of the partly successful defendant.

(3) Where the Court makes an order pursuant to subsection (1) of this section, subsections (2) to (5) inclusive of section 5 apply to and in relation to the order with such modifications as are necessary.

Submissions and evidence on costs

8. The Court may adjourn to Chambers the question of costs or the amount thereof, under this Act to enable the making of submission and the tendering of evidence, including affidavit evidence, on that question.

Payment of costs

9. Where costs are ordered under this Act -

- (a) if the public official a party to the proceedings is a Minister

of the Crown, a person employed in the Public Service of the State, a member of the Police Force, or any other person acting as agent of or under the instructions of such a person, the Clerk or Registrar as the case requires, of the Court shall give to the defendant a certificate signed by the Clerk or sealed with the Seal of the Court, as the case requires, showing the amount of the costs ordered and on production of the certificate to the Treasurer, the defendant shall be paid such costs out of Consolidated Revenue; or

- (b) if the public official a party to the proceedings is a person employed by a municipality within the meaning of the Local Government Act, 1960 or any other statutory body, or is any other person acting as agent of or under the instructions of such a person or body and shall be paid by it to the defendant, and shall be recoverable as a civil debt.

Regulations

10. The Governor may make regulations prescribing a scale of costs for the purpose of this Act.