

Witnesses to have special facilities

The court could make special arrangements for witnesses who felt unable to give evidence in the normal way for reasons associated with customary law. For example, if there was someone in the courtroom who the witness was in an avoidance relationship with, the judge could allow the witness to give evidence from a remote room by closed circuit television, or place a screen in the courtroom so that the witness and the other person could not see each other.

Witnesses to give evidence in groups

If, for reasons of customary law, some matters cannot be spoken of by one person alone, the court could order that evidence could be given by a group of witnesses sitting together.

The court to hear evidence on country

In some cases, the court could come out to the witness's country and hear the evidence, rather than make the witness come to the court.

Keeping some matters secret

If reference to certain matters would be offensive for reasons of customary law, then the court should have the power to order that those matters be kept secret.

Cultural awareness training

It is important to the success of the proposed changes to court procedure that there is a better understanding of the problems faced by Aboriginal people by everyone involved with the courts. The Commission has proposed that all judicial officers in Western Australia (including justices of the peace) should undertake regular cultural awareness training. The aim of this training is to help judicial officers understand the difficulties faced by Aboriginal witnesses and the procedural measures that can be put in place to help with those problems.

Law Reform Commission
of Western Australia

ABORIGINAL CUSTOMARY LAWS PROJECT

Court Procedure

Have your say ...

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

Law Reform Commission of Western Australia
Level 3, BGC Centre
28 The Esplanade, Perth WA 6000

Telephone: 08 9321 4833
Facsimile: 08 9321 5833

E-mail: lrcwa@justice.wa.gov.au
Website: www.lrc.justice.wa.gov.au

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Being a witness in court can be difficult. During the Commission's consultations for this project, Aboriginal people reported a number of problems that they faced when appearing in court. The Commission has given careful consideration to these problems and has made some proposals designed to help Aboriginal witnesses.

Aboriginal language interpreters

One of the main problems for Aboriginal witnesses is the language used in court: many Aboriginal people who do not properly understand English appear in court without an interpreter. There are very few Aboriginal language interpreters working in Western Australian courts. The need for Aboriginal language interpreters has been largely unnoticed because even where English is not the first or second language of many (particularly remote) Aboriginal people, they have enough English to 'get by'. The problem is not that they do not speak English, but that they do not speak English well enough to understand the complex version that is spoken in courts.

To try to overcome this problem the Commission has made a number of proposals:

- To change the *Evidence Act 1906 (WA)* so that a witness has a right to an interpreter – if the witness does not understand English well enough the case cannot go on.
- To create tests to help lawyers and judges find out if a witness needs an interpreter.
- To require that only trained interpreters can be used in court.
- To make sure that information is provided to interpreters before the case so that they can be certain that they have no conflicts under customary law.

The Commission has also invited submissions about how Aboriginal language interpreters should be used in court so that guidelines can be made to help courts, lawyers and witnesses when using the services of an interpreter.

Evidence in narrative form

Some Aboriginal witnesses have problems with the question-and-answer way that information is provided in court. For example, questions that suggest an answer to the witness, questions that ask the witness to be exact about time or distance, and questions that ask the same thing in a number of different ways can be hard for some people to answer.

One way of dealing with this problem is to allow Aboriginal witnesses to tell their story without having to answer questions: this is known as 'evidence in narrative form'. The Commission is of the preliminary view that no reform to the law is needed to enable Aboriginal witnesses to give evidence in narrative form; however, the Commission does not know how often courts let Aboriginal witnesses give their evidence in this way. Therefore, the Commission seeks submissions so that it can decide if changes need to be made to the *Evidence Act 1906 (WA)* to set out guidelines for narrative evidence.

Customary law in the courtroom

Aboriginal people also told the Commission that sometimes when they appear in court as a witness they have problems because their obligations under customary law can clash with the requirements of the court.

Examples of situations where an Aboriginal witness might feel unable to give information to the court include:

- if there is a speech ban in place following a person's death;

- if two people required to be in court together are in an avoidance relationship;
- if the information the witness is being asked to describe is secret; or
- if the information they are being asked about can be told only to men or only to women.

An Aboriginal witness who feels that they might break their customary law by giving evidence in court faces a very difficult decision. They might choose not to give evidence; then the court would not hear information that is relevant to the case. Or they might choose to obey Australian law and give evidence; then they may breach customary law and possibly face punishment. Or they might appear in court as a witness, but not talk about some things. If this happens the court might not know that all relevant evidence has not been provided, or the version provided might seem unreliable and not be taken into account properly.

It is important that courts are able to hear the evidence that Aboriginal witnesses have to give. With this in mind, the Commission has made some proposals for changes to court procedure to take into account Aboriginal witnesses' obligations under customary law.

These proposals include:

Employment of Aboriginal court facilitators

The Department of Justice should employ facilitators to help Aboriginal people who are appearing in court as witnesses. The facilitators would have an understanding of both court procedure and customary law. They would try to make sure that the court is aware of any problems faced by Aboriginal witnesses, and make sure that the witnesses have access to any procedures designed to assist them.