



29 June 2011

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The Honourable Stephen Wade MLC  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Mr Shadow Attorney-General

***Statutes Amendment (Budget 2011) Bill 2011 – Part 5, Summary Procedure Act 1921***

As you are aware, the Government has introduced the *Statutes Amendment (Budget 2011) Bill 2011*. It has passed through the House of Assembly and I understand that it will be debated in the Legislative Council during the week of 4 July 2011. The Society strongly believes that that part of the Bill (Part 5) that seeks to amend the *Summary Procedure Act 1921* should be excised from the Bill and should be opposed. A copy of our media release of 16 June 2011 is attached for your reference. I note from subsequent publicity that the Society is not alone in advocating this position.

The proposed amendments seek to severely restrict the current discretion in a Magistrate to award costs in favour of a successful defendant in a police prosecution. The Government has sought to justify the proposed amendment on a number of grounds including that it is appropriate to bring the practice in the Magistrates Court into line with the superior courts. Why then are the proposed amendments limited to police prosecutions? It does not include criminal proceedings prosecuted by the Crown; the Director of Public Prosecutions; any other instrumentality, agency or servant of the Crown; any Local Government Authority or any private individual. The Bill is purely designed to accommodate police prosecutions prosecuted by a police officer and as such any arguments in its favour relating to practices in other jurisdictions are without merit.

There is a long historical and proper rationale as to why summary proceedings should attract orders for costs. That is the price that the State must pay for the purposes of summary proceedings. That is the price that the State has had to accommodate for the purposes of sacrificing a person's right to trial by jury. That is the price that the State must accommodate for the purposes of having summary disposition of matters in the Magistrates Court. It is the summary nature of proceedings which are cost effective, summary in nature, not liable to the dictates, practices and procedures of the superior court whether as to the conduct of the trial, the conduct of pre-trial matters and appeal rights. It is fundamental to justice and the rights of an individual to have their opportunity to go to court and to obtain an order for costs. That is what exists in this State and has existed for many years.

If the proposed amendments were passed there is a very real risk that persons will be unable to afford to seek representation to defend police prosecutions. The Chief Justice has previously commented on the cost to the judicial system of unrepresented litigants. This amendment has the potential to clog up the Magistrates Court and significantly hamper the delivery of cost effective justice. Cases involving unrepresented litigants invariably take longer.

The proposed amendments will have an impact on the Legal Services Commission, Community Legal Centres and similar organisations who provide representation on limited budgets. The inability to recover some of the costs incurred will have a negative impact on the already strained financial resources of these organisations which in turn will curtail their ability to provide representation for those in need.

The proposed amendments have not been costed and are likely to impact adversely to a far greater extent than the \$1.6M estimated annual saving.

It is proposed that the discretion only be exercised in certain situations and examples are provided in section 189A(2). In respect of these we comment as follows –

- **Whether the prosecution of the offence was conducted in good faith (s189A(2)(a))**

The requirement that a successful defendant establish that the prosecution was not conducted in good faith is almost impossible to achieve. Generally it would be assumed that the prosecution is conducted in good faith. There may be rare cases where it is not so conducted. How does the defendant establish what is in the mind of the prosecuting authority?

- **Whether there was a failure to take appropriate steps to investigate a matter coming to or within the knowledge of the prosecution (s189A(2)(b))**

The question of investigation is not for the prosecution but rather for investigating police. They may be assisted in that respect at some point after a prosecution is initiated. They may not be assisted. Matters may come to the knowledge of the prosecution as a result of all sorts of developments in the course of the prosecution but not be communicated to the investigating officer. This entire concept is simply incapable of meaning and content. What could ever constitute a failure to take appropriate steps to investigate the matter? The question of how, the extent, whether or not, or how well a matter is investigated may well be dependent on all sorts of issues unknown to any objective assessment and impossible of assessment by a court in the context of an application for costs.

- **Whether the investigation into the offence was conducted in an appropriate way (s189A(2)(c))**

This is a fanciful provision because it would require an investigation of the investigation which would require a trial within a trial. This is incapable of assessment. It is tantamount to requiring proof of a criminal act or non compliance with the police Code of Conduct in the Police Act Regulations. This is not the purpose behind prosecutions and cost orders being determined and assessed. These provisions and this type of circumstance will impose unreasonable, complex and disproportionately expensive burdens upon the court and a successful defendant to engage upon this issue.

- **Whether the order for dismissal was made on "technical grounds"(s189A(2)(d))**

It is unclear why this should matter. The breadth of this concept is unknown and not capable of definition. This criteria, again, has an arbitrary and incoherent content. It does not bear any relationship to the basis upon which costs are to be assessed and considered to be awarded. If a prosecution is dismissed on technical grounds then the prosecution should never have been brought.

- **Whether the defendant brought suspicion on himself/herself by conduct engaged in after the events constituting the commission of the offence (s189A(2)(e))**

It is not possible to discern what instance this could apply to. If a person has brought suspicion on themselves by engaging in conduct after the alleged commission of an offence then what difference does it make? If it is an unsuccessful prosecution then the conduct amounting to after the event suspicion obviously had no conclusive probative value.

- **Whether a defendant unreasonably declined an opportunity before a charge was laid to explain the defendant's version of events or produce evidence likely to exonerate the defendant and such explanation or evidence could have avoided the prosecution (s189A(2)(f))**

This is an abrogation of an accused's fundamental right to silence. It is difficult to know when this could arise. It may well be used on the basis that a person exercises their ordinary rights upon being cautioned, arrested and interrogated.

- **Whether the defendant conducted the defence in a way that prolonged the proceedings unreasonably (s189A(2)(g))**

This is already a factor that is used in the exercise of the court's discretion. The reverse of this is that the prosecution can conduct a prosecution such as to prolong proceedings unreasonably for all sorts of reasons and not be liable to sanction. Where is the justice in this?

- **Whether there was an acquittal on one charge but a conviction on another (s189A(2)(h))**

This is a circumstance that is currently taken into account in the exercise of the court's discretion. A person's conviction on a charge should not affect whether they obtain an order for costs to the extent to which they were successful by obtaining an acquittal. The introduction of the concept of a defendant being "acquitted" is different to the criteria in section 189A(1)(a) and (b) concerning dismissal and withdrawal.

The attempt to preserve some discretion in s189A(2)(a)-(h) does not in reality provide any realistic prospect of any costs order in favour of a successful defendant. This is mere window dressing in an attempt to water down the injustice that the proposed amendments create.

The proposed amendments will have the effect of removing the accountability and propriety by which police prosecutions are to be conducted. Without cost sanctions there are no external measures in place to ensure that this accountability remains. I have received comments from members to the effect that the only sanction to ensure that police prosecutions fulfils its functions are the costs orders from time to time made by Magistrates to compensate for delay and lack of preparation.

The Society was not consulted on these proposed amendments and as you will note from the above they seek to effect a fundamental change to a defendant's position. What is the origin of this proposal and why was there no consultation? A self-serving cynical response may well be that the authors of this proposal realised how unacceptable, repugnant and unpalatable it is. This is not a "budget measure" and it should be defeated.

I have written to each of the Independent Members in the Legislative Council in identical terms. As you know, I am happy to discuss the Society's position with you any time should you wish to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ralph Bönig', written in a cursive style.

Ralph Bönig  
**PRESIDENT**