

The Suitors' Fund Act

Terms of Reference

In 1973 the Commission was asked to inquire into the operation of the *Suitors' Fund Act 1964* (WA), for the purpose of determining whether the purposes for which the Act was introduced were being fulfilled, and if not, for the purpose of rendering the Act more effective.

Background of Reference

The purpose of the *Suitors' Fund Act 1964* (WA) ("the Act") is to provide a fund ("the Fund") that can be drawn upon to assist in the payment of costs incurred by litigants where decisions are upset on appeal or proceedings are rendered abortive through no fault of their own such as by the death or long illness of a judicial officer. The Fund is financed by contributions by litigants (a levy upon certain originating processes in the courts)¹ together with interest accruing from investment of any sum not immediately required and is administered by the Appeal Costs Board.

The Act applies to both criminal and civil proceedings, though the circumstances in which costs are payable in these two types of proceedings are not identical. Accordingly the Commission decided to deal with the reference in two parts: Part A was concerned with civil proceedings and Part B with criminal proceedings.

In respect of civil proceedings the Fund is available to assist in the payment of costs incurred by:

- An unsuccessful respondent in an appeal that succeeds on questions of law.
- An unsuccessful respondent in an appeal or motion for a new trial relating to the quantum of damages.
- A successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court did not order the respondent to pay the costs of the appeal.
- Parties to proceedings rendered abortive by the death or protracted illness of the presiding judicial officer, or the disagreement of a jury.
- Parties to proceedings where the hearing was discontinued through no fault of any of the parties and a new trial ordered.

In criminal proceedings the Fund covers the same broad areas as in civil proceedings, namely appeals and abortive or discontinued proceedings, but there are significant differences as to who can claim upon the Fund and the circumstances in which claims can be made. In regard to criminal appeals the Fund is available to:

- An unsuccessful respondent in an appeal that was successful on a question of law.
- A successful appellant in an appeal in which a conviction for an indictable offence was quashed without a new trial being ordered.
- A successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court did not order the respondent to pay the costs of the appeal.
- 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.

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

- In trials rendered abortive by the death or protracted illness of the presiding judicial officer, or disagreement of the jury.
- In trials where the hearing were discontinued through no fault of the accused or his or her legal adviser and a new trial is ordered.
- Where proceedings in a court were adjourned by the prosecution through no fault of the accused or his or her legal adviser.

¹ The issue of a writ of summons in the Supreme Court and the District Court, on the entry of a plaint in the Local Court and on the issue of a summons to a defendant upon a complaint in a Court of Petty Sessions: *Suitors' Fund Act 1964* (WA) s 5.

◀ The Suitors' Fund Act

The Commission was of the view that the Act had a number of anomalies and deficiencies, principally concerning the limits of compensation, the method of financing the Fund, the types of proceedings covered and the classes of litigants who can qualify for benefits.

The Commission issued a working paper in March 1975 that had regard to salient features of legislation of a similar type in other Australian jurisdictions.²

Nature and Extent of Consultation

The working paper was distributed widely among judicial officers, legal practitioners and relevant organisations, including the Australian Legal Aid Office, the Law School of the University of Western Australia, the Solicitor General, Appeal Costs Board and various law reform agencies. Those who commented on the paper included the Law Society of Western Australia, the Institute of Legal Executives (WA) (Inc), the Treasury Department, RH Burton SM and ID Temby. A notice was also placed in *The West Australian* inviting public submissions.

The Commission delivered two separate reports on the subject: *Part A Civil Proceedings* in March 1976,³ and *Part B Criminal Proceedings* in May 1977.⁴

Recommendations

In Part A, the Commission made 20 key recommendations, that may be summarised as follows:

- The limits of compensation, where they apply should be raised and the controller of the Fund should be able to insure the Fund against certain claims.
- The contribution to the Fund should be by way of a levy on civil court fees.
- Costs of successful appeals on fact should be covered by the Fund.
- The Family Court and the Full Court of the Family Court of Australia and the District Court should be included in the list of appellate bodies to which the Act applies.
- In the case of a series of appeals, each appeal should be dealt with separately, as far as concerns the issuing of an indemnity or costs certificate.
- An indemnity certificate or costs certificate once granted, should not be revocable.
- A respondent should be able to claim reimbursement of his own costs notwithstanding that he or she was not ordered to pay the appellant's costs.
- In the case of appeals, relief should be granted if the applicant had acted reasonably at the trial of the hearing.
- All companies, the Crown and legally aided litigants should be eligible for relief under the Act.
- The Appeals Costs Board should be abolished and its functions given to a Master of the Supreme Court.

In regard to Part B the Commission's primary recommendation was that the Act should no longer apply to criminal proceedings, but rather that the legal costs of accused persons be payable under the *Official Prosecutions (Defendants' Costs) Act 1973 (WA)*.⁵ The Commission also recommended certain amendments to that Act. The principal reason for the Commission's determination to remove criminal proceedings from the ambit of the Act was the fact that different principles apply to civil and criminal proceedings⁶ and that the provision for contribution to the Fund in criminal proceedings was at variance with the fact that the Fund was essentially designed as a compulsory insurance scheme for litigants.

² Specifically, New South Wales, Queensland, Tasmania and Victoria.

³ Law Reform Commission of Western Australia, *Suitors' Fund Act Part A: Civil Proceedings* Project No 49 (1976).

⁴ Law Reform Commission of Western Australia, *Suitors' Fund Act Part B: Criminal Proceedings* Project No 49 (1977).

⁵ This legislation arose from the implementation of the Commission's recommendations in a previous report, see Law Reform Committee of Western Australia, *Payment of Costs in Criminal Cases*, Project No 12 (1972).

⁶ It does not seem unreasonable that defendants in civil proceedings should be obliged to contribute to the fund to which they can have recourse if mistakes occur in that process. An accused person is not in that position, in that the accused cannot be said to be

The Commission identified a number of benefits, in the nature of fairness to litigants and administrative improvements, that would accrue upon implementation of its recommendations. In respect of civil proceedings such benefits included the widening of types of proceedings covered by the Fund, the increase in maximum levels of compensation for litigants and a more clearly defined basis for the exercise of the discretion to grant relief from the Fund.

Legislative or Other Action Undertaken

The *Suitors' Fund Act Amendment Act 1978 (WA)* was introduced to redress an injustice concerning persons suffering from a disability. The *Suitors' Fund Act Amendment Act (No 2) 1978 (WA)* was introduced to remedy the situation where an unsuccessful respondent to an appeal on a question of law from a Local Court to the District Court could not be indemnified in respect of his or her own, and the appellant's, costs. Both amendments were highly specific and laudable but failed to implement the substantive recommendations.

Currency of Recommendations

The reforms recommended by the Commission in respect of civil proceedings (Part A) remain current. However, in its recent report on the *Review of the Criminal and Civil Justice System in Western Australia*⁷ ("Project No 92") the Commission made two recommendations that run counter to the reforms recommended in respect of criminal proceedings contained in this report:

- That the *Official Prosecutions (Defendants' Costs) Act 1973 (WA)* should be repealed.⁸
- That the provisions of the *Suitors' Fund Act 1964 (WA)* should be amended to enable any additional costs incurred by defendants through no fault of their own after an initial criminal trial to be fully met from the Fund.⁹

In making these recommendations, the Commission had regard to the Australian Law Reform Commission's (ALRC) 1995 report *Cost Shifting: Who Pays for Litigation*¹⁰ and noted that the current law on the recovery of costs in criminal matters in Western Australia is neither internally consistent, nor consistent with the recommendations of the ALRC. No mention of the reforms recommended in Project No 49 (Part B) was made in the final report of Project No 92; however, it may be presumed that the Commission intended its later recommendations to stand.

Action Required

Implementation of the recommended reforms for civil proceedings require that the Act be amended and the regulations be reviewed.

Priority – Low

Despite the benefits of reform identified by the Commission, the current legislative regime appears to be working satisfactorily. There has been no significant reform to the legislative schemes of other jurisdictions examined by the Commission in its cross-jurisdictional analysis of the law in the area. However, since the Commission concluded its report on this reference, South Australia has enacted the *Appeals Costs Fund Act 1979 (SA)* and, in 1994, the Northern Territory Law Reform Commission undertook an inquiry into the desirability of establishing a suitors' costs fund for civil and criminal proceedings in that jurisdiction.¹¹

submitting to the jurisdiction of the court in the way a civil litigant/defendant does. The Commission therefore considered that if accused persons were to be entitled to reimbursement of their costs in certain cases, the scheme of reimbursement should not require them to contribute to it. This principle had already been established in Western Australian law in the case of summary trials under the *Official Prosecutions (Defendants' Costs) Act 1973 (WA)*.

7 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

8 *Ibid* recommendation 341.

9 *Ibid* recommendation 344.

10 Australian Law Reform Commission, *Cost Shifting: Who Pays for Litigation*, Report No 75 (1995).

11 Northern Territory Law Reform Commission, *Report on a Suitors' Costs Fund*, Report No 16 (1994).