

LAW REFORM COMMITTEE

Inquiry into oaths, statutory declarations and affidavits for multicultural community

Melbourne – 1 August 2002

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Mr J. Saltalamacchia, Prothonotary;

Ms S. Loo, Judge's Associate; and

Mr T. Peters, Senior Tipstaff, Supreme Court of Victoria.

The CHAIRMAN — On behalf of my parliamentary colleagues I welcome you here this afternoon to our inquiry into oaths and affirmations with reference to the multicultural community. I invite you to speak to your submission, following which we will ask a few questions.

Mr SALTALAMACCHIA — We have prepared a statement from the court. It sets out and outlines the current procedures that the court adopts in respect to oaths and the different types of areas in which they are administered. We would like to tender that to the committee.

The CHAIRMAN — Thank you very much. The presence of staff from the Supreme Court has introduced a high level of formality into our proceedings!

Mr PETERS — Should we apologise for that?

The CHAIRMAN — I suggest we take a moment to scan read the statement. There is no point in your reading it aloud.

Mr SALTALAMACCHIA — That was not our intention.

The CHAIRMAN — What is the difference between a tipstaff and a tipstave?

Mr PETERS — ‘Tipstaff’ is singular and ‘tipstaves’ or ‘tipstaffs’ is plural.

The CHAIRMAN — So does that mean that ‘tipstaffs’ would normally have an apostrophe in it?

Mr PETERS — Yes.

Ms LOO — I note that the title of the publication referred to is accurate. This is the document and it does not have the apostrophe.

The CHAIRMAN — Thank you.

Ms HADDEN — That looks like a newer version.

Ms LOO — No, this is the 1971 version, in pristine condition.

The CHAIRMAN — We will refer to the tipstaffs manual in our final report.

Mr SALTALAMACCHIA — It would be appropriate to put it in correctly.

The CHAIRMAN — The Evidence Act 1958 provides that any oath may be administered in any manner which is now lawful. This section appears to be the source of law for the accommodation of alternative religious oaths. Can you give examples of different religious oaths which have been accommodated in the past? In your submission you refer to the Bhagavad-gita.

Mr PETERS — I will not endeavour to pronounce the names of the different religious texts. Our statement relates to those which are available from the Supreme Court library if required. It is not an indication that they have been used in the past, but they are available if they are required. If we look at the last paragraph of the submission, the most commonly used document is the Bible and the next most commonly asked for is the Koran. Those are the only two that I know of in my experience. I have spoken to others, and that seems to be the norm.

The CHAIRMAN — Have any other forms of oath been accommodated at all?

Mr PETERS — Yes.

The CHAIRMAN — Could you speak of those circumstances?

Mr PETERS — Do you recall the matter of the jury service?

Ms LOO — Yes; I can say from personal experience we did have a Wicca witch who was an accused and he insisted that he wanted to swear — —

The CHAIRMAN — Did you say a ‘wicked witch’ or a ‘Wicca witch’?.

Ms LOO — Wicca. He wished to swear on his sacred borstal, which is a staff. He made that request of the judge. The judge adjourned the court in order to — —

The CHAIRMAN — Was this before or after Harry Potter?

Mr PETERS — Well before Harry Potter!

Ms LOO — A form of oath was devised which was similar to the form used for an affirmation except that he swore on his sacred borstal. That is the most unusual instance of swearing.

Ms HADDEN — Did he have the borstal? Did he bring that with him?

Ms LOO — Yes, I think it was retrieved from somewhere and he had it in his hand when he took the oath.

Mr PETERS — There was also one trial where the person requested to swear on an ankh, a religious cross with two loops above the crossbeam. A similar sort of procedure was taken. The judge adjourned the court, went out and conferred with other Judges the best way to do it and an appropriate oath was devised. Both were deemed to be binding by the person giving evidence in the eyes of the judge.

Ms HADDEN — Were those specific witnesses legally represented? Could that not have been advised upon and notified to the court tipstaff so the judge would not have to adjourn the proceeding?

Ms LOO — In the case of the Wicca witch, yes, the person was legally represented. The matter came as a surprise when the witness was first called. He informed everyone of his requirement, including his counsel, only when he was in the box.

Mr PETERS — The standard procedure for any differing oaths is normally that the counsel would contact either the tipstaff or associate and advise whether people want to affirm, take the oath on the Bible, the Old Testament, the Koran and they would be accommodated. It is not that often that we are caught unawares in court. It is usually done through the counsel and instructing solicitors or whatever.

Mr LANGUILLER — Why do you provide the Koran?

Mr PETERS — Personally, I don’t know. It is just a book that we are provided access to for use in court. It is held by the Supreme Court library and there are one or two others around.

Mr LANGUILLER — The reason I asked that question was because we heard submissions today from the Islamic Council of Victoria. They put it to us that the Koran should not be made available to witnesses because their religion does not require it. In the event that it were to be made available, a whole range of procedures would be required in terms of handling their sacred book. Consequently, with the best of intentions, I might suggest that our judiciary may not necessarily have gotten it right in terms of making it available to Muslims.

Ms LOO — This publication was published in 1971. As far as I know there is not a second edition or an updated version. It may well be that the practice is very much out of date.

Mr PETERS — The publication was produced by the Law Department in Melbourne at that time, which was external from the court itself. In the section of the manual that covers the varying oaths that are available to be used, the one under Muslim witnesses states that Muslim dignitaries in Victoria had indicated that in all legal proceedings a Muslim may be sworn in accordance with the usual practice prevailing in the state and that the Koran could be used in that. The Koran has been made available for a number of years and it is still available because it is a practice that is required by people coming into court.

Mr LANGUILLER — Don't get me wrong! I am sure it has been provided for that reason.

The CHAIRMAN — You mentioned a moment ago that in the case of those unusual forms of oath to accommodate the needs of a Wicca witch and another person you were able to stand the court down or the court was stood down while the process was established and that fairly quickly an alternative oath was able to be developed which was acceptable to the particular persons. Do you ever find the circumstance arise where you are not able to accommodate an oath, or that is the all-encompassing range of examples you have?

Mr PETERS — Probably if an oath was not able to be accommodated the alternative would be to offer the use of an affirmation. That would be the standard procedure. Quite often witnesses are able to affirm if they do not wish to take an oath on the Bible, or an oath.

The CHAIRMAN — My next question is responded to in part by the submission you have just handed up, and that relates to cultural awareness training. It is suggested in this written document that it is not really a big issue in the nature of cases that come before you within your jurisdiction. Is that correct?

Mr SALTALAMACCHIA — As our summary document says, training is offered through the department and the majority of staff are aware of it and obviously encouraged to undertake that training, but with the case load and the case types that the Supreme Court generally deals with, the majority of persons who come before it are either represented or need to be referred to a senior member of staff, and that is generally either me in my role as Prothonotary of the Registry, which is the first point of call for most persons wishing to bring the matter to the court, and my senior staff. We are aware of these cultural differences and needs of most people and most litigants who come before the court.

The CHAIRMAN — In your manual for associates there is reference to swearing an oath in the presence of Buddha: the committee is aware that that oath may no longer be an appropriate form of Buddhist oath. How does the court ensure that the format of oaths remains current, relevant and meaningful to adherents of different religions?

Mr SALTALAMACCHIA — A recent example was that the librarian is the one who holds these religious texts and is generally the one who is responsible for updating the information and the reference source for the court. I spoke to him just last week about this particular issue because it was possible that someone from the Sikh religion may have wanted to take an oath, and he had made inquiries through the Sikh society to see what was required. One of the reference texts the librarian showed me at the time was something prepared back in 1992 by the Judicial Board of Studies. Whilst we are still talking about something that occurred 10 years ago, if the situation arises within the court where we need to find information we generally turn either to the librarian or the respective societies to obtain that information.

The CHAIRMAN — Your submission notes that although the vast majority of people take an oath on the Bible, a small but increasing number will make an affirmation. How do witnesses know that they have the right to take an alternative form of oath or affirm? Do court officers inform witnesses that they may object to taking an oath or may take an alternative oath, or is it up to the witness to decline the oath?

Mr SALTALAMACCHIA— It is a combination of all. It depends where the oath has been administered, how, and in particular by whom.

Mr PETERS — In a courtroom situation where a witness is coming in to give evidence, the majority of the time counsel involved in the case who are calling the witness advise the tipstaff that the next witness wishes to affirm, take an oath on the Koran or have some strange or unique form of oath. If that is not done the usual practice when the witness is coming into the court is that the tipstaff will ask the witness if they wish to take the oath or affirm.

Mr LANGUILLER — Do you get the impression that people know the difference between an oath and an affirmation and the various options?

Mr PETERS — Personally? It is very difficult to decide within the short period of time. From the time you ask the question to the time you are administering the oath can be seconds. In the case where they are advised by counsel, we are advised by counsel and we would assume that counsel have instructed or advised the witness of the difference between taking an oath and making an affirmation.

Ms HADDEN — The juror's oath, set out in schedule 7 of the Juries Act, starts with the words, 'You and each of you swear by Almighty God', et cetera. How are individual jury members given the option to make an affirmation if that is their wish?

Mr SALTALAMACCHIA — All jurors view an explanatory video prior to being taken to court and subsequently empanelled. Whilst that does not cover the different options, it makes them aware of what the court process is going to be. On one or two occasions a juror has felt uncomfortable swearing on the Bible and wanted to swear on the Old Testament or preferred to affirm, so they know the situation and what to expect before they get to a court. If they have an objection they generally raise it.

Ms LOO — I have empanelled juries, and the new edition of the manual now has a provision to explain to the jury — I have forgotten the wording — that they can take an oath which is taken on the Bible or they may make an affirmation which is not, but both are equally binding. Those who wish to take an oath are first asked to stand and raise the Bible and take the oath; and if any person wishes to affirm then the affirmation will be taken. So it is explained to them as part of the procedure for empanelling the jury that they have the option.

Mr LANGUILLER — To get that clear, it is explained to them that they have the option of taking the oath or making an affirmation, and in the case of the oath that they have the Bible?

Ms LOO — Yes. They would take the oath on the Bible.

Mr LANGUILLER — But there are many sacred texts?

Ms LOO — That's true, yes.

The CHAIRMAN — Are witnesses who wish to take a culturally appropriate oath currently required to explain their religious practice in open court?

Mr PETERS — Not to my knowledge.

The CHAIRMAN — And do you have any comments about the possible abolition of the religious oath and replacement with an affirmation or a solemn promise to tell the truth?

Mr SALTALAMACCHIA — No, Sir, I would prefer not to say. I have no comment on that.

The CHAIRMAN — My colleagues are accustomed to that remark — that is, my colleagues in Canberra!

The next proposition is in relation to an amendment to the Evidence Act along the lines of the commonwealth Evidence Act whereby the witness has an unconditional right to affirm, and neither the oath nor the affirmation is given primacy.

Mr SALTALAMACCHIA — Again I am not really in a position to comment on that, Sir.

The CHAIRMAN — We have finished in excellent time. Thank you for your written submission, which has responded to a number of the issues, and thank you for coming along here this afternoon. We shall take a short break.

Hearing suspended.

The CHAIRMAN — Colleagues, I would like to go back. There was one other small point that arose during the recess that I would like to have on the record more as a matter of general interest in passing. I invite the Prothonotary of the Supreme Court to outline his experience in dealing with lawyers or prospective members of the legal profession when they are required to attend at the banco court for their swearing in.

Mr SALTALAMACCHIA — It just follows on from the point that Mr Languiller raised when we were talking about the options given to persons and whether they understood the difference between an oath and an affirmation. I thought about it during the recess that one of my duties is to administer the oath of office to members of the legal profession who apply to be admitted under the mutual recognition legislation. One of the questions I ask them is, 'Would you like to take the oath or affirm, or is there another form of oath that you would like to take?', and they look at me with a quizzical look and say, 'What's the difference between the oath and the affirmation?'

The CHAIRMAN — These are interstate lawyers coming to Melbourne?

Mr SALTALAMACCHIA — These are interstate lawyers coming to Melbourne, more so unfortunately than Melbourne lawyers going interstate. It is interesting that when you explain to them that the main difference is that one is taken on the Bible and the other is not; that is when they make the decision.

Mr LANGUILLER — Today we received a submission which was particularly interesting because it suggested that maybe we could change the system, and it happens in other jurisdictions internationally, so that the taking of the oaths and/or affirmations be done by the judge and not necessarily by court officers. How would you feel about that?

Mr SALTALAMACCHIA — I would prefer not to comment on that issue, Sir.

The CHAIRMAN — Yes, you have a career awaiting you! Thank you very much for that additional evidence, Mr Saltalamacchia.

Witnesses withdrew.