

LAW REFORM COMMITTEE

Inquiry into oaths, statutory declarations and affidavits for multicultural community

Melbourne– 2 August 2002

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Ms D. Sisely, Chief Executive, Equal Opportunity Commission Victoria.

The CHAIRMAN — On behalf of the Victorian parliamentary Law Reform Committee I take the opportunity to welcome you to our hearing today and to thank you for the preparation already given to your submission. The Hansard staff will be taking a transcript and you will have the opportunity of perusing that, correcting it as appropriate and returning it to the committee staff. I invite you to speak to your submission.

Ms SISELY — The submission that we have prepared for the committee is basically directed at one of your key questions, which is: should we continue to have religious oaths or should the system be replaced by an affirmation or solemn promise to tell the truth? In doing so we have been guided by the objectives and principles of the Equal Opportunity Act, so they form the backbone of our submission.

We have also been mindful of the extremely diverse nature of our community, with people from over 200 different countries and 100 different faiths living in Victoria, and also of the fact that this diversity is increasing and will continue to do so in the coming years. Finally we have been mindful of the extent of racial and religious discrimination in our community that we see in the numbers of inquiries and complaints that we receive at the commission.

As the inquiry's discussion paper points out, an oath or affirmation is a legal mechanism to ensure the truthfulness of a person's evidence. While the law concerning oaths and affirmations, the Evidence Act, is exempt from the Equal Opportunity Act (EOA), we submit that the objectives and provisions of the act are relevant and helpful when considering this issue of oaths and affirmations. It is really to those objectives and principles that I would now like to talk in relation to the issue before the inquiry.

The objective of the EOA is to ensure that everyone's right to equality of opportunity is realised as far as possible and that as far as possible people do not suffer discrimination, so that is where we are coming from with the Equal Opportunity Act and that is guiding this submission.

In addition to that, however, there are two fundamental concepts that underlie the act, and these are accommodation and reasonableness. Looking firstly at accommodation, to ensure equality we need to recognise as far as possible that not everybody is equal and so to ensure equity of outcome we need to recognise those differences and accommodate them in actions we take, whether that is in relation to employment or in relation to the provision of goods and services. What this means is we sometimes need to take additional actions to accommodate, for example, someone with a disability or from an ethnic background or someone who is aged — to accommodate those differences to ensure that somebody has in effect an equal opportunity. So accommodation is possibly a useful principle for this inquiry to consider in relation to the making or giving of oaths or affirmations.

Secondly, and this goes to building an inclusive society with social cohesion to avoid discrimination, there is also the notion of reasonableness. It is a companion to accommodation, and although it is not required under the Equal Opportunity Act that all possible steps be taken to ensure that actions are reasonable, it is required that people — for example, employers or providers of goods and services — take reasonable steps to accommodate someone, say, with a disability. There is an obligation there for an employer to do that.

Reasonableness also takes into account notions of cost, of practicality, of what factors are relevant in the particular circumstance. So it might be reasonable for a large employer who is on the second floor to install a lift for somebody who might be in a wheelchair. It might not be reasonable for a very small employer of, say, six people to do that. It depends on the circumstances of cost and practicality. But the concept of reasonableness is an underlying one in the Equal Opportunity Act when we are looking to accommodate people who are different or have differences from the mainstream to ensure that there is equal treatment.

These two concepts, accommodation and reasonableness, are important concepts and principles for this inquiry to consider as well in terms of the making of oaths and affirmations.

What we have considered in relation to the current procedures for oaths and affirmations is then the extent of the diversity in the community and the practicality of ensuring that the persons of the hundred different faiths might be able to give and/or commit to an oath on the basis of religion — clearly a huge diversity. That might not be practical or it might be very expensive. So it seemed to us in the light of that and the provisions of the Equal Opportunity Act that the practical response might be not to require a religious oath but to require an affirmation, particularly given that people are attesting to their truthfulness.

If that is coloured or overlaid by religious considerations it may import a notion of hierarchy of oaths or affirmations, that those that have religious connotations may be taken more seriously than others. I know the Evidence Act says that is not the case. It may also import a hierarchy of religions if some of those 100 faiths are provided for and others are not.

Looking at all those issues, it seemed that the fairest and possibly the system that may give rise to least confusion and the least potential for inadvertent offence or discrimination is a system that solely requires an affirmation, and not a religious oath. Given that we have 100 different faiths it could be extremely difficult for staff to be able to identify a particular faith, to know the correct procedure surrounding a particular religious oath and it could lead to the necessity to ask questions that may seem to be invasive and that may inadvertently give offence. It seems that quite a potentially complex and confusing system would need to be developed to accommodate the diversity of faiths we have in this state. That led us to the conclusion that the simplest, the most straightforward and the most equitable system would be one where an affirmation as to one's truthfulness was the system rather than a system of religious oaths.

The CHAIRMAN — Do you have anything further?

Ms SISELY — No.

The CHAIRMAN — I refer to the proposition put by a number of people who have already appeared before the inquiry, including a judge of the Family Court and representatives of the Islamic and Buddhist communities — and I think I can summarise their views correctly. The judge of the Family Court noted that a lot of people would feel affronted by not having the opportunity to make a religious oath. A number of other groups, at least in the case of the Muslim community, say they would like to have that opportunity. Would you have any concerns if there was a system of oaths or affirmations as under the commonwealth Evidence Act which provides a choice?

Ms SISELY — So long as the choice was equitable, so that all faiths were able to be accommodated rather than just some, and so long as obviously there was not seen to be a hierarchy in oaths that are given on the basis of religion and affirmations that are not.

Mr LANGUILLER — Are you suggesting that there is a hierarchy? Why or on what basis do you say that?

Ms SISELY — I am not suggesting there is a hierarchy. What I am being careful to ensure is that one is not developed, in fact, and if people of certain faiths or religions were able to make an oath and others were not, for example, that could import a hierarchy.

Mr LANGUILLER — I am not clear.

Ms SISELY — If we have people in Victoria from 100 faiths, the principle of equity would say that people from those 100 faiths should be able to make an oath on the basis of those 100 faiths.

Mr LANGUILLER — To be practical about it, you are saying that if I am in a court of law in Swan Hill and I profess a particular religion, not only the wording but the text — if there is one or there is supposed to be one — I should be able to have that text in Swan Hill?

Ms SISELY — Yes.

Mr LANGUILLER — If we have not all the texts in all the courts available, because the wording is easy to get with the advent of technology, the question of sacred texts is it the responsibility of the judiciary or is it the responsibility of the individual to bring in the text, whatever it may be, in any court of law in Victoria? You are saying that if that provision cannot be made for all the courts, it is best to remove the oath altogether?

Ms SISELY — Yes, because it could lead to somebody thinking they had been given unequal treatment vis-a-vis somebody else. It is not just, as I understand it, the presence of a particular sacred text, but there are certain procedures and requirements about them.

Mr LANGUILLER — Which includes training?

Ms SISELY — Yes, exactly.

The CHAIRMAN — I comment that under the commonwealth act it is possible for a court to direct a person who is to be a witness to make an affirmation if it is not reasonably practical for the person to take the appropriate oath. Do you think that is a reasonable compromise in that circumstance?

Ms SISELY — To direct a person to make a religious affirmation?

The CHAIRMAN — The court may direct a person who is to be a witness to make an affirmation if the person — or in this case, sorry, in terms of choice it was an issue of the person refusing to take the oath or affirmation, that it was not reasonably appropriate for the person to take the appropriate oath. The issue was where it may not be possible for a person to take the appropriate oath, whether the affirmation represents a suitable compromise. The person has a choice whether to take the oath or the affirmation.

Ms SISELY — I think it is fine lines and we are into greyer areas, but I think the principle of equity should be the guiding principle. In that case that person may feel that they had been treated less equitably than someone who could make a religious affirmation. Again, we might determine at the end that that might be reasonable, and they are the fine judgments you would make, but that person still could feel they had not been treated as fairly as somebody else who could make an affirmation on the basis of their religion.

Mr KATSAMBANIS — Thank you for your evidence and for your submission. We received evidence yesterday from the Islamic community in Melbourne that the swearing of oaths by Muslims was their undertaking to truthful testimony, and that it was established in Islamic law and Muslim tradition to swear an oath, and therefore people of the Islamic faith would consider it as part of their normal practice in giving evidence in an Australian court. Furthermore, we received evidence that an affirmation outside that religious context would be essentially irrelevant and meaningless to a person of Islamic faith. How does that fit in with your concepts and all our concepts of providing the truth in courts, which is our primary goal, and the submission that you have made today?

Ms SISELY — It is difficult. I am looking at society as a whole, and what is fair and equitable for all members of the community. These are the balances that we need to strike. We are in fact looking for people to affirm their truthfulness, and that truthfulness is under Australian law. It seems to me that when we bring those two things together it is about how we best balance those. I guess the judgment we have come to in this submission we put forward, that on balance looking

at and given the diversity we have across the community, it is best, it is the simplest way and the way to give least offence to ask people to affirm their truthfulness under that law.

Mr LANGUILLER — If I applied for a job and in the course of the job interview I was asked for my religious background, generally speaking I would find it offensive, and in fact in my office I hear many reports from individuals that come from religious and ethnic minorities indicating to me that they feel employers have discriminated against them because they were asked in the course of employment interviews about their religious backgrounds. I am trying to work this out in my mind.

Yet the committee heard from religious and ethnic minorities that if we removed the oath we would be discriminating against them. In one jurisdiction, being asked a question by an employer automatically leads to discrimination allegations and your office would be packed with them; but on the other hand, in a criminal court case where there is a jury an ethnic minority person of whichever religious minority, particularly ones that have appeared before the committee, have put to us that if they were not given the opportunity of putting on the record they were of Muslim or Buddhist background, discrimination would be occurring.

I am trying to work this out in terms of consistency across jurisdictions but also, to be fair, consistency in terms of approach to these matters by ethnic and religious communities. I have not yet got an answer for that, but would you give some consideration to the subject?

Ms SISELY — Certainly under the Equal Opportunity Act it is prohibited to discriminate against someone on the basis of their religion or race, so the asking of questions of one's religion or race in an interview would leave that employer open to a complaint of discrimination because that is prohibited behaviour.

Certainly one is liable to a complaint of discrimination in the provision of goods and services if those services are provided or not provided on the basis of race or religion. Certainly that is prohibited behaviour, so you might expect the same sort of behaviour to flow over to court procedures.

Court processes and decisions are not covered by the Equal Opportunity Act, but administrative processes around them are covered. The situation you are talking about would not be covered in that instance.

It is a very difficult issue, but I return to the point I made earlier about being a very diverse and multicultural community, with many different faiths and beliefs, and divisions within particular segments of our community from different cultural backgrounds. For example, they can be people from Arabic backgrounds. There are many different faiths and beliefs among people from Arabic backgrounds.

We need to be careful when we are weighing up these issues, and not presume any particular religious observance from people from a particular cultural background.

The CHAIRMAN — If there was to be a non-religious affirmation, what form do you suggest that should take?

Ms SISELY — I must say I have not looked into the particulars of a form that an affirmation could or should take.

The CHAIRMAN — There are precedents that the committee staff have sourced, thank you.

If the committee opted to retain a religious oath do you have any suggestions for the sort of cultural awareness training that would be appropriate for judges, court officers and people before whom affidavits were to be sworn?

Ms SISELY — Certainly cultural awareness training is important for all of us in our daily walks of life. There is another concept under the Equal Opportunity Act, which is vicarious liability, which says that an employer or a provider of goods and services is liable for the actions of his or her staff or agents. So if a member of staff or agent breaches the act, the employer is liable for that action. An employer can discharge that liability if he or she has taken steps to prevent discrimination. One of the key ways discrimination can be prevented is through providing training and policies to prevent it. Training is critical in terms of promoting cohesion and avoiding discrimination. The onus is on all of us to provide appropriate training to prevent discrimination, whether that be the provision of court services, whether it be retail services or employment.

The CHAIRMAN — In your written submission you state that linking respect for the law to a belief in God has the potential to suggest that some ethno-religious differences impact on honesty. Can you elaborate on how that can occur?

Ms SISELY — It gives the impression that unless a person is of a particular religion or faith, the answers they may give are of lesser value than those of somebody from that faith; or if we pick the top five religions and people are able to make an oath, but not others, they may somehow carry more weight than others. It is a matter of impressions.

Mr LANGUILLER — To revisit the subject, with the utmost respect, it is tempting to have the Equal Opportunity Commission before us for a number of reasons. I will be particular about this. Could it not be said about your submission that by submitting to us that oaths should be removed, the Equal Opportunity Commission is making a suggestion that discriminates against people of religious backgrounds who argue and have put to us that their way of telling the truth or the preamble to making a submission to a court of law must be preceded by an oath?

Ms SISELY — We took as our guide the statement in the inquiry's paper that an oath is about truthfulness in a legal proceeding under Victorian law. A person is affirming that they are giving the truth in that circumstance. That seems to be a separate question from one's religion or faith.

We then also looked at the numbers or vast diversity of faiths we have here, and the guiding principle that we treat everybody of whatever faith, or of no faith, equally; and as far as possible be seen to do that. That is where we were coming from when we prepared our submission.

At the end of the day, equal opportunity decisions that we make and decisions that you are required to make in relation to this inquiry is a balance. It is a balance between what is fair, what is sensible and what is practical in the circumstances. They are the judgments we need to make. That is why under the Equal Opportunity Act there are exceptions to our legislation to enable us to make those balances.

The CHAIRMAN — Thank you.

Witness withdrew.