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Report 60

Costs in Criminal Cases

May 2000
Wellington, New Zealand

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.

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16 May 2000

Dear Minister

I am pleased to submit to you Report 60 of the Law Commission, *Costs in Criminal Cases*, which is part of the continuing reference to the Commission to review the law, structure and practices governing procedure in criminal cases.

Although this is part of the criminal procedure reference, it has not been accorded high priority because it became clear at an early stage that the Costs In Criminal Cases Act 1967 is essentially sound, although there are practical problems in that the Act is not used as often as it might be and the scale of payments is not updated frequently enough. The main point to be noted is the position of the Legal Services Board, which currently is unable to recover its costs under the Act. In this report we recommend that the Board should be able to recover its costs, not as a revenue-gathering exercise, but because this will promote good prosecution standards.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

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Introduction

- 1 **T**HE Costs in Criminal Cases Act 1967 (“the Act”) is now 31 years old. It originated from a September 1966 report by a committee representing the Department of Justice, Police, Crown Law Office,¹ and the legal profession (“the 1966 Report”), and 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.²
- 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 not the principles of the Act itself but 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 who should administer the Act and make payments under it.
- 3 In November 1997, an issues paper³ was published for consultation purposes. It identified the main issues, and sought comment and suggestions for reform from those with practical experience and interest in the topic. We received invaluable responses from, and had useful discussions with, the groups listed in Appendix A.
- 4 We have concluded that the structure of the current scheme in relation to defendants who have not been convicted should be retained. We believe that the scheme achieves, for the most part, an appropriate balance between competing interests. It serves to

¹ “Report of Committee on Costs in Criminal Cases” (Wellington, 12 September 1966, unpublished).

² See para 27 of this report.

³ Law Commission, *Costs in Criminal Cases: MPI2* (Wellington, 1997).

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.

- 5 The issue of appeals against costs awards was not dealt with in the issues paper because at that time a proposal was before Parliament to allow appeals against costs awards under the Act. As a result of that proposal, the Summary Proceedings Act 1957 has now been amended to allow both the defendant and the informant to appeal to the High Court against costs awards made by a District Court.⁴
- 6 Another related matter is the inherent jurisdiction of the Court to award costs against solicitors or counsel who, through a serious dereliction of duty, cause extra costs to be incurred. This is sometimes referred to as a “wasted costs” order and may be made in both criminal and civil cases. As this is a matter of inherent jurisdiction rather than an award under the Act, it was not dealt with in the issues paper. Recent English developments have brought the jurisdiction into attention there,⁵ and it has also been recently discussed and affirmed by the New Zealand Court of Appeal in *Harley v McDonald*.⁶ But as this report is limited to a review of the Act rather than any wider jurisdiction, we shall not take this point further.
- 7 Our recommendations are:
 - Section 5(1) of the Act should be amended to permit costs to be paid to a defendant following a stay.
 - The availability of costs should remain a matter of discretion and the criteria set out in section 5(2) should not be altered.
 - There should be no change to the principle that there is no presumption either for or against a costs award.
 - The Legal Services Board should be able to receive an award of costs. (Amendment of the Act is required to achieve this.)

⁴ Sections 115 and 115DA. Section 115DA came into effect on 3 June 1998.

⁵ See s 19A(1) of the Prosecution of Offences Act 1985 (UK); *In re Sternberg Reed Taylor & Gill (a Firm)*, *The Times*, 26 July 1999 at <<http://www.the-times.co.uk/news/pages/tim/1999/07/26/timlawcrd01004.html>>; Lewis and Bowden “Wasted costs under the Woolf regime” (1999) 143 *Solicitors Journal* 237; Bacon “Costs Update” (1997) 141 *Solicitors Journal* 841.

⁶ [1999] 3 NZLR 545 (currently under appeal to the Privy Council). However, it is uncertain whether the District Court has the power to award wasted costs: see *The Laws of New Zealand* (Butterworths, Wellington, 1992–) vol 5 Civil Procedure: District Courts, para 42.

- Costs should be recoverable for expenses incurred personally by a legally aided defendant, and this should extend to legal aid “top-ups” in the rare cases that such are authorised.
 - There should continue to be a scale of costs under section 13, but it should be modelled on the new civil rules costs structure, which would provide adequately for preparation costs, and be updated regularly.
 - There is no need to amend the statute to provide for total indemnity in special circumstances, as the jurisdiction exists and its exercise should be left to judicial discretion.
 - Section 7 of the Act (payment of costs by central Crown agency) should remain unchanged.
 - The Department for Courts should remain the Crown agency responsible for payments under section 7.
 - There is no need for statutory amendment to change the current situation where prosecuting agencies pay for their own prosecutions but do not receive costs awards. Although this impedes the bringing of prosecutions in all but the most clear-cut cases, this is a state budgetary matter – there is no fault in the Act.
 - The Act should set out criteria defining the circumstances in which awards may be made against defendants. A suggested amendment to the Act is contained in paragraph 116 below.
 - Costs should be available to the Crown where prosecution has proceeded on indictment (although they will be rare in practice), and to the Police where prosecution has proceeded summarily.
 - There should be no change to the current requirement that when costs are awarded to a Crown agency, they are paid directly to a Crown account and not to the individual agency.
 - The ability to award costs to private prosecutors should be retained.
 - Section 5 (e) and (f), which refers to an *information* but not an *indictment*, could be amended to clarify existing case law which confirms that these subsections also apply to indictable matters.
-

2

The justification for awarding costs

AWARDING COSTS AGAINST THE DEFENDANT

8 **T**HE PROSECUTION OF CRIMINAL SUSPECTS is a fundamental state function. When a prosecution succeeds and a defendant has been proved to have broken the law, the court has the task of deciding the state's response in terms of sentence. Since the prosecutor has expended resources in proving the breach of the law, it may be reasonable to recoup some or all of that expenditure. Current sentencing practice tends to confine awarding costs in favour of the prosecution to cases where imprisonment is not imposed. While persons in prison frequently have no means to pay any costs, in other cases the possibility of a costs order can still warrant consideration – although always within the totality principle. This is a general principle of sentencing law which:

requires the Court, where it has imposed a series of cumulative sentences or a combination of concurrent and cumulative sentences upon an offender, to review the overall sentence in order to ensure that the total is not excessively harsh or grossly disproportionate to the general level of gravity of the individual offences.⁷

AWARDING COSTS TO THE DEFENDANT

9 More difficult, in both principle and practice, is the question of costs when a defendant is acquitted. In our 1998 report *Compensating the Wrongly Convicted*, we stated:

Unless set aside on appeal the verdict is, and is seen to be, a public proclamation of the result. Either the case is proved and the verdict is that of guilty, or the case is not proved and the verdict is that of not guilty. Issues of innocence, suspicion, and likelihood of guilt are not

⁷ Geoffrey G Hall *Hall on Sentencing* (Butterworths, Wellington, 1993–) S73.10.

distinguished in the verdict and in a very practical sense the accused is either convicted or cleared. This makes acquittal equivalent, in practical effect, to a finding of innocence . . . ⁸

- 10 There are, however, many cases in which a person is acquitted of an offence not because of innocence but because the prosecution could not reach the required standard of proof. The verdict is of course simply “not guilty” – it may not be known whether the court thought the defendant was innocent. But once the issue is one of compensation, it is reasonable to require a claimant to show something more than a verdict of not guilty. The criminal standard is set to protect people from being wrongly convicted, rather than to provide the basis for a civil remedy. When claiming compensation, the burden of proof should be on the claimant, to discourage claims by those who are not innocent and seek to take advantage of their acquittal to secure a windfall from the state.
- 11 Acquittals can and do occur for a wide range of reasons. At one end of the spectrum, the acquittal may result from proof that the defendant did not commit the crime alleged or that there was no crime. It may be possible for the defendant to establish alibi, or the complainant may acknowledge that the complaint was mischievous. At the other end, the acquittal may result from violence or threats of violence to a Crown witness or from perjury by defence witnesses.
- 12 It is one thing for a defendant to receive the benefit of an acquittal and avoid the taint of conviction where a Court has found that the Crown case is not proved. It is another to award compensation to the defendant on the basis that the prosecution should not have been brought. Questions of costs often fall between the two.

The position in comparable jurisdictions

- 13 In Australia (in the summary jurisdiction) and in England a simple acquittal is treated as carrying a consequential entitlement to costs in favour of the defendant.
- 14 In *Latoudis v Casey*⁹ the High Court of Australia considered the criteria that should be applied by a court of summary jurisdiction when exercising a statutory discretion to award costs in favour of a defendant. The relevant legislation authorised a court, when dismissing an information or complaint or making an order in favour

⁸ Law Commission *Compensating the Wrongly Convicted: NZLC R49* (Wellington, 1998) para 17.

⁹ (1990) 170 CLR 534.

of a defendant, to order the informant or complainant to pay to the defendant such costs as the court thought just and reasonable. (Separate provision was made in similar terms authorising the award of costs in favour of an informant or complainant when the defendant is convicted or an order is made against the defendant.)

15 The High Court noted that the old rule that the Crown neither receives nor pays costs¹⁰ had been displaced, and reviewed the Australian authorities to show two distinct approaches to the exercise of the statutory discretion. The first was applied in *Ex parte Hivis; re Michaelis*¹¹ where it was held that the discretion to award the costs of proceedings was unfettered and that its exercise must depend on the particular circumstances of the case. A similar approach was adopted by the New South Wales Court of Appeal in *Barton v Berman*,¹² where it was held that concern about deterring the police from bringing proceedings was an irrelevant consideration.

16 The second approach was that expressed in *McEwen v Siely*:

generally an acquitted defendant should have his costs unless he has by his conduct brought the proceedings or their continuation upon himself or unless some other consideration is present which makes it unjust to award him costs.¹³

17 In *Latoudis*, Mason CJ observed that the general statutory discretion had not been constrained, even by prescription of relevant considerations or criteria, but that did not preclude the formulation of a principle or guideline by which the discretion should be exercised. He held that in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant, and that in ordinary circumstances it would not be just or reasonable to deprive a defendant, who has secured the dismissal of a criminal charge brought against him or her, of an order for costs:

To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself,

¹⁰ *Attorney-General (Q) v Holland* (1912) 15 CLR 46, 49.

¹¹ (1933) 50 WN (NSW) 90, 92.

¹² (1980) 1 NSWLR 63.

¹³ (1972) 21 FLR 131, 136, Supreme Court of the Australian Capital Territory.

though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs.¹⁴

- 18 Although it was accepted that ordinarily an order for costs should be made in favour of a successful defendant, he rejected the argument that there is a complete analogy between the discretion to award costs in summary proceedings and the power to award costs in civil proceedings, and declined to accept that summary proceedings should follow the civil rule that costs follow the event:

The differences between criminal and civil proceedings are substantial, not least of them being the absence of pleadings, the different onus of proof, the defendant's inability in criminal proceedings to enter into a compromise and the possibility that the charge, if proved, may affect the defendant's livelihood and reputation. These differences may possibly provide grounds in the circumstances of particular cases for refusing to order costs in favour of a successful informant which would have no application in civil proceedings. . . . If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor. . . . if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong a proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs.¹⁵

- 19 The English position is similar. In both the magistrates' court and the Crown Court (where jury trials are held) orders for payment of a successful defendant's costs should be made unless there are positive reasons for not doing so. Examples of such reasons include:
- The defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is.
 - There is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit.
- 20 While in *Latoudis* criminal cases were not seen as completely analogous to civil cases, in Australia and in England, costs in civil cases are awarded on a more substantial basis than in New Zealand, and the principle of awarding full costs is very strong. In New Zealand, a

¹⁴ *Latoudis*, above n 9, 542.

¹⁵ *Latoudis*, above n 9, 543–544.

successful civil party will ordinarily receive an award, but it is rarely intended to fully compensate for loss. It may be some 60 per cent or thereabouts of actual reasonable costs. The justification for that approach is the avoidance of undue costs of litigation, even against an unsuccessful party.¹⁶

The New Zealand position

21 Section 5(3) of the Act states:

There shall be no presumption for or against the granting of costs in any case.

22 We do not agree with the view expressed in *Latoudis* that it is necessary to lay down any presumption in favour of a costs award. The practical experience in the courts is of a wide spectrum of acquittals, from proof of innocence at one extreme to tainted acquittal by perjury or threat of violence at the other. It is the function of a judicial officer to bring judgment to bear on costs as on all other issues and, in the case of costs, to assess where the case fits on the continuum.

23 It is fundamental that no person accused of a crime is required to establish innocence; rather it is for the prosecution to establish guilt beyond a reasonable doubt. As the procedural requirements of our criminal justice system are built on this fundamental proposition, it often happens that a defendant is successful (in that charges are withdrawn or dismissed, or the defendant is acquitted because the prosecution has not proved guilt) without his or her innocence being clearly established.

24 We consider that the following should be taken into account when deciding whether awards should be made to successful defendants:

- Persons accused of criminal offences can be put to a great deal of expense in defending themselves. Unlike defendants in civil actions, they cannot simply compromise the matter: their liberty, reputation and pocket are, or may be, at risk.¹⁷
- If a prosecution has been brought for a malicious or improper reason, the defendant should receive costs (although in some cases a civil action for malicious prosecution may be available).
- It is reasonable that if a prosecution has been conducted in a negligent manner, for example if the facts have not been properly

¹⁶ The US system, with certain notable exceptions, carries that philosophy to its ultimate end in declining to make any civil costs orders at all.

¹⁷ *Acuthan v Coates* (1986) 6 NSWLR 472, 480.

investigated, that the defendant should receive costs. It is clear from our investigations that the possibility of a costs order, even though usually paid by the central fund, does serve as a real incentive to prosecuting agencies to ensure that their standards of investigation and prosecution remain high.

- Costs should not be awarded simply because a defendant has been acquitted:

There is a substantial class of cases where in the popular phrase the accused is “lucky to get off” – the prosecution has not quite clinched the case or the exacting standard of proof in criminal cases is not quite satisfied. Alternatively the accused may by his misconduct or lack of candour contribute to his own misfortune – he has “brought it on himself”. In our opinion it would ordinarily be wrong to award costs in these sorts of case.¹⁸

- In cases where the prosecution has been reasonably conducted and yet the defendant has been able to show that he is definitely or probably innocent, by showing a deficiency in the prosecution case or bringing credible witnesses who shed a more favourable light on the circumstances, it will be reasonable that a costs award be made in favour of the defendant.

25 Although not proposing a solution along the lines of costs in civil cases (not because a prosecutor should be treated more tenderly but for the reasons already discussed) we regard as outmoded Lord Devlin’s proposition that:

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.¹⁹

26 Difficulty arises from the fact that acquittals can and do occur for so many reasons.²⁰ Moreover, there is the conflict between competing public interests that we discuss in chapter 1 of our report *Compensating the Wrongly Convicted*.²¹

27 After balancing the various considerations, the 1966 Committee concluded:

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

¹⁸ “Report of Committee on Costs in Criminal Cases”, above n 1, 9.

¹⁹ *Berry v British Transport Commission* [1962] 1 QB 306, 327, per Devlin LJ.

²⁰ See paras 9–12 of this report.

²¹ Law Commission, above n 8.

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 . . . 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.²²

- 28 Although the 1966 Committee emphasised the desirability of awarding costs where the defendant has shown his innocence, the resultant legislation does not require any actual proof of innocence. This is because of the presumption of innocence, as discussed in paragraphs 10–12 above. Thus, section 5(1) allows for costs to be awarded where a defendant is acquitted or the charges are dismissed or withdrawn, *whether upon the merits or otherwise*. The first four factors to be taken into account under section 5(2) in the exercise of the discretion all relate to the proper conduct of the prosecution; the last two relate to whether the defendant has shown that he is not guilty and how he has conducted himself (that is, that he is not, in the words of the 1966 Committee, just “lucky to get off”).
- 29 Thus it can be said that the fundamental rationale of the Act is to provide a balance between those cases in which there are good reasons for a defendant to receive reimbursement (because the prosecution has been brought unfairly, or not conducted properly, or the defendant has shown himself to be not guilty, or because of other factors which may go to the general discretion) and those in which it is not just for reimbursement to be received. The purpose of the Act is not, however, to reimburse every successful defendant; that has recently been reaffirmed by the Court of Appeal in *R v Rust*.²³
- 30 Clearly England and Australia, at the summary level at least, have a more generous regime than New Zealand, in that they presume that a successful defendant will get their costs unless there is good reason not to, whereas in New Zealand there is no initial presumption. We believe that creating a presumption in favour of the defendant would not be useful because:
- it would create a hierarchy of acquittals, encouraging a perception that a defendant who is “really innocent” will get

²² “Report of Committee on Costs in Criminal Cases”, above n 1, 12–13.

²³ [1998] 3 NZLR 159.

costs, and if no costs order is made there is a shadow over the acquittal; and

- the risk of reimbursing a person who has been acquitted but is in fact guilty would undermine public confidence in the justice system.

31 The fact that being a successful defendant is not sufficient can lead to hard cases. To be innocent and be subjected to the burden of legal fees and disbursements that are not recoverable is a double harshness. Such cases should if possible be avoided, or mollified, by the judge exercising the costs power without undue reticence.

32 But we follow the 1966 Report in declining to propose that there should be a presumption in favour of a successful defendant. Such a presumption would too often entail reimbursing the guilty or the probably guilty. It is true that under the Act as it stands it is possible for a guilty person to be acquitted and awarded costs, for example, if the prosecution through negligence fails to prove its case. However, this risk is acceptable because it is also a function of the Act to encourage high prosecution standards.

33 Facets of the present issues were considered in the Law Commission's report *Compensating the Wrongly Convicted*. It was concluded²⁴ that compensation should be paid to the wrongly convicted only in those exceptional cases where:

- it is clearly established that the claimant is innocent;
- the criminal justice system has failed to discharge the claimant at or before verdict; and
- the conviction has resulted in imprisonment.

That report also recommended²⁵ a new provision to allow for the payment of compensation to the wrongly convicted, under which compensation would be assessed on the basis of factors broadly similar to those contained in section 5(2) of the Act. Criteria based on those recommendations have now been adopted.²⁶

34 Costs and compensation are, however, not synonymous. Defendant's costs are a recognition that a person who has been charged but not convicted, whether rightly or wrongly, has been put to expense in being subjected to the criminal process. Having examined the circumstances, the court may or may not decide that reimbursement is appropriate. In the form which we have recommended and the

²⁴ Law Commission, above n 8, para E9.

²⁵ Law Commission, above n 8, para E11.

²⁶ See Cabinet Strategy Committee paper STR (98) 307, annex B, approved 30 November 1998.

Government has adopted, compensation is more narrowly based, confined to cases where a person has been wrongly convicted, the criminal system has failed to prevent that before the appeal stage, and as a result the convicted person has suffered not only financial loss but great personal and emotional harm. The state has done that person wrong and should make good that wrong, in so far as money can do so.

- 35 We are of the opinion that the Act's rationale is correct, and that the scheme of the Act is essentially well founded and well balanced. However, there is a widely held perception that counsel often do not apply for costs because they perceive the courts as being overly cautious in considering costs, and therefore assume they will be refused, despite being within the scope and intention of the Act. We address this point in paragraphs 65–68 of this report.
-

3

The existing structure of the Costs in Criminal Cases Act 1967

36 THE Costs in Criminal Cases Act 1967 is reproduced in Appendix B.

POWER TO AWARD COSTS

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

Costs awarded to defendants

38 The most commonly used power to award costs is that in section 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 section 167 of the Summary Proceedings Act 1957.

39 The court has power under section 5(1) to order that the defendant be paid “such sum as it thinks just and reasonable towards the cost of his defence”. The primary difference between this power and those relating to awards where a defendant is convicted or on appeal, lies in subsections 5(2)(a)–(c), which set out a number of criteria to which the judge “shall have regard” when deciding whether to award costs.

40 Section 5(2) states:

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.

41 Section 5(3) states there should be no presumption for or against granting costs 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. Section 5(5) states that a defendant should not be refused costs only because the proceedings were properly brought and continued.

42 In the first reported decision under the Act, it was said, in relation to these subsections, that “it 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 subss (3), (4) and (5) say no more nor less than that”.²⁷

43 It has also been said that:

The various criteria in section 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.²⁸

²⁷ *R v AB* [1974] 2 NZLR 425, 429.

²⁸ *R v Margaritis* (14 July 1989) unreported, High Court, Christchurch, T 66/88, 8.

- 44 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 (section 6).

Costs awarded against defendants

- 45 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 (section 4). The Act does not set out any criteria for the exercise of this discretion, but clearly there must be good grounds for making it.²⁹

Costs on appeal

- 46 In an appeal under the Crimes Act 1961 or Summary Proceedings Act 1957 the court may, subject to the regulations, make such order as to costs as it thinks fit (section 8(1)).
- 47 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 (section 8(5)).
- 48 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 (section 8(6)).
- 49 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 (section 9(1)).

THE SCALE FOR AWARDS OF COSTS

- 50 With the exception of those specified in section 8(5)–(6), the powers described above are conferred “subject to any regulations made under [the] Act”.³⁰ The regulations currently in force are the Costs in Criminal Cases Regulations 1987 (SR 1987/200). The regulations set out a scale for awards of costs, based upon a

²⁹ *R v Keesing (no. 44)* [1999] DCR 357, 359.

³⁰ The power to award costs in s 8(5)–(6) is not subject to the regulations and, therefore, no maximum award is prescribed.

maximum payment of \$226 per half day of trial. Travelling expenses and costs incidental to the proceedings may also be claimed.

51 However, section 13(3) of the Act provides:

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 OF COSTS TO DEFENDANTS

52 Where the prosecution was taken by, or on behalf of, the Crown, costs awarded to a defendant under sections 5–6 are generally to be paid by the Department for Courts (section 7(1)(a)). However, where the award is made under section 5 (that is, where the defendant has not been convicted), the court may direct that the costs be paid by

- (a) the government department, officer of the Crown, local authority or public body upon whose behalf the prosecutor was acting,
- (b) if he was not so acting, by the prosecutor personally,

if it is of the opinion that any person has acted negligently or in bad faith in bringing, continuing, or conducting the prosecution (section 7(2)).

COSTS AWARDED 1996–1999

53 As part of its preliminary consideration of this topic, the Commission researched and analysed 77 cases from 1968 to 1996, where defendants applied for awards of costs under the Act. For this report, we updated that research and considered 48 cases from September 1996 to the present day. A list of those cases is contained in Appendix B. We do note, however, that the cases we have considered are not at all comprehensive. The bulk of criminal matters, and almost all regulatory matters, are dealt with at District Court level and there is no database of such cases. We included in our updated case list all reported judgments, unreported judgments available on LINX³¹ and BRIEFCASE³² databases, and we also obtained

³¹ The LINX database is the combined databases of the Auckland, Wellington and Canterbury District Law Society libraries.

³² BRIEFCASE is an index to published New Zealand case law from 1986 to the present produced by Brookers NZ Ltd.

further unreported cases from Crown solicitors and Crown prosecution agencies. We have had discussions with prosecuting agencies, both governmental and private.

- 54 Of the 48 cases, 32 were cases in which a defendant sought costs against the Crown, the Police, or a Crown agency (such as the Department of Labour). Of those 32 cases:
- 22 applications were granted and 9 were declined;
 - Of the 22 successful applications, awards were given in excess of scale in 18, and section 7(2) awards were made in 4 (1 against the Department of Labour, 1 against the Department of Social Welfare, and 2 against the Police); and
 - the highest award was \$80 000.³³ Other significant sums awarded were \$60 000,³⁴ \$35 000,³⁵ \$30 000,³⁶ \$25 000³⁷ and \$20 000.³⁸
- 55 Of the remaining cases:
- two were by a defendant against a local authority. Both related to Resource Management Act 1991 offences. Both were successful and both were in excess of scale;³⁹
 - two were against private prosecutors;⁴⁰

³³ *R v Hugel* (20 October 1998) unreported, High Court, Rotorua, T99/97, Paterson J (medical manslaughter).

³⁴ *W v R* (24 September 1996) unreported, High Court, Wellington, T25/96, Gallen J (sexual offences).

³⁵ *Y v R* (21 July 1997) unreported, High Court, Auckland, T281/96, Salmon J (sexual offences).

³⁶ *Rohloff (Health and Safety Inspector) v Fulton Hogan Ltd*, (February 1999) District Court, Wellington, CRN 8085005880, Judge McAloon.

³⁷ *Ham v R* (9 September 1998) unreported, High Court, Hamilton, M54/98, Hammond J (attempting to procure murder, possession of cannabis); *Trustees of the Estate of P v R* (29 August 1997) unreported, District Court, New Plymouth, T27/95, Judge Abbott (sexual offences); *R v Sheridan* (30 September 1996) unreported, High Court, Greymouth, M4/96, Tipping J (sexual offences).

³⁸ *Sehnert v R* (14 August 1997) unreported, District Court, Timaru, T8/96, Judge Abbott (sexual offences).

³⁹ *Searle v Marlborough District Council* (15 June 1998) unreported, District Court, Blenheim, CRN 6006004645, Judge Treadwell (costs of \$3500 plus disbursements of \$1763.05 awarded); *Auckland Regional Council v Walsh Contractors Limited* (20 January 1997) unreported, District Court, Auckland, CRN Nos 5004050656–57, Judge Bollard (costs of \$10 000 awarded).

⁴⁰ *Woodgate v Parker* (16 October 1997) unreported, High Court, Palmerston North, AP 18/97, Gendall J (upheld District Court award of \$1750 which was in excess of scale); *McGregor v Dunne* (18 July 1997) High Court, Dunedin, AP13, 42/96, 46/96, Panckhurst J.

- one was legally aided and so sought personal disbursements only;⁴¹
- one was an appeal by the Commerce Commission against a District Court award of costs;⁴²
- one was a successful appeal by a defendant who had been ordered to pay costs by the District Court;⁴³
- one was a successful Crown appeal against costs awarded in favour of the defendant in the District Court;⁴⁴
- one was an appeal declined because of lack of jurisdiction;⁴⁵ and
- five were by the Crown, Crown agency or a local authority against a defendant.⁴⁶

56 The figures indicate that a good proportion of the applications made are successful. More importantly, they indicate that although the Act states that the scale should be exceeded only in cases of “special difficulty, complexity or importance”, in fact the scale is exceeded more often than not. It is clear that the outdated scale is now considered so low that section 13(3) is used even where it is not, strictly speaking, appropriate. This point is discussed further in paragraphs 88–91 below.

⁴¹ *Tumai v R* (3 September 1998) unreported, High Court, Gisborne, T18/97, Tompkins J.

⁴² *Commerce Commission v District Court and Griffiths Foods Ltd* (10 July 1998) unreported, High Court, Auckland, M244/98, Smellie J.

⁴³ *R v Evans* (22 October 1997) unreported, Court of Appeal, CA 226/97, Henry, Heron and Goddard JJ.

⁴⁴ *Solicitor-General v Moore* (18 November 1999) unreported, Court of Appeal, CA 310/99, Keith, Doogue and Panckhurst JJ.

⁴⁵ *Brown-Cole v Police* (13 May 1999) unreported, High Court, Auckland, A45/99, Salmon J.

⁴⁶ Of these five, two were declined: *Commerce Commission v Zenith Publishing Ltd & Ors* (23 June 1998) unreported, District Court, North Shore, CRN 7044022122–31 & Ors, Judge Gittos; *Ross v Police* (17 February 1997) High Court, Hamilton, AP 98/96, Penlington J. Two were successful, (*R v Keesing* (no. 44) [1999] DCR 357, *MacDonald v Ministry of Fisheries* (21 May 1997) High Court Christchurch, AP 53/97, Holland J, *Spence v Harris* [1997] NZRMA 337); and one was adjourned.

4

The issues

57 **O**UR ISSUES PAPER SOUGHT SUBMISSIONS on 34 questions relating to the Act. The submissions received were detailed and most helpful, and we set out below our conclusions on the issues raised. We have altered the order of the questions for ease of discussion and omitted some questions which, on reflection, we consider do not assist the discussion.

Should costs be permitted following stays?

- 58 Under section 5(1), costs may be awarded where:
- any defendant is acquitted of an offence;
 - the information charging the defendant with an offence is dismissed or withdrawn, whether upon the merits or otherwise; or
 - the defendant is discharged under section 167 of the Summary Proceedings Act 1957.
- 59 Section 5(1) applies where the defendant is discharged under section 347 of the Crimes Act 1961⁴⁷ and also, it would appear, to a discharge without conviction under section 19 of the Criminal Justice Act 1985. Both section 347(4) of the Crimes Act and section 19(2) of the Criminal Justice Act state that a discharge under those respective sections shall be deemed to be an acquittal.⁴⁸
- 60 It has been held that where a stay is entered by the Solicitor-General under section 378 of the Crimes Act, section 5 does not apply and the court accordingly has no jurisdiction to award costs.⁴⁹

⁴⁷ See *R v S* (30 September 1996) unreported, High Court, Greymouth, M4/96, Tipping J.

⁴⁸ But see the decision in *Gourley v DSW* [1994] DCR 262 where it was 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.

⁴⁹ *D v R* (24 September 1997) unreported, High Court, New Plymouth, T3/96, Williams J.

This appears to be an anomaly. While it is the case that a stay may be entered for reasons quite unrelated to the guilt or innocence of the defendant, there are situations in which an award could be well justified, such as when a stay is granted on the grounds of abuse of process by the prosecution. There seems to be no sound basis for a general exclusion of stays. The reasons for granting the stay should of course be taken into account in the exercise of the discretion.

- 61 We recommend that costs be permitted following a stay and that section 5(1) be amended accordingly.

Should the availability of costs remain a matter of discretion, and are additional or fewer criteria in section 5(2) desirable?

- 62 In deciding whether to grant costs to a successful defendant under section 5, the court is to have regard to all relevant circumstances and, in particular, the relevant criteria set out in section 5(2). There is to be no presumption for or against the granting of costs.

- 63 All submissions were in favour of retaining the discretion. The discretion is wide, and the factors listed in section 5(2), while they must be the first criteria in every case, do not limit the wider discretion. This was recently confirmed in *R v Hugel*:

While a Court is to have regard to the matters referred to in section 5(2), these matters do not limit or affect the Court's discretion to order payment of such costs as it thinks just and reasonable towards the cost of the defence.⁵⁰

- 64 We accept that costs should remain a matter of discretion and that there is no need for amendment or addition to the criteria, and accordingly we recommend no change.

Should there be a presumption for or against a costs award?

- 65 The majority of the submissions were opposed to a presumption. There was concern that, given the almost infinite variety of circumstances that can come before a Court when considering issues of costs in criminal cases, a presumption would be undesirable.

⁵⁰ *R v Hugel*, above n 33, 3.

- 66 Some concern was expressed that the Act is being too cautiously applied, leading to a reluctance by counsel to apply, making it arguable that there is effectively already a presumption against the award of costs because of the emphasis of section 5(2) on the appropriateness or otherwise of the prosecution. However, there is little evidence from the cases we have examined that courts are refusing to award costs in appropriate cases.
- 67 For the reasons discussed in paragraphs 21–32 above, we do not favour a presumption. We also note that if there were a presumption in favour of costs awards, it would raise practical difficulties, as the possibility of an award would have to be considered in the case of every successful defendant, adding a considerable extra burden on to already busy courts.
- 68 We recommend there should be no change to the principle that there is no presumption either for or against a costs award.

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

- 69 The Court of Appeal has held⁵¹ that the Act does not enable the Legal Services Board to receive an award of costs where the defendant is on legal aid, because legal aid is paid directly by the Board to the defendant’s counsel and is therefore an expense incurred by the Board and not the defendant. The defendant is not responsible for the approved costs of his assigned practitioner. As “costs” are defined in section 2 of the Act as expenses incurred by “a party”, no costs are recoverable by the Board. In *Harrington v R*, the Court of Appeal did, however, concede that there are good reasons why the Board should wish to recover legal aid costs:

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

⁵¹ *Harrington v R* [1994] 3 NZLR 272.

to the Board's resources may be open to debate. However, this is not a matter for the Court.⁵²

70 The Legal Services Board itself is strongly of the view that it should be able to recover legal aid costs. In its submission to us the Board stated:

The novel and unique position of the Board as a separate Crown entity capable of receiving and investing funds for the enhancement of future legal aid payments did not appear to have much attraction for the judges of the Court of Appeal. The judges [in *Harrington*] seemed to be immovably influenced by the fact that criminal costs awards are so small that the Board would not be much better off as a result of receiving such awards. If, however, new legislation were put forward which made costs more liberally available and on a more realistic scale then perhaps the matter could be viewed differently.

The Court of Appeal also seemed to take the view that allowing the Board to receive costs awards would be simply to allow money to pass from one pocket of the Crown to another. That argument is not totally without foundation but it does have to be stressed that the Board is constantly in negotiation with the Crown in order to seek future baseline funding for both civil and criminal legal aid over a three-year time scale. The willingness of the Crown to fund all forms of legal aid and related legal services is to some extent conditioned by the willingness of the Board to use its powers of legal cost recovery.

In criminal matters the only form of recovery available to the Board is that of contributions imposed by Registrars on legally-aided parties. In the last financial year only \$62 000 was recovered by this method. Because of the peculiar nature of criminal legal aid, ie, proceedings cannot be held up pending payment of contributions, we now have a very serious imbalance between criminal legal aid recoveries and those in civil cases. For every one dollar collected in a criminal case \$63 is collected in civil – mainly from women.

If legal aid administration is to be put on a business-like basis it is, in the Board's view, essential that prosecution agencies are made to recognise the true cost of launching ill-considered or unnecessarily prolix proceedings.

71 It is true that allowing the Legal Services Board to claim costs would not result in large payments to the Board. Most criminal legal aid matters are very small. The Board's November 1998 newsletter contained figures that show 98 per cent of criminal legal aid matters cost less than \$5000. Of a random sample of 13 719 cases, only 28 were worth more than \$20 000 and two more than \$50 000:

⁵² *Harrington v R*, above n 51, 275.

The real dollar gobblers in the scheme are the multiplicity of smaller hearings where “not guilty” pleas are often changed to “guilty” ones at the very last moment.

However, it is the Board’s view that the recent use of District Court Status Hearings has led to greater efficiencies in this area, with a decrease in overcharging and with more guilty pleas entered at an early stage, and therefore, a decrease in the number of these smaller hearings. This suggests that the average cost of criminal legal aid matters will start to rise, and therefore be worth a costs award. We discuss the topic of status hearings in our forthcoming report “Criminal Prosecution”.

72 There are good arguments in favour of allowing the Board to recover costs. To do so would improve accountability and transparency between government departments. More importantly, it is also a function of costs awards to encourage high prosecution standards, but in criminal legal aid cases that sanction is not there. This is undesirable. We are advised that in summary prosecutions the potential for costs to be awarded against the prosecuting body is very much present in the minds of the prosecutors. The potential for costs to be awarded in legal aid cases could well lead to an improvement in prosecution standards, even if in practice it did not result in large awards being made.

73 We have also considered the practicalities of such applications. Although counsel routinely seek costs in civil legal aid matters, that is in large part because their client’s property is being charged for legal aid fees, and so by obtaining costs, they decrease that charge and thereby assist their client. However, the Board advises us that even where that is not the case, counsel often advise their subcommittees at the end of a case that they believe a costs application would have a good chance of success, and seek a further grant to cover the cost of the application. The grant is given where appropriate, and the Board enforces the award. There is no reason why this system should not work equally well in criminal matters. In small matters it would frequently be the case that a costs application would be made orally at the hearing and no further grant would be required.

74 Against those arguments, the point can be made that costs are awarded in recognition of the imbalance of resources between the Crown and the individual. As the 1966 Committee said:

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.⁵³

⁵³ “Report of Committee on Costs in Criminal Cases”, above n 1, 10.

Although this argument cannot apply to the Legal Services Board, we believe it is outweighed by the other matters outlined above.

- 75 We consider that legal aid expenditure should be recoverable by the Legal Services Board through costs awards, and recommend statutory amendment to achieve this.

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

- 76 In *Harrington v R*, the Court of Appeal stated that although payments by the Legal Services Board are not recoverable, other costs properly incurred (such as a contribution to legal aid by the defendant, or a claim by counsel for additional payments) could be (p 275).

- 77 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.⁵⁴

- 78 The majority of submissions were in favour of such costs being recoverable. There is clearly a distinction between:

- cases where the defendant has made a contribution to legal aid, or has exhausted their own resources before being granted legal aid; and
- cases where legal aid is granted but the Board grants permission under section 11(3) of the Legal Services Act 1991 for a solicitor or counsel to accept an additional payment. However, in practice it is very unusual for the Board to authorise such a “top-up”. There must be some concern that there is room for abuse in that pressure could be put on legally aided defendants to provide additional fees to counsel from meagre private resources, in the hope that an award of costs might cover them.

- 79 Although we have some concern that it will make top-ups more common, we nevertheless consider that both these types of costs should be recoverable. It appears that they already are, and we see no reason why a legally aided defendant should be in a worse position in relation to money paid out personally than a privately defended person. We consider that costs awards should extend to top-ups in the rare cases that such are given.

⁵⁴ See, for example, *Tumai v R* (3 September 1998) unreported, High Court, Gisborne, T18/97, Tompkins J.

Should there continue to be a scale of costs, and if so, how should it be structured? Should preparation costs be provided for in the scale?

80 There was overwhelming support in the submissions for preparation costs to be included in any revised scale. It is clearly unreasonable that the scale should not make allowance for preparation time when both the scales applicable to Crown solicitors and the criminal legal aid scheme do. The Legal Services Board in its submission said:

One of the most costly features of legal services lies within preparation costs.

In civil cases the amount of preparation that can sensibly be put into a case will probably bear some relationship to the value of the property or interest in dispute. Once costs climb to unsustainable levels the cases can sometimes settle.

In criminal cases even some of the less serious cases require significant searches for witnesses, briefing of evidence, reading of prosecution briefs, and time-consuming interlocutory matters involving liberty issues eg, bail.

For many defendants the mere entry of a conviction even for a less serious matter can be such that lengthy preparation is well justifiable. The failure of the prosecution to proceed to a hearing in comparatively “trivial” cases often produces gross injustice unless there is some significant acknowledgement by the court of the amount of preparation time put into the case by the defendant and the adviser. The award of costs also recognises that a form of wrong has been done.

81 It should also be remembered that full preparation is essential not only to justice but also to the efficiency of the courts. Proper preparation is required to ensure that all issues and relevant evidence are before the court, so that a case can be dealt with promptly and unnecessary delays and adjournments avoided.

82 If a scale is to be retained, clearly it should make reasonable allowance for preparation time. If the scale is not retained, it is a matter which can be taken into account in deciding what is a “just and reasonable” sum.

83 Although the existence of a scale seems to provide for consistent awards from one case to another, it has been shown in practice to have two major disadvantages:

- it is not updated regularly enough and consequently the rates are unrealistic; and
- it makes no allowance for the myriad of factors which arise in

individual cases. Although there is provision to exceed the scale in certain circumstances, such a two-step approach does not make for simplicity. Moreover, if the scale is seen as inadequate, there is a strong temptation to strain the law to make a reasonable award of costs in a deserving case, even if that case does not fit the criteria of the jurisdiction to exceed the scale.

84 It is instructive to compare the criminal costs regime with that for civil costs. In the area of civil costs there is an overriding discretion on the court;⁵⁵ and although there is a schedule of costs, the court is free to fix a sum greater or less than the scale. As a result, a considerable body of law has developed in the civil jurisdiction in relation to costs,⁵⁶ and the amounts awarded are flexible. It is likely that if the scale were removed, leaving the provision in section 5(1) that a defendant be paid a sum which is “just and reasonable”, cases would soon establish a tariff. It is envisaged that the Courts would also have regard, where appropriate, to the current legal aid and Crown solicitor rates and the existing principles in relation to civil cases.

85 The High Court civil costs rules have recently been reviewed by the Rules Committee and a new regime enacted,⁵⁷ the central features of which are as follows:

- Costs are to be assessed according to a detailed schedule of the steps in a proceeding, including preparation time. The amounts in the schedule provide for a realistic contribution towards costs.
- There are three categories of proceedings: (1) proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court; (2) proceedings of average complexity requiring counsel of skill and experience considered average in the High Court; (3) proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court. The higher the category, the higher the daily fee rate.
- The schedule is divided into three “bands”: (A) for when the time which is reasonable for a particular step is comparatively small; (B) for when the time which is reasonable for a particular

⁵⁵ Rules 46–53 of the High Court Rules (Judicature Act 1908, Second Schedule) and rr 45–51 of the District Courts Rules (SR 1992/109).

⁵⁶ A short but helpful discussion of the principles is contained in Hon RA McGechan et al, *McGechan on Procedure*, vol 2 High Court Rules, commentary to rule 46.

⁵⁷ High Court Amendment Rules 1999, SR 1999/334, which came into force on 1 January 2000.

step is normal; and (C) for when the time which is reasonable for a particular step is comparatively large. The higher the band, the more time is calculated as being required for that step. Various steps of one proceeding may fall into different bands.

- The court retains the discretion to depart from the schedule, and has the power to award full indemnity costs in appropriate cases.

86 We recommend that there should continue to be a scale of costs for criminal cases, and it should be modelled on the new civil rules. While clearly the trial stages would differ for criminal matters, the structure of categories of proceedings, bands, detailed steps and realistic daily rates are all applicable. Such a structure should provide adequately for preparation costs. The scale also needs to be updated regularly.

The rationale behind the amount awarded to successful defendants

87 The 1966 Committee accepted that there should 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.⁵⁸

The court’s discretion and the scale of costs

88 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 his 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.

89 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” (section 13(3)). If this test is met, the judge may award costs that are just and reasonable without any prescribed maximum. Although some recent awards have been large (see paragraph 54 above), in practice, a total indemnity is

⁵⁸ “Report of Committee on Costs in Criminal Cases”, above n 1, 15–16.

almost never given. It has been held that such an indemnity should only be granted where the proceedings should never have been brought.⁵⁹ It is not entirely clear why this should be so, and certainly there is no statutory basis for such an assumption.

- 90 The current scale sets the maximum level of remuneration at \$226 per half day of the trial. This has not been modified since 1987, and there has been frequent judicial criticism that the scale is unrealistic to cover the actual costs incurred by defendants. In *Bennett v R* 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”.⁶⁰ A more recent example is *R v W*, where Packhurst J awarded above-scale costs and commented that he did:

at the same time join the lament of other Judges concerning the totally unrealistic nature of the regulations as they relate to legal costs.⁶¹

This criticism was strongly and frequently repeated in the submissions on the preliminary paper. As noted in paragraph 54 above, of the recent cases we surveyed for this paper, 18 of 22 successful applications were in excess of scale. When scale costs are so unrealistic, it will be tempting to use section 13(3) even in cases where it may not be totally warranted.

- 91 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.⁶² In some cases, judges have used one or both of these rates as guidelines when awarding costs in excess of the scale.⁶³

⁵⁹ See *Y v R* (21 July 1997) unreported, High Court, Auckland, T281/96, 8.

⁶⁰ (19 June 1996) unreported, High Court, Auckland, T280/95, 7.

⁶¹ (1 March 1999) unreported, High Court, Timaru, T980940, 12.

⁶² Crown Solicitors Regulations 1994 (SR 1994/142) and Legal Services Regulations (SR 1991/293). The Costs in Criminal Cases Committee envisaged that the scale would be in parity with these rates, see Report of Committee on Costs in Criminal Cases, above n 1, 15.

⁶³ For example, *R v Reed* [1980] 1 NZLR 758, 767–768.

**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?**

92 All of the submissions agreed with the first question, but opinion was divided over the second. Some submissions again expressed concern at a “blanket” approach in this area:

To give a yes or no answer to either of these questions would undesirably fetter the Court’s discretion. However, in principle there is no reason why a total indemnity should not be given in cases where the Court concludes that proceedings should never have been brought. To say that a total indemnity was appropriate only in such cases would be undesirable, given the wide variety of circumstances which come before the Courts, although generally speaking, one would expect there to be very few cases where a total indemnity would be appropriate unless the Court had concluded that the proceedings should never have been brought. (The Hon Justice Salmon)

A total indemnity for costs is appropriate in some cases, certainly where there was a conclusion that the proceedings should never have been brought. I should not think, however, that it was appropriate to confine a total indemnity to such cases. There may be other circumstances which would justify such an award. (The Hon Justice Gallen)

93 We note that the civil amendments do contain provision for indemnity in appropriate cases, but do not fetter the court to allow an indemnity only in those situations.

94 In our view, the court should not be bound to give a total indemnity only where proceedings should never have been brought. That is not in accordance with either the letter or the spirit of the Act. However, we do not believe that it is desirable to dictate by statute what other circumstances there may be in which such costs are appropriate. It is a matter which should be left to judicial discretion.

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?

95 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 through a neutral source, namely, the Department for Courts, out of money appropriated by Parliament for the purpose. 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. This provision was recommended by the 1966 Committee because it was concerned that awards of costs would be an expense to the police and thus a source of anxiety and therefore a deterrent to some officers.⁶⁴ The provision highlights the intention that the costs are a payment *to the defendant*, not *against the prosecuting agency*.

- 96 When the prosecution is not conducted by or on behalf of the Crown (as in the case of a private prosecution), costs are paid by the informant.
- 97 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. This provides a means of censuring poor standards or inappropriate behaviour by the prosecuting agencies.
- 98 In the cases we analysed, 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, section 7(2) is rarely applied. In the cases analysed in our preliminary paper, section 7(2) was used in only three out of the 58 cases where costs were awarded. In our updated research, the rate was slightly higher (4 out of 22 successful applications). It is clear, however, from our consultations with prosecuting agencies that they are keenly aware of the possibility of direct awards.
- 99 In one case, the judge did not make an order under section 7(2) but 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.⁶⁵

⁶⁴ “Report of Committee on Costs in Criminal Cases”, above n 1, 12.

⁶⁵ *An application by Gregg* (5 May 1989) unreported, High Court, Hamilton, T22/88, 9–10. We note that the judge in this case has pointed out that s 7(2) was not raised by either party and it was therefore not necessary for him to decide the issue.

- 100 The question is how best to balance the competing interests in this area. The preliminary paper suggested three possible options:
- provide that costs awarded under section 5 of the Act are always to be paid by the particular prosecuting agency;
 - amend section 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; or
 - retain the present system where payments are made out of a central fund but section 7(2) is available where required.

Provision that costs are always to be paid by the particular prosecuting agency

- 101 This 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). There is, however, a real risk that this option could inhibit prosecution agencies in bringing prosecutions. Awards of costs would be seen as a sanction against the prosecutor, rather than a reimbursement to the defendant, which is contrary to the intention of the statute. If there is a presumption that costs will normally be awarded to successful defendants then budgetary considerations could see the threshold of prosecution raised to an unacceptably high level. It is arguably unsafe, in a system where prosecutions are brought in the public interest, to distract a prosecutor from the objective consideration of a case by introducing financial concerns.

Provision that, in cases of negligence or bad faith, the court shall order that costs be paid by the prosecuting agency

- 102 We are concerned that such an absolute rule could give rise to injustice. The existence of section 7(2) provides a useful reminder and incentive to law enforcement agencies and prosecutors to ensure that prosecutions are carried out in a proper way, and it is used in extreme cases. But there are too many potential variations in factual situations to make a blanket rule desirable. There was also concern expressed in the submissions about what evidence would be available to decide whether a prosecution had been brought properly or not, and who should raise the issue.

Retention of the present system

- 103 It appears that the current Act strikes the right balance between:
- the need not to overly inhibit prosecuting agencies, and to emphasise that in most cases costs are a payment to the defendant and not a sanction on the prosecution; and
 - the need to provide a sanction for improper prosecution where that is appropriate.
- 104 It could 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. However, this would not encourage proper performance of the prosecution process, nor provide a means by which to censure prosecuting agencies when proper standards are breached.
- 105 We recommend that section 7 remain unchanged.

If costs should be paid by a central Crown agency, should the Department for Courts remain the responsible agency?

- 106 Once it is accepted that a central Crown agency should be responsible for administering payments, the Department for Courts is the most suitable candidate. It has traditionally administered the payments, and therefore has the required experience. If the task were transferred to another department, or a separate body set up, there would be unnecessary developmental costs incurred. The Department for Courts accepts that it should retain this function, although it noted in its submission:

Although the Department believes it should retain responsibility for those costs awarded [in favour of] a defendant, funding should be appropriated as another expense appropriation rather than an output appropriation as it is not a budget item over which the Department has control. An accurate analysis of the number of times that the Court has awarded costs against the defendant, while at the same time determining that the case involved an important or difficult point of law, would assist in calculating the level of appropriation required.

The payment of costs in criminal cases is not Department for Courts core business and is not a service provided to the Court, but one where the Department reimburses defendants on behalf of prosecuting authorities. Further, the Department has no control over the extent of costs awarded as it does not directly control the prosecuting agencies

on whose behalf costs are paid. Therefore, if the Department was to continue to meet orders made under section 5 of the Act where the prosecution was conducted on behalf of the Crown, the Department would expect to be funded by another expense appropriation.

The Department is currently appropriated funding for the payment of costs in criminal cases in Output Class D3 – Case Processing, Criminal. The amounts payable are determined by the Court. The Department expended \$211 354 on the payment of costs in criminal cases in the financial year to 30 June 1997 and \$108 065 in the financial year to 30 June 1998.

- 107 Accordingly, we recommend that the Department for Courts should remain the responsible agency.

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?

- 108 It is clear that the cost of conducting prosecutions is a major factor for agencies to consider when deciding which cases will be prosecuted. This is true even for departments of state (such as the Department of Labour). For state-funded regulatory agencies (such as the Commerce Commission) or for private prosecutors (such as the Society for the Prevention of Cruelty to Animals) the cost of prosecuting is of even greater significance. The more sensitive the agency is to budgetary pressures, the more clear-cut a case has to be before a prosecution is brought. For example, the Society for the Prevention of Cruelty to Animals advised us that it does not prosecute except in absolutely clear-cut cases because it cannot afford the risk of a costs order being made against it. As a result, many cases that should be prosecuted are not.
- 109 Within the state-funded sector, budgetary considerations are ultimately considerations for the government of the day. However, the courts need to be aware (or, more accurately, be properly made aware) of the fiscal constraints agencies have in discharging their regulatory functions and the inhibiting effect on the agencies of the prospect of an award of costs against them.
- 110 In our view, the Act gives ample scope for addressing this issue. Prosecutions properly brought and properly lost will not attract large

awards of costs. Prosecutions properly brought and properly won should attract awards of costs which recognise the circumstances of both parties.

Should the Act set out criteria, equivalent to those in section 5, for the circumstances in which awards may be made against defendants?

- 111 The Report of the 1966 Committee did not address the issue of when costs should be paid to the prosecution by a defendant, or how the amount of costs should be calculated. Further, the Act does not provide guidelines, equivalent to those in sections 5(2)–5(5), in relation to the circumstances in which costs should be awarded against a defendant. 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 costs awards to defendants. Any costs allowed under section 4 must be specified in the conviction and may be recovered in the same manner as a fine (section 4(4)).
- 112 Traditionally, neither Crown solicitors nor the police have sought costs following a successful prosecution. For the police, this might owe something to the fact that the headings in the Schedule to the Regulations are “Fees Payable to Barristers and Solicitors . . .” However, in one recent case,⁶⁶ an award of \$27 120 costs was made against a self-represented defendant, who had engaged in unacceptable tactics to deliberately prolong to 78 days a trial which should have taken 15 at the most.
- 113 Costs are routinely sought by other government departments and ministries that 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.
- 114 Costs are also sought by prosecuting agencies that 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.
- 115 Any individual may bring a private prosecution and seek costs.

⁶⁶ *R v Keesing (no. 44)* [1999] DCR 357, DCJ Moore.

116 The vast majority of the submissions were in favour of criteria equivalent to section 5(2)–(5). Clearly, the first criterion should be ability to pay, as in a large proportion of cases a defendant will not be in a position to pay any costs at all. There can also be no suggestion that the Legal Services Board should be called upon to pay such costs. To keep the pattern of the statute consistent, and given that the criteria in section 5(2) are factors to be taken into account for both liability and quantum (“in deciding whether to grant costs and the amount of any costs granted”), any criteria for payment by the defendant should be framed in an analogous way. We suggest that the following amendment be enacted:

Section 4A

- (1) 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) The income and assets of the defendant and the reasonable financial needs of the defendant and of any dependent child, dependent spouse or dependent relative of the defendant;
 - (b) Any sentence which has been imposed on the defendant as a consequence of the offence for which the defendant has been convicted;
 - (c) Whether the behaviour of the defendant in relation to the investigation and proceedings was such that it is just and reasonable that he contribute towards the costs of the prosecution.

Should costs be available to the Crown where prosecution has proceeded on indictment? Should costs be available to the Police where prosecution has proceeded summarily?

117 The majority of submissions supported both these propositions and we endorse them. Although we note that, in practice, it will rarely be practical to award costs on an indictable matter, because most persons who are convicted indictably do not have the resources to pay costs (and indeed many are imprisoned as a result of their conviction).

Should costs be paid directly to other government departments or ministries?

118 Section 4 of the Act provides that the Court may order a convicted defendant to pay a sum “towards the costs of the prosecution”.

When the prosecutor is a Crown agency, those costs go directly to a Crown account, not to the individual agency. The prosecuting agencies that we spoke to were strongly of the view that the funding they receive is insufficient to prosecute all meritorious cases. As a consequence, they cannot prosecute many cases that should be prosecuted, meaning that often people can flout the law with impunity. Although agencies can seek costs, some do not do so because they know the costs will be paid to a central fund rather than to their department. Consequently, the agencies would like to be able to receive these costs directly.

119 There are, however, other considerations. In its submission, the Serious Fraud Office stated:

In prosecuting offences the bodies mentioned are executing a public function. Costs should not be available to any of them, unless by exceptions in cases where the defendant has effectively brought about his or her own prosecution by his/her conduct. There is a potential risk of corrupting the prosecution process if a prosecuting agency stood to recover costs in every successful prosecution. This could in turn lead to the Government deciding to reduce the funding to the agency – a bizarre case of “user pays”.

120 It appears to us that the issue is essentially one of state budgetary policy, not law. Accordingly, we do not recommend any change.

Should costs be available to individuals taking private prosecutions?

121 The majority of submissions were in favour of this, and we support the view that there should remain the ability to award such costs in appropriate circumstances. Costs can also be awarded against private prosecutors. *Woodgate v Parker*⁶⁷ is a good example of a case where a District Court costs order was upheld against a particularly unmeritorious (non-professional) private prosecutor.

Should sections 5(e) and 5(f) be amended to remove the narrowing effect of the word *information*?

122 This question arises from the recent Court of Appeal decision of *SG v Moore*.⁶⁸ Moore had been discharged under section 347 of the

⁶⁷ (16 October 1997) High Court, Palmerston North, AP 18/97, Gendall J.

⁶⁸ [2000] 1 NZLR 533.

Crimes Act 1961 a week into his jury trial on charges of cultivating cannabis and possessing cannabis for sale, and awarded \$54 000 costs. The Solicitor-General appealed the order for costs.⁶⁹ The Court of Appeal discussed the argument which had been accepted in the District Court that these subsections could not apply because they both refer to *an information* being dismissed. An information is the document that commences a summary prosecution, but Moore had been charged indictably, and so, it was argued, the subsections could not apply. Although conceding that this is a “strong technical argument”, the Court of Appeal rejected it.⁷⁰

[The] argument gains support from the considerations, mentioned in *R v CD* and *Gillespie*, that “only a Magistrate or Justice sitting as they do without a jury could ever apply the criterion set forth in para (f)”; and that “it is often not possible to deduce the reasons which led a jury to an acquittal”. But it may be possible to deduce those reasons; in the present situation the acquittal follows a hearing and reasoned judgment by a Judge alone without any jury involvement; and Judges alone can now try indictable cases. Next, the particular use of “information” in paras (e) and (f) is perhaps to be explained by the wording of one of the predecessor provisions: Summary Proceedings Act 1957 s 72(2). But much more significant is that the introductory words in subs (2), as well as the broad direction in subs (1), plainly may encompass matters that would have fallen within paras (e) and (f) but for any narrowing effect of the word “information”.

That is to say, it is a mistake to try to force particular circumstances into one of the paragraphs of s 5(2) or to find them excluded from consideration if they are in any event properly relevant to the exercise of the power; see, eg, Tipping J in *R v T* at 218 and the valuable reminder of Hardie Boys in *R v Margaritis* (Christchurch T66/88, 14 July 1989) who, after referring to matters set out in s 5, said that

All this really means [is] that the Court is to do what it thinks right in the particular case.

- 123 While the 1966 Report and the draft legislation contained in it suggest that the use of the word *information* was deliberate,⁷¹ at that time indictable trials could not be tried summarily, as they can

⁶⁹ This was the first time that the Crown has exercised the right of appeal against District Court costs orders conferred on it by ss 115 and 115DA of the Summary Proceedings Act 1957 (see para 5 above).

⁷⁰ *SG v Moore*, above n 68, 543–544.

⁷¹ The Report contains draft legislation which, with a few changes, became s 5(a)–(g). In paras (a), (b), and (c), where now the word *prosecution* is, the Committee’s draft was *informant*. Paragraphs (e) and (f) are unchanged (except that in the draft they were the other way round).

today. Moreover, the Committee clearly envisaged that the principles they set out would apply to both modes of trial:

The wording of the various formulae we have suggested in this report will fit most closely the case of summary proceedings in the Magistrate's Courts. We regard the principles they embody as equally valid for Supreme Court trials and for the preliminary hearing charges that may proceed on indictment, but the language may require adaptation.

- 124 We respectfully agree with the Court of Appeal's point that the introductory words in section 5(2), as well as the broad direction in section 5(1), plainly may encompass matters that would have fallen within paras (e) and (f) but for any narrowing effect of the word *information*. Ideally, the statute should be amended to make this point absolutely clear. While we would not recommend such an amendment if no other amendments were being made, if the amendments that we have proposed in paragraphs 61, 75, 86, and 116 above are accepted, such an amendment could be included in the amending bill. In the meantime, as the position has now been clearly stated by the Court of Appeal, it is unlikely to cause practical difficulty.
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APPENDIX A

List of submitters

- A1 Responses to our issues paper of November 1997 were received from:
- several members of the District Court and High Court judiciary;
 - the Serious Fraud Office;
 - the Department of Conservation;
 - the Commerce Commission;
 - the Legal Services Board;
 - the Department for Courts;
 - the Crown Law Office; and
 - the Criminal Law Committee of the New Zealand Law Society.
- A2 Further discussions were also held with the Legal Services Board, the Serious Fraud Office, the Department of Conservation, the Commerce Commission, the Department of Labour, and the Society for the Prevention of Cruelty to Animals.
- A3 We are grateful for this assistance which has greatly helped us in reaching the conclusions in this report.
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APPENDIX B

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 [or Community Magistrate] 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.
