

Payment of Witnesses in Civil Proceedings

Terms of Reference

In 1986, the Commission was asked to consider and report on the law and practice relating to the payment of compensation in respect of persons who appear, or who are required or undertake to appear, as witnesses in, or who are required or undertake to produce any document or thing in, a civil or other legal proceeding but excluding criminal proceedings.

Background of Reference

The Commission was originally invited to investigate the situation that arises when state public servants are called to give evidence. Because public servants are paid by their employer while attending court, they do not receive an allowance from a party to the proceedings. Consequently, state government departments or agencies bear the cost of this aspect of the proceedings rather than the party that calls the witness. A similar problem arises with private employers who pay their staff when they attend a hearing.

Comments were invited and received from a number of individuals and organisations, both on these issues and any difficulties that had been encountered in practice. The terms of reference were drafted in response to these comments, which indicated that a wider inquiry was justified. The Commission was also concerned that the law in Western Australia relating to the payment of witnesses in civil proceedings lacked uniformity across the courts.

The Commission issued a discussion paper in 1988. The paper proposed the creation of a statutory entitlement to compensation for loss of time or expenses incurred in attending as a witness or in producing a document, record or object for a court. It also discussed reimbursement of employers for salaries paid to employees attending civil proceedings as a witness.

Nature and Extent of Consultation

The discussion paper was widely distributed amongst interested groups and the general public. The paper attracted submissions from a range of persons and organisations including a number of government departments, professional organisations, a District Court judge, the Chief Stipendiary Magistrate and the Registrar of the District Court.

The Commission also surveyed government departments that had commented on the discussion paper. It concluded that very few of the agencies surveyed considered that the absence of employees due to court attendance was a problem either in terms of working hours lost or in lack of compensation for lost working hours. The Commission's final report was delivered in July 1989.¹

No Action Recommended

The report discussed the common law origins of present-day rules relating to the payment of witness fees. The Commission suggested that the justification for change to the existing law hinge on three propositions:

- That the amount should be a realistic compensation for losses and expenses incurred, not a nominal sum.
- That employers, including government departments, should be entitled to compensation because they incur a loss.
- That legislation should be generally applicable to all courts and tribunals and not on a case-by-case basis depending on the particular court or tribunal.

¹ Law Reform Commission of Western Australia, *Payment of Witnesses in Civil Proceedings*, Project No 83 (1989).

After considering the desirability of changing the law, the Commission concluded that to do so might exacerbate the high cost of legal proceedings. Further, the arguments in favour of extending current rights to compensation for witnesses were outweighed by the need to make the legal system more, not less, accessible to the general public.

Consequently, the Commission concluded that it would recommend that no changes be made to the current law relating to the payment of witnesses in civil proceedings.