

NORTHERN TERRITORY LAW REFORM COMMITTEE

REPORT

on

THE OATHS ACT

and amendment thereof in connection with

OATHS AND AFFIRMATIONS BY WITNESSES IN COURT PROCEEDINGS

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# NORTHERN TERRITORY LAW REFORM COMMITTEE

## OATHS AND AFFIRMATIONS BY WITNESSES IN COURT PROCEEDINGS

### 1. INTRODUCTION

#### (a) Terms of Reference

The Northern Territory Law Reform Committee has considered proposals for the amendment of the Oaths Act in connection with oaths and affirmations by witnesses in court proceedings with the object of analysing the arguments for abolishing or retaining oaths and submitting a report thereon to the Honourable the Attorney-General.

#### (b) References

(i) Discussion Paper on Oaths and Affirmations - N.S.W. Law Reform Commission (1980)

(ii) Sworn and Unsworn Evidence - Australian Law Reform Commission Research Paper No. 6 (1981). The Committee acknowledges its reliance on the Australian Law Reform Commission Research Paper No. 6 in the preparation of this Report and expresses its appreciation of the work undertaken by the Commission.

### 2. CURRENT SITUATION

#### (a) Common Law

It has been traditional, in the conduct of Common Law proceedings, for a witness to be required to swear an oath before giving oral evidence. It has been an essential ingredient of the tradition that the witness believed in God and that, if he gave false testimony, divine retribution would ensue. In accordance with the prevailing religious tenets of the time, it was necessary for such belief to conform with the requirements of the Christian religion. In later times the requirement was relaxed and the ability to make an oath was extended to members of other religious groups (e.g. Jews, Muslims etc.) if they swore an oath in a form appropriate to their religious beliefs.

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1. Omychund v. Barker (1744) 1 Ark 21: 25 ER. 16

Accordingly, a witness who did not believe in God or the possibility of divine retribution if he gave false evidence was not competent to take an oath and could not be heard as a witness. It would also appear that if a potential witness believed in some form of religious faith but was unable to identify a form of oath which would be binding on his conscience then he could not be sworn as a witness.<sup>2</sup> Consequently, a court could not receive evidence in such circumstances other than in those jurisdictions where the legislature provided the option of enabling a witness to make an affirmation.

By virtue of the foregoing, it follows that a person is unable to satisfy the requirements of the Common Law and cannot be sworn as a witness where he is an agnostic or an atheist and has no religious belief, where he refuses to take an oath because it is contrary to his religious belief and where he is unable to identify a form of oath which is binding upon him because it is impracticable so to do within the environment of the court.

(b) Legislative Introduction of Affirmation

In view of the difficulties faced by a number of jurisdictions in dealing with such situations, the relevant legislatures have enacted statutes permitting the witness to make a solemn affirmation that the evidence which he is about to give to a court in legal proceedings is "the truth, the whole truth and nothing but the truth" or words to a like effect. The alternative procedure of making an affirmation may be either unconditional, whereby the witness may be permitted to affirm without the necessity of stating the reason for his objection to taking an oath,<sup>3</sup> or conditional upon the court being satisfied that the witness has no religious belief, or it is contrary to his religious belief to take an oath or, in some jurisdictions, that there is some other sufficient reason.

The form of affirmation prescribed by the relevant legislatures normally specifies the words to be used and, in most cases, follows the wording of the oaths prescribed for such jurisdictions subject to the deletion of the reference to "swear by Almighty God" and the substitution of words whereby the witness "solemnly and sincerely declares and affirms" which affirmation is repeated by the witness in all jurisdictions other than in the Northern Territory where the witness listens to the prescribed affirmation being read in the form of a question by a court official and, then acknowledges its binding effect by saying "I do".<sup>4</sup> In Queensland, in cases where it is impracticable to administer an oath in the form and manner required by the witnesses religion, he makes an affirmation which includes the words " ... and I make this solemn affirmation and declaration in the full knowledge that if I do not speak the truth, the whole truth and nothing but the truth I render myself liable to the penalties of wilful and corrupt perjury".<sup>5</sup>

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2. Nash v. Ali Khan 8 Times Reports. 444  
 3. Oaths Act 1980 (N.T.) s.25 and Schedule 7  
 4. Oaths Act 1980 (N.T.) s.25 (2)  
 5. Oaths Act Amendment Act 1891 (Qld) s.1

(c) Criticism of Oath

The requirement for a witness to swear an oath has been subject to a number of criticisms including;

- (i) Its diminishing relevance to an increasing proportion of the population because of the decline in the number of people holding any or any sincere religious beliefs.
- (ii) The change in the demographic structure of the population resulting in an increasing proportion thereof who are non-Christian and, consequently, the increasing difficulty in ascertaining the appropriate oaths by which they can be sworn and the increasing uncertainty as to whether the oath chosen is appropriate to bind the conscience of the witness.
- (iii) The practical difficulty involved in ensuring that courts are seised of the knowledge relevant to swearing witnesses belonging to a number of non-Christian religions and possessed of the requisite religious texts, artifacts, etc. required to solemnise such oaths.

(d) Significance of Affirmation

The Federal/Provincial Task Force on Uniform Rules of Evidence (Canada) argues that the preference for taking an oath or making an affirmation is a matter of social policy rather than of legal determination because both depend on whether a witness understands the moral obligation to tell the truth. The New South Wales Law Reform Commission has recommended that, in retaining the taking of an oath with the alternative of making an affirmation, there should be some significant step associated with the affirmation equivalent to a witness upholding a religious text and recommends that the acknowledgement of the liability for perjury should be in written form and signed by the witness.

3. OPTIONS FOR CONSIDERATION(a) Abolition of Oath

The Canadian Law Reform Commission, the Ontario Law Reform Commission, the Scottish Law Commission and the Criminal Law Revision Committee (U.K.) have recommended the abolition of the requirement for a witness to swear an oath prior to giving evidence. All of the above agencies, except the Scottish Law Commission, include a recommendation that the form of affirmation should include an acknowledgement by the witness of liability to prosecution for perjury.

(b) Retention of Oath and Affirmation

The New South Wales Law Reform Commission, The Chief Justice's Law Reform Committee of Victoria, the Federal/Provincial Task

Force on Uniform Rules of Evidence (Canada) and the Thomson Committee (Canada) recommended the retention of the oath. The High Court, the Federal Court, the Supreme Court of the Australian Capital Territory and the relevant statutes of New South Wales, Victoria, Western Australia, Tasmania, Northern Territory and Norfolk Island give the witness the right to elect, without stating any grounds, to give evidence by making an affirmation. The Law Reform Commission of Canada argues that the availability of the alternative of making an affirmation without being obliged to reveal the nature of a witness's religious beliefs, or absence thereof, is desirable in that it precludes invasion of his privacy.

#### 4. . ANALYSIS OF ISSUES INVOLVED

##### (a) Decline in Religious Belief

The traditional religious basis upon which the taking of the oath is predicated has been eroded over the years as the proportion of practising Christians in the community has declined and the proportion of non-Christians in the population has increased. The Court of Appeal in England has observed that "it is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not recognised". The proponents of the argument for retention of the oath do not contest that the religious significance thereof has lost much, if not all, of its influence for a large proportion of the population. They contend, however, that the oath will have a greater impact than the affirmation on the conscience of some witnesses. If it be argued that breach of an oath imports the potentiality of both a religious and a criminal sanction whereas the making of an affirmation imports the potentiality of a criminal sanction only, it is possible to advance the alternative argument that the making of an affirmation should be accompanied by an additional degree of solemnity of occasion and impact on the conscience of the witness by having the witness acknowledge liability for perjury if he does not tell the truth and/or sign a written affirmation.

##### (b) Automatic Application of Christian Oath

As a matter of practice the Christian oath is normally administered without enquiring as to the religious beliefs of the witness who is entitled to inform the Court if that form of oath does not bind his conscience. In the Supreme Court, a Court official usually enquires of a witness whether he will swear an oath on the Bible. Many witnesses, for a variety of reasons including misunderstanding, nervousness, or a desire to protect their privacy, fail to request the administration of an oath appropriate to their particular religious beliefs. It would appear that, in a significant number of instances, the type of oath taken by witnesses is not appropriate and, accordingly, its effectiveness on binding their consciences is open to doubt.

(c) Practical Considerations

The Ontario Law Reform Commission submits that the practical difficulties involved in the Court being seised of the knowledge for the authentic administration of religious oaths of various categories and having the appropriate religious texts or artifacts available, provide a ground for the abolition of religious oaths.<sup>10</sup> The significance of this practical consideration is exemplified by the Commonwealth Census taken in 1976 which reveals that only about three quarters of the population of Australia (78.6%) belong to a Christian denomination and that, of the remaining quarter, 11.8% did not respond, 8.3% were agnostic and the balance were non-Christian.<sup>11</sup> The Committee feels that the non-Christian proportion of the population in the Northern Territory is higher than is the proportion for the whole of Australia.

(d) Relevance of the Oath and the Affirmation in Assessing Credibility

Proponents for the retention of a religious oath argue that it increases the chance of some witnesses telling the truth. Such an argument is not accepted by the Chief Justice's Law Reform Committee in Victoria notwithstanding that it is in favour of the retention of the oath. The Thomson Committee consulted the Church of Scotland and the Roman Catholic Church which were of the opinion that the oath can be a strong deterrent to giving false testimony but they did not argue that the affirmation is not. The Criminal Law Revision Committee has observed that "For a person who has a firm religious belief, it is unlikely that taking the oath will act as an additional incentive to tell the truth. For a person without any religious belief, by hypothesis, the oath can make no difference".<sup>12</sup>

The Criminal Law Revision Committee contends that, in evaluating evidence, little attention is paid to the fact that it has been given on oath.<sup>12</sup> The New South Wales Law Reform Commission asserts "that evidence given on oath does not per se increase its weight as against evidence given on affirmation".<sup>13</sup>

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10. Report on Taking of Evidence, 121
  11. Australian Bureau of Statistics 1976 Censuses : Population and Dwelling : Cross classification table (Cat. No. 2425.0) and Population and Dwelling : Summary tables - Australia (cat. No. 2417.0)
  12. Criminal Law Revision Committee, 11th Report, 165
  13. New South Wales Law Reform Commission Report on Evidence, para. 1.17; but see Chamberlain v. R. 46 ALR 493 per Bowen CJ. and Forster J., 506-507, and per Jenkinson J., 598-601.

(e) Effect of Choice of Affirmation on Court and Jurors

The Canadian Law Reform Commission<sup>14</sup> and the Scottish Law Commission<sup>15</sup> have suggested that there is a danger that some courts and jurors might attach more significance to the evidence of a witness who swears an oath. The New South Wales Law Reform Commission contends, however, that "the matter depends entirely on the witness and it is for the trier of fact to determine whether a witness is credible and why".<sup>16</sup> "It is likely that, as his evidence progresses, concentration will tend to focus on the evidence and the behaviour of the witness and the fact that an affirmation was taken at the out-set, whilst this might seem significant at the time, will gradually lose its significance in the sight of the trier of fact."<sup>17</sup> The Canadian Task Force acknowledges the danger and argues that the distinction can be eliminated if all witnesses were to be placed on an equal footing.<sup>18</sup> This could be achieved by abolishing the requirement for witnesses to swear an oath and by introducing the universal requirement that a witness will no longer be required to swear an oath but will be required to make an affirmation.

(f) Significance of Legislation Permitting Affirmation

The Criminal Law Revision Committee argues that the legislation enabling a witness to make an affirmation is legislative recognition "that there is nothing wrong in requiring a person to give evidence without being sworn".<sup>19</sup>

5. EVALUATION OF RELEVANT FACTORS(a) Significance of Influence of Religion

Whilst it is accepted that the traditional religious basis upon which the taking of an oath was predicated has been eroded over the years as the proportion of practising Christians in the community has declined and the proportion of non-Christians in the population has increased, it is a significant fact that, according to the 1976 Census, approximately 80% of the population profess Christian or non-Christian religions and that the retention of the oath would be consistent with the prevailing religious or philosophical beliefs of the majority of people within the community. In such circumstances, it is necessary to consider whether it is appropriate to deprive a substantial proportion of the population of the right which is presently enjoyed to elect to swear an oath or make an affirmation.

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14. Canadian Law Reform Commission, 37

15. Scottish Law Commission, Memo No. 3, 67

16. New South Wales Law Reform Commission Report on Evidence, para 1.21

17. Australian Law Reform Commission, Research Paper no. 6 Sworn and Unsworn Evidence.

18. Report 279

19. Criminal Law Revision Committee, 11th Report, 164



Having regard to the increasing proportion of the community possessing non-Christian religious beliefs, it would appear to be necessary for provision to be made in the administration of the courts for the availability of the appropriate religious texts and/or artifacts necessary for such witnesses to make oaths if the practice or swearing oaths is to be retained.

(b) Probative Value of Oaths and Affirmations

The other principal considerations would appear to be whether the swearing of an oath is more successful than making an affirmation in encouraging a witness to speak the truth and whether a court or jury might prefer the evidence of a witness who takes an oath as compared with a witness who affirms.

It is acknowledged that, both for people who hold Christian and non-Christian religious beliefs, swearing an oath imports concepts both of divine sanction and penal sanction as compared with penal sanction alone. Accordingly, it may be argued that making an oath may encourage most witnesses to be more truthful than they might have been if they had affirmed. In order that an affirmation might be vested with an additional degree of impact upon the conscience of a witness, it may be that the making of an affirmation should be accompanied by an acknowledgement by witnesses of liability for the offence of perjury if they do not tell the truth. It may be argued that, notwithstanding that perjury whilst giving evidence on oath imports a penal sanction, many witnesses giving evidence on oath are not familiar with the legal consequences involved. Accordingly, it might be logically consistent for the form of oath, if retained, to include an acknowledgement of liability for perjury.

(c) Necessity for Oath or Affirmation

It is considered to be essential that, in order to ensure that the evidence given to a court is as true and accurate as is practicable within the limits of a witness' recollection, a witness should be required to give evidence either on oath or affirmation and that refusal by a witness to either take an oath or affirm should be punishable as contempt of court. If a witness were not to be bound by his conscience to tell the truth, it would seem that little reliance could be placed on the accuracy of his testimony.

6. RECOMMENDATIONS

(a) Consideration of Options

Having considered the foregoing analysis of the issues involved and the evaluation of the relevant factors, the Committee was unable to reach a unanimous decision as to whether the oath should be abolished or should be retained in conjunction with the affirmation.

The majority of the Committee recommend that the oath should be abolished, thereby confirming the secular nature of the Court, that it should become mandatory for a witness to make an affirmation declaring that he will tell the truth prior to giving evidence and that the affirmation should be followed by a declaration that the witness acknowledges that, if he does not tell the truth, he may commit the offence of perjury and will be liable to punishment.

The minority of the Committee recommend that both the oath and the affirmation should be retained, that the witness should have the right to elect to swear or affirm but that, as a matter of practice, the witness should be required to make an affirmation unless he specifically elects to swear an oath.

The majority and minority recommendations are set out hereunder in detail to enable consideration to be given to the requisite amendment of the Oaths Act and the consequences of the implementation of each of the recommendations.

(b) Abolition of Oath

The Oaths Act would be amended by repealing the requirement for a witness to swear an oath and the substitution of a mandatory requirement for a witness to make an affirmation prior to giving evidence. The affirmation would be followed by a declaration that the witness acknowledges that, if he does not tell the truth, he will commit the offence of perjury and will be liable to punishment.

The Oaths Act would be amended as follows

- (i) The requirement for a witness to swear an oath would be abolished by the repeal of ss. 21 and 22 and Schedules 4 and 5 with consequential amendments to ss. 24(a), 25A, 27 and 27A to eliminate references to the swearing of oaths in court proceedings.
- (ii) The present provisions for a witness to make an affirmation contained in s.25 and Schedule 7 would be repealed and there would be substituted a new section and schedule to require that, before a witness gives evidence, a court official shall read an affirmation to the witness and the witness shall reply in accordance with the following form

Question: Do you declare that the evidence you shall give to this Court shall be the truth?

Answer: I so declare.

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

Answer: I do.

(iii) Consequential amendments would be necessary to provide that, if a witness refuses to make an affirmation, the judge or magistrate may deal with the matter by way of contempt of court but that failure to comply with the provisions of the Act or a refusal to make an affirmation would not render inadmissible the evidence given by the witness.

(c) Retention of Oath and Affirmation with the Affirmation being administered as a matter of practice.

The oath and the affirmation would be retained with each being followed by an acknowledgement of liability for perjury. The Oaths Act would declare that the oath and the affirmation are of equal weight and value in assessing evidence. A court official would advise the witness of the equal weight and value of the oath and affirmation and that he has a right to elect to swear or affirm without the necessity of giving reasons therefor but that he will be required to affirm unless he specifically elects to swear an oath. The forms of oath and affirmation and the manner of their administration would be simplified and the present distinction between the forms of oath in criminal and civil proceedings would be abolished.

The Oaths Act would be amended as follows

- (i) Section 21 would be repealed.
- (ii) A new section 21(1) would be introduced to provide that a witness in criminal or civil proceedings before giving evidence shall make an affirmation unless he elects 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.
- (iii) A new section 21(2) would be introduced to provide that the form of oath be in accordance with that in Schedule 4 unless the witness requests that the oath be administered in some other manner and the form of affirmation be in accordance with that in the Schedule 5.
- (iv) Section 22 would be repealed.
- (v) A new section 22(1) would be introduced to provide that a court official shall advise the witness of the equal weight and value of the oath and affirmation and that he has a right to elect to swear or affirm without the necessity of giving reasons therefor but that he will be required to affirm unless he specifically elects to swear an oath.

- (vi) A new section 22(2) would be introduced to provide that, where a witness who does not have any religious belief makes an oath, the absence of religious belief does not render invalid the oath so made.
- (vii) A new section 22(3) would be introduced to provide that failure to comply with the provisions of the Act for administering an oath or affirmation does not render invalid the evidence given by the witness.
- (viii) A new section 22(4) would be introduced to provide that the refusal by a witness to take an oath or make an affirmation may be dealt with by way of contempt of court.
- (ix) Section 24 would be amended by repealing paragraph (c) consequent upon the introduction of the new section 22(2), be transposed to Part V and renumbered Section 22A.
- (x) Section 25 would be repealed insofar as it refers to the requirement or objection of a person to take an oath and to Schedule 7 and the balance of the section would be combined with section 25A, transposed to Part V and be renumbered section 22B.
- (xi) Section 25A would be amended in consequence of the partial repeal of section 25, be combined with the balance of section 25, be transposed to Part V and be renumbered section 22B.
- (xii) Section 26 would be repealed in consequence of the introduction of the new section 22(4).
- (xiii) Schedule 4 would be repealed and the following schedule would be substituted

"SCHEDULE 4

Section 21(2)

FORM OF OATH

Question: Do you swear by Almighty God that the evidence you shall give to this court shall be the truth?

Answer: I so swear.

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

Answer: I do."

(xiv) Schedule 5 would be repealed and the following schedule would be substituted

"SCHEDULE 5

Section 21(2)

FORM OF AFFIRMATION

Question: Do you declare that the evidence you shall give to this court shall be the truth?

Answer: I so declare

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

Answer: I do."

7. CONCLUSION

If the recommendation of the majority of the Committee to abolish the oath in connection with oral testimony in court proceedings were to be adopted, there could be resultant anomalies between the requirements for giving oral evidence and the requirement for giving written evidence in court proceedings. The position relating to the swearing of affidavits, answers to interrogatories and similar documents would appear to merit examination in order to eliminate the danger of such consequential inconsistencies. This would also involve the consideration of the provisions of the Oaths Act relating to Commissioners for Oaths (Part IV) and the taking of oaths and affidavits out of the Northern Territory (ss. 27 and 27A).

Moreover, the recommendation of the majority of the Committee does not touch upon other oaths referred to in the Oaths Act such as the oath of allegiance (s.5), the judicial oath (s.6), oaths to be taken by justices and special magistrates (s.7), the oath of an officer in charge of a jury (s.23) and oaths taken in other forms (s.24).

The Committee recommends that, if the recommendation of the majority were to be adopted by the Government, it would be desirable, in the interests of uniformity and for the prevention of consequential anomalies, for a reference to be given to the Committee to examine and report on such matters before any amendments are made to the Oaths Act to implement the recommendation to abolish the oath in court proceedings.

NORTHERN TERRITORY LAW REFORM COMMITTEE

The Honourable Mr Justice Kearney, C.B.E.,  
Judge of the Supreme Court  
(Chairman)

The Honourable Mr Justice Muirhead,  
Judge of the Supreme Court  
(Deputy Chairman)

The Honourable J. M. Robertson, M.L.A.,  
Attorney-General for the Northern Territory  
(Ex Officio)

B. F. Martin, Esq., M.B.E., Q.C.,  
Solicitor-General

G. Galvin, Esq., C.M.,  
Chief Magistrate

D. Mildren, Esq., Q.C.,  
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The office of the Law Reform Committee is situated in the Civic Centre, Harry Chan Avenue, Darwin, Northern Territory, Australia. (G.P.O. Box 1335, Darwin, N.T. 5794). The telephone number of the Committee is (089) 89-6874.


NORTHERN TERRITORY LAW REFORM COMMITTEE

REPORT ON OATHS ACT


To: The Honourable J. M. Robertson, M.L.A.,  
Attorney-General for the Northern Territory


The Northern Territory Law Reform Committee has conducted a review of the Oaths Act in connection with oaths and affirmations by witnesses in court proceedings and submits the attached report and recommendations for your consideration.

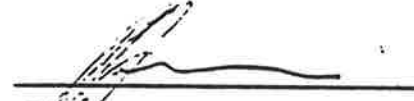
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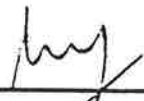
  
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(The Hon. Mr. Justice Kearney)  
Chairman

  
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(The Hon. Mr. Justice Muirhead)  
Vice-Chairman


  
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(B. F. Martin, Esq., Q.C.)  
Member

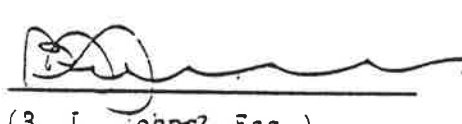
  
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(G. P. Galvin, Esq., C.M.)  
Member


  
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(D. Mildren, Esq., Q.C.)  
Member

  
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(M. Ward, Esq.)  
Member

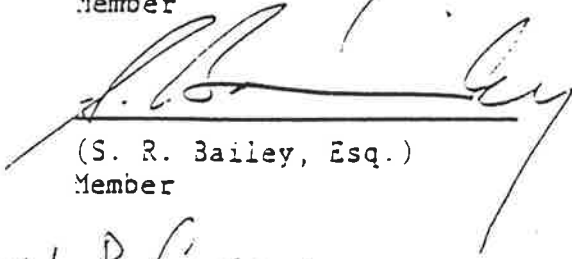
  
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(Miss M. P. Lyons)  
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