



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Miscellaneous Paper 12

COSTS IN CRIMINAL CASES

An issues paper

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Costs in Criminal Cases

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November 1997

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Law Commission welcomes your comments on this paper.

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Introduction

- 1 The Costs in Criminal Cases Act 1967 (“the Act”) is now 30 years old. Originally the work of a committee representing the Department of Justice, Police, Crown Law Office, and the legal profession, it stands among the classic law reforms of the 1960s. It was based on the principle that, ordinarily, costs should be granted to successful defendants in criminal cases where the defendant is shown to be innocent, or where the prosecution has been brought improperly or negligently.¹
- 2 The extent to which the Act has served this principle is debatable. Certainly in recent years it has come under increasing criticism by judges, the legal profession, and some commentators. Much of the criticism – particularly that by judges – has concerned the adequacy of awards under the prescribed scale. Other problems include the relationship between the costs regime and the criminal legal aid scheme, and the question of appeal and review rights. Questions have also arisen, prompted in part by the restructuring of the justice sector in 1995, about the proper location of responsibility for administering the Act, and for making payments under it.
- 3 In 1989, the Law Commission was asked by the Minister of Justice to review the Act, as part of its reference on criminal procedure (see appendix C). The Commission has been working through the reference in stages, and other more pressing priorities have prevented an examination of the costs regime until now. This review will be advanced in consultation with the Department for Courts and the Ministry of Justice, which have joint responsibility for administering the Act.
- 4 This paper has been prepared for consultation purposes, as a preliminary stage of the review. It identifies the main issues as the Commission sees them, and seeks comment and suggestions for reform from those with practical experience and interest in the topic. Underlying all of the issues are the fundamental questions about how the Act is working in practice, where (if at all) it is generally defective, and how fairly the courts are able to deal with the different kinds of cases which come before them.
- 5 At this stage, the Commission favours retention of the current scheme in relation to defendants who have not been convicted. We believe that the scheme achieves, for the most part, an appropriate balance between competing interests. It serves to provide a level of reimbursement to innocent defendants and a means to censure improper prosecution conduct, while not impeding the proper functioning of the prosecution system.
- 6 We believe, however, that there are some areas which require improvement. While the Commission favours the retention of a scale as the means by which costs are assessed, we believe that the current scale needs updating. We are also interested in a means by which the scale may be kept up-to-date. Further, there are indications that the Act in its

¹ See discussion of Report of the Committee on Costs in Criminal Cases (1966) in para 33.

current form, or perhaps as it is currently being applied, is failing to achieve its purpose of punishing improper prosecution conduct.

- 7 We emphasise that these positions are provisional ones, however, and we welcome debate and contrary views. Indeed, encouraging such debate and the stimulation of such views is the purpose of the paper.
- 8 The focus of the paper is on the payment of costs where the defendant has not been convicted, but we also open for debate the issue of payment of costs by a defendant who has been convicted. This issue could have particular relevance to summary prosecutions on behalf of regulatory bodies (for example, the Commerce Commission), government departments enforcing statutory regimes (such as the Department of Labour's Occupational Safety and Health Service) and to organisations which have prosecutorial functions (such as local authorities).
- 9 A proposal is currently before Parliament to allow appeals in respect of costs awards under the Act.² The issue of appeals from costs awards is not therefore dealt with in this paper.
- 10 The paper starts with an outline of the main features of the Act. It then summarises the research undertaken by the Commission of cases where costs applications have been made by defendants, and identifies issues for consideration under a number of heads. Questions are asked at the end of each section.
- 11 The Commission would be very grateful for your views on these questions and your comments and suggestions on the issues more generally. We seek comments by 27 February 1998.

² Statutes Amendment Bill (No 2), cls 64 and 234.

The Costs in Criminal Cases Act 1967

- 12 The Costs in Criminal Cases Act 1967 is set out in full in appendix A.

COSTS AWARDS

- 13 Costs under the Act may be awarded by “any Court exercising any jurisdiction in criminal cases” (s 2). The Act sets out the powers of a court to make awards in specified circumstances.

Where defendant is not convicted

- 14 The most commonly used power to award costs is that in s 5, which is also the most detailed provision. The section applies where:

- the defendant is acquitted of an offence; or
- the information charging the defendant with an offence is dismissed or withdrawn, whether upon the merits or otherwise; or
- the defendant is discharged under s 167 of the Summary Proceedings Act 1957.

- 15 The court has power under s 5(1) to order that the defendant be paid “such sum as it thinks just and reasonable towards the cost of his [or her] defence”. The primary difference between this power and those relating to awards where a defendant is convicted or on appeal, lie in ss 5(2)–5(5). These subsections set out a number of criteria to which the judge “shall have regard” when deciding whether to award costs. In brief, they are whether:

- the prosecution acted in good faith in bringing and continuing the case;
- the prosecution had sufficient evidence to support conviction at the beginning of the case in the absence of contrary evidence;
- the prosecution investigated any matter which came into its hands, suggesting that the defendant may be innocent;
- the investigation was conducted in a reasonable and proper manner;
- the evidence as a whole supported a finding of guilt but the information was dismissed on a technicality;
- the information was dismissed because it was established (by whatever means) that the defendant was not guilty; or
- the behaviour of the defendant in relation to either the alleged offence or the proceedings themselves was such that an award of costs should be made.

16 Section 5(3) states that there is no presumption that costs should or should not be awarded in any case. Section 5(4) provides that the fact that the defendant was not convicted is not by itself sufficient reason for costs to be awarded under s 5. Section 5(5) states that a defendant should not be refused costs under s 5 by reason only that the proceedings were properly brought and continued.

17 In the first reported decision under the Act it was said, in relation to these subsections, that:

[I]t would have made for simplicity if the Legislature had merely said ‘costs shall be awarded to a defendant where the court thinks it right so to do’, for to my mind subs (3), (4) and (5) say no more nor less than that. (*R v AB* [1974] 2 NZLR 425, 429)

18 More recently, it has been said:

The various criteria in s 5 really come down to two questions: was the prosecution reasonably and properly brought and pursued; did the accused bring the charges on his own head. (*R v Margaritis* (unreported, HC, Christchurch, 14 July 1989, T 66/88), 8)

Where defendant is convicted

19 Where the defendant has been convicted, the court may award to the prosecutor such sum as it thinks just and reasonable towards the costs of the prosecution (s 4).

20 Where a court considers that a successful prosecution has involved a difficult or important point of law and in the special circumstances of the case it is proper to do so, the court may award to the defendant such sum as it considers just and reasonable towards the costs of arguing that point of law (s 6).

On appeal

21 In an appeal under the Crimes Act 1961 or Summary Proceedings Act 1957 the court may make such order as to costs as it thinks fit (s 8 (1)).

22 If the court which determines an appeal is of the opinion that the appeal includes any frivolous or vexatious matter, the court may, if it thinks fit, order that the party raising the matter should bear the costs (in whole or in part) of any other party in respect of that matter (s 8(5)).

23 If an appeal involves a difficult or important point of law, the court may order that any party’s costs shall be paid by any other party, irrespective of the outcome of the appeal (s 8(6)).

24 Where a notice of appeal is given under the Crimes Act 1961 or the Summary Proceedings Act 1957, but is not prosecuted, the court may allow the respondent such costs as it thinks fit (s 9).

THE SCALE

- 25 With the exception of those in s 8(5)–(6), the powers described above are conferred “subject to any regulations made under [the] Act”.³ The regulations currently in force are the Costs in Criminal Cases Regulations 1987 (S/R 1987/200). The regulations set out a scale for awards of costs, based upon a maximum payment of \$226.00 per half day of trial. Travelling expenses and costs incidental to the proceedings may also be claimed.
- 26 Section 13(3) of the Act provides as follows:

Where any maximum scale of costs is prescribed by regulation, the Court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.

PAYMENT TO DEFENDANTS

- 27 Where the prosecution was taken by or on behalf of the Crown, costs awarded to a defendant under ss 5–6 are generally to be paid by the Department for Courts (s 7(1)(a)). Where the award is made under s 5, however (ie, where the defendant has not been convicted), the court may direct that the costs be paid by the officer of the Crown or agency upon whose behalf the prosecution was brought. The court must be of the opinion that any person has acted negligently or in bad faith in bringing, continuing, or conducting the prosecution (s 7(2)).

THE ACT IN PRACTICE

- 28 As part of its preliminary consideration of this topic, the Commission has researched and analysed 77 cases from 1968 to 1996, dealing with applications by defendants for awards of costs under the Act. A list of the cases appears in appendix B. We have not, at this stage, embarked on any similar research into applications for costs awards against defendants.
- 29 Costs awards were made in 58 (75%) of the 77 cases analysed. The awards ranged from \$6.50 (in a very early case) to \$95,000. Rather than attempt to adjust the figures into current dollar terms, we have confined our analysis of monetary awards to cases from the last 5 years. The analysis indicates that in cases in the last 5 years involving awards of costs, defendants have, on average, been awarded about 19% of their actual costs.⁴

³ The power to award costs in ss 8(5)–(6) is not subject to the regulations, and therefore, no maximum award is prescribed.

⁴ The survey contains 48 cases from 1991–1996.

- 30 The criteria in s 5(2) were referred to in only 26 (45%) of the 58 cases where costs were awarded. Other criteria considered relevant include that the defendant raised a positive defence,⁵ and the prosecution had a public policy element (for example, to clarify the law).⁶
- 31 We grouped the offences into six categories: administrative, drugs, property, sexual, traffic, and violence (other than sexual violence). These categories were analysed to find out if there were trends between them in the payment of costs. The results are presented in Table 1. The largest categories were sexual and administrative offences. Costs were awarded most frequently for administrative and traffic offences, and least often for sexual offences.

TABLE 1

Offence type	Costs awarded	Total number	Percentage
Administrative	17	18	94
Drugs	4	6	67
Property	10	14	71
Sexual	14	23	61
Traffic	7	8	88
Violence	6	8	75

⁵ *R v Dawson* (unreported, HC, Christchurch, 19 November 1990, T64/89), *R v Margaritis* (unreported, HC, Christchurch, 14 July 1989, T66/88), *Pearce v Barton* (unreported, DC, Wanganui, 10 May 1995, CRN3083006958) and *R v Z* (unreported, HC, Wellington, 3 February 1994, T64/93).

⁶ *An Application by Macaulay* (unreported, HC, Wellington, 26 March 1991, T150-151/88) and *R v Myatt* (1991) 7 CRNZ 460.

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The issues

JURISDICTION

Awards to successful defendants

Balancing competing interests

- 32 Few would disagree that some sort of power should exist for a court to award costs to a successful defendant in a criminal case. But there are conflicting public interests, two of which are illustrated by the following quotations:

A plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly. (*Berry v British Transport Commission* [1962] 1 QB 306, 327)

Persons accused of criminal offences can be put to a great deal of expense in defending themselves. Unlike civil litigation, they cannot simply compromise the matter. Their liberty, reputation and pocket are, or may be, at risk. (*Acuthan v Coates* (1986) 6 NSWLR 472, 480)

- 33 In its 1966 report, the Committee on Costs in Criminal Cases noted that the first of those interests had prevailed previously (10). The committee concluded, however:

It is our view that the law and practice with regard to the award of costs to successful defendants in criminal cases should be based on the principle that ordinarily costs should be granted where in one way or another the defendant has shown his innocence, and of course in cases where the prosecution has for one reason or another been brought improperly or negligently. (12)

- 34 The committee went on to say:

The most difficult part of our task however has been to suggest a way in which this principle can be accorded legal effect without making the award of costs an almost general consequence of acquittal. As we have said we think this would be undesirable. . . . What we recommend is that there should be written into the legislation some principles to guide Judges or Magistrates in determining applications for costs, and to encourage them to use their discretion more liberally. (12–13)

- 35 The Act, as drafted, acknowledges the public interest in protecting the prosecution process, the desirability of reimbursing defendants for the costs they have incurred defending a case, and the need to provide a rebuke for substandard prosecutions in appropriate cases. As a consequence, costs will not be paid automatically where the

defendant has not been convicted, but may be awarded in certain circumstances and there need not necessarily be impropriety by the prosecution.⁷ Where there is impropriety by the prosecution, the court may provide a punishment.

Question 1

- 1 What balance should be given in the legislation to the competing factors of protecting the prosecution process, ensuring that high prosecution standards are maintained, and reimbursing defendants who have been acquitted?

Who may apply for costs?

- 36 Under s 5(1), costs may be awarded

- to any defendant who is acquitted of an offence;
- where the information charging the defendant with an offence is dismissed or withdrawn, whether upon the merits or otherwise; or
- where the defendant is discharged under s 167 of the Summary Proceedings Act 1957.

- 37 It seems that s 5(1) would apply where the defendant is discharged under s 347 of the Crimes Act 1961 and under s 19 of the Criminal Justice Act 1985. Section 347(4) of the Crimes Act and s 19(2) of the Criminal Justice Act state that a discharge under the respective sections shall be deemed to be an acquittal.⁸

- 38 In *D v R* (unreported, HC, New Plymouth, 24 September 1997, T3/96), the applicant submitted that the entering of a stay by the Solicitor-General was the equivalent of a discharge under s 347 of the Crimes Act, and that the applicant could therefore apply for costs under s 5. It was held that the court lacked jurisdiction as there is no wording in s 378 – the section empowering the entry of a stay – comparable to that in s 347(4).

The essence of a stay under s 378 is fundamentally different from a discharge or an acquittal. It forbids the taking of any further step in relation to the trial. It is not an adjudication on whether the accused is or is not likely to be found guilty. It may be entered for reasons wholly unassociated with that question. (5–6)

⁷ See also the following judicial comments on the Act:

[I]f costs are not to be awarded only because the defendant has been acquitted, the defendant must be able to point to some relevant circumstances, either within the criteria or otherwise, that justify an award. (*R v Gillespie* (unreported, HC, Auckland, 10 September 1993, T240/91), 7)

[I]t is perfectly plain that an award of costs under s 5 of the Costs in Criminal Cases Act 1967 can be made in circumstances where it is in no way to be regarded as any form of censure on the Crown or the prosecution. (*R v T* [1992] 3 NZLR 215, 219, per Tipping J)

⁸ The decision in *Gourley v DSW* [1994] DCR 262 considered that s 5 should not apply to discharges under s 19. Reference was not made to s 19(2), however, and we do not agree with this construction.

Question 2

2 Should costs be permitted following stays?

When should costs be awarded?

- 39 In deciding whether to grant costs to a successful defendant under s 5, the court is to have regard to all relevant circumstances and, in particular, where appropriate, the criteria set out in s 5(2) (see para 15). There is no presumption for or against the granting of costs in any case.

Questions 3–6

- 3 Should the availability of costs remain a matter of discretion?
- 4 Are additional criteria in s 5(2) desirable, and if so, what should they cover?
- 5 Should there be fewer criteria, and if so what should they cover?
- 6 Should there be a presumption for or against a costs award?

Awards against defendants

- 40 A convicted defendant has been proved to have broken the law, and the court will have the task of deciding the state's response to that. Since the prosecutor has expended resources in proving the breach of the law there may be circumstances when it will not be unreasonable, or overly harsh, to recoup some or all of that expenditure. This may be particularly relevant where the prosecution is brought by agencies with limited resources.
- 41 The 1966 Report of the Committee on Costs in Criminal Cases did not address the issue of when costs should be paid to the prosecution by a defendant. Further, the Act does not provide guidelines, equivalent to those in ss 5(2)–5(5), in relation to the circumstances in which costs should be awarded against a defendant.
- 42 Traditionally, neither Crown solicitors nor the police have sought costs following a successful prosecution. For the police, this might be in part because Part I of the Schedule to the Regulations is headed "Fees Payable to *Barristers and Solicitors* in Respect of Proceedings Under the Summary Proceedings Act 1957" (emphasis added).
- 43 Costs are sought by other government departments and ministries which conduct prosecutions to enforce compliance with statutes for which they are responsible. (For example, the Department of Labour, the Inland Revenue Department and the Ministry of Fisheries.)
- 44 Costs are also sought by prosecuting agencies which are not part of central government. They include quasi-government agencies such as the Accident Rehabilitation and Compensation Insurance Corporation, local authorities and private organisations such as the Society for the Prevention of Cruelty to Animals.
- 45 It is also open to any individual to bring a private prosecution, and so to seek costs.

Questions 7–13

- 7 Should the Act set out criteria, equivalent to those in s 5, for the circumstances in which awards may be made against defendants?
- 8 Should costs be available to the Crown where prosecution has proceeded on indictment?
- 9 Should costs be available to the Police where prosecution has proceeded summarily?
- 10 Should costs be available to other government departments or ministries?
- 11 Should costs be available to quasi-government agencies?
- 12 Should costs be available to other bodies, such as local authorities, which have a prosecuting function?
- 13 Should costs be available to individuals taking private prosecutions?

COVERAGE

Recovery of preparation costs

- 46 Under s 2 of the Act, the term “costs” is defined as “any expenses properly incurred by a party in carrying out a prosecution, carrying on a defence, or in making or defending an appeal”.
- 47 By definition, this would seem to include preparation time, yet the scale of costs is based on hearing time alone. By contrast, the scales applicable to Crown solicitors and the criminal legal aid scheme make express allowance for both hearing and preparation time. Under the discretion in s 13, it is open to the court to award payment of costs incurred in preparing the defence. It may be, however, that the scale itself ought to allow payment of such costs.

Question 14

- 14 Should preparation costs be provided for in the scale?

Where defendant received legal aid

Recovery by the Legal Services Board

- 48 The Act does not enable the Legal Services Board to receive an award of costs where the defendant was on legal aid (*Harrington v R* [1994] 3 NZLR 272 (CA)). Legal aid is paid directly by the Legal Services Board to the defendant’s counsel and is, accordingly, an expense incurred by the Board and not the defendant. As “costs” are defined in s 2 of the Act as expenses incurred by “a party”, no costs are recoverable by the Board. In *Harrington v R*, however, the Court of Appeal went on to say:

The Board's wish to have the ability to recover legal aid costs against the Crown is understandable, given its status as a Crown entity under the Public Finance Act 1989. . . . Income it derives from other sources goes into its own account and would be available to maintain or enhance its legal aid services, and any amounts recovered under the Costs in Criminal Cases Act would be added to that account. In the end, however, what it might receive by way of costs will come from the same public funds which support its statutory obligations. The desirability of reflecting the Board's autonomous status and of ensuring transparency in the public accounts may justify claims for recovery against the Crown. Whether they would add anything significant to the Board's resources may be open to debate. (275)

Question 15

15 Should legal aid expenditure be recoverable by the Legal Services Board through costs awards?

Recovery by the defendant

- 49 In *Harrington v R*, the Court of Appeal stated that as the legislation stands, where a defendant has received legal aid, those costs are not recoverable but other costs properly incurred could be.
- 50 It is not uncommon for defendants to be legally aided for only a part of the prosecution (for example, from the time of being committed for trial). Those costs incurred by the defendant personally may be the subject of an award.⁹
- 51 In some cases, the defendant is legally aided for the entire proceedings but the amount of legal aid paid is insufficient to cover the actual costs incurred.¹⁰ In these circumstances, an award may be made in respect of personally incurred costs (see, for example, *Brown v Police*).
- 52 In *An Application by Davidson* (unreported, HC, Christchurch, 15 December 1993, T9/93), however, Williamson J indicated that this would not usually be appropriate due to the relationship between the Legal Services Act 1991 and the Costs in Criminal Cases Act 1967. In that case, the applicants had agreed to make additional payments to their counsel, above the remuneration received from legal aid, and approval for this was granted by the subcommittee under s 11(3) of the Legal Services Act 1991. It appeared that the applicants had agreed to pay more to their counsel in reliance on costs awards being made. It was suggested that the costs application was brought in an attempt to "top up" the legal aid payments.¹¹

⁹ See, for example, *Brown v Police* (unreported, DC, Auckland, 16 April 1996, CRN1004300737176,); *R v Rosson* (unreported, HC, Dunedin, 10 March 1991, T24/90); and *R v Accused (T 30/91)* (1991) 7 CRNZ 686.

¹⁰ See, for example, *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111.

¹¹ Similarly, in *R v D* (unreported, HC, New Plymouth, 24 September 1997, T3/96), Williams J held that the costs application was an attempt to obtain a retrospective reimbursement of the costs the defendant had incurred as a result of his making a decision not to invoke his right to apply for legal aid. It was also held to be an attempt to receive reimbursement on a solicitor and client basis rather than whatever may have been the amount payable had legal aid been successfully obtained.

Question 16

- 16 Should costs be recoverable in respect of expenses incurred personally when a defendant was also receiving legal aid?

QUANTUM

Awards to successful defendants

Underlying philosophies

- 53 The question of how much should be paid to a successful defendant depends on the philosophy underlying the making of a payment for costs. In the 1966 Report of the Committee on Costs in Criminal Cases it was said:

It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimised by the provision of fair procedures, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless, there are and will always be, cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.

The proposition that a person wrongly accused of an offence should not suffer financially for having to establish his innocence in Court would, we believe, commend itself to public opinion generally. (10–11)

- 54 On this basis the report went on to accept that there must be a general relationship between the amount of costs awarded in a normal case, and the scale of fees for Crown solicitors and counsel for aided defendants. The committee observed, however, that the scale of fees at the time bore “little relation to what private counsel would usually need to charge”, and concluded:

We are anxious . . . that when costs are awarded they should not be too unrealistic; otherwise the object of awarding costs is frustrated. (15–16)

The discretion and the scale

- 55 Section 5(1) states that the court may, subject to the regulations, order that a successful defendant be paid such sum as it thinks just and reasonable towards the costs of the defence. Section 5(2) states that, in deciding the amount of any costs granted, the court shall have regard to all relevant circumstances and in particular, where appropriate, the criteria set out in that subsection.
- 56 An award higher than the scale may be made only if, “having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable” (s 13(3)). If the test is met, the judge may award costs that are just and reasonable without any prescribed maximum. It has been held that a total indemnity for

costs is appropriate only in cases where the court concludes that the proceedings should never have been brought.¹²

- 57 As noted in para 25 above, the scale sets the maximum level of remuneration at \$226.00 per half day of the trial.
- 58 The scale has not been modified since 1988, and there has been judicial criticism that the scale is unrealistic to cover the actual costs incurred by defendants. In *Bennett v R* (unreported, HC, Auckland, 19 June 1996, T280/95), Robertson J said that “the scales under the Act are quite inadequate to reflect in any meaningful way the actual costs and expenses which will have been incurred” (7). In *R v Brunton* (unreported, HC, New Plymouth, 27 April 1992, T14/91), Barker J referred to the “‘miserable’ nature of the scale of costs” and the “unreality of the scale” (8).
- 59 The amounts payable under the scale are considerably less than the rates payable, not only to Crown solicitors in criminal trials, but also to defence counsel under the criminal legal aid scheme.¹³ In some cases judges have used one or both of these rates as guidelines when awarding costs in excess of the scale.¹⁴
- 60 Awarding costs according to a scale is arguably more efficient than requiring assessment of costs on a case-by-case basis. The scale also provides a basis for consistent awards from one case to another. Its major disadvantage is that it requires updating and, where this depends on formal amendments to regulation, carries a continuing risk of delay.¹⁵

Questions 17–22

- 17 Should there continue to be a scale of costs, and if so how should it be structured?
- 18 How might the scale be kept up-to-date?
- 19 How should the amounts payable under the scale be set?
- 20 Who should be involved in the process of setting the scale?
- 21 Should there remain a discretion to award costs in excess of the scale and, if so, on what grounds?

¹² See, for example, *Y v R* (unreported, HC, Auckland, 21 July 1997, T281/96).

¹³ Crown Solicitors Regulations 1994 (S/R 1994/142) and Legal Services Regulations (S/R 1991/293). The Costs in Criminal Cases Committee envisaged that the scale would be in parity with these rates (15).

¹⁴ *R v Brunton* (unreported, HC, New Plymouth, 27 April 1992, T14/91) and *R v Reed* [1980] 1 NZLR 758.

¹⁵ The Rules Committee has recently invited comment on a proposal aimed, in part, to address the problem of updating the scale in the High Court Rules. The Committee proposed that the scale itself should quantify costs by allocating to each step in a proceeding a notional allowance for professional time expressed in days or part days. It will then be for the court to determine a suitable daily rate. The court could be assisted in its task by a separate process for annually settling a rate considered to be appropriate for a typical legal practitioner engaged in the conduct of typical litigation, perhaps promulgated through Practice Notes issued by the Chief Justice.

- 22 Is a total indemnity for costs appropriate in cases where the court concludes that the proceedings should never have been brought? Is a total indemnity appropriate only in such cases?

Awards against defendants

- 61 As noted in paras 42–43, traditionally neither Crown solicitors nor the police have sought costs following a successful prosecution. Costs are, however, sought by other government departments and ministries which conduct prosecutions to enforce compliance with statutes for which they are responsible.
- 62 The 1966 report did not address the issue of what amount should be paid to the prosecution by a defendant. The Act does not provide any criteria, equivalent to those set out in s 5(2), for assessing the amount to be awarded. Section 4 of the Act gives a court the power to order a convicted defendant to pay “such sum as it thinks just and reasonable towards the costs of the prosecution”. This is subject to the Costs in Criminal Cases Regulations 1987 and therefore, to the same scale as is relevant for costs awards to defendants. Any costs allowed under s 4 must be specified in the conviction and may be recovered in the same manner as a fine (s 4(4)).

Questions 23–27

- 23 Should the Act set out criteria, equivalent to those in s 5(2), for assessing the amount to be awarded against defendants?
- 24 Should prosecution costs be assessed on the same scale as a defendant’s costs?
- 25 Should a defendant’s level of assets be taken into account?
- 26 Should an award of costs against a defendant be considered part of or separate from the sentence for the offending?
- 27 Should the nature of the prosecuting agency make a difference (for example, the police as opposed to a local authority)?

PAYMENT

Payment to successful defendants

- 63 Section 7(1)(a) of the Act provides that where the prosecution is conducted by or on behalf of the Crown, a successful defendant’s costs are met by the Crown itself through a neutral source, namely, the Department for Courts, out of its annual budget. This reflects the principle that prosecutions are brought in the public interest and therefore, the prosecuting agency should not be inhibited in bringing a prosecution by an adverse inference which might be drawn from an award of costs against it.¹⁶

¹⁶ *R v Geiringer* (unreported, HC, Wellington, 20 August 1976, T33/76), 8.

- 64 If the prosecution was not conducted by or on behalf of the Crown, costs are paid by the informant.
- 65 Section 7 also provides a means of censuring poor standards or inappropriate behaviour by the prosecution. Section 7(2) provides that where the court is of the opinion that any person has acted negligently or in bad faith in bringing, continuing or conducting a prosecution, the court may order that costs be paid by the official or agency responsible for bringing the prosecution. In such circumstances, the court may order that costs be paid by “the Government Department, officer of the Crown, local authority, or public body on whose behalf that person was acting; or, if he [or she] was not so acting, by that person personally”.
- 66 In the cases analysed by the Commission, however, it seems that the courts are reluctant to use this provision. Although judicial criticism of the standard of prosecutions is common in cases where awards are made, s 7(2) is rarely applied. In the cases analysed, s 7(2) was used in only three out of the 58 cases where costs were awarded. This equates to about 5% of the cases. In one case the judge, without making an order under s 7(2), stated:
- Of all the cases which I have dealt with in this Court since I was appointed, the present case would be one of the ones which I thought had had the least care and attention in its investigation by the police. (*An application by Gregg* (unreported, HC, Hamilton, 5 May 1989, T22/88), 9–10)
- 67 This raises the issue of how best to balance the competing interests in this area. It might be argued that there should be no provision for costs to be awarded against an individual department or agency, so as to encourage the uninhibited functioning of the prosecution process. This, however, would provide no means by which to encourage proper performance of the prosecution process, nor any means by which to censure when proper standards are breached.
- 68 Another option would be to provide that costs awarded under s 5 of the Act are always to be paid by the particular prosecuting agency. That would be consistent with the modern approach to public sector financial management, by which each department of state and Crown entity is individually accountable to its Minister and to the appropriate select committee of Parliament for its performance (including the performance of its prosecution functions). This option could, however, inhibit prosecution agencies in bringing prosecutions, and it fails to provide any means for the court to signal when proper standards have been breached.
- 69 It may be thought that the current Act strikes the right balance between the desire to provide a punishment for improper prosecution and not to inhibit prosecuting agencies, and that the problem lies in the section not being applied effectively in practice.
- 70 Another option would to amend s 7(2) so that, whenever there is a finding of negligence or bad faith, the court *shall*, rather than *may*, order that costs be paid by the prosecuting agency. This would continue to promote the principles on which s 7 is premised, but would better promote satisfactory prosecuting standards.

Questions 28–32

- 28 Where prosecutions are conducted by or on behalf of the Crown, should all costs awards be paid by a central Crown agency, or should they be paid by the official or agency responsible for bringing the prosecution?

- 29 If they should be paid by a central Crown agency, should the Department for Courts remain the agency responsible?
- 30 Where prosecutions are not conducted by or on behalf of the Crown, is the fact that agencies must pay for their own prosecutions currently serving as an impediment to the bringing of prosecutions in all but the most clear-cut cases?
- 31 Should s 7(2) be amended to provide that whenever there is a finding of negligence or bad faith the court shall order that costs be paid by the prosecuting agency?
- 32 Does the list in s 7(2)(a) of who must pay where there has been a finding of negligence or bad faith – “Government Department, officer of the Crown, local authority, or public body” – require updating?

Payment by defendants

- 71 As discussed above in para 42, traditionally, neither Crown solicitors nor the police have sought costs following a successful prosecution.
- 72 Issues of payment do arise, however, where costs are sought by other government departments or ministries. All Crown prosecuting agencies receive an appropriation in their annual budget for prosecuting cases under the legislation that each agency oversees. Any amount paid by a defendant towards prosecution costs therefore goes into the Crown account, and is not returned to the agency to bolster the prosecution budget.
- 73 Prosecuting agencies which are not part of central government, such as the Accident Rehabilitation and Compensation Insurance Corporation, and local authorities, receive any costs awarded themselves and can use them to off-set the cost of bringing the prosecution.

Questions 33–34

- 33 Is the current system appropriate in relation to payment by defendants to government departments and ministries?
- 34 Is the current system appropriate in relation to payment by defendants to prosecuting agencies which are not part of central government?

4 Summary

74 This paper has focused on

- when costs should be awarded,
- to whom costs should be awarded,
- what awards should cover,
- how the amounts to be paid should be assessed, and
- by whom awards should be paid.

75 The paper is intended to present the relevant issues and to stimulate their further consideration. We look forward to receiving your response.

Comments should be forwarded to:
The Director, Law Commission, PO Box 2590, DX SP 23534, Wellington
89 The Terrace, Wellington
Telephone: (04) 473 3453
Facsimile: (04) 471 0959
E-mail: com@lawcom.govt.nz
by 27 February 1998.

APPENDIX A

Costs in Criminal Cases Act 1967

An Act to amend the law relating to the payment of costs in criminal cases

1 Short title and commencement

- (1) This Act may be cited as the Costs in Criminal Cases Act 1967.
- (2) This Act shall come into force on the 1st day of April 1968.

2 Interpretation

In this Act, unless the context otherwise requires,

"Costs" means any expenses properly incurred by a party in carrying out a prosecution, carrying on a defence, or in making or defending an appeal,

"Court" means any Court exercising any jurisdiction in criminal cases,

"Defendant" means any person charged with an offence.

3 Act to bind the crown

This Act shall bind the Crown.

4 Costs of the prosecutor

- (1) Where any defendant is convicted by any Court of any offence, the Court may, subject to any regulations made under this Act, order him to pay such sum as it thinks just and reasonable towards the costs of the prosecution.
- (2) Where on the arrest of that person any money was taken from him the Court may in its discretion order the whole or any part of the money to be applied to any such payment.
- (3) Where the Court convicts any person and the informant or prosecutor has not prepaid any fees of Court, the Court may order the person convicted to pay the fees of Court.
- (4) Any costs allowed under this section shall be specified in the conviction and may be recovered in the same manner as a fine.

5 Costs of successful defendant

- (1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under [section 167] of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
- (2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to
 - (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings,
 - (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence,
 - (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty,

- (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner,
 - (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point,
 - (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty,
 - (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.
- (3) There shall be no presumption for or against the granting of costs in any case.
 - (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
 - (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

6 Costs of convicted defendant

Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.

7 Payment of defendant's costs

- (1) Subject to subsection (2) of this section, where any order is made under section 5 or section 6 of this Act the amount ordered to be paid to the defendant shall
 - (a) If the prosecution was conducted by or on behalf of the Crown, be paid by the [chief executive of the Department for Courts] out of money appropriated by Parliament for the purpose and may be recovered as a debt due by the Crown,
 - (b) If the prosecution was not conducted by or on behalf of the Crown, be paid by the informant and may be recovered from him as a debt, and any such order made by a [District Court] shall be enforceable as if it were an order made under Part II of the Summary Proceedings Act 1957.
- (2) Notwithstanding the provisions of subsection (1) of this section where a Court is of the opinion that any person has acted negligently or in bad faith in bringing, continuing, or conducting a prosecution it may, in any order made under section 5 of this Act, direct that the defendant's costs shall be paid by-
 - (a) The Government Department, officer of the Crown, local authority, or public body on whose behalf that person was acting; or
 - (b) If he was not so acting, by that person personally,
 and in any such case costs shall not be paid under subsection (1) of this section but shall be paid by, and may be recovered as a debt from, the Government Department, officer of the Crown, local authority, public body, or person specified in the order.

8 Costs on appeals

- (1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.
- (2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.
- (3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.

- (4) No [District Court Judge] or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.
- (5) If the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.
- (6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.

9 Party giving notice of appeal and not prosecuting may be ordered to pay costs

- (1) In any case where notice of appeal is given under any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 but the appeal is dismissed for non-prosecution or a certificate is given under section 107 of the Summary Proceedings Act 1957 that the appeal has not been prosecuted, the Court to which the appeal is made may, subject to any regulations made under this Act, allow the respondent such costs as it thinks fit.
- (2) No costs incurred after notice has been given by the appellant abandoning the appeal shall be allowed.

10 Enforcement of order as to costs made on an appeal

Where on the determination of any appeal either party is ordered to pay costs,

- (a) The order as to costs shall, in the case of an appeal under Part IV of the Summary Proceedings Act 1957, be included in the certificate of the decision transmitted in accordance with section 134 of that Act, and, except where the party ordered to pay costs is the Crown, or a person acting for or on behalf of the Crown, be enforceable as if it were a fine imposed by the [District Court],
- (b) The amount of the costs shall be recoverable from the Crown where the party ordered to pay costs is the Crown or a person acting for or on behalf of the Crown.

11 Order for costs made by the High Court or Court of Appeal

Any order made by the [High Court] or the Court of Appeal, other than on an appeal under Part IV of the Summary Proceedings Act 1957, for the payment of costs by any person, other than the Crown, shall upon being filed in the [High Court] have the effect of a judgment.

12 Submissions and evidence

Before deciding whether to award costs under this Act the Court shall allow any party who wishes to make submissions or call evidence on the question of costs a reasonable opportunity to do so.

13 Regulations

- (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes,
 - (a) Prescribing the heads of costs that may be ordered to be paid under this Act,
 - (b) Prescribing maximum scales of costs that may be ordered to be paid under this Act,
 - (c) Prescribing the manner in which costs for which the Crown is liable shall be claimed from or paid by the Crown,
 - (d) Providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof.
- (2) Any regulations made under this Act may-
 - (a) Apply scales of costs, fees, or expenses prescribed from time to time under other enactments,

- (b) Delegate, or empower a Court to delegate, to any person or officer the power to determine the costs to be allowed under any particular head.
- (3) Where any maximum scale of costs is prescribed by regulation, the Court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.
- 14 Consequential amendments and repeals**
 - (1) This amendment has been incorporated in the reprint of the Crimes Act 1961 (1979. R.S. Vol. 1, p. 801).
 - (2) The enactments specified in the Schedule to this Act are hereby repealed.
- 15 Saving**

Nothing in this Act shall limit or affect the powers of any Court under [sections 19 and 20 of the Criminal Justice Act 1985].
- 16 Transitional provision**

This Act shall apply to proceedings commenced on or after the date of the commencement of this Act and to proceedings commenced but not completed before that date.

APPENDIX B

Table of cases on Costs in Criminal Cases Act

Case name	Citation	Date
Auckland City Council v Gray (No.2)	[1982] 1 NZLR 200	30-Apr-1982
An Application by Davidson	(HC, Christchurch, T 9/93, Williamson J)	12-Sep-1993
An Application by F	(HC, Wanganui, T 17/89, Greig J)	22-Mar-1990
An Application by Gregg	(HC, Hamilton, T 22/88, Doogue J)	5-May-1989
An Application by Macaulay	(HC, Wellington, T150-151/88, Neazor J)	26-Mar-1991
ARCIC v Lovell	[1995] DCR 849	3-Oct-1994
ARCIC v Lovell (No 2)	[1995] NZAR 97	24-Nov-1994
Auckland City Council v Gray	(HC, Auckland, M 1121/84, Chilwell J)	11-Dec-1986
B v R (T2/94)	(1996) 13 CRNZ 629	12-Mar-1996
Bennett v R	(HC, Auckland, T280/95, Robertson J)	19-Jun-1996
Bletchley Developments Ltd v PNCC	(HC, Palmerston North, AP 9/95, Greig J)	8-Mar-1995
Brown v Police	(DC, Auckland, CRN 10043007371, Imrie DCJ)	16-Apr-1996
Butler v MVDI	(HC, Invercargill, AP 47/93 Williamson J)	27-Oct-1993
Butler v MVDI (No. 2)	(HC, Invercargill, AP 47/93 Williamson J)	22-Feb-1994
Butler v MVDI (No. 3)	(CA, Wellington, CA 91/94)	3-Aug-1994
C v R	(HC, Wellington, T 71/93, Ellis J)	10-Jun-1994
Chetty v R	(HC, Wellington, T 61/93, Ellis J)	10-Dec-1993
Collector of Customs v Athfield	[1979] 2 NZLR 272	9-Nov-1979
Commerce Commission v Sweetline Distributors Ltd	[1993] DCR 817	22-Apr-1993
Customs Department v James	(DC, New Plymouth, CRN 1043007371,76, Toomey J)	18-Mar-1994
D v R	[1995] 3 NZLR 366	9-Jun-1995
Daemar v Gilliland	[1979] 2 NZLR 7	4-Nov-1977
Department of Labour v De Spa and Co Ltd	[1991] 1 ERNZ 339	31-Mar-1994
Donald v R	(HC, Auckland, T 63/90, Blanchard J)	5-Jul-1993
E v R	(HC, Wellington, T 37/93, Doogue J)	1-Feb-1994
Edwards v R	(HC, Christchurch, AP 339/93, Tipping J)	29-Mar-1994
Glucina v R	(DC, Henderson, CRN 4004042216-222, Mitchell DCJ)	23-Mar-1995
Goodwin v R	(DC, Auckland, T 392/93, Lance QC DCJ)	10-Oct-1995
Gordon v R	(HC, Whangarei, M 6/93, Robertson J)	14-May-1993
Gourley v DSW	[1994] DCR 262	25-May-1994
Harrington v R	[1994] 3 NZLR 272	30-Jun-1994
Horo v MOT	(HC, Hamilton, AP 90/92, Fisher J)	10-Aug-1992
Housing Corporation v Kontouleas	[1988] DCR 284	14-Nov-1987
London Bookshop v Police	[1980] 1 NZLR 292	13-May-1980
McDonald v Hainstock	(HC, Invercargill, M 34-35/93, Williamson J)	28-Oct-1993

Case name	Citation	Date
McKnight v Horticultural Processors Ltd	(DC, Henderson, CRN 20090016530, Kenderdine DCJ)	8-Nov-1994
McNamara v R	(HC, Napier, T 14/93, Doogue J)	16-Feb-1994
Mihaka v Attorney General	(HC, Rotorua, CP 19/92, Penlington J)	11-May-1992
Mihaka v Police	(HC, Rotorua, AP 46/91, Fisher J)	2-Mar-1992
Mitchell v Corbett	(HC, Hamilton, AP 88/89, Doogue J)	10-Jul-1989
MOT v Cunliffe	[1981] 1 DCR 176	17-Jun-1981
MOT v Morgan	[1977] 1 NZLR 238	26-Nov-1976
Nauman v McCormack	(HC, Hamilton, AP 7/90, Doogue J)	9-Apr-1990
Pearce v Barton	(DC, Wanganui, CRN 3083006958, Ross DCJ)	10-May-1995
Police v Brackenreg	(DC, Auckland, CRN 4004004905, Lovell Smith DCJ)	2-Sep-1994
Police v Maughan	[1975] 2 NZLR 385	8-May-1975
Police v Maughan (No 2)	[1975] 2 NZLR 755	20-Aug-1975
Police v Smith	(1968) 12 MCD 346	18-Aug-1968
R v AB	[1974] 2 NZLR 425	22-Mar-1974
R v Accused (T30/91)	(1991) 7 CRNZ 868	16-Aug-1991
R v Brunton	(HC, New Plymouth, T14/91, Barker J)	27-Apr-1992
R v CD	[1976] 1 NZLR 435	15-Aug-1975
R v Coffey	(HC, Christchurch, T 18/91, Fraser J)	4-May-1994
R v Dawson	(HC, Christchurch, T 64/89, Fraser J)	19-Nov-1990
R v De Rouffignac	(CA, Wellington, CA 100/86)	2-Aug-1986
R v Erwood	[1980] 1 NZLR 751	14-Dec-1979
R v Geiringer	(HC, Wellington, T33/76, Beattie J)	20-Aug-1976
R v Geiringer (No.2)	[1977] 1 NZLR 7	16-Sep-1976
R v Gillespie	10 CRNZ 668	10-Sep-1993
R v Hopkirk	(HC, Rotorua, T 49/92, Penlington J)	27-Jan-1994
R v Kerr	(CA, Wellington, CA 70/91)	15-Apr-1992
R v Lawrence	(HC, Wellington, T 47/88, Ellis J)	27-Jul-1988
R v Margaritis	(HC, Christchurch, T 66/88, Hardie Boys J)	14-Jul-1989
R v McCurdy	[1983] NZLR 551	18-Mar-1983
R v Morgan	(1990) 6 CRNZ 130	28-Jun-1990
R v Myatt	(1991) 7 CRNZ 460	26-Aug-1991
R v Rada	(HC, Auckland, T 54/90, Barker J)	22-Jul-1991
R v Reed	[1980] 1 NZLR 758	2-Aug-1980
R v Reed (No 2)	[1981] 1 NZLR 524	23-Oct-1981
R v Rosson	(HC, Dunedin, T 24/90, Holland J)	10-Mar-1991
R v Sellers	(HC, Christchurch, T 49/90, Roper J)	19-Feb-1991
R v T	[1992] 3 NZLR 215	14-Feb-1992
R v Z	(HC, Wellington, T 64/93, Heron J)	3-Feb-1994
Simpson v Police	[1971] NZLR 393	9-Oct-1970
SPCA v Auckland District Court	(HC, Auckland, M 1246/92, Tompkins J)	14-Apr-1993
The Police v Herbert	(DC, Wanganui, CRN 3083004152, Watson DCJ)	26-Jan-1994
Torrey v R	(DC, Wanganui, T 25/95, Laing DCJ)	27-Jun-1996

APPENDIX C

Law Commission's reference on Criminal Procedure

- A1 The Law Commission's reference on criminal procedure has the following purposes:
- (1) To ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi.
 - (2) To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.
- A2 With these purposes in mind the Law Commission is asked to examine the law, structures and practices governing the procedure in criminal cases from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to
- powers of entry, search and arrest,
 - diversion – principles and procedures,
 - decisions to prosecute and by whom they should be made,
 - the rights of suspects and police powers in relation to suspects,
 - the division of offences into summary and indictable offences,
 - preliminary hearings and criminal discovery,
 - onus of proof,
 - evidence in sexual and child abuse and other special cases,
 - payment of costs to acquitted persons,
- and to make recommendations accordingly.