

be changed so that whoever is deciding bail has to consider any relevant cultural or customary law issues. This proposal will mean that customary law could be taken into account in a number of different ways. For example:

- A court could take into account Aboriginal customary law as the reason why an Aboriginal person missed court (such as the obligation to attend a funeral).
- Kinship and cultural ties could be used to explain why an Elder or other member of the community would be a suitable responsible person to sign a bail form and promise to make sure that the accused attended court.
- If the accused has already been dealt with under customary law then a court could take into account what has been decided by the community. A court can order an accused to do something while he or she is on bail. For example, if an accused has been banished from a particular community for six months and is supposed to stay at an outstation for that time, the court could make it a condition of bail that the accused does not attend the community and lives at the outstation.
- In a case where the court was worried that the accused might intentionally miss court, customary law obligations could be used to explain the cultural ties that the accused may have to a particular community and therefore why that person would be unlikely to run away and miss court on purpose.

The Commission believes that its proposals in relation to bail and Aboriginal customary law will encourage the Western Australian legal system to look at customary law broadly. Aboriginal customary law may help courts work out the best way to make sure that an accused turns up in court and stays out of trouble.

Law Reform Commission
of Western Australia

ABORIGINAL CUSTOMARY LAWS PROJECT

Have your say ...

The Law Reform Commission of Western Australia wants to hear your opinion about the proposals contained in this document.

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Bail

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Problems Aboriginal people face in relation to bail

When a person ('the accused') is charged with a criminal offence under Australian law a decision is made whether the accused can be released into the community on bail or remanded in custody until the charge is dealt with in court. Bail is a promise by the accused to turn up to court at the right time.

Many Aboriginal people have difficulties in being released on bail. A police officer, magistrate or justice of the peace may decide that the accused can be released into the community as long as there is also a surety. A surety is someone else who signs a document promising to pay a certain amount of money if the accused does not appear in court when required. A lot of Aboriginal families do not have enough money or assets and are therefore not accepted by court staff or justices of the peace to act as a surety.

In order to get bail all children under the age of 17 years must have a responsible person to sign a bail form. Aboriginal children, especially those from regional and remote areas, may have problems in finding a responsible person quickly. As a result they may be taken into custody and sent to Perth.

The Commission has proposed changes to the law in Western Australia so that Aboriginal people are not disadvantaged in decisions about bail. The main proposals are that:

- An adult accused may be released on bail if a responsible person signs a document promising that the accused will appear in court. The responsible person does not have to agree to pay any money. The person making the decision about bail (such as a magistrate, justice of the peace or police officer) must decide if a particular person is suitable to be the responsible person. This proposal will allow an Elder or member of a community justice group to act as the responsible person and provide support and guidance to an accused on bail.
- If the person making the decision about bail decides that a surety is necessary, then that person must take into account the financial situation of the proposed surety. If the amount of the surety is a lot of money compared to what the surety owns or earns that surety would be likely to make the effort to get the accused to court on the right day.
- Any accused can apply for bail to a magistrate over the telephone if they are not happy with the decision of a justice of the peace, a police officer or an authorised officer in a situation where they would not otherwise appear in court before 4.00 pm the next day.
- The Department of Justice should continue to develop, in partnership with Aboriginal communities, alternative bail facilities in the community for those children who are not able to find a responsible person.

Aboriginal customary law and bail

The Commission understands that customary law obligations may sometimes interfere with the obligation to appear in court. Many Aboriginal accused miss court because they have to attend a funeral. Australian law says that when people cannot go to court on the day that they are supposed to, they should ring the court and let someone know the reason why they are unable to get to court. They are also supposed to attend court as soon as possible afterwards. The Commission believes that a lot of Aboriginal people are charged with an offence of breaching bail because they did not let anyone know that they had to go to a funeral or did not go to court after the funeral ceremonies were finished. The Commission has proposed that bail forms and notices should be changed and include information about what accused people can do if they are unable to attend court. The Commission also thinks that members of a community justice group might be able to assist people in their community by telephoning the court or the Aboriginal Legal Service when there is an important funeral or other ceremony.

The Commission has also looked at whether the law in Western Australia should be changed to recognise Aboriginal customary law. In terms of traditional punishment the law in Western Australia says that if the punishment is unlawful under the criminal law (such as spearing) a court cannot release an accused on bail for the purpose of undergoing that traditional punishment. The Commission does not think that this law should be changed. It would not be proper for a court to give permission for or agree to any unlawful activity.

If the proposed punishment is not unlawful (such as community shaming) then a court could take that into account when deciding about bail. The Commission has proposed that the *Bail Act 1982*