

SIXTH REPORT

of THE NORTHERN TERRITORY LAW REVIEW COMMITTEE

to

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY

REFERENCE FROM THE HON. P.A.E. EVERINGHAM
CONCERNING ESTABLISHMENT OF A SUITORS' COSTS FUND

DARWIN
MAY 1981

MEMBERS OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE:

The Honourable Mr Justice J.L. Toohey (Chairman),
the Honourable Mr Justice J.H. Muirhead,
Mr B. Martin, Solicitor-General, Mr G. Galvin, S.M.,
Messrs. T. Coulehan, J. Dorling, D. Mildren,
A.R. Miller, A. Oakey, J. Reeves and T. Riley.

REPORT OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE -
RELATING TO SUITORS COSTS FUND

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Sir,

The Northern Territory Law Review Committee having enquired into the matters referred to it by you on 19 March 1980 (a copy of which reference appears at Annexure (1) REPORTS as follows:

1. THE DESIRABILITY OF ESTABLISHING A SUITORS COSTS FUND

It was concluded that it was highly desirable to establish a provision for the granting of financial assistance to litigants in circumstances which largely parallel the Sutors Funds in the various Australian states. The Committee noted that its specific reference was limited to circumstances arising from errors of law made by some judicial forum arising from the novelty or uncertainty of laws in force in the Territory.

1.2 Upon considerable enquiry and deliberation, the Committee felt that it could report more objectively by referring through its report to certain other matters outside the specific terms of the reference, as it was empowered to do pursuant to general clause 8 of the reference.

1.3 The Committee is of the opinion that suitors should be granted assistance not only in circumstances arising from an error of law made by a court or tribunal as a result of the novelty or uncertainty of laws in force in the Territory, but in respect of any circumstance where costs are thrown away by a party or parties to an action or proceeding, due to circumstances which are not the fault of any party or of their counsel.

1.4 In this respect the Committee felt that the Suitors Fund Act of New South Wales was to a degree an ideal model to follow in respect of the circumstances in which a claim could be made by a party.

2. Without exhaustively enumerating each ground set out in that Act, the basic grounds which the Committee proposes should be adopted by the Territory from that Act when adapted to the circumstances prevailing in the Territory are as follows:-

(a) Where an appeal from a decision of a court or tribunal acting judicially, taken to;

(i) The Supreme Court;

(ii) The Federal Court from the Supreme Court;

(iii) The High Court of Australia from the Federal Court;

succeeds on a point of law.

(b) (i) Where any civil or criminal proceedings in any court are rendered abortive by reason of the death or protracted illness of a judge, magistrate or justice before whom the proceedings were held.

(ii) Where an appeal on a question of law is upheld in respect of a person convicted on indictment and a new trial is ordered.

(iii) Where in any criminal proceedings the proceedings were discontinued and a new trial, ordered for a reason not attributable in any way to disagreement on the part of the jury or to any act, neglect or default of the accused or his counsel or attorney.

In addition to the above provisions which essentially follow the New South Wales provisions, it was also felt that assistance should be available in the following circumstances -

(c) Where a proposed settlement out of court on behalf of an infant is not sanctioned by a judge or by the court and the infant is subsequently given judgment for a lesser sum.

(d) In some circumstances where a declaration is sought and obtained from a court or judge on a question of public importance in relation to a law in force in the Northern Territory.

2.2 The Committee concluded that such provisions were desirable on the basis that all the other Australian States had Acts for the purposes of providing assistance, generally similar to that provided by the New South Wales Act. These provisions were clearly being regularly resorted to.

3. THE MEANS BY WHICH A SUITORS COSTS FUND MIGHT BE ESTABLISHED

The relevant provisions should be established by statute. It will be noted that the various states have in most cases established a specific fund which is financed by and large, from the filing fees on initiating court process.

3.2 The expenditure involved is currently approximately \$120,000.00 per annum in New South Wales and \$274,000.00 per annum in Victoria.

3.3 It is however difficult to apply these or any other figures from the Australian states to the Northern Territory, for they cannot simply be related or applied on the basis of the comparative populations. Suffice it to say, that it is not envisaged that the quantum likely to be claimed in the Territory would be anything like the funds expended in New South Wales and Victoria.

3.4 There are no provisions in the Northern Territory for the collection of any fees on the issue or filing of court process. To establish and maintain such a scheme would be an expensive and at times inconvenient exercise and the Committee does not presently recommend one, although it may well be appropriate to do so at some stage in the future. New South Wales has however found itself in a most embarrassing position in respect of its allocation of fees to the fund as the fund now has a surplus exceeding \$1,000,000.00 and this surplus is growing steadily. In the Territory it would be difficult to assess the likely total of claims at this stage and hence if it was to be funded by court fees, it would be likewise difficult to determine an appropriate amount which should be levied on court process.

3.5 In addition the Committee is reluctant to recommend such a fee when to do so may involve an increase in staff to administer collection.

3.6 These and a number of other reasons have led the Committee to believe that initially at least, claims should be met directly from the consolidated Territory Revenue.

3.7 After a trial period of perhaps 18 to 24 months however, this aspect of funding could be reviewed in the light of experience.

3.8 It is suggested that the payments be made by the Treasurer in pursuance of a Certificate granted by a Judge, Magistrate or Justice presiding in the subject proceedings, in respect of costs which have either been awarded directly by that presiding officer, or which have been subsequently taxed by the Master of the Supreme Court in respect of proceedings in the Higher Courts, or by the Clerk of the Court of Summary Jurisdiction or Local Court in appropriate cases. In the case of proceedings rendered abortive by death or protracted illness the Master shall be empowered to grant such a Certificate.

4. THE COURTS AND OTHER JUDICIAL BODIES TO WHICH THE FUND MIGHT APPLY

The Committee feels that the provisions should apply to all courts having jurisdiction in respect of the Northern Territory, in both the civil and criminal jurisdictions, including the Federal and High Courts until appropriate funds are established in respect of those Courts. The Committee feels that the provisions should not apply to tribunals, commissions and the like, on the basis that any important questions of law which are determined by such tribunals or commissions and which are contentious, are likely to be ultimately taken to the courts for final resolution. The Committee does feel however in respect of appeals on questions of law, the provisions should not apply to matters arising from the operation of Commonwealth Laws per se, except perhaps in criminal matters, but that the provisions should be restricted to the operations of Territory laws and to other laws only in respect of their peculiar application to the Territory. The Committee is of the view that any general issues arising from the operation of Commonwealth Laws, whereby parties are put to expense and inconvenience, should be met by the Commonwealth.

5. APPROPRIATE GUIDELINES FOR THE GRANTING OF ASSISTANCE FROM A FUND

The Committee refers to its comments in section 3 above and suggests that relief be made available to both private individuals and corporations- (subject to the matters referred to in paragraph 5.3 herein) to the extent that they are not in fact funded by legal assistance pursuant to the operations of a statute. In this respect the word funded should be construed so as to not include mere advances made to such persons which have to be subsequently repaid to the funding body by an assisted person.

5.2 Limitations on amounts payable from such a fund - It was considered that the maximum amounts to be available to any party should be as follows in respect of the

following courts:-

\$1,500.00 - Local Court or Court of Summary Jurisdiction
\$3,000.00 - Supreme Court
\$5,000.00 - Federal or High Court

These may be low maximum amounts in some circumstances but are recommended for an initial trial period only.

It is to be noted however that \$5,000.00 is the aggregate limit available to all parties to any appeal or series of appeals in respect of which the fund applies, in the most recent Australian Legislation in this field, the South Australian Appeal Costs Fund Act of 1979.

5.3 The availability of assistance to corporations - the provisions should be available to corporations which are not statutory corporations and which with their subsidiaries have a paid up capital not exceeding \$100,000.00. This is only half of the usual accepted limit of "means".

5.4 Applicability to the Crown - The provisions should be applicable against the Crown but could not be used to benefit the Crown whilst they are funded directly from the Treasury. During any initial period of operation however statistics should be maintained of the potential claims of the Crown in the light of the possible extension of the provisions to the Crown as a claimant thereunder. It should however be added that the Crown is presently excluded from entitlement under the relevant Acts of all the Australian States.

6. OTHER RELATED MATTERS

This Act should be considered in the light of legislation for the payment of costs in criminal cases which is recommended by this Committee in a separate report.

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In the making of the report the Committee has taken the following into account:-

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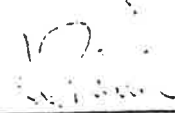
- (i) The provisions which prevail in the other Australian states in respect of the matters considered above

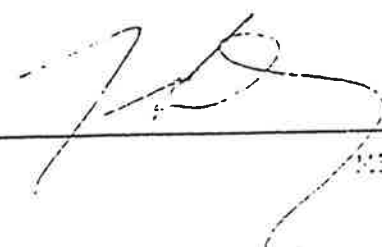
Attached to this report is a brief summary of the provisions which prevail in the Australian states. It is to be noted that there are currently no parallel provisions in the Australian Capital Territory but the Committee understands that the A.C.T. is presently considering adopting legislation modelled on the New South Wales Act.

- (ii) The likely cost to the Territory

As discussed in section 3 above, it is difficult to estimate the quantum of the likely annual payment that would result from the introduction of the recommended provisions in the Territory. The Committee however feels that the initial annual figure is unlikely to exceed about \$50,000.00 and that it may well be closer to half that amount.


CHAIRMAN

10.

EXECUTIVE OFFICER


MEMBER

SEVENTH REPORT

OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE

TO

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY

RELATING TO DEFENDANTS' COSTS IN SUMMARY PROCEEDINGS

DEWIL

MAY 1951

MEMBERS OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE:

The Honourable Mr Justice J.L. Toohy (Chairman),
the Honourable Mr Justice J.H. Muirhead,
Mr B. Martin (Solicitor-General), Mr G. Galvin, S.M.
Messrs T. Coulehan, J. Dorling, D. Mildren,
A.R. Miller, A. Oakey, J. Reeves and T. Riley.

REPORT AND RECOMMENDATION OF THE NORTHERN TERRITORY LAW
REVIEW COMMITTEE - RELATING TO DEFENDANTS COSTS IN
SUMMARY PROCEEDINGS

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Sir,

This Committee has examined the existing laws of the Territory and concluded it should report to you that it has found a need for legislation to provide for the payment of costs to defendants in certain criminal cases.

1. Such costs may in some circumstances be paid under existing law, but there is a need to clarify and codify the position and an Act to deal with costs in criminal proceedings is required. An important problem this Act can eliminate, is the present position whereby a defendant who obtains costs against a public officer who conducts a prosecution on behalf of the Crown or a municipality, may levy execution against that officer personally. This is a highly undesirable situation, even if in practice it is unlikely to arise.
2. The appropriate Territory enactment should, we suggest, contain provisions as set out hereafter; these reflect, in the main, provisions drawn from Tasmanian and Western Australian legislation.
3. The Act should bind the Crown, its instrumentalities and certain statutory authorities including municipalities.
4. Costs recoverable under the provisions of the Act should not include expenses incurred by the Territory, Commonwealth or by a legal aid organisation on behalf of

the defendant to the extent that they are not payable or repayable by the defendant, save where the court determines there are special circumstances justifying payment.

5. The proceedings to be covered by the Act shall be proceedings in any "court" as defined by the Interpretation Act.
6. The legislation should apply to criminal proceedings brought by a public officer against a defendant - the term "public officer" to be defined to include a Minister of the Crown, a person employed in the Public Service of the Territory, Crown Prosecutor, for the Territory, member of the Police Force of the Territory, a legal practitioner acting as solicitor or counsel as or for the Crown Prosecutor, a Probation Officer or an officer employed by a statutory authority, the latter to include a municipality within the meaning of the Local Government Act.
7. Where an accused person has been forced to incur legal costs in order to defend himself against an indictable offence in the Supreme Court, the Act should provide for the payment of his costs.
8. Payment in these cases should be limited to situations where the accused has been acquitted or the prosecution obtains leave to withdraw or enters a nolle prosequi.
9. The Western Australian Law Reform Commission's published report recommends that in the cases mentioned in paragraphs 7 and 8 costs should be paid. With the exception of a nolle prosequi entered, Tasmanian legislation provides for payment of such costs. English, New Zealand and New South Wales legislation is limited to payment where the accused is acquitted.

10. Other states have not followed Tasmania's lead. The Committee recommends that the Territory should do so as the burden of expense upon accused in criminal trials is at least as great, usually greater, than upon defendants in summary proceedings.
11. The legislation should, therefore, provide that the Court, shall, except for good reason to the contrary, grant to the defendant a certificate of costs under the Act in circumstances where:-
- a) he is acquitted of an offence or a nolle prosequi is entered;
 - b) the complaint charging him with the offence is dismissed or withdrawn; or
 - c) he is discharged upon an indictment for the offence.

All summary and indictable offences should be encompassed by the legislation.

12. The Court should be further empowered to adjourn to Chambers any question (in respect of the granting of a certificate under the legislation, or) concerning the amount thereof, to enable the making of submissions and the tendering of evidence, including affidavit evidence, on the question.
13. The legislation should specifically preclude a defendant who obtains a certificate of costs from recovering those costs by execution against the prosecutor personally where it is a public officer.
14. In the case of a prosecution by a public officer, a certificate of costs granted to a defendant should specify:-
- a) in the case of a prosecution brought by a public officer other than one who is employed by or acts as an agent for a municipality or any other statutory body, that on production of the

certificate to the Treasurer, the defendant should be paid the costs specified therein out of Consolidated Revenue.

b) in the case of a prosecution brought by a public officer who is employed by or acts as an agent for a municipality or any other statutory body, costs should be awarded against that body (where appropriate) and recoverable against it as a civil debt.

15. Because for the purposes of the proposed legislation a public officer of the Commonwealth will be in the same position as a private individual (the Territory being unable by its legislation to bind the Commonwealth) this residual anomaly should be brought to the attention of the Commonwealth authorities concerned.
16. The quantum of costs specified in any certificate is to be in the discretion of the court with no upper or lower limits to be prescribed.
17. The courts should be given a further power to grant a certificate of costs where the defendant is convicted but the court is of the opinion that the charge involved a difficult or important point of law or issue of fact and that special circumstances prevail whereby he should recover costs in respect of arguing that issue.
18. The usual general power for the Administrator to make regulations under the legislation should be included, and it should be drawn in the light of any proposed Suitor's Cost Fund Act, and of course any other legislation, existing or in train, touching the matter.

19. The need for legislation as summarised above is commended for your consideration.

Chairman

Executive Member

Member

A BILL

FOR

AN ACT

To provide for the payment of costs to Defendants in criminal cases; to amend the Justices Act and for incidental purposes. Be it ordained by the Legislative Assembly for the Northern Territory of Australia as follows:-

PART I

PRELIMINARY

1. This Act may be cited as the Defendants Costs Act.
2. This Act shall commence upon a day to be appointed by the Administrator by notice in the Gazette.
3. (1) This Act does not apply in respect of proceedings instituted, or appeals lodged, before its commencement.
(2) This Act binds the Crown.
4. In this Act, unless the contrary intention appears -
"costs" means expenses properly incurred by a defendant but does not include any expenses incurred by the Territory, Commonwealth, or any other body by way of legal aid to the defendant;
"Court" means a court of summary jurisdiction;
"defendant" means any person charged with an offence;
"public officer" means any person employed in any capacity in the public service of the Territory and includes:-
 - (a) a police officer;
 - (b) a probation officer; and
 - (c) an officer employed by a Statutory Authority;"Statutory Authority" means any person or body of persons, whether corporate or unincorporate, constituted or established by or under any Act, to administer or control any department, business, or undertaking on behalf of the Territory, and includes a municipality within the meaning of the Local Government Act.

5. (1) Subject to this Act, where a person having been charged by a public officer with an offence is discharged totally or in part from the proceedings in respect thereof, that is to say, where:-
- (a) he is acquitted of an offence;
 - (b) the complaint charging him with the offence is dismissed or withdrawn; or
 - (c) he is discharged upon an indictment for the offence, the Court may subject to this:-
Act in relation to these proceedings or part thereof grant to that defendant a certificate of costs under this Act.
6. The Court may adjourn to Chambers any question in respect of the granting of a certificate under this Act, or the amount thereof, to enable the making of submissions and the tendering of evidence, including affidavit evidence, on that question.
7. Where costs are ordered under this Act:-
- (a) if the public officer a party to the proceedings is a Minister of the Crown, a person employed in the Public Service of the Territory, a member of a Police Force, or any other person acting as Agent of or under the instructions of such a person, the Clerk or Registrar, as the case requires, of the Court shall give to the defendant a certificate signed by the Clerk or sealed with the Seal of the Court, as the case requires, showing the amount of the costs ordered, and on production of the certificate to the Treasurer, the defendant shall be paid such costs out of Consolidated Revenue; or
 - (b) if the public officer a party to the proceedings is a person employed by a municipality within the meaning of the Local Government Act, or by any other statutory body, or is any other person acting as Agent of or under the instructions of such a person or body, the costs shall be ordered against that body and shall be paid by it to the defendant and shall be recoverable as a civil debt.

8. The amount specified in any certificate under this Act other than Court fees, shall be in the discretion of the Court.
9. Where a defendant is convicted but the court is of the opinion that the charge involved a difficult or important point of law or on an issue of fact 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 or issue of fact the court may order that he be granted a certificate under this Act on such terms as it thinks just and reasonable.
10. The Administrator may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for the carrying out of or the giving of effect to this Act.