NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON THE OATHS ACT

Oath – In the phrase “my oath”, an emphatic exclamation of agreement or endorsement; an expletive. See also ‘Bloody’ (From the Australian National Dictionary OUP 1988).

Report No.32 – August 2008

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

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MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE SUB-COMMITTEE ON THE OATHS ACT

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INTRODUCTION

The word "oath" is defined in the OED as, "a solemn or formal appeal to God, or to a Deity, or something held in reverence, in witness of the truth of a statement."

The common law accepted evidence only from witnesses who swore an oath to tell the truth, but the only oath accepted was based on the Christian religion; which, in England after the Reformation, meant the Protestant version. Believers in other versions of Christianity (notably Catholics, but including various branches of Protestantism not in conformity with the Church of England), could not give evidence, and this put them at a serious disadvantage. Adherents of non-Christian religions, being, by definition, in error, were excluded; as were, of course, atheists and agnostics, as undisputedly damned. There were also those, otherwise acceptable, who believed that the Bible prohibited oath-taking (c.f the fourth commandment); and they, too, could not give evidence.

However, since the court did not normally make its own inquiries, and accepted at face value any who took the oath, it is probable that, on many occasions, witnesses said the appropriate words notwithstanding that their version of religion, or lack of it, would have disqualified them. Once taken, it mattered not whether, subsequently, it could be demonstrated that the witness should not, or could not have taken it. The court sensibly relied on the presumption of regularity.

Similarly, the subsequent discovery of some breach of the formalities would not invalidate the process. The fact that the book upon which the oath was sworn was not, in fact, the Bible, did not render the oath void, provided that, at the time, the court believed that it was the Bible; for, if the court had not believed it so, it would not have permitted the oath to be administered. (c.f s22 and s24(c) of the NT *Oaths Act*)

Megarry — "A Second Miscellany-at-law" (p,85), gives examples of oaths sworn on various books which appeared to be Bibles; but, later, were discovered to be "Olendorp's New Method of Teaching French", or "Watts Psalms and Hymns", or "The Young Man's Best Companion". The Report of the Victorian Parliamentary Law Reform Commission Inquiry into Oaths and Affirmations (ISBN — 0 — 7313-5395-5) gives an account of a Clerk of Courts who confessed to a Magistrate that the Bible had disappeared some weeks earlier, and he had been swearing the witnesses on the "Shorter Oxford Dictionary".

The presumption of regularity is also no doubt the reason why a court will reject any mental reservation, or crossing of fingers or some such infantile manoeuvre, whereby the witness may believe that he has invalidated the effect of his actions. None of this will avail him as a defence in any subsequent prosecution for perjury.

"If an adult witness to whom the oath is tendered, takes the oath without objection, in my opinion the court is entitled to assume that the witness has the necessary religious belief or is bound in conscience by the oath. The court is obliged to enquire into the matter only if the witness raises a question or objection, or if a doubt about the propriety of administering the oath is raised by counsel <u>at the time.</u>" (Doyle CJ — R v T (1998) 71 SASR 265 - emphasis added).

Under the common law it was not considered necessary to warn the witness about the penalties, human or divine which false evidence entailed; but then, as now, such penalties were and are frequently alluded to by counsel in cross-examination. Indeed, on one occasion, it is related that, before the witness was sworn, counsel, addressing him in his native language of Irish, and painting a somewhat broad view of divine wrath, (that his cattle would be "clifted", i.e. fall over the cliff), terrified the witness into confessing that he was only defending the action because he wanted time to pay. ("The Old Munster Circuit" pp. 152-3).

It was left to statute law to fill in the gaps that were rapidly widening between those who could and those who could not give evidence. A series of Acts extended the right to take an oath in court to Catholics and other Christian denominations; and then to believers in other religions. Atheists and agnostics, however, presented a different problem because they either doubted or refused to believe in any religious ceremony. The notorious unbeliever Mr Bradlaugh had to be elected three times, because parliament refused to admit as a member one who would not take the oath of allegiance. On the third occasion parliament, faced with an electorate determined to return Mr Bradlaugh as long as it mattered, grudgingly allowed him to take an affirmation, and thus cleared the way to making affirmations co-equal with oaths for evidence in court.

When adherents of non-Christian religions were permitted to take the oath, some attention was given to various rituals thought to be associated with the ceremony[1]. The better view now seems to be that the court should be satisfied if it appears that the witness, by whatever form of words, is acknowledging a promise made to the court as having a special religious significance to him[2].

The Northern Territory Law Reform Committee ("NTLRC") Report of 1983 commented on "The decline in religious belief", (by which they were referring to the Christian religion), and to the fact that the number of peoples of other religions were increasing. These factors are even more evident now (2008); though, rather than suggesting that Christian religious belief has "declined" it may be more accurate to say that belief in divine sanction, or, at least the more fearsome of them, such as eternal damnation and eternal punishment, has declined.

The relevant question is whether there is now any reason to retain a specifically religious oath, rather than using the same form of words for all witnesses, by affirmation in which the witness simply promises to tell the truth. An ancillary question then arises as to whether, having made his promise, the witness should be left to his own conscience, religious or moral, and his knowledge that false evidence is punishable as an offence against law if not the Deity; and whether he should be specifically reminded of this by the court.

[1] Appendix "A"
[2] Or, sometimes, it appears that the significance is lost, See Appendix "B"

TERMS OF REFERENCE

By letter of 3 March 2008[3] the Hon Attorney-General of the NT (The Hon Chris Burns MLA) requested the NTLRC to "investigate the implementation of the proposal of the NTLRC *Oaths Act* Report of 1983, namely that the oath requirements be abolished and replaced by a simpler form of affirmation."

It should be noted that those comprising the NTLRC of 1983 were not unanimous. (para 6(9)). The recommendation mentioned above was the recommendation of the majority, (para 6(b) and 7). The minority recommended that the oath, as distinct from an affirmation, should remain if a witness elected to swear an oath "binding on his conscience according to his religious belief, that the witness will not be obliged to give reasons for his election and that the probative value of the oath and the affirmation shall be of equal weight and significance in assessing evidence." (para 6 (c)).

However the minority did agree that "as a matter of practice the witness should be required to make an affirmation unless he specifically elects to swear an oath. "(para 6(a))-emphasis added.).

[3] Appendix "C"

THE OATHS ACT (NT)

The following provisions of the Northern Territory *Oaths Act* set out the form of oaths and affirmations presently administered in the courts.

S22 (1) Subject to this Act, and unless the person to whom it is proposed to administer an oath requests that the oath be administered in some other manner, an oath, whether in judicial proceedings or otherwise, shall be administered and taken in the manner provided in this section.

(2) The person taking the oath shall, standing up, hold a copy of the Bible or the New Testament or the Old Testament in his hand and, after an oath in accordance with the form in Schedule 5 has been by the officer administering it, shall utter the words "So help me God".

Provided that no such oath shall be deemed to be illegal or invalid by reason of any beach of this section.

SCHEDULE 5

FORM OF OATH

"The evidence you are now about to give shall be the truth, the whole truth and nothing but the truth".

S8 Affirmation in lieu of oath

Any person may make an affirmation in lieu of taking any oath.

S9 Form of affirmation.

(1) Every affirmation shall commence "I, do solemnly and sincerely affirm" and shall proceed in the same words as the oath required or permitted by law under the same circumstances, omitting all words of imprecation or calling to witness, and the attestation of any affirmation in writing may be in the same words of the jurat of an affidavit substituting the word "affirmed" for the word "sworn".

(2) A person making an affirmation before a court shall be addressed by an officer in accordance with the form in Schedule7 and shall thereupon speak the words "I do" or otherwise signify his or her assent.

SCHEDULE 7

AFFIRMATION

"Do you solemnly, sincerely and truly affirm and declare, etc..."

THE NTLRC REPORT OF 1983

The Report of 1983 suggested a simpler form of words for both oath and affirmation, namely, -

Q. Do you declare that the evidence you shall give to this Court shall be the truth?

A. I do so declare. (para 6(b) and para 6 (c) xiv)

Or

Q. Do you swear by Almighty God that the evidence you shall give to the Court in this case shall be the truth?

A. I so swear. (para 6(c) xiii)

It is only necessary to comment that, since 1983, the trend towards simplicity of language has continued or been accelerated in many other jurisdictions.

I [name] do solemnly, sincerely and truly declare and affirm (section 103 *Evidence Act 1958* (VIC) and section 99, *Evidence Act 1906* (WA));

I [name] solemnly and sincerely declare and affirm (Schedule to Oaths and Affirmations, *Evidence Act* (Cth) and Schedule 1 *Evidence Act 1995* (NSW));

I solemnly declare and affirm (Schedule 2, *Oaths and Affirmations Act 1984* (ACT));

Do you solemnly and sincerely declare and affirm (Form 3, *Evidence Act 2001* (TAS)); and

I, [name] do solemnly and truly declare and affirm (Section 6(4) *Evidence Act 1992* (SA)).

All jurisdictions use the word ‘solemnly’ and ‘declare and affirm’, but may or may not contain the words ‘sincerely’ and ‘truly’.

COMMENTARY

This Committee agrees that the oath (if retained) or affirmation should be in simple terms immediately understandable by the witness. It has examined a variety of these terms in other jurisdictions, all of which have the desired effect of simplicity, though all expressed in slightly differing language. (e.g., "I solemnly and sincerely swear that I will tell the truth", or, "I will give true evidence" etc.).

While there is little to choose between the various alternatives, this Committee considers that the most appropriate form, reduced to the essence of simplicity and clarity is "I promise to tell the truth to this Court"; but, following the NT practice of a court official asking the question, it should be in this form.

Q. Do you promise to tell the truth to this Court?

A. "I do", ("or otherwise signify his or her assent" c.f. s.9(2))

SHOULD THE OATH BE RETAINED?

If every witness is to be asked the above question, it follows that no other form of oath be retained; nor should the witness be asked whether he desires to use some form of words other than those propounded by the court. This Committee considers that it would be rare for a witness to raise any objection to the simple question, "Do you promise to tell the truth to this Court?" However there may remain a very few cases where the witness may desire to invoke some religious formula, or, at the other extreme, may share the metaphysical doubts expressed by Pontius Pilate as to "what is truth?"

In such cases the court should be invested with a discretion to satisfy itself that the objection is genuine, and, if so, endeavor to arrive at some formula satisfactory to the witness. Such formula, in whatever form administered, shall conclusively stand as the undertaking by the witness to tell the truth, with the same penalties for deliberate falsehood as attach to the questions asked in the usual form. Refusal to agree to any form of words or procedure at all will constitute contempt of court.

On this basis the need for any specific alternative disappears.

SHOULD THE WITNESS BE WARNED?

Several jurisdictions, which have adopted the simpler language of asking the witness to tell the truth to the court, have deemed it necessary, at the same time, to warn the witness of the penalties against deliberate false evidence. The 1983 Committee adopted this approach, they suggested that, after the witness had declared that his evidence would be true, he should then be asked, -

"Do you understand that, if you do not tell the truth, you may commit an offence and be punished?"

In our view, this is not necessary, and may even create an atmosphere of suspicion and fear in some naive, sensitive or nervous witnesses. As previously mentioned, it is always open to cross-examining counsel to remind the witness, in forcible terms, of the penalties of perjury; and there are times when the court itself might warn that persistence

in a particular assertion might be perilous. But to warn the witness, before he has given any evidence, that he had better not tell lies, seems somewhat insulting to a person who has just promised to tell the truth. Furthermore, it does not appear, over the centuries when the formal oath was the only process permitted, that the courts felt it necessary to give such a warning. Nor does it appear that this failure to warn was ever considered a defect in any subsequent prosecution for perjury.

SUPPORT FROM THE BENCH AND BAR.

In recommending that the witness simply be asked to tell the truth to the court, this Committee has the support of two very experienced Magistrates, namely Ms Blokland CSM, and Ms, Little SM, who have reported to the Committee in the following terms : -

It is the experience of the Magistrates on the Law Reform Committee that there is often difficulty with witnesses appreciating the oath or affirmation administered to them. It is imperative that a witness appreciates the importance of them telling the truth in their evidence to the Court. The proper administration of justice relies on that. Courts have a very wide range of witnesses who appear before the Courts. They vary in age, intellectual capacity, ability to communicate, culturally, religion and experience within the legal system. Some are expert witnesses, some are children and some are persons traumatised by a particular incident. Many are persons who have never stepped into a court room before. Often English is not their first language and an interpreter is used to interpret the oath or affirmation. The present requirement to elect as between an oath or affirmation prior to the administration of that oath or affirmation often leads to the person becoming confused or overwhelmed by the occasion. The Law Reform Committee proposal would mean that no such election needs to be made by the witness prior to them making their promise to the Court. The new proposal will also ensure that deeply personal questions, and in particular the question of a persons religion or spirituality, is not canvassed in an open court house immediately prior to the person being required to give evidence. The present system cannot accommodate religions other than Christianity without a substantial departure from the oaths and affirmations in the *Oaths Act*. The proposal that the wording be “I promise that I will tell the truth to this Court” ensures that the deponent is aware that they are making a personal promise which relates to their appearance in the Court room and there is a requirement to tell the truth. These concepts are not complicated and can be universally translated and understood. The proposed wording will ensure that the widest range of witnesses are made aware of what is required of them. This will cover a range of witnesses including witnesses of differing ages, including children, persons of different cultures, religions and spiritualities, those requiring interpreters and those with less than average intellectual ability. Giving the Judicial Officer a discretion to adopt a different form of wording if the Officer is of the view that the witness has difficulties in understanding the standard wording will allow the Court to deal with any difficulties that are being experienced in the administration of the promise. Those who experience difficulties with communication will also benefit from a simpler form of words.

Similarly a member of the Bar, who is also a member of this Committee, reports as follows : -

From the perspective of practicing Counsel, the Law Reform Committee is informed that members of the independent Bar do encounter difficulties arising from the complexity of the wording of the existing oath/affirmation and from the requirement that a witness publicly choose between the two.

The Bar Association member of the Committee does not envisage any difficulties with the changes proposed in this paper.

Finally, and with the permission of the Chief Justice, we refer to his letter to the Hon Attorney-General dated 28 September 2007.

The Northern Territory of Australia

Chief Justice's Chambers
Supreme Court
State Square
Darwin NT 0800

28 September 2007

The Hon Syd Stirling MLA
Attorney-General
GPO Box 3146
DARWIN NT 0801

My dear Attorney

Oath/Affirmation — Formal Language

The Judges are of the view that the formal language of the current oath and affirmation is singularly inappropriate for many witnesses of all ethnic backgrounds. In particular, there are difficulties in converting the language into appropriate Aboriginal languages and many Aboriginal witnesses have difficulty in understanding the concepts when conveyed in this type of language.

The Judges favour amending the *Oaths Act* to enable the adoption of simple language more likely to be understood by witnesses. I have canvassed the views of the Magistrates, NAAJA, Legal Aid Commission and Director of Public Prosecutions and there is general agreement that the current wording should be replaced by a simple promise to tell the truth. The same language should be applied for all witnesses.

In addition to simplifying the language, the Judges recommend that the *Oaths Act* be amended to enable the judicial officer to adopt a different form of wording if the officer is of the view that the witness has difficulties in understand the standard wording. Although it may be anticipated that difficulties will only be experienced on rare occasions, nevertheless experience demonstrates that at times judicial officers are required to give explanations and take promises to tell the truth in various forms.

Yours sincerely

Brian R Martin
Chief Justice

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RECOMMENDATIONS

1. (THIS IS THE BASIC RECOMMENDATION, UPON WHICH ALL OTHERS DEPEND). That, in any procedure before a "court" as defined in s.4 of the *Oaths Act*, a person about to give evidence shall first be asked the question, "Do you promise to tell the truth to this court?" (or to some other tribunal within the meaning of "court" as defined).

2. An affirmative answer having been given, the person giving it is bound to give such evidence as is truly within his knowledge or recollection; and is liable to the same penalties for wilfully giving false evidence as apply within the *Oaths Act* and the *Criminal Code*.

3. The above question shall be in lieu of any other form of oath or affirmation to a "court", save that a court, in its absolute discretion, may devise a procedure which it considers more appropriate for the particular circumstances. Such procedure, if assented to, shall have the same effect as if the person assenting to it had given an affirmative answer to the question, "Do you promise to tell the truth to this court?"

4. Failure or refusal to answer affirmatively the question, "Do you promise to tell the truth to this court?" or failure to comply with an alternative proposed by the court, shall constitute prima facie contempt of court.

5. That consequent amendments be made to the *Oaths Act*, including, (but not intending to be exhaustive), a definition of "promise" in s.4 as "a promise to tell the truth made to a court", and including within the definition of "oath", the word "promise", repealing s.22(2), save for the proviso, and repealing Schedules 5 and 6 and substituting a Schedule headed "Form of Promise".

NB. See also note on Statutory Declarations and Oaths and Affirmations of Loyalty. Appendix D.

Appendix A

THE CAUTIOUS SOLICITOR AND THE CHINESE WITNESS

THERE was Once a Solicitor who was both Learned and Cautious. He never Allowed Himself to be Taken by Surprise; and he Invariably had his Tackle in Order. Whilst Preparing for the Trial of a Case of Great Importance, the Cautious Solicitor Suddenly Realised that Mr. Chi-Hung-Chang, the Principal Witness for his Client, was a Chinaman, and that he would have to be Sworn in Whatever might be the Appropriate Fashion. The Cautious Solicitor Made Anxious Enquiries and Gathered that Everything Depended on the Precise Place of Origin of Mr. Chi-Hung-Chang. It appeared that if he Came from the Northern Regions the Breaking of a Saucer was the Central Piece of Ritual; that if he was from Kwei Chow (or the Parts Adjacent thereto) he would Require a Lighted Candle which would be Blown Out at the Critical Moment; and that if he Happened to be a Native of Kwangsi he would not Deem himself Properly Sworn Unless and Until he had Sacrificed a White Cockerel in the Witness Box by Cutting its Throat with a Steel Knife. The Cautious Solicitor Took no Risks. He Procured a Dozen Porcelain Saucers of Various Sizes; a Box of Best Spermaceti Candles and a Box of Superior Quality Wax Ditto; and (from Leadenhall Market) a Cockerel of Unblemished Purity, which Spent the

Night in his Bed-Chamber and Inconvenienced him a Great Deal by Crowing Enthusiastically when the Dawn Broke. On the Day Fixed for the Hearing of the Case the Cautious Solicitor Conveyed the Saucers, the Candles, and a Hamper Containing the White Cockerel to the Royal Courts of Justice, and there Awaited the Arrival of the Chinese Witness. When Mr. Chi-Hung-Chang Turned Up he Told the Cautious Solicitor that he had to Catch the Three-Thirty as he was Going to the Grand National. He also Remarked that *Silly Billy's* Price Seemed to have Shortened a Bit. On the Cautious Solicitor Enquiring whether he would Prefer a Saucer, a Lighted Candle, or a Cockerel for the purposes of his Oath, Mr. Chi-Hung-Chang Said he had become a Bit of a Christian Scientist at Balliol, and Thought, on the Whole, he would Like to Affirm. He then Asked the Cautious Solicitor to Come and Have a Drink.

Moral.—*Safety First.*

From “Forensic Fables” by Theo Mathew

Appendix B

OAKES' OATH

A once-familiar figure around whom the mists of legend have gathered is the man who gave rise to the old expression, "Oakes oath."

There used to be a saying current in parts of New South Wales, "I'll chance it, as Oakes did his oath." The story goes that Oakes, a Parramatta identity, once prosecuted a neighbour for stealing some of his cattle.

In the Court case that followed, a pair of horns was produced – alleged to have been found in the prisoner's possession.

When asked if he was prepared to swear that the horns had belonged to one of his beasts, Oaths thought carefully a moment, then said bluffly, "Well, I'll chance it! Yes!".

Australasian Post, June 7, 1956.

Appendix C

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The Hon Austin Asche AC QC
President and Chair
Northern Territory Law Reform Committee
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03 MAR 2008

Dear Mr Asche

As you may be aware, the Northern Territory does not have legislation which allows a person to make a medical enduring power of attorney. A person can make a power of attorney, which allows a person to "donate" certain legal powers to another person. The "donor' appoints a person (who becomes known as the "attorney' or "donee") by way of a formal instrument. The instrument provides that the attorney can act as the donor's representative in respect to legal, financial or business matters. The power granted can be general, or for specific purposes. Further, whilst still competent, a person may make an enduring power of attorney pursuant to the *Powers of Attorney Act.* This allows a person to appoint a substitute decision-maker in the event that they later become incompetent to make decisions. In the Northern Territory, enduring powers of attorney are limited to financial and property matters. Issues of health and welfare decisions cannot be directed in this way and must be dealt with by appointment of a Guardian under the *Adult Guardianship Act.*

Additionally, you may be aware that issues relating to oaths and affirmations were also considered by the Northern Territory Law Reform Committee ("NTLRC") in 1983, Report 10 entitled *"Report on the* Oaths Act *and amendment thereof in connection with* Oaths *and Affirmations by witnesses in Court Proceedings"* ("the Oaths Act Report"). The issue of the language used for the taking of oaths and affirmations in courts and whether there is a need to simplify the language used by the Courts in seeking to ensure that witnesses understand that they should tell the truth, has recently been brought to my attention.

I would like to have the NTLRC examine and report on two issues:

- the need for and whether it is considered appropriate to amend the *Powers of Attorney Act* to accommodate and provide for Medical Enduring Powers of Attorney; and

- investigate the implementation of the proposal of the NTLRC *Oaths Act* Report of 1983, namely that the oath requirements be abolished and replaced by a simpler form of affirmation.

Please prepare reports on possible amendment to the *Powers of Attorney Act* and the language used for the taking of oaths and affirmations in courts by October 2008.

A hard copy of the *Oaths Act* Report will be provided by the Department of Justice.

Yours sincerely

CHRIS BURNS

Appendix D

Statutory Declarations

The 1983 Committee did not deal with statutory declarations, presumably basing themselves within the Terms of Reference to consider "oaths and affirmations by witnesses in court proceedings".

The present Committee, taking the view that the present Terms of Reference include a request to "investigate the implementation of the NTLRC *Oaths Act* Report of 1983", considers that it might be at least of some assistance if its views on the present form of statutory declaration were known.

Schedule 8 of the Act provides that the deponent in a statutory declaration "solemnly and sincerely declares" etc.

This Committee does not see any necessity to change these terms, for the following reasons : -

(a) The deponent does not "swear", but "declares". Thus no problem of any other form, religious or otherwise, arises.

(b) While some might wish to reduce the words "solemnly and sincerely declare" to the one word "declare", there may be a danger in seeking simplicity merely for simplicity's sake. The atmosphere and surroundings of a court will amply remind a witness that he must pay heed to what he says. This is lacking when a deponent makes a statutory declaration, and the words "solemnly and sincerely" may serve to remind the deponent that he is embarking on a serious undertaking.

(c) The deponent will not be warned by counsel or court of the penalties attached to deliberately false evidence, so that the "Note" required by Schedule 8 to the effect that willfully making a false statement is an offence may again have the effect of reminding him that he is not engaging in some unimportant formality.

Affirmations

The same reasoning applies to affirmations, save that the word "truly", which does not appear in a statutory declaration, should be omitted in the affidavit form so as to comply with the statutory declaration form.

Oaths and affirmations of loyalty and of office

Again apologising if it is trespassing outside its Terms of Reference, this Committee believes that the requirements of Oaths or Affirmations of loyalty or of office should not be changed. These proceedings are quite different from the giving of evidence in court, they are solemn undertakings given by persons who, from their training and experience are well aware of their importance. The case here is essentially of due formality rather than simplicity, and those giving the undertakings expect it. More importantly, so does the public.