LAW REFORM COMMITTEE

Inquiry into oaths, statutory declarations and affidavits for multicultural community

Melbourne – 2 August 2002

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Justice N. Mushin, Family Court of Australia.

The CHAIRMAN — Good morning, Justice Mushin. On behalf of the Victorian Parliament's Law Reform Committee I welcome you to the commencement of our hearings today relating to our inquiry into oaths and affirmations with reference to the multicultural community. Should you have any alterations you would like to make to the Hansard record, feel free to correct the record as per your understanding of what took place and return it to committee staff.

Thank you for the very comprehensive written submission to the committee. Subject to your express preference, I would like you to speak generally to your submission and make the main points, and then we have half a dozen questions we would like to put to you.

Justice MUSHIN — Certainly; thank you. First, I appear not only as a judge of the court of some 12 years standing and with an enormous amount of experience of the oath being administered in my court and also as counsel for many years before that, but I am also the chair of the chief justice's advisory committee on ethnic issues, so I am very deeply involved in matters of culture, ethnicity and the like.

The essence of the submission made by the court is that diversity should be the fundamental basis of any opportunity for somebody to give evidence in any court. Our view is that that diversity can best be provided by enacting effectively sections 21 to 24 of the commonwealth Evidence Act. You will be aware that that act gives a witness the opportunity to make either an oath or an affirmation. The oath may be made with the use of a religious text, but it need not be. People frequently take an oath without, for example, holding the Bible or any other religious text. If they wish to use a text they have the option of using any religious text that is appropriate to their religious beliefs.

You will see from the schedule to the commonwealth Evidence Act that the form of oath permits them to refer to God by the name of their deity, so they do not need to use the word 'God' but they can use the word for their deity. I have frequently seen witnesses taking an oath on the Koran, for example, but there are some people who want to take a Muslim oath — this is one example only — but not hold the Koran while doing so. That goes for all the different religions.

There is then the option of the affirmation, and in my view the affirmation needs to be recognised as having exactly the same standing before a court as does an oath. There should be an absolute option in the person giving the evidence as to whether to swear by way of an oath or an affirmation and no judgment should be made of any person for deciding to take either an oath or an affirmation and, in the case of an oath, for the form of the oath taken. It seems to me that that would allow a diversity that would recognise the enormous range of culture, ethnicity, race, religion and language in our community.

I was interested to read in yesterday's *Age* the proposal being put to you by the Equal Opportunity Commission and the Ethnic Communities Council of Victoria. They seemed to be suggesting, if correctly reported, that an oath is not appropriate and that there should be an affirmation only. I disagree with that, and the reason is that I think a lot of people would feel affronted by not having the opportunity to make a religious oath. It is a cultural matter, and by taking away the oath the risk would be that people would feel they were not being taken as seriously as they might be if they took an oath. That is essentially a summary of what I have to put to you, and I invite your questions or comments.

The CHAIRMAN — Thank you. Some general points have been raised in relation to your submission. What cultural awareness training does the Family Court provide for judges, tipstaves and associates? Is there any specific training offered on oaths and affirmations — for example, on the different types or oaths, rituals or practices associated with the taking of the oath and the procedures for the handling of holy texts?

Justice MUSHIN — The people who administer oaths in our court, who are the equivalent of the state court tipstaves, are called court officers. Essentially they do the same work

as a tipstaff in the state courts. They are all trained with regard to the principles I have just enunciated to you with regard to the contents of the Evidence Act. They will ask people when they go into the witness box whether they wish to make an oath — which they explain to be swearing by God or other like swearing — or make an affirmation. If they then elect to take the oath they are told they may, if they wish, take an oath holding a religious text or not holding a religious text.

We have Bibles in every court, and we have the Koran immediately available. One of the advantages we have is that nearly all the evidence-in-chief in our court is on affidavit so we are already on notice of what sort of swearing a witness wants to make before they come into our court. For example, barristers are advised that they should make their clients and witnesses aware of the requirements so they are not embarrassed when they come into the witness box by a whole long inquiry, because that would defeat the whole purpose of the exercise.

I will expand on that a little. The committee I referred to which I chair — the chief justice's ethnic advisory committee — and the court's national cultural diversity committee on which I sit, are both extremely involved in matters of ethnicity, culture and so on both inside and outside the court. We are very actively involved in implementing a most comprehensive audit of our court conducted recently by a consultant, and we are about to commence very wide-ranging consultations outside the court on all sorts of matters of ethnicity. When I use the word 'ethnicity' I mean ethnicity, culture, race, religion and language — there are five aspect to it, and I use it in its widest possible sense. We are intending to commence very wide consultations outside of the court on all those matters.

There are many activities going on within the Family Court throughout Australia with regard to educating our staff, particularly people like our counter staff, who are the first point of call, if you like. When people come in to file an application the counter staff are the first people they see, and we are making them very well aware of these issues. We have facilities for interpreter services and all of those sorts of things.

Mr LANGUILLER — Our committee received a submission yesterday from the Islamic Council of Victoria which basically indicated that the Koran should not be used in a court of law and that according to their tradition it is enough for Muslims to take an oath without the Koran. If anything, that exemplified the complexity of these issues because it appears that courts in various jurisdictions — with the best of intentions, may I add have — use the Koran when, as the council advised our committee, that should not be the case.

Justice MUSHIN — When the Koran is used in court it is used only because the person taking the oath wishes to use the Koran. We do not require them to do so, and in fact the commonwealth Evidence Act makes it absolutely clear that we cannot require them to use the Koran, and I fully respect the Islamic council's submission. It is a matter for each individual who comes into our courtroom as to whether they wish to use the Koran or any other holy text, and we regard them as all being the same. I certainly would make no adverse comment at all on the council's submission.

Mr BOWDEN — The submissions made to this committee have contained several options, and one of those options is for no change to the present practices in Victoria. One of the other submissions was that the committee could consider adopting the practices of the commonwealth Evidence Act to align the Victorian practice in the criminal and civil jurisdictions closer to what is accepted as being a very good procedure. If the committee were to consider aligning the Victorian legislative provisions with the commonwealth Evidence Act, what would be your comments?

Justice MUSHIN — That is also our submission. An enormous amount of work has been done by the Australian Law Reform Commission, and I have simply brought along the text of its *Report No. 26 on the Evidence Act*, which was done approximately in the middle 1980s. I refer you in particular to volume 1 at page 138 and following and to volume 2 at page 106 and

following, where you will see a lot of the work that has been done there. If I could put in a free plug, my respectful view would be that the state of Victoria would do well to follow the state of New South Wales in enacting the entirety of the commonwealth Evidence Act and adapting it to state law so that we have uniformity. That would be my strong urging of you, but obviously that is outside your immediate terms of reference.

Mr BOWDEN — 'Following New South Wales' is a novel expression.

Justice MUSHIN — It happens to have been the first state to effectively enact the commonwealth legislation.

Mr LANGUILLER — Would you give consideration to having an affirmation as the first option? As I understand the act the oath is the first option, and in a practical sense what would happen in a court of law is that the judge or the court officer would initially give the person in the witness box the oath as an option, and then if for whatever reason the person rejected that option then they would be given the option of the affirmation. Given that the courts deal essentially with civil matters, is it not more appropriate to have the affirmation as the first option and then, if the person so wishes, to make provision for the oath to be given as an option?

Justice MUSHIN — My short answer to your question is no, and my reasoning is that by giving a priority to one over the other, whether it be the oath or the affirmation, you defeat the fundamental concept of diversity. To answer part of Mr Bowden's previous question, to retain the procedure you have now, in which witnesses need to show why they cannot give an oath before they can give an affirmation, is in my view the embodiment of the criticism that I would make of the present legislation, and it is the reason I would take the same position with regard to giving primacy to an affirmation over an oath. The whole concept should be contrary to primacy of one option or the other.

Mr BOWDEN — Truthfulness and a conscious level of belief by the person giving the evidence is the core of and the key to what we are trying to achieve. In your experience as a justice, have you been reasonably satisfied that there is a willingness to undertake the responsibility of telling the truth in the normal court processes through either the existing situation or the commonwealth Evidence Act, because that is what we are trying to achieve? It is not about religion or methodology, it is about truthfulness.

Justice MUSHIN — In terms of the willingness of people to tell the truth, I think most people tell the truth. There is a view that lots of people lie in courts. My experience of courts of over 30 years now has been that most people tell the truth. What happens from time to time is that people come to believe a truth which is not a lie but which is wrong. They come to believe their own version of events. In a jurisdiction like mine, where emotions, bitterness and anger are part and parcel of everyday litigation, that is especially relevant. People, for example, talk about children lying. I do not think children lie in that sense. I think they do exactly the same thing — they have their own realities, which might on an empirical assessment be impossible reality in real terms but which is a genuine reality for them. The human mind does some very strange things to us, and I think we all suffer from that from time to time.

Mr LANGUILLER — I wonder if politicians might quote you on that?

Justice MUSHIN — You are most welcome to quote me! This is a public hearing.

Mr LANGUILLER — You said in your remarks that no judgment should be made of any person who decides to take the oath and/or the affirmation.

Justice MUSHIN — Yes.

Mr LANGUILLER — Would you elaborate on that? To put it a different way to be clear, one may interpret that as implying that perhaps a judgment is made.

Justice MUSHIN — I have not been into anybody else's court for nearly 12 years; it is nearly 12 years since I became a judge. However, before I became a judge I practiced in the courts at all levels for some 20 years. I think things changed in the 1980s, but I think when I started in the early 1970s there was a tendency in some quarters to think less of somebody who affirmed as distinct from swore an oath. I would be extraordinarily surprised if that was still the case anywhere because I think the judiciary has matured with the whole community. I cannot say that I have heard an example of that for a very long time. However, certainly, particularly in the lower courts many, many years ago, that occurred from time to time. That is the whole purpose of the commonwealth Evidence Act provisions — that no judgment is to be made.

Mr KATSAMBANIS — Thank you for your contribution today. I want to explore this link between the oath and truthfulness. Is the oath simply a ritual that we undertake at the start of a court case or do you believe it has an actual impact on the nature of the evidence that the witness who is sworn or affirmed then gives and does it therefore add to the obtaining of truthful evidence in our judicial system?

Justice MUSHIN — Definitely the latter. It is much more than a formality. I think everybody takes it very seriously indeed. It is a solemn moment in a courtroom — for example, nobody must move around a courtroom or shuffle papers or anything like that while a witness is being sworn whether by oath or affirmation, and also there is quiet and respect at that moment. I think it is an important substantive moment in a court proceeding. Of course, the reality is it also gives the foundation in those very rare cases for a charge of perjury where deliberate lying can be proved beyond reasonable doubt. It is important.

Mr KATSAMBANIS — Do you believe that the average person being sworn in is aware that the penalties for them not following their oath are not simply divine penalties but penalties of perjury within our legal system? Do you think there is an awareness?

Justice MUSHIN — I cannot say in every case because it is very rare that the specific question is put. However, as a general statement, definitely.

Mr KATSAMBANIS — So there would not really be any need to incorporate the concept of penalties for perjury in the same way they are incorporated in the statutory declaration form as part of that swearing in?

Justice MUSHIN — My view, no. In the context of a trial, if evidence appears to be straying towards being deliberately untruthful, a witness would be warned anyhow; certainly in my experience, judges would always do that. There are times when cross-examiners — sometimes for show and sometimes quite substantively — would say, 'You realise you are under oath and you realise what the penalties are. You can go to jail if you lie, now let me ask you this question.'

Mr KATSAMBANIS — One final question on that point, we have not had many examples of recent charges of perjury. Do you have any examples from your jurisdiction?

Justice MUSHIN — There is a very famous one in England of a very famous author who was a lord of the realm and who is paying a very high price for what he did. I have not done any criminal law for many, many years but I think you would find that criminal lawyers would say to you that the charge of perjury is very difficult to establish. You have to remember that you start with beyond reasonable doubt. Proving beyond reasonable doubt which is the truthful version and then proving the necessary guilty mind is, I am told by the criminal lawyers, a very difficult proposition.

The CHAIRMAN — You noted that a lot of people would feel affronted by not having the opportunity to make a religious oath. How would you define the importance of a religious oath to an individual?

Justice MUSHIN — I would not say proportions of the community, but there are a lot of people within the community who live their lives based on their religious beliefs and they see giving evidence in court as being a very solemn matter. The solemnity of that matter for a lot of people has, as part and parcel of it, the need to swear by God or their deity as that may be. I would see that denying them the opportunity and the right to do that if they so choose, and I emphasise if they so choose, might be seen by them as their evidence being taken less seriously than they would like it to be.

The CHAIRMAN — I have another question. In your written submission you note that the commonwealth Evidence Act retains the religious oath which remains relevant to a large proportion of the Victorian community. There have been some suggestions that Victorians are only nominally Christian or adherents to a particular religion — those citing no religion were the third-largest group in the recent census. How do you deal with that issue in the context of the preference for the religious oath?

Justice MUSHIN — I have no preference, I am not preferring it at all; on the contrary, I am saying it should be on equal terms with the affirmation. However, I suppose if one were stating a principle, if there was one person in the Victorian community who would be affronted by not having the opportunity to swear by their deity that would be reason enough to retain an oath, if I can illustrate it by the principle. I do not think that proportions of religious people or what might be referred to as practicing religious people in the community should be a guide to whether you should do it or not. There is another aspect to that, if I may, and that is that I think the community needs to continue to recognise its courts as a vital part of the democratic process. Therefore, the solemnity of giving correct evidence before the court is fundamental. That being so, as I say, as great a diversity as possible should be given to the opportunity to give truthful evidence and the opportunity to attest to giving truthful evidence.

The CHAIRMAN — I have just a couple of other points I have been asked to ascertain. Have you had examples of people bringing their own religious texts to court? What unusual oaths have been accommodated?

Justice MUSHIN — The answer to the first one is yes. In fact, not all that long ago a Muslim brought a Koran to court, and that is a good illustration of what Mr Languiller put to me earlier. What examples have I had? I have had Buddhists, I have had very Orthodox Jews bring their own Old Testament to court. You would be aware that the Bible has both the Old and the New Testaments and very often when religious Jews wish to give evidence the Bible is opened at the Old Testament. There are some Jews who would find that offensive and would bring their own text, and perhaps we should have that text as well. One of the things we are doing as part of the consultations I spoke about earlier is seeking the views of various groups as to what other texts we should have. Those are two examples.

Mr BOWDEN — My question is very general, and it is a broad question. How many hearings per annum would occur in the courts of the Victorian jurisdiction of the Family Court? If you could take a rough guess — how long is a piece of string — how many witnesses might appear? That would give us some volume appreciation in our deliberations.

Justice MUSHIN — The question is a bit like how long is a piece of string because when you say 'hearings', there are all sorts of different hearings. At the end of the chain, which is what I do — the defended cases, the final hearings — it is an unusual case that is not least 1 or 2 days, 3 or 4 days is quite usual, 5 to 10 occasionally and even one over 10 — I did one case of 22 days two years ago and there were 35 witnesses in that case. It would be very unusual in a case taking 3 or 4 days to have less than at least the parties, so that is two. If it is a child case you might get grandparents or a contact supervisor. If it is a property case you might have a valuer and an accountant, so there would be at least four or five witnesses. There are 12 judges of the Family Court of Australia — there are only 11 at the moment but there are usually 12; we are expecting that to change soon. At any one time there would be four or five of those doing those long

hearings, and we do one or two a week each — a lot of cases settle. If you would like me to, I could give you some statistics.

Mr BOWDEN — I think that would be helpful.

Justice MUSHIN — It would take me a bit of time but if you would like a supplementary submission on statistics, I would be happy to do that.

Mr BOWDEN — The reason I ask is that the practices and the reputation of the Family Court is very high in the community in its techniques and its approach.

Justice MUSHIN — Thank you.

Mr BOWDEN — I think it would be helpful to us in our deliberations to have some appreciation of the volume and the interaction with the community in terms of oaths — the volume relative to what we are considering. That would be appreciated..

Justice MUSHIN — I can tell you it feels vast. The queues are between 12 and 18 months long for final hearings. There is an enormous amount of work being done at lower levels in our court by registrars and then there are other interim hearings which do not involve witnesses. All you need to do is look at the paper to get an idea of the length of the list every day.

Mr BOWDEN — That volume appreciation is important to us because it will give us some feel for the interaction in the community in terms of witnessing of evidentiary statements and documents. It gives us some idea of the facts, whether the objections and the difficulties are either abnormal or occasional statistics.

Justice MUSHIN — I would be pleased to do that. So you want in particular statistical information with regard to matters which involve the swearing in of witnesses in our court in Victoria?

The CHAIRMAN — Swearing the oath in court.

Justice MUSHIN — Oath or affirmation? I will not be able to tell you how many witnesses we have, but I can certainly give you the volume of cases that go through, and we can then give you the anecdotal material with regard to the number of witnesses and so on.

Mr BOWDEN — It would give us a feel for the impact of what we are considering.

Justice MUSHIN — I can tell you in that in our court alone just in Victoria it is enormous.

Mr LANGUILLER — Incidentally, thank you for a very good submission. As a matter of principle I agree with your submission, particularly with respect to making provisions for diversity and varying options in terms of oaths and affirmations. However, I have a concern. I am mindful of your position in the Family Court, but I am also mindful of your position on the justice advisory committee on ethnic issues.

Generally with the judiciary and the lawyers — counsel and the judges — I personally have no concerns with respect to their capacity to be prejudiced by a witness's religion or background. I think the training in Victoria and Australia generally is exceptional in the light of world experience. However, I could not say the same about juries for a variety of reasons based on anecdotal experience in my office in a very multicultural community. The point I am trying to make is this: I would have a concern if I had to appear before a judge and jury but before the jury I were to reveal in a criminal case for example that I was a Muslim at this point in time. I would not be confident — not totally confident — given my anecdotal experience, that the jury would not be prejudiced and the justice would not be prejudiced for a variety of reasons that we all read in the papers and so on and so forth.

I understand we have the option of the affirmation but from that point of view I remain somewhat concerned that the judiciary may retain the oath because I fear that it might be used against a person in a court of law, primarily by juries — individuals who may not ever know that that are being prejudicial about the person before them.

Justice MUSHIN — First of all, can I say that I have not been in a court in which there has been a jury for at least 15 years.

Mr LANGUILLER — I appreciate that.

Justice MUSHIN — That is the starting point. We do not have juries; judges try as a fact in law. I would suggest to you that the proposal I am putting in accordance with the commonwealth Evidence Act precisely answers the very point you are making. Take away the jury, in any court if somebody chooses not to reveal their religion — and it could be for tactical reasons in a courtroom and it could be for purely personal reasons of wanting privacy; I regard that as being an entirely appropriate thing — they have an absolute option to take an affirmation because that is available to them without any adverse comment and without any adverse finding being made. That is an excellent example, if I may say so, of the very point I am seeking to make about diversity and the need to give as many and as wide options as possible.

Mr LANGUILLER — Thank you.

Mr KATSAMBANIS — Just to follow up, would you agree that if the perception that Mr Languiller reveals is a perception in the community, that in itself could lead to damage to our judicial system and its primacy in Victoria?

Justice MUSHIN — It is a very good and very difficult question. I think those in leadership positions in the community have an obligation to educate the community on those matters. I would hope and expect that any reform that the Victorian Parliament were to enact would be accompanied by an education program explaining why whatever has been done has been done. I think generally my answer would be no. I would hope that would not be the case. If the legislation is phrased appropriately and if any explanatory paper or the like and any publicity and education campaign were appropriately drawn and conducted, I do not think it would be a problem. I have a lot of faith in the inherent goodness of the community. I see that every day in my courtroom. I think probably the answer to your question is no.

The CHAIRMAN — Time has eluded us. Thank you very much for an excellent submission, and the details you will be providing.

Justice MUSHIN — The court offers its continuing cooperation. I will get that further submission. Could you give me an idea of when you would like that material?

The CHAIRMAN — I will arrange for Kristin and Merrin to liaise with your associate.

Justice MUSHIN — Thank you very much indeed. Thank you for hearing us.

The CHAIRMAN — Thank you.

Witness withdrew.