

OATHS AND AFFIRMATIONS WITH REFERENCE TO

THE MULTICULTURAL COMMUNITY

**SUBMISSION OF THE VICTORIAN BAR**

OBSERVATIONS ARISING OUT OF THE VICTORIAN PARLIAMENT

LAW REFORM COMMITTEE DISCUSSION PAPER JUNE 2002

WHAT THE DISCUSSION PAPER DESCRIBES AS “KEY GLOBAL QUESTIONS”

- (1) Substitution of affirmation for oath-taking would constitute a radical departure from a fundamental aspect of the Law of Evidence not warranted by the multicultural concerns to which the discussion paper refers.

The discussion paper suggestion of substitution of the present affirmation for oath-taking, and of the elimination of oaths altogether, would constitute a radical departure from a fundamental aspect of the Law of Evidence that seems unwarranted. The power of an oath is that it binds the conscience of the person swearing it, not merely that there is the possibility of a temporal sanction in the event of perjury being established. The Bar sees no need for such radical change, and believes that the concerns in relation to the multicultural community raised in the discussion paper would be met by amendment of the Victorian Evidence Act along the lines of the Commonwealth Evidence Act provisions.

- (2) The Commonwealth Evidence Act presents oaths and affirmations as equal alternatives, rather than giving precedence to the oath, and this seems well accepted in Victoria.

The Commonwealth Evidence Act 1995 presents “an oath” or affirmation as equal alternatives (section 21(1)) and imposes on the court the duty to inform the person that he or she has this choice (section 23(2)). The Commonwealth Act provides that “It is not necessary that a religious text be used in taking an oath.” (section 24(1))

The Commonwealth Act was presented as a uniform act, and has been substantially adopted in New South Wales (Evidence Act 1995 (NSW)) and more recently in Tasmania (Evidence Act 2001(Tas)).

The Commonwealth Evidence Act governs proceedings in Federal Courts sitting in Victoria, including the Family Court. The oath or affirmation provision works well. The court officer asks the witness whether he or she wishes to swear or affirm. Legal practitioners prepare their witnesses for the question. Other witnesses occasionally ask about the alternatives, and the court officer explains. The system works well and seems well accepted.

Although beyond the scope of this enquiry, this raises the larger question as to whether Victoria should amend the entirety of its Evidence Act along the lines of the Commonwealth Act.

- (3) Victorian practice seems to work well, but the Victorian Evidence Act provisions could be better expressed.

The Victorian Bar is not aware of difficulties in or dissatisfaction with Victorian practice. The Victorian Evidence Act provisions are, however, perhaps somewhat dated, and may be out of step with modern multicultural society and sensitivities. For example, there may not be any need now for special provision for the “Scotch oath” (section 101). And the Commonwealth Act provision that the court inform the witness of the alternative of an oath or Affirmation seems more appropriate than the Victorian Act provision leaving it up to the witness to object to taking the oath.

A. The significance of sacred texts to witnesses, other parties and jury members of particular faiths

B. The provision of a sufficient range of appropriate texts and minimum standards in this regard for all Victorian jurisdictions

C. The provision of cultural awareness training to all court staff and persons before whom affidavits are sworn

The Bar is not in a position to comment on the views of people of different faiths, nor has it been practicable to gather what would have been, at best, anecdotal information on practices. Hopefully this Parliamentary Committee is in a position to have information from the various Victorian courts on court practices and training.

Although authorized to do so by the Evidence Act, barristers rarely witness the signing of a statutory declaration, nor are affidavits sworn before them in the course of their practice as barristers.

The swearing of witnesses in the course of presenting a case in court is covered in the Bar Readers' Course and barristers are advised to raise and explain the alternative of an oath or affirmation to their witnesses.

D. Accessibility and diversity of classes of people currently permitted to witness affidavits and statutory declarations

The Bar is not aware of difficulties in or dissatisfaction with the present Victorian provisions or their operation. However, a barrister's practice does not generally extend to attending to or arranging the making or swearing of statutory declarations or affidavits.

The hierarchy of three levels of persons before whom statutory declarations and affidavits may be made or sworn does not appear to raise specifically multicultural issues, and would therefore seem to be beyond the scope of this enquiry. As noted in the discussion paper, the range of people before whom statutory declarations may be made is wide, including for example, all members of the police force, pharmacists, and bank managers. The range is slightly more limited for swearing affidavits generally. For example, it is limited to police of or above the rank of sergeant rather than all members. However, there is still a wide range. The range of persons for swearing affidavits for use in the Supreme Court is limited by the Supreme Court Rules. However, this may not be a problem because most parties to proceedings in the Supreme Court are represented.

19<sup>th</sup> July 2002