Final Report 3

February 2016

South Australian Law Reform Institute

Witness oaths and affirmations

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address:

SA Law Reform Institute

Adelaide Law School

University of Adelaide

North Terrace

Adelaide SA 5005

Contact details:

(08) 8313 5582

SALRI@adelaide.edu.au

http://www.law.adelaide.edu.au/research/law-reform-institute/

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THE LAW SOCIETY OF SOUTH AUSTRALIA

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Participants

South Australian Law Reform Institute

Director	Professor John Williams
Deputy Director	Dr David Plater
Advisory Board	Professor John Williams (Chair)
	The Hon David Bleby QC
	Terry Evans
	The Hon Justice Tom Gray
	Ingrid Haythorpe
	Emerita Professor Rosemary Owens AO
	Jonathan Wells QC
Administrative Officer	Louise Scarman

Acknowledgements

This Final Report and the Issues Paper that informed it were written by the late Helen Wighton, Deputy Director of the Institute. The Final Report was finalised by Professor John Williams, Director of the Institute, and Adjunct Professor the Honourable David Bleby QC, with the assistance of Nigel Wilson, David Caruso and Kellie Toole of the University of Adelaide Law School.

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Abbreviations

Issues Paper – South Australian Law Reform Institute, *Nothing but the truth: Witness oaths and affirmations,* Issues Paper No 3 (October 2013) <https://law.adelaide.edu.au/research/law-reform-institute/>

SAEA – *Evidence Act 1929* (SA)

The Institute – South Australian Law Reform Institute

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

NOTE: Where the author of a submission is first referred to, the author's full name is used together with a reference in brackets to the abbreviation of that author's name referred to in Appendix 2. Subsequent references to the same author use the abbreviation of that author's name only.

Executive Summary

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 Recommendations of the Institute are as follows:

Recommendation 1

That whatever form of public ritual is adopted and the process by which it is to be administered should be prescribed by legislation.

Recommendation 2

That there should be prescribed a single form of non-religious affirmation or promise.

Recommendation 3

That in any formulation of the ritual, whether by oath, affirmation or promise, the witness should respond to a question without reciting the oath, affirmation or promise in full.

Recommendation 4

That the ritual should be in the form of a solemn promise to tell the truth.

Recommendation 5

5.1 That the Courts Administration Authority should cause to be prepared or reviewed as the case may require suitable material to be displayed on its website and that of all State courts and tribunals explaining in plain English:

- The need for sworn evidence to be truthful at all times;
- The importance of that need for the observance of the rule of law and the administration of

justice;

- Explaining the consequences of knowingly giving false evidence; and
- Explaining the rituals to be observed on the making of the promise by interpreters and witnesses.

5.2 That translations of this material in the appropriate foreign languages should also appear on the websites.

5.3 That the Courts Administration Authority should cause to be prepared or reviewed as the case may require appropriate explanatory written material in multiple languages to be made available for distribution to witnesses and interpreters in all State courts and tribunals.

Recommendation 6A

That witnesses should be warned, before they commit to telling the truth to the court or tribunal, of the legal consequences of knowingly giving false evidence.

Recommendation 6B

That witnesses, having been given the warning referred to in Recommendation 6A, should be required to acknowledge, when they commit in court to tell the truth, that they understand the legal consequences of giving false evidence.

Recommendation 7

In the alternative, if it is considered that a warning of the type described is inappropriate, the promise to tell the truth should be preceded by a statement to the witness of the importance of giving truthful evidence and an acknowledgement by the witness that he or she understands that.

Recommendation 8A

That the following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

> [Name of the person being addressed], you are about to make a very important promise to tell the truth to this court/tribunal. If you make this promise and if you then tell the court/tribunal something which you know is not true, you will be committing a serious criminal offence. Do you understand that?
>
> Do you promise to tell the truth to this court/tribunal?

Recommendation 8B

That if it is considered that a warning of the type described in Recommendation 8A is inappropriate, the following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

[Name of the person being addressed], you are about to make a very important promise to this court/tribunal. The court/tribunal relies on you to tell the truth. If you make this promise you must tell the truth. Do you understand that?

Do you promise that you will tell the truth, the whole truth and nothing but the truth to this court/tribunal?

Recommendation 9

That the form of affidavit prescribed by Court Rules should be as follows:

'I (full name, address and occupation of deponent) DO MAKE AN EVIDENTIARY PROMISE that this affidavit is true in every respect.

1. (Set out text of affidavits in successive, numbered paragraphs)

This evidentiary promise is made by the abovenamed deponent ….. etc'

Recommendation 10

That the following ritual be prescribed for the making of affidavits before persons authorised to take affidavits:

[Name of the Deponent], this affidavit may become evidence before a court or tribunal. If you have said something in this affidavit which you know is not true you will have committed a serious criminal offence. Do you understand that?

Is that your name and handwriting?

Do you promise that the statements you have made in this affidavit are true?

Recommendation 11

That the following public ritual be prescribed for all courts and tribunals in South Australia where an interpreter is required for a witness's evidence:

As the interpreter of a witness's evidence you are not to favour any witness or party before the court/tribunal. Your sole duty is to assist the court/tribunal in the administration of justice. If you do not interpret the evidence accurately and to the best of your ability you could be guilty of a criminal offence or contempt of the court/tribunal and liable to punishment. Do you understand that?

Do you promise that you will well and truly interpret the evidence that will be given and do everything that the court/tribunal may require of you to the best of your ability?

Introduction

1. 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.

2. 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.

3. The Institute's consultation began with the release, in October 2013, of an Issues Paper entitled *Nothing but the truth: Witness oaths and affirmations* [2] and an accompanying questionnaire.[3] It has been an essential resource in the preparation of this Final Report. The Institute records its indebtedness to Ms Helen Wighton, its former Deputy Director, in the compilation of the Issues Paper. Her untimely death prevented her from completing the project and is a partial explanation for the delay in producing this Report. The inclusion of the Issues Paper as Appendix 1 to this Report is both a testament to the quality of the research that went into its preparation and prevents the need for unnecessary repetition in the body of this Report.

4. The Issues Paper contains a comprehensive review of the relevant law in South Australia, a comparison with that of other common law and non-common-law jurisdictions and investigates whether the wording and administration of South Australian witness oaths and affirmations should be simplified. It examines why witnesses are required to swear or affirm to tell the truth and looks at the effect that any

[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*.

[2] South Australian Law Reform Institute, *Nothing but the truth: Witness oaths and affirmations,* Issues Paper No 3 (October 2013), referred to hereafter as 'the Issues Paper'.

[3] The webpage containing the Issues Paper and questionnaire is www.law.adelaide.edu.au/research/law-reform-institute/.

changes to laws and procedures may have on the distinction between sworn and unsworn evidence and on the offence of perjury. It analyses the various rationales for witness oaths and affirmations before identifying reform issues for South Australia and presenting four reform models for discussion.[4]

5. The Issues Paper then poses questions designed to identify whether people thought there was a problem with the current requirements, what such problems might be (if any), and whether and how those problems might be fixed.[5] The answers to these questions formed the basis of most submissions that were received by the Institute.

6. Invitations for submissions to the Paper were sent to Aboriginal and Torres Strait Islander organisations and communities within South Australia; multicultural and ethnic associations, organisations and communities within South Australia; religious bodies within South Australia; the South Australian judiciary; South Australian justices of the peace; the Law Society of South Australia, South Australian community legal centres and the Legal Services Commission; South Australian victims of crime organisations and bodies concerned with adult literacy. A list of those who responded is in Appendix 2.

7. Some, but certainly not all, respondents to the Issues Paper supported some change to the law. However, the suggestions for reform of even those supporting some reform often differed, often markedly. There was also a small number of respondents who did not support change and who were in favour of the retention of the current system.

8. This Final Report completes the Institute's review of witness oaths and affirmations. While not repeating the detail given in the Issues Paper, it is convenient to summarise the relevant law in South Australia, and what people have said about it, before considering the various issues that arise and making recommendations about them.

Current law in South Australia

9. South Australian laws on witness oaths and affirmations and their history are discussed in detail in Part 2 of the Issues Paper. What follows here is a brief summary by way of background.

10. 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.[6] South Australia has embodied this rule in its *Evidence Act*,[7] modifying the rule to permit a court to take

[4] See Part 6, 54–61 [197 – 221].

[5] See Part 7, 62–3.

[6] 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].

[7] *Evidence Act 1929* (SA), referred to hereafter as the *SAEA*.

unsworn evidence in limited circumstances. Every person is presumed to be capable of giving sworn evidence unless the judge determines that they do not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.[8] The test is whether the person understands that in court there is a higher duty to be truthful than in ordinary life.[9]

11. Before a person gives sworn evidence they must take an oath or make an affirmation by which they formally promise to tell the truth. The choice between oath and affirmation is entirely up to the witness.[10] The act of taking an oath or making an affirmation is an important public ritual that highlights the significance and solemnity of the process of giving evidence. Each method carries an identical obligation to tell the truth[11] and is, at law, 'equal in force and effect' with the other.[12] The ritual is designed

> to impress upon the minds of witnesses … the crucial importance of telling the truth in the witness-box by comparison with other, everyday occasions.[13]

12. A testimonial oath contains words of imprecation that invoke the wrath of a deity should that promise be broken. Nonetheless, a witness may validly take an oath without holding any religious belief or believing that their conscience will be bound by it.[14]

13. By contrast in its form, a testimonial affirmation contains no such imprecation but is a solemn, secular declaration to tell the truth. The choice to affirm need not be based on a lack of religious belief or the holding of a belief that does not countenance the taking of oaths.

14. Witnesses may, however, be cross-examined about their choice, with a view to testing their evidence:

> 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

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[8] *SAEA* s 9.

[9] 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.'

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

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

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

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

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

the making of an affirmation as binding upon their conscience.[15]

15. 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[16] in accordance with the Act.[17]

16. An oath or affirmation cannot be invalidated by 'a procedural or formal error or deficiency'.[18]

Procedure for witness oaths and affirmations

17. In South Australia a witness **oath** is able to be taken[19] in a number of ways: (a) the person 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 (for which there is no set form of wording under South Australian law), to answer 'I swear',[20] (b) in any manner the witness declares binding on his or her conscience,[21] and (c) there is a general catch-all provision stating that an oath may be taken in any other way or manner permitted by law.[22] The policy of swearing in the manner most binding on the conscience renders the witness's religion immaterial,[23] and may permit many different kinds of oath taking.[24] Each of these forms of administration of the oath is collectively described as an '**oath**'.

18. Alternatively, the procedure for making an **affirmation** is similar to that for taking an oath, but without the use of religious artefacts or the invocation of a deity. The witness is asked: 'Do you solemnly and truly affirm' followed by the words of the affirmation itself (not legislated in South Australia), to which the witness answers 'I do solemnly and truly affirm'.

19. Importantly, every affirmation has, at law, the **same force and effect** as an oath.[25]

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

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

[17] *Supreme Court Civil Rules 2005* (SA), r 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).

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

[19] Ibid s 6(1).

[20] Ibid s 6(1)(a).

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

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

[23] *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.

[24] *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.

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

Wording of witness oaths and affirmations

20. The wording of witness oaths and affirmations is not legislated in South Australia. 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.

21. One source is the instruction manual for South Australian Supreme Court Judges' Associates, who administer oaths in Supreme Court trials. This 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.

22. The other source is the Courts Administration Authority's version. The information for witnesses on the CAA's website[26] 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."*[27]

Consequences of lying under oath or affirmation

23. In South Australia, a person who lies to the court when giving evidence under oath or affirmation may be charged with an offence of perjury.[28] The same liability is incurred when swearing or affirming false evidence by an affidavit.[29]

24. 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[30] (and other offences relating to false testimony such as perverting the course of justice or

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

[27] This is not consistent with the procedural requirements of section 6(4) of the *SAEA* referred to in paragraph 18 above.

[28] The offence of giving false unsworn testimony has been abolished in South Australia (*Evidence (Miscellaneous) Amendment Act 1999* (SA) s 5) on the ground that 'it is unlikely that a person who lacks the understanding necessary to give formal evidence will be able to commit the offence': South Australia, *Parliamentary Debates*, Legislative Council, 9 December 1998, 447, 448 (K.T. Griffin, Attorney-General).

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

[30] 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.

contempt)[31] notwithstanding that it later emerges that the witness had no religious belief, or took the oath in a form not binding on his conscience.[32]

Structure of the Review

25. The Issues Paper invited responses from the public to some nine questions, including an expression of view on the four possible reform models proposed. Many of the submissions overlapped several questions, so it is not proposed to deal in turn with the answers to each question. Rather, the Report addresses in turn the following issues:

    (1) The appropriateness of the existing oaths and affirmations as administered to witnesses in South Australian courts and tribunals and:
        (a) whether change in the public ritual is desirable, and
        (b) whether this should be effected by legislation.

        The recognised rationales for witness oaths discussed in Part 4 of the Issues Paper[33] are adopted as objectives to be satisfied by whatever form of public ritual may be adopted.

    (2) The critical question of whether witness induction should include a choice between a religious and a secular undertaking. Informing this question is the range of policy considerations identified in paragraphs 129–179 of the Issues Paper, including the historical development and use of the public rituals.

    (3) Whether the public ritual should be in the form of a recital by the witness or as a response to a question or instruction.

    (4) Whether the ritual should be in the form of an affirmation or a promise to tell the truth.

    (5) Whether the public ritual should include a statement of the importance to the judicial process of reliable testimony and/or a warning of the consequences of giving false evidence and an acknowledgement that those consequences are understood.

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[31] The power to punish for contempt, an incident of the inherent jurisdiction of a court (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) 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: *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. Relevantly, contempt might arise where a compellable witness, once sworn, refuses to respond to questions during trial when directed to do so: *Zappia v Registrar of the Supreme Court* [2004] SASC 375, [60] (Duggan J); *R v Guariglia* [2000] VSC 45 (Byrne J).

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

[33] See Issues Paper, 29–36 [95–124].

(6) The form of recommended ritual to be adopted for witnesses in court, upon the swearing of affidavits, and for interpreters.

(7) Any consequential amendments to State legislation.

These issues will each be discussed in the light of the various public submissions received touching that issue.

Issue 1: A need for change?

26. The submissions received were overwhelmingly in favour of the need for change. The only submissions opposing any change were five submissions, without reasons, supplied by Victim Support Services Inc (VSS), and the submission from the Legal Services Commission (LSC). In its view, the laws are working effectively and no client has expressed difficulty with or expressed reluctance to adhere to the procedure.[34]

27. Before venturing into what the changes should be, it is desirable to identify the relevant principles which should guide such change. The many law reform reports on the topic have been unanimous in the need to preserve a form of public and formal commitment to tell the truth. None of the submissions received by the Institute on this reference suggested that the practice should be otherwise in this State. The Institute recommends the preservation of this fundamental proposition.

28. The Issues Paper notes[35] four main categories of rationale or objectives which have been identified historically as justifying making the formal commitment by oath. They are:

- To secure the truth;
- To preserve and underscore the proper performance of public duties;
- To preserve honour (in countries where morality is defined in terms of honour and shame rather than right and wrong); and
- To underpin legal sanctions against lying in court.

There is no reason, however, why they should not also be objectives to be satisfied by whatever form of public ritual may be adopted. The Institute would make the following observations about each of these objectives and their significance in contemplating any reform.

29. *Securing the truth* is fundamental to the judicial process and to the just and fair administration of the law. Whatever process is put in place should be one that promotes and encourages truth telling. This also means that the person giving evidence must understand that fundamental need. This will influence both the form of words which

[34] However, it would appear that this submission is based principally on the swearing of affidavits.

[35] See Issues Paper, 29–36 [95–124].

the witness is asked to adopt or recite and any explanation of the process to be given at the time. The language used and the structure of the ritual will need to be understood by people of widely varying levels of education, understanding and linguistic ability. Securing the truth is therefore also fundamental to the rule of law.

30. *Preserving the proper performance of public duties* requires that a witness take seriously the public duty of giving evidence. This will require maintaining the solemnity and formality of the court process, irrespective of whatever public ritual is adopted. The solemnity of the process can only enhance the significance of the occasion and of the judicial process.

31. *Preserving honour* is not preserving one's individual honour at the expense of truth, as suggested by one submission.[36] It is the preservation of honour by virtue of telling the truth and, conversely, being considered dishonourable if one lies under oath, which is the key distinction. In that sense the ritual is to invoke a person's conscience, elevating the importance of being honest when testifying above that of a regular promise to be truthful. As the Issues Paper points out,[37] the increasingly multinational composition of the Australian population makes it important to consider the significance of this objective, given that every witness brings their own set of values and beliefs with them to the courtroom. An important aspect of this objective 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.

32. *Securing the basis for legal sanctions* is one of the incidents of the present process, whether by oath or affirmation and whether realised or not by the witness. No warning is presently necessary before a legal sanction is applied. As discussed in Issue 5 below, a strong case can be made for an appropriately worded acknowledgement of the consequences of lying under oath or affirmation enhancing the seriousness and significance of the promise or undertaking given.

33. As noted above,[38] no form of oath or affirmation is prescribed in the *SAEA*. However, the *SAEA* does prescribe a range of alternative processes for taking an oath[39] and a process for administering an affirmation.[40] This gives rise to an undesirable multiplicity of forms[41] and an apparent failure to comply with a statutory requirement.[42] Whatever

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[36] FAVA.

[37] See Issues Paper, 33 [111], citing the Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community*, No 195 of Session 1999-2002 (October 2002), 92.

[38] [20–22].

[39] *SAEA*, s 6(1).

[40] Ibid s 6(4).

[41] See Issues Paper, Appendix 2.

[42] The form of affirmation appearing on the Courts Administration Authority of South Australia website would appear to have ignored the amendment effected to section 6(4) of the *SAEA* by the *Statutes Amendments (Attorney-*

form or forms of ritual may be adopted as a result of this Report, the Institute strongly recommends that they should be enshrined in legislation, albeit with a validity provision along the lines of section 6(6) of the *SAEA*.

34. Accordingly, the Institute recommends:

Recommendation 1

That whatever form of public ritual is adopted and the process by which it is to be administered should be prescribed by legislation.

Issue 2: Should the public ritual include a choice between a religious and a secular undertaking?

35. At present, witnesses in South Australian courts have a choice of a religious oath or a secular affirmation. This is so whether the court is hearing proceedings that are governed by the *SAEA* (for example, in the Magistrates, District and Supreme Courts of South Australia) or is hearing proceedings governed by the *UEA* (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. However, the Commonwealth and the jurisdictions that have adopted the *UEA* have, by doing so, updated their laws about witness oaths to deal with perceived or real problems associated with that choice, although not necessarily in the same terms.[43] Some of the Australian jurisdictions that have not adopted the *UEA* provisions on witness oaths have updated their own provisions.

36. Central to the discussion as to the desirability of reform is whether the public ritual should include a choice between a religious oath and a secular undertaking. There is a subsidiary issue as to whether the secular undertaking should be the default position with an optional choice of a religious oath. This part of the Report is not concerned with the form of the ritual. That is the subject of Issues 3 - 6 below.

37. This issue attracted a wide range of views and reasons both for and against choice. Those in favour of retaining the choice included Archbishop Wilson (Archbishop Wilson), Family Voice Australia (FAVA), The Legal Services Commission (LSC), Migrant Resource Centre, SA (MRCSA), SA Teaching English to Speakers of Other Languages (TESOL), some members of the SA Multicultural and Ethnic Affairs Commission (SAMEAC) and seven individuals associated with the VSS. The latter submissions were very brief or gave no reasons.

General's Portfolio) Act 2002 (SA), s 8.

[43] See, for example, *Evidence Act 2001* (Tas), s 21(4) and Schedule 1.

38. Reasons given for retaining choice, in the interest of brevity, are paraphrased below. There is inevitably a degree of overlap. In particular, the reasons were:

- The present system is working well and there is no need for change.[44]
- Witnesses should be offered the opportunity to give their undertaking to a court to tell the truth according to their respective religious or non-religious beliefs.[45]
- Choice promotes truth telling by creating a sense of accountability and personal responsibility over and above accountability to the State. For religious believers there is additional accountability to their God which drives their honesty and to themselves for having elected to swear an oath. For agnostics and atheists there is accountability to themselves for having elected to affirm.[46]
- Choice maintains a sense of cultural acceptance and religious freedom consistent with the multicultural character of Australia.[47]
- An oath, for some, emphasises the seriousness with which the witness makes a sworn undertaking to tell the truth.[48]
- Courts should respect the personal, cultural, religious or traditional choice of a witness.[49]
- Those of religious faith should be afforded the opportunity to bind their conscience by swearing to their deity. Otherwise the free exercise of their religion is obstructed.[50]
- Not only should the oath be retained, but the Christian oath should be the only form of oath, on the basis that some religions do not have the same commitment to honesty as the Christian religion.[51]
- Conformity with the *UEA* necessarily requires preservation of choice.[52]

39. Those submissions advocating the removal of choice in favour of one common public ritual for all were numerically fewer than those advocating choice, but included submissions from persons or bodies with extensive experience in the administration of the present system. Those advocating the removal of choice were His Honour Chief Judge Muecke in a personal submission (Judge Muecke), Her Honour Judge Bolton (Judge Bolton), The Hon. D J Bleby QC (Bleby), The Royal Association of Justices of

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[44] LSC;five submissions associated with VSS.

[45] Archbishop Wilson; Chief Justice.

[46] LSC; FAVA; One person associated with VSS.

[47] TESOL; MRCSA; One person associated with VSS.

[48] Chief Justice.

[49] Some members of SAMEAC; Archbishop Wilson; Chief Justice.

[50] LSSA.

[51] FAVA.

[52] This is inferred from the submissions which expressly favour uniformity with the *UEA*, namely Archbishop Wilson and FAVA.

SA Inc (RAJSA), some members of SAMEAC, Mr G Vorillas (Vorillas), and two persons associated with the VSS. Judge Muecke is the Chief Judge of the District Court, being the principal trial court in the State for indictable offences and civil claims. Judge Bolton is the Chief Magistrate of the Magistrates Court of South Australia which deals with by far the greatest number of criminal and civil trials in the State. The Hon. D J Bleby QC is a retired Supreme Court Judge. The Royal Association of Justices of SA Inc represents Justices of the Peace and Special Justices. Mr Vorillas is a resident of Tasmania.

40. Reasons given for abolishing the choice are paraphrased below. As in the case of reasons given against, there is some overlap. In particular, the reasons were:

- The majority of witnesses either through ignorance of religion, or through poor translation or both, do not understand the significance or concept of an oath, making it and the choice meaningless.[53]
- This is particularly so with children who are able to give sworn evidence.[54]
- Making that choice, particularly in open court, can add an unnecessary layer of mystery to what witnesses already find a difficult and unfamiliar environment.[55]
- The obligation to tell the truth can be conveyed and accepted more simply.[56]
- Central to the public ritual is an understanding of and need for a promise to tell the truth. Obfuscating that process with references to a deity, holy book, icons etc. diminishes the power of that promise.[57]
- There is no evidence that the oath encourages truth telling.[58]
- Swearing does not necessarily correlate to telling the truth.[59]
- In a post-Christian era the oath is assuming less and less significance to a large portion of the community. Religious affiliation does not necessarily represent religious commitment.[60]
- A witness's choice may affect the weight of their evidence either favourably or unfavourably in the mind of the decision maker, particularly in the case of jury members.[61]
- The choice is open to manipulation in that the taking of a Christian oath by a person of some other or no religious faith, with a view to bolstering the

[53] Judge Muecke; Bleby; RAJSA; Judge Bolton.

[54] Judge Muecke.

[55] Judge Muecke.

[56] Judge Bolton; RAJSA.

[57] RAJSA.

[58] Judge Bolton.

[59] RAJSA.

[60] Bleby.

[61] Judge Muecke; Bleby; and see the discussions in the Issues Paper at [131 – 144].

perception that the evidence is more credible than if by making an affirmation or a non-Christian oath, can only encourage the taking of a biblical oath by a witness of non-Christian or of no religious faith.[62]

- There should be no reference to a witness's preferred deity.[63]
- The tendering of an oath can cause embarrassment or even offence, often based on an assumption arising from the person's name or appearance.[64]
- The giving of evidence in court is not a religious event but a secular process: Church and State are separate. A non-religious ritual can embrace both religious and cultural diversity.[65]
- While uniformity within and between jurisdictions is desirable, it is not essential if a more satisfactory path is available.[66]
- A simple uniform ritual would have more meaning for most witnesses and prevent inferences from being made by a jury or triers of fact about the witness's commitment to tell the truth from the form of undertaking that the witness chooses.[67]
- A single secular 'oath' is desirable to standardise moral intention and to ensure that all witnesses are held to be equal in affirmation of their testimony, with criminal sanction being the main driver of honesty.[68]

41. Submissions from the Chief Justice on behalf of the Justices of the Supreme Court (Chief Justice) and from Mr Herbert Stock, a member of the Religious Society of Friends (Quakers) (Stock) advocated a third approach: a non-religious ritual as the primary or default requirement but which also allows a witness the opportunity to take a religious oath if so desired.

42. The reasons given for this option were:

- The avoidance of embarrassment and offence especially when choice is the subject of inconsiderate process in open court.[69]
- The entering of a promise to tell the truth as the default option is designed to remedy what is for some an empty ritual, whilst at the same time retaining the oath allows those witnesses who are religiously devout to choose to swear, should they wish.[70]

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[62] Bleby.

[63] Some members of SAMEAC.

[64] Judge Muecke; Bleby; H Stock.

[65] Bleby; RAJSA.

[66] Bleby.

[67] Judge Muecke.

[68] Vorillas.

[69] Stock.

[70] Chief Justice.

- Australia is a multi-cultural society and many citizens are from non-Christian backgrounds.[71]
- The practice of taking an oath, although it has little religious relevance but because it is common to do so, detracts from its sacred and binding nature.[72]
- An accused person should not be deprived of an opportunity to give evidence on oath so as to emphasise the seriousness with which he or she takes the sworn undertaking.[73]
- Making the promise the primary testimonial undertaking will resolve the sometimes awkward and distracting preliminary confusion and equivocation when a witness is asked before a jury to elect between an oath and an affirmation.[74]

43. In considering these arguments it needs to be borne in mind that, apart from those who consider that the present system is working satisfactorily and those who argue for uniformity with the provisions of the *UEA*, all submissions favouring retention of choice do so from the subjective point of view of persons who are capable of, and who have a personal desire to, exercise choice. Those views are genuinely held and are respected. On the other hand, the submissions opposing choice do so from the point of view of a large number of people for whom choice is either irrelevant, confusing, embarrassing or manipulative, and from the point of view of those whose assessment of a witness's evidence may be influenced by the witness's choice. It must be remembered that the ritual must not only serve the individual's desire to acknowledge publicly the obligation to tell the truth but must be designed to serve the judicial process and the public good. In that regard substantial weight must be given, on this issue, to the submissions coming from those with wide experience of administering the judicial process which advocate change and oppose choice. Ultimately a judgment must be made as to whether a choice of public ritual is most likely to enhance the administration of justice by fulfilling the four objectives discussed in paragraphs **29–32** above, or whether it will detract from them.

44. The evidence suggests that the present system of choice seriously detracts from fulfilling these objectives in respect of a significant number – some have said a majority – of the persons who give evidence, whether by choice or by compulsion. For them, the choice, probably not assisted by the language, has meant that they have undertaken a meaningless public ritual. Some are embarrassed or even offended by the choice. Some seek to manipulate the choice to their perceived advantage, and there are those who will be prejudiced in their assessment of a person's evidence by virtue of the choice made by

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

the witness. Even if there were only a few people affected in one or more of these ways reform would be desirable.

45. For that group, there is a greater likelihood of securing the truth by helping them focus on the one serious ritual, provided that it is a ritual which they understand. For the large group which does not care about or which is ignorant of the nature of the choice, a single ritual is more likely to enhance the solemnity of the process and to reinforce the seriousness of the public duty. Replacement of the present choice by a simplified but solemn single ritual is more likely to preserve honour in the sense discussed.

46. It is not unknown for a trial to miscarry because of a mistaken application of one of a variety of rituals available, notwithstanding the technical validity of the oath taken.[75] Any reform which avoids such a consequence is to be encouraged.

47. Will the fulfilment of the objectives be hindered if persons are denied the ability to swear an oath? No-one has suggested that a person of religious conviction will be less likely to tell the truth if they publicly make a solemn promise or give a solemn undertaking to tell the truth, while being fully conscious of the legal consequences of doing otherwise. For such a person a solemn promise or undertaking can still be made in a manner which binds their conscience without the need of a public profession of their relationship with God. The manner and extent to which a breach affects their relationship with God will be as that religious belief prescribes. It has not been suggested that swearing an oath is a ritual which is fundamental to any religion such that to remove its use in the court setting would amount to a denial of freedom to exercise that religion.

48. While choice may maintain a sense of cultural acceptance and religious freedom, a single public ritual honours all belief systems by treating them the same without according special treatment to some. The requirement to tell the truth before a court is one that applies to everyone, whether religious or not. Public acknowledgement and understanding of that requirement and the undertaking to comply should be in a form which applies equally to everyone.

49. An analysis of the history and development of oaths and affirmations both at common law and in South Australia[76] indicates that for many centuries there was only one form of ritual, namely the Christian oath. It was only available to Christians. No one else was competent to give sworn evidence. Over time competence was extended to include Jews but only if they swore the Christian oath. The class of competent witnesses was extended to include non-Christians who could swear some other non-Christian oath. It was further extended to members of certain minority Christian religions if they made a

[75] See, for example, *R v Davies*, The Times, 28 February 2015, 16, where a jury was discharged and a retrial ordered where "incompetence" led to a Muslim witness being sworn on the Bible and not on the Koran. As to validity of the process, see *Oaths Act 1978* (UK), ss 1(3) and 4(1).

[76] See, for example, the Issues Paper, Part 1, [1]–[38].

solemn affirmation. Eventually the class of competent witnesses was extended to anyone who could establish a conscientious objection to taking an oath if they made an affirmation. Later it was further extended to anyone who elected to affirm whether or not they had a conscientious objection to taking an oath. The various forms of ritual and entitlement to use them defined competency to give sworn evidence. They were developed to accommodate the increasing class of persons allowed to give sworn evidence. Competence to give sworn evidence is not now determined by the form of public ritual that a witness is able to undertake. It is determined by other criteria. It is therefore appropriate that, with the abandonment of religious grounds affecting competence, the law should revert to a single objective standard of ritual which emphasises and enhances the objectives of the ritual and which is meaningful to and binding on all competent witnesses, regardless of their religious belief. While many may lament creeping secularism, it began, in the courts and the law, to avoid otherwise unjustifiable discrimination against those who did not qualify, on religious grounds, to give evidence of the same acceptable quality.

50. The court process is, after all, a secular one. There is no religious qualification for judicial officers, jurors, or prosecution or defence lawyers. Whatever may be the religious consequences to an individual of lying, the community has developed its own processes for knowingly breaching a formal undertaking to tell the truth when giving sworn evidence.

51. It remains to consider the option proposed by two submissions, including that of the Chief Justice, that the affirmation or promise to tell the truth should be the default position while leaving open the ability to swear an oath for those who wish to do so. It would overcome some of the difficulties raised against choice. It would go some way to remedy what swearing an oath is, for some, an empty ritual, while allowing those who are religiously devout to choose to swear if they wish. It would rectify what some submissions maintain is a de facto default position in favour of swearing an oath.[77] It will not affect those who might wish to manipulate the choice to their own advantage but who have no religious faith, nor would it overcome any problems of prejudice in the finders of fact based on the form of ritual chosen by the witness.

52. However, the fact remains that it still presents a choice. If a witness is to be fully informed, he or she will need to be informed of the option to swear an oath, giving rise to a repetition of the problems presently identified in that process, particularly if the choice can only be offered in open court. In practice it is likely to revert to witnesses being offered the choice of an affirmation or an oath. In a personal explanation the Chief Justice considered that the choice should be made before the witness enters the court and that the court rules should govern how that is achieved, with the provision of

[77] LSSA submits, with some justification, that this preference is still evident in the structure of section 6 of the *SAEA* itself.

printed cards in English and other languages and with access to court staff for clarification. However, that is not a facility available in many Magistrates Courts and civil tribunals where sworn evidence is required to be given. It would also depend very much on the quality and training of such court or tribunal staff as might be available. Undoubtedly, these are all very worthy aspirations. If it is to be done effectively it may well have resource implications.

53. Finally, the question of uniformity needs to be addressed. It arises on two fronts. If the ability to swear an oath were abolished there would be no choice in State courts and tribunals but a continuing choice in Federal courts and tribunals, thereby giving rise to inconsistency within the State and possible confusion. However, relatively few people are called on to give evidence in both systems, and provided that in each case the available procedure is explained, there should be no difficulty in its application. This would not be the only difference in procedure between State and Federal courts. To deny change on this basis would be to suggest that State law should follow relevant Commonwealth law in all circumstances, regardless of merit - a conclusion which is not in keeping with the federal nature of Australia's constitutional arrangements.

54. The second front concerning uniformity relates to the situation in other jurisdictions of Australia. The forms of oath and affirmation or promise prescribed are not identical. However, every jurisdiction other than Queensland allows an unfettered choice between swearing an oath or making an affirmation or promise.[78] In most jurisdictions the court may direct or the relevant Act deems that in certain circumstances the witness shall make an affirmation.[79] Those circumstances include refusal to choose, where it is not reasonably practicable for the person to take an appropriate oath or where the witness indicates that he or she does not have a preference. However, that option is not available in Queensland and is only available in limited circumstances in Western Australia.[80]

55. To prescribe a single form of non-religious ritual would be to differ from all other Australian jurisdictions. However, it would not be the first time that such a recommendation has been made by a law reform body.[81] South Australia has, in the past, been a leader in many beneficial areas of law reform subsequently taken up by others. If the Institute's recommendation is seen as a beneficial reform it should not be put aside merely because it is novel.

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[78] *Evidence Act 1995* (Cth), s 23 (1)–(2); *Evidence Act 2011* (ACT), s 23(1)–(2); *Evidence Act 1995* (NSW), s 23(1)–(2); *Evidence Act 2001* (Tas), section 23(1)–(2); *Evidence Act 2008* (Vic), s 23(1)–(2); *Oaths Affidavits and Statutory Declarations Act 2005* (WA), section 5(1); *Oaths Affidavits and Declarations Act* (NT), section 5(1)–(2). The *Oaths Act 1857* (QLD), s 17, allows an affirmation to be made only if the witness objects to being sworn.

[79] *Evidence Act 1995* (Cth), s 23(3); *Evidence Act 2011* (ACT), s 23(3); *Evidence Act 1995* (NSW), s 23(3); *Evidence Act 2001* (Tas), s 23(3); *Evidence Act 2008* (Vic), s 23(3); *Oaths Affidavits and Declarations Act* (NT), s 5(3).

[80] *Oaths Affidavits and Statutory Declarations Act 2005* (WA), s 5(2).

[81] These are referred to in the Issues Paper, 51, [188].

56. The Institute therefore recommends:

Recommendation 2

That there should be prescribed a single form of non-religious affirmation or promise.

Issue 3: Whether the ritual should be in the form of a recital by the witness or an answer to a question or instruction

57. In South Australia the forms of oath in use all involve a recital of the oath by a court official followed by the instruction to say 'I swear'. In the case of an affirmation it appears that in some cases the affirmation is recited in full by the witness or, as in the case of the oath, recited by the court official with the instruction to say 'I do solemnly and truly affirm'.[82]

58. In those jurisdictions which have adopted the *UEA* provision,[83] both the oath and the affirmation are recited in full by the witness. Tasmania merely respectively requires the response 'I swear' or 'I affirm' to the oath or affirmation.[84] The Northern Territory would appear to require in each case an affirmative answer to a question.[85] Tasmania and the Northern Territory have adopted the *UEA* with variations. Queensland requires the response 'I swear' to the oath and recital of the affirmation in full.[86] Western Australia requires both to be recited by the witness.[87]

59. Most submissions favoured simplification and updating of the language in order to be more user-friendly, meaningful and practical, while maintaining the required degree of dignity and solemnity. Not all submissions expressed a preference for recital or answering a question. Those who favoured no change were presumably content with the present format used in South Australia, where there is no full recital of the oath or affirmation. Each of the four models on which comment was sought by the Issues Paper posed alternatives in the form of questions and answers, rather than having the witness recite the oath, affirmation or promise. It is to be inferred that those who opted for a particular model without comment as to the procedure were happy with the

[82] This would appear to be the correct form: *SAEA*, s 6(4).

[83] The Commonwealth, ACT, NSW, Victoria.

[84] *Evidence Act 2001* (Tas.), s 21(4).

[85] *Oaths, Affidavits and Declarations Act* (NT), s 8.

[86] Oaths Act 1867 (Qld), ss 23, 25 and The Schedule.

[87] Oaths, Affidavits and Statutory Declarations Act 2005 (WA), ss 4, 5 and 7.

question and answer format. Only two submissions advocated that the witness should recite the oath or affirmation in full.

60. FAVA submitted that reading or repeating the whole oath or affirmation expresses a more powerful commitment to the truth than merely making a brief response. It is not clear why that should be so, particularly if, as discussed below, the importance of telling the truth and the significance of the undertaking is explained to the witness. The Chief Justice's reasons for the witness reciting the undertaking in full were based on the need for the solemnity of making a public pronouncement in court. The submission said:

> A witness is likely to have brought home to them the solemnity of the occasion and the importance of giving a truthful testimony if the witness is required to publicly state their promise to tell the truth.

The Institute does not wish to understate the need for solemnity or the importance of giving truthful testimony. However, there are other ways, depending on the form of both the ritual and the question, by which that can be maintained. As a number of submissions pointed out,[88] many witnesses who choose the affirmation have difficulty in articulating the words 'I do solemnly and truly affirm'.[89] That may be due in part to the use of language with which they are unfamiliar. However, a longer statement is likely to create as much if not greater difficulty, particularly when they are the first words uttered by the witness in a strange and overbearing environment.

61. Accordingly, the Institute recommends:

Recommendation 3

That in any formulation of the ritual, whether by oath, affirmation or promise, the witness should respond to a question without reciting the oath, affirmation or promise in full.

[88] Judge Muecke; Bleby.

[89] In considering the appropriate language associated with the oath, it is important to appreciate the general level of literacy in the Australian community. According to the Australian Bureau of Statistics 'Adult Literacy and Life Skills Survey' (2006), approximately 7 million Australians aged 15 to 74 years (46%) had a literacy rate below Level 3. Level 3 (on a scale of 1 to 5) is regarded as 'the minimum required for individuals to meet the complex demands of everyday life and work in the emerging knowledge based economy' (ABS, 'Adult Literacy and Life Skills Survey' (2006) Cat. 4228.0, p 5). The avoidance of overly complex phrases and concepts should be a consideration in any proposed text. There are a number of measures that assess the readability of any sentence. Most calculate the length of the sentence and number of syllables. According to the Flesch–Kincaid Reading Ease Formula, the phrase 'I do truly and solemnly declare and affirm that my evidence will be completely truthful' scores approximately 50 on a scale of 0 – 100 (the lower the score the more difficult the readability of the sentence). This version of the affirmation would be at a reading age of 12 years old.

Issue 4: Whether the ritual should be in the form of an affirmation or a promise to tell the truth

62. This issue arises whether or not the religious oath is abolished. Of the models proposed in the Issues Paper, Models 1 and 3 propose an affirmation, while Models 2 and 4 propose a promise. It is therefore to be assumed that those who favoured no change at all or who favoured Models 1 or 3 would prefer an affirmation, while those who favoured Models 2 or 4 would prefer a promise.

63. Those in favour of an affirmation were therefore LSC and four persons associated with VSS (opposing any change); TESOL and one person associated with VSS (Model 1); and SAMEAC (all members) and LSSA (Model 3). Those in favour of a promise were the Chief Justice (Model to vary) and Judge Muecke, RAJSA, Bleby and two persons associated with VSS. Archbishop Wilson considered that, apart from semantics, Models 1 and 2 appear to be substantially the same, as do Models 3 and 4.

64. Only two submissions gave reasons for opposing a promise. TESOL considered that the wording of the promise 'is perhaps not powerful enough – it may not be seen to be equal in weight to the oath'. LSSA considered that the promise 'is apt to lead to undermining the solemnity of a witness's role in giving evidence; the notion of a promise in society does not carry the same ritualistic significance as oaths and affirmations have come to carry ... It may well serve to blur the distinction between sworn and unsworn evidence, given the place of a promise to tell the truth in section 9 (of the *SAEA*)'.

65. As to the ritualistic significance, power or solemnity of a promise compared with an affirmation, this will depend to a large extent on the wording of the promise and the context in which it is set. This is further considered in Issue 6 below. As to the blurring of the distinction between sworn and unsworn evidence, section 9 of the *SAEA* does not require a promise. An appropriate definition of 'sworn evidence' would be required in the Act. This is further discussed in Issue 7 below.

66. The Chief Justice cited the position in the Northern Territory in support of a promise. No other reasons were given other than to say that the Judges who supported a change "favour a form of promise in which the witness solemnly promises that the evidence the witness shall give 'shall be the truth, the whole truth and nothing but the truth'". Other reasons given in favour of the promise were its simplicity and ease of understanding and translation,[90] the difficulty that many have in articulating and apparently understanding the required response to the affirmation,[91] and the fact that words and phrases such as 'solemnly and sincerely', 'declare' and 'affirm' and

[90] Judge Muecke; Bleby.

[91] Judge Muecke; Bleby.

'affirmation' are not words commonly used and are often not understood.[92] The wording should be simple everyday language.[93] The present wording is irrelevant today. What is important is the penalty for knowingly making a false statement while giving 'sworn' evidence, the need for a warning of the consequences and an acknowledgement of the warning.[94]

67. The objectives of the ritual will best be fulfilled if the ritual is simple, easy to understand, readily translatable in words and concept to a wide variety of people from different backgrounds and cultures, and yet which reflects the dignity and solemnity of the occasion. Subject to dealing satisfactorily with the problem of blurring the distinction between sworn an unsworn evidence and appropriately defining the offence of perjury, it is considered that an appropriately worded form of promise will fulfil these objectives.

68. Accordingly, the Institute recommends:

Recommendation 4

That the ritual should be in the form of a solemn promise to tell the truth.

Issue 5: Whether the public ritual should include a statement of the importance to the judicial process of reliable testimony and/or a warning of the consequences of giving false evidence and an acknowledgement that those consequences are understood

69. The first objective of any reform (referred to in paragraph 28) is securing the truth. That is fundamental to the judicial process, to the just and fair administration of the law and to the rule of law. Essential to the securing of that objective is that a witness should clearly understand the obligation to tell the truth when giving sworn evidence, regardless of the witness's attitude to telling the truth on other occasions. If the judge determines that a person does not have sufficient understanding of that obligation the judge may, subject to certain conditions, allow that person to give unsworn evidence.[95] An understanding of the obligation to tell the truth when giving sworn evidence can only be enhanced by an understanding of why that is necessary.

70. However, there are limits to what can conveniently be said to a witness as part of the public ritual. A full explanation is not necessary for all witnesses, especially for those

[92] Bleby; RAJSA.

[93] RAJSA.

[94] RAJSA.

[95] *SAEA*, s 9.

who give evidence frequently. A detailed explanation could also detract from the solemnity of the ritual. Accordingly, the Institute does not consider it appropriate for the public ritual to include a recital of the importance of giving truthful evidence. Rather, such knowledge should be assumed with stress being placed upon the significance of the promise about to be made.

71. Nevertheless, there is an undoubted need for witnesses to be educated as to the significance of giving truthful sworn evidence and of the reasons for that. Most of that will need to be given outside the courtroom. Some of that information is already provided in various forms. The adoption of a revised ritual provides an opportunity to review all such material and to provide it where it is not already provided.

72. Accordingly the Institute recommends:

Recommendation 5

5.1 That the Courts Administration Authority should cause to be prepared or reviewed as the case may require suitable material to be displayed on its website and that of all State courts and tribunals explaining in plain English:

- **The need for sworn evidence to be truthful at all times;**
- **The importance of that need for the observance of the rule of law and the administration of justice;**
- **Explaining the consequences of knowingly giving false evidence; and**
- **Explaining the rituals to be observed on the making of the promise by interpreters and witnesses.**

5.2 That translations of this material in the appropriate foreign languages should also appear on the websites.

5.3 That the Courts Administration Authority should cause to be prepared or reviewed as the case may require appropriate explanatory written material in multiple languages to be made available for distribution to witnesses and interpreters in all State courts and tribunals.

73. The issue of whether a warning should be given of the consequences of giving false evidence and whether an acknowledgement given of the understanding of those consequences was the subject of Questions 4 and 5 in the Issues Paper[96] on which submissions were specifically sought. Most submissions included answers to these questions, but some which were only concerned with specific issues did not.

[96] See Issues Paper, Part 7, 62.

74. Of those submissions which addressed the questions, all but one were strongly in favour of a warning being given to the witness of the legal consequences of giving false evidence and of requiring an acknowledgement from the witness that the witness understands the legal consequences of giving false evidence. Only one submission[97] questioned the need for a general warning, suggesting that where appropriate a judge could remind a person of those consequences.

75. Of those in favour of the warning all but one[98] agreed that the warning and acknowledgement should be given before the formal promise. A majority of the Advisory Board of the Institute in its consultative capacity agrees that both a warning and an acknowledgement of the consequences of knowingly giving false evidence should be an important part of the ritual. It would ensure that, with appropriate translation where necessary, a witness is fully informed of the importance of telling the truth and understands the consequences of not doing so, regardless of the witness's cultural or ethnic background. Rather than by way of threat, if carefully worded, it would reinforce the significance of telling the truth to the court. It would enhance the solemnity of the process. One submission[99] regarded such a warning and acknowledgement to be a requirement of due process and natural justice. Indeed, that is a view that is consistent with the need to require informed consent to what is a very serious process. With the decline in religious adherence and corresponding rise of non-belief in any form of divine retribution for giving false evidence, the need for such a warning gains added significance.

76. The giving of the warning and the acknowledgement should normally precede the making of the promise so that the witness, before making a solemn promise, is fully aware of and acknowledges the significance of what is being required by the promise. To require a commitment to tell the truth before being warned of the obligation to do so is, as one submission noted,[100] to put the cart before the horse.

77. However, that does give rise to an issue raised in some submissions[101] that, while favouring the giving of a warning, unless carefully handled, some people may be unduly worried by the warning and fear prosecution for making a mistake or not remembering accurately, resulting in a reluctance to give evidence at all. In order to overcome any such fears, the explanation and its delivery would need to be comprehensible, in standard form, in plain English and capable of ready interpretation into different languages.

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[97] LSC.

[98] LSSA. No reasons were given for making this the second question other than communicating the serious consequences of giving perjured evidence.

[99] Archbishop Wilson.

[100] Bleby.

[101] Judge Muecke, LSC.

78. A minority of the Advisory Board would oppose the giving of a warning. In their view a belief in Divine retribution for false witness has long since ceased to influence the conscience of an oath taker; there is no evidence that fear of Divine retribution has extracted truth telling. Rather, they consider that the ritual of making an oath or affirmation has never been attended with threats of prosecution for giving false evidence. Notwithstanding the response expressed in paragraph 77, witnesses, already overwhelmed by the unfamiliarity and formality of a court setting, would be further disadvantaged and unsettled by fear of placing a foot wrong, resulting in a witness declining to give evidence at all or failing to tell the full story for fear of saying something that may not be true. In their view what is needed instead is to stress the importance of the witness's role in the public administration of justice and to stress the solemn trust and reliance placed upon the witness by the court and the community to assist justice by telling the court what the witness knows as accurately as humanly possible.

79 In the circumstances of these competing views, the Institute has decided to offer two alternatives: the first incorporating an appropriate warning, and the second without this requirement.

80. Accordingly, the Institute recommends:

Recommendation 6A

That witnesses should be warned, before they commit to telling the truth to the court or tribunal, of the legal consequences of knowingly giving false evidence.

Recommendation 6B

That witnesses, having been given the warning referred to in Recommendation 6A, should be required to acknowledge, when they commit in court to tell the truth, that they understand the legal consequences of giving false evidence.

Recommendation 7

In the alternative, if it is considered that a warning of the type described is inappropriate, the promise to tell the truth should be preceded by a statement to the witness of the importance of giving truthful evidence and an acknowledgement by the witness that he or she understands that.

Issue 6: The form of recommended ritual to be adopted for witnesses in court, upon the swearing of affidavits, and for interpreters

6.1 Witnesses

81. The form of public ritual to be recommended will depend on whether Recommendations 6A and 6B are followed or recommendation 7. In the former case it will be dictated by the recommendations made above, namely a secular promise to tell the truth preceded by a statement of the seriousness of the requirement and the consequences of knowingly giving false evidence, and an acknowledgement that that is understood, presented in the form of questions and answers. In the latter case a statement of the consequences of knowingly giving false evidence would be omitted.

82. In either case the expression of each component of the ritual will be dictated by the following:

- The need to be understood by persons covering a wide range of intellectual ability;
- Simplicity;
- The preservation of the solemnity and formality of the occasion;
- The avoidance of concepts and language which cause confusion or which may have no equivalent in other languages or cultures; and
- Being capable of ready and accurate translation.

83. The forms to be recommended assume that, if there has been a question under section 9 of the *SAEA* as to whether the witness is capable of giving sworn evidence, that question has been resolved in the affirmative.

84. The Institute recommends:

Recommendation 8A

That the following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

[Name of the person being addressed], you are about to make a very important promise to tell the truth to this court/tribunal. If you make this promise and if you then tell this court/tribunal something which you know is not true, you will be committing a serious criminal offence. Do you understand that?

Do you promise that you will tell the truth to this court/tribunal?

85. Those who consider that no reference should be made to the consequences of knowingly giving false evidence also consider that the time-honoured formula of promising to tell the truth, the whole truth and nothing but the truth should be followed. The reasons are that it emphasises the importance of the occasion, the high expectations of the court or tribunal and the community and covers omissions, incompleteness and failure to correct. This form of promise could also be used in conjunction with Recommendation 8A, as could the form of promise in Recommendation 8A be used with the preamble in Recommendation 8B.

Recommendation 8B

That if it is considered that a warning of the type described in Recommendation 8A is inappropriate, the following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

> **[Name of the person being addressed], you are about to make a very important promise to this court/tribunal. The court/tribunal relies on you to tell the truth. If you make this promise you must tell the truth. Do you understand that?**
>
> **Do you promise that you will tell the truth, the whole truth and nothing but the truth to this court/tribunal?**

6.2 Deponents to Affidavits

86. The recommendations made above, if implemented, will require not only a variation to the ritual relating to the making of affidavits but to the form of an affidavit.

87. The form of an affidavit prescribed by the *Supreme Court Civil Rules 2006* (SA) and the *District Court Civil Rules 2006* (SA) [102] require that a deponent either "swear on oath" or "truly and solemnly affirm" the facts stated in the affidavit. The prescribed jurat clause requires "Sworn/Affirmed (*delete whichever is inapplicable*) by the above named deponent…… etc."

[102] Rule 162 and Form 33.

88. It is desirable that the form of affidavits be consistent with the recommendations made above. Paragraphs 97-99 below make certain suggestions for the use of terminology to accommodate the changes recommended in this Report. Assuming that such terminology is adopted, the Institute recommends:

Recommendation 9

That the form of affidavit prescribed by Court Rules should be as follows:

'I (*full name, address and occupation of deponent*) DO MAKE AN EVIDENTIARY PROMISE that this affidavit is true in every respect.

1. (*Set out text of affidavits in successive, numbered paragraphs)*

This evidentiary promise is made by the abovenamed deponent … etc'

89. The swearing of affidavits is usually undertaken in a much less formal atmosphere than in a court or tribunal. A deponent is therefore less likely to be overwhelmed by the solemnity of the occasion than a witness unfamiliar with the court process. Nevertheless, sworn affidavits are often tendered in legal proceedings either with or without additional verification by the deponent. An affidavit enjoys the same status as sworn evidence when so tendered.

90. The *Evidence (Affidavits) Act 1928* (SA) enables affidavits to be sworn before a justice of the peace[103] or proclaimed member of the police force.[104] It also prescribes that a person who wilfully swears falsely in an affidavit is guilty of perjury.[105] The Act does not prescribe a form for the swearing of affidavits. The authority for Commissioners for taking Affidavits to do so derives from Part 4 of the *Oaths Act 1936* (SA).

91. The *Supreme Court Civil Rules 2006* (SA) and the *District Court Civil Rules 2006* (SA) provide[106] that an affidavit made in South Australia is to be sworn or affirmed in accordance with section 6 of the *SAEA*. However, the forms provided in that section and in Recommendations 8A and 8B are inappropriate for use in swearing an affidavit. Nevertheless, a similar type of recognition and acknowledgement is required of a deponent, together with a solemn acknowledgement of the truth of the contents of the affidavit.

[103] Section 2.

[104] Section 2A.

[105] Section 4.

[106] R 164 (11).

92. The Institute therefore recommends:

Recommendation 10

That the following ritual be prescribed for the making of affidavits before persons authorised to take affidavits:

[Name of the Deponent], this affidavit may become evidence before a court or tribunal. If you have said something in this affidavit which you know is not true you will have committed a serious criminal offence. Do you understand that?

Is that your name and handwriting?

Do you promise that the statements you have made in this affidavit are true?

6.3 Interpreters

93. The form of the ritual to be adopted for interpreters should follow the same principles which apply to witnesses with suitable adaptation. In the case of interpreters, the primary obligation is to assist the court or tribunal.

94. In most courts and tribunals professional and properly trained interpreters are available for witnesses whose first language is not English or who have difficulty in understanding and/or speaking English. However, professional interpreters are not always available and persons known to the witness are used. Sometimes the professional interpreter may be known to the witness.

95. It is therefore desirable that the interpreter be reminded in each case of his or her primary duty to the court, not to the witness, and that he or she acknowledge that responsibility before making the appropriate promise.

96. The Institute therefore recommends:

Recommendation 11

That the following public ritual be prescribed for all courts and tribunals in South Australia where an interpreter is required for a witness's evidence:

As the interpreter of a witness's evidence you are not to favour any witness or party before the court/tribunal. Your sole duty is to assist the court/tribunal in the administration of justice. If you do not interpret the evidence accurately and to the best of your ability you could be guilty of a criminal offence or contempt of the court/tribunal and liable to punishment. Do you understand that?

Do you promise that you will well and truly interpret the evidence that will be given and do everything that the court/tribunal may require of you to the best of your ability?

97. The requirements of an interpreter in the attesting of an affidavit are presently contained in Rule 162 (8) of the *Supreme Court Civil Rules 2006* and of the *District Court Civil Rules 2006*.[107] They require that the interpreter swear or affirm before the authorised person the matters referred to in that sub-rule. Provided that the substance of those rules is retained (with appropriate variations to accommodate the recommended form) there is no need to prescribe a form of undertaking by an interpreter in relation to the swearing an affidavit by a person.

Issue 7: Consequential amendments to State legislation

98. This Report does not address the question of official oaths and affirmations or Statutory Declarations prescribed in Parts 2 and 3 of the *Oaths Act 1936*.

99. The prescription by statute of the various forms of ritual is recommended in Recommendation 1. These should ideally be contained in a Schedule to the appropriate Act prescribing them.

100. While it is not a formal recommendation of the Institute, consideration should be given to consolidation of all requirements into one Act. The various requirements are to be found at present in the *SAEA*, sections 6 and 7, the *Oaths Act 1936*, Part 4 and the *Evidence (Affidavits) Act 1928*.

[107] See also *Magistrates Court (Civil) Rules 1992* (SA), r 19 (10).

101. A question arises, if oaths and affirmations are no longer prescribed for the verification of oral evidence and affidavits, as to the appropriate description that should be applied to the processes recommended in this Report. The expression 'sworn evidence' is defined in the *SAEA,*[108] for example, as meaning 'evidence given under the obligation of an oath or an affirmation'; and 'unsworn evidence' has a corresponding meaning. Assuming that the expression 'sworn evidence' is retained, [109] some other expression will be needed in substitution for the expressions 'oath' and 'affirmation' in the definition. One such expression might be 'evidentiary promise', to be defined as a promise referred to in the Schedule to the Act in which the prescriptions are set out. Similar attention would need to be given to such expressions occurring in the *Oaths Act 1936*, section 28(2) and in Rules of Court.

102. If such a scheme were to be adopted, the provisions of section 9 of the *SAEA* relating to unsworn evidence would not require amendment. The requirement of a witness giving unsworn evidence under that section falls short of requiring an understanding of the consequences of giving false evidence and of requiring a promise to tell the truth.

103. Various Acts and Rules refer to the expressions 'sworn' and 'swear'.[110] The *Evidence (Affidavits) Act 1928* refers to affidavits being 'sworn' before certain persons without any definition of 'sworn' or 'swear'. Rules of Court refer to affidavits being 'sworn or affirmed' or being 'made' or 'taken'.[111] In common parlance 'sworn' evidence and the process of 'swearing' a witness or an affidavit are often used to describe a process which includes the process of affirmation. Such expressions have no doubt survived from the time when the only available process was the swearing of an oath. It is not unusual for English words to expand their meaning over time by common usage. There is no reason why such expressions should not continue to be used in legislation and rules, provided that they are appropriately defined. It may be preferable, however, in the case of affidavits to refer to them as being 'made' and the evidentiary promise (if that is the expression used) as being 'taken' by an authorised person.

104. The definition of the offence of perjury in section 242 of the *Criminal Law Consolidation Act 1936* would require amendment either by substituting the expression 'under oath' with an expression to cover the suggested evidentiary promise or by amending the definition of 'oath' in subsection (5). References to an oath would not be necessary for the purpose of perjury in Commonwealth courts and tribunals, as the *Crimes Act 1914* (Cth), section 35, would appear to cover false evidence given in such courts and tribunals.

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[108] Section 4.

[109] See paragraph 103 below.

[110] For example, *SAEA* section 9.

[111] For an example, *Supreme Court Civil Rules 2006*, rr 162 and 163.