

LAW REFORM COMMITTEE

Inquiry into oaths, statutory declarations and affidavits for multicultural community

Melbourne – 1 August 2002

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Mr G. Laher, Legal Adviser; and

Mr P. Knight, Executive Officer, Islamic Council of Victoria.

The CHAIRMAN — On behalf of the Victorian Parliament Law Reform Committee I welcome you to our proceedings this afternoon in relation to our inquiry into oaths and affirmations with reference to the multicultural community.

I understand we have received a submission from you, which some of us will have scanned, and I invite you to speak to your submission or to present it to us, following which we will ask you some questions.

Mr LAHER — First and foremost I acknowledge your welcome and thank you for giving us the opportunity of being here.

My name is Goolam Laher. I am a past executive member of the Islamic Council of Victoria (ICV) and I have been associated with that council for the past 15 years on a number of fronts, both on a pro bono basis and on an active basis. With me I have Philip Knight, who has acted on behalf of and continues to represent the ICV on a number of matters. Mr Knight might want to expand on that in the course of the afternoon. I will leave that up to him.

You would have received a two-page submission on behalf of the ICV, and with your leave I submit that document to your committee.

The CHAIRMAN — Thank you.

Mr LAHER — It is not an overtly or otherwise substantive document because ultimately our understanding is that the requirements under Islamic law are in fact simple and direct, and that simplifies the entire exercise of how to take oaths in Islam.

As a matter of information and background, it is the view and the belief of every Muslim that as a practising Muslim the repository of knowledge and the repository of truth comes from God, and from God through the Prophet Mohammed into the Koran, which was revealed to him. The Koran as we have it is not an amended document and it has existed through the ages in that exact format since the date of its creation. It has injunctions on various aspects of life, including the actual giving of an oath or a promise.

The explanatory memoranda that accompany the Koran are what are described in the submission as the Hadith, which are the actual sayings and practices of the Prophet himself, which have then been inscribed, written down and passed through the ages.

In short, under the Islamic law, which is sharia law, the requirements for giving an oath are based on the individual's conscience as opposed to the conscience being in the context of an act of placing a hand on the Koran or on any other script. The giving of an oath does not require the presentation or the presence of the Koran, but implicit in the Koran is a clear injunction that if you wish to take an oath then you should not break the oath that has been sworn as you have set up God as a surety to your oath and God knows best what you are doing. That is in the Koran itself.

The explanation of that verse by the Prophet was that if as a person you take an oath, you should swear by God alone, otherwise you keep quiet. By inference, affirmations would therefore be excluded because there is no reference to God at all; and by direct implication, any oath must have and be based on a reference to God, because God is deemed to be the witness to your actual profession of the oath. So in giving an oath I would say:

I, Goolam Laher, hereby swear in the name of God, Allah, that I will tell the truth, et cetera, et cetera, and God, Allah, be my witness to what I am saying.

That is all that is required as a practising Muslim. I have mentioned God and I have mentioned the requirements of the Koran, and they are the sole requirements of a binding and conscientious oath. As I said, the actual act of performance is not dependent on the production of the Koran itself.

As part of the submission Mr Knight has also indicated that because the oath is an injunction out of the Koran, it is an act of belief. It is not a performance of a ritual, it is an act of belief. You are conscientiously transacting and saying the words you are required to under the Koran; that is the one aspect I need to stress. There is the implication of the name of God in that transaction, and the requirements as to the production of the Koran are there largely for practical reasons.

It is a fundamental tenet of belief that the Koran, which is revealed in Arabic text, is the actual Word. There are a number of translations, but what must be understood clearly is that you will never get an exact translation because the very act of translation and usage of other language would lose the real meaning of the Arabic word. There are a number of important words of an Arabic nature that do not really have an exact English translation.

Mr LANGUILLER — Can you give an example?

Mr LAHER — An example would be words like ‘allwadila alfadila’. The closest you will come to it in simple English is ‘the protector’, but in the Arabic sense — I am not Arabic-speaking myself but I have knowledge of it — it would be wider than that. It would involve issues of honour and honourable protection, and it goes through issues of bearing witness and testimony to your act of protection and honour and just not the aspects of ‘I will be your protector’ in the context in which you can use the word.

The practical reasons for the production of the Koran are also stated in the submission. The point I was making was that the actual text itself requires the performance of ablution by every person who handles the Koran. Ablution is a washing ritual: if you are in what I will describe as a religiously or physically impure state — for example, women who are in their menstrual cycle or any persons who have performed a sexual act, whether it is the full act or part of it — you are required to go through a mandatory form of ritual washing, which is a complete bathing, and the recitation of verses to say ‘I reject all evil, I reject all bad’, and then the performances of washing your hands, gargling your mouth and having a direct relationship with your Maker. That is the actual ritualistic performance.

Individually, even with that cleansing process, today as I sit here I am in a state of what is called wadu, which means I have had short-form washing — not a full bathing but just my arms, my hands and my face — as a ritual rejection of evil and a ritual rejection of bad and making my contact. So I can say, ‘In the name of God’, and I can pick up the Koran because I am in that state.

The Koran requires to be handled in a certain way and placed in a certain way with reference to other texts. It is not unusual that every Muslim who picks up the Koran, like any other scripture, would kiss it and bring it up to the forehead. It is always put on the top shelf on top of books, always turned upright, because the handling of the Koran in any other form would amount to a sacrament of the book itself.

I am not sure if I have covered all the important bits. Mr Knight might need to elaborate on any further aspects.

Mr KNIGHT — Thank you, Chairman and committee. My name is Phillip Knight and I am the executive officer of the Islamic Council of Victoria, which is a title that sounds much grander than it really is, I assure you. I work part time on various tasks for the council.

The only other significant bit of our short submission that I would like to mention now is our addressing of one of the global questions — that is, the status of one religion as opposed to others in the existing legislation.

As is clear, there is no problem for Muslims in taking a religious oath in court. Indeed, that is a thing a Muslim would expect to do and should be expected to do. So the short answer is, yes, we believe oaths should continue to be used before giving evidence in court. Of course, if there is an

option of taking an affirmation, that is perfectly within the rights of other people, but we would not like to see the provision of a religious oath removed from the legislation.

At the same time, we feel the references in the law to the Bible as the primary form of oath should be replaced by a formulation that reflects the fact that Australia is now a multifaith country, that there are other religions and that there is no reason to give one religion a particular status in the legislation.

We believe it is self-evident that swearing on the Bible should no longer enjoy formal status as the principal form of oath-taking in our society. It will be the main one, of course, because most people are Christians, but the legislation should refer to an appropriate form of religious oath of the person's choosing. That is the only other important opening point in our submission, Chairman; thank you.

The CHAIRMAN — In this morning's paper an article by the *Age* law reporter cited the Equal Opportunity Commission and the Ethnic Communities Council of Victoria, which suggested that the courts should abandon the practice of requiring religious oaths and use only a secular affirmation. I take it from what you have just said that you would not support that proposition?

Mr LAHER — Correct.

The CHAIRMAN — Some courts have indicated they currently hold copies of the Koran which they make available to witnesses who wish to swear an oath on this text. Is it the submission of the Islamic council that the Koran should no longer be made available to witnesses?

Mr LAHER — The submission would be that it not be available any more in the court process, yes.

Ms HADDEN — Is that because of the way it would be kept within the court system — that is, contrary to the Islamic beliefs?

Mr LAHER — More so that the presence of the Koran and the performance of the act of holding the Koran is not a requirement of the giving of an oath. That would be the principal reason. The secondary issue that jumps out is the way the Koran is handled and managed.

Mr LANGUILLER — So a Muslim person would make an oath but not have the Koran in his or her hand?

Mr LAHER — It is not necessary and not required.

Mr KNIGHT — The use of a Koran in court is by analogy with the Bible. Muslims do not swear on the Koran. I do not know if, literally, Christians swear on the Bible. I do not know what the status of the Bible is in the giving of an oath. In a sense, it is a prop; it is an aid to make things look serious, is it not, and to reinforce, perhaps?

Mr KATSAMBANIS — Thank you for your submission, which has been informative and enlightening. Based on what we have heard, it is quite obvious that in an attempt to be sensitive to the religious needs of the Muslim community in Victoria we have been doing things wrongly in our courts. Have any steps been taken in the past to make courts aware that the Koran should not be made available or that the oath should be taken without holding onto a religious text?

Mr LAHER — I do not believe nor recall that in the Victorian jurisdiction at least there have been any direct steps taken, but there may well have been instances in dramas unfolding in the courtrooms where individual witnesses have said, 'I am not touching the Koran' or asked who has translated it if it is an English translation and then rejected it. I also know of one instance

where a smart defence lawyer questioned a plaintiff witness as to the integrity of his oath by saying, 'Hang you, you have just taken an oath on the Koran, and we believe your credibility is at stake now because you have done the wrong thing'. So there have been those instances.

I cannot recall any specific reports or submissions made, but I am aware of many instances where individuals have refused to hold the Koran in a courtroom situation.

Mr BOWDEN — It has been suggested to the committee by previous submissions that there is some level of support for a non-religious statement or affirmation. What would your comments be if the oath were modified to read:

I swear that the evidence I give this court will be the truth, the whole truth — —

full stop? In your opinion, would that bind someone of the Muslim faith to be truthful?

Mr LAHER — My understanding of the Koranic requirement is that there has to be a reference to God, because you are taking God as your witness and as your surety to giving the oath. Failing to mention God basically attacks the very premise of the requirement of being an oath.

Mr LANGUILLER — Thank you for your contribution. Can you clarify for me, please, the procedure in terms of the ritual where you wash your hands and face and so on; does that have to happen before you make an oath?

Mr LAHER — The answer is no. The requirement for ablution is only when you in fact perform your prayers or when there is a requirement for you to actually hold the Koran.

Mr LANGUILLER — So in the absence of the Koran, you would not need provision for ablution in our court system?

Mr LAHER — That is correct.

Mr LANGUILLER — With the utmost respect, are there not other interpretations within the Muslim community, as happens within other religious denominations, as to whether or not the Koran should be made available to people giving oaths in a court of law? In other words, to your knowledge would there be others within the Muslim community, perhaps through having a different view or through not having proper knowledge of the religion, who might argue, 'If I am going to make an oath, I should have the Koran available to me'?

Mr LAHER — The actual processes of sharia law are not based on what I would describe as a clerical or a clergy system, in which you have recourse to individuals who are systematically giving rules or interpretation by extension. Your first source is the Koran itself. If the answer is in the Koran, no matter what anyone else says the Koran prevails; that is the Word. The next source is the interpretation by the Prophet. Those are the only two sources. If those two sources are clear, as we believe they are, then any other spin or viewpoint would basically be contributing to a misunderstanding of the issue.

Insofar as arriving at an understanding in Victoria is concerned, we have a council of imams representing all the mosques and centres in Victoria, and this submission has in fact been put to them and they have come out in support of the submission.

We have not gone as far as putting it to sister organisations interstate, but I believe the individuals who are involved in Victoria are involved in the peak organisation based in Sydney, and it would have a similar view, or this view.

Mr LANGUILLER — In other words, if I may persist on this very point, you are saying that the Koran is as prescriptive as you are saying — that is, it says that an oath should be taken in a particular way?

Mr LAHER — Yes.

Mr LANGUILLER — Are you able to refer us to the Koran itself?

Mr LAHER — Yes, it is in the submission.

Mr LANGUILLER — Do you not think that the Muslim community is somewhat disadvantaged in a court of law by letting the courts know, and the jury particularly — perhaps not so much the judge, if given the training — that the witness is of Muslim background?

I put to you the following: I represent a very multicultural electorate in Sunshine and there is a large number of Muslims, as you know.

Mr LAHER — I understand that.

Mr LANGUILLER — Without going into too much detail, many reports have been put to me about prejudice, racism and so on. On occasions I have wondered whether a person or a witness in a court of law is better placed for the purpose of acquiring justice — whatever that means, and that is in itself a subject — by allowing the courts and particularly the juries know that he or she is of X or Y religious background if it has nothing to do with the case that is being run. I wondered, for the purpose of justice, whether it would not be better in order to make everyone equal before the law that the jury and the judge not know his or her religious background?

Mr LAHER — My personal response would be that if I were put in that situation I would doubt the entire justice system for a start. At the end of the day I think it is about personal conscience and integrity, and an individual should be bold enough, direct enough, to be able to stand up for what he believes in. If that belief requires him to disclose that he is a Muslim, and I think that must be the case, I would do that. The very essence of an oath requires a binding conscience, and if an individual were to shirk that obligation by professing to be something else, then I think the entire question of an oath would be at risk — the individual would not be on oath, he would be doing something antithetical of his belief.

Insofar as a general proposition is concerned I am afraid I cannot make a general observation as to whether or not an individual should elect to remain silent as to his faith for fear of an injustice because I personally believe that that would be an indictment on the system itself.

Mr KNIGHT — Could I add a comment? I think one's antenna pretty quickly tell people what people's origins are by their names or by their demeanour and so on, and I would have thought in court that that would have been one of the things that people involved in the proceedings would become quickly aware of. As to their religion, that would be another question, perhaps, but there would be certain presumptions as to a person's religion.

I defer to your experience of what may well happen in courts and perceptions people may have of the way things happen in courts on occasion, but I would be a bit worried about the logic of homogenising everyone in that way. The answer really is that the system should work to accommodate people of all faiths and ethnicity on a basis of equality, and the whole basis of our society as we have built it is that these differences are recognised and accepted and people are not prejudiced on the basis of their origins.

Mr LANGUILLER — Sorry to interrupt you, but we only have the use of a Christian Bible in courts of law. We do not have the Koran, or a book for Hindus and others.

Mr KNIGHT — We do. You can give an oath under any religion according to the law, and people do. People blow out candles, hold the Koran, and do all sorts of things.

The CHAIRMAN — Some courts have.

Mr KNIGHT — By way of clarification, this submission of ours has been submitted to members of the Board of Imams Victoria, including the leading members; it is not formally endorsed by them, though. The line we have taken is cleared and has been discussed with them.

The CHAIRMAN — Thank you for that. We are constrained by time, too, at the moment, but I would like to get a few more questions in.

Ms HADDEN — Do you have any views about what should be included in any cultural awareness training for magistrates, judges, court staff and those before whom affidavits are sworn? We have heard evidence from the Magistrates Court this morning as to the availability of the Koran in some courts and to the training that is given to court staff. Given your submission there seems to be a fairly wide gap between what is known, especially in rural courts where there may not be a Muslim community, or if there is it might be very small. Do you have any views about what should be included in a program within the courts?

Mr LAHER — If this committee were to make a submission that was acceptable that the actual providing of an oath by a Muslim does not require a Koran then quite clearly that is an educative course that needs to be taken, but apart from that there are not any particular acts or rituals that need to be observed.

Ms HADDEN — I am just looking at the notes provided to us by the Magistrates Court this morning that a Koran, when it is provided in a Magistrates Court, is wrapped in a black cloth and the note is, 'Do not remove the cloth as the Koran cannot be seen by non-believers or infidels'. Would that assist a Muslim person or not?

Mr LAHER — The covering of the Koran? Would that assist?

Ms HADDEN — If the Koran were presented by a non-believer, albeit wrapped in black cloth by the court staff to the witness, does that assist?

The CHAIRMAN — I think your answer to the earlier question overrules this particular question.

Mr LAHER — I think the handling of the Koran would be offensive to a Muslim person.

Ms HADDEN — So the holding of a Koran, wrapped in black cloth, at a Magistrates Court is useless?

Mr KNIGHT — It has no extra religious significance but people may still want to bring it. It is conceivable that someone might turn up at court and say, 'I've brought my Koran'. You were asking us a minute ago and that is how I understand we do it. It would be difficult to say that people gave evidence to a parliamentary committee saying that they should not do it. There is nothing offensive about it.

The CHAIRMAN — Just two final questions. Do you think the classes of people available to witness affidavits and statutory declarations as currently prescribed under legislation make those people sufficiently accessible to members of the Muslim community?

Mr LAHER — I have given a bit of thought to that. I think Phillip might have the same view. We believe that that list is comprehensive enough. It does not need further extension, and the individuals listed therein are accessible.

The CHAIRMAN — Are both of you able to take affidavits or declarations?

Mr LAHER — I am able to take affidavits as a solicitor.

The CHAIRMAN — Finally, what do you say about the proposition that a court is a secular rather than a religious institution? Is there a need to have any religious connotation to a courtroom procedure such as the oath?

Mr KNIGHT — The people in the court are spiritual beings. The word ‘secular’ is used so easily these days. Yes, the court should apply no religious tests — it should not discriminate under religion. ‘Secular’ means you do not discriminate as to religion. But an individual coming into a court comes in as, say, a Muslim person, a Christian person, a Buddhist person, and depending on the teaching of their own religion in performing any act, public or private, they should act in accordance with the requirement of their religion. Muslims are instructed that they should give testimony by oath and they should do that in the name of Allah. In our view it does not affect the secularity of the court.

Mr LAHER — Or of the whole system.

The CHAIRMAN — Mr Knight and Mr Laher, thank you very much for your testimony.

Witnesses withdrew.