LAW REFORM COMMITTEE

Inquiry into oaths, statutory declarations and affidavits for multicultural community

Melbourne – 1 August 2002

Members

Mr R. H. Bowden
Ms D. G. Hadden
Mr P. A. Katsambanis
Mr T. Languiller
Ms A. L. McCall
Mr R. E. Stensholt
Mr M. H. Thompson

Chairman: Mr M. H. Thompson
Deputy Chairman: Ms D. G. Hadden

Staff

Executive Officer: Ms M. Mason
Research Officers: Ms K. Giles and Ms S. Kaufmann

Witnesses

Mr V. Borg, former Chairman;

Ms J. Klepner, Policy Officer; and

Mr T. Hazou, Executive Officer, Ethnic Communities Council of Victoria..

The CHAIRMAN — Welcome, and please begin your submission.

Mr BORG — Thank you very much for the opportunity to come here today. We certainly welcome it and we are very grateful that the committee is looking at this aspect because it has been a matter of some concern to ethnic communities for some time.

Perhaps before I start I might say I have been the owner of this new version of the Evidence Act for a couple of hours. I decided I had better get the last reprint so I had my secretary go out at lunchtime and get it for me. I noticed that this incorporates the amendments as at 1 September 1999. The point I am getting is that many believe that the oath as currently administered is nothing more than a ritual, and I will go to that shortly. This is supported, I would suggest, by the provisions of this act because section 100 of the act, which is contained in part IV, 'Oaths Affirmations Affidavits Declarations' starts off by stating:

> (1) … The person taking the oath shall hold the Bible or the New Testament or the Old Testament in his uplifted hand and shall repeat … the words "I swear by Almighty God …"

and it also contains provisions for the oath to be administered to a number of people at the same time. So the primary obligation is to take the oath. Then in subsection 5 of the same section it states that if someone voluntarily objects then obviously he is swept across into the affirmation section. It also states:

> (b) unless the officer or in the case of judicial proceedings unless the court or person acting judicially, has reason to think or does think that the form of the oath prescribed by sub-section (1) or sub-section (2) would not be binding on the conscience of the person about to be sworn —

so that is clearly understood. You have one officer — it could be the tipstaff or the judge, I would suggest — making a decision on the spot as to whether this man is going to tell the truth if he does not take the oath. There is already a prejudice creeping in simply because the bloke looks different and the judge has either read his name or been told the witness's name by counsel or has seen it on the depositions and has to make a flash decision as to whether this fellow is likely to be bound by this oath or not.

The other thing I found amusing is section 101. It looks like the Scottish community is well looked after in this country, because it states:

> If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

That does not say whether a Scottish person who just puts his hand up has to pick up a Bible or not, but if that is what they do in Scotland, then we go along with it. Section 102 deals with affirmations and states — and this the crux of some of our argument:

> When affirmation may be made instead of oath
>
> Where —
>
> a person objects to being sworn; or

that is simple; and this is the crux:

> it is not in the circumstances reasonably practicable without inconvenience or delay to administer an oath to a person in the manner appropriate to the religious belief of the person —
>
> the person shall be permitted to make a solemn affirmation …

Inconvenience to whom? To the judge? To the proceedings or anyone else? This detracts, it seems to me, from the seriousness that this legislation gives to the oath. Then we go on further, and I find this quite interesting because I hear there have been some cases referred to in your explanatory material. Section 104 states:

> When an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief shall not for any purpose affect the validity of such oath.

Virtually what you are saying is that if a person goes through a nonsense, provided he goes through a ritual, then he is bound to tell the truth because we judge humans by their having taken the oath.

What concerns us and a matter that has been raised in debate quite often is that there seems to be a cultural tradition that we are sticking to that may no longer be relevant in this sense, that somehow a legal system has entrenched within it a belief that unless you bind people in conscience then people are inclined not to tell the truth. Now, in one case we say to a person, 'You can take an affirmation if you refuse to take the oath'; in another sense we can say to a person, 'But if you have religious beliefs, we insist upon you taking the oath because only then can we be assured that you will be telling the truth'.

It seems to us that the motivation for truthfulness must be dependent upon a commitment to a system and respect for a judicial system and knowledge that breach could result in severe penalties including imprisonment. We are going through a process, walking through a minefield, I would suggest, quite unnecessarily because in reality it is not the individual who insists on the oath; it is our legal system that imposes that primary obligation on him to do so.

Many people that we have spoken to say, 'What is the difference? We should have one formula that applies to all. The fact that I am of a different colour, have slanty eyes, or am of a different religion, what does it mean? It means nothing. I am going through a civil process, not a religious process, where I am giving a commitment to tell the truth, and I am made aware of the result which necessarily follows if I do not tell the truth'. We say that if that were to happen that would get away from the current situation which we consider, quite charitably, to be a messy system.

This idea has simpleness about it. It has clarity. It has the community regard, so that we are all equal before the law. We have a simple process whereby someone is called to sign a document that he says contains the whole truth, and it is a system of which people will say, 'This is part of the legal process'. It seems to me that sometimes we approach this from the wrong side. We say to people, 'Now, what is your religious belief? What do you think will bind you in conscience? What do you prefer?' Or should we say to people, 'This is a very serious thing. You are giving evidence before a court of law that is one of the institutions in this country and you are obliged to tell the truth. If you do not tell the truth penalties will result from it'?

It seems to me quite often that the system that we go through, particularly in the courts, could be quite prejudicial. Let me explain. I should say that I am a lawyer and have been in private practice for about 30 to 40 years. Most of my clients were born overseas, but they are mostly of Maltese background. There is no system that obliges a solicitor or lawyer to give prior notice to a court or any office of the court as to the religious background of his client. That may be procedurally wrong, but I put it to the committee in that a person's religious belief, political affiliation, or support of a particular football team are irrelevant to the legal process.

Sometimes the people we represent and for whom we are advocates feel hardly done by by the system because they believe they do not really get justice, that people view them as being very different from the rest and that perhaps there is an aura of suspicion about the evidence they give. It seems to me that to go through a process, particularly before juries, where a person has to be sworn in in a particular fashion and where a person has to be cross-examined about his religious background, where a person has to be asked, 'What binds you to conscience? What do you tell us, the court here in Australia, will bind you that you have a conscience about the evidence you are going to give?'. Quite often it is suggested that this difference, which is highlighted in this process, can actually grit members of juries.

We say there is only one way to do away with this prejudice. At best what we should do in reality is to reverse the primary obligation: to have the declaration up front, but if you are not comfortable with the declaration, okay, you can take the oath if you prefer to do so. That makes more sense in a multicultural community without prejudice to any party in the proceedings. It is very difficult sometimes for people to go through this process. Witnesses are called in and the very act itself tells you that if there is inconvenience to the court and someone cannot scramble in time to get the right form of the right oath you can just push the guy through a declaration; at least it has to bind him up and he can be penalised if it can be established that he is lying.

The committee would be surprised to know — -- I did not read it for the reason of boredom — -- that we can also use as some excuse, 'So help me God'. That is what we hear on television, but apparently some acts before the passage of the current legislation had a formula that had 'So help me God' at the end. I could never work out whether that was directed towards some protection for the forthcoming cross-examination or whether it was pleading to the Almighty to see you through the process. What I am saying to the committee is basically that this is a fairly basic issue in a multicultural community. The current system is not only a nonsense in some ways, but it could be quite obviously prejudicial to many of the members that we represent.

Our preference is, as the committee will see in our submission, to have a secular form of affirmation. Then, if the need be, if people still insist because they follow a particular religion and they feel more comfortable in taking the oath, they can do so. In an earlier answer to a question someone said, 'We do not want to hold any sacred text in our hands, we just want to read a formula'. The act says that so long as an oath is lawful you can take any oath that you like. Why do we insist on people holding up the Koran, some other text or some other form of sacred document? Is there a need to? Apparently the Scottish can just raise their hands. Why can't the rest of the community raise their hands when the question is asked? Is that an option given, or do you have to prove your Scottish background? That is very important.

It seems to me that the current act is just a bit of a scrambled egg; there are bits everywhere. There is this obsession with tying up the conscience to an act that a person goes through and then following from that act you have legal consequences for breach. But those legal consequences could follow simply by having a simple affirmation that everyone understands, administered to everyone the same way in whatever language they choose.

Why do we have to fall back on a formality of the oath when you find even provisions in the act themselves saying that even if a person has no religious beliefs at all and takes the oath there is no problem, it is still binding? Why bother taking it? I have noticed in the committee's material there is some reference to a case that came up with someone — I think it might have been a Buddhist — who was questioned about taking the oath. Is it proper that defence counsel or whoever it is should try to damage evidence given by a person simply because while he held other beliefs he chose to take the oath? Does it mean that because he has not strictly gone by the formula of his religious background therefore one must imply that his intent was to say what he liked, be untruthful, and then take the consequences?

If you bind the oath to the affirmation it seems that people who breach the act, tell untruths, have to be dealt with civilly on this earth but at a later stage by the Almighty; but I have never seen anyone get a discount for a particular religion and going to the oath, simply because after serving his sentence here he will be looked after for having suffered here and for what he has gone through.

Our preference is for the secular affirmation, uniform throughout the state, with the only variation being that is it may be administered in another language through an interpreter. Some people in our community may insist upon taking some formal oath according to their own religious beliefs. So be it. We say there is no necessity for any text to be introduced — no Bibles — and that should be as of choice to that person, but the primary obligation should be to take an affirmation.

I have already spoken about the problems that could arise within the court system. The committee's material talks about the provision of a sufficient range of appropriate texts within our courts, tribunals, et cetera. I thought I would make some inquiries myself and I rang one of the Magistrates Courts, explained about this inquiry and said, 'Tell me what you have got there'. The person told me, 'We've got the Bible here, the Old Testament and the New Testament, and we've got the Koran'. When I asked how he knew which one to administer, he said, 'Sometimes they tell us, sometimes they don't'. I asked whether he had any guidelines. He said, 'We've got a handbook', and when I asked whether he ever refers to it he answered, 'Oh, sometimes when we have to'. That is an example of the casualness of all this.

Referring to another area where the oath is taken — affidavits and statutory declarations — there is considerable casualness by authorised persons in signing statutory declarations and affidavits, sometimes even within the legal profession. I cannot understand how people can swear affidavits without any interpreter clauses and then in court proceedings an interpreter is called to assist the witness. That is just incredible. We have a range of people who talked about authorised persons. These authorised persons are all people who are extremely busy in their professions — doctors, veterinary surgeons and chemists and so on.

Have you ever stood at a chemist shop and seen a person come up with a document and the chemist say, 'Yes, what do you want? Oh, all right. Sign it quickly. Off you go.'? The bloke does not know whether he is signing a recipe for some foodstuff the chemist has on board or what. He just signs it. We say these are serious documents. We believe there is no reason to go through it. If you read the Evidence Act properly you will see it contains provisions for instances where instead of using an affidavit form you can go into the statutory declaration. I am saying that community confidence in the system is constantly undermined by the casualness of the process. That is very tragic.

Talking about professionals, the only thing I was taught at Melbourne University when I was going through there in 1960 to 1962 was that some countries have a different oaths from that we have — the Chinese blow out a candle, people of another background hold the Koran, and so on. There is no literature or handbook by the law institute or Attorney-General given to legal practitioners to alert them to diversity and how to deal with it; it is all a matter of chance.

Obviously it is very important from our point of view that we do away with this casualness of approach and that people should not be authorised simply because they hold positions in particular professions such as veterinary surgeons or chemists and signing statutory declarations if many of them regard it as an imposition. An authorised person does not apply to be an authorised person like a justice of the peace would. He becomes an authorised person — I have taken the liberty of handing the committee a document at the back of my submission with the list of all the authorised persons — simply because of the profession or particular status he holds. That is nonsense. That is one issue we raise.

The committee also refers to the issue of the cultural awareness, training, et cetera, of the courts. I suggest that that sort of cultural awareness program should not be directed just at the administration of the oath; it should be put in place throughout the whole legal process. Some courts have been a very up front. For example, the Family Court of Australia has the Victorian and New South Wales chief justice committees on ethnic issues. I sit on the Victorian committee, and we advise and offer recommendations to sensitise the process to clients of diverse backgrounds that come before courts. It also has a national council. I am also told that recently a workshop for judges was held for a whole day of cultural awareness training. It seems to me that it is very important that judges form part of the community, that they are aware of what diversity brings with it. It is only then that we can get real justice in the system.

The other issue raised is accessibility and diversity of classes of people currently permitted to witness affidavits and statutory declarations. It is too restricted. We believe that other classes should be considered, for example social workers — they are members of a profession — or

perhaps postmasters or people in charge of post offices. I believe a postmaster can actually sign your application for a passport. Perhaps coordinators of migrant resource centres could do it — people of some standing, who have a sense of responsibility, but who are readily accessible.

The last issue I shall address quickly relates to English as a second language and the use of interpreters and so on. Tied to that is the fact, which I think is obvious in this state, that people born overseas or children of people born overseas are not really represented — in fact, they are unrepresented — within the judicial system. There are not many people who were born overseas and who are excellent in this profession who have ever had a smell of getting into a judicial position.

There is only one magistrate I know who is non-Catholic and black, and he is a credit not just to his community but to the whole Australian community. That is diversity, and that is where you do provide for a sensitivity to other cultures. I am sure this particular magistrate has made a great impact on the magistracy not just sitting on the bench but dealing with his fellow magistrates. For some unknown reason there seems to be a barrier or an exclusion clause because of background. I think that matter should be addressed.

We are very anxious that there be changes and that this change in relation to oaths be taken up immediately, which would reverse the priority and would give all people a right to make a solemn declaration, an affirmation, and not an oath; and if they believe in their conscience that an affirmation will not result in their telling the truth, okay let them take an oath.

The point I make very strongly is that it is not the communities that demand the oath but the system that is imposing it on them. I think that is a very important issue. The Evidence Act itself with respect to politicians and everyone else is lacking. It is messy; it is inconsistent; and it relegates the oath to a ritual. How can you say to someone, 'If you've got no religious beliefs you can still take the oath. Take the oath.' Where is the effect of that on him? Does that requirement to tie in the conscience go simply because you have no religious beliefs?

In closing, we are delighted that we have had this opportunity to present our views to the committee, and we hope we have somehow convinced it that there needs to be a change.

The CHAIRMAN — Has the Ethnic Communities Council of Victoria come across actual problems with ethnic stereotyping? For example, are assumptions made that people from a particular background will necessarily be of a particular religion?

Mr BORG — People believe they are stereotyped in many respects, not simply within the legal process, but there are people who say that just because you look Vietnamese or you are Vietnamese therefore necessarily these things will follow. There are some people that say, 'We have taken Australian citizenship, but will we really ever be Australian?' The issue is always there.

The CHAIRMAN — Have witnesses' choices of oath or affirmation been challenged or inappropriately taken into account in court proceedings?

Mr BORG — You really cannot tell. I mean, no juror will say to you, 'This fellow was not prepared to take an affirmation'.

The CHAIRMAN — It is all right if you do not have any specific ones.

Mr BORG — No, but people complain that they have been unduly dealt with by the legal process. When you ask why they say that, they say, 'Because of the unexpected result'. When asked what they mean by that, they say 'They obviously didn't believe me or my witnesses'. In all sincerity, if you have someone born overseas you would never or would hardly ever call someone from his own background to give character evidence. That is the reality of the

situation. Many court cases in this state, and no doubt around Australia, are heavily discounted in settlements simply because of a client's background. It is sad, but it is a reality of life.

The CHAIRMAN — Are you aware of the unavailability of any particular holy books or a lack of knowledge or understanding by judges and court staff of religious practices?

Mr BORG — It is my belief that although the system may be improving some of our lower courts and tribunals may not be sufficiently well equipped. You need that cultural awareness. If you go back to the act, if a judicial officer or judge were to inquire whether a person would be bound by conscience, how could he make a decision unless he was aware of the particular background of that witness? Does he have a hunch that because he looks different the oath may not apply to him, or does he let him take the oath and then rely on the later provisions of the act to say, 'If your religious beliefs are otherwise but you take the oath, you are bound anyway.'? It is very convenient for the courts to rush people through a system.

Ms HADDEN — Some witnesses have suggested that the state adopt the equivalent to the commonwealth Evidence Act, where witnesses are given a choice. It is set out in division 2 of the act, and the procedures are in sections 21, 23 and so on, where the court has an obligation to inform the person that he or she has a choice whether they make an oath or take an affirmation. The commonwealth Evidence Act is played out every day in the Federal and Family courts. Do you have a view as to whether that could satisfy your concerns with the state Evidence Act?

Mr BORG — Just advise people they have a choice?

Ms HADDEN — That is the procedure, that they have a choice and the witness in a proceeding must either take an oath or make an affirmation before giving evidence.

Mr BORG — I suppose, in effect, that is an easier process than our state processes, because it does not have either one as a primary method of binding a person to tell the truth. Our suggestion goes further than that, as I have explained, to make the affirmation the primary process but to give the witness the choice as to whether he would feel more comfortable taking an oath of his own choice.

Ms KLEPNER — To add to that, it still requires people to identify that they would rather do something different. We are of the view it might be better to move away from that identification as wanting to do something different and that by putting an affirmation as the first default, if you like, it may shift that focus away from the requirement to self-identify as different, especially for people who feel vulnerable or uncertain about our legal processes.

Also, there is an assumption in talking about holy texts that every faith is going to have the same adherence to oaths made against holy texts. That is not necessarily going to be the case. That does not diminish the sincerity with which they might make a commitment to tell the truth. It is the nature of the particular religion. It also does not really address the issue of agnostics and atheists of different cultural backgrounds as well, who may not necessarily have that affinity to their religious background and may not feel it so strongly that the fear of that particular version of their God will incite them to tell the truth. Our emphasis is on respect for the Australian legal institutions rather than on a negative aspect.

The CHAIRMAN — Do you have ideas about what form the non-religious affirmation should take? For example, should it just be the affirmation now in the Evidence Act — that is, 'I do solemnly, sincerely and truly declare and affirm'?

Mr BORG — We have no trouble with that. It would be a uniform affirmation. I do not think people would object to it.

Ms HADDEN — What about the word 'solemnly'?

Mr BORG — 'I hereby undertake' — whichever is the most understood form is the form we should use.

Mr LANGUILLER — If I went to you in your capacity as a lawyer or if you went to you as a former chairman of the council and said, 'I applied for a job and in the job interview I was asked about my religious background', what would you do? How would you feel about it?

Mr BORG — He has obviously found it offensive. I would probably refer him to the Equal Opportunity Commission and suggest he lodge a complaint. Sometimes things are done that look innocent on the surface. I remember once acting for a Syrian in a jury trial. A lot of time was played on the fact that this guy had put his occupation on the employment form as a paratrooper. The relevance of the question was to try to damage his evidence, to portray him as a violent person. Regrettably, yes, the judiciary let it through. These are the sorts of little things that come into the legal process that could consciously damage a man's evidence, and we say we should not let the man's religion be part of that. You do not ask a witness, 'What are your political affiliations?'. We often say, do we not, that religion and politics should be kept out of public discussion? What is the relevance of that in court? The same thing happens with the oath, sometimes.

The CHAIRMAN — Do you have any further comments, Mr Hazou?

Mr HAZOU — Mr Borg has covered it well.

The CHAIRMAN — Thank you for your evidence.

Witnesses withdrew.