Issues Paper 3

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South Australian Law Reform Institute

Nothing but the truth

Witness oaths and affirmations

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THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Abbreviations

ALRC Evidence (Interim) Report – Australian Law Reform Commission, *Evidence (Interim),* Report No 26 (1985)

ALRC Aboriginal Customary Laws Report – Australian Law Reform Commission, *Recognition of Aboriginal customary laws and Anglo-Australian law after 1788,* Report No 31 (1986)

ALRC Evidence Report - Australian Law Reform Commission, *Evidence,* Report No 38 (1987)

ALRC Multiculturalism and the Law Report - Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992)

ILRC Report – Irish Law Reform Commission, *Report on oaths and affirmations,* Report No 34 (1990)

LRCC Report – Law Reform Commission of Canada, *Report on Evidence* (1975)

LRCSA Report – Law Reform Committee of South Australia, *The form of oath to be used in courts and other tribunals,* Report No 46 (1978)

NSWLRC Discussion Paper –New South Wales Law Reform Commission, *Oaths and Affirmations,* DP 8 (1980)

NTLRC Report – Northern Territory Law Reform Committee, *Report on the Oaths Act,* Report No 32 (2008)

NZLC Report – New Zealand Law Commission, *Evidence,* Report No 55 (1999)

OLRC Report – Ontario Law Reform Commission, *Report on the Law of Evidence* (1976)

SAEA – *Evidence Act 1929* (SA)

The Institute – South Australian Law Reform Institute

UEA – the *Evidence Act 1995* (Cth), on which the scheme of Uniform Evidence Acts is based

VPLRC Inquiry – Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community,* No 195 of Session 1999-2002 (October 2002)

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Terms of reference

On 25 February 2012 the Attorney-General of South Australia, the Hon. John Rau MP, wrote to the Institute inviting it to:

> inquire into and report upon whether the existing oaths and affirmations as administered to witnesses in Court are appropriate and to make recommendations concerning the adoption of new simpler forms of affirmations and/or oaths for use in South Australia; consult widely and include in the report the views of relevant persons and bodies, including actively engaging and consulting with:
>
> - Aboriginal and Torres Strait Islander associations, organisations and communities within South Australia;
> - multicultural and ethnic associations, organisations and communities within South Australia;
> - religious bodies within South Australia.

The request was prompted by a recommendation by Judge Peggy Hora (ret.) for a separate and simpler witness oath for Aboriginal witnesses.[1] In making the request the Attorney-General said:

> Rather than adopt an oath specifically for Aboriginal people it may be more appropriate to consider whether the current wording of the oath could be simplified and modernised and whether a more appropriate oath could be adopted, and then incorporated into legislation.

Overview

This Issues Paper is the first stage in responding to the terms of reference for this project.

The paper investigates whether the wording and administration of South Australian witness oaths and affirmations should be simplified or made clearer. In doing so it examines why witnesses are required to swear or affirm to tell the truth and looks at the effect any legislative or procedural change may have on the distinction between sworn and unsworn evidence and on the offence of perjury.

The reference does not invite review of the rules governing who qualifies to give evidence in court (for example, whether very young witnesses or people with significant intellectual disability should be considered competent to give evidence). That is a separate area of law from the topic under review, which is the administration and nature of a preliminary formal procedure (swearing under oath) that witnesses who are competent must undertake before giving evidence.

The paper begins with a brief history of testimonial oaths and affirmations, drawing from the thorough research of other law reform agencies and parliamentary law reform inquiries and legal

[1] The suggestion was part of Recommendation 1.10 of Judge Hora's report to the South Australian Government entitled *Smart Justice: Building Safer Communities; Increasing Access to the Courts and Elevating Trust and Confidence in the Justice System*.

academics. There is a bibliography in **Appendix 4.** The law reform reports consulted are listed separately, with website links, in **Appendix 5.**

Then follows an outline of South Australian law in this area, followed by a discussion of features of laws in other jurisdictions - primarily those which require evidence to be sworn or affirmed but also some which do not. The South Australian legislation is reproduced in **Appendix 1.**

After discussing the changing rationales for witness oaths and affirmations over time, the paper identifies and discusses reform issues relevant to any change to South Australian law before proposing some reform models for consideration.

Finally, readers are asked to respond to a series of questions, the answers to which will inform the Institute's further consultation and final recommendations. The questions are also presented separately online in downloadable format to assist in making a submission at <www.law.adelaide.edu.au/reform/publications>

1 Historical background to common law practice

Witness oaths

1. The custom of administering an oath is based on an ancient conditional self-curse thought to have originated in the practice of primitive tribes.[2] From naturalistic origins, the oath developed into a religious invocation of deities or religious artefacts. The calling upon a natural thing was replaced by the guarantee of a deity as to the oath taker's honesty;[3] divine retribution, while not necessarily visited on all liars, would attend a person who lied under oath.[4] Aristotle described such an oath as 'an unproved statement supported by an appeal to the Gods'.[5]
2. Roman, Germanic, Christian and Jewish cultures treated witness oaths as much as an assertion of one's cause, like an oath of allegiance, as promissory.
3. The Roman Constitution of Naissus, enacted by Constantine in the mistaken belief that he was following a uniquely Christian tradition, was the first known statute requiring testimonial oaths.[6] These provisions were later included in the Justinian Code,[7] and adapted from that code to all European Christendom by roughly 395 AD.[8]

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[2] See, for example, Irish Law Reform Commission, *Report on oaths and affirmations*, Report No. 34 (1990) 11 (ILRC Report); Helen Silving, 'The Oath: I' (1959) 68(7) *The Yale Law Journal* 1329, 1330.

[3] Silving, above n 2, 1331–33.

[4] Eugene R. Milhizer, 'So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America' (2009) 70 *Ohio State Law Journal* 1, 9.

[5] Aristotle, *Rhetoric* (W. Rhys Roberts trans, Pennsylvania State University, 2010).

[6] *Constitution of Naissus* 334 AD.

4. Over the ensuing centuries the form and administration of the witness oath became increasingly standardised. The oath as a mode of proof was adopted by early English society and introduced into judicial trials in the 7th century AD.[9] The plaintiff detailed his or her claim and swore an oath that it was factually true, sometimes supported by compurgators.[10] Independent witnesses eventually replaced compurgators. The use of oaths as a method of settling cases grew after 1215, when the Lateran Council banned trials by ordeal.[11]

5. Until the 17th century the English common law oath was available only to Christians. No-one else was competent to give evidence. The case of *Robeley v Langston*[12] in 1666 extended oaths to Jews on the reasoning that 'the old and the new Testaments were considered to be the one "word of God"'.[13]

6. In 1774 the landmark case of *Omychund v Barker*[14] further extended the oath's ambit so that it could be administered in any form to non-Christians, as long as they 'believe[d] a God, and future rewards and punishments in the other world'.[15] It was explained in this case that:

> it would be absurd for [a non-Christian] to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath.[16]

7. By the second half of the eighteenth century this was settled law in England.[17] The oath was no longer based exclusively on a belief in punishment by divine wrath and greater emphasis was given to its effect on the conscience of the oath taker — 'not to call the attention of

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[7] Fred H Blume (trans) and Timothy Kearley (ed), *Annoted Justinian Code* (University of Wyoming, 2nd ed, 2008) <http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/>

[8] Milhizer, above n 4, 13.

[9] Cyril Kett, 'Oaths' (1952) 25 *Australian Law Journal* 681, 681.

[10] Silving, above n 2, 1362. A compurgator was usually a member of your tribe who supported the truthfulness of your cause under oath, but did not necessarily attest personal witness or experience. The more compurgators a party had, the more binding their testimony became on the adjudicator.

[11] Silving, above n 2, 1363-1364.

[12] (1667) 84 ER 196.

[13] ILRC Report, 7.

[14] (1745) 26 ER 15 ('Omychund').

[15] *Omychund* (1745) 26 ER 15, 31 (Willes LCJ).

[16] Ibid.

[17] *R v Taylor* (1790) 170 ER 62; *R v Morgan* (1765) 168 Eng Rep 129; *R v Brown* [1977] Qd R 220, 221.

God to man; but the attention of man to God'.[18] For some, its primary force became its mental and emotional effect in influencing the witness to tell the truth.[19]

8. Correspondingly, the power of courts to punish perjury, recognised by statute in 1494, first became an offence in 1562.[20] Conviction for perjury, at least since 1713, required corroborative evidence beyond that of two sworn witnesses against each other,[21] supporting the notion that the oath itself no longer formed proof that the witness had told the truth.

Witness affirmations

9. The affirmation was introduced not for the non-religious but for the Religious Society of Friends (Quakers) and other minority or dissenting religious groups, such as the Separatists and the Moravians, who were too devout to take oaths because they believed them to be blasphemous[22] and whose refusal to take the oath meant that they could not give evidence and were vulnerable to lawsuits.[23] Members of minority Christian religions were permitted by statute to make solemn affirmation in civil cases in 1696 [24] and criminal cases in 1714.[25] The right to affirm was extended to Moravians in 1749,[26] and in 1833 an affirmation for Quakers and Moravians was provided by specific legislation.[27] However this right was not extended to non-Christians,[28] and a person with no religious belief could neither affirm nor take oath.[29]

10. In 1854 the English *Common Law Procedure Act* was enacted to permit anyone unwilling to be sworn to affirm if they could establish a conscientious objection to taking an oath.[30]

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[18] Simon Greenlead, *A Treatise on the law of Evidence, Volume 1*, (Little, Brown and Company, 16th ed, 1899) 504.

[19] 'A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century Source' (1977) 75(8) *Michigan Law Review* 1681, 1685.

[20] Law Reform Committee of South Australia, *The Form of Oath to be used in Courts and other Tribunals,* Report No 46 (1978) 4. This report is referred to hereafter as the 'LRCSA Report'.

[21] *R v Muscot* (1713) 88 ER 689, 690 (Parker CJ).

[22] Because the Bible prohibited any form of swearing: 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1691.

[23] Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103(7) *Harvard Law Review* 1409, 1467; Milhizer, above n 4, 38.

[24] *Quakers Act 1695,* 7 & 8 Will 3, c 34; *Cheers v Porter* (1931) 46 CLR 521, 529 (Dixon J); Allen, Christopher, *The Law of Evidence in Victorian England* (Cambridge University Press, 1997), 95-122, 50-94.

[25] See eg *Tithes and Church Rates Recovery Act* 1714 (1 Geo I, st 2 c 6) (Imp) See also *Civil Rights of Convicts Act* 1828 (9 Geo IV c 32) (Imp) s 1.

[26] *Settlement of Moravians in America Act 1748*, 22 Geo 2, c 30.

[27] *Quakers and Moravians Act 1833*, 3 & 4 Wm IV, c 42 (Imp).

[28] *R v Laurence* (1852) 20 LTOS 16.

[29] *Maden v Catanach* (1861) 7 H & N 360 (158 ER 512).

[30] *1854* 17 & 18 Vict c 125 (Imp) s 20.

Testimony under affirmation was to carry equal weight with testimony under oath, attracting the same penalties for falsity.[31]

11. It was not until 1888 that laws were enacted in England to confirm that any person could object to being sworn and could make an affirmation in place of an oath on any occasion when an oath was required by law.[32] A standard form of affirmation was legislated in 1896.[33]

12. The *Oaths Act 1909* expressly maintained the common law right of persons other than Christians to take an oath[34] and to use an alternative form that they considered binding on their conscience.[35] There was no longer any need at law for a witness to express or a court to inquire into the witness's religious beliefs to establish their right to affirm.[36]

2 The law in South Australia

History[37]

13. The English common law was received on settlement of the Australian colonies.[38]

14. In South Australia, the legislative declaration of South Australia's date of settlement was made in Ordinance 2 of 1843, which provided that

> In all questions as to the applicability of any laws or statutes of England to the Province of South Australia, the said province shall be deemed to have been established on the 28th day of December, 1836.[39]

15. It was assumed that statutes in force in England were received by the colonies unless their application was not held to be consistent with local conditions.[40] One of those statutes

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[31] 32 & 33 Vict. c 68; South Australia, *Parliamentary Debates*, Legislative Council, 2 December 1869, 1035 (J T Bagot, Chief Secretary).

[32] *Oaths Act 1888*, 51 & 52 Vict, c 46 ss 1 and 3.

[33] *Affirmations Act 1896* (UK).

[34] 9 Edw 7, c 39 s 2(2).

[35] See, for example, *R v Chapman* [1980] Crim LR 42. Here the witness did not take the Bible in his hand; *R v Hayes* [1977] 2 All ER 288, 291 (Bridge J).

[36] 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1694.

[37] For a learned account of the history of Imperial and South Australian law on oaths and affirmations, readers are referred to the LRCSA Report, which is reproduced in **Appendix 3** to this paper.

[38] *Lipohar v The Queen* (1999) 2000 CLR 485 [53]; *R v Kidman* (1915) 20 CLR 425, 435-6; McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007), 203-4.

[39] Alex C Castles, 'The reception and Status of English law in Australia' *Adelaide Law Review*, 2, 3 (note 14).

[40] Ibid 4.

specifically provided that an affirmation or declaration could be made in any court in the colony.[41]

16. In 1911 the *Oaths and Affirmations Act* was enacted in South Australia. It described how the oath was to be administered, based on the current practice for a Christian oath:[42]

> The person taking the oath shall, standing up, hold a copy of the Bible, New Testament, or Old Testament in his hand and, after the oath has been tendered by the officer administering the same, shall utter the words 'I swear'.

17. Similarly, it described how an affirmation should be administered:

> 'I, *A. B.,* do solemnly, sincerely, and truly affirm and declare,' and then shall follow the words of the oath prescribed by law, but omitting any words of imprecation or calling to witness.

18. It allowed the choice of a different form of oath, which would be as binding and valid as the standard oath. It provided that if it were later found that a person taking the oath had no religious faith this would not affect the legality or validity of the oath they took.

19. In 1929 the South Australian *Evidence Act (SAEA)* repealed the *Oaths and Affirmations Act 1911* (SA) and moved South Australian laws about witness oaths and affirmations into the new *Evidence Act.*

20. The 1972 amendments to the *SAEA* also provided that if a person requested that an oath be administered otherwise than on a Bible, and the sacred book they requested was not available, they could affirm.[43]

21. In 1978 the South Australian Attorney-General requested the Law Reform Committee of South Australia (LRCSA) to consider

> whether the form of oath used in Courts, which in one form or another requires the witness to tell the truth, the whole truth and nothing but the truth, should be altered to an adjuration that the witness will tell the truth 'as I know it to be'.[44]

22. The Committee reviewed the history of the form of the testimonial oath. The Committee's full report is reproduced in **Appendix 3.** It described the words then used to administer the oath in South Australian courts (set out in **Appendix 2**) and noted that these words had 'not

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[41] *An Act for amending the Law of Evidence and Practice on Criminal Trials 1867* (Imp).

[42] In the Second Reading Report to the *Oaths and Affirmations Bill 1911* in the Legislative Council, it was noted the then 'present method [of] taking the oath in English Law Courts [which] involved the process of kissing the bible' had been objected to on sanitary grounds. This objection was not reflected in the legislation.

[43] *Evidence Act Amendment Act 1972* (SA). See South Australia, *Parliamentary Debates*, Legislative Council, 14 March 1972, 3791 (A J Shard).

[44] LRCSA Report, 1.

been prescribed by any statute in force in South Australia' and that they were 'certainly centuries old and there is no record of exactly when they were adopted.'

23. The Committee rejected the Attorney-General's suggestion for an oath that permitted the witness a subjective understanding of the truth. It supported retaining the traditional form of words because it thought its meaning well understood and because no convincing case had been made against it. Some alternative wordings (also set out in **Appendix 2**) were offered in case the Committee's recommendation to retain the current form of oath was not endorsed by the Attorney-General. '

24. The *SAEA* was further amended in 1984[45] in accordance with the LRCSA's recommendations to retain the current form of oath and to put affirmations on an equal footing with oaths. Parliament accepted the Committee's view:

> … that it should not be necessary for a witness who desires to affirm to have to produce some religious or philosophical objection to the Court. It should be sufficient that he wishes to affirm and not to be sworn … [46]

and replaced this requirement with provisions giving witnesses an unfettered choice to affirm whenever an oath was required, the Attorney-General noting that the only consideration should be 'what is appropriate to the person taking the oath.'[47]

25. The South Australian Court of Criminal Appeal initially held that the amended provisions would still permit a judge to ask the witness questions about their understanding of the religious significance of taking an oath.[48] In later cases the court doubted this and held that it was sufficient that witnesses swear in a way they found binding on their conscience[49] and that the 1984 amendments were intended to render inquiries of the witness' faith inappropriate. 'The focus', the court stated,

> has changed … to a consideration of the ability to understand an obligation which is common to both oath and affirmation.[50]

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[45] By the *Statutes Amendment (Oaths and Affirmations) Act 1984* (SA). The relevant amendments were to the *Evidence Act 1929* (SA), ss 6 and 8. The South Australian Evidence Act is cited hereafter as the '*SAEA*'.

[46] LRCSA Report, 5, referring to the requirement in s 8 *SAEA*.

[47] South Australia, *Parliamentary Debates,* 11 April 1984, 3446 (C J Sumner, Attorney-General), referring to the repeal of s 8 *SAEA* and the proposed new s 6 (3).

[48] R *v Schlaefer* (1992) 57 SASR 423, 429.

[49] R *v Simmons* (1997) 68 SASR 81, 85 (Perry J). *Schlaefer* was also not followed in *Attorney-General's Reference (No 2 of 1993)* (1994) 4 Tas R 26.

[50] R *v Climas (Question of Law Reserved)* (1999) 74 SASR 411, [24] (Duggan J).

26. The operative section (s 6(3)) was amended once more in 1999[51] to make it clear that a prospective witness should be explicitly offered a choice between oath and affirmation.

27. The 1999 amendments also changed s 9 to establish a presumption that any person is capable of giving sworn evidence unless the judge determines that they do not have sufficient understanding of the obligation to be truthful that is entailed in giving sworn evidence.[52] In 2004, in the case of *R v Pascoe,*[53] it was held that what this contemplates is an understanding and acceptance by the person giving sworn evidence of the solemnity of the oath or affirmation and its sanctions, which is more akin to early English thinking. In the same year, in *R v P, BR*,[54] Mullighan J took the view that

> the 1999 Act removed what may be called discrimination on the basis of religion or no religion … with the consequence that any proposed witness, regardless of religious beliefs … is presumed to be capable of giving sworn evidence.[55]

28. In 2003, the *SAEA* was further amended to ensure that a witness who wishes to affirm is no longer required to recite the entire affirmation, there being no need for such recital for a witness oath.[56]

Oaths and affirmations for Aboriginal people in South Australia

29. When English law was first inherited by the colonies, including laws about witness oaths and affirmations, colonial governments had to address the fact that there was an indigenous population whose status under English law was not clear. It was not until 1836 that it was established[57] that Aboriginal people were subject to colonial law, notwithstanding that their culture, customary laws, social structures and spiritual beliefs were very different from those of their colonisers and often incompatible with the practice and tradition of English law.

30. From the outset, judges in South Australia had difficulty administering oaths to Aboriginal people. Because of this difficulty, Cooper J was of the view in 1841 that it was impossible to

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[51] *Evidence (Miscellaneous) Amendment Act 1999* (SA).

[52] *SAEA* s 9(1). Such an inquiry is at the discretion of the court: *R v Starrett* (2002) 82 SASR 115, 119 (Doyle CJ).

[53] (2004) 90 SASR 505.

[54] [2004] SASC 323.

[55] Ibid [115] (Mullighan J).

[56] *Statutes Amendment (Attorney-General's Portfolio) Bill 2003*, amending s 6(4) *SAEA*. See South Australia, *Parliamentary Debates*, Legislative Council, 3 October 2001, 2350 (K T Griffin, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 15 October 2002, 1543 (Michael Atkinson, Attorney-General).

[57] *R v Jack Congo Murrell NSW* (1836) 1 Legge 72.

31. try the Aboriginal people of South Australia in accordance with English Law.[58] In 1844, South Australia passed *An Ordinance to Allow the Aboriginal Inhabitants of South Australia and the Parts Adjacent to Give Information and Evidence without the Sanction of an Oath* (Ordinance 8) under the authority of *The (Colonies) Evidence Act*.[59] This Act allowed received laws to be adapted to accommodate Aboriginal testimony because

> [i]ts purpose was to allow colonial legislatures to pass acts or ordinances to allow their indigenous inhabitants to give unsworn testimony before the courts.[60]

32. Ordinance 8 allowed Justices of the Peace to receive unsworn testimony from Aboriginal people upon a promise to be truthful. Aboriginal witnesses who gave unsworn evidence would nonetheless be liable for perjury as if they had taken an oath. If, however, a court found that the Aboriginal witness 'believe[d] in a God, a future state of reward and punishment and the obligation of an oath' their testimony could not be admitted, because they were not permitted to take an oath.[61] The ordinance also affirmed that the unsworn evidence of Aboriginal witnesses carried less weight than sworn testimony.[62]

33. Not much later, Ordinance 8 was repealed by another ordinance[63] which contained essentially similar provisions and which acknowledged, in its preface, that its goal was to enable courts to punish Aboriginal people for crimes against colonial laws, which could not be done unless courts had some way to take their evidence.[64] The ordinance stated that the requirement for witnesses to give testimony under oath

> necessarily excludes the testimony of many persons Aboriginal Natives (sic) of this province, and of the countries adjacent thereto on the continent of Australia, who are altogether uncivilized and are destitute of the knowledge of a God, and of any fixed religious belief.

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[58] CSO 511/1840, Advice from Cooper J to the Government of South Australia, quoted in Australian Law Reform Commission, *Recognition of Aboriginal customary laws and Anglo-Australian law after 1788*, Report No 31 (1986) ch 23, This report is cited hereafter as the 'ALRC Aboriginal Customary Laws Report'.

[59] 1843 (Imp).

[60] Dorsett, Shaunnagh, 'Destitute of the knowledge of God': Māori Testimony Before the New Zealand Courts in the Early Crown Colony Period' (2012)in Kirkby, Dianne (ed), *Past Laws, Present Histories* ANU E-Press 39 <http://epress.anu.edu.au?p=200721>

[61] *The (Colonies) Evidence Act 1843* (Imp), s 7.

[62] Ibid s 5.

[63] *Ordinance 3 of 1848 (An Ordinance to Facilitate the Admission of the Unsworn Testimony of the Aboriginal Inhabitants of South Australia and the parts adjacent 1848*).

[64] See Castles, above n 59, 532-3; Brent Salter, 'Early interactions between indigenous people and settlers in Australia's first criminal court' (2009) 83 *Australian Law Journal* 56, 60; *R v Paddy* (1876) 14 SCR (NSW) 440.

34. As offensive and ignorant as these opinions about Aboriginal people are, the legal assumptions behind them were consistent with those held in England at the time, where a person regarded as having no religious faith (in the limited Judeo-Christian sense of it at that time) could not give sworn testimony.

35. The substance of the 1848 Ordinance remained the law for Aboriginal people until 1972, when new provisions were inserted into the *Evidence Act*[65] for the giving of unsworn evidence generally, deliberately omitting specific mention of Aboriginal people. It appeared to make little difference when the *Nationality Act 1920* (Cth) provided that all Aboriginal and Torres Strait Islander people born after 1 January 1921 were to be regarded as natural-born British subjects.[66]

36. Until the 1972 amendments, the practice in Australia and in South Australia was for judges to examine Aboriginal witnesses routinely as to competency.[67] In addition jury warnings were often given about the lesser value of Aboriginal testimony.[68] For example, Kreiwaldt J commented in *Chambers*:

> [O]ver and above the fact that evidence is given by natives, regard shall be had to the fact that evidence is unsworn … one should think twice before one decides to accept the evidence of natives.[69]

37. Introducing the 1972 amendments, the Chief Secretary, A.J. Shard, said

> the obsolete and in some ways offensive provisions relating to evidence from aboriginals are struck out and more general provisions applicable to any person who does not understand the obligation of an oath are inserted.[70]

38. Since the enactment of these amendments, the laws relating to sworn and unsworn evidence and the administration of oaths and affirmations apply equally to Aboriginal and non-Aboriginal persons.

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[65] *Evidence Act Amendment Act 1972* (SA).

[66] See *Nationality and Citizenship Act 1948* (Cth), s 10(1) (now repealed); see now *Australian Citizenship Act 2007* (Cth), s 4 (definition of 'Australian citizen'), s 11A (formerly the *Australian Citizenship Act 1973* (Cth)); *Nationality Act 1920* (Cth) s 6(1)(a).

[67] *R v Smith* 6 SR (NSW) 85.

[68] See for example *Wogala* (unreported, Supreme Court of the Northern Territory, Kriewaldt J, 14 May 1951) 208; *Peppin* (unreported, Supreme Court of the Northern Territory, Kriewaldt J, 22 January 1952) 166; *Jangala* (unreported, Supreme Court of the Northern Territory, Kriewaldt J, 1 May 1956) 166; Heather Douglas, 'Justice Kriewaldt, Aboriginal identity and the criminal law' (2002) 26 *Criminal Law Journal* 204, 212.

[69] *Chambers* (unreported, Supreme Court of the Northern Territory, Kreiwaldt J, 15 December 1955), 300.

[70] South Australia, *Parliamentary Debates*, Legislative Council, 14 March 1972, 3791 (A.J. Shard).

Current law

39. The general common law rule is that the only evidence a court may hear and admit is evidence (whether oral or written) that is sworn or affirmed.[71] In most common law jurisdictions, including South Australia, the common law rule has been embodied in legislation and modified to permit a court to take unsworn evidence in limited circumstances.

40. The *SAEA* defines sworn evidence to mean evidence given under the obligation of an oath or an affirmation and unsworn evidence to have a corresponding meaning.[72] Under the *SAEA*, every person

> is presumed to be capable of giving sworn evidence in any proceedings unless the judge determines that the person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.[73]

41. Any such inquiry is held on the *voir dire*.[74] The judge is not obliged to make this inquiry and a failure to inquire will not of itself render the evidence inadmissible.[75] The kinds of cases where judges generally make such inquiries are those where a witness is very young[76] or has a mental illness or psychological impairment.[77] The inquiry is as to the witness's understanding of the obligation that an oath or affirmation brings with it: namely, to tell the truth to the court. It has been described as an understanding that in court there is a higher duty to be truthful than in ordinary life.[78] It is not a test of whether the person understands the oath's religious significance.[79]

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[71] See the discussion of this in the context of the evidence of children in *Andrews v Armitt* (1971) 1 SASR 178. For South Australian commentary, see LexisNexis Australia, *Lunn's Civil Procedure South Australia* (at 24 October 2012) 18,050.5 Evidence on oath, 18,050.10 Witnesses not requiring an oath, 18.050 'Oaths Affirmations etc.' [18,050.5]-[18,050.10].

[72] *SAEA* s 4. This definition was inserted by the *Evidence (Miscellaneous) Amendment Act 1999* (SA), which came into effect 27 June 1999, to complement amendments giving affirmations the same effect as oaths and permitting witnesses a choice of affirmation or oath – see South Australia, *Parliamentary Debates*, Legislative Council, 9 December 1998, 447, 448 (K.T. Griffin, Attorney-General).

[73] *SAEA* s 9.

[74] *R v T* (1998) 71 SASR 265, 271 (Doyle CJ).

[75] *Nichols v Police* (2005) 91 SASR 232 (Gray J).

[76] *R v P, BR* [2004] SASC 323.

[77] *Nichols v Police* (2005) 91 SASR 232, 239 (Gray J).

[78] See *R v Climas (Question of Law Reserved)* (1999) 74 SASR 411, [24] (Duggan J), approving King CJ's explanation of the nature of the obligation entailed in an oath or affirmation in *R v Whittingham* (1988) 49 SASR 67, 69:

'The law depends upon the solemnity attaching to the taking of the oath or affirmation to impress upon the minds of witnesses the importance of telling the truth in the witness-box, and indeed the crucial importance of telling the truth in the witness-box by comparison with other, everyday occasions on which the sanction and solemnity of the oath are not invoked.'

[79] Ibid; See also *Evidence (Miscellaneous) Amendment Act 1999* (SA) s 5.

42. Where a witness does not understand the obligation, the court may permit them to give unsworn evidence – that is, without taking an oath or giving an affirmation that the evidence they give will be truthful.[80]

43. Before permitting a person to give unsworn evidence, the judge must be satisfied that they understand 'the difference between the truth and a lie',[81] must tell them 'that it is important to tell the truth'[82] and, having had an indication from the person that they 'will tell the truth',[83] must be satisfied that they understand the meaning of being truthful.[84] It may constitute a ground of appeal if the judge has not been so satisfied,[85] as the testimony should not then have been received and an irregularity capable of giving rise to a miscarriage of justice will have occurred.[86] Because judges are not bound by the rules of evidence when determining whether a person understands the difference between the truth and a lie, they can inform themselves on this as they think fit.[87]

44. Once a witness has been permitted to give unsworn evidence, the judge must explain to the jury why it is unsworn, and, if a party requests it, instruct the jury of 'the need for caution in determining whether to accept the evidence and the weight to be given to it.'[88] Unsworn testimony may be given less weight than sworn evidence.[89]

45. In South Australia witnesses who give sworn evidence have a choice between a religious oath and a secular affirmation.[90] A testimonial oath is not simply a promise to tell the truth. It contains words of imprecation that invoke the wrath of a deity should that promise be broken. A testimonial affirmation contains no such imprecation but is, too, something more than a simple promise to tell the truth. It is a solemn declaration to do so.

46. The purpose of an oath or affirmation has been described as being

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[80] *SAEA* s 9.

[81] Ibid s 9(2)(a)(i).

[82] Ibid s 9(2)(a)(ii).

[83] Ibid s 9(2)(b).

[84] *R v Meier* (1982) 30 SASR 127, 129-130 (King CJ).

[85] Ibid.

[86] *R v Starrett* (2002) 82 SASR 115, 126 (Lander J). In this case a witness was examined about what it meant to tell the truth and then gave unsworn evidence. On appeal, the witness's evidence was ruled inadmissible because the trial judge had not first determined that the witness was incapable of giving sworn evidence (as required by s 9(2) SAEA) before moving on to test the witness's capacity to give unsworn evidence.

[87] *SAEA* s 9(3).

[88] *SAEA* s 9(4).

[89] *Starrett* (2002) 82 SASR 115, 124 (Doyle CJ).

[90] *SAEA* s 6(3).

> to impress upon the minds of witnesses … the crucial importance of telling the truth in the witness-box by comparison with other, everyday occasions.[91]

47. An oath and an affirmation are, at law, 'equal in force and effect.'[92] Evidence sworn by either method must be given the same weight, and each method carries with it the same liability for perjury should its promise be broken.

48. Before the *SAEA* was amended in 1999 to give this choice and achieve this equality,[93] witnesses could affirm only after stating their objection to taking an oath.

49. As noted earlier, witnesses today have an unlimited right to affirm rather than take a religious oath. The obligation to tell the truth that accompanies an affirmation is no different from that accompanying an oath.[94] The choice to affirm is a personal choice, and need not be based on a lack of religious belief or the holding of a belief that does not countenance the taking of oaths. To establish competence, no inquiry is necessary or proper into whether a witness taking an oath holds any religious belief or believes their conscience will be bound by the oath.[95]

50. The court's right to question the reasons a person may have for their choice of oath or affirmation, in the context of establishing competence, has been described this way:

> If a witness elects to swear an oath so that he or she voluntarily and publicly undertakes some further obligation to God with the prospect (if he or she so believes) of a divine sanction as well, he or she is at liberty to do so. It is not for the court to question that person's state of belief or understanding in that regard. If the question of the person's competence arises, the court, in my opinion, need only inquire into the person's understanding of the common obligation [the obligation to tell the truth]. Of course, in earlier times, when evidence could only be given on oath, or when a person had to advance good reasons why he or she should not be sworn but should be allowed to affirm, a wider inquiry as to the person's religious belief and as to whether the oath was binding on the person's conscience was necessary. However, if inquiry as to the person's belief in God is not now necessary to establish competence, neither is an inquiry as to whether the oath or affirmation binds the person's conscience.[96]

51. Notwithstanding that they are no longer required to state their objection to taking an oath before being permitted to affirm, witnesses may still be cross-examined about their choice:

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[91] *R v Whittingham* (1988) 49 SASR 67, 69 (King CJ).

[92] *SAEA* s 6(5).

[93] *Evidence (Miscellaneous) Amendment Act 1999* (SA) s 4.

[94] *R v Climas* (Question of Law Reserved) (1999) 74 SASR 411, [142]-[143] (Lander J).

[95] *SAEA* s 6(2).

[96] *R v T* (1998) 71 SASR 265, 284 (Bleby J).

> Although there is no longer a requirement for a witness to state grounds for their objection to taking an oath, cross-examining counsel is not precluded from asking why a witness objects to taking the oath. Such an inquiry is not in contravention of the statute. Such an inquiry does not involve any suggestion that evidence on affirmation is in some way inferior to evidence on oath. It is an inquiry as to the subjective reasons of a witness for making an affirmation.
>
> Plainly, the fact that a witness has taken an oath or made an affirmation does not render the witness immune from cross-examination which suggests that the witness is not giving truthful evidence. Ever since the *Queen's Case* it has been accepted that after a witness has taken the oath the witness may thereafter be asked whether the witness considers the oath to be binding upon their conscience. The witness may be asked whether they recognise the responsibility that is associated with either having taken an oath or made an affirmation. It may be suggested to the witness that the witness does not regard the taking of the oath or the making of an affirmation as binding upon their conscience.[97]

52. The act of taking the oath or affirmation before giving evidence in court takes place in front of the judge (and jury, in a criminal case). Sworn evidence may also be submitted to the court in written form, by affidavit sworn or affirmed as to the truth of its contents before an authorised person[98] in accordance with the Act.[99]

53. An oath is to be taken in the manner specified in s 6(1)(a) *SAEA*: the person taking the oath is to hold a copy of the Bible — a book that contains the New Testament, the Old Testament or both — in their hands and, after the oath has been tendered to them in the form of a question, to answer 'I swear'.[100] The oath may be taken in any manner the witness declares binding on his or her conscience,[101] and there is a general catch-all provision stating that an oath may be taken in any other way or manner permitted by law.[102] The policy of swearing in the manner most binding on the conscience renders the witness's religion immaterial,[103] and may permit many different kinds of oath taking.[104]

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[97] *R v VN* (2006) 15 VR 113, 140 (Redlich JA, referring to *The Queen's Case* (1820) 129 ER 976).

[98] *Oaths Act 1936* (SA), Parts 4-5; *Supreme Court Civil Rules 2005* (SA), Rule 162(3).

[99] Ibid 162(11)(a). See also *Question of Law Reserved on Acquittal (No 5 of 1999)* (2000) 76 SASR 356, where s 6 of the *Evidence Act* was applied so that a police officer had power to administer an oath in relation to a determination of whether to issue a warrant was made under s 52 of the *Controlled Substances Act 1984* (SA).

[100] *SAEA* s 6(1)(a).

[101] Ibid s 6(1)(b).

[102] Ibid s 6(1)(c).

[103] *R v McIlree* (1866) 3 WW & a'B (L) 32; *R v T* (1997) 71 SASR 265; *R v Ah Foo* (1869) 8 SCR (NSW) 343.

[104] *SAEA* s 6(1)(b). For examples of types of oath taking, see Stanley Johnston, 'The Witness Sworn Saith'(1956) 30 *The Australian Law Journal* 74, 76.

54. The procedure for making an affirmation is similar to that for taking an oath. The witness is asked 'Do you solemnly and truly affirm' followed by the words of the affirmation itself (see below), to which the witness answers 'I do solemnly and truly affirm'.

55. The words of the testimonial oath and affirmation are not legislated in South Australia. There are currently two sources for the form of words and method of affirmation: information for witnesses on the South Australian Courts Administration Authority (CAA) website[105] and the instruction manual for Supreme Court Judges' Associates. Each offers a slightly different version of the administration of the affirmation. And, unlike the CAA website, the Associate's manual offers a range of different wordings and methods of administration for oaths: in standard form, or, respectively, for witnesses of Muslim, Jewish, and Buddhist faiths, and (again respectively) for witnesses of Chinese and Scottish nationalities. The CAA version is reproduced in **Appendix 2** to this paper.

56. Although the wording of the oath has shortened over time, its substance has not.[106]

57. An oath or affirmation cannot be invalidated by 'a procedural or formal error or deficiency'.[107] If an oath has been lawfully administered and taken (in the sense that the witness was competent to swear an oath and did so properly) the witness is still liable for perjury[108] (and other offences relating to false testimony such as perverting the course of justice or contempt)

> notwithstanding that it later emerges that the witness had no religious belief, or took the oath in a form not binding on his conscience.[109]

58. Swearing falsely by an affidavit makes the person liable for perjury[110] in the same way as giving false oral testimony under oath.

59. In criminal prosecutions under Commonwealth laws the offence of perjury also applies to unsworn testimony.[111] That is not the case for prosecutions under South Australian laws.

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[105] Courts Administration Authority of South Australia, *Witness/Victim: What to Expect* <http://www.courts.sa.gov.au/GoingtoCourt/Witness-Victim/Pages/default.aspx >.

[106] LRCSA Report, 3.

[107] *SAEA* s 6(6).

[108] Under South Australian law '[a] person who makes a false statement under oath is guilty of perjury' (*Criminal Law Consolidation Act 1935* (SA) s 242(1)). The maximum penalty for perjury (or counselling, procuring, inducing, aiding or abetting perjury) is seven years imprisonment.

[109] *R v T* (1998) 71 SASR 265, 271 (Doyle CJ on the effect of *SAEA* s 6 (2)).

[110] *Evidence (Affidavits) Act 1928* (SA) s 4.

[111] *Crimes Act 1914* (Cth) s 35.

South Australia amended its *Evidence Act* in 1999 to abolish the offence of giving false unsworn testimony[112] on the reasoning that

> it is unlikely that a person who lacks the understanding necessary to give formal evidence will be able to commit the offence.[113]

60. The power to punish for contempt, an incident of the inherent jurisdiction of a court,[114] is mentioned here for the sake of completeness, although it is not used to prevent or punish lying in court. Common law contempt of court consists of any act in a court which interferes with or with the due administration of justice.[115] Relevant examples of contempt are the refusal of a compellable witness to be sworn and give evidence[116] and the refusal of a witness to respond to questions during trial when directed to do so, even if doing so might put the witness at risk of a perjury charge.[117]

3 Comparison with laws elsewhere

Comparison with laws in other parts of Australia

61. South Australian laws on oaths and affirmations and competence to give evidence have many features in common with other Australian jurisdictions, including that

    - oaths and affirmations are available at the choice of the witness[118] and have equal weight and effect[119]. The only exception to this is the Northern Territory, which offers a choice

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[112] See *Evidence (Miscellaneous) Amendment Act 1999* (SA) s 5.

[113] South Australia, *Parliamentary Debates*, Legislative Council, 9 December 1998, 447, 448 (K.T. Griffin, Attorney-General).

[114] See Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449; Dockray MS, 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 *Law Quarterly Review* 120.

[115] *Lewis v Ogden* (1984) 153 CLR 682, 688; *MacGroarty v Clauson* (1989) 167 CLR 251, 255; *MacGroarty v A-G (Qld)* (1989) 86 ALR 513, 515; *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264, 268.

[116] *R v Jones* (1991) 58 A Crim R 471, 471 (Hedigan J).

[117] See *Zappia v Registrar of the Supreme Court* [2004] SASC 375, [60] (Duggan J); *R v Guariglia* [2000] VSC 45 (Byrne J).

[118] *SAEA* s 6; *Evidence Act 1995* (NSW) s 23; *Evidence Act 2001* (Tas) s 23; *Evidence Act 2008* (Vic) s 23; *Evidence Act 2011* (ACT) s 23; *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 5; *Oaths Act 1867* (Qld) s 17; *Evidence Act 1995* (Cth) s 23.

[119] *SAEA* s6(5); *Evidence Act 1995* (Cth) s 21; *Evidence Act 2011* (ACT) s 21; *Evidence Act 1995* (NSW) s 21; *Evidence Act 2001* (Tas) s 21; *Evidence Act 2008 (*Vic) s 21; *Oaths, Affidavits and Declarations Act 2012* (NT) s 5; *Oaths Act 1867* (Qld) s 17(2); *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 5(3). The rules of evidence in most other Australian jurisdictions are based on model provisions in the *Evidence Act 1995* (Cth). For this discussion, we call these Acts (*Evidence Act 1995* (Cth), *Evidence Act 2011* (ACT), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas) and *Evidence Act 2008* (Vic)) the Uniform Evidence Acts and their enacting jurisdictions 'UEA jurisdictions', with the remaining jurisdictions described as 'non-UEA jurisdictions'. South Australia is a non-UEA jurisdiction.

between swearing on a deity or making a promise[120] as a result of recent reform; each is treated as one of two equal forms of oath;[121]

- proof of a religious belief is not required in order to take an oath;[122]
- it is not an absolute requirement that a holy text be held while the oath is sworn;[123]
- the court should inform witnesses that they have a choice to swear or affirm (or, in the case of the Northern Territory, to take the oath by swearing on a deity or making a promise to tell the truth);[124]
- an oath does not lose its validity (for example, for the purposes of making the swearer liable for perjury if he or she lies in court under oath) if it later emerges that the witness had no religious faith or did not understand the nature and consequences of the oath;[125]
- minor departures from the administration procedure or prescribed form of the oath have no effect on its binding nature as long they do not materially affect the substance of the oath;[126]
- every person, including a child,[127] is presumed competent to give sworn evidence.[128] The presumption may be rebutted as to individual facts[129] or fully rebutted by showing that the witness does not understand the 'obligation to give truthful evidence';[130]
- understanding the purpose of the oath is not part of the test to rebut the presumption of competence;[131]

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[120] *Oaths, Affidavits and Declarations Act 2012* (NT) s 5.

[121] Ibid s5(1).

[122] *SAEA* s 6(2); *Evidence Act 1995* (NSW) s 24(2)(a); *Evidence Act 2001* (Tas) s 24(2)(a); *Evidence Act 2008* (Vic) s 24(2)(a); *Evidence Act 2011* (ACT) s 24(2)(a); *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 4(2); *Evidence Act 1995* (Cth) s 24(2)(a).

[123] *SAEA* s 6(1)(b); *Evidence Act 1995* (NSW) s 24(1), *Evidence Act 2001* (Tas) s 24(1); *Evidence Act 2008* (Vic) s 24(1); *Evidence Act 2011* (ACT) s 24(1); *Evidence Act 1995* (Cth) s 24(1).

[124] See for example, *Evidence Act 1995* (Cth) ss 23(1), 23(2) and *SAEA* s 6(3).

[125] See for example, *Evidence Act 1995* (Cth) s 24(2)(b) and *SAEA* s 6(2).

[126] See for example *SAEA* s 6(6); *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), s 16; *Oaths, Affidavits and Declarations Act 2010* (NT), ss 11 and 13; *Oaths Act 1876* (Qld) s 32.

[127] *R v Brooks* (1998) 44 NSWLR 121, 124; *ASIC v Karl Suleman Enterprises Pty Ltd* (2002) 217 ALR 716.

[128] *Evidence Act 1995* (Cth) s 12 and *SAEA* s 9(1).

[129] *Evidence Act 1995* (Cth) s 13(1).

[130] Ibid, s 13(3). For a discussion of the test for competence to give sworn evidence, see *R v Climas (Question of Law Reserved)* 74 SASR 411, 431-2 (Lander J).

[131] *Evidence Act 1995* (Cth) s 12. See discussion in Australian Law Reform Commission, *Evidence (Interim)*, Report No. 26 (1985) 243. This report is cited hereafter as the 'ALRC Evidence (Interim) Report'.

- a person who is incompetent to give sworn evidence may give unsworn evidence if the court is satisfied that they understand the difference between the truth and a lie and the importance of telling the truth;[132]
- a witness giving sworn testimony will be liable for perjury if their evidence is untruthful.[133]

62. However there are some differences between South Australian and other Australian laws about oaths and affirmations and competence to give evidence. For example:
    - in other Australian jurisdictions, neither the oath nor the affirmation appears to be the first alternative in the legislation,[134] whereas the South Australian Act appears to offer the affirmation as a second, lesser alternative;
    - in other Australian jurisdictions, a standard form of oath and affirmation is in the legislation itself;[135] that is not the case in South Australia;
    - in other Australian jurisdictions, the standard wording for the oath specifically allows a witness to use the name of his or her deity,[136] whereas South Australian law, having no legislated standard wording, makes no mention of a deity. The practice referred to on the South Australian Courts Administration Authority's website[137] would appear to allow it;
    - in most other Australian jurisdictions, there is no requirement for a judge in a criminal trial to explain why it is that a witness has given unsworn evidence or, if a party requests it, to warn the jury to treat it with caution. This is a requirement in South Australia;[138]
    - in other Australian jurisdictions, a judge may direct a witness to make an affirmation where the witness 'refuses to choose whether to take an oath or make an affirmation' or when it is not 'reasonably practicable for the person to take an appropriate oath'.[139] There is no similar provision in South Australia;
    - in other Australian jurisdictions, an accused person has the right to make an unsworn

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[132] *Evidence Act 1995* (Cth) s 13(4) and (5)(a)-(c).

[133] *Criminal Law Consolidation Act 1935* (SA) s 242; *Crimes Act 1914* (Cth) s 35.

[134] The *Evidence Act 1995* (Cth) provides that '[a] witness in a proceeding must either take an oath, or make an affirmation, before giving evidence' and witnesses 'may choose whether to take an oath or make an affirmation'.

[135] *Evidence Act 1995* (Cth) sch.

[136] Ibid.

[137] See Appendix 2.

[138] *SAEA* s 9(4).

[139] Ibid s 23(3). See also *Oaths, Affidavits and Declarations Act 2012* (NT) s 5(3).

statement (a provision designed to minimise the risk of wrongful conviction).[140] That right was abolished in South Australia in 1985;[141]

- in some other Australian jurisdictions, a person giving *un*sworn testimony is liable for perjury.[142] That liability was removed from the *SAEA* in 1999[143] and is not a crime in the ACT, New South Wales, Victoria, or Tasmania.

63. Some Australian laws about witness oaths and affirmations still retain features that have been discarded by other jurisdictions which have reformed their laws. These features include requiring the witness to object to taking the oath[144] or to show reason why they should not take the oath[145] before they can be permitted to take an affirmation. But, in general, there is little substantial difference between South Australia's laws on witness oaths and affirmations and those in most other Australian jurisdictions.

Comparison with other common law countries

64. The common law on witness oaths and affirmation is founded on an assumption of universal Christianity.

65. In the United Kingdom and Canada, witnesses may choose oath or affirmation,[146] although in the United Kingdom Christians and Jews are presumed to choose to swear on oath.[147]

66. While they carry equal weight,[148] many jurisdictions continue to place the oath in preference to the affirmation in practical terms, assuming the oath to be the witness's choice for sworn testimony unless he or she elects otherwise.[149]

67. In New Zealand and Canada a holy text will *not* be used if the witness objects,[150] whereas in the United Kingdom Christians and Jews must use it.[151]

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[140] See Australian Law Reform Commission, *Evidence*, Report No 38 (1987) 95. This report is cited hereafter as the 'ALRC Evidence Report'.

[141] See *Evidence Act (Amendment) Act 1985* (SA) s 18A.

[142] *Crimes Act 1914* (Cth) s 35; *Criminal Code 1899* (Qld) s 123; *Criminal Code Act 1983* (NT) ch 1, s 96; *Criminal Code Act Compilation Act 1913* (WA), Schedule, s 124.

[143] See *Evidence (Miscellaneous) Amendment Act 1999* (SA) s 5.

[144] See *Oaths Act 1867* (Qld) s 17. This is also the case in New Zealand: *Oaths and Declarations Act 1957* (NZ) s 15.

[145] *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 5(1).

[146] *Oaths and Declarations Act 1957* (NZ) s 4; *Oaths Act 1978* (UK), s 5(1); *Canada Evidence Act*, RSC 1985, s 14.

[147] *Oaths Act 1978* (UK), ss 1(2)-(3).

[148] *Oaths Act 1978* (UK), s 5; *Oaths and Declarations Act 1957* (NZ) s 4(1); *Canada Evidence Act*, RSC 1985, s 14(2); *Evidence Act, 1990* (Ontario), s 17(1).

[149] *Oaths Act 1978* (UK), s 5; *Canada Evidence Act,* RSC 1985, ss 13-14; *Evidence Act, 1990* (Ontario), s 17(1).

[150] *Oaths and Declarations Act 1957* (NZ) s 15; and, for example, *Evidence Act, 1990* (Ontario), s 16.

[151] *Oaths Act 1978* (UK), s 1.

68. In parts of Canada, and in New Zealand, the oath may be administered in such a way or using such ceremony as binds the witness's conscience only when the witness chooses not to take the oath in the standard way.[152] Further, in New Zealand[153] and the United Kingdom[154] the oath need not take any particular form as long as the taker considers it binding on his or her conscience.

69. In the United States, oaths and affirmations are both available for witnesses, and, as in many other jurisdictions, the oath need not take any particular form as long as the taker considers it binding on his or her conscience.[155] The requirement has been described thus:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. 'Oath' includes affirmation.[156]

Comparison with non-common law countries

70. Although South Australian laws on witness oaths and affirmations are based on the common law, many people who give evidence in South Australian courts come from countries with very different legal systems and traditions. It is important for any review of South Australian law to take account of this when considering how best to convey to prospective witnesses the significance of the witness oath and affirmation and to help all witnesses understand their obligations under South Australian law when giving evidence under oath.

Scandinavian, European and Baltic countries

71. In Scandinavian, European and Baltic countries, oaths are still common but most, while declaring 'I swear', do not contain religious words.[157] Anecdotal evidence suggests that in Bosnia, the oath, although without religious words,[158] will nevertheless be sworn on the Bible

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[152] See, for example, *Evidence Act, 1990* (Ontario), s 16, *Oaths and Declarations Act 1957* (NZ) s 3(c).

[153] *Oaths and Declarations Act 1957* (NZ) s 3(c).

[154] *Oaths Act 1978* (UK), s 1(3).

[155] Fed R Evid 603 (US): 'Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience'; Milhizer, above n 4, 32.

[156] Fed R Evid 603 (US), Notes of Advisory Committee on Proposed Rules.

[157] See, eg, *Criminal Procedure Code* (Republic of Albania) art 360; *Criminal Procedure Code* (Republic of Azerbaijan) art 328; *Criminal Procedure Code* (Bosnia and Herzegovina) art 88; *Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 317(4); *Criminal Procedure Code* (French Republic) art 331; *Criminal Procedure Code* (Republic of Moldova) art 108(1); *Criminal Procedure Code* (Montenegro) art 105(3); *Criminal Procedure Code* (Republic of Serbia) art 96; *Criminal Procedure Code* (Slovak Republic) s 542; *Criminal Procedure Code* (Republic of Uzbekistan) art 441.

[158] The oath reads: 'I swear that I shall speak the truth about everything that I am going to be asked before this Court and that I shall withhold nothing known to me' – *Criminal Procedure Code* (Bosnia and Herzegovina), art 88.

or Quran. It may be that this is the case in many jurisdictions with apparently non-religious oaths, but only limited information in English is available to confirm this.

72. The words 'I swear' have been variously considered inherently religious (such as in France and Germany) and the contrary (such as in Switzerland).[159] Alternately, some oaths are taken on one's honour so are unlikely to involve a holy text. German and Maltese oaths overtly refer to God[160] but both offer other options.[161]

73. In Germany, there are three options: a religious oath,[162] a non-religious oath[163] and an affirmation (which can be chosen for reasons of faith or conscience).[164] However, although German laws for sworn testimony recognise cultural diversity, testimony is not routinely sworn, in contrast to common law countries. An oath or affirmation will only be taken where the court deems it necessary.[165] In Germany (and in Macedonia) the oath is administered *after* the testimony.[166]

74. Some countries offer only an affirmation[167] but most European jurisdictions appear to retain the oath and offer an affirmation as an alternative.[168] It is interesting (and atypical) that Norway has no oath, as the dominant religion is Christianity. However, Norway has historically been lenient in administering the oath, allowing objectors to affirm on conscience and honour.[169]

75. In France, despite a brief abolition of the oath during the French Revolution,[170] the current law requires an oath and is very rigid. Any deviation from the official form of the oath renders the witness's testimony invalid. Any reliance on such testimony by the trial judge is both appealable and reversible.[171]

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[159] Silving, above n 2, 1353.

[160] *Criminal Procedure Code* (Federal Republic of Germany) s 64(1); *Criminal Code* (Republic of Malta) art 632.

[161] See for example, *Criminal Code* (Republic of Malta) art 631(3). In Malta the oath is available to Roman Catholics, while others are sworn in whatever manner most binds their consciences.

[162] *Criminal Procedure Code* (Federal Republic of Germany) s 64(1).

[163] Ibid s 64(2).

[164] Ibid s 65.

[165] Ibid s 59.

[166] *Criminal Procedure Code* (Federal Republic of Germany), ss 64, 65; *Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 317(4).

[167] *Criminal Procedure Code* (Kingdom of Norway) s 131.

[168] ILRC Report, 33. See for example *Criminal Procedure Code* (Bosnia and Herzegovina) art 88(1).

[169] Silving, above n 2, 1357.

[170] Ibid 1353.

[171] Ibid 1355.

76. Another important difference between civil and common law jurisdictions is that in some civil systems, the oath is also used in ways that are no longer contemplated in common law jurisdictions – to substantiate the initiating party's otherwise weak case (as a decisory or party oath): for example, where a judge has greater confidence in one party, but neither party has provided enough evidence to persuade the court, the judge may offer that party the option to take an oath to make up the missing portion of the evidence.[172] A variant is also available in Islamic law,[173] where a plaintiff with insufficient evidence to support their claim can demand the defendant take an oath proving their case, and whether or not the oath is taken can then be used as evidence to support the case of the relevant party.[174]

Middle Eastern countries

77. Unlike the secularised common law world, many civil law countries still have a strong connection between law and religion. Recent practices of the Israeli Supreme Court have raised speculation that the court rules and procedures may be too heavily influenced by religious elements of Jewish law.[175] Oaths are taken very seriously in Israel and rabbinic courts have hesitated to enforce oath-taking because of its potentially dire consequences, sometimes reaching a compromise judgment to avoid the necessity.[176]

78. Similarly, in Muslim (or Sharia) courts, oaths are taken on the Quran and are of strict religious significance. Although witnesses are not required to swear on the Quran, many do so to strengthen their testimony.[177] Obviously when parties testify a conflict can arise between self-interest and truth. Traditionally, the risks of lying on oath appear to have outweighed self-interest. Customs vary across Sharia courts, but there have been recorded incidents in Moroccan Islamic courts of litigants who

> maintain their testimony 'right up to the moment of oath-taking and then ... stop, refuse the oath, and surrender the case.'[178]

79. This is compelling evidence of the sacred nature of the oath, but is also surprising as Islam teaches that it is a great sin to lie generally, not just on oath.[179]

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[172] ILRC Report, 30.

[173] Milhizer, above n 4, 56.

[174] Ibid.

[175] Steven Friedell, 'Some observations about Jewish law in Israel's Supreme Court' (2009) 8(4) *Washington University Global Studies Law Review* 659, 665.

[176] Ibid 666.

[177] Milhizer, above n 4, 56.

[178] Michael J Frank, 'Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq' (2006) 18(1) *Florida Journal of International Law* 1, 83.

[179] Milhizer, above n 4, 47.

80. The reluctance of some Muslims to take the oath in their defence can be contrasted strongly with the common law oath. In mid-twentieth century America, even those without religious belief would hesitate to refuse the oath, because they might not be heard or believed.[180] So, in fundamentalist Islamic courts, people sometimes baulk at taking the oath, even to the point of surrendering their case, because of the force of its spiritual implications, while in the common law system, people are motivated more by 'external compulsion rather than personal conviction'[181] in their decision to give evidence under oath.

81. Evidence of the significance of oaths in Islam can also be found in the fact that, under some variants of Islamic law, the oath is the whole testimony. If a defendant takes the oath, he or she will be acquitted; if a defendant is unwilling to take the oath, he or she will be convicted.[182] Practically speaking, 'decisory' oaths replace the need for judgment.[183]

Significant differences between common law and non-common law jurisdictions

82. One of the major differences between traditions in non-common law jurisdictions (as varied as it is) and South Australian law is that oaths are used less often in those jurisdictions.

83. Non-common law jurisdictions generally do not allow the accused to give sworn testimony,[184] as they have too much interest in the outcome of the proceedings. For defendants, there is believed to be an innate conflict between taking an oath pledging to tell the truth and a desire for self-preservation[185] and the exemption from oath-taking[186] is a privilege which 'relieves [the accused] of the dilemma of perjury or confession.'[187]

84. In certain jurisdictions this exclusion even extends to relatives of the accused, or others who are close to them.[188] Although there is some variation in such exemptions, it is essentially universal that a criminal defendant can never be put on oath.[189] The Muslim rationale for this

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[180] Sorensen, Robert, 'The effectiveness of the oath to obtain a witness' true personal opinion' (1956) 47(3) *The Journal of Criminal Law, Criminology and Police Science* 284, 287.

[181] Ibid 292.

[182] Frank, above n 178, 80.

[183] Silving, above n 2, 1338.

[184] Silving, Helen, The Oath: II, (1959) 68(8) *The Yale Law Journal* 1527-1577, 1533.

[185] ILRC Report, 30; Frank, above n 178, 47; Silving, above n2, 1351.

[186] Frank, above n 178, 79; ILRC Report, 24.

[187] Silving, above n 184, 1535. The Council of Rome abolished the oath for accused persons in 1725, not because of concerns of morality in forcing the accused to make a decision between perjury and conviction, but because 'it failed to extract truthful statement': ibid, 1347.

[188] Silving, above n 184, 1551.

[189] ILRC Report, 35; *Criminal Procedure Code* (Bosnia and Herzegovina) art 89; *Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 228(2); *Criminal Procedure Code* (Federal Republic of Germany) s 60; *Criminal Procedure Code* (Montenegro) art 106.

is that it protects devout Muslims from blasphemy by allowing them to testify without swearing falsely on the Quran.[190] Courts assume defendants will lie to save themselves, so avoid requiring oaths which would profane the Quran through perjury.[191]

85. Children are also usually deemed incompetent to give testimony under oath in civil law jurisdictions.[192] It is both protectionist and reflective of their lack of capacity. Many non-common law jurisdictions endeavour to avoid taking testimony from children at all.[193] In jurisdictions where there is no oath, minors tend to not be advised of the potential penalties that would be faced for false testimony for sworn witnesses.[194]

86. Many non-common law jurisdictions also exclude people with convictions for crimes that inspire moral distrust (such as dishonesty or giving false testimony) from giving evidence under oath.[195]

87. While defendants are exempted for their protection, the exclusion of children, the mentally impaired and those with certain criminal records is based on either their inability to fully understand the oath or its obligations or community distrust of the witness. In some cases, failure to exclude these witnesses leads to re-categorisation of their testimony as unsworn and even a reversal of decisions which relied on it as sworn evidence.[196]

88. In countries where there is no requirement for witnesses to swear or affirm, practices range from a simple admonition to tell the truth[197] to a warning of the legal consequences of false testimony.[198] In one such country, Switzerland, the witness must be cautioned and failure to caution renders the examination invalid.[199]

89. Many countries without oaths or affirmations are notably secular, some with a history of traditional religion which has been superseded by secularising influences. Except for Switzerland, all 'no-oath' jurisdictions compared here (China, Switzerland and Slavic

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[190] Frank, above n 178, 47.

[191] Ibid 80.

[192] See, for example: *Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 228; *Criminal Procedure Code* (Federal Republic of Germany) s 60; *Criminal Procedure Code* (Bosnia and Herzegovina) art 89; *Criminal Procedure Code* (Republic of Azerbaijan) art 328; *Criminal Procedure Code* (Republic of Albania) art 360.

[193] Silving, above n 2, 1373.

[194] See, for example: *Criminal Procedure Code* (Latvia) s 152; *Criminal Procedure Code* (Russian Federation) art 191, 280.

[195] Silving, above n 184, 1547.

[196] Ibid.

[197] *Criminal Procedure Code* (Republic of Armenia) art 340; *Penal Procedure Code* (Bulgaria) art 120; *Civil Procedure Law* (People's Republic of China) art 124; *Criminal Procedure Act* (Republic of Slovenia) art 240.

[198] *Criminal Procedure Law* (People's Republic of China) art 156; *Code of Criminal Procedure* (Estonia) art 68(2); *Criminal Procedure Code* (Republic of Latvia) s 151.

[199] *Criminal Procedure Code of the Swiss Confederation* art 177.

countries) have Communist affiliations. However, evidence suggests that the absence of oaths may be attributable to influences predating Communism.

90. Chinese law has never officially used an oath,[200] for both cultural and legal reasons,[201] but there have always been certain formalities to giving evidence. Currently, witnesses are instructed in civil trials on their rights and obligations[202] and in criminal trials to tell the truth and of the legal consequences of falsity.[203] Witnesses also sign a written bond,[204] a practice which, although it takes a 'secular and rationalistic'[205] form, in essence performs the same job as the oath.

91. A key reason for the absence of the oath in China is that it was never necessary to compel truthfulness. Citizens owe absolute obedience to the State[206] which translates to a duty of 'filial piety' to the magistrate, and untruthfulness in court would incur disgrace and severe punishment.[207] False testimony is punished with seven years of hard labour.[208] Furthermore, a rationale for the absence of the oath is found in Confucian teaching, the oath's assumption of man's tendency to lie being contrary to the Confucian view of man as innately good.[209]

92. In Swiss courts witnesses are told to be truthful and informed of the legal consequences for falsity.[210] Where this caution is not given, the examination of the witness is held to be invalid.[211] The testimonial oath is used only in large civil (not criminal or religious) matters; and traditionally, oaths could be taken only by plaintiffs and defendants of good character, and were only exceptionally used in criminal cases.[212] The oath's decline is partly due to the Swiss focus on simple trials[213] but religious considerations were also relevant in questioning the oath's appropriateness.[214]

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[200] Silving, above n 2, 1380.

[201] Silving, above n 184, 1554.

[202] *Civil Procedure Law* (People's Republic of China) art 124.

[203] *Criminal Procedure Law* (People's Republic of China) art 156.

[204] ILRC Report, 29.

[205] Silving, above n 184, 1554.

[206] Silving, above n 2, 1380.

[207] Ibid.

[208] ILRC Report, 23; Silving, above n 184, 1554.

[209] Silving, above n 2, 1380-1.

[210] ILRC Report, 24.

[211] *Criminal Procedure Code of the Swiss Confederation* art 177.

[212] Ibid.

[213] ILRC Report, 24.

[214] Silving, above n 2, 1379.

93. Similarly, Slavic countries have traditionally little or no reliance on oaths.[215] Oaths were prohibited under Soviet law,[216] not for reasons of secularity, but because they were incompatible with the Soviet doctrine of intimate conviction, under which judges are free to decide based solely on their own personal evaluation of evidence, without set rules or logic, and are absolved from giving reasons for their decisions.[217] The absence of an oath or affirmation is maintained by a number of former USSR states, including Russia,[218] Armenia,[219] Estonia,[220] Latvia[221] and Poland[222] (client state) and by former communist and socialist states Bulgaria[223] and Slovenia.[224]

94. As can be seen, laws requiring people to give evidence under oath, or the absence of such laws, are a product of religious and cultural tradition and history, and the rationales underpinning them vary accordingly. In the next part of this paper we examine contemporary rationales for giving evidence under oath.

4 Contemporary rationales for witness oaths

95. Rationales for requiring witness oaths have been categorised in various ways by the many law reform reports on this topic. The main categories of rationale for requiring witnesses to make a formal commitment, by oath or affirmation, to tell the truth are:

- to secure the truth;
- to preserve and underscore the proper performance of public duties;
- to preserve honour; and
- to underpin legal sanctions against lying in court.

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[215] ILRC Report, 23-4.

[216] ILRC Report, 24.

[217] Silving, above n 184, 1555-6.

[218] *Criminal Code of the Russian Federation*; ILRC Report, 30.

[219] *Criminal Procedure Code of the Republic of Armenia*, art 340.

[220] *Code of Criminal Procedure of Estonia*, 1 July 2004, art 68(1).

[221] *Criminal Procedure Code* (Republic of Latvia), s 151.

[222] ILRC Report, 30; Silving above n 2, 1353.

[223] *Penal Procedure Code* (Bulgaria) art 120.

[224] *Criminal Procedure Act of the Republic of Slovenia*, art 333.

Securing the truth

96. The overriding rationale for requiring witnesses to swear to tell the truth is, not surprisingly, to secure truthful testimony from that witness, because the act of swearing has traditionally been seen as increasing the likelihood of truth-telling.[225] There are many who now question this assumption.

97. Originally the invocation of divine retribution meant that if a sworn witness was not 'struck down' their testimony must have been truthful.[226] The decline in religious belief in Australian society has coincided with a more significant decline in the belief in the concept of eternal damnation.[227] With that decreasing emphasis on divine retribution has come an acceptance that even if one does not expect divine retribution for giving false evidence, the oath would at least bind one's conscience.

98. Even for witnesses who do have the requisite religious belief, it is questionable whether taking an oath provides any significant additional incentive to testify honestly. If a witness believes in an omnipresent deity committed to punishing dishonesty wherever it occurs, then the direct invocation of that deity is arguably redundant.[228] It is for this reason that Quakers reject the institution of oath-taking, arguing that oaths are unnecessary and create a double standard of truthfulness inconsistent with the imperative to be honest at all times.[229] Furthermore, it has been argued, a religious witness intending to give false evidence could simply elect to make an affirmation, thereby avoiding any additional divine punishment.[230] Conversely, as it is not unlawful for people without religious faith to give evidence under oath, some such witnesses may choose to give evidence under oath in the belief that this will make their testimony appear more truthful to the court, or at least make it seem as believable as the testimony of a religious witness.

99. Nevertheless, it can still be argued that oaths increase truthfulness by appealing to witnesses' sense of morality more strongly than either secular affirmations or mere promises to tell the truth,[231] and this point is often made by religious organisations.[232] The increasing secularity of

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[225] Tony Radevsky, 'Is the Oath Out of Date?' (1980) *New Law Journal* 397, 399.

[226] Mark Weinberg 'The Law of Testimonial Oaths and Affirmations' (1976) 3 *Monash University Law Review* 25, 28.

[227] Northern Territory Law Reform Committee, *Report on the Oaths Act*, Report 32 (2008) 5 (this report is cited hereafter as the 'NTLRC Report'); Ronald Bartle, 'Should We Abolish the Oath?' (1991) 108/109 *Law and Justice – Christian Law Review* 28, 28-9.

[228] Myron Gochnauer, 'Oaths, Witnesses and Modern Law' (1991) 4(1) *Canadian Journal of Law and Jurisprudence* 67, 79.

[229] Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community*, Inquiry No 195 (2002) 199. This inquiry is cited hereafter as the 'VPLRC Inquiry'.

[230] Weinberg, above n 226, 39.

[231] Gochnauer, above n 228, 73.

our society does not invalidate the meaning of the religious oath for those witnesses with a belief in God. Also, it seems that the object of requiring oaths, quite distinct from magic and self-curses, is still to 'get at the truth by obtaining a hold on the conscience of the witness'.[233] At the least, the oath serves a cautionary function, reminding the witness of the requirement to be truthful.[234]

100. Regardless of the religious belief of an individual witness, the formality of swearing an oath reinforces that in court proceedings it is even more important to tell the truth than it would be in daily life.[235] This is supported by the fact that its clichéd depiction in literature and on the screen has made swearing an oath to tell the truth a well-known aspect of legal proceedings and one that most witnesses expect to undergo.[236] Witnesses thus come prepared to demonstrate their intention to be truthful in this manner.[237] Consequently, if witnesses were not required to swear to the veracity of their evidence, they might think that they were under no legal obligation to testify honestly.

101. Against this it has been contended that this symbolic role could be adequately performed by a secular affirmation, given that it takes place in the context of other ritualistic aspects of court proceedings.[238]

102. Ultimately, there is no conclusive evidence on whether retaining the religious oath (for those who wish to take it) secures more truth.[239] However, whilst noting a deficiency of empirical research in this area, the Australian Law Reform Commission observed that the available psychological testing lends 'qualified support' to the notion that religious oaths may encourage truth telling.[240] The retention of the oath in the Uniform Evidence Acts might be seen not only as reinforcing tradition but also as an acknowledgement that the oath may sometimes encourage truthfulness.[241]

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[232] VPLRC Inquiry, 86-88.

[233] ILRC Report, 15.

[234] L S McGough, Child Witnesses: Fragile Voices in the American Legal System (Yale University Press, 1994) 115.

[235] New Zealand Law Commission, *Evidence*, Report No. 55 (1999) vol 1, 95 and vol 2, pt 5 subpart 2, 194. This report is cited hereafter as the 'NZLC Report'.

[236] VPLRC Inquiry, 94.

[237] Gochnauer, above n 228, 100.

[238] ALRC Evidence (Interim) Report, [565].

[239] ILRC Report, 34-37.

[240] ALRC Evidence (Interim) Report, [564].

[241] See 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1707.

103. Although people do lie in court, successful prosecutions for perjury are rare, and this is apparently well-known.[242] Legal academics have argued that the oath may not be effective at securing truthful testimony, or that it may be no more effective than an affirmation.[243] When assessing a witness's credibility, the fact that their evidence was given under oath or affirmation is usually ignored.[244] Also, the oath's purpose has been weakened by legislation, as an oath is still valid even where it would not have bound the conscience of the witness.[245]

104. The English Criminal Law Revision Committee considered it unlikely that oaths would provide any additional incentive to tell the truth for those with a firm religious belief, and did not believe swearing an oath would have any effect on a person with no religious belief.[246]

105. A 1985 article in the *Journal of Psychiatry & Law* suggested that belief in the power of the oath to secure truthful testimony has its basis in a time when words were thought to have magical qualities.[247] Given an apparently widespread occurrence of perjury, the article described the oath as endowing '…the testimony of witnesses with an undeserved aura of truthfulness' and suggested it deserved to be discarded.[248]

Preserving the proper performance of public duties

106. Swearing on oath is often seen as an important way to ensure that witnesses take their public duty of giving evidence to the court seriously. Kett suggests that oaths administered among civilised nations are chiefly intended for maintaining the rule of law and securing the performance of public business,[249] of which an important part is maintaining the solemnity and formality of court process.

107. It has been said that as a ritual, the oath reminds witnesses of the solemnity of giving testimony in court and doubles as an implicit caution[250] (and by contributing to the solemnity of the courtroom ritual, oaths are said to enhance truthfulness).[251]

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[242] Canadian Taskforce on Uniform Rules of Evidence, *Report on the Uniform Rules of Evidence* (1982) 234-240.

[243] C. G. Schoenfeld, 'A psychoanalytic approach to the law of evidence' (1985) 13 *Journal of Psychiatry & Law* 109, 114; Weinberg, above n 226, 40.

[244] ALRC Evidence (Interim) Report, 308.

[245] Ibid 309.

[246] Criminal Law Revision Committee, House of Commons, *Eleventh Report: Evidence (General)*, Cmnd 4991 (1972) 165.

[247] Schoenfeld, above n 243, 113.

[248] Ibid 114.

[249] Kett, above n 9, 682.

[250] McGough, above n 234, 115.

[251] VPLRC Inquiry, 213.

Preserving honour

108. Another traditional rationale for the oath in many parts of the world is that it calls on a person's honour, so that if a person lies under oath they will be considered dishonourable.

109. This practice stands in direct contrast to early common law oaths, where belief in God was required to testify:

> By definition a religious oath could not bind a nonbeliever, and one's 'own notions of honor, veracity, and amenability to criminal justice' were thought no substitute for the fear of divine wrath. Such reasoning mandated the exclusion of a witness in *United States v. Lee*, because he had declared that 'Nature' was God and that 'when a man died, he died like a tree, and was resolved into his natural elements'.[252]

110. A modern common law oath, however, might be thought to have something in common with an oath on honour because it, too, invokes a witness's conscience and elevates the importance of being honest when testifying above a regular promise to be truthful in appealing to the witness's morality.[253]

111. Oaths based on honour have more meaning in cultures where morality is defined in terms of honour and shame rather than right and wrong.[254] The increasingly multicultural composition of Australia's population makes it important to consider this rationale, given that every witness brings their own set of values and beliefs with them to the courtroom. An important aspect of this rationale is that it can justify to some communities why one of their members felt compelled to tell the truth, despite it being adverse to another member.[255]

Securing the basis for legal sanctions

112. In many countries, including Australia, there is an offence of perjury, which is to lie to a court when you have sworn to tell the truth. The offence cannot be made out without evidence of that initial oath.[256] A witness's oath enlivens their criminal liability for lying in court.[257]

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[252] 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1690, quoting *Central Military Tract R R v Rockafellow*, 17 Ill 541, 554 (1856) and *United States v Lee* 26 F. Cas. 908, 909 (C.C.D.C. 1834) (No. 15, 586).

[253] Gochnauer, above n 228, 73.

[254] Macedonia (*Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 317(4)), Serbia (*Criminal Procedure Code* (Republic of Serbia) art 96) and Slovakia (*Criminal Procedure Code* (Slovak Republic) s 542) require witnesses to swear on their honour.

[255] VPLRC Inquiry, 92.

[256] McGough, above n 234, 115. In South Australia, perjury is defined as "a false statement under oath": *Criminal Law Consolidation Act 1935* (SA) s 242 (emphasis added).

[257] 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1705.

113. However, the reality is that perjury prosecutions are rare, and it is unclear 'whether the threat of criminal punishment invoked by the oath actually deters perjury'.[258] There are strong arguments that people are often motivated to lie or not tell the whole truth in court by embarrassment, financial considerations, loyalty, revenge or fear of the outcome of the case, and that these motives can override any fear of prosecution for lying.[259]

114. Many civil law jurisdictions give a legal warning alongside the oath, and the giving of the warning[260] or its verbal[261] or written acknowledgement[262] by the witness is sometimes noted in the record to form the basis for potential prosecution.

115. Countries without a witness oath often require warnings to be given to emphasise the legal consequences of false testimony, rather than trying to 'awaken the conscience' of the witness.[263] In these jurisdictions, legal warnings are arguably the equivalent of the religious oath, as authority to judge and punish in a secular society belongs not to God but the law, and legal consequences similar to perjury apply to unsworn testimony where such warnings have been given.

116. In some Islamic countries, lying under oath is not punishable under law even though the oath is an important and sacred procedure.[264] This may be because traditionally, where this behaviour was a crime, it was a crime against religion.[265]

117. Some commentators consider legal warnings unnecessary and insulting, particularly if given just after a witness has sworn to tell the truth.[266]

118. One method of securing the truth, it is argued, is to warn witnesses that they may be prosecuted for perjury if they lie. Although some countries simply have a warning, and no oath or affirmation of promise to tell the truth, the option of having a warning alone has not been taken up by any common law country and for that reason is not suggested here.

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[258] Ibid 1706.

[259] Ibid.

[260] See, for example, *Criminal Procedure Code* (Republic of Azerbaijan) art 328.

[261] In Macedonia, for example, oaths are administered at the court's discretion, but witnesses are always warned of their duty to state everything they know and that false witnessing is a crime: *Code of Criminal Procedure* (Former Yugoslav Republic of Macedonia) art 317(1). Likewise in Germany: *Criminal Procedure Code* (Federal Republic of Germany) s 57.

[262] See, for example, *Criminal Procedure Code* (Republic of Uzbekistan) art 441.

[263] 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1701. In Norway, where there is no oath, witnesses are warned to tell the truth before affirming: *Criminal Procedure Code* (Kingdom of Norway) s 128.

[264] Frank, above n 178, 80.

[265] Silving, above n 184, 1559.

[266] NTLRC Report, 9-10.

119. If such a warning were to be required to be given to a witness, the question is then whether it should be given by the judge *before* the witness takes the oath or affirms (as is done in Macedonia and Germany) or whether an acknowledgement of an understanding of those consequences should be incorporated into the oath or affirmation itself (as was suggested by the Irish Law Reform Commission).[267] The Irish Law Reform Commission suggested that the process should be simplified by replacing the oath with a single affirmation to be used by all witnesses, worded as follows:

> I, A.B. do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth. I am aware that if I knowingly give false evidence I may be prosecuted for perjury.

120. A warning about the legal consequences of lying under oath or affirmation would remind the witness that our system of justice treats that promise very seriously, and give greater significance to it, whether it be in the form of an oath or affirmation or not. Thus the purpose of securing the truth of witness testimony might be furthered by requiring witnesses to be given the warning.[268]

121. It has also been pointed out that if the requirement for witnesses to swear an oath or affirm were removed altogether, a mandatory warning about perjury would be essential to eliminate any misapprehension in a witness that the abolition of the oath meant that they were no longer liable for perjury.[269] That liability would, of course, depend on the elements of the current offence of perjury changing so that it was no longer based on a promise to tell the truth, as it is now.

122. It is worth noting that the UEA provisions do not require witnesses to be given such a warning, nor do the words of the oath or affirmation incorporate an acknowledgement of the legal consequences of lying under oath or affirmation.

123. The Northern Territory Law Reform Committee concluded that a perjury warning was not necessary and could create an 'atmosphere of suspicion and fear' in some witnesses,[270] especially if it was given just after a witness had promised to tell the truth, in which case it would imply that their promise could not be trusted.

124. The option of giving the warning *after* the witness has sworn or promised to tell the truth has not been offered in this paper for this reason and also because it is hardly fair to ask

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[267] Ibid 43.

[268] Ibid.

[269] Ibid.

[270] Ibid 6.

someone to promise to do something when they may not know the consequences of failing to keep that promise.

5 Reform issues for South Australia

125. The impetus for this review was a recommendation that there should be a separate form of oath for Aboriginal people in South Australia. That change was not supported by the South Australian Attorney-General (see *Terms of reference,* above) on the basis that any change should be universal in application, without reference to race or ethnicity.

126. Because there has not been widespread public concern about South Australia's form of oath, some may think it needs no reform. There is certainly a virtue in leaving a law alone if it seems to be working. But this reference presents an opportunity to find out whether this particular law is indeed working as well as it could, and if it is not, to improve it.

127. At present, witnesses in South Australian courts have a choice of religious oath or secular affirmation. This is so whether the court is hearing proceedings that are governed by the *Evidence Act 1929* (SA) (for example, in the Magistrates, District and Supreme Courts of South Australia) or is hearing proceedings governed by the *Evidence Act 1995* (Cth) (for example, in the Family Court of Australia and the Federal Court of Australia sitting in South Australia), because both those Acts offer that choice.

128. However, the Commonwealth and the jurisdictions that have adopted the Commonwealth Evidence Act have by doing so updated their laws about witness oaths to deal with perceived or real problems associated with that choice. Some of the Australian jurisdictions that have not adopted the Commonwealth Evidence Act provisions on witness oaths have updated their own provisions.

129. Central to this discussion is whether to retain the religious oath or not. Informing this question is a range of policy considerations, including whether current law and procedures:

- have the potential to create prejudice in the trier of fact or to offend witnesses;
- infringe privacy in requiring witnesses to declare a religious preference or lack of religious faith in open court;
- can cause misunderstandings about the significance of giving sworn evidence;
- could be made simpler and more understandable to a wider range of people;
- as part of the test for witness competence, may needlessly exclude some witnesses from giving evidence;
- are incompatible with a secular court system and Constitution;
- should be identical in all courts in South Australia (whether exercising State or

Federal jurisdiction).

130. The next part of this paper examines each of these considerations, ending with a summary of the arguments for and against abolishing the religious oath.

Potential for prejudice or offence

131. The danger that a witness's choice between oath and affirmation might affect the weight accorded to their evidence is sometimes cited as a negative consequence of the current law.[271] If a ritual to be undergone before giving evidence indicates a witness's religious faith or lack of it or helps identify their cultural background, there is the possibility that it will induce a prejudice against the witness that might not otherwise have arisen because there would have been no reason, in the proceedings themselves, to identify that particular personal characteristic in the witness.

132. An example is where the trier of fact harbours a mistrust of atheists or members of the witness's religion. The prejudice may occur subconsciously but in contemporary courts is unlikely to be openly voiced by the trier of fact[272] with the result that the incidence or extent of such prejudice is difficult to assess.[273] Some say material religious bias in the judiciary is increasingly unlikely in Australia's secular and tolerant society.[274]

133. Before going on to discuss this, some statistics on the religious adherence and cultural background of Australians may be useful. The Australian Bureau of Statistics noted in 2011[275] that:

> Since the first Census, the majority of Australians have reported an affiliation with a Christian religion. However, there has been a long-term decrease in affiliation to Christianity from 96% in 1911 to 61% in 2011. Conversely, although Christian religions are still predominant in Australia, there have been increases in those reporting an affiliation to non-Christian religions, and those reporting 'No Religion'.
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> In the past decade, the proportion of the population reporting an affiliation to a Christian religion decreased from 68% in 2001 to 61% in 2011.
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> …

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[271] VPLRC Inquiry, 229.

[272] ILRC Report, 38.

[273] JGS, 'Practice Note – Administration of Oaths and Making of Affirmations' (1982) 56 *Australian Law Journal* 254, 255; Frank Swancara, 'Non-religious witnesses' (1932) 8 *Wisconsin Law Review* 49, 50.

[274] New South Wales Law Reform Commission, *Oaths and Affirmations*, Discussion Paper 8 (1980) [1.22]. This discussion paper is cited hereafter as 'NSWLRC Discussion Paper'.

[275] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census*, 2012–2013 (21 June 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>

> Between 2001 and 2011, the number of people reporting a non-Christian faith increased considerably, from around 0.9 million to 1.5 million, accounting for 7.2% of the total population in 2011 (up from 4.9% in 2001). The most common non-Christian religions in 2011 were Buddhism (accounting for 2.5% of the population), Islam (2.2%) and Hinduism (1.3%). Of these, Hinduism had experienced the fastest growth since 2001, increasing by 189% to 275,500, followed by Islam (increased by 69% to 476,300) and Buddhism (increased by 48% to 529,000 people).
>
> The number of people reporting 'No Religion' also increased strongly, from 15% of the population in 2001 to 22% in 2011. This is most evident amongst younger people, with 28% of people aged 15-34 reporting they had no religious affiliation.

134. The Bureau also noted, when examining country of birth as an indicator of cultural background, that

> Recent arrivals make up a large proportion of some population groups in Australia, reflecting the increasing number of people born in Asian countries. Recent arrivals accounted for 47% of the total Indian-born population in Australia and 35% of the total Chinese-born population. In contrast, only 11% of the total United Kingdom-born population were recent arrivals.
>
> Country of birth groups which increased the most between 2001 and 2011 were India (up 200,000 people), China (176,200) and New Zealand (127,700). The largest decreases were seen in the birth countries of Italy (less 33,300 people), Greece (16,500) and Poland (9,400). These decreases can be attributed to deaths and low current migration levels replenishing these groups.[276]

135. There is no doubt that even in relatively tolerant and secular society such as ours there are times when there is a community prejudice against people of a particular religion or culture,[277] and when swearing a witness oath in the name of the God of that religion may generate that same prejudice in jury members. Equally, though, the choice of oath or affirmation and the form the oath taken by a witness is only one indication to a jury of a witness's cultural background, and prejudice against a particular cultural group that can be identified by other means may well still arise even if oaths were abolished.[278] On the positive

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[276] Ibid.

[277] In 2011 a 12 year nationwide survey (the Challenging Racism Project) found considerable racial and ethnic prejudice in Australia. It found, for example, that half of Australians harboured anti-Muslim sentiments. Partners in the project included the Australian Human Rights Commission, the Equal Opportunity Commission South Australia, the Victorian Equal Opportunity and Human Rights Commission, VicHealth (The Victorian Health Promotion Foundation), the ACT Human Rights Commission, the Department of Immigration and Citizenship - Living in Harmony Section, and Multicultural South Australia. The Universities involved were University of New South Wales, pursuant to a grant from the Australian Research Council, the University of Western Sydney, Macquarie University, Murdoch University, the University of Melbourne, James Cook University, and the University of South Australia. The web link for the project is <http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism/>

[278] VPLRC Inquiry, 263.

side, commentator Nadine Farid suggests that if a trier of fact initially harbours prejudice towards a witness's religion, then observing the witness taking an oath may actually reduce this prejudice by demonstrating to them the sincerity of the witness's beliefs.[279]

136. Yet even a small likelihood of prejudice might be an adequate reason to abolish a process that, perhaps unnecessarily, requires witnesses to reveal their religious persuasion or lack of it in court. Furthermore, even if incidents of actual bias are infrequent, submissions made to the Victorian Law Reform Report indicate that perceptions of such bias remain amongst certain witnesses.[280] This perception of bias may decrease confidence in the legal system, and has led some non-Christian witnesses to take a Biblical oath so as not to attract attention to their religious affiliations or lack of them.[281] For these reasons, it could be argued that maintaining the affirmation alone would reduce the potential for discrimination that arises out of the current system.[282] In an attempt to avoid discrimination against those who chose an affirmation over an oath in what remains a highly religious society,[283] the Irish Law Reform Commission recommended in 1990 that the oath be replaced with a simple affirmation of 'I am aware that if I knowingly give false evidence I may be prosecuted for perjury'.[284]

137. Alternatively, prejudice towards a witness may result not from any religious or cultural bias but from a suspicion that the witness has deliberately selected a ritual that is not binding on his or her conscience because he or she intends to give dishonest evidence.[285] For instance, in *R v Kemble,*[286] cross-examining counsel suggested that a Muslim witness had 'felt free to lie' because, when a Qur'an was not unavailable, he had given an oath on the Bible. In this instance the court found that the oath was taken in a way that bound the witness's conscience. However, despite the fact that the cross-examiner was unsuccessful in discrediting the Muslim witness, it is still clear how such a suggestion might raise prejudice in the minds of a jury.

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[279] Farid, Nadine, "Oaths and Affirmations in the Court: Thoughts on the Power of a Sworn Promise' (2006) 40 *New England Law Review* 555, 561.

[280] VPLRC Inquiry, 27, 135 and 159.

[281] Ibid 137-9; Bartle, above n 227, 29; ILRC Report, 38.

[282] ILRC Report, 39.

[283] Ibid 19.

[284] Ibid 49.

[285] Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) ch 10 [10.42]. This report is cited hereafter as the 'ALRC Multiculturalism and the Law Report'.

[286] (1990) WLR 1111.

138. This form of prejudice is arguably diminished by the presumption of regularity,[287] which clarifies that an oath is not invalid merely because witnesses do not hold a corresponding religious belief or feel bound by the oath. Also, the stigma associated with taking a non-Biblical oath or a secular affirmation has likely subsided as the community has become more familiar with these rituals.[288] For instance, while conceding that there was a historical tendency to accord less weight to evidence given on affirmation, Justice Mushin of the Family Court of Australia said that he would be 'extraordinarily surprised if this were still the case today'.[289] Similarly, suspicions that a religious witness must be affirming to avoid divine retribution for giving false testimony are likely to reduce as affirmations become more commonly accepted.

139. Yet this discussion reveals a logical inconsistency between two of the arguments in favour of maintaining oaths. If oaths are indeed thought to be more effective than affirmations at binding the conscience of a significant proportion of witnesses, then a rational trier of fact would likely be inclined to favour evidence given under oath. The effectiveness of oath-taking therefore appears to be mutually inconsistent with the notion that bias is unlikely to arise from the choice to take an affirmation.

140. Both forms of potential prejudice may be exacerbated by the ability of cross-examining counsel to attack a witness's credit based upon their choice to take an oath or affirm. In *R v VN,*[290] the Victorian Court of Appeal held that:

> Although there is no longer a requirement for a witness to state grounds for their objection to taking an oath, cross-examining counsel is not precluded from asking why a witness objects to taking the oath ... Such an inquiry does not involve any suggestion that evidence on affirmation is in some way inferior to evidence on oath. It is an inquiry as to the subjective reasons of a witness for making an affirmation.

141. It has been suggested that this line of questioning should be restrained through a legislative prohibition similar to that preventing cross-examination relating to a complainant's sexual history in sexual offence cases.[291] However the Victorian Parliament Law Reform Committee concluded that the courts' discretion to exclude unfairly prejudicial evidence[292] may adequately address this issue.[293] There is no case directly on point in South Australia.

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[287] *SAEA* s 6(2). See also *R v T* (1998) 71 SASR 265 (Doyle CJ, Williams & Bleby JJ); *R v Borg* [2012] VSC 26, [56] (Lasry J).

[288] NSWLRC Discussion Paper, [1.22].

[289] VPLRC Inquiry, 159.

[290] (2006) 15 VR 113, 140 (Maxwell P, Buchanan and Redlich JJA).

[291] See, eg, *SAEA* s 34L.

[292] In South Australia this is a common law discretion.

[293] VPLRC Inquiry, 169.

The opportunity to cross-examine a witness as to whether their oath binds their conscience is likely to be limited more by the presumption of regularity and relevance than by the ability to exclude prejudicial evidence.

142. The wording of the *SAEA,* in offering the choice of making 'an affirmation instead of an oath',[294] arguably makes affirmation a secondary option to the default religious oath. The drafting of the Uniform Evidence Acts, on the other hand, carefully gives each an equal weight.[295] But few witnesses or jurors are likely to examine the intricacies of the legislation itself, and this point of statutory interpretation has not been found to be a problem in any cases.

143. In its consultations, the Victorian Parliament Law Reform Committee found that what was more important to witnesses, and to juries, was the way the oath or affirmation was administered. Practices varied significantly between courts and individual court officers.[296] Although witnesses can nominate the appropriate ritual, the practice has developed in some courts of furnishing all witnesses with a Bible and leaving it up to the witness to voice a preference for a different form of ritual.[297] This has understandably led to a perception amongst some witnesses, particularly those who are unfamiliar with Australia's judicial processes, that the Biblical oath is the default ritual.[298] Consequently, the Biblical oath is often taken by non-Christian witnesses, a practice that is potentially offensive to the witness and that arguably undermines the sanctity of the oath itself.[299]

144. It could also be argued that treating the oath as the standard way in which to give sworn evidence also bolsters the perception that it lends greater credence to one's testimony than an affirmation, and so encourages the taking of the Biblical oath by witnesses without religious faith or who adhere to non-Christian religious faiths, making it meaningless.

Causing offence or embarrassment

145. Sometimes, the oath is administered or offered in ways that are 'at best embarrassing and at worst offensive to the religious beliefs of the person'[300] based on the assumptions arising from the person's appearance or name.

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[294] *SAEA* s 6 (3).

[295] *Evidence Act 1995* (Cth) ss 23-24.

[296] VPLRC Inquiry, 135.

[297] Ibid 137, 202; ALRC Multiculturalism and the Law Report, [10.42].

[298] VPLRC Inquiry, 204.

[299] Ibid.

[300] ILRC Report, 28.

146. To address such situations, the Administrative Appeals Tribunal of Australia published a guideline on the administration of oaths and affirmations for witnesses, including an appropriate form of deity phrase and religious text for common religious beliefs held by witnesses.[301] The guidelines encourage communication between the witness and the tribunal attendant before the hearing to ensure the appropriate form of deity phrase and religious phrase are available when the witness is to be sworn. The witness is also told at this stage that an oath has the same effect as an affirmation.

147. Where alternative oaths are employed, contemporary courts are generally guided by the witnesses as to what would be the most appropriate ritual.[302] However, an enquiry in Victoria found it to be rare for an oath to be taken other than on the Bible or the Quran,[303] which may indicate a lack of demand for alternative religious methods of administering the oath when there is also the option of affirming.

Infringement of privacy

148. The requirement to choose whether to swear on oath or affirm in open court may cause some witnesses embarrassment. Witnesses are often given little, if any, information regarding this choice.[304] Witnesses from non-English speaking backgrounds may feel overwhelmed when presented with this choice for the first time whilst in the witness stand, [305] and may consider it an invasion of privacy to be obliged, in this way, to publicly declare their particular religion or lack of religion.[306]

149. Some see the intrusion into privacy as a minor consideration if there are other benefits in offering a witness oath.[307] It can be overcome by providing for the choice to be made outside court to a clerk or associate, before the witness enters the witness stand to be put on oath or affirmation, and for witnesses to be given a clearer explanation of the difference between oaths and affirmations at that point.[308]

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[301] Duncan Kerr, *Oaths and Affirmations for Witnesses and Interpreters appearing before the Administrative Appeals Tribunal* (22 Aug 2012) <http://aat.gov.au/docs/DirectionsGuides/OathsAndAffirmations.pdf>

[302] Ibid 117.

[303] VPLRC Inquiry, 110.

[304] NTLRC Report, 10.

[305] Judge Sydney Tilmouth, 'Courtroom advocacy – Reflections of a trial judge' (2012) 36 *Australian Bar Review* 31, 31; ALRC Multiculturalism and the Law Report [10.40].

[306] See submission by the Equal Opportunity Commission of Victoria to the VPLRC Inquiry, 134.

[307] Law Reform Commission of Canada, *Report on Evidence* (1975) 87. This report is cited hereafter as the 'LRCC Report'.

[308] VPLRC Inquiry, 129.

Misunderstanding the procedure

150. Differences in language, religion and cultural norms between minority and mainstream cultures, alone or in combination, can lead to conceptual and literal misunderstandings of the function and meaning of a witness oath or affirmation.

151. As discussed, the administration of witness oaths to Aboriginal people has been problematic and often culturally inappropriate.[309] Chief Justice Martin of the Northern Territory Supreme Court noted the difficulty in converting the language of oaths into appropriate Aboriginal languages, with the result that many indigenous witnesses whose first language is not English have difficulty understanding the concept of an oath due to poor translation.[310] Even an accurate translation could lead to confusion, as the oath is an Anglo-Saxon construct. Cultural differences may also encourage suggestibility in indigenous witnesses.[311]

152. There are often difficulties finding an appropriately qualified interpreter for witnesses who do not speak English, given that interpretation requires more than the mere 'substitution of a word in one language for an equivalent word in the other' where 'social or cultural differences may mean that even the "idea or concept" itself has no equivalent in both societies.'[312] Oaths and affirmations may, in some societies, have no easily translatable equivalent.[313] The words 'the truth, the whole truth and nothing but the truth' may be confusing by their repetition and the phrase 'declare and affirm' may not have an equivalent in other languages.

153. To avoid these comprehension problems completely, a universal simple affirmation to replace current practice would have to be very simple indeed, with the risk of detracting from the sense of solemnity or formality that an affirmation, like an oath, is expected to introduce to the witness. The Northern Territory Law Reform Committee suggested that the best means by which to address the difficulty experienced by witnesses in understanding the oath and the affirmation was to replace both with a simple request to the witness to tell the truth to the Court.[314] However, those in favour of retaining oaths assert that despite the potential for offence, some religious individuals would be more affronted if

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[309] VPLRC Inquiry, 114.

[310] NTLRC Report, 12.

[311] *R v Anunga* (1976) 11 ALR 412 (Forster J).

[312] *De La Espriella-Velasco v The Queen* (2006) 31 WAR 291, 313 (Roberts-Smith JA).

[313] ALRC Aboriginal Customary Laws Report, [596].

[314] NTLRC Report, 10.

denied the opportunity to give an oath that corresponded to their religious or cultural beliefs.[315]

Excluding some otherwise capable witnesses

154. Under South Australian law, everyone is presumed competent to give evidence, regardless of age. Competence depends on an understanding of the obligations inherent in giving sworn testimony.[316]

155. As a general rule, judges will only inquire into that understanding where the witness is very young or mentally or psychologically impaired.[317]

156. However, it has been argued that 'a person's understanding of moral matters as evidenced by his comprehension of the oath might bear very little relationship to his ability to comprehend questions and formulate rational responses',[318] and that this test may wrongly exclude some intellectually disabled people from giving evidence: their mental vulnerability and inability to articulate the significance of sworn evidence does not necessarily make these witnesses any less able to recall and recount a particular experience reliably.[319]

157. In South Australia, witnesses who fail this test may still give unsworn evidence (which is likely to be given less weight that if it were sworn).[320] However, judges may no longer tell juries, or permit juries to be told, that the evidence of children is inherently less credible or reliable or should be given more careful scrutiny than that of adults.[321]

158. To qualify to give unsworn evidence, a witness must answer positively the judge's questions as to whether they understand the difference between the truth and a lie, indicate that they appreciate 'that it is important to tell the truth' and indicate that they 'will tell the truth'.[322] Asked bluntly, these questions will be highly suggestible[323] to a very young

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315 VPLRC Inquiry, 238.

316 See SAEA s 9(1); Heydon, J D, *Cross on Evidence* (LexisNexis, 8th ed, 2010).

317 *R v P, BR* [2004] SASC 323; *Nichols v Police* (2005) 91 SASR 232, 239. The discussion of Judge Nicholson in *R v McLeod* [2011] SADC 114 (28 July 2011) [49]-[63] is an example of a s 9 inquiry involving an intellectually disabled witness. Note that mental impairment is defined in s 4 *SAEA* to include intellectual disability, and this is the sense in which that term is used in this paper.

318 ALRC Evidence (Interim) Report, ch 7.

319 Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses,* Project No 87 (1991) 112; Patrick Parkinson, 'The Future of Competency Testing for Child Witnesses' (1991) 15 *Criminal Law Journal* 186, 189.

320 Upon the request of a party, a judge in a criminal trial must warn the jury of the need for caution in determining whether to accept unsworn evidence and the weight to be accorded to it; *SAEA* s 9(4)(b).

321 *SAEA* s 12A(1).

322 Ibid s 9(2).

323 Psychological studies have found that children have a propensity to answer questions that they are unable to

child and to some mentally impaired people, risking answers that do not reflect their actual understanding or willingness.

159. The formality of oath-taking may also contribute to the confusion and sense of intimidation that young or mentally impaired witnesses may experience when they appear in court.[324] Most Australian jurisdictions, including South Australia, now have evidence laws that relax the rules for vulnerable witnesses, but the court environment and the language used in court (including in the administration of the oath or affirmation) is still innately adult, and rules requiring evidence to be sworn or affirmed may not be relaxed under these laws.[325]

Compatibility with secular courts and constitution

160. Some have questioned whether the administration of oaths is compatible with the secular nature of Australia's constitutional order.[326]

161. In contrast to England, where the oath originated, Australia does not have an official religion; religious belief is commonly regarded as a private matter to be kept separate from the performance of public duties.[327] Many other public duties, such as voting, are performed by religious individuals without religious ceremony or identification. Why then should promising to tell the truth in court be an occasion for professing one's religious beliefs or lack of them? For this reason it has been suggested that oaths represent a religious 'hangover' that should be abolished.[328] Others have argued that the ecclesiastical nature of the oath injects an unnecessary element of irrationality into judicial proceedings.[329]

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understand without asking for clarification. Factors affecting the suggestibility of a given child witness include their 'yield' (a tendency to respond affirmatively to leading questions) and 'shift' (a tendency to be socially sensitive to negative feedback which may cause a child to answer in the manner they feel the questioner desires.) Propensity for suggestibility is higher in younger children. To allay concerns of suggestibility, Robyn Layton suggests that children are 'questioned using an open-ended free narrative': Robyn Layton, 'The Child and the Trial' in Gray, Justice Tom, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 201, 208. Similarly, research suggests that intellectually disabled witnesses 'can easily be suggestible and can have a great desire to please or accommodate the questioner': *R v P, LB* [2008] SADC 6 (12 February 2008) [42] (Judge Nicholson). White J noted that an intellectually disabled witness 'was often putty in the hands [of the questioner and] ... often gave answers to please': *R v Beattie* (1981) 26 SASR 481. Note, however, that in both these cases the witness had already been permitted to give unsworn evidence and the question of whether the intellectually disabled witness's answers to the court's enquiry as to competence had been 'suggested' by the court was not being tried or even discussed.

[324] Virgil W Duffie Jr, 'The Requirement of a Religious Belief for Competency of a Witness' (1958) 11 *South Carolina Law Review* 547, 551.

[325] See *SAEA* s 13(4)(a).

[326] VPLRC Inquiry, 198.

[327] Ibid 208-9.

[328] Ibid.

[329] Helen Silving, *Essays on Criminal Procedure* (Dennis, 1964) 22.

162. In response, religious groups have contended that the ability of witnesses to bind their conscience in the manner that they deem to be most appropriate is itself an element of religious freedom, and that they would be affronted if not afforded this opportunity.[330]

163. Others say that the strict division between private religious belief and secular public duty may not always accord with the reality experienced by witnesses, who remain influenced by their existing spiritual beliefs even when appearing in court.[331] However, the former Chief Justice of the High Court of Australia, Murray Gleeson, writing extra-judicially to acknowledge the important role played by religion in shaping the moral values that underpin our laws, stressed that

> In our community there is no established church. Church and State are separate. The majority of people do not regularly go to church. Most do not expect the law to enforce religious doctrine. Our community prides itself on being multicultural. Multiculturalism necessarily involves a multiplicity of values, including religious and moral values. We do not equate religion with morality. Many people have strong moral values without basing those values on religious doctrine. People of religious faith do not assume that they have a monopoly upon moral values. Some people who profess religious beliefs are notably deficient in religious virtues.
>
> Our legal system is not in the least theocratic.[332]

164. This does not mean that the abolition of the witness oath is a logical extension of the separation of church and state. Indeed it can be argued that witness oaths provide a mechanism through which a secular judicial system appropriately embraces religious and cultural diversity.[333] The New Zealand Law Commission noted that any alienation felt by the indigenous Mäori population towards the criminal justice system would likely be exacerbated by a failure to acknowledge their spiritual ties through appropriate oaths.[334]

165. Despite these arguments, many may still question whether courtrooms are an appropriate forum for recognising religious or cultural identity when this is not in issue in the proceedings.

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[330] VPLRC Inquiry, 95.

[331] VPLRC Inquiry, 214.

[332] Murray Gleeson, 'The Relevance of Religion' (2001) 75 *Australian Law Journal* 93, 93.

[333] Michael Bennett, 'The Right of the Oath' (1995) 17 *Advocate Quarterly* 40, 68.

[334] NZLC Report, vol 1, 97 [360].

The merits of simplicity?

166. The traditional administration requirements for witness oaths have been criticised as being unduly convoluted and inconvenient.[335]

167. Oath administration requirements to observe a particular religious ritual (such as holding a religious text or performing a ceremony when swearing) can be difficult to meet and far from simple.[336] However, some have suggested that this burden has been overstated, given that most witnesses adhere to a relatively small number of the most common religions.[337]

168. The language used to administer the oath can be problematic for some witnesses, particularly those from non-English speaking backgrounds,[338] such that it can serve to conceal the proper significance of the oath. Equally, though, it can be argued that the wording of the affirmation also needs to be simplified. Basic readability tests (that indicate the level of educational grade a person will need to understand a text)[339] show that, to understand the South Australian oath, a person will need to have reached the equivalent of Year 11 at secondary school, and for the South Australian affirmation, to have reached the equivalent of the second year of tertiary study. Indeed, one judge[340] has remarked on how often, in his long experience, witnesses have difficulty repeating the words 'I do solemnly and sincerely declare' when affirming.

169. The link between simplicity and understanding was seen as so critical to the Northern Territory Law Reform Committee that it recommended abolishing the oath altogether and substituting a short, secular promise to tell the truth.[341] The Northern Territory Government did not accept the recommendation of abolition, but substituted a promise for the affirmation, treating it as a form of oath[342] while retaining the oath itself in whatever religious form the witness prefers.

170. One argument against requiring merely a simple promise from competent witnesses is that excessive simplification undermines the very purpose of swearing evidence:

> the artificiality which serves to make the affirmation easy to apply also makes it

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335 Ontario Law Reform Commission, *Report on the Law of Evidence*, Final Report (1976) 121. This report is cited as 'OLRC Report' in this paper.

336 VPLRC Inquiry, 82-4.

337 Ibid 238.

338 NTLRC Report, 12.

339 For example, the Flesch-Kincaid method.

340 The remark was made to the author of this Paper during its preparation by a recently retired Judge of the Supreme Court of South Australia.

341 Ibid 10. Similar recommendations were made by the Law Reform Commissions of Ontario and Ireland.

342 *Evidence (National Uniform Legislation) Act 2011* (NT) s21 and *Oaths, Affidavits and Declarations Act 2012* (NT) s 5.

> morally sterile.[343]

171. There are ways of overcoming this kind of objection to a promise. A witness can appreciate that it is even more important to keep this promise than to keep one made in everyday life if he or she is required to be made aware of the importance of reliable witness testimony to the process of justice and, if there are legal consequences for breaking that promise, to be made aware of and understand those legal consequences before making the promise.

172. A stronger argument against simplification is that replacing the choice of oath or affirmation with a promise blunts the distinction between sworn and unsworn evidence.

173. A person may not give sworn evidence if they do not have a 'sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.'[344] That understanding has been described thus:

> Section 9(1) contemplates an obligation more than simply an obligation to be truthful. In my opinion, what is contemplated in s 9(1) is an understanding that, in giving sworn evidence, the person is thereby accepting the solemnity of the taking of an oath or the making of an affirmation and the sanctions which would follow, both morally and legally, if that person failed to comply with the obligation to tell the truth.[345]

174. People who fail to demonstrate that understanding may give unsworn evidence if they satisfy the court that they understand the difference between the truth and a lie and the importance of telling the truth to the court and promise to tell the truth.

175. If a simple promise were to replace the oath or affirmation, or a person could choose between swearing an oath or promising, the difference between sworn and unsworn testimony would be difficult to discern. This is not an insurmountable obstacle to simplicity; it has been overcome in recent Northern Territory reforms in which a promise was deemed to be a form of oath (see discussion of this later under *Reform models).*

The merits of uniformity?

176. Another potential consideration in reforming the law of oaths and affirmations in South Australia is the desirability or otherwise of maintaining uniformity with other jurisdictions.

177. Basing South Australian law on the laws in the majority of other Australian States and Territories by adopting the UEA provisions on this topic would mean that the oath is

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[343] Myron Gochnauer, 'Swearing, Telling the Truth, and Moral Obligation' (1983-1984) 9 *Queen's Law Journal* 199, 200.

[344] *SAEA* s 9(1).

[345] *R v Climas (Question of Law Reserved)* (1999) 74 SASR 411 [137] (Lander J).

administered in the same way in state and federal courts in South Australia. This was seen as an advantage for Victoria by the VPLRC in its recent inquiry.[346]

178. Some might argue, though, that because very few people give evidence, let alone more than once and in different kinds of court, minor differences in oath administration between courts have no real importance to the public or, for that matter, the courts and lawyers.

179. The value in the UEA model for oaths and affirmations may be more in its features than in satisfying any need for uniformity. It seeks to simplify the procedure of oath-taking by removing the need to use religious texts,[347] to simplify the wording,[348] to limit the forms that an oath can take by providing that witnesses of other religions may simply substitute for the words 'Almighty God' in the Christian oath the name of the God of their religion,[349] to give a clearer equal weight to the oath and affirmation, to require a court to inform each witness of their right to choose between them,[350] and to make an affirmation the default when a person will not choose or it is impracticable to administer an oath.

In summary: why retain a witness oath?

Arguments for abolishing the oath

180. In spite of the testimonial oath's longstanding and seemingly universal presence in common law systems, there are many who have argued that it should be abolished. In 1817, Jeremy Bentham argued that the oath was built on a logical falsehood, as well as being ineffective and unchristian.[351] There is also evidence that the choice between an oath and affirmation is not always made clear, and can lead to a witness becoming confused or overwhelmed.[352]

181. While the UEA model requires the court to inform witnesses of their choice between oath and affirmation,[353] neither that Act nor the SAEA requires the court to explain the

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[346] VPLRC Inquiry, 231. The UEA was the second model of choice for those who wished to reverse the then current weighting of the oath over the affirmation by Victorian law (VPLRC Inquiry, 229).

[347] *Evidence Act 1995* (Cth) s 24(1); note that SA and New South Wales remain the only two jurisdictions in Australia requiring the use of religious texts for taking oaths. *SAEA* 6(1)(a) requires a witness who is taking the standard oath to do so on the Bible.

[348] *Evidence Act 1995* (Cth) s 21(4).

[349] Evidence Act 1995 (Cth) Sch 1.

[350] *Evidence Act 1995* (Cth) ss 23(1), 23(2). Note that according to the CAA guidelines, judges do inform witnesses in SA of this choice.

[351] Jeremy Bentham, '*Swear not at all: containing an exposure of the needlessness and mischievousness, as well as antichristianity of the ceremony of an oath'* (R. Hunter, 1817).

[352] NTLRC Report, 10.

[353] *Evidence Act 1995* (Cth) ss 23(1)-(2).

significance of that choice. Further, while witnesses in South Australia may choose the form of their oath or affirmation, they are not permitted to refuse to take either if they are competent witnesses. Witnesses who refuse to be sworn or affirmed face the possibility of being held in contempt by the court.

182. Some say that having a universal affirmation, without the option of an oath, would reduce the potential for discrimination that arises out of the current model.[354] The LRCI found that given the prominent role of religion in Ireland there was an unacceptable risk that evidence given on affirmation would be treated as second-rate.[355] In countries such as Australia where stigma based on a lack of religious belief is declining, the potential for such discrimination may be less serious.[356] To make the affirmation standard practice or the only practice would address concerns that witnesses are often considered less trustworthy by a jury if they choose to give a non-religious affirmation rather than an oath.[357] But although such discrimination is a risk commonly referred to in law reform reports on this topic, [358] there is little empirical evidence that this discrimination actually occurs.

183. Nevertheless, abolishing the oath would altogether remove considerations of a witness's religion (irrelevant to one's capacity to tell the truth) from our secular court processes. This might minimise the potential for prejudice, perceptions of discrimination or for the giving of unintended offence.[359]

184. Also, abolishing the oath could simplify our current system. Having only a simple affirmation or even a promise would remove what for some witnesses is a confusing choice. The court would not have to accommodate different religious and cultural beliefs and practices in the formalities for giving evidence; in fact, those considerations would arise, if at all, only when relevant to the matters in issue in the trial and after the witness takes the stand.

185. Abolition of the oath would also address the criticism levelled at the current model which suggests that the oath has become an empty ritual, 'rattled off with little outward sign or understanding of its applications'[360] – a criticism of the Irish court system.[361]

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[354] ILRC Report, 39.

[355] Ibid.

[356] VPLRC Inquiry, 214-215.

[357] Ibid 231.

[358] See, eg, ILRC Report, 37.

[359] VPLRC Inquiry, 134, 198: There is a danger of actual or perceived discrimination or inadvertent offence:

'Quite inadvertently, discussion around issues of religion may lead to offence, particularly where it is incorrectly thought that people from a particular region or country tend to belong to a particular religion … the potential for this would seem to be avoided through a system based solely on affirmation.'

[360] ILRC Report, 29.

[361] See 'A Reconsideration of the Sworn Testimony Requirement', above n 19, 1681.

186. It has been asserted that oaths are no longer an effective instrument to bind the conscience of witnesses, because as well as a decline in religious following, there has been a decline amongst religious people in the belief that divine retribution will follow from lying on oath.[362] The religious foundation by which oaths may be said to secure truth-telling has become 'demographically archaic'.[363] If witnesses wish to lie they are likely to do so irrespective of taking an oath because 'whilst not holding a positive disbelief, their concept of God is not sufficiently personal or powerful to influence their conduct'.[364]

187. Without the oath, there are plenty of other aspects of the courtroom experience that emphasise the seriousness of proceedings, let alone the solemnity of affirmation.[365] Furthermore, it is precisely the fact that oaths have become a 'quaint court ritual' that has contributed to them being administered in a 'perfunctory manner', diminishing their significance.[366] It is not uncommon for witnesses to take an oath without understanding the rationale behind it, merely because it is regarded as conventional practice.[367] The normalisation of the oath has been said to detract from its sacred and binding nature, as oaths administered in a 'perfunctory' manner are divested of any solemnity.[368] Some say the overuse of the oath in common law jurisdictions (in that it is used in all proceedings, by all witnesses) encourages perjury.[369]

188. Various law reform bodies have recommended abolishing the oath and substituting a simple promise or universal affirmation – for example, the Ontario Law Reform Commission in 1976,[370] the Irish Law Reform Commission in 1990[371] and the Northern Territory Law Reform Committee in 2008.[372] The wording recommended by each of these bodies is set out in **Appendix 2** to this paper. None of these recommendations, to the

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[362] NTLRC Report, 5.

[363] Bennett, above n 333, 40.

[364] Bartle, above n 227, 28.

[365] ALRC Evidence (Interim) Report, [565].

[366] Robin Auld, *Review of the Criminal Courts of England and Wales*, Report (Stationery Office, 2001) [194].

[367] Ken Liberman, 'Problems of communication in Western Desert courtrooms' (1978-1979) 3 *Legal Services Bulletin* 94, 95.

[368] Auld, above n 364, [194].

[369] Silving, above n 184, 1552.

[370] OLRC Report, 129.

[371] ILRC Report, 49.

[372] NTLRC Report, 10. The NTLRC suggested not an affirmation but a simple request to the witness to tell the truth to the Court, with the court retaining the discretion to devise more appropriate wording for particular circumstances and given a new discretion to change the prescribed promise to some religious formula if the witness's objection to it is genuine.

extent that it would abolish the oath altogether, was adopted by their respective legislatures.[373]

Arguments against abolishing the oath

189. The requirement of a testimonial oath has been called 'a universal rule of the common law'.[374] Abolishing the oath would be a radical break from tradition and current common law practice.

190. Despite inconclusive evidence, it has been suggested that the affirmation may not be as binding on religious witnesses' consciences as an oath, and therefore not as effective in securing the truth from this cohort of witnesses.[375] In 2011, 22.3% of Australians identified as having no religion whilst 61.1% reported that they were Christian and 7.2% reported that they followed non-Christian religions,[376] a statistic that might lend support for retaining the religious oath as security for the truth from religious people.

191. Consultation by the VPLRC indicated that, for some witnesses with strongly-held religious beliefs, a religious oath is more significant than a secular affirmation and may *somewhat* increase the likelihood that they will tell the truth.[377] The Queensland Law Commission suggested 'that the practice of swearing witnesses should continue while it *appears* of value in securing the truth at a trial.'[378]

192. Some say that if taking an oath will secure the truth only from a small group of witnesses, the practice is justifiable notwithstanding any intrusion on people's rights to keep their religious beliefs or lack of them private.[379] The VPLRC has pointed out, though, that the choice of oath is only one of several potential indicators of a person's culture or religion, any one of which could give rise to discrimination,[380] and was not convinced by arguments that a

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[373] *Evidence Act,* RSO 1990 (Ontario); *Rules of the Superior Court* (Ireland), O39, rr 4 and 18.

For the Irish procedure see Citizens Information Board of Ireland, *The procedure for being a witness* (11 September 2008) <http://www.citizensinformation.ie/en/justice/witnesses/the_procedure_for_being_a_witness.html>; and for commentary on it see Rossa McMahon, *Oaths: At Best Embarrassing and At Worst Offensive* n *A Clatter of the Law* (24 May 2012) <http://aclatterofthelaw.com/2012/05/24/oaths-at-best-embarrassing-and-at-worst-offensive/>. For the Northern Territory, see *Evidence (National Uniform Legislation) Act 2011* (NT) s21 and *Oaths, Affidavits and Declarations Act 2012* (NT), s 5.

[374] Silving, above n 184, 1682, quoting *Atwood v Welton* (1828) 7 Conn 66, 72.

[375] Farid, above n 279, 555.

[376] Australian Bureau of Statistics, *2071.0 - Reflecting a nation: Stories from the 2011 Census* (21 June 2012). <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main=features902012-2013>.

[377] VPLRC Inquiry, 238 (emphasis added).

[378] Queensland Law Reform Commission, *The Oaths Act*, Report No 38 (1989), 95 (emphasis added).

[379] LRCC Report, 87.

[380] VPLRC Inquiry, 239.

universal secular affirmation (established after abolishing the oath) would reduce religious or cultural bias against witnesses.

193. Others argue that even if the oath does not serve to better secure the truth, it is still the best way to

> … bring home to witnesses the seriousness of the occasion, calling for more than a merely 'social' regard for truth in their testimony.[381]

194. There is also the concern that some witnesses might be affronted if denied the opportunity to give an oath that corresponds to their religious or cultural beliefs.[382]

195. The main argument for retaining the oath is that, at the very least, it may well help secure the truth from some religious witnesses, for whom a mere warning about the penalty for perjury might appear 'a pale and weak substitute' to the prospect of facing 'eternal torture should [the witness] dishonour his oath'.[383] The prospect of divine retribution enlivened by taking an oath augments, rather than replaces, the threat of legal sanctions that may result from giving false testimony.[384] And even when stripped of a fear of divine retribution, the religious oath may still have a ritualistic significance to religious people in emphasising the seriousness of the occasion. For them, as the affirmation may do for secular witnesses, the oath forms part of a ritualistic court process that emphasises the solemnity of giving evidence and the importance of telling the truth.[385]

196. Supporters of this argument claim that affirmations are a 'morally sterile' means of securing the truth because eliminating the religious element leaves a mere ordinary obligation to tell the truth that may be subordinated by other duties such as loyalty,[386] and that, by contrast, oaths elevate the importance of being honest because they invoke a witness's morality.[387] They would argue that, at the very least, it would cause no harm to retain the oath if to do so would not diminish the incentive to testify honestly.[388]

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[381] NZLC Report, vol 1, 96 [354].

[382] VPLRC Inquiry, 238.

[383] PJ Carrigan, 'The Oath' (1996) *New Zealand Law Journal* 27, 27. See also discussion by the VPLRC Inquiry, 211.

[384] ALRC Evidence (Interim) Report, [565].

[385] Ibid [306]; NZLC Report, vol 1, 96 [354].

[386] Gochnauer, above n 341, 200.

[387] Gochnauer, above n 228, 73.

[388] Ibid.

6 Reform models

197. So far we have asked readers to consider whether South Australian laws about oaths and affirmations really need to be changed. In providing for legal equality between affirmations and oaths and permitting witnesses to choose their own form of oath so long as they consider that form binding on their conscience, ours is a highly permissive approach, and is similar in effect to most Australian jurisdictions.[389]

198. That said, though, the wording of South Australian witness oaths and affirmations is not simple. Neither can be understood easily by any potential witness (the suggestion is that to understand the oath a person needs an educational level of Year 11 secondary school, and to understand the affirmation a person needs to be educated to second year university level).[390]

199. And, aside from the question of understanding, there is the question of whether the administration of an oath or an affirmation is the most effective way to ensure that witnesses tell the truth in court. Could it be improved to minimise the risks of causing offence or embarrassment to witnesses, of appearing to invade their personal privacy, of excluding some witnesses who might otherwise give valuable testimony, and of creating prejudice in the trier of fact?

200. We now ask readers to consider other models for committing witnesses to tell the truth in court. In evaluating the current law and putting forward alternatives for committing witnesses to vouch that the evidence they give will be truthful, there are two important considerations to bear in mind. One is that people who are prepared to give false evidence will do so whether they give a formal commitment to tell the truth or not[391] and regardless of the legal consequences. The other is that most people understand that they are expected to tell the truth in court and would do so without formal commitment or admonition.

201. But courts are solemn places for good reason, because the rights, obligations and entitlements of individuals and the State are finally determined there. If for no other reason than to emphasise the necessity for judicial decisions to be based on reliable evidence, there is value in having witnesses make some kind of formal commitment to telling the truth in court.

202. For that reason and because it would leave South Australia very much at odds with the rest of the country and most of the common law world, the paper does not propose a model

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[389] *Evidence Act 1995* (Cth) ss 21-24; Cf *Oaths Act 1867* (Qld) s 17.

[390] See discussion at paragraph 167 above.

[391] For a discussion of this, see ALRC Evidence (Interim) Report, [563] citing Jeremy Bentham as a source for this view (J Bentham, 'Rationale of Judicial Evidence' in John Bowring (ed), *The Works of Jeremy Bentham*, *Vol VI* (William Tait, 1843), 308).

which would remove any explicit commitment by a witness to tell the truth. Instead, it puts forward four models as alternatives to the current South Australian system, should that system be thought wanting.

203. Of these models, those that include a religious oath do not permit religious ritual of any kind, in keeping with the secular nature of our justice system, to prevent undue attention being drawn to a witness's particular faith; the verbal invocation of an appropriate deity in the wording of the oath is enough.

204. All models include a perjury warning (in prescribed form) to help witnesses recognise the reliance courts place on truthful testimony in administering justice and to acknowledge, on the court record, that they understand the legal consequences of lying to the court. For the models without an oath, the offence of perjury[392] (which refers to false statements made under oath) would also need to be amended to refer instead to the giving of false testimony in judicial proceedings, whether under oath or not.[393]

205. For each model, various forms of wording are offered for consideration. Each form of wording is simplified to make it easy to understand. For ease of comparison, the models are described in outline first and then in detail.

Outline of models

Model 1	**Retain the choice between religious oath and affirmation** but update the legal requirements for and simplify the wording of the oath or affirmation (this was the option taken by the Commonwealth)
Model 2	With similar updating and simplification, **abolish the affirmation and instead have a choice between a religious oath and a promise to tell the truth** (this was the option taken by the Northern Territory)
Model 3	With similar updating and simplification, **abolish the religious oath and instead require an affirmation**
Model 4	With similar updating and simplification, **abolish the religious oath and instead require a promise to tell the truth**

[392] *Criminal Law Consolidation Act 1935* (SA) s 242.

[393] See for example, *Criminal Code Act 1983* (NT) Schedule I, s 96.

Model 1

Retain choice of oath and affirmation but update and simplify

206. This model, like the model in the Uniform Evidence Acts, would retain a choice of oath or affirmation but

(a) make it clearer than under the current law that the choice of affirmation does not depend on rejecting the oath as a first alternative;

(b) give equal weight to affirmations and oaths;

(c) provide for affirmations to be the default when a person cannot choose between them or is unwilling to swear on oath;

(d) make it clear that, when swearing a witness oath, the invocation of deity is by utterance of the words of the oath alone, without other religious ritual or ceremony (such as the touching or holding of relics or holy books);

(e) require information about the need to choose between oath and affirmation, the offence of perjury and the importance of reliable witness testimony to the justice process to be given to a witness *before* they enter court to be sworn; in a culturally appropriate way, using an interpreter if necessary; in an informal setting in which the witness is encouraged to ask questions; and by the judge or such court official as he or she designates.

(f) require the witness to make the choice before entering the court to be sworn or affirmed, and, if the choice is to swear on oath, to identify which deity he or she wishes to invoke, so that the oath or affirmation can be administered correctly by the court;

(g) simplify and standardise the words of the oath and affirmation but provide also that minor departures from the procedure or wording of the questions or answers will not invalidate the oath.

(h) include in those words an acknowledgement that the witness understands the legal consequences of failing to keep their commitment to tell the truth.

207. The **oath** would be administered by two questions from the judge, associate or clerk of the court, each to be followed by a standard formal response by the witness.

208. Like the oath, the **affirmation** would be administered by two questions from the judge or clerk of the court, each to be followed by a standard formal response by the witness. Note that neither form of wording suggested here includes the word 'affirm'. To affirm something is simply to declare it formally, and it is unnecessary to use both words. Also, the

word 'affirm' is a legal term, rarely used in ordinary speech, and may hold little meaning for some witnesses.

Model 1: oath
First question
Do you swear by [witness's preferred deity] *(and here follow three alternative forms of wording)*
Alternative 1: to tell the truth to this court/tribunal?[394] Say 'Yes, I swear'.
Alternative 2: to speak the truth to everything you are asked in this court? Say 'Yes, I swear'.
Alternative 3: that what you tell this court will be the truth, the whole truth and nothing but the truth? Say 'Yes, I swear'.
Second question
Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).
Model 1: affirmation
First question
Do you declare *(and here follow three alternative forms of wording)*
Alternative 1: that what you tell this court will be the truth, the whole truth, and nothing but the truth? Say 'Yes, I declare'.
Alternative 2: that you will speak the truth to everything you are asked in this court? Say Yes, I declare'
Alternative 3: that you will tell the truth to this court? Say 'Yes, I declare'.
Second question
Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).

Model 2

Abolish affirmation and replace with choice between oath and promise to tell the truth

209. Under this model, the affirmation would be abolished and a witness would instead have a choice between a religious oath and a promise to tell the truth. This was the option taken by the Northern Territory, which has retained the religious oath, permitting witnesses to swear by the deity of their choice but also offering them the option of a simple promise to tell the truth (described in the legislation as an alternative 'form of oath').[395] There is no option of

[394] The reference to a court in all these models can be changed to match the forum that is taking the evidence.

[395] *Oaths, Affidavits and Declarations Act 2012* (NT) s 5 and Schedule 1: 'If, under a law in force in the Territory, a

making an affirmation. Although the Northern Territory has adopted most of the Uniform Evidence Act,[396] it has specifically excluded the UEA provisions about oaths[397] and witness competence[398] where they are incompatible with its witness oaths regime.

210. But because a promise is all that is required for witnesses to give unsworn evidence when disqualified from giving sworn evidence, this model needs to

(a) characterise the promise as a form of oath for the purposes of this Act and for the purposes of the offence of perjury (or instead amend that offence to refer simply to giving false testimony);

(b) permit those who do not qualify to give sworn evidence to give unsworn evidence only if they can demonstrate an understanding of the difference between the truth and a lie and the importance of telling the truth (the first two requirements under South Australian law).[399] It is the third requirement, for witnesses who have demonstrated such understanding to then indicate (or promise) to tell the truth,[400] that is problematic in any model that permits sworn evidence to be given under promise. This third requirement seems superfluous because a witness who has just said they understand the difference between truth and a lie and the importance of telling the truth will inevitably answer a request to indicate whether they will tell the truth in the affirmative. A better model, used in the Northern Territory, where a promise may be used as a form of oath, might be to replace the prerequisites in s 9 with an explanation from the judge:

> (a) that it is important to tell the truth; and
>
> (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
>
> (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements

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person is to take an oath, the form of the oath must be one of the following, according to the person's preference:

(a) I, ... [full name] ..., promise to tell the truth to this court;

(b) I, ... [full name] ..., swear by Almighty God [or a deity recognised by the person's religion] to tell the truth to this court. So help me God! [or as appropriate].'

396 *Evidence (National Uniform Legislation) Act 2011* (NT).

397 Ibid ss 22-24.

398 Ibid s 21.

399 *SAEA* s 9(2)(a).

400 Ibid s 9(2)(b).

that he or she believes are untrue.[401]

211. Otherwise, this model would follow Model 1, albeit substituting a promise for an affirmation, and would use the same administration and wording for the religious oath.

Model 2: Oath
First question
Do you swear by [witness's preferred deity] *(and here follow three alternative forms of wording)*
Alternative 4: to tell the truth to this court/tribunal?[402] Say 'Yes, I swear'.
Alternative 5: to speak the truth to everything you are asked in this court? Say 'Yes, I swear'.
Alternative 6: that what you tell this court will be the truth, the whole truth and nothing but the truth? Say 'Yes, I swear'.
Second question
Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).
Model 2: Promise
First question
Do you promise that you will tell the truth to this court? Say 'Yes, I promise'.
Second question
Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).

Model 3

Abolish oath and replace with affirmation

212. Under this model, the religious oath would be abolished and replaced with an affirmation.

213. This model obviates any need to inform witnesses about a choice before they enter court. It has the practical virtue of not placing extra demands on court officials and resources.

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[401] *Evidence (National Uniform Legislation) Act 2011* (NT) s 13(5).

[402] The reference to a court in all these models can be changed to match the forum that is taking the evidence.

214. Instead, the judge, before taking the affirmation from the witness, would simply explain the importance of reliable witness testimony for the process of justice and what constitutes the offence of perjury.

215. For Model 3, the offence of perjury would need to be amended to refer to evidence given under affirmation, rather than under oath, or, as suggested for Model 2, to refer simply to the giving of false testimony without reference to the nature of the witness's commitment to tell the truth.

216. As with Model 1, administration of Model 3 would be by two questions from the judge or clerk of the court, to be asked after the judge has explained the importance of reliable witness testimony for the process of justice and the offence of perjury. Each question would be followed by a standard formal response by the witness.

Model 3: affirmation
First question
Do you declare *(and here follow three alternative forms of wording)*
Alternative 4: that what you tell this court will be the truth, the whole truth, and nothing but the truth? Say 'Yes, I declare'.
Alternative 5: that you will speak the truth to everything you are asked in this court? Say Yes, I declare'
Alternative 6: that you will tell the truth to this court? Say 'Yes, I declare'.
Second question
Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).

Model 4

Abolish oath and affirmation and replace with promise to tell the truth

217. Under this model, the religious oath and the affirmation would be abolished and replaced with a promise to tell the truth.

218. Like Model 3, this model obviates any need to inform witnesses about a choice before they enter court. It has the practical virtue of not placing extra demands on court officials and resources.

219. Instead, the judge, before taking the promise from the witness, would simply explain the importance of reliable witness testimony for the process of justice and what constitutes the offence of perjury.

220. For Model 4, the unsworn evidence provisions in *SAEA* s 9 will need to be amended to reflect that a promise constitutes a form of oath[403] for the purposes of giving 'sworn' evidence and to distinguish between this promise and the indication that the witness will tell the truth that is a prerequisite for giving *unsworn* evidence.[404] As to this, see suggestion (b) for Model 2.

221. As with Model 1, administration of Model 4 would be by two questions from the judge or clerk of the court, to be asked after the judge has explained the importance of reliable witness testimony for the process of justice and the offence of perjury. Each question would be followed by a standard formal response by the witness.

Model 4: Promise
First question Do you promise that you will tell the truth to this court? Say 'Yes, I promise'.
Second question Do you understand that if you do not now tell the truth to the court you may be charged with the offence of perjury? Please answer yes or no. (*If the witness answers no, the judge is to explain further, briefly, and then repeat the question*).

[403] Note that the Northern Territory law deems giving evidence under promise to be a form of oath (see *Oaths and Affirmations Act* (NT) s 5(1)) so that evidence given under promise is taken to be evidence under oath for the purposes of the competence requirements of the *Evidence (National Uniform Legislation) Act 2011* (NT) ss 13 and 21.

[404] See *SAEA* s 9(2)(b).

7 Questions

The Institute would appreciate submissions on this review to inform its Final Report, including your answers to the following questions. To make it easier to make a submission, the questions are available for downloading on www.law.adelaide.edu.au/reform/publications/

Question 1

Do you think our current laws about witness oaths and affidavits need to change? If so, why and how?

Question 2

Do you think witnesses should continue to be offered the choice of swearing on oath or affirming to tell the truth? Why or why not?

Question 3

Do you think the option of swearing an oath should be removed altogether? Why?

Question 4

Do you think witnesses should be warned, *before* they commit to telling the truth to the court, of the legal consequences of giving false evidence and the importance of reliable witness testimony to the justice process?

Question 5

Should witnesses who have been given such a warning be required to acknowledge, when they commit in court to tell the truth, that they understand the legal consequences of giving false evidence?

Question 6

What are your views on the reform models proposed in this paper?

If you would you prefer a different model, please describe it here

Question 7

Have you ever given evidence before a court or tribunal?

If so, please briefly describe that experience and how it influences your answers to these questions.

Question 8

If you are a lawyer or paralegal with experience in preparing witnesses for court, or a lay person who supports people from non-mainstream cultures or groups, please describe your role and any

problems your witnesses may have had with

(a) giving the commitment to tell the truth that is required for giving sworn evidence (currently by oath or affirmation);

(b) understanding what commitment is required of them to give unsworn evidence;

(c) understanding their liability for perjury.

Question 9

If you are a judge or magistrate, please describe any problems you have encountered

(a) with a witness's apparent understanding of the oath or affirmation;

(b) with a witness's ability correctly to recite the wording of the affirmation response;

(c) of any other nature in the administration of the oath or affirmation.

Appendices

1 Current South Australian legislation

Evidence Act 1929

Part 2—Witnesses

6—Oaths, affirmations etc

(1) An oath shall be administered and taken as follows:

(a) the person taking the oath shall hold a copy of the Bible (being a book that contains the New Testament, the Old Testament or both) in his hand and, after the oath has been tendered to him, shall say 'I swear'; or

(b) in any other manner and form which the person taking the oath declares to be binding on his conscience; or

(c) in any other manner or form authorised or permitted by law.

(2) Where an oath has been lawfully administered and taken, the fact that the person taking the oath had no religious belief, or that the oath was not taken so as to be binding on his conscience, shall not affect, at law, the validity or effect of the oath.

(3) A person is permitted, and should be offered the choice, to make an affirmation instead of an oath in all circumstances in which, and for all purposes for which, an oath is required or permitted by law.

(4) An affirmation is to be administered to a person by asking the person 'Do you solemnly and truly affirm' followed by the words of the appropriate oath (omitting any words of imprecation or calling to witness) after which the person must say 'I do solemnly and truly affirm'.

(5) Every affirmation has, at law, the same force and effect as an oath.

(6) No oath or affirmation is invalid by reason of a procedural or formal error or deficiency.

7—Oaths or affirmations taken before a court

(1) Every court has authority to administer an oath or an affirmation.

(2) Where an oath or affirmation is to be taken before a court, or in connection with proceedings before a court, it may be administered by—

(a) the court itself; or
(b) an officer of the court; or
(c) any person authorised by the court to administer the oath or affirmation; or
(d) any other person authorised by law to administer the oath or affirmation.

9—Unsworn evidence

(1) A person is presumed to be capable of giving sworn evidence in any proceedings unless the judge determines that the person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.

(2) If the judge determines that a person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence, the judge may permit the person to give unsworn evidence provided that—

(a) the judge—
i. is satisfied that the person understands the difference between the truth and a lie; and
ii. tells the person that it is important to tell the truth; and
(b) the person indicates that he or she will tell the truth.

(3) In determining a question under this section, the judge is not bound by the rules of evidence, but may inform himself or herself as the judge thinks fit.

(4) If unsworn evidence is given under this section in a criminal trial, the judge—

(a) must explain to the jury the reason the evidence is unsworn; and
(b) may, and if a party so requests must, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(5) A justice to whom it appears that a person who desires to lay a complaint or information does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence may ascertain by inquiry the subject matter of the complaint or information and reduce it into the appropriate form, and any action or proceedings may be taken on the complaint or information in all respects as if the complainant or informant had deposed to the truth of the contents on oath or affirmation.

12—Evidence of young children

(4) A young child who is called as a witness is, while giving evidence, entitled to have present in the court, and within reasonable proximity, a person of his or her choice to provide emotional support (but the person must not interfere in the proceedings).

(5) Unless the court otherwise allows, a witness or prospective witness in the proceedings

cannot be chosen under subsection (4) to provide emotional support for a young child.

12A—Warning relating to uncorroborated evidence of child in criminal proceedings

(1) In a criminal trial, a judge must not warn the jury that it is unsafe to convict on a child's uncorroborated evidence unless—

(a) the warning is warranted because there are, in the circumstances of the particular case, cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and

(b) a party asks that the warning be given.

(2) In giving any such warning, the judge is not to make any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.

2 Forms of witness oaths and affirmations

South Australia

2013 standard oath and affirmation in South Australia

This is not legislated. There are two sources in South Australia for the wording and method of administration of witness oaths and affirmations, and their instructions are not the same. One source is the instruction manual for South Australian Supreme Court Judges' Associates, who administer oaths in Supreme Court trials (described in paragraph 54 of this paper).

The other is the Courts Administration Authority website.[405] The information for witnesses on that website is reproduced below.

> 'When it is time for you to give your evidence, you will be asked to stand in the witness box. First, you will be sworn in. This means you must take an oath, or make an affirmation, to tell the truth. The most common form of oath will require you to hold the Bible, Koran or appropriate item while a court officer asks you,
>
> *"Do you swear that you will tell the truth, the whole truth and nothing but the truth, so help you (God/Allah etc)?"*
>
> to which you reply,
>
> *"I swear."*
>
> Or you can choose instead to make an affirmation, in which case you will be asked to say:
>
> *"I [your name] do truly and solemnly declare and affirm that my evidence will be completely truthful."'*

1978 traditional oath in South Australia

To a witness in a criminal case:

> The evidence which you shall give to the court and jury sworn to try the issues joined between our Sovereign Lady the Queen and the prisoner at the bar (or if the trial be for misdemeanour the defendant) shall be the truth, the whole truth and nothing but the truth. So help you God. Say 'I swear'.

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[405] <http://www.courts.sa.gov.au/GoingtoCourt/Witness-Victim/Pages/default.aspx>.

To a witness in a civil case:

> The evidence which you shall give touching the matter now before the court shall be the truth, the whole truth and nothing but the truth. So help you God. Say 'I swear'.
>
> *or, sometimes, in the Supreme Court:*
>
> The evidence you shall give to the court to try the issues joined between the parties in this cause, shall be the truth, the whole truth and nothing but the truth, so help you God.

1978 LRCSA proposed alternative (adapting Spanish oath):

> 'Will you swear [by appropriate God, if of a deistic faith; otherwise omit reference to a God] to speak the truth to all you may be asked?
>
> To which the witness answers 'I swear it'.

1978 LRCSA suggestion (proposed by Bright J) for people having a religion without a holy book to swear on:

> I swear in manner binding on my conscience that I shall truthfully answer the questions now put to me

Elsewhere

1995 UEA provision

> (An oath or affirmation, for all kinds of cases)
>
> **Oath:** I swear by Almighty God that the evidence I shall give will be the truth, the whole truth, and nothing but the truth.
>
> **Affirmation:** I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth, and nothing but the truth.

2008 NTLRC Recommendation

(A promise, for all kinds of cases)

"Do you promise to tell the truth to this court?" (or to some other tribunal within the meaning of "court" as defined).

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*.

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?"

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.

2012 Northern Territory form of oath[406]

(For all kinds of cases)

One of the following, according to the person's preference:

I, … [full name] …, promise to tell the truth to this court

I, … [full name] …, swear by Almighty God [or a deity recognised by the person's religion] to tell the truth to this court. So help me God! [or as appropriate].

[406] *Oaths, Affidavits and Declarations Act 2012* (NT) ss 5, 6(b), Schedule 1.

1990 ILRC recommendation

(An affirmation for all kinds of cases, acknowledging legal consequences of giving false evidence)

> 'I, A.B. do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth. I am aware that if I knowingly give false evidence I may be prosecuted for perjury.'

1976 OLRC recommendation

> (An affirmation for all kinds of cases, acknowledging the legal consequences of giving false evidence)
>
> 'I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the court.'

3 Law Reform Committee of South Australia, Report 46

The form of oath to be used in courts and other tribunals

To:

The Honourable Peter Duncan, M.P.,

Attorney-General for South Australia.

Sir,

You have referred to us for consideration the question of whether the form of oath used in Courts, which in one form or another requires the witness to tell the truth, the whole truth and nothing but the truth, should be altered to an adjuration that the witness will tell the truth 'as I know it to be'.

There are three forms of oath in common use in this State. The first is that which is used in trials on indictment of an alleged criminal offence, which is in the following words:- 'The evidence which you shall give to the court and jury sworn to try the issues joined between our Sovereign Lady the Queen and the prisoner at the bar (or if the trial be for misdemeanour the defendant) shall be the truth, the whole truth and nothing but the truth. So help you God. Say "I swear".' In civil cases the usual form of the oath is:-'The evidence which you shall give touching the matter now before the court shall be the truth, the whole truth and nothing but the truth. So help you God. Say "I swear".'

There is an alternative form of oath which is sometimes used in civil proceedings in the Supreme Court. It reads:- 'The evidence you shall give to the court to try the issues joined between the parties in this cause, shall be the truth, the whole truth and nothing but the truth, so help you God.'

There is a shorter form of oath which is used both in criminal and civil proceedings such as where the witness is giving evidence for the first time only on the voir dire, or is being sworn to a purely formal matter, such as production of documents on subpoena duces tecum, in such cases as it is necessary to take an oath at all. That oath is in the form:-

'You shall true answer make to all such questions as may now be put to you. So help you God. Say "I swear".' So it is only in two out of the three forms of oath in common use that the adjuration appears to speak the truth, the whole truth and nothing but the truth.

None of these three forms of oath are prescribed by any statute in force in South Australia. The first two are certainly centuries old and there is no record of exactly when they were adopted.

After the edict of the Lateran Council in 1215 prohibiting the use of trial by ordeal, gradually the use of an oath in judicial proceedings became, over the centuries, the normal and accepted way of qualifying a person who was to give evidence in a cause. It was a process which took some four to five centuries to approach its modern form as to witnesses giving evidence: see

Holdsworth: History of English Law volume IX pages 1 77-1 85.

It did not take long for the Courts to discover the truth of the words which Aeschylus puts into the mouth of Athene, 'Oaths are not proof to make the wrong the right' (Aesch. Eum. 432) and so perjury became an offence, probably at first at common law, and then by statute. As Holdsworth says, perjury was made a statutory offence in 1562 by the statute 5 Eliz. c.9. That statute remained in force until 1911 in England when it was repealed by the statute 1 & 2 Geo. V c.6, and parts of it may still be in force in South Australia. It has always been held that perjury was an offence at common law but it seems impossible to prove this strictly from history. The Chancery and the Star Chamber had power to punish perjury from 1494 by the statute 11 Henry VII c.24 and some forms of perjury became offences in 1540 by the statute 32 Henry VIII c.9, but the law of perjury in its modern form dates from the Elizabethan statute of 1562.

Originally a witness could not qualify to give evidence unless that witness was a Christian and was prepared to be sworn on the gospels.

That was the law as stated by Coke: the witness must be sworn tactis sacrosanctis evangeliis. This position was criticised by *Hale: Pleas of the Crown* Volume 11 279. As Holdsworth says: Volume IX page 191-

> But Coke's intellectual outlook was often very mediaeval; and shortly after he wrote commercial considerations helped to give a decisive weight to the counter considerations of reason and tolerance. 'I take it, says Hale, "that altho' the regular oath, as it is allowed by the laws of England, is ractis sacrosanctis Dei euangeliis, which supposeth a man to be a Christian, yet in cases of necessity, as in forein contracts between merchant and merchant, which are many times transacted between Jewish brokers, the testimony of a Jew tacto libro legis Mosaicae is not to be rejected, and is used, as I have been informed, among all nations". Even in Spain the oaths of infidels who swore by their gods were admitted.'
>
> 'And it were a very hard case if a murder committed here in England in presence only of a Turk or a Jew, that owns not the Christian religion, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of England'. These principles were finally sanctioned by Lord Hardwicke and Willes, C.J., in 1744 in the case of *Omichund v. Barker*. And so, in this case, as in the case of the infant, the relaxation of the rule of absolute incapacity, had led the lawyers to see that the fact that a witness was not a Christian, was an objection, not to his competence as a witness, but to the weight of his evidence. 'But then', says Hale at the conclusion of his argument in favour of .the competency of such witness, 'it must be agreed that the credit of such a testimony must be left to the jury'.

It was held in the nineteenth century that the fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience: see *Sells v. Hore* [I8221 3 B. & B. 232: 129 E.R. 1272, a case in which a Jew was mistakenly sworn upon the

gospels.

The present form of oath referring to the truth, the whole truth and nothing but the truth, was approved by the King's Bench Judges in January 1927, for use in civil and criminal courts: see: *Halsbury's Laws of England* 4th Edition paragraph 264 note 5, but it had been in force for a long while before that.

However the law still is as it was laid down by Coke, that a new oath cannot be imposed upon any, judge, commissioner or any other subject without authority of Parliament and the giving of every oath must be warranted by Act of Parliament, or by the common law time out of mind: see 2 *Institutes* 479. Accordingly if any alteration is to be made, it will have to be made by statute.

The law was altered in 1833 (3 & 4 Will. IV c.49) and again in 1838 (1 & 2 Vict. c.77) to provide that persons who have a tender conscience on this subject, such as Mennonites and Quakers, who interpret the injunction strictly 'Swear not at all' as contained in St. Matthew 5:34 and James 5:12 may make an affirmation instead of being sworn. In more recent years the law has been further amended to permit atheists and persons of no religious belief to make an affirmation.

By Section 8 of the *Evidence Act*, 1929-1974, a person who objects to being sworn, on the ground that he has no religious belief, or that the taking of the oath is contrary to his religious belief or his conscience, or on any other ground that the Court thinks sufficient, or if the book upon which he requests that the oath be administered is not readily available to the Court, may make a solemn affirmation instead of taking an oath, which affirmation has the same force and effect as if the oath had been taken. The Committee thinks that it should not be necessary for a witness who desires to affirm to have to produce some religious or philosophical objection to the Court. It should be sufficient that he wishes to affirm and not to be sworn. Accordingly, although this goes beyond the terms of your remit, we would recommend to you for your consideration that Section 8 be amended by deleting all words after 'sworn' in the first line down to 'thinks sufficient' in line seven.

The present sections governing the administration of an oath are contained in Sections 6 and 7 of the *Evidence Act* and they read as follows:-

> 6. Subject to the provisions of this Act, and unless the person to whom an oath is administered 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 following manner, namely:-
>
> The person taking the oath shall, standing up, hold a copy of the Bible (New Testament or Old Testament) in his hand, and, after the oath has been tendered by the officer administering the same, shall utter the words, 'I swear':
>
> Provided that no oath shall be deemed illegal or invalid by reason of any breach of this section.
>
> 7. Notwithstanding anything in this Act or any other Act or law-

(1) An oath, whether in judicial proceedings or otherwise, may be administered and taken in any form and in any manner which would have been lawful if this Act had not been passed.

(2) Every such oath shall be binding for all purposes if it is administered and taken in any form and in any manner which the person taking the same declares to be binding.

(3) Where any such oath has been administered and taken, the fact that the person taking the same had at the time no religious belief shall not for any purpose affect the legality or validity of the oath.

There is no doubt too that the ultimate adjuration of the oath has been shortened over the centuries. It appears from *Blount's Law Dictionary*, 3rd edition (1717), s.v. 'oath' and *Jacob's Law Dictionary* (1739), s.v. 'oath', that the ending in earlier times was 'so help me God at his holy Dome' (i.e., the last day of judgment) and a reference is given to the *Black Book of Hereford*, folio 46. That form is still in use in Scotland in a different wording, namely 'I swear by Almighty God as I shall be answerable to God at the great day of judgment', etc. Forms of oath have in fact differed in various particulars over many centuries in England: see *Encyclopaedia Britannica* (1947 edition), volume 16, s.v. 'oath', at page 663.

At present as we have said there is no prescribed from of oath in judicial proceedings in this State except by long standing usage. There are of course prescribed forms of oath, contained in the *Oaths Act, 1936*, relating to oaths to be taken by Governors, Judges, and other persons holding public office, but nothing in this report is intended to deal with those special forms of oath.

We are mindful of the criticism in the letter that you sent us, that only the ignorant think that they know the whole truth, but we feel that if the witness was sworn to tell the truth, as he knows it to be, that would provide a subjective test which would make prosecutions for perjury very difficult indeed. The present forms have been in use for a very long time. The obligation is well understood by ordinary people as well as by those presiding in Courts which is a matter of considerable importance.

We do not think that a case has been made out to disturb long established usage in relation to the matter, and we accordingly advise against making the change. We may add that this recommendation has the concurrence of the Acting Chief Justice of the Supreme Court and the Senior Judge of the Local Court each of whom read through and commented on this report in its draft stage.

If however Government feels that some alteration ought to be made we should like to draw attention to the Spanish form of oath referred to in Ford on Oaths 8th Edition (1903) page 52:-

'Will you swear by God and by these holy Gospels to speak the truth to all you may be asked?'

To which the witness answers 'I swear it'.

Leaving out the references to the Almighty and to the Gospels, which is implicit in our form or oath in any event that form of oath is quite close to our short form of oath at present in use and would, we feel, be less liable to subjective, and sometimes to deliberate, misinterpretation by a less than candid witness.

There are two matters which arose out of the consideration of the draft report to which we think we should draw your attention although they go beyond the terms of your reference.

Mr. Justice Bright communicated with us about the present Section 8 of the *Evidence Act*. He said that the change made in the section in 1972 was as a result of representations made by him following difficulties experienced in a case he was trying. The Judge considers that the right to affirm given by the present Section 8 is seen by Buddhists (and possibly by those of other similar religions, e.g. Shinto) as being in a sense derogatory because it classes them in effect with atheists and agnostics. He told us that a Buddhist witness in the case before him was insistent that he was a religious man; the only difficulty was that his religion does not possess a sacred book like the Bible or the Qoran. Bright J. suggests that there ought to be a form of oath to meet such cases where the witness has a belief in a Supreme Being but has no holy book such as 'I swear in manner binding on my conscience that I shall truthfully answer the questions now put to me', and that Section 7 of the Act be amended accordingly.

The other matter arises from the case of *Flinders University v. Clark* (not yet reported) in which three members of the Committee were involved either as counsel or judges. In that case Judge Murray (as she then was) sitting as Chairman of a Board of Discipline set up pursuant to Section 20 of the *Flinders University Act 1966-1973* administered an oath to witnesses appearing before the board and questions arose as to her power to do so. In fact the general power to swear witnesses otherwise than in Court proceedings is contained in Section 41 of the *Acts Interpretation Act*. No one who did not know where the power was contained would think of looking in that Act to find it, as was obvious when the appeal to the Full Court came to be heard. The reason for this is the purely historical one that the power was originally given by Section 21 of the *Language of Acts Act* of 1872. We think that the section ought to be transferred either to the *Evidence Act* or the *Oaths Act* where an inquirer would reasonably expect to find it.

We have the honour to be

Howard Zelling

L. J. King

B. R. Cox

J. M. White

D. W. Bollen

J. F. Keeler

Law Reform Committee of South Australia

29th August, 1978.

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