



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 83

**Payment Of Witnesses in
Civil Proceedings**

DISCUSSION PAPER

FEBRUARY 1988

The Law Reform Commission of Western Australia was established by the Law Reform Commission Act 1972.

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PREFACE

The Commission has been asked to consider and report on the law and practice relating to the payment of compensation to witnesses in civil or other legal proceedings but excluding criminal proceedings.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 29 April 1988.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

Comments should be sent to -

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CONTENTS

Paragraph

CHAPTER 1 - INTRODUCTION

1.1

CHAPTER 2 - THE PRESENT POSITION

1. Introduction 2.1
2. Compensation for lost time 2.2
3. Expenses 2.3
4. Expenses incurred or loss suffered in complying with
a subpoena to produce any document or object 2.4

CHAPTER 3 - POSSIBLE REFORMS

1. The Commission's approach 3.1
2. Who should be liable to pay the compensation? 3.4
3. A fixed scale 3.7
4. Amount of compensation 3.8
5. Those to whom the legislation would apply

(a)

Chapter 1

INTRODUCTION

1.1 The Commission's terms of reference are as follows:

"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."

1.2 The Commission was asked to undertake a project on the payment of witnesses in civil proceedings¹ because of the situation that arose where State public servants were called as witnesses in civil proceedings either in an official capacity or in other circumstances. As State public servants are paid by their employer while attending court they do not receive an allowance from a party to the proceedings for attending a proceeding as a witness. The result is that State government departments or agencies bear the costs of this aspect of the proceedings rather than one of the parties. A similar position arises with private employers where staff are paid by their employer during the period that they attend a hearing.

1.3 The Commission wrote to a number of individuals and organisations seeking comment on the issues that needed to be examined and any difficulties that had been encountered in practice. The comments of those who responded to this invitation² indicated that a wider inquiry was justified. These comments were taken into account both when the terms of reference were drafted and subsequently during the preparation of this Discussion Paper.

1.4 At present a person may be required or undertake to give evidence or produce documents or objects at hearings in relation to various civil proceedings including proceedings of the Supreme, District and Local Courts and Courts of Petty Sessions.³ A person may also give evidence or produce documents, records or objects at Royal Commissions, coronial inquiries, inquiries of the Parliamentary Commissioner for

¹ A reference to "civil proceedings" in this paper is intended to include a reference to proceedings within the scope of the Commission's terms of reference, that is, a "civil or other legal proceeding but excluding criminal proceedings."

² The names of those who made preliminary comments are listed in the Appendix to this paper.

³ Although Courts of Petty Sessions deal predominantly with simple offences they also hear civil matters, for example, disputes as to dividing fences.

Administrative Investigations, commercial arbitrations and proceedings of administrative tribunals such as the Town Planning Appeal Tribunal of Western Australia. The law relating to compensation for time spent in attending the hearing or for out-of-pocket expenses varies from court to court and tribunal to tribunal. In some cases there is no legal entitlement to compensation or at least no clear rule allowing it.

1.5 In this paper the Commission discusses the existing law and practice and tentatively proposes the creation of a statutory entitlement to compensation for losses suffered or expenses incurred in attending as a witness or in producing a document, record or object. Other major tentative proposals made are that employers should be entitled to reimbursement of salaries or wages paid to employees for time spent attending civil proceedings and that, in all civil proceedings, persons summoned to produce documents at a hearing should be entitled to their expenses of searching out, collating and copying the documents.

Chapter 2

THE PRESENT POSITION

1. INTRODUCTION

2.1 A person who attends civil proceedings to give evidence or to produce a document, record or object may suffer a loss as a result of -

- (1) the time spent in attending the court to give evidence or to produce a document, record or object or, in the case of an expert witness, in qualifying to give evidence;¹ and
- (2) the expense of going to and from the court or of obtaining sustenance during the time he or she is required to remain at the court.

A business, such as a bank, may also incur expenses, for example, in searching out, collating or copying documents required for a proceeding. The circumstances in which compensation is payable for these losses at present are discussed below.

2. COMPENSATION FOR LOST TIME

2.2 Where rules of court and rules relating to various tribunals provide for the payment of allowances to witnesses for loss of time according to prescribed scales² a witness is entitled to compensation from the person on whose behalf he or she was summoned according to the appropriate scale.³ The entitlement to compensation is confined to a sum not exceeding that

¹ That is, reading up or otherwise mastering the details of the particular case on which he or she is to give evidence.

² *Rules of the Supreme Court 1971* Fourth Schedule, item 30; *Local Court Rules 1961* O 37 rr 38 and 41, and Part III of the Appendix, item 21; *Workers' Compensation Board Rules 1982* reg 61. In the case of the Land Valuation Tribunal the allowances paid are based on those in the Local Court Rules because reg 11 of the *Land Valuation Tribunals Regulations 1979* provides that the procedure for proceedings before the tribunal shall be in accordance with the procedure of the Local Court. In the case of the Family Court, the *Family Law Rules* make provision for the payment of costs and expenses of witnesses: O 20 r 17 and O 28 r 9. As these are Commonwealth, and not State, rules, they are beyond the scope of the Commission's terms of reference.

³ *Bank of New South Wales v Withers* (1981) 35 ALR 21, 37.

provided in the prescribed scale.⁴ If there is no prescribed scale the common law applies. At common law, the general rule is that a person who has been subpoenaed to give evidence has no right to compensation for lost time and cannot enforce any agreement with a party to the proceedings for the payment of a sum of money as compensation for attending to give evidence.⁵ There are, however, exceptions to this common law rule in the case of professional witnesses, such as doctors, and seafaring witnesses.⁶ It is not clear whether these exceptions extend to fees involved in a witness qualifying to give skilled or expert evidence.

3. EXPENSES

2.3 At common law, and in some cases under statutes, rules or regulations, a person subpoenaed to attend a hearing, whether to produce documents or otherwise, is entitled to an adequate indemnity for the expenses of going to and from the place at which the hearing is held and for sustenance during the time the person is required to remain there. These expenses may be recovered in an action based upon an implied contract from the party⁷ who caused the subpoena to be served. The person may refuse to give evidence until he or she is given a proper assurance that the expenses will be met.⁸ In some cases a person cannot be penalized for failing to appear in response to a summons unless a proper sum for the expenses (called "conduct money") has been paid or is not obliged to appear in response to a summons unless that sum has been paid.⁹

4. EXPENSES INCURRED OR LOSS SUFFERED IN COMPLYING WITH A SUBPOENA TO PRODUCE ANY DOCUMENT OR OBJECT

2.4 At common law, persons subpoenaed to produce documents at a hearing are not entitled to their expenses of searching out, collating and copying documents.¹⁰ In Western

⁴ Id 38.

⁵ *Collins v Godefroy* (1831) 1 B and Ad 950, 956-957; 109 ER 1040.

⁶ These exceptions were developed in cases in England prior to 1852: *Bank of New South Wales v Withers* (1981) 35 ALR 21, 34 and 37. Scales of fees for witnesses were first promulgated in this year pursuant to the *Common Law Procedure Act 1852* (UK): id 37.

⁷ Not usually the party's solicitor.

⁸ *Bank of New South Wales v Withers* (1981) 35 ALR 21, 37.

⁹ Eg *Local Courts Act 1904* s 63; *Mining Regulations 1981* reg 127(3).

¹⁰ *Bank of New South Wales v Withers* (1981) 35 ALR 21, 39. In this case the Bank received subpoenas, issued on behalf of Withers, to produce documents at a hearing by the Federal Court of Australia. The proceedings involved Withers and other parties but not the Bank. The Bank sought an order that Withers pay its expenses of searching for, and copying, documents. The application was dismissed.

Australia, the *Rules of the Supreme Court*¹¹ provide an exception to the common law position. Under the Rules, the court may fix an amount, or order that it be taxed, for the cost of complying with a subpoena for the production of any document or object where the person subpoenaed is not a party to the proceedings if substantial expense or loss is incurred in complying with the subpoena.¹²

¹¹ These rules also apply to the District Court of Western Australia:

Chapter 3

POSSIBLE REFORMS

1. THE COMMISSION'S APPROACH

3.1 The Commission considers that witnesses in civil proceedings should be entitled to receive compensation for certain losses suffered or expenses incurred in attending as a witness. This entitlement should be generally applicable and the Commission suggests that

to the trial in order to be in a position to assist the court or may be less than conscientious in their efforts.

3.3 If witnesses could not receive compensation for lost time or expenses it would mean that they would have to bear any loss involved rather than the parties to the proceedings, proceedings which generally⁴ involve a private contest between the parties in which the loser bears the costs involved. This would be unfair to witnesses, particularly to expert witnesses who could be called to give evidence regularly and would therefore be required to undertake the duty to give evidence to a disproportionate degree. Requiring the parties to bear the cost of witnesses' expenses and losses could also serve to encourage greater efficiency in the civil justice system in two ways. First it would encourage a party to consider whether it was really necessary to call a particular person as a witness. If persons were not called unnecessarily the length and cost of trials would be reduced. Secondly, the payment of compensation to witnesses and the recognition of that cost component of trials might encourage the development of more efficient procedures for obtaining evidence from witnesses.⁵

2. WHO SHOULD BE LIABLE TO PAY THE COMPENSATION?

3.4 The Commission suggests that, as regards civil proceedings, the liability to pay compensation should rest on the party calling a person as a witness. This, of course, would not preclude one party from being required to pay the costs of another party as agreed or taxed, including any compensation paid to a witness by that party.

3.5 Proceedings of some tribunals, however, present a special problem because there are no parties to the proceedings before them, for example royal commissions. In these proceedings a person may be called as a witness by the tribunal. Where a witness is called by a tribunal, the Commission suggests that the witness should be entitled to receive compensation in the same manner as a witness called by a party to legal proceedings, and that the tribunal should have power to order that the witness's compensation be paid either by the

⁴ In some cases, such as Royal Commissions and some other tribunal hearings, there wiD -d0uhearini,by.

tribunal itself⁶ or out of monies appropriated by Parliament.⁷ This approach would be justified because of the public interest involved.

3.6 In the case of a number of administrative tribunals, the tribunals have power to call persons on their own motion even though there may be a party or parties to the proceedings.⁸ Where tribunals have such a power a party might choose not to call a witness in order to avoid the costs involved but rely on the tribunal to call the witness. As with tribunal hearings which do not involve parties, these proceedings may also raise issues which are of public interest. The Commission therefore suggests that in these cases the tribunal should have a discretion to order that the compensation be paid by a party to the proceedings or by the tribunal itself or out of monies appropriated by Parliament.

3. A FIXED SCALE

3.7 The existing rules provide a limit on the compensation payable by scales which fix the maximum sum payable. These scales may be subject to the common law exceptions⁹ so that a person may be able to obtain a greater sum from the party calling him or her as a witness, though the difference between the sum paid and the sum fixed in the scale could not be recovered from the unsuccessful party. One advantage of limiting compensation payable to witnesses according to a scale is that it places a limit on one aspect of the cost of legal proceedings. It also reduces the opportunity of witnesses to obtain a higher sum, ostensibly as compensation, in return for co-operating with the party in giving evidence. It might, however, be argued that it could be unfair to impose any limit as some persons, such as medical specialists, might incur losses far in excess of the sum prescribed for a day if they attend the proceedings, even for a period as short as only two or three hours. It may also result in professional persons not being prepared to co-operate with parties to litigation by qualifying to give expert evidence. One means of balancing the interest in being fair to witnesses and preventing witnesses having unlimited bargaining power would be to provide for scales to be fixed but to give the presiding officer or taxing officer a discretion to order the payment of a

⁶ See *Credit Unions Act 1979* s 159 and *Credit Unions Regulations 1980* reg 51.

⁷ See *Royal Commissions Act 1968* s 23 and *Evidence Act 1906* s 119(4).

⁸ For example, the *Dental Board: Dental Act 1939* s 45 and *Dental Board Rules 1973* r 33. In civil cases the position is that ". . . a judge (or umpire) may not call a witness without the consent of both parties, though the position in Australia may be controversial": D Byrne QC and J D Heydon, *Cross on Evidence* (3rd Aus Ed, 1986) 376 para 9.17.

⁹

sum greater than that prescribed if satisfied that a person had by reason of his or her attendance as a witness lost wages, salary or other earnings in an amount substantially greater than that prescribed.

4. AMOUNT OF COMPENSATION

3.8 The Commission proposes that, subject to any maximum or minimum amount prescribed in the scale, a witness should receive such sum for fees or expenses as the presiding officer or taxing officer thinks reasonable. The presiding officer or taxing officer could be given guidance as to the factors to be taken into account in determining what is a reasonable sum to be paid to a witness. These factors could include the time spent by the witness travelling to and from the proceedings and in attending at the proceedings, the amount of salary, wages or other earnings thereby lost by the witness and, in the case of an expert witness, any time occupied by the witness qualifying to give evidence. Any compensation payable should be recoverable as a civil debt.

5. THOSE TO WHOM THE LEGISLATION WOULD APPLY

(a) Those who attend civil proceedings

3.9 The Commission proposes that the legislation should apply to all witnesses who attend civil proceedings¹⁰ in response to a summons or at the request of a party to the proceedings or the presiding officer whether or not they are actually called to give evidence. Such persons will probably have suffered a loss for which they should be compensated. If a distinction were made between those who attended in response to a summons and those who attended voluntarily so that only those summoned to appear received compensation, witnesses might only be prepared to attend proceedings in response to a summons. The need to obtain a summons would merely reduce the efficiency of the system and add to the cost of proceedings. Of course, a person who attends voluntarily and does not desire compensation is always free to decline it.

¹⁰ For the proceedings which this term is intended to include see footnote 1 in ch 1.

(b) Those who suffer loss though their attendance was not necessary

3.10 One question which arises is whether compensation should be payable to those who were summoned to attend or who agreed to attend civil proceedings and who rearranged their affairs in order to ensure that they could attend the proceedings only to be informed that it was not necessary for them to attend on the arranged date. This could arise where the proceedings were adjourned prior to the date for some reason or the matter in dispute was settled by the parties. The Australian Dental Association pointed out that a dentist who had to organise or reorganise appointments in order to appear as a witness would be caused considerable inconvenience. On the other hand, it could be argued that witnesses should receive compensation only where they actually attend the proceedings. It would add considerable complexity to the provision for compensation of witnesses if it were necessary to assess any collateral loss suffered in the circumstances discussed in this paragraph. For example, a dentist who arranged it so that he or she had no appointments on the day concerned might be able to arrange appointments, including emergency cases, once notified that attendance was not required. Further, it would not be unreasonable if, in such a case, expert witnesses came to a private arrangement with the party intending to call them concerning losses incurred as a result of not being called. Consideration might be given, when proposing legislation concerning payment of witnesses, to providing authority for the making of such arrangements.

(c) Employers of witnesses

3.11 In some cases employers of witnesses continue to pay witnesses during the time they attend court to appear as a witness. For instance, it is not uncommon for public servants to be called as a witness in civil proceedings either in a private capacity or in an official capacity, for example, to produce documents from public records or to give expert evidence. In practice (and in accordance with Administrative Instruction 719 of the Public Service Board) a public servant who appears as a witness in civil proceedings, whether or not called in an official capacity, is granted leave with pay. In such a case, therefore, a public servant suffers no loss of salary or wages and does not receive an allowance for attending as a witness. Consequently, the Government or its agencies bears the cost of the salary or wages of public servants during the time they attend as a witness, rather than a party to the proceedings as is

7. EVIDENCE BY DEPOSITION OR AFFIDAVIT

3.13 In the Supreme, District and Local Courts evidence may be given by deposition.¹³ Any person required to attend for the purpose of being examined or of producing any document before the examiner is entitled to be compensated in the same manner as upon attendance at a trial in court.¹⁴ If generally applicable legislation for the compensation of witnesses in civil proceedings were introduced, these rules could be retained with the result that a witness would be entitled to be compensated in accordance with the legislation. Evidence may also be given by affidavit in certain circumstances¹⁵ though there is no provision for the compensation of the deponent for the time spent in preparing and swearing the affidavit. The Commission suggests that the deponent should be entitled to compensation for such losses.

3.14 One means of reducing the cost of compensation to employers is to permit evidence to be given or tendered by their employees by affidavit rather than orally. Evidence may be given in this manner at present in the case of an entry in a banker's book.¹⁶ In any legal proceedings in which it is necessary to prove the state of an account in the books of a bank it is not necessary to produce any such book, but evidence of the state of such account may be given either orally or by affidavit by a bank officer who has examined such books.¹⁷ A banker or officer of a bank cannot be compelled, in any legal proceedings to which the bank is not a party, to produce any banker's book or to appear as a witness to prove the matters therein record without an order of a judge of the Supreme Court made for special cause.¹⁸

3.15 The Commission welcomes comment on whether this concept should be extended to apply more widely. For example in Victoria and Queensland¹⁹ the banker's book concept has been extended so as to apply to any book of account. In Victoria a book of account is defined as including a:

¹³ *Rules of the Supreme Court 1971* O 38; *Local Court Rules 1961* O 20 r 2.

¹⁴ *Rules of the Supreme Court 1971* O 38 r 9; *Local Court Rules 1961* O 20 r 16.

¹⁵ See *Rules of the Supreme Court 1971* O 37 and *Evidence Act 1906* s 92.

¹⁶ *Evidence Act 1906* ss 92 and 93. Section 4 of the *Evidence Amendment Act 1987*, which has not been proclaimed as yet, amends the definition of "bank" or "banker" so that the provisions apply not only to banks but also to building societies and credit unions.

¹⁷ *Evidence Act 1906* s 92.

¹⁸ *Id* s 93. A party to a legal proceeding may also apply to the Supreme Court for an order to inspect and take copies of any entries in a banker's book relating to the matters in question in such proceeding: *id* s 94.

¹⁹ *Evidence Act 1958* (Vic) ss 58A-58J and *Evidence Act 1977* (Qld) ss 83-91.

". . . ledger, day book, cash book, account book, and any other document used in the ordinary business of a bank, or in the ordinary course of any other business for recording the financial transactions of the business and also includes any document used in the ordinary course of any business to record goods produced in, or stock in trade held for, the business."²⁰

8. INTERPRETERS

3.16 The Commission also invites comment on whether the generally applicable legislation for the compensation of witnesses should also apply to interpreters required to interpret the evidenc

Liability to pay the compensation

3. Should the party responsible for a person being called as a witness in civil proceedings be liable to pay that person's compensation?

Paragraph 3.4

Witnesses

4. Should compensation be payable to witnesses who are requested to attend civil proceedings irrespective of whether they are actually called to give evidence?

Paragraph 3.9

5. Should compensation be payable to witnesses irrespective of whether they attend voluntarily or in response to a summons?

Paragraph 3.9

6. Should those persons who were summoned to attend or agreed to attend civil proceedings and who rearranged their affairs in order to ensure that they could attend the proceedings only to be informed that it was not necessary for them to attend on the arranged date be entitled to compensation?

Paragraph 3.10

7. If not, should expert witnesses be permitted to come to a private arrangement with the party intending to call them concerning losses incurred as a result of not being called?

Paragraph 3.10

Employers of witnesses

8. Where an employee suffers no loss of wages or salary in attending civil proceedings as a witness, should his or her employer be entitled to receive compensation for the attendance of the employee?

Paragraph 3.11

9. If so, should the compensation be payable only where the witness is absent from his or her place of work for more than a specified period of time, say three hours?

Paragraph 3.11

Administrative Tribunals

10. Where a tribunal calls a witness of its own motion, should it have power to order that the witness's compensation be paid either by the tribunal itself or out of monies appropriated by Parliament or, where there are parties to the tribunal's proceedings, by a party to the proceedings?

Paragraphs 3.5 and 3.6

Compensation payable

11. Should the allowance payable to a witness be fixed according to a scale subject to the presiding officer's or taxing officer's discretion to order the payment of a greater sum if satisfied that a witness has by reason of his or her attendance as a witness lost wages, salary or other earnings in an amount substantially greater than that prescribed?

Paragraph 3.7

Amount of compensation

12. Subject to any prescribed scale should a witness receive such sum for fees or expenses as the presiding officer or taxing officer thinks reasonable?

Paragraph 3.8

Expenses incurred or loss suffered in complying with a subpoena or request to produce any document or object

13. Should Order 36 rule 19 of the *Rules of the Supreme Court 1971*, but extended to include those who agree to produce the documents or objects voluntarily to a

party to the proceedings or at or for the proceedings, apply to all civil proceedings?

Paragraph 3.12

Deponents

14. Should deponents of affidavits be entitled to compensation for any loss suffered in preparing and swearing an affidavit?

Paragraph 3.13

15. Should the concept of banker's books be extended so as to apply to any book of account?

Paragraphs 3.14 and 3.15

Interpreters

16. Should interpreters required to interpret the evidence of witnesses in civil proceedings be entitled to compensation in legislation dealing with the compensation of witnesses?

Paragraph 3.16

