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

Justice Kellam, President;

Mr J. Ardlie, Chief Executive Officer; and

Mr G. Small, Tipstaff, Victorian Civil and Administrative Tribunal.

The CHAIRMAN — On behalf of the Victorian parliamentary Law Reform Committee I welcome you to our inquiry into oaths and affirmations with reference to the multicultural community. We value your contribution to this process. Should you have any questions in relation to the *Hansard* text, please feel free to liaise with committee staff, Merrin Mason or Kristin Giles, who are doing the underpinning work for our review. I invite you to speak to your submission, following which we will ask questions.

Justice KELLAM — Our submission is made on behalf of the Victorian Civil and Administrative Tribunal, and I do not wish to be seen to be speaking on behalf of the Supreme Court. It is clearly a VCAT submission and takes into account our particular circumstances. I have no authority to speak on behalf of the court. I am not sure if it put a submission in, and if it did I do not know what it says.

The CHAIRMAN — We will be taking evidence from the Supreme Court — that is, the Prothonotary, a judge's associate and a tipstaff — after your evidence.

Justice KELLAM — We have put in a written submission which I adopt, and probably several matters arise out of it. I have also brought along another document that I thought might be useful to the committee: it is an extract from the staff manual which we provide to members of staff.

VCAT — unlike the Supreme Court where you would have somebody like my tipstaff, Mr Small, who has been doing it for many years and is very familiar with the administration of oaths and affirmations — has oaths and affirmations more often than not either administered by the member or by a member of our staff. The regulations provide that a VPS2 or above can administer the oath and affirmations.

At the commencement of VCAT I had some concerns about issues of oaths being administered in hearing rooms where people were not represented, where there was perhaps insufficient explanation to them about what was involved. I had a look at the matter and at that stage we decided that we would direct our staff, generally, to offer people who were giving evidence the choice, 'Do you wish to be affirmed or do you wish to make an oath?'.

I do not think that, on a strict reading of the Evidence Act, complies with the act, however I took the view that it was quite arguable that there was a prospect that it was not reasonably practicable within section 102B to necessarily provide the oath required by the person, be they Muslim, Hindu or otherwise. That is the course we have taken, which could arguably not comply with the act but I think is within the spirit of the act.

The CHAIRMAN — Should the act be amended so it is more clear cut then?

Justice KELLAM — Our view at VCAT is that the act should be amended and, frankly, we would see an affirmation as the primary secular obligation to tell the truth — whether such an affirmation was perhaps married with a penalty — an affirmation such as, 'I promise to tell the truth and recognise that there are critical penalties or sanctions if I do not'. It is that simple, if you like: I am not purporting to draft it, but that is the spirit. We would see that as the more appropriate first base with the person having an opportunity should they have particular religious principles to say, 'There are reasons why I don't want to make this affirmation; I want to make an oath in accordance with my religious beliefs'. That is basically where we see it.

We have some 90-odd thousand cases a year that come in, and a large number of the people who appear are from a variety of ethnic backgrounds. Probably every nationality appears, particularly in our residential tenancy list. We have people coming in for antidiscrimination issues, and it tends to be a mechanical thing. One thing that is interesting is that in the residential tenancies list, and I made an inquiry about it this morning, we are offering, 'Would you prefer to make an oath or an affirmation?'. Some 80 per cent or thereabouts of people say 'oath', just as I did.

Quite a lot of people who appear in the residential tenancies list are white Anglo-Saxon real estate agents and we think that might reflect that and we think other people think it is the conventional thing to do and we should follow suit. So we do not have any conviction that people who are taking a religious oath are doing so with any real belief that it has any solemnity, in the old meaning of that word, beyond a process. We would see an affirmation as the appropriate first base and from there on.

There are practical difficulties, and I was listening to the last evidence. My belief is that every court, at least every court that is regularly used in this state, has a Koran available and wrapped in a variety of cloths. Certainly anywhere where a Supreme Court or County Court sits there is a Koran available, but there are often difficulties about getting a Koran. In our situation we have 41 hearing rooms and we might find that a Koran has gone missing. We actually have three copies, but they can be around various places. Our view is that people do feel singled out if the hearing has to be stood down to get a Koran from the library — that does not happen to other witnesses.

I have an example that I would like to offer to the committee of a very unhappy misunderstanding, as it turned out in due course. It was a residential tenancy matter. I have listened to the tape of this and this is not in any way a criticism of our member. Our member was a lawyer — a barrister — with a Greek background, and I am confident that she had perhaps a clearer understanding than most people about some cultural issues. The person who was giving evidence before her was a Jewish gentleman. She asked whether he would like to be affirmed or sworn. He said he would prefer to take the oath. He was an elderly gentleman and he was fumbling with the Bible that was offered to him, looking for the Old Testament.

I do not purport to quote her exactly, but she said words to this effect, 'Sir, are you Jewish? There's no problem about you swearing the Old Testament'. I am perfectly satisfied that was designed from her viewpoint to assist the man. He took offence to it and took the view that it discriminated against him, that it was racial discrimination, and suddenly an issue developed that I think was not caused by anything else other than an endeavour from one culture to meet another culture, but with real opportunities for misunderstanding. Had there been an affirmation or had the gentleman the option to say, 'I prefer to be sworn on the Old Testament' the problem might not have occurred. So we take the view that an affirmation, in our particular situation, is the best first option and that a religious oath should then be an opportunity but not an obligation. I do not think there is any doubt, people see the oath as principally their obligation and they have to have perhaps a bit of courage if they want to affirm.

I think that they are probably the matters that we would want to raise.

The CHAIRMAN — Would any of your counterparts wish to make a contribution at this stage?

Mr ARDLIE — I think His Honour has certainly covered it. If I may, I agree with His Honour. I am not sure whether His Honour mentioned the large numbers of people who come to VCAT in the high volume list, like residential tenancy. They do not have the benefit of a professional advocate — lawyer or other — so that when they come there many of them are not too sure what to expect by way of the hearing process, whether or not they can make an oath or an affirmation. We are a little different in that regard from courts.

Justice KELLAM — There is probably one other matter in that regard that I should add, and this does happen in the courts so I am trespassing outside of VCAT. Grant Small will often, where there is an advocate, say, 'Does your person need the Koran?' or 'Will your witness be sworn or affirmed?'. To some degree that approach, which I am not criticising in any way, involves staff in making a prejudgment. Does this person have a skin colour and a surname that looks like they might need the Koran? I have some unease about our staff being placed in that position.

Ms HADDEN — We have just heard from the Islamic council. It is their submission that the Koran being held in the court is not appropriate if it is going to be held by nonbelievers and therefore the Islamic witness would swear on a Bible because they are making an oath before God; that is as I understand the situation. Where does that leave the court if it is going to have three Korans in the library?

Mr ARDLIE — In my experience I always understood that the Koran was covered for the purposes — —

Ms HADDEN — But it is still held. If it is a nonbeliever, whether it is covered or not you are physically taking it from one place and putting it before the witness.

Mr ARDLIE — I did not have the benefit of hearing all of what was said here today.

Mr KATSAMBANIS — The overarching point before you came in was really that for the purposes of Islamic law not only is there no requirement for there to be a Koran but there should not be a Koran that is sworn to. The oath is taken as an oath without the presence of a text — it is simply taken as an oath before God or Allah.

Mr ARDLIE — The practice has grown traditionally, in ignorance I suppose.

Justice KELLAM — I am not sure about that. I am going back to my tipstaffs 1971 manual which asserts — from what basis I do not know; we would be happy to lend this to you for a copy to be made — that "Muslim dignitaries in Victoria have indicated", and this is where it is coming from, "that in all legal proceedings a Muslim witness may be sworn in accordance with the usual practice prevailing in the state and may take the form of oath ordinarily administered to a witness provided only that he raises a Koran in his hand instead of the Bible". So some time pre-1971 — this is a Law Department publication — somebody in the Law Department formed an opinion that the Muslim view was this. I believe this is the source of our current practice and our practice is to have a wrapped Koran in the library. I cannot say that that Koran has never been touched by somebody who is not a Muslim believer. In the course of events it is obtained from the library, Mr Small takes it to the hearing room and it is then passed to the witness. I have seen witnesses remove the tape and hold the Koran inside the wrapper and then rewrap it and hand it back to the tipstaff. I must say that we have never seen a complaint of that from anyone but that is not to say that they do not object to it.

Mr KATSAMBANIS — We did hear evidence to that effect. One question I had is, when the VCAT was formed and certainly in some of the tribunals that predate VCAT, there was the common assumption from the public, especially as it relates to residential tenancies or small claims, that this was a less formal jurisdiction. As a result, do you find that, especially in those jurisdictions where there is not ordinarily representation, the people presenting for hearing are often surprised that they will be giving evidence under oath or affirmation in the first place? Do you find that that is a barrier?

Justice KELLAM — I have not heard that said but I am probably the wrong person to ask because I do not regularly sit there with people who are unrepresented; not all that often. What is your response to that?

Mr SMALL — I would say that some people are surprised. In our hearing room we have a Bible with the oaths and quite often you go in there and people will be going through those oaths and looking to see what is applicable to them. Some of them are surprised that they have to give evidence on oath and that it is a little bit more formal than what they thought. Whether or not they know what the penalties are — they will take the oath and rattle it off because someone told them to rattle off the oath, but what it means is another question. I do not think a lot of the users would know that there are penalties or what the actual oath they are taking means and what effect it could have on them.

Mr KATSAMBANIS — I ask that question because of anecdotal evidence I have of people coming back to my office after having gone to planning — it is ordinarily planning or small claims hearings — and saying, 'Gee, they made me take an oath, I thought it was going to be less formal than that'. The follow-up question to the point you make, Mr Small, is, has anyone been prosecuted for perjury in the time that VCAT has existed?

Justice KELLAM — No.

Mr ARDLIE — There have been a couple of reports but no prosecution; it is a matter for the police. On those couple of times another party might come and complain that someone perjured themselves, in their view. We do not take that any further; we advise complainants to refer that to the police,we advise them to go off and make their complaints to the Police. As His Honour said, we are not aware of any prosecution following a complaint about paying out VCAT.

Justice KELLAM — In planning cases people are sometimes sworn in depending on whether they are giving pure evidence; if it is mixed submission and evidence, we do not swear them in.

In terms of the informality issue, I think there is a rather difficult line to walk. I think it ought to be informal and I do not think a religious oath assists in making it informal. However, at the same time I also think that people who are giving evidence ought to understand that it is different to having a chat to a mate in the pub. That is why I have suggested that maybe it can be made a lot more simple, a lot more informal and a lot more sensible but there should be a sting in the tail so it is recognised that it means something. Whether that is a mere acknowledgment that there are penalties for perjury in some suitably worded manner, I think that could well be appropriate. I am not sure that many people do realise that. If you go to the Supreme Court or the County Court and all the trappings of a court are there, I think people do walk in there and think they could be in a bit of bother if they do not tell the truth. I suspect where we run a completely informal hearing that might not occur to people. I suspect they may not know that there are penalties where we are. I am not sure that everyone does think that if you do not tell the truth, having made an oath, you could be jailed for perjury; as you say, it does not happen often.

Mr KATSAMBANIS — Are we as lawyers or people involved in the legal process making an unfair presumption that the general public knows there is a law against perjury? It is a rhetorical question.

Justice KELLAM — I ask the same question.

Ms HADDEN — I think you have answered the question I was going to ask. From what you are saying perhaps there should be a better educative process before witnesses get into the courtroom or the tribunal room as to the importance of making an affirmation or an oath and what it means if you do not tell the truth and you are not coming in as an honest and truthful witness.

Justice KELLAM — You can maybe achieve that by handing out something beforehand, but I might say that we do not have enough resources to produce the guidelines we produce now in languages other than English. The trouble with many educative processes is just that: you are educating people who speak and read English well so you are preaching to a small part of the community you are really dealing with.

Mr LANGUILLER — Thank you for your submission. I make the following point for the record: the Islamic Council of Victoria registered that their strong preference was to make an oath and that we should not have the Koran available to people who are not Muslims. With the best of intentions obviously our system, in the light of their submission, has made a mistake of a religious nature by making it available to the staff. Following that, I understand that both Turkey and Spain, to use two countries of Muslim-Christian-Catholic backgrounds, are going in a rapid way very secular for a variety of reasons. I recently met with a judge in Barcelona. A strong Catholic, he said to me that he believed Spain should be secular. I asked why. He said, in a short

way, that, 'Obviously the oath refers to a question in terms of the relationship between the state and religion, and I have knowledge that some religions have redefined the concept of state nationhood. People have said in my court that they wish to make an oath and they promise to tell the truth because of God, but it has nothing to do with the state of Spain'. He said, 'I am a strong Catholic but I want them to make a commitment to my court and to this state because, until redefined differently, the state nation is Spain as we know it. They wish to make a commitment to a God and give no regard to the state as we know it'. He said that in his court he wanted them to tell him the truth because of who we are as defined.

I raise the question in the light of the submission from the Islamic Council of Victoria and others that I have heard informally: is it not time to consider very seriously the question of being a secular system precisely because of that diversity of interpretation and because of the debates going on in the community? They are other types of debates but, at the end of the day, isn't it about our system and how it works? Is that not the fundamental thing?

Justice KELLAM — My personal view is that the other obligations that we place on people who come to courts and tribunals are civil obligations. It is a civil obligation to be a juror; it is a civil obligation to come to court in answer to a subpoena. Everything else about it is a civil obligation. The problem here is you have a marriage or a merging or a side-by-side situation where some people have a religious obligation and a civil obligation. I see it as a civil obligation principally. It may be that you might regard your obligation to tell the truth at court more highly than your civil obligation for religious reasons, but nevertheless I see it as a parallel obligation. I think we should accommodate people who by reason of the nature of their religious obligation have a religious objection to taking the form of oath or affirmation or whatever it is that we might require of them from a civil viewpoint, but other than that I see the civil obligation of members of this community as the paramount ones. From that viewpoint I would say that everything about courts is secular.

I agree with the proposition that you put. That is a personal view. I am not suggesting that the Evidence Act have a Supreme Court, a County Court and a VCAT section, but from our view at VCAT where we are the final arbiters of issues of antidiscrimination — subject to appeal to the Supreme Court — we would like to see a more secular approach in general. We think it is inappropriate for our antidiscrimination jurisdiction to be taking anything other than a secular approach.

Mr KATSAMBANIS — As part of our reference we are also looking at affidavits and statutory declarations. I know that VCAT receives evidence in both affidavit and declaration form. We received evidence this morning from some people who suggested that the distinction between an affidavit and a statutory declaration for all intents and purposes no longer really needs to exist. I was wondering what your views were on that subject.

Justice KELLAM — From the viewpoint of VCAT, I think that is right. We are not bound by the rules of evidence: according to our act, we are to look at evidence according to its weight, and frankly, if that is the situation, what is the difference? If somebody has gone and made a declaration before the local sergeant of police, is it any different to somebody swearing an affidavit before the chemist? I think the chemist is still able to take an affidavit, or perhaps he is not — before my associate, if you like. From the viewpoint of the weight of the evidence, what is the difference? The practical effect of it from our viewpoint would be that I would think that a member who was receiving some evidence on statutory declaration would give that as much weight as an affidavit on the same subject matter.

Mr ARDLIE — There was some comment about the use of the word 'solemnly'. Some of us have had a bit of difficulty trying to pronounce it at times.

Justice KELLAM — My tipstaff has a particular view on that: he stumbles on it sometimes himself and people are regularly embarrassed because the word gets mispronounced,

particularly if they are people for whom English is a second language. It is a word that Chinese people have tremendous difficulty with. His view, and I think it is one I share, is if there is to be a rewriting of these words, 'solemn' has a particular meaning that I think is now past and not understood by most of the community and people are embarrassed when they stumble. They are nervous about giving evidence, and if they have to have one particular word repeated three times in giving the oath or affirmation, it is not a good start.

Mr KATSAMBANIS — But 'sincerely' would fulfil all the purposes for which 'solemnly' was there in the first place.

Justice KELLAM — I would have thought so, and I think it is fair to say, is it not, that 'solemnly' is more related to the religious obligation rather than the secular.

The CHAIRMAN — We have a couple more questions. I was just wondering whether Mr Ardlie needs an increase in his library or book allowance!

Mr ARDLIE — These are former clerk of courts manuals. I was going to leave with Merrin. The source of all of these oaths listed here is not disclosed, so one wonders where they came from, but as the clerk of courts that is what we were given.

The CHAIRMAN — They could prove to be most useful. We might get a copy of those later on.

Justice KELLAM — Would you like a copy of the tipstaffs manual? It has a great variety of oaths but also it has that point that whatever has happened in recent times certainly it appears that at some stage there was a different view.

The CHAIRMAN — The next question is: the Evidence Act 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 VCAT? Are different forms of oaths included in the VCAT staff manual? Do witnesses ever ask to take oaths which cannot be accommodated?

Justice KELLAM — My answer, and Grant is more familiar with this — I might say that if I am not sitting in either the court or VCAT Grant spends all his time in small claims and residential tenancies hearings so he is more familiar with the day-to-day nuts and bolts — is that it is commonplace for us to permit people to take an oath on the Koran; that is almost a daily event.

Mr ARDLIE — It may change.

Justice KELLAM — It may have to change. It is commonplace for affirmations to be taken. As I say, we give people the option. However, beyond that I have not known of anyone seeking to take a Chinese oath. This was not really in VCAT but in the provision of services to the person who came from Pakistan to conduct the cricket inquiry — I might say that my associate assisted with that — we had a lot of difficulty with oaths about that but in the end something that was lawful in Australia and lawful in Pakistan was settled — negotiated, I suppose, is the best term. I think outside the Koran we do not have too much trouble. We have not had a Hindu or Chinese oath.

Mr SMALL — In my 12 years experience — I was at the County Court for 10 years prior to going to the Supreme Court — I have never been requested to do anything outside of the Koran, the oath and the Bible, and the affirmation. However, I do know that there have been examples in the County Court where a fellow had to come up with a match for the Buddhist or Chinese. I cannot be specific about that but know it happened a few years back. For my part, I have only ever had to give the three oaths.

Justice KELLAM — Harking back to something we heard at the end of the last evidence, I have never seen anyone bring their own Koran, but it is not uncommon for a Jewish person to produce their own Old Testament. I have seen that on a number of occasions.

The CHAIRMAN — In terms of training provided to VCAT staff, can you describe what cultural awareness training is currently provided to VCAT staff, and do you think the current training could be improved?

Justice KELLAM — I can answer the second question. I have no doubt about that, but there are very significant resources. Cultural training, to do it well and to do it properly, is expensive. We have resource limitations of a significant nature in that regard. However, John Ardlie of course is in charge of the staff; I am not. I might say that the document we have passed on to you was really produced at my instigation when VCAT started, but in the end it is John's responsibility.

Mr ARDLIE — The training manual we passed to Merrin is the document used to train young employees. I say 'young' because most of the people we take on are junior employees when they join the organisation. When they join many of them are bench clerks and their duties are to assist the hearings and assist the members, as does Grant when he is in the Supreme Court. Having heard some of the process here today, and after referring to the manual when we were looking at material to bring up here, I can see there is probably more training we could do, particularly with respect to what we have heard today about the Koran. We will be taking measures when we get back to make it available to those who might want it, but not provide it voluntarily. We will take that on board, with other issues, and improve that area if we can.

Justice KELLAM — Of course, at VCAT the members administer many oaths and affirmations, so I can answer from their view point. We have done cultural training in terms of the Aboriginal community, but we have not done it outside the Aboriginal community. I think we have done that quite well, but you need to rely on the particular community. It is all very well for us to sit around and say what we think ought to be happening in terms of cultural training; you need to get articulate people from that community to really be in charge of the training. It is time consuming and expensive. We are not really sufficiently resourced to do it. I must say that I hope the newly formed Judicial College will provide much of this for VCAT. But I am far from satisfied that we have done enough in this regard.

Mr LANGUILLER — On the subject of customary law, are there any additional comments you may wish to make in the light of Aboriginal culture and customary law? I make the following point: I recently attended a conference in Darwin and I learnt, for example, that 250 languages are spoken, particularly in the Top End.

I was told anecdotally by a Victorian lawyer some extraordinary stories about bush courts and how it all works. The more I heard the more I came to the view that it is a lot more complex than we thought, and in relation to training and cultural training I think we should do more. However, for the record I am not sure that we will ever be able to cover all the aspects that may well have to be covered in such a multicultural society as Australia with 250 languages in the Aboriginal culture alone. Consequently I believe secular is the way to go.

Do you have any comments on Aboriginal culture, and are there any generalisations that can be made with respect to this preference?

Justice KELLAM — I am fairly familiar with this because I have been President of the Australian Institute of Judicial Administration (AIJA) and we have had the obligation, under recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, to provide cultural training to the judiciary. There are very different issues in the Northern Territory, Western Australia and Queensland than in Victoria in terms of consistency law and our statute law, if you like, or our common law.

What you say about languages is correct. Not long ago I was in Alice Springs and dealing with people for whom English was their fourth language. That is not a problem we have in Victoria in terms of language, but we have the issue in terms of culture.

I was fairly concerned — and John Ardlie knows about this because of the cultural training we did for our residential tenancy and other lists — when the royal commission 10 years ago made the recommendation that there be cultural training for the judiciary. The AIJA provided that to the judiciary. In my time as a judge I have dealt with about five Aboriginal people whom I know were Aboriginal, and yet this training was provided and should have been provided. Our residential tenancy list deals with Aboriginal people every week — in Bairnsdale, Mildura, Robinvale, Swan Hill, Warrnambool — and no training has been provided. I think it is necessary to understand the issues that are involved in people's lives. That is not to say necessarily that the decision will be any different. The argument that has been advanced in relation to customay law is that if our own culture in Victoria is taken into account the decision should be much different. That might be an issue that is alive and well in the Warburton Ranges, of WA but I do not think it is in Victoria.

I would not say that cultural training is necessary in terms of the decision-making process, but I think it is absolutely necessary in terms of the perception of the person who comes to the tribunal as to whether they are getting a fair go or not. If the person who is hearing their case is adopting all the attributes of a fairly ignorant white Anglo-Saxon, Protestant approach to life, these people will not think they are getting a fair go. If there is some understanding of the cultural issues they have in their lives it may not change the result but they perceive the process as fairer. The result might be exactly the same, but they might still get a fairer go, or at least believe that the system is looking after their interests. That is where I see cultural training as very relevant in Victoria. I think we are pretty ignorant really.

The CHAIRMAN — Justice Kellam, I would like to put to you another proposition that has been suggested to us, and which has already been answered for the record in another way. Some witnesses have called for the removal of the religious oath entirely and for it to be replaced with an affirmation or solemn promise for all witnesses regardless of religion. What do you think of that option?

Justice KELLAM — I suppose my answer would be that I am not confident that I understand all the cultural approaches that people might take to making an oath or an affirmation. Our position at VCAT is we think there ought to be a secular responsibility, but at the same time I do not think we should crush people's consciences. If their conscience puts them in a position where they cannot accept the secular obligation, in fairness they should have that entitlement. In fact I think it would be discriminatory if their conscience was against making an affirmation or oath, whatever, by reason of their religious background. It should be an option, whereas right now we say to people, 'You take the oath', and the option is another way out.

People like Grant try to be sensitive and might say to a person, with the risk that I talked about before, 'Would you like to be sworn on the Koran?'. It is an attempt to be understanding, but it is fraught with danger. That is what our system now requires. Our system is basically the Judaeo-Christian ethic, 'Here is the Bible; if you want another way out you had better stand up and speak for yourself'. It would be better to give somebody a generic obligation if they have good reason — and I do not say it is good reason that has to be established to the court's satisfaction as it used to be. The amendment was made in about 1991. Before that if somebody wanted to make an affirmation they were required to answer the question, 'Is it because of religious belief or because you have no belief?'. I think that was the formula. There ought to be room for people who feel, for whatever reason, that they do not wish to take the generic secular way out. It is better to give them that option.

Ms HADDEN — The commonwealth Evidence Act gives people a choice. It says, as you are probably aware, that a witness in a proceeding must either take an oath or make an affirmation, and that is played out every day in our Family Court and Federal Court. That works

okay; there are no hiccups with it. For the sake of consistency, why should that not operate in our state jurisdictions?

Justice KELLAM — I do not necessarily have a problem with that. What we are doing at VCAT is basically that, but I do not think it complies with a strict view of section 102. What we do is precisely that. We say, 'Do you wish to make an oath or affirmation?', and my justification is that we could argue that if they were put in the position of section 102 then it might not be practical to meet their request. I think that is a device to deal with it in a fairer way. The commonwealth position is that somebody is given the opportunity without having to justify why; here they have to justify it. Where a person objects, they have to raise the objection or it is not practicable. That does not seem to me to be appropriate.

Our first preference would be to have a generic affirmation, but if it was either/or I would see that as satisfactory way out too. If that is the commonwealth position — and I was not aware it was — it is probably a very good argument why we ought to adopt the same position for consistency. It seems to be absurd that somebody would appear in the Family Court one day and at VCAT on another day and have a different civil obligation. John raises the issue of interpreters. We would say the same thing with that.

Mr ARDLIE — It is administered frequently.

Justice KELLAM — Yes, that is administered frequently. I might say again there, it is unusual in that interpreters always take the oath.

Mr SMALL — I would say 80 to 90 per cent of the time, yes. However, occasionally they will take an affirmation.

Justice KELLAM — That is an interesting reflection. You are talking about interpreters who are commonly Vietnamese, Cambodian, Turkish or Lebanese — when I started practising law they were Greek and Italian, but now you would see as many of those other groups; in fact, I am not sure I have seen an Italian interpreter recently — yet invariably they take the oath. I suspect not all those people are either Jewish or Christian interpreters.

Mr KATSAMBANIS — The committee has heard evidence that the Islamic community prefers the oath too.

Ms HADDEN — Using the Bible.

Justice KELLAM — That is a pretty good example of the need for cultural change. I have learnt something if that is the case — that what we are telling everybody is wrong.

The CHAIRMAN — Many thanks for your time today.

Witnesses withdrew.