

## Legislative Council

Wednesday, 6 July 2011, Page 3325

### STATUTES AMENDMENT (BUDGET 2011) BILL

**The Hon. A. BRESSINGTON** (11:42):

While there is much to be said of this year's budget, and more broadly of the priorities of this government, I shall save that for another time. Instead, I rise today to add my objections to the reforms of costs orders in criminal proceedings and the Magistrates Court as proposed in the Statutes Amendment (Budget 2011) Bill.

Surely I have seen since my time in here this government try to get away with some pretty dodgy legislation, but in my mind this one takes the cake, because it has been done in a sneaky and arrogant manner. It just shows a government that has little or no respect for the justice system, for the law in general or for the people who elected them.

As has been outlined, the government seeks to remove the magistrate's discretion to award costs to a defendant who has successfully defended charges against them. Currently, the Summary Procedure Act 1921 enables magistrates to award costs as they think fit. Subject to consideration of incompetence or negligence of a defendant's legal practitioner or prosecutor, or the obstruction by a party or witness to proceedings, proposed section 189A, however, will see a magistrate restricted to awarding costs to a defendant only where it is proper to do so.

What is 'proper' is guided by section 189A(2), which details eight scenarios to which a magistrate must have regard, three and arguably four of which relate to the incompetence of the prosecution. As the President of the Law Society of South Australia has submitted, many of the scenarios, even if they have occurred, will be difficult to demonstrate, and in some cases will necessitate a trial within a trial.

Further, one such scenario is where a defendant is unreasonably declined an opportunity before a charge was laid to explain the defendant's version of events; that is, they have exercised their right to silence, a fundamental cornerstone of our criminal justice system and a right they are informed of on being cautioned when arrested. Will the caution not be amended to inform the accused that if they do exercise their right to silence then, they may not be awarded costs if successful in court?

The restriction on the awarding of costs where it is proper, particularly with regard to these scenarios, will, by intent, severely restrict the number of cases in which costs are awarded. As the Law Society submitted:

...the attempt to preserve some discretion in s 189A(2)(a)-(h) does not in reality provide any realistic prospect of any costs order in favour of a successful defendant .

Adding that, as the Hon. Stephen Wade quoted, section 189A(2) is 'merely window-dressing in an attempt to water down the injustice that the proposed amendments create'.

The effect of this will be to restrict the ability of people accused of a summary offence from accessing the court to defend themselves. Access to justice has long been a concern of mine and it is disappointing that we find ourselves debating a measure that will see our constituents, particularly those for whom the budget is tight, less likely to be able to defend themselves. Let us not forget that we can all be accused of a crime and it is to the courts that the innocent look to defend themselves.

An unintended consequence of the proposal is the impact it will have on community legal centres and the Legal Services Commission that currently provide representation on limited budgets. The inability to recover costs where they have successfully defended a client will mean that that additional source of revenue will no longer be available to assist other people who would otherwise be unable to procure legal representation.

The Treasurer, presumably revealing that the Legal Services Commission had not been consulted on the bill, attempted to argue that legal aid lawyers do not, as a rule, pursue costs in the Magistrates Court. Having spoken to the Legal Services Commission, I can inform the Treasurer that the commission, and lawyers acting on its behalf, vigorously pursue costs.

Another unintended consequence is that the bill removes a disincentive from proceeding with improper prosecution. The awarding of costs is not itself compensation for improperly brought prosecutions, given that prosecutions fail for a variety of reasons, not simply because an innocent person is in the dock—a crucial witness may withdraw their support, for example. However, the potential imposition of costs does act as a deterrent to police from proceeding with doubtful or dubious charges. This, with this amendment to this section of this bill, will no longer be the case

As has been raised previously, this will also have the effect of acting as a further deterrent to a person challenging what they believe to be a wrong or unjust expiation notice. While other members have raised examples of motorists wrongly accused of speeding, I would like to raise an example of a constituent who was given an expiation notice after being pulled over by the police for driving without a numberplate.

This young woman went to her car late at night after finishing a late night shift and had no idea that she was missing her rear numberplate and (short of the two screws holding it in place coming loose simultaneously and the numberplate falling off) is convinced that it had been stolen the night before. The two police officers who, realising she was the victim of a crime, could have exercised their discretion and focused on the theft of her numberplate whilst also informing the woman on how to have it replaced, instead wrote her up for a \$577 fine. Clearly they were yet to reach their quota for the day.

This woman is yet to take legal advice on how best to proceed, but if she does elect to challenge the expiation notice, under this bill, even if she is successful, she will still face the financial penalty of her legal and associated court costs, a sum likely to far exceed the original fine. I remind members that she is a victim of a crime. The person who brought this to my attention was a retired police officer and he was absolutely disgusted with the conduct of police in this matter. There was no intent by this young person to drive without a numberplate. She had obviously no idea why she was pulled over, yet slapped with a \$577 fine.

To impose a financial penalty on an individual when they have been found not guilty of an offence is plainly unjust. That the government would consider doing so when they only stand to supposedly save \$1.6 million per year for the police is an indictment of the Labor Party, its values and its lack of concern for justice for the people of this state. I say 'supposedly save \$1.6 million', for I am at a loss as to how this figure has been calculated.

As was made clear in another place by the Treasurer, the total value of costs being awarded in the Magistrates Court against the police has been steadily increasing. On the figures provided, this is seemingly due to an increase in the percentage of cases in which costs are awarded, but primarily due to the increase in the amount awarded, a reflection on the broader increases in the cost of legal representation.

Given that the total amount awarded each year has been increasing, how the government can suggest that it will save the police a stable figure is beyond me. Further, if it is as the Law Society suggests, that very few defendants will be awarded costs if this bill passes as it stands, then how did the government reach the conclusion of \$1.6 million and not the near \$3 million awarded last financial year?

I pose these as questions, but I believe the answer was inadvertently given by the Treasurer himself in another place, who revealed during the committee stage that the figure is calculated on the total amount awarded against the police in the 2008-09 financial year. Answering a subsequent question by the member for Davenport about the average cost of each file, the Treasurer stated:

In 2008-09, there were 755 files. In 1.06 per cent of files, costs were awarded against police. It came to a total of \$1,660,351 and the average cost per file was \$2,199.

So the projected saving of \$1.6 million is based on the 2008-09 financial year in which just over \$1.6 million was awarded against police. So members are clear, this is a clear confirmation of the Law Society's position that few if any defendants will be awarded costs and that the attempt at preserving some discretion is mere window dressing.

One final point I seek to make relates to the debate about whether this is a money bill or not. In my opinion, it is frankly irrelevant. While such considerations may be of importance in another place, here in the Legislative Council, the house of review, the issue should simply be whether or not it will be good law. This, I note, is the position of the assistant commissioner Tony Harrison who, in an attempt to distance SA Police from responsibility for this so-called reform, in an interview with *Today Tonight* stated:

This is a piece of legislation before parliament and it is really up to the parliament now to determine if that legislation gets passed or not.

The point to be made in relation to this, however, is that the government sought to fundamentally undermine access to justice without consultation or public debate by inserting it in the budget bill and using its money bill status as cover. No doubt the government assumed that the Liberal opposition would raise its objections but, on the premise that it is a money bill, allow its passage. I am ashamed that the government would attempt this, and I commend the opposition and the crossbenchers for proving them wrong and not allowing this abuse of power to eventuate.

I have one more line here from an email that I received today from a constituent that I believe is quite pertinent to this particular debate. The closing line is: 'When injustice becomes law then it is time to fight the law'. Thank you.